

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1366, AFSCME, AFL-CIO

and

CITY OF FOND DU LAC

Case 146
No. 57312
MA-10587

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by **Mr. William G. Bracken**, Coordinator of Collective Bargaining Services, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1998-99 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear a grievance regarding overtime distribution. The undersigned was appointed and held a hearing on June 14, 1999, in Fond du Lac, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by September 20, 1999.

ISSUE

This case involves two grievances which are encompassed in a broad framing of the issue as follows:

Did the City violate Article VIII of the collective bargaining agreement in the manner in which it distributed overtime in the Wastewater Division during the calendar year of 1998? If so, what is the appropriate remedy?

CONTRACT LANGUAGE

**ARTICLE VIII
OVERTIME AND HOLIDAY PAY**

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Section 2 – For emergency and non-emergency overtime, each division shall post in all other divisions, once a year, or more often if deemed necessary, a list of employees with space for each employee to indicate whether or not he wishes to be called in for regular overtime work. After an employee has indicated that he does not wish to be called in for overtime work, he shall not be called unless that employee is needed due to his specific skills or due to the non-availability of a sufficient number of employees desiring overtime work. Overtime shall be divided as equally as possible among the qualified employees of the division, then divided as equally as possible among the qualified employees outside the division, except as otherwise provided in this Agreement, who have signed indicating their desire for overtime. The overtime of employees shall be posted. In the event of an emergency, all employees may be required to work overtime, however, those employees who have indicated a desire to work overtime will be called first provided they are capable of performing the available work. Overtime hours worked in a division other than the employee's normally assigned division shall not be used for the equalization of overtime language contained herein.

...

Section 5 – Overtime shall be divided as equally as possible on a calendar year basis among qualified employees in a division. Overtime of employees shall be posted. Part-time and temporary employees will not be assigned overtime work except in cases of emergency or when all permanent employees are working overtime or when permanent employees are unavailable for overtime work.

BACKGROUND

The first grievance in this dispute was filed on July 1, 1998, and it contended that employees qualified to handle the quarterly sampling were not offered overtime work, and that the contrast of overtime hours had a very wide gap. The parties put this grievance on hold while there was some attempt to equalize overtime during the last part of the year. The second grievance was filed on January 18, 1999, and it alleged that overtime was not divided as equally as possible among the qualified employees.

The City does not dispute that it does not equalize overtime among all the employees in all job classifications in the Wastewater Division. The City has never interpreted the collective bargaining agreement in the manner urged by the Union.

There are five job classifications involved in the division:

OCL – Operator Crew Leaders - 4 employees
STO – Secondary Treatment Operators - 4 employees
IPS – Influent Pump Station - 4 employees
ZIMPRO – Process Operators - 2 employees
Maintenance – 7 employees

The four OCL employees are shown below with their total number of overtime hours for 1998:

David Meilahn	166 hours
John Gremminger	143 hours, plus 8 declined
Paul Rawlsky	112.5 hours, plus 8 declined
John Konz	115.75 hours, plus 8 declined

All of the OCL employees are qualified to work in any of the other job classifications in the wastewater plant.

The four STO employees and their 1998 total overtime hours are:

David McEnroe	121.5 hours
Curtis Giese	99 hours
Ray Manderscheid	112.5 hours
Joseph Ditter	91 hours, plus 8 declined

The four IPS employees and their 1998 total overtime hours are:

Tim Wilkens	80.25 hours, plus 20 declined
Joseph O'Boyle	123 hours
Alan Lietz	64.75 hours, plus 24 declined
Brian O'Reilly	60.25 hours

Lietz started in March of 1998 and O'Reilly sometime in the middle of the year. IPS is the starting position in the plant.

The ZIMPRO employees and their 1998 overtime hours are:

Gary Delzer	98 hours
Gerald Hilt	95 hours

The maintenance employees and their 1998 overtime hours are:

Paul Krueger	23.75 hours
David Wuest	- 0 - hours
David Edwards	13.50 hours
David McDermott	12.5 hours
Stephen Durocher	37 hours
Brian Huelsman	35 hours
Robert Halfmann	- 0 - hours

Only two of the maintenance employees – Durocher and Huelsman – are qualified to work in IPS.

Operations Crew Leaders (OCL's) are shift supervisors responsible for assigning duties to other operators. They also fill in for any vacancies or gaps in shifts. They fill in for people who are sick, on vacation, etc. They are part of the bargaining unit. OCL's are required to have a Grade 1 certification but are encouraged to have a Grade 4 certification. STO's or Secondary Treatment Operators work in the secondary portion of the treatment plant, with activated sludge and pure oxygen generation. They work with chemicals for phosphorus removal and do some laboratory testing. IPS or Influent Pump Station operators adjust influent pumps and maintains levels of wet wells, runs vacuum filters, sludge dewatering, etc. This is the entry level position at the plant.

OCL, STO and IPS employees work a rotating schedule of 28 days, covering three shifts seven days a week. ZIMPRO operators work Monday through Thursday for two 10-hour shifts, and maintenance employees work Monday through Friday on a day shift.

ZIMPRO is a high pressure, high heat treatment system for sterilizing and dewatering sewage sludge. The two employees in ZIMPRO, Hilt and Delzer, work four 10-hour days on Monday through Thursday. Hilt works from 4:00 a.m. to 2:00 p.m., and Delzer works 2:00 p.m. to midnight. A crew leader (OCL) fills the four-hour gap between midnight and 4:00 a.m. By the middle of 1998, Hilt had 62 hours of accumulated overtime. He objected to the manner in which the overtime hours were being distributed and the accumulation differences. David Meilahn had 85 hours while Hilt had 30 hours at one point. Hilt and others also objected to the OCL's scheduling overtime hours. Hilt was available for many of the hours in STO and IPS that the OCL's scheduled for themselves and filled. Hilt was not available the last week of 1998.

There was a change of personnel in May of 1997, when Mark Serillo left and James Williams became the Wastewater Operations Manager. Hilt testified that when Serillo was in charge, the overtime was not as out of whack as it became under Williams' direction. Hilt also testified that OCL's were used in the past to help equalize overtime. He has been with the City for 12 years. Hilt declined to take overtime for a period of time after June of 1997.

Hilt is qualified to work in ZIMPRO and IPS. He has an operator's license, which allows him to work anywhere in the plant as long as he has been trained. He has been trained to work in IPS. All his overtime has been in ZIMPRO, the hours between midnight and 4:00 a.m. He did not ask for overtime work on weekends in IPS. Hilt may work overtime in ZIMPRO because a crew leader is filling in on IPS or STO when someone in those areas is off sick or on vacation.

The crew leaders fill in certain hours on a regular basis. They fill in for IPS every Friday morning between midnight and 8:00 a.m. They fill in for STO every Monday between 4:00 p.m. and midnight. They fill in for ZIMPRO on Tuesday, Wednesday and Thursday mornings from midnight to 4:00 a.m.

Stephen Durocher has been with the City for 10 years. He is a maintenance helper and worked in IPS in the past. He holds a wastewater license, although no longer required to do so. Durocher felt that some of the overtime should have been offered to maintenance employees in a couple of areas. One area was in IPS, where Durocher and Huelsman were both licensed operators and qualified to work in IPS. The other area was in picking up samples. After the parties met in June over this issue of overtime, Durocher got a little overtime in IPS. Durocher has worked overtime in the past outside of the maintenance area. He generally works Monday through Friday, 6:30 a.m. to 2:30 p.m. Maintenance is considered a one-shift operation. There is backup equipment that eliminates the need for overtime to maintain equipment that breaks down.

Durocher has signed postings stating that he is available for overtime and interested in being considered. Everyone in the maintenance area has been certified for confined space work, which is involved in some of the sampling work. The IPS or OCL employees normally do the sampling work. Durocher estimated that there were 90 hours of overtime in sampling for the first six months of 1999. Sampling means taking samples of wastewater from various industries in the City.

The City has had the same kind of overtime distribution variations in prior years, and the Union has not filed a grievance. The City posts the accumulated overtime hours at the end of each payroll. The computations clerk in the wastewater office posts the hours. The record of the hours declined may not be accurate.

John Leonhard has been the Utilities Director in charge of the water and wastewater facilities since September of 1998, and was the Superintendent of Wastewater plant since 1984. The plant engineer and operations manager assign overtime. Leonhard stated that the

Wastewater Division has struggled to equalize overtime within job descriptions, because people work in specified areas of the plant. ZIMPRO and IPS have not been trained in STO and OCL work and would not be qualified to work in those areas. The Division tries to equalize overtime hours between employees in OCL and hours between employees in STO, etc., rather than throughout the plant. Leonhard said they have never tried to equalize overtime across the board. OCL's are the only ones qualified to work in all areas of the plant, and they get more overtime because of their qualifications. They also have more opportunity to work more overtime than people do in other job classes.

At the end of 1998, Hilt was on vacation and another crew leader was on vacation. Crew leader Meilahn got 24 hours of overtime, crew leader Rawlsky got 4 hours, and Delzer in ZIMPRO got 4 hours during the last week of 1998. Meilahn's 24 hours at the end of 1998 were for filling in at ZIMPRO. On December 28, 29, 30 and 31 of 1998, Hilt was on a floating holiday and vacation. Another crew leader - Gremminger - was also on vacation at that time. And one of the IPS, Wilkins, was on vacation the last day of December. The crew leader would have to get overtime in addition to the schedule of filling in. Crew leaders also assign and distribute overtime in the absence of the Operations Manager. It is typical for employees to take time off around the end of the year, which creates some overtime opportunities.

The normal procedure is to fill a vacancy with the person working in that classification who is already scheduled to work immediately before or after the shift that is left vacant. Either someone would come in early or stay over, but it would be someone in the same job classification. Leonhard stated that it was convenient to offer those employees the overtime first because they know the job. Employees are aware of this procedure.

If no one accepts the overtime before or after the shift, the overtime is then offered to a crew leader. Leonhard stated that if one person is low on overtime, they try to give some overtime to that person within that job classification.

Leonhard stated that if the system of offering overtime to employees working before or after the vacant shift results in an unequal distribution of overtime, then they try to give the overtime to someone with the least amount of overtime.

There were two vacancies in IPS for the first part of 1998. Lietz was hired in March and O'Reilly hired mid-year. IPS employees Wilkens and O'Boyle got more overtime during the first part of 1998 because of the vacancies. Leonhard testified that he does not allow employees to work more than 12 hours in a row because of safety concerns.

Historically, maintenance has less overtime than the operations side of the plant. Leonhard stated that the treatment plant was built with backup equipment, so that if one piece of equipment went down, they could switch to another piece of equipment. There would be no emergency for maintenance to come in and work on equipment right away, and those employees could wait to work on the equipment until regular hours when parts were available.

The Wastewater Division has planned for overtime in its budget, and the records show that the Division plans its budgets based on prior experience with overtime. Several years of budget records show that the Wastewater Division anticipates that OCL's, STO, ZIMPRO operators, and IPS operators will work much more overtime than maintenance employees. Leonhard also noted that the records show that employees who were high in overtime in 1997 were low in 1998, and the end of the year tends to skew the numbers.

The work of sampling is done on both a daily and quarterly basis. The Wastewater Division has changed its method from time to time. The samples are from high strength industries on a daily basis, and every quarter, the outlying sanitary districts are sampled. Employees used to collect samples every morning about 5:30 a.m. An IPS operator or an OCL employee went to get the samples, and a maintenance person also went along. There was a requirement regarding confined space entry, where two people were needed on a confined space job, so they tried to get more samples from above ground. Now, IPS operators take the samples at midnight from the industries that are sampled on a daily basis. They do the sampling because it's part of their job and they are familiar with the work. A crew leader covers their job while they collect samples. If there is a confined space entry, the operator on shift and another person goes along for safety reasons. The second person has to be certified in CPR and first aid for confined space entry. The second person for confined space could be done by a number of employees at the plant. The ISP and OCL's usually do the quarterly sampling.

Normal sample pick ups do not generate any overtime. The quarterly sampling creates some overtime due to the need to send an extra person for the confined space entry requirements. It would be possible to use someone low on overtime to help with the quarterly sampling.

Leonhard stated that the plant has been distributing overtime in the same manner for 20 years and no one has questioned it. Maintenance employees cross over two shifts, because they start at 6:30 a.m., and they would not be available to work overtime for the other shifts. Leonhard stated that the management has attempted to equalize overtime among qualified people according to the contractual requirement.

The call-in sheets were incomplete, because people did not write down employees who declined overtime in all instances. It was sometimes just noted who took the overtime.

The Wastewater Operations Manager since September of 1998 is James Williams. He schedules operators' overtime and makes sure the plant is staffed. On January 15, 1999, he issued the following memo:

Since we are now operating short a couple of operators the following guidelines will apply for shift vacancies occurring as a result of unforeseen absences.

1. Attempt to fill the vacancy within the position classification: IPS for IPS, Zimpro for Zimpro, etc.
2. Attempt to fill a vacancy with two four-hour assignments. The operator on shift will stay for an additional four hours, and the operator on the shift subsequent to the vacancy will report four hours early.
3. If the vacancy occurs with IPS, the maintenance helpers are available for overtime assignments, notify them and Rich Meilahn, if they will fill the vacancy.
4. Attempt to fill the vacancy with an operator scheduled off for that day if the two four-hour assignments are not possible. Consult posted OT accumulation list and select lower OT worked plus OT declined operator for assignment.
5. Schedule an additional eight-hour shift for the operator on duty. This assignment is the last resort. A shift operator is not relieved until his replacement shows up.
6. Document all overtime assignments and contacts on form WPCP-108.
7. I will attempt to equalize overtime by assigning hours to cover vacancies from vacations, terminations, training periods and retirements.
8. If situations arise not covered by this procedure, contact me at home (# omitted).
9. Absences should be reported to OCL on duty or to me whenever possible.

Williams took a previous memo from Serillo and re-wrote it to show that maintenance helpers were available for overtime in IPS. Williams said that there was a change in policy that allowed maintenance helpers to work overtime in IPS, and that policy changed in June of 1998. Leonhard told him at that time that he could use the maintenance helpers in IPS. Williams also added the fourth item that requires consulting the overtime accumulation list. Everything else in the memo was the same as the previous memo. Union members contend that they never saw the memo issued by Williams, although it was posted in the control room at the plant and in the administration building. Notices are customarily posted at those places.

Williams described the assignment of overtime in the same manner that Leonhard described. Williams found that in about 70 percent of the time, he could fill the overtime by grabbing the person on either side of the shift. If he were missing a STO, he would ask the STO before and after the shift to work late or come in early. Then he would go to the crew leader to fill in for slots that he could not fill by using the person on either side of the shift. Then he would go to someone who was off and try to get that person to work, still

looking at employees within the same job classification at this point. If Williams were still short, he would start switching people from one job classification to another where possible. For example, if he needed to find a STO, he could fill the STO with an OCL and have an IPS person work overtime. Or then he could use the two maintenance helpers to work in IPS.

The parties agreed to waive the time limits of the grievance procedure that require the arbitrator to deliver the findings on the case within 30 days of the filing of the briefs.

THE PARTIES' POSITIONS

The Union

The Union believes that the labor contract is very clear, that overtime is to be equalized "among qualified employees in a division." The City has taken the position that it has acted consistent with its past practice and divided overtime as equally as possible among job classifications. The City has pointed out that OCL's are responsible for taking the place of employees who are not at work, thereby reducing that amount of avoidable overtime. However, there was also testimony that OCL's were assigning themselves overtime rather than attempting to find other employees who were available to work overtime. That obviously skews the overtime toward the OCL's and away from the other four classifications. The Union asserts that the question is whether the City can avoid the clear language of the contract that requires equalization of overtime throughout the entire Wastewater Division by artificially assigning more overtime to the OCL's rather than offering it to others in the plant.

The Union states that the second issue regarding overtime assignments involves the availability of employees to work overtime as it occurs. Leonhard stated that the City's preference was to assign available overtime to the employees working before or after the open hours within the specific job classification, then with an employee in that classification who was off.

The Union is not arguing that available overtime must be offered to employees who do not have either the qualifications or licenses required to perform a particular job or who are unavailable to work the open hours. However, the current system in place is designed to channel overtime assignments to certain employees and does not give the remaining employees an equal chance to work available overtime. That violates the contract language on equalization of overtime.

The evidence at the hearing made it clear that there is an unequal distribution of overtime at the plant. The question is what the appropriate remedy would be. The contract calls for equalization overtime on a calendar year basis, a time period that the City was aware of when the parties agreed to hold the first maintenance employees' grievance to the end of 1998.

The Union asserts that there are two principal remedies where overtime has not been distributed equally among the employees. One is a make-up remedy where employees are given a chance to work future overtime opportunities prior to those employees who have been denied overtime opportunities. The other is a monetary award to those employees who have been denied the opportunity to work overtime in the first place.

The Union argues that a make-up remedy would be inappropriate in the facts of this case, where a small number of employees are being assigned a large part of the available overtime. The proper remedy is for the City to pay employees for the overtime opportunities they were denied.

The City

The City argues that it has distributed overtime as equally as possible among qualified employees. Over the past 15 years, the City never equalized overtime across all job classifications, but tried to equalize it within the classifications of OCL, STO, IPS, SIMPRO and Maintenance due to the qualifications of employees. The City states that the qualifications of employees render it impossible to equalize overtime across the entire division, because not all employees are qualified to do all of the jobs. ZIMPRO and IPS cannot be STO and OCL's because they lack the qualifications for those positions. Overtime within each job classification is close, but differs between classifications. All four operator job classifications have never had the same number of overtime hours. Thus, overtime has not been distributed equally among all employees, as the Union argues, but rather equally among qualified employees, the City contends. The term "qualified" necessarily means that some employees will have overtime opportunities that others will not. The clear language of the contract requires overtime to be distributed as equally as possible among qualified employees, those that are able to perform the job. The City states that it has significant safety issues involved in the Wastewater Plant. The ZIMPRO operators deal with a high temperature/high pressure process that could create serious safety problems. STO's produce oxygen.

Both Leonhard and Williams testified that in the final two months of the year, it is difficult to equalize overtime because of the number of employees who are scheduled for vacations, holidays, sick leave and so on. Employees are trying to use their allotted vacation at the end of the year. An employee who is in line to receive overtime may be on vacation. Distortions of overtime are inevitable and beyond the control of the City. When an employee is absent, he cannot be included in the overtime rotation list.

The City asserts that it has made a good faith effort to distribute overtime as equally as possible among qualified employees. The distribution for 1998 was the same as that in 1997. One arbitrator held that an employer did not violate a contractual provision requiring the scheduling of overtime as equally as possible even though there was over 100 hours difference between the high and low employees within a particular job classification. The range here for

Maintenance employees is 12.5 to 37 hours. The ZIMPRO employees were within three hours of each other. The range among IPS was from 60 to 123, and STO's ranged from 99 to 121.5 hours. The OCL's ranged from 120.5 to 166.

Arbitrators have upheld employers' efforts to distribute overtime when done in a reasonable manner. Employees do not have the right to perform overtime at a specific time. The City agrees that Maintenance and IPS employees can be used in the quarterly sampling. However, the regular work hours for Maintenance limits their ability to perform overtime for some of the sampling work.

The City contends that the past practice supports the City's interpretation of distributing overtime. Leonhard was emphatic in his description of the 15-year practice of equalizing overtime by job classifications. Union witness Hilt admitted that employees do not go outside of their job classifications for seeking additional overtime. While he could have worked in IPS, he never did. The parties reached an understanding regarding the distribution of overtime. For the most part, qualified employees mean employees in a particular job classification.

The City believes that the Union would ask the Arbitrator to ignore the word "qualified" in Article VIII, Sections 2 and 5. The term qualified means employees must be able to perform the job in a safe and proficient manner. Not all employees are qualified to perform all of the overtime, and the Union's remedy flies in the face of the language that requires overtime distributed as equally as possible among qualified employees. Moreover, the Union has not shown that the City acted arbitrarily, capriciously or unreasonably. The City argues that the Union's interpretation of having all employees receive the same amount of overtime would lead to a harsh and absurd result, since not all of them are qualified to perform the work.

Reply Briefs

The Union

The Union points out that the management of the Wastewater Treatment Plant made no real effort to equalize overtime among all of the operators during the course of the year, based on their statements of how they handled overtime. First, they offered it to the employees within a classification in four-hour blocks prior to or after their shifts. Then they had OCL's work the hours.

The Union states that the City has avoided its obligations regarding equalization of overtime by saying that the OCL's will automatically be assigned more overtime than other classifications in the plant because they can perform all other jobs in the division. The Union has a concern about the OCL's scheduling themselves to overtime without offering it to other employees who could have been available.

The Union has never taken the position that overtime must be absolutely equal without regard for qualifications and availability. However, the Union believes that the issues of qualifications and availability are of little significance as there was no evidence presented that any effort was made to equalize overtime during 1998. The City knew that this issue concerned employees when Maintenance employees grieved the matter in July of 1998. Joint Exhibit #5 shows no effort on the part of the City to equalize overtime after the filing of the grievance. The fact that the Union did not file a grievance over the distribution of overtime in 1997 does not preclude the grievance in question from being filed. The lack of a grievance in 1997 does not indicate that the Union waived its right to grieve the issue in future years. Each year brings a new requirement that overtime be equalized.

While the City states that it did not keep an accurate count of hours of overtime refused, this argument should be dismissed as there was no evidence on this at the hearing. Joint Exhibit #5 contained a list of declined overtime for six employees, indicating that the City did have a method in place to keep track of those totals.

The Union also objects to the City's argument regarding past practice, pointing out that past practice cannot be used to overrule clear contract language. There was no agreement between the parties on how overtime was to be assigned. Moreover, the City did not show that there was a consistent method of assigning overtime, thereby diminishing the City's argument regarding past practice.

The Union asserts that the City misrepresented the Union's arguments by the City's argument that the remedy is for all employees to receive an identical amount of overtime. The Union agrees that equalization is modified by the adjective "qualified" as the primary criteria in the distribution of overtime. The availability of employees also has to be considered. Certainly if an employee is offered overtime and is not available to work it, this may affect equalization. Over the course of a year, the contract language is meant to provide opportunities for overtime to be equalized.

The Union contends that the City's decision not to follow the contract is the real absurd result in this proceeding. The City knew that the overtime had not been distributed equally at the time of the Maintenance grievance, but it put its head in the sand and denied that it needed to make any effort to follow the contract.

The City

In reply to the Union, the City objects to the Union's chart of overtime in the Maintenance area because there is no evidence regarding the desire to work overtime, the qualifications for employees, as well as what work was available and who was assigned. There is also overlapping and incomplete data, and not enough evidence in the record to know all of the facts surrounding the Maintenance employees. After the grievance was filed, the City gave

more overtime opportunities to Edwards, Durocher and Huelsman in the second half of the year, refuting the Union's contention that there was no significant change in how overtime was distributed after the grievance was filed.

The City also notes that the Union excluded the amount of overtime declined by employees in its documentation of overtime worked in 1997 and 1998. While the Union argued that City Exhibits #'s 10-13 have no bearing on the issue of overtime equalization, the City submitted those documents to show that the Employer never tried to equalize hours among all job classifications. Rather, the job classifications were treated independently in how overtime was budgeted and allocated according to the contract.

The City believes that if there should be any remedy, it would be to allow employees judged deficient in their overtime a chance to work future overtime. The Union's remedy for a monetary award for time not worked would give an unmerited windfall to employees and be unjust to the City. The City has not deliberately or willfully violated the contract. Moreover, there are not enough facts to determine which employees were qualified to work the overtime that was available.

DISCUSSION

Equalization of overtime among bargaining unit members is a difficult thing to do. It is almost never perfectly equal, and employees are often left unhappy with whatever system is in place, because they may not get the premium paying work at the times that they want it. However, the parties have agreed to equalize overtime within a division, assuming that employees are qualified. The relevant provisions are Sections 2 and 5 of Article VIII, which call for overtime to be divided as equally as possible among the qualified employees of the division.

The Wastewater Treatment Plant is the division in this case. The overtime must be divided as equally as possible among the qualified employees of the Wastewater division. The Employer's method has clearly violated the labor contract because the Employer was tried to divide overtime among job classifications, not the entire division as required by the contract.

The Employer's system may have some logical and practical basis, because the employees who are often the ones qualified for the overtime are the ones working in the same job classification. However, the system being used by the Employer violates the contract by not taking into account equalization as the first consideration. It is the last consideration by the Employer, and it is too late to equalize overtime when one looks at it in the last instance rather than the first instance.

The Employer looks first at the job classification and those working before and after the vacancy that needs filling. While this method works for meeting the qualification part of the contract, it does not work for meeting the equalization part of the contract. There are qualified

employees who are outside of the job classification who should be considered along with those in the job classification and the crew leaders. The clearest example of this was in IPS during the early part of 1998. For example, during the first part of 1998 when two IPS operator positions were vacant, there is no evidence that the two qualified maintenance employees were offered overtime in IPS. The record tends to show that the IPS employees were getting more overtime until Lietz and O'Reilly were hired. The two maintenance employees, the ZIMPRO employees and the STO employees could have been offered overtime in IPS. The Employer could have drawn on most of the employees in the plant and considered the equalization factor for IPS work, since most except for some in maintenance would be qualified to work in IPS. If they were offered it and they turned it down, due to the undesirable hours, the record should show that they declined the overtime.

The Employer admits that it has not always tracked who declines overtime, and that needs to be done. If qualified employees are offered overtime and decline it, they need to be credited as if they had worked it in order to show the equalization.

One of the persistent problems with equalization of overtime is that employees often complain about the lack of equalization of overtime but then refuse to work overtime because it falls on undesirable hours, such as weekends or nights and graveyard shifts. A system that shows what work they were qualified to perform but refused to take would help alleviate some of those complaints.

The Employer's records show too much disparity within job classifications as well as across the division. Without a record tracking who has no interest, who is not qualified to work what overtime and who is not available, even the Employer's attempt to equalize overtime within a job classification fails to do that. For example, City Exhibit #14 shows that in 1997, OCL's overtime varied from 70.75 hours to 106 hours. STO's overtime varied from a low of 3 to a high of 95. One might assume that the person with only three hours of overtime somehow declined all overtime opportunities. But one cannot tell that from the records. The ZIMPRO people had 22 and 51, and Hilt testified that he declined to take overtime for part of 1997, which would explain his lower number. The IPS overtime varied from 35.35 to 70 hours. These would be considered too much variance to comply with the contractual requirement of equalization of overtime whether by job classification or by division. The overtime record for 1997 varies from a low of 3 to a high of 106 – a difference of 103 hours without a showing that the low people either were not qualified, not available, or declined the work.

The contract does not call for equalization by job classification, but by division. There is no doubt about that. The contract is clear. It is up to the parties to try to work out a system to comply with the contract or to mutually agree to change the contract. This is admittedly a complex problem, because the Employer has to take into account employees who are not available, employees who are not qualified to work in the positions where overtime is needed, as well as employees who have no interest in working the overtime. However, many employers have the same problem, and some better system of equalization has to be made in order to comply with the contractual requirement of equalization of overtime.

Some employers have managed their overtime equalization problems by crediting employees with the available overtime if they declined it. This Employer could run a set of tallies showing where the overtime was available, then giving the hours to all not qualified, all not available, anyone to whom it was offered but declined it, as well as the person that actually worked it. Such a system would then show employees an attempt to equalize it within the division and within their qualifications. This system has its drawbacks, too, because employees might start disputes over whether they were qualified and dislike a system that points out lack of qualifications to work the overtime. It also forces the Employer to more or less keep two sets of books on overtime – one to show the equalization attempt, another to track actual overtime hours. But a little creativity can keep this all manageable.

The Remedy

It is clear that the contract was violated by the manner in which the Employer equalized overtime among job classifications rather than by the division and failed to take into account qualified employees in some job classifications that could have been offered overtime in other classifications. However, the remedy for this violation is not so simple to discern.

While a monetary award without having to make up the time is the preferred remedy for many cases, I do not prefer it in this case at all. One reason that a money award would be entirely inappropriate is that neither party has any good records of where the overtime was available and who was qualified and available to work it. The Employer made some attempt to show who declined the overtime, but made no attempt to track who was or was not qualified to work the overtime. Since the Employer had operated that way for at least 15 years without a grievance, it would be unduly burdensome to require the Employer to show who was not qualified for which hours of overtime for the year of 1998.

Moreover, in reality, the Employer's system may be more or less accurate to the way overtime would be distributed even if the Employer properly accounted for those not qualified and those not available. While the raw numbers of overtime hours are dramatically skewed, they would not be so skewed if the other factors were shown and such hours all added to employees not qualified or not available.

Any remedy should be prospective only. One remedy is to give employees who can verify that they were qualified and available but not offered overtime an opportunity to work such overtime, without then upsetting the whole apple cart for another calendar year. Such remedial hours could be set aside from the equalization scheme. Another remedy would be for the Union and the Employer to agree on a system for the future and to monitor it carefully to avoid continued problems.

Given the lack of factual data, the Arbitrator will specifically reject any monetary backpay or damage type of remedy, but will hold jurisdiction open for a considerable period of

time in order to allow the parties to reach a mutually satisfactory remedy for the future. If they fail to do so, they may ask for a remedial order before I relinquish jurisdiction in this matter.

AWARD

The grievances are sustained.

The Arbitrator will hold jurisdiction until January 31, 2000 for the purposes of determining a remedy should the parties fail to reach agreement on the matter of a remedy.

Dated at Elkhorn, Wisconsin this 20th day of October, 1999.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator