BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EAU CLAIRE CITY EMPLOYEES, LOCAL NO. 284, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

CITY OF EAU CLAIRE

Case 251
No. 60035
MA-11494

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, appearing for Eau Claire City Employees, Local No. 284, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Jeff Hansen, Assistant City Attorney, City of Eau Claire, 203 South Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin 54702-5148, appearing on behalf of City of Eau Claire, referred to below as the City or as the Employer.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance captioned by the parties as No. 2000-1. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on August 15, 2001, in Eau Claire, Wisconsin. The hearing was not transcribed. The parties filed briefs by October 18, 2001.

ISSUES

The parties' statements of the issues are not identical, but essentially stipulate the following issues:

> Did the City violate the contract when it did not pay ten workers two-hour recall overtime pay for January 18, 2001?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 13 – HOURS

. . .

Section 4. The regular hours of non-shift work will be 8:00 a.m. to 4:00 p.m.

. . .

Article 14 – OVERTIME

Section 1. Employees shall receive one and one-half (1 ½) times their regular hourly rate of pay for all hours worked in addition to their regular standard work day and/or the standard work week, and a minimum of one (1) hour shall be paid for all overtime. For the purpose of computing overtime pay, vacation, holidays, sick and injury leave shall be considered as time worked.

. . .

Section 5. Employees who are recalled to work after the completion of their regular work day by their supervisor shall receive a minimum of two (2) hours pay for each call.

BACKGROUND

The grievance names ten Street Division employees as grievants. The parties do not dispute the bulk of the facts underlying the grievance. Brian G. Amundson, the Public Works Director summarized those facts in a memo dated February 3, 2001 (references to dates are to 2001, unless noted otherwise), which states:

This memorandum is in response to a grievance dated January 29, 2001, which was the result of an oral grievance on January 22, 2001. The oral grievance was reduced to writing, and a second step request was received by the Department Director on February 2, 2001.

Description of Grievance

A snow and ice control operation was initiated on the morning of Thursday, January 18, 2001. The employees reported to work at approximately 6:30 a.m. The employees were paid at the overtime rate for the actual hours worked and the Union feels this is a violation of Article 14, Section 5 of the Contract.

Review

The supervisor called ten (10) employees to begin ice control operations as a result of the early morning snow on January 18, 2001. The employees reported to work between 6:30 a.m. and 6:45 a.m. The called employees continued to work on the ice control into the regular work day hours from 8:00 a.m. to 4:00 p.m. The called employees were paid at 1.5 times the regular hourly rate for the actual time worked prior to the start of the regular work day hours of 8:00 a.m.

Decision

Article 14, Section 5, states that employees that are "recalled" to work after the completion of their regular work day shall receive a minimum of two (2) hours pay. In this instance the employees were "called" to start the work day early, and then continued the work into the regular work day hours. The requirements of Article 14, Section 1, apply in this circumstance, which is how the employees were compensated. Review by the Department Director did not find evidence of a contract violation and therefore the grievance is respectfully denied.

The balance of the background is best set forth as an overview of witness testimony.

Bob Horlacher

Horlacher stated that the grievance poses no issue for the Sewer Crew, which receives a two-hour call-in for similar circumstances. He acknowledged that Street Division employees have worked prior to the start of a shift without receiving the two hour call-in provided the Sewer Crew. The Sewer Crew is a part of the Utilities Division. In his view, the Section 1 minimum call-in applies in cases in which the City extends the work day to complete a project.

Extending the work day is not comparable to the inconvenience caused by an unanticipated late-night or early morning call to work.

Section 1 came into the labor agreement in 1971, while Section 5 was not created until 1973. Horlacher did not, however, participate in the discussions that prompted the creation of either section.

Mike Barnhardt

Barnhardt called in the ten employees because the weather conditions demanded the whole crew. Each member of the crew stayed for the regular work shift on January 18. In his view, the Section 5 call-in applies only to late night call-ins where an employee is not able to extend a regular shift of work. He could not recall authorizing a two hour call-in. He has extended morning shifts on many occasions. In such cases, he applies the Section 1 call-in minimum, as he did on January 18.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Brief

After a review of the evidence, the Union argues that Article 14, Section 5 "applies in the instant case because this was a **recall** to work **after the completion of their regular work day**." Article 13, Section 4 sets the regular hours of work for Street Division employees. On January 17, 2001, those employees finished their regular shift at 4:00 p.m., then went home. In the early morning hours, "the employees received a phone call from their supervisor to come in early to sand and salt." The regular work day was done, and they were recalled to work. Thus, the two hour call in applies.

In contrast, the one hour call in of Article 14, Section 1 "was bargained for two reasons." The first was "to enable the City to finish off a job" and the second was to provide a minimum level of compensation "for the inconvenience of staying even fifteen minutes late."

There is no past practice to address the grievance. Sewer Crew members routinely receive the two hour call in, but that division is separate from the Street Division, and thus there is no binding practice. The Section 1 call in was bargained in 1971, while the Section 5 call in was bargained in 1973. The Union contends that "the higher two hour minimum was bargained to compensate for the higher inconvenience of being recalled into work in the middle of the night." A Section 5 call in is less predictable than a Section 1 call in, and thus imposes greater inconvenience on employees. To conclude that a Section 5 call in cannot apply if an employee continues to work into their regular shift is an absurd result.

The Union concludes that the grievance should be sustained and that the City should be ordered "to pay the ten Street Division employees the minimum two hours of overtime on January 18, 2001 (less whatever overtime they were paid for work before 8:00 a.m.)."

The City's Brief

After an overview of the evidence, the City asserts that the Union's position "cannot be sustained" since "this was not a 'recall'." Unrebutted testimony demonstrates that "two-hour recall pay was intended to establish a minimum compensation for workers who are called back to work after their shift for a brief period of time and then return to their homes." This does not apply to a pre-shift call in.

Beyond this, Article 14, Section 1 clearly and unambiguously demands payment of time and one-half for all hours worked "in addition to" an employee's regular hours. Under Section 1, the City must provide a one-hour minimum, not the two hours requested by the Union. Consistent past practice supports the City's position. The situation grieved in this case "has occurred 'dozens' of times during the tenure of the street superintendent", yet has not produced a grievance until this one. The Union could not rebut the evidence supporting this clear practice.

Practice relevant to the Sewer Crew has no bearing on Street Division employees. Even if the evidence concerning the Sewer Crew is considered, it rests on unreliable hearsay. Contract language and past practice support the City's view, and the "grievance should thus be dismissed."

DISCUSSION

The issue and underlying facts are essentially undisputed. The relationship of Sections 1 and 5 of Article 14 complicates resolution of the grievance. Standing alone, neither is sufficiently unclear to require interpretation. The complication is that they do not stand alone, and each must be given effect.

The factual background highlights this complication. Sometime after the completion of their work day on January 17 at 4:00 p.m., Barnhardt summoned ten Street Division employees to start work on January 18 at roughly one and one-half hours prior to the start of their regular work day at 8:00 a.m. Because the call-in was for a period of time greater than the one-hour minimum of Section 1, but less than the two-hour minimum of Section 5, it poses the distinction between the two sections.

Their relationship cannot be considered clear and unambiguous. The City contends the "in addition to" reference of Section 1 unambiguously applies to work that extends the

beginning or end of a regular work day. The difficulty with this view is that it reads "in addition to" as "immediately proximate to". This difference poses issues beyond grammar. Under the City's view, Section 5 applies only when an employee responds to a call-in by leaving home, reporting to work and then returning home without working a regular shift. Barnhardt's call could have come at any time after 4:00 p.m. on January 17, but prior to the actual report to work time on January 18, provided employees worked continuously through 4:00 p.m. on January 18. Under this view, employees were "called" to work early on January 18, rather than being "recalled" to work after the close of their shift on January 17.

This view strains the language of the two sections without giving clear meaning to Section 5. The assertion that the "in addition to" reference in Section 1 clearly mandates this view obscures that any hours worked after 4:00 p.m. on January 17 but before 8:00 a.m. on January 18 are "in addition to" time worked on either January 17 or January 18. The City asserts that it can determine which work day the overtime hours are "in addition to." However sound the policy basis for this assertion, there is no evident contractual support for it. If, for example, the contract stated that midnight closes a work day, then a call made prior to midnight would "recall" employees to the prior shift, while a call made after midnight would "call" employees to the next shift. The contract is, however, silent on the point. As noted above, the City contends "in addition to" reference can be read to mean "immediately proximate to," but this falls short of establishing that this is the only or the most persuasive reading of the terms.

The strength of the City's position is Barnhardt's testimony that he consistently applies the Section 1 minimum to pre-shift work. Horlacher acknowledged that he was aware Barnhardt had done so. This states the interpretive strength of the City's case by indicating that the Union may be attempting to incorporate a practice from a separate division without first bargaining the point. This poses a troublesome issue.

Accepting the City's view of the practice, however, also poses difficulties. The record is less than detailed on how well known the asserted practice is. Horlacher's testimony falls short of establishing that the Union agreed that Barnhardt's past payment was appropriate. The absence of prior grievances may reflect that the Union was unaware of the circumstances at a time it could timely file a grievance. It may indicate the differential between the payment of the actual overtime hours worked and a Section 5 call-in minimum was not sufficiently large to catch the attention of the affected employee. Beyond this, Barnhardt testified that he has never authorized a Section 5 call-in. This does not in itself address the grievance, but highlights the fundamental interpretive dilemma concerning the relationship of Sections 1 and 5. The City's view of the language fails to clarify what meaning Section 5 has.

On balance, the Union's reading of the language of Section 5 is more persuasive than the City's. The language of that section refers to a phone call summoning an employee to

work. The reference to "recalled to work" has no apparent reference to a specific shift. Rather, it is refers to a phone call received by an employee "after the completion of their regular work day." This is clarified by the closing reference to "each call." Thus, Barnhardt's call for work on January 18 came after employees had left work at 4:00 p.m. on January 17. His call, whenever received, "recalled employees to work." Under the Union's view, Section 5 call-in payment is necessary because the employee has completed a regular work day and is notified that he must report to work prior to the next regular work day, whether or not the hours are contiguous to a shift. This view underscores that the "each call" reference puts a two-hour minimum on each summons to work to limit the disruption between regular work days.

The City's view does not give effect to the terms of Section 5. Under the City's view, Barnhardt's call, late in the evening of January 17 or early in the morning of January 18, "recalled" employees to a work day they had yet to perform. Ignoring the difficulty of labeling this a "recall", it reads the "after the completion of their regular work day" reference out of existence. Street Division employees had not completed "their regular work day" on January 18 until 4:00 p.m. on January 18. Barnhardt's call would have come many hours prior to that. In contrast to this, the Union's view makes the time of the actual phone call-in relevant and thus grants meaning to all of the terms of the section.

Under the Union's view, the Section 1 call-in minimum applies to all overtime, particularly short periods of work adjacent to the close of a regular shift. Section 5 is a more narrow entitlement, triggered by call-ins that are made after the completion of a regular work day, but prior to the commencement of the next regular work day. Presumably, such call-ins reflect unforeseeable circumstances that arise between the close of one work day but prior to the commencement of the next. January weather, like that posed in this grievance, fits within this view, and that view gives meaning to Section 1 and to Section 5. The City's view reads Section 1 so broadly that it denies any meaning to Section 5. As noted above, this conclusion is troublesome in light of past practice evidence. However, that evidence has flaws. More significantly, that evidence cannot justify reading the terms of Section 5 out of existence.

AWARD

The City did violate the contract when it did not pay ten workers two-hour recall overtime pay for January 18, 2001.

As the remedy appropriate to the City's violation of Article 14, Section 5, the City shall make the ten workers whole by compensating them for the difference between the wages and benefits already paid them for January 18 and the wages and benefits they would have earned but for the City's failure to pay the two-hour minimum.

Dated at Madison, Wisconsin, this 27th day of November, 2001.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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