Beitner #12

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

EMPLOYER

-and

UNION

GR: Employee 1, Employee 2 & Employee 3 Overtime

Arbitrator: ELLIOT I. BEITNER

OPINION AND AWARD

An arbitration hearing was held on November 11, 1983 in City A, Michigan in accordance with the applicable provisions of the collective bargaining agreement in effect between the parties. The arbitrator was selected from the closed panel established in the Memorandum of Understanding incorporated in the collective bargaining agreement. At the hearing sworn testimony was taken, exhibits were received in evidence, and both parties made opening and closing statements.

Background:

This arbitration involves an interpretation of Article XV- Overtime, Section 6. The basic facts giving rise to this grievance are not in significant dispute. On June 16, 1983 a crew of bargaining unit members was assigned to a water main and began its work at 6:00 a.m.

The ordinary shift begins at 8:00 a.m. All parties agree that the appropriate crew was assigned initially to the job and that the crew was entitled to and received two hours of overtime

pay at the beginning of the shift. The crew worked its regular eight hour shift and then continued working from 4:30 to 8:30 p.m. to complete the repairs. PERSON 1, a Water Service worker III, with sixteen years in the water department, was working as the crew leader. He testified that it became apparent sometime between 2:00 and 3:00 p.m. that the job could not be completed by the end of the shift and also could not be completed by 6:00 p.m. When Supervisor PERSON 2 visited the job site some time before 4:00 p.m., PERSON 1 and the other crew members informed him that the job could not be completed by 6:00 p.m. PERSON 2 decided to keep the present crew working even though he knew that the job would continue beyond 6:00 p.m.

The Employer maintains a volunteer overtime list. Employees who are interested in working overtime sign their names to a list and then are called from the list on the basis of seniority and offered the opportunity to work overtime. The individual Grievants would have been called to work overtime at 4:30 p.m. had the Employer decided to turn to the overtime list.

Individuals EMPLOYEE 1, EMPLOYEE 2 and EMPLOYEE 3 filed a grievance on June 28, 1983 (Joint 2) reading:

> Statement of Facts: A crew was called out at 6:00 A.M. 6/16/83 to repair a main break on 33rd St. S.E. (Person 1, Person 3, Person 4 & Person 5), at 4:30 P.M. the job was not done and required overtime to finish (more than an hour and one-half, 4:30 - 8:30). The same crew was told to stay. Since at 4:30 P.M. this was a new opportunity of overtime the next people in rotation on the overtime list should have worked (Employee 1, Employee 2 and Employee 3).
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> Suggested Adjustment: Pay for 4 hours overtime to Employee 1, Employee 2 and Employee 3.

In its answer the Employer acknowledged that the Grievants were entitled to be called to work overtime at 6:00 p.m. and to receive either four hours of straight time or the two and a half hours actually worked by the crew at time and a half, whichever amount was greater. The contract provides that employees called in to work overtime are entitled to the greater financial

reward of four hours of straight time or the actual hours worked at time and a half. The detailed answer of the Employer (Joint 3) reads:

> THIS GRIEVANCE IS DENIED.
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> This grievance claims a violation of Article XV, Overtime, Section 6. Article XV, Section 6, states ".... Only employees who have so volunteered for overtime work will be called upon to perform overtime work.... except that all employees may be required to work overtime for up to one and one-half (1 1/2) hours in situations where such work is necessary to complete a job they started at the end of their shift...."
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> Arbitrator William Daniels in arbitration case number 54-39-0828-81 stated, "This exceptional overtime is very clearly defined as that which occurs immediately upon conclusion of a shift and which is a continuation of the job which an individual has been performing. Operationally speaking, there is a very good reason for such a clause so that the employer may complete work in progress without delay. This very system itself demonstrates that it is for the employer's benefit, not that of the employees."
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> On June 16, 1983, a crew was called out at 6:00 A.M. to repair a main break and continued to work until 8:30 P.M. From 6:00 A.M. until 8:00 A.M. in the morning, the crew was working in an overtime situation. The crew continued to work through their regular scheduled work shift from 8:00 A.M. until 4:30 P.M. on the main break, expecting to complete repairs by 6:00 P.M. (which is within the one and one-half hour exception provision in Article XV, Section 6.a. The Water Service worker III in charge of the crew, Mr. Person 1, gave no indication to the Water Service Fore-person, Mr. Person 2, that the main break repair would not be completed by 6:00 P.M. The main break repair job lasted until 8:30 P.M. In accordance with the Labor Agreement, beyond the one and one-half hour overtime exception language, employees other than those working on the main break at that time should have been called to work overtime and complete the job. The employees that should have been called to work overtime are those listed on this grievance. The Suggested Adjustment Request is that the employees be paid for four hours overtime resulting in a total of six hours pay. The grievance requests that the employees be paid from 4:30 until 8:30 P.M. It is Management's position that the grievants are entitled to overtime pay from the hour and a half exception, or from 6:00 P.M. until 8:30 P.M. resulting in two and one-half hours at the overtime rate or a four hour call-back in accordance with the Labor Agreement. Article XV, Section 4.b., which states, "An employee called to work at a time other than his/her scheduled work shift shall be credited with a minimum of four (4) hours....or with the actual hours worked at one and one-half (1 1/2) times....whichever is the greater...." It is Management's position that the grievants should receive a four hour call-back in accordance with the above-mentioned article provision.
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> For the above stated reasons, this grievance is denied.

Contract Provisions:

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ARTICLE XV - OVERTIME

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Section 4. Method of Compensating for Overtime Work

b. An employee called to work at a time other than his/her scheduled work shift shall be credited with a minimum of four (4) hours at his/her regular hourly rate, or with the actual hours worked at one and one-half (1 1/2) times his/her hourly rate, whichever is the greater, unless such time shall be continuous with his/ her scheduled work in which case he/she shall be paid at his/her overtime rate.

Section 6.

a. During each calendar month period, overtime work shall be distributed as equally as practical among employees of the same permanent job classification only, within a given Department or Division, who have expressly volunteered for overtime work for the month. Employees interested in overtime work shall so indicate in writing to their immediate Management Supervisor not later than the last full week prior to the beginning of each month. Employees newly entering the Department or Division shall be afforded the opportunity to volunteer in writing for overtime work within one week of the time of entering the Department or Division. The method of equalization shall be obligated to work the first overtime of the month and so on down the volunteer list through the month. Those volunteers who are excused from their rotation or who are unavailable shall be charged with a call. (Employees on Vacation or Worker's Compensation will not be called. Employees on Sick Leave will be called.) Only employees who have so volunteered for overtime work will be called upon to perform overtime work during the designated month and such employees shall be obligated to perform such work, except that all employees may be required to work overtime for up to one and one-half (1 1/2) hours in situations where such work is necessary to complete a job they started at the end of their shift. In the event that insufficient numbers of employees are available for overtime work assignments, the employees of the classification required with the least amount of seniority will be required and obligated to perform such work.

Union's Position:

It is the position of the Union that the contract is clear and unambiguous and required the Employer to call in an overtime crew to begin work at the end of the regular shift at 4:30 p.m. because the Employer knew at quitting time that the job could not be completed within the hour and a half leeway in the contract provision. When the Employer knows in advance that the overtime work cannot be completed by the regular crew within one and a half hours after the end of the shift, the Employer is obligated to assign the overtime in accordance with the voluntary over time system. The Employer's argument that it could use the prior crew until 6:00 p.m. and then call in an overtime crew is a construction that gives rise to a ridiculous result. An employee assigned to work overtime is entitled to either four hours of regular pay or time and a half for the actual time worked (whichever is greater). The Employer's construction would mean that it should have paid four hours to the employees working from 4:30 p.m. to 6:00 p.m. and another four hours to the employees working from 6:00 to 8:30 p.m., which would have cost the Employer more than assigning the overtime work in accordance with the voluntary system.

The Union further points out that two prior grievances were brought by the Union relating to the improper allocation of overtime. On February 1, 1978 an employee named Person 7 was not offered overtime at the end of a shift and that overtime work was awarded to an employee not on the overtime list. The Employer, in its adjustment of the grievance, acknowledged its mistake and paid Person 7 the requested overtime. In February of 1980 Person 6 was not asked to continue working after the end of his shift although he was on the voluntary overtime list, and the hours were worked by an employee not on the list. The Employer adjusted that grievance by awarding Person 6 the required overtime.

Employer's Position:

It is the Employer's position that the contract grants it the right to ignore the voluntary overtime list for the first hour and a half after the end of the regular shift. In other words, it has the right to assign the regular shift employees to work the first hour and a half of overtime. The Employer acknowledges that its act was wrong and violative of the contract when it did not advise employees on the voluntary over time list to come into work at 6:00 p.m. to complete the repair work.

The Employer points out that Arbitrator William Daniel, in a 1982 arbitration award, drew a distinction between the voluntary overtime assignments and mandatory overtime assignments. Arbitrator Daniel held that the contract grants the Employer the right to make a mandatory overtime assignment up to one and a half hours at the end of a shift. Arbitrator Daniel pointed out that this provision was placed in the contract for the benefit of the Employer, and the language granting the Employer that right is clear and unambiguous. The Employer then has no overtime obligation to the Grievants for the first one and a half hours after the end of the shift.

Decision:

The contract language sets up a system of voluntary overtime wherein employees may sign an overtime list and then are entitled to be called in rotation for the opportunity to work overtime. The contract provision also grants the Employer the right to bypass this system for up restrictive conditions. Section 6(a) reads:

> During each calendar month period, overtime work shall be distributed as equally as practical among employees of the same permanent job classification only, within a given Department or Division, who have expressly volunteered for overtime work for the month. Employees interested in overtime work shall so indicate in writing to their immediate Management Supervisor not later than the last full week prior to the beginning of each month. Employees newly entering the Department or Division shall be afforded

> the opportunity to volunteer in writing for overtime work within one week of the time of entering the Department or Division. The method of equalization shall be obligated to work the first overtime of the month and so on down the volunteer list through the month. Those volunteers who are excused from their rotation or who are unavailable shall be charged with a call. (Employees on Vacation or Worker's Compensation will not be called. Employees on Sick Leave will be called.) Only employees who have so volunteered for overtime work will be called upon to perform overtime work during the designated month and such employees shall be obligated to perform such work, except that all employees may be required to work overtime for up to one and one-half (1 1/2) hours in situations where such work is necessary to complete a job they started at the end of their shift. In the event that insufficient numbers of employees are available for overtime work assignments, the employees of the classification required with the least amount of seniority will be required and obligated to perform such work. (Emphasis added)

While this provision does give the Employer the right to require employees to work overtime work for up to one and a half hours at the end of a shift, it is only: "...where such work is necessary to complete a job they started at the end of their shift." The wording is specific and clear: this right of the Employer can only be exercised if the mandatory overtime assignment is necessary to complete a job started at the end of a shift. In this instance the repair work was started at the beginning of the shift and not at the end of the shift. More importantly, the Employer knew that the job could not be completed within one and a half hours. The assignment then was clearly violative of the restriction of the collective bargaining agreement.

Furthermore, the Employer was apparently aware of the restrictions placed on its right by the contract when in its answer to the grievance it stated: "...Mr. Person 1, gave no indication to the Water Service Foreperson, Mr. Ray Person 2, that the main break repair would not be completed by 6:00 p.m." This assertion, if true, might have excused the contract violation; however, the facts as developed in testimony completely contradict this assertion. PERSON 1 testified that he and the crew met with PERSON 2 before 4:00 p.m. on the job site and advised him that the repairs could not be completed by 6:00 p.m. Foreperson PERSON 2 was present

during the grievance hearing but was not called by the Employer to rebut this assertion. Therefore, on this record, the fact that the parties knew that the job could not be completed by 6:00 p.m. was conclusively established.

The award by Arbitrator William Daniel, while touching on this issue, is not directly relevant. It is true that arbitration decisions involving the same parties interpreting the same contractual provision are generally given either precedential or at least great persuasive effect. Elkouri and Elkouri discuss this concept in their text *How Arbitration Works* as follows:

> ...An award interpreting a collective agreement usually becomes a binding part of the agreement and will be applied by arbitrators thereafter.
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> This was emphasized by Arbitrator Whitley P. McCoy, who declared that where a "prior decision" involves the interpretation of the identical contract provision, between the same company and union, every principle of common sense, policy, and labor relations demands that it stand until the parties annul it by a newly worded contract provision." (pp. 377-78, Footnotes deleted)

The Daniel opinion, however, deals with a different factual situation than that present here.

Arbitrator Daniel was asked to resolve a dispute in which an employee was required to work an hour and a half of overtime to complete repairs begun during his regular work shift. Some days later, that employee -- whose name appeared on the volunteer overtime list -- was afforded the opportunity to work additional overtime. The Grievant, another employee, argued that the hour and a half worked by the first employee should have been counted as his regular turn under the voluntary overtime system, and the Grievant, the next senior person on the overtime list, should have been afforded the opportunity to work overtime. Daniel, in denying the grievance, concluded that an employee who is required to work forced overtime should not be deprived of the opportunity to work under the voluntary overtime procedure. Arbitrator Daniel put it this way:

> It is apparent ... that employees on the voluntary rotation list, charged with each instance of post-shift required overtime as a work opportunity, would regard such minor assignment versus a lost rotational opportunity of substantially more hours as a very disadvantageous occurrence. (Daniel, p. 7)

As Daniel points out, the two overtime systems are separate and distinct:

> The two particular overtime systems have diametrically opposed purposes - one is to provide overtime opportunity for those that want it and the second is to provide to the employer the right to insist upon continued employment as overtime after shift. (Daniel, p. 8)

Daniel made a distinction between the rights granted the Employer to require employees to work an hour and a half and the provisions in the contract creating a voluntary overtime system which requires equalization of voluntary overtime. It was Daniel's decision that when the employer exercises his right to make a mandatory overtime assignment, the employee forced to work overtime should not be deprived of his regular turn on the voluntary overtime system. The Daniel award in no way stands for the proposition that an employer has the right to continue a crew for one and a half hours after the end of a shift when it knows that a job cannot be completed by that time. The clear holding of that decision is peripheral to the issue before me.

The contract provision is clear and unambiguous and allows for mandatory overtime of one and a half hours where such work is necessary to complete a job started at the end of the shift. In this instance, long before the end of the shift, the Employer knew that the work could not be completed within that period. Even though assigning an overtime crew at 4:30 p.m. might result in some minimal delays, it is still necessary for the Employer to follow the contract.

AWARD

It is held that the Employer violated the collective bargaining agreement, Article XV, Section 6(a), which requires the utilization of the voluntary overtime system unless the Employer believes that the job can be completed within an hour and a half. Therefore, the Grievants are entitled to be paid as requested for four hours overtime at the appropriate rate.

ELLIOT I. BEITNER

DATED: December 9, 1983