

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF OSHKOSH

and

**INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS LOCAL 316**

Case 293
No. 56783
MA-10416

(Nighttime Training)

Appearances:

Godfrey and Kahn, S.C., by **Mr. William G. Bracken**, Coordinator of Collective Bargaining Services, 219 Washington Street, Oshkosh, Wisconsin 54902-1278, appearing on behalf of the City of Oshkosh

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Mr. John B. Kiel**, Attorney at Law, 700 West Michigan, Suite 200, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the International Association of Firefighters, Local 316.

ARBITRATION AWARD

The City of Oshkosh, hereinafter referred to as the City, and the International Association of Firefighters, Local 316, hereinafter referred to as the Union, 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 Edmond J. Bielarczyk, Jr., to arbitrate a dispute over nighttime training. Hearing on the matter was held in Oshkosh, Wisconsin on December 10, 1998. A stenographic transcript of the proceedings was prepared and received by the arbitrator on December 22, 1998. Post hearing arguments and reply briefs were received by March 2, 1999. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:
“Did the City violate the collective bargaining agreement when it issued the policy ordering employees to engage in nighttime training at the airport?”

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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ARTICLE II

MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement.

The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent or purposes of this agreement.

. . .

ARTICLE IV

NORMAL WORK WEEK – NORMAL WORK DAY – NORMAL WORK SCHEDULE

The average normal work week for the Fire Department shall be fifty-six (56) hours to be worked on a three (3) platoon system, utilizing a duty system of twenty-four (24) hours of duty starting at 7:00 a.m. and a forty-eight (48) hours off duty, with the exception of the following classifications:

- A. Lieutenant of Instruction
- B. Lieutenant of Inspection

The work week for the following classifications shall be forty (40) hours to be worked in four (4) consecutive ten (10) hour days from 7:00 a.m. to 5:00 p.m. either Monday, Tuesday, Wednesday, Thursday or Tuesday, Wednesday, Thursday, Friday:

- A. Lieutenant of Instruction
- B. Lieutenant of Inspection

In some cases an individual will voluntarily work an extra 24 hour shift and then take 3 days in a row off instead of time and one half. (Platoon transfer.)

The words platoon transfer in the above sentence shall mean a transfer of a permanent nature, not a temporary transfer. A permanent transfer shall consist of no less than five (5) work days. Transfers of any nature shall not be used to circumvent Compensatory time and one-half. Any employee who volunteers to attend schools during his off-duty time will receive expenses that will cover meals, lodging, mileage and registration fee if approved by the administration. No other compensation for off duty time involved will be paid.

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ARTICLE XII

RULES AND REGULATIONS

The Employer may adopt and publish rules which may be amended from time to time, provided, however, that such rules and regulations shall be first submitted to the Union for its information prior to the effective date.

This article in no way will affect the rules and regulations falling under the jurisdiction of the Police and Fire Commission as set forth in state statutes. The employer agrees that any rules or regulations pertaining to wages, hours, conditions of employment whether now in force or hereafter adopted shall be voided by this agreement.

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ARTICLE XV

PRESENT BENEFITS

The parties agree to maintain the present level of benefits and policies that primarily relate to mandatory subjects of bargaining, not specifically referred to in this agreement. This provision is expressly limited to mandatory subjects of bargaining.

BACKGROUND

The Union and the City have been parties to a number of collective bargaining agreements that govern the wages, hours and working conditions of firefighters employed by the City. The instant matter arose when the City's Fire Chief, Stanley Tadych, directed the issuance of a work rule that required firefighters to perform nighttime training duties at Wittman Airport.

The City employs ninety-seven (97) employees assigned to five (5) stations located throughout the City. A typical workday for firefighters begins at 7:00 a.m. when they report for duty. Normally, until 11:00 a.m., they perform routine duties of preparing their equipment, training, and maintaining the fire station. From 11:00 a.m. until 1:00 p.m. they are on break for lunch. From 1:00 p.m. until 4:30 p.m. they again perform routine duties. After 4:30 p.m. they normally rest and relax until relieved at 7:00 a.m. the following day. Historically bargaining unit employees have referred to the time between 7:00 a.m. and 11:00 a.m., and, 1:00 p.m. and 4:30 p.m. as the duty day. The hours between 11:00 a.m. and 1:00 p.m., and 4:30 p.m. and 7:00 a.m. have been referred to as stand-by time. The City has issued a policy that allows employees the use of recreational materials during the stand-by time. However, the collective bargaining agreement is silent concerning the typical workday schedule, duty day and stand-by time.

In 1990 the City scheduled training on Saturdays and the Union grieved the matter to arbitration. In denying the grievance the arbitrator noted that assignment of duties is a permissive subject of bargaining and concluded the City was entitled to schedule Saturday firefighter certification training sessions as a part of a firefighters normal job duties.

During bargaining for the 1993 and the 1995 collective bargaining agreements the Union proposed language which would explicitly define the duty day and limit the City's ability to assign duties after 4:30 p.m. with certain specific exceptions such as nighttime training at the airport. The City rejected the proposals and the collective bargaining agreement remained silent concerning a defined duty day.

In 1998, during a meeting with the Wittman Airport Manager, the manager indicated to Chief Taydych that he was concerned the Fire Department vehicles assigned to the airport were not being exercised on a regular basis. Federal Aviation Administration regulations require familiarization with the airport. Pursuant to Chief Taydych's order Captain Stievo issued a directive on July 20, 1998 that Engine 14 make one night run per month and Engine 17 to make one night run every other month. The training included taking the vehicle out and driving around the airport's access roads and taxiways and takes approximately (30) thirty to forty-five (45) minutes. The Association filed the instant grievance alleging the nighttime training constitutes a change in the level of benefits, thus a violation of Article XV. Thereafter the matter was processed to arbitration in accord with the parties' grievance procedure.

Union's Position

The Union contends that because the City's work rule pertained to hours of active work it is voided by the contract's present benefits clause. The Union asserts the Wisconsin Employment Relations Commission has long held that the length of a firefighter's duty day is a mandatory subject of bargaining and argues that the collective bargaining agreement bars the City's efforts to unilaterally extend the duty day. The Union argues that at the time the current agreement was signed the duty day ended at 4:30 p.m. Further, that no work rule, policy or practice compelled firefighters to perform routine driver training after 4:30 p.m. The Union asserts the rule ordered by the Chief violated Article XII and Article XV.

The Union also argues that nighttime driver training is neither essential nor necessary to safe and efficient response at the airport. The Union argues only Chief Tadych and Assistant Fire Chief Vincent Straus insist nighttime training is necessary. The Union also points out no federal or state official compels such training and the airport manager did not demand such training. The Union claims the Chief's decision that familiarization at night is important because a firefighter could get lost or turned around has never occurred. The Union also asserts that familiarization could be effectively accomplished before 4:30 p.m. and that this is supported by the testimony of firefighters John C. Gee, Peter J. Volkman and John G. Searls. The Union concludes the opinion of the Chief and Assistant Chief regarding the importance of nighttime training is speculative, stand alone and unsupported and not necessary to safe and efficient response.

The Union also argues that the City's attempt to extend the work day should be rejected as a violation of past practice and as an effort to obtain through unilateral action that which it rejected in bargaining. The Union argues the record does not support the existence of a practice of conducting nighttime training at the airport but does establish a clear, unmistakable, long term, consistent custom of ending the active work day at 4:30 p.m.

The Union acknowledges that the parties did discuss the issue of nighttime airport driver training during bargaining during 1993 and 1995. The Union asserts it offered to alter the *status quo* by allowing nighttime training at the airport as an incentive to incorporate the *status quo* into the collective bargaining agreement. The Union points out it withdrew the proposals only on the assurances of the City's representative Norbert W. Savatos that there would be no major changes in the duty day practice then in existence. The Union argues to deny the grievance would be destructive to the bargaining process.

The Union would have the undersigned sustain the grievance and direct the City to cease and desist nighttime training.

City's Position

The City contends arbitral precedent supports the City's contention that it has the inherent managerial prerogative to assign tasks, including training and that the determination as to what tasks are to be assigned to firefighters as part of their normal scope of duties constitutes a permissive subject of bargaining. In support of its position the City points to the 1990 arbitration award concerning the assignment of Saturday training. The City asserts that matter is similar to the instant matter and asserts the Union is advancing the same arguments rejected by the arbitrator therein. The City also points to a 1994 award wherein the arbitrator held the assignment of terry towel laundering was within the regular scope of a firefighter's employment and thus did not relate to a mandatory subject of bargaining. The City asserts the assignment of nighttime training is within the scope of a firefighter's employment and thus does not relate to a mandatory subject of bargaining.

The City also asserts the right to schedule work, including training, is a normal and customary right reserved to management. The City points out nothing in the agreement restricts or limits the City's right to schedule training. The City also points out Article XII allows the City the right to adopt rules and regulations. The City points out the Wisconsin Employment Relations Commission has held that if an employer is vested with a contractual right it is not required to bargain with the union when the employer exercises that right.

The City also points out there is no duty day language in the collective bargaining agreement and argues the agreement does not restrict or limit the City's right to schedule work, including training, beyond the so-called duty day. The City also argues the Union failed to demonstrate an ironclad duty day as it uses the term. The City asserts the record demonstrates that there has always been flexibility in the work schedule to accommodate unique situations including training. The City also asserts it rejected the Union's proposals concerning duty day language in order to maintain flexibility in its scheduling. The City argues that there have always been exceptions to the duty day and it has historically required firefighters to engage in activities outside the duty day. These duties included EMS training one night per month and HAZMAT training at night.

The City also argues nighttime training exercises are reasonable. The City points out the purpose is to familiarize firefighters with the layout of Witman Field, would not consume a large amount of time (thirty to forty-five minutes) and would be reduced when firefighters demonstrated they were familiar with the layout of the airport. The City also argues in light of the Department's mission and responsibilities this is not a significant expansion of what is expected and makes a lot of sense in the provision of greater protection to potential victims.

The City also argues the right to schedule nighttime training is a permissive subject of bargaining and therefore there is no violation of Article XV. The City also points out the Wisconsin Employment Relations Commission has held that if a particular duty is fairly within the scope of responsibilities normally performed by the employees involved the decision to perform such work is a permissive subject of bargaining. The City concludes that while a specific duty day may be a mandatory subject of bargaining, the Union can cite no such language. The City asserts the assignment of nighttime training will only enhance effectiveness in performance of regular job duties.

The City also argues the remedy sought by the Union is harsh, absurd, nonsensical and contrary to public policy. The City further argues the Union is attempting to obtain through arbitration what it could not gain through collective bargaining.

The City would have the undersigned deny the grievance.

Union's Reply Brief

In its reply brief the Union argues the collective bargaining agreement does not afford the City the right to unilaterally implement a work rule compelling nighttime drive training. The Union points out that the City's management rights must be exercised consistently with the other provisions of the agreement and the spirit, intent and purpose of the agreement. In support of its position the Union points to Article II, XII, XV, and XXII and asserts the City is asking the undersigned to ignore Article XV, Present Benefits and if the grievance is denied because of the absence of duty day language Article XV is rendered meaningless. The Union asserts there has been a clear practice of terminating driver training at 4:30 p.m. and if the City desires to terminate the practice or the terms of the collective bargaining agreement it should do so in bargaining.

The Union also argues the City's reliance on Wisconsin Employment Relations Commission case law is misplaced and can provide no support for the City's position. The Union points out the language in the parties' collective bargaining agreement differs from the cases cited by the City. The Union points out Article XII specifically voids any work rules pertaining to wages, hours and conditions of employment. The Union concludes the collective bargaining agreement limits the right of the City to order nighttime driving training and that it has no vested right to order such training.

The Union also argues that bargaining history does not provide a sufficient basis on which to disregard a well established past practice. The Union points out the duty day historically ended at 4:30 p.m. and that this practice is firmly entrenched as demonstrated by the settlement of the use of recreational materials by firefighters. The Union also asserts the 1993 and 1995 proposals to include duty day language into the collective bargaining agreement simply proposed the incorporation of the status quo. The Union asserts it withdrew the duty day proposals when it was assured the status quo would continue unchanged. The Union argues the City should not be allowed to change when it gave assurances the practice would remain unchanged.

The Union also asserts the narrow exceptions of paramedic training and HAZMAT training to the duty day practice should not be allowed to open the door to nighttime training.

The Union also argues the 1990 arbitrator's award determining the scheduling of routine activities is not dispositive because the facts herein are significantly different, specifically a particular day of the week. The question herein concerns the time at which the routine duty is assigned not the duty that was assigned. The Union asserts the firefighters are well trained in airport response even though they have not trained at night. The Union also asserts the reasonableness of the directive is not in dispute because the parties did not put a reasonable standard in the agreement but a standard, which prohibits rules pertaining to wages, hours and conditions of employment.

City's Reply Brief

The City, in its reply brief, asserts the two previous arbitrator awards on the same provisions of the collective bargaining agreement are controlling in the instant matter. The City asserts the rationale articulated in the awards support the City's contention it did not violate Article XV when it issued the directive concerning nighttime training. The City stresses there is no duty day language in the collective bargaining agreement and the Union's use of the phrase is the only reference to the term. The City also argues the settlement of when firefighters can read recreational material does not establish the existence of a duty day. The City also points out that the Union assertion that in the past stand-by time has remained free of routine duties ignores the arbitrator award concerning Saturday training and that the City has scheduled training over the lunch period. The City asserts nighttime training at the airport falls within the normal scope of the firefighter's employment and is essential for providing fire protection. The City concludes the Union's reliance on Article XV is misplaced and point out that arbitrators have already held that the assignment of duties which fall with the scope of a firefighter's employment does not violate this provision of the collective bargaining agreement.

The City also argues that the record demonstrates the parties have adopted a flexible approach to the duty day and undermines the attempt by the Union to have a strict duty day interpretation. The City also stresses the rejection of the Union's 1993 and 1995 bargaining proposals concerning duty day language supports the City. The City also points out that the

Union argument that it only attempted to incorporate the status quo into the agreement would of allowed the City to direct employees to have nighttime training at the airport.

DISCUSSION

The record demonstrates that the instant matter is not the first time that a dispute has arose between the parties concerning the duty day and stand-by time. The record also demonstrates this is not the first time employees represented by the Union have trained during nighttime hours. The 1990 award noted that other than the Management Rights provision the only other article on point was the Present Benefits provision, herein Article XV. This provision mandates that the present level of benefits not referred to in the agreement that are mandatory subjects of bargaining be maintained. The Union argument is that stand-by is a benefit and must be maintained at the same level it was prior to entering into the current contract. In order for the Union to be successful it must demonstrate stand-by was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as fixed and established.

The Union has tried unsuccessfully to bargain into the collective bargaining agreement provisions which specifically identify the duty day and stand-by. The City has consistently refused to incorporate such language into the agreement. The City has even refused to use the terminology used by the Union as demonstrated by the Policy #123.00 concerning recreational materials:

POLICY #123.00

123.00 SUBJECT: USE OF RECREATIONAL MATERIALS, AND OTHER
 ASSOCIATED MATERIALS*

123.00 PURPOSE: The purpose of this policy is to define the time periods for
 the use of recreational activities and other associated
 materials.

123.02 ACTION:

The use of recreational materials and other associated materials shall only
be during the following time periods:

During fire department business days:

Anytime before 7:00 AM

During the hours of 11:00 AM and 1:00 PM

After 4:30 PM

*Recreational materials and other associated materials are defined as follows:

Any materials such as newspapers, books, magazines, playing cards, cross word type puzzles, computer games, etc. non fire/medical related.

The policy does not use the terms duty day or stand-by but identifies the time frames as “fire department business days.” Other employees in the past have been directed to attend training sessions at night (paramedics and HAZMAT). The Union theory is that this is another inroad into stand-by because the parties have not had nighttime driver training in the past. It is however, another form of training and the City has directed firefighters to attend training at night in the past. There is no evidence the Union grieved nighttime paramedic training. There is no evidence the Union grieved nighttime HAZMAT training. There is evidence the Union grieved new training during Saturday standby and this was rejected by an arbitrator. Thus the undersigned finds there is no defined practice which is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a fixed period of time which prohibits the City from assigning nighttime driver training at the airport.

The Union argument that nighttime driver training is not necessary is also unpersuasive. Nothing in the collective bargaining agreement impedes the City’s ability to determine what training is necessary to maintain a safe and efficient work force. While the Union has argued that no one has ever gotten lost at the airport, the familiarization sought by the City does not seem unreasonable. Common sense would dictate that driving at night is different than driving in the daytime. Further, having found there is not a past practice that prevents the City from assigning nighttime driver training at the airport, the undersigned also finds there is no violation of Article XII when the City assigned nighttime driver training at the airport.

The Union has also argued that when it withdrew its proposals concerning stand-by during the 1993 and 1995 negotiations it was assured there would be no changes in the duty day. However, what the Union thought constituted the duty day and what the City thought constituted the duty day is clearly in dispute. Reasonably, the City could have concluded that the Union’s proposal of adding the ability to have nighttime driver training in the Union’s stand-by proposal was an acknowledgement on the Union’s behalf that the City already had the right to direct such training. Further, the City has steadfastly maintained it did not agree to incorporate stand-by language in order to retain flexibility in the assignment of duties. In the City’s view there is no change in the duty day *status quo*. The undersigned concludes that there was no meeting of the minds as to what the duty day *status quo* was. Therefore, the City’s decision to direct nighttime driver training does not violate the intent of the parties collective bargaining agreement.

Therefore, based upon the above and foregoing and the testimony, evidence and arguments presented, the undersigned finds the City did not violate the collective bargaining agreement when it issued the policy ordering employees to engage in nighttime driver training at the airport. The grievance is denied.

AWARD

The City did not violate the collective bargaining agreement when it issued the policy ordering employes to engage in nighttime driver training at the airport. The grievance is denied.

Dated at Madison, Wisconsin, this 12th day of August, 1999.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator