BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF BROOKFIELD PUBLIC EMPLOYEES LOCAL 20, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO	Case 82 No. 45595 MA-6660
and	
CITY OF BROOKFIELD	

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appeared on behalf of the Union.

Mr. Roger Walsh, Esq., Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-6613, appeared on behalf of the City.

ARBITRATION AWARD

On April 22, 1991, Wisconsin Council 40, AFSCME, AFL-CIO filed an arbitration request with the Wisconsin Employment Relations Commission wherein it requested that the Commission appoint a member of its staff to serve as an Arbitrator to issue a final and binding Award on a grievance pending with the City of Brookfield. Following jurisdictional concurrence, the Commission appointed William C. Houlihan to hear and decide the matter. A hearing was conducted on September 30, 1991 in Brookfield, Wisconsin. The proceedings were not transcribed. Briefs and Reply Briefs were filed and exchanged by November 29, 1991.

BACKGROUND FACTS

John F. Budde, Manager of the Wastewater Facilities, was awakened by a heavy rainfall shortly after midnight on June 29, 1990. He proceeded to the Wastewater Plant and determined that he needed to call in three employees to handle the expected increased sewerage flow into the City's sewers and treatment plant. There were nine employees in the department on that date. The first employee Budde called in was Gerald Wold, who was on standby duty, pursuant to Sec. 10.01 of the Contract. Budde then utilized the overtime call list that was developed pursuant to Section 12.03 of the Contract. Employees who desire to work overtime are placed on the overtime call list and this list is posted every two weeks. The most recent list contained the overtime worked by the various employees through June 24, 1990. Employees are placed on this overtime call list in a descending order based on the amount of overtime they have worked. After Budde called Wold, he contacted R. Wiegal, who had the lowest number of overtime hours on the overtime call list. Budde then bypassed D. Carter, who was on vacation, H. Schutt, who was classified as a laborer-helper and was not qualified to perform the work that would be involved in the early stages of the heavy rainfall, M. Bennett, who was also on vacation, J. Brinkman, who was out on an injury leave, and R. Putchinski, who was the third employee out on vacation. Budde then contacted S. Kucharski and had him report to work.

About 1:30 a.m. on June 29, 1990, the rain subsided and Budde testified that he did not feel it necessary to call in any additional employees. The longest any one of the three called-in employees worked was five and one-half hours (S. Kucharski). Wold worked for three and one-half hours that morning and Wiegal worked four and three-quarter hours.

On July 4, 1990, a grievance was filed by James Isleb and H. Schutt complaining that in the early morning of June 29, 1990, the City had violated the Contract by calling in an employee who had not completed his probationary period before calling in Isleb and Schutt. Wiegal was the employee who was called in who was not yet off his probationary period. John Budde responded with his written denial of the grievance on July 13, 1990, indicating that the "proper procedure was followed". On June 29, 1990, James Isleb filed a new grievance relating to the same incident on October 23, 1990. In this grievance, Isleb contends that he was not called in on a "general call in" and that he should be paid for the overtime worked by an employee who had more overtime on the books. This grievance was also denied by John Budde.

The Grievant, John Isleb, was not called in, though he had less accumulated overtime and more seniority than did some who were called. According to Budde, in late 1985 Isleb came to Budde and indicated that he felt he had been working too much overtime and asked to be taken off standby rotation and also off the regular overtime call list. Budde complied. Isleb was removed from all such lists from 1986 through the date of the grievance. No grievance was filed over the removal, though the lists are posted on an ongoing basis. The exception to this agreement was the general call-out when everyone was called back to work. According to Budde, June 29 was not a general call-out.

According to Isleb, he and Budde talked, in 1986, about the Grievant's desire not to work standby duty, particularly the weekend rotation. No other type of overtime work was involved. Isleb points to his overtime hours as support for the fact he was called to work overtime other than under general recall situations.

Isleb's overtime hours for the last six years are as follows:

Year	Overtime Hours
1985	131
1986	79 1/4
1987	55 1/2
1988	45 1/2
1989	43
1990 (through 7/16/90)	45 1/2

ISSUE

The parties were unable to stipulate to an issue. The Union frames the issue as follows:

1. Did the City violate the Collective Bargaining Agreement when it failed to call in the Grievant for overtime work on June 29, 1990?

2. If so, what is the appropriate remedy?

The City's view of the issue is:

> Did the City violate Section 12.03 of the Collective Bargaining Agreement when it failed to call in the Grievant, James Isleb, for overtime work on June 29,

1990?

If so, what is the appropriate remedy under the contract?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I - MANAGEMENT RIGHTS

1.01. Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested in the Employer. The Employer may discharge an employee serving an initial probationary period pursuant to Article III without regard to proper cause.

. . .

1.04. Any rights or privileges not specifically delegated or modified herein shall be deemed to be retained by the Employer.

. . .

ARTICLE XII - OVERTIME AND HOLIDAY PAY

12.01. Time and one-half (1 1/2) shall be paid for all hours worked outside of the employees regular shift of hours, and for time worked on Saturdays and Sundays, except as provided for in 12.07.

12.02. Time worked on designated holidays will be paid for at the rate of two (2) times the employee's regular rate of pay in addition to the payment for the holiday.

12.03. Overtime shall be divided as equally as practical among the employees in a particular department qualified to do the work involved, and who desire to work overtime.

Employees may place their names on a list of employees who do not desire to be called in for overtime except on a general recall, and employees on such list shall not be required to respond to a call to report to work unless no volunteers or an insufficient number of volunteers are available.

Employees available for recall to work shall be called in the reverse order of their accumulated overtime, except that the Employer shall be required to make only one telephone call to recruit a particular employee and any employee who receives notice of the availability of overtime work and does not report shall be deemed, in respect to his position on the calling list, to be charged with the work time he would have received had he reported. An employee who desires to

> be called if work is available and who knows he will not be home may provide a substitute telephone number for call.
>
> A list of the accumulated overtime of each employee shall be posted, and such list shall be updated on a monthly basis.
>
> In the Highway Department between November 1 and May 15 employees who intend to be away from home during the weekend or on a holiday shall notify their supervisor of their intended absence whenever possible.

POSITIONS OF THE PARTIES

It is the Union's view that a general call-out occurred. The Employer, who called every available employee but the Grievant, now makes what amounts to a bootstrap claim that since he didn't call the Grievant, the call-out was not general. Even if the call-out was not general, the Employer failed to distribute overtime "as equally as practical". The Union credits Isleb's version of the 1985-86 conversation. There is no Section 17.03 list for employees to sign so as to opt out of overtime. The Union argues that the Grievant was entitled to 4 1/2 hours of pay at time and one-half.

The City argues that it followed the proper procedures under Section 12.03. There was no need for a general call-out and Budde followed the contractual procedure for calling in the necessary help. Budde had no obligation to contact Isleb, since Isleb had previously indicated that he did not want to be called in for overtime except for general recall. Isleb never objected to the absence of his name from the posted overtime call list.

DISCUSSION

I do not believe that June 29 was a general call out. A total of four people were available for call. Three were called. The Union is skeptical of its characterization of the Employer's claim that since Isleb wasn't called, the call-out was not general. Of course, under the Union's view, once three men were called, the Employer would be obligated to call the fourth, so as not to exclude but one man. As a practical matter, Budde has to make judgment calls as to the manpower needed to handle varying rainfall levels. Nothing in the record suggests that he abused that discretion.

Budde and Isleb had a conversation about overtime in 1985. There is a dispute as to what exactly was said. There is no dispute that Isleb was then taken off the regularly-posted overtime lists, used as the basis for call-ins. Isleb was aware of that fact and did not grieve. Isleb's overtime hours declined dramatically after 1985. Whatever the conversation between the two men, I believe the thrust of their agreement was to reduce Isleb's overtime recalls and that he at least tacitly approved of the reduced overtime.

Article 12.03 provides that "Employees may place their names on a list of employees who do not desire to be called in for overtime..." Isleb did not place his name on any such list. It appears that no such list existed. The City argues:

> The Grievant was on a list. It was a list of omission from the posted overtime call list.

What an artistic and creative rendering of a sentence which, at first blush, appears so simple and straightforward! At the risk of being labelled

unimaginative, this construction stretches literary license beyond my creative capacity.

The contract calls for a list of employees who do not want to be called for routine overtime. No such list existed. The parties relied upon an alternative system. If the Union demands compliance with the terms of the labor agreement it is within its right. However, all parties acquiesced in the alternative system for a period of years. Mr. Isleb is estopped from insisting upon the literal application of this provision to the events of June 29. He had been on notice of, and participated in, the contrary practice. It would be inequitable to permit the City to rely upon the years long practice in making the June 29 calls, and then retroactively apply a changed standard. The City would be unfairly penalized. The Grievant would be unjustly enriched.

The Union is free to insist upon literal adherence to Sec. 12.03 prospectively.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 19th day of February, 1992.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator

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