McCormick #6

VOLUNTARY LABOR ARBITRATION

EMPLOYER

-AND-

UNION

Gr: Union Initiated/Overtime

OPINION AND AWARD

A hearing in the above-captioned matter was held before the undersigned arbitrator, Robert A. McCormick on January 19, 2006 in City A, Michigan. At the hearing the Parties examined witnesses and introduced documentary evidence in support of their respective positions. Thereafter, the Parties, through their representatives, submitted written briefs to the arbitrator. This Opinion and Award is based upon careful consideration of this evidence and argument.

ISSUES:

1. Did the Employer violate the collective bargaining agreement by calling back A shift personnel instead of B shift personnel on the morning of March 10, 2005?
2. Did the Employer violate the contract by treating A shift personnel as performing work "continuous with [their] scheduled work" and, therefore, entitled only to overtime pay, and not the higher of overtime pay for actual hours worked or regular pay for a minimum of four hours of work?

RELEVANT CONTRACT PROVISIONS:

ARTICLE 4. MANAGEMENT RIGHTS

SECTION 1. DIRECTING THE WORK FORCE

Except as otherwise specifically provided herein, the Management of the Employer and the direction of the work force, including but not limited to the right to . . . determine schedules of work, .. . together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management . . . .

ARTICLE 15. OVERTIME

SECTION 4. METHOD OF COMPENSATING 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 hours at his/her regular hourly rate, or with the actual hours worked at the overtime 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 the overtime rate.

ARTICLE 30. MAINTENANCE OF STANDARDS

Management agrees that all conditions of employment not otherwise provided for herein relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at the standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

FACTS:

The facts of this case were presented through the testimony of three witnesses: Person 1, Fire Lieutenant; Person 2, Fire Alarm Operator; and Person 3, Fire Chief.

Lt. Person 1, a member of the Grand Rapids Fire Department for twenty-eight years, also serves as Vice-President of Union. Lt. Person 1 testified that the Department provides continuous coverage on three shifts, designated as A, B, and C shifts. Employees on those shifts work twenty-four hours from 0700 to 0700. During any twenty-four hour shift period, one of the three shifts is scheduled to work and the other two are not. One of those two remaining shifts is

scheduled to work the following shift, and the remaining shift has four consecutive days off - known as a "four-dayer." As Lt. Person 1 described it, employees have one day on, one day off, one day on, one day off, one day on and then begin their four-dayer.

On occasion, Lt. Person 1 said, the Department calls employees back to work. These call backs are of two types: one is for manpower (staffing) needs, and the other is for emergencies. The emergency call back procedure, he said, is used in situations when an extra alarm fire requires more manpower than one shift can handle and involves an ongoing fire scene. When firefighters are called back for manpower purposes, they work a twelve-hour period and are compensated at one and-one-half times their regular rate of pay. When firefighters are called back for an emergency, they earn a minimum of four hours pay. The only exception to this, Lt. Person 1 said, is when a firefighter is held over beyond his or her regular shift.

Lt. Person 1 testified that in his twenty-eight years in the Department he has been involved in emergency callbacks. He testified that the practice has been that the shift on their four-dayer is the shift that is called back, except when that shift is on the last day of their four-dayer. Under those circumstances, Lt. Person 1 said, those employees may be called back until noon of the last day of the four-dayer. After noon of that last day, he said, the shift that just began their four-dayer is called. According to Lt. Person 1, when an emergency callback occurs, the employees are required to report if they are contacted unless they are sick or have been consuming alcohol.[1]

On March 10, 2005, Lt. Person 1 recalled, he was serving on C shift when an early morning fire occurred. His shift was to end at 0700. At approximately 5:30 a.m., however, some relief personnel from the A shift, which was to begin their shift at 0700 that morning, began

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[1] Union exh. 2.

reporting. In Lt. Person 1' view, the Department should have called B shift instead of A shift personnel. He later learned that A shift employees who were called were only paid for approximately one and one-half hours, instead of a minimum of four hours.

The Union's position in this case, Lt. Person 1 said, is that the emergency callback should have been made to the B shift personnel who had started their four-dayer on March 9th and that they should be compensated for four hours of work. He acknowledged that the number of personnel needed on an emergency callback may vary, and that it is within management's discretion whether such personnel are assigned to the fire scene or elsewhere. He likewise conceded that he could not recall an emergency callback being implemented at 0530.

Lt. Person 1 identified the work scheduled for the week of March 6 through March 12, 2005.[2] According to that schedule, Lt. Person 1 said, the B shift began their four-dayer at 0700 on 9, 2005. Thus, at 0500 on March 10th when the emergency callback procedure was begun, B shift fire fighters had been off work for twenty-two hours. While the A shift had been on their four-dayer, they had not yet reported for work. Thus, at 0500 on March 10, 2005 both A shift and B shifts were on four-dayers. In this instance, Lt. Person 1 said, on Wednesday, March 9th, A shift was on the last day of their four-dayer so until noon that day, they were eligible for callback. After noon on March 9th, however, the shift that just started its four-dayer – in this case B shift – should have been called back.

FAO Person 2, an eleven-year member of the Department, testified that from 1994 until 2003, his duties included staffing and callbacks which were performed through the Fire Dispatch office. After January or February, 2003, however, he no longer handled Departmental staffing. During the time he handled these functions, FAO Person 2 said, he followed a February 1, 2001

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[2] Employer exh. 2.

Departmental policy regarding emergency call backs. [3]He also identified a 1977 policy governing such call backs[4] which, he said, was in effect when he began working in the Dispatch Office.

FAO Person 2 agreed with Lt. Person 1 that noon of the last day of a shift's four-dayer was the cut off point for callbacks. This, he said, was the practice consistently used, and he cited the Standard Lumber and Nye Uniform fires as emergency callback situations where this procedure was utilized. He also testified that he was summoned on an emergency callback at 0300 for the Cutler Sports Apparel fire in accordance with this procedure. FAO Person 2 acknowledged that he has not handled regular or emergency staffing for the Department since January or February, 2003. Beginning then, he said, Chief Person 3 or his designee administered staffing responsibilities.

Chief Person 3, Fire Chief for the Employer since September, 2004, has served in the Department for thirty-two years in various capacities and, indeed, has held every position in the fire suppression division of the Department. Chief Person 3 oversees the fire emergency responsibility for the Employer and oversees approximately two hundred and fifty employees at eleven stations throughout the City. All positions within the fire suppression division are represented by Union, including the three Deputy Fire Chiefs.

Chief Person 3 testified that he performs daily staffing duties and, since the purchase of automated staffing software called "Telestaff" in 2001, the emergency callback procedures as well. An emergency callback takes place, he said, whenever a fire occurs that taxes existing manpower and resources.

In the early morning hours of Thursday, March 10, 2005, Chief Person 3 recalled, a structure fire broke out on Grandville Avenue which depleted several stations and most of the C shift

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[3] Union exh. 2.
[4] Union exh. 1.

personnel. A decision was made, he said, to call back personnel to staff engines and a ladder truck to protect remainder of Employer and, if necessary, to assist at the Grandville fire as well. At the peak of the fire, Chief Person 3 said, there were at least nine pieces of apparatus from three fire stations working at the fire.

As regards the shift rotation that morning, Chief Person 3 said, C shift was to be on duty for two more hours at which point A shift was scheduled to report. This fact, he said, was a key element in his decision to call back A shift because the callback occurred very close in time to the shift change. At the time the alarm came in at approximately 0450, he said, A shift personnel were awake and expecting to report for duty in two hours. Chief Person 3 stated that fire fighters sometimes report before their normal starting time and that when they do, they may relieve an individual whose shift is nearing completion. In this instance, he recalled, some fire fighters, including Person 4, were already en route to work when they were called. Thus, he said, it was substantially easier to call the shift coming on duty — A shift — rather than the B shift. Deputy Chiefs Person 5 and Person 6 performed the callback communications.[5] In total, he said, thirteen people responded to the callback.

Emergency callbacks happen infrequently, Chief Person 3 said, and prior to the incident in question in this case, Chief Person 3 said, he could not identify any other emergency callback situations occurring at the time this callback took place. He did not dispute the Union's testimony about the past except he did not know how many, if any, fires had happened under similar circumstances.

Chief Person 3 acknowledged that by calling back A shift instead of B shift personnel that morning, the Employer did not have to compensate employees as much. This factor, however,

[5] Chief Person 3 was on vacation at the time of the fire. However, Deputy Chiefs Person 5 and Person 6 contacted him and informed him that they intended to call A shift personnel in, and he concurred in their decision.

did not play a role in his decision, he said, and, instead, the primary factor was the relative ease with which the Department could get personnel to work that morning.

Chief Person 3 described the Radio Tavern fire that occurred in November or December, March, 2005. On that occasion, he said, the calls were made at approximately 2200 and that, therefore, he did not call back the oncoming shift, but instead called personnel from the shift that was on their four-dayer. Had the fire occurred at the same time as this fire, he said, he would have handled the callback as it was in this instance.

Chief Person 3 could not recall any instance prior to March 10, 2005 in which the "continuous" exception language of Article 15 (4)(B) was applied to a situation where a crew or members of a crew began work before their shift began, as contrasted with remaining on the job after their shift had been completed.

Other facts that bear upon the resolution of this grievance appear later in this Opinion and Award.

DISCUSSION:

There are two issues in this case: first, did the Employer breach Article 30 – the Maintenance of Conditions clause – of the collective bargaining contract by calling back A shift personnel instead of B shift personnel on the morning of March 10, 2005? Second, did the Employer breach Article 15 (4)(B) of the contract by treating those A shift fire fighters as performing work "continuous with [their] scheduled work" and, therefore, entitling them only to overtime pay, and not the higher of overtime pay for actual hours worked or regular pay for a minimum of four hours of work?

The proper starting point for the resolution of the first issue in this case is Article 4 – the Management Rights clause of the contract. That language reserves in the Employer the right to

determine the schedules of work, so long as that right is not otherwise limited in the contract. Put somewhat differently, this contract language preserved the right of the Employer to direct the work force by calling in A shift personnel instead of 13 shift personnel under the circumstances that existed on the morning of March 10, 2005 unless another provision of the contract limited that prerogative.

Here, of course, the Union argues that Article 30 — the Maintenance of Conditions clause — limited the City's prerogatives because it obligated the Employer to maintain "all conditions of employment" and "general working conditions" in existence at the outset of the contract. In this instance, the Union argues, the Department breached its long-standing practice of calling back the shift on its four-dayer until noon of the last day of that four-dayer by calling back A shift fire fighters whose four-dayer was to end at 0700 that day — well after noon of the last day of their four-dayer.

The City, for its part, argues that its decision to call back A shift personnel made sense because A shift fire fighters were scheduled to report within two hours of the callback and, therefore, were awake and preparing to report in any event, thereby facilitating the staffing of its personnel needs that morning. This fact alone, the Employer argues, prompted its decision to call back A shift fire fighters instead of those on B shift.

The resolution of this first issue requires a determination as to whether the emergency callback procedure described by Lt. Person 1 and FAO Person 2 was sufficiently well established as to constitute a "condition of employment" or a "general working condition" such that the Employer was obligated to have adhered to it in this instance. Questions surrounding the nature of a binding past practice have been the subject of many arbitral decisions and scholarly

inquiries,[6] but arbitrators generally agree that for a practice to become binding upon the parties, it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice mutually accepted by both Parties.[7] As the distinguished arbitrator Harry Shulman has written:

> A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding. And in some industries there are contractual provisions requiring the continuance of unnamed practices in existence at the execution of the collective agreement. . . A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.
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> But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things.[8]

In this instance, Lt. Person 1 testified generally that the practice in the Department was to call back fire fighters on their four-dayer until noon of the last day of their four-dayer, and FAO Person 2 cited the Standard Lumber, Nye Uniform and Cutler Sports Apparel fires as examples in which this procedure was followed. No witness, however, could remember an instance like this one in which fire fighters were summoned on an emergency callback basis in the early morning hours less than two hours before the start of their shift, nor was there any evidence that the practice described by Lt. Person 1 and FAO Person 2 was a fixed and established procedure mutually accepted by both Parties. For this reason, the Arbitrator has concluded that the Employer did not breach a "condition of employment" or a "general working condition" when it

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[6] See, e.g. Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements,"59 Mich. L. Rev. 1017 (1961). See also, Elkouri & Elkouri, How Arbitration Works (4th ed.) at 437-56 and sources cited therein.

[7] See, Celanese Corp. of Am., 24 LA 168, 172 (J. Justin, Arb., 1954).

[8] Ford Motor Co., 19 LA 237, 241 (1952). 10

called back the A shift fire fighters on the morning of March 10, 2005 and that, on the contrary, it acted within its managerial prerogatives in doing so on that occasion.

As regards the question of the appropriate compensation for the A shift fire fighters who were called back, the Union argues that Article 15, Section 4 (B) requires that the Employer compensate personnel who are "called to work at a time other than [their] scheduled work shift" the greater of four hours pay at their regular pay rate or their actual hours worked at overtime rates. The City, in turn, argues that inasmuch as A shift employees were called back to work at a time that was "continuous with [their] scheduled work," they were entitled only to compensation at overtime rates for their actual hours worked.

In the opinion of the Arbitrator, however, the language of Article 15 (4)(B) contemplates that personnel summoned to work at times other than their regular duty hours are entitled to the greater of four hours of pay at regular rates of pay or at overtime rates for actual hours worked and that the "continuous with [their] scheduled work" language applies only when they continue to work after their normal duty hours have ended. In this instance, of course, A shift fire fighters were unquestionably "called to work at a time other than" their regular working hours and, thus, were presumptively entitled to the greater of the two alternative amounts of compensation. In his many years in the Department, Chief Person 3 could remember no instance in which fire fighters were limited to compensation for actual hours worked when they were summoned to work before their shifts started. As importantly, the implementation of the City's interpretation of the "continuous" language of Article 15 (4)(B) would essentially swallow the general rule by affording the Employer the opportunity to limit the wages of fire fighters any time they were called back at a time contiguous with their regular working hours. For these reasons, the Arbitrator has concluded that the Employer breached Article 15 (4)(B) by failing to grant to A

shift employees the greater of four hours of work at straight time or the number of hours actually worked at overtime rates. Consequently, the Award in this matter will direct the Employer to make A shift personnel whole for the greater of four hours of pay at their regular pay rates or actual hours worked at overtime rates.

AWARD:

For the forgoing reasons, the grievance is denied in part and sustained in part. The Employer did not violate Article 30 of the contract by electing to call back A shift personnel on the morning of March 10, 2005. It did, however, violate Article 15 (4)(B) of the contract by compensating those A shift fire fighters at overtime rates for their actual hours worked rather than the greater of that amount or the pay resulting from four hours of work at regular pay rates. Thus, the Employer shall make whole those A shift personnel called back to work on March 10, 2005 for the greater of those two amounts.

The Parties shall confer with one another to determine the actual amount due and owing to the affected personnel as a result of this Award. In the event the Parties are unable to reach agreement regarding that amount, the Arbitrator will make himself available to resolve any differences.

Robert A. McCormick

Arbitrator

May 1, 2006