

FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
UPPER MIDWESTERN REGION

TEAMSTERS LOCAL #120,

UNION

And

GRIEVANCE ARBITRATION
FMCS Case No. 051122-51379-7
ARBITRATOR'S AWARD

GOPHER RESOURCES, INC.,

EMPLOYER.

Arbitrator:	Rolland C. Toenges
Date of hearing:	July 29, 2005
Receipt of Post Hearing Briefs:	September 5, 2005
Hearing closed:	October 5, 2005
Date of Award:	January 19, 2006

ADVOCATES

FOR THE EMPLOYER:

Richard W. Pins, Attorney

FOR THE UNION:

Martin J. Costello, Attorney
Russell J. Platzek, Attorney

WITNESSES

Robert D. Oberlie, Production Manager
Dan Olson, Training Manager
Cassie Sober, Human Resources Manager

James Brown, Job Steward, retired
Roosevelt Jones, Grievant
Robert Vickney, Bus. Agent, retired
Tom Riebe, Bus. Agent, retired

OTHER APPEARANCES

James Lowenberg, Job Stewart
Tom Erickson, Business Agent

ISSUE

Did the Employer violate the Collective Bargaining Agreement by not giving the Grievant requested training and available overtime work operating the Volvo loader to supply material to the reverb furnace on September 24, 2004 and October 8, 2004?

JURISDICTION

The matter at issue, regarding interpretation of terms and conditions of the Collective Bargaining Agreement (CBA) between the Parties, came on for hearing pursuant to the grievance procedure contained in said Agreement. The Grievance Procedure (Article 6) provides that unresolved grievances shall be settled via arbitration.¹

Under terms of the CBA, the Parties selected Rolland C. Toenges as Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

¹ Article 6. Section 1. "Grievances concerning interpretation of the provisions of the Agreement shall be settled as follows:

Fourth Step: . . ."In the event of a deadlock, then the grievance shall be handled according to the arbitration procedure outlined in this Agreement."

Section 2. Should the Union and the Employer members of the Board of Arbitration be unable to agree upon the neutral member within five (5) days, they shall request the Federal Mediation and Conciliation Service to submit a panel of five (5) names from which the neutral members shall be chosen by the process of elimination with the toss of a coin to determine which side strikes off the first name.

Section 3. The Union and the Employer shall pay their own expenses in the settlement of grievances except that the fee for the neutral member of the arbitration panel and any cost to make the hearing a matter of record shall be paid equally by the Union and the Employer."

The Arbitration hearing was conducted as provided by the terms and conditions of the CBA and applicable legal requirements. The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute. All witnesses were sworn.

There was no request that a stenographic record of the hearing be made. No procedural issues were raised.

BACKGROUND

The Employer operates a lead recovery business (Gopher Resources Corp.) with principal offices located in Eagan, Minnesota. The Union is affiliated with the International Brotherhood of Teamsters and has principal offices in St. Paul, Minnesota.

The Union and Employer are Parties to a CBA in effect from December 1, 2003 through November 30, 2007.²

The Employer's business is to recover and process lead products for recycling as new consumer goods. Employees are divided into several divisions, including administrative, refining, furnace, RMPC (raw materials processing center), and maintenance.

The Grievant has been employed by the Employer since July 22, 1996. The Grievant previously worked several jobs and served in military service as a truck driver.

The Grievant's first job with the Employer was in the furnace department where he performed several jobs including charging the reverb furnace, which is used to melt lead salvaged from batteries. Charging the reverb furnace involved adding ground lead particles to the furnace with a front-end loader by placing them on a feeder table. At the time the Grievant worked in the furnace department, the front-end loader was a "Waldon Model." The Grievant used the Waldon front-end loader to place lead particles on a vibrating feeder table that moved the particles into the furnace.

In 1999, the Grievant moved from the furnace department to maintenance, where his primary function is to operate a motorized self propelled sweeper to clean floors. The Grievant seeks out and works substantial overtime, the majority of which is worked in the furnace department.

After the Grievant moved to the maintenance department, the Employer replaced the Waldon with a larger front-end loader referred to as a Volvo L70E. The shaker table that was used to feed the reverb furnace was also replaced with a larger conveyor "bolt" feeder. Employees from several departments operate the Volvo, but only a portion have

² Employer Exhibit #1. Union Exhibit #1.

been trained and are authorized to use the Volvo in supplying lead particles to the conveyor that supplies them to the reverb furnace.

The Grievant has not been trained on or authorized to work on this new equipment. Only members of the Furnace Department have been trained to operate the Volvo and charge the reverb furnace. Therefore opportunity to work overtime using this equipment has not been afforded the Grievant. Another employee, who is junior in seniority to the Grievant, has been given overtime work on this equipment, which is the basis for the instant dispute.

The CBA provides that overtime work will be given to the most senior “qualified” person.³ However, the senior employee must be qualified to perform the work. In the

³ Article 16. Section 6. OVERTIME:

“a) Overtime sheets, for each day of the week, can be utilized for nonscheduled days only. Once posted, they must be signed by the day before the day of the overtime. In all cases the overtime will be given to the most senior, qualified person. In the case where there are no personnel signing the overtime sheet the supervisor will follow the existing steps for distributing overtime.

Management will monitor overtime sheets and will either remove sheets on a daily basis or use other means (i.e. black marker) to avoid abuse of the 24-hour advance signup.

b) Senior employees that have signed up for overtime shall be called for all overtime on their scheduled day off in their classification with one exception:

The Employer will provide a list of employees, qualified to work within each department, by seniority, for each of the three (3) departments. The list will be updated at the first of each month. Overtime will be assigned to the employees within each shift as follows:

1. If the overtime is for the first part of a shift and is expected to last four (4) or less hours it shall first be offered to the employees on duty the shift before the overtime is required.

If the overtime is for the last part of a shift and is expected to last four (4) or less hours it shall first be offered to the employees scheduled for the shift following the shift the overtime is needed for.

2. If the overtime is expected to exceed four (4) hours and it is known about more than four (4) hours in advance it shall be offered to all employees signed up on the overtime sheet, by seniority, with the exception of the employees scheduled for the shift immediately following the overtime.

instant matter, the Employer's decision to not offer the Grievant overtime was on the basis that he was not qualified (had not been trained in use of the equipment). The instant dispute centers on whether, under terms and conditions of the CBA, the grievant was entitled to be trained.

The CBA does not address the manner in which training is to be provided that would make employees eligible for overtime work outside their department or on equipment they don't use in their regular job. However, the Union references what it refers to as a "past practice," wherein the Parties, having identified a problem regarding overtime in the late 1990's, reached an agreement where employees interested in working overtime outside their department could receive training that would make them eligible.

UNION EXHIBITS

U-1. CBA in effect from 12/01/03 – 11/30/07

U-2. Excerpts from Gopher Resource Corp. Web Site:

- A. About Our Company
- B. Customers/Suppliers
- C. Career Opportunities
- D. Process/Data

U-3. Gopher Resource Corp. Structural Organization

U-3. Seniority List

U-5. Product Brochure for Volvo Wheel Loader L70E

Management will make every reasonable effort to contact employees for overtime. Overtime will be distributed on a first contact basis.

3. In all the above cases employees must be capable and qualified to perform the work available.

It is the responsibility of each employee to maintain a current phone number with the Human Resource Department.

Employees who do not want to be called for overtime must sign a waiver with the Human Resource Department. The waiver may be withdrawn by the employee at any time.

U-6. Photos:

- A. Waldon Wheel Loader
- B. Cab and Controls for Waldon Wheel Loader
- C. Volvo Wheel Loader L70E
- D. Cab and Controls for Volvo Wheel Loader L70E
- E. "Feed" for Charging Reverb Furnace
- F. Charging Reverb Furnace wit Volvo Wheel Loader L70E

U-7. Volvo Training

- A. Lists of Employees Trained to Operate Volvo, and of Employees who have completed Charging Reverb/Volvo Training.
- B. Employer's Training Materials

U-8. Thursday-Friday, September 23-24, 2004 Records

- A. Overtime sign-up Sheet for September 23 and 24, 2004
- B. Work record for Lee Anthony Kidd for September 23 and 24, 2004

U-9. Friday October 8, 2004 Records

- A. Overtime Sign-up Sheet for October 8, 2004
- B. Work record for Lee Anthony Kidd for October 8, 2004

U-10. Record of Overtime Worked by Grievant 09/11/03 – 10/10/04

U-11. Grievances

- A. Grievance 03-2131, dated August 31, 2004
- B. Grievance 03-2214, dated September 27, 2004
- C. Grievance 03-2280, dated October 12, 2004

U-12. Report of the Joint Committee, dated November 16, 2004

U-13. Letter moving the matters to Arbitration, dated November 17, 2004

U-14. Letter appointing Arbitrator Toenges to hear and decide this matter, dated February 2, 2005

EMPLOYER EXHIBITS

E-1. CBA in effect 12/01/03 – 11/30/07

E-1. Grievance #03-2131, dated 08/31/04

E-3. Letter, dated 11/17/04, Grievance moved to arbitration step

E-4. Excerpt from training material

- A. Charging the Reverb/Why Change
- B. Loader Safety/What Happens If I Get In An Accident????
- C. Specific Safety Violations/Loader Operator Responsibilities
- D. Things to Look For/Loader Procedure
- E. Photo - Filling The Table
- F. Photo – Filling the Table
- G. How to Keep the Loader Running Well/Loader Turning Radius
- H. How to Keep the Reverb Running Well/Table Should Be Full
- I. Charging Procedure/Containment Room
- J. Moving Material From Wet Area to Dry Area/Containment Room
- K. Keep Loader Clean/Washing the Volvo
- L. Photo – Washing the Loader/Washing the Volvo
- M. The End – Questions/Photo
- N. Photo – Volvo Loader in Wash Room

E-5. Cost Of Training

E-6. Employees Trained to Charge and Operate Volvo

E-7. Personnel Record –Roosevelt Jones, OT wkd. 01/01/04 to 10/31/04 = 296.5 hrs.
OT wkd. 01/01/03 to 12/21/03 = 302.7 hrs.

E-8. Overtime Record - Roosevelt Jones 09/11/03 to 10/10/04

E-9. Overtime Signup Record – A Shift Refining & Furnace Depts. 09/20/04 – 09/26/04
- A Shift Refining & Furnace Depts. 10/04/04 – 10/10/04

E-10. Lee Kidd – hours worked 09/20/04 – 09/26/04.
- hours worked 10/04/04 – 10/10/04.

E-11. Employees Shift Schedule – Misc. Departments 09/20/04 to 09/26/04
- Misc. Departments 10/04/04 to 10/10/04

POSTIONS OF THE PARTIES

THE UNION SUPPORTS ITS POSITON WITH THE FOLLOWING:

- The Employer has failed to train the Grievant to operate equipment for which he could work overtime, but has trained junior employees making them eligible to work overtime that rightfully belonged to the Grievant.

- The Employer has failed to honor its commitment to train employees to operate equipment in other departments so they could qualify for overtime.
- The Employer agreed to train preferencing workers to be eligible for overtime work.
- In 1999, the Employer and Union reached an agreement wherein all employees with a genuine interest in receiving training outside their department could receive that training and thereby become eligible for overtime work outside of their department.
- The Employer facilitated this agreement by posting a sign-up sheet for training outside of individual's departments – this arrangement remained in place into 2004.
- In enacting the 1999 agreement, the Parties established a “past practice” which has been followed for several years that the Employer is now violating.
- The CBA contains Article 5, Section 1, providing that “overtime differentials shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provision for improvement are made elsewhere in this Agreement.”
- The CBA contains no “Zipper Clause” stating that the CBA constitutes the parties' entire agreement, nor is there any provision excluding past practice as a valid and binding limitation of management rights.
- The Employer benefits from its employees having broad training outside of their departments, which provides flexibility and resources to fill any overtime.
- The Grievant was improperly denied overtime on two occasions (09/24/04 and 10/8/04) when a junior employee was granted the overtime because the junior employee was trained and the Grievant was not.
- The Grievant was trained on the “Weldon” which is essentially identical to the “Volvo” with the exception of size and small differences in controls.
- The Grievant should be trained as requested and should be granted overtime hours to which he is entitled based on seniority.
- The Grievant's legitimate belief was that he would receive the requested training on the Volvo and in refusing to provide it the Employer has violated the agreement and past practice.

- The past practice in the instant matter started from a clearly defined, mutual agreement to address a clearly defined problem. It was unequivocal, clearly understood, clearly enunciated consistent, and fixed. Until the instant matter, there have been no complaints raised by any employee.
- Having agreed to award overtime by seniority, the Employer cannot undermine this standard by limiting training to junior employees in violation of an express agreement to the contrary.
- The Employer must be directed to provide the necessary training to the Grievant, honor its 1999 agreement and reimburse the Grievant for lost overtime earnings.

THE EMPLOYER SUPPORTS ITS POSTION WITH THE FOLLOWING:

- It is the Grievant's misguided belief that his seniority entitles him to work overtime wherever he wants and whenever he wants, regardless of his department, classification, qualifications or even availability.
- The instant grievances have no basis in contract, past practice or common sense.
- The CBA sets forth twice that to be eligible for overtime an employee must be qualified.
- The CBA does not contemplate a scenario wherein the Employer would be required to train employees in tasks outside of their departments and classifications.
- The record establishes that there is no past practice to oblige anyone who requests training outside of his or her department and classification. The record shows that not everyone who requested training was trained including the Unions own witness.
- The Union's position ignores commons sense. In order to accommodate the Grievant's position, it would be necessary to cross train all employees in whatever operation they chose, regardless of department and classification. Such a scenario is simply beyond the pale. It is so ridiculous on its face that it warrants denial just by virtue of restating it.
- Notwithstanding all of the above, the Grievant was simply not available to work overtime on either of the dates for which he is seeking relief – his shift overlapped with the shifts where overtime work was needed – even if he was qualified, he was not available.

- The “reverb” runs 24 hours per day, seven days per week. It is one of the most critical pieces of equipment and down time can be very costly – one hour of down time could cost up to 14 tons of lead not processed.
- Recharging the “reverb” today is much different than when the Grievant worked in the furnace department. The loader is now much bigger and the conveyor system has been completely replaced. The Grievant is neither trained nor qualified to charge the “reverb” in its current state.
- The record shows that every employee trained to charge the “reverb” is, or was, a member of the furnace department when trained.
- The training of employees on charging the “reverb” is costly, time consuming and results in production loss before the employee can become sufficiently proficient. There are also safety risks associated with the learning process and potential for costly property damage.
- The Grievant was properly informed around August of 2004 that he would not be trained in the ordinary course because he was not a member of the Furnace Department.
- Neither the Grievant nor the Union could offer any facts to support their claim of a past practice entitling the Grievant to the training he requested.
- Some five years ago, the Employer did post a notice asking employees to sign up to be cross-trained in departments and classifications other than their own. However, as admitted by the Union witness Brown, nothing was done with the sign up sheet and the Union did not take issue with the result.
- Other than those who signed up for training some five years ago as noted above, the Grievant is the only employee who has requested cross training to work overtime in a department other than his own.
- Union witness, Vickney, acknowledged that there is no provision in the CBA entitling the Grievant to cross training in another department. Vickney was vague on the details of the Union’s alleged agreement, described it as oral and acknowledged that people who signed up had not been cross-trained.
- None of the Employer’s witnesses had any knowledge of the agreement alleged by Union Witness Vickney and first heard of it at the hearing from Vickney’s testimony. Further the Employer’s witnesses testified that they were unaware of any exception to the long standing practice that management decides who to train for any given job or task.

- The grievances fail because there is no requirement in the CBA to cross-train the Grievant, no past practice supporting such an inference and the Grievant was not available to work the overtime for which he claims to be entitled.
- The provision in the CBA that addresses training has nothing to do with overtime. It addresses training only in the context of mass layoffs and its inclusion in that section clearly establishes that the Parties contemplated the possibility and agreed not to apply it in the overtime context.
- A perfect example of the gross inefficiency that would result in cross-training anyone for any job they wanted is the Grievant's seemingly simple request that would require the Employer to spend over \$800 to train him for overtime work charging the "reverb," when such overtime is rarely available.
- The Unions argument that the Employer should be barred from pointing out that the Grievant was not available to work the two overtime shifts he grieved is misplaced. Under the CBA there is no requirement that the Parties present all evidence or defenses during the grievance steps and there is no past practice from which such a requirement may be imputed. Further there is arbitrable precedent suggesting that the Unions argument is of no moment.

TESTIMONY OF WITNESSES

Union Witness, James Brown, was a former employee of Gopher Resources and Union Steward. He is now retired.

Brown, who has worked in several departments, described the equipment, processes, and conditions where employees work. Brown testified that there are about 125 employees on the seniority list.

Brown testified that he had been trained to do other work on multiple occasions and believes it is a past practice to do so – it never was a problem before. Brown testified that the Union raised the issue of cross-training about five years ago, as it would be in the interest of both the company and employees.

On cross-examination, Brown testified that he had been instructed on operation of the Volvo and that the training included a movie and on-the-job training. Brown testified that he was not trained to place material on the table that feeds the reverb furnace and to do so without training could be dangerous. Brown testified that he used the Volvo to mix material. Brown testified that he had placed material on the feeder table a couple of times, but without authorization.

On cross-examination, Brown acknowledged that if material was placed improperly on the feeder table it could shut down the reverb furnace and slow plant production. Brown also testified that the Volvo could be hazardous if operated improperly. Brown

acknowledged that once he was assigned to RMPC he was not trained for jobs outside the RMPC Department, but added that he did not work overtime.

On cross-examination, Brown testified that he interprets Article 5, Section 1, MAINTENANCE OF STANDARDS, to require the cross training of employees for work in other departments. Brown testified that about five years ago there was a sign up sheet for cross training but not all those who signed up received training. Brown testified that, in negotiations for the new CBA, the Union did not request a new sign up sheet. On cross-examination, Brown acknowledged that the CBA, in Article 16, Section 6, OVERTIME, requires that a senior employee to work overtime must be qualified for the work to be performed.

On re-direct, Brown testified that the Grievant was the only employee requesting to be trained outside his department that was refused. Brown testified that the sign up sheet for cross training some five years ago never got to the Union and the Union did not pursue the matter. Brown testified that he signed up for sweeper training but was never contacted. Brown testified that when operating the Volvo you must “look, look, look,” so you don’t run into anything, run over hot material, etc.

On re-cross-examination, Brown acknowledged that other employees who signed up for cross training never received it, but neither the Union nor the employees grieved.

On re-direct, Brown testified that no one had been harmed by not receiving the training they had signed up for.

Union witness and Grievant, Roosevelt Jones, testified that he has been an employee of Gopher Resources since 1996. Prior to coming to Gopher, he held several jobs and served in the military as a truck driver.

Jones testified that his first job at Gopher was in the Furnace Department where he worked both sides of the feed and discharge. He used the Waldon loader to charge the shaker table that fed the reverb furnace.

Jones testified that he moved to the Maintenance Department in 1999 as a sweeper operator. Jones testified that the sweeper he operates (830) is about the size of the Waldon but smaller than the Volvo.

Jones testified that he filed the grievances because employees junior in seniority were getting overtime that he, as a senior employee, was entitled to. Jones testified that employees junior to him were being trained, but not him. Brown testified that he is generally familiar with the Volvo and thinks he could operate it.

Jones testified to two situations where a junior worked overtime that, he being senior, could have worked if given the training he requested. Jones testified that he does get overtime work, but not as much as he wants – he wants to “max” overtime work.

On cross-examination, Jones testified that he has turned down overtime work opportunities. When asked how he could have worked overtime on the dates he grieved, because his shift overlapped with the overtime shift, Jones replied that Gopher should have reconfigured the shifts so he could have worked both.

On cross-examination, Jones acknowledged that all employees who have been trained on the Volvo were in the Furnace Department when trained and he is in the Maintenance Department.

Jones acknowledged that he would need training to operate the Volvo in charging the reverb furnace and that when he previously did so, he operated different equipment.

Jones acknowledged that he was at negotiations for the current CBA, but doesn't understand that the CBA requires the training of employees for overtime jobs in other departments.

On re-direct, Jones testified that he has not held office in the Union and doesn't understand everything in the CBA.

Union Witness, Robert Vickney, testified that he is a former Business Agent for the Union and is now retired. Vickney testified that he represented Union employees at Gopher for some ten years and, among others, dealt with Henry Lloyd of management and, Jim Brown, Union Steward.

Vickney testified that the matter of training employees for work outside their department came up around the end of the 1990's or early 2000, and was during the term of the second CBA. Vickney testified that Gopher wanted employees to be qualified and the Union thought overtime should be by seniority for, as the crew grew larger, overtime was becoming a bigger issue.

Vickney testified that the Company initially raised the overtime training issue because they couldn't get enough qualified for overtime. The Company agreed to train everybody that wanted to be trained. If people wanted to be trained they had to approach the Company and let it know. The determination of who was trained and who was qualified was to be the sole determination of the Company. Vickney testified that, as far as he knows, everybody that wanted to be trained was. Vickney testified that the arrangement was via a handshake and he was never approached by the Company to change it.

On cross-examination, Vickney testified that there was sign up sheets for the training and numerous people signed up. When asked if he knew that people who signed up were not trained, Vickney responded, "that if Jim Brown said so it must be so."

On re-direct, Vickney testified that he was not aware of any situation where employees who signed up for training were not allowed to do it.

On re-cross, Vickney testified that no one called him and complained about the training matter. Vickney confirmed that the arrangement was via a handshake and was not reduced to writing. Vickney acknowledged that the CBA requires that for senior employees to be eligible for overtime they must be qualified to do the work.

On re-direct, Vickney testified that he had no complaints about the training from either employees or the Company.

Employer witness, Robert Oberlie, testified that he is the Production Manager and previously was the Furnace Department Manager. Oberlie testified that he has been with Gopher for 25 years and was in the union for seven years.

Oberlie testified that the reverb runs 24 hours per day, seven days per week and processes 15 tons per hour. Oberlie testified that the equipment used when the Grievant worked in the Furnace Department is now different. Oberlie testified that the process was changed in mid 2004, increasing the size of equipment used to feed the reverb – the feeder table now is a belt (conveyor) type and the Volvo loader used to supply the conveyor is substantially larger.

Oberlie testified that the Volvo loader is also used in RMPC to mover raw material. Employees who use the Volvo in RMPC are not supposed to use it to recharge the reverb, as recharging the reverb is more complicated than just moving material. Oberlie testified that training for operating the Volvo and recharging the reverb consists of classroom sessions and on-the-job training with an experienced operator. To become proficient, a new operator must have two weeks to a month experience.

Oberlie testified that the consequences of not being adequately trained involve safety and production issues. With the larger Volvo there is limited vision and less space, creating the risk of colliding with workers, objects and the building structure. Oberlie testified that a person who can operate a sweeper and trucks is not automatically qualified to operate the Volvo and recharge the reverb. Oberlie testified that newer operators of the Volvo, even though they previously operated the Waldon, have experienced problems like backing into things.

Oberlie testified that everyone who has been trained to operate the Volvo was a member of the Furnace Department and not everyone in the Furnace Department is trained on the Volvo and recharging the reverb.

Oberlie testified that he has no knowledge of any requirement to train employees from outside the department or any practice of doing so. Oberlie testified that there is no need to train employees from outside the department because the lead worker is used as the last resort back up if a qualified operator is not available.

Oberlie testified that the Grievant is not qualified to operate the Volvo and recharge the reverb and has not been trained because he is not in the Furnace Department. If he were in the Furnace Department he would be trained if there were a need.

Oberlie testified that the Grievant is qualified for some jobs in the Furnace Department and does work overtime on them, but not on the Volvo or reverb.

On cross-examination, Oberlie acknowledged that he was not involved in discussions with Vickney regarding training. Oberlie acknowledged that employees, including the Grievant, have been trained to perform jobs outside their department when a need exists and it benefits the Company.

On re-direct, Oberlie testified that employees have been trained to perform jobs outside their department for less critical jobs where needed to cover overtime requirements. Oberlie testified that five years ago the Company wanted to fill lower level jobs to balance average or under average staffing, but he is not aware of any agreement to train people outside their department to work overtime.

Oberlie testified that to train everybody that wanted training, even though they are not needed, would be counter productive – you would have people with little or no experience doing the job rather than people in the department who have the experience.

On re-cross, Oberlie testified that he knows the Grievant works overtime in the Furnace Department on low level tasks, but he is not qualified to charge the reverb. Oberlie testified that, other than charging the reverb and blast, jobs in the Furnace Department don't require a lot of specialized experience. Oberlie testified that overtime work on the Volvo and recharging the reverb is very seldom.

Employer witness, Dan Olson, testified he has been with Gopher for about ten years, almost all of it as Training Manager. Olson testified that he does training for the Volvo and charging the reverb. He designs and develops classroom training and coordinates on-the-job training. He also prepares training programs for other jobs.

Olson testified that, about a year ago, charging the reverb changed as they went to a much larger belt charger and larger (Volvo) loader. Therefore, training was modified significantly. Olson testified that there is separate training for the Volvo and charging the reverb.

Olson testified that Brown's description of training for the Volvo and charger is not accurate, as it takes considerably longer. The video is 35 minutes and on-the-job training is one to two hours depending on the operator's skill level. Olson testified that for an operator to become proficient takes at least two weeks to a month of experience.

Olson testified in detail about the training material and process and the concern about hazards involved in operating the Volvo and charging the reverb.

Olson testified that the cost of training an employee in operation of the Volvo and charging the reverb is about \$860.55, and does not include the time required for the operator to become proficient.

Olson testified that he was involved in all training for the Volvo and reverb. Olson testified that all employees trained on the Volvo and charger are in the Furnace Department or were there at the time they were trained.

Olson testified that they do not train outside the department for overtime work unless there is a need. Olson testified that the practice is to use employees already in the Furnace Department for overtime on the Volvo and reverb and it is very rare to need an operator from outside the Furnace Department.

On cross-examination, Olson testified that, although he requested training, the Grievant was not trained to charge the reverb because the Employer decides who is to be trained.

On cross-examination, Olson testified that classroom training for the Volvo and reverb can vary but usually takes about one hour depending on previous experience of the trainee and questions.

Employer witness, Cassie Sober, testified that she has been with Gopher for three years and has been the Human Resources Manager the entire time. Sober testified that she is familiar with the CBA and is involved in negotiations of the CBA and its administration.

Sober testified as to her interpretation of CBA provisions applying to the application of seniority in overtime work and application of seniority in layoff.

Sober testified that she was involved in negotiations for the current CBA and there was no discussion regarding overtime. Sober testified that she has no knowledge about a handshake agreement regarding the training arrangement referenced by Vickney.

Sober testified that, in her experience, they have never trained employees outside the department so they could work overtime.

Sober testified that overtime was available to the Grievant on the dates he wanted to work, but in other areas. Sober testified that the Grievant worked over 300 hours of overtime in 2003 and had worked 296.7 hours of overtime in 2004 as of October 31.

Sober testified as to a number of times that the Grievant could have worked overtime but chose not to.

Sober testified that, on the dates the Grievant grieved, he was not available to work it overtime because his regular shift overlapped with the overtime shift.

On cross-examination, Sober, in reference to the issue of overlap in the Grievant's regular schedule and the overtime schedule he wanted to work, disagreed that the CBA allows force of overtime or that the Grievant was entitled to work the overtime on the basis of the language of Article 16, Section 6.

Union Witness, Tom Riebe, testified that he was a Business Agent for the Union (now retired) and represented employees with the Employer. Riebe testified that he handled

Step 3 and Step 4 of the grievance process in the instant matter. Riebe testified that the Employer did not raise the issue of the Grievant being unavailable to work the overtime due to overlap in the shifts, and the first time he heard this argument was at the arbitration hearing.

On cross-examination, Riebe acknowledged that, if it is true that if there was an overlap in the Grievant's regular shift and the overtime shift he wanted to work, he was not available to work both shifts.

On cross-examination, Riebe testified that he "couldn't answer" the question; Is there any record of allowing employees to change shifts so they can work overtime when the shifts overlap?

On re-direct, Riebe testified that the only the supervisor probably knew whether the overtime was more or less than four hours and, in his opinion, could have known if the shifts overlapped.

Employer Witness, Robert Oberlie (recalled), testified that, when there is an overtime need for a charger, it is for a full eight-hour shift and the issue of four hours is not relevant in the instant matter.

DISCUSSION

The Grievant has filed three grievances making the following claims:

- A. The Grievant's claim of August 31, 2004 that Article 4, Seniority, of the CBA was violated by the Employer for not having honored the Grievant's request to be trained on operation of the Volvo loader, and
- B. The Grievant's claims of September 27, 2004 and October 4, 2004, of a violation of Article 4, Seniority, and any/all other applicable provisions of the CBA, when a junior employee was allowed to work overtime the Grievant wanted to work on September 24, 2004 and October 8, 2004.

There are several questions that need answers in order to reach a decision in this case:

- A. Is there a provision in the CBA that applies to the Grievant's situation that was violated?
- B. Was the Grievant "qualified" to perform the work available?
- C. Even if there is not provision in the CBA that applies to the Grievant's situation that was violated, is there a binding past practice that entitles him to the relief requested?

The record indicates that the Grievant, who is member of the Maintenance Department, contends that, based on his seniority, he is entitled to overtime work operating equipment in the Furnace Department that was given to a junior employee.

The equipment at issue requires specialized training to be qualified for its operation, something the Grievant has requested but not been provided. The Grievant also contends that he is entitled to this training based on his seniority.

The Grievant references Article 4, Seniority, as the basis to support his contention. The Employer argues that this Article pertains only to *layoff* situations and is not relevant to the Grievant's right to training or overtime work.

The Arbitrator finds the language of Article 4, Seniority, clearly applies only to *layoffs and work reduction*.⁴ This Article addresses only the circumstance where there is to be a reduction of the workforce and there is no reference to the application of seniority for any other purpose.

Another provision referenced in the CBA with respect to overtime is Article 16, Section 6, OVERTIME. This Section, in Subparagraph a), provides that "Overtime sheets for each day of the week, can be utilized for *nonscheduled days only*. It further provides that the most senior *qualified* person who has complied with the procedure for requesting overtime will be given the work.

In Section 6, Subparagraph b), provides that senior employees that have signed up for overtime shall be called for all overtime *on their schedule day off* in their classification with one exception. That exception is set forth in Subd. 1. Outlining a procedure whereby overtime of four hours or less during the first part of a shift is to be first offered to employees on duty the shift before the overtime is to be worked. Similarly, overtime of fours or less during the last part of a shift is to be first offered to employees scheduled for the shift following the shift where overtime is needed.

Subd. 2. provides that overtime of more than four hours, known more than four hours in advance, is to offered to all employees signed up on the overtime sheet, by seniority, with the exception of employees scheduled for the shift immediately following the overtime.

Subd. 3. provides that: "In all the above cases employees must be *capable and qualified* to perform the work available."

⁴ Article 4, SENIORITY

Section 2. For purposes of layoff's and work reduction there shall be three (3) departments: 1.) Production, 2.) RMPC, 3). Maintenance. [Emphasis Added]

The language of Article 16, Section 6, sets forth the condition that the senior employee must be *capable and qualified* to perform the overtime work requested, but does not address what, if any, obligation the Employer has under the CBA to train an employee to become qualified.

The Union references Article 5, MAINTENANCE OF STANDARDS in support of its contention that there has been a violation of the CBA. The Union's contention is that the provisions of this Article require the Employer to continue a *past practice* that was in existence at the time the CBA was executed by the Parties.

The Grievant contends that there is a binding *past practice* that entitles employees requesting to be trained for overtime work in another department to receive the training.

The record indicates that there likely was some mutual interest in such training about five years ago. The Union contends that there was mutual agreement that both the Employer and employees could benefit from such training. The Employer would have a greater pool of qualified employees to cover overtime requirements and employees interested in working overtime would expand their opportunity by becoming qualified to perform a wider variety of jobs.

Although there appears to be some basis for the Unions contention, the exact nature of this arrangement is unclear. The Union contends that, via a handshake agreement, the Employer agreed to provide a sign up sheet for employees who were interested in being trained. Union witnesses testified that there was such a sheet and employees did sign up. However, what happened thereafter is not completely clear. The record indicates that employees did sign up but few, if any, received training. Union Steward, Brown testified that he signed up but never received any training and didn't pursue the matter because he wasn't interested in working overtime.

The Employer's contention is that employees are trained as needed and there never was any agreement to train anyone and everyone who requested training. The record shows that, in the case of training for the Volvo and charging the reverb, the practice has been for only employees working in the Furnace Department to receive this training.

Elkouri and Elkouri, *How Arbitration Works*, in referencing issues of *past practice* comments as follows:

“Examination of many reported decisions suggests that there are no unanimously accepted standards for determining precisely under what circumstances unwritten practices and custom will be held binding by Arbitrators.”⁵

Elkouri and Elkouri, *How Arbitration Works* references that “A widely accepted standard used by many Arbitrators is that of Arbitrator Jules J. Justin:”

⁵ Elkouri & Elkouri, *How Arbitration Works*, Fifth Edition at page 632

“In the absence of a written agreement, *past practice*, to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties.”⁶

The Arbitrator does not find the *past practice* contended by the Union to meet the above standard. A common definition of the term *unequivocal* is *without doubt*. The record shows that the training arrangement contended by the Union was less than clear. Robert Oberlie, who has been with the Employer for 25 years and was Furnace Manager about the time the arrangement was to have been made, testified that he had no knowledge of any requirement to train employees from outside a department for overtime work, nor does he know of any practice of doing so.

The Arbitrator does not find the arrangement contended by the Union to have been *clearly enunciated and acted upon*. The record shows that few, if any, of the employees that entered their name on the sign up sheet received training and, until the instant case, there was no objection made by the Union.

Neither does the Arbitrator find the arrangement contended by the Union to meet the standard that it *must be ascertainable over a reasonable period of time as fixed, and established practice accepted by both Parties*. It is clear from the record that the arrangement contended by the Union was not accepted as such by the Employer nor implemented.

In summary, the Arbitrator does not find a violation of the CBA, as there is no provision that requires the Employer to provide training, upon an employee's request for overtime work in another department.

The record shows that the Grievant was not qualified to perform the overtime work grieved as he had not been trained, which is a requirement. His experience on the Waldon loader and previous reverb feeder does not qualify him for operation of the present equipment.

The Grievant's contention that there is a past practice entitling him to be trained on the Volvo does not meet a widely accepted standard for a finding of *past practice*.

AWARD

The grievance is denied. The Arbitrator does not find a violation of the CBA or the existence of a binding past practice.

CONCLUSION

⁶ Elkouri & Elkouri, How Arbitration Works, Fifth Edition at page 632

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 19th day of January 2006 at Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR