BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF MERRILL	Case 49 No. 49039 MA-7805
and	
MERRILL CITY EMPLOYEES UNION, LOCAL 332, AFSCME, AFL-CIO	

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing for the Union.

Schmitt, Hartley & Koppelman, S.C., Attorneys at Law, by Mr. James C. Koppelman, appearing for the Employer.

ARBITRATION AWARD

Merrill City Employees Union, Local 332, AFSCME, AFL-CIO, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. The City of Merrill, herein the Employer, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Merrill, Wisconsin, on July 27, 1993. There was no transcript made of the hearing. Post-hearing briefs were received from the parties by October 6, 1993. The time period for the filing of reply briefs ended on October 25, 1993.

ISSUES:

The parties stipulated to the following issues:

> Did the Employer violate the collective bargaining agreement when it refused to pay the grievant overtime at the one and one-half times rate for November 17, 1992? If so, what is the proper remedy?

BACKGROUND:

On November 16, 1992, 1/ the grievant, Don Hanneman, worked from 7:00 a.m. to 3:30 p.m. Prior to leaving work on that date, Hanneman was told to report to work at 12:00 a.m. on November 17 for snow removal. He worked from 12:00 a.m. to 11:00 a.m. on November 17. He received straight time pay plus a 30 cents per hour shift differential for the hours from 12:00 a.m. to 7:00 a.m., straight time pay for the hours from 7:00 a.m. to 8:00 a.m., and time and one-half his regular hourly rate for the hours from 8:00 a.m. to 11:00 a.m.

1/ Unless otherwise specified, all other dates herein refer to 1992.

Upon receiving his paycheck which included November 17, Hanneman filed a grievance wherein he requested to be paid at time and one-half his regular hourly rate for all hours worked on November 17.

The parties stipulated that the way Hanneman was paid for his work on November 17 was consistent with the Employer's payment to employes for similar situations in the past.

POSITION OF THE UNION:

The language of Articles 11 and 18 should be read together to achieve proper understanding of the appropriate meaning. Article 11 provides that any time worked over eight hours in a day is subject to an overtime premium at a rate of time and one-half. Article 18 defines the work day. The language of each article is clear and unambiguous.

Under arbitral law, even a consistent past practice cannot be used to modify or amend clear and unambiguous contract language. In the instant case, the past practice is neither totally consistent nor entirely supportive of the City's position. The grievant testified, without rebuttal, that when an employe is called in at 6:00 p.m. and works through the night until 9:00 a.m., the employe is paid at the overtime rate for the entire period. Under the City's theory, i.e., that the word day means calendar day, it would seem that the overtime pay would not commence until after midnight.

When the contract is read as a whole, it is clear that the parties intended the term day to be defined as the workday, rather than as a calendar day. Thus, any time worked outside of the hours from 7:00 a.m. to 3:30 p.m. would be considered to be outside the employe's regular work day and would be subject to the overtime pay premium required under Article 11.

The grievance should be sustained and the grievant should be made whole for all lost wages and benefits.

POSITION OF THE EMPLOYER:

Article 18 does not define the term day, but rather, it sets out a regular schedule of hours. Therefore, the arbitrator must rely on the plain meaning of the word, which would be a calendar day according to the dictionary. The grievant's attempt to equate the word day to the regular hours of work set forth in Article 18 is without merit.

The manner in which the grievant was paid for his work on November 17 is consistent with the past practice. Accordingly, the grievance should be denied.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 11 - OVERTIME PAY - CALL-TIME PAY

> A) An employee required to perform work outside of eight (8) hours per day and forty (40) hours per week shall be paid one and one-half (1-1/2) time (sic) his/her regular rate of pay. Paid holidays, vacations and sick leave shall be considered as time worked when computing an employee's overtime.

B) Any employee called to work outside of the normal schedule of hours shall receive two (2) hours pay in addition to the actual hours of work, provided the employee was not notified prior to punching out at the end of the work day; however, if the employee was ordered to report for work and no work is available when he/she reports in, he/she shall then receive the two (2) hour call time pay. Call time pay shall be at the regular rate of pay and never at overtime.

C) Employees shall receive thirty cents ($.30) per hour in addition to their base hourly rate for all hours worked outside their normal schedule of hours. The additional thirty cents ($.30) shall also be included when computing overtime pay.

D) Department Heads and Supervisors agree to give a worker at least 24 hours notice for all planned work outside of the regular work schedule. If this is not done, then the employee will receive the called time provided in paragraph B of this Section. This provision does not apply to weather related work and emergency work, as a result of weather related incidents. For example: snow removal, salting, as a result of a storm.

E) The parties, by mutual agreement, may agree to compensatory time to be given in lieu of payment, as provided by this Section. If compensatory time is given, the same shall be at the rate of time and one-half for the year in which the work is performed.

. . .

ARTICLE 18 - SCHEDULE OF HOURS

A) Street Department: The regular schedule of hours for the Street Department employees shall be from 7:00 a.m. to 12:00 noon, and 12:30 p.m. to 3:30 p.m., Monday through Friday, making a forty (40) hour work week.

. . .

DISCUSSION:

The Union relies on the assertion that the language of Articles 11 and 18 is clear and unambiguous. Such an assertion is not persuasive. If that were the case, then it would be unnecessary to refer to other sources to establish the definition of the term day in Section A of Article 11. However, such reference is necessary, since neither of the above mentioned articles defines the term day and both parties present definitions which appear to be plausible on the surface. The Employer contends that day means a calendar day, while the Union contends that day means a 24 hour period commencing with the start time of the employe's regular schedule of hours.

Section A of Article 11 requires that an employe will be paid at the rate of time and one-half when the employe performs work outside of eight hours per day. Said provision does not contain the phrase normal schedule of hours, as does Section B of Article 11. If Section A used the phrase "outside of the regular schedule of hours," rather than the phrase "outside of eight hours per

day," then the Union's argument would be supported by the language. As written however, Article 11 supports the Employer's position.

Although the Union believes that its interpretation is supported by the language in the holiday provision of the contract, the undersigned concludes the opposite. The parties have used the word day throughout said provision. If one applied the Union's position that the day begins with the start of an employe's shift, then employes on different shifts would have different 24 hour periods for the same holiday. For example, a holiday for the grievant would begin at 7:00 a.m., but would begin at 6:00 a.m. for the pickup crew in the Sanitation Department and at various times, including midnight, for the sewage treatment plant employes. It seems unlikely that the parties intended such a lack of uniformity when they drafted the contract. Rather, the Employer's interpretation, that the term "day" refers to a calendar day is more convincing.

It is clear, from the stipulations of the parties at the hearing, that the grievant in this matter was paid in a manner which was consistent with the manner in which employes have been paid in similar situations in the past. The grievant sought to rely on other prior instances when employes were called back to work on the same day after working their regular schedule and then worked from 6:00 p.m. to 9:00 a.m. In those instances the employes were paid at the time and one-half rate for that entire period of time. The Employer believes those cases are different, since the overtime payment started prior to midnight and continued into the next day as a continuous period of time. Certainly such a situation is different from, and does not establish a practice which would control, the instant case.

The case cited in the Union's brief dealt with contractual language which is not present in the contract involved in this case. Consequently, that case has no precedential value for this matter.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the Employer did not violate the collective bargaining agreement when it refused to pay the grievant overtime at the one and one-half times rate for November 17, 1992; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 12th day of January, 1994.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator