

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 136
 CITY OF OSHKOSH : No. 43517
 : MA-5992
 and :
 :
 OSHKOSH CITY EMPLOYEES' UNION, :
 LOCAL 796, AFSCME, AFL-CIO :
 :

Appearances:

Gregory N. Spring, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, for the Union.
John W. Pence, City Attorney, and Warren P. Kraft, Assistant City Attorney, for the City of Oshkosh.

ARBITRATION AWARD

Pursuant to a joint request by Oshkosh City Employees' Union, Local 796, AFSCME, AFL-CIO, herein the Union, and the City of Oshkosh, herein the City, the Wisconsin Employment Relations Commission designated the undersigned as the arbitrator to hear and decide a dispute between the parties. Hearing was held in Oshkosh, Wisconsin on April 3, 1990. No transcript was taken of the hearing. The parties completed the filing of post-hearing briefs on May 15, 1990.

ISSUE:

The parties stipulated to the following issues:

Were the employes, whose shifts were changed on November 2, 1989, entitled to one and one-half (1-1/2) times their normal pay for work performed on November 3, 1989? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE X

NORMAL WORK WEEK, NORMAL WORK DAY AND NORMAL WORK SCHEDULE

The normal work week shall be forty hours, Monday through Friday. The normal work day shall be eight (8) hours per day, Monday through Friday. The normal work schedule shall be five (5) consecutive eight (8) hour days, Monday through Friday, for the following divisions:

. . .

In the event it is necessary to change employees from one regular schedule of hours to another schedule of hours the employees shall be given at least 24 hours notice of change. Work performed on a revised schedule during the 24 hour notice period shall be compensated at 1 1/2 times the normal rate of pay whether or not total working hours for the week are in excess of 40 hours, except as otherwise provided herein for emergencies.

For an emergency such as snow removal, ice control, flood control, sickness, and so on, the employer shall have the right to schedule the work week as may be necessary and from one shift to another shift without regard to prior notice. Any employee who is called in for work outside his normal work week schedule shall not be sent home early on subsequent days or denied his regular work week schedule to avoid over-time payment without his consent. The spirit of this provision is that the employer shall not be penalized during emergency conditions through overtime payment during the 24 hour notice period, but neither shall the employer adjust the working hours after emergency conditions (e.g. to less than 8 hours per day) so as to deny employees legitimate overtime.

. . .

BACKGROUND:

The three grievants, Vernon Ferron, Peter Hathaway and Joseph Spanbauer, all worked in the City Street Department with a normal shift of 7:00 a.m. to 3:00 p.m. All three employes were given a 24-hour notice when they were assigned to different shifts for leaf collecting in the fall of 1989. On

November 2, 1989 1/ Ferron and Hathaway worked from 11:30 a.m. to 7:30 p.m. and Spanbauer worked from 4:00 a.m. to 12:00 noon on leaf collection duties.

In the afternoon of November 2 one of the leaf picking machines was taken out of service because of worn blades which caused severe vibrations and noise.

The City did not have in stock the spare parts needed to repair the leaf picker. Ferron, Hathaway and Spanbauer were told to work from 7:00 a.m. to 3:00 p.m. on November 3 and were assigned to the duty of erecting snow fences.

None of the three employees received a 24-hour notice of that shift change. Ferron and Hathaway worked eight hours on November 3, while Spanbauer worked five hours and took three hours of vacation.

At the beginning of the leaf collection in 1989 the City had two leaf pickers and one leaf vacuum. Normally, five crews, each consisting of three employees, are assigned to leaf collecting duties. Two crews work from 4:00 a.m. to 12:00 noon and three crews work from 11:30 a.m. to 7:30 p.m.

The City was able to rent another leaf picker beginning on November 7. The three grievants then returned to the same schedules they had worked on November 2.

POSITION OF THE UNION:

The breakdown of the leaf picker was not an emergency under the contract. There was no threat to the public nor to the employees. In the past employees have been given a 24-hour notice when their hours were changed for leaf picking duties. Breakdowns have never resulted previously in changed shifts except when preceded by a 24-hour notice. If breakdowns and "the like" are added to situations defined as emergencies, such would modify the specific language and the intent of the contract, as well as making it virtually impossible for employees to ever receive time and one-half pay when their hours are changed regardless of the number of hours' notice received by the employees. Therefore, the grievants should be made whole.

POSITION OF THE CITY:

Equipment failure is an emergency condition which waives the 24-hour notice requirement. The breakdown of the leaf picker was unforeseen. The part needed to repair the machine was on back order so the problem could not be corrected. There was no substitute piece of equipment available. The City was not able to rent another machine until November 7. Thus, the three employees were returned to their normal shift to put up snow fence.

The City has never been required to give a 24-hour notice to employees when they return to their normal shifts either after they were called out for emergencies, such as snow plowing, or at the conclusion of a particular project.

Spanbauer and Ferron comprise the normal crew for erecting snow fence. Hathaway was assigned to the crew to become familiar with the activity and to drive when Spanbauer was gone for three hours.

The grievance should be denied.

DISCUSSION:

There is no dispute over the fact that the City had the authority to change the shifts of the three grievants for November 3, because of the breakdown of the leaf picker. The dispute is over the question of whether said breakdown constitutes an emergency under Article X of the contract. If the breakdown was an emergency, then the grievants were not entitled to pay at time and one-half for work performed on November 3.

It is concluded that the breakdown of the leaf picker on November 2 did not constitute an emergency under Article X. It is true that the breakdown of the leaf picker was sudden and unexpected. Further, a replacement leaf picker was not readily available, nor were the necessary parts available to repair the broken leaf picker. However, Spanbauer testified, without contradiction, that on previous occasions when a leaf picker broke down, the City had the employees use an endloader and forks to continue collecting leaves. Mike Nigel, the City's central garage foreman, also testified that there had been previous occasions when employees collected leaves without using either a leaf picker or a leaf vacuum. The City failed to explain why the grievants were not assigned to collect leaves in a similar manner on November 3. Rather, the City said it chose to assign the grievants to another annual project, i.e., the erection of snow fences.

The undersigned agrees with the City's contention that it is possible the breakdown of certain pieces of equipment could constitute an emergency requiring an immediate change of shifts for affected employees, depending on various factors, inter alia, which equipment broke down, the function of that equipment, whether either alternative pieces of equipment or alternative methods of operation are reasonably available, or whether the breakdown creates a threat to the health or safety of the public or the employees.

In the instant situation the City chose not to use an alternative method

1/ Unless otherwise specified, all other dates herein refer to 1989.

which it had used on prior occasions. The undersigned is not persuaded that the breakdown of the leaf picker left the City with no reasonable alternative other than to immediately transfer the grievants back to their normal shift on November 3. The City has used alternative methods to collect leaves on previous occasions. The project, to which the grievants were transferred, was not of an emergency nature, but rather, was an annual project just like the collection of leaves. Since the breakdown of the leaf picker is not found to have constituted an emergency, the City, when changing the shifts of the grievants, had to either give the grievants a 24-hour notice of the shift change or pay the grievants time and one-half their normal wage rate for their work hours on November 3. Because the grievants did not receive the required 24-hour notice, the grievants were entitled to the premium pay.

Each of the grievants already has received two (2) hours of compensatory time for November 3, in addition to their normal wage rates. Accordingly, Ferron and Hathaway, who each worked eight hours on November 3, are each to be given two additional hours of compensatory time or overtime pay. Spanbauer, who worked five hours on November 3, shall be given an additional one half (1/2) hour of compensatory time or overtime pay.

The City contends that it has never been required to give employees a 24-hour notice to return them to their normal work shift, either when an emergency ends or when a project is concluded. Even assuming said contention to be accurate, the instant matter did not arise either at the end of an emergency call-out or at the conclusion of a particular project. Thus, the undersigned does not find it necessary to determine whether the City's contention is accurate.

Based on the foregoing, the undersigned enters the following

AWARD

That the employees, whose shifts were changed on November 2, 1989, were entitled to one and one-half (1-1/2) times their normal rate of pay for work performed on November 3, 1989; and that Ferron and Hathaway shall each be given two (2) additional hours of compensatory time or overtime and Spanbauer shall be given an additional one-half (1/2) hour of compensatory time or overtime pay.

Dated at Madison, Wisconsin this 9th day of July, 1990.

By _____
Douglas V. Knudson, Arbitrator