BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
VERNON COUNTY HIGHWAY EMPLOYEES, LOCAL 1527, AFSCME, AFL-CIO	
and	Case 80 No. 42778 MA-5803
VERNON COUNTY	

Appearances:
Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, Sparta, Wisconsin, on behalf of the Union.
Klos, Flynn & Papenfuss - Chartered, by Mr. Jerome J. Klos, Attorney at Law, P

ARBITRATION AWARD

Local 1527, Wisconsin Council 40, AFSCME, AFL-CIO, hereafter the Union, and Vernon County, hereafter the County, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance over the meaning and application of the terms of the agreement relative to hours of work. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Viroqua, Wisconsin, on November 2, 1989; it was not stenographically transcribed. On November 8, 1989, by mutual agreement, the County supplemented the hearing record with certain documentary and expository evidence. The County and Union filed written arguments on November 30, 1989 and February 6, 1990, respectively. By February 19, 1990, the parties informed the arbitrator that they would not be filing reply briefs.

ISSUE

As stated by the Union, and not objected to by the County, the issue is as follows:

> "Did the County violate the collective bargaining agreement by denying payment of travel time at overtime rates for the period June 20, 1989 to July 3, 1989? If so, what is the remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE IV
Hours of Work, Wages, Overtime Pay

4.01 The standard work day shall be 7:00 a.m. to 3:30 p.m., with a one-half (1/2) hour off (non-paid) for noon lunch.

4.02 The standard work week shall be five (5) days, Monday through Friday, both days inclusive.

4.03 The County shall make every reasonable effort to operate its projects so as to maintain a standard work week.

4.04 Employees regularly assigned to a patrol station shall continue to report as in the past to said patrol station, except when assigned to other duties. Employees not regularly assigned to a patrol station shall report to the Vernon County Highway Shop at Viroqua, or to a job site, at the discretion of the Employer. When ordered to report to a job site, the employees shall have the option of choosing to utilize transportation provided by the Employer, rather than their own transportation. Such employees will not be paid for the time required prior to 7:00 a.m. for travel to the job site, provided that said travel time normally shall not commence prior to 6:30 a.m. The driver of the transportation furnished by the Employer will be paid for the driving time involved at the overtime rate. Other overtime will be paid only at the authorization of the Commissioner. The employees shall make every effort to return to the County Shop applicable to them as near to 3:30 p.m. as possible.

. . .

4.08 All hours worked outside of the standard work day and/or the standard work week shall be paid at one and one-half (1-1/2) times the regular hourly rate of pay. When deemed necessary, employes shall work reasonable amounts of overtime and shall not be released from duty unless a circumstance exists whereby the employee absence is necessary and approval is received from the Commissioner or foreman.

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BACKGROUND

During the latter part of June and the first week of July, 1989, County crews worked on a blacktop project on State Highway 33. The prime contractor was a private concern, Mathy, with the County crews responsible for hauling sand and other material and equipment. Mathy established a daily work schedule under which the County employes were required to leave the Viroqua highway shop at 5:00 a.m.

The week of June 12-16, 1989, the County employes were paid for all travel time, at the appropriate rate. For the next 12 work days, however, -- the weeks of June 19 and 26 and July 1 and 3 -- the Highway Commissioner directed that thirty (30) minutes of travel time be deducted from their pay status. The County has not sought return of any pay for the period June 12-16.

On or about July 19, 1989, the Union grieved. The County Personnel Committee denied the grievance on August 2, 1989. 1/

Section 4.04 of the collective bargaining agreement -- the section which the Union cites in advancing its grievance, and which the County cites in denial of same -- was mutually agreed to on July 7, 1976, as settlement of a prohibited practice complaint which the Union brought.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union avers and asserts as follows:

> The language at issue is clear and unambiguous, and provides that employes who are required to report to work prior to 6:30 a.m. receive compensation, at overtime rates, for their travel time. Acceptance of the County's position -- that employes other than the vehicle driver would lose up to one-half hour pay for all travel time prior to 7:00 a.m., regardless of the starting time -- would make the contractual reference to 6:30 a.m. meaningless; since contracts are presumed to not include meaningless language, the reference to the 6:30 threshold must have meaning.
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> Further, there is past practice to support the Union's position, both in the week immediately prior to the incident which gave rise to this grievance, and earlier in the spring of 1989. Moreover, a former foreman testified that, during his tenure from 1981-1987, all employes required to report to work prior to 6:30 a.m. received travel time pay, a practice he was instructed in by his predecessor. The County's contention that it was unaware of this practice is simply not credible.
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> Testimony given at hearing by Attorney Klos is either improper, given his position as representative of the party on whose behalf he testified, or irrelevant, given the subsequent documentation which shows how his testimony was in error. Finally, since the employes were told to report to the shop, the arbitrator is asked to take judicial notice of Sec. 785.38 of the Administrator's Interpretation of the Wage-Hour Act, as amended.
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> The contract's clear and unambiguous language, plus the past practice, establish that the County must, and, until this grievance, has, consistently paid the travel time prior to 6:30 a.m. This grievance should be sustained and the employes made whole.

In support of its position that the grievance should be denied, the County avers and asserts as follows:

> Contract construction requires giving value to all words. In the contract under review, the word "normally" requires that the one-half hour travel time before 7:00 a.m. is non-compensable whether the crew starts at the normal 7:00 a.m. or any other time, such as the 5:00 a.m.

1/ At that meeting, the Committee also granted a grievance relating to coffee breaks during this same time period.

starting time on the Mathy project. Any other interpretation would require the arbitrator to ignore the word, "normally." Moreover, the bargaining history of Sec. 4.04 makes clear the intent of the parties with regard thereto, that being the Employer's efforts to reduce travel time costs as much as possible.

Further, the incorrect payment the first week obviously does not require continued incorrect payment. Clearly, if this were the case, it would be impossible to maintain any Employer contract language when Union foremen submit incorrect hours and the error is not corrected until the administrator is so advised.

As there is no contract violation (and, indeed, a payment enhancement, as the County has chosen to forgo efforts to recapture the improper payments from the first week on this job), the grievance should be denied.

DISCUSSION

For close to fifteen years, the question of County payment for employe travel time has been the subject of collective bargaining, prohibited practice complaints, grievances and arbitrations. I would hope, but not really expect, that this award could close this contentious cycle.

If ever there were language failing the test of "clear and unambiguous," it is the fourth sentence of Sec. 4.04, which provides that employes who are ordered to report to a job site "will not be paid for the time required prior to 7:00 a.m. for travel to the job site, provided that said travel time normally shall not commence prior to 6:30 a.m." Merely to cite this language is to establish its ambiguity.

Employes who are ordered by the Employer to report to a job site have the option of choosing to use County-provided transportation or their own transportation. (Sec. 4.04, sentence three.) "Such employees" -- apparently, all those who are ordered to report to a job site, whether they use private or County transportation -- "will not be paid for the time required prior to 7:00 a.m. for travel to the job site, provided that said travel time normally shall not commence prior to 6:30 a.m." (Sec. 4.04, sentence four.) What does this mean?

The first clause is easy enough. It states that employes who are ordered to report to a job site will not be paid for their travel time prior to the start of the standard work day at 7:00 a.m. This blanket rule, however, is then modified by the second clause, which provides that a necessary pre-requisite is that travel time "normally shall not commence" prior to 6:30 a.m.

What is the range of possible meanings for this? It could mean that if any of the travel time does occur prior to 6:30 a.m., all travel time is compensable; or, that only that travel time between 6:30 a.m. and 7:00 a.m. is unpaid; or, that no travel time prior to 7:00 a.m. is ever paid unless and until the County adopts a work schedule which features a pre-6:30 a.m. starting time for travel as a "normal" occurrence. In that case, what is the measurement for whether something is within or without the parameters of "normally shall not commence"? Where falls a four-week job? If the county adopts a work schedule in which 20 weeks a year require travel time prior to 6:30 a.m., is that still a system in which travel time "normally shall not commence prior to 6:30 a.m."?

As with quoting the contract, asking these questions is to reaffirm what I have felt throughout -- that this language is neither clear nor unambiguous. Accordingly, it is necessary and appropriate for me to consider such other evidence as past practice and bargaining history.

The Union is well aware that, to be found meaningful, a purported past practice must be unequivocal, clearly enunciated, and readily ascertainable over a reasonable period of time as an established practice. The Union contends that this standard is met, both by the payment of all travel time at various times during the spring and early summer of 1989 (including the week of June 12, 1989, involving the same project details which underlay the current grievance), and by the testimony from a retired foreman that in all cases where employes reported to work prior to 6:30 a.m., they were paid for travel time.

Clearly, the events of the spring and early summer of 1989 do not form an adequate basis on which to rest claims of past practice; the Union simply cannot establish past practice by contemporaneous or after-the-event occurrences. Also, that the Employer has chosen not to exacerbate an already difficult situation by seeking reimbursement of the travel time pay for the week of June 12 cannot be held against it in evaluating claims of past practice. I also decline to find binding past practice in the testimony of the retired foreman, Dwight Elliott. The central problem here is that the procedure he related was one which showed the amount of time worked, but not the actual hours. That is, supervisory personnel may have realized that they were approving certain travel time hours, but they would not necessarily have been aware that they were approving all travel time hours, including those

falling between 6:30 and 7:00 a.m. Thus, given the state of the record, I do not believe that the evidence establishes with sufficient certainty that there was indeed a clearly-understood, well-established past practice in this regard.

My reluctance to find past practice is made stronger by my impression of the importance which both parties have given to this issue. As noted above, this matter has provoked bitter bargaining and even litigation. Without commenting on the merits of any particular position, I think it safe to say that an issue of such great importance is not one on which the parties would reach the kind of long-standing mutual understanding necessary to establish a past practice.

It is in this bargaining history that I find the answer to the question of Sec. 4.04. As noted above, there are differing interpretations which diverge to the extreme -- from finding that all travel time is compensable if the travel begins prior to 6:30 a.m., to finding that no travel time is compensable if the County maintains a work schedule in which travel time "normally" doesn't start prior to 6:30 a.m. My reading of the record, however, convinces me that neither of these interpretations would have been agreed to by both parties, either in direct collective bargaining or in the voluntary resolution of the complaint case. Where language is clear and unambiguous, arbitrators may sometimes find meaning which the parties did not intend; here, given the very ambiguous and unclear language of the text, it would not be right for me to find a meaning which I know the parties would not have accepted.

County witnesses and the county attorney stated at hearing that the County's interpretation of the clause at issue is that "such employes will not be paid for actual travel time prior to 7:00 a.m., up to a maximum of thirty minutes travel time." That is, an employe who rides from 6:00 a.m. to 6:45 a.m. starts in pay status at 6:30 a.m.; an employe who rides from 6:45 to 7:15 starts in pay status at 7:00 a.m. (references to the employe riding is to distinguish these situations from that of drivers, who receive overtime pay for their driving time). Also, this interpretation does not affect the contractual provision that work outside the standard work day (i.e., 7:00 a.m. to 3:30 p.m.) is at time and one-half.

This interpretation seems to me to have a lot going for it. First, it is understandable. Second, it is not inconsistent with the express language of the existing contract. Third, it is something which the parties, given their initial positions, could have agreed on as a reasonable compromise between no travel time and total travel time.

To be sure, the interpretation and examples just given do not address the complete problem, in that they leave unresolved the meaning of the word "normally." According to the American Heritage Dictionary, "normal" means "constituting a usual or typical pattern." Thus, the above interpretation would hold so long as the usual or typical pattern is for travel time to commence no earlier than 6:30 a.m.; in the event the County adopts a work schedule in which the usual or typical pattern was for travel time to be required prior to 6:30 a.m., all such travel time would be compensated for at the appropriate rate.

The final question, then, is how much deviation from the presumed 6:30 a.m. starting time for travel the County is allowed before such deviation becomes usual or typical. Because highway work is so highly seasonal in its specific nature, the test of whether something is "usual or typical" requires a finer measurement than a comparison to the work year as a whole. That is, there is a finite time frame, be it during the fall, winter, spring or summer, in which particular highway jobs are undertaken; it is within this total time that the comparison is made to determine whether the non-standard work schedule has assumed the status of "usual or typical." That is, assume the total time for the County to perform blacktop work is 140 work days; if the County requires travel time prior to 6:30 a.m. on more than 70 days, this non-standard work schedule has become "usual or typical." In that case, since the County would have failed to meet the standard of the second clause of the critical sentence in Sec. 4.04, all travel time prior to 7:00 a.m. would thereafter be paid for. Here, the County required 17 days of pre-6:30 a.m. travel for this particular blacktop job. On the basis of my interpretation, therefore, I find that travel time did not normally commence prior to 6:30 a.m.

Accordingly, on the basis of the collective bargaining agreement, the record evidence, and the arguments of the parties, it is my

AWARD

1. That this grievance is denied.

Dated at Madison, Wisconsin this 11th day of April, 1990.

By_____
Stuart Levitan, Arbitrator