FF 7/8/91

MICHIGAN EMPLOYMENT RELATIONS COMMISSION
STATUTORY FACT FINDING TRIBUNAL

1-90

In the matter of fact finding between:

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 893

- and -

MACOMB COUNTY ROAD COMMISSION

MERC Case #90 G-1119 /

FACT FINDER: Richard Potter

HEARING: 6/25/91

APPEARANCES:

For the Union:

Lloyd Stage - Staff Representative
Peter Lucido - Local President
John Saile - Sign Shop

For the Employer:

David Comsa - Council for the Employer
Richard Morsette - Assistant Superintendent
Bo Kirk - Assistant Personnel Director
William Cross - Personnel Director

Macomb County Road Commission

INTRODUCTION:

The last agreement between the parties expired on October 6, 1990. According to the parties, between July 9, 1990 and May 7, 1991 they conducted 32 bargaining sessions, including six sessions with state mediator, Leon Confield.

On July 24, 1990 the parties agreed to a set of bargaining ground rules which included as Item 7:

Non-economic proposals shall be resolved prior to discussion of the economic proposals, unless mutually agreed otherwise.

When the parties reached impasse on a series of non-economic issues, the employer filed for fact finding on March 1, 1990. The case was assigned to the undersigned on April 30, 1991, and a prehearing conference call took place on May 28. The hearing was held on June 25, 1991, at the Central Michigan University office in Mt. Clemens.

The parties have reach impasse on the following Articles:

Article 7: Stewards and Alternate Stewards (Representation)

Article 9: Grievance Procedures

Article 10: Promotion of Productivity and Efficiency

Article 24: Authorized and Unauthorized Leave of Absence

Article 29: Job Assignment

Work Rules A and K

DISCUSSION OF ISSUES:

ARTICLE 7: Stewards and Alternate Stewards (Representation)

The employer has proposed two changes to Article 7:

1. Delete the last sentence of paragraph C, which reads "Any alleged abuse by either party will be a proper subject for a special conference."

2. Delete the last sentence of paragraph D, which reads "Provided, however, that a shift continuation established to be of two hours or less will not require a work crew change unless the crew has returned to the service center prior to the shift continuation." Add the sentence: "Provided, however, that a shift continuation established to be of three hours or less will not require a steward or alternate steward unless the crew has returned to the service center prior to the shift continuation." Neither party addressed the first suggested change.

The reason for the second proposed change has little to do with the subject of stewards but rather is related to the manner in which overtime is apportioned. The basic contention of the employer is that there are two ways in which overtime is assigned. Article 31: Overtime Work Requirement and Overtime Equalization, generally discusses overtime, the obligation of the employer to equalize overtime, how it will be apportioned by classification and service center and the procedures by which employees will be called in for overtime.

The employer believes that Article 31 does not (or should not) obtain when a crew is working on a project and it is determined that overtime will be necessary for the crew to finish that project. In this situation, which is referred to as "shift continuation overtime" (hereinafter referred to as SCO), the employer believes that the crew simply continues to work and the crew is not required to be changed. The one exception, the employer contends, is that after two hours, if a steward is not present on the crew working overtime, then one of the crew members must be replaced by a steward, if one is qualified for any of the classifications working.

The employer's contention is supported by the fact that all the language in Article 31 refers to "calling in" employees and no mention is made of overtime that is worked as a continuation of a normal shift. Moreover, Paragraph E of Article 31 states that "Crews returning to the division one-half (1/2) hour or less prior to quitting time and sent out on overtime shall be reorganized according to the equalization of overtime chart." This would indicate that crews sent out to work overtime over 1/2 hour prior to quitting time would not have to be reorganized.

The employer submitted a summary of the language from contracts of other road commissions, which indicated that several commissions did treat SCO

overtime differently than call-in overtime. However, there was no uniformity in the practices of the various commissions.

The employer was not able to state what the actual practice was currently. The personnel director and assistant personnel director said the employer's position defined the way overtime should be apportioned, but it was likely that variations existed and that some service centers apportioned overtime in accordance with the union's position.

Regardless of current practice, however, the employer believes SCO overtime does not require the reorganization of the crew except for the addition of a steward. Therefore, the new language is offered to make it's position clear.

The union proposes the following language change:

1. Amend Paragraph "A" to reflect the addition of an eighth representative Service Center: "Heavy Construction Unit."

2. Add the following language as Paragraph "B" and re-label the remaining paragraphs as appropriate:

> B. A full-time Local 893 President classification shall be created. This officer shall be paid forty (40) hours per week at a rate of pay equal to his present classification by the EMPLOYER. He shall also have full seniority rights and receive all fringe benefits paid by the EMPLOYER. He retains the right to return to his present classification upon vacating his UNION office. The Local 893 President shall be available to the Macomb County Road Commission forty (40) hours per week.

No documents or testimony was submitted directly on this issue by either party, other than some testimony by Mr. Peter Lucido, President of Local 893, as to the presence of full time presidents in some other county road commissions. At the time, however, he was testifying about the length of time to process grievances (Article 9).

The union's position on the way overtime is and should be apportioned differs substantially from that of the employer. The union position is that SCO overtime exists for up to two hours beyond the end of a shift and that Article 7 then requires that the crew be entirely reorganized and that those who have the least accumulated overtime be called in to work.

The union president testified that currently overtime was apportioned as the union position outlined at his center and at all others as well. His uncontroverted testimony was that the reason the two hour limitation was incorporated in Article 7 rather than Article 32 was that in earlier contracts the union requested the stewards be given preference for overtime and the employer wanted relief from the requirement that overtime occurring immediately at the beginning of the shift be equalized and that the compromise of two hours of SCO overtime, that could be worked by those currently on the job, was established.

The strongest argument in the union's favor was an arbitration opinion written by arbitrator Elaine Frost dated July 20, 1990. In it, she found that the practice was that overtime was apportioned in accordance with the union's position.

The undersigned believes that the current practice is as stated by the union--that after two hours of working overtime after the end of a shift, the crew is reorganized on the basis of accrued overtime. The Frost opinion, the uncertainty of the employer witnesses and the unequivocal testimony of the union president all lead to that unescapable conclusion.

During his testimony, Mr. Lucido was asked if, according to the union's interpretation, the employer would be required to reorganize a crew if the employer judged that a crew could complete a job within two hours and continued the crew working, only to find that it would take 2-1/2 hours. To

which Mr. Lucido responded yes, the crew would need to be reorganized and if new crew members were called in, they would need to be paid a minimum of four hours of overtime because of the call-in requirement. The undersigned agrees with his interpretation.

However, this interpretation leads to some rather unreasonable situations. For example, with a slight misjudgment by a foreman, the employer could end up paying for four hours of overtime for each crewman to perform 15 minutes of work. This would undoubtedly lead the employer to conclude that it might be further ahead to violate the contract and not call in a new crew if the work would take less than two hours, since it might not be forced to pay call-in pay. At the very least, it wouldn't be forced to pay the time lost in changing shifts.

Therefore, it is recommended that the employer be granted the flexibility it requested, but that it be done in a more straightforward manner than suggested by the employer. (See specific language in Recommendation below.) However, the recommendation is not the windfall the employer may think. It still has the obligation to "equalize <u>all</u> overtime between employees in the same classification as nearly as possible on a monthly reporting basis." (Article 31). If used unwisely, this added flexibility could simply lead to greater inequality of overtime, more arbitrations and greater penalties for not apportioning overtime equitably. In a sense, the employer is granted greater flexibility at the expense of greater risk and greater responsibility.

Article 9: Grievance Procedure

The employer proposed three changes in this article:

1. The deletion of B(3), which states: "Any violations of the provisions of this agreement considered a policy grievance may be filed on behalf of the union by an official of the local union."

2. The deletion of the sentence in Article 9(B)6 that reads, "If no resolution results, a similar written notice shall be given each designated representative." The addition of the sentence, "If no grievance resolution results, the specific unresolved issue(s) and the specific contract article(s) at issue shall be reduced to written form and signed by the parties."

3. Article III(C)1 to be changed to: "Only unresolved grievances as determined according to Step II, (6), may be submitted to an umpire. The umpire shall limit his/her findings to the Article(s) and issue(s) agreed upon and signed at the grievance hearing."

No testimony was given by either party with regard to these proposed changes.

The union's proposal for Article 9 was related to the time limits for the grievance system. The union proposes to expand the maximum time from the end of Step 2 to arbitration from 75 or 105 days (depending on whether the grievance involves an employer liability or not) to 220 days or 250 days, respectively. The rationale for the union's position is that the internal AFSCME grievance system takes so long to get final approval for arbitration and the AFSCME arbitration department is so busy.

The employer argued that such an expansion of time was unnecessary.

While the undersigned is sympathetic with the fact that internal processing may be lengthy, the proposed time is simply too long.

Article 10: Promotion of Productivity and Efficiency

The employer proposed language subordinating seniority, service boundaries, overtime rights and work assignments in time of emergencies or in hazardous situations. The employer also is demanding deletion of Paragraph D, which reads: "If properly classified personnel are unavailable within the service center, an available qualified employee may be assigned work in either

a higher, lower or comparable classification, consistent with seniority."

Little testimony was offered by either party with regard to these proposed changes.

The union proposal served to limit the work a foreman could do in correcting a hazardous condition to that which could be done in 30 minutes. The arguments for this proposal centered around a single incident involving one foreman.

The arguments for these proposals are not convincing. In regard to the union's concerns, there is a provision in Article 3--Recognition of Bargaining Unit, to address such incidents.

Article 24: Leave of Absence Without Pay

Although this article formerly dealt with only authorized leave of absence, the employer has proposed adding language dealing with employee absence. The language proposed by the employer is as follows:

B. Unauthorized leave of absence shall be any time recorded as "zero time."

E. Unauthorized absence shall be subject to disciplinary action and/or discharge as provided as follows:

ABSENCE

1st Zero Time Occurrence = Verbal Warning;
2nd Zero Time Occurrence = Written Warning;
3rd Zero Time Occurrence = One (1) Day Suspension;
4th Zero Time Occurrence = Three (3) Day Suspension;
5th Zero Time Occurrence = Discharge.

These occurrences will be counted during any twenty-four (24) month period, which is defined to mean consecutive months, such as January to March, February to July, etc. If zero time is used for more than one (1) day at a time, the time off will count as one (1) occurrence if the days are consecutive.

At the hearing, the employer explained that an incident would be defined as absence of 15 minutes or more.

The union proposal was very similar, except it added two steps to the progression: counseling before an oral reprimand and a seven day suspension after the five day suspension, but before discharge. The union also proposed that three types of absences be exceptions to the policy: occupational illness and injuries, long and short term disabilities and lengthy illness and injury of a non-recurring nature.

Little testimony was given regarding the two proposals. Since this policy is, according to the employer, only to take effect after all vacation and sick leave is expended, the progression proposed by the employer, with the exceptions proposed by the union, appears reasonable.

Article 29: Temporary Assignment

By the time of the hearing, both parties had agreed to current language.

Work Rules:

The employer proposed changes to work rules A and K. The change to work rule A is to delete "involving moral turpitude" in the sentence "Has been convicted of a felony or misdemeanor involving moral turpitude." The employer stated that moral turpitude was subject to many interpretations and thus meaningless. The union argued that deletion of the phrase broadened the rule greatly by making any misdemeanor cause for discipline. The undersigned agrees.

The employer proposes dividing Rule K into two parts: K, which would deal with absence and refer to Article 24, and L, which would deal with tardiness. The proposal proscribes five automatic penalties ranging from a verbal warning at the first instance to discharge after nine instances. A single occurrence is considered clocking in six minutes after the beginning of the shift.

The union proposal on tardiness was very similar, but increases the progressive discipline steps to seven. The union proposal allowed up to 13

tardies to invoke discharge while the employer's proposal allows nine.

RECOMMENDATIONS:

1.(a) Add the following paragraph to Article 31.

I. Subject to paragraph E, above, the employer may continue a crew on an assigned job beyond the normal quitting time without reconstituting the crew according to accrued overtime. However, in doing so the employer still has the obligation to equalize overtime in accordance with the introductory paragraph, above.

(b) Delete the last sentence of Article 7D and add:

If the shift continues beyond two hours, the employer is obligated to call in a steward or assistant steward, if he or she can perform the work, to replace the crew member with the greatest accumulated overtime, or to add the steward to the crew.

Note: The employer should read the discussion of this issue carefully.

2. Add the following sentences as the fourth and fifth sentences in Article 9C(1)a. "The grievance must be filed with the umpire within forty-five (45) days of the grievance conference. Grievances not filed within 45 days will also be considered concluded."

3. Article 10: Retain current language.

4. Add the following paragraph to Article 24:

E. Unauthorized absence shall be subject to disciplinary action as follows:

1. When an employee has exhausted sick and vacation time, he or she will be considered to have zero time. An absence is considered to be an absence of 15 minutes or more.

2. 1st zero time absence - verbal warning.
2nd zero time absence - written warning
3rd zero time absence - 1-day suspension

4th zero time absence - 5-day suspension
5th zero time absence - discharge

Occurrences shall be counted during any 24-month period, which is defined as any combination of 24 consecutive months. An absence of consecutive days will count as one occurrence.

3. The following absences will not count as occurrence for the purpose of this article: absence because
(1) of on-the-job injury
(2) of long or short term disability
(3) illness or injury of a continuing, non-recurring nature (heart disease, cancer, serious injury, etc.)

5. Change Work Rule K to read:

"Compiles excessive unexcused tardiness, which is defined as late by six minutes or more, within any twelve consecutive month period, which will be subject to the following penalties:

1 tardy = verbal warning
2 tardies = written warning
5 tardies = 1-day suspension
7 tardies = 3-day suspension
9 tardies = 5-day suspension
11 tardies = discharge

7.8.91
Date

Richard H. Potter
Fact Finder

Exhibits

No.	Description	Submitted by
1	Summary of Bo Kirk's notes	Employer
2	Summary of employer's position	Employer
3	Summary of union position	Union
4	Collective Bargaining Agreement, 1988-1990	Joint
5	Overtime usage report	Employer
6	Average time to arbitrate	Employer
7	Kandler arbitration, 7/20/90	Union
8	Article 10 from 1986-88 contract	Union