BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 43

and

J. W. PETERS & SONS, INC.

Case 13
No. 55449
A-5604

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Ms. Andrea F. Hoeschen**, 1555 North RiverCenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, for the Union.

Dorsey & Whitney, LLP, Attorneys at Law, by **Mr. David J. Lauth**, Pillsbury Center South, 220 South Sixth Street, Minneapolis, Minnesota 55402-1498, for the Company.

ARBITRATION AWARD

The Union and the Company are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union and the Company jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned as Arbitrator to resolve a dispute as set forth below. By letter dated December 3, 1997, the Commission appointed the undersigned as Arbitrator. Hearing on the matter was held on January 20, 1998, at the AmericInn Motel, Elkhorn, Wisconsin. Pursuant to the parties' request that I issue a bench decision, and pursuant to the parties' agreement that the bench decision be issued without any supporting rationale, I there issued a bench decision finding that the instant grievance was timely filed which this Award confirms. In addition, the parties then presented evidence and testimony on the issue noted below. The hearing was not transcribed, and the parties filed briefs and reply briefs by February 23, 1998.

STIPULATED ISSUE

Whether the Company's method of calculating back pay meets the terms of the parties' February 17, 1997 agreement?

FACTUAL BACKGROUND

The Company operates a facility in Burlington, Wisconsin, where it utilizes time clocks for its hourly employes.

Prior to 1997, the Company measured the end of an employe's work day by reference to the last fifteen minute interval completed by an employe. For example, an employe whose shift was scheduled to end at 2:00 p.m. would be paid through 2:00 p.m. if he or she clocked out at any time between 2:00 p.m. and 2:14 p.m. The employe would be paid through 2:15 p.m. if he or she clocked out at any time between 2:15 p.m. and 2:29 p.m., and so on.

This dispute arose on January 30, 1997, when Union Steward Tim Wagner met with Dave Jung and Dick Lewis from the Company to inform them that the above rounding practice was both illegal and unfair. He requested that the Company change said method, and that the Company recalculate the time paid over the prior two years and pay back pay to all affected employes. Jung replied that the Company would check things out and make a change in its method of calculation if it were concluded that the prior method was inappropriate.

Thereafter, there were a number of discussions within the Company to consider Wagner's complaint, and a contact with Federal Wage/Hour authorities to confirm that the Company's potential solution to this issue would be in conformance with wage/hour regulations.

There were also negotiations between the Company and the Union to resolve this dispute over wages and hours and back pay.

By memorandum dated February 7, 1997, to Tim Wagner from Dave Jung, the Company proposed "Per our discussion today, effective 2/10/97, we will change our practice to six (6) minute intervals instead of fifteen (15) minute intervals." The Company added: ". . . we will go back two years (2/11/95-2/9/97) and pay employees on the quarter hour rounded method." The Company went on to explain how an employe's pay would be recalculated:

> if an employee worked eight minutes of a fifteen minute interval, they will be paid for that full fifteen minute interval-if the employee worked less than eight minutes of the fifteen minute interval, they will not be paid for that fifteen minute interval. Fifteen minute intervals start on the hour, quarter past, half past and three-quarters past each hour.

The Company concluded its memorandum by noting that because of the tremendous effort to accumulate two years of information, the recalculation would probably "take one-two months to complete."

Also by memorandum dated February 7, 1997, from Tim Wagner to Dave Jung, the

Union made a counter offer to settle the matter. In said memorandum, Wagner first wrote that his sources at the applicable Wage & Hour Divisions "stated that if the company policy of

recording all time worked is to be calculated using one tenth increments, it must be used with a time split, . . . I read your new policy to them and they concluded" it would violate the law. Wagner then gave some examples of "**The correct procedure for calculating all time worked using one tenth of an hour increments** . . ." while noting that said "**procedure must be followed for accurate recording of time worked at the beginning of each tenth of an hour to assure that employees are lawfully compensated.**" (Emphasis in original) Wagner gave some examples of the correct procedure as follows:

> When an employee punches out after completion of their work day and this punch out time is one or two minutes into a new tenth of an hour the employees recorded time for pay purposes should be rounded down to the nearest tenth of an hour. **(i.e. An employees work day is completed and the employee punches out at 2:31 or 2:32. For pay purposes the employees recorded time should end at 2:30.)** (Emphasis in original)
>
> If the employee punches in three minutes after the scheduled start time the employee will forfeit one tenth of one hour. **(i.e. An employees scheduled start time is 6:00 and the employee punches in at 6:03. For pay purposes the employees recorded time should begin at 6:06.)** (Emphasis in original)

Wagner made, in relevant part, the following counter proposal in said memorandum:

> The company shall agree to pay all Teamsters currently employed by JWP all wages lost due to the companies recording time worked policy, from the period of January 29, 1995 until a lawful policy is put into place. This shall also include unlawful deductions of pay **(i.e. excessive reduction of employees pay due to late starts)**. (Emphasis in original)
>
> The company shall agree to payment of lost wages using one tenth of an hour intervals. Since the company feels this is a good choice to implement for recording time worked I would assume the company would have no problem accepting this provision of this proposal.
>
> The company shall agree that all Teamsters that were previously employed by JWP will be paid all lost wages, due to the companies incorrect method of recording time worked for the past two years beginning January 29, 1995 and ending January 29, 1997. . . .

Wagner concluded his memorandum by asking the Company to respond to his counter offer by February 12, 1997.

Dave Jung and Dick Lewis then met again with Tim Wagner on February 12, 1997. Jung explained that the Company was prepared to change its method of measuring the end of an employee's work day by rounding up or down to the nearest tenth of an hour (i.e. six-minute interval). Jung further proposed that the Company would recalculate all hours worked by hourly employees over the prior two years using this new method, and that the Company would pay back pay where warranted. The Company representatives then presented Wagner with a letter dated February 17, 1997, entitled "To: All Hourly Employees" which outlined the Company's aforesaid proposal to calculate both hours worked and back pay. Said letter, which the Company intended to send to employes, provided, in relevant part, as follows:

> Employees punching in up to five (5) minutes after their shift start will be paid as if they started on time. Employees punching in late will continue to be subject to discipline for tardiness. After this five minute period, we will round to the nearest one-tenth (1/10th) of an hour. (i.e. 1-3 minutes rounds down and 4-6 minutes rounds up) Examples of this practice are as follows:

start time	punch-in	paid from
6:00am	6:00am	6:00am
6:00am	6:05am	6:00am
6:00am	6:06am	6:06am
6:00am	6:09am	6:06am
6:00am	6:10am	6:12am

> Employees punching out up to five (5) minutes after their shift end will be paid as if they finished on time. Employees punching out early will also be subject to discipline. After this five minute period, we will round to the nearest one-tenth (1/10th) of an hour. (i.e. 1-3 minutes rounds down and 4-6 minutes rounds up) To be paid for that next one-tenth of an hour, the employee must have worked in that one-tenth (1/10th) of an hour.
>
> Appropriately, we will recalculate back-pay on this new method for the period 1/29/95-2/16/97. We are making our best efforts to complete this recalculation in a one-two month time-frame.

Tim Wagner did not want to agree to this proposal unless it contained some shift end times listed with specific examples of how the new rounding method would be applied at the end of a shift. The Company agreed to make the change Wagner requested and revised the agreement accordingly. The new letter, also dated February 17, 1997, contained the following:

shift end	punch-out	paid to
2:30pm	2:30pm	2:30pm
2:30pm	2:35pm	2:30pm
2:30pm	2:36pm	2:36pm
2:30pm	2:39pm	2:36pm
2:30pm	2:40pm	2:42pm

Wagner then signed the agreement which also has the signatures of two representatives from the Company. Wagner testified that at no time was there any "indication" that the Company would be subtracting or shorting employes for time already worked. Wagner added that he felt the letter's reference to "Appropriately" meant that the Company would recalculate hours worked "where applicable" namely only upward. Dave Jung, on the other hand, testified that the parties had a clear understanding there would be both additions and deductions based on the method agreed upon and that this was reflected in the parties' written agreement. Jung conceded that he never explicitly explained that this method would result in negative adjustments for hours worked but emphasized that there could be no other "possible interpretation" of the agreement wherein the agreed-upon method provided for both rounding up and down. Jung stated that Wagner understood same.

The parties' February 17 agreement was distributed to all hourly employes. In addition, Dave Jung prepared a chart which was posted at time clocks four days later with specific examples of how the new rounding method to which the parties had agreed would be applied. It showed, for example, that an employe who clocked out at 2:45, fifteen minutes after a shift scheduled to end at 2:30, would be paid only for an additional twelve minutes (i.e. .2 additional hours), and so on.

Dave Jung then coordinated the effort to calculate back pay in accordance with the method which had been agreed upon on February 17. This effort consumed about two months of work, from mid-February through mid-April, 1997. The Company first hired three temporary employes, who manually entered data from 45,000 individual time cards into the Company's computer system. In the course of this first step, Jung gave Tim Wagner a copy of the written instructions he had given to these employes, explaining their method of data entry.

Once this data was entered, the Company manually compared the number of hours worked by each employe as shown by the data entry to the Company's payroll records, in order to insure the accuracy of the data entry. The Company then ran computer spreadsheets for each of the 178 affected employes to determine how much, if any, back pay was due to each when their hours were recalculated using the new method to which the parties had agreed. Each of those spreadsheets showed for an individual employe whether there was a positive or negative adjustment for each day worked over the two-year period after applying the new rounding method.

Dave Jung shared these spreadsheets with Tim Wagner on April 17, 1997. Wagner found a large number of keypunching errors, in which data had been entered incorrectly from the time

cards. He and Jung spent six days reviewing every one of the spreadsheets, and for

any day on which there was a proposed positive or negative adjustment of .2 hours or more, they reviewed the original time card to confirm that it had been entered correctly and to make corrections in every instance where it had not. They then manually calculated any change to the net adjustment initially shown on the spreadsheet, and each initialed the spreadsheet to signify their agreement as to any change.

Also on April 17, Tim Wagner raised an objection to the rounding method that had been employed in performing the calculations. Wagner asserted that if an employe had clocked out fifteen minutes after the end of a scheduled shift, that should not be rounded down, and no negative adjustment should be made. Wagner felt that no employe should have deductions or be shorted from time already worked as a result of the formula.

This objection led to negotiations between the parties in an unsuccessful attempt to resolve the dispute as well as extended correspondence between the parties and their counsel.

In a letter dated May 13, 1997, to representatives of the Union, shared with the Company at the request of the Union's counsel, Scott D. Soldon wrote:

> . . . We understand that although Peters has brought its time clock practices into compliance with the FLSA, Peters' method of computing backpay for past time clock violations is not in accordance with the law. . . .

Counsel for the parties then had additional correspondence regarding the objection raised by the Union. By letter dated June 16, 1997, to Andrea Hoeschen, Attorney for the Union, from David J. Lauth, Attorney for the Company, Lauth wrote as follows:

> I am writing in response to your letter of June 13. As you have requested, we will delay issuing any checks to J.W. Peters employees for two weeks. We do not intend to recalculate the backpay for any employees, however, unless you can present some legal authority demonstrating that a different calculation is legally required.

By memorandum dated June 18, 1997, Tim Wagner informed Dave Jung that:

> I feel that an equitable remedy to both parties would be that J.W. Peters & Sons Inc. pay only for actual time worked.

In response, Dave Jung wrote to Tim Wagner on June 20, 1997:

> We continue to be firmly convinced that the method we have used to compute backpay is in compliance with Wage and Hour law. We hope to release the checks after the requested two week delay and close the matter at that point.

Also on June 20, 1997, Tim Wagner met with representatives of the Company wherein he asked if the Company would move on its position. The Company's response was: "I told him we believe we calculated back pay the way we agreed." The Company also asked to see a copy of the grievance.

Thereafter, the Union filed a grievance dated June 20, 1997, which provided in relevant part:

> On 1/30/97 the Company was made aware of their failure to properly compensate employees for all time worked. The Company agreed to correct this by backpaying all affected past & present Teamsters over a two year time frame. Throughout the process of the Company's task of remedying this issue open dialog was present between the Union and the Company and their attorneys. There was a disagreement between the Company and the Union so in a last ditch effort to come to a fair settlement of this issue a meeting was held on 6/20/97 between Dick Lewis, H.R.M. JWP, Dave Jung Controller JWP, and Tim Wagner Steward.
>
> The Union proposed an offer for settlement of this issue but the Company insisted that their accounting method was fair and appropriate. At this point the Union informed the Company that this would force the Union to grieve this issue.
>
> Since an equitable offer for all affected parties involved in this issue was turned down by the Company the Union now is requesting that all affected past & present Teamsters be paid for all time spent in service of the Company. . . .

The parties continued their discussions to settle the dispute but without success. By letter dated August 27, 1997, the Company distributed checks to employes "due back-pay over the identified period" in an aggregate amount in excess of $16,000.00. If the recalculation method resulted in an employe receiving a negative adjustment that would be subtracted from said employe's gains. If an employe came out with a negative amount, the Company did not ask the employe to pay the money back.

On September 4, 1997, the Union filed a second grievance over the matter which protested the issuance of the aforesaid checks because they were "not in compliance with the agreement struck between the union and J.W.P." For a remedy, the Union requested that the Company "pay employees according to the back-pay agreement that was negotiated in good

faith." The Union added: "If the terms of the struck agreement are not met by the Company the Union is requesting full back-pay for all time spent in the service of employer for all affected past & present employees." (Emphasis in original)

POSITIONS OF THE PARTIES

Union's Position

In its brief, the Union makes the following principal arguments. One, the parties did not intend to allow deductions from employes' wages. Instead, when the parties agreed to the February 17, 1997 agreement they contemplated that the Company would use its new rounding practice to calculate the back pay due to employes for days that they had not been properly paid. They never discussed the possibility that the Company would take offsets from employes' wages on days they were properly paid. In fact, one could not anticipate that the Company would calculate back pay by taking deductions from days that employes had been properly paid. The Company's intent to take deductions is neither explicit in the language of the aforesaid agreement, not explicit in the parties' negotiations and proposals leading up to said agreement.

Two, the idea that an employer with a legal obligation to compensate employes for FLSA violations could reduce its liability by offsetting employes' wages on days that it had properly paid employes is repugnant to FLSA, and should not be allowed absent an express statement of intent to allow offsets.

Three, the Union's interpretation of the agreement conforms to Article 22 of the parties' collective bargaining agreement which requires the Company to pay employes for "all time spent in service of Employer." By taking offsets from employes' wages, the Company is not paying employes for all time spent in service.

Four, the Company's argument that if it uses a rounding practice to compute back pay only on days that it shortchanged employes it will overcompensate employes is without merit. In this regard, the Union notes that the Company agreed to the rounding practice to remedy its FLSA violations, and that these only occurred on the day an employe was underpaid. "Overpaying" employes by a few minutes is a small price to pay to remedy an FLSA violation, in the opinion of the Union, particularly since the Company is paying the employes neither the interest nor the liquidated damages to which the employes may be entitled under the FLSA. In addition, the Union points out that the Company's back pay calculations do not account for inflation. The Union concludes by noting that if the Company is so troubled by the possibility of paying employes for an extra two or three minutes, it can instead pay employes for exactly the hours they worked.

Five, the Company's calculation method works a forfeiture and arbitral law establishes that contract language should not be interpreted in a way that works a forfeiture. The instant forfeiture is particularly egregious, in the opinion of the Union, because it is retroactive and

penalizes employes who tried to clock in and out on the quarter hour in accordance with the Company's prior, illegal time clock practices. The Union adds that employes have the right "to not have new policies retroactively applied to their detriment."

The Union notes that the Company does not claim it overpaid any employes on the day that it took offsets from their wages. In fact, spreadsheets show that on all days the Company took offsets, the employes had been paid for exactly the amount of time they had worked. Therefore, according to the Union, subtracting time and pay from employes on days that they worked and earned the pay in full is a clear forfeiture of wages.

In its reply brief, the Union makes the following principal rebuttal arguments. One, the intent of the aforesaid agreement was to change the Company's illegal time clock practices and make the employes whole for the Company's FLSA and collective bargaining agreement violations. Subtracting pay from employes on days when there was no FLSA violation does not make employes whole.

Two, the Company's estoppel argument about its "massive effort" to calculate back pay has no merit since the Company had a legal duty to undertake same.

Three, the Company takes liberties with the record evidence. For example, contrary to the Company's assertion "Nowhere in Union Exhibit 5 did Wagner agree that employees would forfeit pay." While he agreed to the adoption of a new time recording system that would round employes' time worked to the nearest tenth of an hour, under such a system employes would never forfeit pay since "the ups and downs will average so that employees' pay is the same as it would have been if the employer has recorded time exactly." Also contrary to the Company's assertion, Company Exhibit No. 3 does not say "it is okay for the Company to deprive its employees of wages already earned and paid."

For the foregoing reasons, the Union requests that the Arbitrator find that the Company violated the contract and the February 17, 1997 agreement in the method it used to calculate back pay to employes and award employes appropriate back pay.

<u>Company's Position</u>

In its brief, the Company makes two main arguments in support of its position that it complied with the aforesaid agreement. One, the language of the parties' agreement is clear and unambiguous, and the Company complied with it. Two, the Union should be estopped from attempting to renege on or renegotiate its agreement because the Company devoted substantial effort to recalculating back pay for 178 employes in reliance on the parties' agreement.

In support of the above, the Company first argues that the Arbitrator must enforce the clear language of the agreement even though the parties to that agreement disagree as to its meaning. The Company claims that the meaning of the parties' February 17, 1997 agreement is clear. In

this regard, the Company maintains the parties agreed to round to the nearest six

minute interval, whether that involved rounding up or down. The Company points out that "specific examples as to how this method would be applied at the end of the shift" were added to the agreement at the Union's request and demonstrate "that the agreed-upon method could result in rounding down." The Company adds that the agreement makes "it clear that the exact same rounding method would be used to 'recalculate' time worked over the prior two years." (Emphasis in original)

The Company also argues that there is "nothing in the agreement," or in any of the discussions leading to it, that supports the Union's current position "that quarter-hour intervals should not be rounded down." (Emphasis in original) To the contrary, the Company points out that "Wagner indicated in writing his understanding that Union members could on occasion forfeit pay for minutes actually worked under the rounding method to which he agreed. (Union Ex. 5)" In addition, the Company notes that it posted examples at the time of the agreement showing how the agreed-upon method would be applied in the same situation now complained about by the Union; "namely that an employee clocking out fifteen minutes after the end of a shift would be paid for twelve minutes. (Company Ex. 6)" Furthermore, the Company points out that the parties agreed that the hours would be "recalculated." Finally, the Company emphasizes that the Union is not contesting the practice of rounding both up and down going forward but only that back pay should be calculated in a different manner "notwithstanding the agreement's clear language that the same calculation method would be used both going forward and retroactively over the prior two years." (Emphasis in original)

The Company next argues that the Union should be estopped from attempting to back out of or renegotiate the parties' agreement because "the Company devoted substantial time and effort to performing the calculations in exactly the same manner to which the Union had agreed in the agreement." The Company cites two arbitration awards in support of its position that this "would be grossly unfair."

In its reply brief, the Company rejects the Union's argument that it was never the parties' intention there would be "offsets" of back pay under the agreed-upon rounding method on days for which employes had already been "properly" paid. The Company counters that this argument cannot be advanced without ignoring the plain language of the agreement as discussed earlier. The Company concludes that it is apparent the Union "has simply had second thoughts about its agreement, and now wishes that it had agreed to something different."

The Company next argues that the Union's claim that the relief it seeks is required by the parties' collective bargaining agreement is without merit. In support thereof, the Company makes the following principal points. One, since the Union's counsel framed the issue at hearing as to whether the Company's method of calculating back pay violated the parties' February 17th agreement, this new claim that it violated the collective bargaining agreement is simply "an apparent afterthought." Two, the contract provision relied upon by the Union to support its position does not help resolve the issue at hand. In this regard, the Company notes said contract provision calls for pay "for all time spent in service of Employer," and states that time shall be computed "until (the employee) is effectively released from duty." However, the Company points

out that there is no record evidence indicating that the parties have ever

considered punching out at the time clock to be equivalent to being "effectively released from duty." The Company adds that there is nothing in this provision that either requires or prohibits the use of any rounding method. Moreover, the Company claims that any uncertainty on this issue "is laid to rest by the parties' explicit agreement of February 17, 1997." In conclusion, the Company opines that the Union should not be permitted to demand a better or different agreement in arbitration than the one to which the parties agreed.

Finally, the Company maintains that the performance of the parties' agreement has not resulted in a "forfeiture" as claimed by the Union. In this regard, the Company notes "not a single employee has lost money pursuant to the parties' agreement." "In cases where the agreed-upon recalculation yielded a negative number, Peters simply did not issue any check to the affected employee." The Company concludes that to the extent application of the agreed-upon rounding method resulted in employes not being paid on some occasions for minutes they had worked, this was the result contemplated under the parties' agreement and, as noted above, a result that Wagner was "fully aware . . . would happen." (Emphasis in original)

The Company emphasizes: "Even calling this result a 'forfeiture' betrays the underlying flaw in the Union's argument; the Union wishes that it had extracted a 'rounding' system that worked only to the employees' benefit in every instance." The Company points out "in repeatedly bemoaning the fact that some employees are now not being paid for minutes they actually worked," the Union ignores the corollary to this fact; many employes are now being paid for minutes that they "did not work." (Emphasis in original) The Company claims that this is the essence of rounding as well as the parties' February 17th agreement. The Company concludes that the parties "could have" agreed to a lot of different things, i.e. "that there would be no retroactive adjustment to back pay" or a different rounding method applied retroactively from that to be used going forward, "but they did not." (Emphasis in original) In the opinion of the Company, the parties agreed to apply precisely the same method going forward and going back two years and the Company has lived up to said agreement.

Based on all of the foregoing, the Company requests that the grievance be denied.

DISCUSSION

At issue is whether the Company's method of calculating back pay meets the terms of the parties' February 17, 1997 agreement. The Union argues that the Company's rounding method violates said agreement while the Company takes the opposite position. For the reasons discussed below, the Arbitrator agrees with the Company's position.

As pointed out by the Company, if the language of an agreement is clear and unequivocal, an arbitrator generally will not give it a meaning other than that expressed. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, AT 482 (5TH ED. 1997) Consequently, an arbitrator must enforce the clear language of the agreement even though the parties to that agreement disagree as to its meaning. SUPRA, AT 483. In the instant case, the parties agreed to round to the nearest six minute

interval, whether that involved rounding up or down. Indeed,

specific examples as to how this method would be applied at the end of the shift - "added to the agreement at Wagner's request" - demonstrated that the agreed-upon (representatives of the Union and Company signed this agreement) method could result in rounding down. (Emphasis in original) For example, an employe punching out at 2:39 p.m. would only be paid until 2:36 p.m. according to the examples listed by the Company in the aforesaid agreement. In addition, the agreement made it clear that the Company would not only change to this method of calculating hours worked but that it would "recalculate back-pay on this new method for the" prior two years. Dave Jung, testified unrebutted by the Union, that this language could be interpreted in only one way - that there would be negative adjustments for time already worked, and that these adjustments would be subtracted from gains obtained as a result of the recalculation. Based on the foregoing, the Arbitrator finds that the Company complied with the clear language of the aforesaid agreement when it calculated back pay by rounding down and up.

The Union argues that it was never the parties' intent to allow deductions from employes' wages. However, the Union offered no persuasive evidence of bargaining history in support of same. To the contrary, as noted above, examples of situations where employes would be paid for less time than they worked were added to the aforesaid agreement at the Union's request. In addition, in a memorandum dated February 7, 1997, from Tim Wagner to Jung, Wagner acknowledged that the "**correct procedure for calculating all time worked using one tenth of an hour increments**" included situations where an employe's recorded time for pay purposes should be rounded down:

> When an employee punches out after completion of their work day and this punch out time is one or two minutes into a new tenth of an hour the employees recorded time for pay purposes should be rounded down to the nearest tenth of an hour. **(i.e. An employees work day is completed and the employee punches out at 2:31 or 2:32. For pay purposes the employees recorded time should end at 2:30.)** (Emphasis in original)

Wagner also proposed:

> The company shall agree to payment of lost wages using one tenth of an hour intervals. Since the company feels this is a good choice to implement for recording time worked I would assume the company would have no problem accepting this provision of this proposal.

Furthermore, the parties' February 17 agreement was distributed to all hourly employes, and a chart was posted at time clocks four days later with specific examples of how the new rounding method to which the parties had agreed would be applied. It showed, for example, that

an employe who clocked out at 2:45, fifteen minutes after a shift scheduled to end at 2:30, would be paid only for an additional twelve minutes (i.e. .2 additional hours). At no time material herein, did the Union object to the Company's rounding method.

Finally, Dave Jung testified persuasively that Tim Wagner understood that the rounding method would include both positive and negative adjustments when he signed the February 17 agreement.

Based on all of the above, the Arbitrator finds that bargaining history also supports the Company's position.

The Union also argues that its interpretation of the agreement conforms to Article 22 of the parties' collective bargaining agreement which requires the Company to pay employes for "all time spent in service of Employer." By taking offsets from employes' wages, the Union contends that the Company is not paying employes for all time spent in service.

However, as pointed out by the Company, there is nothing in this provision "that helps to resolve the issue at hand." There is no evidence that the parties considered this provision in the context of arriving at an agreement on February 17, 1997. The clear language of the February 17 agreement does not provide for the aforesaid result. The Company did not pay employes in the past for all time worked, nor did it agree to do so under the new "practice of calculating hours worked." In fact, under the new method of calculating hours worked and back pay employes are both "not being paid for minutes they actually worked" and "now being paid for minutes that they did not work." (Emphasis in original)

The above contract provision which calls for pay for all time spent in the service of the Company also states that time shall be computed from the time an employe is ordered to report for work and registers in and until he is effectively released from duty. However, there is no persuasive evidence, for example, that the parties have ever considered punching out at the time clock to be the same as "effectively released from duty." Based on same, and all of the foregoing, the Arbitrator rejects the aforesaid argument of the Union.

The Union further makes a number of arguments to counter the Company's position that if it adopted the Union's method of calculating back pay it would overcompensate some employes. In this context, the Union mentions the Company's obligation to fully remedy its FLSA violations as well as an apparent decision by the Union not to seek interest, liquidated damages or "account for inflation" in another forum when seeking make-whole monies for the affected employes. Regardless of the equity and/or possible merits of these arguments, the Arbitrator still must enforce the clear terms of the parties' February 17 agreement which provides for a different result than that sought by the Union.

Finally, the Union argues that the Company's calculation method works a forfeiture and arbitral law establishes that contract language should not be interpreted in a way that works a forfeiture. However, as pointed out by the Company, "not a single employee has lost money

pursuant to the parties' agreement." The Company simply did not issue checks to employes in

cases where the recalculation method yielded a negative number. Nor did it ask for money back. The Company concedes that the aforesaid method resulted in some employes not being paid on some occasions for minutes they had worked, but emphasizes that this was the result contemplated under the parties' agreement and agreed to by the Union. The Company points out that it paid out a considerable sum to the affected employes - money in addition to the pay said employes already received. Based on same, and absent any other persuasive evidence or argument that said employes are entitled to the money claimed by the Union, the Arbitrator likewise rejects this argument of the Union.

Based on all of the above, the Arbitrator finds that the answer to the issue as stipulated to by the parties is YES, the Company's method of calculating back pay meets the terms of the parties' February 17, 1997 agreement.

In reaching the above conclusion, the Arbitrator has addressed the major arguments of the Union. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

In light of all of the foregoing, it is my

AWARD

The instant grievance is hereby denied, and the matter is dismissed.

Dated at Madison, Wisconsin, this 31st day of March, 1998.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

DPM/mb
5657.WP1