

**IN RE ARBITRATION BETWEEN:**

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**AFSCME COUNCIL 5**

**and**

**NORTHERN COMMUNITIES CREDIT UNION**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS Case # 08-RA-0067**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**February 14, 2008**

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AFSCME Council 5,

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DECISION AND AWARD OF ARBITRATOR

BMS Case 08-RA-0067

Dembrowski, Leasman and Segal grievances

**APPEARANCES:**

**FOR THE UNION:**

Sarah Lewerenz, attorney for the Union

Lori Leasman, grievant

**FOR THE EMPLOYER:**

Joe Roby, attorney for the Employer

John Thomas, President

Stephanie Chapin, Chief Operations Officer

**PRELIMINARY STATEMENT**

The above matter came on for hearing on October 19, 2007 at the Arrowhead office of the Northern Communities Credit Union at 3311 West Arrowhead Road, Duluth Minnesota. The parties filed Briefs on January 25, 2008 at which time the record was closed.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2005 through December 31, 2007. Article 57 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

**ISSUE PRESENTED**

Did the Employer violate the collective bargaining agreement by not paying for work hours lost due to severe weather on March 1, 2007? If so what shall the remedy be?

## PARTIES' POSITIONS

### UNION'S POSITION:

The Union contended that the Employer violated the collective bargaining agreement when it refused to pay the 3 grievants, all of whom appeared at the Employer's place of business on the morning of March 1, 2007 despite a severe snow storm that had hit the area that day, and instead required them to use accrued leave time to compensate for the lost work. In support of this position the Union made the following contentions:

1. The Union pointed to the provisions of Article 21, which provides as follows

**Article 21:** If severe weather prevents an employee from reporting to work at all that day, the employee shall give notice of same to the Employer as soon as practicable. In such cases, or if the Employer chooses not to open its place of business because of severe weather, the employee may use accrued vacation time, if any, to compensate for the lost work, or may treat the lost work as unpaid time. If severe weather causes an employee to be late for work, the Employer may choose to let the employee make up the missed time on that day or another day. If the Employer closes its place of business due to severe weather or other emergency and releases the employees from work, full-time employees shall be paid for all hours they were scheduled to work that day.

2. The Union noted that the facts are simple and for the most part undisputed. The weather service predicted a severe snowstorm that was to hit the Duluth area sometime on or about February 28<sup>th</sup> and March 1<sup>st</sup> 2007. This is of course nothing new to that area and the Employer and the employees were prepared for it including the prospect that the office would be closed due to the severity of the storm.

3. The Employer's President sent a memo to all employees of the Arrowhead branch dated February 28, 2007 as follows:

From: John Thomas

Sent: Wednesday, February 28, 2007 10:21 AM

To: All Staff

Subject: Severe Weather

During winter storms, the Credit Union will be open unless the city buses (DTA) are pulled from the roads. If the DTA buses are on the streets, we will be open. If the DTA buses are not operating, we will be closed. The radio stations and TV will keep you updated, otherwise call one of the managers.

Although we now have time clocks, it is still required that you sign out for breaks and lunches at the reception desk at Arrowhead Road. Your co-workers may need your assistance and need to know when you are going to return to your desk.

Thanks, John

4. Obviously, the second part of that memo did not pertain to the instant dispute but the first part clearly did. The employees were put on notice that if the DTA buses were running the following day, the day the storm was supposed to hit, the Arrowhead branch of the Employer would be open.

5. When the 3 grievants got up for work the following morning they saw that indeed the weather service was correct and that a severe storm had moved into the area overnight with high winds and considerable snow and ice. The roads were quite dangerous that morning and at least one employee slid into a ditch on her way to the office that day and never made it in.

6. The other grievants checked the radio and TV stations and discovered that the DTA buses were running that day. Pursuant to the memo from the President noted above, they assumed that the Credit Union would be open and that they would be required to appear for work. They braved the storm and left early in order to have time to get to work on time. One grievant, Ms. Leasman was almost hit by another car on the way back from the Employer's business due to the extremely poor visibility.

7. The Union further noted that even the Chief Operations Officer was on the phone with the president that morning advising him to close the office due to the poor weather. He refused to do so as he was in downtown Duluth at the time of these calls and the weather there was considerably different than it was "up the hill" where the wind and snow were much worse. It was not until he got near the Arrowhead office that he realized just how bad the storm was and agreed to close the office. However, by that time the grievants who were scheduled to arrive early in the morning had already left and could not be reached.

8. When the grievants appeared for work they were told to turn around and go home as the office was now closed. They then did just that but applied later for pay from the Employer. That was denied and the Employer advised that in order to be paid for the day they would have to use any accrued vacation leave time they had. The grievants did that but filed this grievance in order to have that time reimbursed.

9. The Union's position is based on the language of Article 21 cited above. The Union argued that the "Employer close[d] its place of business due to severe weather or other emergency and release[d] the employees from work" even though no customer business was transacted that day.

10. The Union further cited to the memo sent out the day before advising that the office would be open if the DTA buses were running. The DTA buses were running and the employees assumed that the office was thus open. It was not until they arrived that they were told the office was closed.

11. The Union asserted that this situation falls somewhere in between the situation contemplated by the scenario where the Employer "chooses not to open its place of business" and the one where the Employer "closes its place of business due to severe weather or other emergency." The Union argued that this situation is more closely analogous to the second scenario since the employees were told that the office would be open since the DTA buses were running, they came to work and were told only after they got there to go back home. There is nothing in the language that requires that the Employer transact customer business or open the drive up window or the like as a precondition to having the office "be open." The Union argued that the office was "open" when the employees were told it was and that the Employer then closed the office only after the employees arrived due to the last minute decision to close it due to the weather.

12. The Union asserted that the language of Article 21 thus requires that the Employer bear the economic burden of paying for the day under the clause that requires that the employees "be paid for all hours they were scheduled to work that day" where the Employer "closes" its place of business.

The Union seeks an award of the arbitrator sustaining the grievance and ordering that the Employer pay the 3 affected grievants for the day lost due to inclement weather on March 1, 2007.

## **EMPLOYER'S POSITION**

The Employer's position is that there was no contract violation here since the grievants voluntarily took the time off and was not specifically requested to do so by the Employer. In support of this position the Employer made the following contentions:

1. The Employer acknowledged that the facts were largely as set forth by the Union. The office was bracing for a predicted snowstorm and the President sent the memo dated February 28, 2007 to the staff.

2. The Employer also pointed to the provisions of Article 21, which provides as follows

**Article 21:** If severe weather prevents an employee from reporting to work at all that day, the employee shall give notice of same to the Employer as soon as practicable. In such cases, or if the Employer chooses not to open its place of business because of severe weather, the employee may use accrued vacation time, if any, to compensate for the lost work, or may treat the lost work as unpaid time. If severe weather causes an employee to be late for work, the Employer may choose to let the employee make up the missed time on that day or another day. If the Employer closes its place of business due to severe weather or other emergency and releases the employees from work, full-time employees shall be paid for all hours they were scheduled to work that day.

3. The Employer had a very different interpretation of the how this language applies to these grievant's situation however. The Employer claimed that this was much more like a situation where it simply did not open versus one where the Employer opened and then closed.

4. The Employer argued that there were several management employees there early that morning who did advise many of the staff that the office would be closed and they did not appear for work. It was only because they were not able to reach these 3 employees that they even appeared that day. Had the Employer been able to reach them they would presumably not have come in and this case would never have arisen.

5. The Employer also pointed out that the Credit Union was never "open" that day for any customer transactions. The drive up window never opened. The lobby never opened and no transactions were conducted. By any definition, the Credit Union was therefore not "open" for business.

6. Moreover, the Employer argued that the memo sent out the previous day did not specifically say that the office would be open for sure but conditioned it on the DTA buses. The memo did not say that employees must come to work if the buses were running nor did it say that they must stay home if they were not.

7. The Employer also pointed to the same contractual language in Article 21 cited above. The Employer argued that this scenario is more closely analogous to the situation where the Employer “chooses not to open its place of business because of severe weather.” The language is clear under that scenario that the employees must use any accrued leave time in order to be paid for the day.

8. The Employer also acknowledged that the case involves the question of who bears the economic burden of the lost hours that day. The parties have language that provides that if the Employer opens for business and then closes and the employees are sent home the Employer covers the lost time. Where, as here the Employer argued, the bank never opens at all, the language calls for the employees to use leave time.

9. The Employer asserted that the employees who never showed up that day never even made a claim for the Employer to pay for their hours. These employees are in no different situation vis a vis the contract language merely because they appeared for work and were immediately sent home. They did no work that day and in fact were met at the door, told the office was not open. They then immediately turned around and left. The Employer argued that under these circumstances the most reasonable conclusion is that the Credit Union never opened for business and the first clause cited above in Article 21 applies.

10. The Employer acknowledged that the decision to not open that day came later but that it came in time as far as the language is concerned. There is no requirement that the notice to close come at any particular time or with any specific notice to the employees. The Employer argued that it never actually opened and that the result follows logically from that.

The Employer seeks an award of the arbitrator denying the grievance in its entirety.

## MEMORANDUM AND DISCUSSION

The underlying facts giving rise to the instant grievance are not in dispute. The evidence showed that a snowstorm was anticipated for the Duluth area that was predicted to hit sometime late on February 28, 2007 and linger on into the following day. The weather prognostications proved to be accurate. The storm did in fact hit the area beginning on February 28<sup>th</sup> and by the early morning hours of March 1, 2007 was quite severe with all of the trappings of an old fashioned Minnesota blizzard. There was apparently heavy snow, high winds and cold temperatures.

In anticipation of this, the President of the Arrowhead Office of the Employer sent out a memo date February 28, 2007 to all staff that provided in relevant part as follows:

During winter storms, the Credit Union will be open unless the city buses (DTA) are pulled from the roads. If the DTA buses are on the streets, we will be open. If the DTA buses are not operating, we will be closed. The radio stations and TV will keep you updated, otherwise call one of the managers.

Only one of the named grievants testified at the hearing but Ms. Leasman indicated that she dutifully got up on March 1<sup>st</sup> and checked the radio and TV stations and discovered that indeed the DTA (Duluth Transit Authority) buses were running. She testified that she checked with the DTA just before 7:20 a.m. that day and asked them directly if their buses were running. She was told that they were running. Based on this she assumed that she was required to come to work that day as scheduled at 8:00 a.m. She received no phone call or other communication from the Employer prior to leaving at approximately 7:20.

She testified that it normally takes approximately 15 to 20 minutes to drive to work from her home in Twig, Minnesota but that on this day it took considerably longer. She indicated that it took about 35 to 40 minutes to get to work that day and that she arrived at the Arrowhead office at about 7:55 a.m. Her husband drove her that day because the roads and weather conditions were so bad.

When she arrived she was met by management personnel at the door and told that the office was closed and that she could go home. She was told that they had tried to reach her but were not able to. She then drove home without punching in or doing any work related tasks.

Mr. Thomas testified that he drove his wife to work that day in downtown Duluth and that there the roads seemed better. They were wet but passable. He acknowledged that Ms Chapin called him and advised him of the poor road and weather conditions at the Arrowhead location.

The Arrowhead location is not in downtown Duluth but is rather at the top of the "hill," as it is known in the Duluth area. Both parties acknowledged that the weather in Duluth Minnesota can be variable and in fact be very different at the lakefront by Lake Superior than it is only a few miles at the top of the hill where the Credit Union is located.

Ms. Chapin advised closing the office when she first spoke to Mr. Thomas. It was not completely clear when this conversation occurred but it was clear it was sometime after 7:20 a.m. as she testified that she did not arrive until then. He denied her request since he was in downtown Duluth and could not see why it was necessary to close the office since the roads where he was at that time seemed wet but not so dangerous as to warrant closure of the office.

Ms. Chapin apparently called Mr. Thomas again a few minutes later and advised him that she thought the office should be closed. She was pleading with him to close the office but he again refused.

Finally, after a third call, when Mr. Thomas was apparently by this time closer to the top of the hill and the office itself and could see what Ms. Chapin and others had been talking about, he agreed to close the office. It was not completely clear when this call was made or precisely when the decision was made to close the office but there was testimony that they began calling employees to advise them not to show up at approximately 7:45 a.m. They reached many of them but never did get in touch with the three grievants who eventually appeared and who were only then told to go back home.

There was little dispute about the relevant facts. It was apparent from this however that the decision to even close the office was made after Ms. Leasman and the other 2 grievants had already left and were on their way in. They left home that morning with the understanding based on the clear memo from the day before that the office was open. The DTA buses were running and as far as the employees were concerned they were to report for work.

The question now is whether the contract language supports the Union's claim that the office was "closed" due to inclement weather or the Employer's that the Employer chose "not to open."

This fact scenario falls somewhere in between these two positions and the contract language cited above contemplates a slightly different set of facts. The first scenario contemplates a situation where the Employer makes a decision to close its business and lets the employees know that before they show up. Under those circumstances the employees must use accrued leave time to cover any lost hours.

The second scenario appears to contemplate a situation where the office opens for business but employees are sent home early due to the weather. In that scenario, the result would be equally clear and call for the Employer to cover the lost time.

Here it was absolutely clear that the employees left for work with the understanding that the office would be open or in fact was open since the DTA buses were running and the memo from the day before ordered them to appear for work under these circumstances. It was also clear that the decision to close was made well after the employees had left for work. Moreover, on these facts it was unreasonable to assume that they had not left for work since at least one was scheduled to be at work at 8:00 a.m. and the Employer did not even try to call anyone to let them know now to come in until after 7:45. Under these facts it would also have been abundantly clear that people would need to leave for work well in advance of their usual times to get there on time.

As always, any result must draw its essence from the labor agreement. Here the labor agreement does not squarely address the question and there is no past practice to aid in the interpretation of the language. There was no evidence of the bargaining history presented that might also have aided in interpreting the language or how it was to be applied in a situation like this. The language itself is clear enough but yields a somewhat unclear result when applied to these facts.

The question thus is whether the Employer closed its business or simply did not open it. Two salient facts conspire to compel the result here.

First, the memo sent the day prior to the storm made it clear that the Employer was to be open if the DTA buses were running and they were. Despite the Employer's argument to the contrary, one could scarcely imagine a clearer more unambiguous statement of whether the bank would be open than what was in the memo of February 28, 2007.

Second, the fact that these particular employees were not informed they were not needed that day and that the Credit Union would be closed was not made until they literally walked in the door. For purposes of this case, and of course based on these somewhat unique facts, the Employer was "open" until these employees were told it was closed. Using these clear factual determinations the result that most closely draws its essence from the contract is in favor of the Union here.

Because it was clear that the Credit Union was open as far as these employees were concerned and that they were not notified of the closure until they got there the clause that provides for payment by the Employer for the time lost where the "Employer closes its place of business due to severe weather ... and releases the employees from work" applies. The Employer's argument that it never opened for customer business that day might apply under different facts but here the facts show that the Credit Union was in fact open that day and subsequently closed as the result of the factual findings set forth herein.

Obviously this result is a result of these facts but on this record it was clear that the Employer told the employees in no uncertain terms that the Employer would be open on March 1<sup>st</sup>. Based on this the employees in question came to work and were not told that the Employer would be closed until then. While they performed no actual work that day this is not relevant to the determination at hand. There is no requirement under the language that they do. What is required is that the facts show that the Employer closed due to the weather and released the employees.

Accordingly, the grievance is sustained and the Employer is ordered to pay the affected grievants for all hours they were scheduled to work and make any appropriate adjustments to their leave accounts to reflect the effect of this Award.

**AWARD**

The grievance is SUSTAINED as set forth above.

Dated: February 14, 2008

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Jeffrey W. Jacobs, arbitrator