BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
WISCONSIN LABORERS' DISTRICT COUNCIL	:	Case 1 No. 49426 A-5082
and	:	
LINK-OSBORN COMPANY	:	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Naomi E. Eisman, on behalf of Wisconsin Laborers' District Council.

Mr. Timothy T. Wilder, Project Manager, on behalf of Link-Osborn Company.

ARBITRATION AWARD

Wisconsin Laborers' District Council, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Link-Osborn Company, hereinafter the Company, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The Company subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on September 10, 1993, in Wisconsin Rapids, Wisconsin. There was no stenographic transcript made of the hearing and the parties completed the submission of hearing briefs in the matter by October 14, 1993. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there were no procedural issues and that the following are the issues to be decided:

1) Whether the Company violated the Collective Bargaining Agreement by failing to pay overtime for hours worked over eight (8) hours per day?

2) Whether the Company violated the Collective Bargaining Agreement by failing to pay the second shift employes call-in pay for the meeting held on the morning of May 17, 1993?

3) Whether the Company violated the Collective Bargaining Agreement by failing to pay four (4) hours pay for every three and one-half (3 1/2) hours worked in containment?

CONTRACT PROVISIONS

The parties are signatory to the "Statewide Asbestos Agreement" and the following provisions of that Agreement are cited:

ARTICLE IX

WAGES AND CONDITIONS

Section 1 Subject to the provisions of this Agreement, the hourly rates of pay shall be June 1, 1991 to May 31, 1992 $13.07 June 1, 1992 to May 31, 1993 $13.57. Overtime rate, working conditions, and all fringe benefits shall be those established through collective bargaining between the appropriate Local Union and the Local contractors in the area where the particular job where the Employer is located.

. . .

Section 3 When the Employer enters an area where conditions of employment have not been established pursuant to negotiations between the appropriate Local Union and the contractors in the area, the Employer and the Wisconsin Laborers' District Council will negotiate such wages and other conditions of employment as are necessary and reduce their understanding to writing.

. . .

ARTICLE X

SAFETY

. . .

Section 4 - Respirator Clause Masks and all other equipment used in the removal of asbestos must meet the requirements of the

regulations governing the industry. The Employer may work his employees up to a maximum of three and one-half (3 1/2) continuous hours in a respirator without a break of any type providing the governing regulations and standards are met. Whenever this no break provision is implemented by the Employer, a minimum of four (4) hours will be paid to the employee at the applicable hourly wage rate.

. . .

ARTICLE XIII

GRIEVANCE PROCEDURE

Section 1 Where Local Union/District Council Agreements have been agreed upon through bona fide collective bargaining, and where such agreements provide procedures for the handling of grievances, except those of a jurisdictional nature, such procedures shall be the means by which grievance(s) shall be handled. In the absence of grievance machinery in the local agreement, or a settlement at the job site, then the matter shall be adjusted as provided below.

. . .

The Union also has a Local Agreement with area contractors and the following are relevant provisions of that Agreement:

ARTICLE VIII: WORKING HOURS

Sec. 8.1: Workday and Workweek - Eight (8) hours between 6:00 a.m. and 2:30 p.m., or 7:00 a.m. and 3:30 p.m., or 7:30 a.m. and 4:00 p.m., or 8:00 a.m. and 4:30 p.m., with one half-hour lunch period, shall constitute a workday. Five (5) days from Monday to Friday, inclusive, shall constitute a workweek.

It shall be permissible to start the workday at 6:00 a.m., 7:00 a.m., 7:30 a.m., or 8:00 a.m. and end at 2:30 p.m., 3:30 p.m., 4:00 p.m., or 4:30 p.m. without overtime rates applying to hours worked before 8:00 a.m. provided all basic crafts on the job involved are in agreement with this plan. The Employer

agrees to give proper notification to the Union of such agreement.

. . .

Sec. 8.1.1: All time worked on Saturday shall be paid for at one and one-half (1 1/2) times the established hourly rate of pay.

All time worked on Sundays and legal Holidays shall be paid for at double the established hourly rate of pay.

Sec. 8.1.2: Employer may schedule Saturday makeup work at the established hourly rate for hours lost because of inclement weather. This shall apply only when there are no other crafts on the job receiving Saturday premium pay. Premium pay received by a foreman supervising laborers shall not negate this provision. An employee will not be discharged or disciplined for refusing to work a makeup day on Saturday.

A four-day workweek consisting of four (4), ten- (10-) hour days may be worked. The workday shall be between the hours of 7:00 a.m. and 6:30 p.m. The workweek shall be Monday through Friday. The minimum weeks that shall be worked to establish a four- (4-) day, ten- (10-) hour schedule shall be two (2) weeks. Overtime rates shall be the same as those indicated in Section 9.1.1 (sic) for all hours worked after 5:30 p.m. for those working between 7:00 a.m. and 5:30 p.m. and for all hours worked after 6:30 p.m. for those working between 8:00 a.m. and 6:30 p.m.

There shall be no shift work performed on a four- (4-) day, ten- (10) hour workday schedule. The hours established in this section shall be flexible if agreed to by the Contractor and Business Agent. This section shall be used at Contractor option only.

Sec. 8.2: Shift Work -

A. A shift for the purpose of this Agreement shall mean one or more crews of men working on a prearranged schedule of hours other than the normal workday as provided for in this

Agreement.

B. In order to avoid any conditions which may result in discrimination in competitive bidding, all jobs on which shifts are contemplated must be reported and receive the approval of the authorized Local Union Representative before shift conditions will apply. All such agreements to be confirmed in writing by the Unions within forty-eight (48) hours.

C. A shift termed the first day shift falling within the normal workweek shall consist of eight (8) hours. All time worked prior to or after the established first day shift (eight (8) hours) shall be overtime.

D. A shift termed the "second shift" shall consist of 7-1/2 hours of work and 1/2 hour paid lunch break for a total of eight hours pay. The lunch break shall be taken as near as possible to mid-shift.

E. A shift termed the "third shift" shall consist of seven (7) hours of work and 1/2 hour paid lunch break for a total of eight hours pay. the Lunch break shall be taken as near as possible to mid-shift.

F. All shift work overtime hours as described in Section 8.2C, D, and E above and worked prior to and subsequent to the first day shift shall be paid for at one and one-half (1-1/2) times the Normal Hourly Wage except that any time worked between 7:00 a.m. Sunday and 7:00 a.m. Monday shall be at two (2) times the Normal Hourly Wage. All shift work overtime hours subsequent to any of the other established shifts shall be paid for at one and one-half (1-1/2) times the Normal Hourly Wage.

Shift hours shall apply on Saturday, Sunday and Holidays. Any overtime compensation shall include the 1/2 hour paid lunch break on the second and third shift.

Shifts shall be justified only when abnormal job conditions make it necessary and they are pre-arranged. When more than one shift is worked, the workweek shall start at 7:00 a.m.

on Monday and end at 7:00 a.m. on Saturday, except those hours worked between midnight Friday and 7:00 a.m. Saturday on the first weekend at the start of a job or program lasting less than seven (7) days.

. . .

Sec. 8.4: Part Time Work - Employees called out from the Hall for part time work shall receive a minimum of four (4) hours' pay.

. . .

BACKGROUND

The Company is involved in the asbestos removal business and the Union represents workers engaged in certain aspects of asbestos removal within its work and geographic jurisdictions. The Company and the Union are signatory to a "Statewide Asbestos Agreement".

The Company was involved in a project at a Georgia-Pacific plant in Nekoosa, Wisconsin in May of 1993 and the instant grievance involves the period of May 17 through May 20, 1993 and approximately nineteen employes employed on the project by the Company who were represented by the Union. The Company ran two twelve-hour shifts (7:00 a.m. - 7:00 p.m.; 7:00 p.m. - 7:00 a.m.) each day and there was "containment" work on each shift. "Containment" is when the employes are working in an enclosed area and wearing their respirator. Not all employes would be working in containment at the same time. The employes were paid overtime only for those hours worked over forty hours in a week and were not paid overtime for hours worked in excess of eight hours per day.

A meeting was held by the Company at 7:00 a.m. the morning of May 17th to which workers were required to bring their papers that are required for them to do such work and at which they selected or were assigned to the shift they would work and the Company's procedures and safety rules were explained. The employes who were assigned to work the night shift were not paid "call-in" pay for attending the meeting. Employes were paid for the time attending the meeting. There was no pre-job conference held between the Union and the Company.

The Union grieved the Company's failure to pay employes overtime for hours worked in excess of eight hours per day, the Company's failure to pay employes four hours' pay for every three and one-half hours worked in containment without a break and the failure to pay night shift employes call-in pay for attending the

May 17th meeting. The parties were unable to resolve their disputes and proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

As to the first issue regarding overtime for over eight hours worked in a day, the Union notes that Article IX, Sec. 1 of the Asbestos Agreement provides that overtime rates, working conditions and fringe benefits are to be those established through bargaining between the appropriate local union and local contractors, i.e., a "local agreement". Here, there is a local agreement covering the area in which Nekoosa is located. Article VIII, 8.1, of the Local Agreement sets forth the starting and finishing times between which overtime rates do not apply, and establishes that the regular workday is eight hours with a half-hour lunch period. The Union's Business Manager, Loren Bloyd, testified that the Local Agreement requires overtime pay for all hours worked beyond eight hours per day. Since the Company admits it did not pay the overtime, the grievance should be granted. Any Company contention that it is not bound by the Local Agreement should be rejected, as the Statewide Asbestos Agreement explicitly adopts the Local Agreement for purposes of determining overtime, working conditions and fringe benefits.

With regard to working in containment, the Union asserts that the Asbestos Agreement, not the Local Agreement, covers safety matters. Article X, Section 4, of the Asbestos Agreement provides that an employer may work employes up to three and one-half hours in a respirator without a break, but that when it does so, it must pay the employe a minimum of four hours' pay. The unrefuted evidence shows that many employes worked more than three and one-half hours in containment without a break and were not given the four hours' pay.

Regarding the issue of call-in pay for the May 17th meeting, the Union contends that pursuant to Article VIII, Section 8.4, of the Local Agreement, the employes on the second shift are entitled to four hours of call-in pay for attending that meeting. That provision provides that employes are to receive a minimum of four hours' pay when they are called out for part-time work. The Company conceded that it held a mandatory safety meeting very early on the morning of May 17th and paid both the first and second shift employes only for the time spent at the meeting - less than four hours. Bloyd testified that contractors normally hold a safety meeting before each shift so employes do not have to come in just for the meeting and go back home. The Union asserts that the plant owner did not require the Company to hold only one meeting. Further, the Company's claim that the meeting was not only a safety meeting does not excuse it from the requirements of

Section 8.4. The Company admitted it had hired the employes prior to the meeting, so it had the authority as the employer to call a mandatory meeting. Section 8.4 requires that employes receive call-in pay when they are "called out from the Hall for part-time work. . ." Time spent at a mandatory meeting is "work" for purposes of Section 8.4. The Company acknowledged as much by paying the employes for the time spent at the meeting. Since the meeting was mandatory, the purpose of the meeting is irrelevant. Therefore, the Company was required by Section 8.4 to pay the second shift employes call-in pay for attending the meeting.

The Union requests that the grievance be sustained and a make-whole remedy granted. The Union also requests that the Arbitrator retain jurisdiction for sixty days to resolve any disputes that might arise regarding remedy.

Company:

With regard to the issue of overtime for hours worked over eight hours per day, the Company asserts that Article IX, Section 9, of the Statewide Asbestos Agreement, (sic) provides that a 4 day/10 hour work week must be agreed to at a pre-job conference between the Union and the Employer. In this case, there was no pre-job conference; however, everyone knew this job required working around the clock because it was to be done during a mill outage. Projects to be completed during outages are always very difficult and this one was no different. The Company asserts that no worker rights under either of the agreements were violated.

As to the issue of call-in pay for the May 17th meeting, the Company contends that the employes were not called out as part-time help. Thus, Section 8.4 of the Local Agreement does not require that call-in pay be paid for attending the meeting. The workers were asked to show up at 7:00 a.m. that morning to turn in their applications for employment with the Company, along with the necessary license and medical release papers required for them to work on a job site. Their papers were then checked to make sure they were up to date. After that, there was a brief orientation as to Company procedures and as to the project. Even though the Company did not feel it was necessary to pay the workers for the time at the meeting, it did so.

While the Company agrees with the Union's representative that a pre-job conference could have helped settle some of these matters, the Union had two weeks' prior notice of the start date for the project and could have requested such a conference if it felt it was important. There were even phone conversations between the Project Manager for the Company, Tim Wilder, and Bloyd, setting up physicals for some of the workers and Bloyd could have requested a pre-job conference in those conversations.

With regard to working in containment, the Company notes that

Article X, Sec. 4 of the Statewide Asbestos Agreement provides that the employer may work employes up to a maximum of 3-1/2 continuous hours in a respirator without a break. Here, employes were in respirators in an enclosed area 3 to 6 hours at a time. That does not mean that they did not get a break inside the work area during that time. They did get such breaks, and that is very common in this type of project. Even though workers signed in at 7:00 a.m. and signed out at 7:00 p.m. on a shift, they did not realize they were paid for a one-hour lunch break, a benefit that was not required.

DISCUSSION

Issue No. 1

Article IX, Wages and Conditions, Section 1, of the Statewide Asbestos Agreement, provides, in relevant part, that "Overtime rates, working conditions, and all fringe benefits shall be those established through collective bargaining between the appropriate Local Union and the Local contractors in the area where the particular job where the Employer is located." In this case the job was located in Nekoosa, Wisconsin, an area covered by a Local Agreement between the Union and local contractors. Article VIII: Working Hours, Section 1, of the Local Agreement, essentially defines a "workday" as eight hours and a "workweek" as five days, Monday through Friday, and specifies starting and ending times for a workday. As to the Company's argument that this was going to be a four-day work week job and everyone knew it, Section 8.1.2 provides for a four-day workweek consisting of four ten-hour days when there is a minimum of two weeks' work. In this case, there were only four days of work. That provision also states, "There shall be no shift work performed on a four- (4-) day, ten- (10-) hour workday schedule. . ." Section 8.2: Shift Work, sets forth the definition of a shift, 1/ the conditions under which shift work would be allowed, what shifts will consist of as far as the number of hours and when overtime applies. Section 8.2, B, provides:

> B. In order to avoid any conditions which may result in discrimination in competitive bidding, all jobs on which shifts are contemplated must be reported and receive the

1/ Section 8.2, A:

> A. A shift for the purpose of this Agreement shall mean one or more crews of men working on a prearranged schedule of hours other than the normal workday as provided for in this Agreement.

> approval of the authorized Local Union Representative before shift conditions will apply. All such agreements to be confirmed in writing by the Unions within forty-eight (48) hours.

Thus, while the parties may agree to a schedule other than a normal "workday" as defined in 8.1., Section 8.2., B, specifically requires that the agreement of the Local Union to a shift work schedule be obtained and that the agreement be confirmed in writing. That this agreement must be ahead of time, and not after the job has started, is made clear in Sec. 8.2, F, paragraph 3: "Shifts shall be justified only when abnormal job conditions make it necessary and they are pre-arranged. . ." Regardless of who might have been at fault for not having a pre-job conference, there was no such pre-agreement to a shift schedule in this case.

Given that the work was for less than two weeks and there was no pre-agreement by the Local Union to a shift schedule of work, a shift schedule was not authorized under the Agreement. Therefore, the Company was required to pay overtime at the rate of 1-1/2 the Normal Hourly Wage for the hours worked over 8 hours per day by an employe. By paying employes overtime only for those hours worked over 40 hours per week, the Company violated the Local Agreement's provisions.

Issue No. 2

The question with regard to this issue is whether Section 8.4: Part Time Work, of the Local Agreement, applies to the meeting held the early morning of May 17th and attended by workers who were assigned to the night shift. For the following reasons it is concluded that the provision does not apply in this case.

Section 8.4 provides as follows:

> **Sec. 8.4: Part Time Work** - Employees called out from the Hall for part time work shall receive a minimum of four (4) hours' pay.

Wilder's unrebutted testimony was that the meeting had several purposes - the employes were to bring in their applications and their paperwork that is needed to do asbestos removal work, to assign employes to one of the two shifts, to pick leadworkers, and to explain Company procedures. One of the employes, Ron Skorie, testified that he went directly to the job site because he had worked for the Company previously, but was told he had to go to the meeting. Skorie also testified he arrived at the meeting approximately five minutes late and was told he would be on the night shift since other employes had already selected the day

shift.

Based on the testimony, it appears that the meeting the morning of May 17th was more in the nature of a meeting at which the workers had their eligibility to work on the project confirmed or were told what documentation they would need to get or to update in order to be able to work for the Company, and at which they selected or were assigned to a shift. Prior to the meeting, the workers did not know which shift they would be working. In the absence of evidence of a binding practice of applying Section 8.4 to such meetings, the undersigned concludes that a meeting of such a preliminary nature is not covered by that provision.

Issue No. 3

The applicable provision regarding this issue is Article X, Safety, Section 4 - Respirator Clause, of the Statewide Asbestos Agreement. That provision provides as follows:

> Section 4 - Respirator Clause Masks and all other equipment used in the removal of asbestos must meet the requirements of the regulations governing the industry. The Employer may work his employees up to a maximum of three and one-half (3 1/2) continuous hours in a respirator without a break of any type providing the governing regulations and standards are met. Whenever this no break provision is implemented by the Employer, a minimum of four (4) hours will be paid to the employee at the applicable hourly wage rate.

The Company asserts that employes did get a break, albeit inside the enclosure. The Union asserts employes did not get a break and are entitled to four hours of pay for every three and one-half hours worked in containment without a break. The only direct evidence presented on this issue was the testimony of Skorie. Skorie testified that he worked five hours straight in containment and that when he was going to leave once to get a drink, the supervisor told him to get a drink in the shower. Bloyd testified that he was told by other employes that they worked over three and one-half hours in containment and did not receive four hours' pay. There is no evidence of any kind in the record to support the Company's assertion that the employes working in containment got any break - inside or outside containment. 2/ Therefore, it is

2/ Therefore, the Arbitrator does not reach any conclusion as to whether Article X, Section 4 requires that a break be outside containment.

concluded that the employes who the records show 3/ worked in containment for three and one-half hours or more straight are entitled to an additional half an hour's pay for each such instance on the Nekoosa project. By not paying those employes four hours of pay for each three and one-half hours straight worked in

3/ The parties agreed that the Company would provide the records as to check-in and check-out if a violation was found.

containment without a break, the Company violated Article X, Section 4 of the Statewide Asbestos Agreement.

Based upon the above and foregoing, the evidence and arguments of the parties, the undersigned makes and issues the following

AWARD

1. The grievance is sustained as to Issue No. 1. Therefore, the Company is directed to pay employes the difference between the pay they received on the Nekoosa project and the pay they would have received had they been paid at the overtime rate of time and one-half (1 1/2) for all hours they worked over eight (8) hours per day on that project.

2. The grievance is denied as to Issue No. 2.

3. The grievance is sustained as to Issue No. 3. Therefore, the Company is directed to pay an additional one-half hours' pay for every three and one-half (3 1/2) hours straight worked in containment to those employes whom the records show worked in containment at least three and one-half (3 1/2) hours straight at a time in containment.

Pursuant to the Union's request, the undersigned will retain jurisdiction for sixty (60) days from the date of this Award for the purpose of resolving any disputes as to remedy.

Dated at Madison, Wisconsin this 6th day of January, 1994.

By David E. Shaw /s/
David E. Shaw, Arbitrator