

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SHEBOYGAN COUNTY HIGHWAY DEPARTMENT EMPLOYEES,
LOCAL 1749, AFSCME, AFL-CIO**

and

SHEBOYGAN COUNTY

Case 408
No. 68957
MA-14421

(Nysse Grievance)

Appearances:

Sam Gieryn, Staff Representative, Wisconsin Council 40, 187 Maple Drive, Plymouth, Wisconsin 53073, appearing on behalf of Sheboygan County Highway Department Employees, Local 1749, AFSCME, AFL-CIO.

Michael Collard, Human Resources Director, Sheboygan County, 508 New York Avenue, Sheboygan, Wisconsin 53081-4126, appearing on behalf of Sheboygan County.

ARBITRATION AWARD

Sheboygan County Highway Department Employees, Local 1749, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Sheboygan County, hereinafter referred to as the County, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance filed by Lawrence Nysse. The undersigned was so designated. A hearing was held in Sheboygan, Wisconsin on September 17, 2009. The hearing was not transcribed. The parties filed briefs and reply briefs whereupon the record was closed November 17, 2009. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

At the hearing, the parties stipulated to the following issue:

What is the appropriate remedy for the Employer's failure to offer the grievant two hours of overtime on January 7, 2009 in violation of past practice?

When the Union filed their initial brief though, it worded the issue differently. Their new wording was this:

What is the appropriate remedy when the Employer violates the collective bargaining agreement by failing to offer an overtime opportunity to an Employee?

In its reply brief, the County contended that it did not stipulate to the issue as worded by the Union in their initial brief, and therefore it objected to same. I am going to hold the Union to the issue which they agreed to at the hearing. Thus, I am going to answer the issue which the parties stipulated to at the hearing.

PERTINENT CONTRACT PROVISION

The parties' 2007-08 collective bargaining agreement contained the following pertinent provision:

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified the employees shall receive all wages and benefits due him for such period of time involved in the matter.

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BACKGROUND

As one of its governmental functions, the County operates a highway department. The Union is the exclusive bargaining representative for the employees in that department. Lawrence Nysse is a highway department employee and thus is in the bargaining unit.

Broadly speaking, this is an overtime remedy case. As will be noted in more detail below, a grievance was filed which alleged that Nysse should have been offered some overtime.

The following information concerns past overtime disputes.

The oldest overtime dispute referenced in the record occurred in 1990. The employee involved in that matter was Dennis Raeder. In that instance, Raeder was not offered certain overtime because he was on vacation on the days in question. He grieved and his grievance went to arbitration. Arbitrator Sharon Gallagher upheld his grievance and found that the overtime in question should have been offered to Raeder. As a remedy for the contractual breach, she found that the County was to “make Dennis Raeder whole for the pay he should have received for work that was available on his beat. . .”

Another overtime dispute arose in 1993. In that instance, employee Jack Murphy was overlooked for an overtime assignment which lasted three hours. The County later admitted that Murphy should have gotten the overtime and paid Murphy three hours of overtime.

Another overtime dispute arose in 2008. In that instance, employee Shawn Murphy was overlooked for an overtime assignment which lasted ten hours. The County later admitted that Murphy should have gotten the overtime. As a remedy, the County offered to let Murphy work ten hours of overtime in the future. The Union did not accept that proposed remedy. The remedy which the parties ultimately agreed on was to pay Murphy three hours of overtime. The parties also agreed that this compromise settlement had no precedential value.

Until this case arose, there have not been any instances in the highway department where an overtime dispute was settled with the employee working additional overtime. In the two cases noted above where an overtime dispute was settled, the agreed-on remedy was that the bypassed employee received pay (as opposed to a make-up remedy).

. . .

The record indicates that overtime/work assignment disputes were settled differently at the County’s health care center. The employees there are also represented by AFSCME. In 2003, several situations arose where the Employer failed to call in employees to work who had previously indicated they were available to work. The Employer later admitted it should have called the employees into work. The remedy which the Employer offered in one case was to let the affected employees “work extra hours. . .in the near future.” The remedy which the Employer offered in the other case was to let the affected employee “work four extra hours . . . in the near future.” The Union essentially accepted the Employer’s proposed remedy in both grievances because it did not appeal either grievance to arbitration. In 2004, another situation arose where the Employer failed to call in an employee to work who had previously indicated she was available to work. The Employer later admitted it should have called the employee into work. The remedy which the Employer proposed in that case was to let the affected employee “work the next day she volunteers for and staff is needed.” The Union essentially accepted the Employer’s proposed remedy because it did not appeal the grievance to arbitration. In 2005, another situation arose where the Employer failed to call in an employee to work who had previously indicated she was available to work. The Employer later admitted

it should have called the employee into work. The remedy which the Employer offered in that case was to let the affected employee “work on the next date when she has signed the volunteer list and a call-in is needed.” This time, the Union objected to the Employer’s proposed remedy and appealed the Employer’s proposed remedy to arbitration. No arbitration hearing was held though because the parties subsequently settled this grievance along with another grievance which also involved the Employer’s failure to call in employees to work who had previously indicated they were available to work. In that settlement agreement, the County agreed to pay four employees a specific amount of pay (which varied from person to person). The settlement agreement then went on to specify the following:

. . .

2. In the future, in any case where the County may violate the terms of the collective bargaining agreement by failing to call in an employee who was on the volunteer list and who should have been called in, the remedy for that violation will be that the employee will have the choice of either: (1) 50% of the pay the employee would have earned if the employee had been called in, or (2) the opportunity to work as an extra employee, on mutually agreed date and shift for the same number of hours, and receive full pay for those hours. . .

. . .

FACTS

On January 7, 2009, managers in the highway department assigned three highway department employees to start work early to haul snow from the county courthouse. Bargaining unit employees normally start work at 7:00 a.m. On that particular day, the three employees just referenced were assigned to start work at 5:00 a.m – two hours earlier than normal. Those three employees reported for work at 5:00 a.m. as assigned. They went on to work until the end of their regular eight hour shift. As a result, those three employees worked a ten-hour day with two of the hours being overtime.

Two of the employees who were assigned to work overtime that day were truck drivers and one was a scraper operator.

When this case arose, the County’s practice was to offer overtime first to operators of the particular class of equipment to be used prior to offering the overtime to other employees. This practice was discontinued at the end of the contract hiatus period for the 2007-08 collective bargaining agreement.

The Union subsequently filed a grievance which contended that truck driver Lawrence Nysse should have been offered the overtime just referenced (rather than a scraper operator). The record indicates that Nysse is not the most senior truck driver, but the truck drivers who are senior to Nysse were already working overtime on the day in question.

When the grievance was being processed through the contractual grievance procedure, the Employer granted the grievance. In doing so, the County admitted that it violated the aforementioned practice whereby overtime was allocated according to the class of equipment to be used, and as a result, the overtime work in question should have been offered to truck driver Lawrence Nysse rather than a scraper operator. To remedy this action, the Employer offered to give Nysse "an opportunity to work two hours of overtime." The Employer's written offer stated thus: "The overtime work offered to Mr. Nysse must be work that would not have been offered as overtime to any employee but for this grievance."

On April 15, 2009, the Highway Commissioner sent a letter to Nysse which identified how the two hours of overtime work just referenced would be implemented. That letter provided in pertinent part:

In accordance with the Human Resources Committee grievance decision we are offering you the opportunity to start at 5:00 a.m. on April 23, 2009. We would like you to work on truck #161 which is the truck you are normally assigned to. The duties that could be performed are: oil change if needed, grease, general cleaning of the interior and exterior of the cab and box, and/or pressure washing of the engine compartment. Any of the above mentioned functions will need to be completed prior to 7:00 a.m., the start of our normal work day.

If you have a conflict on April 23, 2009 please contact me and we will work with you to select a day and time that works for you.

Nysse did not work the overtime offered to him on April 23, 2009. Instead, the Union objected to the Employer's proposed remedy referenced above, and contended that Nysse should instead be paid for the two hours of overtime that was not offered to him on January 7, 2009.

The parties could not resolve this overtime remedy dispute, so the matter was appealed to arbitration.

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At the hearing, Highway Commissioner Greg Schnell and Patrol Superintendent Gary Mentick testified that the overtime work which was offered to Nysse would not have been offered to anyone as overtime in any other circumstance. They further testified that the work which was offered to Nysse was essentially routine maintenance work which was to be done on the particular truck that Nysse was normally assigned to drive. The work specified in the Employer's letter of April 15, 2009 would normally be done by the truck driver during the regular work day when the driver had time. Insofar as the record shows, no employee has ever been called in on overtime to perform such work.

POSITIONS OF THE PARTIES

Union

The Union contends that the remedy that the County should pay for its overtime violation is a monetary award of two hours of overtime pay. As the Union sees it, the remedy which the Employer proposes (i.e. the opportunity to make up two hours of overtime) is inappropriate here. It elaborates as follows.

First, the Union avers that in all prior overtime disputes in the highway department, the remedy was that the affected employee was paid cash. In other words, the remedy was not what the Employer proposes to do here (namely, give the employee the opportunity to work overtime in the future). As the Union sees it, this establishes a past practice that the remedy in overtime disputes is a payment of cash. The Union asks the arbitrator to honor that past practice and impose its application here.

As part of its past practice argument, the Union addresses the fact that in another County bargaining unit, there were a number of instances where the remedy was a make-up remedy. The Union contends that precedent should not be controlling here "because there was nothing in the record to indicate how overtime was being distributed at the health care center at the time of the grievances." Building on that point, the Union submits that the history in that bargaining unit "was not similar enough to this unit to provide any forceful direction in this case."

Second, the Union maintains that the "predominant view" of arbitrators is that overtime violations under a seniority-based overtime system are usually remedied through a monetary award rather than through a make-up remedy. It notes that in a prior arbitration award involving these parties, that was the remedy which Arbitrator Gallagher awarded in the Raeder case (i.e. a make-whole remedy). The Union contends that award is "controlling" here, and it asks the arbitrator to follow the remedy which Arbitrator Gallagher awarded and award Nysse a cash payment for the two hours in question.

Third, the Union disputes the Employer's contention that the parties no longer have a seniority-based overtime system because the Employer discontinued the parties' prior practice concerning overtime assignments. According to the Union, the Employer's repudiation of that practice "should not impact violations that occurred prior to the repudiation."

Fourth, the Union contends that the problem with the Employer's proposed remedy (i.e. a make-up remedy) is this: if the Employer has additional overtime work to perform, it is to be assigned to the senior employee. The Union notes in this regard that Nysse is not the senior truck driver. Building on that point, the Union asserts that the overtime work which the Employer offered to Nysse via its April 15, 2009 letter was not Nysse's for the taking – that possible overtime work belonged to the most senior truck driver. As for the Employer's claim that the work referenced in the Employer's letter of April 15, 2009 would not have been

offered to anyone but Nysse, the Union avers that “there is no way to determine whether this is true.” The Union also contends that the Employer’s proposed remedy is “novel” and “fraught with peril” because the decision whether to assign work as overtime is discretionary with management. According to the Union, management could easily abuse this discretion by claiming that work “would not have been.” Additionally, the Union cites the arbitration award issued by the arbitrator herein in CITY OF SUPERIOR. In that case, the arbitrator found that the appropriate remedy was pay, and that a make-up remedy was not appropriate. The Union specifically calls attention to the fact that in that award, the arbitrator said that “make-up remedies for overtime assignment violations are generally awarded in those situations where overtime is equalized.” The Union emphasizes that here, though, overtime is not equalized; it is assigned by seniority. The Union asserts that the various arbitration awards cited by the Employer in their brief to support their make-up remedy are not on point because they involve equalization based overtime systems.

The Union also maintains that another problem with the Employer’s proposed remedy is that it allows the Employer to make an overtime assignment mistake without any consequence. According to the Union, a cash payment remedy has a deterrent effect which a make-up remedy does not have. It contends that a monetary award is not necessarily punitive.

Finally, the Union relies on a portion of the language contained in the Management Rights clause (Article 3), specifically the sentence which provides that “If any action taken by the Employer is proven not to be justified, the employees shall receive all wages and benefits due him. . . .” According to the Union, that sentence, standing alone, “should settle the question as the appropriate remedy” in this case. Here’s why. As the Union sees it, a make-whole remedy, by its very nature, often results in some financial cost to the employer. The Union submits that that financial cost is not punishment, but simply a necessity of righting the contractual violation. Additionally, the Union disputes the Employer’s interpretation of that sentence as only applying to disciplinary situations. The Union maintains that reading of the language (i.e. that the language is limited to just disciplinary situations) lacks a contractual basis.

The Union therefore asks that the arbitrator award Nysse two hours of pay at the overtime rate.

County

The County contends that the equitable remedy it has already offered – namely, a make-up remedy – is the most appropriate remedy in this case. As the County sees it, the remedy which the Union proposes (i.e. two hours of pay without any corresponding work) is inappropriate here. It elaborates as follows.

It begins by citing Elkouri for the proposition that the purpose of a remedy for a contract violation is to make the aggrieved party whole, rather than to punish the violating party or to provide a windfall to an employee.

Building on that premise, the County next addresses what would have happened but for the Employer's overtime violation. It avers that the following would have occurred: Nysse would have been offered the opportunity to come in at 5:00 a.m. on a particular day and work two hours of overtime. For the purpose of discussion, the County assumes that Nysse would have accepted the offer, come in at 5:00 a.m., worked two hours of overtime that day, and received two hours of overtime pay. The County contends that the Union's proposed remedy (whereby the grievant receives two hours of pay but does not perform two hours of work) does not "put the parties into the positions they should have been in." Instead, the Employer believes the employee is getting a windfall for the Employer's honest mistake.

Next, the County contends that in appropriate circumstances, a make-up remedy is the remedy that is best suited to restore the parties to their proper positions. According to the County, this is a case where a make-up remedy is warranted. Here's why. First, the County notes that there is no contractual provision calling for a particular remedy or specifying that the overtime must be paid without requiring work in exchange. It further notes that there is no contractual provision at all regarding allocation of overtime. The County asserts that it previously had a past practice of calling in other operators of the particular class of equipment to be used prior to offering the overtime to other employees, and it was this practice which was violated. The County argues that the Union's reliance on the second sentence in the first paragraph of Article 3 is misplaced. As the County reads it, that sentence refers only to disciplinary actions taken without just cause, so it is inapposite here. The County maintains that its proposed remedy is not inconsistent with Article 3 because that provision does not speak to the question that is involved here (namely, whether the grievant must perform services in exchange for his two hours of overtime pay). Second, the County argues that there is no need for punitive action to correct repeated abuses by management because this was only the second overtime issue to arise in the highway department in over 15 years. The County submits that for such a large department, this overtime record is remarkable. The County also points out that the past practice that was the basis for this grievance (i.e. that overtime is allocated according to the class of equipment to be used) was discontinued at the end of the recent contract hiatus period. The Employer maintains that the prior practice "does not implicate the same concerns raised in cases involving allocation of overtime either by seniority or by rotation, and so the rationales of the cases cited by the Union are not applicable here." Third, the County avers that imposing unjustified labor costs with no work in exchange is not consistent with the contractually stated objective, in the third paragraph of Article 3, to achieve efficient operation of the Highway Department or with the Union's agreement, in that same paragraph, to further the interest of Sheboygan County as far as it is within its powers. Putting all the foregoing points together, it's the County's view that the make-up remedy it proposed here is fully adequate, results in no inequities, and restores the grievant to the position he would have been in (but for the Employer's violation).

Next, the County acknowledges that there have been cases in which arbitrators awarded overtime pay without the necessity of work performed in exchange. According to the Employer, most of those cases either rely upon concerns that the employer would lack an incentive to comply with the contract, or that awarding overtime work (instead of pay) to the

grievant would potentially prejudice the rights of other employees who might otherwise receive the overtime work. With regard to the first concern, the County argues that “there remains ample reason for the County to continue to comply with whatever obligations the collective bargaining agreement may impose with respect to overtime procedures.” The County specifically calls attention to the fact that it will still have to pay overtime twice – once for the original overtime work, and the second time for work which clearly would not justify the expense of overtime under any other conditions. The County also emphasizes that it did not financially benefit from calling in one employee rather than another for overtime, and did not accrue any financial gain or benefit from the error. As the County sees it, there was no incentive or motivation for the County to commit the original error, so it should not take much incentive to encourage the County to avoid errors. In its view, the incentive that is provided by paying overtime twice is sufficient; anything further would be simple punishment. With regard to the second concern referenced above, the County argues that the particular remedy offered by the County in this case was carefully crafted to avoid the latter concern. To support that premise, it submits that “the evidence at hearing shows that the work offered to the grievant as overtime was work which would not be offered to any other employee, and especially would never be given to any employee as overtime.” The evidence the Employer just referenced is this: two witnesses, Highway Commissioner Schnell and Patrol Superintendent Mentink, testified that the work offered to the grievant would not have been offered to anyone as overtime in any other circumstance. Their testimony was not contradicted. The work that was offered to Nysse was essentially routine maintenance work to be done on the particular truck that he was normally assigned to. Normally, this work would be done by the truck driver during the regular work day when the driver had time. According to the County, it makes no sense to suppose that it would be worth time-and-a-half of taxpayers’ money for an employee to come in and do that work. The County further notes that there was no evidence that, prior to the present case, any employee had ever been called in on overtime to perform such work. The County argues that the Union’s claim that “there is no way to determine whether this is true” is no substitute for contradictory evidence. Additionally, the Employer avers that the timing of the make-up overtime proposed by the Employer was favorable to the grievant. What the Employer is referring to is this: if the violation had not occurred, the grievant would have been given one and only one opportunity to accept it; if he was unavailable that day, the opportunity would be lost. In its remedy, however, the County has already offered to find a day and time convenient to the grievant. That being so, the County believes that the remedy it has offered is more favorable to the grievant than the absence of the violation would have been.

Finally, the County contends that there is no binding past practice which requires a cash remedy. With regard to the 1990 Gallagher arbitration award, the County opines that that award did not address the issue of the appropriate remedy for an overtime violation (except to simply award a make-whole remedy for that particular case). According to the County, that decision “cannot be considered binding precedent on the question of make-up overtime when it did not even consider that possibility.” The County then reviews the other record evidence dealing with overtime violations and, after doing so, believes it to be self-evident that “this evidence falls far short of establishing an unequivocal and binding past practice.”

The Employer therefore asks that the arbitrator find that the remedy it has already offered be determined to be the appropriate remedy here.

DISCUSSION

It is noted at the outset that the County admits it violated the collective bargaining agreement when it failed to offer the overtime work available on January 7, 2009 to the grievant. The County acknowledges that the overtime work should have been offered to the grievant, but was instead offered to – and performed by – someone else.

Since the County admitted to violating the collective bargaining agreement by the actions just noted, one would think that the County violated an express provision in that agreement. However, that's not the case. Here's why. A review of the collective bargaining agreement reveals that there is no contract provision which expressly deals with the allocation of overtime. While the overtime provision (Article 12) says that employees who perform "authorized overtime services" will be paid time and a half, that provision does not specify who will be assigned the available overtime. Some labor contracts have provisions that say, for example, that overtime will be distributed on the basis of seniority. This contract does not contain such an express provision.

While there is no express contract provision that specifies how overtime will be distributed among the employees, the Employer admits that at the time this matter arose, there was a practice which dealt with same. Specifically, the Employer admits that its practice was that when overtime work was available, it offered the overtime to the operators of the particular class of equipment to be used (before it offered the overtime to other employees). The Employer admits that it failed to follow that procedure on January 7, 2009 when it did not offer the available overtime work to the grievant, but instead offered it to someone else. Thus, the County admits to violating that practice. It is common in labor relations for practices which meet certain standards to be considered implied terms of the agreement. In this case, the Employer essentially acknowledges that the practice meets those standards. Given that admission, it suffices to say that the Employer's violation of that practice constitutes a violation of the collective bargaining agreement.

It follows from the foregoing that a remedy is owed to the grievant for the Employer's violation of the collective bargaining agreement. That's the crux of this case. The Union contends that the appropriate remedy is two hours of pay while the County argues the appropriate remedy is for the grievant to be given the opportunity to work two hours of overtime (i.e. a make-up remedy).

I begin my discussion on that point by first looking at the overtime provision (Article 12) to see if it addresses the remedy for a situation where overtime is improperly assigned. It does not. As already noted, that provision does not address how overtime is distributed among the employees. That language also does not address the remedy for a situation where an employee is improperly bypassed for an overtime assignment. Some

collective bargaining agreements do address the remedy for that type of situation. For example, in the Union's initial brief, it cites my arbitration award in CITY OF SUPERIOR, MA-9348 (1996), wherein I found that the appropriate remedy for the overtime violation involved therein was pay rather than a make-up remedy. In that case, the parties had specific language in their collective bargaining agreement which dealt with the remedy for overtime assignment violations. The language in question said that when an overtime assignment violation occurred, the remedy was that the improperly bypassed employee would receive "pay". In the context in which it was used, it meant that when an overtime assignment violation occurred, the improperly bypassed employee would receive "pay" as opposed to the opportunity to make up the time involved. For the purpose of comparison, that type of language is not contained in Article 12 (the overtime provision) or elsewhere in this collective bargaining agreement.

Next, the focus turns to the language contained in the Management Rights clause (Article 3), specifically the sentence which provides that "If any action taken by the Employer is proven not to be justified, the employees shall receive all wages and benefits due him. . ." According to the Union, that sentence, standing alone, "should settle the question as the appropriate remedy" in this case. I disagree. In my view, the sentence quoted from Article 3 does not address the narrow question involved here (i.e. whether an employee improperly bypassed for an overtime assignment is entitled to pay or a make-up remedy). That sentence certainly does not say that when an overtime assignment violation occurs, the remedy is to be pay as opposed to an opportunity to make-up the overtime. That being so, this language simply does not answer the question of whether an employee who is improperly bypassed for an overtime assignment is entitled to pay or a make-up remedy. Given that finding, I've decided that I need not address the Employer's contention that the sentence quoted from Article 3 is limited to disciplinary situations.

Since there is no contract language which addresses whether an employee improperly bypassed for an overtime assignment is entitled to pay or a make-up remedy, the focus turns to whether there is a past practice dealing with same. The Union alleges that there is, to wit: that under those circumstances, the employee gets paid cash for the lost overtime. Before I address what the record shows about that though (i.e. employees getting paid cash for lost overtime), I'm first going to address what the record shows about the remedy proposed by the Employer (i.e. a make-up remedy). It shows that no overtime dispute has ever been settled with an employee working additional time. Thus, the make-up remedy which the Employer proposes here has never been previously accepted in the highway bargaining unit. While the record does show that the Union has accepted make-up remedies at the health care center on several occasions, that history has no bearing at all in the highway bargaining unit. Simply put, it's inapplicable here. What's important here is the history in the highway bargaining unit. As just noted, in the highway bargaining unit, overtime disputes have been settled with the bypassed employee getting pay. That said, it's only happened twice. The first time was in 1993. In that instance, Jack Murphy was paid three hours of overtime pay. The second time was in 2008. In that instance, an overtime dispute arose involving Shawn Murphy. In that case, the Employer offered a make-up remedy to which the Union objected. The parties ultimately agreed to a cash payment for a reduced number of hours. Part of the agreement was

that the compromise settlement had no precedential value. While the remedy which was agreed upon in these overtime disputes was that the employee got pay (as opposed to getting a make-up opportunity), I find these instances are insufficient to create a practice which obligates the Employer to always settle overtime assignment disputes with a cash payment.

As part of its past practice argument, the Union also contends that the 1990 Gallagher arbitration award is “controlling” here and requires a cash remedy. Based on the following rationale, I find otherwise. A review of that award reveals that it did not address the same issue that is involved here (i.e. whether an employee improperly bypassed for an overtime assignment gets pay or an opportunity to make-up the overtime). In that case, after the arbitrator found that an overtime violation had occurred, she did what arbitrators normally do in such circumstances – she ordered a generic make whole remedy. While the phrase “make whole” is usually interpreted to refer to pay, her use of that phrase did not create a precedent that in future situations where an employee is improperly bypassed for an overtime assignment, they automatically get pay as opposed to a make-up remedy. Once again, Gallagher did not even consider that matter in her discussion and/or remedy.

Having found that there is no contract language on point and that there is no binding past practice, this case will be decided on other grounds.

As noted by the parties in their briefs, arbitrators have differed over the remedy in overtime disputes. One view is to give the improperly bypassed employee a monetary award (i.e. pay) for the missed overtime. Another view is to give the improperly bypassed employee the opportunity to work overtime in the future (i.e. a make-up remedy). The Union characterizes the first view as the “predominant view”. I concur with that characterization. Additionally, that’s the remedy I’ve awarded in some prior overtime assignment cases, one of which was the CITY OF SUPERIOR case noted earlier. In those decisions, one of the reasons I cited for awarding a monetary award (i.e. pay) was that awarding a make-up remedy to the improperly bypassed employee would potentially prejudice the rights of other employees who might otherwise receive the overtime work.

In this case though, the Employer crafted a remedy that specifically avoided that concern. The following shows this. The work which was offered to the grievant to perform as overtime (i.e. the work referenced in management’s letter of April 15, 2009) was essentially routine maintenance work to be done on the truck that the grievant drove. The evidence presented at the hearing established that this make-up overtime work which the Employer offered to the grievant (i.e. to clean his truck) was work that would normally be done by the truck driver during the course of his regular work day. As such, that was work that would not be offered to any other employee besides the grievant and also would not normally be given as overtime work. While the Union claimed that “there is no way to determine whether this is true”, the only record evidence is to the contrary. I’m referring to the testimony of Employer witnesses Schnell and Mentick, who testified without contradiction that the work offered to the grievant as overtime work would not have been offered to anyone else as overtime work in any other circumstance. Their testimony was supported by the fact that prior to this case, no

employee had ever been called in on overtime to perform this type of work (i.e. clean their truck). That being so, it can fairly be said that the remedy proposed by the Employer herein avoids a situation where the overtime assigned to the grievant could conceivably be offered to another employee as overtime.

Given the foregoing, I find that in this particular case, the make-up remedy which the Employer proposed in its letter dated April 15, 2009 passes muster as an appropriate remedy. In so finding, it is expressly noted that I am not saying that a make-up remedy is the appropriate remedy in all overtime assignment violation cases. As was noted earlier, the remedy that is usually awarded in such cases is a monetary award that does not involve a make-up component. Here, though, I have found that the Employer's proposed make-up remedy passes muster because the work the Employer offered to the grievant as overtime would not be offered to another employee as overtime. My holding is therefore limited to just this one case.

In light of the above, it is my

AWARD

That the appropriate remedy for the Employer's failure to offer the grievant two hours of overtime on January 7, 2009 in violation of past practice is the remedy which the Employer proposed in its letter dated April 15, 2009. The Employer is directed to make the offer again which it made in that letter with a new make up date.

Dated at Madison, Wisconsin, this 8th day of January, 2010.

Raleigh Jones /s/

Raleigh Jones, Arbitrator