

AFSCME Council 5, the Union,)
)
-and-)
)
STATE OF MINNESOTA,)
Minnesota Department of)
Transportation,)
the Employer.)

ARBITRATION AWARD
Class Action Grievance
BMS Case No. 07-PA-0732

Arbitrator: Barbara C. Holmes

Hearing Date: September 6, 2007

Date of Decision: October 4, 2007

Appearances:

For the Union: Scott Grefe, Advocate
AFSCME Council 5

For the Employer: Tony Brown
Labor Relations Representative Principal
Department of Employee Relations
State of Minnesota

Joy Hargons,
Labor Relations Representative Principal
Department of Employee Relations
State of Minnesota

INTRODUCTION

AFSCME Council 5 (herein the Union) as the exclusive representative brings this grievance challenging certain actions of the State of Minnesota, Department of Transportation (herein the Employer). An arbitration hearing was held where both parties had a full opportunity to present evidence through the testimony of witnesses and the introduction of exhibits. The parties chose to make oral closing arguments in lieu of submitting post-hearing briefs.

ISSUE

Did the Employer violate the collective bargaining agreement when it modified its 2006-2007 Snow & Ice Plan regarding the procedure to be followed if an employee misses a snow and ice call-in?

FACTUAL BACKGROUND

The Employer is a state agency that is responsible for, among many other things, winter road maintenance on state, federal and interstate highways throughout the State of Minnesota. Organizationally, the Employer is divided into different geographical districts through which its many programs are administered. The Metro District covers the metropolitan area of the Twin Cities and provides snow and ice removal for approximately 5,232 route miles.¹

The collective bargaining agreement between the parties contains scheduling language that generally requires work schedules to be posted 14 days in advance. If the Employer changes a work schedule without such notice, the employee is usually entitled to be paid at the overtime rate of time and one-half under the new schedule. However, special language has been negotiated regarding the Employer's scheduling authority in its during times of severe or extreme road or weather conditions. (See, Department of Transportation Supplemental Contract, Article 4, Section 4, Winter Maintenance Schedule.) These conditions typically require the deployment of a large number of employees to operate the snow and ice removal equipment with little time available for advance notice to be given.

¹ Information obtained from Employer's website, www.dot.mn.us

The Employer has developed work rules, referred to as the Snow and Ice Plan, that set forth the details of the schedules, staffing assignments and call-out procedures under the Winter Maintenance Schedule. The Employer is allowed to split the number of employees available for winter maintenance duties into two shifts. These two shifts do not have fixed starting times; rather the Employer can call the first shift in to work any hours between 12:00 a.m. –12:00 p.m. and the second shift can be called in between 12:00 p.m. – 12:00 a.m. Employees can be called in for these shifts without the advance notification typically required for changes to their normal work schedule.

The Snow and Ice Plan sets forth the following procedure to be used by the Employer when calling in employees under the Winter Maintenance Schedule:

Phone Call Notification and Documentation:

The following steps shall be taken whenever a supervisor tries to contact an employee for overtime or for notification of a call for a split shift.

- A) Supervisor or designee completes call to employee and document.
- B) If no answer, verify number and call again, and document.
- C) If still no answer, and no answering machine or voice mail, verify the call by calling the employee on your cellular phone, or contact dispatcher to make the call and document the effort.

NOTE – If you have used a cell phone for the first call, then that would be sufficient.

NOTE: If you reach an answering machine or voice mail, the supervisor shall:

- A) Identify him/her self.
- B) Leave a short message stating the reason you are calling.
- C) State the time you called.
- D) State the actions you want the employee to take when he/she receives the message.
- E) Repeat the call using a cellular phone at your earliest convenience in order to document the call.

The Employer and the Union hold a meet-and-confer every year to review the Snow and Ice Plan. During the 2006 meet-and-confer the Employer notified the Union that it was adding the following language to the Snow and Ice Plan work rules:

If one of the employees that is assigned to your truck station during the normal work week (Monday thru Friday) misses a snow and ice call-in, this is the procedure you should follow:

When they show up for work, they would be assigned snow and ice duties for the rest of the current shift in progress. When the current shift is completed, they would go home with that shift and the rest of the hours up to eight (8) would be leave without pay.

(example) If the shift gets called to come to work at 3 am and you have a priority one driver that doesn't answer the phone, or not home, or whatever, and then shows up for work at 7am, you would assign snow and ice duties to that employee. When the rest of the shift goes home at 11:30am, that employee would also go home and they would end up with 4.5 hours worked and 3.5 hours leave without pay.

The Union filed a class action grievance asserting that the new language added by the Employer was in violation of the parties' collective bargaining agreement.

POSITION OF THE PARTIES

Union: The Union cites a 1991 grievance settlement between the parties that involved an employee who had missed a call-in under the Winter Maintenance Schedule for a shift beginning at 1:30 a.m. at ending at 10:00 a.m. The employee arrived at work at 7:30 a.m. and was allowed to work until 10:00 a.m. He was paid for 2.5 hours, with the remainder of hours of the 8-hour shift being denoted as "leave without pay". The grievance settlement allowed the employee to substitute paid vacation leave for the 5.5 hours previously recorded as "leave without pay". The Union claims that this grievance settlement is precedential and therefore a part of the collective bargaining agreement

between the parties. While the Union acknowledges the Employer's contractual right to establish work rules, it argues that the work rules must not be in violation of the parties' collective bargaining agreement. It argues, therefore, that the Employer's new language in the 2006 Snow and Ice Plan violates the precedent-setting grievance settlement.

The Union also argues that there is no provision in the collective bargaining agreement that specifically allows the Employer to place an employee in "leave without pay" status for missing a snow and ice call-in. In the final analysis, the Union argues that the Employer's actions amount to the imposition of a constructive discipline. The Union argues that a constructive discipline violates all of the due process-related protections contained in disciplinary provisions of the collective bargaining agreement. Furthermore, the Union argues that in "table talk" during the parties' 2001 contract negotiations the Employer agreed not to impose discipline if an employee failed to respond to being called into work outside of the normal schedule.

Finally, the Union believes that the Employer has regularly allowed employees who missed a Snow and Ice call-in and came in to work late, to either work eight hours or use vacation time to receive pay for eight hours.

Employer: The Employer argues that there has been no contract violation. It asserts that when an employee is notified that the Winter Maintenance Schedule is being invoked, his/her regular shift no longer exists for that particular day. For that reason, the Employer believes that the issue is how an employee's pay is affected if he/she comes to work in the middle of the newly declared Winter Maintenance Schedule shift. The Employer's answer to that question is that the employee is not paid for the hours of the Winter Maintenance shift that were missed.

The Employer argues that the 1991 grievance settlement is not precedential. To support this claim it points to the specific language of the settlement offer and the testimony of its representative who negotiated the settlement.

Regarding the Union's argument that the Employer stated during negotiations that it would not discipline employees for not responding to a call-in, it argues that the "table talk" referred to a different situation than the issue in this arbitration. It argues that the discussions concerned the ability of the Employer to discipline an employee who refused the assignment of overtime outside of his/her normal schedule.

The Employer asserts that the new language in the Snow and Ice Plan work rules has always been its practice. It claims that it felt the necessity to add it to the work rules because a change in the classification system resulted in new employees and supervisors being involved with the Winter Maintenance Schedule.

The Employer argues that it has sound operational reasons for its practice. It argues that snow and ice removal activities involve a coordinated team approach that necessitates all employees to be at work at the same time. The Employer also believes that if employees knew they could work their full 8-hour shift even if they didn't respond to the Snow and Ice call-in, many employees would not respond to a call-in made in the early morning hours. The Employer also claims that it would be cost-prohibitive to place all of the winter maintenance employees in a paid "on-call" status.

DISCUSSION AND OPINION

The Union has argued that the language the Employer placed in the Snow and Ice work rules in 2006 violates the 1991 precedential grievance settlement between the

parties. The following language is from the Employer's 3rd Step response that makes the offer of settlement (no actual settlement agreement was offered into evidence):

In order to settle this case I am offering that the 5.5 hours missed by [the grievant] be converted to vacation. *This agreement should not be interpreted to mean that every highway maintenance worker is allowed to miss one call out and be able to convert the time missed into vacation or comp. time* It also does not mean that in every case, an employee will not be allowed to use vacation or comp. time if they miss a call out more than one time. *Individual circumstance will dictate what action will be taken.* I am sure [the grievant] will realize the importance of being available and either coming in or making arrangements beforehand when a winter maintenance schedule call out is possible. (emphasis added)

Although the word "non-precedental" is not specifically used, I find that the italicized language noted above clearly makes this settlement non-precedental. The testimony of the drafter of the document as to his intent also supports this finding. Generally, a grievance settlement is specific to the individual grievant. For it to apply to all similar factual scenarios that occur in the future, specific and clear language must be used.

The Union has argued that since no other provision in the collective bargaining agreement allows the Employer to act in this matter, the Employer's actions amount to a constructive discipline. I find the Union's logic strained and the Employer's analysis more persuasive.

I find that once the Employer has notified the employee in accordance with the procedure in the Snow and Ice Plan, the regular shift of the affected employee ceases to exist and the Winter Maintenance Schedule becomes the new shift. As long as the Employer can prove that it made the call to the employee, the employee does not have the right to work any amount of time outside of the new shift. Nor do they have the right to use vacation time to make up any part of the hours of the new shift that they missed. The

reasons that the employee did not get the message or chose not to heed the call are immaterial.

In further support of this finding I cite the following provision set forth in the parties Supplemental Contract, Art. 4, Sec. 2 that covers all employees in the Employer's Department of Transportation:

Changed Work Schedules. Employees whose schedules are changed without a five (5) day notice and who are not required to work their original (posted) schedule or assigned work, may use accrued vacation or compensatory time to fill in the remainder of their original (posted) schedule. *This provision does not apply to winter maintenance schedules or contractors operations.*

This language suggests that for the Union to achieve its suggested remedy, it must negotiate specific contractual language for employees covered by the Winter Maintenance Schedule.

Because I have rejected the Union's argument that the Employer's actions amounted to a constructive discipline, I do not rule on the meaning of the "table talk" from the parties' 2001 contract negotiations. Therefore, this decision does not make a determination as to whether or not the Employer has the right to discipline an employee under the facts of this case.

In conclusion, I find that as long as the Employer has followed its call-in procedure and can prove that the call to the employee was made, the new language added to the work rules does not violate the parties' collective bargaining agreement.

AWARD

The grievance is denied.

DATED: _____

Barbara C. Holmes
Arbitrator