

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WISCONSIN CENTER DISTRICT**

and

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1**

Case 14  
No. 66971  
MA-13700

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**Appearances:**

**Robert W. Mulcahy**, Michael Best & Friedrich LLP, 100 East Wisconsin Avenue, Milwaukee, Wisconsin, 53202-4108, appeared on behalf of the Wisconsin Center District.

**Andrea F. Hoeschen**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin, 53212, appeared on behalf of Service Employees International Union, Local 1.

**ARBITRATION AWARD**

The Wisconsin Center District (“WCD”) and the Service Employees International Union, Local 1 (“Local 1”) are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. WCD and Local 1 requested that the Wisconsin Employment Relations Commission designate a commissioner or staff member to serve as arbitrator of a grievance alleging that WCD is violating the collective bargaining agreement between WCD and Local 1, by refusing to provide certain benefits to three WCD employees. The undersigned was so designated. A hearing was held on Wednesday, September 5, 2007, and Wednesday, September 19, 2007, in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. A stenographic transcript of the proceeding was made. Thereafter, WCD and Local 1 each submitted an initial post-hearing brief and each waived the right to file a reply brief, at which time the record was closed.

Now, having considered the record as a whole, the Arbitrator makes and issues the following award.

### **ISSUE**

The parties agreed to allow the undersigned to frame the issue based on the evidence and arguments presented. Local 1 proposed that the issue be stated as follows:

Is the employer violating the contract by applying the new benefit plan to full-time employees who were part-time before January 1, 2005? If so, what is the appropriate remedy?

WCD proposed the following statement of the issue:

1. Was the grievance timely filed on this issue?
2. Did the employer violate the contract when it granted Grievants Aaron Henning, Rosa Carrasco, and Corey Brumfield Level 2 insurance benefits when they were hired as full-time employees? If so, what is the remedy?

The undersigned adopts the following statement of the issue:

Was the grievance pursued in a timely fashion?

Does the provision of Group 2 benefits to Grievants Aaron Henning, Rosa Carrasco, and Corey Brumfield, who were part-time WCD employees and members of the bargaining unit before January 1, 2005, and became full-time WCD employees after January 1, 2005, violate the collective bargaining agreement? If so, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

#### **Article 3** **Grievance and Arbitration**

**Section 1.** In case any dispute or misunderstanding arises over the interpretations or application of a specific contract Article and/or Section which cannot be adjusted by conciliation between the two parties to this Agreement, then the same shall be reduced to writing and submitted to the Director of Event Services. All written grievances must be filed within fourteen (14) calendar days of the incident/dispute or knowledge thereof. The Director of Event Services shall respond, in writing, to the grievance within fourteen (14) calendar days. If the grievance is not resolved at this step, it shall be submitted within fourteen (14) calendar days of the written response from the Director of Event Services to the President/CEO who will respond in writing to the grievance within fourteen (14) calendar days. If the parties cannot arrive at an amicable

adjustment after receipt of the President/CEO's response, the parties shall submit said grievance to arbitration within fourteen (14) calendar days of said response through the Wisconsin Employment Relation Commission (WERC). An arbitrator shall be appointed by and from its staff. The Union and the Employer shall equally share the cost of the filing fee to the WERC.

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**Article 6**  
**Part-time Employees**

**Section 1.** Any employee hired as a part time employee shall not be eligible for the following benefits:

1. Hours of Work, Article 5 (with the exception of Article 5, Section 9)
2. Holidays, Article 8
3. Vacations, Article 9
4. Sick Leave, Funeral Leave and Severance pay, Article 10
5. Health and Welfare, Article 13 (with the exception of Article 13, Section 5 – Pension)
6. Full-time Wages, Article 11
7. Jury Duty, Article 15

**Section 2.** Any employee hired as a part-time shall be eligible for the following benefits:

1. Worker's Compensation
2. Salary Increments
3. Overtime – time and one half for all hours worked over eight (8) hours only.
4. Call in pay (Emergency call-in) shall consist of a four (4) hour minimum.
5. The work week shall begin at 6:00 a.m. on Sunday.
6. Hours of Work, Article V, Section 9
7. All work performed on New Years Day, Martin Luther King Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day, as designated by WCD, shall be paid for at the rate of time and one-half.
8. Pension, eligibility as determined by the plan documents, Master Agreement – Article 13, Health and Welfare, Section 5, Pension
9. Flextime, Article 18
10. Seniority for Lay-Off, Article 7 – Seniority for part-timers shall be based upon their original date of hire unless there has been a break in employment.

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**Article 8 – Holidays (13)**

**For Employees hired after 1/1/05, See Appendix A**

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**Article 9**  
**Vacations**

**For Employees hired after 1/1/05, See Appendix A for Benefit Package**

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**Article 10**

**Sick Leave, Funeral Leave, and Severance Pay**

**For Employees hired after 1/1/05, See Appendix A for Benefit Package**

...

**Article 13**

**Health and Welfare**

**For Employees hired after 1/1/05, See Appendix A for Benefit Package**

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**Appendix A**

<b>Benefit</b>	<b>Employees hired after January 1, 2005. (This does not include part-time to full-time employees that were on payroll prior to 1/1/05)</b>
<b>Deferred compensation</b>	<b>Available to all. Employee payroll deduction.</b>
<b>Dental insurance</b>	<b>Full time employees only. Employee copay per month of \$10 single plan, \$20 family plan plus difference above lowest plan rate and plan chosen if other than lowest plan rate. Per month.</b>

<b>Health insurance</b>	<b>Full time employees only. Employee copay per month, \$50 single plan, \$100 family plan plus difference above lowest plan rate and plan chosen if other than lowest plan rate. Per month.</b>
<b>Holiday pay</b>	<b>Full time employees only. 10 designated annually. Part-time limited.</b>
<b>Holiday pay — floating</b>	<b>0</b>
<b>Life insurance</b>	<b>Full time employees only. first \$15,000 coverage free to employee, \$.21 per thousand over \$15,000 co-pay by emp.</b>
<b>Parking</b>	
<b>Full time employee (ONLY)</b>	<b>On WCD property as available and designated.</b>
<b>Pension</b>	<b>Available to all per pension rules.</b>
<b>Employee hired on or after 1/1/200</b>	<b>Employee pays 1.6% for first 78 biweekly pay periods.</b>
<b>Sick leave pay</b>	<b>Full time employees only. Earn 8 hours a month and accumulate up to 336 hours maximum.</b>
<b>Sick leave incentive</b>	<b>not available</b>
<b>Termination pay — based on sick leave accumulation</b>	<b>not available</b>
<b>Vacation pay</b>	<b>FULL TIME EMPLOYEES ONLY. 10 DAYS AFTER ONE (1) YEAR; 15 DAYS AFTER SEVEN (7) YEARS.</b>

### **BACKGROUND**

WCD is a block of convention and entertainment facilities, in downtown Milwaukee, comprised of the Midwest Airlines Center, the U.S. Cellular Arena, and the Milwaukee Theatre. Local 1 is the collective bargaining representative of part-time and full-time cleaning and maintenance employees of WCD.

When WCD and Local 1 began negotiations for their 2004-2008 collective bargaining agreement (hereafter “Agreement”), WCD representatives indicated to Local 1's bargaining team that operating costs needed to be reduced. WCD tax revenues had been down in 2003 and continued to be down in 2004, at the point when WCD and Local 1 commenced bargaining. A number of administrative positions at WCD remained unfilled, and the benefit package for the administrative staff had been reduced. In an effort to meet its cost reduction objective, WCD proposed, during negotiations, an increase in the employee contribution to health insurance premiums for full-time employees. This proposal was rejected by Local 1. WCD likewise rejected Local 1's proposal to extend full-time benefits to part-time employees.<sup>1</sup>

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<sup>1</sup> Part-time WCD employees had been and would continue to be provided a separate benefit package that was much more limited than that available to full-time WCD employees.

Ultimately, WCD and Local 1 agreed to a change in the benefit package available to full-time WCD employees. Pursuant to the Agreement, full-time WCD employees hired prior to January 1, 2005, were grandfathered into the old benefit package that had been available to them leading up to the 2004-2008 Agreement. Those benefits were set forth in various articles in the main body of the Agreement. Full-time employees hired after January 1, 2005, on the other hand, would be provided a newly-fashioned, less generous "Group 2" benefit package. The Group 2 benefits were set forth in a single page document entitled "Appendix A", which was appended to the 2004-2008 Agreement.

In conjunction with the agreement to implement Group 2 benefits, WCD and Local 1 also agreed that WCD would be responsible for informing new full-time hires that they would be receiving less generous benefits than their more senior counterparts. Local 1's business agent and lead negotiator Dan Iverson did not want to receive phone calls from angry bargaining unit members who were surprised to learn that their benefits were more restricted than veteran full-time employees. WCD's Director of Human Resources and lead negotiator Don Sleaper agreed that he would explain the two-tiered benefit structure at such time as offers of employment were being presented.

Once negotiations for the Agreement had concluded, Local 1 undertook the task of typing into the Agreement the changes to which WCD and Local 1 had agreed. Local 1 then sent a proposed draft of the Agreement to Donald Sleaper, who made hand-written edits to the document and returned it to Local 1 for further editing. The two drafts of the Agreement exchanged between WCD and Local 1, in June and August of 2004, included Appendix A. In those drafts of Appendix A, across from "benefit" in the top row, the document indicated the following, regarding which employees would be subject to Group 2 benefits:

**Employees hired after January 1, 2005.**

WCD and Local 1 representatives then signed the Agreement on September 3, 2004. On September 15, 2004, Local 1 faxed to WCD a copy of Appendix A that was to be attached to the already executed Agreement. There is no explanation in the record as to why Local 1 and WCD were attaching a final version of Appendix A to the Agreement twelve days after the Agreement had been signed. In any case, across from "benefit" in the top row, this final version of Appendix A had been amended to read as follows:

**Employees hired after January 1, 2005.  
(This does not include part-time to full-  
time employees that were on payroll prior  
to 1/1/05 [sic])**

When Sleaper received this version of Appendix A, he noticed the addition of the parenthetical statement in the top row. He testified at hearing that he did not understand why the parenthetical had been added. He read the statement to needlessly reiterate the basic point established elsewhere in the Agreement that part-time employees were not entitled to full-time

benefits. Sleaper attempted to reach Dan Iverson to discuss the addition of the parenthetical statement, but Iverson never returned his call. Sleaper did not pursue the matter further, and he attached the amended version of Appendix A to WCD's copy of the Agreement.

WCD has had a consistent past practice of not giving credit for any previous part-time WCD service to employees subsequently hired into full-time WCD positions. When seeking full-time WCD employment, part-time WCD employees are treated the same as outside applicants – they all are required to submit an application and resume, participate in interviews with WCD management, and pass a criminal background check, a drug test, and a physical examination; they receive an offer of employment, go through a mandatory probationary period of employment, receive probationary pay, and are considered to have zero years of service for purposes of calculating vacation and sick leave eligibility. An employee who has held a part-time WCD position is essentially re-hired by the WCD, at such time as that employee gains full-time WCD employment.

The Grievants, Aaron Henning, Rosa Carrasco, and Corey Brumfield, originally worked at WCD as part-time employees. Henning had been hired as a part-time setup employee in October of 2004, Carrasco as a part-time cleaning employee in October of 2001, and Brumfield as a part-time cleaning employee sometime in 2002 or 2003. In 2006, Henning, Carrasco, and Brumfield applied for, were offered, and accepted full-time positions with WCD. Henning started as a full-time setup employee on October 2, 2006, Carrasco as a full-time cleaning employee on January 21, 2007; and Brumfield as a full-time cleaning employee on January 22, 2007.

When Henning, Carrasco, and Brumfield were offered their full-time positions, Don Sleaper informed them that they would receive Group 2 benefits. As he had agreed to do, Sleaper warned the Grievants that their benefits would be different than those received by more senior, full-time co-workers, who had been grandfathered into the old benefit package. Further, during the particular meeting in which Sleaper shared the benefit information with Henning, Sleaper stated that people would tell Henning that he was not supposed to be receiving Group 2 benefits, but that those were the benefits that came with Henning's full-time position.

Indeed, shortly thereafter, several full-time WCD employees, including Local 1 stewards Bobby Rydlewicz and Debbie Wendorf, learned the details of Henning's job offer and told him that he should not be receiving Group 2 benefits. They told Henning that he was eligible for the grandfathered benefit package, because he had been working for WCD prior to January 1, 2005. In early October of 2006, Local 1 representative David Somerscales indicated to Don Sleaper that Local 1 believed Henning was entitled to the grandfathered benefits. Sleaper, Somerscales, Rydlewicz, Wendorf, and Henning met regarding the benefit issue on October 5, 2006. When they failed to resolve the benefit dispute during that meeting, Somerscales indicated to Sleaper that he intended to discuss the issue with Dan Iverson. On October 10, 2006, Sleaper sent an e-mail message to Somerscales, stating that he intended to meet with Henning that afternoon to have him complete certain insurance applications within the thirty-day window for doing so. Somerscales never responded to this message. Henning started in his full-time position, with Group 2 benefits.

The next communication between Local 1 and WCD regarding the benefit issue occurred on January 31, 2007, when Somerscles sent an e-mail to Sleaper, indicating that he had learned that Carrasco and Brumfield also had been told, in conjunction with their offers of full-time WCD employment earlier that month, that they would receive Group 2 benefits. Thereafter, on February 23, 2007, Local 1 filed a grievance regarding the benefit dispute on behalf of Henning, Carrasco, and Brumfield. WCD's final-step denial of the grievance was provided to Local 1 on April 3, 2007. Local 1 filed a petition for arbitration to the Wisconsin Employment Relations Commission on May 14, 2007.

## DISCUSSION

### *Was the grievance pursued in a timely fashion?*

WCD contends that this case should be dismissed because Local 1 repeatedly failed to adhere to the deadlines set forth in the Agreement for processing the grievance. First, WCD asserts that Local 1 filed the initial grievance in an untimely manner. The Agreement between Local 1 and WCD provides that grievances are to be reduced to writing and submitted to WCD within fourteen days of the dispute or knowledge thereof. By the time Local 1 filed the present grievance on February 23, 2007, it had known for some twenty days that WCD intended to provide Group 2 benefits to Carrasco and Brumfield and for four months that those benefits were being provided to Henning. WCD also asserts that Local 1 failed to submit the grievance to the WERC for arbitration in a timely manner. The Agreement provides that grievances must be submitted to arbitration within fourteen days of WCD's final-step, written denial of the grievance. Nearly forty days passed between WCD's final, written denial of the grievance and Local 1's filing of its petition for grievance arbitration with the WERC.

Local 1 contends that this timeline is not a procedural bar to deciding this case on its merits, because WCD's alleged violation of the Agreement is a continuing one. A continuing violation has been defined as an ongoing course of conduct by which employees are "constantly and continually affected", *TENDER CARE INC.*, 111 LA 1192, 1196 (Borland, 1998) (*citations omitted*), as opposed to a single, completed event. *How Arbitration Works*, Elkouri & Elkouri, 6<sup>TH</sup> Ed., pp. 218-219. In such cases, each day represents a separate occurrence of the alleged violation. *MUNICIPALITY OF ANCHORAGE*, 108 LA 97, 99 (LANDAU, 1997). The continuing violation theory has been applied to cases involving disputes over benefits, even where the employees and their bargaining representative knew that there was a problem with the benefits for some time prior to pursuing the grievance. *See, e.g., CELINA CITY SCHOOLS*, 94 LA 1001 (DWORKIN, 1990). Here, I am persuaded that the ongoing provision of Group 2 benefits to the Grievants constitutes a continuing violation, as opposed to an isolated, completed transaction. This finding nullifies WCD's assertion that the initial grievance was filed late, as well as and its assertion that the request to initiate arbitration was filed late.

WCD argues that it suffered a special detriment related to Local 1's belated filing of the grievance in this case, because it committed itself to hiring Carrasco and Brumfield on a full-time basis in early 2007, believing that Local 1 had accepted Group 2 benefits in Henning's



case and would do the same for Carrasco and Brumfield. I am not persuaded by WCD's estoppel argument, however, because I believe WCD had adequate knowledge that the benefit dispute had not been resolved with Henning. In the three months that passed between Local 1's first objection to Henning's benefits and its subsequent objection to WCD's provision of Group 2 benefits to Carrasco and Brumfield, Local 1 gave no indication that it had accepted WCD's position regarding the benefit issue. Following the October, 2006 meeting in which WCD and Local 1 representatives unsuccessfully attempted to resolve the benefit dispute, Somerscales indicated that he would discuss the issue with Iverson. These exchanges should have put WCD on notice that the issue remained unresolved. A few days later, Sleaper sent Somerscales an e-mail message indicating that he intended to have Henning complete his insurance paperwork within the thirty-day time-frame for doing so. To the extent that it did so, WCD was wrong to interpret Somerscales' failure to object to Sleaper's planned course of action as an indication that Local 1 had withdrawn its objection to Henning's benefits. Under the basic labor relations principle of "obey now and grieve later", Local 1 had no choice but to accept the benefits Henning was being offered until the dispute was resolved in its favor.

WCD suggests that Local 1's failure to file its grievance around the time Henning was awarded his full-time position represents a calculated decision on Local 1's part to lie in the weeds with regard to the benefit issue until after WCD had committed itself also to hiring Henning and Carrasco on a full-time basis. WCD's assertion on this point finds no support in the record. First, there is no evidence indicating that, in the period between September of 2006 and January of 2007, Local 1 representatives knew about or considered whether Carrasco and Brumfield were seeking or would obtain full-time WCD positions.

Moreover, the record before me hints that it was WCD that sat quietly by, perhaps hoping to benefit from the three-month period of inaction after the benefit dispute first arose. Don Sleaper has come across in this proceeding as an individual who dots every "i" and crosses every "t", and his approach to bargaining and administering WCD's Agreement with Local 1 is no exception. During the period of time, for example, when WCD and Local 1 were in the process of negotiating the Agreement, Sleaper wrote the following in a letter to Somerscales:

You called me on 4/14/2004 and left a message for me to call you but did not say what it was about. I called you back on 4/15/2004 at both your cell phone and office phone and left messages for you. I have not heard back from you, did your reason for the call get resolved?

This paragraph captures Sleaper as an extremely meticulous individual who recognizes a certain lack of diligence on the part of Local 1's representatives and takes it upon himself to keep track of unresolved matters, including, in the above instance, even Somerscales' failure to follow-up on his own phone call and raise whatever unknown issue was on his mind. In this context, the assertion that Sleaper relied on an assumption that the benefit dispute had resolved itself, because he had not heard otherwise from Local 1 for a couple months, is difficult to accept.

Finally, WCD asserts that Local 1's grievance should be deemed untimely under the theory that the Grievants waived the right to object to the benefits when they accepted their full-time positions with the explicit understanding that Group 2 benefits were being offered. This argument ignores the basic principle that the grievance process belongs to Local 1, not its individual members. The actions on the part of Henning, Carrasco, and Brumfield in accepting full-time WCD employment did not – and, indeed, could not – waive the contractual right Local 1 has, as party to the Agreement with WCD, to assert that the application of Group 2 benefits to the Grievants constitutes a contractual violation. Further, WCD's argument rests on the flawed assumption that the Grievants' only choice would have been to turn down the full-time positions they were being offered if they were dissatisfied with the accompanying benefits. The grievance procedure set forth in the Agreement spared them from having to make such a choice – it allowed them to both accept their positions and pursue the benefit dispute.

In cases of continuing violations, the date on which the grieving party processes the grievance typically restricts the period of retroactivity for purposes of assessing damages. *How Arbitration Works*, Elkouri & Elkouri, 6<sup>TH</sup> Ed., p. 220; U.S. SILICA COMPANY, 102 LA 342, 345 (GOODSTEIN, 1994). In this case, I conclude that the remedy should only accrue starting fourteen days prior to May 14, 2007, the date on which the grievance was filed for arbitration with the WERC.<sup>2</sup>

**Does the application of Group 2 benefits to Henning, Carrasco, and Brumfield violate the Agreement?**

The merits of this case focus on the few statements in the Agreement that simultaneously establish which full-time WCD employees are eligible for the grandfathered benefit package and, conversely, which full-time WCD employees are subject to the less-generous, Group 2 benefit package. The critical lines that appear in Appendix A are worth setting forth here again:

**Employees hired after January 1, 2005.  
(This does not include part-time to full-  
time employees that were on payroll  
prior to 1/1/05 [sic])**

The provisions in the main body of the Agreement that set forth the grandfathered benefits also contain the following statement, directing less-senior employees to the benefits in Appendix A: **For Employees hired after 1/1/05, See Appendix A for Benefit Package.**

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<sup>2</sup> As discussed, the Agreement requires that, within fourteen days of receiving a final denial of a grievance, the grieving party is to “submit” it to the WERC for arbitration. WCD asserts, in its brief, that Local 1 submitted the grievance to arbitration on May 5, 2007. As support for this assertion, WCD cites to the cover letter to the Wisconsin Employment Relations Commission enclosing Local 1's Request to Initiate Grievance Arbitration, as well as that completed form. Those documents actually are dated May 11, 2007, and they were received by (and, therefore, pursuant to ERC 16.03(1), filed with) the WERC on May 14, 2007. Absent any indication to the contrary, I find the term “submit” as used in the Agreement to be synonymous with “file”. The grievance in this case, therefore, was submitted to the WERC on May 14, 2007.

Grievants Henning, Carrasco, and Brumfield were employed by WCD on a part-time basis prior to January 1, 2005, but they did not gain their full-time WCD positions and become eligible for full-time benefits until after January 1, 2005.

I can draw no conclusion as to the appropriate outcome of this case based on the first sentence of Appendix A, which is echoed in the provisions that set forth the grandfathered benefits, that indicates that Group 2 benefits apply to “[e]mployees hired after January 1, 2005”. The evidence before me indicates that the Grievants were hired by and made employees of WCD on two occasions – first, into their part-time positions prior to 2005 and, second, into their full-time positions after 2005. Even accepting, as I do, WCD’s assertion that the Grievants were treated as new hires when they gained their full-time positions, this sentence is ambiguous when applied to their situations.

It is also difficult to determine whether WCD and Local 1 agreed, during negotiations, that employees such as the Grievants would receive grandfathered benefits at such time as they gained full-time positions. Local 1's bargaining team consisted of business agents Dan Iverson and Dave Somerscales and stewards Bobby Rydlewicz and Debbie Wendorf; WCD was represented by Don Sleaper and WCD director of public safety and special services Russ Staerkel. Iverson, Local 1's lead negotiator, did not testify at the hearing. Somerscales did testify, but he was new to bargaining in 2004, present at the table primarily to observe, and had very little recollection regarding the substance of the negotiations. Wendorf's testimony was simply unreliable – she seemed generally confused about most topics and gave conflicting accounts as to what was agreed with regard to the issue that is the subject of this dispute. Rydlewicz testified that the parties agreed that any existing part-time employees who later gained full-time positions with WCD would then be eligible for the grandfathered benefits. Sleaper testified that they did not make such an agreement. While Staerkel testified to the undisputed fact that WCD and Local 1 agreed to provide grandfathered benefits to full-time employees working at WCD at the time, he never was asked specifically about what, if any, any agreement was made with regard to the then part-time employees who would later gain full-time positions.

The outcome of this case, therefore, hinges on the applicability and meaning of the parenthetical statement in Appendix A. At the outset, it is necessary to address WCD’s argument that the parenthetical should not be considered part of the Agreement. It is undisputed that the language was not exchanged in the form of a written proposal during bargaining and it was not the subject of any tentative agreement. It also had not been incorporated into the drafts of Appendix A exchanged between Local 1 and WCD in the summer of 2004, when the typed version of the Agreement was being finalized. Sleaper’s un rebutted testimony is that the language first appeared in the copy of Appendix A faxed from Local 1 on September 12, 2004, nearly two weeks after the Agreement was signed.

Nevertheless, the language was incorporated into the Agreement. Sleaper received the amended version of Appendix A, noted the addition, and attached the document to the Agreement. In the apparent absence of any formal requirements for amending the document, Sleaper had the ability to approve of the addition of the parenthetical statement to Appendix A

on WCD's behalf, and he did so when he attached the amended document to the Agreement. Indeed, Sleaper acknowledges having ascribed his own interpretation to the parenthetical statement, thereby implicitly indicating that he, too, believed it had become part of the Agreement. Most importantly, the statement appears in every physical copy of the Agreement submitted at hearing<sup>3</sup>, including the one provided by WCD as Employer Exhibit 17.

WCD further asserts that the parenthetical statement should not be interpreted and applied by the undersigned, because there was no meeting of the minds as to whether grandfathered benefits would be provided to employees such as the Grievants. It is axiomatic that nullification of clear language in a collective bargaining agreement requires a mistake that is mutual:

When the parties attach conflicting meanings to an essential term of their putative contract, is there then no "meeting of the minds" so that the contract is not enforceable against an objection party? Hardly. The voidability of a presumed contract arises only in the limited circumstances where neither party knew, or should have known, of the meaning placed on the term by the other party, or where both parties were aware of the divergence of meanings and assumed the risk that the matter would not come to issue.

How Arbitration Works, Elkouri & Elkouri, 6<sup>th</sup> Ed., p. 428. Here, the words of the parenthetical statement plainly indicate that an employee who worked for WCD on a part-time basis prior to January 1, 2005, would not be subject to the benefits set forth in Appendix A – and, therefore, would have to be eligible for grandfathered benefits – at such time as the employee gained full-time WCD employment. The evidence on the record indicates that Local 1 has always believed that the parenthetical conveyed this meaning. Further, there is no evidence on the record indicating that Local 1 was aware, at the time the parenthetical was added to the Agreement, that WCD attached a different meaning to the language. Therefore, I must conclude that any misunderstanding, if there was one, belonged solely to WCD.

WCD's proposed alternative readings of the parenthetical statement simply do not comport with a plain reading of its words and do not make sense within the larger context of the Agreement. Sleaper asserts, for example, that he read the parenthetical statement merely to reiterate the basic point that part-time employees are not eligible for full-time benefits. That interpretation does not make sense, first, because the statement plainly applies specifically to those WCD employees like the Grievants who went from part-time to full-time positions, not generally to all part-time employees, as Sleaper's reading suggests. Further, Sleaper's

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<sup>3</sup> WCD has made much of the scattered versions of the Agreement introduced into this proceeding by Local 1 representatives. The copy of the Agreement Local 1 attached to the petition for grievance arbitration filed with the Commission was missing every other page. At hearing, Local 1 submitted an additional copy of the Agreement, which was complete but unsigned and undated. Further, in response to a subpoena issued by WCD, four bargaining unit members submitted their own copies of the Agreement, which had been printed and distributed to bargaining unit members by Local 1. These copies improperly contain two, identical signature pages – one is signed, the other is not, and neither is dated. Although these errors suggest a certain level of carelessness on Local 1's part, none of them really relate to the heart of this dispute.

interpretation would only make sense if some statement excluding part-time employees from full-time benefits also had been incorporated into the provisions setting forth the grandfathered benefits. Such a statement does not appear in any of those provisions. Alternatively, WCD proposes that the parenthetical statement could have been intended to exclude from Group 2 benefits those part-time employees who gained full-time positions in the period of time between the September, 2006 execution of the Agreement and Group 2 implementation date of January 1, 2005. I reject this interpretation as one originating in WCD's post-hearing brief, rather than in the mind of any person developing or applying the language.

WCD asserts that there are several factors that are inconsistent with the conclusion that WCD would have agreed to provide grandfathered benefits to employees such as the Grievants. It is clear, for example, that WCD has an established practice of not giving credit for part-time service to employees who subsequently gain full-time WCD employment. WCD appropriately asserts that agreeing to provide grandfathered benefits to part-time employees who gained full-time WCD positions after January 1, 2005, would have required some recognition of those employees' part-time WCD service. The fact that the provision at issue here represents a departure from WCD's past practice does not outweigh the evidence in the record indicating that, in this situation, WCD agreed to it. WCD also asserts that grandfathering such employees would have been inconsistent with its overall goal to cut costs in the 2004-2008 Agreement. I am not troubled by this asserted inconsistency. Even under the general constraints of a cost-cutting objective, concessions can be made for any number of reasons. Finally, WCD argues that it would not have entered such an agreement after having rejected a proposal by Local 1 to extend full-time benefits to part-time employees. Expanding the benefits of part-time WCD employees, however, is quite different from grandfathering former part-time employees into a specific full-time benefit package at such time as they gain full-time employment. The fact that WCD rejected the former proposal has no bearing on the question of whether it could have accepted the latter.

### CONCLUSION

The grievance addresses a continuing violation and, therefore, was submitted to arbitration in a timely manner. WCD's provision of Group 2 benefits to the Grievants violates the Agreement between WCD and Local 1. Local 1's remedy period begins fourteen days prior to May 14, 2007. Pursuant to Local 1's request, I retain jurisdiction for the purpose of overseeing the remedy portion of this case.

Dated at Madison, Wisconsin, this 24th day of March, 2009.

Danielle L. Carne /s/

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Danielle L. Carne, Arbitrator

DLC/gjc  
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