

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**EAU CLAIRE CITY EMPLOYEES,  
LOCAL NO. 284, AMERICAN FEDERATION OF STATE, COUNTY,  
AND MUNICIPAL EMPLOYEES, AFL-CIO**  
and

**CITY OF EAU CLAIRE**

Case 274  
No. 66916  
MA-13681

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**Appearances:**

**Steve Day**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, for Eau Claire City Employees, Local No. 284, American Federation of State, County, and Municipal Employees, AFL-CIO, which is referred to below as the Union.

**Stephen G. Bohrer**, Assistant City Attorney, City of Eau Claire, 203 South Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin 54702-5148, for the City of Eau Claire, referred to below as the City or as the Employer.

**ARBITRATION AWARD**

The Union and the City 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, a member of its staff, as Arbitrator to resolve Grievance No. 2006-13, filed on behalf of "Local 284." Hearing on the matter was held on September 11, 2007, in Eau Claire, Wisconsin. The hearing was not transcribed. The parties filed briefs and reply briefs by November 19, 2007.

**ISSUES**

The parties did not stipulate the issues for decision. The Union states the issues thus:

Did the City violate the contract and/or past practice by using volunteers, instead of Local 284 employees, to clear snow from the Carson Park Stadium bleachers and field on November 10 and 11, 2006?

If so, what is the appropriate remedy?

The City states the issues thus:

Did the City violate Article 3, Section 2, when volunteers shoveled snow off the bleachers at the Carson Park football field on November 10, 2006, or when volunteers scraped residue/crust from the field's surface on November 11, 2006?

If so, what is the appropriate remedy?

I view the record to pose the following issues:

Did the City violate the collective bargaining agreement when volunteers cleared snow off of the bleachers at the Carson Park football field on November 10 and 11, 2006, or when volunteers cleared snow off of the bleachers and scraped crust from the field's surface on November 11, 2006?

If so, what is the appropriate remedy?

## **RELEVANT CONTRACT PROVISIONS**

### **PREAMBLE**

Both parties to this agreement are desirous of reaching an amicable understanding with respect to the employee-employer relationship that is to exist between them, and enter into an agreement covering rates of pay, hours of work, and conditions of employment, as well as procedures for reducing potential conflict.

Both parties to this agreement will cooperate so that there will be a harmonious relationship . . .

### **Article 1 – RECOGNITION**

Section 1. The City hereby recognizes the Union as the exclusive bargaining agent for all full-time employees . . . of the . . . Parks, Recreation, and Cemetery and Forestry Division . . .

. . .

**Article 3 – UNION SECURITY AND MANAGEMENT RIGHTS**

. . .

Section 2. The rights, power and/or authority claimed by the City are not to be exercised in a manner that will cease to grant privileges and benefits, limited to mandatory subjects of bargaining, that the employees enjoyed prior to the adoption of this agreement and that will undermine the Union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent, or purpose of this agreement.

Section 3. Management Rights. It shall be the exclusive function of the City to determine the mission of the agency, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations.

It shall be the right of the City to direct its employees, take disciplinary action, relieve its employees from duty because of lack of work, or for other legitimate reasons, and to determine the methods, means, and personnel by which the agency's operations are to be conducted. But this should not preclude employees from raising grievances about the impact that decisions on these matters have on wages, hours, and working conditions. . . .

**Article 14 – OVERTIME**

Section 1. Employees shall receive one and one-half (1 ½) times their regular hourly rate of pay for all hours worked in addition to their regular standard work day and/or the standard work week, and a minimum of one (1) hour shall be paid for all overtime. . . .

**Article 31 – GENERAL PROVISIONS**

. . .

Section 7. Supervisors shall not perform any work normally performed by bargaining unit employees, or serve as non-supervisory employees of a work crew except under the following circumstances:

1. During an emergency, when it is necessary in the interest of public safety to complete emergency tasks, to avoid injury and/or damages.
2. For training purposes.

3. When a shortage of bargaining personnel exists after following agreed-upon procedures. . . .

### BACKGROUND

The Union first presented Grievance 2006-13 to the City at Step 1 on November 14, 2006 (references to dates are to 2006, unless otherwise noted). The Union presented a written, Step 2 grievance form, dated November 17, which alleges,

Management had Non-Local 284 personnel shoveling snow off the bleachers and Carson Park Football Field. This is work that would normally be performed by Local 284 employees. This was not a “project” to be performed by a volunteer group. This was work that needed to be completed for a football event to take place on 11-11-06 at the Carson Park Football Facility. Local 284 employees should have been called to work on the field and bleachers on both 11-10-06 and 11-11-06.

The grievance form lists Article 3, Section 2 as the specific agreement provision violated, adding a reference to “any other articles and/or sections of the contract that may have been violated.” The grievance form states the remedy requested thus:

Management should stop using Non-Local 284 personnel to do work that is normally performed by Local 284 employees. Make the appropriate employees that should have been asked to work whole for any wages and/or benefits lost because of the actions that resulted in this grievance.

Mike Huggins, the City Manager, issued the City’s Step 3 response in a letter dated March 8, 2007. The response rejects “the position that shoveling is . . . Union work.” Huggins’ response adds that “these were very unusual circumstances, and management acted reasonably under these conditions.”

The City’s Carson Park facility includes separate football and baseball fields. The baseball field’s playing surface is natural grass and the football field’s is artificial turf. The turf was installed for the City in 2004 as the result of a public/private initiative to upgrade the football field. The turf is the same type used at Lambeau Field and at Camp Randall Stadium and cost roughly \$800,000 to install. It expanded the City’s ability to rent the field and made the football surface safer to play on later in the year.

On November 11, Eau Claire Regis was scheduled to play Stratford in a High School Division 6, Level 4 tournament game to be held at 1:00 p.m. in Osseo. The winner was to contend for the state championship in Madison at Camp Randall. On November 10, however, a significant snowstorm hit northwestern Wisconsin. Sometime about noon on November 10, Terry Allen, the Athletic Director at Regis, learned that the Osseo field could not be made playable by the scheduled kick-off time. The tournament placed time constraints on the game

that made rescheduling a poor option. Allen ultimately contacted Phil Fieber, the City's Director of the Parks, Recreation and Forestry Department, to determine if Carson Park could be made available. After some discussion among City management, Fieber informed Allen that the field could be made available, but that the City could not provide concession facilities; could not clear the bleachers; could not provide bathroom facilities; and could only assure that the locker rooms would be heated to the extent possible. He also voiced concern to Allen that although the playing field could be cleared, the City had never removed that amount of snow from its surface. He also noted that the goal posts were set to collegiate width and could not be changed by kick-off.

The difficulties noted by Fieber reflected that the City had completed all of the scheduled events at Carson Park and was in the process of shutting down the facility for the winter. Stands shared with the baseball field had been removed, eliminating what served as bleachers for the visiting team's fans as well as the end zone seating. All of the plumbing in the field's facilities had been drained of water and all traps had been filled with anti-freeze. Fieber assumed that the weather conditions would limit the size of the crowd to no more than eight hundred, and that the fans could congregate around the field to watch the game. Fieber informed Allen that if Regis hosted the game, Regis would have to provide portable restrooms. Allen discussed the matter with the Wisconsin Interscholastic Athletic Association (WIAA) and offered to host the playoff game at Carson Park. The WIAA agreed to sanction the event and Allen told Fieber to make the facility available.

The City had never removed the type or the amount of snow that covered the turf at Carson Park on November 10. After fitting a plow with a rubber blade and after some experimentation, Pete Bowman, a Local 284 represented employee cleared the end zone areas to create room for the plowed snow and began to plow the balance of the field between 3:30 and 4:00 p.m. He did not complete his work on the field until roughly 10:30 p.m. Lucas Mahal, another Local 284 represented employee, also worked at Carson Park on November 10. He plowed the plaza and area surrounding the stadium. He also cleared the steps to the concession area. While they worked, Bowman and Mahal observed three people clearing the bleachers at various times throughout the late afternoon and evening. No more than two worked at the same time. When Bowman and Mahal closed the Carson Park facility at roughly 10:30 p.m., they told the two remaining people they would have to leave. The people who cleared the bleachers were Allen, his wife and their son.

While Bowman and Mahal plowed Carson Park, Fieber checked weather reporting services, learning that the forecast for November 11 was, "Mostly sunny" with "Highs around 35." Fieber decided that under those conditions, whatever snow or ice remained on the field after Bowman plowed would melt as the black rubber surface of the turf heated under the sun and the above-freezing temperatures on the following day.

At 8:30 a.m. on November 11, Fieber met Phil Johnson, the Superintendent of Parks and Maintenance. Fieber is Johnson's immediate supervisor and Johnson is the immediate supervisor of a number of Local 284 represented employees. They noted that, contrary to the

forecast, the sun was not shining and that even though the temperature was above freezing, an icy crust coating the field would probably not melt in time for the kick-off. At roughly 9:00 a.m. fans began to arrive at the field, and began to clear the bleachers of snow and ice. By 9:30 a.m. Johnson and Fieber had yet to determine how to clear the playing field. Snow removing equipment fitted with brushes were being used to clear the downtown area.

Johnson had called Jason Palmer on the evening of November 10 to inform him that he should be prepared to come in around 11:00 a.m. to work the game on November 11. Palmer is a Parks employee represented by Local 284. Early in the morning of November 11, Johnson phoned Palmer, telling him to come in earlier. Palmer arrived sometime between 9:00 and 9:30 a.m.

Johnson phoned Palmer to get a Groomer to attempt to clean the playing surface. The Groomer proved useless in removing the crust. While this went on, fans made their way to the field and spontaneously began to use their own shovels to clear it. After some experimentation, Fieber found that a twenty-four inch wide push shovel was the best tool to remove the layer of ice. Terry Deetz is a Local 284 represented employee who was called in to clear City trails on November 11. At some point, Johnson called Deetz, telling him to report to the Carson Park field when he had completed the trails. Deetz arrived sometime between 10:00 and 10:30 a.m. When he arrived, Johnson met him and asked how many shovels Deetz had and whether there were any more at the shop. Deetz had only one and Johnson directed him to the field, where Deetz found a number of volunteers clearing the playing surface. Johnson returned to the shop and returned with perhaps ten shovels. He put them in a pile on the field, allowing volunteers to access them. One other Local 284 employee, Bobby Woodford, worked overtime on November 11.

The game started on November 11 at the scheduled time.

The background set forth to this point is largely undisputed. The balance of the background is best set forth as an overview of witness testimony.

### **Bob Horlacher**

Horlacher is President of Local 284 and has worked for the City for thirty-six years. In his view, the Union has, for over thirty years, performed all duties necessary for the operation and maintenance of the Carson Park football facility. The work performed by volunteers cleaning the field and the bleachers on November 10 and 11 is normally done by Union represented employees. The Union has been zealous in defending bargaining unit work. He testified that the Union has filed, since 1992, not less than twenty grievances defending work performed by Parks & Recreation Department employees represented by the Union. A significant portion of them concerned overtime. The City and Union have reached a number of agreements on these grievances, including several concerning City use of volunteers. For example, the parties executed the following settlement of Grievance No. 1985-12:

For Carson Park football field only, the City . . . shall have the right to allow groups or organizations to use the field without a union employee present, and to provide a key to the field to those groups. However, these functions shall not include actual football games, utilization of equipment such as scoreboard, lights, public address systems; nor shall it include events open to the general public.

The parties settled grievance 1988-10 through the following agreement:

The following agreement shall serve as a settlement to union grievance 1988-10. Both parties acknowledge that this is a settlement of this case only and shall not serve as a precedent for any future instances.

The union agrees that the city shall be allowed to permit civic groups or organizations to do public service projects in city parks and lands under the following conditions:

1. Only hand tools that are provided by the organization may be used on these projects.
2. The city would not solicit groups to perform this type of work.
3. The city will not provide materials.
4. These would be volunteers only and would not be fundraisers.
5. The city shall notify the union as soon as possible of the scheduled dates of these projects.
6. These shall be limited term projects only and shall have a designated start and finish time.
7. The union reserves the right to grieve this type of activity.
8. The volunteer work shall not be used to replace bargaining unit employees. . . .

The Union filed Grievance 06-3, dated October 20, 1988, which states:

Management failed to notify Local 284 prior to scheduling volunteer group projects. There are longstanding agreements that Management agreed to notify Local 284 before volunteer groups are assigned to do projects.

The grievance form states the source of the contract violation, and the requested remedy thus:

Article 3, Section 2, Agreements from Grievances # 1998-10 and 2002-7, all other applicable documents, and any other articles and/or sections of the contract that may have been violated. . . .

The City should cease and desist from this practice, and follow the agreements that have been reached in the past.

Fieber answered the grievance in a memo dated May 25, which states:

This letter is in response to Grievance 2006-3, relating to the use of volunteers working in city parks . . .

The use of volunteers in park systems around the country has been well documented and is considered an opportunity for residents to be involved in their community. . . .

As a result of reduction in staff in the Parks Maintenance Division, of one full time employee in 2005 and most recently the reduction of two seasonal staff for 2006, the Department initiated the reduction of park maintenance in 13 park sites . . .

The City of Eau Claire has had an informal program for using volunteers in the past. Groups and individuals contacted Parks, Recreation and Forestry and either had a specific project in mind or requested the Department suggest a project. The department desires to organize a pro-active program that encourages and welcomes the community to participate in the maintenance of their city parks. . . .

Horlacher believed the Carson Park field could have been cleared on November 11 with the use of City-owned power equipment operated, as is normally done, by Local 284 represented employees.

### **Gordon Johnson**

Johnson retired from City service in December of 1984. He served in the City's Department of Public Works as a Heavy Equipment Operator for fifteen years. He then served as a Foreman and as a Superintendent of the Parks and Recreation Department for the fifteen years of service preceding his retirement. He noted that Union represented employees had cleared snow from the bleachers and from the football field at Carson Park several times. He specifically recalled a large snowstorm in 1980 or 1981 in which the crew put belting on snow blowers to soften and clear the field. The crew used snow shovels and brooms to clear the bleachers.

### **Lucas Mahal**

Mahal works as an Arborist in the Forestry Division of the Department of Parks and Recreation. The City hired Mahal in July of 2005. November 10 was Veteran's Day observed and a paid holiday under the labor agreement. Johnson called him in to work on November 10 at roughly 10:00 a.m. Mahal reported in at roughly 11:30 a.m., plowing City trails and paths prior to reporting to Carson Park. Mahal noted it takes him roughly thirty-five minutes to report for work following a call-in. For working on November 10, the City paid Mahal holiday pay plus double time for the hours he worked.



Fieber was not present at Carson Field while volunteers cleared the bleachers. Johnson was. The volunteers worked from between 4:30 and 5:00 p.m. until 10:30 or 11:00 p.m. The snow was six to eight inches deep and was so wet that it caused the trucks to have difficulty moving it. Mahal is a Union Steward. He was willing to work November 11.

### **Pete Bowman**

Bowman has worked for the City for seven years, with the last two and one-half in the Parks and Recreation Department. At roughly 10:30 a.m. on November 10, Johnson called Bowman to clear trails and walkways. He reported for work at 11:50 a.m. and worked from then until 11:00 p.m. He reported to Carson Park at 2:00 p.m. to plow the field, working on the field until 10:30 p.m. His time card notes his hours on the field as 3:30 to 10:30. For roughly thirty minutes, Johnson experimented by plowing small portions of the field until they were sure how to perform the work without damaging the turf. Bowman recognized Allen and his wife, who shoveled the bleacher area for roughly six hours. He thought he saw Johnson speak to Allen and his wife while they were shoveling the bleachers. He was not certain on the point, because he noted he could not recall seeing Johnson climb the bleacher steps. Bowman was willing to work November 11, and could have reported in within twenty minutes.

### **Terry Deetz**

The City hired Deetz in January of 2003. He has worked a little over one year in the Parks and Recreation Department.

Johnson called Deetz in the evening on November 10, asking him to report to work on November 11 to finish plowing trails and walkways. He shoveled alongside volunteers on the Carson Park turf from sometime after 10:30 a.m. until 12:30 p.m. He estimated between forty and fifty volunteers worked shoveling the field. Fieber shoveled with the volunteers. Deetz watched Johnson drive the Mule, an ATV equipped with a dump box, onto the playing surface. He watched volunteers drive the Mule, load ice into its box and dump the ice in the end zones. Deetz estimates it takes him twenty minutes to report to the shop after a call-in. Deetz did not observe Johnson or Fieber direct the work of volunteers.

### **Jason Palmer**

Palmer has worked as a City employee in the Parks Division for roughly eighteen months. Johnson called him during the evening on November 10, telling him to report for work at 11:00 a.m. to prepare to work the kick-off. Early in the morning on November 11, Johnson phoned Palmer to advise him to report for work at 9:00 a.m. Palmer phoned Johnson after he arrived at 9:00 a.m. to determine what to do. Palmer's time card notes 9:30 a.m. as his start time. Johnson told Palmer to get the Groomer from the shop and bring it to Carson field. Palmer could not find the Groomer, and reported to Carson field with a pick-up at 9:30 a.m. Fans from Regis were already there. Ultimately, Palmer and others were able to get the Mule and the Groomer to the field. Neither piece of equipment worked well under the

conditions. Johnson got to the field between 10:00 a.m. and 10:30 a.m. By that time volunteers were using hand shovels on the field. Palmer had to perform custodial duties away from the field and did not come back to the field until Noon or 12:30 p.m. to pick up City shovels. Palmer estimated fifty volunteers worked on the field. Johnson and Fieber worked among them, although Palmer only saw Fieber using a shovel. Palmer can report to work within fifteen minutes after a call-in.

At the start of the field clearing effort, the field was covered with an at least one-eighth inch thick layer of ice. The Mule was useless on the surface, and could only spin its wheels.

### **Phil Fieber**

Fieber has served as Director for four and one-half years. Johnson is the direct supervisor of Union represented employees and reports to Fieber. The snow stopped falling on November 10 at roughly 10:30 a.m. Sometime around 2:15 or 2:30 p.m. the Regis football coach spoke with him about using Carson park for the playoff game. Fieber responded by describing in detail the condition of the partially winterized facility. Sometime shortly after this conversation, Allen called Fieber to advise him that Regis wanted to host the game at Carson Park, with a kick-off set for 1:00 p.m. Fieber directed Johnson to check the status of the field and report back. Johnson did not recommend opening the facility, leaving the decision to Fieber. Johnson advised Fieber that he had difficulty getting unit employees to report for work that morning to clear streets and walkways.

Fieber decided to allow Regis to host the game. He informed Allen the City could not change the width of the goal posts; could not turn on the water; could not provide restroom or concession facilities; could not clear the bleachers; but would get the field into safe playing condition. Allen agreed. Neither Fieber nor Johnson was aware that Allen or others planned to clear the bleachers and neither was aware of any example of Union represented employees clearing snow from the bleachers for a football game.

On November 11, Fieber met Johnson on the field at Carson Park. Fans began to arrive at 9:00 a.m., and began to clear the bleachers. Even after experimenting with various pieces of equipment, neither could figure out how to clear the field. Between 10:00 and 10:30 a.m., fans began to use their own shovels on the field. Johnson and Fieber decided to get more shovels "not only for our guys but for anyone who could pitch in." Stratford players, coaches and fans began to arrive at roughly the same time the shoveling began. Neither Fieber nor Johnson specifically directed any volunteer to scrape the field. Perhaps two dozen volunteers scraped the field at any one time. The shoveling and scraping stopped at about 11:45 when uniformed players began to take the field.

Fieber was surprised by the weather conditions on November 11, and did not consider a general call-in of unit employees. He did not view the work as attractive or the morning to allow sufficient time to get a meaningful response. It was, however, evident from 9:15 a.m. that the field would need clearing. The field could not have been cleared as it was without the work of volunteers. Had the Groomer worked, no one would have needed to shovel.

**Terry Allen**

Regis, a Catholic high school, has roughly two hundred forty students. He has been the Athletic Director at Regis for thirty-two years. Allen was aware late in the morning on November 10 that Osseo could not provide its field for the scheduled playoff game. He phoned Fieber sometime after 2:00 p.m. to determine whether Regis could host the game at Carson Park. Fieber detailed the difficulty involved, but offered the use of the field and after Allen confirmed that the WIAA would approve, he accepted Fieber's offer. Fieber never requested that Regis volunteers clear the bleachers. Once Allen had secured the use of the field, he returned to Regis for dinner with the football team at sometime between 6:00 and 6:30 p.m. Allen sought, without success, to get any volunteers from the dinner to assist with clearing the bleachers or with operating the concessions. Allen then went home and had his wife and son check the condition of Carson Park. His wife and son observed the field being plowed, and did some work clearing the bleachers. He later went to the park and assisted in clearing the bleachers. He never saw Johnson that evening and no City employee requested or directed him to clear the bleachers.

The following day, Allen and his wife got to the field sometime between 9:00 and 10:00 a.m. He attended to arrangements with the contractor providing portable restrooms, and checked the field. He found the field had significant patches of ice, particularly from the hash marks to the sidelines. Sometime between 10:00 and 10:30 a.m., various volunteers started scraping the field. None received any direction from the City. Sometime between 11:30 a.m. and Noon, the shoveling/scraping effort stopped because the players had taken the field. Allen did speak with Fieber and Johnson about the ice on the field, and they responded that they would try the equipment they thought might work. At no time did they seek volunteer assistance. They did not discourage it, but never sought it to Allen's observation.

**Cynthia Hofacker**

Hofacker is the President of the Regis school system, and has served in that position for seven years. Hofacker came to the game early in the morning on November 11. She and her husband worked clearing the bleachers for a period of time. No one from the City sought or directed their work. As more fans came into the field, the shoveling effort expanded. She thought the effort on the field started sometime around 10:30 a.m. At any one time, perhaps fifteen to twenty people tried to scrape ice off of the field. The effort lasted perhaps an hour, with the team benches being shoveled some time around Noon. Early in this effort, Hofacker approached a City employee to determine whether the shoveling and scraping with metal bladed tools would hurt the field. The employee informed her that to his knowledge the metal bladed shovels would not harm the turf. The volunteer effort, in her view, is typical of Regis parents and fans. The school relies on volunteers.

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

## THE PARTIES' POSITIONS

### The Union's Brief

After a review of the evidence, the Union argues that City citation of CITY OF EAU CLAIRE, DEC. NO. 5474, MA-9694 (McLaughlin, 5/97) is misplaced because "the arbitrator was in error in the overall award" but that "an analysis of his criteria for the application of Article 3, Section 2 may be useful in the instant matter."

More specifically, the Union argues that legal and arbitral precedent establishes that the subcontracting of bargaining unit work is a mandatory subject of bargaining. The parties' past practice and bargaining history confirm this. This evidence satisfies the first element of the analysis.

The second element of the analysis is met because all work done at Carson Park Stadium for football games "has historically been performed by Local 284 members." The final element of the analysis is met because City exercise of its rights "undermines the Union and attempts to evade the agreement." The recognition clause establishes the Union as the exclusive bargaining representative for employees affected by the grievance. If the Union "cannot control City use of alternative sources of labor, bargaining unit work will be diminished." The evidence establishes that Union concern over this issue is not speculative since Fieber has expressly stated during grievance processing that the City intends to expand the use of volunteer labor. The evidence establishes that the Union has a consistent history of fighting City unilateral use of volunteers to erode bargaining unit work.

City action also violates the spirit of the agreement. The Agreement's Preamble imposes a duty to bargain in good faith that cannot be reconciled to the City's unilateral action to curtail unit work. Arbitral precedent confirms this. Beyond this, the evidence establishes that the work involved was not "*de minimus*" and that unit employees were ready and willing to perform the work. Significantly, supervisors provided equipment for the volunteers to use and assisted in the field clearing work. Heavy snow cannot, "in west central Wisconsin", be considered to pose an emergency. The snowfall had, in any event, arrived primarily on November 10, and supervisors had time to call-in unit members to clear the field on the following day. Johnson's drive to the shop to get shovels and return to Carson Park to distribute them to volunteers belies any assertion that an emergency was at issue. In fact prior settlement agreements confirm that the City is not to encourage the use of volunteer labor to perform unit work at Carson Park.

City assertions that it could not control the volunteers are "shallow" and, if accepted, "then the future bargaining unit work of Local 284 is at risk." Two city supervisors were present while the volunteer work proceeded. Beyond this, it is "suspicious that volunteers were at the stadium three hours before kick-off was scheduled." This confirms the City's avowed intent to use volunteers with increasing frequency. The Union concludes that the grievance should be sustained and that to remedy the violation, "the appropriate Local 284

employees” should be made whole “for the number of hours performed by volunteers on November 10 and 11, 2006.”

### **The City’s Brief**

After a review of the evidence, the City notes that a “threshold issue is whether the substance of the work at issue is unit work.” The substance of the work at issue is “hand shoveling snow from the bleachers or the stadium’s artificial turf.” Article 3 grants the City broad authority to determine what work is done and who does it, and, contrary to the Union’s assertions, there is no clear practice or bargaining history to make the work at issue “unit work.” Each of the grievances and related settlement agreements set forth by the Union “are dissimilar and distinguishable.”

Nor will the evidence point to a past practice to support the grievance. Johnson’s testimony relates to a single instance and this is “insufficient evidence of an established past practice.” The Maintenance of Standards clause set forth at Article 3, Section 2 has been interpreted before and demands the application of three elements. Without conceding that the Union has met its burden to meet the first two elements, the City argues that the third element precludes granting the grievance.

The hand shoveling of snow cannot be considered a “benefit” within the meaning of Article 3, Section 2. Even it could be, the City committed no act to “undermine the Union.” Fieber actually brought work to the unit, producing “many Union members with triple time in wages for working on November 10, and time and one-half for overtime on November 11.” The evidence establishes that Allen and his family cleared the bleachers on November 10 as a volunteer effort, without any direction from any City employee. The clearing of the field on November 11 was too brief an effort to undermine the Union. Ignoring how widely the accounts of the extent of volunteer activity vary, it is evident “that there were a lot of volunteers and it happened very quickly.” No item bigger than a hand shovel was involved.

Beyond this, the circumstances were highly unusual and unexpected. The volunteer response was spontaneous. That no Union member objected to the volunteer effort and at least one encouraged it confirms that there was no City intent to evade the contract.

At most the City had a single supervisor assist in scraping the turf. Article 31 establishes that this effort was authorized by the labor agreement. At most, Fieber “may have acquiesced in allowing Regis fans and volunteers to scrape the field”. This demonstrates not “bad faith”, but Fieber’s flexibility to allow the public to quickly help so that the game could proceed on schedule.” It follows that the grievance should be denied.

### **The Union’s Reply Brief**

A review of Horlacher’s and Johnson’s testimony establishes that the Union has historically cleared snow from the bleachers and the field at Carson Park. Johnson testified not

to a single prior instance of clearing snow from the park prior to a football game but to “several” instances. Nor can City assertion that the work was completed too quickly for a call-in be credited. That it made no effort to call-in employees makes this point irrelevant. Many employees, within and outside of the Parks Department, were available and “hungry” for overtime. The testimony establishes that the City had several hours to implement a call-in. To call a single snowfall in winter in west central Wisconsin a two-day “emergency” strains that term beyond its limits. The snow removal was normal work for unit employees.

### **The City’s Reply Brief**

Hand shoveling of snow from the bleachers and the turf “at an unscheduled football game is an act of impromptu community spirit, not a case of depriving the Union of protected, guaranteed work.” Such volunteerism “should be appreciated and not punished.” Without the unsolicited help, “the playoff game would not have been possible.”

That work has the potential to be assigned to unit members does not make it “bargaining unit work.” The Union’s reading of the Maintenance of Standards clause would make the cleaning off of a picnic table by a picnicker “bargaining unit work.” In any event, the elimination of “potential work” does not violate Article 3, Section 2. Had Fieber called in the whole unit, it is evident the field would not have been cleared in time for kick-off.

The Rice award cited by the Union affords no support for their grievance. It involves a subcontract, to an independent contractor, of work normally done by unit members. Beyond this, the award specifically excludes “unusual circumstances” from its holding. The Nielsen award is distinguishable, turning on the loss or reduction of hours of unit employees. At root, subcontracting “requires affirmative and purposeful action by an employer that results in the elimination of established unit work.” The Union has failed to prove that this grievance poses such action.

The Union’s case rests on the assertion that it has met the three elements defining the application of Article 3, Section 2. The hand shoveling of ice from the turf has never been done by the unit and thus cannot fit within the first element. There is no evidence of past practice and no real proof that the work the grievance questions has been “traditionally done by Union members.” Management commentary from other grievances has no bearing on this case. There has been no City attempt to undermine the Union and thus no violation of the labor agreement. The grievance must be denied.

### **DISCUSSION**

My statement of the issue on the merits draws from the parties’ statements, but does not adopt either. Union reference to “using volunteers” presumes the City directed them. This highlights the Union’s position, but obscures that City direction of volunteers is a disputed fact. The Union’s statement combines the work performed on November 10 and 11 and uses “instead of” unit employees. This highlights its position, but obscures that no volunteers

worked on the field on November 10 while some unit members worked to clear the field on November 11. The Union's specific reference to past practice is unnecessary because application of Article 3, Section 2 demands the review of practice preceding the labor agreement. The City's restriction of the issue to Article 3, Section 2 ignores that the section points to consideration of other agreement provisions. The City's separation of the work involved by day obscures that volunteer work on the bleachers took place on both days. The parties' statements each use "volunteers" to cover non-City employees involved in the effort on both days, and my statement of the issue follows that.

Each party employs the standard applied in DEC. NO. 5474, which states the elements of the standard thus:

. . . the Union must demonstrate (1) that the benefit is a mandatory subject of bargaining; (2) that the benefit predates the adoption of the current agreement; and (3) that the City's exercise of its rights "will undermine the Union," or attempts to evade the agreement, or violates the agreement's "spirit, intent, or purpose." DEC. NO. 5474 AT .8.

The Union asserts that it has met the first element because "it is well settled that the decision to subcontract bargaining unit work constitutes a mandatory subject of bargaining" under a line of cases starting with UNIFIED S.D. NO. 1 OF RACINE COUNTY V. WERC, 81 Wis.2D 89 (1977).

RACINE did not, however, address "bargaining unit work." Rather, the RACINE court determined that the standard governing the subcontracting decision was,

the "primary relationship" standard established in BELOIT. The question is whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. 81 Wis.2D at 102, citing BELOIT EDUCATION ASSO. V. WERC, 73 Wis.2D 43 (1976).

In RACINE, the court held a subcontracting decision mandatory where,

The policies and functions of the district are unaffected by the decision. The decision merely substituted private employees for public employees. 81 Wis.2D at 102.

The RACINE Court, as the Rice award cited by the Union, addressed not employer use of volunteers, but employer use of an independent contractor. Brought to the facts posed here, this means that a City decision to use volunteers to clear the bleachers or the field may be considered mandatory if the "decision merely substituted" volunteers "for public employees." Crucial to this determination is whether the City acted to take the benefit of the work of volunteers to relieve itself of the cost of using unit employees.

The evidence will not support a conclusion that Fieber or Johnson did anything to direct or to control the bleacher clearing of November 10. Fieber specifically advised Allen that the City would not clear the bleachers. He testified credibly and without rebuttal that he assumed weather conditions precluded a large enough crowd to make bleacher clearing necessary. Allen sought volunteers to clear the bleachers on November 10 at a team dinner. He secured none beyond his wife and son. There is no evidence that any City employee sought the Allens' effort or did anything to encourage it.

Against this background, Union challenge to the bleacher clearing on November 10 does not question the substitution of volunteer labor for City labor. Rather, it questions the validity of Fieber's decision not to clear the bleachers as a condition of making the field available to Regis. There is no contractual basis to support my review of that decision. Article 3, Section 2 offers no support for this. Rather, the section presumes a City decision creating work that could be assigned to unit employees. Fieber's decision to conditionally offer the Carson Park field is the source of the overtime on November 10 and 11 and is not reviewable on this grievance.

The closer issue under Article 3, Section 2 is whether more substantial bleacher clearing by volunteers took place on November 11 and whether the City acted to take the benefit of that effort to avoid the use of unit employees. If that happened, the City arguably substituted volunteers for unit employees, thus posing an issue reachable under Article 3, Section 2. The grievance does not pose that issue, because there is no reliable evidence on the point. It can be assumed that a larger effort took place because it is undisputed that the crowd was larger than Fieber anticipated. However, there is no evidence to establish the extent of volunteer bleacher clearing on November 11. Hofacker and her husband may have cleared more bleacher seating than they needed, but there is no basis to conclude they or any other fan did anything other than assist fellow fans. There is no evidence to undercut Fieber's testimony that the size of the crowd took the City by surprise. This makes it impossible to distinguish the bleacher clearing on November 11 from that of November 10. Rather, the issue again turns on Fieber's decision to make the field available without bleacher clearing. That decision is not reachable under Article 3, Section 2, without making City management decisions on which events to host at Carson Park a mandatory subject of bargaining. Neither party addresses this point, and I see no basis to justify reviewing it.

In sum, the evidence does not show City action to substitute volunteers for unit members for bleacher clearing on November 10 and 11. This precludes finding a violation of Article 3, Section 2, since the Union cannot establish the existence of the first element to the section's application. On the evidence posed here, the section cannot be read to allow arbitral review of Fieber's decision to open the field without clearing the bleachers.

This turns the analysis to the field clearing of November 11. While there is some dispute on how much substitution took place, the evidence leaves little doubt that the City substituted the labor of volunteers for that of unit members on November 11. It is evident that Fieber and Johnson worked on clearing the field. They were aware no later than



9:15 a.m. that the field required clearing and that City power equipment was not going to work. No fewer than three unit employees assisted in clearing the field. The absence of any others can be traced to only two factors. One is the presence of volunteers to do the work and the second is City refusal to call-in other unit employees. Johnson returned to the shop to get shovels which he provided to volunteers. He had them placed in the middle of the field, to be used by volunteers. He had the Mule placed so that volunteers could use it. This establishes that the City acted to take the benefit of volunteer labor, thus substituting it for that of unit employees. This meets the first element of the analysis.

The second element of the analysis is not seriously disputed. Horlacher's and Johnson's testimony establishes that the clearing of the football field has been done by unit members for many years prior to the current labor agreement. City use of unit employees on November 11 confirms the point.

The final element is more closely disputed. The City urges that it did not intend to undermine the Union. The evidence supports this broad assertion. This cannot obscure, however, that its action to take the benefit of volunteer labor had the effect of undermining agreement provisions. That the City made no attempt to call-in any unit members other than those contacted the prior evening makes it impossible to credit City assertion that a call-in would be fruitless. It can be noted that less senior employees responded to the November 10 call-in. This affords some support for the City's assertion that a call-in might be difficult or untimely. However, the absence of any City effort to call-in unit employees on November 11 precludes granting persuasive force to City assertions on this point. City action to take the benefit of volunteer labor resulted in the loss of an overtime opportunity.

Beyond this, City action undercut the provisions of Article 31, Section 7. The assertion that Fieber and Johnson responded to a snow emergency or to an issue of "public safety" has no persuasive evidentiary support. If the ice on the field posed an issue of public safety, why were fans permitted to walk up and clear icy bleacher steps and seating? The snow stopped during the morning of November 10. The lack of sunshine on November 11 did not pose an emergency. Rather, it complicated the clearing of the field on that date. This did not make Fieber's or Johnson's effort a response to an emergency. Rather, it opened an option to the use of unit members. If an emergency was posed, it is impossible to account for any consideration of delaying the kick-off. The evidence establishes that the shoveling and scraping effort ended as the players took the field. The assertion of an emergency unpersuasively urges that Fieber, Johnson and the volunteers collectively concluded that even though public safety was at issue, the game must go on as scheduled. This is an untenable position. The more persuasive reading of the evidence is that Fieber, Johnson and the gathering football fans undertook a collective effort to make the field as playable as possible before scheduled kick off. This effort, if laudable, is not an emergency demanding action "in the interest of public safety". In sum, the Union has met the third element of proof, since the City's deliberate taking the benefit of volunteer labor operated to undermine an overtime opportunity under Article 14 and to undercut the ban on supervisors performing "work normally performed by bargaining unit employees" stated at Article 31, Section 7.

The remaining issue is remedy. As noted above, the violation of Article 3, Section 2 turns on the undermining of agreement provisions governing overtime and the use of supervisors to perform the work of unit members. The evidence makes it impossible to precisely measure either. The extent of the lost overtime opportunity is virtually impossible to measure. This is traceable to the fact that the volunteer effort was not specifically directed and the goal of clearing the field is only roughly definable. The evidence indicates that Johnson returned to the field with ten shovels, but there is no evidence anyone from the City knew or cared how many of those shovels were used or for how long. A conclusion that this indicates potential work for ten unit employees ignores that the volunteer effort was fitful. Volunteers wandered on to the field, worked as long as they chose and left. Witness estimates of how many volunteers were involved varied from ten to fifty. As noted above, the effort was less to a specific end than to clear the field to the degree possible before game time. Beyond this, the time involved was limited. Fieber stated that he knew from 9:15 a.m. that the field would require some clearing. Witness estimates of when the effort ended vary from 11:30 a.m. to 12:30 a.m., but the bulk of the estimates center around Noon. City failure to call-in any unit employee during the morning is established, but this cannot obscure that it is speculative how many employees could have responded to the call-in during the hours of the volunteer effort.

Against this background, the most reliable measure of the remedy is to focus on the supervisory involvement in the effort. The record will not support the assertion that Fieber and Johnson worked the entire time between Fieber's realization that a clearing effort was needed and the end of that effort. However, it is evident that each supervisor actively participated in the work and consciously took the benefit of volunteer labor. Each is accountable for the decision not to call-in any unit employees. The Award entered below thus measures the remedy as the time period between 9:15 a.m., when Fieber realized an organized clean-up effort was necessary, and Noon, when the effort ceased. The Award grants pay, at the overtime rate, to the two unit employees who were eligible to be called. Restricting the remedy to two unit employees reflects that the work of two supervisors is at issue. That the two supervisors did not necessarily work the entire period cannot obscure that some loss of an overtime opportunity took place. The imprecision of the record regarding the extent of the overtime opportunity cannot obscure the need for some remedy. Measuring the loss of an overtime opportunity by filling out the hours the supervisors who performed some work normally performed by unit members affords as meaningful a measure of remedy as the evidence permits. The Award does not attempt to identify the two employees who will receive the benefit of the remedy. This must be left to the parties.

Before closing, it is appropriate to tie the conclusions reached above more closely to the parties' arguments. It is evident that larger issues surround the ostensibly simple effort to clear some bleacher seating and some of the football field. The larger issues center on the difficulty of drawing the line separating the appropriate use of volunteers from the work of employees.

The parties' use of broad concepts affords little help. The Union paints the grievance as a basic determination of bargaining unit work. That determination is not as simple as the Union asserts. The Union asserts that bleacher clearing is "bargaining unit work" because it is

“work normally done by the bargaining unit”. This ignores that the bleachers have been cleared a few times over a considerable number of years. Beyond this, as the City asserts, it begs the question of how to define the work. Can a fan not clear off their seat before a game? What if the fan clears more than their own seat? What if the effort is organized, say of a teacher to clear off the seats of their students? Defining the work by the tool affords little assistance. Does the use of a hand shovel or a broom vest the work in the unit? If it does, can a fan shovel out their own car if it is stuck in the parking lot? In any event, the agreement does not define “bargaining unit work” and Article 3, Section 2 does not even refer to it.

City assertion of a spontaneous outburst of volunteer spirit affords no more guidance. The extent of this spirit is at least debatable from the perspective of November 10 when the Allen family faced the snow covered bleachers alone. More to the point, City arguments seek to wash the City’s hands of the inevitable responsibility for its exercise of public authority. The assertion that Fieber was overwhelmed by a volunteer effort does not stand up to scrutiny. If the volunteers brought metal ice scrapers that gouged the turf, can it be seriously be contended that Fieber had no option but to watch the \$800,000 surface be ripped apart? Does leaving a City owned Mule on an ice covered field to be operated by volunteers make sense if some of those volunteers turn out to be high school boys looking less to clear ice than to play on it? There is no doubt that any employee who tore the surface would be subject to discipline for their negligent or willful conduct in damaging the field while clearing it. If the City asserts that Fieber worked as a volunteer on November 11, is the City prepared to acknowledge that Fieber lacked the ability to discipline a unit employee who deliberately damaged the turf? The responsibility of his supervisory position is not so easily shed as labeling him “volunteer”. No more easily shed is the responsibility of a unit employee to perform the work for which they are paid. How the volunteer spirit toward the City would fare if a volunteer was seriously injured due to a fall from ice covered bleachers is anyone’s guess.

The assertion of past grievance settlements underscores how closely the Union has monitored its view of bargaining unit work. The settlements have, however, no direct bearing on the application of Article 3, Section 2 to the grievance. This is not to say the past has no bearing on the application of that section. On November 11, a City attempt to call-in or to discuss the matter with the Union when Fieber realized field clearing would prove necessary would have had a direct bearing on whether City use of volunteer or supervisory labor undermined Article 14 or 31. Past discussion may afford guidance on the means to a solution if not the specific end.

Each party’s view of the grievance points to untenable results. If extended, the Union’s characterization of the work performed on November 10 would effectively bar legitimate use of a public facility by members of the public. The City’s assertion that no work of interest to the Union took place on November 11 ignores that unit members did some of the work; that supervisors did some of the work; that supervisors actively supported the efforts of volunteers; and that unit supervisors took no action to call-in unit members. If extended, the City’s characterization of the work performed on November 11 would strip Article 3, Section 2 of any meaning.

Ultimately, the agreement defines the appropriate scope of an arbitrator's authority. Here, the three-element standard to the application of Article 3, Section 2 is the beginning and the end of the appropriate scope of arbitral inquiry into the events of November 10 and 11. Larger issues regarding the line between volunteer effort and bargaining unit work must be left to the bargaining process. What can be extended to future breakdowns in that process is the operation of Article 3, Section 2 through the application of the three-element standard to the facts of an individual grievance.

### AWARD

The City did not violate the collective bargaining agreement when volunteers cleared snow off of the bleachers at the Carson Park football field on November 10 or 11, 2006. The City did violate Article 3, Section 2, when volunteers, including Fieber and Johnson, scraped crust from the field's surface on November 11, 2006.

As the remedy appropriate to its violation of Article 3, Section 2, the City shall make whole the two unit members who would have been called-in to work on November 11, 2006 had the City called-in unit employees other than those who actually worked on that day. Those two employees shall be compensated at the appropriate contractual rate for the pay and benefits that would have resulted from two hours and forty-five minutes of work (the time period between 9:15 a.m. and Noon) on November 11, 2006.

Dated at Madison, Wisconsin, this 3rd day of January, 2008.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator

