

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 176
No. 64564
MA-12940

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 2004-5, 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 2004-5 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 stipulated the following issues for decision:

Did the County violate the collective bargaining agreement by the manner in which it laid-off employees for the month of October, 2004?

If so, what is the appropriate remedy?

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 form initiating Grievance 2004-5 alleges the "County laid off a more senior employee while there are other employees qualified to perform the work." The grievance 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.

By its meeting of June 10, 2004, the Highway Committee had begun in-depth discussions of how to maintain its operations within the reduced budget. The discussions involved the Union and included among the options considered a reduction in hours of the entire unit or a layoff of the least senior employees. At a special meeting held one week later, the Highway Committee again considered funding the reductions. The Highway Committee determined the 2004 budget could achieve the necessary \$307,000 reduction through its County Trunk Highway (CTH) supplemental account, which budgeted and expensed major summer improvement work. The Highway Committee concluded that labor costs constitute roughly one-quarter of the total costs from that account, and from this conclusion determined to cut labor expenditures in that fund by roughly \$76,000. The Highway Commissioner, Jack Dittmar, calculated three different means to achieve that reduction. One was to layoff the seven least senior employees for four months. The second was to layoff the least senior fourteen employees for two months. The final was to layoff the least senior twenty-seven employees for one month. The minutes for the meeting detail the deliberations thus:

All layoff scenarios were calculated based on excluding the most senior day mechanic position of each of the 7, 14 or 27 employee scenario's from the layoff. All Committee members and Union representatives expressed his/her opinions during a lengthy and respectful interactive discussion. Motion . . . to

layoff the least senior twenty-seven employees for the month of October, this action will remain in effect unless the Union responds by July 07 that they are willing to accept a reduced work schedule to reduce 2 days per month up to a total of 7-8 days per employee, it is understood that the reduced work schedule would not affect health insurance contributions . . . motion carried.

Dittmar advised unit employees of the Committee's action in a memo issued the following day.

The Union called a special meeting to address the Highway Committee's action. By the Highway Committee's meeting of July 8, 2004, however, the Union had not formally responded to June 17 motion. The Committee, at its July 8 meeting, affirmed its intent to implement the October layoff. The layoff was designed to generate the labor cost reductions necessary to achieve the \$307,000 budget reduction prior to the start of the winter maintenance season in November.

The Highway Committee again addressed the layoff at its September 2 meeting. Dittmar voiced his concern that the layoff as approved would leave the department without a full-time day-shift mechanic. The meeting minutes state the Committee's deliberations thus:

Jack and Gary strongly feel a full-time day mechanic is needed . . . in addition to the night assistant mechanic . . . because there will still be 20 employees working and using equipment which will require maintenance and repairs. Jack feels there are two options: increase the layoff by one more employee to the 28th senior or reduce the layoff by one employee by just excluding the most senior mechanic. Unfortunately, increasing by one employee is further complicated by the fact that the 28th and 29th senior employees were both hired on the same day, which would require a decision as to who would or wouldn't be laid off or if both would be laid off . . .

The Committee ultimately determined to revise the June 17 motion to require the "layoff of the least senior twenty-seven employees excluding the most senior day mechanic (26 employees) for the month of October".

The County implemented the September 2 motion, laying off twenty-six employees in inverse order of seniority. Gerald Chaffee is the day shift Mechanic. His seniority date is August 15, 1990. Keith Waege is the most senior employee laid off. His seniority date is March 21, 1988. The County laid off eleven employees, including Waege, who are senior to Chaffee.

The remaining background is best set forth as on overview of witness testimony.

Jack Dittmar

Dittmar understood the Union's position regarding the layoff to be that a unit-wide reduction in hours was a contract violation which would prompt a grievance if implemented. Dittmar acknowledged that he told Union representatives that the budget reductions might have been possible without a layoff if the Board reduced its machinery account.

Jon Pauley

Pauley is the Union's President, and has a seniority date of June 18, 1990. In the Union's view, Chaffee should have been laid off, since the "if qualified" reference of Article 11, Section 2 applies only to recall. He acknowledged no unit employee applied to bump Chaffee. The County did not, however, advise the unit members of their bumping rights.

Kurt Schendel

Schendel has served as a Union officer, and has a seniority date of October 8, 1980. Schendel was originally employed as a Mechanic on the day shift, and served the County as a Mechanic for roughly fifteen years. Although he posted out of the Mechanic position, Schendel has substituted and has offered to substitute for the Mechanics, including Chaffee. At present, the County employs three Mechanics. Chaffee is the most senior of them. The Union's position in the grievance is that each of the three should have been laid off.

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

The Union's Position

After a review of the evidence, the Union notes that the October layoff was the County's first, and concludes that "there is no past practice to guide the parties." The grievance challenges the contractual validity of the layoff under Article 11, Section 2. The Union contends that the "if qualified" reference "only applies to the last part of the sentence", which governs recall, not layoff. The County's attempt to read the "if qualified" reference into the layoff process "makes no sense . . . in the context of the entire Section." The "if qualified" reference adds no meaning to the layoff of the "last person hired".

It thus follows that the layoff of Highway employees "should have been by strict seniority." Strict seniority demands the layoff of all three Mechanics. While the Union "does not dispute" that the County "needed a mechanic working to appropriately operate the Highway Department", Chaffee's duties could have been performed by Schendel, who has more seniority. The Commissioner could have and should have made the necessary reassignment. Other options were available to the County, including laying Chaffee off then recalling him; finding the necessary savings other than through lay-off; or using some type of partial lay-off. Section 5 should not be read to overcome Section 2, since the October layoff was a general layoff. Whether the County needed to resort to layoff may reflect a management decision, but the decision must comply with the labor agreement.

The Union concludes that the October layoff violated Article 11, Section 2 and that a “make-whole” remedy is necessary. The Union states that remedy thus:

Since the lay-off procedure was compromised at the point that Mr. Chaffee was not laid-off . . . all of the employees, who were laid off and who had more seniority than Mr. Chaffee, should be “made whole” for all wages and benefits lost for the month of October of 2004. This would include employees Jon Pauley to Keith Waege . . .

The County’s Position

After a review of the evidence and of the fiscal difficulties facing Wisconsin counties generally and the County specifically, the County argues that Article 11, Section 2 demands that departmental needs be considered in the layoff decision. To conclude otherwise would produce the absurd result that the County could not consider qualifications during layoff, but could layoff the entire department and then recall the employees with necessary qualifications.

Dittmar acknowledged that eleven employees could have asserted a right to bump Chaffee. None did. Union assertions that the employees were unaware they could do so cannot be considered credible. The layoff process was a long-standing and hotly disputed subject. In any event, none of the employees “was qualified for the position”. Schendel last worked as a Mechanic in 1996, and Dittmar concluded that Schendel’s retention would not have reflected “what was best for the department and its efficiency of operations.” Arbitral precedent confirms Dittmar’s authority to make this determination.

To read the contract as the Union does would make Section 5 meaningless. Beyond this, it “would further exacerbate the inefficiencies associated with a layoff” by forcing the County to “reassign more employees than are absolutely necessary.” Beyond this, the Union’s narrow reading of Section 2 would “archaically and illegally” extend Article 11 beyond bargaining unit personnel. The Union’s position, if accepted, would encourage further grievances, as demonstrated by the companion grievances to Grievance 2004-5.

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 shotgun 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

The issue is stipulated but does not specify governing contract provisions. The reference to the “manner” of layoff focuses the issue on Article 11, and more specifically on Subsections 2 and 5. Neither subsection can be considered clear and unambiguous on its face. Even if they could, their relationship is less than clear.

Bargaining history and past practice are the most reliable guides to the interpretation of ambiguous language since each focuses on the conduct of the bargaining parties, whose intent is the source and goal of contract interpretation. Here, however, neither guide is available. There is no evidence of bargaining history and the October layoff was unprecedented.

The core of the parties’ dispute is whether the “if qualified” reference of Section 2 applies solely to recall. On balance, the County’s reading of the reference is more persuasive than the Union’s. As the County argues, it is not immediately apparent what the practical impact of the Union’s view is. If the County determined it needed a Mechanic, could it send out a recall notice to a Mechanic at or immediately after the issuance of a notice of layoff?

More significantly, the County’s view is better rooted in the language of Section 2, and is more easily reconciled with the language of Section 5. The Union persuasively contends that layoff of “the last person hired . . . if qualified” is an awkward reference standing alone, since it is not evident what it means to be “qualified” for a layoff. If restricted to recall, the awkwardness vanishes, since “the first person re-hired, if qualified” makes sense standing alone. This view, however, has dubious support in Section 2. Article 11 is entitled “Seniority” and Section 2 is a single sentence. The use of a single sentence makes it probable that the “if qualified” reference was intended to apply to both layoff and to recall. The awkwardness thus reflects the use of a single sentence to address two different events, layoff and recall. That the Union’s view lacks practical impact underscores this. More to the point, the County’s view underscores that there is a common exception to the application of “Seniority” and that exception is whether or not an employee is qualified for a position that survives a layoff.

The persuasive force of the Union’s position is undercut by its reading of Section 5. Under the Union’s view, Section 2 makes layoff and recall separate events, with qualifications relevant only to recall. The Union contends this establishes a strict seniority system for layoff, which the County could have implemented by reassigning Schendel to return to the Mechanic position, thus permitting the layoff of Chaffee and retention of Pauley, an Operator with greater seniority than Chaffee.

Even assuming the “if qualified” reference of Section 2 does not apply to layoff, the Union’s interpretation is not a strict seniority system and cannot be reconciled to Section 5. Section 5 grants a right for a laid off employee, if qualified, to “take” the position of a less senior employee. The bumping right thus created turns on the choice of a laid off employee. The Union’s view authorizes the involuntary, temporary reassignment of a more senior

employee to create a vacancy for a less senior employee. While Schendel may be willing to return to the Mechanic position, the Union's view of Section 2 demands that Schendel be moved, whether he wants to or not, to permit Pauley to avoid layoff. The contractual difficulty with this view is that Section 5 grants the bumping right to Pauley, not to Schendel. The Union's view avoids the problem that Pauley is not qualified to be a Mechanic by seeking to coerce Schendel's reassignment under Section 2. This view, unlike the County's, cannot reconcile Sections 2 and 5. Schendel was never laid off, and thus cannot claim a right to "take" Chaffee's position under Section 5. The reassignment the Union seeks thus ignores that a bumping employee under Section 5 claims a position, not a temporary reassignment. Beyond this, the Union's view forces the County to use something other than a seniority based system to layoff. Schendel posted out of the position of Mechanic, and there are seventeen less senior employees between him and Pauley on the seniority list. In spite of this, the Union's view would move him out of his Operator position into the Mechanic position. As the County contends, there is no need for Section 5 if the Union's view of Section 2 is implemented.

In sum, the County's reading of Sections 2 and 5 of Article 11 is preferable to the Union's. The language of the subsections is not clear and unambiguous. The County's reading of the provisions grants meaning to each, while the Union's reads Section 2 in a manner which cannot be reconciled to Section 5.

AWARD

The County did not violate the collective bargaining agreement by the manner in which it laid-off employees for the month of October, 2004.

The grievance is, therefore, denied.

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

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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