BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 366, AFSCME, AFL-CIO, DISTRICT COUNCIL 48,	Case 240 No 45506
and	MA-6620
MILWAUKEE METROPOLITAN SEWERAGE DISTRICT	

Appearances:
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Harold B. Jackson, Senior Staff Attorney, Milwaukee Metropolitan Sewerage District, P.O. Box 3049, 260 West Seeboth Street, Milwaukee, WI 53201, appearing on behalf of the Milwaukee Metropolitan Sewerage District.

ARBITRATION AWARD

Local 366, AFSCME, AFL-CIO, District Council 48 (hereinafter Union) and the Milwaukee Metropolitan Sewerage District (hereinafter District) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an impartial arbitrator appointed by the Wisconsin Employment Relations Commission (hereinafter Commission) from its staff. On March 25, 1992, the Union filed a request with the Commission to initiate grievance arbitration. The District concurred in said request. On July 9, 1991, the Commission appointed James W. Engmann, a member of its staff, to act as the impartial arbitrator in this matter. A hearing was held on October 30, 1991, in Wauwatosa, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The hearing was transcribed, a copy of which was received on November 26, 1991. The parties filed briefs, the last of which was received on May 11, 1992, and they waived the filing of reply briefs. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

On Friday, October 12, 1990, a dry overflow caused over four million gallons of effluent to be diverted into the Menomonee River. Crew Chief Topczewski was working at the time the overflow happened. The District assigned Topczewski to work overtime that day, which overtime assignment the Union does not dispute. The dry overflow continued on October 13 and 14, 1990, causing the need for the assignment of additional overtime. The District assigned the overtime to Topczewski on both days. At that time Topczewski had worked 183 hours of overtime while Crew Chief Wagner had worked 173 hours of overtime.

PERTINENT CONTRACT LANGUAGE

SECTION 1

. . .

PART II

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C.MANAGEMENT RIGHTS.

. . .

2. Overtime. The District has the right to schedule and offer overtime work as required in a manner most advantageous to the District and consistent with the requirements of municipal employment, public interest, and this Agreement. Temporary or provisional employees shall not be offered overtime unless employees in the bargaining unit in that department have first been offered the overtime. This section shall not apply in an emergency situation.

. . .

SCHEDULE A

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I.OVERTIME.

1. Overtime shall be paid for all hours worked outside of an employee's particular work schedule as specified in subparagraph three (3) below.

2. Overtime Distribution. The District will distribute overtime equally among the employees of a given job classification in each department (excluding employees assigned to rotating shifts and training conducted on overtime).

ISSUE

The parties stipulated to framing the issue as follows:

Whether the failure to offer the overtime to Mr. Wagner on October 13 and 14, 1990, violated the collective bargaining agreement (and), if so, what is the appropriate remedy?

POSITION OF THE PARTIES

Union

The Union asserts that it is not in dispute that overtime is equalized among the employes on a daily basis; that the District attempted to create an aura of disaster or calamity in the situation; that the District attempted to show that the situation was changing and intensifying; that the Union agrees it is not good when untreated sewerage flows into our rivers and into the lake; that over the years it has not been unusual for untreated sewerage to overflow into the river for many reasons; that when it is "Miller Time", we do not want to be drinking chlorinated dung; and that the issue is not whether something

must be done but simply who should be doing it.

The Union argues that the District had plenty of time to review its records and then offer the overtime for Saturday and Sunday to the employe having the least overtime and equalize as the contract requires; that the District attempted to show that the situation was so serious that the District was going to use two crews consisting of five persons; that, however, the situation was not as serious as the District tried to show since only one crew having three persons, including the Crew Chief, worked; that the crew installed manning dippers to measure flows; that Crew Chief Wagner had installed manning dippers many times; that if called and if he had accepted the overtime, Crew Chief Wagner could have done the job.

The Union concludes that the contract requires the District to distribute overtime equally among the employes of a given job classification; that the District has not done this; and that, therefore, the District has violated the labor agreement. The Union seeks an order to make Crew Chief Wagner whole for the loss of the overtime assignment together with interest on the back pay.

District

The District asserts that the collective bargaining agreement did not require the District to offer the overtime in question to Crew Chief Wagner and that, even if it did, the self-executing nature of the system of equalizing overtime has rendered any proposed remedy moot; that while the agreement has a provision requiring equal distribution of overtime among employes of a given job classification, there is no requirement in the contract as to when this equalizing must be done; and that the overtime distribution paragraph is clearly superceded by an earlier paragraph in the Management Rights section which states: "This section shall not apply in an emergency situation."

The District argues that the existence of a dry overflow was causing over four million gallons of effluent per day to be diverted into the river; that the condition constituted an emergency in the opinion of the District's management; that there is no evidence to the contrary in the record; that based upon the emergency nature of the situation, the District was under no obligation to offer this overtime to anyone except the employe of its own choosing; that it did so for the reasons stated on the record; and that the Union conceded the issue.

The District also argues that any proposed remedy has been rendered moot; that Crew Chief Wagner was not interested in the specific overtime and had refused to sign the grievance; that Wagner was not the person with the lowest number of overtime hours; that this issue notwithstanding, it is clear that the Union failed to demonstrate entitlement to anything; that there was no proof as to when the next overtime was offered in this classification; that this could mean that other overtime may have been offered that week to the person with the lowest hours of overtime and that, therefore, no damages at all would have occurred since the pay period for all of the overtime would be the same; that, in any case, no proof was offered and no one knows; and that since no testimony established a loss, no remedy is required. Finally, the District argues that the self-executing nature of the daily overtime equalizing technique has rendered the Union's claim entirely moot.

DISCUSSION

The contract calls for equal distribution of overtime among the employes of a given job classification in each department. The parties do not dispute that overtime is equalized on a daily basis and that it is offered to the

employe with the lowest number of hours of overtime worked. The Union asserts that, therefore, Crew Chief Wagner should have been given the overtime on October 13 and 14, 1990. The District asserts that, based on the emergency situation, the District was not obligated to offer the overtime to any specific employe and, therefore, the District did not violate the agreement by assigning the overtime to Crew Chief Topczewski.

Schedule A, Section I - Overtime, Subsection 2 - Overtime Distribution, of the collective bargaining agreement states, "The District will distribute overtime equally among the employees of a given job classification in each department (excluding employees assigned to rotating shifts and training conducted on overtime)." This is the only language in the agreement pertaining specifically with overtime distribution. The parties do not dispute that overtime is distributed on a daily basis. Nor is it in dispute that the District did not distribute the overtime equally in this circumstance. Based only upon this language, it appears clear that the District violated the collective bargaining agreement.

But, the District argues, even though it did not distribute the overtime equally in this situation, it did not violate the agreement because the situation was an emergency. As such, it was not required to distribute overtime equally, citing Section 1, Part II, Paragraph C - Management Rights, Subparagraph 2 - Overtime, of the agreement, which states as follows:

> The District has the right to schedule and offer overtime work as required in a manner most advantageous to the District and consistent with the requirements of municipal employment, public interest, and this Agreement. . . This section shall not apply in an emergency situation.

Several representatives of management testified that an emergency existed. The Union disputes that an emergency existed as of Saturday and Sunday. The issue boils down to whether an emergency existed which allows the District to assign overtime unfettered by the equal distribution requirement of the agreement.

"Emergency" has been defined as "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action." 1/ But an emergency is not present if management has discretion in the situation. 2/

On Friday, October 12, 1990, the District discovered that a dry overflow was causing effluent to be diverted into the Menomonee River at the rate of over four million gallons a day. This was certainly "a sudden, generally unexpected occurrence" which demanded "immediate action" by the District; in other words, an emergency. Crew Chief Topczewski was working at that time and the District assigned him the overtime for that day. The Union does not dispute this assignment and rightfully so.

On Saturday and Sunday, October 13 and 14, 1990, in its effort to determine the source of the dry overflow, the District again assigned overtime to Crew Chief Topczewski. On those two days, he installed manning dippers to measure flows. But while the dry overflow was still occurring, the emergency, as that term is defined, was no longer present. No longer was the dry overflow

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1/ Lennox Industries, Inc., 70 LA 417, 419 (Seifer, 1978).

2/ Canadian Porcelain Co., 41 LA 417, 418 (Hanrahan, 1963).

"a sudden, generally unexpected occurrence". No longer did the dry overflow demand "immediate action". The District was aware of the problem and was working to solve the problem. In its efforts to solve the problem, however, the District did not choose to work Crew Chief Topczewski or anyone else continuously until the problem was solved. Indeed, the District sent Crew Chief Topczewski home Friday, brought him back on overtime Saturday, sent him home Saturday and brought him back on overtime Sunday. The District did not determine that the manning dippers had to be installed Friday in order to determine the source of the dry overflow. Instead, the District chose to have some manning dippers installed on Saturday and some more on Sunday. This is not immediate action. This is no longer an emergency.

The policy underlying language which in an emergency suspends contractual restrictions on the employer's ability to act is that said contractual restrictions should not prevent the employer from taking the action necessary to deal with the emergency situation. But said suspension of contractual restrictions is limited to those situations where it is unavoidable and, then, only for the amount of time necessary. 3/ While the District could rightfully assign the available overtime to Crew Chief Topczewski on Friday in order to act immediately to deal with the sudden, unexpected occurrence of the dry overflow, the assignment of overtime to him on Saturday and Sunday was avoidable. The District had the time necessary to determine who qualified for the overtime on those two days and to assign it to that employe as required by the agreement. It was not necessary for the District to assign the overtime on Saturday and Sunday to Topczewski and thereby disregard the contractual requirement of equalization of overtime on a daily basis, as Crew Chief Wagner was qualified to do the work and had the least amount of overtime.

Therefore, it is clear that the failure to offer the overtime to Crew Chief Wagner on October 13 and 14, 1990, violated the collective bargaining agreement.

In terms of remedy, the District argues that the self-executing nature of the daily overtime equalizing technique has rendered the Union's claim entirely moot. Some arbitrators accept the thrust of this argument, holding that make-up overtime within a reasonable time is the preferred remedy for the improper assignment of overtime, especially where the improper assignment of overtime was made within the classification entitled to the overtime and included in the equalization formula or technique. 4/ But the most frequently utilized remedy where an employe's contractual right to overtime work has been violated is a monetary award for the overtime in question. 5/ Indeed, this arbitrator leans toward the reasoning expressed by Arbitrator Larkin as follows:

> Offering an employee an opportunity to make up improperly lost hours at a later date is not an adequate remedy. He is entitled to work those hours at the time they are available, to know when he may expect his turn, and not be expected to work at (another) time . . . .
>
> The one sure way of putting an end to . . . errors . .

3/ Virginia-Carolina Chemical Co., 42 LA 237, 240 (Kesselman, 1964).

4/ Price Brothers Co., 76 LA 10, 13-14 (Shanker, 1980); Kaiser Aluminum and Chemical Corp., 54 LA 613 (Bothwell, 1970).

5/ Pope Maintenance, 78 LA 1157, 1160 (Yancy, 1981).

> . in making overtime assignments under the round-robin system, is to hold the Company liable for these breaches of contract by awarding pay to the employee who failed to get his proper assignment.

John Deere Dubuque Tractor Works, 35 LA 495, 498 (1960).

The District also argues that Crew Chief Wagner was not interested in the specific overtime and refused to sign the grievance and that Wagner was not the person with the lowest number of overtime hours. A myriad of reasons exist as to why an employe does not grieve, none of which impacts on the merits of the grievance filed. As to whether Wagner was the employe with the lowest number of hours, the record is clear that the two employes with less overtime were unavailable to be asked.

As to the Union's request for interest, as the agreement does not call for the awarding of interest, the Union's request is denied.

For these reasons, based upon the foregoing facts and discussion, the Arbitrator issues the following

AWARD

1. The failure to offer overtime to Crew Chief Wagner on October 13 and 14, 1990, violated the collective bargaining agreement.

2. The District shall pay Crew Chief Wagner at the overtime rate for the number of hours worked by Crew Chief Topczewski on October 13 and 14, 1990, and shall make Crew Chief Wagner whole in every other respect.

Dated at Madison, Wisconsin, this 6th day of August, 1992.

By _____
James W. Engmann, Arbitrator