BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150, AFL-CIO, CLC	Case 384 No. 47049 MA-7152
and	
CITY OF MILWAUKEE (MILWAUKEE EXPOSITION AND CONVENTION CENTER AND ARENA)	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. John J. Brennan, on behalf of Service Employees International Union, Local 150, AFL-CIO, CLC.

Ms. Mary M. Kuhnmuench, Assistant City Attorney, on behalf of the City of Milwaukee.

ARBITRATION AWARD

Service Employees International Union, Local 150, AFL-CIO, CLC, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a dispute between the City of Milwaukee, hereinafter the City, in conformance with the grievance and arbitration procedure contained in the parties' labor agreement. The City subsequently concurred in the request and David E. Shaw, a member of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the Arbitrator on August 19, 1992 in Milwaukee, Wisconsin. A stenographic transcript was made of the proceeding and post-hearing briefs were submitted by October 27, 1992. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated to the following statement of the issues to be decided:

1) Is the Employer in violation of the contract by its current method of assigning available overtime? If so, what is the appropriate remedy?

2) Is the Employer in violation of the contract by its current method of allocation of regular hours to part-time employes? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The parties cite the following provisions of their 1991-1993 Agreement:

ARTICLE V
Hours of Work

Section 1. Eight (8) hours shall constitute a day's work, and forty (40) hours shall constitute a

week's work. All work performed in excess of either eight (8) hours per day or forty (40) hours per week shall be paid at the rate of time and one-half. Hours of work shall be consecutive.

. . .

Section 5. All overtime available shall be shared equally from the top of seniority to the least senior employee and will be rotated.

. . .

Section 7. Management shall determine the method, means and processes by which the work is performed. Management has the right to schedule and assign regular and overtime work and to establish work rules.

. . .

ARTICLE VI
Part-Time Employees

Section 1. Any employee hired as a part-time employee shall not be eligible for the following benefits:

1. Hours of Work, Article V
2. Seniority for Lay-off, Article VII
3. Holidays, Article VIII
4. Vacations, Article IX
5. Sick Leave, Funeral Leave, Severance Pay, Article X
6. Health and Welfare, ARticle XIII (with exception of Article XIII, Section 5.)
7. Jury Duty, Article XV
8. Flextime, Article XVIII

Section 2. Any employee hired as part-time shall be eligible for the following benefits:

1. Worker's Compensation
2. Salary Increments
3. Overtime - time and one half for all hours worked over eight (8) hours only.
4. Call-in-pay (Emergency call-in) shall consist of a four (4) hour

minimum.

5. All work performed on Martin Luther King Day, Memorial Day, Good Friday, Fourth of July, Christmas Day and Labor Day shall be paid for at the rate of time and one half.

. . .

Section 4. The employer agrees to have no more than forty-five (45) employees on the part-time roster at any one time.

If the need for part-time workers declines and the Employer reduces the number of part-time employees on the roster, the least senior part-time employees shall be the first deleted from the roster. If the Employer increases the size of the roster, the last employee selected from the roster shall be the first restored.

BACKGROUND

The City maintains and operates the Milwaukee Exposition and Convention Center and Arena (MECCA) and the Union is the exclusive collective bargaining representative of the part-time and full-time maintenance and cleaning personnel employed by MECCA, as well as for employes in two other bargaining units. MECCA is a complex of three buildings, the auditorium, the arena and the convention hall, located in downtown Milwaukee. MECCA books sporting events, conventions, trade shows, rock shows, entertainment, etc.

The Grievant, Joseph Block, has been employed by MECCA as a maintenance and set-up person since 1969. From September 6, 1975 until November of 1991, he held the position of lead person for the maintenance and set-up crew. At all times Block has been a member of the bargaining unit represented by the Union. When Block became the lead person in 1975 he was informed that he would take over scheduling duties from the retiring supervisor and was to learn the method for scheduling from that supervisor. From 1975 until he was relieved of his scheduling duties in 1990, Block utilized a seniority list and called people off of that list on a rotating basis for all overtime work, scheduled or unscheduled. Block did not schedule part-time employes for such work until he had first offered it to all full-time employes and there were not enough full-time employes available to work the overtime. Block utilized a similar rotation method of offering the work to the part-time employes in such instances where not enough full-time employes were available.

In November of 1990, management at MECCA decided to assign the scheduling responsibilities to a member of management and the scheduling duties were assumed by Thomas Harms, the Assistant Director of Operations. Block gave Harms a copy of the chart he used for scheduling upon Harms' assuming that duty and explained that he used a rotation system for bringing in full-timers for the extra work. There is some dispute as to whether Block explained that the method used was only for "unscheduled overtime" as opposed to "scheduled overtime." Harms followed Block's system for call-in (unscheduled) overtime, but did not follow that system of offering overtime to all full-timers before offering it to part-time employes with regard to "scheduled overtime," i.e. extra work that was known far enough in advance so that it could be scheduled. In late November of 1990, one of the full-time maintenance employes, Cyril Kulinski, went to Harms and complained about part-time employes being used for

weekend work without it being offered to full-time employes first. Harms told Kulinski that he would check into it, but never responded after that to Kulinski. No grievance was filed.

Block resigned from the leadworker position as of November 1, 1991, after being informed that the parties had agreed in negotiations that it would be made a supervisory position. Block chose not to remain in that position and went back to the position of maintenance worker.

On December 9, 1991, Block filed the instant grievance alleging a violation of Article V, Section 5 of the labor agreement, based on the scheduling of part-time employes for weekend work, which is premium pay for full-timers, and working part-timers overtime without first offering it to all of the full-time employes. The grievance also alleged that management was limiting the hours of some part-time employes because they are in the pension plan and asserted that hours for part-time employes are to be scheduled equally.

The grievance was processed through the parties' grievance procedure. Being unable to resolve the matter, the parties proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the grievance in this matter should be sustained as to both issues. In support of its position the Union first asserts that during the 15 years that Block was responsible for scheduling, he was never told what method to use or that his method used was wrong or to change it in any manner either as to overtime or as to scheduling regular hours of part-time employes. It does not even appear that management was aware of the method Block used for scheduling purposes. Rather, Block was told how many people were needed and the rest was left to him. However, his practices or methods for scheduling were readily available to anyone who cared to find out. Thus, Block's scheduling methods constituted a past practice as they were unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Citing, Celanese Corp. of America, 24 LA 168 (Justin, 1954). Elkouri and Elkouri, How Arbitration Works, (4th ed. BNA 1985), page 439, footnote 10. The Union asserts that past practice is relevant in this case because of the ambiguity caused by the language in Article V, which is not applicable to part-time employes, and Article VI, which grants part-time employes some "generic right" to overtime. Block's scheduling method constituted a clear past practice and was therefore part and parcel of the labor agreement. Since there are no written provisions in the agreement in direct conflict with the established practice, it would be the City, not the Union, who would be obtaining a windfall through the arbitration process for which they did not bargain if the grievance is denied.

The Union notes the City's reference in its case to the Union's bargaining proposal in the 1989-90 negotiations and asserts the proposal had nothing to do with scheduling overtime for full-time employes or the regular scheduling of part-time employes. Rather, if accepted, the proposal would have changed the method of scheduling all work in that part-timers could not be used for any work if full-timers were idle. Also, if adopted, it would not have changed the method of scheduling overtime that Block had used and which was continued up until 1991.

With regard to the City's assertion that it also has an obligation to

part-time employes regarding overtime, the Union argues that Article V has no application whatsoever to part-time employes. The terms of Article VI are explicit that part-timers are excluded from the "hours of work" language. Also, Article V, Section 5 of the agreement applicable to the overtime issue, is almost identical to the method used by Block in scheduling overtime. While part-timers do not fall under the terms of Article V, Section 5 or 7, Article VI, Section 2 does permit them to have overtime. Although that provision does not specify when part-time employes are eligible for overtime, nor does it guarantee them overtime. Under Block's system part-time employes did have opportunities for overtime which was consistent with the agreement.

The Union also disputes the distinction the City now makes between "regularly scheduled overtime" and "emergency or non-scheduled" overtime. Those distinctions never existed during the 15 years when Block did the scheduling as he scheduled all overtime hours by the same method. The City's witnesses clearly testified they had no idea as to how Block scheduled overtime.

As to the distribution of regular hours for part-time employes, the Union relies upon an arbitration award addressing that issue which was issued in January of 1990 by Arbitrator Yaffe. That award sustained a grievance in this department protesting the unilateral decision of management to change the method of scheduling part-time employes. In that case management had scheduled part-timers in such a fashion to limit them to less than the 1,040 hours necessary to benefit from participation in the pension program. As should be the case here, that scheduling procedure was rejected because part-time employes have the right to be given assignments from the part-time roster based on seniority and without limitation on the number of hours they may be assigned. In his award, Arbitrator Yaffe relied upon then Article V, Section 5 which is now unchanged other than being renumbered as Article VI, Section 4 of the agreement. In this case management has attempted to get around the award by using another method, i.e., increasing the hours of those employes who have worked less rather than utilizing the more senior employes. Continuing that method may someday result in keeping newer employes out of the pension. Thus, while no employes have been currently harmed, that could occur in the future. The City is arguing it has the right to schedule part-timers for regular hours in any manner it deems appropriate. To prevail, it must be concluded that there is no limitation on the manner of scheduling part-timers for regular hours. However, Article VI, Section 4 of the agreement contains a clear limitation in that regard. If, however, an ambiguity is found, then the past practice of the method utilized by Block must prevail and management's attempt at a unilateral change must be repudiated.

City

The City takes the position that it has the right under the agreement to schedule and assign regular and overtime work. The City cites Article V, Section 7 of the agreement and asserts that the language of that provision is clear on its face. The Union is claiming that management's right to schedule and assign regular and overtime work has been significantly reduced by past practice. In that regard, it is a basic labor relations principal that in construing a labor agreement the intent of the parties should be determined from the contract as a whole. Also, as far as possible, contract provisions should be harmonized so as to give the language a uniform meaning. Where one provision of the agreement provides for certain rights or duties, it is fair to assume that the parties do not intend for a subsequent provision to cancel the earlier provision. If the contract language is susceptible to two constructions, and one will carry out the objectives of the contract in its entirety and the other will not, the first should prevail.

In this case Article V, Section 7 must be harmonized with Article V, Section 5. Section 7 provides management the right to operate and manage its affairs in all respects including the right to schedule and assign overtime work. That provision also gives management the exclusive right to determine work schedules and establish methods and processes by which work is performed. Section 5 addresses the manner in which all overtime work is to be assigned. To attempt to harmonize the two provisions it must be understood what the parties agreed to with respect to Section 5. Bargaining history is a valuable and proper source in that regard. Many arbitrators have held that an unsuccessful attempt to obtain a specific expansion of rights in bargaining, indicates that the right does not exist by agreement or past practice. Since a party cannot obtain through arbitration that which it could not obtain in bargaining, then a contract should not be construed as though the rejected proposal had been accepted. In this case MECCA rejected the Union's proposal in the 1989 negotiations which included the following proposed addition to the language of Article V, Section 5: "No part-time employee shall be utilized when full-time employes are available for work." That proposed language mirrors the language of the Union's grievance: "The rule has always been full-timers first, then part-timers. If full-timers didn't want to work, then part-timers were scheduled. . . . " The City disputes any claim that, after rejecting the proposal, the City reached an understanding that the scheduling of overtime was on a seniority rotation basis. It also disputes any claim that the proposal merely reflected an attempt to confirm what had been the practice. Rather, it is more likely that the proposal was rejected because the language was more expansive than the practice.

The City also contends that the Union has not established a legitimate past practice. The record demonstrates that there were inconsistencies between the parties' respective views concerning the alleged practice. Local 150 President, Dan Iverson, testified that from the mid-1980's to approximately November of 1991, he had a mutual understanding with management that the scheduling of overtime would be done on a seniority rotation basis. Block testified that the method he used to schedule overtime hours was that it was always full-timers first and that if none were available, then he would call part-timers until they had enough men to do the assignment. Witnesses for management uniformly testified that to the extent any past practice existed, it was limited to the assignment of "unscheduled overtime." Harms testified that was his understanding of the manner in which Block scheduled overtime. Harms further testified that rock shows fell into the category of call-in or unscheduled overtime since information about such shows comes into MECCA very late, hindering the ability to schedule it as regularly scheduled overtime. Block's own testimony supported that testimony.

According to the City, the Union's interpretation of the scope of the past practice would in essence permit full-time employes to schedule their own overtime. Block testified on cross examination that management had mutually agreed with the Union to allow employes to decide when and if they were going to work overtime. That testimony is directly contradicted by the testimony of MECCA President, Geoffrey Hurtado. Thus, the alleged past practice cannot be characterized as "clearly enunciated" and well established by both parties.

While management adhered to a scheduling practice for unscheduled overtime, it did so by choice and as a function of its discretion, not because of any contractual requirement. It is a well established principal of labor relations that past practices are not always binding upon the parties. Even where a practice is otherwise found to be binding, questions may arise as to its scope. In this regard one must look at the underlying circumstances to consider the true dimensions of the practice. In this case, any past practice relative to scheduling of overtime arose out of the context of Article V, Section 7 of the agreement. To the extent that section is silent as to a

particular scheduling practice, that logically falls within the purview of things left to the discretion of management pursuant to the management rights clause. The scope of such a practice must then be reviewed in light of that provision of the agreement. Also, whether a practice is binding or not, may be dependent upon whether the matter involves methods of operation or direction of the workforce or involves a benefit of peculiar personal value to the employe. Past practices should not restrict the exercise of legitimate functions of management. Standard Oil Company, 16 LA 73 (1951). In this case the method of scheduling overtime was merely a choice by management in the exercise of its discretion under Section 7. If the choice is a product of managerial discretion, such practices are, absent contractual provisions to the contrary, subject to change in the same discretion. While an employer may be required to inform the union and be ready to discuss the matter with it on request, there is no requirement of mutual agreement as to the condition precedent to a change of practice of this character. Ford Motor Company, 19 LA 237 (1952).

If it is determined that a past practice exists, it must be limited in scope to those matters the parties are in agreement with. Here they only agreed as to the methodology employed by Block in scheduling unscheduled overtime. There was no further meeting of the minds as to whether that practice extended to regularly scheduled overtime.

The Union's interpretation of the scheduling practices is also inconsistent with the clear wording of Article V, Section 7. The City also asserts that Article VI, Section 2 of the agreement includes a provision that provides that part-time employes are eligible for overtime hours and pay. Thus, management has certain contractual obligations to those part-time employes as well. The Union's interpretation would run afoul of that contractual requirement.

Regarding the scheduling of regular hours for part-time employes. The City denies that its method was intended to prevent them from becoming eligible for pension. The Union has not offered any evidence to substantiate its claim in that regard. Conversely, management witnesses explained their methodology and reasoning for scheduling part-timers, i.e., to equalize their hours as much as possible.

DISCUSSION

Article V, Hours of Work, Section 5, of the Agreement provides that "All overtime work available shall be shared equally from the top of seniority to the least senior employee and will be rotated." (Emphasis added). However, Section 7 of that article reserves to management "the right to schedule and assign regular and overtime work...", i.e., the right to determine whether there will be "overtime" available to be worked. In other words, management has expressly reserved the right in this provision to determine whether the hours will be worked as "overtime" or assigned to part-time employes as part of their scheduled hours. It does not become "overtime" until management schedules it as such, i.e., to schedule employes beyond their regular hours so as to generate hours in excess of eight hours in a day or 40 hours in a week.

As the City asserts, the language of Article V, Section 7, reserving that right to management is clear and unambiguous. Therefore, past practice is not properly considered. 3/ Further, the Union's attempt in the 1989 negotiations

3/ It is also noted that both Kulinski, a Union witness, and Harms testified that any practice of offering all extra work (scheduled or unscheduled) to full-timers first ended in November of 1990.

to obtain contract language that would have precluded the use of part-time employes while any full-time employe was not working supports a conclusion that the parties recognized that management had the right under then current language to use part-time employes instead of utilizing full-time employes on an overtime basis. That language has not changed. However, once management decides that work will be scheduled and generate overtime, then Section 5 requires that it first be offered to full-time employes. As the Union asserts, Article VI, Section 1, expressly excludes part-time employes from Article V. Article VI, Section 2, only requires that part-time employes be paid time and one-half for all hours worked over eight in a day, and does not provide any contractual right to overtime.

The Union's argument that all weekend work must first be offered to full-time employes before part-time employes are assigned that work has no support in the Agreement. Article V, Section 3 simply provides that the full-time employes will receive the weekend premium of $3.50 per hour when they are scheduled to work weekends as part of their regular shift. There is no contractual provision similar to Section 5 that limits management's right under Section 7 to assign weekend work per se.

It is therefore concluded that management did not violate the parties' 1991-1993 Agreement by its current method of assigning "available overtime" as described herein. To the extent management has assigned part-time employes to work in an overtime capacity without offering to full-timers first the hours that constituted overtime for the part-time employe, 4/ that would in fact violate Article V, Section 5 of the Agreement.

With regard to the assignment of part-time employes' regular hours, the Union relies upon the Yaffe Award issued in January of 1990. That award provided in relevant part:

> On the merits, under the maintenance agreement, although the Employer has preserved for itself the right to assign work, it has also agreed to limit its discretion in that regard somewhat when it agreed to Article V, Section 5. 5/ Said proviso, particularly when viewed in the context of the Employer's past assignment practices, seems to afford part time employees covered by said agreement the right to be retained and given assignments from the part time roster based upon their seniority, without limitations on the number of hours of work they may be assigned. It is noteworthy in this regard that there is no equalization language in the maintenance contract, unlike the other two agreements which are relevant to this dispute. Also noteworthy is the fact that the maintenance agreement is the only agreement which contains the language set forth in Article V, Section 5. What the totality of the evidence indicates is that in the maintenance unit, prior to the agreement which went into effect in October, 1986, part time employees were given assignment preference by seniority, without

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4/ The grievance alleges that a part-time employe was assigned to work 14 hours on November 15, 1991. However, no evidence was adduced to support that allegation.

5/ Article VI, Section 4 in the current agreement.

> limitation, and that low seniority employees were given assignments from the part time roster only when more senior employees were not available.
>
> Though the Employer argues that Article V, Section 5 is not applicable to the facts present herein, the undersigned agrees with the Union that the impact of the Employer's changed assignment policy was to effectively remove senior maintenance employees from the roster for a period of time, and Article V, Section 5 specifically requires that removal from the part time roster shall be in inverse order of seniority.
>
> While the undersigned concedes that Article V, Section 5 does not clearly set forth this arrangement, when viewed in the context of the parties' past assignment practice, that's what it appears to have meant to the parties. Under said circumstances, the Employer had the obligation during negotiations to have at least notified the Union that it no longer intended to be bound by said practice so that the Union would have had a meaningful opportunity to negotiate the impact said change would have on bargaining unit employees.
>
> Because the Employer failed to give the Union an opportunity to negotiate the change in this practice, which clearly affected the rights of employees under Article V, Section 5, its unilateral change in this regard violated the rights of affected employees under said contractual proviso.

The record indicates that the contractual language relied upon by Arbitrator Yaffe has not changed, other than being renumbered. Arbitrator Yaffe also relied upon an existing practice of offering hours to part-timers on a seniority basis without limitation on hours. The evidence indicates that management is attempting to equalize the hours worked by the part-time employes by limiting the hours assigned to those part-time employes who have worked more hours than the others, ostensibly in an attempt to equalize the hours worked. As Arbitrator Yaffe noted in his award, the Agreement covering this bargaining unit does not have equalization language in it with regard to assigning work to part-time employes. It is also noted that Article V, Hours of Work, including Section 7, does not apply to part-time employes. While it does not appear that more senior part-time employes have in effect been removed from the part-time roster, as was the situation in the case before Arbitrator Yaffe, that could be the effect of management's current method if there is a sufficient decrease in the work available.

There being no evidence that the Union was put on notice during the last negotiations that management intended to change the practice of following seniority in the assignment of work to part-time employes, and given that the contractual language relied upon by Arbitrator Yaffe has not materially changed, the undersigned finds no basis for reaching a different conclusion in this case. Thus, it is concluded that management's current method of assigning regular hours to part-time employes violates the parties' agreement. As the remedy requested is to follow the past method of assigning regular hours to part-time employes, that remedy is granted to the effect that management is to follow the practice described in Arbitrator Yaffe's award, - i.e., the hours are to be offered on a seniority basis.

Based upon the above and foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

As to Issue 1, the grievance is denied.

As to Issue 2, the grievance is sustained.

Dated at Madison, Wisconsin this 25th day of January, 1993.

By David E. Shaw /s/
David E. Shaw, Arbitrator