

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**DAIRYLAND POWER COOPERATIVE OF LA CROSSE, WISCONSIN**

and

**LOCAL UNION 953 OF THE INTERNATIONAL  
BROTHERHOOD OF ELECTRICAL WORKERS**

WERC  
Case 60  
No. 71928  
A-6537

AMERICAN ARBITRATION ASSOCIATION  
Case No. 51 300 01419 12

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**Appearances:**

**Rhea A. Myers**, Wheeler, Van Sickle & Anderson Attorneys at Law, 25 West Main Street, Suite 801, Madison, Wisconsin, appeared on behalf of the Employer.

**Richard L. Kaspari**, Metcalf, Kaspari, Engdahl & Lazarus, 2536 University Avenue West, 230 Specialty Building, St. Paul, Minnesota, appeared on behalf of the Union.

**ARBITRATION AWARD**

Dairyland Power Cooperative of La Crosse, Wisconsin, hereinafter “Employer,” and Local 953 of the International Brotherhood of Electrical Workers, hereinafter “Union,” using the procedures of the American Arbitration Association (herein “AAA”) jointly selected the undersigned, a member of the staff of the Wisconsin Employment Relations Commission (herein “WERC,” to serve as the impartial arbitrator to hear and decide the dispute specified below. The parties agreed to proceed with this matter being jointly administered by the

WERC and AAA. The arbitrator held a hearing in La Crosse, Wisconsin, on April 24, 2013.<sup>1</sup> Each party filed a post-hearing and reply brief, the last of which was received June 6, 2013, and the record was closed as of that date.

### ISSUES

The parties stipulated to the following statement of the issues:

1. Did the Employer violate the collective bargaining agreement when it failed to pay the grievants for a regularly scheduled shift they missed as sleep in time pay for October 1, 2010?
2. If so, what is the appropriate remedy?

### FACTS

The Employer operates two main electric power plants and an electrical distribution grid in western Wisconsin and northwestern Illinois. The plant in dispute is termed herein the “Alma Plant” and the other plant is called the “Genoa Plant.” The Union represents rank and file employees in the Employer’s power plants and distribution division. The Grievants, Dennis Arendt and Jim Schonke, are welders employed at the Alma plant in the maintenance department. Their positions are positions in the bargaining unit represented by the Union. Both employees are 10-hour first shift employees who normally work 6:30 a.m. to 5:00 p.m. with a half-hour unpaid lunch, Tuesday through Friday. All relevant maintenance employees normally work on the same shift.

On one or two occasions per year, the Employer has unforeseen major maintenance issue which require that plant maintenance employees have their regular schedule of hours changed and/or to work extensive overtime. One of the routine alternatives the Employer uses to deal with some of those situations is to assign some maintenance employees to a “back shift” which would normally work a full shift during a time when the first shift would be off. This method allows the Employer to work on a vital repair continuously.

One of these situations occurred in the September, 2010. The Employer discovered a leak in one of its boilers on Wednesday, September 29, 2010. The Employer determined to have the work performed by using the “back shift” approach of to have it done as continuously as possible.<sup>2</sup> At 9:00 a.m. Thursday, September 30, the Grievants were sent home and returned as directed at 6:30 p.m. that evening to work on the leak. They worked 12 hours

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<sup>1</sup> The parties stipulated that the audio recordings of the hearing were for the arbitrator’s own notes, would not be available to either party and would be erased after the award was rendered.

<sup>2</sup> They were, however, given at least twenty-four hours’ notice of the change of their starting time.

from 6:30 p.m. until 6:30 a.m. Friday, October 1, at which time the day shift employees took over the work. The day shift worked until 6:30 p.m. Friday, but did not complete the work. Grievants next returned to work at 6:30 p.m. on Friday, October 1 and worked until Saturday October 2, 2010, until at 5:00 a.m. when they completed the work. They were then sent home for the weekend. The Employer paid them at the rate of time and one-half for all of the hours in they worked during this period. However, the Employer declined to pay them for the 10 hours of their ordinary regular day shift on Friday as the sleep-in time (“rest period”).

The Employer did not consider allowing Grievants to work five scheduled work days at the back shift hours.

The Union filed a grievance alleging that the Employer was required under Article V, Section 11, to pay the Grievants “rest period pay” [straight time pay] for the ten hours they did not work on Friday as their regularly scheduled day shift. The Employer denied the grievance and the same was properly processed to arbitration herein.

It is important to note that the parties have addressed a similar issue at the Genoa plant by a grievance settlement which they refer to as the “McLees letter.” On June 14, 1985, Genoa Plant Superintendent McLees wrote a confirming letter which states:

As of the date of this memo, Article V; Section 13, Sleep-In-Time will be paid in the following manner. Sleep in time will not be paid anytime an 8 hour rest period has elapsed before an employee returns to work.

The Union agreed to the terms of the letter in December, 1986. The Employer has administered rest periods in accordance with that letter at the Genoa Plant ever since. There is a dispute between the parties as to whether the past practice at the Alma Plant was consistent or inconsistent with that of the Genoa Plant.

### RELEVANT AGREEMENT PROVISIONS

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#### ARTICLE V

#### SCHEDULE OF HOURS

##### 1. **Week’s Work – Work Week**

The parties recognize the necessity of furnishing essential service on a twenty-four (24) hours per day, seven (7) days per week basis; therefore, working

hours will be scheduled and overtime paid in accordance with the rules hereinafter set forth.

### **Week's Work**

The regular week's work for all employees shall be forty (40) hours within the work week and shall consist of five (5) eight-hour days arranged so that the regular work days fall in sequence except as otherwise specifically modified. Sundays and holidays shall be included as scheduled work days as required.

### **Work Week**

The work week shall be one hundred and sixty-eight (168) consecutive hours. Its starting time shall be fixed for each employee but shall be subject to change as required and as provided for in other sections of this Article. The work week shall correspond as nearly as possible to the calendar week which ends Saturday midnight.

## **2. Work Schedules**

- A. Regular hours of employment for employees in divisions 6, 7 and 12 shall be eight (8) or ten (10) hours per shift between 5:30 a.m. and 6:00 p.m. with not more than ½ hour lunch period Monday through Friday, unless another schedule is mutually agreed to.
- B. Regular hours of employment for Materials Management Division and for generating station employees who are not on rotating shifts shall be eight (8) or ten (10) consecutive hours per shift starting at 6:30 a.m. or 7:30 a.m. plus a ½ hour for lunch, Monday through Friday, unless another schedule is mutually agreed to. Hours shall be subject to the following modifications: When the nature of the services performed by this group of employees, during major scheduled or unscheduled overhaul or new unit start-up necessitates working hours other than referred to above in excess of seven (7) calendar days, the Cooperative:
  - (1) May establish an additional work schedule beginning at the starting time on Tuesday and terminating at the quitting time on Saturday.
  - (2) May assign employees on a "back-to-back" maintenance schedule (or some other schedule if reached by mutual consent) for the duration of the overhaul or new unit start-up.

All generating station employees hired after 2-1-76 and Materials Management employees hired after 2-1-79 shall, at the discretion of the Cooperative, be subject to assignment to the P.M. or "Owl" shift or to a rotating shift. Generating station employees hired prior to 2-1-76 who may wish to volunteer for the P.M. or "Owl" or rotating shift, if such work schedules are established by the Cooperative within their division, will be given first consideration regarding such shift schedule assignment.

- C. Regardless of date of employment, regular hours of employment and sequence of scheduled work days for employees assigned to coal handling crews shall be as determined at each generating station, consistent with operational requirements. Such employees regularly scheduled to work one or more calendar Sundays per month will receive additional pay as outlined in Article IV, Section 6(D).
- D. Regular hours of employment for generating station employees and dispatchers who are assigned to a rotating shift shall be eight (8) and/or twelve (12) consecutive hours per shift on a regular work schedule. The starting and quitting time of the rotating shift schedule utilized at their assigned work location for employees performing classifications of work where service is required twenty-four (24) hours a day and seven (7) days a week shall remain in effect unless a change is mutually agreed upon between the Cooperative and the Local Union.
- E. Regular hours of employment and sequence of scheduled work days for an employee assigned to the Combustion Turbine (Division 13) and Renewable and Combustion Turbine Generation (Division 14) classifications shall be Monday through Friday, eight (8) hours per day with starting times beginning between 6:00 a.m. and 9:00 a.m. and ending eight and one-half hours later including a one-half hour unpaid lunch intermission. Additional schedules may be established through mutual agreement with the Union.

When the nature of the services performed by this group of employees, during major scheduled or unscheduled overhaul or new unit start-up necessitates working hours other than referred to above in excess of seven (7) calendar days, the Cooperative may establish an additional work schedule beginning at the starting time on Tuesday and terminating at the quitting time on Saturday.

Regular hours may be changed subject to operational or maintenance needs of the units. Such employee(s), whose work schedule is changed and who are not notified twenty-four (24) hours prior to the starting time of the revised work schedule shall be considered as working outside their regular schedule during the remainder of the twenty-four (24) hour period and shall be paid in accordance with the applicable overtime rate. Such schedule changes shall be for the duration of the work week unless mutually agreed otherwise.

### **3. Schedule Changes for Rotating Shift Employees**

Rotating shift employees shall work in accordance with posted schedules. Should the needs of the service require a change, the Cooperative for legitimate reasons may change such work schedule when necessary provided that the divisional steward or alternate steward is given a copy of the change at least twenty-four (24) hours in advance of such change.

This same twenty-four (24) hour period shall likewise apply when a unit is ready for operation or for testing and said job duties change from maintenance back to operations. The work schedule for such operating employees assigned to maintenance type duties shall be the same as regular maintenance employees assigned to work full time on the unit down for maintenance. During such periods, their temporarily assigned maintenance schedule shall be used to determine the recognition of holidays.

- (1) Such employee, whose work schedule is changed and who is not directly notified by the person in charge at least twenty-four (24) hours prior to the beginning time of the revised work schedule shall be considered as working outside their regular shift during the remainder of the twenty-four (24) hour period, and shall be paid in accordance with Section 7(A) of this Article.
- (2) Such employee, whose work schedule is changed, and is removed from their revised schedule prior to satisfying the five (5) day schedule change requirement shall be considered as working outside their regular shift during the 5-working day period, and shall be paid in accordance with Section 7(A) of this Article.

### **4. Schedule Changes for Generating Station Non-Rotating Shift Employees**

Generating station non-rotating shift employees shall, likewise, work in accordance with posted schedules. Should the needs of the service require a

change, the Cooperative for legitimate reasons may change such work schedules when necessary, provided that the divisional steward or alternate steward is given a copy of the change at least twenty-four (24) hours in advance of such change. Schedule changes shall be five (5) working days or longer.

- (1) Such employee, whose work schedule is changed and who is not directly notified by the person in charge at least twenty-four (24) hours prior to the beginning time of the revised work schedule shall be considered as working outside their regular shift during the remainder of the twenty-four (24) hour period, and shall be paid in accordance with Section 7(A) of this Article.
- (2) Such employee, whose work schedule is changed, and is removed from their revised schedule prior to satisfying the five (5) day schedule change requirement, shall be considered as working outside their regular shift during the 5-working day period, and shall be paid in accordance with Section 7(A) of this Article.
- (3) Such employee, whose revised work schedule is changed due to early completion or interruption of a work project shall be deemed to satisfy the five (5) working day requirement. Parties involved in the schedule change may complete their current schedule or return to a regular schedule at straight time pay by mutual agreement.

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## 7. Overtime Pay

- A. All work done by employees outside of regular hours or scheduled shifts, except work done on Sundays or the recognized holidays listed in Section 8 of this Article, or except as otherwise provided, shall be paid for at the rate of time and one-half.
- B. Double time will be paid for time worked on Sundays.
- C. Work performed on a holiday shall be paid in accordance with the following:
  - (1) Work performed on a holiday during which hours are coincident with the employee's regular work schedule, with 24 or more

hours advance notice of the time to report for work, shall be paid for at the rate of time and one-half.

(2) Work performed on a holiday during hours, which are coincident with the employee's regular work schedule, but with less than 24 hours notice of the time to report for work, shall be paid for at the rate of double time.

(3) Work on a holiday during hours which are not coincident with the employee's regular work schedule, regardless of the time element in the advance notice, shall be paid for at the rate of double time.

D. After the employee has worked sixteen (16) consecutive hours, his/her rate of pay shall be double the basic straight time regular rate until he/she is relieved from duty; provided, however, if such work in excess of sixteen (16) hours occurs on a recognized holiday, he/she shall receive only double time pay. If such work in excess of sixteen (16) hours occurs on a Sunday, he/she shall receive only double time pay for such Sunday work.

E. An employee who works a regular shift and subsequently works such overtime as to take the employee forward into the next regular shift (24 hours or more), with no break in the work, will remain on double time (the rate paid at the time just prior to the beginning of the next regular shift) until relieved from work. In addition, the employee shall be entitled to such rest period pay at the basic hourly rate, as the contract may provide.

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#### 11. Sleeping-In-Time

A. Each day shift employee shall be entitled to one hour off after the start of his/her regular shift for each overtime hour worked between 12:00 Midnight and 4:00 a.m.

B. If a day shift employee works four (4) or more consecutive hours of overtime from 10 hours prior to the start of their regular scheduled shift and is released from work, an eight (8) hour rest period shall elapse before they return to work without loss of a regular scheduled work day's pay. Employees working ten (10) hour or longer shifts are entitled to a ten (10) hour rest period. In the event that an employee, after being



released from work, is called back during their rest period, prior to and until the start of their regular shift, they shall be paid at the rate of time and one-half plus rest period pay. If they continue to work into their regular shift or are called back during the aforementioned rest period during their regular shift, their rate of pay shall be their basic hourly rate plus rest period pay.

If the employee has worked during any part of their eight (8) or ten (10) hour rest period and then is called upon to continue or return to work following expiration of the eight (8) or ten (10) hour rest period, they shall be paid at the rate of time and one-half. If the employee returns to work during their regular shift, but after the eight (8) or ten (10) hour rest period, he/she would be paid at straight time.

- C. If a rotating shift employee, or employee assigned to other than day shift, works four (4) or more consecutive hours of overtime after the completion of his/her regular scheduled shift and is released from work, an eight (8) hour rest period shall elapse before he/she returns to work without loss of a scheduled work day's pay. Employees working ten (10) hour or longer shifts are entitled to a ten (10) hour rest period. In the event that an employee, after being released from work, is called back during their rest period, prior to and until the start of their regular shift, they shall be paid at the rate of time and one-half plus rest period pay. If he/she is called back during the aforementioned rest period, his/her rate of pay shall be his/her basic hourly rate plus rest period pay. If he/she works four (4) or more consecutive hours of overtime prior to the start of his/her regular scheduled shift and is not released from work he/she is entitled, beginning with the start of his/her regular scheduled shift, to one (1) additional hour's pay in addition to his/her regular rate for each such overtime hour worked in excess of four (4) hours. When personnel assigned to a regular twelve (12) hour rotating shift schedule work six (6) or more consecutive hours immediately prior to the start of their regular scheduled shift, they shall be entitled to a ten (10) hour rest period without loss of pay for regular scheduled hours. If the employee continues to work during the aforementioned rest period (regular scheduled shift), his/her rate of pay shall be his/her basic hourly rate plus rest period pay.

If a twelve (12) hour rotating shift employee works two (2) or more consecutive hours immediately following their regular scheduled shift, and is released from work, a ten (10) hour rest period shall elapse before he/she returns to work, without loss of a scheduled work day's pay. In

the event that an employee, after being released from work, is called back during their rest period, prior to and until the start of their regular shift, they shall be paid at the rate of time and one-half plus rest period pay. If he/she is called back during the aforementioned rest period, during the regular scheduled shift, his/her rate of pay shall be his/her basic hourly rate plus rest period pay.

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### POSITIONS OF THE PARTIES

#### UNION

##### Union Brief

Article V, Section 4 gives the Employer the authority to change the regular schedule of an employee only upon 24 hours' notice and then only for a period of five consecutive days or more. The Employer argues that the rest period provision only guarantees an employee a period of ten hours' rest and that they will not lose a full shift of pay. However, nothing in the rest period provision guarantees that an employee will actually get to rest that amount of time. Other provisions provide for premium pay when the 10 hour period is violated. This provision only guarantees rest period pay. The issue is whether it is always a full ten hours or not. The circumstantial and past practice evidence establishes that the parties have accepted at the Alma plant that it is always paid.

##### Union Reply Brief

The Union has never taken the position that the agreement requires pay for all ten hours of the Section 11 A rest period in every circumstance in which a rest period is required. The employee is entitled to pay only for those hours which fall within the employee's regular scheduled shift. The Grievants herein are entitled to pay only because they worked right up to the beginning of their normally scheduled 6:30 a.m. regularly scheduled shift. Therefore, they are entitled to 10 hours' pay for their entire regular shift (6:30 a.m. to 5:00 p.m.) on October 1, 2010. The third and fourth sentences of Section 11 B specify the only exceptions. Mr. Becker's opinion that Section 11 B only requires that the employees be given 10 hours' rest and does not require pay if they work a normal day's number of hours (10) during the day is without merit. The Employer' subtracts whatever an employee earns working outside his or her regular scheduled shift during that calendar day from that employee's rest time pay. Mr. Becker's testimony is also inconsistent with the parties' undisputed practice of paying rest time pay under Section 11 A. The Employer characterizes that section as requiring time off with

pay when, in fact, it is silent as to whether it is with pay. Section 11 A requires pay because the rest period by definition falls within the employee's regular shift.

The McLees' letter specifies applies only to the Genoa plant.

The Employer's argument that it changed the Grievants' shift is without merit. Article IV, Section 4 requires that any change to an employee's regular shift be upon 24 hours' notice and be for a minimum of five days. The Employer did give Grievants 24 hours' notice, but it scheduled the change for only two days. That section requires that any other change be treated as overtime and paid at time and one-half.

Finally, the Union is entitled to an adverse inference that there is no evidence that the Employer has ever administered the rest period time when the employee receives 24 hours' advance notice of a "change in shift" to a backshift of less than five days.

## **EMPLOYER**

### **Employer Brief**

The stipulated question requires that the arbitrator interpret two phrases of the Agreement. The Union relies on Article V, Section 11 B which requires a ten hour rest period ". . . without loss of a regular scheduled work day's pay" for the proposition that the Employer is required to pay for the ten hours in dispute. Those hours were not actually worked. However, the Employer contends that the obligation is more limited.

The right to pay for rest time not worked is anticipated in Article V, Section 11 A, but not in Section 11 B. The Agreement provides only two reasons for rest time pay for the Section 11 B rest period. Both require that the employee work in the rest period. There is no dispute in this case that the Grievants received a full ten hours of rest period and did not do any work in the rest period.

Mr. Becker testified that the Section 11 B rest period has two purposes. First, it requires that the employee be given ten hours off work. This requirement is for safety purposes. Second, employees are to be given consideration for changing schedules. The Employer has agreed to give a half time pay consideration for employees changing shifts for less than five days. Under this circumstance the Agreement in Article V, Section 11 B only requires that employees not be shorted pay for having had a rest period. In that regard, there is no dispute that Grievants worked a full day's work and, thus, were not shorted pay for having had a rest period.

The concepts of "work day pay" and "rest time pay" are two different concepts. Each of the terms in the first phrase "regular," "scheduled," "work," "days" is an adjective of the

word “pay.” The words “rest” and “period” are also adjectives that modify the word “pay.” If the two were meant to mean the same thing, then the parties would have used the same term. The different words used mean the terms are different. Further, the last two sentences of 11 B would be superfluous. Those last two sentences make it clear that there is an extra penalty for requiring an employee to work during their rest period.

The Union’s past practice exhibits do not support the Union’s position. The Union’s exhibits were admitted provisionally over the Employer’s hearsay objection. Mr. Blanks speculated from the pay codes that the employees were paid for time not working; however, Mr. Becker explained that employees were paid at Genoa when they received less than 24 hours’ notice of the change in their shift. The Union has then argued that the 24 hours’ notice is irrelevant because the agreement required that any change from the regularly scheduled day shift had to be for 5 days or more. Thus, the Union contends that any change in schedule short of 5 days is just “overtime” requiring premium pay under Paragraph IV.7A and, therefore, not a “schedule” change. The Union is wrong. The “regular schedule” of employees is changed when they are told to work overtime and/or when they are told to work nights instead of days. The sole remedy is that specified in the agreement for a change on less than 24 hours’ notice. To make its point, however, the Union will need also to admit that the Employer has no obligation under the contract to pay Genoa employees for rest time when they do not receive 24 hours’ notice of the schedule change as per the McLees letter. The Union then cannot explain why the Employer pays those Genoa employees the same as the Alma generation employees as was confirmed by Mr. Becker. Mr. Becker testified that these situations only arise when there are unexpected or emergency shutdowns where by their very nature there can be no advance notice. These situations are unlike the situations in which the employees have 24 hours or more notice.

The Union cannot claim that examples involving changes of schedule on less than 24hours’ notice are relevant to this dispute. Note that Mr. Blank testified that “he would have heard” if there had been any earlier instance of the failure to pay anyone in Generation outside of Genoa for sleep time with at least 24 hours’ notice and where the employees were not required to work during their during their rest period. The Union is just confusing the right to overtime for schedule changes of less than 5 days with the concept of rest time.

The rest period sleep time language just assures the employees adequate time off to rest and assures them that they will receive 40 hours pay.

The McLees’ letter controls this grievance. The Union accepted that letter in 1986 as an accurate statement of the practice going forward. There is nothing in the letter which limits it solely to Genoa. The Union has not explained why the Employer should have different policies at different plants. The Employer suggests that the reason that the letter was addressed to the Genoa plant employees was only because the dispute was at that plant at the time. Mr. Becker testified that he tried to keep the pay practices the same at both plants. He does not

review every pay slip, but has no reason to question that it was different at the Alma plant. The Employer asks that the grievance be denied.

### **Employer Reply Brief**

The issue in this matter boils down to what the term a “regular scheduled day” means in Section 11 B and the right to be paid for hours not actually worked. The term “rest period pay” is only used at the very end of Section 11 B and then only in relation to pay for the time worked during the rest period at the Employer’s direction. The Union’s attempt to refer to the rest period practice among transmission employees is outside the scope of this dispute. Transmission employees do different work. Further, the Union has not produced evidence to support its allegation that rest period time not worked is paid. Finally, the Employer has not denied that it is required to pay rest period pay when it does not give the required 24 hours’ notice. Here the Employer gave the Grievants more than 24 hours’ notice.

The Union has failed to acknowledge that overtime pay is the workers’ remedy for changed working hours. The point of the provisions in Article 5 upon which the Union relies is that employees are entitled to overtime pay for violations of the scheduling restrictions. Whether or not work hours changes of less than five days are a scheduling violation or not is irrelevant. It only affects how employees are to be paid for time worked, not for time not worked. The Employer has reserved, and the Union does not object, to the right of the Employer to order employees to work on a schedule that meets the needs of the situation regardless of the notice.

The Union failed to establish that rest time is paid except for the specific exception addressed by Witness Becker. The Employer changed the regularly scheduled working hours of the Grievants. It paid for their work in the early morning hours by paying them premium pay. The Grievants now want to be paid for rest time they did not work even though they had more than 24 hours’ notice of the change in their regular schedule. The Grievants were contractually entitled to ten hours’ rest time. The fact that this overlaps the hours of their regular schedule is relevant only if they are denied the amount of a regular days’ pay. We are not dealing with a situation in which the Employer called them back in their rest period time. Had they worked during their rest time, they would have been entitled to premium pay during that time of actual work.

The Union has not justified treating its members less favorably at Genoa than at Alma. The Union has agreed that the agreed payroll practice at Genoa would preclude its claim herein. The work at the two plants is the same. The Union has offered no reason why one group should be treated more favorably. The Employer has always maintained that the precedent represented in the McLees’ letter signifying the Union’s agreement at the Genoa plant to not paying rest period pay if the employee has 24hours’ notice is the same for both plants. The Employer again urges dismissal of the grievance.

## DISCUSSION

Arbitrators are bound by the agreement of the parties. The role of the arbitrator in enforcing collective bargaining agreements is to apply the terms of the agreement as it is written. If the agreement is ambiguous, the role of the arbitrator is to determine what the parties intended the ambiguous provision to mean. If the parties' intent is not clear, the role is to determine what parties similarly situated would have meant.<sup>3</sup> A contract provision is ambiguous if it is fairly susceptible to more than one meaning.

When the language is ambiguous, arbitrators use a number of techniques to ascertain the meaning of the ambiguous provision.<sup>4</sup> One of the main techniques arbitrators use in interpreting agreements is to look at the past practice of the parties. Simply put, a "past practice" is a frequent and consistent pattern of interpreting ambiguous language in one consistent way. Where this practice is well-known to the parties, a reasonable inference is that the parties have agreed to interpret the ambiguity in that way. In that context, past practice is evidence of an agreement of the parties.

When language is ambiguous, arbitrators also use the principles of contract construction long recognized by the courts and arbitrators. Two of these principles are to construe the agreement as a whole and to give effect to all the provisions.<sup>5</sup> These are the main principles applied in this matter. One of the main purposes of this is to take into account the parties' overall scheme of regulation.<sup>6</sup>

The main ambiguity in this matter appear in Article V, Section 11 B wherein it provides that the 10 hour rest period is ". . . without loss of a regular scheduled work day's pay." Where the employee's shift is allegedly changed this reference could mean that the employee is entitled to pay for the shift which had been his regular schedule work day, the shift to which he or she has newly been assigned, or merely any 10 hour period on the same work day as the rest period. There are other ambiguities which must be addressed as well in construing the agreement as a whole.

### A. Past Practice

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<sup>3</sup> NAA, The Common Law of the Workplace: The View of the Arbitrators, Sec. 2.2, comment, (BNA, 2d. Ed.): Williston on Contracts, Sec. 30.4, (West, 4<sup>th</sup> Ed.)

<sup>4</sup> In his seminal work, Arbitrator Richard Mittenthal identified the past practice of the parties as important evidence of how parties understood their own collective bargaining agreement. See, Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," 1961 NAA Proceedings p. 30 (BNA).

<sup>5</sup> May, ed., Elkouri & Elkouri, How Arbitration Works (BNA, 7<sup>th</sup> Ed.), pp. 9-2, *et seq.*, esp. 9-34-6.

<sup>6</sup> Common Law, *supra*, Sections 2.10, 2.11 and 2.13.

As noted above, arbitrators heavily rely upon proven past practice evidence because it represents evidence of the parties' actual mutual understanding. The Union alleged that there is a long standing practice to pay rest period pay at the Alma Plant and in the industry as a whole. It acknowledged that it had signed the McLees letter which contradicts that alleged past practice. It asserts that the letter only applies to the Genoa Plant. The Employer made countervailing allegations about past practice which allegedly support its view and relied heavily upon the McLees letter. I conclude the past practice evidence submitted in this matter is insufficient to be reliable even though it is possible that there are some well-established past practices. Under this circumstance, I emphasize that the decision herein is limited to the case presented.

#### B. "Regular Shift"

One of the Employer's main contentions is that the employees' "regular scheduled work day" is the Grievants' newly assigned 6:30 p.m. shift because the Employer had given them twenty-four hours' notice of the change.

The parties' scheme of regulation, in turn, is important in understanding the use of "regular shift."<sup>7</sup> Article V balances the parties' recognition that the maintenance work must be accomplished in a prompt manner to ensure continued service to customers. It balances this imperative with the non-rotating shift employees' expectation of regular hours. The agreement as a whole recognizes that in some circumstances maintenance work will have to be done on overtime and in some others it may have to be done on a "back shift" basis. It has established rules for changes to an employee's regular schedule by requiring overtime pay and requiring that in ordinary circumstances employees who have their regular shift changed should have their shift changed for a period of no less than five days with at least a twenty-four hour notice of the change. It enforces these rules by the use of premium and other penalty pay rather than by absolute rules. Therefore, the parties' scheme of regulation as it applies to this dispute can only be fully understood by taking into account the premium pay provisions as well as the rules governing shift changes.

The better view of the use of "regular scheduled shift" in Article V, Section 11 B is that it is the employee's regularly scheduled shift before the change of schedule, unless the schedule change is properly made in accordance with Article V, Sections 4 and 7. Article V, Section 4 allows the Employer to change an employee's work schedule upon twenty-four hours' notice, but expressly provides that:

Schedule changes shall be five (5) working days or longer.

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<sup>7</sup> Although the wording may be slightly different in other provisions of Article V, the concept is the same.

Sections 4 (2) and (3) provide the only express exceptions to the five day requirement. They do not specify that the Employer may change an employee's regular schedule upon twenty-four hour's advance notice for less than five days. Section 4 (2) also states that employees who are not allowed to complete the five day revised schedule shall be considered ". . . as working outside their regular shift during the 5-day working period, and shall be paid in accordance with Section 7(A) of this Article" which requires that they be paid at time and one-half for all of the hours. The Employer, in fact, paid Grievants at time and one-half for all of the hours they worked after their hours were changed.

The parties essentially disagree as to whether the Employer may change an employee's regular schedule on twenty-four hours' notice but for less than five days. Section 4 (3) effectively answers the question. Section 4 (3) provides that the five day requirement is considered waived if the work is completed early or interrupted provided:

Parties involved in the schedule change may complete their current schedule or return to a regular schedule at straight time pay by mutual agreement.

It would leave this provision with no practical meaning if the Employer were permitted to change an employee from day shift to a back shift for less than five days at straight time if it did not have to comply with that requirement. Conversely, it would make no sense to require the Employer to schedule an employee for five days if the work were really not going to last five days as long as it complies with the requirement of reaching mutual agreement with respect to the schedule. Therefore, the Employer may change an employee's schedule on twenty-four hours' notice for less than five working days if it complies with requirements of Section 4 (3).

It is not necessary to get into the mechanics of how Section 4 (3)'s option provision works, because the better view of the evidence is that no effort was made in scheduling the Grievants to even consider a five day schedule. Accordingly, Grievants were working outside their "regular shift" for purposes of Section 4 and Section 7.

### C. Rest Period Pay

I turn now to rest period pay under Section 11 B. The better view is that in the absence of the Employer having complied with Section 4 (3)'s requirement or the Employer showing of highly unusual circumstances why it could not afford the employee an opportunity to work 5 days if he or she so desired at the new schedule, the employee is to be considered as if he or she was still working his or her former day shift for rest period purposes. The term "without loss of a regular scheduled work day's pay"<sup>8</sup> requires that they either work their former regular 10 hour schedule or be paid for it.<sup>9</sup>

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<sup>8</sup> Emphasis is mine.



When the Employer has failed to comply with the Section 4 (3) requirement, rest period pay acts as a penalty for that failure.<sup>10</sup> This intention is buttressed by how “rest period pay” is used in the other two penalty situations expressed in Section 11 B when an employee is required to work during his or her rest period. The better view of these two provisions is that the Employer is required to pay the full 8 or 10 hour rest period at straight time pay anytime it requires the employee to work during his or her rest period.

The Employer also emphasized that the Union’s construction of Section 11 B would require it to pay for 10 hours’ rest period even though the employee did not actually work those ten hours plus at least straight time for the hours actually worked. In its view this is a penalty provision which is so inconsistent with the other provisions of Section 11 B that it could not have been the parties’ intention.<sup>11</sup> The better view of this is that the hefty penalty is meant to give the Employer an incentive to comply with and reach agreement under Section 4 (3). Section 4 (3) has no other provision dealing with what happens if the parties do not agree on whether or not the employee may continue to work the new shift for a total of five days. The Employer can pay the penalty for a few days or take its chances in the grievance procedure and explain why circumstances are so unusual it cannot offer the employee the choice specified in Section 4 (3). The concept of the penalty in this case is supported by the view that employee is forced to make two transitions, one to the new schedule and another back to the old schedule.

#### D. Inconsistent Administration Between Plants

The Union has contended that the parties have a different practice at the Genoa Plant than that it seeks with respect to the Alma Plant. In essence, the Employer urges that the practice created by the Mc Lees letter should be extended to the Alma Plant if it isn’t already the practice there. Circumstances at the Alma Plant are not a part of this grievance and are not properly before me. Therefore, I cannot fully evaluate the inconsistency

Accordingly, I conclude that the Employer did violate the agreement when it failed to pay Grievants for the rest period pay in dispute. Pursuant to the agreement of the parties, I reserve jurisdiction over the specification of remedy.

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<sup>9</sup> The Employer’s construction that it requires only pay for the portion of the rest period violated would leave those two prohibitions with little practical meaning and does not account for the unusual phrasing “their basic rate of pay plus rest period pay.” If the parties meant double time, they could have as easily said it that way.

<sup>10</sup> This is a penalty separate from the situations identified in Section 11 B when employees are required to work during their rest period.

<sup>11</sup> The Employer paid time and one half for the hours worked on the changed schedule. Thus, in this case, it would effectively be required to pay double time and one half for 10 hours of each shift.

AWARD

1. The Employer violated the collective bargaining agreement by failing to pay rest period pay for the period in dispute. It shall immediately make each of the Grievants whole for all lost wages and benefits in accordance with this award.

2. I reserve jurisdiction over the specification of remedy if either party requests that I exercise that jurisdiction over the specification of remedy if either party requests that I do so, in writing, with a copy to opposing party within sixty (60) days of the date of this award.

Dated at Madison, Wisconsin, this 9th day of July, 2013.

Stanley H. Michelstetter II /s/  
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Stanley H. Michelstetter II, Arbitrator