

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 274
No. 66161
MA-13444

Appearances:

Andrew & Bransky, P.A., Attorneys at Law, 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 parties stipulated to the following statement of the issues:

Did the County violate the collective bargaining agreement when it failed to offer Brian McMinn available overtime work on Friday, June 16, 2006?

If so, what is the appropriate remedy?

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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BACKGROUND

The County maintains and operates the Douglas County Highway Department. The Union is the collective bargaining representative of certain employees in the Department, including Brian McMinn. McMinn, who is employed as a No. 1 Equipment Operator, is assigned to work out of the Pattison Park portal.

During the summer months, the Department has a normal work schedule of four ten-hour days, Monday through Thursday. McMinn worked on County Highway "L" from Monday, June 12th through Wednesday, June 14th.

On Thursday, June 15, 2006, prior to the start of his normal work shift and consistent with Department policy, McMinn called the Department and left a voice mail message indicating that he was sick. McMinn did not notify management that he was available for overtime work on Friday, June 16, 2006. On that same day, another bargaining unit employee, Tim Haskins was on sick leave.

At or about the end of the work day on Thursday, June 15, 2006, Patrol Superintendent Keith Armstrong announced that overtime would be worked on Friday, June 16, 2006. Management did not contact McMinn or Haskins to offer overtime work for Friday, June 16th.

On June 20, 2006, McMinn, hereafter Grievant, filed a grievance alleging, *inter alia*:

WORKED ON CNTY L JOB ALL WEEK WITH CRAIG TYSON ON 6-15-06
I CALLED IN SICK. FRIDAY EVERYONE WAS CALLED FOR
OVERTIME EVEN PEOPLE THAT WERE OFF WORK 6-14 & 15
EXCEPT FOR ME. I SHOULD HAVE BEEN ALSO SHOWN AS WORK IN
PROGRESS.

This grievance was denied at all steps and, thereafter, submitted to arbitration.

Union

The Grievant did not have an obligation to explicitly communicate to the Employer that he was available for overtime work on Friday, June 16th. Rather, under Article 17, Section 2, the Employer has an affirmative duty to offer available overtime assignments by seniority without exception. Following such offer, the employee has discretion to accept or refuse the offer, unless the employee is forced to work because of low seniority.

The fact that the Grievant was off work on sick leave on Thursday, June 15th, does not excuse the Employer from its contractual obligation to offer the Grievant overtime work that was available on Friday, June 16th. Employee Ryan Haworth, who was on personal leave on June 14 and 15 was offered overtime work for Friday, June 16th. On another occasion, employee Brad Greely, who was off sick on a Thursday, was called that Thursday and offered overtime work for the following Friday.

Highway Commissioner Paul Halverson readily admitted that, if an employee is on sick leave, the employee is called and offered snowplow overtime. The snowplow overtime is subject to the same contract provisions as the overtime in dispute.

Commissioner Halverson claims that he orally communicated to the bargaining unit that winter and summer overtime opportunities are treated differently. He could not recall when this occurred or the circumstances under which it occurred. Union Steward Amys states that he does not recall Commissioner Halverson mentioning any difference between winter and summer call outs. The facts do not establish a practice of not offering overtime opportunities by seniority following a day off.

On Friday, June 16, 2006, the Union's bargaining unit members worked overtime on two separate projects, i.e., County Roads "T" and "L." On County Road "T", the most overtime hours any employee worked that day was eight. On County Road "L," the employees were offered the opportunity to work up to 13.5 hours of overtime. The facts warrant the conclusion that the Grievant would have been assigned to the County Road "L" project.

Article 5, Section 5, of the collective bargaining agreement prohibits the Arbitrator from adding to the express terms of the agreement by excluding the Grievant from the contractual requirement that the County offer overtime by seniority. The grievance should be sustained and the Grievant made whole for his lost overtime opportunity of 13.5 hours.

County

Employee Haworth's circumstances differ from that of the Grievant in that he was not sick and he had previously discussed his availability for work on June 16th with management. Snowstorms present a different set of circumstances. There are 23 employees and 23 snowplow routes. Each route must be accounted for.

There has never been a practice of calling an employee who has reported sick to offer summer overtime work. Common sense would suggest that employees who wish to be available for work on days when they would not ordinarily be called and who have been home on sick leave, should notify their employer of their availability for work.

Acceptance of the Union's contract language interpretation would require the Employer to notify each and every absent employee on each and every occasion, no matter the employee's circumstances, that overtime work will become available. This would include employees such as Tiffany Jenner, who was off due to injury. The common sense application, which is in keeping with the Department practice, dictates that the parties intended otherwise.

DISCUSSION

At hearing, the parties stipulated to a statement of the issue. Given this stipulation, the undersigned declines to consider the alternative statement of the issue that was proposed by the County in its post-hearing brief.

The stipulated issue is whether the County violated the collective bargaining agreement when it failed to offer Brian McMinn available overtime work on Friday, June 16, 2006. The Grievant claims that he was available to work overtime on Friday, June 16th. The record does not establish otherwise.

In arguing that the County was required to offer the Grievant overtime work on Friday, June 16, 2006, the Union relies upon Article 17, Section 2. In arguing that the County does not have a contractual obligation to offer the disputed overtime to the Grievant, the County relies, inter alia, on Article 4, Management Rights. Article 4 expressly recognizes that the referenced management rights are subject to the provisions of the parties' contract. Thus, to give effect to Article 4, the undersigned must first give effect to Article 17, Section 2.

Article 17, Section 2, requires that the Employer offer overtime assignments, other than "when work is currently in progress," on the basis of seniority and classification. The Employer has not argued that Friday overtime work need not be offered because it falls within the "work in progress" exception. Nor has it argued that the Grievant is excluded from Friday overtime work on the basis of seniority or classification.

As the Union argues, the plain language of Article 17, Section 2, places an affirmative duty upon the Employer to offer overtime assignments and does not condition this offer upon any conduct of the employee. As the Union further argues, the plain language of Article 17, Section 2, does not distinguish overtime assignments on the basis of the type of work performed, such as snowplowing. Thus, under the plain language of Article 17, Section 2, the Grievant's absence from work on June 15, 2006; the Grievant's failure to notify the County of his availability to work overtime on June 16, 2006; and the fact that the overtime assignment in dispute does not involve snowplowing are not exceptions to the County's Article 17, Section 2, duty to offer overtime assignments.

It is undisputed that all employees are called to perform overtime snowplowing, including those on sick leave. Highway Commissioner Halverson states that, at some point in time during the tenure of the previous Patrol Superintendent, Halverson made the decision to not call employees who were home sick to offer overtime work, unless this overtime work involved snowplowing, because he did not want to bother employees while they were sick.

Halverson recalls that he discussed this decision with the Union's bargaining unit employees at a staff meeting, but does not recall the date of this staff meeting. Halverson does not state that, at the time of his communication, any Union representative acknowledged that Halverson had the right to not call employees who were home sick to offer overtime work, unless this overtime work involved snowplowing.

Union Steward Amys, who has been with the County since 1999, does not recall such a discussion at a staff meeting. According to Amys, he first learned of Halverson's decision when he filed and processed the instant grievance.

Halverson recalls that he discussed his decision to not call employees who were home sick to offer overtime work, unless this overtime work involved snowplowing, with current Patrol Superintendent Armstrong. Halverson, who confirms that he is not the management employee who offers overtime to employees, does not have first hand knowledge of whether or not Armstrong, or any other management employee, implemented his decision to not call employees who were home sick to offer overtime work, unless this overtime work involved snowplowing.

Armstrong acknowledges that he is not the employee who always offers overtime work and that sometimes the foreman, a bargaining unit employee, offers overtime. Armstrong states that the foreman may have mistakenly offered overtime to employees who are on sick leave. The foreman did not testify at hearing.

Bargaining unit employee Brad Greely testified that, after this grievance was filed, Acting Superintendent Johnson called Greely on a Thursday, at a time in which Greely was on sick leave, to determine if Greely was available for Friday overtime work. Greely also testified that, in the past, when he had been on vacation, he was called and offered Friday overtime work.

Armstrong states that he (Armstrong) never called an employee who was on sick leave and offered him overtime work, unless the overtime work involved snow plowing or an emergency. Armstrong did not identify any employees who were on sick leave at a time that non-snowplowing or non-emergency overtime work was available. Absent such evidence, the undersigned cannot reasonably conclude that Armstrong has consistently implemented a practice of not offering non-snowplowing or non-emergency overtime work to employees on sick leave. Perhaps no employees were on sick leave at times that Armstrong was offering such overtime.

In summary, the record provides a reasonable basis to conclude that, years ago, Halverson decided that an employee who was on sick leave should not be called and offered overtime work, unless the overtime work involved snow plowing. The record, however, does not provide a reasonable basis to conclude that this decision was implemented as a consistent practice that has been accepted by both parties. Nor does the record provide a reasonable basis to conclude that the Union has otherwise acquiesced in this decision.

Bargaining unit employee Ryan Haworth recalled that, on June 14 and 15, 2006, he was off on personal leave and that, on the evening of Thursday, June 15th, Armstrong called Haworth at home and offered Haworth overtime work for Friday, June 16th. Haworth further recalled that, believing that he was under an obligation to report to work on Friday, he accepted this offer.

Armstrong recalls that, earlier in the week, he had a conversation with Haworth in which Armstrong asked Haworth if he would be available for Friday overtime work and Armstrong confirmed that he would call Haworth for the Friday overtime work if he was needed. Haworth did not recall this conversation, but stated that it was possible that it occurred.

A communication from Haworth indicating availability for and/or interest in working Friday overtime would not provide Haworth with an Article 17, Section 2, right to work overtime that differs from that of the Grievant. Nor would one instance of such a communication be sufficient to establish a practice of only offering overtime to absent employees who had provided prior notice of availability for such overtime.

Conclusion

In summary, the most reasonable construction of the plain language of Article 17, Section 2, is that the County has a contractual obligation to offer the Grievant the opportunity to work overtime on Friday, June 16, 2006. The record provides no reasonable basis to conclude that the parties mutually intended any other construction.

The County argues that such a conclusion is absurd because it would require the County to contact absent employees on each and every occasion, no matter what the circumstances. This Award, however, addresses the issues presented in this grievance; which issues do not include all absences whatever their circumstances.

By failing to offer the Grievant available overtime work on Friday, June 16, 2006, the County has violated Article 17, Section 2, of the parties' labor contract. The appropriate remedy for this contract violation is to order the County to make the Grievant whole.

The Union, in its brief, argues that, on Friday June 16th, the Grievant would have been assigned to the "L" crew and, therefore, the appropriate remedy is to pay the Grievant 13.5 hours of overtime. The only members of the "L" crew to work 13.5 hours of overtime on June 16th were the foreman, Sisko, and Equipment Operator #2 Smith. On that date, Smith, who has more seniority than the Grievant, operated the water truck, as he had on June 15 and 14, 2006.

In his grievance, the Grievant requested that he be paid 10 hours of overtime. The only member of the "L" crew to work 10 hours of overtime on the 16th is Ellison. Ellison is classified as a 1T and has more seniority than the Grievant. On June 16th, Ellison was operating the all wheel roller; which he also had operated on June 14 and 15, 2006.

The Grievant's testimony, as well as the daily work schedules, indicates that, during the week of June 12, 2006, his assignment was "labor dump man" on "L." Armstrong's testimony, as well as the daily work schedules, indicates that, on Friday June 16, 2006, there was not a "labor dump man" on "L."

Armstrong states that, had the Grievant worked on Friday, June 16, 2006, he would have been assigned to hauling black top on "T." The record does not establish that the Grievant would not have received such an assignment. Nor does the record establish that such an assignment would be contrary to the requirements of the parties' collective bargaining agreement.

The seniority list entered into this record (Jt Ex #6), indicates that, of the employees assigned to haul black top on "T" on June 16, 2006, only one was less senior than the Grievant, i.e., Buck. Buck performed 4.50 hours of overtime work on Friday, June 16, 2006.

The record does not establish that the Grievant is contractually entitled to perform the overtime work that had been assigned to the more senior employees who hauled blacktop on "T." It not being evident that the Grievant would have worked more than the 4.50 hours of overtime worked by Buck, the undersigned has concluded that the appropriate make-whole remedy for the County's contract violation is to pay the Grievant 4.5 hours of overtime.

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

AWARD

1. The County violated the collective bargaining agreement when it failed to offer Brian McMinn available overtime work on Friday, June 16, 2006.

2. In remedy of this violation of the collective bargaining agreement, the County is to immediately make Brian McMinn whole by paying him 4.5 hours of overtime based on his June 16, 2006 wage rate.

Dated at Madison, Wisconsin, this 13th day of February, 2007.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
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