

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 357, AFSCME, AFL-CIO

and

WASHBURN COUNTY

Case 67
No. 70224
MA-14909

(Recall Grievance)

Appearances:

Mr. Steve Hartmann, Staff Representative, P.O. Box 364, Menomonie, Wisconsin, appearing on behalf of Local 357, AFSCME, AFL-CIO.

Ms. Mindy Dale, Attorney, Weld, Riley, Prenz & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of Washburn County.

ARBITRATION AWARD

Local 357, AFSCME, AFL-CIO hereinafter "Union" and Washburn County, hereinafter "County," mutually requested that the Wisconsin Employment Relations Commission assign Lauri A. Millot to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The hearing was held before the undersigned on December 7, 2010 in Spooner, Wisconsin. The hearing was not transcribed. The parties submitted briefs, amended briefs and responsive emails. The parties retained the right to file reply briefs and having provided two weeks for such filing, the record was closed on March 2, 2011. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The Union framed the substantive issues as:

Did the County violate the collective bargaining agreement by using contract and/or limited term employees while Union members were on lay off? If so, what is the appropriate remedy?

The County frames the substantive issues as:

Did the County violate the collective bargaining agreement, the weeks of September 22, 2010; November 1-2, 2010; and November 9, 2010 when it continued to use outside suppliers to haul asphalt while bargaining unit employees were on layoff? If so, what is the appropriate remedy?

I accept the Union's framing of the issue, but with the addition of the specific dates of alleged infraction. The modified framing of the substantive issues therefore is:

Did the County violate the collective bargaining agreement by using contract and/or limited term employees during the week of September 22, 2010 and on the dates of November 1, 2 and 9, 2010 while Union members were on lay off? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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ARTICLE 5 SENIORITY

Section 5.01. The seniority of employees covered by the terms of this Agreement shall begin with the employee's original date of employment, provided, however, that no time prior to a discharge or quit shall be included. An employee's seniority shall not be diminished by temporary layoffs due to lack of work or lack of funds, or any other contingency beyond the control of the parties of this Agreement.

Section 5.02. The policy of seniority shall apply to the regular employee. A regular employee is an employee who has successfully completed his/her probationary period.

Section 5.03. The seniority list shall be brought up to date annually and posted on shop bulletin board. A copy of the up to date seniority list shall be made available to the secretary of Local 357.

ARTICLE 6 LAYOFF

Section 6.01. Whenever it becomes necessary to lay off employees, they shall be laid off in inverse order to length of service, except that volunteers will be solicited by a two working day posting. The factor to be considered by the County in determining which volunteers are to be laid off shall be seniority within classifications. The Commissioner shall determine which positions and which classifications shall be reduced. Whenever so laid off, employees shall possess re-employment rights according to their length of previous service. Health insurance premiums for laid off employees shall be paid by the Employer for two (2) months.

Section 6.02. It shall be the responsibility of the laid off employee to notify the highway office of his/her availability for call to work.

Section 6.03. The Employer agrees that no limited term employees shall be employed until all regular employees on layoff status have been given notice of recall, as provided in Article 7, Section 1.

Section 6.04. Lay off notice: The employer agrees to provide two weeks written notice in case of layoff, or pay the employee for their regular schedule hours in lieu of thereof at the County's discretion.

ARTICLE 7 HIRING

Section 7.01 Whenever it becomes necessary to employ additional workers, either in vacancies or new positions, former qualified employees who have rendered satisfactory service and who have been laid off without delinquency records on their part for a period of two (2) years prior thereto, shall be entitled to be re-employed in such vacancies or new positions in preference to all other personnel, provided, however, that employees who have voluntarily laid off shall be deemed to have lost all seniority, and shall be considered as new employees.

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ARTICLE 24 MANAGEMENT RIGHTS

Section 24.01. The Employer possesses the sole right to operate the County and all management rights repose in it, subject to the provisions of this Agreement and applicable law. These rights include, but are not limited to the following:

- A. To direct all operations of the County;

- B. To establish reasonable work rules;
- C. To hire, promote, transfer and assign employees in positions within the County;
- D. To suspend, demote, discharge employees for just cause;
- E. To relieve employees from their duties because of lack of work or lack of funds, or other legitimate reason;
- F. To maintain efficiency of County operations;
- G. To take action which is necessary to comply with state or federal law;
- H. To introduce new or improved methods or facilities;
- I. To change existing methods or facilities;
- J. To determine the kinds and amounts of services to be performed as pertains to County operations, and the number and kind of classifications to perform such services;
- K. To contract for goods and services, provided such action shall not result in the layoff of bargaining unit personnel;
- L. To determine the methods, means and personnel by which County operations are conducted;
- M. To take action necessary to carry out the functions of the County in situations of emergency.

Whether or not the Employer has been reasonable in the exercise of management rights shall be subject to the grievance procedure.

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BACKGROUND AND FACTS

The County Highway Department provides town, county, and state road maintenance, construction and reconstruction services. At all times relevant herein, Jon Johnson was the Highway Commissioner. The County fleet includes tandem (two axle) trucks and nine tri-axle trucks. It is unclear from the record whether the County owns any quad-axle trucks. Tandem

two-axle trucks have a nine ton hauling capacity, tri-axle trucks have an 18 ton hauling capacity and quad-axle trucks have a 22 ton hauling capacity.

In October of 2009, there were 31 Local 357 bargaining unit members working in the Highway Department. On October 21, 2009 the County notified five bargaining unit members, one mechanic and four entry level drivers, that they were being laid off pursuant to Article 6 of the collective bargaining agreement. The lay offs were effective November 5, 2009. One entry level driver was recalled for a two week time period in December 2009 and then laid off again. The mechanic was recalled effective April 5, 2010.

During the week of September 22, 2010, the County was paving a four mile section on County highway B in Shell Lake. The County contracted with another county, Barron, for assistance in the paving operation. Barron County provided vehicles and operators to haul 120,000 tons of hot asphalt. Each day of that week (four day work week) three Barron County drivers transported in Barron County tri-axle vehicles between 22,000 and 25,000 tons of hot asphalt mix from the Asphalt plant in Barron County to the job site in Washburn County. The asphalt deliveries to the paving location were time sensitive in asphalt must be applied at certain temperature in order to achieve the desired density. The County compensated Barron County for the asphalt and use of its tri-axle trucks and operators.

On September 22, 2010, the Union filed a grievance alleging a violation of Article 6 asserting that “on 9-20-2010, Washburn County Highway Dept. hired temporary truck drivers and trucks while regular highway department employees (truck drivers) are on lay off.” The remedy which the Union sought was “no limited term employees shall be employed until all regular employees on layoff status have been given notice of recall.” The Union also noted Article 7, Section 1 on the grievance form. The County denied the grievance at all steps.

At hearing the parties stipulated that after the filing of the grievance, there were two additional instances of alleged infractions. The Union and County agreed to add these alleged dates of violation to the pending grievance. Following are the facts relevant to those instances.

On November 1 and November 2, 2010, the County was paving a one mile section in the town of Sennett. In addition to using the County’s nine tri-axle vehicles for this job, the County contracted with two private contractors, Monarch Paving Company and Dirt Works, to transport additional hot asphalt to the job site.¹ Monarch provided three vehicles and Dirt Works provided one tri-axle vehicle, all with operators. The County paid the private contractors an hourly fee for the use of the vehicle and operator.

¹ The parties interchangeably referred to the Mathey Construction and Monarch Paving Company. The County’s contracts were entered into with Monarch Paving Company and there was also testimony that Monarch is a subsidiary of Mathey Construction. For purposes of clarity and consistency, I have referred to only Monarch in the body of the discussion.

On November 9, 2010 the County's nine tri-axle vehicles were involved in various projects within the County. The County needed cold mix asphalt delivered to the Highway Shop and contracted with Monarch to transport the asphalt. The County paid Monarch an hourly fee for the use of the vehicle and operator.

Additional facts, as relevant, are contained in the DISCUSSION section below.

DISCUSSION

The Union is challenging the County's use of Barron County trucks and employees and private contractors to transport asphalt during road paving operations while bargaining unit employees were on layoff. The Union's arguments challenge various clauses of the labor agreement including Article 6, Article 7 and Article 24, each of which will be addressed.

The Union first asserts that the County violated Articles 6 and 7 when it employed new and/or limited term employees to operate the vehicles that were hauling asphalt on the dates contained the grievance. The relevant portion of Article 6 is section 3 which provides:

Section 6.03. The Employer agrees that no limited term employees shall be employed until all regular employees on layoff status have been given notice of recall, as provided in Article 7, Section 1.

This section establishes that the County may not hire a limited term employee if a regular employee is on lay off. Article 7 provides regular employees with recall rights for a period of two years. The four bargaining unit employees were laid off in November of 2009 and therefore they retained recall rights in September and November of 2010. The Union's argument would have merit if the County had employed any limited term or new employees to perform the asphalt hauling functions, but there is no evidence to suggest that any hiring, whether regular or limited term, occurred to perform this work.

The evidence establishes that the County entered into contracts with Barron County and two private contractors to provide paving assistance for specific paving jobs. Barron County, Monarch Paving Company, and Dirtworks performed paving services by transporting asphalt, hot and/or cold, with their tri-axle or quad-axle vehicles driven by their operators. In all instances, the drivers of the tri-axle and quad-axle vehicles that hauled the asphalt were employed by the contractors, not the County. The County never hired a regular employee or a limited term employee while the four bargaining unit members were on lay off.

I move next to the Union's assertion that the County violated Article 24, Section 1, subsection K when it contracted with Barron County and the two other private contractors. Subsection K provides:

K. To contract for goods and services, provided such action shall not result in the layoff of bargaining unit personnel;

This language is clear and unambiguous. The County is permitted to subcontract for services as long as it does not result in the lay off of bargaining unit members. Result is defined by Merriam-Webster as “to proceed or arise as a consequence, effect, or conclusion” “result.” Merriam-Webster. 2011. <http://www.merriam-webster.com/dictionary/result.htm> (14) May 2011). The act of laying off employees therefore must be the result or a consequence of the subcontracting and that is not what occurred in these instances. Rather, these bargaining unit employees were laid off almost one entire year before the County resumed its sub-contracting relationship in 2010.

The parties stipulated that the County has a practice of sub-contracting for asphalt hauling services. The record contains contract awards dating back to 2004 which indicated that the County utilized Monarch Paving Company for tri-axle and quad-axle truck rental with operators. The County therefore had a practice of entering into service contracts for a specific need – “Miscellaneous paving item” - which is exactly what it did during the week of September 22, 2010 and on November 1, 2, and 9, 2010. The County’s decision to continue to sub-contract for tri-axle and quad-axle vehicle and operator services did not cause the lay off of the bargaining unit employees.

It need also be noted that the language of sub-section K is vastly different than language contained in many other collective bargaining agreement which forbids an employer from sub-contracting while bargaining unit members are in lay off status. The language of sub-section K establishes a condition precedent which is designed to establish security and protect jobs. Lacking language that specifically limits subcontracting while employees are in lay off status, the County’s continued practice of using contractors to provide additional larger capacity vehicles accompanied by drivers to perform a specific function, on a specific day, is reasonable, efficient, and consistent with its management rights.

The Union argued that the County should have recalled the laid off bargaining unit members to transport the asphalt in the two axle tandem trucks. While this was an option available to the County, it is not one that was required by the collective bargaining agreement in these specific circumstances. The four bargaining unit employees on lay off did not have a claim to the asphalt hauling work on the specified dates.

AWARD

1. No, the County did not violate the collective bargaining agreement by using contract and/or limited term employees during the week of September 22, 2010 and on the dates of November 1, 2 and 9, 2010 while Union members were on lay off.

2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 3rd day of June, 2011.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator