BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
LOCAL 1594, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS	:	Case 58 No. 45213 MA-6532
and	:	
CITY OF KAUKAUNA	:	

Appearances:
Mr. Charles Buss, 5th District Vice-President, International Association of Fire Fighters, appearing on behalf of the Union.
Mr. Bruce K. Patterson, Employee Relations Consultant, appearing on behalf of the City.

ARBITRATION AWARD

Local 1594, International Association of Fire Fighters, hereinafter referred to as the Union, and the City of Kaukauna, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Kaukauna, Wisconsin on May 2, 1991. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on June 5, 1991.

BACKGROUND

The basic facts underlying the grievance are not in dispute. The minimum staffing for the Fire Department is four (4) fire fighters and there are usually five (5) fire fighters assigned for a 24 hour shift. On October 19, 1990, apparently the staff was at the minimum because an employe was attending the School for Workers. An "emergency" run took employes out of the station, leaving the staff level below the minimum and Jay Dahl was called in to work. Dahl was not paid for his call in and the instant grievance was filed.

ISSUE

The parties stipulated to the following:

> Did the City violate Article 22 of the agreement between Local 1594, IAFF and the City of Kaukauna when it refused to pay Jay Dahl for hours of a "call-in" on October 19, 1990?
>
> If so, what should the remedy be?

PERTINENT CONTRACTUAL PROVISIONS:

> ARTICLE 4 - Overtime
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> . . .
>
> C. Call time: Employees recalled to duty shall receive not less than three (3) hours pay at overtime rates. All time worked in excess of three (3) hours shall be compensated for at overtime rates as set forth in Paragraph A of this article.
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> . . .
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> ARTICLE 22 - Union Activities
>
> A. School for Workers: The City agrees to allow delegates from the Kaukauna Fire Department time off with no loss of pay, to attend annual Wisconsin State Firefighters Union Activities provided delegates make arrangements that their working time (if any) is absorbed by fellow employees.
> In addition, the City agrees to four (4) days off (in

> total) without any work back of an employee(s) to attend the State Convention or School for Workers, subject to necessary manpower being available to maintain minimum staffing at no overtime cost to the City.

Union's Position

The Union contends that the City violated Article 22 by refusing overtime pay to Jay Dahl. It submits that as long as the work shift starts with the minimum staffing, anyone recalled to work overtime has been compensated for such overtime even when the minimum staffing has been the result of Union business. It alleges that there is no evidence of any discussion in negotiations about overtime costs incurred after a shift started with the mimimum staff. The Union points out that Article 22 was changed in the 1988-89 contract. It refers to the 1987 contract which provided that no more than one (1) man per platoon could be off under Article 22, Section A, at any one time. The Union sought the change so that more than one man per platoon could be off at the same time. Under Article 22, the Union claims that if four firefighters are not available at the start of the shift because of Union business, then the City is not liable for overtime. On the other hand, according to the Union, if the minimum are available at the start of the shift, then any subsequent overtime is the City's responsibility. The Union asks that the grievance be sustained, thereby continuing the long-standing practice of compensating employes for any overtime incurred after the minimum staffing has been met at the beginning of the work shift.

City's Position

The City contends that Article 22 is clear and umambiguous and allows employes to attend certain union activities at no overtime cost to the City. It agrees with the Union that this language came in the 1988-89 agreement because the Union desired to have more than one person per shift off for certain activities. It submits that without the protection of "at no overtime cost", it would not have agreed to such a change.

It argues that past practice cannot modify clear and unambiguous language. It refers to the testimony of the present and past fire chiefs as demonstrating the understanding of not paying overtime for call-in necessitated by absences governed by Article 22. It claims that, except for one error, overtime has been paid while employes were off on Article 22 activities only because other employes were sick, on vacation or absent for reasons other than Article 22 and the one error does not meet the accepted definition of a past practice. It asks that the grievance be dismissed.

DISCUSSION

Article 22 of the parties' 1987 collective bargaining agreement provided, in part, as follows:

> "In addition, the City agrees to four (4) days off (in total) without any work back of an employee(s) to attend the State Convention or School for Workers. However,

no more than one (1) man per platoon may be off under the provisions of this section at any one time." 1/

There are normally five (5) men per platoon, with the minimum requirement of four (4) men per platoon. Under this section, if only one (1) man per platoon was off, the minimum of four (4) men would still be available. In negotiations for the 1988-89 contract, the Union desired to have more than one man off per platoon for this activity and sought the deletion of the last sentence set out above. 2/ The City agreed to delete the last sentence but added the clause, "subject to necessary manpower being available to maintain mimimum staffing at no overtime cost to the City." The City maintains that the language is clear and unambiguous and it is not responsible for paying any overtime for call-in necessitated by absences under Article 22.

Under the 1987 agreement, one firefighter per platoon could attend the School for Workers and overtime for call-ins would be borne by the City. For example, let us assume that only one firefighter per platoon goes to the School for Workers. There is still a mimimum of four employes left and assuming nothing out of the ordinary occurs, there would be no overtime. If an emergency occurred such that a call-in was needed, the City paid overtime for the call-in. Additionally, if someone was on vacation or was absent due to sick leave, the City paid overtime for a call-in as it was attributed to the vacation or call-in.

After the contract language was changed in 1988-89, again assume for example that only one man per platoon goes to the School for Workers and there is still a minimum of four for the shift. Now suppose that due to emergencies, the minimum is not maintained and the City requires a call-in. The City submits that the reason for the call-in was the absence under Article 22 and it is not required to pay overtime. This would not have occurred under the 1987 contract but the City insists that it does under the present contract. If the facts are changed further and three (3) firefighters from the same platoon go to the School for Workers, there would be two (2) below the minimum staffing and the Union would be required to arrange for two (2) employes to work for them so that there is a minimum of four per shift. If any employe substituting for one on Article 22 leave would be entitled to overtime, due to the FLSA, it would be the responsibility of the Union to pay it. In other words, the City would not be responsible for overtime to maintain the minimum staffing at the start of the shift due to the absence of two more employes than the one previously allowed under Article 22. If emergencies come up such that the City needs 2 or 3 call-ins, it arguably could claim that these were not to be paid overtime under Article 22, yet these had been already covered by the substitutions and as the absence of the two regular employes were covered by substitutions, no overtime is caused by their absence. Rather, it is caused by the emergency. Thus, the City's interpretation could lead to absurd results by requiring the Union to pay overtime twice for the same absence and it would place the City in a better position than if all the employes had been at work, and better than under the 1987 contract.

No matter how you look at it, as long as there are 5 persons to a platoon and a minimum of 4 per shift, there could only be one man per platoon off because the Union would be responsible for covering the absence of any other person attending the convention or School for Workers on each platoon in order to maintain the minimum at no overtime cost to the City, which is the same result as the 1987 language. There was no evidence that the parties when they made the change in language were agreeing to require the Union to provide a substitute or absorb overtime when only one man per platoon was gone and something required a call-in, yet that is the effect of the City's interpretation. Therefore, it must be concluded that as long as the Union meets the requirement that there is the necessary manpower to maintain minimum staffing at the start of the shift, any subsequent events giving rise to a call-in are the City's responsibility because it is not the absence of employes attending a Union function that gives rise to the call-in but another absence due to vacation, sick leave or emergencies, and these are the City's responsibilities, just the same as when there are no Article 22 absences.

Based on the above and foregoing, the record as a whole, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The City violated Article 22 of the agreement between Local 1594, IAFF and the City of Kaukauna when it refused to pay Jay Dahl for the hours of "call-in" on October 19, 1990. The City shall immediately make Jay Dahl whole by paying him the overtime for the "call-in" on October 19, 1990.

1/ Ex. 7.

2/ Ex. 4.

Dated at Madison, Wisconsin this 14th day of June, 1991.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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