Becker #2

BEFORE UMPIRE LAWSON E. BECKER

In the Matter of the Arbitration Between

UNION

-and-

EMPLOYER

OPINION OF THE UMPIRE

This matter is before the Umpire pursuant to a Stipulation marked Exhibit A, which is attached to and made a part of this opinion.

FACTS

None of the relevant facts are in dispute, having been agreed upon by the stipulations of the parties. Most of the facts are set forth in the Employer's pre-hearing brief, from which (excluding irrelevant or argumentative statements) they are quoted as follows:

> "On April 22, 1976, the Employer notified all three of the unions representing its employees of its intention to reduce the hours and, resultantly, the pay of all general fund Employer employees, including employees in the bargaining unit represented by Union, effective July 1, 1976. It stated the reduction would not exceed an average of four (4) hours per week or eight (8) hours bi-weekly. The notice also indicated that the decision was taken as one part of a plan to avoid a sizable projected budget deficit for fiscal year 1977.
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> In response, the Union requested initiation of a general Union grievance at Step 4-b of Article VIII of its Agreement with the Employer. The parties have agreed that the mediation step of the grievance procedure (Step 5) may be waived and stipulated' that the grievance is now properly before the Umpire for decision.
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> The Employer's action was taken when, in its budgetary planning for fiscal year 1977, it became apparent there would' be a 4.4 million dollar excess of expenditures over revenues in the general fund.
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> On the expenditure side, the Employer plans in fiscal 1977 to continue existing levels of

service and not to add any new programs or services. Because of inflationary factors, the cost thereof will be greater than in 1976. These expenditures include those increases negotiated for 1977 as reflected in all existing Collective bargaining Agreements negotiated in 1974.

On the revenue side, the Employer has in recent years become increasingly dependent upon non-local sources of income. For example, at the present time, approximately 66% of its revenue is locally generated by comparison to approximately 85% five years ago. For various reasons, mostly beyond the Employer's control, the amount of Federal revenue sharing which will be available to the general fund in fiscal 1977 has decreased by more than $2,000,000 from 1976. State shared revenues also have declined. At the same time, because of recessionary factors, a declining tax base and changes in Michigan tax laws, locally generated revenues will not be sufficient to make up the substantial loss of non-local revenue.

The result of all of this is that in order to balance its .budget for fiscal 1977, 4.4 million dollars in expenses must be eliminated from a budget which is already premised on simply continuing, without improvement, the existing level of Employer services.

To do this the Employer plans a five part program, one of which is a 10% reduction in the hours and pay of all general fund employees, bargaining unit and non-bargaining unit employees alike, including management and supervisory employees. (This reduction will be offset by the 1974 negotiated wage and benefit increases scheduled for 1977.) This will account for approximately $2,000,000 of the 4.4 million dollars of expenditures which must be reduced.

Additionally, reducing hours rather than laying off Fire Department employees will keep the Employer in compliance with a Federal Court Order entered on January 22, 1973, relating to an Equal Employment Opportunity Program in that Department. That Order incorporated by reference an affirmative action goal to be achieved during a five year period ending December, 1978. Under it, the goal for 1976 (the third year) is to have 20 minority background employees on the job in the Fire Department. The Employer has met that 1976 goal and presently employs 22 minority employees in the Department. It continues to make an ongoing effort to meet the 1977 and 1978 goals by hiring increasing numbers of minority background employees in the Department as the occasion permits."

Additional facts were presented at the hearing. If budgetary economies were to be effected by a layoff rather than a general reduction of hours, between 7 and 16 people would have to be laid off, which would include 3 minority employees in the case of a 7 person layoff, and 11 minority employees if 16 persons were laid off.

There presently exists 11 vacancies in the department which would be filled by the

Employer if a reduction in hours is permitted, mostly by CETA employees.

Historically, and at present, hourly rates for the purposes of fringe benefits are determined as follows:

(a) For 56-hour employees, the annual salaries in the appendices to the contract are divided into 26 pay periods. The, resulting amount is divided by 112 hour to arrive at an hourly rate. The 56-hour schedule represents fluctuating work weeks which average 56 hours over each 9-week period.

(b) As to 40-hour employees, the annual salaries are divided by 2,080 hours.

Historically (23 years or more), there never has been a reduction in hours in lieu of a layoff. The only layoff either party could recall occurred in 1971, and this was for a 30-day period in order to qualify the employees for "EEA" funds. After this 30-day layoff, the employees were reemployed in the department with EEA funds.

Compensation is paid bi-weekly and is a constant amount, except for variations due to fringe benefits, etc. The Employer contemplates that this system will be continued.

During contract negotiations, the words "guarantee" or "guaranteed work week" were never used.

During the negotiations which resulted in the current contract, the. Union's original request for a change in Article XIV was for a 50.4 hour schedule with 24 hour shifts and three platoons. The Employer refused this request and countered with a 40 hour schedule with 8 hours per day and 5 days per week. The Union refused this offer and countered with a proposal for a 40 hour schedule of 10 and 14 hour shifts with four platoon system, and in connection with this counter offer, submitted its "Plan D".

"Plan D" complies with the "Fireman's statute"; Act 125 of the Public Acts of 1925, as

amended, (MSA 5.331, et seq), provided the statutory requirements are considered to be "average" requirements, and both parties agree that this is the proper interpretation of the statute.

ISSUE

The parties have agreed that the issue presented is whether the bargaining contract prohibits the Employer from unilaterally putting into effect an average work week of less than 40 hours of work and pay as part of a program to balance its budget.

POSITIONS OF THE PARTIES

The principal arguments advanced by the Employer are as follows:

1. The contract contains no specific language guaranteeing a minimum work week, and accordingly, consistent with the majority of arbitrated decisions, the broad Management Rights clause (Article IV) must be interpreted as reserving to the Employer the right to reduce hours of work in lieu of a layoff.
2. The "normal" work weeks referred to in Article XIV are only for the purpose of computing overtime and do not constitute substantive contractual guarantees, either under the wording of the contract or under the majority rule in arbitrated decisions.
3. The Maintenance of Standards clause (Article XXIX) is not applicable because it applies only to conditions "not otherwise provided for", and its purpose is limited to minor operating details which are not of sufficient importance to justify specification in the contract.
4. Read in its entirety, the contract indicates that employees are paid on the basis of an hourly rate and not on an annual rate.
5. A reduction in hours rather than a layoff is justified by the necessity of the Employer to comply with the Federal District Court case in 1973.

6. The "Fireman's statute" is not applicable because the contract does not "require" firemen to work more than an average of 40 hours per week.

The principal arguments of the Union are the following:

1. Negotiation notes of the parties (Union Exhibit 1) show that the parties agreed to a 40 hour work week and that this is mandated by the word "shall" in the third paragraph of Section 3a of Article XIV.
2. The specific contract provisions as to 10 and 14 hour shifts must prevail over the general language of the Management Rights clause.
3. If the contract should be interpreted to permit a reduction in hours, it would violate the "Fireman's statute" because that statute requires a contract which prohibits more than an average of 40 hours per week, and the statute must be considered to be a part of the contract.
4. The employees are paid on the basis of an annual salary rather than an hourly rate, so that even if the Employer should have the right to reduce hours, it could not reduce total compensation.
5. The Maintenance of Standards clause prevents a reduction in hours in lieu of a layoff.
6. A reduction in hours would contravene the purpose and intent of the Seniority clause.

DISCUSSION

The "40 Hour Employees"

For the purposes of this grievance, it is immediately clear that the contract makes a distinction between the employees identified in the first paragraph of Section 3a of Article XIV' as working a normal work week of 40 hours, and all other employees. As to the "40 Hour Employees", the last sentence-of the second paragraph of Section 3a specifically recognizes the

rights of the Employer to change the work schedule. The controlling phrase is ". . unless regularly scheduled otherwise." It might be contended that this quoted phrase applies only to the hours per day and days per week and not to the 40 hours per week, but such a narrow construction is illogical in the absence of proof that the parties did not intend the phrase to apply to the 40 hour work week provision. It is concluded, therefore, that the phrase "unless regularly scheduled otherwise" contemplates that the work schedule of these "40 hour employees" can be changed by unilateral action of the Employer, including the scheduling of less than a 40 hour work week. Since it also is concluded that the employees are paid on an hourly basis rather than an annual basis, for the reasons hereafter set forth, it follows that by a unilateral reduction in hours, the Employer can reduce the pay of the "40 hour employees".

As to these employees, and as argued by the Employer, the Umpire is unable to find any contract language which specifically derogates from the language of Article IV. On the contrary, the second paragraph of Section 3a of Article XIV confirms the particular management right in question.

The "56 Hour Employees"

As to all other employees (the so-called "56 Hour Employees"), the situation is different. The phrase, "unless regularly scheduled otherwise," is not applicable to them. This is a significant difference it raises an inference (if not a presumption) that the parties intended that. "56 hour employees" would work a specified schedule that could not be changed unilaterally. This is, the issue addressed by the parties.

Arbitral authority has been examined. Except as to the "40 hour employees", no clear cut majority rule of interpretation or precedent emerges. In view of this situation, it is necessary to resolve this matter on its own facts and without resorting to other cases or authorities.

It is doubtful that the parties ever contemplated, during negotiations; that a work reduction might be accomplished by a reduction in hours rather than by a layoff.' As between these parties, such a thing had never occurred. If it had been contemplated, presumably it would have been provided for. The parties did, however, contemplate that circumstances might necessitate a layoff, even though only one such layoff had ever occurred. While such a single layoff is not deemed sufficient to establish a practice which would be protected by the Maintenance of Standards clause, it nevertheless tends to throw some light on what was and was not within the contemplation of the parties.

The parties negotiated and provided a layoff procedure. (Article XII). Further, they foresaw the possibility of the present circumstances where the Employer anticipates having a "lack of funds". The Employer was careful to retain the "right to layoff for lack of work or funds". (Article IV). That the Employer did not expressly reserve the right to reduce hours for lack of work or funds, as an alternative to a layoff, supports the conclusion that this alternative was not then contemplated. It seems probable that the idea of reducing hours as a desirable alternate occurred as a result of considering the availability or loss of CETA funds.

The Umpire has no difficulty in agreeing with the Employer that a reduction of hours and pay in lieu of a layoff is desirable and in the best interests of the citizens of the Employer. The Employer, however, is the employer in this matter, and the rights of its employees are not to be determined solely on the basis of the best interests of the employer. Likewise, the interests of these employees cannot be determined by what is best for other Employer employees who are not a part of this bargaining unit. The Umpire has no authority to determine this matter on the basis of his opinion as to what action is in the best interests of the greatest number of persons.

One of the Employer's arguments is that the 1973 Federal District Court Order adopting a

Consent Decree and Equal Employment Opportunity Program should be considered as justification for the proposed reduction in hours. It is doubtful that the Umpire has authority to consider this outside matter in view of the limitations and restrictions imposed on him by Article VIII, Section 3, Step 7. In any event, a reading of the Order indicates that it is limited in its effect to recruiting and hiring procedures and not to layoffs. While the E.E.O, Program sets forth goals for the Employer, these are expressly stated as being based on the assumption of a constant total work force. The question of the seniority rights-of minority employees is not before the Umpire, but it should be noted that it is possible that those rights might be held to be determinable by other factors than mere hiring dates, which was the basis used by the parties in determining the effect of a layoff in lieu of a reduction in hours. (See Franks v Bowman, U. S. Supreme Court, March 24, 1976, 44 LW 4356; Acha v Hearne, 11 CCH Employment Practices Decisions 110,750; and Schaefer v Tannian, 9 CCH Employment Practices Decisions 110,142.)

One of the Union's arguments is that the "Fireman's statute" is a part of the contract and would be violated if the contract is interpreted to mean that the Employer did not agree to a 40 hour week. Without decision as to whether or not the statute is a part of the contract, the Umpire is unable to give weight to this argument, because he is satisfied that the statute is not applicable so long as the contract does not require employees to work more than 40 hours. It is not necessary that the contract prohibit such employment. It is recognized, as argued by the Union, that this interpretation might contravene the purposes of the act, but it comports with the exact statutory language used. In a criminal statute, such a narrow construction is necessary. (See also, Op Atty. Gen, April 15, 1957, No. 2958).

Likewise, the Umpire does not agree with the Union's argument that a reduction in hours would contravene the purpose and intent of the Seniority clause. Such clauses are found in all

bargaining contracts, and research has failed to disclose any decision where such a clause, by itself, was held to prohibit a reduction in hours.

It is the view of the Umpire that the proper disposition of this case depends upon the meaning of the third paragraph of Section 3a of Article XIV and its relationship to the other sections of the contract.

The Employer maintains, and properly, that the contract does not guarantee 40 hours of work per week or 2,080 hours per year to any individual employee. The word "guarantee" does not appear and it was never used• in. negotiations. There may, however, be a contractual obligation to maintain a schedule averaging 40 working hours per week for such employees as the Employer may choose to employ from time to time.

The Employer relies strongly on the Management Rights clause (Article IV), asserting that it gives the Employer the right to reduce working hours and pay, "except as otherwise specifically provided".

The third paragraph of Section 3a of Article XIV "specifically" provides for a "forty (40) hour average work week based on ten (10) and fourteen (14) hour shifts with four (4) platoons". The Employer says, however, that this provision is limited solely and exclusively to the computation of overtime and overtime pay, and thus is not a specific limitation on its reserved right to reduce hours and pay.

Section 3a of Article XIV is in an article which is entitled "Overtime", and every other provision in that article deals strictly and solely with overtime. At the same time, Section 3a does not, of itself, refer to overtime. It relates solely to work schedules. The question is whether the parties intended' Section 3a to relate only to overtime or whether they intended it to have a broader application.

The only provisions for rates of pay are the annual salaries set forth in Appendices B, C and D. The Employer maintains, and correctly, that in actual practice and viewing the contract as a whole, the compensation of the employees in question consists of an hourly rate of pay rather than an annual rate of pay. Certainly, hourly rates of pay are determined and used by the parties for many contractual provisions, including most of the various fringe benefits. It is conceded by both parties that these hourly rates of pay are determined by the use of the schedules set forth in Section 3a. There is no other method by which the hourly rates can be determined, since they are not set forth in the contract and are not set forth in the Employer's pay ordinance. It is further conceded that the hourly rates are determined by dividing the annual salaries in the Appendices by the applicable schedules of hours specified in Section 3a. It seems necessary to conclude, therefore, that Section 3a, in practice, is intended and used as an independent provision, and that its application is not limited merely to the computation of overtime.

The question remains as to whether or not the third paragraph of Section 3a constitutes a contractual obligation which cannot be changed by unilateral action of the Employer. Certainly, this paragraph is worded in the form of an independent contractual obligation. In simple, straight-forward language, it provides that for "56 hour employees" the work schedule "shall be changed to a forty (40) hours average work week". (Emphasis added). Such clear and precise language cannot be ignored without substantial proof that the parties did not intend what they said.

Some indication of the intent of the parties with respect to this paragraph is shown by Union Exhibit 41, which consists of various settlement proposals prepared by the parties in the course of their negotiations of the current contract. The parties stipulated that in these

negotiations, the Union's first proposal concerning changes in Article XIV was to change Section 3a to provide for a work schedule of 50.4 average hours per week with 24 hour shifts and three platoons. The Employer turned down this proposal and countered with a proposal (effective the third year) of a schedule consisting of "40 hour work week, 8 hours per day, 5 day per week all personnel". (See Item 11 on Settlement Proposal marked Employer #4 in the handwriting of Person 1, Personnel Director of the Employer.)

The Union countered this with a proposal which came to be known as "Plan D", which is referred to in Union Exhibit 1 in three different places - in Item 11 on the sheet dated May 31, 1974 in the handwriting of Curtis D. Smith, President of Local 366; in Item 11 on the sheet identified as Settlement Proposal Employer #5 in the handwriting of Person 1; and in Item 11 on the second page of the Union's typewritten summary of contract changes. The Employer in its negotiation notes (Settlement Proposal Employer #5) describes the change as "Plan D 40 hours 3rd year". The Union in its summary describes the change as "Reduce work week Plan D - Refer to attached sheet".

Plan D provided for alternating work weeks averaging 40 hours over a 12-week period based on 10 and 14 hour shifts with four platoons. This agreed-upon settlement was written into the contract as the third paragraph of Section 3a of Article XIV.*

*(As originally proposed, Plan D appears to have involved an average work week of 42 hours. It is not clear from the evidence whether or not the parties understood this at the time, but in any event, the figure was reduced to 40 hours.)

The resolution of this grievance turns on whether the third paragraph of Section 3a, in its entirety, is a contractual obligation. if this paragraph is not a contractual obligation, the Employer would be free to institute a schedule of 40 hours (or less) per week, 8 hours per day and 5 days per week - the exact schedule which the Employer proposed in negotiations and which the Union refused. In view of the specific negotiations over this paragraph, it is unreasonable to conclude that the parties intended that the Employer unilaterally could go back to the very schedule which it proposed in negotiations and which the Union refused.

It does not appear that the Employer claims this entire right. The Employer has stipulated that it agreed to 10 and 14 hour shifts, which is one of the elements of Plan D. If it is contractually bound to this element, it is difficult to find any basis for saying that the Employer is not bound to the other two elements, namely, an average of 40 hours per week and 4 platoons. The conclusion that the 40 hour per week element is a contractual obligation is supported by reference to Person 1's notes, which specifically say "40 hours", and by the fact that this element is conceded by the Employer to be controlling and binding for the purposes of determining .he all important question of hourly rates. It is illogical to say that this 40 hour provision is a contractual obligation for so-.e purposes but not for others, in the absence of a clear indication that such an illogical conclusion was intended.

On the basis of an examination of the entire contract, the differences in contract language between "56 hour employees" and "40 hour employees", the specific wording of Section 3a," the necessity of applying Section 3a to the entire contract, and the history of the negotiation of the third paragraph of Section 3a, it is concluded that the third paragraph of Section 3a of Article XIV is a contractual obligation that cannot be nullified or modified by unilateral action of the Employer.

AWARD

As to the "40 hour employees" identified in the first paragraph of Article XIV, Section 3a, the contract does not prohibit the Employer from unilaterally putting into effect a work week of less than an average of 40 hours of work and pay.

As to all other employees, the contract prohibits the Employer from unilaterally putting into effect a work week of less than an average of 40 hours of work and pay.

The Umpire views this matter as being in the nature of an action for a declaratory judgment. Accordingly, pursuant to the provisions of Article VIII, Section 5, fees of the Umpire will be charged equally to the parties.

Lawson E. Becker,

Umpire

Dated: June 2, 1976.