BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 1366 I, AFSCME, AFL-CIO

and

CITY OF RIPON

Case 29
No. 54148
MA-9566

Appearances:

Mr. James L. Koch, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Edward J. Williams, Godfrey & Kahn, Attorneys at Law, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1996-1998 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to resolve a grievance involving overtime and seasonal employees. The undersigned was appointed and held a hearing on August 14, 1996, in Ripon, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by September 26, 1996.

ISSUE:

The issue is:

> Did the Employer violate the collective bargaining agreement when it assigned the tasks of cleaning park bathrooms for two hours on Saturday and two hours on Sunday during the summer months to a summer employee, rather than have the Grievant, Howard Stibb, perform such work on overtime as he had done in for the past 16 years? If so, what is the appropriate remedy?

BACKGROUND:

The Grievant is Howard Stibb, an employee with the City for more than 17 years. Stibb is a maintenance worker/equipment operator. He was asked by the City if he wanted to maintain the parks on weekends during the summer after another employee retired, and Stibb started the weekend work in 1980. He usually started working on Saturdays and Sundays on an overtime basis between the third and fourth week in April until the second to third week in October. An annual celebration called Ripon Fest also required some overtime on the weekend, usually four to six hours per day on Saturday and Sunday, including the time spent on the parks duty.

Stibb's duties at the parks included emptying garbage cans, checking reservations for shelter houses and the need for extra tables or volleyball nets, seeing that the shelters and bathrooms were clean and that toilet paper was available for the entire day. Stibb checked on all five parks, with a sixth shelter added last year.

Stibb was not given other overtime as part of the labor contract's demand for equal distribution of overtime, because he was getting enough overtime on the weekends. The Union was aware of that arrangement. Stibb received about 80 to 88 hours of scheduled overtime each year for the weekend duty, plus another eight hours for Ripon Fest weekend work.

Negotiations for a 1996-1998 labor agreement were held on August 21, September 6, and November 28 in 1995, and on April 22 in 1996, the parties had a mediation session. Sometime in the middle of April, Maintenance Foreman Richard Fenner told Stibb that the City decided to use a summer help or a part-timer to work on the weekends in the parks instead of having Stibb do the work on overtime. Stibb has worked with seasonal employees or summer help in the parks and has supervised them.

During 1996, after Stibb no longer worked overtime every weekend in the parks, he was offered overtime for other jobs, such as working on Ripon Fest, setting barricades up, or filling in at the recycling center on a Saturday.

The City usually hires eight or nine seasonal employees or summer help to work in the parks, the streets and cemeteries. These employees have normally worked the same scheduled hours that full-time employees work and have not in the past been used to eliminate overtime. The seasonal employees are not part of the bargaining unit and are not allowed to work more than 600 hours altogether. They usually work with regular full-time employees, but they may work alone, especially when mowing or using a weed eater or working in separate parts of a cemetery or a park.

In its budget deliberations, the City Council was concerned that the weekend overtime for the parks was scheduled overtime, not emergency overtime. To address that concern, Fenner assigned a summer employee, Natalie Novitske, to the weekend park duty formerly done by Stibb. She started on May 20, 1996 and was tentatively scheduled to end on August 21, 1996. Novitske worked 40 hours a week including the time worked on Saturdays and Sundays.

The parties stipulated that neither party proposed changing contract language regarding overtime hours during their last round of negotiations.

THE PARTIES' POSITIONS:

The Union:

The Union asks that the labor agreement be reviewed as a whole, and asks that particular attention be paid to the preamble, the articles regarding recognition, management rights, wages, hours of work and overtime, holidays, seniority, grievance procedure, definitions, termination clause, the wage and classification schedule and the on-call addendum. All these articles and the agreement as a whole were negotiated for bargaining unit members and were never intended to cover seasonal summer employees. The Union challenges the assignment of traditional bargaining unit work to non-union employees to the detriment of one of the bargaining unit members, the Grievant Stibb.

The Union contends that the past practice of having the Grievant perform the work in the parks on weekends meets the definition of a past practice that is binding. The Employer never attempted to address the matter in negotiations and never repudiated the practice, even though the parties were negotiating the successor contract when the Employer decided to use summer help to work in the place of the Grievant in order to avoid paying him overtime.

The Grievant has considered his overtime assignment in the parks as part of his duties for the past 16 years and has depended on the overtime pay as part of his yearly income and budgeted accordingly. This is a substantial amount -- approximately $1,800 for the 1996 rates of pay for the normal 96 hours of overtime. This is nearly 86 cents per hour when taking the annual pay into account.

The Union asserts that the Employer's argument that the issue turns on whether overtime is guaranteed is misplaced. The real issue is whether the Employer decided to continue to provide services within the park system on weekends and provide additional services during Ripon Fest. The Union asks -- did the Employer simply decide to continue to provide the community with the exact same services that it has in the past, assigning them to non-union seasonal summer help at a lower rate of pay? The answer, it says, is a resounding "yes."

The Union states that the Employer's objective was not to change the direction of its operations, but to save money by circumventing a negotiated rate of pay for a service by assigning a non-union employee at the rate of $5.15 per hour to perform the duties normally done by the Grievant who was making $12.41 per hour. Then as a *quid pro quo*, the Employer offered to give the Grievant some of the overtime that would have normally been assigned to other bargaining unit employees, only robbing Peter to pay Paul. This only compounded the amount of employees affected by a reduced annual income. The Union argues that it entered into a settlement that would initially result in a three percent increase in overall salary compensation for all employees, only to see one of those employees take a 4.15 percent decrease in pay.

The Union believes that the Recognition Clause, Seniority, Job Posting, and the Overtime Articles, combined with other Articles of the negotiated agreement as a whole, entitle the Grievant

to the weekend duty hours. This assignment has been the fruit of the bargaining over the years, in that it provided him with a salary above and beyond his normal 40 hours per week every year for the past 16 years.

The Union asserts that the Employer has not advanced a meritorious reason or any specific rationale to support its assignment of seasonal summer employees to do the Grievant's weekend assignments, only that it had the right to assign its employees and the right to have the work done at straight time rather than overtime. The Employer should not be excused from the contractual and past practice obligations of the bargaining because of a change in heart or a desire to economize. If management were allowed to unilaterally expand or increase and/or decrease to discontinue an existing condition of employment without negotiating the same, it would have an undermining effect on the Union.

As a remedy, the Union asks that the Employer be ordered to cease and desist from assigning bargaining unit work to non-bargaining unit employees to avoid paying overtime and be ordered to make the Grievant and all others employees affected whole for all overtime hours that they would have worked.

The City:

The City argues that the express provisions of the bargaining agreement give the City the right to determine in the first instance whether work is to be done on straight time or on overtime. If the work is assigned on a straight time basis, Article VIII, Section H does not apply. Also, the labor agreement does not guarantee overtime.

The City asserts that the bargaining agreement is clear and unequivocal. Article II gives management the right to schedule and assign employees, as well as modify and eliminate positions. Article VIII expressly provides for a regular work week of eight consecutive hours each day Monday through Friday, with the hours changing during the summer. While the bargaining unit members' straight time hours are spelled out in the contract, work performed at straight time by summer help is not prohibited as long as it does not result in a loss of straight time hours or a layoff, because the labor agreement does not apply to summer help.

The City states that the arbitrator does not get to the issue of past practice if the contract language is clear and unequivocal, such as in this contract. It is clear under the contract that it is management who first determines if there is to be overtime. Also, the fact that the Grievant has not been scheduled to the weekend work as overtime does not mean that he will not get overtime where the City has an obligation to equally distribute overtime.

There is ample arbitral authority for the principle that when the labor agreement provides for or implies that the employer is to determine in the first place whether work is to be done on an overtime or straight time basis, then the provisions of the agreement concerning equalization

of overtime are not violated. Also, the fact that the work has previously been done on an overtime basis does not prevent the Employer from using substitutes to do the work on a straight time basis.

The Union's reference to past practice is misplaced. If the Employer has the contractual right to schedule and assign employees and it exercises its discretion in one way for several years, that does not mean that it has given up its right to exercise its discretion in another way, because it has the discretion to do so under the labor agreement. Arbitrators are hesitant to permit unwritten past practices to restrict the exercise of legitimate functions of management expressly incorporated into the labor agreement. Even if the Employer had not used the rights under Articles II and VIII of the labor agreement to assign work on a straight time basis to perform the weekend duty in the parks, it still would not have lost that right. Even if a practice existed, it cannot contravene the express language contained in Articles II and VIII regarding the City's discretion to schedule and assign work.

DISCUSSION:

While the Union urges the enforcement of a long-standing past practice, there is generally no need to look to the parties' past practice unless it is necessary to interpret ambiguous contract language. Past practices may also be used as gap fillers, to account for matters that the parties did not include in their contracts. In this case, the labor contract has addressed the matter of hours of work and overtime, and if the contract is clear and unambiguous, the past practice is irrelevant to the outcome of this grievance, because clear contract language should always take precedence over past practices.

The contract language most relevant here is the following:

ARTICLE II

Management Rights

> The Union recognizes the prerogative of the Employer to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers of authority which the Employer has not officially abridged, delegated, or modified by this Agreement are retained by the Employer. Unless otherwise herein provided, the management of the working forces, the right to hire, promote, transfer, schedule and assign Employees and to create, combine, modify and eliminate positions;
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> . . .

ARTICLE VIII

Hours of Work and Overtime

A. The work week shall consist of eight (8) consecutive hours of work of each day, Monday through Friday, excluding the Employees of the Wastewater Treatment Plant, as follows:

1. 6:30 A.M. to 3:00 P.M., inclusive of a one-half (1/2) hour lunch break; commencing the first full week in May and running through the last full week in September, 6:30 A.M. to 2:30 P.M. with two (2) fifteen (15) minute breaks taken at the work site.

. . .

F. Overtime shall be paid for all hours worked out of the scheduled hours specified in Section A, B, C, and D above, at the rate of time and one-half (1-1/2) the Employee's normal rate of pay.

. . .

H. Overtime is to be equally distributed as is practicable among the Employees, provided the Employees are qualified to do the required work on such call for overtime.

. . .

Under Article II, the Employer had the right to schedule and assign employees. It scheduled Stibb to work overtime on Saturdays and Sundays, primarily because it also was forced to schedule him to work eight hours a day Monday through Friday. As long as the Employer wanted a regular employee or a full-time bargaining unit member to perform duties in the parks on weekends, it had to schedule and assign the work on an overtime basis.

However, nothing in the labor contract would prevent the Employer from not scheduling Stibb or any other regular employee to the weekend work in the parks. The Employer came up with a way to get the work done on straight time by using a seasonal or summer employee, who had no guarantee of 40 hours a week Monday through Friday as did the bargaining unit members. Therefore, the Employer could schedule the summer employee through the weekend and also during the week all on straight time. Once the Employer assigned the weekend work to the summer employee, Stibb was no longer needed to do the work on overtime or at all on the weekends.

While the Union noted that the Employer gave away traditional bargaining unit work to a non-union employee, the summer help has apparently always performed some bargaining unit work. Stibb has worked with summer helpers in the parks and on the weekends. They do some of the work that bargaining unit members have done and will continue to do after the Employer dismisses them each year before they accumulate more than 600 hours.

The Employer could choose to have the summer help perform weekend work, or have regular bargaining unit members do it on overtime, or not have it done at all. If the Employer

chose not to have any work performed in the parks on the weekends, Stibb would have been in the same position that he is now, with no regular expectation of weekend overtime. The Union is correct when it states that the Employer decided to provide the community with the exact same services as it had in the past except to assign the work to seasonal summer help at a lower rate of pay. But that does not violate the collective bargaining agreement. The fact that the Employer used summer help to save money does not violate the agreement, and if the Employer chose to save more money by not having any work performed on weekends, it would not violate the agreement.

The Employer was not obligated to repudiate any past practice in bargaining where the practice was not binding due to the fact that the contract language takes precedence over that practice.

The labor agreement is certainly clear and straightforward in the matter of scheduling and assigning employees, as well as what hours of work are guaranteed and how overtime is to be distributed. Accordingly, the past practice cannot control in this case. The Employer had the right to assign the weekend parks duty as straight time rather than overtime to a seasonal employee. The Employer did not violate the collective bargaining agreement, and the grievance must be denied.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 23rd day of October, 1996.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator