BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS LOCAL NO. 75

and

CITY OF MANITOWOC

Case 108
No. 51628
MA-8678

Appearances:

Mr. John J. Brennan, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorney at Law, appearing on behalf of the Union.

Mr. Patrick L. Willis, City Attorney, City of Manitowoc, appearing on behalf of the Employer.

ARBITRATION AWARD

The Union and the City named above requested that the Wisconsin Employment Relations Commission appoint an arbitrator to hear a grievance involving overtime. The undersigned was appointed and held a hearing on December 14, 1994, in Manitowoc, Wisconsin. The parties completed filing briefs by February 1, 1995.

ISSUE:

The parties ask:

> What is the appropriate remedy for the City's failure to call the Grievant in for overtime work on August 8, 1994?

BACKGROUND:

The facts are not in dispute.

The Grievant is Jack Keil, a heavy equipment operator whose normal shift is 7:00 a.m. to 3:00 p.m. On August 8, 1994, the Superintendent of Public Works, Garry John, was called about 5:15 or 5:30 a.m. by the assistant superintendent about a sewer problem. John has call-out lists at home, to call employees by seniority for different types of work. He keeps 14 separate lists.

The first person on the list, Terry Skarda, accepted the overtime assignment. The second on the list, Terry Hubbartt, turned it down. The third person, Neil Cegielski, was already working and not available. The Grievant, Keil, was next on the list. John inadvertently skipped over him and eventually reached another employee with less seniority, Randy Junk, who came in.

Skarda and Junk received three hours pay (minimum of two hours pay at time and one-half). They actually worked one hour and 15 minutes.

John has no idea why he missed Keil's name. Keil is a good and reliable employee and usually accepts the overtime assignments. Keil does not believe that John intentionally missed him, and that it was an error.

THE PARTIES' POSITIONS:

Since the City admits that Keil should have been called in for the overtime work, the question is not whether he is entitled to a remedy but what that remedy should be. While the Union contends that Keil should be granted the same three hours pay as the other two employees received, the City submits that Keil should be permitted the opportunity to be made whole without providing him with a windfall. The City offers him the opportunity to work one hour and 15 minutes and receive three hours pay, and to work at a time mutually agreeable to Keil and the City. The City has also offered him one hour of premium pay without working.

The City contends that the purpose of a remedy should be to place the parties in a position they would have been in had there been no violation, which means Keil would get three hours pay. However, he would have also had to work had there been no violation. A number of arbitrators have held that make-up overtime rather than damages is an appropriate remedy, and decision turn on analysis of the contract, past practice of the parties, the nature of the breach of contract, and the availability of make-up work.

The City notes that both parties admit that the Employer acted in good faith and the failure to award overtime to Keil was inadvertent. There is no contract language that specifies damages rather than make-up overtime as a remedy for this error, and there is no past practice of granting damages as a remedy in these type of cases. Overtime work is available and can be scheduled solely for the purpose of giving Keil the chance to earn the money he lost on August 8th, and the City does not propose to give him work which would otherwise be awarded to some other employee.

The City submits that its remedy is more fair, as it makes the Grievant whole without unduly penalizing the City and the Grievant will have a choice of when he works the overtime.

The Union contends that past settlements of similar grievances are non-precedential by their own terms, and the fact that some employees agreed to work overtime at a later date for a missed call is inconsequential. The Union submits that the most frequently used remedy for this type of contract violation is a monetary award for the overtime in question.

While some arbitrators have held that a make-up overtime is an appropriate remedy where the employer's mistake was inadvertent, other arbitrators have disagreed. The Union points out that the burden would be on the Union to prove whether a mistake was inadvertent or whether an

employee was skipped over for overtime work due to bad faith on the part of a supervisor. The Union could never prove that a supervisor acted in bad faith.

The Union argues that mistakes are easily avoided. The City maintains seniority lists which supervisors have at home. Moreover, make-up overtime deprives another employee of overtime somewhere down the line. While the City has said that it would assign work to the Grievant in a manner to not deprive anyone else of the overtime, there is no evidence of what that would be. The Union believes that work completed by Keil would then be a missed work opportunity for another employee unless it was work outside of the bargaining unit work or outside of the Department of Public Works.

The Union concludes that the appropriate remedy should be payment of three hours pay.

In a reply brief, the City states that it would be more than willing to assume the burden of showing that it acted in good faith. In most cases, there is no reason to act in bad faith, since the cost of overtime is usually the same no matter who is assigned the overtime. While the Union has argued that mistakes are easily avoided, the City points out that its supervisors deal with complicated seniority lists for different types of work, and some mistakes will occur.

Finally, the City does not agree that make-up work could not be assigned without depriving others of overtime. The DPW employees only get overtime during emergencies or, in rare cases, for projects extending beyond the end of the work day. The City envisions no trouble in assigning make-up overtime which clearly involves tasks that would otherwise be performed in the course of the normal work day.

DISCUSSION:

The collective bargaining agreement provides in Article VII, Section 5, that: ". . . overtime shall generally be awarded on the basis of seniority within the applicable crew, bracket, or classification. . ."

It is refreshing to have a party admit its mistake and ask only that the remedy be determined. The City is to be commended for its open and honest approach to this problem, and the time it has saved for all concerned in this grievance.

The remedy that the City proposes is not an unreasonable remedy, and other employees in the past have accepted this remedy. Both parties agree that John's skipping over Keil's name was a simple error. John has no idea why he missed Keil's name, and he likes Keil and knows that Keil would probably respond and accept the overtime assignment. It was early in the morning when John made the calls, and although he had the call-in list at home when he made the calls, errors happen.

However, it would never be practical to prove in any given case whether the error was inadvertent or done in bad faith to prevent a certain employee from gaining overtime. While the City says that it is willing to assume the burden of showing that it acted in good faith, it is as

difficult to show good faith as bad faith in these situations without having to determine credibility. These parties have a good relationship and it may be better in the long run to keep them off the stand testifying against each other as to credibility issues.

The City believes there is no motive to act in bad faith, since the cost of overtime is the same no matter who works it. If the employer's cost were the only thing involved when a senior employee is bypassed, the City would never have to prove good faith. But in some employment settings, supervisors have been known to wield power in ways to retaliate against employees. Not all employees know when they have been skipped over for available work in some job settings, and may never know that they had a potential for the overtime or for a grievance.

Even where employers have made good faith mistakes about calling in senior employees for overtime, arbitrators have awarded the overtime pay without requiring make-up work. 1/ Moreover, where the contract is silent on the remedy, the weight of arbitral authority is to award monetary relief. 2/

While mistakes happen, a monetary award without make-up work gives employers the incentive to see that supervisors assign overtime properly according to the contract. It resolves credibility questions when excuses are made for skipping over senior employees. It gives the grievant involved a remedy without infringing on the rights to other employees to have the next available overtime work assigned to them. A monetary remedy is particularly appropriate where the language, as in this contract, gives senior employees preference and does not attempt to equalize overtime. The remedy under an equalization scheme may well be different, because the parties intend to spread the overtime to all employees. Under the contract language used in this labor agreement, the parties intended that the senior employees always get the assignment if they want it.

For those reasons, I prefer the monetary award and will order such relief in this case.

AWARD

The grievance is sustained.

The City is ordered to give the Grievant three hours of pay at his regular wage rate.

Dated at Madison, Wisconsin this ____ day of February, 1995.

1/ See Trane Co., 52 LA 1144, Arb. Cahn, 1969.

2/ See George-Pacific Corp., 93 LA 4, Arb. Thornell, 1989.

By _____
Karen J. Mawhinney, Arbitrator