BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between AFSCME LOCAL 1425A and CITY OF LADYSMITH	Case 27 No. 52433 MA-8970

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO P.O. Box 364, Menomonie, Wisconsin 54751-0364, on behalf of the Union.

Mr. William R. Sample, Labor Relations-Consultants, Inc., P.O. Box 808, Duluth, Minnesota 55801, on behalf of the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the City agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute over the meaning and interpretation of the terms of the collective bargaining agreement relating to hours of work. The Commission appointed Stuart D. Levitan, a member of its staff, to hear and decide the matter. Hearing on the matter was held on August 22, 1995, in Ladysmith, Wisconsin. The hearing was not transcribed, and the parties filed briefs by November 27, 1995. The City filed a reply brief on December 15, 1995. On January 11, 1996, the Union notified the arbitrator it was waiving its right to file a reply brief.

ISSUES

The parties stipulated to the following statement of the issue:

> *Did the employer violate the collective bargaining agreement by its refusal to pay the grievant call-in pay on January 30 and 31, and February 1 and 2, 1995?*

If so, what is the remedy? 1/

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 - MANAGEMENT RIGHTS

2.1 It is understood and agreed that management possesses the sole right to operate this agency and that all management rights repose in it but that such rights must be exercised consistently with the other provisions of this contract and Union rights guaranteed by law. The sole and exclusive rights of the Employer except as specifically abridged by this agreement shall include but are not limited to the following:

. . .

B. The right to determine the services and level of services to be offered by the Employer;

C. The right to establish or continue policies, practices and procedures for the conduct of the operation of the Employer and from time to time change or abolish such policies, practices or procedures except in such cases as would deprive a bargaining unit employee of a tangible economic benefit; provided, however, that agreement to the foregoing does not constitute a waiver by the Union of its right to bargain over mandatory subjects of bargaining;

D. The right to determine and from time to time redetermine the methods of operations to be employed by its employees;

E. The right to discontinue methods or operations or to discontinue their performance by the

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1/ The employer's brief states that the parties were unable to agree on a statement of the issue, and proposes language essentially identical to that which my notes indicate was in fact that to which the parties stipulated.

employees; provided, however, the agreement to the foregoing does not constitute a waiver by the Union of its right to bargain over those aspects of the foregoing which may be mandatory subjects of bargaining;

F. The right to determine the number and types of employees required;

G. The right to assign work to such employees in accordance with the requirements determined by the Employer;

H. To right to establish and change work schedules and assignments;

. . .

J. The right to temporarily transfer by seniority or promote or demote employees, or lay off, terminate or otherwise relieve employees due to lack of work or other reasons, and to determine the fact of lack of work.

The Employer specifically agrees that none of the foregoing rights may be executed by it if the same would result in a violation of any of the provisions of this Agreement.

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ARTICLE 4 - GRIEVANCE PROCEDURE

4.1 Definition. A grievance is defined as any dispute concerning the interpretation, application or enforcement of the terms of this contract.

4.2 Subject Matter. Only one subject matter shall be covered in any one grievance. A written grievance, where required, shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved and the relief sought, the date the incident or violation took place, the specific section of the agreement alleged to have been violated, and the signature of the

grieving party.

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4.5 Grievance Arbitration.

B. ARBITRATOR. The grievance will be submitted to arbitration by requesting the Wisconsin Employment Relations Commission (WERC) to appoint one (1) of its staff as sole arbitrator. The parties shall select a panel of three mutually agreeable WERC staffers and shall request that the WERC appoint one of the three to serve as arbitrator based on availability.

C. ARBITRATION HEARING. The Arbitrator appointed shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. On completion of this review and hearing, the Arbitrator shall render a written decision to both the City and the Union, which shall be final and binding on the parties.

D. DECISION OF THE ARBITRATOR. The Arbitrator shall have no right to modify, nullify, ignore, add to, or delete from the express terms of the Agreement, and the decision of the Arbitrator shall be limited to the subject matter of the grievance and be based solely on his interpretation of the "express language" of the Agreement.

. . .

ARTICLE 6 - EMPLOYEE DEFINITIONS

6.1 Regular Full-Time Employees. A regular full-time employee is hereby defined as an employee who is scheduled to work the full hourly workday and workweek in permanently and continuously funded positions.

6.2 Regular Part-Time Employees. A regular part-time employee is defined as an employee who is regularly scheduled to

work in a permanently and continuously funded position, but who is not a regular full-time employee.

. . .

ARTICLE 9 - JOB POSTING

9.1 Posting Award. Seniority shall be the guide in filling all vacancies and new positions, provided however, that the senior employee considered is qualified and able to perform the work. When the Employer finds it necessary to fill a bargaining unit vacancy or a new bargaining unit position in any department or classification, the Employer shall bulletin such position or vacancy for a period of seven (7) working days, stating the job to be filled, qualifications commensurate with the job to be performed and rate of pay. The most senior qualified person who signs the posting shall be awarded the position.

9.2 Trial Period. On appointment to fill a vacancy or a new position, an employee shall serve a trial period of thirty (30) calendar days. Should the employee not qualify or should he/she so desire, he/she may be reassigned to his/her former position without loss of seniority. Upon mutual agreement between the parties, said trial period may be extended an additional thirty (30) calendar days if warranted. Employees promoted to a new position shall be paid ninety percent (90%) of the rate of said position during the trial period unless the rate of the newly appointed position is less than 110% of the rate of the job the employee is leaving, in which case the employee shall maintain his/her prior rate for the duration of the trial period. On successful completion of the trial period, the employee shall assume the rate of the position. If the rate of the newly appointed position is less than the rate of the job the employee is leaving, the employee shall immediately assume the rate of the new position.

9.3 Temporary Assignments. This article shall apply only to permanent vacancies and permanent new positions.

ARTICLE 10 - WORK WEEK/WORK DAY

10.1 Defined. The normal work day and work week for the departments and classifications in the bargaining unit shall be as set

forth below:

A. CITY GARAGE: Five (5) eight (8) hour days Monday through Friday from 7:00 a.m. to 4:00 p.m.

B. REFUSE COLLECTION: From 6:00 a.m. to 4:00 p.m. on Monday; From 6:00 a.m. to 3:00 p.m. on Tuesday, Wednesday and Thursday; From 6:00 a.m. to 1:00 p.m. on Friday (without a lunch period)

C. WASTEWATER TREATMENT PLANT: Five (5) eight (8) hour days Monday through Friday, having two shifts each day. The 1st shift from 7:00 a.m. to 4:00 p.m. and the 2nd shift from 12:00 to 9:00 p.m.

D. CITY HALL (INCLUDING POLICE DEPARTMENT CLERICALS): Bargaining unit employees working in this department are assigned staggered eight (8) hours of work shifts between 8:00 a.m. and 5:00 p.m., Monday through Friday.

E. LIBRARY: Bargaining unit employees who work in the library are assigned staggered hours of work shifts so as to provide coverage during library hours. The hours of work of library employees shall be continued as worked in 1991. Such hours of work may be varied at any time by mutual agreement of the Employer and the Union. From Memorial Day through Labor Day the Library may be open on Saturdays from 9:00 a.m. to 12:00 noon. Employees may trade hours by mutual consent of the employees involved provided that such trading of hours is recorded on each employees time sheet, the supervisor is notified of the traded hours, and the trading of hours does not create overtime.

F. CEMETERY: The work day and work week shall consist of five (5), eight (8) hour shifts Monday through Friday and such hours on Saturdays as may be necessary to accommodate for funerals. During Winter employees may be assigned to work at other job sites.

G. PARKS: The work day and work week shall consist

of five (5), eight (8) hour shifts Monday through Friday and such hours on weekends as may be necessary to clean restrooms, refill towel and tissue dispensers, and empty trash cans; provided however, the worker will be laid off during periods of inclement weather unless two hours or less in duration and provided that weekend hours shall not create overtime pay, or call-in pay, except during Mardi Gras. The worker will be laid off during the months of November through March except to assist with Christmas Display preparations and removal as required. If qualified, the worker shall perform work of seasonal/contract workers during periods of lay off.

All work shifts for full-time employees shall include a one (1) hour unpaid lunch period, with the exception the Refuse Collection crew's Friday schedule set forth above.

The parties recognize that during the term of this Agreement, the Employer may effect changes at the Waste Water Treatment Plant which will entail some shift changes. The parties agree to bargain over these changes at the time they occur.

10.2 Rest Periods. All employees shall be entitled to a fifteen (15) minute maximum rest period in the morning and in the afternoon, inclusive of travel time. Rest periods shall be taken as reasonably close as possible to 9:30 a.m. and 2:30 p.m. When construction projects are in progress, rest periods shall be taken at the job site.

ARTICLE 11 - OVERTIME

11.1 Overtime Pay. Overtime work may be required of bargaining unit employees; however, any employee working in excess and outside of his scheduled hours shall only do so with the express permission of the Employer, obtained in advance if possible. In cases of emergency, the employee must notify his supervisor as soon as possible. Overtime (one and one-half [1 1/2] times the regular hourly rate) will be paid for all hours worked in excess of eight (8) hours per day (except where the regularly scheduled work day exceeds 8 hours) or 40 hours per week. No employee shall be sent home early and ordered to report at a later hour solely to avoid the payment of overtime. Overtime will be

> offered to the full-time bargaining unit employee on the scene. When employees are called in or if there is more than one full-time bargaining unit employee on the scene, all overtime for bargaining unit employees will be offered pursuant to the mutually agreed on call list. When more than one employee's regularly assigned duties overlap in the area in which the overtime is to be worked, the most senior qualified employee regularly assigned to the area will be offered the overtime. In the event there are no volunteers, overtime shall be required of the least senior employee in the classification in which employees' regularly assigned duties include the area in which the overtime is being worked.
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> 11.2 Compensatory Time. To the extent that it be allowed by law, employees may take compensatory time off (at the rate of time and one half) for overtime hours worked in lieu of taking overtime pay. Subject to legal restrictions, compensatory time must be taken during the calendar year in which it is earned. If applicable law is more restrictive, it shall be taken as provided by law. Notwithstanding the foregoing, compensatory time may be used at the employees' discretion, subject to the prior approval of the employee's immediate supervisor (and department head if the two are not the same).
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> 11.3 Call-In Pay. Employees who are called in to answer emergency calls after they have completed their normal working day, or employees who are called in to work other than their regularly scheduled work day, will receive a minimum of one (1) hour of call-in time plus pay for the time actually worked.

BACKGROUND

This grievance concerns provisions in the collective bargaining agreement relating to call-in pay.

The grievant, Earl Monnier, was, at the time of the alleged infraction, a 14-year veteran of the City work force, classified as a Heavy Equipment Operator II. As such, he was permanently assigned to the Public Works Department, also known as the City Garage, where the agreement provided for a "normal work day and work week" of "Five(5) eight (8) hours days Monday through Friday from 7:00 a.m. to 4:00 p.m." This grievance arose after the City required Monnier to work a 6:00 a.m. shift on refuse collection from January 29 to February 2, 1995, and paid him call-in pay for January 29, but not the rest of the week.

On February 9, 1995, Monnier filed a grievance, seeking four hours of call-in pay, representing one hour a day for each of the four days from January 30 to February 2. The City Personnel Committee rejected the grievance on March 13, 1995.

Section 11.3 of the collective bargaining agreement states as follows:

> Employees who are called in to answer emergency calls after they have completed their normal working day, or employees who are called in to work other than their regularly scheduled work day, will receive a minimum of one (1) hour of call-time plus pay for the actual time worked.

The parties agree that there are circumstances under which the City has paid call-in pay pursuant to Section 11.3, such as when employes are called in early to stripe streets, or are called back after their regular shift to flush water hydrants. The record also shows that the grievant worked on refuse collection, at the refuse collection hours without receiving call-in pay approximately 17 times from January through August, 1995. Given the size of the workforce, Monnier has been the only employe qualified to fill-in on refuse collection duty, which assignment he does not particularly enjoy.

THE PARTIES' POSITIONS

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

> The essence of this case is elementary. The grievant's regularly scheduled work start time is 7 a.m., according to Article 10, Section 10.01(a). There is no dispute that when required irregularly to work on the refuse truck that he is required to come in earlier than his regular start and is not compensated for it. Except for the first day which apparently has some magical properties.
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> The grievant is paid call-in pay for the first day he is required to work on the refuse crew but not for subsequent days. According to the City, this is because once on the refuse crew his regular hours have been adjusted. This is exceedingly difficult for the Union to understand since when employees know in advance they will be coming in early to do striping or flush hydrants they are paid the one hour plus time worked.
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> The grievant is clearly required to come in to work and to work other than his regularly scheduled work day. His regular posting/bid work day is 7 a.m. to 4 p.m. The grievant should be paid according to Art. 11, Sec. 3 when starting on the refuse truck at 6 a.m. The arbitrator should therefore make the employee whole for all losses caused by the City's violative actions.

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

> There is no claim that the employer is not allowed to temporarily transfer employes. The grievant's claim is that call-in pay must be paid when an employee's work schedule, or work day, is changed. The arbitrator is limited to this claim due to the contractual provision limited the issue to the subject matter of the grievance. The alleged infractions occurred on the employee's regular work day and were allegedly due to a change in the hours of work on those days.
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> Contract language is clear and unambiguous, and there is no issue as to how call-in pay has been paid in the past. The union argument requires interpreting the contract language as requiring call-in pay as

a penalty for the employer exercising its right to change an employes schedule of working hours on a specific work day. If that argument is successful, then the employer will not have any obligation to pay call-in when an employe is called in for weekend work, because the phrase, 'regularly scheduled work day' cannot mean both 'regularly scheduled hours of work on a work day' as well as 'regularly scheduled days of work.' If that had been the parties' intent, then both definitions should have been included.

The key sentence in this grievance, Article 11.3, is clear and unambiguous, and provides that employes who are called in on emergencies, or are called in to work on a day other than their regularly scheduled work day, are entitled to call-in pay. There is no contractual support for the union's argument that when an employee's scheduled hours for a day are changed with or without notice, that employee should be entitled to call-in pay.

Further, if call-in pay were to be paid at times other than when an employe receives overtime, this language would have been placed in Article 10, rather than in Article 11, where its placement cuts against the union theory that employes whose scheduled hours are changed but who do not receive overtime pay are entitled to call-in pay.

The arbitrator is contractually bound to base his decision on his interpretation of the express language of the agreement. There is no such express language that supports the union argument.

Finally, the reason for this grievance is that the grievant is angry because he was the only employe physically able to serve as a replacement on the garbage truck. It is not the employer's responsibility that the grievant feels put upon. Additionally, the grievant testified that the Street Superintendent, who is a union member, testified that the grievant should be getting call-in pay, but did not produce the Superintendent, thereby denying the City the opportunity to ascertain if he did, in fact, make that statement and the reasoning behind the statement, if it was made.

The grievance is without merit.

The union waived its right to file a reply brief. In further support of its contention that the grievance should be denied, the city posited further as follows:

> The union's interpretation of the relevant language is fundamentally flawed. The union argues that Article 11.3 deals with a situation where employes are required to come in to work at other than their regularly scheduled starting time. But the clause specifically deals with employes who are called in to work other than their regularly scheduled work day. Nowhere in Article 11.3 is an employee's starting time referenced or referred to.
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> There are three departments under this collective bargaining agreement; all employees who have been referred to during this proceeding work within the Public Works Department. The union's argument therefore, that an employe has changed departments and therefore is eligible for call-in pay because he/she did not have the privilege of bidding on the new department is specious. Upon first blush, this sounds like a reasonable argument. However, nothing in Article 11 is contingent upon an employee changing departments.
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> Given the plain unvarnished facts, it is apparent that the employer has correctly interpreted the contract language and has paid call-in pay when required to do so by the labor agreement. The employer is required to pay call-in pay when an employee is called in to work for emergencies, either before or after their shift of work or on a non-working day. When the employee's shift of work is changed and the employee has advance notice, no call-in pay is required.
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> The arbitrator must ignore arguments in the union's brief and rule that the grievance is without merit.

DISCUSSION

According to the Union's analysis, this case is "elementary," in that the grievant was clearly required to work other than his regularly scheduled work day, and is thus entitled to be made whole for all losses. The employer sees the matter differently, and presents a number of theories as to why the grievance should be denied.

The parties do agree that the correct answer to this grievance is to be found in the words of Section 11.3 of the collective bargaining agreement. I concur.

Arbitral standards for contract interpretation on this kind of question are fairly well-settled.

For fifty years, it has been held that words in an agreement "....cannot be considered as

mere surplusage...." Bordens's Farm Products, Inc. 3 LA 401, 402 (Burke, 1945). Arbitrators have believed that to "render meaningless the language contained....would be in contravention of accepted principles of contract interpretation. It is academic that the interpreter of contractual provisions must where possible and practical be given meaning to all provisions and avoid rendering as surplusage language which the parties have agreed upon." Beatrice Foods Co., 45 LA 540, 543 (Stouffer, 1965). It is further "a rule of contract interpretation that each word and phrase of a contract is to be given meaning on the theory that if the parties to the contract had not intended to give each word and each phrase meaning, then they would have deleted such language in order to assist the eventual interpreter." General Telephone Co. of Southwest, Ipavec, 86 LA 293, 295 (1985).

Thus, I begin my analysis of the agreement with the conviction that the words therein have meaning and purpose. Applying this assumption to Article 10, I conclude that "work day" and "work week" must have separate meanings. The employer, however, has implicitly argued that they are the same, by asserting that Section 11.3 "deals specifically with employes who are called in to work other than their regularly scheduled work day."

The employer argues that Section 11.3's reference to "work day" means "day on which the employe is scheduled to work." The list of the regularly recurring days on which an employe is scheduled to work, of course, is more typically referred to as the "work week." Unfortunately for the employer's argument, the collective bargaining agreement specifically defines and describes the work week for the several departments and classifications. If the parties had meant "work day" as used in Section 11.3 to mean "day of work," they would not have used both the terms "work day" and "work week" in Article 10. Simply put, "work day" means the schedule of hours in a particular department or classification; "work week" means the schedule of days. To have used two terms where one would have done would have fostered unnecessary surplusage. As discussed above, it is "axiomatic in contract construction that an interpretation which tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect." John Deere Tractor Co., 5 LA 631, 632 (Updegraff, 1946).

As the employer correctly notes, the way words are used elsewhere in the agreement can provide insight into the interpretation of Section 11.3. "Sections or portions cannot be isolated from the rest of the agreement and given construction independently of the purpose and agreement of the parties as evidenced by the entire document ... the meaning of each paragraph must be determined in relation to the contract as a whole." Great Lakes Dredge & Dock Co., 5 LA 409, 410 (Kelliher, 1946)

A review of the other sections in which the words "day" or "work day" appear fail to provide any meaningful assistance, other than to corroborate that there are no instances in which the contract uses the phrase "work day" to mean "day of the normal business week on which the employe is scheduled to work." Some sections are explicitly defined in terms of "working days,"

or "calendar days," for reasons particular to the parties special concerns in terms of collective bargaining and contract administration. Other terms to unspecified, with only our own general understanding to inform our interpretation.

The employer asserts the union is wrong in arguing that Section 11.3 "requires call-in pay as a penalty" when the employer "exercis(es) its right to change the employee's schedule of working hours on a specific work day."

But that is exactly what Section 11.3 does. Whether its intent is to serve as "a penalty," or a deterrent, or to provide compensation to an employe for the disruption caused, Section 11.3 requires call-in pay when the employer changes an employe's schedule of working hours on a specific work day.

The employer asserts it has the "right" to make such changes. Pursuant to Article 2, management does have the right to "assign work to such employes in accordance with the requirements" which it determines, as well as the right to "establish and change work schedules and assignments." These rights, however, exist only to the extent that they "must be exercised consistently with the other provisions" of the collective bargaining agreement and "union rights guaranteed by law."

One of those "other provisions of the contract" is Article 10, which sets forth the "normal work day and work week" for specific departments and classifications. The fact that the collective bargaining agreement explicitly sets for specific days and hours of work means that the employer does not have the unfettered "right" to change an employe's schedule, without activating the provisions of Section 11.3.

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

AWARD

That the grievance is sustained. The employer shall pay to Earl Monnier four hours of call-in pay, for work performed on January 30-February 2, 1995.

Dated at Madison, Wisconsin, this 5th day of April, 1996.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator

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