Beitner #6

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

EMPLOYER

-and

UNION

GR: Employee 1

Arbitrator: ELLIOT I. BEITNER

OPINION

An arbitration hearing was held in City A, Michigan on September 9, 1981 in accordance with the applicable provisions of the collective bargaining agreement in effect between the parties. The selection of the arbitrator was in accordance with the procedures of the American Arbitration Association. Post-hearing briefs have been filed by the parties and considered.

Issue:

Did the Employer violate Article XV, Section 6(a) and (b) relating to equalization of overtime hours?

Background:

The Grievant, EMPLOYEE 1, JR., has been employed by the Employer for the past twenty-five years as a park patrol officer. Previously, he worked for the Employer Police for five and a half years. There are four park patrol officers. The Parks Department has for the most part followed the overtime provisions of the contract, posting monthly sign-up sheets for employees who are interested in working overtime. The park patrol, by contrast, has operated on an informal

basis not using sign-up sheets or posting overtime: the employees could generally agree amongst themselves how to share overtime. Overtime assignments for the park patrol would develop as the result of: (1) a specific event; (2) participation in the arrest and booking of violators 'and related court appearances; and (3) special projects.

On or about July of 1979 the Employer initiated a special project to control vandalism. Person 1 was initially assigned to the special vandalism project. The Grievant, EMPLOYEE 1, was aware of this project and, in fact, assisted in initiating the program. As the senior park officer he would come to work one-half hour early and meet with Park Official Person 2 or Person 3 to discuss special assignments with them and advise management of the officer best qualified to perform any special assignment. He was not paid overtime for coming into work one half hour early, but was compensated by being allowed to work out each day for an hour at Park A.

PERSON 4, another park patrol officer, learned of this overtime assignment and discussed the matter with PERSON 5, a park maintenance worker who is a second vice-president of Union and executive steward. PERSON 5 set up a meeting with Mr. Person 3, himself, and PERSON 4 and told Person 3 about the provision in the contract providing for equalization for overtime. At the meeting Person 3 said he was determined to do something about the vandalism and authorized PERSON 4 to participate in the project by continuing the work at the end of his shift. PERSON 4 did work overtime, and the amount of overtime was not questioned by anyone. PERSON 4's impression was that the project would involve all four employees. PERSON 5 left the meeting believing that the problem had been resolved.

In October PERSON 5 learned while playing racquetball with EMPLOYEE 1 that there had been no subsequent posting of overtime. EMPLOYEE 1 had learned that Person 1 had

received a paycheck in an amount double the ordinary paycheck reflecting overtime worked. PERSON 5 went to the park office and asked Person 2 to see an overtime equalization list. Person 2 told him that the department was behind in its bookwork.

In fact, the overtime list was not prepared until February 21, 1980. That list (Joint 4 and 5) showed that for the calendar year 1979 the park patrol officers worked the following overtime:

Employee 1 94-1/2 Hours

Person 1 450-3/4 Hours

Person 4 229-1/2 Hours

Person 6 318-3/4 Hours

As part of that overtime, Person 1 made ten court appearances totaling sixty hours while EMPLOYEE 1 made no such appearances. During that year Person 1 also performed work beyond his eight-hour shift on forty occasions to transport prisoners for bookings, to do related paperwork, or to handle other emergency police problems arising during his shift totaling 220 hours. EMPLOYEE 1 performed overtime work of this nature on only four occasions for a total of ten hours. Finally, for prearranged work such as races and ethnic festivals, Person 1 worked twelve additional days for a total of approximately 144 hours, while EMPLOYEE 1 worked eight additional days for 96 hours.

The grievance was filed on March 4, 1980 alleging violations of Article XV Section 6(a) and (b). That grievance (Joint 2) filed by and on behalf of EMPLOYEE 1 alleges:

> Management of the Park Dept. did not conform to the contractual stipulations found in the overtime provision and allowed an imbalance of some four hundred (400) hours.

The remedy requested was:

> The Employer equalize the overtime in the classification of Park Patrol Officer by paying the employee four hundred (400) hours back pay.

Contract Provisions:

ARTICLE IX - GRIEVANCE PROCEDURE

Section 2. Grievance Time Limits and Exclusive Remedy

a. Any grievance not initiated, advanced to the next step or answered within the time limits specified herein will be considered settled on the basis of the last answer by Management, if the Union does not advance it to the next step within the time limits, or on the basis of the Union's last demand, if Management fails to give an answer within the time limit. Time limits may be extended only by written mutual agreement by Union and Management.

Section 3. Grievances will be processed in the following manner and within the stated time limits.

Step I. The aggrieved employee or group of employees with the Union Steward will orally present the grievance to the immediate supervisor outside the bargaining unit. The grievance must be so presented within five (5) working days of its occurrence, not including the day of occurrence, provided the employee had knowledge of the occurrence, otherwise the grievance must be so presented within ten (10) working days of its occurrence, not including the day of occurrence. The Supervisor will give a verbal answer within five (5) working days of the date of presentation of the grievance, not including the date of presentation.

Step 4.B Arbitration

a. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association. The power of the arbitrator shall be limited to the interpretation and application of the express terms of this Agreement as written. His decision on grievances within his jurisdiction shall be final and binding on the employee or employees involved, the Union, and Management. In disciplinary cases involving stealing by employees and/or possession or use of illegal drugs or narcotics during work hours or while on Employer property, the parties agree that such violation shall be considered proper cause for summary discharge. In such cases the arbitrator shall be limited to a determination of facts only, and shall have no authority to modify the penalty imposed. Such violations shall not be construed as, exclusive proper cause for discharge.

ARTICLE XV - OVERTIME

Section 6. Equalization of Overtime Hours.

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. 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 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.

B. In the assignment of overtime hours Management will, consistent with the needs of the service, give preference to those persons holding permanent appointment. A record of such overtime hours shall be kept and the record shall be posted during the first ten (10) days of April, July, October, and January of each year. Accumulation of such recorded hours shall begin anew at the beginning of each calendar year.

POSITIONS OF THE PARTIES

Union's Position:

It is the Union's contention that the Employer violated the contract's express and unambiguous provisions covering equalization of overtime (Article XV, Section 6(b)). The Employer made no attempt to distribute equally the overtime hours on the special vandalism project. Furthermore, the Employer was put on notice in July by the discussion between PERSON 5, Person 3, and PERSON 4 of PERSON 4's desire to work on this project and that the Union expected the Employer to comply with the provisions of the contract.

PERSON 4 and PERSON 5 left that meeting with the understanding that overtime would be distributed equally and posted. The Union further argues that the Employer has not complied with Section 6(b) which requires a quarterly posting of overtime hours. The Employer admitted this breach of the contract in its third step answer. The Union requested an overtime list in October of 1979 but did not actually receive the list until February 21, 1980. This February date

was the first time the Union was aware that a grievance existed: the Union filed its grievance within the time limits set forth in the contract following that date. The Employer's violation of a specific provision of the contract in not posting overtime should in any event suspend the application of the time limits set forth in the grievance procedure.

The Union asks that the Grievant be paid for the difference between the Grievant's overtime hours and the hours of the employee with the greatest amount of overtime hours.

Employer's Position:

It is the Employer's position that procedurally the grievance is defective because it was not filed within ten days of the occurrence complained about. The remedy requested of equalization of overtime for calendar 1979 cannot be granted; the only remedy that might be granted would be overtime equalization for February of 1980.

With regard to the merits of the dispute the Employer acknowledges that it did not follow the express provisions of Section 6, but asserts that the Park Patrol Officers did not do so either. The provisions require employees to signify in writing their interest to work overtime.

This had not been done and was not the policy of the parties: in the past the parties would, by mutual agreement, distribute overtime assignments. The Employer further argues that EMPLOYEE 1, functioning as a Senior Park Patrol Officer, met with management on a daily basis and, in fact, participated in the initiation of the vandalism project giving advice on the selection of officers to work on that project. At no time did he request to work on the project nor did he actually work on it.

Furthermore, he was aware in October 1979 of a discrepancy in overtime as reflected in the paycheck of Officer Person 1, but did not file a grievance until February 1980.

Decision:

The parties have agreed under Article XV, Section 6(a) to equalize overtime work insofar as such equal distribution is practical. Certain overtime assignments of the park patrol cannot practically be distributed among employees: these are functions that cannot appropriately be transferred or delegated to another employee. An example of such work is the processing of paperwork and assistance given to the police in the booking procedure after a park officer arrests or detains a violator toward the end of that officer's shift. Another example would be court appearances which cannot be delegated to another officer.

In the present case Officer Person 1 had sixty overtime hours in court appearances and 220 hours as a result of working beyond his eight-hour shift because of arrests or bookings. These hours, as stated above, are such that they cannot be delegated to another officer. It is true, of course, that pre-arranged hours can be equalized and in that area there was a discrepancy: Person 1 had 144 such hours, the Grievant, 96. These hours are those, then, that the officers had the ability to divide evenly, and it is assumed that they agreed among themselves who would work this pre-arranged overtime.

It must here be noted that the equalization of overtime clause contains certain conditions. Overtime is to be distributed among those employees "who have expressly volunteered for overtime work for the month." The Grievant had assisted in setting up the special project to eliminate vandalism and had been called upon to advise management on which officers to assign to that work. Despite this familiarity with the project, Grievant EMPLOYEE 1 at no time requested either in writing as required by the contract or orally that he be allowed overtime on the project. Even in October when the Grievant learned of the discrepancy between the amount of his pay and that of Person 1, he made no request to work overtime.

EMPLOYEE 1 was no doubt surprised when he discovered that the overtime worked by other park officers on the special project was greater than he had anticipated. There was, however, testimony given that any officer could work beyond his shift if he felt it was warranted. PERSON 4 and Person 1 were, according to PERSON 4, authorized to continue work at the end of the shift; PERSON 4 testified that he assumed all four park officers would be involved in the special project and his impression was that overtime would be equalized. It was not clear from the testimony whether the freedom to work overtime at one's own discretion was transmitted to the Grievant; that after July the Grievant did not work beyond his shift was, however, shown by Joint Exhibit 4.

It is found that while overtime was not equalized, it is also clear that the Grievant did not meet his contractual obligation to request in writing the opportunity to work on the overtime assignment. Nor did he request such work orally either which was the informal method used by the officers in the Parks Department. Since the Grievant did not request overtime on the pre-arranged project, it is held that the Employer did not violate Article XV, Section 6(a) of the contract in not equalizing overtime.

The Employer has, of course, argued that the Union failed to comply with the time limits for filing a grievance, limits spelled out in Article IX, Section 3, Step 1 of that provision states that a grievance must be "presented within five (5) working days of its occurrence ... provided the employee had knowledge of the occurrence." The provision goes on to state: "otherwise [when the aggrieved employee did not have knowledge of the occurrence) the grievance must be so presented within ten (10) working days of its occurrence." The parties have agreed by this provision that even if an employee is unaware of an occurrence of a possible contract violation, he has only ten days to file a grievance.

It is not within the powers of an arbitrator to modify or change an express provision agreed to by the parties. This provision is clear and unambiguous and must be adhered to even if the result is harsh. Elkouri and Elkouri discuss such clear contract language in their text HOW ARBITRATION WORKS as follows:

> If the language of an agreement is clear and unequivocal, an arbitrator generally will not give it a meaning other than that expressed. As Arbitrator Fred Witney has stated, an arbitrator cannot "ignore clear-cut contractual language," and he "may not legislate new language, since to do so would usurp the role of the labor organization and employer." (p. 303, Footnotes deleted)

And the Elkouris state:

...the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases the result is based upon the clear language of the contract, not upon the equities involved. (p. 304, Footnotes deleted)

The language of the contract in this case is clear. A grievance must be filed within a maximum time period of ten days of an occurrence. Certain circumstances can act to extend the period during which a grievance can be filed. If a violation is found to be of a continuing nature, this could serve to extend the period for filing. In this case overtime assignments are, of course, required to be equalized on a monthly basis; therefore, each month during which overtime is not distributed as equally as practical would constitute a separate and continuing offense. The Grievant could, therefore, challenge that monthly distribution after any particular month. The remedy in a case of a continuing violation is limited. The reason for this and for restrictive time requirements generally in a grievance procedure is to avoid imposing upon an employer an economic consequence that has not been anticipated and has, thus, not been considered in preparing a budget. Any remedy that could be afforded the Grievant in this case as a continuing

violation would be limited to a consideration of February 1980, his grievance having been filed on March 4, 1980.

The Union, of course, argues that the time restrictions of Article IX are inapplicable because the Employer did not comply with its contractual requirements listed in Article XI, Section 6(b) in that it failed to post quarterly overtime hours. Section 6(b) requires the Employer to post in the first ten days of April, July, October, and January the overtime hours worked.

Insofar as the relationship between the lack of postings and the Grievant's damages is concerned, it must be said that a posting in the first ten days of July would not have been helpful to the Grievant because the special project was started in July.

In October 1979 the Grievant became aware of the discrepancy between the hours worked by Person 1 and those worked by himself. Had he filed a grievance in October – whether he learned of the discrepancy in hours through a posting or some other means, as was the case -- he would have been restricted to looking at the overtime for the month preceding the filing in seeking a remedy. This is true because the grievance procedure (Article XV, 6(a)) is clear and unambiguous on this point, stating as it does that "[d]uring each calendar month period overtime work shall be distributed as equally as practical."

To interpret the contract to allow a remedy dating back more than a month before the filing of a grievance with regard to overtime would be to change the contract to which the parties have agreed. An arbitrator does not have this power: "he shall have no power to alter, add to, subtract from or otherwise modify the terms of this Agreement as written." (Article IX, Section 3, Step 4B) The jurisdiction of an arbitrator flows from the contract, and his powers are restricted and defined by that contract. Were an arbitrator to ignore these provisions relating both to his

powers and to clear, unambiguous language, he would be acting in an improper fashion, and his award could be attacked in a judicial proceeding.

The U.S. Supreme Court addressed the role of the arbitrator in United Steelworkers v Enterprise Wheel & Car Corp., (80 Sct 1358 (1960) at page 1361 as follows:

> "...Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

Any remedy would then be restricted to the month preceding the filing of the grievance in accordance with the contract. The Union is correct that generally it is well established that a party cannot be held to specific time limits until that party is aware of the problem or grievance to which it must respond. While this argument is ordinarily valid, in this particular case the parties have stated specifically in the contract that a grievance must be filed within five days of an occurrence or within ten days in instances where the employee did not know of the occurrence. That this provision may lead to harsh results in undisputed as has been discussed above; the appropriate place, however, for the parties to correct the procedure if that is their desire is at the bargaining table, not through the grievance procedure.

In this particular case it seems clear from the testimony that Grievant EMPLOYEE 1 was aware of a discrepancy in overtime hours in October 1979 when he saw Person 1's pay check. He had himself worked no overtime hours in October so would have to have been aware that Person 1 had worked a good deal of overtime to have gotten such a large check. While a posting in October would have verified the disparate overtime hours, that posting was not necessary to make the Grievant aware of the situation. Therefore, the Employer's not having posted the lists

did not substantially affect the Grievant. In fact, the Employer and the Parks Department employees had operated without such a list for years, following an informal method of overtime assignment. The Employer has, incidentally, acted to correct this procedural error.

It is held that the grievance was filed untimely with regard to overtime worked before February 1980. It is further held that the Employer did not violate Article XV, Section 6(a) since the Grievant did not request the distributable overtime. It should be noted that the Grievant, as the senior park patrol officer, had assisted management in the initiation of the special vandalism project and had recommended officers for that project.

Although he met with management every day for one-half hour he never requested being assigned to the project. While the Employer did violate Article XV, Section 6 (b), this did not result in any harm to the Grievant.

The grievance is denied.

ELLIOT I. BEITNER

DATED: November 3, 1981