BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TOWN OF SOMERS

and

TOWN OF SOMERS EMPLOYEES, LOCAL 71 AFSCME, AFL-CIO

Case 7
No. 65498
MA-13235

(Management/Bargaining Unit Work Grievance)

Appearances:

Thomas G. Berger, District Representative, Wisconsin Council 40 AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, for Town of Somers Employees, Local 71, AFL-CIO.

Jeffrey J. Davison, Attorney, Davison & Mulligan, Ltd., 1207 55th Street, Kenosha, WI 53140, for the Town of Somers.

ARBITRATION AWARD

The Town and the Union are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. On January 18, 2006 the Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission alleging: contract violation overtime signup/reduction bargaining unit work. The Commission designated Paul Gordon, Commissioner, to serve as the arbitrator. The Town raised an issue of the abitrability of the dispute, and the parties agreed to have the arbitrability issue determined on written submissions. After the parties submitted their arguments on that issue the undersigned issued an Order Determining Arbitrability on May 17, 2006, finding the matter arbitrable. Hearing on the merits was held in the Town of Somers on September 24, 2006. No transcript was prepared. The parties filed written briefs and arguments thereafter and the record was closed on November 7, 2006.

ISSUES

The parties did not stipulate to a statement of the issues. The Union states the issues as:

> Did the Town of Somers violate the Labor Agreement when Public Works Foreman George Stoner performed bargaining unit work on October 27, 2005? If so, what is the remedy?

The Town states the issues as:

> The Union grievance alleges that "Public Works Supervisor was performing bargaining work (excavation for park setting), Article 5 Management Rights subsection (B) the welfare of general public was not at risk". As was reflected in the first and second stage responses by the Town to the grievance, the Town cited Article 5 concerning management rights as being dispositive of this issue.

The Union's statement of the issue is selected as that which best reflects the record. The Union's statement is an issue, whereas the Town's statement reflects more the arguments of the parties.

RELEVANT CONTRACT PROVISIONS

Article 1 – Union Recognition

(A) **Recognition.** The Town hereby recognizes the Union as the exclusive bargaining representative for purposes of negotiation on all matters concerning wages, hours, and other conditions of employment for all full-time represented Town of Somers employees, but excluding elected officials, seasonal employees, supervisors, department heads, independent contractors hired by the Town and all fire and emergency medical service employees.

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Article 5 – Management Rights

(A) **In General.** The management of the Town of Somers and the direction of the employees in the bargaining unit, including but not limited to, the right to hire, the right to assign employees to jobs and equipment in accordance with the provisions of this agreement, the right to assign overtime work, the right to schedule work, the right to relieve employees from duty because of lack of work or for other legitimate reasons for just cause, except as otherwise provided in this Agreement, shall be vested exclusively in the Town. Each represented employee shall be required to report to and/or take direction from any management designee, who shall include: Town Clerk/Treasurer, Town Administrator, Public Works Coordinator, Office and Financial Manager, Fire chief, Public Works foreman and every member of the Town Board.

(B) **Change in Methods and Equipment.** In the event of change of equipment or methods of operation, the Town shall have the right to reduce the working force subject to this agreement and in the sole judgment of the Town make reductions in the work force as required. Nothing in this Agreement shall be construed to restrict the right of the Town to adopt, install, or operate new or improved equipment or methods of operation. It is further recognized by the Union that the Town of Somers public works department is comprised of a small group of people, both hourly and salary. As a result, both hourly union members and management may, at times, be required to work physically, hand in hand to insure the welfare of the general public. Management employees will not perform overtime until overtime is first offered to qualified members of the bargaining unit.

(C) **Public Health and Safety.** Nothing in this Agreement shall be construed to limit the discretion of the Town with regard to matters affecting the public health, safety or general welfare.

(D) **Work Rules.** The Union recognizes the right of the Town to establish reasonable work rules, subject to the Union's right to grieve such rules, and to enforce applicable work related regulations promulgated by agencies of the State of Wisconsin or United States of America.

(E) **Subcontracting.** The Union recognizes that the Town has statutory and charter rights and obligations in contracting for matters relating to municipal operations. The right of contracting or subcontracting is vested exclusively in the Town. However, no employee shall be laid off or suffer a reduction in regular hours as a result of subcontracting.

(F) **Community Service.** The Town participates in the Community service program. The Union recognizes the Town's participation in this program and the value of such, and will cooperate with this program and its intent. However, no employee shall be laid off or suffer a reduction in regular hours as a result of the town's participation in a community service program.

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Article 7 – Types of Employees.

(A) **Regular, Full-time.** Any employee who has been hired into a permanent, full-time position and who works a shift of eight (8) hours per day, five (5) day per week. This type of employee is entitled to all the usual and normal Town benefits.

(B) **Seasonal.** The Town will not have bargaining unit work performed by other than full-time bargaining unit employees (defined as forty (40) hours per week, eight (8) hours per day), except that seasonal workers may be employed for not more than one hundred twenty (120) continuous days. Seasonals will not be employed while any regular bargaining unit employee is on layoff, unless the laid off employee(s) first declines the available hours.

Article 8 - Employee Responsibility.

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(B) **Voluntary call-in.** Any employee who wishes to be offered overtime for which they are qualified shall do so by indicating his or her willingness on a week-to-week basis on a form provided by the Town. The Town shall offer available overtime to one or more employees who have signed up for overtime on an equalized basis. In the event that no employee has notified the Town of their willingness to work overtime, or in the event that an employee or employees have failed to respond to the Town's call-in, the Town shall be free to have such overtime work performed by non-represented employees or subcontractors.

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Article 15 – Seniority.

(A) **Definition.** The seniority of a regular employee is determined by the length of his/her service, computed in years, months and days from the first day of his/her last continuous employment.

(B) **Recognition of Principle.** The employer recognizes the principle of seniority and the Union recognizes the need for maintaining an efficient work force. In all matters involving the increase or decrease of forces, layoffs, or promotions, the length of continuous service with the employer shall be given primary consideration. Skill, ability and efficiency shall be taken into consideration only where they substantially outweigh considerations of length of service, or where the most senior employee is unable to do the work.

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BACKGROUND AND FACTS

The parties stipulated to the facts. On October 27, 2005 the Town Public Works Supervisor worked for four hours using a piece of heavy equipment to prepare part of a Town park for installation of some playground equipment. Of the normal four person bargaining unit crew, one was on vacation that day. The Supervisor did not ask any bargaining unit employee

to do that work that day. There was no emergency and there were no circumstances that would have prevented changing the bargaining unit employees' duties that day so as to have them do the excavation work either that day or the next day. No overtime was incurred by any Town employee that day. No Town employee was denied any work opportunity and all employees who worked that day worked a full day.

After the events noted in the above factual stipulation the Union filed a written grievance on October 31, 2005, stating : "Public works supervisor was performing bargaining work (excavation for park setting), Article 5 management rights subsection (B) the welfare of general public was not at risk." The grievance contention of the article or section of contract violated was: Article 5 – (B), Article 7 (B) and all other relevant articles of the contract." The grievance requested compensation for the duration of the violation in accordance with overtime equalization and to cease further performance which could violate the contract language.

The Town denied the grievance in writing, being of the opinion ". . . that all work performed by Public Works is in the welfare of the general public. No union worker was denied regular or overtime hours because of management working hand in hand". The Town also stated that the grievance ". . . is based on a misunderstanding of the Article 5 - Management Rights (B) Change in Methods and Equipment and is being denied for that reason. . . .".

This arbitration followed. Further facts appear as mentioned in the discussion.

POSITIONS OF THE PARTIES

Union

In summary, the Union argues that the Supervisor violated the terms of the labor agreement when he performed bargaining unit work without just cause or reason to do so. The Supervisor has worked when unable to reach bargaining unit members in an emergency. The practice is to offer bargaining unit members work by following Article 15 (B) Seniority. The Union argues that the clear and unambiguous language of Article 7 Types of Employees subsection B states "the Town will not have bargaining unit work performed by other than full-time bargaining unit employees (defined as forty (40) hours per week, eight (8) hours per day), except that seasonal workers may be employed for not more that one hundred twenty (120) continuous days". The Supervisor is not a bargaining unit employee and should not, absent an emergency or for some urgent reason, be performing bargaining unit work.

The Union also argues that in a prior grievance the Town took a position in a "call out" situation which is different than its position in this case. The Union argues that the Town is arguing that it is not a violation of the labor agreement for the Supervisor to perform bargaining unit work anytime he gets the urge to do it.

Citing arbitral authority, the Union argues that some arbitrators have looked at seniority language as sufficient to rule that management does not have carte blanche to perform bargaining unit work. Others have looked at the recognition clause and found management is excluded from performing bargaining unit work outside of clear emergencies.

The Union contends that if the Town's arguments as to public health or general welfare and management rights are followed this would allow the Town to replace bargaining unit members with supervisors whenever it chooses. That flies in the face of the intent of State Statute 111.70 and was never the intent of the Union when the labor agreement was first drafted. The need here is to interpret the language of the labor agreement and bring back the proper balance to the labor/management situation in the Town of Somers.

The Union argues the work was not supervisory nor hand in hand with bargaining unit employees, did nothing to protect the public safety and could have been addressed by bargaining unit members later at straight time. The Supervisor was not assisting or training bargaining unit members and could have assigned the work to them. The Union also argues that the practice is to assign the work to bargaining unit employees and there is no justification for this violation of the practice or the labor agreement.

Town

In summary, the Town argues that under Article 5 (B) it is clear that the Public Works Supervisor was a member of the Public Works Department who worked physically hand in hand to accomplish a department scheduled task for the benefit of the general public which did not incur overtime to the detriment of overtime available to bargaining unit members. The Town argues that apparently the Union takes the position that the general welfare of the public connotes an emergency situation. This is contrary to Article 5 (C) wherein nothing in the labor agreement shall be construed to limit the discretion of the Town with regard to matters affecting pubic health, safety or general welfare. Public health and safety are distinguished from general welfare. There is no requirement that an emergency exist in order for a need to exist for management to perform labor alongside Union members. Had an emergency been contemplated by the parties it would be in the agreement, and it is not. The overwhelming majority of work performed daily is for the welfare of the general public and not on an emergency basis.

The Town argues that the benefit of the work was to the public at large, not a particular individual or group. The absence of a Union member triggered the need with a relatively small work force. This is precisely the situation envisioned in the language in Article 5. It would be unreasonable to engraft a further requirement of exigent circumstances or the like onto the plain language of Article 5 (B). And Article 5 (C) grants broad power to the Town

with regard to public health, safety or general welfare. These are three separate standards. General welfare of the public is referred to in Article 5 (B) which recognizes the need for management to at times work together with members of the Union, and is within the broad powers of Article 5 (C).

The Town also argues that the Union's arguments touch on many issues other than that which is central to this arbitration. This was a single occasion. The Union's obfuscation is a result of its untenable position regarding the contract language. This is not a continuing practice of the Town. The Town argues that the Union contention as to other occasions after business hours being inconsistent has nothing to do with anything. The Town adheres to the terms of the contract by offering overtime to Union members. The Union strays from the stipulated facts. No Union member was disadvantaged in any fashion. No overtime was incurred by anyone. No one suffered less than a full day or week of pay or even for the entire calendar year of 2005 and 2006. The Town contends that the Union gives short shrift to the contract language relative to management rights. And the Supervisor was not an independent contractor, temporary employee or volunteer. There was no change in the relative economic positions of the parties. The Town requests the grievance be denied.

DISCUSSION

Both parties have argued somewhat beyond the stipulated facts in the record. The issue to be decided is whether the Town violated the labor agreement by the Supervisor performing excavation work on October 27, 2005 while a bargaining unit member was on vacation. Given the very limited nature of the factual stipulation, there is no evidence of any other practices of the parties which could arguably be considered a binding past practice. Arguments as to practice here are not persuasive. Thus, it is the interpretation of the labor agreement which will determine the outcome.

There is little or no argument that the excavation work performed by the Supervisor was of the type reasonably considered to be bargaining unit work. The Town has not argued that it was not bargaining unit work, but only that the labor agreement gives management the right to perform that work in this case. The Union argues that the agreement prohibits management from doing that work absent an emergency or like circumstances.

The agreement here does give some right to management to perform what would be considered bargaining unit work. Article 5 states in pertinent part:

> It is further recognized by the Union that the Town of Somers public works department is comprised of a small group of people, both hourly and salary. As a result, both hourly union members and management may, at times, be required to work physically, hand in hand, to insure the welfare of the general public.

The times or circumstances when management may perform this work is not further defined, or limited, in the agreement. It does not refer to an emergency or to any risk to public health or safety. It does refer to the welfare of the general public, which is the broadest of the three public interests argued by the parties. The Town does have some right under this language to have management perform this work. The Union's argument that an emergency or similar situation must exist for management to perform this work is not supported by the language of the agreement which most closely addresses the question. Usually the more specific language in an agreement controls over more general language. *See,* Practice and Procedure in Labor Arbitration, *Schoonhoven,* (3rd Ed.) p. 176. Conversely, there is no specific language in this labor agreement which limits or prohibits management from performing such work.

The Union's arguments do point to other parts of the agreement, broadly invoking the recognition clause and seniority provisions which have been the basis upon which other arbitrators have ruled in favor of the union in other cases. As discussed below, those decisions have been in cases where there are no contract provisions allowing management the right to perform some bargaining unit work. Here, by contrast there are the provisions in Article 5 (B) as discussed above. The general topic is discussed in How Arbitration Works, *Elkouri & Elkouri,* (6th Ed.) pp. 759 – 762.

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> Other arbitrators have ruled against the right of management to assign work out of the bargaining unit, on the ground that it is not included within the scope of general management-rights clauses. Similarly, arbitrators have so ruled on the basis that the recognition, seniority, or job security clause is violated by such action; or that the job, being listed in the contract, is a part of the contract, and its reassignment outside the bargaining unit violates the contract.
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> The reasoning underlying this view was elaborated by one arbitrator:
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> > Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies. . . . The transfer of work customarily performed by employees in the bargaining unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes.
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> Some arbitrators take an intermediate position, agreeing that the recognition, seniority, and other such contract clauses do evidence an intention to restrict the performance of unit work to unit employees, but at the same time not considering such provisions to create an absolute restriction. Arbitrators in

this camp recognize that the assignment of such work outside the bargaining unit may be proper where there is "good cause", where it is de minimis, where the work is supervisory in nature, or where there is an emergency or some other justification, but may be improper if layoffs and displacements from jobs result or employees suffer loss of pay.

A related view as to the proper approach for judging the assignment of bargaining-unit work to persons outside the unit was offered in *Chrysler Corp*. In that case, the agreement recognized management's right "to manage its plants and offices and direct its affairs and working forces". The arbitrator stated that, "This 'right', which obviously exists even though the Agreement does not so provide, must be balanced against the interests and rights which the Union and bargaining unit employees have under the [recognition, seniority, and wage clauses of the] Agreement. He explained:

> In the opinion of the Umpire, this is not a case of "absolutes" one way or the other. Rather, it is a case of an appropriate balancing of the legitimate interests of management, the bargaining unit employees, and their union representative. The management interest in efficient allocation of work should not have to stop at the boundaries of a defined bargaining unit. On the other hand, the decision to allocate work to employees outside the bargaining unit should be one made in the honest exercise of business judgment, and not arbitrarily, capriciously, or in bad faith.

Other arbitrators have used a similar "balancing of interests" approach, and considered the effect on the bargaining unit. . . .

. . .

(citations omitted)

The Union has cited two cases cited in the above passage to support its argument that the seniority and recognition clause language of the labor agreement excludes management from performing this work, at least short of an emergency. The Union does not offer a specific analysis of the seniority language in the agreement here, but argues the principle of seniority as reflected in BETHLEHEM STEEL CO., 16 LA 111 (Killingsworth, 1951). In that case the employer had unilaterally taken a bargaining unit position and made it supervisory, while retaining essentially the same job duties. There had been an established practice covering the duties of that position relative to its bargaining unit status, and a specific clause in the parties' labor agreement required the employer to carry the burden of justifying its actions in departing from that practice. Citing both the specific clauses in the labor agreement and the

principles embedded in the seniority clause, noting that arbitrators are virtually unanimous in holding that a Company may not unilaterally remove a job from the bargaining unit, even when there is no express limitation to that effect in the agreement or when there is a management rights clause, arbitrator Killingworth found the Company failed to justify its unilateral withdrawal of the job from the bargaining unit. The circumstances in the present case are materially different. Here, there was no removal of a bargaining unit position from the bargaining unit. Rather, the stipulated facts show a single four hour instance where work normally performed within the bargaining unit was done by a supervisor while the crew was short staffed due to the vacation of a Union member. This is the type of situation which was correctly distinguished by the Union in BETHLEHEM STEEL CO. ID. p. 113. That case and the seniority clause in this labor agreement do not support the Union's position here, especially in view of the management rights provision allowing management, at times, to work hand in hand with union members.

The recognition and seniority clauses of a labor agreement were among those considered in the other award cited by the Union, HOLLAND PLASTICS, INC., 74 LA 69 (Belcher, 1980). There, the issue was an alleged violation of the agreement when non-bargaining unit truck drivers transported loads to and from the company plant. A new parent company had subcontracted certain truck driving work previously done mainly by bargaining unit members from the subsidiary company's plant. Arbitrator Belcher's award determined what routes would be driven by either the union members or the non-union drivers. The case did not involve questions or facts of supervisory or management personnel performing bargaining unit work. Thus, it is of little persuasive value here. And the Union has not argued that this is a subcontracting instance which violates Article 5 (E) of the labor agreement.

But HOLLAND PLASTICS, INC. did deal with having work customarily performed by bargaining unit members done by other, non-supervisory, non-bargaining unit members. That is a circumstance which would appear to be addressed in some fashion in Article 7 – Types of Employees, in the parties' labor agreement. The Union has argued, though not in respect to the recognition or security clauses for which it cites HOLLAND PLASTICS, INC., that Article 7 was violated because the Supervisor is not a bargaining unit member. The language cited by the Union is:

> The Town will not have bargaining unit work performed by other than full-time bargaining unit employees (defined as forty (40) hours per week, eight (8) hours per day) except that seasonal workers may be employed for not more than one hundred twenty (120) continuous days.

This language is part of Article 7 (B), which is entitled Seasonal, and also contains language further restricting the employment of seasonal employees while regular bargaining unit employees may be on layoff. While the part of the subsection cited by the Union may at first appear to be at odds with the Article 5 (B) management rights language as to management working hand in hand with union members, set in the context of distinguishing seasonal employees from regular full-time bargaining unit members, Article 7 does not reach the issue

of management performing bargaining unit work. That is specifically covered in Article 5 (B). Both clauses have meaning, but not conflicting meanings, and are reconciled without rendering either meaningless or superfluous.

The Union argues that the Town could have scheduled the excavation work for a different date or reassigned duties. However, the management rights clause in Article 5 gives the Town the right to assign employees to jobs and equipment in accordance with the provisions of the agreement, and the right to schedule work. The question is not what the Town could have done differently. The question is if the Town violated the agreement by what it did.

The Union's grievance requested an overtime equalization. The stipulated facts show that there was no overtime worked by the Supervisor. The agreement provides in Article 5 (B) that management employees will not perform overtime until overtime is first offered to qualified members of the bargaining unit. Aside from being another expression in the agreement that management and bargaining unit members may in some instances both perform the same work, because no one worked overtime that day, the overtime provisions are not implicated in this case. Similarly, the call-in provisions of Article 8 (B) are not implicated because there was no overtime scheduled or worked by anyone.

The labor agreement does provide for management working hand in hand with Union members and that implies doing bargaining unit work. The agreement does not further define what those permissible circumstances are. The language negotiated by the parties does not require there be an emergency situation or any other specific requirements. An arbitrator may not add to or delete from the language of an agreement of the parties. Article 5 (B) references the welfare of the general public. That is the case here with the provision of playground in a Town park. Public health and public safety are not contained in the subsection of the Article and public health or safety cannot be read into that subsection as a qualification or required circumstance. Requiring an emergency or other circumstances would be doing that. But the language does express limited use by management by including the phrase "at times". In this case it is clear that no bargaining unit member lost any hours of work or opportunity to work. There was no overtime worked by anyone and the overtime provisions of the agreement are not implicated. No bargaining unit members' position or duties were changed. There has been no attempt to undermine the Union or reduce the size of the bargaining unit shown here. The Union is rightly concerned for job security, but no actual threat to job security has been established by this incident. The single incident was of relatively short duration and occurred while the relatively small crew was short staffed due to a Union member's vacation. That was not a situation orchestrated by the Town. Article 5 (B) is limited to "at times", which does not allow its continual or carte blanch use as would be rightly feared by the Union. This incident does not show an imbalance in the labor/management relationship in the Town which is demonstrated by a violation of the labor agreement.

The labor agreement gives the Town a limited right to have management perform what would be considered bargaining unit work by working hand in hand with Union members. In the limited facts of this particular case it has not been demonstrated that any clause of the agreement was violated or that the Town acted in bad faith or in an attempt to undermine the Union or its security. Accordingly, based upon the evidence and arguments in this case I issue the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 14th day of June, 2007.

Paul Gordon /s/
Paul Gordon, Arbitrator

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