

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CITY OF MANITOWOC PUBLIC WORKS
EMPLOYEES, TEAMSTERS LOCAL NO. 662**

and

CITY OF MANITOWOC

Case 214
No. 69682
MA-14702

(Shift Change Grievance)

Appearances:

Scott Soldon, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local No. 662.

Juliana Ruenzel, City Attorney, City Hall, 900 Quay Street, Manitowoc, Wisconsin 54220, appearing on behalf of the City.

ARBITRATION AWARD

City of Manitowoc Public Works Employees, Teamsters Local No. 662, hereinafter referred to as the Union, and the City of Manitowoc, hereinafter referred to as the City or the Employer, were parties to a collective bargaining agreement that provided for final and binding arbitration of disputes arising thereunder. The parties requested a list of five staff arbitrators from the Wisconsin Employment Relations Commission from which to select an arbitrator to hear and decide the instant dispute. The undersigned was selected to arbitrate the dispute. The hearing was held on July 1, 2010 in Manitowoc, Wisconsin. The hearing was not transcribed. The parties submitted briefs, whereupon the record was closed on August 3, 2010. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Union framed the issue as follows:

Did the City violate the collective bargaining agreement by failing to pay overtime pay? If so, what is the appropriate remedy?

The City framed the issue as follows:

Whether the City is required to pay overtime when it gives a twenty-four (24) hour notice of a schedule change?

I have not adopted either side's proposed issue. Based on the entire record, I find that the issue which is going to be decided herein is as follows:

Did the City violate either the collective bargaining agreement or the parties' 2006 Side Letter when it paid the employees who worked from 12:00 a.m. to 8:00 a.m. on Monday, December 28, 2009 at straight time rather than overtime? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2008-09 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 5

NORMAL WORK WEEK, NORMAL WORK DAY AND NORMAL WORK SHIFT

Section 1. Normal Work Week.

(a) Department of Public Works Employees and Clerks. The normal work week for Department of Public Works employees and clerks shall consist of forty (40) hours, five (5) consecutive work days scheduled from Monday through Friday.

Section 2. Normal Work Day.

(a) Department of Public Works Employees and Clerks: For All Department of Public Works employees and clerks, except those employees listed below, the normal work day shall consist of eight (8) hours commencing at 7:00 a.m. and terminating at 3:00 p.m., except the clerks may, at the discretion of the Employer, be assigned hours between 7:00 a.m. and 4:30 p.m., depending upon Department needs, subject to Section 4. Employees shall be expected to carry their lunch and will not be permitted to stop at restaurants, taverns or similar places of business for their lunch breaks. Said break not to exceed twenty (20) minutes.

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Section 3. Overtime. All work performed in excess of eight (8) hours per day or forty (40) hours per week and all work performed on Saturdays shall be compensated at the rate of one and one-half (1½) times the regular rate of pay. Office employees shall not be regularly scheduled to work on Saturdays.

All work performed on Sundays and holidays shall be compensated for at the rate of two (2) times the regular rate of pay. There shall be no pyramiding of overtime.

Section 4. Schedule Changes. In the event it is necessary to change employees from one regular schedule of days and/or hours to another schedule for days and/or hours, the employee shall be given at least twenty-four (24) hours notice of change if possible. Work performed outside of regularly scheduled hours during the twenty-four (24) hours notice period shall be compensated at one and one-half (1½) times the normal rate of pay, whether or not total working hours for the week are in excess of forty (40) hours, unless waived by the employee. For purposes of computing work in excess of eight (8) hours per day under Section 3 of this Article, any work performed during an employee's regularly scheduled hours shall be counted toward the first eight (8) hours per day on which a schedule change occurs.

Section 5. Emergencies. For emergencies such as snow removal, ice control, flood control, and so on, the Employer shall have the right to schedule the work week as may be necessary and for one schedule of hours to another schedule of hours without regard to prior notice. Effective January 1, 1996, hours which are worked outside of the normal work schedule on less than 24 hours notice shall be compensated at time and one-half, as provided in Section 4, except that when the Employer makes a call out for emergency reasons overtime will not be paid on the second day of the same emergency if the Employer notifies the employees before the end of their changed schedule that their schedule will be changed again from their normal scheduled hours to respond to the original emergency. Said notice shall be treated as being as (sic) at least twenty-four (24) hours in advance for purposes of Section 4. Prior to January 1, 1996 pay for work during emergencies shall be covered by the terms of the 1992-1994 collective bargaining agreement. Any employee who is called in for work outside the employee's normal work schedule shall not be sent home early on subsequent days that week nor denied the employee's regular work schedule that week to avoid overtime payment without the employee's consent. The spirit of this provision is that the Employer shall not be penalized during emergency conditions but neither shall the Employer adjust the working hours after emergency conditions during that week (e.g. to less than eight (8) hours per day) so as to deny employees legitimate overtime.

Section 6. Weekend and Emergency Call. All employees shall be subject to call for weekend work and emergency work.

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ARTICLE 6

PAY POLICY

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Section 2. Call-In Pay. In the event employees are recalled to work outside of their regular work day, they shall receive a minimum of two (2) hours of pay at time and one-half (1½) their regular rate of pay.

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ARTICLE 19

MANAGEMENT RIGHTS

Except as provided herein, all rights, privileges and prerogatives previously exercised by the Employer are retained by the Employer.

BACKGROUND

The City operates a public works department. The Union represents certain employees in the department of public works (DPW).

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DPW employees normally work eight hours a day from 7 a.m. to 3 p.m., Monday through Friday. Employees are not normally scheduled to work on weekends. When they do work on Saturday, they are paid at the rate of time and one-half. When they do work on Sunday, they are paid double time.

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The parties have had previous overtime disputes.

In 2006, the parties settled several overtime grievances. In doing so, they wrote up a Side Letter which was intended to clarify Sections 3, 4 and 5 of Article 5 (which is entitled "Normal Work Week, Normal Work Day and Normal Work Shift"). The Side Letter provides thus:

2006 SIDE LETTER OF AGREEMENT

The City of Manitowoc and Teamsters Local 75 representing the employees of the Manitowoc Department of Public Works enter into this agreement for the purposes of mutual interpretation of language outlined below:

Article 5 NORMAL WORK WEEK, NORMAL WORK DAY
AND NORMAL WORK SHIFT

Section 4 and Section 5

1. A schedule is defined as eight (8) or more consecutive hours of work, for schedule change purposes.
2. Any call out for work consisting of less than eight (8) consecutive hours will be addressed in Article 6, Section 2 (call outs).
3. A call out which extends into the normal schedule (7-3) will be paid overtime only up to the normal shift unless management designates it as a schedule change.
4. Schedule Changes
 - With a twenty-four (24) hour notice: No overtime is paid.
 - Without a twenty-four (24) hour notice: All hours worked during the entire changed schedule, including a schedule change that runs into the normal work hours (7-3) are paid at overtime rates.
 - 2nd Scheduled Change Made During 1st Scheduled Change: Should a second schedule change be made during the original schedule change, overtime will not be paid for the first eight (8) hours worked except for holiday, weekend or the over eight (8) hour provisions.
5. Section 3. Overtime applies in all situations.

CITY OF MANITOWOC

TEAMSTERS LOCAL NO. 75

James A. Wyss /s/ 7-7-06
James A. Wyss
City Attorney/Personnel Director

Michael Williquette /s/ 7/7/06
Michael Williquette
Business Agent

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Prior to the instance involved herein, the City had never given notice of a schedule change to the Monday work schedule on the weekend.

FACTS

On the evening of Saturday, December 26, 2009, a DPW supervisor called all DPW employees and told them to report to work at midnight (i.e. 12:00 a.m.) that night to plow snow. The employees reported to work as directed.

When the employees reported to work later that night, there was a notice posted on the chalkboard where messages to employees are posted. The message said: "All employees must report at 12:00 a.m. Monday." The "Monday" referenced in this notice was Monday, December 28, 2009. Thus, employees were told to report to work at 12:00 a.m. (midnight) on Monday, rather than their regular start time of 7:00 a.m.

The employees then plowed snow for the next seven to ten hours. They were all paid double time for their work that day (Sunday, December 27) per the labor agreement.

Most of the employees showed up as directed at 12:00 a.m. (midnight) on Monday, December 28. Four employees took vacation that day. Two employees showed up at 7:00 a.m. Those employees that showed up at midnight worked for eight hours and were sent home at 8:00 a.m. The two employees that showed up at 7:00 a.m. worked their normal hours that day of 7:00 a.m. to 3:00 p.m.

During the remainder of the work week, employees worked their regular shift of 7:00 a.m. to 3:00 p.m. and were paid straight time.

The City paid the employees who reported for work on Monday, December 28 at 12:00 a.m. straight time with a shift differential. The Union grieved, contending that those employees "did not get paid overtime for a shift change."

The grievance was processed through the contractual grievance procedure and was appealed to arbitration.

Insofar as the record shows, the instance referenced above was the first time the City gave notice of a schedule change to the Monday work schedule on the weekend. The Monday work schedule has been changed before, but when it happened previously, notice of the schedule change was given to employees on the prior Friday.

POSITIONS OF THE PARTIES

Union

The Union's position is that the employees who reported to work at midnight on Monday, December 28, 2009 should have been paid overtime. Since they were paid straight time instead, the Union contends the City violated the collective bargaining agreement. It elaborates on this contention as follows.

The Union acknowledges at the outset that the first bullet point in number 4 of the parties' 2006 Side Letter allows the City to avoid the payment of overtime for a schedule change when the employees are given 24 hours notice of same. The Union puts it thus: If the Employer gives the employees at least 24 hours notice of the schedule change, overtime is not owed and the employees are paid straight time; however, if less than 24 hours notice is given, the employees are to be paid overtime.

While the City contends that what happened here is governed by the first bullet point in number 4 of the parties' 2006 Side Letter, the Union disputes that contention and sees it differently. The Union maintains that when the City gave the employees notice via the chalk board on Saturday night that they were to report to work at 12:00 a.m. (midnight) the following night for their Monday workday, that was a call-out covered by number 3 in the Side Letter – not a schedule change covered by the first bullet point in number 4. The Union argues that when an employee is at work on a weekend (as was the case here), the employee is not on the Monday through Friday 7:00 a.m. to 3:00 p.m. normal schedule, so no notice of a schedule change can happen over the weekend. As the Union sees it, in order for the City to implement a schedule change, it has to give notice of a schedule change while the employees are working their regularly-scheduled hours of 7:00 a.m. to 3:00 p.m., Monday through Friday. In other words, the Union avers that to pay the employees at straight time for a Monday work schedule that starts at midnight rather than 7:00 a.m., the City needed to give the employees notice prior to the employees leaving work at 3:00 p.m. on Friday, December 25, 2009 that their Monday work schedule had been changed to start at midnight rather than 7:00 a.m. That did not happen though, and the Employer did not give the employees notice of the Monday schedule change until Saturday night. Building on the foregoing, the Union believes that the Employer's notice on late Saturday night was not a timely notice of a schedule change, and the employees were instead subjected to a Sunday call-out. According to the Union, a call-out occurs when the employees are recalled to work outside their regular hours. The Union points out that call-outs are paid at overtime pursuant to number 3 in the parties' 2006 Side Letter.

Next, the Union makes several arguments that can be characterized as past practice arguments. First, the Union notes that until this case arose, the City had never attempted to use the 24 hour notice provision in number 4 of the Side Letter to avoid overtime for a schedule change. The Union implies that makes it a practice. The Union also avers that on those occasions when the Monday work schedule was changed, the employees were told of it

on Friday (before 3:00 p.m.). Second, the Union points out that its steward testified that on one occasion about 2005, the City changed the employees' Tuesday work schedule and directed them to come into work at 12:00 a.m. (midnight) rather than 7:00 a.m. The steward testified that when that happened, the employees were initially paid at straight time, but later were paid overtime. The Union maintains that result should occur here as well.

The Union therefore asks the arbitrator to grant the grievance and order an appropriate remedy including, but not necessarily limited to, a cease and desist order and a requirement that employees be made whole for all losses sustained.

City

The City's position is that it did not violate either the collective bargaining agreement or the 2006 Side Letter when it paid the employees at straight time for their work on Monday, December 28, 2009. As the City sees it, the employees were not contractually entitled to overtime. It elaborates on this contention as follows.

First, the City avers that as the grieving party, the Union has the burden of proving that a contract violation occurred. According to the City, the Union failed to meet its burden of proof. In making that contention, the City notes that the only testimony presented by the Union was that of former union steward Wuensch. The City calls his testimony "unclear, off point and confusing at times" and contends that when he testified, he just made "general statements" which did not have any "supporting documentation."

Second, with regard to the Union's past practice claim, the City disputes the Union's contention that there is an applicable past practice requiring the payment of overtime. To support that contention, it notes that while the Union's sole witness testified that the employees got paid overtime for a similar circumstance about five years ago, he "provided no documentation as to a settlement agreement to prove it." The City asserts that the lack of any written document supporting that claim is significant and should result in the claimed practice being "given little if any weight."

Next, the City addresses the contract language that it believes is applicable to this dispute.

First, it focuses on the overtime language found in Article 5. It acknowledges that Sections 3 and 4 in that article require the City to pay overtime to employees for work performed on Saturdays, Sundays and holidays, and when it gives less than 24 hours notice for a schedule change. With regard to the last category dealing with a schedule change, the City maintains that Section 4 says in clear and unambiguous terms that it does not have to pay overtime to employees for a schedule change if it gives the employees 24 hours notice of the schedule change. Addressing when that notice is to be given, the City asserts that Section 4 does not say when the 24 hour notice has to be given – just that the 24 hour notice be given. According to the City, there is nothing in Section 4 that restricts when a schedule change

notice is given, or that says that the 24 hour notice (for a schedule change) has to be made while the employees are working their Monday through Friday 7:00 a.m. to 3:00 p.m. work schedule. The City then goes on to cite a 1984 arbitration award between the parties for the proposition that the arbitrator in that case “recognized that the City has the ability to call the employees in to work giving notice on a Saturday to come in at midnight Sunday and not have to pay overtime due to the twenty-four hour notice provision.”

Second, the City addresses the parties’ 2006 Side Letter which deals with portions of Article 5 (namely, Sections 3, 4 and 5). The City asserts that the portion of the Side Letter that applies here is the first bullet point under number 4 (which deals with schedule changes). The City notes that that bullet point says that when the City gives 24 hours notice to the employees of a schedule change, then no overtime is paid. The City further points out that, once again, nothing in that bullet point says when notice of a schedule change needs to be given, or says that the 24 hour notice (for a schedule change) has to be made when the employees are working their Monday through Friday 7:00 a.m. to 3:00 p.m. work schedule. That being so, it’s the City’s view that it can give notice of a schedule change either during the week or during the weekend; it is not limited (as the Union contends) to just being given when the employees are working their normal work hours of 7:00 a.m. to 3:00 p.m. Monday through Friday.

Finally, the City disputes the Union’s contention that what happened here was a call-out. For background purposes, the City opines that a call-out is when employees are recalled to work outside their regular work hours. As the City sees it, the employees were subjected to a call-out when they were called on Saturday, December 26, 2009 and told to come in to work that night at midnight. However, when they reported to work again 24 hours later (per the notice posted on the chalkboard) that was not a call-out but rather a change to their Monday work schedule. On that particular day, their work schedule was 12:00 a.m. to 8:00 a.m. (as opposed to their normal Monday work schedule of 7:00 a.m. to 3:00 p.m.).

In sum then, it’s the City’s view that it complied with both Article 5 of the collective bargaining agreement as well as the 2006 Side Letter when it paid the employees at straight time for their work on Monday, December 28, 2009 because it gave them 24 hours notice of a change to their Monday work schedule. It therefore asks that the grievance be denied.

DISCUSSION

Here are the pertinent facts. When the employees reported to work on the evening of Saturday, December 26, 2009 to plow snow, they were notified, via a note on the chalkboard, that they were to report for work on Monday at 12:00 a.m. (midnight). They normally start work at 7:00 a.m., so they were directed to come in to work seven hours earlier than normal. Most of the employees did as directed and reported to work at midnight, Monday, December 28, 2009. Then, they worked for the next eight hours until 8:00 a.m. Those employees were paid straight time (with a shift differential) for working that shift.

I've decided to comment at the outset on the scope of this decision. Both at the hearing and in their brief, the Union made a passing reference to the fact that two employees showed up for work at 7:00 a.m. that day (rather than midnight), and that four employees took vacation that day. The Union then raises a seniority claim relating to same. I'm not going to address that claim because it was not raised in the grievance. The grievance just raised an overtime claim. That being so, this decision is just going to deal with the employees who reported to work at midnight, and whether they were entitled to overtime for same.

As just noted, at issue here is whether overtime should have been paid to the employees who reported to work at 12:00 a.m. on Monday, December 28, 2009. Based on the rationale which follows, I find that overtime was not required pursuant to the collective bargaining agreement and the parties' 2006 Side Letter.

Notwithstanding the conclusion just noted, I've decided to begin my discussion by noting that after I learned the facts at the hearing, my initial reaction – without looking at the contract language – was that the employees must surely be entitled to overtime as a result of being directed to report to work at midnight rather than 7:00 a.m. As Union witness Wuensch put it at the hearing, “it just doesn't make sense” that employees could be told to come into work seven hours earlier than their normal start time, and then be paid at straight time for doing so.

However, the outcome of this case is not going to be decided based on my subjective view of what ought to be. Instead, since this is a contract interpretation case, it's going to be based on the contract language. As the following discussion shows, the contract language does not require overtime to be paid under the circumstances.

The focus now turns to a review of the contract language. I begin by looking at the Work Week and Work Day provisions. Article 5, Section 1(a) provides that the “normal work week” for DPW employees is “five (5) consecutive work days scheduled from Monday through Friday.” Article 5, Section 2(a) then goes on to provide that the “normal work day” is “eight (8) hours commencing at 7:00 a.m. and terminating at 3:00 p.m. . . .” Thus, the “normal” work schedule for DPW employees is 7:00 a.m. to 3:00 p.m. Monday through Friday. The key word in the previous sentence is “normal”. The reason that word is key is because that schedule can be unilaterally changed by the Employer so long as it complies with another contract provision. The provision I am referring to is Article 5, Section 4, which is entitled “Schedule Changes.” That contract provision will be addressed later in this discussion.

Next, I'm going to review the various overtime provisions. Article 5, Section 3 says that overtime is paid when employees work in excess of 8 hours per day, or 40 hours per week, or when employees work on Saturdays, Sundays or holidays. Article 5, Section 4 then goes on to say that employees will be paid overtime for some schedule changes, namely when the Employer gives less than 24 hours notice of a schedule change to the employees. Article 6, Section 2 then goes on to say that employees will be paid overtime if they are “recalled to

work outside their regular work day.” The parties’ shorthand term for this last category is a call-out.

This case involves the last two overtime categories referenced above. Consequently, that language will be addressed in more detail below.

On its face, Article 5, Section 4 does not say when the notice of a schedule change has to be given to the employees. Instead, all it says is that if the Employer gives less than 24 hours notice, then overtime is to be paid to the employees. Implicit in this directive is that if the Employer gives the employees at least 24 hours notice of a schedule change, then the employees are paid at straight time – not overtime – for the changed work schedule.

That is also the case with the parties’ 2006 Side Letter which was intended to “clarify” Article 5, Sections 3, 4 and 5. The Side Letter provides in pertinent part:

4. Schedule Changes

- With a twenty-four (24) hour notice: No overtime is paid.
- Without a twenty-four (24) hour notice: All hours worked during the entire changed schedule, including a schedule change that runs into the normal work hours (7-3) are paid at overtime rates.

Once again, there is nothing in this language that says when the notice of a schedule change has to be given. Instead, all it says is that if the Employer gives less than 24 hours notice, then overtime is paid; if more than 24 hours notice is given, then no overtime is paid.

The Union argues that the City can only give notice of a schedule change during the employees’ regular work schedule of Monday through Friday 7:00 a.m. to 3:00 p.m. As the Union sees it, the notice which the City gave here (on Saturday night) was not an effective notice because no (work) schedule was in effect at the time the notice was given. While the employees were at work that night, the Union emphasizes that the employees were not on their regular work schedule, so there could not be a “change” in that schedule. Building on that premise, the Union argues that if the City wants to change the Monday work schedule to start at say, midnight, rather than 7:00 a.m., then it has to give the employees notice of same on Friday afternoon prior to 3:00 p.m.

The problem with that contention is that it lacks a contractual basis. If it were the parties’ mutual intent that notice of a Monday schedule change had to be given on the prior Friday by 3:00 p.m., the parties could have put that restriction in either the collective bargaining agreement or the 2006 Side Letter. They did not. Since they did not, I find that the most plausible interpretation of both Article 5, Section 4 and the parties’ 2006 Side Letter is that the Employer can give the notice of a schedule change at any time, whether it’s on the weekend or during the employees’ normal work week. In my view, what the Union is

essentially asking me to do here is infer a restriction into the language that the Employer is precluded from giving notice of a schedule change on the weekend. I decline to do so because were I to do that, it would be adding a restriction which does not currently exist. It is a general arbitral principle that an arbitrator is not to add terms to the agreement that don't currently exist. That's the parties' job.

Application of that interpretation of the contract language to the facts involved here yields the following results. On the evening of Saturday, December 26, 2009, the employees were called and told to report to work at midnight. When the employees arrived at work, they were given notice, via a note on the chalkboard, that they were to report to work at midnight the next night.

The parties have differing views on how that note should be characterized. According to the Union, it was notice of a call-out. The Employer disagrees and contends it was notice of a schedule change.

Based on the rationale which follows, I find it was a notice of a schedule change – not a call-out. Article 6, Section 2 says that a call-out (or as Section 2 actually states, “call-in”) occurs when employees “are recalled to work outside their regular work day. . .” In contrast, a schedule change is when the employees’ schedule is changed “from one regular schedule of days and/or hours to another schedule for days and/or hours.” On Saturday, December 26, 2009, the employees were called and told to come in to work at midnight on Sunday, December 27, 2009. That was a call-out. When they arrived at work, they were given notice that they were to report to work “at 12:00 a.m. on Monday.” Since the employees’ normal Monday work schedule starts at 7:00 a.m., and this notice directed them to report at 12:00 a.m. instead, it was implicit from this notice that the employees’ Monday work schedule had been changed to start at midnight rather than 7:00 a.m. Most of the employees reported to work on Monday at 12:00 a.m. as directed. Those employees ended up working from 12:00 a.m. until 8:00 a.m. That was an eight hour period. That was significant for two reasons. First, eight hours constitutes a normal work day. Second, as such, it complied with item number 1 in the parties’ 2006 Side Letter which provides thus: “A schedule is defined as eight (8) or more consecutive hours of work, for schedule change purposes.” It would have been one thing if the employees had worked less than eight hours on Monday, December 28, 2009. However, they didn’t. The Employer had them work eight hours, so their work that day constituted a schedule change as contemplated by item number 1 in the Side Letter. Moreover, since the employer gave the employees 24 hours notice of that schedule change, it did not have to pay them overtime pursuant to Article 5, Section 4 and the first bullet point under number 4 in the parties’ 2006 Side Letter.

The arbitrator understands why bargaining unit employees will find this outcome confusing. They will no doubt focus on the fact that on two days in a row, they reported to work at midnight (namely, Sunday and Monday). They were paid overtime for the first night but not for the second. They will say, rhetorically, doesn't consistency require overtime for both nights? My answer is this: not in this case. Here's why. A distinction exists between

the two nights. The first night employees qualified for overtime for two separate reasons: they worked on a Sunday and it was a call-out. The second night (Monday, December 28, 2009) though, they did not qualify for overtime because it was not a call-out but rather a schedule change. The employees could still have received overtime for their work that day if the Employer gave less than 24 hours notice. However, the Employer did give 24 hours notice of the schedule change, so no overtime was contractually required.

. . .

Notwithstanding the contract interpretation and application noted above, the Union contends that overtime should still have been paid to the employees pursuant to an (alleged) past practice. The focus now turns to addressing these arguments.

First, the Union avers that until this case arose, the City had never given notice of a change to the Monday work schedule on the weekend. This was the first time that happened. However, just because the Employer had never given notice of a change to the Monday work schedule on the weekend prior to doing it here does not mean that an enforceable practice had somehow been created that the Employer could not give notice of a schedule change on the weekend. The Union's underlying theory that this is a past practice case overlooks the fact that not every pattern of conduct amounts to a past practice, particularly where the pattern of conduct results from management exercising its discretion under the contract. That is what happened here. As was noted earlier in the discussion on the contract language, there's nothing in the contract language, in either Article 5, Section 4 or the parties' 2006 Side Letter, that explicitly or implicitly requires the Employer to give notice of a schedule change during the employees' Monday through Friday normal work schedule. That being so, the Employer retained the right – pursuant to the contractual management rights clause – to give notice of a change to the Monday work schedule on the weekend.

Second, the Union points out that on one occasion about five years ago, a similar situation occurred, and the employees were ultimately paid overtime. As the Union sees it, the Employer violated this “practice” when it did not pay overtime here. I do not find that contention persuasive for the following reasons. First, generally speaking, a single instance does not create a practice. Simply put, more instances than that are needed. Second, while there was some testimony about this incident, that was it; no other proof – such as written documentation – was offered to substantiate it. Because of the foregoing (i.e. that it was just a single incident from about five years ago which lacks substantiating proof), I find that instance insufficient to create a practice which requires the payment of overtime here.

In sum then, I find that the Employer complied with both Article 5, Section 4 of the collective bargaining agreement as well as the parties' 2006 Side Letter when it paid the employees at straight time – rather than overtime – for their work on Monday, December 28, 2009 between 12:00 a.m. and 8:00 a.m.

In light of the above, it is my

AWARD

That the City did not violate either the collective bargaining agreement or the parties' 2006 Side Letter when it paid the employees who worked from 12:00 a.m. to 8:00 a.m. on Monday, December 28, 2009 at straight time rather than overtime. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 12th day of October, 2010.

Raleigh Jones /s/

Raleigh Jones, Arbitrator