

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 177  
No. 64565  
MA-12941

---

**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 2004-7, 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 2004-7 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 a loader while there were employees on layoff 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 adopt 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, for 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 form initiating Grievance 2004-7 alleges the “Highway Dept. contracted the repair of a loader while employees are on lay-off.” This grievance, like Grievance 2004-5, 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.

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.

Sometime in late September, the County learned that one of its loaders had engine oil in its antifreeze and antifreeze in its engine oil. Jack Dittmar, the Highway Commissioner, discussed the problem with his administrative team, including Gary Wieman, and decided to have Brooks Tractor, which has a shop in West Salem, examine the unit. Between September 28 and September 30, Brooks employees inspected the unit and discussed the matter with Dittmar, who directed Brooks to pick up the loader, move it to their shop and isolate the problem.

Brooks did so, and Dittmar ultimately ordered Brooks to make extensive repairs, including the removal of the old engine and the installation of a remanufactured engine. Brooks completed the work on or about October 22. The invoice from Brooks shows a labor cost of \$2171.75, and details the work done thus:

**Engine – Replace**

For rebuild and complete reman engine. Cust. decided to go with raman engine. Also found hyd. oil cooler leaking from being rusted out on lower cores. Steel cooler was pitted to bad for repair – cust said to replace. Also replaced trans. Drive dampner and drive shaft. Put in new engine mounts. Sent radiator out for cleaning. Swapped over parts onto reman engine. Reinstalled engine, cooler, radiator. Replaced heater hose. And all oil cooler hoses. Filled with break-in oil, new coolant and air filters. Run engine and adjusted high and low idle. Checked for leaks, OK.

Throughout October, the County had two of its Mechanics on layoff. Larry Axelson is the County’s Shop Superintendent. He could not recall the County doing “a major diesel engine overhaul on a loader or grader since Jim Olson retired in 1990.” He researched County records, and detailed the Highway Department’s “Diesel Engine Overhaul” work thus:

<b>Date</b>	<b>Unit</b>	<b>Type</b>	<b>Description</b>	<b>By</b>
Feb. 84	104	Shoulder Grader	Replaced Engine (gas to diesel)	Dock M.
April 96	104	Shoulder Grader	Engine Overhaul	Kurt S.
July 96	240	Tractor	Engine Overhaul	Jerry C.
Sept. 96	98	Truck	Engine Overhaul	Jerry C.
Jan. 98	55	Truck	Engine Overhaul	Jerry C
Jan. 98	231	Loader	Engine Misfiring	Brooks
June 98	103	Shoulder Grader	Engine Overhaul	Jerry C
Aug. 98	235	Loader	Engine Noise	Fabco
Aug. 99	67	Truck	Engine Overhaul	Jerry C
Feb. 02	59	Truck	Engine Overhaul	Jerry C
Feb. 04	39	Truck	Replaced Head Gaskets	Jerry C
Mar. 01	36	Truck	Replaced Eng. Heads & Injectors	Jerry C
July 03	71	Truck	Engine Overhaul	Jerry C
Nov. 02	236	Loader	Replaced Injector tips	Brian G.

Axelson served as a Mechanic and an Assistant Mechanic for the County for roughly twenty-seven years prior to becoming Shop Superintendent. Over time, engines have improved and with the conversion from gas to diesel, the County has had less major engine work to perform on its heavy equipment. In Axelson’s view, much of the maintenance work on loaders is done in house by the County. It was not, in his experience, common to subcontract work, but the County occasionally does so, as his research into County logs showed. He felt the diagnostic work on the loader could have been done in house, since “a diesel is a diesel.” He felt County mechanics had the expertise to install factory rebuilt engines into loaders.

Kurt Schendel has worked for the County for roughly twenty-four years. He was hired as a Mechanic but currently works as a Section Leader. He believed each of the County's Mechanics has the ability to install a factory rebuilt engine, and would have been more than willing to do the work. In his view, the installation of a factory rebuilt engine would not be substantially different from a loader to a truck. Because the loader's engine is mounted higher and is more open, the loader work is probably easier.

Dittmar noted that Brooks broke the engine down before the County made its decision to install a factory rebuilt engine. He agreed that County Mechanics had the expertise to do the installation work on the diesel. He felt, however, that subcontractors such as Brooks brought specialized expertise to the work, particularly regarding power trains. The County also received a warranty for their work, both on parts and on labor. Dittmar thought the work took roughly two weeks to complete. He detailed the basis for his decision in a letter to the Union, dated November 12, 2004, which states:

. . . Of the twelve sub-sections of Article 3, Section 1K is the only one relating to contracting. . . 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". Heavy equipment drivetrain repair (engines and transmissions) have been contracted for at least 20 years. These services are contracted out as needed when heavy equipment breaks down (not often) because they are somewhat beyond our domain of mechanic expertise. This loader had antifreeze in the oil and oil in the antifreeze. Therefore, the exact problem was not known and the fix would've been contracted out no matter what. Another way of looking at it is: if the County had waited to repair this loader (by contract) after the layoff, there would not have been a problem. A 10% (\$306,000) tax levy cut in our 2004 budget resulted in the layoff, not these historically contracted services. If management is required to act according to how the Union is grieving, where would we draw the line on contracting that could possibly be performed by the Union? Would garbage collection, motor fuel hauling, tire repair, electrical or plumbing work, overhead door repair and service, equipment painting, roof repair, furnace servicing, computer maintenance, etc. have to be discontinued and performed by Union members also? These services are and have historically been contracted for a good reason. Because it is more economical and efficient to do so and not doing so (especially only very temporarily) would further exacerbate the budget shortfall, which precipitated the layoff in the first place.

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

### **The Union's Position**

The Union asserts that the County's subcontract with Brooks 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 loader engine, not diagnostic work. There is no issue regarding warranty, since the County's purchase of the engine would have secured the same warranty. Thus, if there is a warranty issue, it focuses solely on labor, and those costs were minimal. Beyond this, the testimony of County supervisors establishes that unit Mechanics are qualified to perform the work.

That recall under Article 11, Section 6 imposes time limitations has no bearing on this matter, since there "is nothing in the record to indicate that this particular loader was needed during the time in question nor is there information as to how long it took Brooks to repair the machine." The County could have recalled Mechanics 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 contract violation."

Even if the County has contracted engine work in the past, it has never subcontracted while employees are on layoff. 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 be awarded."

### **The County's Position**

The County contends that the grievance questions whether "the engine repair of a loader by Brooks . . . could have been handled by a mechanic on layoff." The "breakdown and assessment of the loader's condition occurred in late September, prior to the October layoff". The repair demanded roughly "30 hours of time at the standard shop rate." Supervisors testified that the County has not performed an engine overhaul in many years, but has chosen to subcontract the work. Even if unit Mechanics could have done the work, the agreement leaves the determination of "the efficiency of county operations" to the Highway Commissioner as a management right.

An examination of Dittmar's response to the grievance establishes that he fully and accurately assessed the efficiency of subcontracting the engine work. That is all the agreement requires and thus there was no contract violation.

This and two companion 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 preferable to "contracting", the parties stipulated the issue for decision. As with Grievance 2004-8, the issue does not specify governing contract provisions. The parties agree that Section 1K of Article 3 is prominent among them. That section uses "contract", not "hire", to describe County use of other than Highway Department employees to perform 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 dispute, and because the balance of the relevant contract provisions do not consistently use "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 engine and power train work performed by Brooks on a loader between late September and mid October of 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. 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 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. Dittmar’s November 12, 2004 grievance response states this point well. The contract was not violated if the subcontracting decision would have been the same without regard to the layoff.

These general considerations must be applied to the facts of Grievance 2004-7. Under the County’s view, the 2004 budget reductions caused the October layoff, thus making the limitations stated by Article 3, Section 1K irrelevant to work required to troubleshoot and to repair the loader. 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 use County Mechanics denied them an opportunity to work. As to the troubleshooting work, this may have produced their layoff, and as to the repair work it may have prolonged the layoff. Either can be viewed to result in the layoff of a present employee within the meaning of Article 3, Section 1K.

This poses a closer interpretive issue than Grievance 2004-8. The evidence offers some support for Dittmar’s testimony that engine overhaul work strains the limits of the County’s in-house mechanic shop. Testimony supports Axelson’s conclusion that the County has been less inclined to do engine overhaul type of work since Olson’s retirement in 1990. However, the evidence also supports the Union’s view. The installation of a rebuilt engine is not the same as the engine overhaul work addressed by Dittmar. Beyond this, there is evidence the County has kept significant engine work in house even since Olson’s retirement. Significantly, there is no dispute that the County has the expertise in-house to perform the engine work contracted to Brooks. Axelson’s, Dittmar’s and Schendel’s testimony confirm this point. Schendel’s even affirms eagerness to keep the work in-house.

Beyond this, the amount of work involved affords an opportunity significant enough to make the recall provisions of Article 11 relevant. It is evident that the County had sufficient work during October to keep a day shift and a night shift Mechanic busy. There were two other Mechanics on layoff, arguably available to perform the work done by Brooks. It is less than clear how the cost of the work done by Brooks compared to the cost of in-house work. If the in-house costs were comparable or could have produced savings, it would appear the subcontract expanded the scope of Article 3, Section 1K during the layoff, since there would be no evident reason why the work went to Brooks, other than the layoff. The October layoff reflected a Board imposed cost reduction, which the parties do not dispute constitutes

“legitimate reason” under Article 3, Section 1E. If, however, the subcontracted work increased County costs, it can no longer be taken as a given that the layoff of Department employees was proper under Section 1E. Dittmar urged that the need for the work was not evident until shortly before the October 1, 2004 layoff, but this begs the contractual issues, since he did have time to either rescind the Mechanics’ layoff or recall them.

These considerations highlight that the Union’s position carries considerable persuasive force. Viewed as a whole, however, the evidence confirms that Dittmar made the subcontracting decision within the scope of his authority under Article 3, Section 1K. That the work done by Brooks includes power train work beyond the installation of a remanufactured diesel is fundamental to this conclusion. There is no dispute that the County has historically relied on outside contractors to do this type of work. Nor is there any dispute that the County has subcontracted engine overhaul work with increasing frequency over time. This affords the strongest support for Dittmar’s assertion that the work would have been contracted to Brooks whether or not County employees had been on layoff.

The Union highlights that Dittmar did not know when he contacted Brooks on September 28 that the work would involve power train work beyond the engine installation. At that point, he could have used County Mechanics to troubleshoot the problems. As noted above, this is the strength of the Union’s case, since it is arguable the decision to subcontract the work unnecessarily prolonged the layoff of a County Mechanic or Mechanics in violation Article 3, Section 1K.

This factor is not, however, sufficient to obscure that Dittmar exercised good-faith discretion authorized by Article 3, Section 1K. As of September 28, he had sufficient knowledge of the problem to know that there was a chance the repairs would be significant enough that the unit might not be salvageable. This made it possible that the condition of the entire unit would have to be assessed. To the extent that implicated power train inspection and repair beyond the type of work typically done in-house, it falls within a type of work historically subcontracted. Even ignoring this, the evidence indicates the County decides on a case-by-case basis whether or not to subcontract major engine work. In any event, the troubleshooting and any resulting repairs were known to involve considerable labor.

Significantly, the record affords no solid basis for the Union to question whether Dittmar exercised good faith in deciding to use Brooks to provide that labor. As of September 28, it was generally known that the Union would grieve the layoff if the County did not select the incumbent day-shift Mechanic, Gerald Chaffee, for layoff under Article 11, Section 2. The Union’s position in Grievance 2004-5, filed on October 1, 2004, is that the contract did not permit Dittmar to consider the qualifications of employees for layoff selection. There is no issue that this is the Union’s good faith reading of the contract. It highlights, however, the fundamental awkwardness of the Union’s position, which, if adopted, would require Dittmar to violate Article 11, Section 2 to preserve the Mechanics necessary to keep the diagnostic work on the loader in house under Article 3, Section 1K.

In sum, the agreement requires the County to exercise its authority under Article 3, Section 1K in a manner that neither expands its authority to subcontract during periods of layoff nor undercuts agreement recall provisions. Application of these general considerations to the facts of Grievance 2004-7 is a more difficult issue than County arguments acknowledge. However, the evidence indicates that Dittmar exercised the good faith discretion granted in Article 3, Section 1K to subcontract the repair of the loader to Brooks. The subcontract arguably prolonged the layoff of County Mechanics, and involved sufficient labor to make the recall provisions of Article 11 a relevant consideration. However, the subcontract involved a type of work historically contracted out. Beyond this, the evidence establishes that Dittmar exercised his discretion in good faith, and did not act to expand County authority to subcontract or to undercut recall provisions.

**AWARD**

The County did not violate the collective bargaining agreement by contracting the repair of a loader while there were employees on layoff status.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 5th day of August, 2005.

Richard B. McLaughlin /s/

---

Richard B. McLaughlin, Arbitrator