OFFICE OF COLLECTIVE BARGAINING
CITY OF NEW YORK
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In the Matter of the Impasse

Between

DISTRICT COUNCIL 37, AFSCME,

DOCKET NO. I-190-87

Respondent - Union

IMPASSE PANEL'S OPINION AND RECOMMENDATION

And

THE CITY OF NEW YORK (Department of Environmental Protection),

Petitioner - Employer

RE: SLUDGE BOAT OPERATORS
x----------x
BEFORE: DAVID N. STEIN, ESQ., IMPASSE PANEL

APPEARANCES:

FOR THE CITY OF NEW YORK: ROBERT W. LINN, ESQ. DIRECTOR, MAYOR'S OFFICE OF MUNICIPAL LABOR RELATIONS, BY: MR. MICHAEL F. MCDONALD, and FRANCES MILBERG, ESQ. GENERAL COUNSEL, MAYOR'S OFFICE OF MUNICIPAL LABOR RELATIONS, BY: SHARON GALLO - KOTCHER, ESQ.

FOR DISTRICT COUNCIL 37, AFSCME: ROBERT PEREZ - WILSON, ESQ., GENERAL COUNSEL, BY: JOEL GILLAR, ESQ., ASSISTANT GENERAL COUNSEL and MR. DENNIS SULLIVAN, ASSOCIATE DIRECTOR, RESEARCH AND NEGOTIATIONS

TIME, DATE AND PLACE OF HEARING:
SEPTEMBER 3, 1987, 10 A.M., OFFICE OF COLLECTIVE BARGAINING, 110 CHURCH ST., NEW YORK CITY

I M P A S S E P A N E L ' S O P I N I O N

Pursuant to the New York City Collective Bargaining Law and the Rules and Procedures of the New York City office of Collective Bargaining, the City of New York (the City), by its office of Municipal Labor Relations (OMLR), and District Council 37, AFSCME (the Union), designated me to hear and recommend what should be the number of hours in the workday and the workweek of certain City employees who work on so-called "sludge" boats operated by the Department of Environmental Protection.

At the outset of the hearing, the Union and the City

agreed to submit this controversy to me in the form of the following issue:

> What shall be the maximum number of hours per week and per day for sludge operators in the relevant bargaining unit?*

Throughout this proceeding , both the City and the Union were represented by counsel, presented documentary evidence, examined and cross-examined witnesses and presented argument in support of their respective Positions. Upon the record so produced, I find the following to constitute the significant facts in this impasse.

Sludge is a by-product of the treatment performed by the City of New York on raw sewage. Since the inception of the sewage treatment Process, the City has disposed of the sludge by transporting it to the ocean and dumping it. The City performs this so-called it ocean dumping" with vessels specially designed for the purpose, which are City owned and operated, and staffed by City employees.* The City currently owns four such vessels.

The sludge boats take on the sludge at twelve of the fourteen waste treatment plants operated by the City. The sludge from the remaining two plants is pumped through pipelines to other plants. The vessels generally operate two trips a day during a twelve hour shift. Each plant requires removal from one to four or five times per month.

The work schedule for the City employees who work on these sludge vessels has been three days per week consisting of thirteen

*These sludge vessels are three hundred feet long, and resemble a tanker.

hours and twenty minutes. Thus, the work week is forty hours.

The thirteen hour twenty minute day is comprised of approximately twelve hours on the boat, and one hour twenty minutes reserved for travel time, either at the commencement or the termination of the workday. The provision for travel time was necessitated by the frequent occurrence of a difference between the point from which the vessel departed at the beginning of the shift and the location where employees disembarked at the conclusion of the shift. Thus, the City had to allow for the time it took an employee, at the end of the shift, to be transported to his car, which had been left at the treatment plant where he had been instructed to report for work that day.

The City has one plant located in the Hunts Point Section in the Bronx; two plants in Manhattan: at W. 137th St. and the Hudson River, and on ward's Island, under the Triborough Bridge; three plants in Queens: in the College Point Section near the Whitestone Bridge, in the Rockaways on the southern shore of Jamaica Bay, and near Kennedy Airport; five plants in Brooklyn: located near Starrett City, near Coney Island in the Sheepshead Bay neighborhood; at Owl's Head Park near the Verranzano Bridge; in the Greenpoint section, and in the former Brooklyn Navy Yard. The two plants on Staten Island are on the Kill Van Kull at Port Richmond and in the Oakwood. Beach section.

In 1985, the federal Environmental Protection Agency, acting pursuant to the Marine Protection Sanctuaries and Research Act,

removed the location at which municipalities could dump, sludge from the twelve mile site to a location 106 miles offshore. The City was compelled to enter into a consent order which provided for a phase out of its use of the twelve mile site, and a phase in of the 106 mile location, as follows: ten percent of sludge to the 106 mile limit as of April, 1986; forty percent by June, 1987; seventy-five percent on August 1, 1987; and all of the sludge by November 20, 1987.

Were the City found to violate the terms of the consent order, it could result in a fine of ten thousand dollars per day. In addition, the City would be subject to a fine in a like amount were it to limit the production of sludge by electing to avoid the treatment of sewage.

As a direct result of its entry into the consent order pursuant to federal law, the City was compelled to completely overhaul its operation for the disposal of sludge. It is no longer possible for a sludge vessel to fill up with sludge, dispose of it at the twelve mile site and return for another load before the completion of the workday, as had been the former practice. Moreover, the City decided that the size of the vessels in its sludge fleet was too small to undergo the 212 mile round trip to the new site.

The City has contracted for the construction of four large oceangoing barges which are five times the size of the sludge vessels. At present, only two of the barges are available. In any event, the barges will be moored at or near one of the City's sewage

treatment plants, from which they will take on sludge. In addition, sludge vessels will deliver sludge from other plants to the barge at that location. Instead of going twelve miles out to sea, the sludge vessels will be confined to operate within the New York harbor. As of November 20, 1987, and as a result of the new scheme of operation, the sludge vessels will return at the end of each shift from the point of embarkation at the commencement of the shift, which will be Ward's Island.

Moreover, because the distances traveled by the vessels will have been appreciably decreased, it is anticipated that employees will spend less time in transit while on ship than previously. However, in order to remove the sludge accumulated at the treatment plants, and to account for transfer of the cargo of sludge from the vessels to the barge, the City must operate the sludge boats twenty-four hours per day.

The Coast Guard apparently prohibits employees to be scheduled more than twelve hour shifts. It is common, in the commercial operation oceangoing ships for employees to work two six hour shifts, interrupted by six hour rest periods. Such an arrangement requires that a vessel carry two full crews, and that one crew sleep while the other works. The employees in the bargaining unit vigorously objected, however, to any arrangement which would keep them on board for the extended periods of time mandated by such a work schedule.

For its part, the City has been sufficiently interested in retaining the employees in the bargaining unit, and in continuing the sludge operation under its aegis, to have sought to reach

agreement with the Union on a work schedule which meets the City's operational goals, and is satisfactory to the sludge vessel operators.

Beginning in 1985, the parties started to negotiate about the impact of the change to the 106 mile site. At first, the City entertained the possibility of refitting the small vessels for the longer trip, including the use of the double crew with each crew working the two six hour shifts. Because the parties were unable to make progress, the City was compelled to contract out the ten percent portion of the sludge operation which had to be transported to the 106 mile cite beginning April 1, 1986.

The focus of the bargaining then turned to what would occur when the entire operation was shifted to the 106 mile location on November 20, 1987, a date which is now at hand.

From April, 1987 through the hearing of this matter, the parties met eight times. The City initially proposed that the Operators work a seventy-two hour* week, in consonance with the commercial marine practice, which was described above. Under this proposal, employees would spend six days on board the vessel on alternate weeks. During t1ae intervening week, they would be off. The Union continued to vigorously oppose this captive time arrangement.

The City therefore altered its approach to various versions of a fixed twelve hour shift. The City's final proposal was that

*Maritime employees who work on board seagoing vessels are not subject to the overtime provisions of the Fair Labor Standards Act which require premium pay at time and one half for time worked in excess of forty hours in a given week.

it would compensate the employees for forty hours of work each week, but that the employees would actually work periods of three week "shifts" in which the first two weeks would consist of three twelve hour days, and the third week would consist of four twelve hour days. Thus, the sludge operators would work 120 hours over the three week period for an average of forty hours in each of three weeks. In addition, the City offered to guarantee that the employees would always be returned to the location from which they had embarked at the beginning of the shift. Thus, the daily one hour twenty minute paid period of travel time would be eliminated. That elimination is what necessitated the addition of the fourth twelve hour day in the third week of the work period to assure an average forty hour workweek.*

The City also offered the Union the option of three twelve hour days each week, with a consequent reduction in compensation to account for the reduced workweek. This, too, was turned down by the union.

Under cross-examination by the Union, the City's expert witness, Edward Wagner, Assistant Commissioner and Director of Waste Water treatment, who has been with the City's Department of Environmental Protection since 1961, conceded that vessels have occasionally been out for more than twelve hours at a time, therefore causing employees to work more than the twelve hour limit set by the Coast Guard. He distinguished, however, be-

*The City has continued the thirteen hour twenty minute day pending the outcome of this Impasse.

tween the advance scheduling of a shift in excess of twelve hours, and the extension of a shift due to unforeseen circumstances, such as heavy weather, to exceed twelve hours. In fact, Wagner pointed out, the Department has canceled a shift where it has reason to believe that weather or tidal conditions will force the employees to be on board one of the vessels for more than twelve hours.

Wagner also dismissed the use of three eight hour shifts during a daily twenty-four hour operation of the vessels. He stated that the City would lose valuable time through the additional embarkation and disembarkation occasioned by the use of an additional crew. He also projected decreased productivity as a result of having to ensure the full staffing of an additional crew for each vessel, as a full complement is required for departure.

It was at the hearing of this matter that the Union advanced the proposal, for the first time, that a workweek consisting of five eight hour days was the appropriate answer to the question posed to me by the parties. It was noted by the Union that the officers of the local to which the employees in the bargaining unit had very recently undergone a wholesale change when many of the former negotiators were removed pending imminent promotion to management. This new position, articulated for the first time before me, is, the Union advises me, the product of the infusion of "new blood" into the bargaining process, as well as the initiation of the employees involved into the new scheme of operations caused by the change to the 106 mile site.

Walter Boeko is the new chief negotiator from the bargaining unit designated to replace those who were about to be promoted to management positions at the time of the hearing. Mr. Boeko has been an able-bodied seaman for some thirty-five years, the first ten of which were spent on commercial ships on long term trips. About twenty-five years ago, he joined the City sludge boat fleet in the title of mariner.

In his experience as a seaman on cargo ships and oil freighters, Boeko testified that he worked eight hours per day in two four hour shifts which were separated by an eight hour break period.

When Boeko started working for the City in 1961, mariners assigned to work on the sludge fleet worked five eight hour days per week. During this period, mariners could do mutuals, i.e. one employee could arrange for another to substitute for him. At times, under this arrangement, some mariners would work sixteen straight hours. In 1975 or 1976, the City ceased permitting the employees to engage in the practice of mutuals. In 1982, Boeko agreed, the City changed the workweek of the mariners to three thirteen hour and twenty minute days, as previously described in this Opinion.

Boeko testified that about two weeks before this hearing, the City assigned him to the in-harbor operation. The new operation, he stated, involved several trips to and from the barge. On each trip, the mariners were required to open the valves to the boat, attach the lines to either the treatment plant, or the barge, depending on

whether the boat was taking on or unloading sludge, and again shut the valves when the operation was completed.

Boeko characterized the work associated with the twelve mile operation as relatively simple. Since it took three hours to reach the dump site, the employees were free to relax, and have some coffee while they performed routine maintenance duties. The boat dumped the sludge automatically by opening the tanks. Thus, the mariners only had to take on sludge twice a day.

Boeko described the in-harbor operation as constant work. Not only to the men take on the sludge, but it has to be pumped out into the barge. This means that the valves are loosened and tightened twice each trip, and, of course, there are many more trips, as the vessels are traveling within the harbor.

Moreover, Boeko indicated that the valves were never designed for the constant manipulation required by the new operation, and that in pumping out the sludge from tanks under either side of the deck, the employees had to exercise care that the boat did not list to one side or the other because too much sludge had been removed from a particular tank. This, Boeko testified, requires frequent manipulation of the valves by three or four men at a time. Boeko claimed that he was more fatigued after working eight hours under the new operational scheme than he had been after working twelve hours under the old set up. He maintained that this fatigue increased the chances of a serious accident, and that the twelve hour shift had become dangerous.

Boeko said that, until recently, the Department worked the mariners assigned to the midnight shift an eight hour tour of duty. In addition, he testified, the employees who work dockside, or in the shipyards, work an eight hour shift. The Union established, in addition, that employees who work on ferry boats, or in other marine titles, work a five day, forty hour, workweek. However, there was no evidence that the duties of employees in those titles were closely related to the duties of the seamen assigned to the sludge vessels.

The employees in question have been classified as serving in a physically taxing position by the City's Department of Personnel since at least January 21, 1981. As a result, they are eligible to retire at age fifty, after twenty-five years of service.

Mr. Boeko concluded his testimony by stating that while a workweek of three twelve hour shifts for the same pay was previously acceptable to the employees who work on the sludge vessels, after two weeks under the so-called "mosquito" operation, the same employees are willing to put in an extra two appearances each week by switching to the five day, eight hours per day, forty hour workweek.

On these facts, the Union argues that the employees subject to this impasse proceeding should have a normal workweek consisting of five eight hour days. The Union maintains that the evidence shows that for more than twenty years prior to 1982, the City worked employees on sludge vessels a forty hour weeks consisting of five eight hour days.

The Union adds that until recently, mariners assigned to the "graveyard" shift continued to work an eight hour day. The Union points to the fact that marine titles and ferryboat titles, both seagoing series, work five eight hour days during the workweek.

The Union notes that the employees in question have sought their positions out of a desire to have a regularized work schedule, and that the City has always had such a schedule. The Union stresses that its change in positions was motivated by its discovery of new information, i.e., the taxing nature of the new operation on the sludge vessel workers. The Union concludes that the position has become dangerous, and therefore, that a shorter workday is necessary.

By contrast, the Union maintains the City has been unable to demonstrate the necessity for the twelve hour day, or its claim that the twenty-four hour operation of the vessels by three eight hour shifts would be, of necessity, less efficient than by two twelve hour shifts. In this regard, the Union stresses that if the new conditions of employment causes by the juxtaposition of the twelve hour shift with the new operation were not dangerous, then its constituency would hardly be seeking two additional appearances a week under the five day workweek proposal.

The City, for its part, rejects the Union's insertion of the five day per week, eight hours day, as a demand during the eleventh hour of the negotiating process, as improper and unfair. It asks that I disregard the Union's position because of the

untimely nature of its proposal.

The City stresses that its own position starts with the premise that the in harbor work should not be contracted out, and should continue to be performed by the class of employees who had been carrying on this work since the City began disposing of its sludge by ocean dumping. Thus, the City has acted, it maintains, in the interests of job preservation.

Secondly, the City stresses that prior to 1975, when the mariners were able to work mutuals, employees frequently worked sixteen hour shifts. This, the City contends, explodes the Union's position that a twelve hour shift, even under the new and more difficult conditions, is impossibly burdensome to the employees.

The City stresses that the fact that its employees who work on ferry boats work an eight hour day is irrelevant, as the Union has not shown any similarity between the ferry jobs, and the jobs at issue in this dispute. The sole similarity is, the City argues, that both groups of employees work on City owned vessels.

The City notes that the eight hour day worked in the private sector occurs in a so-called captive time arrangement where the employees are on board for an extensive period, although they are off duty during much of that time. This is a configuration of the-workweek, which, the City points out, the Union has already rejected.

The City maintains that the schedule it proposes is

regular and periodic. Employees know when they are to work, and in two out of three weeks have four days between assignments, and in the third week have three days between assignments. The schedule promotes family life, the City concludes, because employees always have the opportunity to return home after each work day.

The City concedes that the position is physically stressful, but stresses, in turn, that the mariners may retire five years earlier than most civilian City employees because of the taxing nature of the position. The fact that these employees now have less down time, the City reasons, should not be held against it, since the City is entitled to expect that employees will work for the time for which they are paid. Moreover, the City maintains, the Coast Guard permits these employees to work a twelve hour shift. The City characterizes as speculative the Union's claim that the twelve hour workday is unsafe.

The City, citing the public interest and welfare provisions of the New York City Collective Bargaining Law, contained in the statutory criteria applicable to impasses, underscores the fact that its need to work the mariners a twelve hour day is rooted in the necessity to remove sludge as efficiently as possible in order to maintain its capacity to operate its sewage treatment plants. Its purpose, it says, is to assure clean water, and to avoid federal fines.

The City stresses that the twelve hour shift permits it to operate the vessels on a twenty-four hour basis, while limiting to the legal minimum the number of crew changes it must make. This decreases down time as well as the number of chances that there will be problems with obtaining the full complement of crew members for embarkation, the City concludes.

The City closes by pointing out that there is no longer any need for the thirteen hour twenty minute workday as it has committed itself to returning the employees in question to the same point from which they embarked at the beginning of the day at the conclusion of the shift. In order to insure, therefore, that these employees continue to be paid for the forty hour week, the City notes that they must work a fourth appearance every three weeks. The City refuses, it says, to pay employees the same salary for fewer hours.

In reaching a recommendation to the parties to resolve this dispute, I am required by law to consider the statutory criteria contained in the provisions of Section 1173-7.0(b) of the New York City Collective Bargaining Law, which states, as follows:

> (1) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work in New York City or comparable communities;

(2) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;

(3) changes in the average consumer prices for goods and services, commonly known as the cost of living;

(4) the interest and welfare of the public;

(5) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits, and other working conditions in collective bargaining or in impasse panel proceedings.

In this matter, of course, many of the criteria are irrelevant, as this dispute is not concerned with an entire collective agreement, but arises mid-term in an agreement because of the impact of a change in operations. Clearly, the only factor at issue here is the normal length of the workday and work week.

After applying those criteria which are relevant to the limited issue at hand, and after reviewing the facts and arguments submitted by the parties to this dispute in support of their respective positions, I conclude that the appropriate length of the workday should be twelve hours, and of the workweek, forty hours. This requires, therefore, the three week cycle of three appearances in each of the first two weeks of the cycle, followed by a week of four appearances, all consisting of the twelve hour workday, be recommended, as it would not be appropriate to provide for a reduced workweek for the same pay. The Union has already rejected a City offer which provided for a workweek

consisting of three twelve hour days at a ten percent reduction in pay to coincide with the ten percent reduction in hours, and, in addition, now takes the position that three twelve hour days for the same pay as the current forty hour work week is unacceptable.

The public interest and welfare mandates that the City remove and dispose of the sludge in accordance with federal law, and that it provides the cleanest possible water to its citizenry. It goes without saying that federal law or not, the public interest is served when raw sewage does not wash up on the beaches or foul the water near our shores.

The City has found that in order to meet these vital goals, it must be able to operate its sludge vessels at maximum efficiency on a twenty-four hour basis. It concluded, quite logically, that to impose three twenty-four hour shifts on the system would decrease efficiency, because added time would be required to embark and disembark a third crew, because the vessels would have to return to the point of embarkation an additional time and because there would be an increased load in ensuring that a fully staffed crew was available an additional time each day.

The Union has contended that the City has failed to document its reasoning. However, since the new operation will not be effective until November 20, there has been little opportunity to test the City's hypothesis. On the other hand, the Union has likewise failed to present any empirical proof which sustains its position that the its proposal of three eight hour shifts will match the efficiency of

the twice daily twelve hour shifts advanced by the City. In contrast to the City's position, however, the Union's proposed configuration of a twenty-four hour period lacks logical force. Given the deference which should be accorded the City to design and operate this new system at its inception, I cannot compel it to revise the operation in the form advocated by the Union.

The health and safety issue raised by the Union is based on insufficient experience, and is not supported by any evidence other than Mr. Boeko's testimony that the new operation is more strenuous. I do not quarrel with his opinion, but I cannot equate stress, standing alone, with a greater risk to health and safety. In addition, it is probable that Mr. Boeko will adapt, in short time, to the additional work he has associated with the new operation. In any event, I cannot recommend a change in the City's plans based on Mr. Boeko's two weeks of experience with the so-called mosquito operation.

Should a health or safety issue emerge which is subject to documentation, this decision will not preclude the Union from raising it in the normal course of contract bargaining.

I note, as well, that the employees who serve in the ferryboat and marine titles which were cited by the Union as comparable, and who work a forty hour week, are not relevant with respect to the length of the workday and workweek, as the sludge vessel operators do not travel routes of uniform length. Moreover, the Union has not shown that the same need for optimal efficiency exists with respect to the

operations of the ferries as it does to the sludge vessels. Finally, I find that the eight hour day in effect prior to 1982 is too remote both in time, and from the City's present operational needs, to be accorded significant weight in this determination.

F I N D I N G S A N D R E C O M M E N D A T I O N S:

1. The public interest and welfare require that the City operate its fleet of sludge vessels on a twenty-four hour per day basis, with the maximum flexibility permitted by law.

2. The Coast Guard permits a shift of twelve hours, at a maximum.

3. The length of the workday for mariners and other employees who work on the sludge vessels should be twelve hours.

4. The salary received by mariners and other employees who work on the sludge vessel should not be reduced as a result of the new operation caused by the removal of the dumping site to 106 miles off shore.

5. Employees generally should not receive a reduction in work hours for the same salary as a result of a change in operations.

6. The City will disembark crews of sludge vessels at the same point from which they embarked at the commencement of the shift, therefore permitting the elimination of the daily one hour twenty minute period previously accorded mariners and others employed on the sludge vessels for land transit, either prior to, or subsequent to the shift.

7. The City's proposal for a three week cycle in which employees on sludge vessels worked three twelve hour days in each of two weeks, and four twelve hour days in the third week should be implemented as the only method to maintain salaries at current levels, maximize efficiency and productivity and achieve the operational goals of the new so-called mosquito operation for the disposal of the sludge by-product of the City's waste treatment plants.

8. City employees in mariner titles not assigned to sludge vessels and in ferryboat titles who work an eight hour week are not comparable to the employees covered by this impasses proceeding, because of the nature of the mission and responsibility of the latter group.

Dated: Maplewood, New Jersey
October 19, 1987

DAVID N. STEIN, ESQ.
IMPASSE PANEL

DAVID N. STEIN, impartial arbitrator, affirms in accordance with Article 75 CPLR that he is the impartial designated by the City of New York and District Council 37 to serve as a single person Impasse Panel pursuant to the New York City Collective Bargaining Law and the Rules of the Office of Collective Bargaining to resolve a dispute between D.C. 37 and the City concerning the normal workday and workweek of employees assigned to work on sludge vessels. The above constitutes his Opinion, Findings and Recommendations in said matter.

Dated: Maplewood, New Jersey
October 19, 1987

DAVID N. STEIN