

IN THE MATTER OF ARBITRATION BETWEEN

City of Brainerd,

Employer,

and

Law Enforcement Labor
Services,

Union.

DECISION AND AWARD

BMS CASE NO. 05-PA-610

ARBITRATOR:

Stephen A. Bard

DATE OF HEARING:

January 18, 2006

PLACE OF HEARING:

Brainerd City Hall

DATE OF MAILING OF POST-HEARING BRIEFS:

February 24, 2006

DATE OF DECISION AND AWARD:

March 17, 2006

GRIEVANT:

Ray McCollum

APPEARANCES:

For the Employer:

Mr. Tom Fitzpatrick
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For the Union:

Ms. Tiffany Schmidt
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INTRODUCTION

This matter came on for arbitration before Neutral Arbitrator Stephen A. Bard, on January 18, 2006, at 10:00 a.m. in Brainerd, Minnesota. The Employer was present with its witnesses and was represented by Mr. Thomas Fitzpatrick. The Union was present with its witnesses and was represented by Ms. Tiffany Schmidt.

Testimony and exhibits were taken at the time of the hearing and at the conclusion thereof the parties agreed to simultaneously serve and submit briefs on February 24, 2006.

At the hearing the parties made the following stipulations:

1. The grievance was timely filed and the matter is properly before the Arbitrator for a decision on the merits pursuant to the terms of the grievance procedure.
2. The thirty day period for issuing the Arbitrator's Award set forth in Article XV, Section 15.5B was voluntarily waived by both parties.

ISSUES

1. Did the Employer violate the Collective Bargaining Agreement when it adjusted a work shift to avoid premium pay for furnishing airport security on holidays?
2. If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

The following provisions of the Collective Bargaining Agreement are relevant to a decision of this case.

ARTICLE IV – WAIVER

4.2 RIGHTS AND OBLIGATIONS OF THE

EMPLOYER. The Employer is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the Employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

ARTICLE VII – HOURS OF WORK, OVERTIME

7.1 Eight (8) hours or ten (10) hours and an averaged forty (40) hours shall be the normal work day and work week. However, nothing in this or any other Article shall constitute a guarantee of a minimum or maximum number of hours the Employer may assign employees to work.

7.3 All work required beyond the employee's scheduled shift of eight (8) hours or ten (10) hours on any holiday shall be paid at two (2) times the employee's regular hourly rate of pay.

ARTICLE VIII – HOLIDAYS

8.1 All employees will receive an additional eight (8) hours of straight time pay for each of the following 10 holidays: New Year's Day, President's Day, Martin Luther King Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, Christmas Day.

FINDINGS OF FACT

The Arbitrator finds that the following facts are either not in dispute or have been established by a fair preponderance of the evidence by the party having the burden of proof.

1. Following the terrorist attacks of September 11, 2001, airport security at the Brainerd Lakes Regional Airport was increased significantly. This airport is served by a scheduled commercial carrier, Mesaba Airlines.
2. Responsibility for this security is vested in the Department of Homeland Security/ Transportation Security Administration (TSA). Accordingly, TSA has entered into a contract with the City of Brainerd which states in relevant part that its purpose is "...to provide reimbursement...of the salaries of the Brainerd Police Department at the hourly rate...for providing qualified law enforcement services on-site at the Brainerd Lakes Regional Airport and to provide law enforcement response to the security passenger screening checkpoints...."
3. Pursuant to this contract, Brainerd has a uniformed police officer at the airport for most but not all scheduled Mesaba departures and it bills TSA monthly for the hours of coverage provided. The agreed hourly rate is sufficient to reimburse the

City for straight time wages and benefits, but fall short of these costs when holiday premium rates are applicable.

4. Mesaba determines the number of Brainerd flights and arrival and departure times without input from the Brainerd Police Department. During the time relevant to this grievance, there were three daily flights, with the earliest departure at 7:10 a.m.
5. Normal patrol shifts are 7:00 a.m.–5:00 p.m.; 5:00 p.m –3:00 a.m., and 9:00 p.m. to 7:00 a.m.
6. To provide the necessary coverage for flights that won't be handled at straight time as part of regular shifts, a sign-up sheet was posted where officers can volunteer for the two-hour overtime assignment based on seniority. Under the CBA, overtime worked on holidays has the highest premium rate. These sign-up sheets are posted one to three weeks in advance.
7. Officers are typically at the airport for 45 minutes to an hour prior to the flight leaving. Depending on the flight schedule, if a flight time is at the end or beginning of a regularly scheduled shift, the sign up sheet may indicate that only a day or night shift car is allowed to sign up for the overtime. This limits the overtime to a shift extension rather than a callback under the applicable provisions of the CBA. Some flights during the day are set to be handled by on-duty officers. Because of the 7:10 a.m. departure of the morning flight, it is necessary for an officer to be there at 6:30 a.m. This necessarily requires either the extension of a shift or the early start of another shift and the payment of some overtime.

8. As a cost containment measure to help assure the department's actual annual coverage costs would not exceed the contractual TSA reimbursement total, a decision was made in the fall of 2004 to cover all holiday flights as part of regular shifts. The City conceded that this action was designed to avoid paying the holiday premium pay. To accomplish this, one day shift officer, a sergeant from another bargaining unit, volunteered to begin his day shift at 6:30 a.m. and end it at 4:30 p.m. rather than the regular hours of 7:00 to 5:00. By doing this, the morning flight could be covered without incurring overtime or premium pay on holidays. This was done without posting or bidding this altered shift.

The noon and evening holiday flights were handled by on-duty officers without schedule adjustments.

According to the testimony of the Chief of Police, since that time some of the early morning flights have gone uncovered and other have been covered by other on-duty officers by adjusting their schedules.

9. In 2004 the Grievant had signed up to cover the early morning flights on July 4, Labor Day, and Columbus Day. He came in before his regular shift began and was paid double time for working those hours on a holiday. However, he was not given that same opportunity for Veterans Day and Thanksgiving that year because the system of covering those flights with an on-duty officer whose shift hours had been slightly adjusted had already been implemented by the City.

10. At the hearing the Grievant conceded that the weekly sign-up sheets covering Veterans Day and Thanksgiving in 2004 were posted well in advance and

showed flights on those days would be covered by “on-duty” personnel during his adjusted regular shift rather than by elective overtime. No opportunity for overtime was offered on the sign-up sheets. Grievant did not provide airport security on either Veteran’s Day or Thanksgiving 2004. He filed this grievance seeking holiday overtime premium pay for both days, claiming he would have signed up for and handled the assignment if it had been made available.

POSITION OF THE UNION

The arguments of the Union in support of the grievance can be summarized as follows:

1. Management may not make temporary changes in the work schedule where the purpose and motive for doing so is solely to avoid contractually mandated overtime payments. There is considerable arbitral precedent for this position. In addition, the Union argues that the City would have been within its rights to cover this problem by creating a permanent new shift so that the morning flight could be covered within the regular hours of a scheduled shift and posted it to the members as part of the shift bidding process. However, the Union contends that the City made a random, “undocumented”, and temporary schedule change for the purpose of avoiding paying overtime and that this is contractually prohibited.
2. The Union argues further that the action of the City violates the Fair Labor Standards Act as well as the overtime provisions of the CBA. This is because no changes were made to the police department schedule in November 2004 which

would have allowed the 7:10 a.m. flight to be covered on-duty on a regular shift without providing overtime or holiday compensation as the case may be.

3. The City's management right to schedule its work force under CBA Article 4.2 does not grant it the right to unilaterally change hours of work on a daily basis without negotiation with the Union. Hours of work are a term and condition of employment and are the subject of mandatory bargaining under PELRA (Minn. Stat. §179A.03, Subd. 19).

POSITION OF THE EMPLOYER

The Employer's arguments in defense of its actions are summarized below.

1. Minnesota Statute §179A.07 sets out certain inherent managerial rights which are reserved to public employers in Minnesota unless restricted or surrendered in a collective bargaining agreement. Included among these enumerated rights are the rights to determine the organizational structure and to direct personnel. This language has been incorporated *verbatim* into this CBA. While the CBA does describe a "normal" work week and establishes premium pay for overtime and holiday work, it provides in Section 7.1 that "...nothing in this or any other Article shall constitute a guarantee of a minimum or maximum number of hours the employer may assign employees to work." Nowhere does the CBA guarantee employees the continuation of overtime opportunities.
2. It is well settled arbitral precedent that scheduling of work is deemed to be a normal and customary function of management which should not be deemed waived or limited except by an express provision of the contract. Arbitrators

have regularly allowed employers to make changes in work schedules with a view to optimum efficiency. The employer here had the right to arrange work schedules to handle holiday flight security during regular duty shifts in order to reduce costs by eliminating unnecessary holiday premium pay.

DISCUSSION

The action of the employer in this case did not alter the work week. The Union concedes this point in its argument. It did deprive the workforce of previously available overtime opportunity. However, as noted above, the CBA expressly states that there is no guaranteed work week in this contract and, therefore, there is no guarantee that holiday work or any amount of overtime will be available simply because it was in the past. There was no violation in this case by the City of failure to pay premium pay for holiday hours actually worked since the Grievant did not, in fact, work the holiday time in question. Accordingly, the only real question before the Arbitrator is whether or not the City violated the CBA by the *manner* in which it adjusted the schedule of one officer to avoid holiday and overtime pay for coverage of the 7:10 a.m. flight.

There is a deep split in the arbitral precedent on the question of whether or not an employer is entitled to make temporary changes in the work schedule where the only purpose of doing so is to avoid paying overtime. The Union, not surprisingly, relies on the cases denying employers that right. See, e.g., *Kennecot Copper Corp.*, 6 LA 820 (Kleinsorge, 1947); *United Carbon Co.*, 39 LA 310 (Hale, 1962); *Marathon S. Corp.*, 35 LA 249 (Maggs, 1960); *United Potash Co.*, 21 LA 416 (Beatty, 1953). One case was found in which an Arbitrator held that when a holiday work schedule has been

established, management cannot change its mind and cancel the shift without paying employees at the overtime rate for the holiday that they would have otherwise worked. *Fairbanks N. Star Borough*, 103 LA 614 (Landau, 1994). In that case the arbitrator found that the employer had violated the contract by unilaterally cancelling scheduled holiday work and closing the facility on the holiday instead. The arbitrator noted that the cancellation was unprecedented, contravened long standing practice, and was not attributable to an emergency, an act of God, or circumstances beyond the company's control.

However, there is an equally long and persuasive line of cases which hold that in the absence of limiting contract language, management is permitted to change work schedules to avoid the payment of overtime on the grounds that there is no obligation to provide overtime work. See, e.g., *Seamless Rubber Co.*, 27 LA 92(Stutz & Williams, 1956); *Chrysler Corp.*, 21 LA 210 (Wolff, 1953); *United States Potters Ass'n.*, 19 LA 213 (Uible, 1952).

In light of the split in the authorities on the point, this Arbitrator is left to his own judgment and common sense to resolve this matter. It seems to the Arbitrator that the City acted reasonably in most respects. It had a legitimate purpose in making the schedule change. It did not change schedules adversely to anyone since the problem was solved by one individual voluntarily moving back his schedule by one-half hour. The rest of the work force was unaffected. No one was deprived of any contractually guaranteed benefit since there is no guarantee in the contract of overtime being made available. There has been no non-payment of overtime or holiday premium pay to

anyone who actually worked that time. The change was posted well in advance so neither the Grievant nor any other member of the force had to change holiday plans. The Arbitrator believes that the inherent right of management to schedule its work force, under the facts of this case, is not prohibited because the employer's motive was to avoid paying overtime.

Similarly, the Arbitrator does not believe that there was a failure to bargain over a mandatory term and condition of employment when one individual voluntarily adjusted his shift hours by one-half of an hour. The evidence was sketchy at best as to how the early flight has been covered since November of 2004. There was testimony that other individuals in this bargaining unit may have had their shifts adjusted on a temporary basis. The Arbitrator does agree with the Union that it would be a better practice to make this shift change permanent by posting it in accordance with procedures established under the CBA. Indeed, failure to do so may itself have been a violation of the CBA. However, that is not the subject of this grievance and is not before this Arbitrator for decision.

In regard to the November 2004 situation, neither party paid much attention to a fact that this Arbitrator deems critical, namely that the person whose shift was changed was not a member of this bargaining unit. That being the case, the shift change did not involve the work schedule of any member of this bargaining unit and there can not have been any failure to bargain terms and conditions of employment under PELRA with this Union. It is possible that there may have been a violation of the CBA of the sergeant's bargaining unit, or even, theoretically, a "contracting out" of this bargaining unit's work,

but there was no evidence to support that and it is an issue which was not raised by the Union. An important point needs to be made in this connection. The Union seems to be of the mind that it is the loss of the premium pay and overtime opportunity which was required to be bargained about under PELRA. The Arbitrator does not agree with this position. There is no guaranteed overtime in this contract and the loss of the premium pay opportunity to this Grievant and other members of this bargaining unit came about as a result of the change of a schedule to a member of a different bargaining unit. Nobody's schedule in this bargaining unit was changed. Accordingly, the City was not obligated to bargain with this Union even if it might be so obligated to bargain with the sergeant's Union because of the manner of making a temporary shift modification.

DECISION AND AWARD

For the above stated reasons the grievance is denied.

Respectfully Submitted

Stephen A. Bard, Arbitrator