

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

THE TEAMSTERS UNION, LOCAL 320

Re: Pay For Overtime

-and-

B.M.S. No. 06-PA-09

**THE CITY of FERGUS FALLS
FERGUS FALLS, MINNESOTA**

**Before: Jay C. Fogelberg
Neutral Arbitrator**

Representation-

For the Union: Patrick Kelly, Attorney
Brent LaSalle, Attorney

For the City: Michael Rengel, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article 8, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the procedure. A formal complaint was submitted by the Union on behalf of the Grievants on May 11, 2005, and thereafter appealed to binding arbitration when the parties were unable to resolve the matter to their mutual satisfaction during discussions at the intermittent steps. The undersigned was then selected as the Neutral Arbitrator to hear evidence

and render a decision from a panel provided to the parties by the Minnesota Bureau of Mediation Services. A hearing was convened in Fergus Fall, Minnesota on January 20, 2006. At that time, the parties were afforded the opportunity to present position statements, testimony and supportive documentation. At the conclusion of the proceedings, each side indicated a preference for submitting written summary statements. They were received on February 24, 2006, at which time the hearing was deemed officially closed. The parties have stipulated that this matter is properly before the Arbitrator for resolution on their merits, and while they were unable to agree upon a specific framing of the issue(s) the following is believed to fairly state the questions to be considered.

The Issue-

Did the City violate the parties' Collective Bargaining Agreement when it denied overtime pay to the Grievants in the spring of last year and/or by reducing their hours on the last workday of the week(s) in question in order to limit their time worked to forty hours that week? If so, what shall the appropriate remedy be?¹

¹ While the Employer indicated at the outset of the hearing that they were raising an issue of procedural arbitrability ("timeliness" of the grievance) that position was never addressed at the hearing, nor developed in the course of the post-hearing summaries submitted. Accordingly,

Preliminary Statement of the Facts-

The adduced evidence indicates that the Grievants, Stephan Nelson, Dave Christianson, Alan Haibe, and Kevin Oehler are hourly employees assigned to the Public Works Department in the City of Fergus Falls (hereafter "City", "Employer" or "Administration"). In that capacity, they are represented by the Teamsters Union, Local 320 ("Union" or "Local") who, together with the Administration have negotiated and executed a labor agreement (Joint Ex. 2) covering terms and conditions of employment for the hourly personnel that comprise the bargaining unit.

Each spring, and again in the fall, the City's Public Works Department ("Department") hauls "sludge" collected from its sewer system to farmers' fields located outside the City for fertilization purposes. The precise timing for these projects depends largely upon weather conditions, but normally occurs within a two to three week "window." Equipment Operators in the bargaining unit, and others are normally assigned this work. In the past it has sometimes entailed longer hours during the work day, depending upon

this dispute will be resolved based upon an examination and evaluation of the substantive evidence placed into the record.

the amount of sludge that needed to be transported and the weather conditions.²

A similar procedure is followed in the fall after harvest and prior to the first frost.

During the week of May 2nd, 2005, the City's Operations Manager, Steve Hames, assigned Grievants Christianson and Nelson to haul the sewage into the neighboring fields. As a result, both men experienced days where they worked in excess of the standard eight hours. However, on the Friday of that week, both worked only four hours. Consequently, their time cards reflected a forty hour week and neither were paid any overtime (Joint Ex. 4; testimony of Supervisor Hames).

Similarly, during the weeks of May 9th and May 16th, Kevin Oehler and another Equipment Operator, Alan Haiby were pressed into duty and assigned to drive one of the City's garbage trucks, as the larger (and newer) truck had broken down and was out of service for a period of time. Like Messrs Christianson and Nelson, both men worked days in excess of eight hours during this two week period, but had their work day

² The record shows that the sludge cannot be put into the fields until after the ground has thawed, but before the farmers plant their crops.

abbreviated at the end of the week in order to avoid accumulating more than forty hours.

When it came to the Local's attention that these four men were not paid overtime for the hours they worked in excess of eight in any given day, they filed a "class action" complaint with the Administration alleging a violation of Section 9.1, "...and any other applicable article..." while seeking a make whole remedy (Joint Ex. 1). Eventually, the matter was appealed to binding arbitration when the parties were unable to resolve these matters to their mutual satisfaction.

Relevant Contract Provisions-

Article VI Employer Authority

6.1 the Union recognizes the right of the Employer to operate and manage its affairs in all respects in accordance with existing and future laws and regulations of appropriate authorities including municipality personnel policies and work rules. The Employer retains all prerogatives and authority not officially abridged, delegated or modified by this Agreement.

* * *

Article VIII Work Schedules

8.1 the Employer may require employees to work during emergency situations and the work schedules may be adjusted accordingly.

* * *

Article IX
Overtime, Premium Pay, Call-Back, Out of Class Pay

9.1 Except for positions listed in 9.5 of this Agreement, all work performed at the expressed authorization of the Employer in excess of an assigned shift shall be paid for at one and one-half (1½) times the employee's regular straight time hourly rate.

Positions of the Parties-

The **UNOIN** takes the position in this matter that the Employer violated Article 9.1 of the parties' Collective Bargaining Agreement when it refused to pay overtime to the Grievants for the hours worked in excess of their regular shifts on Monday May 2, 2005, and when it forced them to work a shorter shift on the Friday of that week to avoid payment of overtime. Further they claim that the City violated generally accepted labor practices by altering the employees' hours to avoid payment of overtime compensation in a non-emergency situation. In support of these claims, the Local argues that the language in Section 9.1 clearly mandates payment at time and one-half the employee's regular straight time rate whenever

he/she works hours "in excess of" their assigned shift. Here, the evidence plainly shows that in May of last year, all four Grievants logged more than their normal eight hour shift on one or more days, and yet were not compensated at the premium rate for the additional time put in over and above their regular shift. Rather, the Employer unilaterally, and suddenly, decided to cut their normal work week short by reducing their hours on the last scheduled day of the week(s) in question in order to stay within the forty hour time frame. Their actions in this regard are unprecedented in the City. Indeed, the Administration can offer no other examples where they have interpreted the Contract in the same or similar manner. The Union further maintains that, with regard to the garbage trucks that Grievants Oehler and Haiby drove when the new primary truck broke down and they were pressed into service, this was not an "emergency" within the meaning of Section 8.1. Not unlike the "sludge" incident, the City again, without notice, cut their work week short on Friday in order to avoid payment of overtime. For all these reasons then, they ask that the class action grievance be sustained; that the Grievants be made whole, and; that the Administration be directed to cease and desist from this practice.

Conversely, the **CITY** takes the position in this matter that there has been no violation of the Master Agreement relative to either of the two

incidents complained of in the Local's grievance. In support, the Administration contends that with regard to the hauling of sludge, they have little advance warning when this work needs to be done, as it is subject to weather conditions and planting schedules of the farms where it is delivered. Grievants Christianson and Nelson had been paid overtime for the additional hours they worked during the two weeks immediately preceding the week of May 2, 2005. The third week, unlike the other two, involved only one day where they were required to work more than eight hours in any given shift. It was within the Administration's managerial prerogative, they assert, to shorten the final day of that week in order not to pay overtime to these employees. The City points out that 2005 was an extraordinary year for them financially, causing the Administration to constantly monitor expenses. Further, they argue that there is nothing in the parties' Labor Agreement that defines a "work shift." Indeed, its definition was deliberately removed from the current Contract in order to give the Administration flexibility. Further they claim that the events surrounding the garbage truck constituted an emergency, as the larger newer truck was out of service indefinitely. Without the ability to collect garbage in a timely manner, garbage would have been sitting on the curbs in the City indefinitely; something the 12,000 residents would most certainly find

unacceptable. For these reasons then, they ask that the grievance be denied in its entirety.

Analysis of the Evidence-

As the issues to be considered here involve questions of contract interpretation, the burden of proof lies with the Union to demonstrate initially, by a preponderance of the evidence, that the City violated Article 9.1 of the parties' Labor Agreement when it refused overtime pay to the Grievants. Following a careful consideration of the evidence placed into the record and the arguments proffered by the representatives, I conclude that the Local has satisfied their obligation in this regard.

There can be little question but that distilled to its basic elements, the gravamen of this dispute centers on Section 9.1 of the Master Contract, *supra*. That provision obligates the City to pay members of the bargaining unit (save for the two positions specified in Section 9.5) "...at one and one-half (1½) times the employee's regular straight time hourly rate," for all work performed, "...in excess of an assigned shift..." Grievant David Christianson testified that at the end of the week of April 25, 2005, he and fellow Operator Stefan Nelson, were informed by Operations Manager Hames, that they would again be working a twelve hour day (hauling sludge to

nearby farms) when they returned to work on the following Monday, May 2nd. According to the Employer, this announcement by Hames constituted a new "assigned shift," which then consisted of twelve hours, rather than the normal eight both men had been working. Similarly, their regular shift on the Friday of that week, May 6th, would be changed to four hours.

According to the Administration, this new assignment allowed them to avoid paying overtime to the Grievants. The claim is made that there is nothing in the parties' Agreement that guarantees overtime, and similarly, nothing which restricts the right of the City to designate schedules. Only one of these assertions however, is accurate. While there is nothing in the Agreement that inhibits the Administration's right to establish schedules for its work force, there is language which establishes premium pay at time and one-half, in the event a member of the bargaining unit works beyond his/her "assigned shift." That provision is set out in Section 9.1. When it is considered along with the practice of the parties, and the unrefuted fact that these events are unprecedented, I find the Employer's argument to be less than persuasive.

While the Administration has considerable latitude with regards to the scheduling of its work force, this prerogative cannot fairly be utilized as a means of avoiding what is otherwise a clear obligation under the terms of

their collective bargaining agreement to pay overtime for work performed in excess of the employee's assigned shift. Although the Master Contract here does not specifically define the term "assigned shift," that does not give the City license to modify an employee's work schedule from one day to the next for the sole purpose of avoiding what is otherwise a clear obligation to pay them overtime. Here, the evidence shows that prior to the events giving rise to this dispute, the Administration has never before massaged work schedules of the bargaining unit membership in order to avoid paying time and one-half. Both Grievants Christianson and Haiby testified that in their combined 30+ years with the City, they have never before not been paid for overtime worked in excess of their normal eight hour day.³ Similarly, under cross-examination, Manager Hames admitted that this was the first time that he has shortened an employee's work week to remain within forty hours.

A review of the most recent negotiations and prior contract language addressing overtime and work hours further buttresses the Local's position. Union witness John Avery testified that he has been a member of the Local's negotiations team for the past ten years. He noted that prior to the

³ While both men acknowledged that their hours "change" from time to time, their normal assigned shifts nevertheless have remained constant at eight hours each work day.

current Agreement, there was language in the parties' Contract that established the "normal work day for any employee," at eight hours. During negotiations over Joint Exhibit 2 however, Mr. Avery recalled the Administration proposing the elimination of this language as it failed to reflect the current working conditions in the City. He remembers the Union agreeing with management's assessment that not everyone in the bargaining unit works a 7:30 a.m. to 4:00 p.m. shift Monday through Friday. "It made sense," then, according to this witness and his bargaining committee at the time, to insert the more generic phrase "assigned shift" into the Agreement, replacing the old work schedule language. More particularly, he offered the following:

Union: "Are you familiar with the issue of hauling sludge?"

Avery: Yes, I am.

Q: Are you familiar with Section 9.1 of Article 9 * * * Did you help negotiate that particular clause?

A: Yes.

* * *

Q: When you referred to the "assigned shift" of an employee, is that the assigned shift on that particular day?

A: *The "assigned shift" was your normal work shift. Let's say 7:30 to 4:00 – that was your assigned shift and that's what we always*

considered an assigned shift being. And we always were paid overtime anytime we exceeded that before.

Q: So, in this particular situation, with Mr. Christianson and Mr. Nelson, what would your understanding be if they worked twelve hours on May 2nd (2005)? Would they get overtime?

A: They would get overtime for four hours *on that day*.

Q: Was that also the understanding that you had with the prior Human Resources Officer here?

A: Yes" (emphasis added).

Significantly, there was little if any countervailing evidence offered by the Employer to refute this witness' testimony. Moreover, the application of dictionary definitions would appear to be most consistent with his statements and the position taken by the Union here.

Roberts' Dictionary of Industrial Relations, BNA, 4th Ed., defines the term "shift" to be: "A regularly scheduled period of work during the 24-hour day (with) a fixed beginning and ending each day" (at p. 713). The recorded evidence established that the Grievants were regularly scheduled to work eight hours each day during the time in question. Indeed, the Employer concedes that "generally" all attempts are made to provide a shift that begins at 7:30 in the morning and concludes at 4:00 in the afternoon. I would concur with the Administration when they add that under some circumstances it is not possible to maintain such hours due to

the needs of the citizens of Fergus Falls. However, when an employee's normally assigned shift is exceeded on any given day, it is clear that Section 9.1 mandates they be paid at time and one-half for the additional hours worked that day.

Additionally, both sides presented testimony and documentation relative to whether the hauling of sludge, and to a greater extent, the break down of two of the City's garbage trucks met the definition of an "emergency." I find this, however, to be a non-issue. Section 8.1 of the parties' Agreement, *supra*, allows the Administration to require employees, "...to work during an emergency situation," and to alter work schedules "accordingly." Arguably at least, the break down of refuse hauling equipment could constitute an unforeseen event requiring prompt attention, more than the hauling of sludge - something that is normally performed twice each year. However, for purposes of the immediate dispute it is not particularly relevant. Clearly, the Administration possesses the authority to remain flexible in making unscheduled temporary changes to an employee's work schedule in the case of an emergency. At the same time however, this does not absolve them from their obligation to pay overtime for all hours worked in excess of their normal daily "assigned shift," per the terms of Section 9.1.

Finally, I would concur with the Employer, that there is nothing specific in the Agreement that guarantees any employee a forty hour week. Absent such a provision, and in light of common precepts of inherent managerial rights -not to mention the specific language in Section 6.1 of the Master Contract – there is little to challenge the City’s the authority to alter the work schedule of an employee. This would include the events that transpired last spring when they shortened the Grievants’ workweek once they attained the forty hour threshold. At the same time however, I find that the language in Section 9.1 requires the Administration to pay overtime for work performed in the course of any given day that exceeds an employee’s normally assigned shift.

Award-

Based upon the foregoing analysis of the evidence, the Union’s grievance is sustained to the extent that they have demonstrated a violation of Section 9.1 of the Master Agreement by the Employer when they failed to pay the Grievants overtime for hours worked on the days in question in excess of their normally assigned shifts. Accordingly, the City is forthwith directed to compensate them at the contractual rate of time and one-half their regular straight time hourly rate for all hours worked beyond

each of their eight hour shifts during the days in question. No further relief is ordered here.

I will retain jurisdiction in this matter for the sole purpose of resolving any dispute that may arise concerning the implementation of this remedy.

Respectfully submitted this 23rd day of March, 2006.

Jay C. Fogelberg, Neutral Arbitrator