BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WINNEBAGO COUNTY HIGHWAY DEPARTMENT EMPLOYEES UNION, LOCAL 1903, AFSCME, AFL-CIO

and

WINNEBAGO COUNTY

Case 373
No. 64229
MA-12846

Appearances:

Mary B. Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 807 Saunders Road, Apartment 1, Kaukauna, Wisconsin 54130, appearing for Winnebago County Highway Department Employees Union, Local 1903, AFSCME, AFL-CIO, referred to below as the Union.

John A. Bodnar, Winnebago County Corporation Counsel, 448 Algoma Boulevard, P.O. Box 2808, Oshkosh, Wisconsin 54903-2808, appearing for Winnebago County, referred to below as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement, which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve grievance number H91604, a "Class Action" grievance. A hearing on the grievance was conducted in Oshkosh, Wisconsin on March 22, 2005. The parties settled the grievance in part and agreed to postpone further hearing to permit further discussion of the matter. Those discussions did not produce an agreement, and the Union filed an amended grievance, which was heard in Oshkosh on May 19, 2005. The hearing was not transcribed. The parties filed briefs and reply briefs by July 27, 2005.

ISSUES

The parties stipulated the following issues for determination:

Did the County violate the collective bargaining agreement if it denied employees the opportunity to work their regular eight hour shift on days when they worked overtime?

Is the County required under the collective bargaining agreement to pay employees overtime pay (1½) for all hours worked in excess of eight in a day?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1
MANAGEMENT RIGHTS

The management of the Winnebago County Highway, Solid Waste, Airport, and Parks Departments and the direction of the employees in the bargaining unit, including, but not limited to . . .

3. the right to assign overtime work,

4. the right to relieve employees from duty because of lack of work or for other legitimate reasons, shall be vested exclusively in the County.

. . .

ARTICLE 11
CALL-IN AND REPORT PROVISIONS

A minimum of three (3) hours' compensation is guaranteed to an employee who is requested to and returns for duty at a time when he would not otherwise have to be on hand or if such employee reports for duty and is sent home due to adverse weather conditions.

Call-in provisions are not intended to apply where an employee is requested and reports for work any time within three (3) hours immediately preceding his regular starting time for work or when he is requested to and works later than his regular quitting time.

Any employee so called in and/or reporting for duty may be required to work the full amount of time for which compensation is guaranteed. . . .

ARTICLE 21
OVERTIME

With the exception of hours worked by Janitor-Watchmen and the employees at the Airport, all time worked outside the regular basic work hours shall be considered overtime and shall be paid for at the rate equivalent to one and one-half (1-½) times the employee's regular hourly rate, or at the employee's option the employee will receive compensatory time off on a time and one-half (1-½) basis. Said shifts shall be for a minimum of eight (8) hours inclusive of a lunch/break allowance. Employees at the Airport who work more than eight (8) hours in a day or forty (40) hours in a week shall be paid at the rate of one and one-half (1-½) times the employee's regular hourly rate. Janitor-Watchman shall be paid overtime at the rate of time and one-half (1-½), or at the employee's option, the employee will receive compensatory time off on a time and one-half basis, for all hours worked in excess of their eight (8) hour shift and for hours worked in excess of forty (40) in their established work week. . . .

ARTICLE 22
HOURS OF WORK

The regular basic workweek for all full-time employees shall consist of eight (8) hours per day and forty hours per week. Unless specified elsewhere in this article or unless temporarily modified by mutual agreement of the parties, the regular work day will be from 7:00 AM to 3:00 PM, Monday through Friday . . .

Starting and ending times may be changed on a temporary basis by mutual agreement between the department head and the majority of the affected employees and such changes shall not create any overtime pay obligation on the part of the County except for hours worked in excess of eight (8) in a day or forty (40) in a week. Any such temporary change in the hours of work of more than one (1) week's duration must have the written concurrence of a Union officer to continue. All agreements signed under this provision shall expire no later than December 31 of any given year.

BACKGROUND

The Union and the County ratified a 2004-06 labor agreement in June of 2004. The Union filed the original grievance in September of 2004, challenging the County's calculation of retroactive pay due under certain provisions modified from the 2003 to the 2004-06 agreement. At the March 22, 2005 hearing, the parties resolved the issue in part, and agreed to permit the grievance to be amended if subsequent discussions could not resolve the remaining portion of the dispute. Ultimately, the Union amended the grievance, and the parties agreed that the issues stated above pose the remaining unresolved interpretive issues.

The predecessor to the 2004-06 agreement was in effect from January 1 through December 31 of 2003. The first and third paragraphs of Article 21 of the agreement read thus:

> With the exception of hours worked by Janitor-Watchmen and the Custodians at the Airport, and emergencies as defined herein, all time worked outside the regular basic work hours shall be considered overtime and shall be paid for at the rate equivalent to one and one-half (1-½) times the employee's regular hourly rate. Custodians at the Airport who work more than eight (8) hours in a day or forty (40) hours in a week shall be paid at the rate of one and one-half (1-½) times the employee's regular hourly rate. Janitor Watchman shall be paid overtime at the rate of time and one-half (1-½) for all hours worked in excess of their eight (8) hour shift and for hours worked in excess of forty (40) in their established work week.
>
> . . .
>
> In emergencies, such as snow removal, ice control, and flood control, the county may vary an employee's regular basic work schedule up to three (3) hours. Said shifts shall be for a minimum of eight (8) hours inclusive of a lunch/break allowance.

The first paragraph is noted in the 2003 agreement as lines 11 through 18. The third is noted as lines 23 through 25.

The bargaining for a successor to the 2003 agreement took perhaps six to seven meetings, and addressed a wide range of issues. Frederick Bau, the County's Human Resources Director, was the County's chief spokesman and Mary Scoon was the Union's. One of the County's principal goals was to secure employee contribution to the cost of health insurance premiums. A number of other issues, including revisions to the first and third paragraphs of Article 21, were caught up in the bargain. By May of 2004, the parties had reached a tentative agreement, which included changes to employee contributions to health

insurance premiums as well as changes to Article 21. It is undisputed that the changes to Article 21 were part of the "quid pro quo" for the insurance changes, but that the agreement was a total package agreement, in which the quid pro quo for each party was spread throughout a number of provisions.

The parties reduced their tentative agreement to a four-page summary, which each side presented for ratification. The Union put the matter to ratification first. The ratification document set forth the agreement on overtime thus:

> 7. ARTICLE 21 – OVERTIME
>
> Amend language on page 15, lines 11-18 as follows: With the exception of hours worked by Janitor-Watchmen and the employees at the Airport, all time worked outside the regular basic work hours shall be considered overtime and shall be paid for at the rate equivalent to one and one-half (1½) times the employee's regular hourly rate, or at the employee's option the employee will receive compensatory time off on a time and one-half basis. Employees at the Airport who work more than eight (8) hours in a day or forty (40) hours in a week shall be paid at the rate of one and one-half (1½) times the employee's regular hourly rate. Janitor-Watchman shall be paid overtime at the rate of time and one-half (1½), or at the employee's option, the employee will receive compensatory time off on a time and one-half basis, for all hours worked in excess of their eight (8) hour shift and for hours worked in excess of forty (40) in their established work week.
>
> Employees will be allowed to maintain a compensatory time account balance not to exceed forty (40) hours.
>
> C.T. may be liquidated w/the approval of department mgmt.
>
> Add the following language on page 15, line 25: Hours worked outside of the employee's regular work schedule will be paid at one and one-half (1½) times the employee's regular hourly rate.

On May 21, 2004, Scoon sent an e-mail to Bau, which stated:

> I've met with my group and we want to be sure that we have the same understanding regarding a couple of issues as they will be asked at the meeting for ratification.

. . .

2. Hours of work/overtime: Employee gets called into work at 4 a.m. and works until 2 p.m. Based on new language the employee receives time and one half for the hours from 4 until 7, and then overtime pay (1 ½) for all hours worked beyond 8 hours, which in this case, would be 2 hours overtime.

. . .

Bau responded, by e-mail on May 24, thus:

Responses:

. . .

2. Correct

. . .

The Union ratified the tentative agreement on June 2, 2004. The County Board considered the ratification of the tentative agreement at its June 15 meeting. The resolution summarized the overtime portion of the tentative agreement thus:

. . .

8) **ARTICLE 21 – OVERTIME**

Amend the language to allow the accumulation of compensatory time, not to exceed forty (40) hours.

In addition to the foregoing, the new agreement provides for modifications to the articles covering hours of work, job classifications and duration and revisions to Appendix A (pay schedules).

The Board ratified the tentative agreement, on a 33 to 1 vote.

On July 20, 2004, the parties met to go over the tentative agreement to determine if there were any misunderstandings or issues prior to incorporating the tentative agreement into the final draft of the 2004-06 agreement. During this discussion, it became evident that the parties did not share a common understanding of the calculation of overtime under the revised Article 21. Scoon's May 21 e-mail played a role in these discussions. The Union contended

that the e-mail set out that the overtime rate would apply to the three hours worked before the normal start time of 7:00 a.m., as well as to any hours worked beyond eight hours, which under the e-mail would be any time worked after 12:00 p.m. The County took the position that the contract language had changed regarding the hours preceding the normal work day, but had not changed in other respects. Under its view, no overtime would be due for the hours of an employee's regular shift, which, under the e-mail, meant no overtime would be due for hours worked after 12:00 p.m., but before 3:00 p.m.

In mid-August of 2004, the parties signed the 2004-06 labor agreement.

The background set forth to this point is undisputed. The balance of the background is best set forth as an overview of witness testimony.

Steven Binder

Binder has worked for the Highway Department for over fourteen years. He noted that the Union bargaining team referred to Scoon's and Bau's e-mail exchange during the ratification vote. At the July 20 meeting, the Union bargaining team reacted strongly to Bau's changed view of the e-mail, contending that it had been a crucial part of the ratification vote and that the Union considered withdrawing its ratification. Bau responded that there was an agreement, and if there was a misunderstanding on its terms, the appropriate action would be to file a grievance. When the Union questioned how his response related to that of the May 24 e-mail, Bau responded, "I changed my mind."

Binder noted that the parties did not discuss the final paragraph of Article 22 during the negotiations preceding the 2004-06 agreement, or during the July 20 meeting. Binder noted his view that the County did not send employees home after putting in eight hours due to a weather emergency. Rather, employees were permitted to go home if they were tired, but could choose to stay to complete their normal shift, even if they had been called in prior to 7:00 a.m.

Louis Clark III

Clark has worked for the County for twenty-four years, and currently serves as a Foreman. He has served the Union in a variety of positions, including Chief Steward. He processed Grievance No. H3-2-00, which the Union filed in March of 2000 on behalf of Jim Ryf. Ryf alleged that on February 14, 2000, he reported in at 2:00 a.m. to plow snow. He left work ill at 10:00 a.m., and claimed two hours of sick leave. The parties ultimately resolved the matter under the following Stipulation and Order of Dismissal:

> 1. That the Grievant . . . shall be paid two (2) hours of sick time in relationship to an absence occurring on February 14, 2000.
>
> 2. That sick leave payments, in the future, shall be made to Union employees only for those hours of work missed due to sickness, as defined in the Collective Bargaining Agreement, during an employee's regular work schedule or during an employee's regular work schedule as adjusted pursuant to Articles 21 and 20 of the parties' Collective Bargaining Agreement.
>
> 3. That the grievance . . . shall be dismissed with prejudice.

Clark also processed Grievance H-1-16-03, filed as a "Class Action", alleging:

> . . . The County varied . . . employees' basic regular work schedule by 3 hours, having the basic regular work day begin at 4 AM. Some employees were told to go home before noon.

The grievance asserted this action was improper because "employees were sent home before they had acquired their minimum 8 hours regular time as provided in Article 21". The parties ultimately resolved this matter as confirmed in a letter dated January 20, 2003 from John Haese, the Highway Commissioner, to Clark. The letter states:

• • •

> The grievance . . . concerns a situation in which employees who had reported to work prior to 4:00 A.M. on January 6th were instructed to punch out and leave the worksite by 11:00 A.M. after having completed a total of 8 hours of work.
>
> The current contract states on page 16, line 1, 2 and 3: In emergencies, such as snow removal, ice control, and flood control, the County may vary an employee's regular basic work schedule up to three (3) hours. **Said shifts shall be for a minimum of eight (8) hours** . . .
>
> Therefore, the employees should not have been asked to leave work until after they had completed a work shift of 8 regular hours of time for the day. In the future the employees will be compensated for any overtime pay prior to 4:00 A.M. (or after 6:00 P.M.) and will also receive their regular rate of pay for any hours worked up to a minimum of 8 hours. . . .

Clark interpreted the settlement to confirm that employees have a right to work a shift of eight regular hours, without regard to an early call-in.

Clark stated that it is the employee's choice whether to remain after the completion of an eight hour shift prior to the end of the normal work day. If there ever was a practice to send employees home prior to the end of their regular shift, the grievance settlements changed it.

Clark noted that Haese's estimate of the costs of the Union's view of Article 21 was exaggerated. The overtime paid by the County under the settlement of the retroactivity issue was $11,643.00.

Frederick Bau

Bau has served as Human Resources Director since July of 2003. Bau attended all of the bargaining sessions that produced the 2004-06 agreement. The negotiations were long, and revolved around insurance. From his perspective, the bulk of the quid pro quo for the insurance changes was the wage increases paid on the effective date of the series of changes. The change to the reference to the three hour shift variance due to weather emergencies (referred to below as the three hour variance) was a part of the quid pro quo. The three hour variance was difficult to apply. The County proposed to eliminate the confusion by paying overtime for hours outside of the normal work schedule, which runs from 7:00 a.m. through 3:00 p.m. Under his view of the proposal, this meant that there could be no overtime payment for regular hours, meaning the time and one-half rate would not apply between the hours of 7:00 a.m. and 3:00 p.m. The parties never discussed applying the time and one-half rate for hours between noon and 3:00 p.m., and never discussed a guarantee that each shift must include eight regular hours.

At the July 20 meeting, the Union questioned him regarding the application of revised Article 21. The Union alleged he offered a different view than expressed in his May 24 e-mail, but his view presumed the "2 hours overtime" noted in Scoon's e-mail had to occur outside of regularly scheduled hours. He denied stating to the Union that his comments on July 20 reflected that he had "changed his mind" from the May 24 e-mail.

John Haese

Haese has worked in highway departments from 1981, in unit positions through his current position of Highway Commissioner. He has served the County in that position for six and one-half years. Haese had never seen the May 24 e-mail prior to the July 20 meeting. Prior to the Union's producing the document, Bau had informed them that there could be no overtime for regular hours of work between 7:00 a.m. and 3:00 p.m. Haese did not attend all of the bargaining sessions that produced the 2004-06 agreement, but stated that at every session he attended, the County noted that the proposal to modify Article 21 could not produce overtime payment for hours worked during the normal schedule. The County has never guaranteed an eight hour shift, and did not do so in bargaining or during the July 20 meeting.

Haese has routinely sent employees home prior to the end of a regular shift where the employee has completed their plowing duties. He believed the costs of the Union's reading of Article 21 could increase the Highway Department budget by $79,000.00 over the costs of the winter of 2004-05. Such an increase could price the County out of the snowplowing marketplace. His administrative staff prepared this figure, assuming that employees on an overtime shift would stay a full eight hour shift beyond the hours worked outside of a normal schedule. With State revenue to municipalities declining, the County could never pass this cost on to its customers. Had he known how the Union interpreted the change to Article 21, he would have opposed any County action to agree to it. The changes to the 2003 agreement reflect that the language was confusing, was unsupported by comparable departments, and as implemented offered an employee no incentive to work outside of normal hours.

William Demler

Demler has served as a Maintenance Superintendent for roughly two and one-half years. Prior to that, he worked for the Highway Department for roughly seventeen years in a variety of unit positions. On July 20, Scoon noted that the calculation of overtime had been resolved, and Demler agreed regarding the period between 4:00 a.m. and 7:00 a.m., but when he noted that overtime would not be paid for work during normal hours, the dispute began. Bau noted to the Union that the e-mail made no difference regarding the interpretation of the changes to the labor agreement and that the purpose of the meeting was to agree to the final draft of the changes.

Demler calls employees in to plow, and noted that County payment of overtime for hours beyond eight was a function of the old system, triggered by the three hour variance language. Under the changes to Article 21, there can be no paid overtime between the hours of Noon and 3:00 p.m. In any event, overtime shifts typically do not exceed eight hours.

Mary Scoon

Scoon and Bau attended all of the bargaining sessions that produced the 2004-06 agreement. The parties addressed at length during the bargaining that the three hour variance language offered no incentive for employees to work outside of normal hours, and did nothing to compensate them for the inconvenience. Scoon prepared the tentative agreement summary, which Bau proofed before its ratification. Prior to the day set for the ratification, questions arose within the Union's bargaining team regarding how overtime would be calculated. This prompted Scoon's May 21 e-mail to Bau. She used his May 24 response to answer questions at the ratification vote on June 2. At the meeting on July 20, Bau stated that he had changed his mind regarding the issue.

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 contends that the grievance must be granted because "the County is attempting to back out of the deal by use of the grievance procedure." Testimony establishes that the parties met roughly seven times to create the 2004-06 labor agreement. The agreement included significant insurance concessions by the Union and significant overtime changes to compensate the Union for those concessions. More specifically, the predecessor agreement permitted the County to "vary an employee's regular basic work schedule up to three (3) hours for emergencies without having to pay overtime." The 2004-06 agreement eliminated that right, and demanded pay at time and one-half for such hours. The parties left unchanged provisions governing the regular work day or its consensual modification.

The May 24 e-mail must be read against this background. The Union relied on Bau's responses to ratify the agreement. The July 20 meeting cannot alter this. The Union signed the agreement solely because Bau correctly asserted that the parties had reached an agreement. This cannot alter what the parties agreed to, as affirmed in Bau's May 24 e-mail. Employee testimony and two grievance settlements confirm that Bau's May 24 response was correct. The parties' failure to discuss any change to existing practices regarding an employee's right to work their regular eight hour shift underscores this. Bau's testimony fails to support the interpretation he tried to give the May 24 e-mail during the July 20 meeting.

Haese's testimony regarding bargaining history cannot support the County's view. He did not attend all of the sessions, and his testimony on why the parties made the overtime changes is unreliable. His assertions that the Union's interpretation would cost roughly $80,000 and would price the County out of the snow removal market are "mere speculations." The evidence would indicate the costs are closer to $12,000.

The evidence establishes that the Union bargained in good faith. The County's view of the agreement turns an overtime payment into a premium payment. This view obscures the bargaining history and affords the County, through grievance arbitration, a benefit never secured in collective bargaining. The Union did not back out of its agreement to pay more for insurance. The County should not be permitted to back out of its agreement to pay more for overtime. The Union concludes that the grievance should be sustained, and that employees should be made "whole for any and all losses they incurred by not being paid overtime for hours in excess of eight (8) in a day". The Union further urges that the County should be ordered to "cease sending employees home prior to working their eight (8) regular hours on overtime days."

The County's Brief

The County contends that under governing Wisconsin statutory and administrative law, "local government entities . . . such as counties, are primarily subject only to federal regulations with regard to the payment of overtime wages." There is no federal requirement specifically or legal requirement generally that the County "must compensate its employees at a rate of one and one-half (1½) time regular pay for working more than eight (8) hours in a single day." Beyond this, the labor agreement does not provide overtime for employees working during their regularly scheduled day. The agreement is "quite clear" that overtime is "time worked outside the regular basic work hours." Accepting the Union's position would allow the Union "to double dip".

Article 22 does not, in any event, guarantee work between 7:00 a.m. and 3:00 p.m. on any single day. Such a guarantee would fly in the face of the Department's work needs, which demand plowing at odd hours in times of weather emergency. Typically, employees have no desire to work their normal schedule when they are called in off-schedule, and departmental practice allows the County to send employees home after working eight hours, "despite the fact that their regular shift has not expired." The contract places no duty on the County to allow people to work their shift after an early call-in, and Article 1 permits the County "the right to relieve employees from duty because of a lack of work or other legitimate reasons." The agreement does not allow employees to receive pay unless they are working.

During the July 20 meeting, Bau informed the Union that his response to Scoon's May 24 e-mail was a mistake. He also informed the Union the County would interpret the agreement consistent with past practice. That the Union signed the labor agreement cannot obscure that it was aware of the County's position. That the Union did not re-vote the agreement cannot become a basis for the extraction of a concession in arbitration that the County never agreed to during negotiation. The concession would be dear, and "would likely price (the) County out of the market for providing snow removal services to towns and to the State of Wisconsin".

Nor will bargaining history support a finding that the County made the concession the Union seeks. The County made significant tradeoffs in the overtime area without regard to the concession the Union seeks. To adopt the Union's position would grant a benefit in grievance arbitration never secured in collective bargaining, and the grievance should be denied.

The Union's Reply Brief

It is not necessary to look to state or federal law to determine the contractual issues. Laws "only provide minimum standards that employers must meet" while the labor agreement provides a greater benefit, which must be enforced. The agreement demands overtime

payment for hours worked in excess of eight in a day or forty in a week. Article 22 confirms this, and will not support the County's assertion that overtime is based on eighty hours over two weeks.

A review of the record demands that the contract be enforced as the Union asserts. The Union's view is consistent with the contract, as well as grievance settlements, bargaining history and past practice. Any other conclusion uses grievance arbitration to afford a benefit never secured in good faith collective bargaining.

The County's Reply Brief

The agreement and the parties' practices cannot be stretched to force the County to pay time and one-half for hours worked outside of the regular schedule and to guarantee payment for regular hours, whether or not worked. Articles 1 and 21 confirm that such an obligation has never been agreed to and is inconsistent with County management rights. That overtime payment is now required for early call-ins is not in dispute. The parties agreed to that change in the 2004-06 labor agreement. Agreement provisions on the alteration of start and end times has no bearing on this point. The grievance settlements pointed to by the Union are either distinguishable or non-precedential.

The bargaining for the 2004-06 agreement did not alter the fundamental operation of a highway department, which demands the alteration of schedules to respond to emergency weather situations. Haese's testimony is not speculation, but a graphic portrayal of the weakness of the Union's view. There is no established relationship between such a large concession and the insurance changes made during the bargaining. The Union's view cannot be sustained without granting a large benefit never secured in negotiations.

DISCUSSION

The parties stipulated the issues for decision noted above at the hearing. As argued, each issue questions contract language, past practice and bargaining history, including grievance settlements.

The first issue questions whether the agreement guarantees employees an eight hour shift in addition to any overtime hours worked under a weather emergency demanding work preceding or following the regular shift.

The Union bases the contractual support for its view on Article 22, which uses "shall consist" and "will be" to define the "regular work day" of the "regular basic workweek". In addition, the Union points to Article 21, which notes, "Said shifts shall be for a minimum of eight hours". The past practice and bargaining history evidence rests on testimony summarized above.

The support the Union's interpretation has in the evidence falls short of establishing a guarantee of an eight hour shift. Standing alone, the Union's view of Articles 21 and 22 is tenuous. The use of "shall" and "will" to define a shift is consistent with a guarantee. However, the "shall" and "will" are tied to the "regular basic workweek" and to "the regular work day". The terms thus defined are less the statement of a guarantee of hours than of a slate of hours which define the basis upon which overtime will be calculated. That Article 22 separately defines "Hours of Work" while Article 21 defines "Overtime" underscores this.

The "Said shifts" reference of Article 21 more clearly points to a guarantee, if viewed in isolation. However, the reference is in the Overtime Article, which makes it difficult to read as a guarantee of shift hours specified in Article 22. Beyond this, the reference is, at best, ambiguous. It is what is left of the three hour variance language of the 2003 agreement. As used in the 2003 agreement, the reference was to protect employees from being called in outside of a regular shift under the three hour variance language only to be denied a full shift by being sent home early. This reference was to prevent the abuse of a shift variance due to a weather emergency rather than to specifically guarantee a full eight hour shift without regard to weather emergencies. There is no reason to give it a broader meaning in the 2004-06 agreement, since the evidence establishes that that the parties never specifically discussed giving it this new meaning.

Beyond the tenuous nature of the Union's view of the contract, the County's view has solid contractual support. Sections 2 and 3 of Article 1 vest the County "exclusively" with the authority to assign overtime and "to relieve employees from duty because of lack of work or for other legitimate reasons". There is no evident way to reconcile the Union's assertion of a guaranteed shift under Articles 21 and 22 with these provisions. The "shall be vested exclusively in the County" reference is not reconcilable to employee choice to complete a shift. That the management rights are general provisions which are something less than clear and ambiguous cannot obscure that the Union lacks specific guarantee language to restrict them. More specifically, the provisions of Article 11 demonstrate that the parties understand how to clearly state a guarantee of hours. Thus, the governing contract provisions afford more support for the County's than for the Union's view of the first stipulated issue.

That the governing contract provisions are not clear and unambiguous makes past practice and bargaining history arguably relevant. That evidence will not, however, make the Union's interpretation preferable to the County's. The past practice evidence rests on testimony which is conflicting and irreconcilable. Clark and Binder perceive employee choice to leave work where Haese and Demler perceive the exercise of employer authority to send employees home. The persuasive force of past practice rests on the agreement manifested by the parties' conduct. Here, there is no evidence of agreement. The absence of such agreement undercuts the Union's position, since the governing contract language favors the County's.

The Union's assertion of grievance settlements cannot overcome this. The grievances complicate the Union's view of past practice, since the grievances reflect fundamental disagreement rather than the agreement that is the persuasive force of past practice. Nor can the terms of the settlements support a guarantee of an eight hour shift. The Ryf settlement can be read as the Union asserts. However, it can also be read to support the County's view, since sick leave payments were restricted to an employee's "regular work schedule", and thus cannot be used to support overtime payment for hours not actually worked. The difficulty is that the terms of the settlement beg the issue here, which is whether the contract guarantees a regular shift. The settlement did not address the issue posed here. This undercuts the Union's view, for the contract falls short of otherwise establishing the guarantee the Union seeks.

Similar considerations govern the 2003 grievance settlement. The underlying grievance questions the application of the three hour variance language, which the parties removed from the 2004-06 agreement. Haese's resolution of the grievance confirms what the parties discussed during the bargaining to remove the three hour variance language – using the three hour variance for a weather emergency, when combined with sending employees home prior to an eight hour shift, affords no incentive to come into work. As noted above, there is evidence that the parties understood that a weather emergency should not punish employees for reporting for work. This reflects an understanding that overtime provisions should not be evaded or abused. However, this falls short of guaranteeing an eight hour shift on every work day, without regard to the length of the emergency weather call-in. It should also be noted that the County does not assert that the absence of a guarantee of a normal shift grants it the right to call-in employees off their regular schedule due to a weather emergency, then send them home prior to the completion of an eight hour shift.

Beyond this, the evidence of bargaining history supports the County's view over the Union's. While the cost of the Union's position may not be a meaningful guide to interpreting the agreement standing alone, it does set the bargaining context. More specifically, the guarantee the Union seeks is a significant benefit lacking clear support in the agreement. Against this background, some specific discussion to grant the benefit can reasonably be expected. Here, however, the evidence establishes that there was no such discussion. The parties' summaries of the tentative agreement confirm that the asserted guarantee of hours did not receive specific mention.

Grievance arbitration is to grant the bargaining parties the benefit of their agreement, and regarding the first stipulated issue, the Union seeks to push the bargain in arbitration farther than it reached in negotiation.

In sum, the governing contract provisions favor the County's view of the first issue. Those provisions are less than clear and unambiguous, but evidence of past practice and bargaining history fail to grant persuasive support for the Union's view.

The second stipulated issue focuses broadly on the same articles. The dispute calls other provisions into play, and more specific evidence of bargaining history regarding their interpretation.

The Union places the contractual support for its view on Article 21, which mandates that "all time worked outside the regular basic work hours shall be considered overtime". Article 22, as noted above, mandates that the "regular basic work week . . . shall consist" of an eight hour day and a forty hour week. In addition, the Union points to that portion of Article 21 which notes, "Said shifts shall be for a minimum of eight hours". Additionally, the Union points to the final paragraph of Article 22, which governs temporary changes to shift start and end times. The provision notes that the changes will not create overtime obligations "except for hours worked in excess of eight (8) in a day or forty (40) in a week." The bargaining history evidence focuses on Bau's and Scoon's e-mail exchange.

The County urges that it has no legal or contractual obligation to pay employees overtime for working more than eight hours in a day. Beyond this, the County urges that the overtime obligation the Union seeks is too significant to rest on the weak evidence of bargaining history.

Unlike the first issue, the contract provisions cited by the Union afford strong support for its interpretation. Article 21 reads as the Union urges. It mandates that time worked outside of the "regular basic work hours" is overtime. Article 22 defines the "regular basic work week" to consist of an eight hour day and a forty hour week. The tightness of the terms across these articles cannot be ignored. Beyond this, the final paragraph of Article 22, even though it does not necessarily apply to a weather emergency, affirms that the overtime obligation arises "for hours worked in excess of eight (8) in a day or forty (40) in a week." Beyond this, the Airport and Janitor-Watchman comp time provisions are triggered by an eight hour day or forty hour week. The uniformity of these provisions supports the Union's view. The "Said shifts" reference of Article 21 may be ambiguous, but does refer to "a minimum of eight hours". This reference survived the 2003 agreement, and presumably establishes that overtime should not be evaded by altering the length of a shift under eight hours. Whatever its ultimate scope may be, it underscores the other provisions pointing to an eight hour day as the definition of a regular shift.

Unlike the first issue, the County has no contract provisions to undercut those cited by the Union. Article 1 recognizes the County's right to assign overtime, but has no provisions limiting those cited by the Union.

To the extent the governing provisions are ambiguous, bargaining history supports the Union's view over the County's. While the County persuasively asserts that the e-mail exchange is not binding regarding the interpretation of Article 21, the exchange affords no support for the County's interpretation and cannot be read to undercut the persuasive force of the Union's

contractual position. More to the point, it affirms the Union's understanding of Article 21. It may be debatable if County Highway management shared this understanding, but the evidence shows no basis to undercut the force of the Union's reading of Articles 21 and 22.

Beyond this, the County's view of the bargaining history affords little assistance to interpret Articles 21 and 22. The parties chose to retain the "Said shifts" reference from the three hour variance language. The County's view cannot account for the retention of this reference. The County contends that the underlying overtime language was not changed, and thus it cannot be obligated to pay overtime for time worked beyond eight hours in a day. As noted above, the County has established that Article 22 defines a regular workday for overtime purposes but falls short of guaranteeing those hours. However, the same provision that defines a normal workday defines it as an eight hour day. The retention of the "Said shifts" reference also points to an eight hour day for overtime purposes. The County's view of bargaining history affords no clarity, other than the opinion of Highway management which was not communicated across the table, on how these provisions can be granted meaning.

In sum, the Union's position on the second issue has greater support in the governing contract provisions of Articles 21 and 22 than the County's. What evidence there is of bargaining history offers no support for the County's position, but supports the Union's. Unlike the first issue, the County's contentions regarding the cost of the Union's position lacks persuasive force. Unlike the first issue, the Union's contractual position is strong, and the County's concerns were not voiced across the table. Against this background, the County's view of costs seeks to turn contract interpretation on an arbitrator's view of a fiscal issue. As noted above, the goal of arbitration is to give the parties the benefit of their agreement, not an arbitrator's view of departmental management.

In sum, the agreement cannot be read to guarantee employees an eight hour shift in addition to overtime hours under Article 21 which are worked due to a weather emergency preceding or following the regular shift defined in Article 22. Article 21 does, however, require overtime payment if the County chooses to have employees work beyond an eight hour day.

The final issue concerns remedy, but there is no evidence to establish what, if any, losses can be traced to the County's view of Articles 21 and 22. The Award is silent on the issue of remedy, other than noting a general make-whole remedy, if one is warranted. The Award leaves the remedial issue to the parties to address, and includes my retention of jurisdiction in the event such discussions prompt a dispute requiring further hearing.

AWARD

The County did not violate the collective bargaining agreement if it denied employees the opportunity to work their regular eight hour shift on days when they worked overtime.

The County is required under Articles 21 and 22 of the collective bargaining agreement to pay employees overtime pay (1½) for all hours worked in excess of eight in a day.

As the remedy appropriate to the violation noted in the second paragraph above, the parties shall discuss what, if any, losses are traceable to the County's interpretation and to make affected employees whole for such losses. I will retain jurisdiction over this matter for not less than forty-five days from the date of this Award to address disputes that such discussions cannot resolve and that require further hearing.

Dated at Madison, Wisconsin, this 14th day of October, 2005.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
6894