BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1287 AFSCME, AFL-CIO

and

CITY OF WAUSAU

Case 118
No. 66698
MA-13601

(Call-In Pay Grievance)

Appearances:

Mr. John Spiegelhoff, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1457 Somerset Drive, Stevens Point, Wisconsin, appearing on behalf of Local 1287.

Mr. William P. Nagle, City Attorney, City of Wausau, 407 Grant Street, Wisconsin, appearing on behalf of City of Wausau.

ARBITRATION AWARD

Local 1287, AFSCME, AFL-CIO, hereinafter "Union," and City of Wausau, hereinafter "City," mutually requested that the Wisconsin Employment Relations Commission provide them a list of arbitrators from which to select assign an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. From said list, the parties selected Lauri A. Millot to hear the dispute. The hearing was held before the undersigned on June 12, 2006 in Rothschild, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on July 9, 2007, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues, but were unable to agree as to the substantive issues.

The Union framed the substantive issues as:

1. Did the City violate the collective bargaining agreement when it failed to pay "call in pay" to four employees at the Department of Public Works for work performed prior to the normal working hours on December 4, 2006?

2. If so, what is the appropriate remedy?

The City framed the substantive issues as:

1. Did the City violate the collective bargaining agreement when it paid overtime to individuals for working approximately 15 minutes in excess of the eight hour work day and failed to pay "call-in pay" for that 15 minutes?

2. If so, what is the appropriate remedy?

After considering the arguments of the parties and the evidence, I frame the issues as:

1. Did the City violate Article 29 of the collective bargaining agreement when it failed to pay four employees four hours of "call-in pay" for work performed prior to the start of their normal working hours on December 4, 2006?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

. . .

ARTICLE 5 – MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in that but such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following:

A. To direct all operations (sic) City government.
B. To hire, promote, transfer, assign and retain employees in positions with the City;
C. To suspend, demote, discharge and take other disciplinary action against employees for just cause;

D. To relieve employees from their duties because of lack of work or other legitimate reasons;

E. To maintain efficiency of City Government operation entrusted to it;

F. To take whatever action is necessary to comply with State or Federal law;

G. To introduce new or improved methods or facilities;

H. To change existing methods or facilities;

I. To contract out for goods or services. Whenever possible, the Employer shall provide the Union a reasonable opportunity to discuss contemplated subcontracting that would result in the layoff of bargaining unit personnel prior to a final decision being made on such subcontracting.

J. To determine the methods, means and personnel by which such operations are to be conducted;

K. To take whatever action is necessary to carry out the functions of the City in situations of emergency.

. . .

ARTICLE 29 – CALL PAY

A. Amount of Call-in Pay: All employees are subject to "call in" to work at any time, within the provisions of this agreement. Except as provided in paragraph B, Prescheduled overtime, and paragraph C, Rescheduling of Shifts, an employee called to return to work at an time after for before the employee's regularly scheduled hours shall receive no less than four (4) hours pay. It is specifically agreed that the provisions in paragraph B, Prescheduled Overtime, and paragraph C, Rescheduling of Shifts, shall take precedence over and shall pre-empt where in conflict with the provisions contained within this paragraph (paragraph A, Amount of Call-in Pay). If an employee works any length of time up to two and two-thirds (2 2/3) hours, the employee shall receive no less than four (4) hours pay. If the employee works more than two and two-thirds (2 2/3) hours, the employee shall receive time and one-half (1½) the employee's regular classified rate for all such work performed unless the employee works in a higher class for three (3) or more hours, the employee shall receive the rate for the higher classification.

B. Prescheduled Overtime: Any employee who has received prior or written notification that he/she is expected to report to work before his/her regularly scheduled shift shall receive time and one half (1½) for all hours of work performed up to his/her regularly scheduled start time. The provisions within paragraph A, Amount of Call-in pay are not

applicable here. This notification will occur at least by the end of the employee's regular shift on the preceding day. The employee's regular shift shall be worked unless otherwise mutually agreed upon. If an employee who has received written notification that he/she is to report for work under paragraph B, Prescheduled Overtime, is notified by the City that he/she is not to report for work, the employee shall still receive the amount of pay for the hours that were to be worked by the employee. The employee's regular shift will be paid at the regular hourly rate. The provisions within paragraph C, Rescheduling of Shifts, shall take precedence over and shall pre-empt where in conflict with the provisions contained within this paragraph (paragraph B, Prescheduled Overtime).

C. Rescheduling of Shifts: If a large portion of the shift is called in, it will be considered that the entire shift was floated ahead and regular hourly rate plus shift differential will be paid to all such employees. A large portion of the shift shall consist of the following number of employees in each department as follows:

. . .

Construction Division and Maintenance Division - 3 employees

. . .

ARTICLE 33 – HOURS AND OVERTIME

A. Normal Work Week: The normal work week for all employees shall be forty (40) hours per week, Monday through Friday, whenever possible.

B. Hours of Work of Individual Departments:

1. Construction and Maintenance Division and Water Distribution Division: The hours of work of the Department of Public Works and the Construction Crew of the Water Department shall be 7:00 a.m. to 12:00 noon and 12:30 p.m. to 3:30 p.m.

. . .

C. Overtime: Any employee who is required to perform work in excess of the employee's scheduled workday or workweek shall be compensated at the rate of time and one-half the employee's regular classified rate. For purposes of this article, a week is defined as 12:01 a.m., Sunday to 12:00 midnight Saturday. Any hours worked between midnight Saturday and midnight Sunday shall be paid on the basis of time and one-half.

. . .

BACKGROUND AND FACTS

The Union filed this grievance on behalf of four Public Works Department employees: Joseph Andrys, Rich Wendlick, Bob Hoffman and Dennis Rice, hereinafter "Grievants". The Grievants work Monday through Friday from 7 a.m. to 3:30 p.m. with a one-half hour unpaid lunch break. During the winter months, the Grievants are responsible for snow removal.

The Grievants follow an early morning ritual. They collectively arrive at the shop facility between 6 a.m. and 6:30 a.m. and meet in the lunch room, sit at a table, drink their coffee and converse. Sometime between 6:30 a.m. and their scheduled start time of 7 a.m., the Grievants punch in at the time clock, but do not begin working until the scheduled 7 a.m. start time.

On December 4, 2006, there was a winter snow storm in the Wausau area. The Grievants arrived at the shop facility at their normal times, between 6:00 a.m. and 6:30 a.m. in preparation for their 7 a.m. starting time. As a result of worsening weather conditions, the Grievants' supervisor, Rick Mare, approached them in the lunch room at approximately 6:40 a.m. and told them that they "could go now". The Grievants understood Mare's comment to mean that they were to start to start their work day immediately. All four Grievants complied. The Grievants completed their time cards for December 4, indicated a start time of either 6:40 a.m. or 6:45 a.m., and requested "4 hr. call-in pay". Mare denied the four hours call-in pay, but approved compensating the Grievants at the overtime rate for all hours worked in excess of eight on that date.

On January 2, 2007, the Union filed a grievance seeking four hours call-in pay for each Grievant for the time worked prior to their scheduled start time on December 4, 2006. The City denied the grievance at all steps.

Additional facts, as relevant, are contained in the **DISCUSSION** section below.

DISCUSSION

The issue in this case requires a determination of what the parties' intended when they created the "Call-in Pay" benefit. The City argues that the Call-in Pay provisions are not applicable to the facts presented in this case while the Union disagrees asserting that the affected employees are entitled to Call-in Pay. [1]

---

[1] The City argues that "called' in this section means that the employee receives a telephone call directing the employee to report to work. I disagree. I am unwilling to accept the City's argument that Call-pay compensation is triggered by a telephone call. This interpretation of Article 29 is too constricting. There are multiple communication methods that would allow for an employee to be "called to return to work". It is not the vehicle by which the City communicates with the employee of relevance, but rather it is the act of communicating or "calling in" the employee that triggers the call-in payment.

The Union first argues that the contract interpretation principle of specific provisions control general provisions is applicable in this case and when applied, support its position. The Union characterizes Article 33, Overtime, as a general provision and Article 29, Call Pay, **as** a specific provision and concludes that call pay is a more specific type of overtime benefit. I disagree. The overtime and call pay articles create separate and distinct economic benefits and while they interrelate, both articles establish specific criteria which must be met in order for the employee to be eligible for additional compensation.

Looking first to Article 33, this is the overtime provision which establishes that employees are entitled to receive a higher hourly rate for work performed outside of their normal working hours. The Grievants' regular workday begins at 7 a.m. and ends at 3:30 p.m. with a one-half hour unpaid lunch break. Section C of the article provides that employees that work hours in excess of the 7 a.m. to 3:30 p.m. workday will be paid for those hours at the rate of time and one-half.

Article 29 is the Call Pay provision. It defines Call-in Pay, Prescheduled Overtime and Rescheduling of Shifts. The Union argues that this is a "more specific overtime provision". Article 29 is not an overtime provision. Rather, it is a separate benefit – distinct in purpose and level of compensation - from an overtime provision. Section A first establishes that employees are subject to "call-in" at any time and that if the employee "is called to return to work at any time after or before the employees regular scheduled shift," then he/she is entitled to additional compensation. This language makes it a condition precedent that the employee is "called to return to work" in order to be eligible for the Call-in Pay.

The record evidence establishes on the date of significance, the Grievants followed their normal pre-workday habits of picking up coffee, arriving at work greater than 30 minutes before the start of their workday, meeting at the table in the break room and talking with one another. No Grievant was asked, whether by telephone, email or some other means of communication, to arrive at the City Shop prior to the start of his workday. The Grievants were not "called in" and therefore they have not met the "called to return to work" condition precedent and thus are ineligible for Call-in Pay. [2]

Call-in pay is understood by industry standards as "reporting pay". Employees are compensated for reporting for duty at the behest of the employer. In this case, the plain language of the agreement establishes that the compensation is due when the employee is "called to return to work". Given that these four employees were not called to work but rather were already at the work site awaiting the start of their shift, they are not entitled to Call-in Pay.

Call-in, as defined by the Union, is "to make a request or demand; to command or request to come or be present; to cause to come; to summon to a particular activity,

---

[2] Neither party argued that the additional work the Grievants performed on December 4 constituted Prescheduled Overtime or was the result of a Rescheduling of Shifts as defined by Article 29.

employment or office." Un. Br. 10. Such an interpretation in this context is too broad. Accepting this definition, an employee who completes his/her regular shift and is requested/demanded/commanded/summoned to stay and work additional time before he/she clocks out or leaves the work site would be entitled to call-in compensation. While this interpretation is consistent with the Union's argument, I am not persuaded it is a valid interpretation of the contract language and/or the parties' intent.

The Union argues that it is the City's practice to pay employees that start work before their scheduled shift the call-in bonus and it offered numerous time sheets in support of its position. In reviewing these time sheets, the witnesses testified as to whether they put in for or submitted for call-in pay and whether they were physically at the shop at the time they were called in to work. While it is true that the City consistently compensated the Grievants the Call-in premium for work performed prior to the start of their shift, none of the Grievants testified that they were at the shop when they were asked to begin work in advance of their scheduled start time. Rather, the Grievants were off-site, were called by the City and were asked to report to work prior to the start of their regular shift. The evidence does not support that the parties have a practice of compensating employees with the Call-in Pay premium when they are at the shop and are asked to start work before their scheduled start time. [3]

AWARD

1. No, the City did not violate Article 29 of the collective bargaining agreement when it failed to pay four employees four hours of "call-in pay" for work performed prior to the start of their normal working hours on December 4, 2006.

2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin this 27th day of September, 2007.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

[3] There was testimony offered at hearing that Joe Andrys received call-in pay for work performed prior to his regular shift on December 13, 1006. Rick Mare testified that he did not recall compensating Andrys call-in pay for December 13 and further, that if it was paid, it was a mistake. Given that the City cites mistake as the reason for payment, that this is one instance and the fact that this instance occurred after the date of the grievance, I cannot consider it for purposes of establishing a practice.

LAM/gjc
7196