

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MONROE COUNTY HIGHWAY EMPLOYEES,
LOCAL 2470, AFSCME, AFL-CIO**

and

COUNTY OF MONROE

Case 178
No. 64566
MA-12942

Appearances:

Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appearing on behalf of Monroe County Highway Employees, Local 2470, AFSCME, AFL-CIO, referred to below as the Union.

Ken Kittleson, Monroe County Personnel Director, 14345 County Highway B, Room 3, Sparta, Wisconsin 54656-4509, appearing on behalf of County of Monroe, referred to below as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin to resolve Grievance number 2004-8, a "Union Grievance". Hearing on the matter was held in Sparta, Wisconsin on April 11, 2005. The hearing was not transcribed. The parties stipulated that the hearing would address Grievance 2004-8 and two other layoff-related grievances, and that I should address each grievance separately. The parties filed briefs on the grievances by May 16, 2005.

ISSUES

The parties were not able to stipulate the issues for decision. The Union states the issues thus:

Did the County violate the collective bargaining agreement by contracting the repair of the 293 mowing tractor while there were employees on lay-off status?

If so, what is the appropriate remedy?

The County agrees with the Union's statement of the issues with the exception that the County would use "hiring" where the Union uses "contracting".

I have adopted the Union's statement as that appropriate to the record.

RELEVANT CONTRACT PROVISIONS

Article 1 – RECOGNITION

Section 1. The County hereby recognizes the Union as the exclusive bargaining agent for all Monroe County Highway employees, except those who were excluded by the Wisconsin Employment Relations Commission (WERC) in their direction of election, for the purpose of bargaining collectively on all matters pertaining to wages, hours, and working conditions of employment. . . .

Article 3 – MANAGEMENT RIGHTS

Section 1. The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this Contract and applicable law. These rights include, but are not limited to the following:

. . .

- E. To relieve employees from their duties because of lack of work or any other legitimate reason;

. . .

- K. To contract out for goods and services, provided that such contracting out for goods and services shall not result in layoffs of present employees . . .

Article 11 – SENIORITY

Section 1. Seniority shall begin at the time of original employment and shall not be diminished by temporary layoffs due to lack of work or funds.

Section 2. In reducing employee personnel, the last person hired in the Highway Department shall be the first person laid off, and the last person laid off shall be the first person re-hired, if qualified.

Section 3. Whenever it becomes necessary to employ additional workers, either in vacancies or new positions therein, former qualified employees who have been laid off for lack of work within one (1) year prior thereto shall be entitled to be re-employed in such vacancy or new position for which he/she may qualify, in preference to all other persons.

Section 4. No new employee shall be hired while there are seniority employees on the laid off list.

Section 5. When an employee is laid off due to the shortage of work, lack of funds, or the discontinuance of a position, such employee may take any other position for which he/she may qualify and that his/her seniority will permit to hold.

Section 6. Persons recalled to service according to seniority shall receive a mailed registered letter and must answer within five (5) days and shall be available for work within seven (7) days.

BACKGROUND

The Union filed Grievance 2004-8 on October 13, 2004. The grievance form alleges, "Horizon Equipment came to fix 293 mowing tractor in Cashton while employees were laid-off." This grievance, like Grievance 2004-5, and 2004-7, traces its roots to a series of events affecting the County's budget, including State directed cuts in shared revenues. In November of 2003, The County Board directed budget cuts in all departments. The decrease in the Highway Department's 2004 budget was \$307,000, a 10.03% tax levy reduction. In September of 2004, the Board demanded additional cuts from the Highway Department.

After extensive deliberation and discussion, the Highway Committee decided to achieve the budget reductions through the layoff of twenty-six employees for the month of October. There were, at the time of the layoff, forty-seven employees in the Highway Department bargaining unit. The County laid the employees off in inverse order of seniority, with the exception of Gerald Chaffee, the day shift Mechanic. For the duration of the layoff, the County had Chaffee and a night shift mechanic available to attend to the Department's equipment maintenance and repair needs.

Philip Geier has worked for the County for roughly twenty-nine years. On October 11, 2004, he was mowing a shoulder on County Highway F near its intersection with Highway 27. He ran over a steel post that broke a metal transmission line, draining the system and immobilizing the tractor. The shoulder was between the road and a field. He estimated the tractor was roughly thirty feet from the road, on level ground.

Geier left the immobilized tractor, returned to his pickup and called Gary Wieman, a Shop Superintendent, at roughly 2:30 p.m. Wieman concluded the Mechanic on duty was too swamped with work to fix the tractor, and called Horizon. Geier performed culvert work on October 12, but drove to the site where he had left the tractor, and found it fixed. He had the key to the unit, and moved it. He mowed with it the following work day. He acknowledged that the County has used implement dealers to repair mowers, and noted that employees often leave mowers on site for periods from one day to a couple of weeks.

Jack Dittmar, the Highway Commissioner, learned of the incident from Wieman. He thought the mower needed immediate repair. He knew it was covered by warranty and directed Wieman to contact Horizon. The County would typically send one of its own Mechanics to perform such a repair. Chaffee was, however, the only Mechanic available and was "awful busy" at the time. That the mower was under warranty also concerned Dittmar, since he did not want to risk that an in house repair might void any part of the unit's warranty, which ran until May of 2008. He did not, however, know whether the work would be covered by warranty at the time Wieman contacted Horizon. The Invoice states the work performed by Horizon thus:

Hit fence post and bent hyd line and pulled out of fitting. Note: Found trans pump section line bent by T-post. Had to replace with new pipe. Removed 1" line from front of trans to differential. Front held by bolts and back was pressure fit with O'Rings. Installed new line, bushing, O'Rings and filled with oil. Will have to recheck oil level when up on level area.

The Union filed Grievance 2004-8 on October 13. Dittmar filed a response with the Union on November 12, which denied the grievance based on "Article 3, Section 1K" and which stated the basis for his decision thus:

. . . The Union is interpreting this subsection as if it reads, "the County cannot contract out while employees are on layoff". If this were the case, I believe the subsection would have simply been worded so. The key part of this subsection is the "provided that such contracting shall not result in layoffs of present employees;". This statement implies that there may be employees on layoff while the County contracts out for goods and services so long as the contracting itself did not result in the layoff. The question then becomes, did the contracting out result in the layoff? The answer is an absolute "NO". This was a quick emergency repair of a mowing tractor when the one mechanic on duty that day would not have been able to get there quickly that particular day. The tractor was broke down on the edge of a steep slope and needed to be repaired and moved as soon as possible. A 10% (\$306,000) tax levy cut in our 2004 budget resulted in the layoff, not this quick emergency repair service. If management is required to act according to how the Union is grieving, I would have to comply with article 11, section 6 to recall a qualified employee. This would require me to send a registered letter to the most senior employee and

they would have 5 days to respond and 7 days to report to work. Does this really make sense for a couple hour emergency repair? If we could have waited, we would have had the one mechanic that was working perform the repair within a day or so. . . .

Further facts will be set forth in the **DISCUSSION** section below.

The Union's Position

The Union asserts that the County's subcontract with Horizon Equipment, Inc. violated the labor agreement in three fundamental ways. The first is that Article 1 "generates a basic principle regarding bargaining unit work." The second is that the subcontract violates Article 3, Section 1K. The third is that the subcontract violates the "seniority and recall for work" provisions of Article 11.

The work at issue is the replacement of a hydraulic pipe in a mower. The County has offered no satisfactory explanation of why the work could not have been performed by a unit Mechanic. Contrary to Dittmar's assertion, the tractor was not left on a steep slope, and did not require emergency repair. Dittmar did not see the tractor, and did not, when he subcontracted the work, even know where it was.

That recall under Article 11, Section 6 imposes time limitations has no bearing on this, since there "is nothing in the record to indicate that this particular tractor was needed during the time in question." In fact, the evidence shows other tractors were available since over one-half of the unit had been laid off and their equipment was sitting idle. Beyond this, the evidence establishes that the tractor remained unused where it had broken down for at least two days. The County could have recalled a Mechanic to perform the work. The County's assertion that the subcontract did not cause the layoff has no bearing on the interpretation of Article 3, Section 1K. To accept the County's view means that the County could layoff "all of the employees and then contract out all of the work without it being a violation of the contract".

The grievance seeks to preserve unit work which should make employees "subject to recall under Articles 1 and 11." The County's concern for its financial situation should play no role in this grievance, since the subcontract complicated the problem by directing County funds to Brooks while competent County Mechanics were being paid unemployment compensation.

The evidence establishes a County violation of the agreement. The grievance should be sustained and a make whole remedy should be awarded.

The County's Position

Dittmar learned of the tractor breakdown from a Shop Superintendent, and understood that the breakdown had occurred on a steep slope. Because the tractor was still under warranty, Dittmar elected to have the work performed by Horizon. The work was not covered by the warranty, "but that was not known at the time the tractor broke down." The work took "about five hours at the standard shop rate." An examination of Dittmar's response to the grievance establishes that he fully and accurately assessed the efficiency of subcontracting the tractor repair. That is all the agreement requires and thus there was no contract violation.

This, with the other two grievances, highlight a similar theme. The Union cannot argue that the agreement did not permit the layoffs. Rather, the Union has attempted "to find any loophole in the contract to attempt to dissuade the employer from laying off employees, using a shogun grievance approach that began with eight grievances and was winnowed down to what they considered were the most viable three". The County concludes that a "more productive use of their time and energy may have been to work with the employer to explore ways to hold down costs". This does not bode well for the future, since funding of municipalities will continue to be strained. Each grievance must be denied.

DISCUSSION

With the exception of a disagreement on whether "hiring" is a preferable term to "contracting", the parties stipulated the issue for decision. As with Grievance 2004-7, the issue does not specify governing contract provisions. The parties agree that Article 3, Section 1K is prominent among them. That subsection uses "contract", not "hire", to describe County use of other than Highway Department employees to perform Highway Department work. None of the remaining provisions cited by the parties use "hiring" or "hire" with the exception of Article 11, Section 2, which states recall rights. Section 6 of Article 11 also governs recall, but does not use "hiring" or "hire". Because Article 3, Section 1K is at the core of the parties' dispute, and because the balance of the relevant contract provisions do not establish a consistent use of "hiring", I have adopted the Union's statement of the issues as that appropriate to the record.

The issue on the merits is whether the work performed by Horizon on Mower 293 on October 11, 2004 was authorized or forbidden by Article 3, Section 1K. The County argues that this grievance is one of a litany of grievances advanced primarily to make the layoff process sufficiently painful to the County that it will not use it again.

The strength of the County's contractual position is that the Union reads Article 3, Section 1K to prohibit contracting out while any Department employees are on layoff. The section does not state such a limitation, and there is no specific language elsewhere in the agreement to establish it. While this underscores a weakness in the grievance, the County understates the force of the Union's contractual position.

The Union contends that a variety of agreement provisions, including the recognition clause, limit the County's authority to subcontract when employees are on layoff. There is no reason to consider the impact of the recognition clause which applies, if at all, on a general level to the grievance. The agreement contains specific language governing layoff and subcontracting, and the specific provisions govern the grievance. Article 3, Section 1E authorizes the County to "relieve employees from their duties" due to "lack of work or any other legitimate reason." Article 3, Section 1K forbids subcontracting if it results "in layoffs of present employees." Sections 2, 3, 4 and 6 of Article 11 state a series of recall rights.

The Union's arguments establish that the agreement does limit County authority to subcontract under Article 3, Section 1K during periods where employees are on layoff. The limitations however, vary from broad statements to narrowly specified rights and duties. The interpretive issue is to grant meaning to all of the terms of Article 3, Sections 1E and 1K without undercutting the recall provisions of Article 11. This means that the authority to subcontract under Article 3, Section 1K must not expand during a period for which Department employees are on layoff, and must not undermine other contract provisions.

These general considerations must be applied to the facts of Grievance 2004-8. Under the County's view, the 2004 budget reductions caused the October layoff, thus making the limitations of Article 3, Section 1K irrelevant to work required by the breakdown of Mower 293 on October 11, 2004. The County's assertion that Article 3, Section 1K does not apply because the Mechanics were laid off for October due to a budget shortfall ignores that the subcontracted work cost the County money. More significantly, the County's assertion ignores that a failure to recall Mechanics denied them an opportunity to work, arguably prolonging their layoff. The Union persuasively contends that a failure to abide by the recall provisions can be viewed as "resulting" in their layoff within the meaning of Article 3, Section 1K.

The persuasive force of the Union's contractual arguments breaks down, however, on the examination of the facts of the grievance. While the Union correctly notes that Dittmar's November 12, 2004 answer does not reflect an accurate assessment of the "emergency" nature of the repair, the record establishes that he acted based on his good faith understanding of the need for the repair. The presence of good faith is meaningful, since a desire to punish the Union for not agreeing to a partial layoff would not be "legitimate" under Article 3, Section 1E. More significantly, the record establishes that the repair took a minimal amount of time and that Mower 293 was under warranty. Even if it was unlikely that the type of damage to the unit would fall under warranty, the evidence establishes that, at the time he made the decision, Dittmar preferred to have Horizon do the work to avoid any future dispute regarding whether County labor voided warranty protection. This decision is, on its merits, debatable. It is evident that Dittmar acted to call in Horizon before he knew the actual facts of the breakdown, and that he was willing to use a County Mechanic, if available.

What is significant as a contractual matter is that his exercise of discretion is the same that would apply in the absence of the layoff. County use of Horizon on October 11, 2004 reflects reasons independent of the layoff, and thus an application of Article 3, Section 1K that did not produce or prolong the layoff of any County Mechanic.

Nor did Dittmar's exercise of discretion violate the recall rights of Article 11. The minimal repairs required make Sections 2, 3 and 4 inapplicable on these facts. At best, the grievance seeks to delay the work until Chaffee could do it. Geier's testimony establishes that Mower 293 could have sat for a considerable period before being repaired. He had other duties to attend to, and the Mower did not have to be moved. To give this evidence controlling significance demands reading Article 11 to preclude a subcontract while County employees are on layoff. There is no language in Article 3 or Article 11 to support this view. Section 1K of Article 3 contains no such restriction, and authorizes the subcontract provided it does not result in the layoff of "present employees." As noted above, there was no such result. The work was not sufficiently involved to open a meaningful recall opportunity under Article 11. On these facts, the layoff of Mechanics resulted from the 2004 budget shortfall, not the Horizon subcontract. Since the Horizon work did not result in the layoff of any unit employee, and did not undercut the recall provisions of Article 11, it is consistent with the authority granted the County under Article 3, Section 1K.

AWARD

The County did not violate the collective bargaining agreement by contracting the repair of the 293 mowing tractor while there were employees on lay-off status.

The Grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 4th day of August, 2005.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator