

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**PARKS, RECREATION AND FORESTRY DEPARTMENT
EMPLOYEES UNION, AFSCME LOCAL 1287, AFL-CIO**

and

MARATHON COUNTY

Case 335
No. 70488
MA-14975

Appearances:

John Spiegelhoff, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1105 East 9th Street, Merrill, Wisconsin 54452, for the labor organization.

Dean Dietrich, Ruder Ware, 500 First Street, Suite 8000, P.O. Box 8050, Wausau, Wisconsin 54402-8050, for the municipal employer.

ARBITRATION AWARD

Background Facts

Marathon County provides recreational services to the general public through its Parks, Recreation and Forestry Department. Regular employees in that Department are represented by AFSCME Local 1287, the grievant in this dispute. This grievance arises out of the County's use of unrepresented seasonal employees to perform various duties in connection with the maintenance and operation of recreational ball diamonds.

The County operates ball diamonds at Athletic Park, the Sunnyvale Softball complex and various sites in the City of Wausau identified here as the "City Fields". During 2010 the County assigned three seasonal employees to the Athletic Park, two to the softball fields at Sunnyvale and two to the twelve City Field diamonds. The Athletic Park is a semi-pro level facility and Sunnyvale Complex is used by high school teams and softball associations. Little League games and tournaments predominate at the City Fields.

The County began using seasonal employees exclusively for the daily maintenance at Athletic Park at least as early as 1984. It has used seasonal employees at the City Fields since at least 1986, and to maintain Sunnyvale since at least 1994. The Parks Department budget includes funds for overtime pay for seasonal employees, and has done so since at least 1986. In 2010, the seasonal employees began work on April 11, working until early July at the City Fields and September at Athletic Park.

Regular full-time employees work on the fields before and after the season, including basic preparatory work in early spring and rebuilding work in the fall. They are not involved in the daily operations or maintenance of the fields during the spring and summer seasons.

Seasonal employees, who work with general independence, have various responsibilities including pre-game grooming, set up, marking, and changing base-path distances at Sunnyvale based on the age of the ballplayers. The seasonal employees also cut grass, maintain the division between the skinned area and the grass, and level the field, and chalk and paint the foul lines at Athletic Park and Sunnyvale. As the need arises, seasonal employees use clay bricks or clay bags to rebuild the pitcher's mound and the batter's boxes. Employees maintaining ball fields need to know the proper height of the mound, levels, lips, and safety guidelines

Built at different times, and subject to different uses, the various diamonds are not uniform in material, quality or design. Because ongoing experience with the various fields gives an employee a greater ability to maintain a field properly, seasonal employees are assigned to specific diamonds but do rotate throughout the various fields. Field conditions can change over the course of the season, making an ongoing awareness of the field and how it had been treated valuable information for an employee to have. Such an ongoing understanding is especially useful when an employee needs to use Diamond Dry or some other soil additive when a field is too wet.

In the early portion of the summer of 2010, a combination of events placed an unusually heavy demand on the ball diamonds. From June 20 through July 10 the Wausau Area Youth Baseball program was using City Fields for games and practices. During that period the Wisconsin Woodchucks, American Legion teams, Dairyland teams and Babe Ruth League participants were playing every day at Athletic Park. There were on average three softball games Sunday through Thursday at Sunnyvale. In addition to regular use there were two tournaments scheduled on June 25 through June 27 using all three fields. To further compound matters the season included significant rainfall with heavy amounts on July 5 and 7. Players and spectators have increased expectations of the quality of ball diamonds used for tournaments, and employees groom the fields throughout the day during tournaments.

During that twenty-day window several seasonal employees worked more than forty hours per week accounting for a total of 67.5 hours of overtime.¹

¹ The background facts were prepared by Arbitrator Levitan shortly after the hearing in this matter.

Grievance Process

On July 13, 2010, Local 1287 steward Gregory Stark filed a grievance asserting that the assignment of overtime hours to seasonal employees on June 26 and 27 violated the terms of the collective bargaining agreement and more particularly Articles 35 sections (C) and (D) and Article 2. (Jt. Ex. 3) The dispute proceeded through the contractual steps culminating in a demand for arbitration. (Jt. Exs. 3 to 7)

Following the request for arbitration the Wisconsin Employment Relations Commission appointed Stuart Levitan to serve as arbitrator. A hearing was held on April 7, 2011. Following the hearing, the Union, on April 20, 2011, requested that Mr. Levitan recuse himself as Arbitrator. He did so with the understanding of the parties that he would prepare a factual summary which would be utilized by a replacement arbitrator would decide the matter without further hearing. The parties submitted timely briefs and replies. Commission Chairman James R. Scott appointed himself as arbitrator. The matter is ripe for decision and the award follows:

Issue

The parties were unable to agree on a statement of the issue and accordingly the undersigned has framed the issue as follows:

Did the County violate the terms of the collective bargaining agreement when it utilized seasonal employees to perform weekend work at various ball diamonds during the period from June 20, through July 10, 2010? If so, what is the appropriate remedy?

Contractual Language

ARTICLE 31 – CALL PAY

A. Amount of Call In Pay: An employee called to return to work at any time after or before the employee's regularly scheduled hours shall receive no less than four (4) hours pay. If an employee works any length of time up to two and one-half (2 ½) hours the employee shall receive no less than four (4) hours pay. If the employee works more than two and one-half (2 ½) hours the employee shall receive time and one-half (1 ½) the employee's regular classified rate for all such work performed unless the employee works in a higher class for four or more hours the employee shall receive the rate for the higher classification. If the employee is sent home during the four (4) hour period, the employee is subject to call in during the same day and shall receive time and one-half (1 ½) for the work actually performed.

B. **Rescheduling of Shifts:** An employee that is called into work before the regularly scheduled hours of work is sent home after having worked eight (8) hours or ten (10) hours during scheduled ten (10) hour days shall receive time and one-half (1 ½) for hours worked before the regularly scheduled start time, except that if a large portion of the shift is called in it will be considered that the entire staff was floated ahead and straight time will be paid to all such employees. A large portion of the shift shall consist of eleven (11) employees in the department.

C. **Inclement Weather:** Employees shall be paid two (2) hours pay at their straight time rate of pay if they report for work at the scheduled hours and are sent home due to inclement weather or lack of material. Employees who are not advised to the contrary and start work at the scheduled hour and then are sent home because of inclement weather or lack of material shall be paid four (4) hours pay at their straight time rate.

D. **Seniority:** The employee with the greatest seniority within the appropriate classification or employees regularly assigned to the routes scheduled shall be called first when the need arises for employees to perform extra work., emergency calls, etc., other than the extension of the work day for completion of a project in progress. Seasonal, temporary, other part-time and regular part-time employees will be called only when regular full-time employees are unavailable.

The Union agrees to provide the County with a list of employees who normally desire to work overtime. This list may not be changed by the Union unless a new list is provided at least thirty (30) days before the effective date of the change. The employees and the Union agree that overtime assignments must be accepted in the event of an emergency where all or part of the employees in the bargaining unit are needed.

AWARD

The facts giving rise to this matter are not in dispute. For many years the County has been using seasonal employees, who are not covered by the collective bargaining agreement, to perform routine maintenance tasks on County-operated ball diamonds at various locations. During the three-week period from June 20 through July 10, 2010, there was particularly heavy use of the diamonds as a result of tournaments being conducted in that timeframe. Seasonal employees performed weekend work on several occasions during that period. The work was scheduled in advance as the County was aware of the need for weekend staffing. Bargaining unit employees had the skills necessary to perform the work in question but historically the seasonals had performed this work on weekends without objection from the Union.

There is some confusion on the part of the Union as to the scope of the dispute. The original grievance challenged the fact that seasonal employees “worked in excess of 40 hours per week and received overtime.” (Jt. Ex. 2) At the hearing the Union described the issue as whether the regular full-time employees should be offered “the prescheduled overtime work”. (Union Brief p. 2) Ultimately the Union came to the conclusion that whether the weekend work was overtime for the seasonals or not was irrelevant. (Union Brief p. 15) I agree that given the Union’s analysis and arguments, the question of whether the seasonals were performing work in excess of 40 hours is irrelevant. The dispute is over weekend work performed by casuals, regardless of whether it constituted overtime for the casuals.

The Union’s position is that Article 31(D), read together with Article 35, guarantees that all work outside the normal work day or work week (that is not an extension of existing work) must be offered first to bargaining unit members before seasonals can be assigned. In other words, if someone is needed to rake the diamond before the tournament final game, scheduled to start at 7:00 p.m. on Saturday night, that work must first be offered to bargaining unit members before any seasonal employee is scheduled.

Article 31, titled “Call Pay”, addresses various issues arising out of the need to call in bargaining unit members after normal work hours. It provides, under (A), for a guaranteed minimum of four hours pay. In subsection (B) it addresses early pre-shift call in and in (C) situations where employees are sent home early because of inclement weather.

Sub (D), the focus of this dispute, is titled “Seniority” and provides the sequence used when employees are called in “when the need arises for employees to perform extra work, emergency calls, etc., other than the extension of the work day for completion of work in progress.” It also provides that seasonals will be called “only when regular full-time employees are unavailable.”

The Union reads this language as, in effect, requiring that any work outside the normal work day or work week be offered to its members before a seasonal is scheduled to perform the work. In my judgment, that requires a strained interpretation of contract language.

Had the Union desired such a restriction, it could have negotiated language directly addressing the issue. They certainly were capable of doing so given the various other contractual restrictions on the use of seasonals. Article 4(D) restricts seasonals to 1,040 hours of work in a year. The County is required to report to the union quarterly with information on the hiring and termination of seasonals. Seasonals must be laid off ahead of regular full-time and part-time employees as set forth in Article 12(A). Article 4(A) also sets forth restrictions as to what type of equipment seasonals can operate. Appendix B of the Agreement restricts both the type of work and number of seasonals performing various tasks. In the aggregate these restrictions severely limit the use of seasonals by the Employer.

The Union argues that the above contractual restrictions support its interpretation of Article 31(D). To the contrary, I conclude that numerous specific limitations placed on the use of seasonals creates the inference that that which is not restricted is permitted. Presumably, the exhaustive list of restrictions on time and content of seasonals work is exclusive.

Another problem with the Union's interpretation of the language is that the question of what is the "normal" work day is not easily answered. Article 35 provides that the hours of work at the various parks is subject to agreement between the Department Head and the Union. Provision is also made for changes in the hours of work during the spring and summer. See Article 35(A). Additionally, up to two employees may be regularly scheduled for work on the weekend. The Union's argument that all work that falls outside the "normal" work week is "extra work" under Article 31(D) is significantly undercut by the fact that (at least during the spring and summer) there is no "normal" work week.

A necessary corollary of the union's position, and one which they argue, is that the term "extra work" as used in Article 31(D) really means all work outside the normal work day/work week. If true the Union can then arguably lay claim to it under Article 31(D).

The obvious response, however, is why would the parties take a circuitous route to create that provision. Why not simply include language reserving all work outside a specified timeframe to bargaining unit personnel? The use of the term "extra work", along with the term "emergency work", suggests that it was intended to address circumstances of an unexpected nature. This is particularly true because of the context of the sub-section which is a reference to personnel being "called" to perform the work. Employees are typically called in to work because of an unanticipated need for their services. There is no need for special treatment for scheduled work.

What the Union seeks via interpretation is a restriction on the use of seasonals outside of 7:00 a.m. to 3:00 p.m. Monday through Friday. Given the past history, such a significant restriction could only have come about through direct negotiation. Accordingly, the grievance must be denied.

AWARD

That the grievance in the above matter is dismissed.

Dated at Madison, Wisconsin this 12th day of December, 2011.

James R. Scott /s/

James R. Scott, Arbitrator

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