BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BROWN COUNTY

And

BROWN COUNTY HIGHWAY DEPARTMENT EMPLOYEES,
GENERAL TEAMSTERS UNION LOCAL 662,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Case 795
No. 70592
MA-14997

Appearances:

Soldon Law Firm, by **Scott D. Soldon**, Attorney at Law, 3541 North Summit Avenue, Shorewood, Wisconsin, appeared on behalf of the Union.

Frederick J. Mohr, LLC, by **Frederic J. Mohr**, Attorney at Law, 414 East Walnut Street, Suite 101, Green Bay, Wisconsin, appeared on behalf of the Employer.

INTERIM ARBITRATION AWARD

Brown County Highway Department Employees, General Teamsters Union Local 662, International Brotherhood of Teamsters, herein referred to as the "Union" and Brown County, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Green Bay, Wisconsin, on April 26, 2011. Each party submitted a written argument, the last of which was received on May 6, 2011.

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ISSUES

The parties were unable to stipulate to the statement of the issues, but agreed that I might state them. I state them as follows:

1. Whether the Employer violated its obligations under the collective bargaining agreement by discontinuing its past practice of calculating overtime "time worked" to include some times when employees did not actually work?

2. If so, what is the appropriate remedy?

FACTS

The Employer is a Wisconsin county. The Union represents various non-supervisory employees of the Employer's Highway Department. It also represents a separate unit of non-supervisory workers at the Employer's airport. The parties have had a long standing relationship in both bargaining units going back over forty years. Both bargaining units have always had substantial overtime work each year.

Employees have at all times in the past been paid overtime pay after they work forty hours in a week. For at least 40 years, the payroll procedure of the Employer is that the payroll clerk would gather information as to the hours worked and calculate the pay for each employee including overtime. The completed payroll would then be submitted to the Highway Commissioner who is the chief executive officer of the Highway Department for his approval. Upon his or her approval the payroll would be paid.

The parties agree that for at least the last seventeen years and most likely more than forty years, the Employer has counted time paid, but not actually worked, and other time off as time worked for the purposes of determining when the employee has reached the forty hour threshold for the payment of overtime. Without making a definitive finding on specifically what has been included, it has included vacation time and sick leave. It has also included some time taken off as no-work, no pay days (time taken off without pay). This is true even though the collective bargaining agreement specifies that overtime is paid after forty hours of time "worked."

The parties reached agreement on the current collective bargaining agreement in May, 2010. The Employer never proposed changing the way the forty hour threshold is calculated.

The Employer converted to a new payroll system. The oversight responsibilities for payroll were transferred from the Employer's Department of Administration to it Human Resources Department. The Employer converted the Highway Department payroll to the new system in the latter part of 2010. The Personnel Department noticed the "discrepancy" shortly thereafter. Personnel Director Klarkowski notified the Union that the Employer intended to change the way overtime was calculated.

The Union filed the grievance in dispute. The grievance was properly processed to arbitration.

RELEVANT AGREEMENT PROVISIONS

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ARTICLE 7. CORRECTIVE ACTION – GRIEVANCE PROCEDURE

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Grievances may be brought by an individual employee or employees. Should differences arise between the Employer and any employee of the County, as to the meaning or application of the provisions of this agreement, such differences should be settled in the following manner:

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ARTICLE 21. HOURS OF WORK

The regular work day shall consist of eight (8) hours per day Monday through Friday and forty (40) hours per week. Time and one-half (1 1/2) shall be paid for all hours worked in excess of eight (8) hours per day and forty (40) hours per week, exclusive of Sundays and holidays. Double time shall be paid for the seventh consecutive day of work: for overtime purposes shall be interpreted so

as to mean work performed on Sundays. The work day shall be 7:00 a.m. 3:00 p.m., Monday through Friday. The regular work week and work hours will be altered as agreed under A (Summer Work Week of this Article).

During a regular work day, employees will be given two (2) paid ten (10) minute breaks to be taken during mid-morning and mid-afternoon. The breaks will be staggered among the construction and maintenance work force to provide for continuous operations.

All employees who are required to work on weekends will be notified of such work no later than twelve (12:00) noon on Friday, except in the case of emergencies.

On emergency work, time shall be paid from storage quarters and return. All regular employees who qualify shall be given first preference in operating equipment if it becomes necessary, due to emergency conditions.

Employees shall be allowed up to one-half (1/2) hour to arrive at the storage quarters at the end of the work day, except in the case of construction work on roads and bridges. Their work day shall commence and cease at the location of such project.

In the event employees are called for work outside of their regular daily hours in effect at the time, they shall be given a minimum of three (3) hours work or pay at the prescribed rates, when said hours are not contiguous with the employee's regular shift.

Any employee who was off work the day preceding a non-scheduled work day (holidays, Saturdays, Sundays, evenings) due to vacation, or other excused absence, shall be considered unavailable for call-in until his/her next scheduled work day, unless he/she tells his/her supervisor at the beginning of his/her last scheduled work day that he/she will be available to work non-scheduled hours. In addition to calling his/her supervisor on his/her availability, the employee must also indicate on a pre-vacation leave slip that he/she will be available and turn the slip in with his/her time slip on his/her last scheduled work day.

On a scheduled work day, the employee assigned to carry out work normally performed by a person who is off work due to vacation or other excused absence will be offered the continuous overtime hours necessary to complete his work task. The assigned employee's work shift is completed at such time as he/she leaves the job and goes home, no matter what hour or day. The next employee called in for non-scheduled overtime hours will first be the bid person, second the senior person by shop, and the third the overall highway crew seniority.

Summer student workers will not be given overtime work when a bargaining unit employee is available on the job site. Overtime Duty (Flagging Duty) Should a bargaining unit employee wish to perform flagging duty on overtime he/she shall notify management two (2) hours in advance of the end of the normal shift. Only individuals on the crew working will be allowed to bump the summer student worker that is flagging that day.

Also, all overtime work on equipment repair will be performed by the shop mechanics as per their seniority. A mechanic working on a specific piece of equipment during regular work hours will be offered the overtime to continue the repair work beyond the end of the scheduled work day until such time the repair job is completed.

Compensatory Time

The employer and the employee mutually agree that overtime pay may be earned as compensatory time and banked. Usage will be by mutual agreement between the employer and the employee. Compensatory time will not accumulate in excess of 80 hours. Compensatory time will not be allowed to be carried over from year to year and will be paid out at the end of the year.

Non Scheduled Work Day and Emergency Call In Procedure

Procedures by work task is as follows:

A. Snowplowing and Salting:

1. Bid section employees

2. Highway crew seniority at nearest shop

3. Overall highway crew seniority

4. Shop employee seniority.

B. Sign Knockdowns and Traffic Control Signing:

1. Bid sign shop employee

2. Highway crew seniority at nearest shop

3. Overall highway crew seniority

State Sections:

Bid winter snowplow truck sections (18)

County Sections:

Bid winter snowplow truck section (15)

Town Sections:

Bid winter snowplow truck sections (6)

C. Equipment Repair – Field and Shop:

1. 1st Mechanic seniority

2. Overall shop employee seniority

3. Bridge Crew/Blacksmith Helper

4. Overall highway crew seniority

D. Pavement Blowouts:

State Highways

1. State bid section employee.

2. State full-time employees at nearest shop.

3. Overall State full-time employees by seniority.

4. Overall highway crew seniority at nearest shop.

5. Overall highway crew seniority.

County Highways

1. Overall highway crew seniority at nearest shop.

2. Overall highway crew seniority.

E. Bridge Maintenance and Construction:

1. Bid bridge crew employees

2. Overall highway crew seniority

F. Tri-Axle Snow Hauling/Salt Hauling at near shop:

1. Senior tri-axle bid drivers during the season in which the work occurs

2 Shop employee seniority where tri-axle truck is normally parked

3. Overall Highway crew seniority

G. Culvert Steaming:

1. Bid #1

2. Bid #2

3. Overall highway crew seniority

H. Guardrail and Bridge Joint Cutting:

1. Bridge Crew Seniority

2. Chief Blacksmith

3. Blacksmith

4. Overall Highway Crew Seniority

NOTE: During the period of April 1 to November 30, all fulltime State Bid Section employees will be called in first for State work (Applies to A and D above).

All employees have the responsibility of informing the office of any changes to their home phone number and/or place of residence. The employee will be able to provide both primary and secondary phone numbers where he/she can normally be reached during weekday non-work hours, weekends, and holidays. The Superintendents maintain an employee list, with "one" phone number listed for each employee. The phone number listed is the employee's primary residence where he/she can normally be reached during weekday non-work hours, weekends, and holidays.

The standard procedure for non-scheduled work day emergency call-in is for the Superintendent on duty to first call the primary phone number and then the secondary number if available until a sufficient work force is available to handle the work. The phone call will be to the employee's home, unless the employee specifically informs the Superintendent on duty that he/she can be reached at a different location during a given time period.

During weekday non-work hours, weekends and holidays, and Superintendents rotate duty based on a schedule published prior to the winter season.

In the event an employee is on sick leave or vacation for a partial day, the employee forfeits his right to his specific job assignment for that day.

A. Summer Work Week:

1. Time Element – The second Monday in April through the last Friday in September.

2. Work Days – The regular scheduled work day will be from 6:00 a.m. to 4:00 p.m. Monday through Thursday. The work day will consist of ten (10) hours. Time and one-half (1 ½) will be paid for all hours worked in excess of ten (10) hours per day and forty (40) hours per week, exclusive of Sundays and holidays. Double time will be paid for work performed on Sundays and holidays. Overtime will be paid for all hours worked outside the normal scheduled 10 hour work day.

During a regular work day, employees will be given two (2) paid fifteen minute breaks, to be taken during mid-morning and mid-afternoon. The breaks shall be staggered among the construction work force to provide for continuous operation of the paver, concrete work, and other road and bridge construction projects.

3. Vacation, Sick, Casual, Holidays – The existing system of "accumulating" vacation and casual days would remain as per the contract. A credited day of vacation, casual or personal is calculated at 8 hours. In order to achieve a 40 hour work week during the summer, any holiday, vacation, casual or personal day taken by an employee will be 10 hours. If the Fourth of July falls on a Saturday, employees will have the holiday off on the preceding Thursday. If the Fourth of July falls on a Sunday, employees will have the holiday off on the following Monday.

> 4. Staggered Work Days – In order to make a timely response to roadway emergencies, on Fridays during the summer 4-day work schedule, two (2) State section employees by seniority on an annual basis and the night mechanic will work a 10 hour day. Their work week will be from Tuesday through Friday. If needed, additional work crews will be called in on Fridays to handle roadway emergency work on an overtime call-in basis.
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> 5. Friday, Saturday and Sunday Work – The County will use the call-in procedure.

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POSITIONS OF THE PARTIES

Union

The undisputed facts establish that for more than forty years, during the tenure of numerous County Highway Commissioners, Human Resource Directors, County Executives and County Attorneys, the County included holiday pay, sick leave pay, bereavement pay, casual days, personal days, vacation time, compensatory time and other time away from work in the calculation of weekly overtime in the Highway Department and at the County Airport. The County even included what are known as "no work-no pay days" (days when employees voluntarily chose not to work with the permission of the County) in this calculation, as well as time when employees went home to rest during snow emergencies which required sixteen hour shifts overlapping more than one work day. During this entire period, the Contract language remained the same. At the Highway Department, the payroll was prepared by a payroll clerk and sent to the downtown County offices for review and payment. When the Clerk was absent, the Highway Commissioner did the payroll, applying the same calculation.

At the beginning of 2011, without any notice to or bargaining with the Union, and without any discussion or change in the Contract, the County unilaterally announced that it had "discovered some errors" in the overtime calculation. See Jt. Exh. 3. The County thereupon ceased the prior calculation in the Highway Department (but not at the Airport).

This unilateral abrogation of an agreed-upon method for calculating overtime pay violated the Contract. The term "hours worked" is an ambiguous term of art, which must be construed in light of the parties' understandings evidenced by their conduct. Unlike the case cited by Mr. Mohr, there is no prior or contrary method of calculation to which the parties may return; the genesis of the practice was not the result of an error or a change inexplicably initiated by a new payroll clerk; and the Contract does not contain any form of a "zipper clause." The County concedes that the calculation of overtime under this Contract has always included the items/practices described above. This pay practice gives meaning to the literal terms of the Contract.

Even if the County is correct about the allegedly "unambiguous" terms of the Contract, the parties have agreed upon the meaning of this contract (or have, alternatively, engrafted upon it an additional overtime pay requirement) by their conduct. The parties' practice evidences an intention to engraft this additional pay requirement upon the literal terms of the contract. That behavior, relied upon by the Union in bargaining the various pay provisions in the Contract for several decades, reflects a mutual and enforceable past practice which has amended (by adding a pay requirement clearly understood by the parties, not by violating any specific or contrary provision) the terms of the Contract.

Continuing the long-standing calculation of overtime pay does not violate any specific provision of the Contract; it merely enforces the expectations of the parties which both sides have relied upon for many years. Let the County attempt to bargain this change in the next round of negotiations between these seasoned negotiators. The County must attempt to obtain this concession through bargaining, not by unilateral fiat (justified by the somewhat absurd contention that it recently "discovered" a payment calculation implemented and approved by its managers for decades).

The Arbitrator should grant the grievance, order the County to return to the prior calculation of overtime and direct that all employees be made whole for all losses sustained, retaining jurisdiction over any subsequent disputes over the implementation of the remedy.

Employer

Although the Employer has a history of including sick leave and other time off as “time worked” in its calculations of hours worked for overtime, this was not known to the Personnel Department. The Highway Department has its own payroll clerk. Historically, the payroll clerk entered this data. The Employer converted to a new payroll system on January 1, 2010,

and first discovered that the payroll clerk was entering this data to give credit for sick and other leaves as "time worked." The Employer corrected this error. The collective bargaining agreement provides that overtime should be calculated on the basis of "time worked." It is clear and unambiguous in that time taken in the form of paid leave is not "time worked." Where the language of the agreement is clear and unambiguous, the arbitrator should not look beyond the express language to extrinsic evidence such as past practice. Accordingly, the Employer has not violated the collective bargaining agreement.

DISCUSSION

1. Statement of the Issue

The Employer stated the issues as:

1. Did the County violate the collective bargaining agreement by refusing to credit employees with paid holiday time, vacation time, personal days and causal days as time worked for purposes of calculating overtime even though employees did not work on during said periods?
2. If so, what is the appropriate remedy?

The Union stated the issues as:

1. Did the County violate the contract by changing the method it used for calculation of overtime pay?

2. Is so, what is the appropriate remedy?

This is a situation in which a compelling past practice is offered to contradict the allegedly clear express terms of a collective bargaining agreement. I conclude that the preponderance of available evidence establishes that the parties never intended the collective bargaining agreement to be fully integrated on the specific subjects of the extent to which time not worked would be used in computing overtime. The issues implicate the concepts of the legal doctrine known as the "parol evidence rule" to a collective bargaining agreement. If the rule is applied as sought by the Employer it will not be required to include some time not

worked in computing the total hours beyond which overtime is paid. If the past practice is given weight, the Employer will be required to continue following the past practice even though it is arguable that there is no express agreement to do so. I conclude that the issues presented at this phase are:

1. Whether the Employer violated its obligations under the collective bargaining agreement by discontinuing its past practice of calculating overtime "time worked" to include some times when employees did not actually work?

2. If so, what is the appropriate remedy?

I note that it is not necessary to address the specifics of the past practice at this time. Those matters will be addressed at the remedy phase.

2. Standards

a. Parol Evidence Rule

Labor arbitrators have long looked to a variety of methods to interpret collective bargaining agreements to find the "intent of the parties." These include, but are not limited to, looking at the method courts use to interpret contracts as a guide in assisting in the interpretation of labor agreements. However, labor agreements are not ordinary contracts and labor arbitrators take the differences from ordinary contracts into account when applying those rules.[1]

The parol evidence rule is stated by arbitrators and the courts as follows:

> When the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake.[2]

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[1] Ted St. Antoine, Ed, NAA, The Common Law of the Workplace: The View of the Arbitrators, Sections 1.88 2.1 and 2.2 (BNA, 2d Ed.).
[2] See, TOWN BANK V. CITY REAL ESTATE DEVELOPMENT, 2010 WI 134, 793 N.W.2D 476, 484 (2010), and Common Law, *supra,* Sec. 2.5. TOWN dealt with an issue as to whether a contract was fully integrated.

I conclude that the gravamen of this dispute is whether the parties intended it to be "fully integrated." Therefore, this case deals with the limited exception stated concerning the issue of whether the agreement is intended to be "integrated.

The most common form of parol evidence used in labor arbitration is the "past practice" of the parties. A "past practice is a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action. The factors to qualify conduct as a "past practice" are:

1. Clarity and consistency of the pattern of conduct,
2. Longevity and repetition of the activity,
3. Acceptability of the pattern, and
4. Mutual acknowledgement of the pattern by the parties[3]

3. Merits

The phrasing "all time worked" in itself has a clear meaning in general usage. It means the hours a person actually worked and does not by itself include time paid (such as sick leave) but not actually worked. The phrasing may become a term of art in labor relations as argued by the Union. There is some ambiguity which arises when it is used in a labor relations context because it is often used to state a general rule or concept to which exceptions are often noted elsewhere for practical reasons. The alternative to the "time-worked" phrasing is "time-paid," but it is cumbersome to state the exceptions when the parties do not want to use all time paid as a threshold or wish to include some unpaid time as part of the threshold for overtime calculation. Thus, it is commonly used in labor relations to state a general rule. When there are exceptions the phrasing "time worked' is properly construed as "time deemed worked" rather than "time actually physically worked." The past practice strongly supports the conclusion that the "time-worked" phrasing is used as a general rule.[4]

The existence of a practice of extensive exceptions dating back at least seventeen years and probably forty years or more is not disputed. It meets all of the foregoing tests. There is no evidence that there was ever a time in the parties' long standing collective bargaining

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[3] Common Law, supra, Sec. 2.20

[4] In this regard, the better view is that the past practice does not conflict with the "time worked" concept, but supplements it.

relationship going back at least forty years that the overtime threshold was ever strictly based upon time worked. The Employer's chief argument that it only recently discovered this "error" and, therefore, the practice does not represent the mutual intent of the parties is without merit. First, it is highly unlikely that the practice was not intended. There is no dispute that each former Highway Commissioner has had to approve the payrolls prepared by his or her payroll clerk. In some cases, they actually performed the calculation. The Highway Commissioner is the chief executive officer of the Highway Department and a management official responsible for the department's budget and expenditures. He or she is responsible to insure that each successive payroll clerk is trained and performs the payroll function properly. This, alone, is sufficient to establish that the overtime threshold practice was intended by the "Employer." In any event, the Employer's position is that past personnel directors and employer negotiators were unfamiliar with the disputed past practice. I find that highly unlikely. It is far more likely that they were acutely aware of this practice. There are potential reasons why negotiators for multiple bargaining units would choose to leave a past practice unarticulated in the agreement. The better view is that the parties intentionally left the past practice unarticulated in the agreement.

The preponderance of the available evidence in the past practice establishes that the agreement is not fully integrated as to the exceptions to the "time worked" rule and that at least some time not worked is ordinarily credited to the threshold. The agreement does not contain the usual "entire agreement" clause expressly stating that the written agreement is the entire agreement of the parties. As noted above, there is no evidence that the Employer ever administered the overtime threshold differently in the Highway Department or did so inconsistently. The passage of time has erased the evidence as to how the practice started. The better view is that the agreement is not fully integrated as to the calculation of the overtime threshold and the past practice is the agreement of the parties as to the exceptions of time which should be deemed worked. This is the essence of the analysis by Arbitrator Greco in VILAS COUNTY, MA-9711 (Greco, 1997) cited by the Employer.[5]

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[5] The distinction between that award and the award of Arbitrator Hempe in PROMOTIONS UNLIMITED CORPORATION, A-5506 (1997) is that Arbitrator Hempe viewed the phrasing as clear and unambiguous in its commonly used sense, but a careful reading indicates that prior to the clerk's making a change in that practice, the parties had undisputedly used the term in the sense of "time physically worked" for many years. Thus, there was no issue of ambiguity. Further, it should be noted that he found that the practice, in fact, was not an agreement of the parties.

4. Remedy

The parties have agreed that I would address the main issue and reserve issues concerning the specification of a remedy if one is ordered. I have, therefore issued an interim order on the issue presented and given the parties an opportunity to resolve the remedy issues. If they fail to agree, I will assert jurisdiction to determine a final remedy.[6]

INTERIM AWARD

The Employer violated the agreement when it failed to pay overtime calculated in the proper way. It shall pay employees all wages and benefits lost as a result of the disputed changed. It shall pay employees in accordance with the overtime threshold procedure in existence before the disputed change. I reserve jurisdiction over the remedy issues if either party requests in writing, copy to opposing party, that I exercise jurisdiction within sixty (60) calendar days of the date of this award.

Dated at Madison, Wisconsin, this 12th day of October, 2011.

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Arbitrator

[6] No decision is expressed or implied as to whether the Employer will be required to abide by the practice after the expiration of the agreement. That matter is left to future negotiations.

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