ployee's (good) work record and (long) seniority. I find that the discipline was for cause. The grievance is denied.

KLEIN TOOLS INC. —

Decision of Arbitrator

In re KLEIN TOOLS, INC. (Skokie, Ill.) and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 1255, FMCS Case No. 95/16844, February 25, 1996

Arbitrator: Lamont E. Stallworth, selected by parties through procedures of the Federal Mediation and Conciliation Service

WAGES

— **Bonuses ▸114.45**

Employer did not violate bonus agreement when it included in productivity calculation that determined bonuses day-long downtime due to operators' absences, where agreement specifically includes downtime in run time and provides that any exclusions to productivity calculations must be approved by plant manager and company president, which they did not do.

— **Bonuses ▸114.45**

Employer did not violate bonus agreement that requires it train backups when it allowed day-long downtime, which was figured into productivity calculations that determined bonus, because both of scheduled operators were on leave, where it trained four operators overall, agreement does not specify numbers of backups to be trained, company has not failed in its responsibilities just because in several instances no operator was available, and overtime is not mandatory, which may explain why one of other two operators were not called upon.

— **Bonuses** — **Staffing ▸114.45 ▸117.3351**

Employees who work on new equipment are not solely responsible for staffing of that equipment under bonus agreement, which places in hands of crew responsibility to plan and anticipate needs of equipment, where collective-bargaining agreement reserves to employer right to "determine the size and composition of the workforces" and to "assign, direct, employ, re-employ and transfer employees," and only employer can request bids for position, or train employees on certain job, or schedule overtime.

Appearances: For the employer — R. Clay Bennett (Keck, Mahin & Cate), attorney. For the union — James Pressley, international representative.

BONUSES

The Issue

STALLWORTH, Arbitrator: — The Parties presented the following issue(s) to the Arbitrator:

1. Did the Company violate the Agreement by paying the Impacter crew the way it did for the April 25 to May 12, 1994 machine run?

2. If so, what shall the remedy be?

Relevant Agreement Provisions

Memorandum of Agreement dated 1/15/93

Boilermakers Local Lodge No. 1255 hereby agrees to allow Klein Tools, Inc. to implement a bonus program for the employees who work in the Impacter Work Center, in accordance with the attached guidelines for an Impacter Work Center Bonus Program. It is understood and agreed that it is not possible to determine in advance all the details of such a bonus program, and that adjustments in the guidelines may need to be made for the Impacter Work Center bonus program to operate in the manner intended. Klein Tools, Inc. agrees that no changes will be made in the attached guidelines without informing the Union in advance, and providing an opportunity for full discussion as to the reasonableness of any proposed change.

Impacter Bonus Program

1. Bonus payment is measured on the entire forge lot productivity, not per hour or shift.

* * *

4. Productivity is equal to the actual good pieces produced on the forge lot, divided by the machine cycle time per hour times the actual total work center hours charged against the lot. For example, a lot of 40,000 pieces required 50 work center hours for completion, so with a machine cycle time of 1,000 pieces per hour:

$$\frac{40{,}000 \text{ Pieces}}{1{,}000 \text{ pcs/hr} \times 50 \text{ hours}} = \frac{40{,}000}{50{,}000} = 80\% \text{ productivity}$$

Each percentage point above 60% earns $.20 per hour, so this 80% productivity earns $4.00 an hour bonus per crew member (80 − 60 = 20, 20 × $.20 = $4.00). The percentage point will be rounded to a whole number: .5% or above to the next higher percentage, and below .5% to the lower percentage.

* * *

7. Various support work will be performed by other departments, however, it is in the interest of the Impacter System Operator and of the entire Impacter crew to work closely together, and, with other responsible departments as well, to plan and anticipate the system needs and insure that required tools, materials etc. are available when needed.

8. The following will be included in the lot run time.

* Set up for the forge lot, which begins after the last piece from the previous lot is trimmed.

* All equipment maintenance and downtime except scheduled periodic major equipment inspection.

* Try-out of a new or modified tools will be considered as an ordinary production run, but Engineering and the Tool Room will continually strive to minimize Impacter System down time associated with the "tryout" process.

9. Back ups will be trained for trimmer and Impacter shift operator substitution, and will be eligible to share in the bonus plan in proportion to their contributed hours. Absent crew members are not eligible for bonuses for the time they missed.

10. Any exclusions to the productivity calculations to be approved by Jeff Butdorf and R.T. Klein Jr.

Background

Many of the facts of this case are not in dispute. At issue is the operation of a bonus program instituted by the Company with the agreement of the Union after the Company installed new equipment, referred to as an "impacter." According to the evidence, each impacter unit costs about one and a half million dollars, and is a high-tech, state-of-the-art operation. The machines are able, through a computerized process, to forge pliers, hooks and other products which previously were produced largely in a manual fashion.

According to the testimony, there were two (2) impacters running at the time of the grievance. Each one is run on two shifts, with three employees running the machine on each shift. The Impacter Operator, labor grade 12, "sets up" the machine, a process which can take as long as five (5) hours, before each run, and makes adjustments to the setup, as necessary, during the course of the run. The Impacter Operator also inspects the finished product.

There are also two Trimmers assigned to each crew, who spend all their time trimming, classified as labor grade 4 employees. An Impacter Operator Assistant, labor grade 6, is assigned to work as a trimmer, unless the Impacter Operator is absent, and then the Assistant does the operator's job. One person acts as the Impacter Systems Operator, labor grade 15, and he keeps the production records for both machines, as well as operating the machine.

Mr. Terry Short, the Impacter Systems Operator, testified that he told Management that he believed the Trimmers were underpaid, and Management presented a bonus plan to the Union, about a year and a half after the first impacter went into operation. The Company presented the plan to the Union in December, 1992, and the plan was signed in January, 1993.

Joint Exhibit No. 4 shows that for the date of May 9, 1994, no operator was present to operate the machine. The eight hours when no operator was available were figured in the production rate; thereby lowering the rate of items produced per hour for that day. This lowered the bonus for the two-week period in which May 9th fell.

The Parties agree that the regular operator for the machine during that period, Mr. Short, was absent with approval on May 9, 1994. The Parties stipulated that Mr. Short was on a one-week vacation which had been scheduled properly, and according to him, approximately four (4) months earlier.

The Parties also stipulated that there is one Impacter Operator Assistant, Mr. Catalino Nueves, Jr., commonly known as "Junior." He was absent for jury duty on May 9, 1994. The Company reimbursed him for the time he took for jury duty, in the manner prescribed by the collective bargaining agreement.

The Union filed the instant grievance contending that the hours on May 9, 1994 when the machine was not run should not have been counted in the total hours on which the production rate was figured. The Company denied the instant grievance. The Parties could not resolve the dispute and the matter proceeded to arbitration. It is within this factual context that the instant dispute arises.

THE UNION'S POSITION: The Union argues that the Company's interpretation of the Memorandum Of Agreement is incorrect. The Union points to the language of the first paragraph of the Agreement, which states that the bonus will be figured on the entire forge lot productivity, not per hour or shift. The Union argues that productivity cannot be accomplished with the machine shut down.

The Company's argument that Paragraph 4 does not say anything about excluding machine down time due to employees' absences is not convincing. The Union argues that Paragraph 8 specifically mentions "downtime" as being included in the lot run time, but this downtime is clearly within the context of maintenance on the machine.

The Union's primary argument is that Paragraph 9 of the Agreement requires the Company to train sufficient backups and the Company has failed to do so. The Union argues that

the words "will" or "shall" define a mandatory obligation. In addition, the Union argues that there is only one backup operator and he was already on the job prior to the time when the impacter bonus program went into effect. Therefore, the Union argues, the Company has not met its obligation to train crew members, as required by Paragraph 9.

The Union argues that Mr. Short's testimony gives a clear insight into the Company's intention with regard to Paragraph 9. According to the Union, Mr. Short identified excessive absenteeism and a low rate of pay for the Trimmers as the problems which the Company sought to address in the bonus plan. The Union argues that the Company presented no witness to contradict Mr. Short's testimony, and Mr. Palazzolo's testimony was not relevant to this major issue.

The Union argues that the Company had the ability to train sufficient employees for the purpose of substitution. The Company's decision not to bid the Operator Assistant job for more than one person was unreasonable, the Union asserts, and should not be permitted.

The Union argues that the Company erred when it included the non-productive hours in the bonus calculations. According to the Union, to rule otherwise would allow the Company to have the unrestricted right to diminish employees' bonus by allowing the machine to sit idle. The employees have no control over bidding jobs, the Union notes.

As a remedy, the Union requests that the employees should be made whole for the period in question and for all subsequent situations in which the calculations were based upon the same way of counting the hours.

THE COMPANY'S POSITION: The Company argues that the instant grievance should be denied. The Company contends that the purpose of the Impacter Bonus Program is to provide a handsome bonus to employees in exchange for their assuming the responsibility of keeping the impacters running at peak efficiency. The Impacter Bonus Program read as a whole clearly places the burden of downtime created by operator absence on the employees, according to the Company.

The Company also relies upon Paragraph 7, which it contends clearly places the burden on the employees to anticipate and provide for the system's needs. One of the primary needs of the Impacter System is crew, the Company argues, and the import of Paragraph 7 is to place on the crew the responsibility of keeping the system running at near peak efficiency.

The Employer also relies upon Paragraph 8, and argues that "downtime" in that paragraph includes all downtime except scheduled periodic major equipment inspection. According to the Company, the inclusion of downtime for any reason other than the specific exclusion of scheduled periodic maintenance mentioned specifically in Paragraph 8 is proper under the agreement negotiated between the Parties.

Thus, according to the Company, all downtime due to breakdowns of the equipment, Acts of God, and employee absences is included in the hours used to calculate the bonus. The Company also argues that the testimony of Mr. Short indicated that when the crew was short a Trimmer, "we," i.e. the crew would ask for outside help from other areas in the shop.

The Company argues that the Impacter Bonus Program provides for the calculation of bonuses subject only to the exclusions specified in Paragraph 8 or additional exclusions jointly approved by the plant manager and Company President, under Paragraph 10. The downtime here does not fit under either category, the Company urges.

The Company argues that because some types of downtime are mentioned as excluded in the Agreement, the Parties intended not to include others. In addition, the Company contends, the Parties recognized that there might be additional exclusions, but required that they be approved by the Plant Manager and the Company President.

The Company also contends that it did not violate Paragraph 9 of the Impacter Bonus Program. According to the Company, nothing in the bonus program requires the Company to train a certain number of backup operators, or even more than one, at any given time. The Company contends that what Paragraph 9 requires is that the Company train backup operators as needed over the course of time.

In addition, the Company argues that nothing in the Impacter Bonus Program forbids using current operators as backups. According to the Company, there are two operators and three backups available for each shift, including the Assistant Operator.

The Company contends that the Union's argument that it always have backup operators available under every circumstance is nonsensical. Even if the Agreement required a particular number of employees, there would still be no guarantee that situations would not occur which would create a situa-

tion where no backup operator was available.

The Company further contends that any grievance based upon Paragraph 9 is time-barred because the same type of incident has occurred in the past and has not been grieved. The Union witness' statement that he was exercising patience in not filing a grievance, violates the purpose of the grievance procedure, which is to raise and settle disputes promptly, the Company contends. In addition, the Company argues that Paragraph 9 was not raised until a later grievance meeting.

Even if the Arbitrator were to find a violation of Paragraph 9, the Company contends, it should not be remedied by counting the downtime created by an absence in the calculations. To do so would directly contradict Paragraphs 8 and 10 of the Agreement, the Company asserts. For all of the above reasons the Company contends that the instant grievance should be denied.

Opinion

This is a case involving the operation of a bonus plan instituted after the Company began operating a large impacter. The Parties have submitted the following issue(s) to the Arbitrator:

1. Did the Company violate the Agreement by paying the Impacter crew the way it did for the April 25 to May 12, 1994 machine run?

2. If so, what shall the remedy be?

The Arbitrator has considered the testimony, other evidence and arguments presented by the Parties and concludes that the Company did not violate the Agreement by paying the Impacter crew as it did for the period which included May 9, 1994. The Arbitrator's findings, conclusions and reasoning are set forth below.

The dispute in this case involves around the interpretation of a bonus agreement signed by the Parties in early 1993. There is no dispute that the agreement is binding upon the Parties.

Paragraph 4 of the Agreement establishes a formula for calculating the bonus on the basis of the actual pieces produced, divided by the machine time needed to produce a certain number of pieces, multiplied by the "work center hours charged against the lot." Paragraph 4 does not define "work center hours" to be charged against the lot.

Paragraph 8 specifically addresses that issue. It begins, "(t)he following will be included in the lot run time." The second item under time which is included in the lot run is "(a)ll equipment maintenance and downtime except scheduled periodic major equipment inspection." The Union argues that the word "downtime" in this sentence must be read as part of "equipment maintenance." However, if the downtime referred to only meant "equipment maintenance downtime," then there most likely would not be the word "and" separating the two. The most logical reading of the language is that by saying "equipment maintenance *and* downtime" (emphasis added), the Parties intended to include other kinds of downtime besides just equipment maintenance time.

In fact other kinds of non-productive time are included in the lot run time. Under Paragraph 8 "set up" time for the machines is included in the lot run time. Mr. Short testified that "set up" time for these complex, state-of-the-art machines may take as long as five hours per run. No pieces are produced during this time. In addition, time allotted to trying out new or modified tools is also specifically included in the lot run time.

From the language itself, the Arbitrator cannot conclude that the Parties intended the word "downtime" in Paragraph 8 to mean only maintenance downtime. Nor was there any other evidence that would convince the Arbitrator that the Parties intended this meaning.

Paragraph 10 supports this conclusion as well, by requiring "any exclusions to the productivity calculations" to be approved by the Plant Manager and the Company President. The exclusion of certain hours from the total work hours charged against the lot would be such an exclusion. The use of the word "any" suggests that all exclusions, except the one specifically mentioned in Paragraph 8 (periodic inspection) must be approved by the highest level of management.

Under the plain language of Paragraphs 8 and 10, therefore, downtime attributed to a lack of staff would be included in the lot run time. The Union argues, however, that the Company has a responsibility under Paragraph 9 of the agreement to make sure that there is sufficient backup personnel to staff the impacters, and that the Company has failed in this responsibility on this occasion and on other occasions.

Paragraph 9 requires that backups be trained for "trimmer and impacter shift operator substitution." The Company contends that it met this responsibility by training the current four Operators. Each of these Operators may substitute for the others, and an Operator Assistant, who normally works as a Trimmer may substitute for any of the four Operators who are absent.

The shortage in this case occurred when one Operator and the Operator Assistant both took off the same day, one for scheduled vacation and the other for jury duty. There is no question that each employee was entitled to take the vacation or jury duty day. The question is whether the Company violated its duty to train backups because this situation occurred.

The Arbitrator does not concur with the Employer's view that the impacter crew is solely responsible, under the bonus agreement, for the staffing of the impacters. The Employer has the primary responsibility for staffing the plant, under the management rights clause of the collective bargaining agreement, which reserves to the Employer the right to "determine the size and composition of the workforces" and to "assign, direct, employ, re-employ and transfer employees." In essence, the Company contends that Paragraph 7 of the bonus agreement modifies these rights, by placing in the hands of bargaining unit personnel, i.e. the impacter crew, the sole responsibility to ensure sufficient staff.

Paragraph 7 does enjoin the impacter crew to plan and anticipate the needs of the impacter system and "insure that required tools, materials, etc. are available when needed." Even if the Arbitrator were to conclude that this phrase includes staffing, the Arbitrator does not conclude that the Paragraph vests sole responsibility for staffing the impacter crew in the hands of that crew. As the Union notes, only the Employer can bid a position, or train employees on a certain job, or schedule overtime, all factors which would significantly affect the impacter crew's ability to find suitable replacements.

Nevertheless, the bonus agreement does not require that a certain number of backups be trained. Nor does the Arbitrator conclude that any time there is not a backup Operator, the Company has failed in its responsibility under Paragraph 9.

It does not appear from the evidence that it is very common for both an Operator and the Backup Operator to be absent on the same day. Furthermore, it is not clear from the evidence why one or more of the other Operators could not perform overtime to cover the absence on that day. It is not clear from the evidence, for instance, whether Management asked them to work overtime and they refused, or whether Management failed to ask.

The Union Witness testified that overtime is not mandatory unless it is scheduled in advance. He also mentioned that his vacation had been scheduled months in advance, suggesting that the Company could have scheduled a replacement. However, it is not clear from the evidence in this case when the Employer first knew that Mr. Nueves, the usual replacement, would also be off for jury duty and whether there was sufficient notice to schedule overtime for one of the other operators.

The Union suggested that there had been other instances, both before and after this grievance was filed, when time had been subtracted from a run because the impacter was down due to lack of staff. Only two instances were mentioned specifically and the circumstances surrounding those instances were not described in detail.

If there were a consistent pattern of the impacters being shut down due to absences, then perhaps the Employer could be in violation of Paragraph 9 and would be required to train additional personnel. This is the gravamen of the Union's complaint. However, on the basis of the evidence presented here, the Arbitrator cannot conclude that the Employer has violated Paragraph 9 because on several instances the impacters could not run because of a lack of trained available personnel. Paragraph 9 is not written in absolute terms, i.e. that there must never be a lack of staff to run the impacters. The Union has the burden of proving that the Company has violated Paragraph 9, and has not done so on the basis of the record here.

Therefore, the downtime in this case cannot be attributed to the Employer's failure to perform an obligation required under the bonus agreement. Because Paragraph 8 of the bonus agreement specifically includes downtime in the run time, and there was no approved exclusion under Paragraph 10, the Arbitrator concludes that the

Company did not err when it included the downtime due to absences in the productivity calculation for the period encompassing May 9, 1994. It may be that, if there is a consistent patter of foreseeable absences which cannot be covered under the current backup situation, the Employer would be required, under the bonus agreement, to train more employees.[1] However, on the basis of the record as it stands before the Arbitrator at this time, there is not sufficient evidence to draw that conclusion. Therefore the grievance is denied.

AWARD

The grievance is denied.

MASON & HANGER-SILAS MASON CO.—

Decision of Arbitrator

In re MASON & HANGER-SILAS MASON CO., INC. [Amarillo, Texas] and PANTEX GUARDS UNION LOCAL 38, INTERNATIONAL GUARDS UNION OF AMERICA, FMCS Case No. 96/17330; May 10, 1996

Arbitrator: Harold E. Moore, selected by parties through procedures of Federal Mediation and Conciliation Service

DISCHARGE

— Off-duty misconduct ▸118.634 ▸118.640

Nuclear-weapons facility had just cause to discharge guard who was under protective order not to come within 300 yards of his wife, who was also guard at facility and who he had injured off-duty, despite union's contention that employer should have found way to keep both of them on job, where they could have contact at change of their 12-hour shifts and when there was overtime, in atmosphere in which two employees who have easy access to weapons and one employee has demonstrated propensity for violence, employer need not make special working arrangements absent specific language in collective-bargaining agreement requiring it.

— Termination meeting ▸118.301

Employer is not barred from discharging guard who had hit his wife in off-duty incident, even though it failed to comply with collective-bargaining-agreement requirement that it have "Senior Security Management Representative" discuss guard's termination with union prior to taking action, where security manager notified outgoing union president and later incoming union business agent that there was "serious situation" involving guard, business agent had discussion with Management Representative during grievant's initial suspension period, and grievant was represented by business agent at termination meeting; union was not prejudiced by company's actions and company's failure to offer specific union representative opportunity to discuss case with Management Representative is not procedural defect that in and of itself would prohibit company from terminating employee.

Appearances: For the employer — S. Tom Morris (Gibson, Ochsner & Adkins), attorney; James T. Rackstraw, security manager; Robert Rowe, human resources manager. For the union — David K. Watsky (Gillespie, Rozen, Tanner, and Watsky, P.C.), attorney; William A. Boles, business agent.

OFF-DUTY MISCONDUCT

Issues

MOORE, Arbitrator: — The parties stated the issues in a different manner in their post-hearing briefs. Therefore the arbitrator is required to frame the issues and find them to be as follows:

1. Was M—, the Grievant, terminated for just cause? If not what is the proper remedy?

2. Was a Union official given the opportunity to discuss the case with a Senior Security Management Representative prior to the termination of the Grievant as called out in Article XXIV, Section 8, of the Articles of Agreement? If not, what is the proper remedy?

Applicable Provisions of the Articles of Agreement

Article XXIV, Section 8, Discipline or Discharge

"The Company shall not discipline or discharge an employee without *just cause*. The Company shall have the right to issue Company rules of expected employee conduct and performance in order to maintain safety, security and efficiency in the Plant. In cases of reprimand or other disciplinary action requiring an adverse notation in the record, a Union Steward may be present if so requested by the involved employee. *In cases where suspension without pay or dis-*

[1] For example, if the operators were being asked to perform significant amounts of unscheduled overtime to fill in for each other's absences, it might be reasonable to train more employees to fill these positions as substitutes.