BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE AND SOUTHERN WISCONSIN DISTRICT COUNCIL OF CARPENTERS

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 39

Case 1
No. 56638
A-5696

(Betty Garwell Grievance)

Appearances:

Mr. Matthew Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, appeared on behalf of the Carpenters.

Mr. John Peterson, Business Manager, OPEIU Local 39, appeared on behalf of OPEIU Local 39.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Carpenters and OPEIU Local 39, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on October 22, 1998, in Madison, Wisconsin. After the hearing, the parties filed briefs, whereupon the record was closed November 11, 1998. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. OPEIU framed the issue as follows:

> Did the Employer properly compensate the grievant, Betty Garwell, for her attendance at a training session held May 1, 1998, in Chicago, Illinois? If not, what is the appropriate remedy?

The Carpenters framed the issue as follows:

> Did the Employer violate the collective bargaining agreement by its payment to Betty Garwell for May 1, 1998?

Having reviewed the record and arguments in this case, the undersigned finds the Carpenters' proposed issue appropriate for purposes of deciding this dispute. Consequently, the Carpenters' proposed issue will be decided herein.

PERTINENT CONTRACT PROVISIONS

The parties' 1996-99 collective bargaining agreement contains the following pertinent provisions:

ARTICLE VIII-OVERTIME

. . .

> Section 3. Any Employee whose regular hours are eight (8) hours per day shall receive time and one-half for hours worked in excess of eight (8) hours per day.
>
> Section 4. For any work performed on Saturdays, Sundays, Holidays and for the tenth (10^{th}) hour and over in excess of the regular work day hours shall be compensated at double time.

FACTS

The Employer (Carpenters) is a labor union which represents carpenters in the southern half of Wisconsin. Its main office is in Milwaukee and a branch office is in Madison. The clerical employes of the Employer at both offices are represented by the OPEIU: the two clericals in the Madison office are represented by Local 39 and the five clericals in the Milwaukee office are represented by Local 9.

In the spring of 1998, the International Union decided to offer a one-day computer training seminar. This training seminar was subsequently scheduled for May 1, 1998 in a Chicago suburb. The District Councils in the Chicago region were not required to send employes but could if they wanted. Attendance at this training seminar was voluntary.

The Employer's Business Manager (in Milwaukee) initially decided to send just one clerical employe from the Milwaukee office to the seminar with the intention that that employe would then provide the other clerical employes with the information learned at the seminar. The Business Manager later changed his position and decided to offer all employes at the Milwaukee and Madison offices the opportunity to attend the seminar if they so wished. The Employer's Assistant Business Manager (Greg Sefcik), who is in charge of the Madison office, then offered both Madison clerical employes the opportunity to go to the seminar. Betty Garwell indicated she wanted to attend the seminar while Barb Helsel indicated she did not. Later, Helsel changed her mind and decided that she did want to go to the seminar. Sefcik then made additional arrangements so that there was space for Helsel at the seminar.

On April 30, 1998, Sefcik offered both Garwell and Helsel a ride to Chicago for the seminar. Both accepted this offer. Garwell lives in Brodhead, approximately 37 miles southwest of Madison, so arrangements were made for Garwell to meet Sefcik in Janesville near the interstate.

On May 1, 1998, Sefcik picked up Helsel at her home in the Madison area at 5:45 a.m. He then drove to Janesville where he picked up Garwell at the pre-set site at 6:45 a.m. He then drove to the Chicago suburb where the seminar was held. The seminar lasted eight hours and ended at 5:30 p.m. Afterwards, the same three Madison office employes returned to Wisconsin in Sefcik's car. Sefcik dropped off Garwell at her car in Janesville at 6:50 p.m. Sefcik then drove back to Madison and dropped off Helsel at her home.

The Employer subsequently paid all the clerical employes who attended the seminar (both those from Milwaukee and Madison) eight hours of straight time for the time they spent at the seminar. The Employer also paid those same employes three hours of overtime at time and one-half for the day.

Garwell grieved the Employer's overtime computation. She contends she is entitled to three and three-quarter hours of overtime for the day, not three hours. Garwell was the only employe from either office who grieved the Employer's overtime payment.

Garwell testified she has previously gone to Milwaukee for training sessions and been paid overtime "several times" for her travel time. Just one instance though was documented in the record. In that instance, Garwell was paid one and three-quarter hours of overtime in September, 1996, for travelling to and from Milwaukee. It is unclear from the record whether this particular training session was mandatory or voluntary, but it appears to have been mandatory.

The clericals in the Employer's Madison office do not usually work overtime beyond their 40-hour workweek. Other than the instant case, the only instance where overtime was paid that is documented in the record is the September, 1996 incident just referenced.

POSITIONS OF THE PARTIES

The Union contends the Employer did not properly compensate the grievant for the time she spent travelling to and from a training session held on May 1, 1998 in Chicago. According to the Union, the grievant is owed three and three-quarter hours of overtime for the day, not the three hours which the Employer has paid. It makes the following arguments to support this contention. First, the Union avers that the training session in Chicago was not voluntary, but mandatory. Second, the Union contends that travel time on a special one-day assignment to another city is compensable. To support this contention, it cites a portion of the Wisconsin Department of Workforce Development Administrative Code. As the Union sees it, Garwell's travel time on May 1, 1998 should qualify as compensable work time under state and/or federal law. Third, the Union argues that the Employer has paid employes overtime before for travelling to and from a training program. According to the Union, this has created a past practice which should be applied here. In order to remedy this contractual breach, the Union requests that the grievant be made whole for the lost overtime. The Union suggests two possible overtime calculations. The first is this: if the grievant is found entitled to time and one-half for the time in question, then she is owed $17.39. The second is this: if the grievant is found entitled to double time for the time in question, then she is owed $38.65.

The Employer contends its payment to Garwell for May 1, 1998 did not violate the labor agreement. It makes the following arguments to support this contention. First, the Employer avers that Garwell's travel time is not compensable under the contract. According to the Employer, nothing in the contractual overtime provision requires it to pay an employe for travelling to a voluntary training seminar. It notes in this regard that it does not pay Garwell for her travel time between her home and her work site in Madison. It contends that the trip to Chicago should not be any different. Second, the Employer contends that Garwell's travel time to and from Chicago is not compensable under the Fair Labor Standards Act (FLSA) either. It cites the case of FOX V. GENERAL TELEPHONE CO. OF WISCONSIN, 85 Wis. 2D 698 (1978) to support this proposition. Third, in response to the Union's contention that a past practice exists governing payment for travel time, the Employer disputes the existence of same. It argues that the one instance documented in the record where Garwell received overtime for her travel time simply does not establish a binding past practice. The Employer therefore requests that the grievance be denied.

DISCUSSION

At issue here is the whether the Employer's payment to Garwell for May 1, 1998, violates the labor agreement. The Union contends that it does while the Employer disputes that contention.

In contract interpretation cases such as this, I normally focus attention first on the contract language and then, if necessary, on the evidence external to the agreement such as an alleged past practice. In this case though, I have decided to structure the discussion so that this normal order is reversed. Thus, I will address the alleged past practice before looking at the contract language. My reason for doing so is this: if I address the contract language first and find it to be clear and unambiguous, there would be no need to look at any evidence external to the agreement (i.e. an alleged past practice) for guidance in resolving this contract interpretation dispute. Were this to happen, the case could be decided without any reference whatsoever to the alleged past practice. The problem with this approach is that the Union sees this case, in part, as a past practice case. Thus, if I were to decide this case without reviewing the alleged past practice, I would not have addressed one of the Union's main contentions. I have therefore decided to use this unique structural format and review the Union's past practice contention in order to complete the record.

Past practice is a form of evidence commonly used or applied to clarify ambiguous contract language. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given to the contract. Said another way, the actual practice under an agreement may yield reliable evidence of what a particular provision means. In order to be binding on both sides, an alleged past practice must be the mutually understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future.

That said, the focus turns to whether the Union established the existence of a practice governing payment for travel time. To support its contention that a practice exists, the Union relies on the testimony of its sole witness, Garwell. She testified she has been paid overtime for her travel time to Milwaukee "several times". Just one instance though was documented in the record where overtime was paid to her for her travel time. In that instance, Garwell was paid one and three-quarter hours of overtime in September, 1996, for travelling to and from Milwaukee for a training session.

Based on the following rationale, I find that what was just referenced does not establish a past practice which is entitled to contractual enforcement. To begin with, while Garwell testified that she had been paid overtime for her travel time "several times", the only specific instance which was established at the hearing was the one which occurred in September, 1996. Thus, just one instance was established. It is a generally accepted arbitral principle that a single instance is insufficient to create a past practice which supplements the labor agreement. Moreover, aside from that, it is unclear whether the training that occurred in September, 1996, was mandatory or voluntary. In the context of this case, the distinction between mandatory and voluntary training is important because employers sometimes pay travel time for the former (i.e. mandatory training) but not for the latter (i.e. voluntary training). That certainly is the position of the Employer here, namely that it does not have to pay overtime for travel

time for voluntary training. Notwithstanding the grievant's contention to the contrary, the training at issue here was voluntary. This point is conclusively established by the fact that Garwell's co-worker, Helsel, initially decided not to go to the training session. If the training session had been mandatory, she would not have had a choice – she would have had to go. The fact that she had a choice proves that the May 1, 1998 training session in Chicago was voluntary. If the Union had established that the September, 1996 training session which Garwell attended was voluntary, then that training (and how travel time for it was paid) would certainly be relevant here. However, the Union did not prove that. In fact, it appears from the record that the training on that date was not voluntary, but mandatory. That being so, the training involved herein has not been shown to be identical to the training where the Employer once paid Garwell for her travel time. This basic difference means that just because the Employer paid Garwell for her travel time to a training session in September, 1996 does not mean that the Employer had to do so here. Again, this is because the training involved in this instance (i.e. voluntary training) has not been shown to be the same as the training involved in the September, 1996, instance. Given the foregoing, I find that no enforceable past practice exists concerning the payment of overtime for travel time.

Having so found, attention is turned to the pertinent contract language. The contract language applicable here is Article 8, Sections 3 and 4. Section 3 provides that "any employe whose regular hours are eight (8) hours per day shall receive time and one-half for hours worked in excess of eight (8) hours per day." Section 4 provides that "for any work performed on Saturdays, Sundays, Holidays and for the tenth (10^{th}) hour and over in excess of the regular workday hours shall be compensated at double time." Under Section 3, overtime is paid at the rate of time and one-half, while under Section 4 overtime is paid at double time. The plain meaning of Section 3 is that time and one-half is paid for "hours worked in excess of eight hours per day." Similarly, the plain meaning of Section 4 is that double time is paid for "work performed" on weekends, holidays and for the 10^{th} hour and over. Neither of the overtime provisions just referenced specify that travel time qualifies as time worked for purposes of determining overtime.

The overtime language will now be applied to the instant facts. May 1, 1998 was a long day for Garwell and the others who went to the training seminar. That day they travelled to Chicago, sat through the seminar all day, and then travelled home. The travel time was at least two hours each way. There is no dispute that the time at the seminar itself qualifies as work. What is disputed is whether the travel time involved qualifies as "work" or "hours worked" for purposes of determining overtime. I find it does not for the following reasons. To begin with, it is noted at the outset that there can potentially be different answers to this question in different legal forums. For example, if Sefcik's car had been involved in an accident on the way to or from Chicago, and someone had been injured, the State Workers' Compensation Division would probably conclude that the travel time involved was work-related. That said, this arbitrator is not applying the State Workers' Compensation law herein. Instead, I am applying the labor agreement. The contractual overtime provision does not say

that travel time qualifies as "work" or "hours worked" for purposes of determining overtime. If the parties had intended that, they could have said so. They did not. Second, both Sections 3 and 4 envision that the time in excess of the employe's regular work hours involve work. Insofar as the record shows, Garwell did not do anything to benefit the Employer while she was a passenger in Sefcik's car that day. Specifically, she did not do any "work" while she was in the car travelling. Third, it is noted that Garwell travels each day from her home in Brodhead to her work site in Madison. She has done so for many years. Historically, her travel time has not been considered work time or compensable time. Thus, she is not paid for travelling between her home and her work site. On May 1, 1998, the location of her work site changed for one day from Madison to Chicago. While it certainly took her longer that day to get to her work site than it normally does, that change does not alter the basic principle just noted that Garwell is not paid for travelling between her home and her work site. Given the foregoing, it is held that Garwell's travel time on May 1, 1998 to and from Chicago does not qualify as "work" or "hours worked" for the purposes of determining overtime. This finding means that Garwell did not work more than eight hours on that day, so overtime compensation was not required to be paid to her. The fact that the Employer subsequently chose to pay all the clerical employes who went to the seminar three hours of overtime pay for the day does not change this result.

Attention is now turned to the Union's contention that the Employer's actions here violated state and/or federal wage and hour laws governing overtime. Assuming for the sake of discussion that the Employer's actions here did violate one of those laws, the undersigned is not empowered to enforce those laws and remedy same. This is because my authority is limited to interpreting the labor agreement and resolving questions of contractual rights. Any alleged statutory violation is separate and distinct from an alleged contractual violation. Consequently, nothing in this award should be construed as a ruling on state and/or federal wage and hour laws governing overtime.

In light of the above, I issue the following

AWARD

That the Employer did not violate the collective bargaining agreement by its payment to Betty Garwell for May 1, 1998. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 28th day of January, 1999.

Raleigh Jones /s/

Raleigh Jones, Arbitrator
REJ/gjc
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