Chiesa #4

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER

-and-

UNION

Gr. Employee 1/Overtime

Arbitrator: Mario Chiesa

OPINION AND AWARD

THE CASE

The written grievance in this matter is dated December 2, 1997. In part it reads as follows:

> "Date of Occurrence 10/31/97"
> "Statement of Facts: On October 31, 1997 Management was asking people (sic) if they wanted to work over-time on November 1, 1997 (Saturday from 7:30 AM to 5:30 PM). Employee 1 asked Employee 2 if he could work. Employee 2 said yes. Then about 20 minutes later he was told by Employee 3 that he could not work November 1, 1997 because he was a No for overtime in the month of October. Employee 1 told Employee 3 that he was a Yes for the month of November. Employee 3 still would not let him work the overtime."
>
> "Articles Violated XV, Section 6"
>
> "Suggested Adjustment Pay Employee 1 the 9 and 1/2 hours of overtime he was ready and able to work and any and all things to make the grievant whole."

The operative facts leading to this dispute are not seriously in contention. The grievant, Employee 1, has a seniority date of July 14, 1983. At the time the dispute arose he was working in Streets and Sanitation as a refuse packer operator.

As a general rule, about a day or two before the end of the month a clerical employee compiles for the Employer an overtime list identifying those who have volunteered for overtime for the next month. Individuals on the volunteer list are the first to be called for overtime.

In this case the grievant listed himself as a non-volunteer for the month of October on the October overtime list. However, for the overtime list for November, the grievant listed himself as a volunteer.

On October 31, 1997, the Employer began calling employees to work overtime on Saturday morning, November 1, 1997. However, when it did so the Employer utilized the October overtime list. As a result, the grievant was not called to work overtime.

The Streets and Sanitation supervisor related that it was his practice to use the list which existed at the time the work was offered. As a result, he used the October list even though the November list was available. Further, he related that there has never been an occasion when he has utilized two lists at the same time.

The grievance was filed, processed through the grievance procedure, and presented to me for resolution. Additional aspects of the record will be displayed and analyzed as necessary.

DISCUSSION AND FINDINGS

There was a full and complete hearing with both parties being afforded every opportunity to present any evidence they thought was necessary. In addition, both filed helpful post-hearing briefs. It should be understood that I have carefully analyzed the entire record even

though it would be impossible and probably inappropriate to mention everything contained therein.

Portions of the Collective Bargaining Agreement read as follows:

ARTICLE IX. GRIEVANCE PROCEDURE

"Step 3. B. Arbitration

b. The purpose of the pre-arbitration conference shall be for exchanging evidence, identification of witnesses and stipulation of fact. Only that evidence so exchanged may be submitted to arbitration. . .

c. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association. The power of the arbitrator shall be limited to the interpretation and application of the express terms of this Agreement and he/she shall have no power to alter, add to, subtract from or otherwise modify the terms of this Agreement as written. . ."

ARTICLE XV. OVERTIME

"Section 6.

a. During each calendar month period, over time work shall be distributed as equally as practical among employees of the same permanent job classification only, within a given Department or Division, who have expressly volunteered for overtime work for the month. Employees interested in overtime work shall so indicate in writing to their immediate Management Supervisor not later than the last full week prior to the beginning of each month. Employees newly entering the Department or Division shall be afforded the opportunity to volunteer in writing for overtime work within one week of the time of entering the Department or Division. The method of equalization shall be by a strict rotation by seniority. The most senior employee who volunteers shall be obligated to work the first overtime of the month and so on down the volunteer list through the month. Those volunteers who are excused from their rotation or who are unavailable shall be charged with a call. (Employees on Vacation or Workers' Compensation will not be called. Employees on Sick Leave will be called.) Only employees who have so volunteered for overtime work will be called upon to perform overtime work during the designated month and such employees shall be obligated to perform such work, except that all employees may be required to work overtime for up to one and one-half (1 1/2) hours in situations where such work is necessary to complete a job they started at the end of their shift. In the event that insufficient numbers of employees are available for overtime work assignments, the employees of the classification required with the least amount of

seniority will be required and obligated to perform such work."

The Union argues that Article XV, Section 6 (a) clearly supports its position in this dispute. It maintains that overtime will be distributed to those employees who have "expressly volunteered for overtime work for the month." It argues that the Employer's interpretation of the disputed language is contrary to its clear meaning. It argues that employees are allowed to volunteer for overtime on a month-to-month basis. Further, it maintains that the November overtime list was completed and available when the supervisor distributed overtime to be worked on November 1, 1997. It argues that if the language is found to be ambiguous, a past practice established by the evidence provides meaning to the language. It argues that the past practice of employees volunteering for the month that the overtime is actually going to be worked by submitting overtime cards for an overtime list clearly supports the Union's rendition of how the language should be applied. It points out that the parties have agreed by grievance settlements that the scheduling of overtime work will be controlled by the date of performance, rather than the date of scheduling. It argues that the grievance resolution submitted by the Employer and identified as Employer Exhibit 3, is non-precedential to begin with and, further, has no relationship to the dispute in question. It argues that the Employer's interpretation of Article XV, Section 6 (a) is harsh and nonsensical and would produce an inequitable result.

It argues that the grievant in this matter should be awarded 9 ½ hours of overtime as back pay.

The Employer argues that there is a preliminary issue which concerns the admission of Union Exhibits 8 and 9. It argues that 8 and 9 were not provided to the Employer at the pre-arbitration conference and, hence, according to the language in the contract, cannot be submitted-in arbitration. It goes on to argue that in relation to the merits of the case, Article XV,

Section 6 (a) clearly requires the Employer to distribute overtime "as equally as practical." This is done on a monthly basis among volunteers who sign up not later than the last full week prior to the beginning of each month. It maintains that overtime is at "strict rotation by seniority." It argues that in this case it is clear that during the month of October there were multiple lists generated. Further, it maintains that some classifications were not combined under a supplemental agreement approved by the Union sometime between the 8th and 10th of November. It argues that dealing with rotation in this matter was not as simple as the Union would like to portray. It argues that past grievance resolutions, specifically that displayed in Employer Exhibit 3, clearly supports its position in this case. It asks that 1 find that strict rotation by seniority requires the Employer to schedule from the list in use at the time the overtime is being scheduled. It argues that to find otherwise would mean that the Employer could not schedule in advance and remain in strict rotation or that the supervisor would have to work from two lists from two separate months, using two separate rotations at the same time. It argues that the Union carries a burden of proof in this matter and that it has failed to show a violation of the contract which would require the Employer to pay the grievant 9 1/2 hours of overtime.

From the outset it should be understood that in a case of this nature it is the arbitrator's responsibility, and hence mine, to interpret and apply-the express terms of the agreement. This responsibility is clearly outlined in Article IX of the Collective Bargaining Agreement.

The Employer has suggested that the Union has the burden of proof in this matter because it is the Union that's alleging a violation of the contract. I agree that many arbitrators and commentators would take the position that in cases of this nature the Union has the burden of proof. I really have no quarrel with that characterization, although I would suggest that the

parties have a mutual burden to supply enough evidence to insure that the arbitrator has a complete enough record to arrive at a reasonable and appropriate conclusion.

From the outset the parties should understand that the decision and resolution in this case is confined strictly to the facts and circumstances established in this record. This record presents a fairly straightforward and confined set of circumstances and I am not inclined to make a decision based upon hypothetical or possible scenarios which could arise in the future. Thus, if the factual scenario of a future dispute is different than what is considered herein, then the parties may very well have to revisit the grievance procedure to have their dispute resolved.

As noted above, the Employer has raised an objection to two exhibits offered by the Union. The exhibits are identified as Union 8 and 9, and represent grievance settlements which, inter alia, establish that overtime opportunities in the Sewer and Maintenance division will be charged according to the day the overtime is worked and the scheduling of overtime will be controlled by the date of performance, rather than date of schedule. Given that pronouncement, it is pretty clear that those two grievances are very closely related to the dispute in question.

Nonetheless, the Employer argues that they should not be allowed into evidence because they were not part of the evidence exchanged at the pre-arbitration conference.

In that regard, it is clear that the documents were not provided the Employer at the pre-arbitration conference and, in fact, were provided only a few days before the arbitration hearing. According to the Union, they were provided as soon as they were discovered, but nevertheless, subsequent to the pre-arbitration conference.

The language clearly states that only evidence exchanged at the pre-arbitration conference may be submitted to arbitration. While I have no authority to ignore clear contract language, there are some observations which must be related. First of all, the documents in

question are not evidence in the sense that they represent what someone heard or saw, or wrote about an event. While they are "evidence" in the broad term, they indeed reflect agreements reached by the parties in regards to two specific disputes. Arbitrators desire as much evidence as possible to insure that an appropriate decision is made. Yet, understanding that reality, the contract language regarding exchange of evidence must be enforced, even if it limits the amount of evidence an arbitrator may consider. This is true even if a portion of the basis for the language may be to prevent surprises which can easily be prevented by an arbitrator appropriately managing the hearing.

So while certainly it is my responsibility to enforce the language in question, enforcement of the language may lead to the rejection of very pertinent relevant and probative evidence.

If there is a saving grace in this issue, however, it is that the rejection of Union Exhibits 8 and 9 really has no impact on the resolution of this dispute. As will be seen in subsequent discussion, there is more than enough evidence to support the conclusions I have reached.

The Employer itself submitted a grievance resolution which it suggests is helpful in resolving the current dispute. Without displaying the specifics of the dispute, I do note that the last sentence of the resolution states:

> "4. This settlement is non-precedential and shall be considered a full and complete resolution to the issues raised in this grievance."

The parties have clearly designated the settlement as "non-precedential" which I interpret to mean that it stands as a resolution of only that dispute and cannot be relied upon as a basis for resolving any other dispute, including the current dispute. There is some testimony challenging that fact, but nonetheless, the parties agreed in writing that the settlement would be non-

precedential. Notwithstanding that agreement, the actual description of the dispute in the grievance in question, i.e., 3-93, while somewhat related, is not on all fours with the current dispute. A finding that the Union should prevail in the current case can easily co-exist with the resolution in grievance 3-93.

As indicated above, there has been testimony regarding what practices were utilized, how overtime was allocated under certain conditions, etc. The point is that this evidence is so conflicting that it is impossible to conclude that a binding past practice, which could be utilized to interpret language if language were ambiguous, has been established. Furthermore, given the factual setting of this case and the language in the Collective Bargaining Agreement, I am persuaded that the language itself provides the answer to the dispute.

The basic facts of this dispute are clear and straightforward. The overtime denied the grievant was assigned on October 31, 1997, but was to be worked on the following day, November 1, 1997. The overtime volunteer list for October indicated the grievant was a "non-volunteer," while the overtime list for November, which was completed at the time, showed the grievant as a "volunteer".

Nevertheless, the grievant wasn't allowed to work and was denied 9 ½ hours of overtime. It is important to keep these facts in mind when analyzing the contract language in question.

The first sentence in Section 6(a) shows that the parties have used some key language which is very helpful in resolving this dispute. The language recognizes that for each calendar month period overtime work shall be distributed, inter alia, to those who have expressly "volunteered for overtime work for the month." That last phrase "who have expressly volunteered for overtime work for the month" can and should be reasonably construed to mean that the work in question shall be appropriately assigned to the volunteers who have volunteered

to work overtime for the month. The term "for the month" relates to the month in which the work is to be performed. I note that the Employer has indicated that adoption of the Union's provision would prevent it from properly equalizing overtime or would require it to use two lists. However, the language clearly indicates that the method of equalization shall be "by a strict rotation by seniority." It goes on to say that the most senior employee who volunteers shall be obligated to "work the first overtime of the month. . ." The language goes on to state that only employees who have volunteered for overtime work will be called upon to perform overtime work "during the designated month. . ."

In the current case the Employer's action of denying the grievant overtime work in November, even though it was assigned on October 31, 1997, clearly violated the Collective Bargaining Agreement. At the time the overtime work was assigned, the November list existed and the Employer knew that the grievant had volunteered. The language in the contract indicates that employees who have volunteered for overtime work will be called upon to perform the overtime work during the "designated month." The designated month was November and the grievant had volunteered for overtime work in November. His status as a volunteer should have been recognized.

I understand that the Employer has presented some arguments regarding its equalization concerns, but the fact is that the method of equalization is clearly outlined in the language, and while in other factual scenarios the concern may be appropriately addressed, in the current case the facts are so clear and unequivocal that the Employer really had no alternative but to apply the November list. The language indicates that overtime work "shall be distributed as equally as practical . . ." for employees who have volunteered for "overtime work for the month." As I indicated, the overtime work to be worked in November should have been allocated according to

the list indicating who volunteered for work in November. That's what the language demands.

As a result, I really have no alternative but to find that the Employer's actions violated the Collective Bargaining Agreement.