

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**GRAPHIC COMMUNICATIONS INTERNATIONAL
UNION LOCAL 577-M, Complainant,**

vs.

S & M ROTOGRAVURE SERVICE, INC., Respondent.

Case 1
No. 56543
Ce-2189

Decision No. 29419-A

Appearances:

Murphy, Gillick, Wicht & Prachthausen, by **Attorney George F. Graf**, 300 North Corporate Drive, Suite 260, Brookfield, WI 53045, appearing on behalf of the Complainant, Graphic Communications International Union Local 577-M.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Jack D. Walker**, Suite 600, Insurance Building, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, WI 53701-1664, appearing on behalf of the Respondent, S & M Rotogravure Service, Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel J. Nielsen, Examiner: On June 4, 1998, Graphic Communications International Union Local 577-M (hereinafter referred to as the Union or the Complainant) filed a complaint of unfair labor practices alleging that S & M Rotogravure Service, Inc. (hereinafter referred to as the Company or the Respondent) had violated Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA) by refusing to submit a grievance to binding arbitration as provided in the collective bargaining agreement. On June 19, 1998, the Company filed an answer, denying any unfair labor practice, and asserting that the underlying grievance had been settled and withdrawn, and that arbitration was thus precluded by the doctrine of accord and satisfaction, release, and waiver and estoppel.

No. 29419-A

The Commission assigned Daniel J. Nielsen, an examiner on its staff, to hear the case. A hearing was convened in New Berlin, Wisconsin, on September 18, 1998. The parties engaged in pre-hearing discussions, and ultimately agreed that the Examiner should hear the unfair labor practice case and the underlying grievance, acting in a dual role as Examiner and Arbitrator in a consolidated proceeding. In the event that the Examiner found that arbitration was required, he would simultaneously issue an Award in his capacity as arbitrator of the dispute. The September 18th hearing was adjourned to October 3, at which time the parties presented such testimony, exhibits and other evidence as was relevant. Post-hearing briefs were submitted and exchanged through the Examiner on November 4, 1998, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the applicable provisions of the statute, and the record as a whole, the Examiner makes the following

FINDINGS OF FACT

1. That Graphic Communications International Union Local No. 577-M (hereinafter referred to as the Union or the Complainant) is a labor organization maintaining its principal offices at 633 South Hawley Road, Milwaukee, Wisconsin. Christopher Yatchak is the Union's President, and Gene Holt is the Vice-President. Todd Ockwood and Donn Koglin are stewards for the Local at S & M Rotogravure Service, Inc.

2. That S & M Rotogravure Service, Inc. (hereinafter referred to as the Company or the Respondent) was, at times pertinent to the complaint, an employer engaged in the business of photo-engraving, with its principal offices located at 2650 South 166th Street, New Berlin, Wisconsin. Paul Peterson is the Company's President, Peter Gross is the Company's Vice-President and Dave Puzach is the Company's Electronics Coordinator.

3. The Company and the Union are parties to a collective bargaining agreement for the period from April 1, 1995 through March 31, 1999. Among the provisions of the contract are clauses dealing with hours of work, overtime and grievance processing:

SECTION 3 - JURISDICTION

. . .

3.3 Following are the recognized branch classifications covered by this contract:

**GRAVURE: PHOTOGRAPHY
RETOUCHING
STRIPPING**

**LAYOUT-PROGRAMMING
FINISHING
CYLINDER MAKER
PROOFING
SCANNER OPERATOR
ELECTRONIC ENGRAVER
SYSTEMS OPERATOR**

and any others which may be practiced in connection with foregoing.

. . .

SECTION 8 - HOURS

8.1 The hours of work shall be equally divided into five (5) consecutive shifts, Monday to Friday inclusive, and shall constitute a week's work as follows:

DAY SHIFT (1ST SHIFT).....	35
NIGHT SHIFT (2ND SHIFT).....	33-3/4
NIGHT SHIFT (3RD SHIFT).....	32-1/2

8.2 The hours for each shall be established within the following periods:

DAY SHIFT (1ST SHIFT)	BETWEEN 7:30 A.M. AND 3:00 P.M.
NIGHT SHIFT (2ND SHIFT)	BETWEEN 3:00 P.M. AND 10:15 P.M.
NIGHT SHIFT (3RD SHIFT)	BETWEEN 10:15 P.M. AND 5:15 A.M.

For purposes of this section, the shift commencing at 10:15 p.m. Sunday shall be considered Monday; the shift commencing at 10:15 p.m. Monday shall be considered Tuesday, etc.

8.3 All schedules of working hours shall be consecutive - except for a luncheon period as hereinafter provided - and uniform for all persons employed on such shifts. On nights which precede a holiday the regular hours shall extend to the usual hour of quitting.

8.4 A uniform regular interval of not less than one-half hour shall be allowed for luncheon on each shift. In no case shall this luncheon period be considered the time of the Company.

8.5 After starting for the day or night no employee shall receive less than a full shift's pay in conformity with the regular established hours being observed

except in the event of interrupted production caused by explosion, fire or act of God ... and except in instances where the employee voluntarily requests to be excused for personal reasons.

...

SECTION 10 - DIVISION OF WORK

10.1 In the event of overtime in any branch classification making it necessary to operate for more than a regular scheduled workweek, then the Company shall divide the available overtime as equally as possible among all employees including the foreman in that branch classification.

Further, to help equalize overtime the Company will make a good faith effort to cross-train employees within each branch classification to insure that overtime will be shared equally amongst all employees within a particular branch classification.

10.2 A foreman may work overtime on non-production work when there is no production overtime in that branch classification. A foreman may also correct minimal errors found on non-production overtime.

10.3 Should conditions warrant a reduction of working hours, the Company shall designate the number of hours of work. At its option, the Company may close for one day a week on the first or last day of the week or reduce its working schedule uniformly for each work day provided such reduction per day or per week shall affect each branch classification separately.

Notice of any change in the schedule of hours shall be posted prior to 12:00 noon of the working day before the day that such change becomes effective.

In no instance shall hours be reduced to either less than six (6) hours per day or 30 hours per week or four seven hour days per week as described above or 28 hours per week in this option. When hours are reduced to six (6) hours per day, the hours shall be consecutive without a lunch period. Changes of working schedule shall be limited to one change per calendar week except when returning to regular shifts.

10.4 Both parties agree the intent and purpose of 10.3 above is to implement a share-the-work principle ... it is therefore intended that a reduced schedule of fifteen (15) working days shall be instituted prior to extended layoffs.

...

SECTION 12 - OVERTIME

12.1 Overtime shall be permitted when necessary. The refusal of any employee to work overtime shall not be deemed a breach of contract, nor shall any employee be disciplined or discriminated against for such refusal. Overtime rates shall be on the following basis:

a) For each of the first two (2) hours worked in excess of the standard workday on any day from Monday to Friday inclusive, an employee shall receive one and one-half (1-1/2) times his hourly wage.

b) For the third and each additional hour worked in excess of such standard workday from Monday to Friday inclusive, an employee shall receive two (2) times his hourly wage.

c) For the first three (3) hours of work done on Saturday, an employee shall receive one and one-half times their hourly wage and two times their hourly rate thereafter.

d) For all work performed on Sunday, an employee shall receive two (2) times his hourly wage. (sic) and shall be guaranteed a minimum of two (2) hours of work.

e) For all work done on holidays, an employee shall receive two (2) times his hourly wage plus his regular full holiday pay, and shall be guaranteed a minimum of two (2) hours of work.

When an employee is asked to work Saturday and refuses, but, offers to work an extended shift Friday upon mutual agreement with the Employer. (sic) they shall receive one and one-half times their hourly rate for the first three (3) hours worked beyond their normal scheduled shift and two times their hourly rate thereafter.

12.2 All time worked before or beyond the regular shift shall be considered overtime irrespective of the time that such employee started that day.

a) Any employee who is tardy or for personal reasons voluntarily leaves the premises of the Employer and returns to work, the employee may at the Employer's discretion, continue to work in order to complete their regular shift at straight time.

12.3 All overtime earned shall be paid by computing the prescribed overtime rate on the basis of the employee's current regular wage rate.

. . .

SECTION 33 - STRIKES, LOCKOUTS AND GRIEVANCES

33.1 There shall be no strike, lockout or slowdown in the plants of the Employer covered by this Agreement during the term of the Agreement, industrial peace being deemed essential to the best interests of both parties.

. . .

33.5 In the event of disagreement as to the interpretation or application of any provisions of this Agreement or any charge by either party of any violation of the terms or provisions of this Agreement, the matter shall be taken up in the following manner:

a) The Shop Delegate and management of the Company will seek an amicable adjustment of the disagreement.

b) In the event of failure to adjust the matter. (sic) the issue shall be taken up by the representative of the Local Union and the management of the Company.

c) Should no settlement result within a reasonable time as provided in (b) above, then either party may submit such controversy in writing to a joint committee consisting of three (3) representatives from the Union and three (3) representatives from the Employer. Any person involved in the question at issue shall be heard.

d) If the joint committee is not able to arrive at a satisfactory settlement of such dispute within a reasonable time, either party may request the matter be submitted to an impartial arbitrator, then a joint request will be made to the Federal Mediation and Conciliation Service to submit the names of seven (7) qualified arbitrators. Upon receipt of such list of arbitrators the parties shall alternately delete one name from the list, the person whose name remains on the list after six (6) names have been stricken shall be the arbitrator. The decision of the arbitrator shall be final and binding on all parties and the expense of the arbitrator shall be borne equally by the Union on the one hand and Employer on the other hand.

The jurisdiction of the arbitrator shall be limited to those matters concerning the meaning and application of this Agreement and its amendments.

. . .

4. The contract recognizes various branch classifications, including that of Systems Operator. Systems Operators work on various platforms, which at the time of this grievance included the Contex, the Combi (also referred to as the Cromacom) and the Macintosh. Employees are primarily assigned to one of these platforms, but are cross-trained on one or more of the others. In early 1995, Systems Operator Donn Koglin, who had been primarily assigned to the Contex, asked Dave Puzach to let him cross-train on the Macintosh.

5. For several years, Koglin had questioned the distribution of overtime in the shop. In December of 1996, Koglin initiated a grievance contending that he had not been given an equal opportunity for overtime among the employees in the Systems Operator branch classification. Union President Chris Yatchak and Company President Paul Peterson exchanged correspondence about the matter throughout the first half of 1997, without coming to any resolution.

6. On September 4, 1997, a Union team of Yatchak, Koglin, Todd Ockwood and Gene Holt met with Company representatives Peterson and Peter Gross to discuss the grievance as required by the grievance procedure. The men talked about resolving the issue by having the three platforms treated separately for overtime distribution, with the Company posting overtime information on a weekly basis starting on October 1st, so that employees could monitor how overtime opportunities were being distributed. The Company asked Yatchak to draft language detailing how the system would work and prepare forms to be used to report overtime.

7. Later in the day on the 4th, Peterson and Gross met with Dave Puzach and told him they had reached a settlement with the Union that would require him to start compiling records of overtime offers, refusal and time worked, and posting the information on a weekly basis. Puzach passed this information along to the line supervisors, and told them they would have to start submitting weekly reports of overtime offers. Prior to this time, Puzach had been compiling this information for the Systems Department, but not for the engraving departments.

8. Approximately one week after the grievance meeting, Yatchak, Ockwood and Koglin met to try to formulate language that would put the proposed system into effect.

9. Yatchak contacted Scott Soldon, the Union's attorney, and directed him to contact the Company and advise them that the Union would pursue arbitration of Koglin's grievance if a satisfactory settlement could not be worked out. Soldon sent a letter to Peterson, dated October 2nd:

We represent GCIU, Local 577-M. Mr. Chris Yatchak, the President of that Local Union, has asked me to write to you concerning the referenced matter.

We have reviewed the correspondence and the collective bargaining agreement. We understand that the parties have discussed a prospective resolution of this dispute. However, the Union cannot lawfully agree to modify the contract prospectively without resolving the past (and continuing) dispute concerning overtime distribution. Therefore, we herewith advise you, pursuant to Section 33.5 of the collective bargaining agreement, that the Union herewith refers this dispute to arbitration. We will hold the matter in abeyance to see whether a resolution can be achieved within the next 30 days.

During this 30 day period, the Union wants to make a final effort to resolve the past discrepancies in overtime distribution. Under the current collective bargaining agreement, the Company must divide the available overtime within a branch classification “as equally as possible among all employees including the foreman in that branch classification.” Section 10.1. While the Union may be willing to consider the principle of separating particular platforms (e.g., the MAC, the Context, and the Cromacom) into separate classifications for overtime on a prospective basis, while retaining branch classification seniority for purposes of layoff and recall, the Union cannot lawfully do so without resolving the past.

In order to intelligently resolve the past, the Union must have access to Company records (both for the past and the present) concerning which employees have received overtime, when they have received it, and when they have refused it. As we understand the Company’s position, it is that overtime has been properly distributed among employees, considering training requirements and the implementation of the different platforms, when viewed over a period of approximately 10 years. Unfortunately, no records have yet been produced to prove this assertion.

The National Labor Relations Board has repeatedly ruled that a union is absolutely entitled to receive information concerning payroll and overtime payments. The United States Supreme Court has stated that an employer’s duty to furnish information “extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement”. *NLRB V. ACME INDUSTRIAL CO., INC.*, 385 U.S. 432, 436 (1967). Thus, a union has a right to obtain information that it needs “to service and police the contract”. *VIEWLEX, INC.*, 204 NLRB 1080 (1973). Of course, this extends to information about wages earned. In the words of the Court of Appeals for the District of Columbia Circuit, “[A] union’s right to such information cannot be seriously challenged.” *WOODWORKERS LOCALS V. NLRB*, 263 F.2D 483, 484 (D.C. CIR. 1959).

Accordingly, we herewith advise you that Local 577-M again demands access to payroll information concerning what employees have received what overtime (or refused overtime) within the branch classification of Systems Operator during 1996 and 1997. Local 577-M would appreciate receiving this information no later than 10 days from the date of this letter. If you believe that reviewing information from other years would be helpful, feel free to provide that information, as well.

After reviewing this information, Mr. Yatchak will be in touch with you to advise as to the Union's settlement proposal. That settlement proposal can then be the basis for discussions about a resolution of the past, as well as for the future.

Alternatively, the Union will have no choice but to fulfill its duty to fairly represent its members by pressing the point through arbitration (with the possibility of a substantial monetary remedy for employees whose rights to overtime may have been violated), as well as demanding that the Company produce the appropriate records.

Please contact Mr. Yatchak within the next 10 days so that we can attempt to resolve this amicably without resort to arbitration or the National Labor Relations Board.

Thank you for your anticipated courtesy and cooperation.

10. After receiving Soldon's letter on October 6th, Peterson drafted a letter to Yatchak, confirming what he understood to be the terms of the settlement, and attaching a summary:

I am writing to confirm the settlement that we worked out at our meeting last month. At the meeting were Todd Ockwood, Donn Koglin and yourself for the Union. Peter Gross, Dave Puzach and I represented the Company.

Under the guide lines (sic) of Section 19.3 of our contract we discussed the new changing technologies which have been implemented or evolved to a point that branch classification contract wording should be amended.

We agreed that the "systems branch" would be redefined by job function, ie. (sic) Mac, Contex and Cromacom, for the sake of the distribution of overtime, however, the same three platforms would be considered one in regard to seniority. We also discussed the newly implemented "Helio-Com"

department, as new technology. We further agreed that the company would begin posting overtime information weekly. At the end of the meeting, all parties agreed and all shook hands on this agreement.

Effective October 1, 1997, the Company has put the agreement into effect. The first posting for the first week of October was done last week.

I had understood that the Union was going to draft your proposed wording for this agreed-upon change. Since I have not received a draft from you, I have prepared and enclosed a simple statement of your agreement. If you would like, after you have reviewed it, we can make this into a formal amendment to the collective bargaining agreement. If not, we will simply proceed on the basis of the agreement we reached at our meeting.

Thank you for your courtesy to us on this matter.

...

P.S. Chris,

I was puzzled to receive a letter from your lawyer after this matter was settled. I have asked our lawyer to respond.

...

S&M ROTOGRAVURE SERVICE INC./GCIU LOCAL 577M

CHANGES IN BRANCH CLASSIFICATIONS
PER SECTION 19.3 OF COLLECTIVE
BARGAINING AGREEMENT

1. EFFECTIVE OCTOBER 1, 1997, FOR PURPOSES OF DISTRIBUTION OF OVERTIME OF SECTION 10.1, THREE SEPARATE JOB CLASSIFICATIONS, NAMELY, MAC, CONTEX AND CROMACOM, WILL BE ESTABLISHED IN THE SYSTEMS DEPARTMENT. HOWEVER, THE SYSTEMS DEPARTMENT WILL BE CONSIDERED ONE BRANCH CLASSIFICATION FOR PURPOSES OF SENIORITY.
2. EFFECTIVE OCTOBER 1, 1997, ON A WEEKLY BASIS THE COMPANY WILL PUBLICLY POST, DISCREPANCIES IN OVERTIME HOURS OFFERED IN EACH JOB CLASSIFICATION. THE POSTING WILL SHOW WEEKLY AND CUMULATIVE FIGURES. THE COMPANY

WILL COMPILE AGGREGATE RECORDS OF THESE WEEKLY POSTINGS AND MAKE THEM AVAILABLE TO THE UNION UPON REQUEST.

3. THE NEW "HELIO-COM" DEPARTMENT, WHICH REPRESENTS NEW TECHNOLOGY, HAS BEEN ESTABLISHED AS A SEPARATE BRANCH CLASSIFICATION.

4. THE UNION AGREES THAT THE COMPLAINT OVER PAST OVERTIME HOURS IN THE SYSTEMS DEPARTMENT IS SETTLED.

11. The parties met again on December 10th to discuss the status of the grievance. The Company took the position that the grievance had been dropped as a result of the September settlement, while the Union's representatives contended that there was, at best a proposed settlement in September, and that it had only addressed how to handle overtime distribution in the future, not how to remedy past violations. The parties were unable to agree on whether there had been a settlement in September. They then discussed splitting the dispute into pre-grievance and post-grievance issues and treating them separately. Yatchak sent a letter on December 23rd, confirming that conceptual agreement.

12. On January 13, 1998, Soldon sent a letter to John Niebler, attorney for the Company, proposing a list of arbitrators to hear Koglin's grievance. He simultaneously sent a request for an arbitration panel to the Federal Mediation and Conciliation Service. Niebler responded on January 27th with two letters. The first was to the FMCS, asking that a panel not be submitted. The second letter was to Soldon, advising him that the Company would not agree to arbitrate the Koglin grievance because it had been settled and withdrawn on September 4th.

13. On June 4, 1998, the Union filed the instant complaint, alleging that the Company was violating Sec. 111.06(1)(f), WEPA by refusing to arbitrate the Koglin grievance. The Company answered the complaint on June 19th, raising the September settlement as an affirmative defense to arbitration.

14. The collective bargaining agreement directly addresses the issues of overtime and overtime equalization.

15. The collective bargaining agreement directly addresses the means of processing grievances and the steps required for dispute settlement.

16. The collective bargaining agreement requires the submission of unresolved disputes to arbitration on demand.

17. The existence or non-existence of a settlement agreement withdrawing the Koglin grievance from arbitration is a question of procedural arbitrability.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSIONS OF LAW

1. The question of whether the grievance was settled and withdrawn in the lower steps of the grievance procedure presents an issue of procedural arbitrability, which is solely within the province of the grievance arbitrator provided for in Article 33, Section 33.5(d) of the collective bargaining agreement.

2. The Wisconsin Employment Relations Commission is without jurisdiction over the merits of this dispute.

3. The Company violated Section 111.06(1)f, MERA, by refusing to proceed to arbitration.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and enters the following

ORDER

The Company is directed to submit the Koglin grievance to arbitration.

Dated at Racine, Wisconsin, this 2nd day of April, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner

S & M ROTOGRAVURE SERVICE, INC.

**MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

The Company and the Union agree that the grievance was properly filed and processed, and that it would in most instances be arbitrable. The central issue in this complaint case is whether the grievance was settled at the September 4, 1997 meeting between the Company and the Union.

Arguments of the Complainant Union

The Union takes the position that the law is crystal clear as to the Company's duty to arbitrate this dispute. The Company claims that a settlement was reached in September of 1997 that resolved all outstanding overtime grievances and led to the withdrawal of these grievances. This claim is both factually incorrect and legally suspect. The Union notes that the President of Local 577-M, Chris Yatchak, testified that there was no settlement at the September meeting. Instead, there was a discussion of possible solutions centering on a more precise record keeping system for overtime distribution. While both parties were interested in this as a means of avoiding future problems, according to Yatchak there was never an agreement that this would waive the Company's liability for past violations. The actions of the parties in the wake of the September meeting buttress Yatchak's view. The Union met to discuss its options after the meeting, and decided that the matter could not be resolved. Yatchak directed Union attorney Scott Soldon to inform the Company that, if no solution could be found within a reasonable period of time, a demand for arbitration would be made. Soldon did this by letter on October 6, 1997. For its part, the Company took no steps to implement the supposed settlement until after Soldon's letter was received. Had there actually been a concrete agreement at the September meeting, one would expect some effort to put the new record keeping system in place. Thus the actions taken by the parties are consistent with the Union's version of events, and inconsistent with the Company's view. Accordingly the Examiner should conclude that there was no settlement, and thus there is no bar to the arbitration of this claim.

Even if the Examiner is unable to determine the parties' subjective states of mind at and after the September meeting, such a determination is really irrelevant. Under the STEELWORKERS TRILOGY, the relevant legal inquiry for a reviewing court (or in this case, the Commission) is whether the subject matter of the grievance is encompassed by the arbitration clause. If it is, then the issue of whether there was or was not a settlement is for the arbitrator to determine. Here the dispute concerns overtime distribution, a matter that is clearly addressed in the collective bargaining agreement. The grievance procedure is very broad, providing the means to resolve any "disagreement as to the interpretation or application of any

provisions of this Agreement or any charge by either party of any violation of the terms or provisions of this Agreement" and requiring that such grievances "shall be taken up" via the agreed-upon procedure. That procedure ends in arbitration.

The claim that this matter was resolved in the lower steps of the grievance procedure presents a question of procedural arbitrability. Since the Supreme Court's decision in JOHN WILEY AND SONS, INC. V. LIVINGSTON, 376 U.S. 543 (1964) it has been settled law that procedural objections to arbitration are properly decided by an arbitrator, and not by the courts.

For all of these reasons, the Union asks that the Examiner enter a finding that the Company has violated WEPA by refusing to arbitrate this grievance, and order it to proceed to arbitration.

Arguments of the Respondent Company

The Company takes the position that the Union's request for arbitration in this case is barred by the settlement reached in the lower stages of the grievance procedure. By the terms of the contract, a matter is eligible for arbitration only "[if] the joint committee is not able to arrive at a satisfactory settlement of such dispute within a reasonable time . . ." In this case, the joint committee did reach a settlement within a reasonable time. Specifically, the parties met on September 4, 1997, and settled all outstanding issues related to overtime distribution. They agreed to treat the three platform separately for overtime purposes, but jointly for seniority purposes. They agreed that overtime information would be posted so that employees could monitor distribution. They agreed that the Union would prepare appropriate forms and draft a settlement agreement. And, most significantly, they agreed that the Union would drop the grievances.

After the meeting, Company President Paul Peterson told Dave Puzach that he would be receiving overtime forms from the Union as a result of the settlement, and that he would be required to post those forms starting in October. Puzach in turn briefed the foremen on the need to post overtime records on a weekly basis. Clearly the Company believed a settlement had been reached. The Union also proceeded as if an agreement had been reached. Steward Todd Ockwood referred to the agreement when he spoke with Puzach a couple days after the meeting, saying that Donn Koglin was not comfortable with the agreement and was changing his mind. Indeed, in his testimony at the hearing, Ockwood repeatedly referred to "the agreement." Yatchak, Koglin and Ockwood held a meeting to draft new language for overtime equalization. Both parties conducted themselves in a manner consistent with the existence of a settlement agreement. Even after the Union decided to renege, its conduct shows its knowledge of an agreement. The October 2nd letter from Soldon refers to "a prospective

resolution," which indicates that Soldon was advised of the agreement. After receiving Soldon's letter on October 6th, the Company realized that the Union would not be producing the overtime reporting forms it had promised to prepare, and proceeded to prepare the forms itself and start posting overtime.

The testimony at the hearing and the objective evidence of the parties' actions after the September 4th meeting establish that there was a clear and definite agreement to resolve the overtime dispute prospectively and drop the grievances. There was nothing contingent or uncertain about this agreement. No party can lawfully condition an agreement on unstated contingencies. The fact that some details about the implementation of the agreement remained to be worked out does not affect the enforceability of the agreement. Ambiguity is a common feature of agreements.

The evidence overwhelmingly establishes that the parties settled the overtime grievances and that the Union agreed to drop them as a result. This is an enforceable agreement. The Union thereby waived arbitration, and should be estopped from pursuing the matter further. Accordingly, the Examiner must conclude that the Company has violated neither WEPA nor the contract, and should dismiss this matter in its entirety.

DISCUSSION

Section 111.06 makes it an unfair labor practice for either party to violate the terms of a collective bargaining agreement:

(1) It shall be an unfair labor practice for an employer individually or in concert with others:

. . .

(f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

. . .

(2) It shall be an unfair labor practice for an employe individually or in concert with others:

. . .

(c) To violate the terms of a collective bargaining agreement, including an agreement to accept an arbitration award.

. . .

The sole issue here is whether the overtime equalization dispute is arbitrable in light of the alleged settlement at the lower stages of the grievance procedure. I conclude that it is, and that the existence or non-existence of the settlement is a matter properly within the jurisdiction of the grievance arbitrator. The law governing a Commission determination of whether a particular grievance falls within the scope of a contractual arbitration clause is ultimately rooted in the STEELWORKERS TRILOGY. STEELWORKERS V. AMERICAN MANUFACTURING CO., 363 U.S. 546, 46 LRRM 2412 (1960); STEELWORKERS V. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574, 46 LRRM 2416 (1960); and STEELWORKERS V. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593, 46 LRRM 2423 (1960). In AT&T TECHNOLOGIES, INC. V. COMMUNICATION WORKERS OF AMERICA, 475 U.S. 643, 121 LRRM 3329 (1986), the U.S. Supreme Court gleaned four guiding principles from the STEELWORKERS TRILOGY. In AT&T the Court said:

The principles necessary to decide this case are not new. They were set out by this court over 25 years ago in a series of cases known as the Steelworkers Trilogy. . . .

The first principle gleaned from the Trilogy is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." . . .

The second rule, which follows inexorably from the first, is that the question of arbitrability--whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination. . . .

The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. . . .

Finally, where it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "(a)n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." AT&T, SUPRA, 121 LRRM AT 3331-3332 (citations omitted).

The collective bargaining agreement includes a grievance procedure. The scope of the grievance procedure is defined in Section 33.5 of the contract: "In the event of disagreement as to the interpretation or application of any provisions of this Agreement or any charge by either party of any violation of the terms or provisions of this Agreement, the matter shall be taken up in the following manner . . ." The instant grievance concerns overtime equalization, which is directly addressed in Section 10.1. Clearly the substance of the grievance is arbitrable. The Company's defense to arbitration is that the matter had been settled and withdrawn prior to the arbitration step of the contract. If true, this is a valid procedural defense to arbitrability, in that the otherwise arbitrable substance of the grievance would not qualify for the final step of the procedure. However, unlike questions of substantive arbitrability, questions of procedural arbitrability are a matter for the arbitrator, not for the courts or the Commission. *TEAMSTERS LOCAL 984 V. MALONE & HYDE*, 23 F.3D 1039, 146 LRRM 2274 (6TH CIR., 1994); *UNITED STEELWORKERS V. BLACK TOP PAVING COMPANY*, 137 LRRM 2873 (U.S. DISTCT, PENN, 1990); *JOHN WILEY & SONS, INC. V. LIVINGSTON*, 376 U.S. 543 (1964). Accordingly the Examiner concludes that there is no valid defense to proceeding to arbitration, and directs that the Koglin grievance be submitted to an arbitrator for resolution.

Dated at Racine, Wisconsin, this 2nd day of April, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner