

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

OSHKOSH CITY EMPLOYEES LOCAL 796,
AFSCME, AFL-CIO

and

CITY OF OSHKOSH

Case 242
No. 51725
MA-8719

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, on behalf of the Union.

Mr. Warren P. Kraft, City Attorney, on behalf of the City.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "City", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held on May 5, 1995, in Oshkosh, Wisconsin. The hearing was not transcribed and the parties thereafter filed briefs which were received by July 3, 1995.

Based upon the record, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Did the City violate Articles X and XI of the contract when it insisted that grievants Mike Gelhar and Don Schettle work on a weekend to fill in for vacationing Plant Operators and then subsequently insisted that they take a day off in their normally scheduled work week to avoid paying overtime and, if so, what is the appropriate remedy?

DISCUSSION

The City employs about 7 Maintenance Mechanics and 14 Plant Operators at its wastewater treatment plant where the Maintenance Mechanics regularly fill in for the Plant Operators as part of their regular job duties. The normal work for Maintenance Mechanics runs

from Monday - Friday, and from 8:00 A.M. to 4:00 P.M.

Grievant Gelhar, a Maintenance Mechanic, was instructed by management to come in and work on Sunday, July 4, 1994, 1/ from 12 A.M. to 8 A.M. in order to fill in for an absent employe. Gelhar did so. Thereafter, he was off on Monday, July 4, for which he received holiday pay and his schedule for the rest of the week was as follows: on July 5 and 6 he worked 8 A.M. to 4 P.M.; on July 7, a scheduled work day, he took off from work pursuant to management's directive that he take a day off during the work week; on July 8 he worked from 12 A.M. to 8 A.M.; and on Saturday, July 9, he was off. Gelhar thus worked a total of 32 hours that week for which he received straight time pay in addition to receiving holiday pay on Monday, July 4.

Gelhar had earlier told Charles Isham, the Superintendent of the wastewater treatment plant, that he did not want to take a forced day off during the week. Isham told him to take a day off anyway.

Grievant Schettle, also a Maintenance Mechanic, worked 2 hours on Sunday, July 3, for which he was paid time and a half and he worked 2 hours on Monday, July 4, for which he got double time emergency pay. Schettle then worked from 8 A.M. to 4 P.M. on July 5; 4 hours on July 6 and July 7 - which were scheduled work days; 8 hours on July 8; and 8 hours on July 7. He thus worked a total of 34.5 hours for which he received 32 hours of straight time pay and 2.5 hours of overtime pay.

Schettle, like Gelhar, had earlier told Isham that he wanted to work his scheduled work week during the July 3-9 work week and that he did not want to take a forced day off. Isham told him to take a day off anyway.

This marked the first time that Maintenance Mechanics coming in to work on a weekend to fill in for vacationing Plant Operators objected to taking a forced day off during their regularly scheduled work week. Prior thereto, employes since about 1977 had been sent home by management under similar circumstances.

Earlier, the City in an October 3, 1988, memorandum notified all waste water treatment plant employes that, inter alia:

. . .

Maintenance Mechanics will generally be assigned to work on the day shift, Monday through Friday, which is the best time to procure supplies and equipment. However, Maintenance Mechanics may be assigned to work on night shifts for special projects and to fill in for

1/ All dates hereinafter refer to 1994.

operators on vacation, etc.

. . .

The City in a November 12, 1992, memorandum unilaterally adopted its wastewater treatment plant rules which state, inter alia:

. . .

Mandatory Scheduled Vacation Fill In

The Maintenance Staff has agreed to rotate responsibility to cover Operators [sic] vacation requests on the weekends and night shifts. It is agreed that the week following a Mechanics Call In Duty, he will spend the next seven days as the Mechanic listed for Mandatory fill in. In order for mandatory fill in to commence, the vacation requesting Employee must have his application submitted 2 full weeks in advance. The requesting Employee is limited to the number and length of requests they may submit as follows:

- 2 weeks vacation - One 2 day, One 3 day, One 5 day request
- 3 weeks vacation - Two 2 day, Two 3 day, One 5 day request
- 4 weeks vacation - Two 2 day, Two 3 day, Two 5 day request
- 5 weeks vacation - Three 2 and 3 day, Two 5 day request

Compensatory, Floating Holiday, and Pro rated Vacation time will not be honored for Mandatory fill in.

Day Shift Fill In will continue to be filled by "Extras" that are available.

All vacation requests submitted prior to May 1 of the year will be considered on a Seniority basis. After May 1, first come, first served.

Management reserves the right to deny any request, cancel approved requests, or change schedules to meet staffing requirements.

. . .

Utilities Superintendent Tom Konrad testified here that it has been customary to assign the least senior Maintenance Mechanics to fill in for vacationing Plant Operators if there were no volunteers and that the Union has never objected to this practice. He also said that he was unaware of any overtime ever being given in those situations; that new employees are told of the City's practice in interviews; that he was not part of the City bargaining team and thus has no first-hand knowledge of what was discussed in past negotiations on this issue; and that the Union several years ago agreed to the City's rotational system for assigning such weekend work.

Superintendent Isham, a former Union Steward, agreed that Maintenance Mechanics have not received overtime when they fill in for vacationing Plant Operators on weekends; that this practice dates back to at least 1977 when he was a Maintenance Mechanic; that when he was a member of the bargaining unit and wanted to object to the City's practice, he was told by a Union president, "That's the way it is, kid", and that he thus could not file a grievance; that prior Superintendent Leo Newick "would order you off a day during the week"; that the City has adopted a rotating schedule under which all Maintenance Mechanics take turns filling in for Plant Operators on weekends; that neither the Union nor any Maintenance Mechanics have ever objected to this practice; and that no Maintenance Mechanics under similar circumstances before 1994 ever objected to taking time off during the week and not receiving overtime for their weekend work.

Isham added that Maintenance Mechanics were assigned weekend work 41 times in 1993 and 36 times in 1994.

Gelhar, Schettle and the other Maintenance Mechanics filed the instant grievances on July 12 wherein they claimed that the City violated the contract by forcing them to take off one of their scheduled work days after they work on weekends, thereby depriving them of the overtime that they otherwise would receive had they worked those days.

Isham in a July 18 memorandum subsequently informed the Maintenance Mechanics:

. . .

The City of Oshkosh Wastewater Treatment Plant has an established mandatory vacation fill in policy which went into effect January 1, 1992. This policy (see attached) outlines the responsibility of the Maintenance Mechanics in regards to filling in for Operators who request vacation time off on weekends and night shifts. Since the policy has been in effect, all Maintenance Mechanics who have filled in on weekend shifts have taken day(s) off during the week to keep their work week at 40 hours. All Mechanics have been given

the opportunity to select their day(s) off. There has (sic) been 14 times during 1992 and 1993 that Mechanics have filled in for Operators on weekend shifts during a contractual holiday week. All of those times, the Mechanic has taken day(s) off during the week to keep his holiday work week at 32 hours.

The holiday week in question, July 3, 1994 to July 9, 1994, Mr. Schettle actually worked 34.5 hours and was compensated at a rate of time and one half for 2.5 hours. Mr. Gelhar worked 32 hours during that holiday week. The Request for Settlement or corrective action desired states "Award Mike and Don time and one half for eight hrs. worked over 32 hrs. in a holiday week".

Therefore, because neither Mr. Schettle nor Mr. Gelhar worked 8 hours over 32 hours during a holiday week, and because of the established past practice of Mechanics taking day(s) off during the week when they work weekend shifts for vacation fill in, your grievance is denied.

...

Isham the next day issued another memorandum which stated:

...

The City of Oshkosh Wastewater Treatment Plant originally started with three (3) Maintenance Mechanics back in 1975. The Plant restructured its table of organization in 1986 to increase the Maintenance Mechanic classification up to seven (7) because of a higher demand for equipment maintenance and also because the Operators have increased their vacation benefits through longevity. All the Maintenance Mechanics since that time have those jobs with the complete understanding that part of their job is to fill in for Operators on night and weekend shifts.

The Plant has an established vacation fill in policy which went into effect on January 1, 1992. This policy outlines the responsibility of the Maintenance Mechanics in regards to filling in for Operators who request vacation time off on night and weekend shifts. Since this policy has been in effect, all Maintenance Mechanics who have filled in on weekend shifts have taken day(s) off during the week to keep their work week at 40 hours. The City of Oshkosh Wastewater Treatment Plant has never awarded overtime pay to an employee to fill in for another employee who is off on vacation.

Therefore, because of the established practice of Maintenance Mechanics filling in on weekend shifts and taking day(s) off during the week to keep their work week at 40 hours and because of the fact that overtime pay has never been used for an employee filling in for another employee off on vacation, your class action grievance is denied.

. . .

Konrad by memorandum dated August 12 informed Gelhar, Schettle, and Union Steward Henry Butcher that:

. . .

In 1986 the table of organization of the Wastewater Treatment Plant was revised and since that time the maintenance mechanics have filled in for operators during scheduled vacations. On January 1, 1992 a written policy regarding vacation schedules was placed in effect. A portion of this policy outlines the responsibility of the maintenance mechanics to fill in for operators who are on scheduled vacation. This vacation time may fall on night, weekend or holiday shifts. Since this policy has been placed in effect, maintenance mechanics who have filled in for vacations or weekends or holidays have taken time off during the week, keeping their work week to 40 hours. There has (sic) been 14 times since the policy has been in effect that mechanics have filled in during a holiday week and all of those times the mechanics has (sic) taken time off during the week to keep the work week at 40 hours, including the holiday.

The city has never paid over time to an employee who fills in for another employee who is on scheduled vacation. I see no differences between the situation in these grievances and the established policy and past practice and, therefore, must deny both grievances.

. . .

In support of the grievances, the Union mainly argues that Arbitrator William C. Houlihan's decision in the prior Kosmer case 2/ "should govern in this matter"; that

2/ Case 197, No. 48438, MA-7599 (3/93).

"Notwithstanding the mutual agreement language of Article X, the City must pay the grievants' time and one-half (1 1/2)"; and that "the Employer's right to change an employee's regular day off of work was removed as part of the 87-88 Agreement."

The City, in turn, asserts that Maintenance Mechanics traditionally have filled in for Plant Operators on holidays and weekends without overtime compensation; that the Union has acquiesced to this practice for nearly 20 years; that City memos in 1988, 1991, and 1992 reflect this practice; that the facts here are different from those presented in the prior Kosmer case which also involved an overtime issue; and that the Union is attempting to get something in the arbitration process which it has been unable to get at the bargaining table.

The resolution of this issue turns on Article X of the contract which states:

NORMAL WORK WEEK, NORMAL WORK DAY AND NORMAL WORK SCHEDULE

The normal work week shall be forty hours, Monday through Friday. The normal work day shall be eight (8) hours per day, Monday through Friday. The normal work schedule shall be five (5) consecutive eight (8) hour days, Monday through Friday, for the following divisions:

- a. Street Department
- b. Parks Department
- c. Sanitation Department
- d. Cemetery
- e. Water Department, Outside Crew
- f. Electrical Division
- g. Forestry Division
- h. Labor Pool Division

The Sewage and Water Plant operation shall work a forty (40) hour work week, as per mutually agreed to schedule. (Emphasis added.)

Transit employees shall work in accordance with present mutually agreed upon schedule. Selection of the runs shall be made semi-annually unless requested in writing by not less than seventy percent (70%) of the total employees affected. Each driver shall make his/her "selection" on the order of his/her division seniority. Transit garage employees shall receive a thirty (30) minute uninterrupted unpaid lunch break.

Sanitation Division: The Union agrees to the concept of the route

change and will continue to work with the City to finalize the changes. Any change in route shall be by mutual agreement between the employee and the employer. The adjustment of the normal work day and normal work week shall be the function of the Employer, subject to consultation with employees, as above. A Route system shall be defined as a designated number of pickups for a certain area, as the case may be, and the employee is expected to complete the work involved on a weekly basis. In the event of severe weather, the closing of the landfill or other reasons the Sanitation employees cannot go on the routes, every effort will be made by the employer to notify the employees before they report for work. If this is not possible, employees will either be sent home with no pay for that day or temporarily transferred to other departments for work. Routes will be made up either within the normal work week or by working on Saturday. Employees will be compensated at the rate of time and one-half for hours worked in excess of 40 hours in that week.

In the event it is necessary to change employees from one regular schedule of hours to another schedule of hours the employees shall be given at least 24 hours notice of change. Work performed on a revised schedule during the 24 hour notice period shall be compensated at 1 1/2 times the normal rate of pay whether or not total working hours for the week are in excess of 40 hours, except as otherwise provided herein for emergencies.

For an emergency such as snow removal, ice control, flood control, sickness, and so on, the employer shall have the right to schedule the work week as may be necessary and from one shift to another shift without regard to prior notice. Any employee who is called in for work outside his normal work week schedule shall not be sent home early on subsequent days or denied his regular work week schedule to avoid over-time payment without his consent. The spirit of this provision is that the employer shall not be penalized during emergency conditions through overtime payment during the 24 hour notice period, but neither shall the employer adjust the working hours after emergency conditions (e.g. to less than 8 hours per day) so as to deny employees legitimate overtime.

Compensation for work on any regularly scheduled shift shall be at the straight rate time of pay, unless otherwise specified in this agreement.

The employer shall endeavor to maintain stability of employment throughout the year.

This language is not a model of clarity. For while it establishes a normal work week, a normal work day, and a normal work schedule for other City employees, it carves out a special exception by providing: "The Sewage and Water Plant operation shall work a forty (40) hour work week, as per mutually agreed to schedule."

This proviso on its face does not guarantee the normal Monday-Friday work week accorded to other City employees. Hence, it appears that the City can alter the Monday-Friday work week for the Maintenance Mechanics only if such a change has been "mutually agreed to. . ."

AFSCME Staff Representative Gregory N. Spring testified here that this contract language was changed in about 1987 so that the City could no longer unilaterally change the days of the normal Monday-Friday work week for certain other City employees. There is no evidence, however, that the parties then ever discussed or agreed that said prohibition also covered the wastewater treatment employees.

This general issue was addressed by Arbitrator Houlihan in the Kosmer case. He found that the City violated this part of the contract when it called in grievant Kosmer to work on a weekend in an emergency situation caused by another employee's illness and then ordered Kosmer to take off one of his regularly scheduled Monday-Friday work days so as to avoid paying him overtime. In so ruling, Arbitrator Houlihan stated: "I find no basis to conclude that there exists a practice of the Employer obligating a reluctant employee to take a day off over his objection." He added that: "Article X precludes Isham from denying Kosmer his regular work week schedule in order to avoid overtime", and that, as a result, Kosmer was not obligated to take a subsequent day off.

The Union asserts that that case represents binding precedent which should be adopted here and cites in support of its position Pan Am Ref. Corp., 2 ALLA 67, 937, p. 464 (1948), and Elkouri and Elkouri, How Arbitration Works, p. 421-2 (BNA, Fourth Edition). The City counters by asserting that the Kosmer case "is not on point because the grievances here do not involve short notice call-ins" and because that case failed to recognize the "long-standing fill-in practice" testified to here, thereby making "suspect" the relevancy of that case. The City thus argues that its position here is supported by a long-standing past practice.

This is a difficult issue to resolve. On the one hand, there is a need under the Houlihan Award for stability and the principle of stare decisis which binds parties to legal principles which have already been decided. On the other hand, the record here establishes that there has been a long-standing practice dating back to at least 1977 of where the City has unilaterally told certain

employees that they must take a day off during the week after working on a weekend.

There is, however, one fundamental difference between the two cases: The facts here center on filling in for Plant Operators who were on vacation, whereas the Kosmer case dealt with an emergency situation caused by the sudden sickness of a regular Plant Operator who called in sick on the day in question. 3/ Thus, when Plant Operators are on vacation, the City is able to tell Maintenance Mechanics ahead of time that they must fill in for them, which is what it did here when it told the grievants ahead of time that they would have to work the July 4 weekend. That is not true when emergencies arise since Maintenance Mechanics in those situations are given practically no advance notice.

The critical inquiry here thus turns on whether such a difference compels a different result than the one reached by Arbitrator Houlihan.

As noted above, Isham testified here that the City has been following its practice since about 1977. Isham's testimony is buttressed by the fact that the Union over the years has agreed to have Maintenance Mechanics fill in for vacationing Plant Operators and the additional fact that Maintenance Mechanics have done so without receiving overtime.

In such circumstances, it must be concluded that the Union has mutually agreed to such schedule changes under Article X of the contract and that the grievances here therefore must be denied. 4/

In so finding, I am of course aware of the Union's assertion that only individual employees, and not the Union, are entitled to waive their normal work week schedule under Article 10 and that the grievances should be sustained because neither Gelhar nor Schettle ever agreed on their own to change their schedules after working the July 4 weekend. While this argument might be persuasive in other circumstances, the fact remains here that the Union never objected to either this practice or to the City's 1992 memorandum on the subject. Since the Union is the authorized collective bargaining representative for the waste water treatment plant employees, such acquiescence bars individual employees from now challenging this practice.

3/ That is why Kosmer's September 24, 1992, grievance referred to "vacancies created by sick leave on weekends and night shifts at the Oshkosh Waste Water Treatment Plant are filled by a supervisor calling other available qualified operators or maintenance mechanics and requesting if they would like to work and then take off later in the week." The separate question of filling in for vacationing Plant Operators therefore was never raised in that grievance. Accordingly, the decision reached herein does not in any way detract or affect the decision reached in the Kosmer case.

4/ That is also why the City under Article XI need not pay overtime in such circumstances.

This does not mean that the employes here are totally without recourse to change this situation. For since the result here turns on a past practice of long standing duration, the Union is free at the contract's expiration to notify the City that it is repudiating this practice.

In light of the above, it is my

AWARD

1. That the City did not violate Articles X and XI of the contract when it insisted that grievants Mike Gelhar and Don Schettle work on a weekend to fill in for vacationing Plant Operators and then subsequently insisted that they take a day off in their normally scheduled work week to avoid paying overtime.

2. That the grievances therefore are dismissed.

Dated at Madison, Wisconsin, this 13th day of October, 1995.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator