BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MANITOWOC COUNTY SHERIFF'S DEPARTMENT EMPLOYEES, LOCAL 986-B, AFSCME, AFL-CIO	Case 257 No. 46940 MA-7108
and	
MANITOWOC COUNTY	

Appearances:
Mr. Jerry D. Ugland, Staff Representative, on behalf of the Union.
Lindner & Marsack, S.C., by Ms. Lisa M. Leemon, on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein the Union and County, are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held on April 6, 1992, in Manitowoc, Wisconsin, where it was transcribed. Briefs were filed by May 28, 1992.

Based upon the entire record, I issue the following Award.

ISSUES

Since the parties were unable to jointly agree upon the issues, I have framed them as follows:

1. Are the grievances arbitrable?

2. If so, did the County violate Article 23 of the contract when it refused to grant call-in pay to grievants Todd D. Hermann and Randy A. Novak who did not actually come in and work after their previously scheduled court appearances canceled and, if so, what is the appropriate remedy?

DISCUSSION

Since about 1980, the parties have entered into a series of collective bargaining agreements having call-in language identical to what is now Article 23 of the contract, entitled "Overtime - Compensatory Time - Holiday Pay", which, inter alia, provides:

> ARTICLE 23 - OVERTIME - COMPENSATORY TIME - HOLIDAY PAY
>
> Overtime shall be compensated at the rate of time and one-half (1 1/2) for the following conditions:
>
> . . .
>
> B. A two (2) hour minimum or time and one-half (1 1/2), whichever is the greater, shall be earned for court time or a call to work not immediately preceding or following the scheduled work shift on a scheduled work day.
>
> C. A four (4) hour minimum or time and one-half (1

1/2), whichever is greater, for court time or call to work on the officer's day off.

. . .

G. All assigned work performed in excess of eight (8) hours in any twenty-four (24) hour period. COURT CANCELLATION. Whenever a court appearance is cancelled with less than twenty-four (24) hours advance notice to the employee, the employee should receive the minimum call-in pay provided in this Article as follows:

1. Scheduled day off - Section "C"

2. Scheduled work day - Section "B"

Up to June, 1991, employes requesting and receiving call-in pay for court time did not have to come in and actually work any hours if their call-ins cancelled and if they were not required to report for court duty.

That changed when Inspector Kenneth J. Peterson informed all Department personnel via a June 27, 1991 Memorandum that:

Memo No. 91-014

Date: June 27, 1991

To: All Department Personnel

From: Kenneth J. Petersen, Inspector

Subject: TWO AND FOUR HOUR MINIMUM CALL-INS

Due to the high costs associated with overtime and a significant increase in the workload, the following policy shall apply. Any employee requesting the two-hour minimum as regulated in the contract will be required to put in 1.3 hrs. Any employee requesting the four-hour minimum will be required to put in 2.6 hrs. For these items, the employee will be paid two and four hours respectively.

For your work assignments, you would report to your direct supervisor. If you have any questions or concerns, feel free to contact me.

Under this policy, employes are now allowed to come in and work at any time during the two-week payroll period in which the call-in occurred; hence, they need not work on their days off. The County instituted this change because of the very high caseload and overtime costs it was incurring and because it believed that an officer had abused the prior policy of not coming in to work.

Thereafter, then-Union president James Lenk, who is now a supervisor, had several discussions with management personnel regarding the new policy, the upshot of which was his statement that the Union would not then grieve the matter and that the Union might raise it in negotiations.

Officers Todd E. Hermann and Randy A. Novak filed the instant grievances of December 4, 1991, after the County refused to pay them four (4) hours call-

in time because they had refused to come in and work 2.6 hours after their court appearances canceled. This marked the first time that any employes refused to come in to work to qualify for call-in pay, as all employes before them who requested such call-in pay actually came in and worked pursuant to the terms of Paterson's June 27, 1991 Memorandum. The County denied the grievances on December 9, 1991, on the grounds that they were untimely and because the grievants had failed to come in and work the 2.6 hours required for such payment.

In support of the grievances, the Union primarily argues that the County's refusal to pay the call-in time in issue violates a well-established past practice which in its words, it was aware, "was applied uniformly, existed for years, occurred in clearly-defined circumstances, which did not markedly change, required mutual participation, and occurred frequently." The Union also claims that the contract provides for minimum paid court time and that it "is silent regarding have to work the minimum hours". The Union goes on to assert that the grievances are timely because they represented the first time that any employees refused to work in order to collect call-in pay. As a remedy, it therefore asks that all affected employes be made whole for minimum hours not paid.

The County, in turn, maintains that the grievances were untimely because they were filed more than thirty (30) days after promulgation of the June 27, 1991, Memorandum and that, furthermore, its revised call-in policy is in accord with its management rights and is not contravened by the contract. As for the Union's past practice claim, the County argues that it is not a binding past practice and that it is insufficient to overcome its reserved management right to assign work under this call-in proviso.

The first thing that must be addressed is the timeliness issue. Article 8 of the contract, entitled "Grievance Procedure", provides in pertinent part:

. . .

B. Time Limitations: The failure of a party to appeal a grievance in a timely fashion will be treated as a settlement to that particular grievance, without prejudice. However, if it is not possible to comply with the time limitation specified in the grievance procedure because of work schedules, illness, vacations, holidays, any approved leave or time off, these time limitations may be extended by mutual agreement.

The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure.

C. Steps in Procedure:

Step 1: The employee and one (1) Union steward shall orally state grievances to the Department Head (Sheriff) or the Sheriff's designee within a reasonable period of time, but in no event later than thirty (30) calendar days after the Union knew or should have known of the occurrence of such grievance. It is understood, however, that discharge and policy grievances may be initiated at Step 3. In the event of a grievance, the employee shall perform his or her immediate assigned work task, if any, and grieve the dispute later, unless his or her health or safety is endangered. The Department Head or the Sheriff's designee shall within five (5) working days orally inform the employee and one (1) Union steward of his or her decision.

. . .

Since the grievances herein were filed on December 4, 1991, they obviously were filed more than thirty (30) days after Peterson's June 27, 1991, Memorandum. But that does not mean that they automatically are untimely, as the specific facts giving rise to the grievances did not arise until much later, i.e., the County's refusal to pay call-in to the grievants after their court appearances had canceled and after they refused to come and work under the terms of the June 27, 1991 Memorandum. Inasmuch as their grievances were filed within thirty (30) days of those occurrences, they are timely. 1/

As to the merits of the grievances, the Union is certainly correct in

1/ This finding is limited to the very unique facts of this case and nothing herein should be interpreted to mean that the thirty (30) day period is to be computed on the same basis in different circumstances.

noting that the County for about a decade has paid such call-in without requiring employes to actually come in and work after their court appearances canceled. The Union is also correct in pointing out that there is no express language in the contract requiring that such work be performed.

However, the Article 23, Section G, call-in language was agreed to at the bargaining table in 1980 only after management representatives expressly stated that the County was reserving the right to have employes work if their court appearances canceled and if they thereafter applied for call-in pay. Said statement was consistent with the practice arising under Article 23-B and C - which was then already in the contract - wherein employes claiming call-in pay had to actually come in and work in order to receive it.

This history was testified to by Peterson who attended the bargaining sessions as Union steward. In addition, Peterson's testimony was uncontradicted, as no Union witnesses challenged his recollection of the 1980 negotiations. Peterson added that the then-Sheriff did not require employes to come in and work because he believed that it would have taken too much time to administer the contract in that fashion.

Managements' statements therefore stand as a clearly expressed reserved management right - one which the County could exercise at any time under Article 3 of the contract entitled, "Management Rights Reserved", which gives it the right to assign work because the Union has never changed the understanding reached in collective bargaining negotiations to reflect what it is arguing here - i.e. that employes do not have to work to qualify for call-in pay after their court appearances cancel. For as the County correctly points out, "There is a clear distinction between an unexercised management right and a clearly enunciated and accepted past practice." Here, we have the former and not the latter. As noted in Elkouri and Elkouri, it therefore is wrong to now read into the contract an implied term - i.e. a past practice limitation - which the parties themselves have never agreed to. How Arbitration Works, (BNA, 4th Edition, pp. 440-442.)

This is why the Union's reliance on various arbitration cases is misplaced; 2/ none of those cases involved a clearly-expressed statement at the bargaining table to the effect that management was reserving its right to have employes work in order to qualify for a particular benefit and the Union's acceptance of that understanding. For it is this clearly-expressed understanding which is determinative of this case and not whether the County thereafter did not immediately do what it did here. See Southern Indiana Gas and Electric Co., 86 LA 342, (Scheller, 1985) and Kahn's and Company, 83 LA 1225 (Murphy, 1984).

The same is true for the Union's claim that the grievances should be sustained because of the principles enunciated in Management Rights by Marvin Hill Jr. and Anthony V. Sinicropi (BNA Books, 1986, pp. 24-27) which address what circumstances must exist for there to be a binding past practice. For as just noted, the practice relied upon by the Union is insufficient to overcome the County's clearly-reserved management right to assign the work in issue.

In light of the above, it is my

2/ Coca-Cola Bottling Co., 9 LA 197 (1947); Diamond National Corp., 52 LA 33 (1969); Esso Standard Oil Co., 16 LA 73 (1951).

AWARD

1. That the grievances are arbitrable.

2. That the County did not violate Article 23 of the contract when it refused to grant call-in pay to grievants Todd D. Hermann and Randy A. Novak.

3. That the grievances are therefore denied.

Dated at Madison, Wisconsin this 9th day of October, 1992.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator

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