BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**KAUKAUNA CITY EMPLOYEES UNION,
LOCAL 2150, IBEW**

and

**THE CITY OF KAUKAUNA
(UTILITY COMMISSION)**

Case 97
No. 57399
MA-10608

(Grievance of Gerald Kieffer)

Appearances:

Ms. Naomi E. Soldon, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

Mr. Edward J. Williams, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appeared on behalf of the Employer.

ARBITRATION AWARD

On March 16, 1999, Local 2150, IBEW and the City of Kaukauna (Utility Commission) requested that the Wisconsin Employment Relations Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Hearing on the matter was conducted on June 18, 1999 in Kaukauna, Wisconsin. A transcript of the proceedings was made and distributed by July 7, 1999. Post-hearing briefs were submitted, and exchanged by August 16, 1999.

This Award addresses the hours assigned to Gerald Kieffer, an employe of the Utility Commission, between August 27 and September 17, 1998 when Mr. Kieffer was working in the office while on light duty due to an injury.

BACKGROUND AND FACTS

Gerald Kieffer, the grievant, has been employed by the Kaukauna Electric and Water Utility for approximately 17 years and holds the position of Lead Lineman.

Mr. Kieffer suffered a work-related injury on or about March 28, 1998 and subsequently underwent surgery. Kieffer's physician authorized his return to work to perform light duty the first week of May, 1998. The Utility placed him in the office department performing office work during this period. His work hours during this time frame were 7:30 a.m. to 3:30 p.m., his normal working hours in the line department as a Lead Lineman. Those hours differ from office hours, which extend to 4:00 p.m. He worked in the office department in a light duty status for approximately three to four weeks.

Kieffer continued to suffer pain, and underwent additional surgery in July, 1998. For the next several weeks, he was off work recovering from that surgery. On August 7, 1998, his doctor authorized his return to work with restrictions from the period August 24 to September 21, 1998. Kieffer's attending physician indicated his return was for "office type work only, paperwork only, no lifting, extended standing or bending." Further, the doctor indicated "Patient must be able to elevate left leg as needed to decrease swelling – any concerns regarding this – please contact our office."

Kieffer approached Pete Prast, General Manager, to determine whether there was work available to meet the doctor's restrictions. Prast placed Kieffer in the office department performing a computer project. This assignment was confirmed by memo dated August 28, 1998, which provides as follows:

> TO: Jerry Kieffer
>
> RE: Temporary Job Transfer
>
> This memo is written to document your temporary job transfer. Due to your light duty status, you have been temporarily transferred to the office. This temporary transfer will continue until either there is no longer any work for you to do or your work status changes. I anticipate that we have approximately two weeks of work in the office.

> With a job transfer, you are expected to follow the work rules as they pertain to the department that you are currently assigned to. This means that work hours, lunch and coffee breaks, etc. must be done in accordance to the regular practices of the office. Regular office hours are 7:30-4:00 p.m., Monday-Friday, with a half-hour unpaid lunch break.
>
> You must understand that it is imperative that we have all employes within the department working under the same set of work rules.
>
> I would be glad to meet with you to discuss any of the items contained within this memo.
>
> Pete Prast

Upon receipt of the memo, Kieffer filed a written grievance which takes issue with the hours of work he was assigned. The text of that grievance provides the following:

> This written grievance is a follow-up to my verbal grievance of 8-27-98 to Pete Prast concerning changing my work hours from 7:30 a.m. to 3:30 p.m. to 7:30 a.m. to 4:00 p.m. with an unpaid 30-minute lunch. In Exhibit B, Work Schedule, my hours as a lineman are 7:30 a.m. to 3:30 p.m., with a 15-minute paid break in the morning, and a 20-minute paid lunch break. I was brought back to work on light duty because of knee surgery. A job was created to get me off workman's comp: this job is not a regular office job and I am contesting having my hours changed. All previous people that have gone on light duty have been allowed to work 7:30 a.m. to 3:30 p.m. No one was forced to change their hours. I have plenty of precedent not to have to change my hours. I am asking that the unpaid lunch be paid as overtime as I am working 8 ½ hours per day, 7:30 a.m. to 4:00 p.m.

Notwithstanding Prast's August 28 memo, Kieffer began his temporary assignment by taking breaks timed to coincide with those taken by his regular work colleagues. He was subsequently directed to work the schedule, including the breaks, taken by office personnel, and complied with that direction.

Prast denied Kieffer's written grievance, by memo dated September 19, 1998. That memo provides the following:

There are several statements in your written grievance which need to be clarified. It is true that you were brought back on light duty because of knee surgery. However, a job was not created for you. The tasks that you were assigned was a specific project that is crucial for the office to be able to bill out the new method of recovering the fire protection charges. This work would have been done by office staff or ORCOM.

Other people that have been on light duty have worked on projects that involved work within an operating department, i.e. hydro, distribution, system operating and water departments. The hours that they worked coincided with the department's normal work hours. As was described to you, if you were working in the meter department your hours were changed to that department's normal hours.

Your written grievance describes that the work schedule has been violated. Schedule B defines work schedules by job descriptions and departments, not by an individual's name. On August 27, 1998, you were noticed that you were temporarily assigned to the office and that you were expected to follow the same work rules as other office staff, including their work hours.

Since the work hours, as described in Schedule B has not been violated your written grievance is denied.

Pete Prast

The record contains instances of other employes who worked in the office, yet maintained an alternative work schedule. Mr. Kieffer's daughter was employed as a non-bargaining unit college summer helper. Her normal work schedule was 7:30 a.m. to 3:30 p.m., though she worked in the office department. She worked alongside bargaining unit members whose hours were the contractual 7:30 a.m. to 4:00 p.m.

Ken Arbs worked light duty in the office, alongside Kieffer, during Kieffer's first light duty assignment. Arbs worked in the same room performing the same work as did Kieffer in May, 1998. Like Kieffer, Arbs worked 7:30 a.m. to 3:30 p.m.

In May, 1992, Gary DeBruin was an electric meter man. However, DeBruin was assigned to read meters for approximately 90 percent of his work time. This responsibility was not a part of his meter man job. The hours of work applicable to a meter man under the contract in effect at the time were 7:00 a.m. to 3:30 p.m. with a one-half hour lunch break. DeBruin was assigned the hours of a meter reader, which varied from his hours as a meter

man, in light of his assignment to read meters. The Union objected to the change in DeBruin's hours. In February, 1993, the parties reached an agreement resolving DeBruin's grievance. That agreement caused the summer hours of meter readers to be modified, and the employer agreed to pay DeBruin $600.00 in satisfaction of his grievance.

In approximately 1995, Robert Murphy, a bargaining unit employe, entered into an agreement with the Utility that he would work four 10-hour days, rather than the regular work hours of his operational department. The Union grieved, arguing that any time an employe worked in excess of eight hours per day was to be considered overtime. The grievance was resolved by restoring Murphy to the contractual schedule of hours, and awarding him approximately $650.00.

In 1987, Ray Hardtke, a foreman in the water department was temporarily assigned to the office. Hardtke had injured his knee and was restricted to light duty. During the period he worked in the office, he worked operational, and not office, hours.

ISSUE

> The parties were unable to stipulate an issue. The Union believes the issue to be: Did the Utility violate the collective bargaining agreement when it unilaterally changed the grievant's hours; and if so, what is the appropriate remedy?

The Employer believes the issue to be:

> Did the Employer violate the terms of the collective bargaining agreement when it temporarily transferred the grievant from the line department to the office department to perform light duty; and if so, what is the appropriate remedy?

I believe the issue presented is:

> Does the Employer violate the collective bargaining agreement by requiring an employe classified as a Lead Lineman to work the hours of the Office Department when it transfers that employe to the office to perform light duty work? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE IV

WORKING HOURS AND RULES

. . .

Section 4. Work schedules contained in Exhibit "B". Exhibit "B" is attached hereto and is part of this Agreement.

Section 5. All work performed by employes outside of regular hours or scheduled shifts, shall be paid for at the rate of time and one-half, except that work performed on Sundays shall be paid for at double time, and men shall not be required to take time off during a regular working day for overtime worked, or to be worked. System operators are to be paid on calendar Sundays as follows; schedule to work and works one and one-half times, not scheduled to work and works (2) times.

. . .

Section 16.1. When an employe is temporarily transferred by his supervisor for at least 4 hours from the occupation in which the employe is regularly classified to another occupation, and when such occupation has a higher wage rate than that of the employe's regular occupation, the employe shall be so notified, and shall be placed in the lowest wage step of the occupation to which he is temporarily transferred which will provide an increase in wage rate.

EXHIBIT "B"

WORK SCHEDULE

WORKING HOURS EFFECTIVE JUNE 1, 1993

All Year Hours

Office – 7:30 a.m. to 4:00 p.m. with One Half Hour Intermission for Lunch

Hours for Line Dept., Water Dept., Auto Mechanic, Janitor Stores Clerk, Distribution Aide, Substation Dept., Power Plant Maint., Meter Reader Dept., and Electric Meter Dept. are from 7:30 a.m. to 3:30 p.m. with a 15 minute paid break in the morning and a 20 minute paid lunch break. All breaks are to be taken at the job site.

Five days beginning Monday morning and terminating Friday evening shall constitute a week's work for all except System Operators

. . .

Relief System Operator is scheduled for 12M – 8A Friday shift.

The work week for the Relief System Operator shall be Sunday through Saturday. Work schedules shall provide that the employee in this classification shall have two consecutive days off within the specified seven day period and shall further provide that the employee shall not be sent home once he/she has been scheduled to report for work and has so reported. For purposes of scheduling the Relief System Operators, the senior Relief System Operator will be offered first preference on System Operator work after the junior Relief System Operator has been scheduled for one day of System Operator work per week. This provision shall not be administered to create overtime.

When the Relief System Operator is filling the weekly vacation or illness (seven (7) days or more) of a System Operator, that person shall follow the seven (7) day weekly schedule.

ARTICLE XI

RIGHTS OF EMPLOYER

It is agreed that unless otherwise provided or limited by this Agreement, the rights, function and authority to manage all operations and functions are vested in the Employer and include, but are not limited to the following:

. . .

C. To hire, promote, transfer, assign, and retain employes and to discipline or dismiss for just cause. . .

POSITIONS OF THE PARTIES

It is the position of the Employer that the contract is clear and unambiguous in expressly stating that the Utility has the right to transfer employes and to require transferred employes to adhere to the work hours of the department to which they are transferred. The Employer points to Article XI and Exhibit B in support of this contention. The Management's Rights clause of the Agreement is alleged to clearly and unambiguously give the Utility the right and discretion to transfer employes, assign personnel, and to maintain the efficiency and economy of the Utility's operations. The parties have agreed, in Exhibit B of the labor agreement, that employes working in the office department are expected to work from

7:30 a.m. to 4:00 p.m. Because employes in the line department work from 7:30 a.m. to 3:30 p.m. and take their paid break and paid lunch break at the job site, those periods are not duty free like the office department. Because the paid break and lunch period time is considered work time, it is compensable and therefore the linemen get off work at 3:30 p.m. Such is not the case for the office department employes who receive a one-half hour unpaid duty free lunch break. Since office department employes get 30 minutes off duty free for lunch, they work until 4:00 p.m. The Employer cites arbitral authority in support of the proposition that when the language of the Agreement is clear and unambiguous, arbitrators will not give it a meaning other than that expressed in the Agreement.

Maintenance of commonly worked hours is important to the Utility in order to maintain the efficiency and economy of the Utility operations, a right expressly retained by the Utility under Article XI of the labor agreement. When Kieffer was temporarily transferred by the Utility from his lead lineman position in the line department to the office department, he was classified as an office department employe, and as such he was required to work the particular schedule of the office department.

In the past, the Union has relied on the clear and unambiguous language of the labor agreement that the work hours set forth in Exhibit B must be adhered to. The Employer points to the DeBruin and Murphy incidents as evidence of this position.

It is the view of the Employer that even if I were to assume for the sake of argument that the contractual language is unclear and ambiguous, the factual circumstances involving Murphy and DeBruin, Hardtke, Arps and Kieffer do not rise to the level of a past practice. The Employer cites arbitral authority defining the creation of a past practice, and goes on to contend that the conventional practice standard has not been met in this dispute. The Employer contends that all of the instances noted by the Union in support of its contention that a practice exists are distinguishable from the facts of this dispute in that Kieffer was temporarily transferred and that was not the case for any of his predecessors. With respect to Amy Kieffer, the Employer notes that she was not a member of the bargaining unit, that she was summer help, and that she was therefore not subject to the terms of this Agreement. Murphy was not a transfer situation, but rather a circumstance in which Murphy had negotiated a work schedule with the Utility, independent of the Union. Under the DeBruin matter, DeBruin had been assigned to work office hours when there was more than one meter reader on duty, contrary to the express provisions of the collective bargaining agreement which then stated:

> When on summer hours, one man will have the same hours as the office. If man who normally works the same hours as the office is unavailable for work, office hours will be worked by another meter department employe.

The Employer contends that DeBruin would have been the second bargaining unit member working office hours. The practice of so doing conflicted with the specific provisions of the contract. That was the basis for sustaining DeBruin's grievance.

The Employer contends that the sum total of the above instances do not rise to the level of being readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

The Employer contends that the mere non-use of a right it possesses does not entail its loss, and cites arbitral authority for that proposition. The Utility has always retained the right to require employes to work the hours of the department to which they are assigned including those employes who have been transferred. This is due to the explicit, clear and unambiguous provisions of the Agreement.

The Employer points to the hours worked by relief operators and contends that despite the lack of language expressly so stating, when not operating, relief system operators work the hours of the maintenance department. As such, there exists a long standing practice supporting the Employer's position that transferred employes do not carry with them the hours of their home department. The Employer notes testimony which indicates that relief system operators work the hours of the position to which they are assigned and they do this based simply on the language of Exhibit B.

It is the Employer's claim that adoption of the Union's position would impermissibly render provisions of the Management Rights clause meaningless. If the Agreement is read such that a lead lineman was never required to work any hours other than the line department hours the Utility would lose its right, under the Management Rights clause, to transfer and assign employes; a right it has specifically retained. However, if the arbitrator accepts the Utility's understanding that the explicit terms of the Agreement specifies hours for certain departments, and the proposition that transferred employes work the hours of the department to which they are transferred, all words in the Agreement are given effect.

It is the position of the Union that the Utility violated the Agreement when it required Kieffer to follow the office department's hours during his temporary light duty assignment. The collective bargaining agreement provides that employes follow their classification's work schedule. That Agreement lists two sets of work schedules for Utility employes. Because Kieffer is classified in the line department his hours under the Agreement, like all other employes in the manual/operational departments, is 7:30 a.m. to 3:30 p.m. When Kieffer worked in the office he was still classified as a lineman. It is the Union's view that the Agreement clearly sets forth the line department schedule, and provides no exception to that schedule for employes temporarily transferred.

Since the Agreement provides, Article IV, Section 5, that "all work performed by employes outside of regular hours or scheduled shifts, shall be paid at the rate of time and one half", Kieffer is entitled to receive overtime for the 30 minutes he was required to work past his normal ending time of 3:30 p.m.

Citing authority that a work schedule is an enforceable provision of the Agreement, the Union goes on to argue that if the Employer is allowed to ignore the normal and fixed hours and days as set forth in the Agreement, the contractual schedule will have no meaning. The Union cites authority for the proposition that broad statements of managerial powers contained in management clauses cannot form the basis for disregarding rights clearly conferred by other specific provisions of such contracts. The Management Rights clause does not give the Utility the authority to disregard the work schedule provision.

The Union argues that the fact that Kieffer retained his lineman wages, as opposed to having to work at the lower office employe wages, further indicates that Kieffer maintains his line department status while transferred for light duty.

The Utility's reliance upon the fact that the relief system operator works two different sets of hours as a basis for requiring Kieffer to work office department hours during his light duty assignment is without merit. The relief system operator works the system operator's hours while filling in for the system operator, and works the power plant maintenance hours at all other times as the Agreement requires. There is no parallel provision providing that manual/operational employes work office department employes' hours when temporarily assigned to the office.

The Union contends that the parties' past practice dictates that Kieffer was entitled to follow his regular work schedule. The Union points to the various incidents set forth above and concludes that they form a practice which the Utility has consistently acknowledged in the past, that it is not now free to ignore. The clearly enunciated and understood past practice has been that light duty or transferred employes work their regular classification's hours regardless of where they are working. By its grievance settlements, the Utility has acknowledged that it may not unilaterally change an employe's work schedule, and that if it does, it must compensate the employe accordingly and schedule according to the Agreement.

DISCUSSION

The Employer contends that the contract provides that it has the clear and unambiguous right to transfer. That contention is not meaningfully in dispute. Disputed is the Employer's further contention that the contract unambiguously provides for transferred employes to work the hours of the department to which they are assigned. No explicit provision of the contract so provides. It is the Employer's contention that Exhibit B establishes the working hours for

respective employes and compels a conclusion that employes assigned to those departments are subject to the enumerated hours. That is certainly a logical reading of Exhibit B. The Union contends that Exhibit B provides that employes assigned to the positions set forth in the Exhibit are subject to the hours which accompany their respective position. While not as obvious a construction of the clause, the Union's interpretation of the provision is not without support. While some of the references are to departments, i.e., line department, others are to individual positions, i.e., auto mechanic. The clause is highly abbreviated, and lacks language detailing the impact on hours resulting from a transfer, or reassignment. In summary, I do not believe that Exhibit B clearly and unambiguously provides that an employe transferred from one department to another is to assume the hours of the new department.

The Employer makes a corollary argument that its failure to exercise its managerial rights do not result in an atrophication and loss of those rights. I agree with the assertion. However, it is the essence of this dispute as to whether the Employer possesses those claimed rights. The Employer's claim in this regard implies a failure to exercise a held right, or the absence of circumstances which would give rise to the opportunity for the Employer to exercise such rights. That is not what has occurred here. To the contrary, this employer has repeatedly encountered circumstances where employes working hours which varied from those of the department to which they were assigned created a problem; or where the Employer assigned departmental hours, was challenged, and reversed its course in the face of challenge. This is not a case in which the Employer lacked the opportunity to exercise an existing but unutilized right.

The Employer contends that its efficiency needs, reflected in the Management Rights provision of the Agreement, are served by its construction of the labor agreement. I agree. However, I also agree with the Union's claim that general management prerogative, articulated in the Management Rights clause, cannot trump rights otherwise found in the Agreement. The question of whether the workplace would operate more efficiently if the work schedules of individuals within the same department were common is a separate question from whether that has been accomplished by the provisions of the labor agreement. It is the latter question, and not the former, that I have jurisdiction to address.

The parties do not dispute the standard against which a past practice is established. In order to establish a practice, it is binding where the practice is: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. It is against that standard that the incidents set forth in this record must be measured.

Kieffer's daughter was employed, as summer help, in the office assisting a regular office worker. That worker had been injured and was unable to enter information into the computer. Ms. Kieffer worked alongside the woman entering the data. The two women worked different schedules. The Employer is accurate in pointing out that Ms. Kieffer, a non-bargaining unit member, was not covered by the provisions of the labor agreement. As a seasonal employe, Ms. Kieffer could not enforce, through the filing of a grievance, the provisions of the Agreement. What is noteworthy about Ms. Kieffer's experience is the voluntary nature of the assignment of her hours. The Employer allowed Ms. Kieffer to work non-departmental hours, even though her work was coordinated with a departmental employe who worked different hours, though not required to do so by the Agreement. What this suggests, is that such a scheduling was an understood dimension of the workplace.

Arbs and Kieffer performed light duty in April and May of 1998. In their light duty capacities, each held their non-office hours schedule of work. These assignments were at the direction of the Employer, and occurred immediately before the facts giving rise to this dispute. In May of 1992, six years preceding the grievance, DeBruin successfully challenged a change in his hours in light of his assignment to read meters. Both parties claim the DeBruin incident supports their respective positions. The contract language noted by the Employer clouds the DeBruin grievance as practice building. However, the fact remains that with DeBruin, the Employer ultimately paid overtime as a consequence of scheduling him for hours of work different from those he enjoyed as a meter man.

I do not find the Murphy incident particularly helpful. Murphy evidently entered into an agreement with the Employer to work a schedule of hours nowhere found in the labor agreement. The Union intervened and compelled the Employer to change Murphy's hours, and to pay the man for overtime. The sole contribution of the Murphy grievance to this dispute is it contributes to an understanding of how the parties have handled remedies in situations like this.

I believe the Hardtke matter, which occurred approximately 11 years before the incident giving rise to the grievance, is on point. Finally, I note there are no incidents advanced by the Employer where it successfully caused a bargaining unit member to work a schedule of hours other than those assigned to that member's original classification.

In summary, I believe a practice exists. I believe the events set forth above to be unequivocal. All incidents either support the Union's interpretation of the language or are consistent with that view. A number of the incidents are contrary to the view of the Employer. I believe the practice is clearly enunciated and acted upon. These parties have fought over their competing interpretations of Article IV and Exhibit B, and in each instance, the Employer has backed down. This is not a situation where some procedure exists sub rosa, and is only

belatedly discovered by the Employer. The practice has existed for a considerable period of time. There is an 11 year span indicated in the record. While there are relatively few incidents to point to, those incidents appear to comprise the universe of the parties' experience. These work assignments constitute an administrative headache for the Employer. There are incidents of grievances filed and apparently sustained, with the Employer paying out monies in overtime to employes adversely impacted by the Employer's hours assignment. The practice is fixed insofar as there are no contrary incidents.

The Employer contends that this grievance is distinguishable from all matters cited above in that the matters above did not involve formal transfer. I believe this to be a distinction without meaning. There is no indication that the Employer has suddenly come upon transfer rights, that it lacked in the past. Like previous incidents, this is a short-term assignment. Prast' August 28 memo suggests a two-week duration. The move was prompted by Kieffer's injury. Kieffer retained his rate of pay. The Employer's claim that it possesses transfer rights is simply a new argument in an old dispute. It is an argument that should have been raised when the practice began to take root and flower.

I do not believe the hours of work of the relief system operators shed any light on the dispute giving rise to this Award. The relief system operators' work schedule is set forth in a different paragraph of the Agreement. This schedule is open-ended, in contrast to the schedules involved in this proceeding which are specific as to the days of the week, hours of the day, and breaks which are defined to the minute. The nature of their work is such that their assignments, and hours, vary according to task. They thus stand in stark contrast, both practically and contractually, from the employes whose hours are addressed in this Award.

Finally, the Employer contends that the construction of the agreement urged by the Union renders portions of the collective bargaining agreement meaningless. I disagree. The Employer continues to have a right to transfer. This Award concerns a dispute over the parties' reading of Exhibit B. The question presented is whether employes assigned from one department to another carry their original departmental hours of work with them. Because I regard the parties' behavior as indicating they do, I so construe the Agreement. That is not incompatible with the Employer's right to transfer.

AWARD

The grievance is sustained.

REMEDY

The Employer is directed to pay Kieffer, at the appropriate overtime rate, for hours worked outside those set forth as applicable to the Line position.

JURISDICTION

I will retain jurisdiction over this matter for a period of sixty (60) days, unless extended by the parties, to resolve any dispute over back pay.

Dated at Madison, Wisconsin this 19th day of May, 2000.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

WCH/gjc
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