BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 244, AFSCME, AFL-CIO

and

CITY OF SUPERIOR

Case 178
No. 59260
MA-11234

(Leach shift grievance)

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, 1701 East Seventh Street, Superior, Wisconsin, for the labor organization .

Fryberger, Buchanan, Smith & Frederick, by **Attorney Joseph J. Mihalek**, 1419 Tower Avenue, Superior, Wisconsin, for the employer.

ARBITRATION AWARD

Local 244, AFSCME, AFL-CIO ("the union") and the City of Superior ("the city") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The union made a request, in which the city concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to changing shifts and duties. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Superior, Wisconsin on October 17, 2000; it was not transcribed. The parties submitted written arguments on November 22, 2000, and waived their right to reply.

ISSUE

The union states the issue as follows:

Did the Employer violate the terms of the collective bargaining agreement when it unilaterally changed the work day and work week of the grievant without the contractually required two week notice of the change? If so, the appropriate remedy is to make the grievant whole for any lost overtime pay due to this short notice and to cease and desist from making changes in the employee's work day/work week without the contractually required two week notice. 1/

1/ The numbering of sections has changed between the collective bargaining agreements of 1997-1999 and 2000-2000. Under the collective bargaining agreement currently in force, the union makes its arguments under sections 18.01(I) and (J).

The city states the issue as follows:

Did the City violate the AFSCME Local #244 collective bargaining agreement when it assigned Wade Leach, the least senior qualified employee, to work relief at the Landfill, under the Landfill shift hours, with less than two weeks notice after no one had signed the posting for voluntary assignment to the relief position?

I state the issue as follows:

Did the city violate the collective bargaining agreement when it assigned the grievant to the landfill for the period April 3-7, 2000? If so, what is the appropriate remedy?

RELEVANT CONTACTUAL LANGUAGE

ARTICLE 3
MANAGEMENT RIGHTS

The city possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

A) To direct all operations of the City.

B) To establish work rules and schedules of work.

C) To hire, promote, schedule and assign employees to positions within the City.

. . .

D) To maintain efficiency of City operations.

E) To take whatever action is necessary to comply with State or Federal law.

F) To subcontract work presently performed by bargaining unit members provided that regular, full-time Union members will not be laid off or lose regularly scheduled straight time hours as a result of any subcontracting. The City agrees that it shall consult with the Union prior to subcontracting work presently performed by full-time bargaining unit members.

G) To introduce new or improved methods or facilities.

H) To determine the methods, means and personnel by which City operations are to be conducted.

I) To take whatever action is reasonably necessary to carry out the functions of the City in situations and emergency. (sic)

ARTICLE 18
WORK DAY AND WORK WEEK

It is hereby declared to be the policy of the City of Superior to provide regular full-time employees of the Public Works Department forty (40) hours of work each week for fifty-two (52) weeks each year and the City does hereby pledge and promise to do all that is within its power to carry out this policy.

18.01 For all regular full-time employees of the Public Works Department, forty (40) hours shall constitute a normal work week consisting of five (5) eight (8) hour days, Monday through Friday, from 7:00 A.M. to 11:00 A.M. and from 11:30 A.M. to 3:30 P.M., with the following exceptions listed below:

A) Central Equipment Division: 3:30 P.M. to 7:30 P.M.; 8:00 P.M. to 12:00 Midnight; 11:30 P.M. to 3:30 A.M.; 4:00 A.M. to 8:00 A.M.

B) Street Division: 10:30 P.M. to 2:30 A.M. and 3:00 A.M. to 7:00 A.M., November 15 through April 15. This shift shall be limited to no more than five (5) employees.

. . .

H) Alternative Work Schedules: The Department Head and the Union may mutually agree to a pattern of work that deviates from the normal scheduling and overtime practices outlined in this Agreement. The Employer shall retain documentation of the agreement. Either the Employer or the employee may revoke such election by giving written notice to the other party at least five (5) work days prior to the effective dates of revocation.

Employees shall have the opportunity to review an alternative schedule or schedules, prior to volunteering for flexible work hours. Alternative work schedules may include shifts that are less than eight (8) hours or more than eight (8) hours per day.

I) It is understood that once an employee has permanently been assigned to one of the above shifts he/she shall not be rotated from shift to shift.

J) It is agreed that the Employer decides to establish a new shift, they will give two (2) weeks notice of their intent unless the Union agrees to forego such two-week notice.

K) Seasonal employees: See Appendix C

. . .

BACKGROUND

Wade Leach has been an equipment operator with the city for approximately three years, a Street Department employee with a work schedule of Monday-Friday, 7:00 a.m. to

3:00 p.m. This grievance concerns the employer's action assigning him to staff the city landfill for one week in April 2000. 2/

2/ Unless otherwise stated, all dates are 2000.

On August 10, 1999, Paul King, Administrative Engineer for the city's Public Works Department, sent landfill employees the following memo:

> I have discussed with you, on several occasions, that we will be changing the hours of operation at the landfill and subsequently the work schedule.
>
> As of Tuesday, September 9, 1999, the landfill will be open per the following schedule:
>
> | | |
> |---|---|
> | Monday
Wednesday
Friday | 9:30 a.m. – 2:30 p.m.
City crews only |
> | Tuesday
Thursday | 8:30 a.m. to 6:45 p.m.
City crews and City residents only |
>
> Per the above operating schedule, your working hours are as listed below:
>
> | | |
> |---|---|
> | Monday-Wednesday-Friday | 9:00 a.m. – 3:00 p.m. |
> | Tuesday-Thursday | 8:00 a.m. – 7:00 p.m. |
>
> Sick, vacation and holidays will be used and accrued according to the hours scheduled for the date of use/accumulation. For example, sick leave used on a Monday would be six (6) hours and sick leave used on a Tuesday would be for eleven (11) hours.
>
> Also on August 10, 1999, Union chief steward Mike Rainaldo grieved this matter, alleging that the collective bargaining agreement was "very specific as to the work day, work week and shift and shift hours. In addition, an overtime question is at issue here." The Union sought to have the city "return to proper hours or negotiate any changes that management wishes to make."
>
> On August 31, 1999, Public Works Director Jeff Vito replied to Rainaldo as follows:

Your grievance states that the City has violated Articles 18.00, 18.01, 18.02 and 19.01 of the working agreement. In review of those articles I see nowhere that the City violated any aspects of the working agreement whatsoever.

In accordance with Article 18.02 of the working agreement, the City exercised its right in deciding to establish a new shift for the landfill. We put the employees on notice prior to the two weeks required for such a shift change. Based on this, there is obviously no violation of Article 18. There is also no violation of Article 19 in regard to overtime as proper notification was given the employees. Beyond this, it is clearly my understanding that we hand entered into flexible scheduling agreements with both employees to better suit their needs as well as the City's needs, which is certainly outlined in the working agreement of which we followed the process and procedure.

Based on this information, I see absolutely no violation of any components of the working agreement on the City's behalf. I am therefore denying this grievance. You have the option to move this grievance to another level.

The union did not advance this grievance to any further steps.

On March 29, 2000, the city posted a notice as follows:

ATTENTION: STREET DEPARTMENT EMPLOYEES

POSTING FOR LANDFILL RELIEF

Any street department employee interested in working as a relief worker at the Superior Landfill for the week April 3-7, 2000 please sign below. The hours will be regular landfill hours: Monday, Wednesday and Friday 9:00 a.m. – 3:00 p.m. and Tuesday and Thursday 8:00 a.m. – 7:00 p.m.

The rate of pay is 3601. All seniority and qualifications will prevail.

Please sign below by March 31, 2000.

No street department employee signed the voluntary posting. On Friday, March 31, city supervisor Clarence Mattson informed Leach, the least senior qualified employee, that he was being assigned to work at the landfill April 3-7.

Notwithstanding this assignment, the following Monday Leach reported to his normal work site, the city garage, at his normal starting time, 7:00 a.m. He was directed to leave the workplace and report to the landfill at that facility's stated starting time, 9:00 a.m. Leach worked the published hours at the landfill for the rest of the week, earning straight time for 40 hours work. He did not receive any overtime.

On April 3, the union grieved this matter, stating that "management changed work day, work week hours of employee without giving two week notice of change," which it alleged established that "management did not follow article 18.02c of the working agreement." As remedy, the union sought to have the city "pay employee for lost overtime hours, do not change employee's hours without proper notice, make employee whole and follow working agreement."

On May 2, Public Works Director Vito replied to Union Steward Rainaldo as follows:

> Article 18.01(J) of the 2000 Local #244 Working Agreement is interpreted by management to apply only when a new shift is established. In this case there was no new shift, but rather the assignment and work schedule already existed at the Landfill so the two week notice to Wade Leach would not be pertinent.
>
> This situation was the posting of an assignment at the Landfill. When no one signed up for the posting, management had the right to assign someone. Mr. Leach was the least senior qualified employee and was, therefore, assigned the work.
>
> Because we do not feel there has been a violation of the Working Agreement, your grievance is denied at the first step. You may advance to the second step.

On May 15, Mayor Margaret Ciccone wrote to Rainaldo as follows:

> This is a follow-up to our meeting on Wednesday, May 10th, to consider the above-mentioned grievance. I have reviewed the Local #244 contract language in Section 18.01(J) regarding shift work and my interpretation is that the contract is for a new shift, but the staffing was for an existing shift with the work assignment at the Landfill.
>
> As we discussed at the meeting, the interpretation differs between the Union and management and it may be that this language interpretation needs to go to the arbitration level for clarity.

> I thank you for your courteous work on this issue in noting that both sides disagree, however, we are mutually seeking a solution to this contract language. I am denying your grievance at this level. If you wish, you may proceed to the next level.

On September 18, the city's Human Resources Committee also denied the grievance. The Union thereafter advanced the matter to arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

> The language and intent of the labor agreement are clear regarding the guarantee of stable working hours, and prevent the grievant from being rotated to another work shift.
>
> The collective bargaining agreement is clear – the essential requirement is a two-week notice for the establishment of new shifts. This is in the interest of stability of work shifts, in that this two-week period allows for employees to make the necessary adjustments to their lives. Waiver of this two-week notice is solely at the discretion of the employee.
>
> The long standing past practice of the parties is clear. The city never unilaterally or arbitrarily tried to force upon employees a less than two-week notice in shift changes. Testimony at hearing clearly affirmed the past practice that a two-week notice was always given to employees.
>
> The apparent reason that the grievant was called upon to report to the landfill with such short notice was that management made a mistake, in that the supervisor did not realize until only a few days before the start of the landfill worker's vacation that no one had been contacted to fill in for the vacation schedule. While one can sympathize with management's oversight of a vacation that had been scheduled several months earlier, it can not be the employee who should be penalized for a supervisor's oversight.
>
> It was obvious how to address this problem. The grievant should not have been sent home for two hours, but should have worked till the landfill opened at 9 a.m., then worked the full shift at the landfill and receive the appropriate overtime.

The language of the collective bargaining agreement and the long standing past practice is clear regarding employees being afforded a two week notice before a shift change. This is a fundamental right.

The employer now tries to argue that it is within the scope of management rights to change employees' scheduled with less than two weeks notice. Neither the contractual language nor the past practice supports this assertion.

Accordingly, the grievance should be sustained and the grievant awarded any overtime he lost due to the city's unilateral action changing his shift without the required two week notice. The arbitrator should also order the city to cease and desist from unilaterally changing employees' work schedule without providing a two week notice.

In support of its position that the grievance should be dismissed, the City asserts and avers as follows:

The city fully complied with the collective bargaining agreement when it temporarily assigned the grievant to fill a vacancy causedby another employee's vacation. The collective bargaining agreement gives the city the management right to establish schedules of work, assign employees to positions, determine personnel and take action reasonably necessary to operate. This means that the city has the power to assign employees to temporary assignments to fill in for sick or vacationing employees. Otherwise, the city would be paralyzed and unable to function when employees called in sick or went on vacation.

Moreover, under the residual or reserved rights doctrine, the city properly exercised its management rights when it assigned the grievant to fill in for the absent employee at the landfill. Absent an express provision to the contrary, the assignment and transfer of employees is within management rights and authority. Because there is nothing in the collective bargaining agreement restraining the city's right to temporarily assign employees to fill in for absent employees, the city was within its standard management right.

Interpreting the collective bargaining agreement to restrain the city's authority to temporarily assign the grievant to the landfill would render its provisions meaningless, and lead to absurd and nonsensical results.

The temporary assignment was not the rotation of shifts, such that the union's argument regarding section 18.01 is without merit. As that provision is written, temporarily assigning an employee to fill in for an absent employee does not constitute rotating an employee from shift to shift. The slight difference in hours between the grievant's normal position and the relief landfill position does not constitute rotating an employee from shift to shift.

Nor did the temporary assignment constitute the establishment of a new shift, which would have required the city to provide two weeks' notice. Assigning an employee to cover a position due to another employee's absence is not establishing a new shift. This language is not ambiguous and must be applied as written. The establishment of a new shift occurs when the city sets new general working hours for an entire group of employees in a specific job classification; it does not occur when the city assigns an employee to cover on a different but already established shift. When the city established the landfill position, it provided the two-week notice. The city does not "re-establish" the shift every time it assigns an employee to cover a position.

The temporary assignment of employees to fill in as relief for vacationing or sick employees does not violate the collective bargaining agreement provision relating to normal work week.

The city's assignment of the grievant to work one week as a fill in for a vacationing employees was consistent with the city's past practices.

Finally, even if there was a technical violation of the collective bargaining agreement, the violation did not damage the grievant and he is not entitled to a remedy.

Accordingly, the grievance should be dismissed.

DISCUSSION

For five days in early April 2000, the city assigned Wade Leach to staff the landfill rather than perform his normal duties as an equipment operator. Because this relief work at the landfill had a different work schedule than Leach's normal shift of 7:00 a.m. to 3 p.m., the union claimed the assignment violated one or more provisions of the collective bargaining agreement relating to hours of work.

The explicit terms of the collective bargaining agreement provide that an employee with a permanent assignment to a set shift "shall not be rotated from shift to shift." The collective bargaining agreement also requires that when the city "decides to establish a new shift," it will give two weeks' notice of its intent, "unless the Union agrees to waive such two-week notice." The union claims that the temporary reassignment of Leach to the landfill for the period April 3-7 violated both the provision regarding the two-week notice for establishing a new shift, and the provision against being "rotated from shift to shift."

Apart from the two provisions on which the union relies, the city enjoys certain residual management rights, which it may exercise subject only to the terms of the working agreement and applicable law. These rights include the rights to "direct all operations of the city ... establish ... schedules of work ... schedule and assign employees ... maintain efficiency of city operations ... determine the methods, means and personnel by which city operations are to be conducted, and to take whatever actions are reasonably necessary to carry out the functions of the city" in exigent circumstances.

The union has quoted at length my award in COLUMBIA COUNTY (HIGHWAY DEPARTMENT), MA-8640, 8653 (1995), in which I sustained a grievance over the employer's unilateral alteration of an employee's work schedule. Other than a similarity of topic (changes in shifts/hours), I do not find that this earlier case has much persuasive value in the matter before me now.

In COLUMBIA COUNTY, the parties had mutually agreed to modify an employee's work schedule from that stated in the collective bargaining agreement to accommodate his physical condition following a work-related injury. Because the union and the employee participated in, and concurred in, the modification, I found that "the altered work day and work week did not constitute a violation of the collective bargaining agreement." Subsequently, however, the employer unilaterally changed both the work hours and work week from that which the parties had agreed to. It was this action which I found to violate the collective bargaining agreement. Given the dissimilarities in contract language and facts, the COLUMBIA COUNTY case has no significant persuasive force in the case currently before me.

The union contends that the city's action in this regard constituted establishing a new shift, contrary to the terms of 18.01(J). Indeed, setting the work week and work hours at the landfill as something other than Monday-Friday, 7:00 a.m. to 3:30 p.m. (with a break from 11:00 to 11:30) did constitute the establishment of a new shift. However, the city did not take this action contemporaneously with the assignment of Leach, but rather established the new shift in September 1999. As the record clearly shows, the city informed the union of its intent to establish a new schedule for the landfill a full month before the effective date. While the union immediately grieved the matter, it did not pursue the grievance to any further steps beyond the Public Works Director's denial. By the time of Leach's assignment to the landfill,

the unique work week and work hours for the landfill were seven months old. Accordingly, the employer's action did not constitute establishing a new shift, such that it would have been required to provide two weeks' notice to the union.

I turn now to the union's contention that by assigning Leach to the landfill for one week, the city violated the terms of the collective bargaining agreement which protect an employee from being "rotated from shift to shift." Leach does have a permanent assignment to a set shift, and thus cannot be "rotated from shift to shift." Stating that fact, however, does not resolve this matter.

As I read and understand the plain language of 18.01-I, there clearly is a restriction on the schedule that the city can assign to an employee who, like Leach, had permanently been assigned to one of the standard shifts. The critical questions are, (a), what constitutes being "rotated from shift to shift," and (b), what is the relationship between that restriction and the city's broad rights under Article 3 to direct all operations, schedule and assign employees, maintain efficiency of operations, take actions necessary to comply with state and federal law, subcontract, and determine the personnel by which its operations are to be conducted.

On its face, the phrase "rotate from shift to shift" indicates a continuing, or at least successive, nature of reassignment. For example, the collective bargaining agreement provides for multiple shifts for the Central Equipment Division and Street Division; clearly, the employer could not assign an employee who was permanently assigned to a particular shift a work schedule that consisted of the 3:30 p.m. to 7:30 p.m. shift one week, the 4:00 a.m. to 8 a.m. shift the next, the 8:00 p.m. to midnight shift the following week, and so on.

But the union maintains this language does more, and "protects the grievant from being rotated to another work shift." The record does not contain evidence of bargaining history or conclusive past practice to support the conclusion that the phrase "rotated from shift to shift" also includes a single, temporary reassignment to a different shift, such as the union appears to be arguing. While such evidence may exist and be presented in future proceedings, it was not made a part of this record.

The union asserts that the collective bargaining agreement gives to represented workers the "fundamental right" to a "two-week notice ... before their work shift is changed by the City." That is not how I read the language of sections 18.01 (I) and (J). There is no question but that the collective bargaining agreement prevents the city, in the absence of waiver from the union, of *establishing* a new shift with less than two weeks' notice. However, the union's case herein mistakenly merges the concepts of *establishing* a new shift with *assigning* a different employee to an *existing* shift.

The language of the collective bargaining agreement provides that workers with permanent shift assignments "shall not be rotated from shift to shift." This is an important protection, and nothing in this award should be construed as minimizing the validity or value of this provision, as noted above. The grievant, however, was not "rotated from shift to shift." Instead, he was given a temporary reassignment, albeit one with different hours. Upon the completion of that limited-term assignment, he returned to his normal assignment and hours. Given the city's residual rights, there is simply not the record evidence -- either in terms of bargaining history or contract administration – to support a conclusion that the contractual ban on employees being "rotated from shift to shift" also serves to prevent the employer from making a temporary reassignment of limited duration for the purpose of providing a vital public service. By its actions, the city did not violate section 18.01(I) of the collective bargaining agreement.

Leach's co-worker exercised his contractual right to vacation. Consistent with its responsibilities to protect the public health, safety and welfare, the city was required to keep the landfill open in his absence. Owing to certain regulatory and licensure standards, only Leach and one other worker were qualified to serve in this capacity. The city temporarily assigned Leach, the less senior of the two, to do the duty. The fact that the city gave him less than two weeks' notice – indeed, gave him notice on Friday for a Monday assignment – does not speak well of the city's management in this affair or its attention to scheduling detail, and makes understandable Leach's sense of being aggrieved. However, given that the assignment was to an existing shift – even though it was not Leach's shift -- the lack of two weeks' notice did not violate section 18.01(J) of the collective bargaining agreement.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin this 7th day of February, 2001.

Stuart Levitan /s/
Stuart Levitan, Arbitrator

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