BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 366, AFSCME, AFL-CIO DISTRICT COUNCIL 48	Case 259 No. 46961 MA-7116
and	
MILWAUKEE METROPOLITAN SEWERAGE DISTRICT	

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, by Mr. Alvin R. Ugent, appearing on behalf of the Union.

Mr. Donald L. Schriefer, Senior Staff Attorney, appearing on behalf of the District.

ARBITRATION AWARD

Local 366, AFSCME, AFL-CIO, District Council 48, hereinafter referred to as the Union, and the Milwaukee Metropolitan Sewerage District, hereinafter referred to as the District, 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 District, 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 Milwaukee, Wisconsin, on May 12, 1993. The hearing was transcribed, and the parties filed briefs which were exchanged on July 28, 1993.

BACKGROUND:

The basic facts underlying the grievance are not in dispute. On September 29, 1991, an "A" shift employe scheduled to work from 6:30 a.m. to 2:40 p.m. as an Operator III Rear called in sick which required overtime to cover for the employe. The parties' collective bargaining agreement contains a seven step Rotating Shift Overtime Replacement Procedure which required the District to offer the overtime first to the Operator III Rear who was going off work from the previous 10:30 p.m. to 6:40 a.m. "B" shift. It is undisputed that the Operator III Rear on that shift was Clarence Pinion, and he was the "regular offman." Pinion was offered the overtime, but he turned it down. The procedure provides that the overtime will then be offered to the "extra offman" but there was none listed for September 29, 1991. The next person to be offered the overtime is the utility operator, if off. The grievant was the "off utility" but he was not offered the overtime and filed the instant grievance.

Sometime prior to September 29, 1991, Pinion had been an Operator IV and Rudy Salas held the job of Operator III Rear on "B" shift. Pinion was demoted back to Operator III Rear on "B" shift bumping Salas. Salas could have bumped to a lower classification, but he was to receive a promotion in a week or two, so the District decided to keep him on "B" shift to avoid numerous personnel and schedule changes. On September 29, 1991, Salas was classified as an Operator III Rear but was performing miscellaneous odd jobs on "B" shift.

After Pinion declined the overtime opportunity, the supervisor offered it to Salas who accepted it and worked it. When the grievant found out that Salas had worked the overtime, the instant grievance was filed.

ISSUE:

The parties stipulated to the issue as follows:

> Whether the District violated the labor agreement by failing to offer overtime to the Grievant, Mr. Kersten, on the day in question?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISION:

SCHEDULE A

. . .

Q. MISCELLANEOUS PAY PROVISIONS.

. . .

14. Rotating Shift Overtime Replacement Procedure. When assigning an employee as an overtime replacement for an absent rotating shift employee, the following procedure will be used:

Replace with man in same classification in the following order:

a. Eight (8) hour replacement (full shift)

(1) Offman (regular)

(2) Offman (extra)

(3) Utility (if off)

(4) Special Utility (if off)

(5) Split shift (12-12)

(6) Work 16

(7) Go out of classification, ask qualified employees who are working if they would stay over and work 16.

. . .

UNION'S POSITION:

The Union contends that the parties, in clear contractual language, set out how overtime would be assigned when and if it became available. It notes that employes are not required to accept the overtime. It argues that when the overtime became available on September 29, 1991, the procedure for assigning overtime should have been followed. It submits that the District called the Offman (regular) who turned it down and the next person to be called was the Offman (extra) but there was none so the next one to be called was Utility (if off) and that person was the grievant, but he was not called. The Union insists that there is only one Operator III Rear on the shift, and it is a one-person job. It claims that when an Operator III is assigned to another job, the person receives the pay of his normal classification but is really doing a different job. It maintains that Pinion bumped Salas out of the Operator III job and Salas was no longer the Operator III and because Pinion had the job, he was called but Salas was not next in line to be called and the failure to call the grievant was a clear contract violation.

The Union notes that the District's Supervisor in assigning overtime may have felt that it was a good and efficient way of doing it, but the contract is specific on how overtime is to be assigned and the Supervisor did not follow this procedure and the grievant lost overtime. It asks that the grievant be made whole including interest on the amount of money he is due.

DISTRICT'S POSITION:

The District contends that when overtime work was required on September 29, 1991, it is undisputed that it was to be offered first to the Offman regular, in this case Pinion. It submits that Pinion was classified as an Operator III Rear on the immediately preceding shift and September 29, 1991, was his regular off day. It points out Salas was also classified as an Operator III Rear, and September 29, 1991, was also his regular off day, so he fit the category as Offman regular and was offered the overtime. It states that it is irrelevant that Salas was performing other duties, and it was admitted that the District could assign two people to the same classification on a shift.

It argues that the Union has failed to show that the assignment to Salas violated the contract, logic, common sense or anything else, and, in fact, the failure to assign him the overtime would violate the contract.

The District insists that the contention that Salas should have been offered overtime only after the first six steps had been exhausted is contrary to the plain language of the contract. It notes that the seventh step allows the overtime to be offered to an employe who is "out of classification." According to the District, the Union is seeking an interpretation that bypasses a qualified employe with the precise classification required but allows the District to offer it to him under a provision that clearly does not apply to

him. It maintains that such a tortured result underscores the illogicality of the Union's position. It concludes that the District's actions comported with logic and the plain language of the contract and the grievance should be denied.

DISCUSSION:

It must be noted that the factual situation giving rise to the grievance occurs very infrequently. Normally, only one employe in the classification is assigned to a shift, but under unusual circumstances, more than one person in the class is assigned to a shift although that person may be performing different duties. In the present case Pinion and Salas were assigned to the same shift as the District had decided to avoid bumping and schedule changes because of Salas' imminent promotion. Under these circumstances, the decision to offer the overtime to Salas, after Pinion declined it, was sensible, reasonable and logical. However, the issue here is whether the assignment violated the parties' contract.

Schedule A, Paragraph Q, Section 14, sets out a very detailed procedure to be followed when assigning an employe as an overtime replacement for an absent rotating shift employe. The parties did not use general language in the overtime distribution clause, such as assigning overtime on the basis of seniority. Instead the parties enumerated the persons to be called in very elaborate and express language leaving no room for doubt and no discretion by the District. The intent of the parties is expressed by this contractual language and because it is so detailed and precise, it must be followed precisely. The offer of the overtime to Salas fell outside the order specified in Section 14 because Salas was not the regular operator but was merely an additional employe assigned to the shift. Otherwise, why was Pinion offered the overtime first instead of Salas? If the District assigned two or three regular operators, the result might be different but Salas was not the "Offman (Regular)" and should not have been offered the overtime; thus, the District violated Section 14.

The District has relied on "past practice" in that in 1989, the District skipped the present supervisor who at that time was training as an Operator III Rear and questioned why he was not offered the overtime. On that occasion, he was paid for the overtime missed and no grievance was ever filed. This single incident does not establish that the failure to offer Salas the overtime would be a violation of the contract. There was no evidence the Union knew about this incident or agreed with the result. The 1989 incident does not establish that the District's position in the instant case must be upheld.

The District asserts that Section 14, a, states that the procedure will be used to replace the absent man with an employe in the same classification but Step 7 allows it to go out of classification. It would appear contradictory to replace a man in the same classification with someone out of classification, but Step 7 requires the employe be qualified even if the employe is not in the same classification. Here, offering the overtime to Salas at Step 7 would meet that requirement because he is qualified albeit he is in the same classification.

The problem here is that having an extra man on the shift happens only occasionally, and it is likely that the parties did not contemplate this unusual occurrence when they negotiated the procedure. Even though it happens infrequently, if the parties intended that the man on the shift who was in the same classification as the regular operator should be given the next offer of overtime, they could have stated so in their detailed procedure. Because they didn't, it must be concluded that they did not intend that the additional employe be offered the overtime until the applicable Step, namely, Step 7 because he was not the regular operator. It is concluded that the District violated the agreement by failing to offer the grievant the overtime on September 29, 1991, and he shall be made whole.

The Union has asked for interest on the make-whole remedy. The agreement contains no provision requiring such a result. The undersigned is mindful that he has the authority to make the grievant whole; however, the vast majority of arbitrators do not award interest. Certainly, the parties were aware of this when they negotiated the agreement, and if they intended an opposite result, they could have easily specified so with express language. 1/ Therefore, the undersigned will not award interest on the overtime pay.

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

AWARD

The District violated the labor agreement by failing to offer overtime to the grievant, Mr. Kersten on September 29, 1991. The District shall make him whole by paying him the amount of pay he would have received had he worked the overtime on September 29, 1991. The undersigned will retain jurisdiction for a period of thirty (30) days solely for the purpose of resolving any disputes with respect to the remedy herein.

Dated at Madison, Wisconsin, this 16th day of August, 1993.

By Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator

1/ See Berg Mfg. & Sales Co., Inc., 71-1 Arb para. 8294 (Anrod, 1971); Intermountain Operators League, et al., 26 LA 149 (Kadish, 1956).