BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1

and

GREATER MILWAUKEE METROPOLITAN AREA CONTRACTORS, ABM JANITORIAL SERVICES, INC.

Case 1
No. 66313
A-6247

Appearances:

Matthew R. Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212 for Service Employees International Union, Local 1, which is referred to below as the Union.

James R. Scott, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin 53202, for Greater Milwaukee Metropolitan Area Contractors, ABM Janitorial Services, Inc., which is referred to below as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the Employer agreed that the Wisconsin Employment Relations Commission an arbitrator to resolve a grievance concerning a pay rate affecting certain janitorial staff at the 411 East building. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on February 13, 2007, in Milwaukee, Wisconsin. No transcript was made of the hearing, and the parties filed briefs by March 19, 2007.

ISSUES

The parties were not able to stipulate the issues for decision. The Union states the issues thus:

Did the Employer violate the collective bargaining agreement by reducing the affected employees' wage rate by twenty-five cents per hour?

If so, what is the appropriate remedy?

The Employer states the issue thus:

Did the Employer violate the collective bargaining agreement when, on August 1, 2006, they took away a twenty-five cent per hour bonus provided to employees who:

A) worked on floors occupied by the Quarles & Brady law firm, and
B) formerly worked on floors occupied by the Quarles & Brady law firm?

I adopt the Union's statement of the issues as that appropriate to this record.

RELEVANT CONTRACT PROVISIONS

ARTICLE 8 – GRIEVANCE PROCEDURE

. . .

6) . . . The arbitrator shall not have the authority to add to, subtract from or alter the provisions of this Agreement. . . .

ARTICLE 21 – WAGES

. . .

SECTION 21.2 – WAGE RATES:

1. Effective August 1, 2006, each employee hired before that date shall receive a wage increase of $.40 cents per hour, or the cleaner wage rate of $9.85 per hour, whichever results in the greater wage increase.

   Effective August 1, 2006, each employee hired after that date shall receive an hourly wage rate of $9.00 for the first twelve (12) months of continuous employment. After twelve (12) of continuous service, that employee will move to the full contract rate, as specified above. . . .

4. Employees who, as of the above effective dates, were receiving pay rates in excess of those provided by the previous agreement between the parties or this Agreement shall be entitled to receive the full amount of the hourly increases included in the above rates.

. . .

ARTICLE 24 – PAST PRACTICE

Although this Agreement states essential provisions covering wages, hours and working conditions applicable to all covered employees and buildings (Employers), it does not state each privilege, rule of the shop or working condition which employees in a particular building (employer) have enjoyed under the prior agreement or the particular working conditions actually in effect in each such building (employer). The current Employer shall not use this Agreement as a reason for reducing or eliminating a beneficial working condition, rule of the shop of privilege.

However, the Employer has the right to request to remove any past practice, as the business need arises. This will apply only within the first year after a building changes contractors or when the past practice is a result of building owner action. The Employer must consult the Union prior to implementing any change. The Union will not unreasonably withhold consent to eliminate a past practice, provided the Employer can demonstrate a significant business need.

BACKGROUND

Dave Somerscales, the Union's Business Representative, filed the grievance in a letter dated August 14, 2006 (references to dates are to 2006, unless otherwise noted) to Cheryl Berry, the Employer's General Manager. The letter notes, "We are aware of the fact that ABM has cut .25 per hour of pay from numerous cleaners at 411 East" and asserts the action constitutes a violation of Section 21.2, Subsection 4. The letter seeks ".25 in pay as well as to back pay all effected cleaners for the lost .25 per hour."

Berry responded in a letter dated August 16, which states:

As we discussed earlier, ABM is not cutting $.25 per hour from cleaners at 411 East Wisconsin Center which they were given on merit, for doing a specific job; however, the cleaners involved are no longer entitled to $.25 per hour since some cleaners no longer clean the floors associated with the pay increase and the tenant no longer pays for the increase.

I will quote the document that several cleaners signed and as they stated to us are very aware of:

> "The Q&B floor cleaners will receive a raise, which does not apply to that person but it is the pay rate for the floor itself. If that person leaves the floor they will go back to their original pay rate, and who ever takes over those floors will receive that pay rate."
>
> As stated above, this extra money was being paid by Q&B and now they no longer pay or are willing to pay the extra money. ABM has kept the cleaners involved at this wage even though most of them are no longer and have not, for years, cleaned these floors.
>
> All the cleaners involved knew of these arrangements and should consider themselves fortunate to have been paid an extra $.25 for years which they were not suppose to be receiving. For some, this was a few thousand dollars, which technically they were not entitled to.
>
> Therefore, Section 21.2 does not apply to this situation, because we did give them the full raise; however, we no longer can give these cleaners the $.25 increase which was only for certain floors that they are no longer cleaning and the tenant is no longer willing to pay for.
>
> ABM along with building management is standing our ground and the cleaners involved will not receive the additional money as requested.
>
> I apologize for the inconvenience of this situation; however, we strongly feel that all affected cleaners know this is just and honest. . . .

In a response to Berry dated August 18, Somerscales questioned the existence of the document cited in the third paragraph of her response, but affirmed the Union's stance without regard to the document. Berry responded in a letter to Somerscales dated September 12, in which she noted the Employer's position "remains the same and the affected cleaners will not receive the $.25 an hour that they are not entitled to." She added,

> We are prepared to go to the next step in the grievance process which is an arbitration hearing. In fact our position in the hearing will not only be that all the affected cleaners not receive the additional $.25 an hour, ABM along with building management will request that all affected cleaners pay back the additional money that they have already received and were never entitled to. . .

Berry included in the letter a form signed by one cleaner and a payroll document, noting that "on both of these forms this increase was paid as an incentive to clean the Q & B floors and was never associated with the individual but rather the floor."

The Employer maintains a number of buildings in downtown Milwaukee. The Employer took over the maintenance for 411 East, after it bought out Lakeside Building Maintenance in 2002. The twenty-five cent add-on questioned in the grievance originated with Lakeside, and

focuses on the floors occupied by the Quarles & Brady law firm. From at least July of 1999 until August certain employees who cleaned the floors occupied by Quarles & Brady received a twenty-five cent per hour add on, referred to below as the Add-on, for that work. In May of 2006, ownership of 411 East changed. As of the change in ownership, the Employer billed work at 411 East on a "cost plus" basis by which it passed on the wage costs of each of the employees working at 411 East. The new owner looked into all of its costs, and at some point in this process, Quarles & Brady declined to fund the Add-on.

When Berry learned that the Add-on was not going to be paid by Quarles & Brady, she contacted Somerscales and then directed John Baltz, the Employer's Project Manager, to inform employees that they would no longer receive it. On or about July 26, Baltz and another Project Manager met with employees. The Employer's receptionist attended the meeting as a translator. Baltz informed employees that they would not receive the Add-on starting with the next payroll period. Somerscales did not attend this meeting. The Employer ceased paying the Add-on, prompting the grievance noted above.

As of the date of the arbitration hearing, five employees worked the floors occupied by Quarles & Brady. Three did so full-time and two part-time. Prior to August, each of those employees received the Add-on for their entire shift, without regard to whether they worked the entire shift on floors occupied by Quarles & Brady. Six other employees received the Add-on until August. Each of these employees had once worked those floors, but continued to receive the Add-on after ceasing to do so.

The "document" referred to in the third paragraph of Berry's August 16 letter is dated July 12, 1999, and states:

> To: Whom it May Concern
> RE: Q&B floor Cleaners
>
> The Q&B floor Cleaners will receive a raise, which does not apply to that person but it is the pay rate for the floor itself. If that person leaves the floor they will go back to their original pay rate, and who ever takes over those floors will receive that pay rate.

The document states "Rosa N. Rios" on the "Signature" line.

The Employer produced two Payroll Change Notice forms, one from May of 2005 (for Ricardo Rios) and one from August of 2005 (for Esperanza Ramirez). Each form lists an effective date of a payroll change by which the employee would no longer receive the Add-on after leaving the Quarles & Brady floors. Five of the six employees who continued to receive the Add-on after leaving the Quarles & Brady floors have a Payroll Change Notice form to document that they first received it when they started work on those floors. Four of the five employees who receive the Add-on while working the Quarles & Brady Floors in July have a Payroll Change Notice form to document that they received it for work on those floors.

It is undisputed that the second paragraph of Article 24 was created in the bargaining for a 2006-09 labor agreement. The Background set forth to this point is essentially undisputed and the balance of the background is best set forth as an overview of witness testimony.

Juana Ruiz

Ruiz has cleaned at 411 East for almost nine years. She did not work the Quarles & Brady floors until December 1, 2000, when she started to receive the Add-on. She received the Add-on until August, receiving it for all hours that she worked, whether or not on a Quarles & Brady floor. She estimated she spent roughly one-half of her shift working Quarles & Brady floors. She could not recall if she signed a document similar to that signed by Rosa Rios. She served on the Union's negotiating team. The Employer proposed no change to Section 21.4 during the most recent round of bargaining.

Ruiz is a Union Steward and attended the meeting at which Baltz noted the termination of the Add-on. Employees asked Baltz to justify the termination and Baltz responded that Quarles & Brady were not willing to pay it. She denied indicating to Baltz that the termination would be appropriate if it applied to all. Ruiz knows Rios and knew Rios does not read English.

Patricia Castro

Castro has worked nine years at 411 East. She stopped working the Quarles & Brady floors sometime in 2004. She continued to receive the Add-on until August.

Dave Somerscales

Somerscales served on the Union's negotiating team for the most recent labor agreement. The second paragraph of Article 24 first came into existence during that bargaining, "most likely" as a result of an Employer proposal.

Berry phoned him on July 26 to advise him of the termination of the Add-on due to the refusal of Quarles & Brady to continue funding it. Somerscales denied telling Berry the action was appropriate. Rather, he noted she should, "do what you have to do." He was unaware of any Union employee being denied the Add-on prior to August.

Cheryl Berry

Berry did not work for Lakeside, becoming the Employer's General Manager in August of 2005. The Employer bought out Lakeside in 2002, but Lakeside continued to manage certain properties until 2005. Prior to 2005, she served the Employer as an Operations Manager and as a Project Manager. The Employer is paid by the owner or property manager of a building the Employer has successfully bid to maintain. Triple Net Properties became the owner of 411 East in May and scrutinized Lakeside's cost plus arrangement on 411 East. The bulk of the buildings the Employer maintains are billed as a fixed fee.

In her opinion, the Add-on was a bonus paid by an "anchor tenant" of 411 East. The work performed for that tenant was not distinguishable from work performed for any other tenant. The Employer has not been consistent in its administration or documentation of the Add-on. The document signed by Rios is the only one of its type in the Employer's possession. She phoned Somerscales on July 26 to give him a "heads up" regarding the termination of the Add-on. Somerscales responded by asking a few questions regarding who received the Add-on, concluding that it "seems fair" to terminate the Add-on if it applied to all employees. After the meeting conducted by Baltz to advise employees of the termination of the Add-on, Berry was surprised to receive a grievance. She phoned Somerscales to find out what had happened, and Somerscales responded that if he did not file a grievance, he could not show his face in 411 East and would be better off to quit.

Berry did not know when Quarles & Brady first declined to pay for the Add-on. She served on the Employer's negotiating team and acknowledged that the Employer did not make a proposal to modify Section 21.2, Subsection 4 or to eliminate the Add-on.

John Baltz

Baltz has served as a Project Manager for 411 East since August of 2001. He became an Operations Manager in 2005, and worked for Lakeside prior to his employment with the Employer. On or about July 26, he met with 411 East cleaning employees to advise them of the termination of the Add-on. He stated that the termination reflected the unwillingness of Quarles & Brady to continue funding it. Baltz brought the document signed by Rios to the meeting to clarify why the Employer had to remove the Add-on. Rios noted that she remembered signing the document after he showed it to her. A number of employees acknowledged that they understood the Add-on was a rate for the Quarles & Brady floors. Baltz did not know when Quarles & Brady ceased funding the Add-on.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Brief

The Union contends that the grievance is governed by the clear and unambiguous language of Section 21.2, Subsection from the multi-employer agreement including the Employer. The Employer's attempt to apply that provision "only . . . where an employee is performing some special service" has no basis in the governing language. It is not even consistent with the assertion that the premium is limited to work in the Quarles & Brady offices. There is no evidence such work was ever a "special service" or work in any sense distinguishable from standard janitorial work. The governing language "does not distinguish the reason why employees received more than the contractual wage rate." Rather, it demands that the rate be continued, with negotiated increases added on. Any other conclusion runs afoul of Section 8.1, Subsection 6, by demanding that the language be altered.

The Employer "presented no evidence of past practice contrary to the clear and unambiguous contact language". In fact, evidence of past practice supports the Union, by demonstrating that employees kept the premium after "they no longer worked on the Quarles & Brady floors." Only one instance contradicts this. That instance was of "short duration" and the affected employee did not complain to the Union. That the unit is largely immigrant and not English-speaking underscores the weakness of this evidence as an indication of a practice.

Contrary to the Employer's assertion, employees did not know that the premium was traceable to work on the Quarles & Brady floors. Ruiz' and Castro's testimony contradicts this. Evidence of signed acknowledgements of this point reflects individual bargaining at most. Nor can the provisions of Article 24 be brought to bear on this point. They generally govern past practice, and must yield to the specific provisions of Section 21.2, Subsection 4. Even if Article 24 is considered applicable, it is not on point, since the Union does not assert the premium rests on past practice. Rather, the premium rests on Section 21.2, Subsection 4.

Witness credibility issues need not be addressed. If, however, they are, it is evident that Somerscales did not acquiesce to the Employer's view of the premium. At best, he acknowledged that the Employer should "do what you gotta do". This may acknowledge a "fait accompli", but affords no basis for the Employer's reliance on Union acceptance of the elimination of the premium pay. At its root, the Employer's "decision to violate the contract is based upon its desire to maintain its profit margin". However, this is basis upon which to interpret a labor agreement, and the Union should be given the benefit of its bargain. The appropriate remedy is to sustain the grievance "and order the Company to make whole all affected employees."

The Employer's Brief

After a review of the evidence, the Employer contends that the grievance cannot be made into a simple matter of applying Section 21.2, Subsections 1 and 4. The term "pay rate", in the Employer's view, "does not include gratuities provided to employees generally and particularly for those employees who no longer fulfilled the condition precedent to receiving the gratuity, i.e. cleaning a floor occupied by the Quarles & Brady law firm." The agreement does not provide for the twenty-five cent per hour premium and the work covered is no different from any other work at the 411 East building. The premium is traceable only Quarles & Brady and "effective in the summer of 2006" the law firm "was no longer willing to pay such a bonus nor was the new owner of the building willing to continue the practice."

The evidence establishes that, prior to August 1, 2006, the Employer had three groups of employees: one included those cleaning the Quarles & Brady floors; one included those who had, at some point in the past, cleaned the Quarles & Brady floors; and one who never cleaned the Quarles & Brady floors. The first group received the add-on; some in the second group received the add-on and none of the third group received it. All of the employees performed the same work.

Had the Employer simply deleted the add-on prior to August 1, 2006, the Union's "argument would evaporate." This highlights the weakness of the Union's view of the contract, which is that "one's compensation can never go down." If, however, bonus compensation can never be lost, then there will be no bonus compensation.

At best, the Union's grievance argues that the add-on "was an established past practice which could not be unilaterally eliminated." By complying with Article 24, however, the Employer eliminated that as a basis for the grievance. The second paragraph of Article 24 "permits an employer to disavow past practices which occur as a result of building owner action." Here, the Employer put the Union on notice of the need to eliminate the practice. The Union acquiesced, but even if it did not, the Employer demonstrated the need for its action. When Quarles & Brady declined to fund the add-on, the negotiated 4.25% wage increase ballooned to a 10.6% wage increase, and "a significantly larger pay increase for ABM employees is a hardship."

Whether or not the Union acquiesced, it is contractually bound to assist in the elimination of the type of past practice posed here. Since the parties never agreed to "teat the 'add-on' as part of compensation in perpetuity", the grievance must be denied.

DISCUSSION

I have adopted the Union's statement of the issues. Each party's reflects that the grievance questions more than one contract provision. The Employer's makes the asserted practice appear more systematic than the evidence supports, and fails to acknowledge potential remedial issues. The difference between the statements is not, however, large.

The parties agree that the interpretive issue pits Section 21.2, Subsection 4 against the second paragraph of Article 24. Crucial to grievance's resolution is whether the language of Section 21.2, Subsection 4 is so clear that recourse to practice under Article 24 is inappropriate.

Grievance responses highlight that the parties agree that Section 21.2, Subsection 4 can make the Add-on an enforceable pay rate. The Employer's position is that the Add-on, while funded, was factored into the pay rates generated under Subsection 1, but cannot be considered among the "pay rates" made by Section 21.2, Subsection 4 a permanent part of an employee's hourly rate. Rather, the Add-on is a bonus without a contract basis, which must be addressed as a practice governed by the second paragraph of Article 24.

Each party's position is plausible, thus making the relationship of Articles 21 and 24 ambiguous. Definition of the contractual basis of the Add-on is troublesome. At least two employees ceased receiving the Add-on when they left the Quarles & Brady floors. No employee received it until they began work on those floors. There is no basis to distinguish work on those floors from other cleaning work at 411 East. These factors support the conclusion that the Add-on is not an individual employee pay rate, but a floor rate based on "building owner action" under the second paragraph of Article 24, which is traceable to the cost-plus billing ultimately traceable to Lakeside's arrangement with the prior building owner.

No less substantial evidence supports the Union assertion of an enforceable pay rate. At least six employees continued to receive the rate after leaving the Quarles & Brady floors. Full and part-time employees received the rate for an entire shift, even if they did not spend the entire shift working Quarles & Brady floors. Even though the document signed by Rios does not bind the Union, who is the party to the collective bargaining agreement enforceable through arbitration, it underscores the strength of the Union's position. While it documents a "pay rate for the floor itself", the reference to "pay rate" uses the terms of Section 21.2, Subsection 4, not those of the second paragraph of Article 24.

On balance, however, the evidence points to the persuasiveness of the Employer's position. The Union's reading of Section 21.2, Subsection 4 affords no basis to distinguish between a pay rate and a mistake. More specifically, the Union's view affords no basis to distinguish between the pay rates received by the eleven past and present cleaners from the Quarles & Brady floors and the two who had that rate removed upon leaving those floors. Nor can it account for why the Employer would document the start of work on the Quarles & Brady floors. The Union forcefully questions the lack of certainty regarding when Quarles & Brady ceased funding the Add-on, but this cannot obscure that the only link in the evidence between those who received the rate and those who did not is the presence of work on the Quarles & Brady floors. The employer's inconsistency in documenting and in administering the Add-on cannot obscure that the evidence shows it to be a type of premium or project rate, rather than a fixed rate linked to the work of an individual employee. The Employer's care in documenting the start of the rate was not matched by its care in documenting its end. Section 21.2, Subsection 4 speaks to the wage rate calculated for an individual employee, by which negotiated across the board increases were added to individual rates preceding them. The second paragraph of Article 24 speaks to past practice traceable to "building owner action." Lakeside, the Employer and the prior building owner served as a conduit for the Add-on as long as Quarles & Brady funded it. The Add-on fits better within that provision than within Article 21.

This does not, however, resolve the interpretive dispute. The second paragraph does not grant the Employer the unfettered right to terminate a practice. Rather, it grants the Employer "the right to request to remove any past practice". The paragraph applies if "the past practice is the result of building owner action" and demands that the Employer "must consult the Union prior to implementing any change." The paragraph envisions some type of meaningful exchange, since it mandates that the "Union will not unreasonably withhold consent" and that "the Employer . . . demonstrate a significant business need" to "eliminate a past practice."

Application of these requirements to the evidence is troubling. Berry contacted Somerscales on July 26, and understood him to be agreeable to the termination of the practice, if it applied to all employees. Somerscales denied such an agreement. The evidence does not, however, pose a credibility determination. Berry credibly related her understanding of their phone conversation. Even if it is assumed Somerscales agreed to that view, this side steps the fundamental issue posed by the grievance, which is whether Article 24 or Article 21 governs the Add-on. The evidence does not, in any event, offer a reliable basis to conclude Somerscales agreed that the Add-on was no more than a practice. At most, the testimony points to an agreement to disagree.

This disagreement points to the difficulty of applying Article 24 to the grievance. Berry's conversation with Somerscales establishes her view of the "business need" justifying the request, which was the Employer's unwillingness to absorb the cost of the Add-on after Quarles & Brady declined to fund it. However, the final sentence demands the Employer "demonstrate a significant business need" to justify elimination of a practice. As the Union points out, the desire to cut costs, if taken as "a significant business need" undermines the validity of the labor agreement's establishment of pay rates under Article 21. Here, the prior owner of 411 East accepted the pass-through of the Add-on through cost-plus billing that was less than rigorously documented. The action of Triple Net Properties, after acquiring the building, led to scrutiny of the pay rate and the questioning of the source of the payment. Somerscales' testimony underscores that neither the Union nor the Employer understood how the Add-on had come to be administered. The rate thus rests in a sense on practice and in a sense on inadvertence.

The interpretive difficulty regarding the second paragraph of Article 24 is that the evidence falls short of establishing that the July 26 conversation represents the sort of meaningful exchange the agreement points to. The parties' dispute was not clarified until the processing of the grievance. The lack of clarity on when and how Quarles & Brady ceased funding the Add-on manifests the absence of discussion. As noted above, the Union's insistence that Article 21 guaranteed payment of the Add-on as part of an hourly rate affords no basis to distinguish between those employees who actually worked the floors and those who either never did so or did so at some time in the past. This makes Union unwillingness to consider the impact of Article 24 unpersuasive.

No more persuasive, however, is Employer insistence that it had only to note the absence of Quarles & Brady funding to establish a "significant business need" warranting elimination of the practice. This view equates the work of employees actively cleaning the floors with those who never did or did so only in the past. Whatever persuasiveness this has as a business proposition comes with considerable contractual risk. The document signed by Rios describes the Add-on as "the pay rate for the floor itself." The document does not link that pay rate to Quarles & Brady funding. The document may not be enforceable through arbitration, but the labor agreement is, and it states no link between the Quarles & Brady funding and the Add-on.

The significance of past practice to the enforcement of a labor agreement should not be understated, see for example, Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements" from *Arbitration and Public Policy*, (BNA, 1961). Arbitrators often demand that practices which establish benefits not covered by contract language be continued until the expiration of the labor agreement, see, for example, Bornstein, Gosline & Greenbaum *Labor and Employment Arbitration* at Sec. 10.03(2), (Matthew Bender, 2006); and Elkouri & Elkouri, *How Arbitration Works* at Sec. 12.6 (BNA, 2003), It would not be unreasonable for the Union to assert that point, and the Employer's equation of employees who actually work the Quarles & Brady floors with those who do not is something less than the establishment of the "significant business need" demanded by Article 24.

The parties' assertion of extreme positions complicates the application of the second paragraph of Article 24. That said, the language must be given meaning. I am satisfied that Berry's call of July 26, coupled with her good faith conclusion that Somerscales had agreed to eliminate the

practice, satisfied the requirement of Article 24 that she consult the Union. I am also satisfied that those employees who did not work the Quarles & Brady floors but continued to receive the Add-on can make no reasonable claim to it other than Employer inadvertence in administering it. Against this background, the cessation of Quarles & Brady funding is a significant business need warranting the elimination of the practice. Regarding those employees who actually worked the floor, however, the mere citation of a funding issue falls short of establishing a "significant business need." To accept the Employer's position on this point risks undercutting the labor agreement and the past practices it recognizes under Article 24. The Employer cannot, however, be held solely responsible for the absence of communication contemplated by Article 24. The Union's view unreasonably faced the Employer with the prospect of continuing the Add-on for employees who had no defensible claim to it. While the Union could have reasonably sought to continue the benefit for those who worked the floors for the duration of the agreement, it chose not to.

Against this background, the Award entered below continues the practice through the date of this decision for those employees who worked the floors after August. This reflects that the discussions contemplated by Article 24 took place through the processing of the grievance. The evidence established at hearing is sufficient to establish that the Employer never agreed to assume the cost of the Add-on and to establish that "building owner action" prompted the removal of the less than rigorous cost-plus billing and its pass-through of the Quarles & Brady funding of the Add-on. This, coupled with the Union's insistence on continuation of the Add-on as a pay rate under Article 21 to anyone who ever received it, makes it unreasonable to continue the practice to the end of the labor agreement and meets the "significant business need" requirement. Because this conclusion rests on this decision rather than on the parties' direct discussions, the Award continues the practice to the date of this decision for those employees who worked the Quarles & Brady floors. This conclusion should operate to encourage the discussion called for by Article 24 through direct discussion rather than the arbitration process.

In sum, the Add-on represents a past practice amenable to elimination under the terms of Article 24 rather than a pay rate enforceable through Article 21.2, Subsection 4. Because employees who did not, as of August, work the Quarles & Brady floors have no defensible claim to the Add-on, the Employer's termination of the practice in August did not violate the second paragraph of Article 24. As to those employees who actually work the Quarles & Brady floors, however, the Employer did not, as required by Article 24, demonstrate a "significant business need" to eliminate the practice until the completion of the arbitration process. The Union's reading of Article 21.2, Subsection 4 unpersuasively links the Add-on to any employee who ever worked the Quarles & Brady floors as well as those who work those floors, presuming that payment of the Add-on indiscriminately applies to all. The Employer's reading of Article 24 unpersuasively links all employees who ever worked those floors to those who currently work them, presuming that the termination of the Add-on indiscriminately applies to all. The Award entered below reflects the failure of direct discussions to demonstrate the "significant business need" required to eliminate a practice until the completion of the arbitration process.

AWARD

The Employer violated the collective bargaining agreement by reducing the affected employees' wage rate by twenty-five cents per hour.

The "affected employees" are those employees who actually worked the Quarles & Brady floors for the period of time from the Employer's termination of the Add-on in August until the date of this Award. To remedy its violation of the second paragraph of Article 24, the Employer shall pay the affected employees the difference between the wages the affected employees received between August and the date of this Award and the wages they would have received but for the Employer's elimination of the Add-on in August. The Employer's termination of the Add-on in August regarding those employees who did not actually work the Quarles & Brady floors between August and the date of this Award does not constitute a violation of Article 21 or Article 24. As of the date of this Award, the past practice supporting the Add-on is removed under the second paragraph of Article 24.

Dated at Madison, Wisconsin, this 6th day of June, 2007.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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