

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**OUTAGAMIE COUNTY HIGHWAY DEPARTMENT
AND SOLID WASTE EMPLOYEES UNION
LOCAL 455, AFSCME, AFL-CIO**

and

OUTAGAMIE COUNTY

Case 295
No. 67679
MA-13982

Appearances:

Ms. Mary Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W5670 Macky Drive, Appleton, Wisconsin 54915, on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney James R. Macy**, 218 Washington Avenue, Oshkosh, Wisconsin 54903-1278, on behalf of the Employer.

ARBITRATION AWARD

At all times pertinent hereto, Outagamie County Highway Department and Solid Waste Employees Union, Local 455, AFSCME, AFL-CIO (herein the Union) and the Outagamie County (herein the County) were parties to a collective bargaining agreement dated November 30, 2005 and covering the period from January 1, 2005 to December 31, 2007. On January 2, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the alleged offering of overtime hours to non-bargaining unit summer employees ahead of bargaining unit employees. The undersigned was appointed to hear the dispute pursuant to a panel selection by the parties and a hearing was conducted on October 29, 2008. The proceedings were transcribed. The parties filed initial briefs by December 14, 2008 and reply briefs by January 15, 2009, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues:

The Union would frame the issues, as follows:

Did the Employer violate the collective bargaining agreement when it assigned overtime work to the summer help before offering available overtime to employees within the bargaining unit?

If so, what is the appropriate remedy?

The County would frame the issues, as follows:

Did the County violate the collective bargaining agreement when it continued summer help employees on crews working into overtime without reassigning bargaining unit employees to those crews upon completion of their regular assignments at the end of the workday?

If so, what is the appropriate remedy?

The Arbitrator frames the issues as follows:

Did the County violate the collective bargaining agreement or past practice when it continued summer help employees on crews working into overtime instead of offering the overtime to employees within the bargaining unit?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE I - MANAGEMENT

1.01 - Except as herein otherwise provided, the management of the work and the direction of the working forces, including the right to hire, promote transfer, demote, or suspend or discharge or otherwise discipline for proper cause, and the right to relieve employees from duty and to layoff employees is vested exclusively in the Employer. In keeping with the above, the Employer shall adopt and publish reasonable rules which may be reasonably amended from time to time. The Employer and the Union will co-operate in the enforcement thereof.

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ARTICLE II - RECOGNITION

2.01 - The Employer recognizes the Union as the authorized representative of all full-time employees in the employ of the Outagamie Highway Department and the Solid Waste Department, but excluding the

Department Heads, Engineer, Superintendents and Foremen, clerical employees and all confidential, supervisory, and managerial employees. The Employer shall not discharge or discriminate against any employee for membership in the Union because of union activities and shall, in the event an employee is discharged, reinstate such employee without loss in pay, if, through the procedures contained in this Agreement, the employee is found unjustly discharged. This provision shall not be interpreted for purposes other than the identification of the bargaining representative and the bargaining unit.

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ARTICLE IX – OVERTIME

9.01 – Employees, except those classified as maintenance workers, shall be paid time and one-half (1-1/2) for all hours worked over eight (8) hours per day or forty (40) hours per week. Maintenance workers shall be paid time and one-half (1-1/2) for all hours worked over forty (40) hours per week. For the purposes of computing overtime, all authorized paid leaves shall be considered time worked.

...

ARTICLE XIX – JOB POSTING, SENIORITY, LAYOFF AND RECALL

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19.02 – Unless otherwise modified elsewhere in this Agreement, seniority shall prevail. Seniority shall prevail on a bargaining unit basis. A seniority list of employees shall be posted in a conspicuous place in each garage. Any disagreement concerning an employee's seniority shall be subject to the grievance procedure.

BACKGROUND

For many years, the regular full-time employees of the Outagamie County Highway Department and Solid Waste Department have been organized for the purposes of collective bargaining with the County and, at all relevant times were parties, with the County, to a collective bargaining agreement setting forth the wages, hours and conditions of employment of the employees in the bargaining unit. During the summer months, however, the County hires casual summer laborers, who are not members of the bargaining unit, to supplement the work force during construction season. These employees are typically assigned to construction crews and perform largely unskilled tasks, such as flagging traffic and mowing ditches.

The normal workday for bargaining unit employees is 7:00 a.m. to 3:30 p.m., including a one-half hour unpaid lunch period. During the summer, however, construction crews are occasionally directed to work beyond their normal workday and, under the provisions of Article IX, Section 9.01 the contract, receive overtime pay for all hours worked beyond eight in a given day. The non-bargaining unit employees, although they are not covered by the collective bargaining agreement, also receive overtime for hours worked beyond eight on a given day. In May 2007, it came to the attention of the Union that non-bargaining unit summer employees were being held over and were paid overtime while bargaining unit employees were sent home at the end of their shifts. The Union filed a grievance, asserting that assigning available overtime to summer employees before offering it to bargaining unit employees constituted a violation of the contract. The County denied the grievance and the matter was advanced through the contractual grievance procedure to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the collective bargaining agreement provides for the assignment of overtime by seniority under the language contained in Article XIX, Sec. 19.02, which specifies that unless otherwise and elsewhere provided in the contract, seniority shall prevail. Since, therefore, there is no language limiting the application of seniority in the assignment of overtime, the Union argues that the language of Sec. 19.02 controls. The Union further notes that summer employees are not covered by the collective bargaining agreement and argues, therefore, that they cannot be preferred over bargaining unit employees in the assignment of overtime. Thus, the Union concludes that available overtime must be offered to bargaining unit employees by seniority before it can be assigned to non-union summer employees.

The Union further points out that on May 29, 2007, six days after the filing of the grievance, Alvin Geurts, the County Highway Commissioner, issued a letter to Union President Alan Hansen, in which he asserted that "...it is not a policy of this department to offer overtime to summer employees before offering them to full time employees." This is contended to be an acknowledgement that available overtime should be offered to bargaining unit employees before summer employees and the Union does not credit the County's assertion that this letter referred only to Saturday overtime.

The Union further disputes the County's claim that it would be unworkable and inefficient to require the County to move employees from one job site to another at the end of the day in order to assure that available overtime is first assigned to bargaining unit employees. No evidence establishing this assertion was offered and, during the remainder of the year, when there are no summer employees, bargaining unit employees are routinely moved from site to site, undercutting the County's position that it is unreasonable to do so on summer road construction crews.

The County

The County asserts that the contract language in Article I, Section 1.01 clearly and unambiguously vests in the County the right to assign overtime as it did here. The arbitrator must give effect to its express intent, allowing management to direct the working forces, unless the Union can identify some other contract provision which nullifies it. Even if the language of Sec. 1.01 is not deemed to expressly give management the right to assign overtime to summer employees, however, such a right is commonly held to exist within management's residual powers. In this case, the contract contains no language limiting management's right to assign overtime and Sec. 32.01 specifies that the contract constitutes the entire agreement between the parties. Therefore, the Union cannot assert any contractual limitation on management's authority to assign overtime. In fact, overtime is addressed in Article IX, but does not in any way guarantee overtime or require that it be assigned by seniority.

The Union asserts that Article XIX supports its position, but Article XIX actually only deals with the application of seniority to such things as job posting, layoff and recall. The seniority language has never been applied to overtime. As such, for the Arbitrator to sustain the grievance would require him to modify the terms of the contract to restrict a right management currently has or to grant a right the Union does not have, something that is expressly prohibited under Sec. 7.02. Additionally, the Union previously sought language restricting assignment of overtime in bargaining and was unsuccessful. Arbitrators have held that a party should not be able to obtain in arbitration what it could not obtain in bargaining.

History also supports the County. Historically, the County has assigned overtime work to summer employees in the same way, as indicated by the testimony of all witnesses. Furthermore, the assignment of overtime under these types of circumstances has never been grieved. Now, the Union wants to add a new procedure, allowing employees to bump into crews at the end of the day by seniority to claim overtime. The evidence establishes that County employees have never exercised such a right in the past. Rather, the practice has been that work crews, including both regular and summer employees, are kept together, and if overtime is needed the entire crew is assigned the overtime, rather than bringing in bargaining unit employees from other crews to work the overtime. The Union points to two past grievances to support its position, but the evidence reveals that these grievances dealt with weekend overtime, which is a different issue. Further, the grievances were denied and the County made no concessions beyond stating that it was not County policy to assign weekend overtime to summer employees before regular employees.

Finally, the County asserts that the Union's position would lead to absurd results. Allowing bargaining unit employees to bump bargaining unit employees would involve extensive and unnecessary travel throughout the county. It would also be impractical for the County to try to set up a system of notification allowing employees by seniority to accept or decline available overtime. There would be no simple way to discover which employees wanted the overtime, nor would it be easy to handle situations where more than one crew was needed to work overtime. Further, if bumping for overtime is allowed, it would apply not only

to summer employees, but also to less senior bargaining unit employees. Such a scheme would also make it difficult for the County to successfully bid for discretionary construction projects through area communities and the Wisconsin Department of Transportation, which could cost the County significant revenue. For all these reasons, the Union's proposed solution would be unreasonable.

Union Reply

The Union disputes the County's contention that both the past grievances dealt with weekend overtime. The 1994 grievance covered three consecutive days in July, which would cover at least one weekday. The County's claim that it dealt with weekend overtime cannot be credited. The County further falsely claims that sustaining the grievance would lead to absurd results. The County controls overtime, so presumably it can plan in advance for overtime needs.

There is no language in the contract referring to overtime for summer employees whatsoever, much less giving them priority to overtime. Overtime is provided for in the contract, however, and is referred to in the job descriptions for bargaining unit positions.

The County further is in error in its assertion that the Union previously failed to obtain overtime language in bargaining. Its claim is based on equivocal testimony from one witness, which does not establish the County's argument. The Union asserts that there is no language supporting giving summer employees priority in overtime assignments. Thus, the Arbitrator may, without exceeding his authority, so find and conclude that overtime priority should go to bargaining unit employees.

County Reply

The County reasserts that the past overtime grievances dealt only with weekend overtime. Commissioner Guerts testified that the letter he wrote in 2007 referred specifically to Saturday overtime. Neither that statement, nor the one written in the 1990s, was intended to address allocation of weekday overtime. The County's position was further supported by former Union vice-president Jim Bennin, who had filed the previous grievances, and who testified that those grievances were never intended to limit the County's authority to assign weekday overtime to summer employees.

The historical record also refutes the Union contention that Article XIX extends seniority rights beyond the scope of that article and, specifically, governs the assignment of overtime. Here, again, the unrefuted testimony of Bennin makes it clear that Article XIX has never been used to apply seniority to overtime or anything else beyond job posting, layoff and recall.

DISCUSSION

In this case, for a number of years the County has, with the acquiescence of the Union, hired non-Union summer employees to work in the Highway Department as unskilled laborers. It appears from the record that there is also a long-standing practice of the County assigning overtime work to summer employees, as needed, in addition to assigning overtime work to bargaining unit employees. On occasion, this practice has resulted in grievances being filed by the Union, which is a factor in this case that will be addressed below.

In this instance, the Union is specifically grieving the fact that the Department assigned overtime to summer employees working on construction crews, while bargaining unit employees were sent home at the end of the normal work day. It is the Union's position that bargaining unit employees, on the basis of seniority, should have the opportunity to work any available overtime hours before summer employees.

The contract makes no reference to summer employees, nor does it guarantee overtime to members of the bargaining unit. All it says on the subject of overtime is that bargaining unit employees who work more than eight hours on a given day or more than forty hours in a given week will receive one and one-half times their regular wage rate for any such hours worked. The County argues that where the contract is silent as to how overtime is to be allocated, management retains the right to assign overtime under its reserved powers, or under the management rights clause, where there is language to the effect that management retains the authority to assign work or direct the work force, etc. The Union maintains, however, that the seniority provision indicates that, unless altered elsewhere in the contract, seniority generally prevails. It argues, therefore, that seniority prevails in the assignment of available overtime, which precludes the County from assigning overtime to summer employees until it has been offered to bargaining unit employees on the basis of seniority. For a variety of reasons, I find the County's argument to be more persuasive.

First, there is no contractual guarantee of overtime to bargaining unit employees. Thus, unless there is some other restriction on management's discretion, the County may assign any available overtime as it wishes and to whom it wishes. I do not find the seniority clause to be such a restriction in this case. I acknowledge the Union's point that the specific language of the provision is that "(u)nless otherwise modified elsewhere in this Agreement, seniority shall prevail." One could further infer from that that seniority controls in the assignment of overtime. However, since seniority only applies among bargaining unit employees, that does not answer the question of whether overtime may be allocated to non-unit employees before bargaining unit employees, but only how overtime must be allocated among bargaining unit employees after it has been decided to do so.

Even were the seniority provision held to be applicable here, it is difficult to envision how the seniority language could be applied unit-wide to assignments of overtime in cases like this one, where a work crew's shift is extended beyond the normal workday to complete a project. As the County points out, if unit-wide seniority controlled, each employee in the

bargaining unit would have to be offered the opportunity on the basis of seniority to bump into the work crew at the end of the day and take the position of a less senior member of the crew. This would involve contacting every qualified employee in the bargaining unit and giving them an opportunity to travel from wherever they were assigned to the location of the crew, which might be on the opposite end of the County. If, after every bargaining unit employee had been contacted, the overtime positions were not filled, the County would then need to assign junior employees to perform the overtime, or assign it to summer employees if they were qualified. This would clearly be an unworkable system and does not, by all accounts, appear to have been the method employed in the past. I find, therefore, that the seniority provision is not germane to the question of whether overtime must be offered to bargaining unit employees before summer employees.

The Union also points to grievance settlements in the past as a basis for its position. Union Exhibit #4 is a 1990 grievance dealing with overtime offered to summer employees before bargaining unit employees. The grievance was apparently withdrawn after a meeting with the then Highway Commissioner, Michael Marsden, wherein Marsden stated that he would not offer overtime to summer employees ahead of bargaining unit employees in the future and later reduced the statement to writing. Union Exhibit #2 is a 1994 grievance where summer employees were offered Saturday overtime before bargaining unit employees. Marsden initially denied the grievance, but ultimately paid the most senior bargaining unit employees who weren't assigned the overtime.

The 1994 grievance clearly states that it deals with the assignment of Saturday overtime, which would likely be scheduled overtime. Scheduled overtime, because it is planned for in advance, is different in character from overtime that arises when employees are held over on a shift. Thus, the resolution of the grievance, and any understanding that may have been reached regarding the assignment of pre-planned weekend overtime, would not necessarily have any bearing on the circumstances arising in the present grievance. The 1990 grievance is a different matter. There, the days in question were July 25-27, which fell on a Wednesday, Thursday and Friday. The statement signed by Marsden indicated that he had no intention of offering overtime to summer employees over bargaining unit employees and would not do so in the future. So far as this record indicates, Marsden did not assign overtime to summer employees over bargaining unit employees thereafter. Because the 1990 grievance was a class action grievance, and Marsden's resolution of the matter took the form of a commitment to the Union that in the future overtime would not be assigned to summer employees ahead of bargaining unit employees, I find this settlement has precedential effect. Certainly nothing in the record suggests otherwise.

Alvin Geurts, the current Highway Commissioner, testified that during his tenure overtime has been assigned to intact crews working on projects, including both regular and summer employees. He testified that bargaining unit members have never been able to bump summer employees from overtime assignments during his tenure. Nonetheless, on May 29, 2007, Geurts wrote to then Union President Alan Hansen, apparently in response to this grievance, and stated that "...it is not a policy of this department to offer overtime hours to

summer employees before offering them to full time employees.” (U. Ex. #5) So, on the one hand Geurts testified that full time employees cannot bump summer employees for overtime assignments, but then, on the other, he informed the Union that it is not the policy of the department to assign overtime to summer employees ahead of full time employees, two apparently irreconcilable positions, made the more so by the fact that it appears that the department continued to offer overtime to summer employees ahead of full time employees thereafter. Guerts testified that he wrote the letter because the Union indicated that it would be content if it received a letter similar to the one Marsden wrote resolving the overtime dispute in 1990 (U. Ex. #4, p.4), in effect reinforcing the terms of the 1990 settlement, and, in fact, the wording is identical. Guerts stated that the May 29 letter was, likewise, intended to refer to Saturday overtime. The difficulty with that position is that the 1990 grievance, and, therefore, Marsden’s letter, did not deal with Saturday overtime. Further, the current grievance does not deal with Saturday overtime. It is difficult to see, therefore, how Guerts’ letter could have been intended to refer to Saturday overtime or why the Union would be expected to perceive it as such.

I credit the County’s position that requiring management to offer occasional crew overtime to bargaining unit employees on a unit-wide seniority basis, before overtime could be assigned to summer employees already assigned to the particular crew would be untenable. It would be impossible on short notice to notify each eligible bargaining unit employee of the availability of overtime in a timely fashion and then have the employee(s) relocate to the crew’s worksite to replace the summer employees. Nonetheless, the history of grievances on this subject, and the letters of Marsden and Guerts addressing them, show that there has historically been some understanding between the Union and the County that Union employees are entitled to available overtime before summer employees. In my view, logically this understanding would apply among and within work crews working on specific projects. Thus, within a particular crew, if some, but not all, workers are needed to work overtime on a given day, it would make sense that the overtime would be offered first to the bargaining unit employees and only to the summer employees, if qualified, after the bargaining unit employees have been offered the overtime and turned it down.

As noted above, absent some contractual restriction, or binding practice, there is no basis for limiting the County’s ability to assign overtime as, and to whom, it will. I have already noted that the contract does not restrict management’s right to assign overtime. The settlement of the 1990 grievance, however, based on Marsden’s explicit statement that he would not in the future assign overtime to summer employees ahead of bargaining unit employees, in my view constitutes a binding settlement upon which the Union could rely in the future. Guerts’ May 29, 2007 letter confirmed the continuing nature of the practice of not assigning overtime to summer employees working on County work crews before offering the overtime to the bargaining unit members of the crew. As among the bargaining unit members of the work crews, I find that the seniority language of Section 19.02 does apply. This is because the language specifically states “(u)nless otherwise modified elsewhere in this Agreement, seniority shall prevail.” This is unambiguous language, which is not restricted to the particular section, as management argues, but explicitly applies to the entire agreement,

including overtime. I reaffirm, however, that the application of seniority in this context cannot reasonably be done unit-wide for the reasons previously set forth. Thus, within the work crews overtime should first be offered to qualified bargaining unit employees on the basis of seniority, and to summer employees on the crews only thereafter.

For the reasons set forth above, therefore, and based on the record as a whole, I hereby issue the following

AWARD

The County violated past practice to the extent that it continued summer employees on crews working into overtime instead of offering the overtime to employees within the bargaining unit working on the same crews. As the record does not identify, however, any specific bargaining unit employees who were denied overtime while working in crews where overtime was assigned to summer employees working in the same crews, I am unable to make a determination as to whether a make whole remedy is in order and, therefore, this award shall only have prospective application.

Dated at Fond du Lac, Wisconsin, this 11th day of May, 2009.

John R. Emery /s/

John R. Emery, Arbitrator