BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between MARATHON COUNTY HIGHWAY EMPLOYEES UNION, LOCAL 326, AFSCME, AFL-CIO and MARATHON COUNTY (HIGHWAY DEPARTMENT)	Case 226 No. 51802 MA-8745 (Ken Ressel Grievance)

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Jeffrey T. Jones, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by Marathon County Highway Employees Union, Local 326, AFSCME, AFL-CIO, herein the Union, and the subsequent concurrence by Marathon County (Highway Department), herein the County, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on December 9, 1994 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on September 7, 1995, at Wausau, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on December 22, 1995.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties were unable to stipulate to the issues. The Union frames the issues as follows:

> Did the County violate the collective bargaining agreement when it deducted one-half hour of paid work time for employes who worked through lunch?
>
> If so, what is the appropriate remedy?

The County frames the issues in the following manner:

> Whether the County violated the terms of the Memorandum of Agreement by paying employees 9.5 hours at the straight time rate and one-half hour at the overtime rate when employees were working through the lunch period on the four day - ten hour work schedule?
>
> If so, what is the appropriate remedy?

Based on the entire record, the Arbitrator adopts the County's framing of the issues.

FACTUAL BACKGROUND:

The County and the Union have been parties to past collective bargaining agreements for a significant period of time. In the contract negotiations for a successor 1993-1994 agreement, the parties discussed implementation of a four day - ten hour work schedule in the summer months.

During negotiations the parties agreed that employes who worked a four day - ten hour work week would be paid on a daily basis for nine and one-half hours of work at their straight time rate. The parties also agreed that employes would be paid regular time for the one-half hour lunch period, that was part of the ten hour work day, even though the employes would not work during the lunch period. The Union's bargaining committee recognized this as a "great benefit" since employees would be paid for unworked time.

Glenn Speich, Highway Commissioner, participated in the above negotiations. He testified on behalf of the County that the parties further agreed that employes who worked through the one-half hour lunch period would be paid nine and one-half hours at their straight time rate and one-half hour at their overtime rate. Speich stated that the parties recognized that their agreement to pay employees for unworked time during the lunch period at their straight time rate, and to pay employees who worked through the lunch period at their overtime rate, was a benefit for the greater number of employes at the cost of the smaller number of employes. Speich testified that the parties specifically discussed this issue, and reached agreement over it. Speich added that he felt that the Union understood that an employe who worked through the lunch hour was to receive nine and one-half hours pay at the straight time rate and one-half hour at the overtime rate.

Ken Ressel, Local Union President, testified that he was also involved in the contract negotiations which resulted in the above agreement. He testified, however, that he could not remember whether the parties had specifically discussed the rate of compensation for employes who worked through the one-half hour lunch period.

The parties subsequently executed a Memorandum of Agreement which expressed their

understandings in regard to the four day - ten hour work week for the summer. The Memorandum of Agreement became part of the 1993-94 collective bargaining agreement. The agreement was executed on April 29, 1993.

In the summer of 1993, the parties implemented the four day - ten hour work week schedule. During the course of the 1993 summer, the County paid a number of employes, who worked through the lunch period, ten hours of pay at their straight time rate and one-half hour pay at their overtime rate. One employe, Richie Nowak, worked through lunch on several occasions but was not paid for ten regular hours on those days. He questioned it and involved the local Union representative in the matter. They brought the problem to the attention of the Highway Commissioner and his Assistant and Nowak was ultimately paid for ten hours at straight time and an additional one-half hour of overtime.

In 1994, the County changed the manner in which it paid employes who worked through the one-half hour lunch period during the four day - ten hour work week. On the first of several days when certain employes worked through their lunch period (i.e. June 6, 7 and 8, 1994), the County paid the employes nine and one-half hours at their straight time rate and one-half hour at their overtime rate. The Union then filed a grievance dated July 1, 1994 alleging that the County's action constituted a violation of the agreement. The parties stipulated that there are no procedural issues, and that the instant dispute is properly before the Arbitrator for a decision on the merits pursuant to the terms of the parties' agreement.

PERTINENT CONTRACTUAL PROVISIONS:

Article 5 - Hours and Overtime

> 1. Normal Hours: The normal hours of work for employees of the Highway Department shall be forty (40) hours a week as follows:
>
> . . .
>
> C. Other Employees: All employees not mentioned above shall work the regular day shift, Monday through Friday, 7:00 a.m. to 3:30 p.m., with a thirty (30) minute duty free lunch period.
>
> . . .
>
> 4. Overtime: Employees shall receive time and one-half (1 1/2) their normal hourly rate for all hours worked in excess of eight (8) hours in a day, or forty (40) hours in a week, or for hours worked outside the normal hours of work. There shall be no "pyramiding" of overtime, overtime hours shall be paid for only

once. Time off for vacations and holidays shall be considered time worked when computing overtime. Employees shall receive time and one-half (1 1/2) their normal hourly rate for all hours worked on Saturday and/or Sunday.

. . .

MEMORANDUM OF AGREEMENT
BETWEEN
MARATHON COUNTY
AND
MARATHON COUNTY HIGHWAY EMPLOYEES
UNION, LOCAL 326

WHEREAS, the Marathon County and Local 326 are interested in establishing a four day work week for the summer work hours;

WHEREAS, the parties wish to enter into a Memorandum of Agreement to summarize the terms and conditions under which the parties would implement a four day-ten hour work week for the summer hours;

WHEREAS, the framework for the implementation of a four day-ten hour work week for the summer has been prepared by the parties;

NOW, THEREFORE, it is hereby agreed by and between Marathon County and Marathon County Highway Employees Union Local 326 that the following shall constitute the terms and conditions for implementation of a four day-ten hour work week, as follows:

1. That the attached list of items shall form the basis for implementation of a four day-ten hour work week for Highway Department employees.

. . .

3. That this Memorandum of Agreement shall be executed by representatives of Marathon County and Local 326 and shall be considered a binding agreement separate from the terms of the current

Labor Agreement between Marathon County and Local 326 and shall continue in full force and effect unless discontinued by mutual agreement of the parties.

. . .

FOUR DAY - 10 HOUR WORK WEEK

The following is a list of items agreed to for implementing a four day week:

1. Hours

   A. Normal work hours would be 6:00 a.m. to 4:00 p.m., Monday thru Thursday.

. . .

2. Overtime

   A. Overtime shall be for all hours outside the normal work day and work week (after 10 hours per day and after 40 hours per week).

. . .

   D. Overtime for working thru lunch time -- ten hour day will be 9 1/2 hours of regular time and 1/2 hour overtime.

UNION'S POSITION:

The Union argues that the County has violated the parties' Memorandum of Agreement by paying employes who worked through the one-half hour lunch period of a ten-hour day, at the rate of nine and one-half hours of straight time pay and one-half hour at their overtime rate. The Union claims that employes who worked through the one-half hour lunch period should be paid ten hours of pay at their straight time rate, plus one-half hour of pay at their time and one-half rate.

In support thereof, the Union claims that "this case turns on the undisputed fact that nine and one-half hours of work during the summer months is considered to be ten hours for purposes of compensation". Therefore, according to the Union, when the agreement indicates that overtime for working through lunch will be nine and one-half hours of regular time and one-half hour overtime, it is understood that nine and one-half hours is considered to be ten hours for purposes of calculating overtime pay when on the summer hours. Consequently, employes who work over the lunch period during the summer should receive not only their ten hours of regular pay, but a

one-half hour of overtime pay as well.

The Union believes that the contract language does not provide a clear answer to the disputed question especially in light of some apparent conflicts between Article 5 which clearly indicates that forty hours is the normal work week and the Memorandum of Agreement which indicates that overtime should be paid for hours outside the normal work day and work week, yet expresses the normal work day, work week as ten hours per day and forty hours per week despite the reality of employes working only nine and one-half hours per day and thirty-eight hours per week. The Union opines that the ambiguities in this contract language can be clarified by looking at the parties' practice.

The Union maintains that past practice supports its position. In this regard, the Union notes during a previous summer an employe (Richie Nowak) worked through lunch on several occasions but did not receive pay for ten regular hours on those days. When the employe and the Union brought it to management's attention, he did not have the time deducted but instead was paid not only for the one-half hour lunch period but given an additional one-half hour of overtime as well. The Union believes that this single Nowak example should serve as a binding past practice herein because it is "fully parallel" to the instant dispute, and because parallel situations are not likely to arise often given the relative newness of the summer schedule.

The Union also argues that concepts of equity, reasonableness and common sense support its position. In this regard, the Union opines:

> It simply does not make sense for an employee who works through his lunch break (at the behest of the employer) to have a half hour deducted from his (or her) regular pay as a result. . . .

The Union concludes that to hold otherwise, and adopt the position put forward by the County, would lead to a harsh or absurd result, something not favored by arbitral law.

Finally, the Union believes that if the County's interpretation of the disputed contract language is upheld the Highway Commissioner can abuse the system and require all Highway Department employees to work through lunch and have the time deducted from their regular pay for the summer period.

Based on all of the above, the Union maintains the record in its entirety supports its position and that the Arbitrator should sustain the grievance and make the grievant whole for all his losses incurred as a result of the County's action.

COUNTY'S POSITION:

The County initially argues in its brief that the clear language of Item 2(D) of the

Memorandum of Agreement should be given effect and that a reading of this language "unequivocally" demonstrates that no violation of the agreement has occurred. The County points out that said contract provision states:

> Overtime for working through lunch time -- 10 hour day will be 9 1/2 hours of regular time and 1/2 hour overtime.

In other words, according to the County, pursuant to this language "an employee who performs overtime work as a result of working through the lunch period is to be paid nine and one-half hours regular time pay (i.e. at the employee's straight time rate) and one-half hour of overtime (i.e., at the employee's overtime rate)". Moreover, the County claims, to read Item 2(D) as the Union requests would require modification of the language of the provision to state:

> Overtime for working through lunch time - 10 hour day will be 10 hours of regular time and 1/2 hour overtime. (Emphasis supplied).

The County opines that the above was not done by the parties and that the Arbitrator is prohibited from changing the meaning of the language because doing so would violate the mandate of Article 3(6)(F) that an arbitrator is not to "modify, add to or delete from the express terms of the agreement". The County adds that the clear contract language on the subject is controlling over the alleged past practice relied upon by the Union in support of its position.

The County also argues that the parties' bargaining history supports giving effect to the clear language of Item 2(D). In this regard, the County points out that in the contract negotiations for the 1993-94 agreement the parties discussed the manner in which employes would be compensated who worked through the one-half hour lunch period. The County maintains that the parties intended as a result of those negotiations that employes who worked through the lunch period were to receive nine and one-half hours of pay at their straight time rate and one-half hour of pay at their overtime rate. The County contends that its specific testimony in support of such an approach should be credited over the testimony of the Union's witness who couldn't remember any discussion on the subject.

In its reply brief, the County takes issue with the Union's contractual arguments. For example, the County claims that the specific language of the Memorandum of Agreement which provides that employes who work through lunch time shall be paid for nine and one-half hours of regular (straight) time and one-half hour overtime prevails over the general language of Article 5 which might lead to a different result as argued by the Union.

The County also argues that a single instance (Nowak), which arose upon implementation of a new work schedule for the first time, hardly constitutes a binding past practice. The County notes that the Nowak incident does not meet the standard for establishing a past practice; namely, "unequivocal, clearly enunciated and acted upon", and "readily ascertainable over a reasonable

period of time as a fixed and established practice accepted by both parties". (Emphasis supplied). The County adds that it doesn't even meet the standard proposed by the Union since "parallel situations are likely to arise each and every summer, including the summers of 1993 and 1994, when the 4-day, 10 hour per day, work schedule is implemented". The County points out that except for the Nowak incident (which occurred upon the first implementation of the new work schedule) the Union has not identified any other "parallel situations" in the summers of 1993 and 1994 even though such situations must have occurred i.e. compensation provided to employes who worked through the lunch break. As such, the County concludes that the Union has failed to establish its alleged binding past practice.

Finally, the County argues that the Union's contention that giving effect to the clear language of Item 2(D) would lead to an absurd result is without merit because "an employee who works through the lunch break does not have one-half hour of pay deducted from his or her paycheck . . . the employee receives overtime pay for the lunch break and, as a result, receives an additional 15 minutes pay". Other employes, who do not work through the lunch period, are paid at their straight time rate. The County concludes that although the Union may feel that the distinction in compensation (small) between employes who work through the lunch period, and those who do not work through the lunch period, is unfair, it certainly is not an absurdity.

The County further claims that the Union's allegation that the Highway Commissioner may direct all employes to work through the lunch break is speculative and unsupported by the record.

Finally, the County opines that what has really happened is that the Union has reconsidered the agreement it entered into during the contract negotiations for the 1993-94 agreement and now decided that the compensation provided for employes who work through the lunch period, as compared to those who do not work through the lunch period, is not equitable. However, the County points out that if the Union finds the parties' prior bargain unfair, the place to change it is at the bargaining table, not through the grievance process.

Based on all of the foregoing, the County requests that the grievance be denied and the matter dismissed.

DISCUSSION:

At issue is whether the County violated the terms of the Memorandum of Agreement by paying employes nine and one-half hours at the straight time rate and one-half hour at the overtime rate when employes were working through the lunch period on the four day - ten hour work schedule. The Union maintains that the County violated the Agreement by its action while the County takes the opposite position. For the reasons discussed below, the Arbitrator agrees with the County's position.

The Union initially argues that the Memorandum of Agreement is ambiguous regarding the disputed issue. The Arbitrator agrees. Item 2(D) of the Memorandum of Agreement does provide, as pointed out by the County, that "Overtime for working through lunch time -- ten hour day will be 9 1/2 hours of regular time and 1/2 hour overtime". (Emphasis supplied). However, it does not specifically define what is meant by "9 1/2 hours of regular time". For example, the County argues that this phrase means 9 1/2 hours of straight time pay but, although the language suggests this result, it does not specifically and clearly state this. The Union, on the other hand, argues that it means ten hours for purposes of compensation, but it doesn't exactly say this either. The disputed contract language can be interpreted a number of different ways as the parties' arguments demonstrate.

Since the disputed contract language is ambiguous, the Union argues that this ambiguity can be clarified by examining the rest of the agreement, particularly Article 5, as well as the parties' past practice. A review of Article 5 and the Memorandum of Agreement, however, does not support the Union's assertion.

The Union argues that there is no dispute that employes are entitled to overtime pay for all hours worked in excess of the normal work week (40) or the normal work day (8) pursuant to Article 5. Likewise, according to the Union, there is "no dispute that during the summer months, an employe who works beyond the normal quitting time receives overtime at the rate of time and one-half". The Union adds:

> Quitting time for most employees is 4:00 PM. Work after that is compensated at the overtime rate, despite the fact that workers may have actually worked only nine and one-half hours, and the side letter requires overtime only "after 10 hours per day and after 40 hours per week". This is the case because it is understood by all that nine and one-half hours are considered to be ten for the purposes of calculating overtime pay when on the summer hours.

The problem with this approach is that the parties do not agree "that nine and one-half hours are considered to be ten for the purposes of calculating overtime pay when on the summer hours". Nor do Article 5 and the Memorandum of Agreement read together necessarily lead to such a result.

What little evidence of past practice that exists supports the Union's position. In this regard, the Arbitrator notes that in the summer of 1993 the County paid an employe who questioned his pay for working through the lunch period, ten hours of pay at his straight time rate and one-half hour pay at his overtime rate. And, contrary to the County's arguments, this was not the only employe to receive such payment. The record indicates that the County paid a number of employes, who worked through their lunch period that summer, ten hours of pay at their straight time rate and one-half hour pay at their overtime rate.

Bargaining history, however, supports the County's position. In this regard, the Arbitrator notes that Glenn Speich, the County's Highway Commissioner, testified unrefuted for the County that during the 1993 contract negotiations which resulted in the Memorandum of Agreement in regard to the four day - ten hour work week, the parties discussed the manner in which employes would be paid who worked through the one-half hour lunch period. He testified that the parties agreed that employes who did not work through the lunch period would be paid ten hours at their straight time rate, and employes who worked through the lunch period would be paid nine and one-half hours at their straight time rate and one-half hour at their overtime rate.

Based on all of the above; namely, one, ambiguous contract language; two, past practice which supports the Union's position; and, three, bargaining history which supports the County's position, the Arbitrator finds that the Union has not sustained its burden of proof that the County violated the Agreement herein. In reaching this conclusion, the Arbitrator rejects the Union's argument that such a result is unfair and unreasonable because "an employe who works through his lunch break (at the behest of the employer)" will "have a half hour deducted from his (or her) regular pay as a result". As pointed out by the County "An employe who works through the lunch bread does not have one-half hour of pay deducted from his or her paycheck. Rather . . . the employe receives overtime pay for the lunch break and, as a result, receives an additional 15 minutes pay". Nor is there any persuasive evidence in the record that finding for the County will lead to abuse by the Highway Commissioner as alleged by the Union. The Highway Commissioner has not required all Highway Department employes to work through the lunch period in the past, and doing so in the future would contravene the parties' understanding in reaching agreement over the Memorandum of Agreement.

In view of all of the foregoing, the Arbitrator finds that the answer to the issue as framed by the County is NO, the County did not violate the terms of the Memorandum of Agreement by paying employes nine and one-half hours at the straight time rate and one-half hour at the overtime rate when employes were working through the lunch period on the four day - ten hour work schedule, and it is my

AWARD

The grievance filed in the instant matter on July 1, 1994 by Ken Ressel is hereby denied, and the matter is dismissed.

Dated at Madison, Wisconsin this 18th day of March, 1996.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator