SUPERVISORS PERFORMING BARGAINING UNIT WORK AND THE SIGNIFICANCE OF "EMERGENCY" AS A JUSTIFICATION

Many Collective Bargaining Agreements utilize the word "emergency" to define conditions under which supervisors may perform work contractually reserved for bargaining unit employees.

> *EMERGENCY is defined as a sudden, generally unexpected occurrence or set of circumstances demanding immediate action. Any sudden or unforeseen situation that requires immediate action. (Webster's New World Dictionary, Second College Edition, 1978.)
>
> **EMERGENCY is also defined as a sudden, unexpected happening or unforeseen occurrence or condition, perplexing contingency, or complication of circumstances, a sudden or unexpected occasion for action, a pressing necessity. (Black's Law Dictionary, Fifth Edition, 1979)
>
> Other terms often used to characterize or define emergency in Agreements include:
> ... an act of God, uncontrollable by mortals
> ... threatening to life, limb, property, or process, or threatening to the continuity of operations or service.

Supervisors who claim that their performance of work normally reserved for bargaining unit employees is being done under the emergency clause may have the burden of proving the applicability of one of the above terms or considerations. The proof may require a preponderance of evidence sufficient to convince an arbitrator, with any doubt likely to be resolved in favor of the employee.

Another term which may justify supervisory performance of bargaining unit jobs in some Collective Bargaining Agreements involves "TRAINING," where the supervisor is either allegedly "training" an employee or where the supervisor is being "trained".

Supervisors who claim their efforts were justified under a training clause may, if challenged, similarly have the burden of proving the applicability of the term "training" or they might have to prove:

A) there was a need for training,
B) the equipment or process was new or innovative, thus requiring training,
C) the supervisor or the employee involved did not already possess the skills or techniques being learned.

A commonly utilized definition for the word "train" is "to subject to certain action, exercises, etc., in order to bring to a desired condition; to guide or control the mental, moral, etc., development of; to instruct so as to make proficient or qualified." (Webster's New World Dictionary, Second College Edition, 1978.)

If the supervisor alleges "training" as the reason for supervisory performance of bargaining unit work, it would be desirable to have in the "trainee's" records some form of brief written observation or evaluation of the training done. If the training was intended to increase the supervisor's skill or proficiency, at least a few notes to that effect in the supervisor's personal log is desirable.

If the supervisor does a task under the claim of "TRAINING," then he/she should, in good faith, be engaged in a training activity and there should be some reasonable standard or expectation for the training to ultimately produce a trained employee to perform the task. Repetitive use of the training justification waters down the good faith intent and damages the supervisor's credibility, especially if the training is done when no employee is present.

Often the supervisor's performance of bargaining unit employee work is justified as a result of a "CONTINGENCY CREATED BY A BARGAINING UNIT" employee, which is, in effect, an extension of the "EMERGENCY" principle. A "contingency" is often defined as "some thing or event which depends or is incidental to another." (Webster's New World Dictionary, Second College Edition, 1978.) Some examples of such contingencies may include:

... refusal by an employee to do a job, without acceptable cause, and the unavailability of any other employee to do the job in a timely manner,
... a work stoppage or interruption of work created by employees,
... injury or illness or absence of an employee and unavailability of any other employee to do the job in a timely manner.

Under such contingencies, it is appropriate for the supervisor to take steps concurrently with performing the job to obtain the assistance of another employee or to obtain a replacement employee.

In some cases where a specific piece or amount of work is minimal or insignificant and doesn't alter the employee's job security or deprive the employee of employment (or wage-earning opportunity), the supervisor may justify supervisory performance of the job by the "deminimis principle." This principle implies, in effect, that the work was trifling and immaterial, and that the matter is so trivial that it should not be a matter for dispute or argument.

If no bargaining unit employee was readily available when the "deminimis" or trivial task was performed, the triviality appears to take on added significance in so far as justification for the supervisor's actions are concerned.

The supervisor should consider, however, that if the job was indeed so trivial, could it possibly have waited until a bargaining unit employee was available to perform the task.

The "deminimis principle," if overworked, will be seen ultimately as an excuse of the supervisor. Likewise, repeated performance by the supervisor of a specific job or task "waters down" the "deminimis" claim.

The supervisor should not feel that an individual employee can waive the employee's rights or the union's rights to any job covered under the Collective Bargaining Agreement. The supervisor and the bargaining unit employee cannot agree to allow the supervisor to do bargaining unit work or the bargaining unit employee's job. To so agree would violate a union security clause; and it is up to the union, as the bargaining agent, not each individual employee, to make that decision. In effect, if the employee were to agree to allow the supervisor to do bargaining unit work, the employee would be waiving the union's rights under the union security clause, and this, of course, is not permissible under the Collective Bargaining Agreement.

The issue most often defined during arbitration hearings in "supervisors performing bargaining unit work" cases is job security. Supervisors should not fail to realize that a major concern to many employees is pride in their work, and the acts by supervisors to perform work normally done by employees may be interpreted as a "slap in the face" or as being disrespectful to the employee. It is very difficult for the union to thusly define this issue during an arbitration hearing however, as it does not create as convenient a remedy (pay for work not performed), as does the job security issue.

Repeated violations or abuses by the supervisor may lead to more severe restrictions and possibly stiffer sanctions in future renewal Agreements.

In serious, repeated abuse cases, unions have resorted to court orders requiring the company to "cease and desist" the violation of Collective Bargaining Agreement union security clauses. Violations of such court orders generally carry with them stiff financial sanctions against the employer.

Major factors which may support union grievance positions include:

... if bargaining unit employees are laid-off during the period when the work was performed,

... if the manpower complement is lower than normal, for any reasons,

... if job bids have not been expediently filled, and if work performed is within jurisdiction of those bids,

... if the supervisor received any additional compensation for the performance of the job.

Supervisors should not be discouraged by the above considerations from assisting employees on especially demanding or complex jobs or from performing the jobs in dispute when such performance is necessitated by or appropriate under the Collective Bargaining Agreement or when such performance is necessitated by compelling production or personnel needs.