BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE CITY OF EAU CLAIRE

and

THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 284

Case 245
No. 59125
MA-11185

Appearances:

Mr. Steve Day, Staff Representative, AFSCME, 318 Hampton Court, Altoona, Wisconsin, 54720, appeared on behalf of the Union

Mr. Jeff Hansen, Assistant City Attorney, City of Eau Claire, 203 S. Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin, 54702, appeared on behalf of the City

ARBITRATION AWARD

On August 17, 2000 the City of Eau Claire, Wisconsin and AFSCME Local 284 requested the Wisconsin Employment Relations Commission to appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on November 15, 2000 in Eau Claire, Wisconsin. The proceedings were not transcribed. The parties filed post hearing briefs which were received and exchanged by December 19, 2000.

This award addresses the right of the City to call out non–unit workers to do snow plowing.

BACKGROUND AND FACTS

The City of Eau Claire and Local 284, AFSCME have been signatories to a series of collective bargaining agreements, relevant portions of which are set forth below. The City plows and maintains City streets during the winter, using bargaining unit employees.

On January 5, 2000 it snowed in Eau Claire. As a result, the City called a number of employees back to work, after they had completed their normal work day of 8:00 a.m. to 4:00 p.m. Seven employees returned to work at 5:00 p.m. Two employees returned at 5:30 p.m. At the time of the call back these employees were engaged in a limited sand and salt operation. All were sent home at midnight.

As the snow intensified the City shifted to a full scale plowing operation. Such an operation requires 45 men and equipment. To secure a work crew, the employer called down the seniority list. 31 bargaining unit members responded. 45 bargaining unit members declined or were not available. The call left the employer 14 workers short of a full employee complement.

The City secured the additional 14 workers by calling in Supervisors and other non – unit employees. There is a history of using non – unit employees to plow when an insufficient number of bargaining unit employees are available to perform. The 9 employees called in at 5:00 – 5:30 were replaced at midnight by workers responding to the plowing operation. A grievance was filed on January 24 protesting the decision to send the nine employees home at midnight, without completing an eight-hour shift, while non – bargaining employees worked.

Mark Struck, a bargaining unit member, testified that he has worked past midnight in the past, and that employees are allowed to work 16 continuous hours plowing before they are sent home. Bob Horlacher, the local Union President, testified that the City has never previously sent bargaining unit employees home and replaced them with non – unit workers. He further indicated that the City has an established policy that an employee can only drive for 16 continuous hours. According to Horlacher the 16 hour standard is a safety standard. Employees called in to plow at midnight may plow until 8:00 A.M. and then typically work the full shift the next day.

Mike Barnhardt, the Street Maintenance Manager, testified for the City. Barnhardt testified that once he realized that he needed to go to a full plow operation, he wanted to start the plowing operation all at once. He determined to send the early crew home at midnight as a safety measure. He testified that employees called for overtime are not guaranteed 8 hours of work, and frequently work less. He also indicated that the City tries to limit consecutive plowing to 16 hours as a safety measure.

ISSUE

The parties could not stipulate to an issue. The Union believes the issue to be:

Did the City violate the contract, and/or past practice, when it sent Union employees home and replaced them with non – union employees during a snow plow operation on January 5, 2000?

If so, what is the appropriate remedy?

The City regards the issue as:

Did the City violate the contract by its staffing actions for street operations on the night of January 5, 2000?

If so, what is the remedy?

I regard the issue to be:

In an overtime operation, where work is available, is the City required to allow bargaining unit employees who have worked a full shift to work 8 overtime hours before calling in non – unit employees to work?

If so, what is the remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 3 – Union Security and Management Rights

. . .

Section 3. Management Rights. It shall be the exclusive function of the City to determine the mission of the agency, set standards of service to be offered to the public, and exercise control and discretion over its organization and operations.

It shall be the right of the City to direct its employees, take disciplinary action, relieve its employees from duty because of lack of work, or for other legitimate reasons, and determine the methods, means, and personnel by which the agency`s operations

are to be conducted. But this should not preclude employees from raising grievances about the impact that decisions on these matters have on wages, hours, and working conditions.

. . .

Article 14 – Overtime

. . .

Section 9. The workers recognize that overtime work is part and parcel of their jobs and in that spirit the Union agrees that a concerted refusal to work overtime shall not be sanctioned and is in violation of this agreement. In order to provide necessary services, the City may require the least senior qualified employees in the work group to report for overtime work upon the exhausting of the established voluntary overtime procedure. Employees will not be expected to work an excessive number of continuous overtime hours. Workers scheduled to be on vacation or with established long – range plans shall be exempt from mandatory overtime requirements. Violations of this section shall be just cause for discipline.

. . .

Article 31 – General Provisions

. . .

Section 7. Supervisors shall not perform any work normally performed by bargaining unit employees, or serve as non – supervisory employees of a work crew except under the following circumstances:

1. During an emergency, when it is necessary in the interest of public safety to complete emergency tasks, to avoid injury and/or damages.

2. For training purposes.

3. When a shortage of bargaining personnel exists after following agreed – upon procedures.

. . .

POSITIONS OF THE PARTIES

It is the position of the Union that the nine Union Street Department employees had the right to finish out their overtime shifts on January 5, 2000. The Union points to Article 14, Sec. 9 and argues that the recognition that overtime is part and parcel of their work is a provision that cuts both ways. This provision reflects an agreement that the City can order an employee to perform overtime work and bargaining unit members have a corresponding right to that work.

The Union points to the testimony of Struck and Horlacher to the effect that there exists a practice that employees are allowed to work 16 hours to finish overtime assignments. The Union further points to their testimony for the proposition that overtime must first be offered to bargaining unit members. It is in this context that Article 31, Sec 7 must be read. The Union contends that many of the non – unit employes called in to work were supervisors, and that they are ineligible for such a call until the practices described above have been satisfied.

The Union contends that the City argument relating to efficiency has no bearing on this case. Pointing to Horlacher`s testimony, the Union claims that shuttling employees to work sites is a common practice, and further with larger gas tank vehicles there is little need to bring trucks in for refueling.

The Union contends that the Union and City have been forced between a rock and a hard place. The City has reduced the size of the bargaining unit to a level insufficient to plow the streets. It has simultaneously continued to buy and rent equipment to service its expanding street system. To accommodate this situation, the parties have arrived at an understanding. The Union has allowed non-unit employees to perform bargaining unit work under one circumstance; the work must be offered to bargaining unit employees first. Only when Union employees are not available or have worked the maximum number of hours (16) can non – unit employees work. This case represents the first instance where this practice has been violated.

The City contends that Article 3, Sec 3 grant it the managerial control to change operations and personnel for logistical and planning purposes, as well as the health, safety and welfare of all employees.

The City further argues that the Union has failed to establish that any provision of the Agreement or practice has been violated. The contract has no guaranteed shifts or hours. Evidence establishes that there have been many occasions when union employees have worked less than eight hours overtime. The City contends that the use of non-unit employees is an established practice.

The only contractual provision applicable is Article 31, Sec. 7, Sub.3. However, the City notes that there is no dispute that it followed the call in procedure. Non unit employees were used only after the call in procedure was exhausted.

DISCUSSION

I believe that certain aspects of the snow plowing operation are controlled by the Management Rights clause. The decision to initiate a sand and salt operation, the decision to change to a full snow plow operation, the commitment of manpower, the prioritization of work all fall within the discretion possessed by the City. However, the right of the employer to "…determine… the personnel by which the agency`s operations are to be conducted…" under Article 3 is a matter also addressed by Article 14 and Article 31.

I agree with a portion of the Union`s construction of Article 14, Sec. 9. The provision does obligate bargaining unit members to work overtime. It does make such work a part of the employees job. It also explicitly permits (. . .the City may require. . .), but does not compel the employer to require the least senior employee to perform undesired overtime work. However, I do not read the language to contain the reciprocal work guarantee argued by the Union. That is, I do not read this clause to guarantee the bargaining unit certain kinds or amounts of overtime work.

Article 31, Sec.7 also addresses the work in question in this dispute. That section generally prohibits supervisors from performing unit work, subject to three exceptions, two of which are potentially relevant to this dispute. The first is the emergency exception. For this exception to apply it must be"…necessary in the interest of public safety to complete emergency tasks, to avoid injury and/or damages." While the snowstorm certainly created emergency conditions I do not believe the record supports a finding that a change of employees at midnight was necessary to complete the work or to avoid injury or damages. The work would have proceeded to completion if the 9 unit employees had been allowed to work a full eight hours of overtime and then been replaced. The record indicates that the City allows, and at times requires 16 hours continuous work in a plowing operation. The 16 hour threshold was established as a safety standard. There is nothing in this record which suggests that the 16 hour plowing standard was inappropriate given the conditions of January 5.

The second applicable exception is the shortage of personnel provision found in sentence 3. The employer exhausted the call in list. There is no dispute in this proceeding that the employer was then free to use non-unit employees, including supervisors, to plow. The dispute here is when. So long as the nine unit employees were operating equipment, there was no "shortage of bargaining unit personnel", as least with respect to their assigned equipment. It was only when they were sent home, and there was a need to replace them that the shortage of unit personnel appeared.

Sentence 3 allows for supervisors to work after the City follows "agreed – upon procedures". I believe that the call in procedure is one of those procedures. The call in procedure addresses who is offered the work. It does not, per se, address how long called in employees will be allowed or assigned to work. The record indicates that the parties have established 16 consecutive hours as the standard. It would require a strained reading of this contract to permit the City to call unit employees in for two hours, thereafter send them home, and replace them with supervisors or other non unit employees for a protracted plowing operation, due to a " shortage of bargaining personnel". The second aspect of the "agreed upon procedure" is that called in employees are allowed to work 16 hours. That is not to say that there may not arise circumstances where safety considerations or other compelling factors dictate a shorter work cycle. For instance, if an employee appears so exhausted as to constitute a hazard or to be unable to perform the work, he may be directed to go home short of a complete shift. However, no such circumstance is suggested here. It must be recalled that the event giving rise to the overtime is a snowstorm. Working conditions are poor, and at times hazardous. It is against this backdrop that the 16 hour rule has evolved. I believe it has evolved into a practice which interprets Article 31, Sec. 7.

The City contends that the contract does not guarantee eight hours of overtime. This decision does not guarantee eight hours of overtime on a call out. If the work requires less than eight hours, there is no obligation to retain unit employees any longer. However, if the work requires eight hours, the record establishes that bargaining unit employees called in to work are allowed to work eight overtime hours, and up to 16 continuous hours, before they are sent home for safety reasons.

AWARD

The grievance is sustained.

REMEDY

The City is directed to pay the seven grievants who began work at 5:00p.m. 1 hour of overtime pay, and the two grievants who began work at 5:30 11/2 hours of overtime pay.

Dated at Madison, Wisconsin this 9th day of January, 2001.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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