BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL DRIVERS, DAIRY EMPLOYEES, WAREHOUSEMEN, HELPERS & INSIDE EMPLOYEES LOCAL UNION NO. 346

and

DOUGLAS COUNTY (HIGHWAY DEPARTMENT)

Case 275
No. 66162
MA-13445

Appearances:

Andrew & Bransky, P.A., by **Timothy W. Andrew**, on behalf of General Drivers, Dairy Employees, Warehousemen, Helpers and Inside Employees Local Union No. 346.

Frederic P. Felker, Douglas County Corporation Counsel, on behalf of Douglas County.

ARBITRATION AWARD

General Drivers, Dairy Employees, Warehousemen, Helpers and Inside Employees Local Union No. 346, hereinafter the Union, and Douglas County (Highway Department), hereafter the County or Employer, are parties to a collective bargaining agreement that provides for final and binding arbitration. On August 4, 2006, the Union requested that the Wisconsin Employment Relations Commission appoint a Commissioner or staff member as Arbitrator to hear and decide the instant dispute. The County subsequently concurred in the request and the Commission appointed staff member Coleen A. Burns as Arbitrator. A hearing was held before the undersigned on October 12, 2006 in Superior, Wisconsin. The hearing was not transcribed and the parties submitted post-hearing briefs by November 6, 2006. Following consideration of the evidence, the arguments of the parties and the record as a whole, the undersigned makes and issues the following Award.

ISSUES

At hearing, the Union framed the issues as follows:

Is the County's assignment of employees to an activity at the start of the work shift, where the activity is expected to exceed the regular work shift and require overtime work, an "overtime assignment" within the meaning of Article 17, Section 2.A?

At hearing, the County framed the issues as follows:

Did Douglas County violate the collective bargaining agreement when it failed to assign Brad Greely and Gill Botten to work on County Highway L on June 5 and 6 of 2006?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 4.

MANAGEMENT RIGHTS:

The County possess the sole right to operate the County 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 County.
B) To hire, promote, schedule and assign employees to positions with the County.
C) To suspend, demote, discharge and take other disciplinary action against employees for just cause.
D) To relieve employees from their duties, to change assignments or lay-off.
E) To take whatever action is necessary to comply with State or Federal law.
F) To introduce new or improved methods or facilities.
G) To determine the methods, means and personnel by which County operations are to be conducted.
H) To take whatever action is reasonably necessary to carry out the functions of the County in situations and emergency.
I) To establish work rules and schedules of work.
J) To maintain efficiency of County operations.

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ARTICLE 17

SENIORITY: Section 1. A. Definition of seniority: County-wide seniority shall mean the length of service of an employee from his/her last permanent employment date with the County. The employee's seniority shall continue to accrue during temporary layoff due to lack of work, shortage of funds, or any contingency beyond the control of either party to this agreement.

Working Foremen shall be authorized to operate all departmental equipment when the need arises and as directed/assigned by management. These assignments will be made only when all available Equipment Operators have been given work assignments within their respective work related classifications.

B. Definition of Work related classifications: Work related classifications shall be the following classifications:

(a) Equipment Operators 1 and Equipment Operators 2
(b) Equipment Operator/Technician/Trainer;
(c) Working Foreman;
(d) Mechanics, and Shop Foreman;
(e) Clerical; and
(f) Building Service Employee Worker
(g) Equipment Operator/Sign Coordinator
(h) Parts Coordinator/Mechanic

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Section 2. A. For overtime assignments in cases other than when work is currently in progress, overtime work will be offered in the following order: (NOTE: The Equipment Operator Technician and Equipment Operator/Sign Coordinator will maintain their seniority and be included in the classification of Equipment Operator for all purposes of call outs).

a. The most senior person at the portal within the work related classification, including the working foreman if the task can be completed/performed with a 1-Ton truck. The employee with the least county-wide seniority at the portal within work related classification must accept the work. If no one within the portal can be reached the following order will be used:

b. The most senior person within the work related classifications, including the working foreman if the task can be completed/performed with a 1-Ton truck.

c. The most senior qualified person outside of work related classifications.

B. Employees assigned to work on a Friday shall be assigned to continue such work on overtime on Saturday, when the work is scheduled prior to 3:30 p.m. on Friday, without regard to seniority. Weekend call outs will be done per Article 17, Section 2A.

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BACKGROUUND

The County maintains and operates the Douglas County Highway Department and the Union is the collective bargaining representative of the Department's unionized employees. On June 5 and 6, 2006, Union bargaining unit members Brad Greely and Gill Botten worked their normal ten hour day and did not receive any overtime.

On June 8, 2006, Greely and Botten each filed a grievance alleging that the County had violated Article 17, Section 2, of the collective bargaining in the assignment of grinder crew overtime on June 5 and June 6, 2006. Although the grinder crew continued to work overtime after June 5 and 6, 2006, the Grievants did not claim further grinder crew overtime because each was assigned to other overtime work. The grievance was denied at all steps and, thereafter, submitted to arbitration.

Union

Article 17, Section 2, requires the County to offer overtime assignments to the most senior person at the portal within the same work related classification. On June 5, 2006, the Grievants were assigned to the Hawthorne Portal; as were the less senior employees who were assigned to the grinder crew, *i.e.*, Smith, Ellison and Amys. Grievant Greely is an Operator No. 2, as is Smith, and Grievant Botten is an Operator No. 1, as are Ellison and Amys.

On June 5, 2006, the County clearly understood that employees assigned to the grinder crew would work overtime. The assignment, therefore, was an overtime assignment within the meaning of Article 17, Section 2. Although there is an exception for "work in progress" overtime, there was no "work in progress" at the time that the junior employees were assigned to the grinder crew on the morning of Monday, June 5, 2006.

Under the County's interpretation of Article 17, Section 2, the "assignment" of overtime only occurs immediately prior to when the overtime is worked. Such an interpretation limits overtime by seniority opportunities to call outs. Inasmuch as call outs are governed by another provision of the labor contract, the County's interpretation makes the Article 17, Section 2, right to overtime by seniority virtually meaningless. Under applicable rules of contract construction, the arbitrator should avoid any interpretation which tends to nullify or render meaningless provisions of the labor contract.

The Union's interpretation gives meaning to both Article 4 (Management Rights) and Article 17, Section 2 (Overtime Assignment by Seniority). So long as a job is not expected to produce overtime at the end of the shift, the County has the right to assign junior employees to the job. The practice of the parties clearly establishes that the parties understood that the seniority overtime right includes circumstances where the morning assignment is expected to create overtime at the end of the shift.

The grievance should be sustained. The Grievants are entitled to receive the overtime that they should have been offered on June 5 and 6, *i.e.*, 4.5 and 4 hours respectively.

County

The language of Article 17, Section 2, does not say that "daily work crew assignments which have a high probability of working overtime shall be offered to the senior employees..." nor should such language be lightly inferred to exist as a matter of contract interpretation. In order for work to be "offered", implies work to be performed with a certainty in the near future. The Union's interpretation is not supported by past practice evidence that is unequivocal; clearly enunciated and acted upon; and readily ascertainable over a reasonable period of time as fixed and established practice.

In practice, according to the testimony of Halverson and Armstrong, when overtime is offered it is offered by way of an extended work week or pursuant to call out provisions under Article 17, Section 7. The more reasonable interpretation of the contract language as it exists is to define overtime in terms of the non-contingent circumstances that are expressly addressed in the contract, those being the planned extensions of the normal workweek and the decisions to make call-outs under the procedures specifically outlined in the contract.

The assignment of employees to various jobs based upon the relative skills of the employees, relevant work restrictions and other factors is essentially part of management's function to direct the workplace. The County's assignment of employees is consistent with its Article 4 rights to direct its workforce and maintain efficiency of County operations.

The County's Article 4 management rights trumps all but equally specific language limiting these rights. Such limiting language does not exist.

DISCUSSION

Issues

The parties were unable to stipulate to a statement of the issues. The undersigned is persuaded that the issues are most appropriately stated as follows:

> Did the County violate the parties' collective bargaining agreement when it did not offer grinder crew work to Brad Greely and Gill Botten on June 5 and 6, 2006?

If so, what is the appropriate remedy?

Merits

The essence of the Union's argument is that the grinder crew work in dispute is an "overtime assignment" within the meaning of Article 17, Section 2, and, thus, assignment of such work is governed by Article 17, Section 2. In denying that the grinder crew work in dispute is an "overtime assignment" within the meaning of Article 17, Section 2, the County relies, *inter alia*, upon Article 4, Management Rights.

Article 4 expressly recognizes that the referenced management rights are subject to limitation by other provisions of the contract. Thus, to determine the relevance of Article 4, the undersigned must first give effect to the language of Article 17, Section 2.

The testimony of Highway Commissioner Halverson establishes that, when the County bid to lease the grinder, it knew that, absent an act of god, such as inclement weather or mechanical breakdown, the grinder would operate until dark; which, on June 5, 2006, would have been after the end of the Grievants' normal work shift. Patrol Superintendent Armstrong acknowledges that, when he assigned the grinder crew on June 5, 2006, he knew that the grinder crew would work overtime unless there was a mechanical problem or bad weather.

The undersigned is satisfied that, when the County assigned employees to the grinder crew on June 5, 2006, the County knew, or should have known, that, but for an act of god, such assignment would result in overtime. Contrary to the argument of the County, at the time that the grinder crew work was assigned, there was sufficient certainty that this work would result in overtime that such work is reasonably construed to be an "overtime assignment." Article 17, Section 2, recognizes that bargaining unit employees have a seniority right to perform "overtime assignments."

Armstrong recalls that, for the majority of the time, the former Patrol Superintendent would make daily assignments on the basis of seniority if a senior employee said that job involves overtime and I want it. According to Armstrong, he is aware of this practice and does try to honor seniority the best that he can. Armstrong also stated that he does not normally assign tasks on the basis of seniority; that a few times he has assigned tasks on the basis of seniority; and that his working foreman does assign tasks on the basis of seniority when Armstrong is absent.

Highway Commissioner Paul Halverson recalls that the former Patrol Superintendent retired approximately 3½ years ago. Halverson further recalls that, despite Halverson's objections, the former Patrol Superintendent "to some degree" made daily assignments by offering work on the basis of seniority. Halverson also states that Dave Johnson, a bargaining unit employee who acts in the absence of the Patrol Superintendent, continues to offer daily assignments on the basis of seniority. Halverson acknowledges that he is not always aware of how work is being assigned to bargaining unit employees.

Dean Amys has been employed by the Highway Department for approximately seven years. Amys recalls that, during his tenure, work assignments that are known to involve overtime, such as the grinder crew and ditching work, have been offered to employees on the basis of seniority. Amys, a Union Steward, further recalls that, approximately one week before the instant grievance, he received complaints that Armstrong was not offering ditching work on the basis of seniority.

According to Amys, he discussed these complaints with Armstrong and Armstrong responded that, for the rest of the summer, he would offer this work on the basis of seniority. Armstrong does not deny that he agreed to assign this work on the basis of seniority.

Grievant Botten has been employed by the Department for approximately thirteen years. Botten recalls that, before and after this grievance, work assignments that are known to involve overtime always have been offered to employees on the basis of seniority. According to Botten, this was the first time during the tenure of the prior Patrol Superintendent and the current Patrol Superintendent that he was passed over when overtime was expected.

Grievant Greely has been employed by the Department for approximately sixteen years. Greely confirms Botten's testimony that work assignments known to involve overtime have been offered to employees on the basis of seniority.

The testimony regarding past practices reasonably establishes that there are work assignments which are recognized by both parties to normally involve overtime. This testimony also reasonably establishes that employees authorized by the County to assign such work to bargaining unit employees have recognized a seniority right to perform such work assignments.

In summary, the most reasonable construction of the plain language of Article 17, Section 2, is that the grinder crew work in dispute is an "overtime assignment" within the meaning of that provision. The evidence of the parties' prior practices is consistent with such a construction. The record provides no reasonable basis to conclude that the parties mutually intended another construction. Concluding that the grinder crew work in dispute is an "overtime assignment" within the meaning of Article 17, Section 2, the undersigned turns to the issue of whether or not Article 17, Section 2, provides the Grievants with a right to be offered this "overtime assignment."

Article 17, Section 2, requires that "overtime assignments", other than "when work is currently in progress," be offered to the most senior person at the portal within the work related classification. On June 5, 2006, Grievants Botten and Greely were assigned to work out of the Hawthorne Portal, as were employees Amys, Smith and Ellison.

Ellison, Amys and Smith were less senior than either Greely or Botten. Botten, Amys, and Ellison were in the Operator 1 classification and Greely and Smith were in the Operator 2 classification.

Under the language of Article 17, Section 1, Equipment Operators 1 and Equipment Operators 2 are related classifications. It is undisputed that the two Grievants were qualified to perform the grinder crew work performed by Amys, Smith and Ellison.

On the mornings of June 5 and 6, 2006, the County assigned Amys, Smith and Ellison to work on the grinder crew overtime assignment and did not offer such work to either Greely or Botten. The County, therefore, failed to offer the grinder crew overtime assignment to the most senior person at the portal within the work related classification.

Monday, June 5, 2006 was the first day that the grinder was operating and, thus, when the "overtime assignment" of grinder crew work was assigned to Smith, Ellison and Amys, it did not involve work that was "currently in progress." Inasmuch as the County did not provide the Grievants with the opportunity to work the grinder crew overtime assignment on June 5, 2006, the work "currently in progress" exception cannot be reasonably applied to the grinder crew overtime work that was performed by Smith, Amy and Ellison on June 6, 2006.

In summary, the work "currently in progress" exception is not applicable to either the June 5, 2006 grinder crew overtime assignment or the June 6, 2006 grinder crew overtime assignment. Accordingly, the language of Article 17, Section 2, required the County to offer the June 5 and 6, 2006 grinder crew overtime assignment to Greely and Botten prior to assigning this work to Smith, Amys or Ellison.

Greely recalls that, on June 6, 2006, he gave Armstrong an overtime slip for June 5th. Greely further recalls that, when Armstrong denied this overtime, he complained to Armstrong and Halverson about not having been assigned to the grinder crew on June 5th. According to Greely, he was told that he should not be operating the equipment because of his injury and that he questioned how these supervisors would know that he should not be operating the equipment unless he operated the equipment.

It is undisputed that, on June 5 and 6, 2006, Greely was under a medical work restriction. Neither party offered medical documentation of this work restriction. Halverson recalled that Greely was restricted to lifting 35# and that there were other restrictions, but was not able to recall the specifics of these other restrictions.

Greely states that his injury was a herniated disk in his neck. Greely recalls that, approximately one month prior to June 5, 2006, while under the same medical restriction, he had complained to Halverson or Armstrong that operating the power broom was hard on his neck. Greely provided the County with a written statement detailing his power broom complaints, which focused primarily upon soreness caused by turning around backwards when backing up and bouncing over rocks, gravel, driveways and piles of gravel in a vehicle that did not have suspension.

Given Greely's complaint about the power broom, Armstrong and Halverson had a reasonable basis to be concerned that they not assign work that would aggravate Greely's

existing medical condition. If the record were to establish that assignment of the disputed grinder crew work would be contrary to Greely's medical restriction, or that such assignment would subject Greely to the same conditions that were the subject of his recent power broom complaint, the undersigned would have a reasonable basis to conclude that Greely's medical condition rendered him unavailable for the grinder crew overtime assignment in dispute. The record, however, does not so establish.

Conclusion

Contrary to the argument of the County, the County's Article 4, Management Rights, are "trumped" by the language of Article 27, Section 2. Under the language of Article 27, Section 2, the County is required to offer the grinder crew "overtime assignment" of June 5 and 6, 2006 to Botten and Greely before assigning this work to Amys, Ellison, and Smith. Inasmuch as the County failed to offer the grinder crew "overtime assignment" of June 5 and 6, 2006 to Botten and Greely before assigning this work to Amys, Smith and Ellison, the County has violated Article 27, Section 2, of the parties' collective bargaining agreement.

On June 5, 2006, Amys, Ellison and Smith each worked 4.5 hours of grinder crew overtime. It is evident, therefore, that the overtime assignments that should have been offered to Botten and Greely on June 5, 2006 involved 4.5 hours of overtime. Accordingly, the appropriate make-whole remedy for the County's violation of Article 27, Section 2, includes an order requiring the County to pay each Grievant 4.5 hours of overtime at their June 5, 2006 rate.

On June 6, 2006, Smith worked 3.0 hours of grinder crew overtime; Amys worked 3.5 hours of grinder crew overtime and Ellison worked 4.0 hours of grinder crew overtime. Smith, the most senior of the three employees who was assigned an overtime assignment, is entitled to his 3 hours of overtime. The record does not clearly establish which of the remaining June 6, 2006 overtime assignments would have been worked by each Grievant.

On or about June 6, 2006, each of the Grievants submitted a time sheet requesting 3.5 hours of overtime pay for June 6, 2006. (Jt #12 and 13) Under the facts of this case, the Grievants' request for 3.5 hours of overtime pay for June 6, 2006 is reasonable and has been adopted by the undersigned as an appropriate make-whole remedy.

Based upon the foregoing and the record, as a whole, the undersigned makes and issues the following

AWARD

1. The County violated the parties' collective bargaining agreement when it did not offer grinder crew work to Brad Greely and Gill Botten on June 5 and 6, 2006.

2. The appropriate remedy for the violation found in Paragraph 1, *supra*, is for the County to immediately

a) make Gill Botten whole by paying him 4.5 hours of overtime at his June 5, 2006 rate of pay and 3.5 hours of overtime at his June 6, 2006 rate of pay.

b) make Brad Greely whole by paying him 4.5 hours of overtime at his June 5, 2006 rate of pay and 3.5 hours of overtime at his June 6, 2006 rate of pay.

Dated at Madison, Wisconsin, this 29th day of January, 2007.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
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