Muessig #4

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

BACKGROUND

This is an arbitration proceeding pursuant to the provisions of Article 16 of the Collective Bargaining Agreement ("Agreement") between the Union and the Employer. A hearing was held on April 29, 1997. At that time, sworn testimony was taken, exhibits were offered and made part of the record and oral arguments were heard.

The Employee was present throughout the hearing. The testimony was stenographically reported and a transcript was provided to the Arbitrator on May 21, 1997. Post-hearing briefs were not filed. Each party summarized its position at the close of the arbitration hearing.

The exhibits introduced by the parties during the arbitration hearing are listed in the Addendum to this Award. They have been retained by the Arbitrator. Where relevant, references to these exhibits will be made in the following manner; Joint Exhibits are cited as "J" and Union Exhibits as "U," followed by the exhibit number. The Employer did not introduce any exhibits.

STATEMENT OF THE CASE

The Agreement, in pertinent part, provides that overtime work "shall be distributed as equally as possible among all qualified employees in the respective classification at that location and on the shift where overtime is required by the Employer." Overtime distribution charts are used to keep

track and show the status of each eligible employee's overtime. Whenever overtime work is required, the employee who has worked the least number of overtime hours must be called first. The Employee, on October 23, 1996, had worked the least amount of overtime of eligible employees. However, he was bypassed and an employee with more hours of overtime listed on the overtime chart was called to work. This action, on the part of the Employer, triggered the Grievance before me here. The Employee seeks to be paid the number of hours of overtime that he was deprived, because he was bypassed.

ISSUE TO BE DECIDED

Did the Employer violate Article 6 D of the Agreement? If so, what shall the remedy be?

APPLICABLE AGREEMENT PROVISIONS

> Article 6: Overtime
> A. ***
> B. ***
> C. ***
> D. The requirement to work overtime is a condition of employment and shall be performed as required. Overtime shall be distributed as equally as possible among all qualified employees in the respective classification at that location and on the shift where overtime is required by the Employer. The Employer will provide overtime distribution charts to be posted in each work area. Names will be listed in order of hiring date. Overtime will be assigned in accordance with the charts. The employee having the lowest amount of overtime will be asked first, and all overtime worked will be charged on the charts. The shop steward at the location on the shift where overtime is required will be responsible for recording overtime hours worked and the accuracy of the information on the charts. The Employer shall not be liable for overtime lost as a result of an error on the chart. The shop steward will be given a reasonable amount of time to update the overtime charts while on duty. This provision and Section E does not apply to Field Service.
>
> E. If, near the end of a shift, the Employer determines in good faith that a job in progress may require no more than three (3) hours overtime; the Employer may require the employees working on that job to complete it. The Employer may be responsible for an overtime penalty only if its determination was made in bad faith.
> F. ***

POSITION OF THE PARTIES

The following is believed to be an accurate abstract of the parties' substantive position in this dispute. The absence of a detailed recitation of each and every argument or contention advanced by the advocates in this arbitration does not mean that the issue was not fully considered by the undersigned.

THE UNION'S POSITION

The Union's position is relatively straight-forward, it points to that part of Article 6 D which reads: "Overtime will be assigned in accordance with the charts. The employee having the lowest amount of overtime will be asked first, and all overtime worked will be charged on the charts." Given what the Union asserts is the "clear and unambiguous" language of Article 6 and noting that there is no dispute that Employee was bypassed, the Union submits that the Grievance must be sustained.

THE EMPLOYER'S POSITION

The Employer, as this grievance was processed and at the hearing, acknowledged that it erred when it bypassed the Employee and selected another employee for the overtime. The Employer, however, strongly contests the request that it should be required to pay for work not performed. The Employer's position is that the Employee was given every opportunity to work the lost overtime at his convenience. However, he has refused to accept what the Employer argues is a reasonable remedy. The Employee's request, the Employer argues, amounts to a "windfall" and should not be sustained.

FINDINGS AND CONCLUSIONS

The facts are not in dispute. On Wednesday, October 23, 1996, the Employer needed an employee for overtime. The Employee had worked the lowest amount of overtime of eligible employees. He therefore should have been asked first to work the overtime. However, a fellow employee who had worked more overtime than the Employee was asked and he worked instead. As noted earlier, the Employer violated the provisions of Article 6 D of the Agreement. The only issue therefore is the question of a proper remedy for the Employee.

At the arbitration hearing, Person 1 testified that he had been the past president of the local lodge, that he had also held the position of chief steward and served on the negotiating committee when the current and prior Agreements were negotiated.

Person 1's testimony pointed out that early on there were just a few employees who worked much of the overtime. This caused a certain amount of discontent among the Union's members. The Union, in an effort to address this concern and to assure equal distribution of overtime, therefore, negotiated the language contained in Article 6 D of the current Agreement. Person 1 also testified that the overtime distribution provision was an effort "to hold the Employer's feet to the fire if there was a bypass" of an employee with fewer overtime hours. Person 1 also testified that Article 6 E and its penalty clause were not applicable to the factual situation in this grievance.

Accordingly, I conclude that the Agreement does not provide for a penalty with respect to this specific Agreement violation. Therefore, this case must be viewed within the context of the proper role and goals of arbitration and collective bargaining. While much has been written about this and there are many views of diverse nature on these matters, there is basic agreement that arbitration and collective bargaining should not be viewed as alternative and competing

processes for securing and establishing rights. The prevailing concept is that rights and remedies are established in the Agreement and arbitration is the means of enforcing those rights.

In this context, when an arbitrator demonstrates a willingness to provide a penalty where none exists, the arbitration process displaces the collective bargaining process and embarks on a course that is outside the contemplation of the courts and past arbitral holdings.

In the case here, there has been a clear violation. However, the Agreement does not provide for a penalty or "punitive damages." Accordingly, the remedy clearly should be one that makes the employee "whole."

The Agreement violation at issue here has been a fairly common one in the industrial work setting and the remedy proposed by the Employer is also one that is generally proposed when employees do not work overtime as required by the Agreement. Most arbitral awards on this issue have held that if the employer can "restore equality of distribution within a reasonable time, no further remedy is necessary."

The reasons for not awarding damages in situations like the one now under dispute here are typically as stated in the following excerpts of past awards.

> Ordinarily the assessment of damages by a court or by an arbitrator requires clear proof that the person to benefit from the payment of damages has actually suffered by the amount to be reimbursed. In the present case, there would normally be many instances where the person who was not called in his turn might first collect for the shift which he failed to work as is claimed here, and subsequently obtain his full share of the overtime of the month or quarter or year, as also was the case here.
>
> It is of course possible for parties to draft a contract authorizing an arbitrator to assess penalty payments, but since, as has very often been stated, the law abhors penalties, the language should be clear, definite and positive or the award of the arbitrator granting a penalty rather than damages would quite likely be set aside by a court reviewing the same. It is to be noted that one of the positions taken by management in this case was the positive one that there is no authorization in the contract between the parties providing for the awarding of a penalty against the Employer in situations like the present, or in any other. (A.O. Smith Corp, 33 LA 365, 366 Updegraff, 1959)

> A party claiming a forfeiture or penalty under a written instrument has the burden of proving that such is the unmistakable intention of the parties to the document. In addition, the courts have ruled that a contract is not to be construed to provide a forfeiture or penalty unless no other construction or interpretation is reasonably possible. Since forfeitures are not favored either ins law or in equity, courts are reluctant to declare and enforce a forfeiture if by reasonable interpretation if can be avoided. (Mode O'Day Corp., 1 LA 490, 494, Cheney, 1946)
>
> Although the Union, in effect, asks for punitive damages for violation of the cited provision, in the opinion of the undersigned arbitrator, punitive damages are out of place in the arbitration process absent a showing of a willful attempt to injure the other party by violating the Agreement. In the case at issue, the question of violation of Article 12(A) was at worst an honest difference of opinion over the Employer's responsibility in this regard. (64-2 ARB § 8585, Howard, 1963 at 5 062-63)

In summary, there is no contractual requirement for penalty payments. Because the Employer paid damages in two prior lost overtime cases does not serve to amend the Agreement provisions. I find that the Employer's offer of overtime to the Employee to be taken at his convenience, within a reasonable time after he lost the overtime, is a reasonable remedy under all the circumstances.

AWARD

The Employee will be provided the opportunity to work the lost number of overtime hours, at his convenience, as previously offered by the Employer.

The overtime work will be completed within thirty (30) days of the date of this Award, unless agreed otherwise by the Employer and the Union.