

IN THE MATTER OF ARBITRATION )  
 )  
 ) between )  
 ) Hennepin County )  
 ) Overtime - Jeff Nelson,  
 ) Warren Ringate and Gary  
 ) Glunz  
 )  
 ) -and- )  
 ) BMS Case No. 11-PA-0985  
 )  
 ) International Union of )  
 ) Operating Engineers, )  
 ) Local 49 )  
 ) May 5, 2012  
 ))

**APPEARANCES**

**For Hennepin County**

Jennifer E. Peterson, Labor Relations Representative  
Chris Sagsveen, Road and Bridge Division Manager  
Steve Boisclair, Traffic Foreman Sign Shop  
Michael Legg, Former District Maintenance Supervisor, Present  
Highway Maintenance Superintendent  
Brian Langseth, Operations Support Supervisor

**For International Union of Operating Engineers, Local 49**

M. William O'Brien, Attorney, Miller O'Brien Cummins, PLLP,  
Minneapolis, Minnesota  
Kent Korman, Area Business Representative  
Gary Glunz, Grievant

**JURISDICTION OF ARBITRATOR**

Article 7, Grievance Procedure, Section 3, Step 4,  
Arbitration, of the 2010-2011 Collective Bargaining Agreement  
(Union Exhibit #1; Employer Exhibit #6) between Hennepin County  
(hereinafter "Employer" or "County") and International Union of  
Operating Engineers, Local 49 (hereinafter "Union") provides for  
an appeal to arbitration of disputes that are properly processed  
through the grievance procedure.

The Arbitrator, Richard John Miller, was selected by the Employer and Union (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services. A hearing in the matter convened on February 23, 2012, at 9:00 a.m. at the Medina Transportation Facility, 1600 Prairie Drive, Medina Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions.

The Parties' legal counsel elected to file electronically post hearing briefs, with an agreed-upon postmark date of no later than April 6, 2012. The post hearing briefs were submitted in accordance with those timelines. The Arbitrator then exchanged the briefs electronically to the Parties' legal counsel on April 7, 2012, after which the record was considered closed.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator, and made no procedural or substantive arbitrability claims.

**ISSUES AS DETERMINED BY THE ARBITRATOR**

1. What is the appropriate remedy where the Parties agree that the Employer violated the Collective Bargaining Agreement by failing to offer seven hours of overtime to Warren Ringate and two hours of overtime to Jeff Nelson?

2. Did the Employer violate the Collective Bargaining Agreement when it bypassed Gary Glunz in favor of a less senior employee for the assignment of ten hours of overtime?
3. If the Employer did violate the Collective Bargaining Agreement regarding Mr. Glunz, what is the appropriate remedy?

**WARREN RINGATE AND JEFF NELSON GRIEVANCES**

**STATEMENT OF THE FACTS**

The Employer regularly offers overtime work for various projects, some foreseeable (such as regular seasonal maintenance) and some unforeseeable (such as snowplowing). The Employer may issue a "full call-out" in which all employees assigned to snowplowing duties are called in for overtime work. In the context of full call-outs for snowplowing, overtime violations can occur when a designated driver is unable to report for duty and must be replaced by another driver. In other circumstances, the Employer may issue a "partial call-out" in which only a few employees are called for an overtime assignment for snowplowing.

The Parties on November 29, 2005, executed a Letter of Understanding which has been appended to the Collective Bargaining Agreement. (Union Exhibit #1, p. 30; Employer Exhibit #6, p. 30). The Letter of Understanding affirms that overtime assignments will be "offered by seniority within job classification. However, due to the many variables that we must

take into consideration when making overtime assignments, there must be some flexibility." Id.

The Union represents employees who perform road and bridge construction, repair, and maintenance, including snow plowing, in the Employer's Public Works Department. The Grievants, Jeff Nelson and Warren Ringate, are both Highway Maintenance Operators. Mr. Nelson works in the Road and Bridge division under Administrative Supervisor Brian Langseth and Division Manager Chris Sagsveen. (Employer Exhibit #1). Michael Legg, Former District Maintenance Supervisor, who is now Highway Maintenance Superintendent, supervised Mr. Nelson. Mr. Ringate works in the Traffic Division under Division Manager Greg Chock. Mr. Ringate's supervisor is Steve Boisclair. Id.

The first overtime situation involves Mr. Nelson, and it occurred on December 14, 2010. Supervisor Legg needed to assemble a crew to clear the snow off bridges in Edina, an assignment that would include two hours of overtime. When he asked Highway Maintenance Operators in order of seniority as to their interest in this two hour assignment, he failed to contract Mr. Nelson. It was not intentional, just a mistake.

The second overtime situation involves Mr. Ringate. Supervisor Boisclair called employees sometime after midnight on January 22, 2011, for a partial call-out for Snow and Ice Control. Supervisor Boisclair called Mr. Ringate's cell phone

twice rather than calling his home phone once and then his cell phone (as provided per overtime assignment procedures). Because Mr. Ringate could not be reached, Supervisor Boisclair called the next person on the seniority list to take Mr. Ringate's place. Supervisor Boisclair's conduct was not intentional, just a mistake.

Both Mr. Nelson and Mr. Ringate filed separate grievances over being denied the opportunity to work the respective overtime assignments that were given to less senior employees. (Union Exhibit #3; Employer Exhibit #2).

The Employer stipulates that it mistakenly assigned overtime work to employees less senior than Mr. Nelson and Mr. Ringate in violation of the Collective Bargaining Agreement which affirms that overtime assignments will be offered by seniority. Accordingly, as to Grievants Nelson and Ringate the only remaining issue is the appropriate remedy. The Parties agree that the overtime hours in question are two hours for Grievant Nelson and seven hours for Grievant Ringate. If the the Grievants seek to be paid the overtime rate for those lost hours, this would amount to \$70.23 for Grievant Nelson and \$245.80 for Grievant Ringate. (Employer Exhibit #8). In the alternative, the Grievants would have the option to receive compensatory time in the amounts requested rather than receive pay.

The Employer contends that the appropriate remedy when mistakes are made in following the Employer's overtime assignment procedure is to offer the equivalent amount of overtime work, not to pay employees for time not worked. Thus, according to the Employer, the appropriate remedy is that Grievant Nelson be offered the equivalent overtime work of two hours and seven hours for Grievant Ringate. The Employer's position is that there is no Contract language that absolutely and specifically sets forth a process for remediating a mistake made in assigning overtime; therefore, the Employer has not violated the Contract, and has the right to determine the most appropriate remedy.

The Contract is silent about makeup work for remediating a mistake made by the Employer in assigning overtime once the Employer determines that overtime is warranted. However, Article 9, Work Schedules - Premium Pay, Section 4 of the Collective Bargaining Agreement states that overtime hours worked with permission from the Employer shall be "compensated at one and one-half (1 ½) times the employee's base pay rate in cash or compensatory time off.... Overtime premium pay shall be provided in the form of cash payment except that employees may elect to receive compensatory time in lieu of cash payment subject to the approval of the Employer." The Collective Bargaining Agreement also provides in Article 9, Section 5 that

"[e]mployees who refuse to work overtime... are subject to disciplinary action."

The compulsory nature of overtime, combined with the clear mandate that the employee may choose the method of compensation, indicates that cash or compensatory time is a viable remedy where the Employer fails to follow seniority when assigning overtime work. It logically follows that if cash or compensatory time are appropriate compensation options for overtime hours worked, they should also be remedy options where the Employer fails to follow the Contract's overtime assignment language.

The Employer alleges that there is a consistent past practice that the appropriate remedy for an unintentional mistake is the offer of equivalent overtime rather than payment or the offer of compensatory time. Past practice has been defined as:

a prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances. Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance:

1. clarity and consistency
2. longevity and repetition
3. acceptability
4. a consideration of the underlying circumstances
5. mutuality

Ramsey County v. American Federation of State, County and Municipal Employees, Council 91, Local 8, 309 N.W.2d 785, 788,

n. 3 (Minn. 1981). Under the foregoing factors, not only must it be demonstrated that clear and consistent conduct has been developed over a period of time, but it must also be shown that the conduct was known and mutually accepted by the parties. This requirement of mutuality is a crucial standard since past practice should prevail only if the proof indicates that there was mutual agreement. Thus, past practice only exists in a situation in which both parties can be deemed to have assented to the practice. If the conduct was a mistake, there can be no mutuality established by rule.

In this case, both Parties presented evidence to support their position. The Union avers that over the last few years, five Bargaining Unit employees have received cash or compensatory time when they were improperly passed over for overtime work. In January 2008, Dave Carlson received 6.5 hours of overtime pay when the Employer bypassed him for an overtime assignment. (Employer Exhibit #15). Later in 2008, Patrick Voss received 16 hours of compensatory time when he was wrongly bypassed for overtime work. (Employer Exhibit #16). In 2009, Matt Van Lith and Berkley Rodgers were credited 10 hours and 11.5 hours, respectively, of compensatory time when the Employer failed to contact them for overtime work. (Employer Exhibit #17). Most recently, Pat Becker was paid cash for a seniority violation.

Administrative Supervisor Langseth, who has had a history with the County's Transportation Department of over 30 years and who has previously been employed as a Foreman and District Supervisor in the Road and Bridge Division, provided testimony as to how overtime assignment mistakes have been handled historically. He testified that when the Department was smaller and "more of a family" and when overtime assignment mistakes were made, no remedy was requested by the affected employee or offered by management because everyone recognized that mistakes occurred and were infrequent. Mr. Langseth testified that when Mr. Chock was the Division Head (1999-2007), although mistakes in assigning overtime were infrequent, the Division began to offer equivalent overtime work to employees when they were missed by mistake for an overtime assignment. Both Supervisor Langseth and Supervisor Legg testified to at least two situations each (four situations in total) where they had made such offers to employees in a effort to make them whole. The Union claims that they were unaware of some or all of these overtime equivalent work settlements made between the affected employees and their supervisors.

The Employer argues that the overtime pay provided to Mr. Carlson, as a result of the Employer failing to call him out for a snow removal overtime assignment, was a mistake made by an Acting Division Head for Road and Bridge. She was in this

acting position for less than a year. The Employer also alleges that the Acting Division Head did not have the authority to settle this grievance with pay, but there is no evidence that the County attempted to recoup this payment from Mr. Carlson.

The Employer also notes that even though Mr. Voss received pay, as a result of the Employer's error in missing his overtime assignment, the grievance settlement specifically stated that it was not precedent setting and may not be cited as precedence or referred to in future matters involving any members of the Bargaining Unit. (Employer Exhibit #16).

The Employer also argues that the Union's pay-out example for a missed overtime opportunity in January 2012 should not be considered by the Arbitrator because it occurred after the instant grievances were filed and it was a hasty decision made by a newer supervisor without the approval of the Road and Bridge Division head and was in the process of being reversed.

The foregoing missed overtime assignment opportunities provided by both Parties establishes that there is no binding past practice that would govern the outcome of this case. There was no clarity, consistency, longevity, repetition, acceptability or mutuality that would support either Parties' position in this regard. If anything, it would appear that overtime payment or overtime equivalent, for an employee missing an overtime assignment, was a decision made by supervision which fluctuated

over time without a standard policy being in effect at the time of the overtime assignments.

The Employer's argument that it has the unfettered management right under the Contract and past practice to assign makeup work to remediate their mistake in assigning overtime is not consistent with the Parties' own agreement on this subject matter. The Parties have expressly agreed that, as part of the 2010 settlement over the grievances of Union members Van Lith and Rodgers, all future makeup work would be the appropriate remedy only where an employee is not contacted for a full call-out. (Employer Exhibit #17). While there is evidence that the Employer proposed during settlement discussions of those grievances extending the makeup work remedy to partial call-outs as well, the Union did not agree to a makeup work remedy for partial call-outs. The reasons for the Union's rejection of the County's settlement proposal are that most overtime violations occur during partial call-outs, and the Union wished to be cooperative in resolving the full call-outs issue because of the complexity of full call-outs.

The Employer is seeking from the Arbitrator to award a remedy that was rejected by the Union and for which the Employer failed to win through grievance settlement negotiations. Clearly, this grievance settlement is dispositive of the remedy

issue before the Arbitrator. The Employer's proposal to extend the 2010 grievance settlement to cover partial call-outs is the best evidence that the Employer does not have the unfettered management right or there is a binding past practice to order the makeup remedy in this case. The Employer's position is contrary to the arbitral principle that a party may not obtain "through arbitration what it could not acquire through negotiations." U.S. Postal Service v. Postal Workers, 204, F.3d 523, 530 (4th Cir. 2000).

The Employer argues that to pay the Grievants for the missed overtime opportunities would amount to "unjust enrichment" and violate or is in conflict with the "Public Purpose Doctrine" which requires that a public entity must have the authority to make an expenditure and that the expenditure must be made for a public purpose. The Employer argues that because other employees called for the overtime assignments were required to work before they were paid should preclude the Grievants from being paid for the missed overtime opportunities.

The Employer's argument is without merit for several reasons. First, Article 7, Section 3, Step 4 of the Contract states that "[t]he arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way, the application of laws, rules or regulations having the force and effect of law." There is

nothing in the law, rules or regulations or even in the Contract that precludes the Arbitrator from ordering a cash payment for missed overtime opportunities for partial call-outs. In fact, this was done by the Employer in the past and has been the traditional remedy for overtime breaches by arbitrators for many years. Elkouri and Elkouri, How Arbitration Works, 1244 (6<sup>th</sup> ed. 2003); John Deere Dubuque Tractor Works, 35 LA 495, 498 (1960); Georgia Pacific Corp., 93 LA 4 (1989). A breach by the Employer for violating the Grievants' overtime opportunities is no different than had the Employer improperly disciplined employees without just cause. The traditional remedy for both examples for breach of contract is damages.

Second, Supervisor Sagsveen admitted that the Employer has a stronger incentive to follow the Contract in missed overtime opportunities for partial call-outs when its missteps are remedied by a cash payment rather than an opportunity to work overtime hours at a different time. There is no evidence that the County's Transportation Department will be financially compromised by paying the overtime hours requested by the Union on behalf of the Grievants. In order to avoid paying for partial call-out overtime violations, the Employer need only comply with the seniority requirements of the Contract.

Finally, while makeup work might be appropriate in an "overtime equalization" or "round robin" unit, in which overtime

assignments are given first to employees with the least amount of overtime worked, it is not an appropriate remedy in a seniority-based overtime unit which exists in the County. Here, assigning makeup work to one wrongly-bypassed employee simply creates another seniority violation for another employee. In other words, it creates a "domino-effect" which results in employees not receiving the opportunity for the overtime work or it makes the Employer "create" unnecessary overtime work and expenditure which would be contrary to the "Public Purpose Doctrine."

#### **GARY GLUNZ GRIEVANCE**

The third grievance involves Gary Glunz, another Highway Maintenance Operator. Grievant Glunz worked in the Road and Bridge division under Administrative Supervisor Langseth and Division Manager Sagsveen. (Employer Exhibit #1). Mr. Legg supervised Mr. Glunz.

The County's Transportation Department was still working on its crack sealing obligations for 2010 in November, well past the regular season. In order to complete the work, the Department ran crack sealing crews during the week and on weekends. Crews were made up of employees from the list to the extent possible; however, when there were open shifts to fill after the list was exhausted, employees were asked if they wanted to work. Absent other factors, the employees were asked

in order of their seniority. Grievant Glunz expressed a known desire to work on the crack sealing crews in November 2010 which would be an overtime opportunity.

Grievant Glunz was improperly passed over for an overtime assignment on the crack sealing crew on November 6, 2010. He discussed the overtime mistake made by the Employer with his supervisor, Mr. Legg, the following Monday but did not elect to file a grievance over this incident. Rather, he asked that Supervisor Legg be more careful when making overtime assignments. (Union Exhibit #4).

Supervisor Legg testified that as he looked to the weekend of November 20-21, 2010, he evaluated the potential staffing for a crack sealing crew to be deployed on Saturday, November 20, 2010. Mr. Legg also evaluated whether or not snow or freezing rain was in the forecast and if so, he would also need to call out staff for Snow and Ice Control. He consulted with the other District Supervisor and they made the joint decision, after checking the weather forecast, to save Grievant Glunz for a likely Snow and Ice Control call-out; therefore, they did not offer him the opportunity to work on the crack sealing crew. The Employer avers that this decision was necessary to ensure that Snow and Ice Control, which must take priority over other work, could begin if needed, immediately with the full complement of night staff.

Grievant Glunz was on the night shift for Snow and Ice Control. (Employer Exhibit #5, page B-3). His shift would regularly be 4:30 p.m. to 1:00 a.m., but if there was a call-out (what Supervisor Legg was anticipating), Grievant Glunz would have been called in as early as 12:30 p.m. on Saturday, November 20, 2010. If Grievant Glunz had been assigned to the crack sealing crew, a shift that ran from at 7 a.m. to 5:30 p.m., he would not have been able to work into the evening on Snow and Ice Control, as employees are typically not allowed to work more than twelve hours straight. Further, the night crew in 2010 consisted of five staff. Id. If it had snowed that afternoon and Grievant Glunz was working on the crack sealing crew, only four night employees would have been available to work Saturday afternoon to start handling the Snow and Ice Control call-out. For Snow and Ice Control on weekends, if the actual need arises during or after mid-day, the five night staff are called in immediately. Then, depending on the weather, a decision may be made to bring in the day staff between 12:30 a.m. and 2:00 a.m.

The record indicates that a Snow and Ice Control call-out occurred the morning of Sunday, November 21, 2010, and not on Saturday, November 20, 2010, as first anticipated by the Employer. Day staff were called in at 12:30 a.m. (Employer Exhibit #13). Supervisor Legg was correct in forecasting the need for a call-out, but the need was a day later and did not

initially involve the night shift which would have allowed Grievant Glunz to receive ten hours of overtime on the crack sealing crew on Saturday, November 20, 2010, without affecting the night shift crew for Snow and Ice Control. The ten hours of overtime was given to a less senior employee which resulted in the Union, on behalf of Grievant Glunz, filing a grievance on December 7, 2010. (Union Exhibit #2). Grievant Glunz's requested payment of ten hours of overtime equals \$351.15. (Employer Exhibit #8).

The Employer argues that Grievant Glunz was not entitled to overtime on Saturday, November 20, 2010, because management used their inherent managerial authority in using their discretion to assign another employee less senior to Grievant Glunz to the Saturday crack sealing crew, holding Grievant Glunz for likely Snow and Ice Control due to inclement weather that was in the forecast for that Saturday afternoon. While the need for Snow and Ice Control came a little later than anticipated, the County contends that it made the best decision with the facts they had in hand at the time, and their decision should not be second guessed or viewed with 20/20 hind-sight by the Arbitrator. The Union avers that the County's decision was in violation of the Contract.

Article 5, Employer Authority, Section 1 of the Contract states that "[i]t is recognized by both parties that except as

expressly stated herein, the Employer shall retain...the right...to schedule working hours and assign overtime." Clearly, this Contract language gives the Employer the right to decide whether to assign overtime, but does not authorize the Employer to ignore other provisions of the Contract that establishes how to assign overtime. In fact, the 2005 Letter of Understanding, appended to the Collective Bargaining Agreement, indicates that overtime "assignments shall be by seniority within job classification", but "when making overtime assignments, there must be some flexibility."

It is clear from the Contract language that Article 5 gives the Employer clear authority and discretion to assign overtime. The 2005 Letter of Understanding provides that overtime assignments shall be by seniority within job classification, but in making the overtime assignments the Employer has some flexibility.

The "some flexibility" language has been adhered to by the Union on several occasions. First, when a storm washed out a section of Highway 81, the Employer dispatched the employees and equipment closest to the scene without regard to seniority. The Union, recognizing the emergency and the need for efficiency, did not grieve that overtime assignment. Second, the Union withdrew the 2008 Greg Wald grievance over a seniority violation when it discovered the unusual circumstances which led to the

violation. (Employer Exhibit #16). Finally, and very important to the resolution of this grievance, is the fact that Grievant Glunz did not grieve the November 6, 2010 incident in which he was improperly bypassed for an overtime assignment, but rather called the issue to the Employer's attention. He only filed a grievance when he was improperly bypassed for overtime a second time two weeks later by a junior employee. Indeed, Supervisor Langseth acknowledged in his testimony that the Union has shown reasonableness and flexibility in overtime assignments usually assigned by strict seniority.

Article 9, Work Schedule - Premium Pay, Section 9 of the Collective Bargaining Agreement provides the following as to the authority and factors considered by the Employer in assigning overtime to employees:

Staffing schedules and assignment of employees thereto, shall be established by the EMPLOYER. Factors that are used in making such assignments shall be determined by the EMPLOYER. Factors the EMPLOYER may consider include but are not limited to:

- A. Seniority of equally qualified employees
- B. Efficiency of operation
- C. Capabilities of individuals to be assigned
- D. Classification levels needed on project
- E. Length of time needed to complete projects
- F. Staffing requirements of other projects
- G. Geographical work location of project

Article 9, Section 9 provides that seniority is only one of the factors to be considered by the Employer when overtime staffing decisions are made by the County. The Employer

considered "B. Efficiency of Operation," "E. Length of time needed to complete project" and "F. Staffing requirements of other projects" as the controlling factors requiring Grievant Glunz to be saved for potential Snow and Ice Control on November 20, 2010.

It is undisputed that the Mission of the County's Transportation Department, as outlined in the Snow and Ice Control Operator's Manual for 2010-2011, PREFACE, page 1, is the removal of snow and ice from Hennepin County roadways during and after a winter storm, with Snow and Ice Control operations often occurring on short notice and take precedence over all other work. (Employer Exhibit #5). Yet, the Employer's stated reasons for saving Grievant Glunz for Snow and Ice Control are not persuasive.

The Employer claims it withheld Grievant Glunz from the crack sealing crew to keep him available for snow plowing duty. However, no snow or freezing rain was forecast for the weekend of November 20-21, 2010, in the local Star-Tribune newspaper. (Union Exhibit #5). The Employer did not offer evidence of any forecast of snow or freezing rain for Saturday, November 20, 2010, when the crack sealing job was being performed by employees other than Grievant Glunz. The only evidence provided by the Employer was the forecast for Sunday, November 21, 2010, which indicated "light freezing rain" that resulted in

the call-out of the day staff, but not the night staff. In fact, there was no snow or freezing rain on November 20, 2010, and Grievant Glunz was not called for overtime for Snow and Ice Control.

The Employer also had several other options available in this situation which would have been consistent with their own controlling factors. The County could have offered Grievant Glunz the choice between the assignment on the crack sealing crew and the potential snow plowing assignment. The Employer could have placed Grievant Glunz on the crack sealing crew, for which he had signed up, and had it actually snowed, replaced him on the night shift of the snow plowing assignment. The Employer also had the option of placing Grievant Glunz on both the crack sealing crew and the snow plowing assignment, allowing him to work a double shift, as he had done on prior occasions. Instead, the Employer bypassed Grievant Glunz from the crack sealing crew, and the snow plowing assignment never materialized, resulting in the loss of an overtime opportunity for Grievant Glunz, the second such lost opportunity in a period of two weeks.

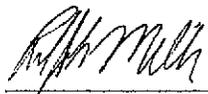
One might have been able to forgive the Employer for the first overtime violation, deeming it to be a mistake or oversight made by management or simply adhering to the "flexibility" standard contained in the 2005 Letter of

Understanding. However, when management repeated the same overtime violation two weeks later, it cannot be ignored or forgiven under the foregoing circumstances surrounding this assignment.

Clearly, the Employer violated the Contract when it did not fill the crack sealing overtime assignment according to seniority. The appropriate remedy is cash or compensatory time, and not makeup work, for the Employer's overtime violation in Grievant Glunz's case.

**AWARD**

Based upon the foregoing and the entire record, the grievances are sustained. The Grievants are entitled to cash or compensatory time off in the amount of seven hours for Mr. Ringate, two hours for Mr. Nelson and ten hours for Mr. Glunz.

  
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Richard John Miller

Dated May 5, 2012, at Maple Grove, Minnesota.