BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION LOCAL 577-M

and

S & M ROTOGRAVURE SERVICE, INC.

Case 2
No. 56849
A-5718

Appearances:

Murphy, Gillick, Wicht & Prachthauser, by **Attorney George F. Graf**, 300 North Corporate Drive, Suite 260, Brookfield, WI 53045, appearing on behalf of Graphic Communications International Union Local 577-M.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Jack D. Walker**, Suite 600, Insurance Building, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, WI 53701-1664, appearing on behalf of S & M Rotogravure Service, Inc.

ARBITRATION AWARD

Graphic Communications International Union Local 577-M (hereinafter referred to as the Union) and S & M Rotogravure Service, Inc. (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission assign Daniel Nielsen, an arbitrator on its staff, to hear and decide a dispute concerning the equalization of overtime at the Company's New Berlin facility. A consolidated hearing was held on October 3, 1998, in New Berlin, Wisconsin, at which time the parties presented such testimony, exhibits and other evidence as was relevant to the grievance and to a pending complaint of unfair labor practices. Post-hearing briefs were submitted and exchanged through the arbitrator on November 4, 1998, whereupon the record was closed. In his capacity as a hearing examiner on the unfair labor practice case, the arbitrator determined that the underlying grievance was substantively arbitrable, and that the Company's defense presented issues of procedural arbitrability. Accordingly the complaint was dismissed and the undersigned proceeded to this Award on the merits.

Now, having considered the evidence, the arguments of the parties, the applicable provisions of the contract, and the record as a whole, the arbitrator makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The issue before the arbitrator is whether the Company violated the collective bargaining agreement by failing to equalize overtime opportunities for the grievant, Donn Koglin? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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SECTION 3 - JURISDICTION

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3.3 Following are the recognized branch classifications covered by this contract:

GRAVURE: PHOTOGRAPHY
RETOUCHING
STRIPPING
LAYOUT-PROGRAMMING
FINISHING
CYLINDER MAKER
PROOFING
SCANNER OPERATOR
ELECTRONIC ENGRAVER
SYSTEMS OPERATOR

and any others which may be practiced in connection with foregoing.

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SECTION 8 - HOURS

8.1 The hours of work shall be equally divided into five (5) consecutive shifts, Monday to Friday inclusive, and shall constitute a week's work as follows:

DAY SHIFT (1ST SHIFT)…… 35
NIGHT SHIFT (2ND SHIFT)…….. 33-3/4
NIGHT SHIFT (3RD SHIFT)…… 32-1/2

8.2 The hours for each shall be established within the following periods:

DAY SHIFT (1ST SHIFT)	BETWEEN 7:30 A.M. AND 3:00 P.M.
NIGHT SHIFT (2ND SHIFT)	BETWEEN 3:00 P.M. AND 10:15 P.M.
NIGHT SHIFT (3RD SHIFT)	BETWEEN 10:15 P.M. AND 5:15 A.M.

For purposes of this section, the shift commencing at 10:15 p.m. Sunday shall be considered Monday; the shift commencing at 10:15 p.m. Monday shall be considered Tuesday, etc.

8.3 All schedules of working hours shall be consecutive - except for a luncheon period as hereinafter provided - and uniform for all persons employed on such shifts. On nights which precede a holiday the regular hours shall extend to the usual hour of quitting.

8.4 A uniform regular interval of not less than one-half hour shall be allowed for luncheon on each shift. In no case shall this luncheon period be considered the time of the Company.

8.5 After starting for the day or night no employee shall receive less than a full shift's pay in conformity with the regular established hours being observed except in the event of interrupted production caused by explosion, fire or act of God … and except in instances where the employee voluntarily requests to be excused for personal reasons.

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SECTION 10 - DIVISION OF WORK

10.1 In the event of overtime in any branch classification making it necessary to operate for more than a regular scheduled workweek, then the Company shall divide the available overtime as equally as possible among all employees including the foreman in that branch classification.

Further, to help equalize overtime the Company will make a good faith effort to cross-train employees within each branch classification to insure that overtime will be shared equally amongst all employees within a particular branch classification.

10.2 A foreman may work overtime on non-production work when there is no production overtime in that branch classification. A foreman may also correct minimal errors found on non-production overtime.

10.3 Should conditions warrant a reduction of working hours, the Company shall designate the number of hours of work. At its option, the Company may close for one day a week on the first or last day of the week or reduce its working schedule uniformly for each work day provided such reduction per day or per week shall affect each branch classification separately.

Notice of any change in the schedule of hours shall be posted prior to 12:00 noon of the working day before the day that such change becomes effective.

In no instance shall hours be reduced to either less than six (6) hours per day or 30 hours per week or four seven hour days per week as described above or 28 hours per week in this option. When hours are reduced to six (6) hours per day, the hours shall be consecutive without a lunch period. Changes of working schedule shall be limited to one change per calendar week except when returning to regular shifts.

10.4 Both parties agree the intent and purpose of 10.3 above is to implement a share-the-work principle … it is therefore intended that a reduced schedule of fifteen (15) working days shall be instituted prior to extended layoffs.

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SECTION 12 - OVERTIME

12.1 Overtime shall be permitted when necessary. The refusal of any employee to work overtime shall not be deemed a breach of contract, nor shall any employee be disciplined or discriminated against for such refusal. Overtime rates shall be on the following basis:

a) For each of the first two (2) hours worked in excess of the standard workday on any day from Monday to Friday inclusive, an employee shall receive one and one-half (1-1/2) times his hourly wage.

b) For the third and each additional hour worked in excess of such standard workday from Monday to Friday inclusive, an employee shall receive two (2) times his hourly wage.

c) For the first three (3) hours of work done on Saturday, an employee shall receive one and one-half times their hourly wage and two times their hourly rate thereafter.

d) For all work performed on Sunday, an employee shall receive two (2) times his hourly wage. (sic) and shall be guaranteed a minimum of two (2) hours of work.

e) For all work done on holidays, an employee shall receive two (2) times his hourly wage plus his regular full holiday pay, and shall be guaranteed a minimum of two (2) hours of work.

When an employee is asked to work Saturday and refuses, but, offers to work an extended shift Friday upon mutual agreement with the Employer. (sic) they shall receive one and one-half times their hourly rate for the first three (3) hours worked beyond their normal scheduled shift and two times their hourly rate thereafter.

12.2 All time worked before or beyond the regular shift shall be considered overtime irrespective of the time that such employee started that day.

a) Any employee who is tardy or for personal reasons voluntarily leaves the premises of the Employer and returns to work, the employee may at the Employer's discretion, continue to work in order to complete their regular shift at straight time.

12.3 All overtime earned shall be paid by computing the prescribed overtime rate on the basis of the employee's current regular wage rate.

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SECTION 33 - STRIKES, LOCKOUTS AND GRIEVANCES

33.1 There shall be no strike, lockout or slowdown in the plants of the Employer covered by this Agreement during the term of the Agreement, industrial peace being deemed essential to the best interests of both parties.

. . .

33.5 In the event of disagreement as to the interpretation or application of any provisions of this Agreement or any charge by either party of any violation of the terms or provisions of this Agreement, the matter shall be taken up in the following manner:

a) The Shop Delegate and management of the Company will seek an amicable adjustment of the disagreement.

b) In the event of failure to adjust the matter. (sic) the issue shall be taken up by the representative of the Local Union and the management of the Company.

c) Should no settlement result within a reasonable time as provided in (b) above, then either party may submit such controversy in writing to a joint committee consisting of three (3) representatives from the Union and three (3) representatives from the Employer. Any person involved in the question at issue shall be heard.

d) If the joint committee is not able to arrive at a satisfactory settlement of such dispute within a reasonable time, either party may request the matter be submitted to an impartial arbitrator, then a joint request will be made to the Federal Mediation and Conciliation Service to submit the names of seven (7) qualified arbitrators. Upon receipt of such list of arbitrators the parties shall alternately delete one name from the list, the person whose name remains on the list after six (6) names have been stricken shall be the arbitrator. The decision of the arbitrator shall be final and binding on all parties and the expense of the arbitrator shall be borne equally by the Union on the one hand and Employer on the other hand.

The jurisdiction of the arbitrator shall be limited to those matters concerning the meaning and application of this Agreement and its amendments.

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BACKGROUND

A. Background on the Merits

The Company is in the business of photo-engraving in suburban Milwaukee. Its customers provide artwork, which the Company converts to finished engravings for the printing process. Paul Peterson is the Company's President, Peter Gross is the Company's Vice-President and Dave Puzach is the Company's Electronics Coordinator. The Union is the exclusive bargaining representative for certain of the Company's employes, including those in the classification of Systems Operator. Chris Yatchak is the Union's President. The grievant, Donn Koglin, is a Systems Operator, as well as a Union steward.

The labor contract recognizes various branch classifications, including that of Systems Operator. Systems Operators work on various computer platforms in the pre-press process, which at the time of this grievance included the Contex, the Combi (also referred to as the Cromacom) 1/ and the Macintosh. Work is initially entered in the Macintosh computer, and the operator manipulates the file to retouch color or add or change text, and then converts the file format to one which can be used by the Contex work station, which is the next step in the

process. Once the Macintosh operator has confirmed that the file has been correctly converted, the Contex operator assumes responsibility for the job. The Contex operator is primarily responsible for insuring that the colors will print properly and generating a film of the project for customer approval. The file then goes to the Heliocom Department, where it is finalized on a disk that can be directly read by the Helio engraving machine, which will prepare the printing cylinder.

1/ The Combi or Cromacom platform is no longer used in the normal production process.

Section 10.1 of the contract calls for the equalization of overtime within branch classifications:

> **10.1** In the event of overtime in any branch classification making it necessary to operate for more than a regular scheduled workweek, then the Company shall divide the available overtime as equally as possible among all employees including the foreman in that branch classification.

In practice, the Company holds over employes working on a particular job if overtime is needed to complete that job. In the relatively unusual case where overtime is needed for some discrete job, that assignment is made on a rotating basis. In either event, however, the Company avoids assigning an operator from one platform overtime work on another platform because most jobs cannot be completed just within an overtime shift, and it wants the operator to be able to go back to work on the project during his next regular shift. Only if the regular operator is unavailable would an operator from another platform be assigned to work overtime on a continuing job on a different platform. The Company's response to equalizing overtime has been to try to anticipate which platform would require the most hours in coming months and regularly assign more operators to that platform. Prior to 1996, the Company did not keep records of offers of overtime to employes or whether employes refused offered overtime.

Section 10.1 also calls for cross-training employes within each branch classification, so that overtime can be distributed equitably:

> Further, to help equalize overtime the Company will make a good faith effort to cross-train employees within each branch classification to insure that overtime will be shared equally amongst all employees within a particular branch classification.

Employes are primarily assigned to one of the platforms, but are cross-trained on one or more of the others. In early 1995, Systems Operator Donn Koglin, who had been primarily assigned to the Contex, asked Dave Puzach to let him cross-train on the Macintosh. Puzach agreed, but cautioned him that it would have to be an on-going assignment rather than just an intermittent training assignment. Koglin was assigned to the Macintosh for the final eleven months of 1995.

For some time, Koglin had been concerned that overtime was not being distributed equitably. After his move to the Macintosh, his overtime hours dropped dramatically compared to what he had worked when assigned to the Contex. Moreover, he felt that working foremen were staying over to work overtime that he could have worked on the Mac, and recording the time as "supervision" on their time cards to disguise the amount of production overtime they were working. He also felt that the other Mac operator was working more overtime than he was, and that he was not being offered available overtime on the Contex. He sought information from the Company about how much overtime was being worked and by whom, but was told the information was private. In late 1996, Koglin initiated a grievance contending that he had not been given an equal opportunity for overtime among the employes in the Systems Operator branch classification. Koglin and Union President Chris Yatchak continued to seek information on overtime hours from the Company, but the Company continued to be reluctant to provide the information. At one meeting, Yatchak was shown a list of overtime hours worked, without names, and the numbers struck him as being very unequally distributed. He and Peterson exchanged correspondence on the topic throughout the first part of 1997, without reaching any resolution. Finally a meeting was set between the Company and the Union for September to attempt to resolve the dispute.

B. Background on Procedural Arbitrability

On September 4, 1997, a Union team of Yatchak, Koglin, Todd Ockwood and Gene Holt met with Company representatives Peterson and Peter Gross to discuss the grievance and the general issue of overtime distribution. Peterson suggested that, in light of the Union's desire to equalize overtime within a defined period of time, the Systems Operator branch classification be divided into three distinct branch classifications -- Macintosh, Combi, and Contex. He also proposed a new branch classification for the recently introduced Helio Department. The Union caucused and countered with a proposal that the platforms be treated as separate branch classifications for overtime distribution, but as a single branch for seniority purposes. The Union also suggested that the Company post overtime information on a weekly basis starting on October 1st, so that employes could monitor how overtime opportunities were being distributed. As part of an overall settlement, the Union suggested that pending grievances could be withdrawn. Peterson and Gross caucused, and returned saying that they could agree to the Union's proposal. Peterson asked Yatchak to draft contract language detailing how the system would work and prepare forms to be used to report overtime and get

back with him before October 1st. Several issues, including the Union's objections to the Company's practice of charging absent employes with refusals of overtime, were not conclusively resolved before the meeting ended.

Later in the day on the 4th, Peterson and Gross met with Dave Puzach and told him they had reached a settlement with the Union that would require him to start compiling records of overtime offers, refusal and time worked, and posting the information on a weekly basis. Puzach passed this information along to the line supervisors, and told them they would have to start submitting weekly reports of overtime offers. Prior to this time, Puzach had been compiling some of this information for the Systems Department, but not for the Engraving departments.

Approximately one week after the grievance meeting, Yatchak, Ockwood and Koglin met to try to formulate language that would put the proposed system into effect. They discussed the overall issue. Koglin was reluctant to drop his claim for back pay in return for a prospective systemic remedy. A day or two after the Union officials met on the grievance, Puzach had a conversation with Ockwood and asked him how things were going. Ockwood told him that things were not going well, and that Koglin had changed his mind about the settlement because he had a great deal of time and effort invested in the grievance and wanted to see it through.

After the meeting with Ockwood and Koglin, Yatchak contacted Scott Soldon, the Union's attorney. He directed Soldon to contact the Company and advise them that the Union would pursue arbitration of Koglin's grievance if a satisfactory settlement could not be worked out. Soldon sent a letter to Peterson, dated October 2nd:

> We represent GCIU, Local 577-M. Mr. Chris Yatchak, the President of that Local Union, has asked me to write to you concerning the referenced matter.
>
> We have reviewed the correspondence and the collective bargaining agreement. We understand that the parties have discussed a prospective resolution of this dispute. However, the Union cannot lawfully agree to modify the contract prospectively without resolving the past (and continuing) dispute concerning overtime distribution. Therefore, we herewith advise you, pursuant to Section 33.5 of the collective bargaining agreement, that the Union herewith refers this dispute to arbitration. We will hold the matter in abeyance to see whether a resolution can be achieved within the next 30 days.
>
> During this 30 day period, the Union wants to make a final effort to resolve the past discrepancies in overtime distribution. Under the current collective bargaining agreement, the Company must divide the available overtime within a branch classification “as equally as possible among all

employees including the foreman in that branch classification." Section 10.1. While the Union may be willing to consider the principle of separating particular platforms (e.g., the MAC, the Context, and the Cromacom) into separate classifications for overtime on a prospective basis, while retaining branch classification seniority for purposes of layoff and recall, the Union cannot lawfully do so without resolving the past.

In order to intelligently resolve the past, the Union must have access to Company records (both for the past and the present) concerning which employees have received overtime, when they have received it, and when they have refused it. As we understand the Company's position, it is that overtime has been properly distributed among employees, considering training requirements and the implementation of the different platforms, when viewed over a period of approximately 10 years. Unfortunately, no records have yet been produced to prove this assertion.

The National Labor Relations Board has repeatedly ruled that a union is absolutely entitled to receive information concerning payroll and overtime payments. The United States Supreme Court has stated that an employer's duty to furnish information "extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement". NLRB V. ACME INDUSTRIAL CO., INC., 385 U.S. 432, 436 (1967). Thus, a union has a right to obtain information that it needs "to service and police the contract". VIEWLEX, INC., 204 NLRB 1080 (1973). Of course, this extends to information about wages earned. In the words of the Court of Appeals for the District of Columbia Circuit, "[A] union's right to such information cannot be seriously challenged." WOODWORKERS LOCALS V. NLRB, 263 F.2D 483, 484 (D.C. CIR. 1959).

Accordingly, we herewith advise you that Local 577-M again demands access to payroll information concerning what employees have received what overtime (or refused overtime) within the branch classification of Systems Operator during 1996 and 1997. Local 577-M would appreciate receiving this information no later than 10 days from the date of this letter. If you believe that reviewing information from other years would be helpful, feel free to provide that information, as well.

After reviewing this information, Mr. Yatchak will be in touch with you to advise as to the Union's settlement proposal. That settlement proposal can then be the basis for discussions about a resolution of the past, as well as for the future.

> Alternatively, the Union will have no choice but to fulfill its duty to fairly represent its members by pressing the point through arbitration (with the possibility of a substantial monetary remedy for employees whose rights to overtime may have been violated), as well as demanding that the Company produce the appropriate records.
>
> Please contact Mr. Yatchak within the next 10 days so that we can attempt to resolve this amicably without resort to arbitration or the National Labor Relations Board.
>
> Thank you for your anticipated courtesy and cooperation.

After receiving Soldon's letter on October 6th, Peterson drafted a letter to Yatchak, confirming what he understood to be the terms of the settlement, attaching a summary, and commenting on his puzzlement at the attorney's letter:

> I am writing to confirm the settlement that we worked out at our meeting last month. At the meeting were Todd Ockwood, Donn Koglin and yourself for the Union. Peter Gross, Dave Puzach and I represented the Company.
>
> Under the guide lines (sic) of Section 19.3 of our contract we discussed the new changing technologies which have been implemented or evolved to a point that branch classification contract wording should be amended.
>
> We agreed that the "systems branch" would be redefined by job function, ie. (sic) Mac, Contex and Cromacom, for the sake of the distribution of overtime, however, the same three platforms would be considered one in regard to seniority. We also discussed the newly implemented "Helio-Com" department, as new technology. We further agreed that the company would begin posting overtime information weekly. At the end of the meeting, all parties agreed and all shook hands on this agreement.
>
> Effective October 1, 1997, the Company has put the agreement into effect. The first posting for the first week of October was done last week.
>
> I had understood that the Union was going to draft your proposed wording for this agreed-upon change. Since I have not received a draft from you, I have prepared and enclosed a simple statement of your agreement. If you would like, after you have reviewed it, we can make this into a formal amendment to the collective bargaining agreement. If not, we will simply proceed on the basis of the agreement we reached at our meeting.

Thank you for your courtesy to us on this matter.

. . .

P.S. Chris,

I was puzzled to receive a letter from your lawyer after this matter was settled. I have asked our lawyer to respond.

. . .

S&M ROTOGRAVURE SERVICE INC./GCIU LOCAL 577M

CHANGES IN BRANCH CLASSIFICATIONS
PER SECTION 19.3 OF COLLECTIVE
BARGAINING AGREEMENT

1. EFFECTIVE OCTOBER 1, 1997, FOR PURPOSES OF DISTRIBUTION OF OVERTIME OF SECTION 10.1, THREE SEPARATE JOB CLASSIFICATIONS, NAMELY, MAC, CONTEX AND CROMACOM, WILL BE ESTABLISHED IN THE SYSTEMS DEPARTMENT. HOWEVER, THE SYSTEMS DEPARTMENT WILL BE CONSIDERED ONE BRANCH CLASSIFICATION FOR PURPOSES OF SENIORITY.

2. EFFECTIVE OCTOBER 1, 1997, ON A WEEKLY BASIS THE COMPANY WILL PUBLICLY POST, DISCREPANCIES IN OVERTIME HOURS OFFERED IN EACH JOB CLASSIFICATION. THE POSTING WILL SHOW WEEKLY AND CUMULATIVE FIGURES. THE COMPANY WILL COMPILE AGGREGATE RECORDS OF THESE WEEKLY POSTINGS AND MAKE THEM AVAILABLE TO THE UNION UPON REQUEST.

3. THE NEW “HELIO-COM” DEPARTMENT, WHICH REPRESENTS NEW TECHNOLOGY, HAS BEEN ESTABLISHED AS A SEPARATE BRANCH CLASSIFICATION.

4. THE UNION AGREES THAT THE COMPLAINT OVER PAST OVERTIME HOURS IN THE SYSTEMS DEPARTMENT IS SETTLED.

The parties met again on December 10th to discuss the status of the grievance. The Company took the position that the grievance had been dropped as a result of the September settlement, while the Union's representatives contended that there was, at best a proposed settlement in September, and that it had only addressed how to handle overtime distribution in

the future, not how to remedy past violations. Peterson asked Ockwood if he thought there had been an agreement, and Ockwood said he thought an agreement had been reached but that it wasn't acceptable to Koglin. However, Yatchak and Koglin disagreed with Ockwood, and the parties were unable to agree on whether there had been a settlement in September. Ockwood suggested splitting the dispute into pre-grievance and post-grievance issues and treating them separately. The parties discussed that idea, but the Company stood firm on its position that the entire dispute had been settled. Yatchak sent a letter on December 23rd, purporting to confirm a conceptual agreement to divide the issue into pre-grievance and post-grievance segments, but the Company did not respond.

On January 13, 1998, Soldon sent a letter to John Niebler, attorney for the Company, proposing a list of arbitrators to hear Koglin's grievance. He simultaneously sent a request for an arbitration panel to the Federal Mediation and Conciliation Service. Niebler responded on January 27th with two letters. The first was to the FMCS, asking that a panel not be submitted. The second letter was to Soldon, advising him that the Company would not agree to arbitrate the Koglin grievance because it had been settled and withdrawn on September 4th.

The Union subsequently filed an unfair labor practice complaint under the Wisconsin Employment Peace Act, challenging the Company's refusal to arbitrate. At the hearing on the unfair labor practice, the parties agreed that the Examiner should also serve as arbitrator if he concluded that the grievance was arbitrable. In Dec. No. 29419-A (Nielsen, 4/2/99), issued today, the Examiner concluded that the alleged settlement agreement posed a question of procedural arbitrability, and that it should properly be submitted to arbitration.

ARGUMENTS OF THE PARTIES - PROCEDURAL ARBITRABILITY

Arguments of the Company - Arbitrability

The Company takes the position that the Union's request for arbitration in this case is barred by the settlement reached in the lower stages of the grievance procedure. By the terms of the contract, a matter is eligible for arbitration only "[if] the joint committee is not able to arrive at a satisfactory settlement of such dispute within a reasonable time . . ." In this case, the joint committee did reach a settlement within a reasonable time. Specifically, the parties met on September 4, 1997, and settled all outstanding issues related to overtime distribution. They agreed to treat the three platforms separately for overtime purposes, but jointly for seniority purposes. They agreed that overtime information would be posted so that employes could monitor distribution. They agreed that the Union would prepare appropriate forms and draft a settlement agreement. And, most significantly, they agreed that the Union would drop the grievances.

After the meeting, Company President Paul Peterson told Dave Puzach that he would be receiving overtime forms from the Union as a result of the settlement, and that he would be required to post those forms starting in October. Puzach in turn briefed the foremen on the

need to post overtime records on a weekly basis. Clearly the Company believed a settlement had been reached. The Union also proceeded as if an agreement had been reached. Steward Todd Ockwood referred to the agreement when he spoke with Puzach a couple days after the meeting, saying that Donn Koglin was not comfortable with the agreement and was changing his mind. Indeed, in his testimony at the hearing, Ockwood repeatedly referred to "the agreement." Yatchak, Koglin and Ockwood held a meeting to draft new language for overtime equalization. Both parties conducted themselves in a manner consistent with the existence of a settlement agreement. Even after the Union decided to renege, its conduct shows its knowledge of an agreement. The October 2nd letter from Soldon refers to "a prospective resolution," which indicates that Soldon was advised of the agreement. After receiving Soldon's letter on October 6th, the Company realized that the Union would not be producing the overtime reporting forms it had promised to prepare, and proceeded to prepare the forms itself and start posting overtime.

The testimony at the hearing and the objective evidence of the parties' actions after the September 4th meeting establish that there was a clear and definite agreement to resolve the overtime dispute prospectively and drop the grievances. There was nothing contingent or uncertain about this agreement. No party can lawfully condition an agreement on unstated contingencies. The fact that some details about the implementation of the agreement remained to be worked out does not affect the enforceability of the agreement. Ambiguity is a common feature of agreements.

The evidence overwhelmingly establishes that the parties settled the overtime grievances and that the Union agreed to drop them as a result. This is an enforceable agreement. The Union thereby waived arbitration, and should be estopped from pursuing the matter further. Accordingly, the arbitrator must conclude that he lacks jurisdiction over the merits of this grievance and should dismiss it in its entirety.

Arguments of the Union - Arbitrability

The Union takes the position that the Company's claim that a settlement was reached in September of 1997 is factually incorrect. The Union notes that the President of Local 577-M, Chris Yatchak, testified that there was no settlement at the September meeting. Instead, there was a discussion of possible solutions centering on a more precise record keeping system for overtime distribution. While both parties were interested in this as a means of avoiding future problems, according to Yatchak there was never an agreement that this would waive the Company's liability for past violations. The actions of the parties in the wake of the September meeting buttress Yatchak's view. The Union met to discuss its options after the meeting, and decided that the matter could not be resolved. Yatchak directed Union attorney Scott Soldon to inform the Company that, if no solution could be found within a reasonable

period of time, a demand for arbitration would be made. Soldon did this by letter on October 6, 1997. For its part, the Company took no steps to implement the supposed settlement until after Soldon's letter was received. Had there actually been a concrete agreement at the September meeting, one would expect some effort to put the new record keeping system in place. Thus the actions taken by the parties are consistent with the Union's version of events, and inconsistent with the Company's view.

The Union also asserts that the claim of a comprehensive settlement defies logic. It makes no sense for the Union to drop Koglin's very large claim, and to segregate overtime by platform, merely in return for the posting of information that the Company was already obligated to provide. The more logical conclusion is that testified to by Yatchak -- that the September meeting dealt in conceptual terms with a prospective remedy to the problem, and left unresolved the question of Koglin's pending claim. For all of these reasons, the arbitrator should conclude that there was no settlement, and thus there is no bar to the arbitration of this claim.

DISCUSSION - PROCEDURAL ARBITRABILITY

The existence or non-existence of a comprehensive settlement of this grievance in September of 1997 is a question of fact. The parties agree that a system for tracking overtime was discussed, as was a prospective change in the definition of "branch classifications" for overtime purposes. They further agree that some matters, including the definition of refusals, the nature of the reporting form to be posted and the contract language that would reflect this new system, were left unresolved in September. They disagree about whether there was an agreement, or even a discussion, over the status of Koglin's grievance.

Taking the record as a whole, I find that the parties did discuss the Koglin grievance. First, it seems quite unlikely that they would have met on the grievance without in some way addressing Koglin's claim. Granting that the parties discussed the general issue of overtime distribution, the fact is that it was Koglin's grievance that brought them to the meeting, and it would be odd for them to devise an elaborate new system for overtime equalization and simply forget about the grievance itself. Moreover, Ockwood's statement to Puzach that the reason for the Union's rejection of the deal was Koglin's discomfort with the settlement of his claim is consistent with the notion that the withdrawal of Koglin's grievance was discussed as part of the overall agreement.

While I conclude that the parties discussed an overall settlement which would have included waiving Koglin's wage claim, I also conclude that the discussion produced, at best, a conceptual agreement. Even as described by the Company's officials, the putative deal was tentative in the extreme. It did not include actual contract language, nor did it resolve the critical question of how refusals were defined. The Company correctly notes that almost every agreement has ambiguity, and that this alone cannot prove the lack of an agreement. However, the question is not what the agreement means -- it is whether on this record, the arbitrator can

conclude that both parties intended their discussions on September 4th to be a final agreement, substantively altering the contract for the future and waiving Koglin's past claims. To the credit of the parties, there is little history of grievance activity at this plant, but this also means that there are no mutually accepted protocols for how final grievance settlements are signified. The Company representatives earnestly believe that they reached a binding agreement on September 4th, and their disappointment at the Union's reversal of course is understandable. However, given the uncertain nature of the agreement, the lack of any past practice showing that this is how the parties have done business in the past, and the absence of any written confirmation of an agreement and its terms, the arbitrator cannot find that the Union unambiguously waived Koglin's back pay claim. Accordingly I conclude that the grievance is procedurally arbitrable.

ARGUMENTS OF THE PARTIES - MERITS OF THE DISPUTE

Arguments of the Union - Merits

The Union takes the position that this is a simple and clear-cut case. The Company has a clear obligation to equalize overtime among all employes in the Systems Operator branch classification. The Company's view that it can segregate overtime by platform and "equalize" overtime over an indefinite number of years is simply without support in the contract. It does not represent even an effort at equalizing overtime. This is clearly demonstrated by the Company's own flawed and suspect overtime records, which show that in 1996, Koglin worked 440 fewer hours of overtime than the highest operator. In 1997, Koglin worked 290 fewer overtime hours than the high man on the overtime list. These documents by themselves prove that the Company has flagrantly ignored its contractual obligation to equalize overtime.

While acknowledging that arbitrators are reluctant to order payment for hours not actually worked, the Union argues that an order of monetary relief is the only appropriate remedy in this case. First, the arbitrator must take account of the fact that the Company made no effort whatsoever to live up to the contract. This is not a case of a confused or mistaken good faith attempt by the Company to comply with the contract. Indeed, the disparity in overtime worked is so great that it is impractical to remedy it by ordering some sort of prospective relief. The record indicates that the amount of overtime overall has greatly decreased, and it is probably not possible to ever make up the lost hours. Moreover, the arbitrator must disregard the self-serving "records" produced to suggest that the grievant has turned down substantial amounts of overtime. Not only does the Company adhere to a definition of refusals that includes vacations and sick days, it generated the supposed records for the sole purpose of minimizing the grievant's claim. They cannot be treated as legitimate business records. The more reliable calculation is that proposed by Union attorney Scott Soldon in March of 1998, when he computed the amount owed at between $26,400 and $28,600 for 1996 and 1997.

Arguments of the Company - Merits

The Company takes the position that the grievance is without merit and must be denied. The contract requires that overtime be distributed "as equally as possible." This term is ambiguous on its face, but it clearly contemplates that the Company may act rationally in apportioning overtime among employes. This includes taking account of business efficiency and equalizing overtime over a reasonable period of time, rather than slavishly assigning it so as to end each month, or each year, with absolute equality among employes. Here, the employer followed a long-standing practice of assigning overtime work to the employes who were already working on a given project. Even the Union concedes that this is a legitimate consideration. The Company also followed a long-term policy on equalization, adjusting work assignments so that each employe would be given a chance to work on the platforms that were the busiest and, thus, worked the most overtime. While the Union objects to this practice, it was not successful in placing specific limits on the allowable disparities in overtime during contract negotiations, and it should not be allowed to impose such limits through arbitration.

Over a nine-year period, Systems Operators average 312 hours of overtime, while Koglin averaged 302 hours. A difference of ten hours is not proof of an unequal distribution of overtime. Over the most recent four years, Systems Operators averaged 238 hours of overtime and Koglin averaged 191. While this is a larger difference, there is no magic number that constitutes a violation of Article 10.1, and it can be argued that Koglin is in the ballpark. Moreover, these figures do not include refusals, and Koglin has a much higher refusal rate than other operators. Thus the contract language itself and the records of overtime offered and worked demonstrate that there is no contract violation.

The Company also cites past practice in support of its position. The contract has required overtime equalization for many years. Over that time, the Company has consistently assigned overtime on three bases. First, individual operators are assigned overtime work on the projects they are already working on. General overtime or small projects done on overtime are equalized on a current basis on individual platforms, rather than among all platforms. Finally overtime is equalized among platforms only on an on-going, long-term basis by reassigning employes to the platforms that are expected to be busy. These practices are well known to the Union and to Koglin himself, yet aside from Koglin's grievance in late 1996, there has never been a grievance over overtime distribution. There is ample arbitral precedent for fleshing out ambiguous overtime provisions through reference to well-established past practices.

The Company denies that it has committed any contract violation. However, should the arbitrator find a violation, the violation would have to be limited to the difference between Koglin's overtime and the overtime worked on average among Systems Operators from the filing of the grievance through the current time, reduced by the amount of overtime refused by Koglin. The resulting deficit, if any, should be remedied through a prospective order directing the Company to conform its practices to the arbitrator's interpretation of the contract. A specific remedy for Koglin is not appropriate, since it is impossible to say that he would have

or could have worked the theoretical additional hours he believes he is entitled to. If some sort of remedy is ordered for Koglin, the only arguably appropriate course of action would be to order that he be given preference over other employes for future overtime opportunities. This is unfair to other employes and inconsistent with the notion of equalization, but it is a more plausible remedy than would be a windfall award of money for time not worked.

DISCUSSION - MERITS

The contract requires the Company to divide available overtime "as equally as possible among all employees" in a branch classification:

> **10.1** In the event of overtime in any branch classification making it necessary to operate for more than a regular scheduled workweek, then the Company shall divide the available overtime as equally as possible among all employees including the foreman in that branch classification.

The Systems Operator branch classification includes distinct computers and programs, each of which requires expertise to efficiently operate it. Operators on the Macintosh may not be skilled enough on the Contex to be able to take advantage of available overtime on that machine, and vice versa. The parties recognized this problem, and negotiated a cross-training provision to deal with it:

> Further, to help equalize overtime the Company will make a good faith effort to cross-train employees within each branch classification to insure that overtime will be shared equally amongst all employees within a particular branch classification.

Reviewing the record in light of this language, it is difficult to characterize the Company's day-to-day system as an overtime equalization system at all. It is more of an overtime assignment system. According to Dave Puzach, the Company assigns overtime to whoever is already working on the project requiring the overtime, and then to the Systems Operators who are regularly assigned to the computer system used for the project (Mac or Contex). If no operator from that platform is available for the overtime, the Company looks to cross-trained operators from other platforms. This progression does not actually depend upon current overtime balances in the branch classification and, prior to 1996, the Company did not even regularly record who was offered overtime and who refused overtime, two obviously critical elements in any meaningful effort to equalize overtime opportunities.

The primary means of equalizing overtime is the Company's effort to move people between platforms on a long-term basis, based on whether they think the platform will be busy or not. While the long-term assignment system may be a good faith effort to roughly equalize overtime, the Company's own records show a marked inequality in overtime offered and overtime worked. In 1996 and 1997, according to the Company's calculations, the overtime was distributed as follows:

PRODUCTION OVERTIME IN THE SYSTEMS OPERATOR BRANCH CLASSIFICATION
(from Company Exhibits 8 and 9)

Employe	1996 Overtime Hrs. Offered	1996 Overtime Hrs. Worked	1997 Overtime Hrs. Offered	1997 Overtime Hrs. Worked
Callies	324.75	251.50	325.00	303.25
Warzon	114.75	98.50	313.75	287.75
Begeer	499.50	364.50	495.75	459.75
Abel	341.25	320.75	213.25	207.25
Stanek 2/	-----	-----	237.00	215.00
Koglin	136.50	68.75	286.75	146.00
Eskau	495.00	391.15	477.00	385.25
Fennig	300.25	232.25	213.00	176.75
Ockwood	520.25	462.00	470.00	419.25
Stehlik	493.75	363.75	432.50	357.25
Day	108.50	43.75	77.75	65.75
Peter 3/	555.50	508.75	----	----
Average	353.64	282.33	275.54	274.81
Koglin	136.50	68.75	286.75	146.00
Deviation	-217.14	-213.58	+11.21	-128.81

2/ Stanek was not offered overtime, nor did he work overtime, in the Systems Operator Classification in 1996. He is excluded from the calculation for that year.

3/ Peter spent half of 1997 in the Scanner Department. He was offered and worked 303.25 hours of overtime in 1997, but his overtime hours for that year are not broken out between the two departments. Thus he is excluded from the calculation for that year.

The Company includes in its statistics as an offer of overtime to an employe, any overtime made generally available to workers in a department, whether the employe is at work that day or not. Looking at these figures, in 1996 Koglin was offered 39% of the average

overtime offered to other operators, and actually worked 24% of the average overtime worked by other operators. In 1997, after this grievance was formally presented, Koglin was offered 104% of the average overtime offered to other operators, and worked 53% of the average overtime worked by other operators. Even if one accepts the Company very expansive view of what constitutes a refusal, and thus concludes that Koglin has no complaint as far as 1997 is concerned, the figures for other operators demonstrate that equalization across the classification is not occurring in any recognizable fashion. 4/

4/ The definition of a refusal used by the Company does not make a great deal of sense in a system where overtime is equalized over a period of time, and where it does not need to be offered in some strict rotation according to a sign-up list. The definition of a refusal is not directly in issue in this case, and given the overall conclusion on the merits, it is not necessary for the arbitrator to make a definitive ruling on the question.

The Company argues that the long-term approach to overtime equalization is appropriate and has worked well over the years. It cites Company Exhibit 6, which purports to show that overtime has averaged 312 hours each year since 1990, and the grievant has worked on average 302 hours of overtime per year, 97% of average. In fact, excluding employes who were not actually present in each year, and the partial year figures for 1998, and using annual averages, the exhibit shows the following:

Year	Highest OT Worked	Lowest OT Worked	Average OT Worked	Koglin's OT Worked
1990	344.50	154.06	248	154.06 (62%)
1991	676.00	381.00	567	613.50 (108%)
1992	721.75	400.19	531	400.19 (75%)
1993	621.75	413.25	490	413.25 (84%)
1994	531.25	317.75	415	373.00 (90%)
1995	483.00	74.00	260	297.05 (114%)
1996	508.75	43.75	290	68.75 (24%)
1997	459.75	65.75	279	146.00 (52%)
Ave:	543.09	231.12	385	308.21 (80%)
% of Ave:	141%	60%	100%	80%

Again, while the Company may intend that overtime be equalized over time, there is no evidence that it is happening. A system in which the average difference between the top and bottom overtime earners is over three hundred hours per year is not an equalized system. The commitment to distribute overtime "as equally as possible" certainly contemplates some overall variation and may even include substantial variations at any given point in time. Indeed, some

variation is virtually guaranteed. This is not a mass production process, and the work load consists of individual projects. Assuming that the Company is distributing projects to operators in good faith, and is not funneling projects that will require substantial overtime to or away from specific operators, the "as equally as possible" language of the contract is sufficiently flexible to allow the Company to assign necessary overtime to finish a project to the employe who is already assigned to the project. While Koglin had a multitude of concerns about overtime distribution practices, this was not one he identified as being a problem, and Yatchak agreed that the Company's desire to have employes finish the projects they start was reasonable. This type of overtime represents a substantial portion of the overtime in the Systems Operator branch classification.

Having granted that the contract language contemplates some variation in overtime, the arbitrator must also observe that if equalization is to have any meaning at all, it has to be read as incorporating a realistic period of time for measuring whether overtime is in fact being equalized. Even though the Company is right that there is nothing sacred about equalization over each calendar year, its suggestion that nine years or fours years or a similar time span is reasonable simply cannot be reconciled with the contract. Using so long a base period for comparing overtime accumulations makes the contract impossible to administer and enforce. The use of a calendar year for measuring equalization is commonplace and reasonably easy to track, and it need not be unduly restrictive. A substantial variation in overtime offered across a calendar year does not necessarily constitute a violation of the duty to equalize overtime (where, for example, the Company has concrete plans to offer sufficient overtime in January to an employe who is substantially behind at the end of the year, or where the excess overtime worked by one operator is due solely to finishing projects already assigned to that employe), but it does at the very least impose an obligation on the Company to explain the variation and its plans to remedy the variation.

Absent any reasonable alternative, the arbitrator concludes that the goal in complying with Article 10.1 should be to equalize overtime on a calendar year basis. In so doing, the Company need not take a continuing project from an operator simply to make overtime available to another operator, but it may not refuse to offer overtime to a cross-trained operator simply because he or she is regularly assigned to a different platform. Clearly, the current practice is inconsistent with these basic principles. It is, however, a practice that the Company has followed for as many years as it has had equalization language in the contract. The Union has been completely aware of the practice. By his own account, the grievant has questioned management's allocation of overtime many times, has been briefed on the system, and has not previously pursued a grievance. Where there is a well-established and mutually accepted practice that is either extra-contractual or is inconsistent with, but not directly contrary to, contract language, parties may be bound to the practice until one party gives unequivocal notice to the other that it intends to repudiate the practice, and that the other party has an opportunity to address the issue in bargaining. This is such a practice. In this case, the filing and pursuit of the instant grievance constitutes unequivocal notice that the Union no longer accepts the practice with respect to overtime distribution. While the Company may continue to

rely upon the practice for the balance of the contract term, having been given notice it now bears the burden of negotiating new language on the topic of overtime distribution, or changing its system to make it consistent with the existing language.

Having accepted the Company's practice for many years, the Union is nonetheless entitled to insist on its rights under the contract language, once a new contract is in place. Prior to that time, however, the Union cannot recover make-whole relief for violations flowing from a system in which it was at least tacitly complicit. The only affirmative relief ordered is that the Company is directed to make available to the Union on request at reasonable intervals, records showing overtime hours offered, refused and worked for each bargaining unit employe. The basis for this portion of the remedial order is the need for the Union to have sufficient information to administer and enforce the contract. It is readily apparent from the testimony at the hearing that much of the dispute concerning overtime is attributable to the Union's understandable skepticism over the Company's claims that overtime is being equalized, while at the same time vigorously resisting the Union's efforts to secure information about overtime equalization.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

1. The grievance is procedurally arbitrable;

2. The Company's overtime distribution system is not consistent with Article 10.1;

3. The appropriate remedy is for the parties to abide by the existing practices for the balance of the collective bargaining agreement under which the grievance arose and to either:

a. Negotiate a different system upon contract expiration or

b. During the term of the successor agreement, to change the practice to provide for equalization of overtime, to the extent possible, over each calendar year; to eliminate the Company's practice of not assigning overtime to otherwise qualified operators based on the platform to which they are regularly assigned; and to provide to the Union on request at reasonable intervals, the overtime data necessary to monitor overtime equalization.

Dated at Racine, Wisconsin, this 2nd day of April, 1999.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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