BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 953

and

POLK-BURNETT ELECTRIC COOPERATIVE

Case 21
No. 56692
A-5702

Appearances:

Mr. Steve A. Glaim, General Manager, appearing on behalf of the Polk-Burnett Electric Cooperative.

Mr. Bruce Michalke, Assistant Business Manager, appearing on behalf of the International Brotherhood of Electrical Workers, Local Union No. 953.

ARBITRATION AWARD

Pursuant to a stipulation between the parties, the International Brotherhood of Electrical Workers, Local Union No. 953 and the Polk-Burnett Electric Cooperative agreed to submit a dispute over the interpretation of the sleep time provisions of the contract to linemen working on Sundays to the Wisconsin Employment Relations Commission for a decision. The parties waived a hearing and submitted the case on written stipulations and arguments. The last of the stipulations was received at the Commission's Madison office on July 17, 1998. On August 20, the Commission designated Daniel Nielsen as the Arbitrator to decide the dispute. On August 24, the Arbitrator sent the parties a summary of his understanding of the stipulated facts and the arguments raised by each party, and requested that they review it and confirm its accuracy. The Arbitrator also posed several questions to the parties, in order to clarify the facts and the parties' arguments. The parties confirmed the accuracy of the summary and responded to the Arbitrator's questions, with the last response coming on August 31, whereupon the record was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties did not submit a formal stipulation of the issue. From the written submissions, the issue may be fairly stated as:

> Are employes who work eight or more hours after 4:00 p.m. on Sunday entitled to eight hours of sleep/rest time on the following day, under Article 4, Section 4.2(B) of the collective bargaining agreement?

RELEVANT CONTRACT PROVISIONS

1997-1999 Collective Bargaining Agreement

. . .

ARTICLE 4

HOURS OF WORK

4.1 **Workweek and Workday**

A. Eight (8) hours shall constitute a regular day's work and forty (40) hours or five (5) days, Monday through Friday, shall constitute a regular week's work except as hereinafter modified. Because the nature of the services rendered necessitates the furnishing of more than five (5) days regular service perweek (sic), the Cooperative may establish an additional regular week's work for and limited to the crew, Tuesday through Saturday. All employees in the crew shall be required to rotate on the different weeks. The workweek shall correspond with the calendar week.

B. Regular daytime work hours shall not begin prior to 7:00 a.m. nor end later than 5:30 P.M. A 24-hour notice is to be given when the daily work schedule will change. During Daylight Savings Time, a 6:00 A.M. start time shall be allowed if decided by the Cooperative. All work schedules shall provide a one-half hour unpaid intermission for lunch for all employees covered by this agreement.

C. Employees shall be paid in accordance with the rates and schedules set forth herein, for all time spent traveling from headquarters to job, job to job, and from job to headquarters.

4.2 **Overtime**

A. All work done by employees outside of regular scheduled hours except as stated otherwise in Section 4.3 hereof, shall be paid for a rate of time and one-half.

B. Any employee who shall work eight (8) hours overtime between quitting time in the afternoon and starting time in the morning shall be paid at the rate of his basic hourly rate plus rest period pay during the next regular workday, providing he is required to work. If the employee is not required to report for work during such successive regular workday, he shall be credited with straight time for such day.

C. **Time Off Between Shifts -** If an employee works four (4) or more hours during the ten hour period prior to the morning starting time, eight (8) hours shall elapse before he returns to work without loss of a regular scheduled workday's pay, provided he uses such periods of time only for rest and recuperation. If an employee is called back to work during the aforementioned eight (8) hours, he shall be paid at the rate of his basic hourly rate plus rest period pay for any and all time worked during the eight (8) hours.

. . .

ARTICLE 6

GRIEVANCE AND ARBITRATION PROCEDURE

. . .

6.4 **Arbitration**

. . .

E. The Arbitrator shall have no authority to hear or decide violations of the no-strike, no-lockout clause alleged against the Union or Cooperative, nor to hear or decide issues of representation and determination of proper unit (which shall be decided by the processes under applicable Federal and/or State statutes), nor any authority to alter, modify or change the terms of the contract at any time.

. . .

BACKGROUND

General Background

This dispute concerns linemen employed by the Polk-Burnett Electric Cooperative in northwestern Wisconsin. The linemen are represented by Local 953 of the IBEW. In the Spring of 1998, several linemen worked on Sunday restoring outages, and put in eight or more hours after 4:00 p.m. On the following day, Monday, they claimed rest time under Section 4.2(B) of the contract:

> B. Any employee who shall work eight (8) hours overtime between quitting time in the afternoon and starting time in the morning shall be paid at the rate of his basic hourly rate plus rest period pay during the next regular workday, providing he is required to work. If the employee is not required to report for work during such successive regular workday, he shall be credited with straight time for such day.

Steve Glaim, the General Manager of the Cooperative, took the position that they were not entitled to rest time, since Sunday was not a regularly scheduled work day. The Union disagreed. The Cooperative and the Union decided to take the dispute to the Wisconsin Employment Relations Commission for resolution without a hearing, under a stipulated procedure they worked out in discussions with WERC General Counsel Peter G. Davis:

> 1. Both the cooperative and the union would send to Mr. Davis information pertaining to their position with respect to the implementation of Sections 4.2(B) and 4.2(C) of the contract.
>
> 2. Mr. Davis or another representative of the commission will rule on the question as to the interpretation of the sections.
>
> 3. Based upon this commission ruling the cooperative and union will accept the decision and operate accordingly until one or the other wishes to discuss it as a negotiations item during a subsequent time when the contract is reopened for a normal bargaining session (i.e., Fall of 1999).

History of Negotiations

In one form or another, Sections 4.2(B) and 4.2(C) have been included in the labor contract for more than twenty years. In the 1976 contract, what is now 4.2(B) was Section 6 of Article 5. It differed from the current version in that it defined the time frame for qualifying overtime work in terms of specific times, rather than by normal quitting and starting times:

> 6. Any employee who shall work eight (8) hours overtime between 4:30 P.M. and 8:00 A.M. shall be paid at the rate of time and one-half during the next regular work day, providing he is required to work. If the employee is not required to report for work during such successive regular workday, he shall be credited with straight time for such day.

Section 4.2(C) was Section 13 of Article 5 in the 1976 contract. It differed from the current version in two significant ways. First, it defined the qualifying four hours of work as being "overtime," whereas the current contract simply refers to four hours of work in the ten hours preceding the morning starting time. The second difference is that, while the present contract calls for the basic rate plus "rest period pay" when an employe worked during the 8 hour rest period, the 1976 version called for time and one half:

> 13. If an employee works four (4) or more hours overtime and is released from work, eight (8) hours shall elapse before he returns to work without loss of a regular scheduled workday's pay, provided he uses such periods of time only for rest and recuperation. If an employee is called back to work during the aforementioned eight (8) hours, he shall be paid at the rate of time and one half for any and all time worked during the eight (8) hours.

In 1983, the parties reorganized this section of the contract and placed both provisions in Section 4.2 - Overtime. In 1984, the parties agreed to modify Section 4.2(C) to define the specific time period (midnight to 8:00 a.m.) during which the overtime work had to take place to entitle an employe to 8 hours of rest and recuperation time:

> C. **Time Off Between Shifts -** If an employee works four (4) or more hours overtime between midnight and eight A.M., eight (8) hours shall elapse before he returns to work without loss of a regular scheduled workday's pay, provided he uses such periods of time only for rest and recuperation. If an employee is called back to work during the aforementioned eight (8) hours, he shall be paid at the rate of time and one half for any and all time worked during the eight (8) hours.

In October of 1996, Glaim wrote to Union Business Manager Richard Haley, setting out his proposals for the 1997-1999 collective bargaining agreement. Among the changes Glaim proposed were two to Section 4.2(B), and one to 4.2(C). In Section 4.2(B), Glaim proposed language substituting "normal end of the work day time and normal beginning time in the morning" for the specific times (4:30 PM and 8:00 AM) in the existing contract. Glaim also proposed to delete the reference to credit for straight time when an employe was not required to

work the next day, suggesting that the employes instead be credited with "sleep time pay." In Section 4.2(C), Glaim proposed to delete the existing reference to "Any employee who shall work . . . " and substitute, "If an employee actually works . . ."1/

1/ This appears to be a typographical error, in that the phrase Glaim proposed to delete is actually part of Section 4.2(B), rather than 4.2(C). In any event, it does not appear that any change was made in either section in response to this proposal, and thus it does not bear on the decision in this arbitration.

The parties ultimately agreed to replace the specific times with a general reference to "quitting time in the afternoon and starting time in the morning" in Section 4.2(B). The parties made a similar change in Section 4.2(C), removing the specific times during which overtime was worked, and replacing them with a reference to "the ten hour period prior to the morning starting time":

> B. Any employee who shall work eight (8) hours overtime between quitting time in the afternoon and starting time in the morning shall be paid at the rate of his basic hourly rate plus rest period pay during the next regular workday, providing he is required to work. If the employee is not required to report for work during such successive regular workday, he shall be credited with straight time for such day.
>
> C. **Time Off Between Shifts** - If an employee works four (4) or more hours during the ten hour period prior to the morning starting time, eight (8) hours shall elapse before he returns to work without loss of a regular scheduled workday's pay, provided he uses such periods of time only for rest and recuperation. If an employee is called back to work during the aforementioned eight (8) hours, he shall be paid at the rate of his basic hourly rate plus rest period pay for any and all time worked during the eight (8) hours.

There was no specific discussion at the bargaining table about whether Sunday work qualified for the rest period pay or straight time credit under Section 4.2(B).

Response to the Arbitrator's Inquiry

On August 24, 1998, the Arbitrator wrote to the parties, posing questions to the parties. The Cooperative responded on August 25th, and the Union responded on August 26th:

Question:

> 1. Mr. Michalke's argument suggests that Section 4.2(B) has been applied to Sunday evening work in the past. Mr. Glaim's argument suggests that it is not

clear how this provision has been applied in the past. Has this provision actually been applied to Sunday evening work in the past? Is there any instance in which it has not been applied to Sunday evening work?

Cooperative's Initial Response:

1. Sunday work is a very infrequent occurrence. The records are not clear on whether there is any consistent pattern of applying or not applying Section 4.2(B) to Sunday work. Some records show Sunday work without noting whether it was after quitting time. Some records show rest time the day after Sunday work, and some do not. In addition, there is some variation in the way these provisions are applied between the main office and the branch office. It may be that Section 4.2(B) has been applied in some cases.

On August 31, the Cooperative supplemented this response:

While the records are not conclusive as to whether Section 4.2(B) has been applied to Sunday work three supervisors were supervised about the application of Section 4.2(B) to a Sunday evening/Monday situation. The three supervisors are Joe Sobol, Steve Sylvester and Blake Douglas. They have between 15 and 26 years of experience with the Cooperative. None of them recalls an instance in which Section 4.2(B) was applied to Sunday evening work. The General Manager of the Cooperative likewise has no recollection of a specific instance in which 4.2(B) has been applied to Sunday work.

Union's Response:

1. The Steward advises the Union that Section 4.2(B) has been applied to Sunday work in the past.

Question:

2. Mr. Glaim's argument indicates that it is clear that Section 4.2(C) applies to Sunday evening work. Mr. Michalke's argument seems to say the same thing. Is there any part of this dispute that requires me to interpret or apply Section 4.2(C)? If so, what is the question about that provision?

Cooperative's Response:

2. There is no dispute over Section 4.2(C), and there is no need for the arbitrator to interpret or apply this provision of the contract.

Union's Response:

2. The Union agrees that there is no dispute over Section 4.2(C).

Question:

3. What exactly did the employes claim in the Spring of 1998? Did they take Monday off and request 8 hours of pay? If so, did they receive the pay, or does this case involve a request for a backpay remedy?

Cooperative's Response:

3. The employes took the day off on Monday and claimed rest pay. The Cooperative disagreed with their claim for rest pay, but paid the employes and reserved the right to have the disagreement resolved through this proceeding.

Union's Response:

3. The Union agrees with the Cooperative's version of events.

ARGUMENTS OF THE PARTIES

The Position of the Union

The Union takes the position that there had never been a difference between weekdays and Sundays in the past, and that Section 4.2(B) should continue to apply no matter when the hours are worked. The Union notes that the Cooperative never proposed any changes in the contract language on this point, even though it had ample opportunity to do so. If the Cooperative wants to change these sections of the contract, it should do so through negotiations, not through arbitration.

The Position of the Cooperative

The Cooperative takes the position that Section 4.2(B) is not used very often, and thus it isn't clear exactly how it applies to Sunday work. While Section 4.2(C) is clearly applicable to any work performed in the ten hours preceding the start of a normal work day, logic suggests that Section 4.2(B) should not apply to Sunday work. During the normal workweek, an employe works an eight hour regular shift. If he is then required to work eight more hours, for a total of sixteen hours of work, it stands to reason that he is going to be very tired and less safety-conscious the next day. However, if an employe works only eight hours on a Sunday, even

though those hours are after the normal 4:30 p.m. quitting time, there is no reason that he cannot report to work the next morning following a good night's sleep. Section 4.2(B) is aimed at a situation where an employe works an unusually long day, not a situation where an employe only puts in the normal eight hours.

DISCUSSION

The issue in this case is whether Section 4.2(B) of the contract applies to all situations in which an employe works eight or more hours after the normal quitting time, and then works or is scheduled to work his normal shift on the following day. The Union contends that it does. The Company contends that the provision only applies if the worker has worked a double shift, and does not apply if the eight hours after the normal quitting time are the only hours he puts in.

Section 4.2(B) reads:

> B. Any employee who shall work eight (8) hours overtime between quitting time in the afternoon and starting time in the morning shall be paid at the rate of his basic hourly rate plus rest period pay during the next regular workday, providing he is required to work. If the employee is not required to report for work during such successive regular workday, he shall be credited with straight time for such day.

On the face of it, in order to qualify for the benefit of this language, an employe must:

1. Work eight or more hours of overtime;

2. The hours must be worked after the normal quitting time and before the normal starting time.

Under this agreement, any hours worked "outside of regular scheduled hours" are considered overtime. (Section 4.2(A)). Thus the hours worked by these employes would qualify as overtime hours.

Prior to the 1997 contract, Section 4.2(B) began by defining the qualifying hours of work in terms of specific times: "Any employee who shall work eight (8) hours overtime between 4:30 P.M. and 8:00 A.M. shall be paid . . . " In the 1997 negotiations, the Cooperative proposed to eliminate these specific times and substitute a generic reference to quitting and starting times. The Union agreed, and the language was changed to: "Any employee who shall work eight (8) hours overtime between quitting time in the afternoon and starting time in the morning shall be paid . . . " The Cooperative concedes that this change was not intended to change the substance of the provision, and was simply a reflection of the fact that the normal starting and quitting

times varied during the year to accommodate daylight savings time. The hours worked by these employes were between the normal quitting time and the normal starting time. Thus on the surface they would qualify for the benefit under Section 4.2(B).

The Cooperative argues that the remainder of the language and simple logic both indicate that the qualifying hours must be worked in conjunction with a full normal shift. Specifically, the Cooperative notes that the premium pay is to be paid "during the next regular workday" if the employe works that day, or "If the employee is not required to report for work during such successive regular workday," he receives his regular pay for the day off. The underlined references, in the Cooperative's view, show a clear intent that the language would only apply to work performed after one regular workday and before another. This argument is not persuasive for two reasons. First, the cited language relates to when the benefit is payable, not to when it is earned. It is reasonable to provide the benefit on the next regularly scheduled workday, since if an employe is being required to work for eight hours outside of the regular workday it is presumably being done on an urgent basis and is already being paid at premium rates. Making the benefit available on the next day, without regard to whether it is a regular workday, might unduly complicate the provision of emergency services if employes were needed for two consecutive non-work days. Thus the fact that the benefit is payable on the next regular workday does not mean that it can only be earned on a regular workday. The second problem with the argument that this language applies only to night work following a regularly scheduled shift is that the Cooperative essentially concedes that the benefit would be payable for overtime work on non-regular workdays, if the employe first works eight hours between 8:00 a.m. and 4:00 p.m. and then works eight or more overtime hours after that.

The Cooperative's argument that logic limits the benefits of Section 4.2(B) to hours worked in conjunction with a regular shift depends upon certain assumptions. The primary assumption is that Section 4.2(B) is intended to insure that employes are not overtired on the day following a night of work. In fact, this appears to more properly be the objective of Section 4.2(C), which guarantees eight hours of rest and recuperation time for employes who work late hours. Under either party's interpretation, Section 4.2(B) does nothing to insure that employes get a certain amount of rest. If the employe works until 2:00 a.m., he may still be required to report to work at 8:00 a.m., so far as Section 4.2(B) is concerned. All that Section 4.2(B) does is compensate employes for working a night shift, either by awarding them premium pay for the next work day or paid time off, at the Cooperative's option.

The Cooperative's interpretation of Section 4.2(B) is rational, but it is not supported by the language used in the contract. The employes at issue here worked eight overtime hours between the normal quitting time and the normal starting time. That is all that is required to qualify for either premium pay or paid time off on the next regularly scheduled workday under the plain language of the contract. Accordingly I conclude that the Union's interpretation is correct.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

Employes who work eight or more hours after 4:00 p.m. on Sunday are entitled to eight hours of sleep/rest time on the following day, under Article 4, Section 4.2(B) of the collective bargaining agreement.

Dated at Racine, Wisconsin, this 2nd day of September, 1998.

Daniel Nielsen, Arbitrator

DN/ig
5731.doc