BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MILWAUKEE METROPOLITAN SEWERAGE DISTRICT	Case 263 No. 47828 MA-7398
and	
DISTRICT COUNCIL 48, AFSCME, AFL-CIO, AND ITS AFFILIATED LOCAL 366	

Appearances:
Mr. Donald L. Schriefer, Senior Staff Attorney, Milwaukee Metropolitan Sewerage Comm
Podell, Ugent & Cross, S.C., by Mr. Alvin R. Ugent, 611 North Broadway, Milwaukee, Wi

ARBITRATION AWARD

The Milwaukee Metropolitan Sewerage District, hereinafter referred to as the Employer, and District Council 48, AFSCME, AFL-CIO, and its affiliated Local 366, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the accumulated time of two (2) employes. Hearing on the matter was held in Milwaukee, Wisconsin on June 11, 1993. A stenographic transcript of the proceedings was prepared and received by the undersigned on July 12, 1993. Post hearing written arguments were received by the undersigned by December 17, 1993 and the parties informed the undersigned by December 22, 1993 that they would not be filing reply arguments. Full consideration has been given to the testimony, evidence and arguments presented in rendering this award.

ISSUE

During the course of the hearing the parties unable to agree on the framing of the issue and agreed to leave framing of the issue to the Arbitrator. The undersigned frames the issue as follows:

> "Did the Employer violate the labor agreement when it scheduled Special Utility Operators to work less hours than other employes during the same two (2) week period?"
>
> "If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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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).

3. Overtime Pay.

a. All overtime worked by an employee shall be paid at the applicable rate for such hours computed on the employee's biweekly rate. An exception will be made for monitoring crews (District Services), field maintenance crews (District Services) and Engineering Aides (Construction) who will receive certified accumulated time at the rate of time and one-half (1-1/2) with District approval for time worked on a normal workday in excess of eight (8) hours.

b. If a rotating shift employee is scheduled to work on a holiday, he/she will receive double time (2) for time worked from 10:30 p.m. on the day preceding the holiday to 10:30 p.m. on the holiday, computed on an employee's biweekly rate exclusive of shift premium. If a rotating shift employee is sick on one of these holidays, he/she shall receive sick leave pay at straight time. If a replacement is called in on his/her day off, he/she will receive double time (2) pay for the hours worked, as will an individual who is held over as a replacement.

c. All laboratory employees who work Saturday or Sunday as scheduled by management, will be eligible for time and one-half (1-1/2) pay only. All employees scheduled to work in the Acid House on Ferric Chloride unloading time, or taking samples between the Acid House and Laboratory, on Saturday or Sunday will be entitled to time and one-half (1-1/2) pay.

d. In cases of death, certified overtime and vacation pay accrued, and accumulated time due, will be paid to the employee's survivors or estate.

e. Regular day shift employees shall receive double (2) time for work performed on Sundays or holidays unless provided otherwise in b or c above. Rotating shift employees shall receive double (2) time for work performed on their second regular day off unless provided otherwise in b or c above.

f. Time and one-half (1-1/2) will be paid for all hours scheduled and actually worked in excess of forty (40) hours in any given workweek. Workweek is defined as Sunday, 6:30 a.m. - Sunday, 6:29 a.m. (This does not decrease any current pay practice, as stated in the Agreement.)

Shift changes can be made, except this time is not included in the above overtime computation.

g. All employees shall receive double (2) time after working twelve (12) consecutive hours.

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O. HOURS OF WORK

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3. Nothing in this Agreement shall be construed as a guarantee or limitation of the number of hours to be worked per day, per week, or for any other period of time, except as may be specifically provided herein.

4. Work Schedules. All employees shall work on a schedule prepared by management.

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BACKGROUND

The Employer employs workers on three (3) shifts. Employes on these shifts are informed at the beginning of the year what days they are scheduled to work and how many hours they will work for the entire year, a normal work year being one thousand, nine hundred and eighty-four (1,984) hours of work. When shift employes are absent because of vacations, sick leave or other time off their jobs are usually filled by Special Utility Operators. Special Utility Operators do not have a set schedule. Their work schedules are based upon Employer needs and are developed two (2) weeks in advance. Special Utility Operators may work any of the three (3) shifts during a two (2) week pay period including Saturdays or Sundays. It is not unusual for Special Utility Operators to work more than forty (40) hours in a one week period. When they do they receive compensation in the form of time and one half (1 1/2) per each hour worked in excess of forty (40). This compensation consist of one (1) hour accumulated time and one half (1/2) hour pay. Special Utility Operators may not carry over more than forty (40) hours of accumulated time from year to year, with the excess being paid out at the end of the year. When the Special Utility Operators are scheduled to work less than forty (40) hours in a week accumulated time is used to maintain an eighty (80) hour pay check.

Prior to April 2, 1992 the Employer employed only two (2) Special Utility Operators on the "Wet End" of the Employer's operations, Rufus Thomas and Don Pecard, hereinafter referred to as the grievant. During a year it was not unusual for either grievant to generate over seventy (70) hours of accumulated time by the end of the calendar year. As of April 2, 1992 a third Special Utility Operator was employed on the Wet End. Thereafter the Employer scheduled both grievants less hours. Thereafter the grievant filed grievances alleging the Employer's actions of scheduling them less hours than the scheduled hours for other regular shift employes stripped them of their

opportunity to attain accumulated hours. The Employer denied these grievances and the matter was processed to arbitration in accordance with the parties grievance procedure.

UNION'S POSITION

The Union points out that the collective bargaining agreement is silent concerning how overtime is to be paid. The Union does acknowledge that the parties have a long standing past practice that allows the Employer to pay overtime in the form of one half (1/2) hour paid time and one (1) hour of accumulated time. The Union argues that employes have not been required to use their accumulated time but may carry it on the books until the end of the year when the collective bargaining agreement determines how much must be paid out and how much the employe can carry over. The Union contends that employes have determined when they will use their accumulated hours, not the Employer. The Union argues this is a binding practice on both parties. The Union asserts the Employer unilaterally changed this practice in an attempt to limit employes overtime in subsequent weeks. The Union argues such a change should be done at the bargaining table. The Union would have the arbitrator direct the Employer to return to the past practice of allowing employes to use accumulated time at their discretion not the Employer's.

EMPLOYER'S POSITION

The Employer contends the Union case is essentially that the Employer must schedule the Special Utility Operators the same number of hours each pay period as are scheduled for Utility Operators. The Employer points out that Utility Operators are scheduled to work one thousand nine hundred and eighty-four (1984) hours per year. The Employer argues that if it were required to schedule the Special Utility Operators the same exact hours each bi-weekly pay period, whether needed or not, their hours would be inflated even more hours at the end of the year than other employes. The Employer points out there is no practice which requires it to schedule the Special Utility Operators to work, at a minimum, the same number of hours as the Utility Operators. The Employer stresses that the record, clear contract language and plain common sense support its position that it try to schedule the Special Utility Operators so that their annual hours approximate those worked by other employes.

The Employer contends the language of the collective bargaining agreement is clear and in support of its position the Employer points to Appendix A, Paragraph O, Section 3. The Employer argues this provision clearly demonstrates there is no guarantee of any hours for any employe. The Employer argues this provision unequivocally gives it the right to reduce the hours of the grievants when scheduling needs permit it to do so.

The Employer also argues that all the Utility Operator schedule does is give it a convenient benchmark to use when it keeps track of the grievants work hours. The Employer points out that the grievant's supervisor, Leonard Aprahamian, testimony and the exhibits the Employer introduced at the hearing clearly demonstrate that he has kept track of the hours of Special Utility Operators, that he has attempted to bring their annual hours in line by scheduling them fewer hours, and that he has in the past scheduled them to work less hours in a bi-weekly pay period than the hours scheduled for the Utility Operators. The Employer asserts that the only distinction between what the supervisor is doing now and what he did in the past is that because of the addition of the third Special Utility Operator it has become easier for him to keep the total hours of the grievants in line with other employes.

For the above reasons the Employer would have the Arbitrator deny the grievance.

DISCUSSION

The record herein demonstrates that prior to the hiring of a third Special Utility Operator the grievants had a significantly greater opportunity to work overtime and to generate accumulated hours. With the addition of the third worker it is evident that the overtime opportunities have been greatly reduced. There is no evidence, as argued by the Union, that the Employer is mandating the use of accumulated time. The record does demonstrate that in 1989, 1990, 1991 and 1992 the grievants were scheduled to work during some bi-weekly pay periods to work less hours than those scheduled for other employes. Thus there is no basis for the grievant testimony that they should be scheduled to work the same hours as the other employes. Further, as the Employer has argued, Appendix A, Section O, Paragraph 3, specifically states there is no guaranteed work week or work period for employes unless specifically provided for in the collective bargaining agreement. A careful review of the parties' collective bargaining agreement demonstrates that there is not a specific guarantee of hours for Special Utility Operators in the agreement. Thus the undersigned finds the Employer did not violate the collective bargaining agreement when it scheduled the grievants to work less hours in a bi-weekly pay period than it did other employes.

There is also no evidence in the record which would lead to a conclusion that the Employer has altered the practices concerning the payout or use of accumulated time. As the Union has pointed out there is no language in the agreement concerning this matter and thus the past practice of the parties is controlling. The Union position in effect is that when the grievant's are scheduled to work less than eighty (80) hours in a bi-weekly pay period they should not have to use accumulated time but may make an option, take home pay based upon the hours actually worked or use accumulated time. However, the practice is binding on both parties and if the Union desires to have employes receive less of a paycheck than an eighty (80) hour pay check for a bi-weekly pay period the place to make such a change is at the bargaining table, not through the grievance procedure. Herein, on each occasion during the last four (4) years when the grievants were scheduled to and worked less than eighty (80) hours during a pay period they still took home a paycheck for eighty (80) hours. Thus, the Employer contention that it has merely continued the past practice but applied it to three (3) employes instead of two (2) is supported by the record.

Therefore, based upon the above and foregoing, the arguments, testimony and evidence presented the undersigned concludes the Employer did not violate the collective bargaining agreement when the Employer scheduled the grievant to work less hours than other employes during the same two (2) week period. The grievance is denied.

AWARD

The Employer did not violate the collective bargaining agreement when it scheduled the grievant to work less hours than other employes during the same two (2) week period.

Dated at Madison, Wisconsin this 18th day of March, 1994.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator