SUPREME COURT
FILED

MAY 29 2013

Frank A. McGuire Clerk

Deputy

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Appearing for Appellant and Real Party in Interest Craig Medeiros

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PARATRANSIT, INC. Respondent, V. UNEMPLOYMENT INSURANCE APPEALS BOARD Respondent, CRAIG MEDEIROS Appellant and Real Party in Interest.	Case No. S204221 Court of Appeal, Third Appellate District No. C063863 Sacramento County Superior Court No. 34-2009-80000249 **APPELLANT'S MOTION FOR JUDICIAL NOTICE IN SUPPORT OF REPLY BRIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF STEPHEN E. GOLDBERG IN SUPPORT THEREOF; PROPOSED ORDER**

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE; THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT; RESPONDENTS AND THEIR ATTORNEYS OF RECORD:

Pursuant to California Evidence Code Section 459 and California Rules of Court 8.252 and 8.520(g), Appellant Craig Medeiros hereby moves this Court to take judicial notice of the following documents:

1. Pursuant to Evidence Code Sections 452(c) and 459, *Matter of Reed*, Precedent Benefit Decision No. 187 (1949, designated precedent 1976), a true and correct copy of which is attached as Exhibit 1.
2. Pursuant to Evidence Code Sections 452(c) and 459, *In Re Barton Brands, Ltd.* (1976) 120 LA 1764, a true and correct copy of which is attached as Exhibit 2.
3. Pursuant to Evidence Code Sections 452(c) and 459, *In Re Bay Medical Center* (1995) 104 LA 830, a true and correct copy of which is attached as Exhibit 3.
4. Pursuant to Evidence Code Sections 452(c) and 459, *In Re City of Mattoon* (1995) 105 LA 44, a true and correct copy of which is attached as Exhibit 4.
5. Pursuant to Evidence Code Sections 452(c) and 459, *In Re Kilsby Tubesupply Co.* (1981) 76 LA 921, a true and correct copy of which is attached as Exhibit 5.
6. Pursuant to Evidence Code Sections 452(c) and 459, *In Re Sheller Mfg. Corp.* (1995) 105 LA 689, a true and correct copy of which is attached as Exhibit 6.
7. Pursuant to Evidence Code Sections 452(c) and 459, *In Re Transamerica Delaval, Inc.* (1985) 84 LA 190, a true and correct copy of which is attached as Exhibit 7.
8. Pursuant to Evidence Code Sections 452(c) and 459, *In Re Bechtel Power Co.* (1985) 277 NLRB No. 88, a true and correct copy of which is attached as Exhibit 8.
9. Pursuant to Evidence Code Sections 452(c) and 459, *In Re City of Southfield* (2009) 126 LA 1144, a true and correct copy of which is attached as Exhibit 9.

This motion is made on the grounds that all of the above are properly noticeable under the Evidence Code and are relevant to the issues before this Court. It is based upon this motion, the attached memorandum of points and authorities, and the Declaration of Stephen E. Goldberg.

DATED May 17, 2013

Respectfully submitted,

LEGAL SERVICES OF NORTHERN CALIFORNIA

By:
STEPHEN E. GOLDBERG

Attorneys for Appellant Craig Medeiros

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE

The Court of Appeal can take judicial notice of official acts of California executive departments. (Evid. Code § 452(c); Evid. Code § 459.) Appellant Craig Medeiros asks the Court to take judicial notice of one California Unemployment Insurance Appeals Board (CUIAB) Precedent Benefit decision, seven federal labor arbitrator decisions and one National Labor Relations Board (NLRB) decision.

These decisions were not presented to the courts below. However, all are relevant to review of the majority opinion of the Court of Appeal and to respond to the arguments raised in Respondent's Answer Brief. Specifically, *Matter of Reed* demonstrates that the CUIAB held that misconduct for purposes of unemployment insurance is different than good cause for termination of employment, and that labor arbitration proceedings are not binding in unemployment insurance cases. (*Matter of Reed*, (1949, designated precedent 1976) P-B-187 at pp. 4-5.) Because the Appeals Board is charged with interpreting the Unemployment Insurance Code and accompanying regulations, this Court has determined that its interpretation of the same is entitled to great weight unless clearly erroneous, unauthorized, or otherwise contrary to legislative intent. (*Pacific Legal Foundation v. California Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111.) Accordingly, Precedent Benefit decisions are persuasive authority in deciding cases involving unemployment insurance benefits.

The seven federal labor arbitrator decisions and one NLRB decision respond to various federal labor law arguments raised in Respondent's Answer Brief. The labor arbitrator decisions also address federal common law interpretation of collective bargaining agreements in response to Respondent's argument that federal common law is used to interpret

collective bargaining agreements.

For these reasons, Appellant requests that this Court take judicial notice of the attached Precedent Benefit decision, seven federal labor arbitrator decisions, and one NLRB decision.

DATED: May 17, 2013

Respectfully submitted,
LEGAL SERVICES OF NORTHERN CALIFORNIA

By:
STEPHEN E. GOLDBERG

Attorneys for Appellant Craig Medeiros

DECLARATION OF STEPHEN E. GOLDBERG IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE

I, Stephen E. Goldberg, hereby declare:

1. I am an attorney licensed to practice law in the State of California. I am one of the attorneys representing Appellant and Real Party in Interest Craig Medeiros in *Paratransit, Inc. v. Unemployment Insurance Appeals Board*, California Supreme Court No. S204221.

2. The document attached as Exhibit 1 is a true and correct copy of *Matter of Reed*, Precedent Benefit Decision No. 187 (1949, designated precedent 1976), which I downloaded on April 17, 2013 from the California Unemployment Insurance Appeals Board website at http://www.cuiab.ca.gov/Board/precedentDecisions/precDecNumerical.asp #benefit.

3. The document attached as Exhibit 2 is a true and correct copy of *In Re Barton Brands, Ltd.* (1976) 120 LA 1764, which I copied from the Labor Arbitration Reports at University of California Davis law library on April 4, 2013.

4. The document attached as Exhibit 3 is a true and correct copy of *In Re Bay Medical Center* (1995) 104 LA 830, which I copied from the Labor Arbitration Reports at University of California Davis law library on April 4, 2013.

5. The document attached as Exhibit 4 is a true and correct copy of *In Re City of Mattoon* (1995) 105 LA 44, which I copied from the Labor Arbitration Reports at University of California Davis law library on April 4, 2013.

6. The document attached as Exhibit 5 is a true and correct copy of *In Re Kilsby Tubesupply Co.* (1981) 76 LA 921, which I copied from the

Labor Arbitration Reports at University of California Davis law library on April 4, 2013.

7. The document attached as Exhibit 6 is a true and correct copy of *In Re Sheller Mfg. Corp.* (1995) 105 LA 689, which I copied from the Labor Arbitration Reports at University of California Davis law library on April 4, 2013.

8. The document attached as Exhibit 7 is a true and correct copy of *In Re Transamerica Delaval, Inc.* (1985) 84 LA 190, which I copied from the Labor Arbitration Reports at University of California Davis law library on April 4, 2013.

9. The document attached as Exhibit 8 is a true and correct copy of *In Re Bechtel Power Co.* (1985) 277 NLRB No. 88, which I downloaded from Westlaw on April 17, 2013.

10. The document attached as Exhibit 9 is a true and correct copy of *In Re City of Southfield* (2009) 126 LA 1144, which I copied from the Labor Arbitration Reports at University of California Davis law library on May 9, 2013

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Executed on May 17, 2013 at Sacramento, California.

Stephen E. Goldberg

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PARATRANSIT, INC. Respondent, V. UNEMPLOYMENT INSURANCE APPEALS BOARD Respondent, CRAIG MEDEIROS Appellant and Real Party in Interest.	Case No. S204221 Court of Appeal, Third Appellate District No. C063863 Sacramento County Superior Court No. 34-2009-80000249 **PROPOSED ORDER GRANTING MOTION TO TAKE JUDICIAL NOTICE**

Pursuant to Evidence Code Sections 459 and 452(c), Appellant's motion for judicial notice is GRANTED. The Court takes judicial notice of the Precedent Benefit decision, seven federal labor arbitrator decisions and the National Labor Relations Board decision attached to the motion as Exhibits 1-9.

DATED: ________________

____
HON. CHIEF JUSTICE OR ASSOCIATE SUPREME COURT JUSTICE

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT
DECISION NO. 5361 AS A PRECEDENT
DECISION PURSUANT TO SECTION
409 OF THE UNEMPLOYMENT
INSURANCE CODE.

In the Matter of:

MEREDITH A. REED
(Claimant)

RICHFIELD OIL CORPORATION
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-187

FORMERLY
BENEFIT DECISION
No. 5361

On February 11, 1949, the above-named claimant appealed the decision of a Referee (LA-19843) which affirmed a determination of the Department of Employment holding him disqualified for benefits under Section 58(a)(2) of the Unemployment Insurance Act (now section 1256 of the Unemployment Insurance Code).

Based on the record before us, our statement of fact, reason for decision, and decision are as follows:

STATEMENT OF FACT

The claimant was last employed for approximately four and one-half years as an instrument repairman by the above-named employer at its oil refinery in the Los Angeles area. A strike was called by the claimant's union in September, 1948, which resulted in the establishment of picket lines at the plant in which the claimant was employed. The claimant actively participated in picketing activities during the period of the strike, which ended in a settlement agreement on November 9, 1948. Pursuant to a provision of the agreement the claimant was notified by the employer on November 12, 1948, that he was discharged as of November 10, 1948, because of alleged improper activities during the strike.

On November 15, 1948, in the Long Beach office of the Department of Employment, the claimant registered for work and reopened a claim for benefits originally filed to establish his benefit year on February 3, 1948. On December 8, 1948, the Department issued a determination disqualifying the claimant for benefits under Section 58(a)(2) of the Act (now section 1256 of the code) from November 15, 1948, to December 19, 1948, on the ground that he had been discharged for misconduct connected with his work. The claimant appealed this determination to a Referee, who on February 3, 1949, issued his aforesaid decision affirming the determination and denying benefits whereupon this appeal was taken.

A provision of the strike settlement agreement provides in pertinent part as follows:

> "The employer has evidence that in connection with the strike certain employees have engaged in acts or threats of violence towards other employees or to the property of the employer, or acts constituting physical interference with restraint or coercion of other employees entering or attempting to enter the property of the employer. If the employer discharges or refuses to reinstate such an employee . . . he shall be given a hearing. . . . The hearing will be by a committee consisting of two representatives appointed by the employer and two representatives appointed by the union, at which hearing such committee shall hear the circumstances and review the evidence against each employee and will hear the evidence of the employee or any others on his behalf. In the event the employee is discharged or refused reinstatement he shall not be reentitled to claim any rights or benefits under the new article of the agreement. . . ."

The claimant exercised his right to request a hearing under this provision after receiving his notice of discharge.

On November 29, 1948, a hearing to review the claimant's discharge was held before a joint panel constituted under the quoted provision of the agreement. Later, the panel issued its ruling sanctioning the discharge by a three-to-one vote and recommending leniency. No phonographic record of the hearing was kept. The only evidence before us with respect to the content of this proceeding is the sworn testimony of the claimant given at the hearing before the Referee. An employer representative was present at that hearing, but testified that he had no knowledge of what transpired at the hearing before

the panel and could not, even by hearsay, testify as to what the panel's findings of fact were.

The evidence discloses that the claimant took an active part in the strike. He admitted that he was considered a "nuisance" by the plant management during the course of his picketing activities, because he energetically sought to dissuade workers from entering the plant. However, he insisted that he never at any time indulged in profanity nor engaged in acts or threats of violence towards other employees or the property of the employer, and denied exercising any physical interference, restraint or coercion on other employees or with respect to the property of the employer. Typical of the charges specified against him was one that he obstructed the progress of cars and trucks into the employer's plant. The claimant admitted that on several occasions he signalled such vehicles to stop and then when they did stop he conversed with their occupants in an attempt to persuade them not to enter the company property, in which activity he was sometimes successful. He denied that he stood in front of advancing vehicles to force them to stop or that he laid violent hands upon them.

The claimant is a practicing member of a recognized church well-known to be opposed to violence in any form. The claimant asserts that because of his religious principles he carefully avoided even the appearance of force or intimidation during his strike activities, and at all times counselled against the use of such tactics on the part of his fellow strikers. He contends in this appeal that throughout the strike he never went beyond verbal persuasion, and that at all times he conducted himself within the law while picketing. The employer representative testified that he himself had no knowledge, direct or indirect, of any activity on the part of the claimant exceeding such limits, but maintained that it was self-evident from the decision of the joint panel that the claimant must have been guilty of misconduct.

REASON FOR DECISION

By virtue of its stand in the instant case, the employer in effect contends that the decision of the joint panel which approved the claimant's discharge is sufficient to sustain his disqualification for benefits under Section 58(a)(2) (now section 1256 of the code). The Department in its determination and the Referee in his decision accepted this theory in finding the claimant guilty of disqualifying misconduct. We cannot sanction such a disposition of this case. It is our statutory duty to give to this claimant a fair and impartial hearing. We must decide this case upon an evaluation of all the evidence in the record before us, and should not depart therefrom in so doing.

We are not bound by the decision of the joint panel, nor may we infer from it alone that the claimant's activities during the strike were such as to constitute misconduct. The function of the panel was to decide whether or not the claimant's said activities were such as to justify a discharge. It is our function in this appeal to decide whether or not those activities were misconduct within the meaning of Section 58(a)(2) of the Act (now section 1256 of the code). These two functions differ in purpose and in end, and the basic issues with which they are concerned are wholly different. It is well settled that a discharge for cause is not of necessity a discharge for misconduct. For example, an employer may properly discharge an employee who is temperamentally unsuited to his job, but such a discharge would not be for misconduct in the absence of acts or omissions demonstrating a wilful or wanton disregard of the employee's duty as such. Moreover, it is our judgement, not that of the panel, which must prevail in this case at this stage of the matter. We would abdicate our statutory duty to adjudicate this appeal fairly and impartially if we were to consider that the action of the panel foreclosed us from making an independent evaluation of the facts of the case.

The only direct evidence before us as to the claimant's activities during the strike was offered by the claimant himself. The claimant's testimony exhibits complete candor and credibility, and gives every appearance of having been comprehensive of all his strike activities. The record reveals neither inherent inconsistency nor improbability in that testimony. There is no evidence before us contradictory of it, and nothing to show that the joint panel had before it any evidence not adduced at the hearing before the Referee. The claimant's testimony is therefore entitled to its full measure of weight (Dillard vs. McKnight, 87 A.C.A. 1). The direct evidence of one witness who was entitled to full credit is sufficient proof to establish a fact (C.C.P. 1844, Klein vs. Farmer, 85 Cal. App. 2d 545).

The evidence in the instant case fails to establish that the claimant's activities during the strike exceeded the legal limitations upon picketing activities. It affirmatively shows that the claimant, though he picketed energetically, always did so within the confines of peaceful picketing. "Peaceful picketing" is picketing which does not interfere with another's person or property by unlawful use of force, violence, intimidation or threats. It is a right secured by constitutional provision and allows individuals to convey their opinions and promote their causes with respect to a labor controversy by presenting persuasive facts to other workmen in a legitimate manner (Ex parte Bell, 37 Cal. App. 2d 582). It is lawful so long as it remains an appeal to reason as distinct from a weapon of illegal coercion (7 Cal. Jur. Supp., Labor, Sec. 35).

To constitute misconduct under Section 58(a)(2) (now section 1256 of the code) the acts or omissions which brought about the discharge of a claimant must have been wrongful or improper in character. Inasmuch as the acts for which the claimant herein was discharged were acts done in the lawful exercise of his right to picket peacefully, they were neither wrongful nor improper. They did not therefore constitute disqualifying misconduct. Whether or not they were of a character to justify the employer in discharging him is a question neither pertinent to this case nor within our jurisdiction to decide. It is the conclusion of this Board that the claimant is not subject to disqualification for benefits with respect to his discharge on November 10, 1948.

DECISION

The decision of the referee is reversed. Benefits are allowed if the claimant is otherwise eligible.

Sacramento, California, April 29, 1949.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

MICHAEL B. KUNZ, Chairman

GLENN V. WALLS

PETER E. MITCHELL

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 5361 is hereby designated as Precedent Decision No. P-B-187.

Sacramento, California, January 27, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

HARRY K. GRAFE

RICHARD H. MARRIOTT

In addition to the information provided at the hearing concerning sleep apnea, the Arbitrator focused on the reasons given by the Grievant for her inability to report to work on time.

The first two instances of being absent from the workplace without leave and failing to request leave prior to the absence, the Grievant gave reasons for not reporting on time as back pain problems. On October 2nd, she indicated that she was not at work because of sleep apnea, but the October 21st absence again was apparently related to back pain. It was early September 2003 when she received word that she had sleep apnea and it was on October 10 that her doctor indicated that she was being treated for sleep apnea. Why did the Grievant give reasons of back pain on the 21st of October? Why did she indicate that some of the instances were due to the medication she was taking for her back pain? Why did she indicate, in her oral reply to the charges, that all of the occurrences were due to her sleep apnea condition? These inconsistent positions reflect upon the Grievant's credibility.

In most cases where sleep apnea was determined to have an impact on the employee's work and the Employer was required to make an accommodation, the individual was falling asleep during the day inexplicably. See, e.g., *Phyllis A. Miller v. Centennial State Bank*, 472 N.W.2d 349 [56 FEP Cases 416] (June 25, 1991 Minnesota Court of Appeals). This case, as well as others, deals with the inability of an individual to perform the duties of their work as a result of a disability. In this case, there is no evidence to demonstrate that the illness of sleep apnea in general, nor the illness of sleep apnea related to the Grievant, prevented her from setting an alarm clock and waking up at a designated hour.

The lack of this nexus combined with the excuses given for failure to report to work on time and the frequency at which they existed compelled the Arbitrator to conclude that the Grievant's absence was not related to circumstances beyond her control.

The Grievant alleged that the Employer discriminated against her because she was disciplined as a result of conduct that resulted from her sleep apnea disability. The facts in this proceeding do not support such an allegation. The Grievant failed to establish a prima facie case of discrimination because the record reflects that she did not inform the agency with sufficient medical evidence nor was the Employer otherwise made aware of her alleged disability prior to the issuance of the notice of proposed suspension in December, 2003. In other words, on each of the four instances involved, the Employer did not have sufficient knowledge of any physical disability at the time the charge of AWOL and failure to properly follow report procedures was lodged against the Grievant. As discussed above, the Employer cannot be found to have discriminated in the way that they handled the Grievant not reporting to work on time or calling in on time on the four occasions in 2003. Rather, the Grievant must be held accountable for her actions.

[4] While the Arbitrator finds that the Grievant did engage in the conduct that subjected her to discipline, he does not agree that a three day suspension is appropriate under the circumstances for two reasons. First, the Grievant does have an exemplary employment record and the Arbitrator does not believe that her record was properly taken into consideration. Secondly, the Arbitrator does not feel that the Grievant was adequately warned that she could be subjected to a lengthy suspension, if she continued to fail to report on time and not follow the proper leave request procedure. As the Arbitrator indicated earlier, employees are charged with knowledge that failure to report to work will lead to disciplinary action, but it is incumbent upon an employer to specifically warn the employee of the nature of the discipline that will be used as a corrective measure. The concept of progressive discipline as set forth in Article 30 of the parties' Agreement requires this. The Grievant's supervisor could easily have told her that her failure to report to work on time without calling in before her shift would lead to a suspension the next time it occurred. A warning letter could have been given to her. In this case there was no verbal or written warning of the consequences of her actions. For these reasons, the Arbitrator believes that the appropriate discipline under these circumstances is a one day suspension.

AWARD

For all of the foregoing reasons and conclusions, the grievance is sustained in part and denied in part. The Grievance is sustained to the extent that a three day suspension for the offenses charged is improper; the Grievance is denied to the extent that discipline was warranted based upon a showing of just and sufficient cause. The Arbitrator therefore orders that the disciplinary action taken by the Employer be reduced to a one day suspension and that the Grievant be made whole as to any lost wages or other differentials caused by the additional two days of suspension. The Union's request for reasonable attorney fees is denied. It cannot be determined from the evidence of record that the Employer acted in bad faith or otherwise engaged in conduct warranting the imposition of attorney fees.

Barton Brands Ltd.

Decision of Arbitrator

In re BARTON BRANDS, LTD. [Owensboro, Ky.] and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, DISTILLERY, WINE AND ALLIED WORKERS DIVISION LOCAL 31D

FMCS Case No. 04-03108-7

February 18, 2005

Arbitrator: Harold D. Smith, selected by parties through procedures of the Federal Mediation and Conciliation Service

EMPLOYEE BENEFITS

[1] Health insurance — Premiums — Certified disability — Bargaining history ▶ 116.6011 ▶ 116.81 ▶ 24.37

Employer violated collective-bargaining agreement when it required employees on certified disability for up to 24 months to pay one-half of health-insurance premium, where provision stating that employees who work less than 16 hours in week will pay one-half of premium requires that employee on disability work some hours in week to be obligated to pay cost-sharing contribution, review of agreement as whole does not support argument that employee can work zero hours and be obligated to pay, there is insufficient evidence that union ever agreed to such requirement, and employees on certified disability had not been required under prior agreement to share in cost of health insurance premiums.

[2] Health insurance — Premiums — Certified disability — Past practice — Bargaining history ▶ 116.6011 ▶ 116.81 ▶ 24.361 ▶ 24.37

Employer violated collective-bargaining agreement when it required employees on certified disability for up to 24 months to pay one-half of health-insurance premium, where provision stating that employees who work less than 16 hours in week will pay one-half of premium refers to employees who work some hours less than 16 in week, rather than employees who do not work any hours in week, since employer's failure to charge such employees their share of insurance premiums for some time following effective date of new contract indicates that employer participants in negotiations did not come away with clear understanding that employees on certified disability were to be charged share of premiums, even if it does not establish past practice.

[3] Health insurance — Premiums — Certified disability ▶ 116.6011 ▶ 116.81

Employer violated collective-bargaining agreement when it required employees on certified disability for up to 24 months to pay one-half of health-insurance premium, where provision stating that employees who work less than 16 hours in week will pay one-half of premium requires that employee on disability be engaged in some activity for which he receives wages before employee is required to pay one-half of their weekly premium, another provision in agreement states that "[e]mployees prohibited from working for certified disability conditions and who remain on the seniority list . . . will be provided health insurance for as long as they remain on the list," and it is inconsistent to say that employees who are "prohibited from working" due to certified disability are also considered employees "who work" less than 16 hours in week.

Appearances: For the employer—David B. Sandler (Greenbaum Doll & McDonald PLLC), attorney; Thomas P. O'Brien, senior vice president, human resources. For the union—Irwin H. Cutler Jr. (Segal, Stewart,

Cutler, Lindsay, Janes & Berry, PLLC), attorney; Tom R. Ballard, international representative.

HEALTH INSURANCE

SMITH, Arbitrator.

Background

The Union filed a grievance on January 27, 2004 challenging the Company's action in requiring employees on certified disability to pay anything towards health insurance premiums. The grievance requests that the Company stop charging employees on certified disability one-half of their scheduled amount towards insurance premiums, and to reimburse any employees who have been charged in the past.

Stipulated Issue

DID THE COMPANY VIOLATE THE COLLECTIVE BARGAINING AGREEMENT BY REQUIRING RAMONDA TOWERY, AND OTHER EMPLOYEES ON CERTIFIED DISABILITY, TO PAY ONE-HALF OF THE EMPLOYEE'S SHARE OF HEALTH INSURANCE PREMIUMS? IF SO, WHAT IS THE PROPER REMEDY?

Applicable Contractual Provisions

ARTICLE IV
SENIORITY

(59) Any person who quits or resigns his position, or is discharged for cause, forfeits his seniority rights. Any employee who has not worked for the Company for a period of twelve (12) consecutive months, forfeits his seniority rights. Provided, however, that if such employee is prohibited from working solely by reason of a properly certified disability condition such employee's seniority shall not be broken until they have not worked for a period of twenty four (24) consecutive months unless the employee is classified as totally and permanently disabled under the Kentucky Workers' Compensation Law. . . .

ARTICLE XIII
GRIEVANCE AND ARBITRATION

(97) (4). . . . The Arbitrator shall not be empowered to rule contrary to, to amend, to add to, or to eliminate any of the provisions of this Agreement.

ARTICLE XVI
HEALTH AND WELFARE

(104) During the term of this agreement the Company will continue to provide certain group health, life and disability benefits for eligible employees on the seniority list. Health Insurance benefits will be as defined in the Constellation Brands, Inc. Standard PPO and Enhanced PPO plans, subject to change from time to time. . . . Laid off employees will be covered for two (2) months from the date of their lay-off. Employees prohibited from working for certified disability conditions and who remain on the seniority list in accordance with Paragraph 59 will be provided health insurance for as long as they remain on the list. . . .

* * *

(106) The Company will provide Dental Coverage as included in the health plan. The cost of this coverage is indicated in the health insurance cost table and depends on coverage selected.

* * *

(108) Each active employee will make cost sharing contributions according to the medical and dental coverage selected. Annual increases will not exceed 10% in any calendar year. Employees who work less than sixteen (16) hours in a week will pay one-half (1/2) of their scheduled amount.

PREMIUMS UNDER PRIOR CONTRACT

Article XVI Health and Welfare, Paragraph (101), of the prior Contract effective April 6, 1998 to April 7, 2003, provides in part:

. . . Employees prohibited from working for certified disability conditions and who remain on the seniority list in accordance with paragraph 57 will be provided health insurance for as long as they remain on the list. . . .

Paragraph (105) provides in part:

The appropriate employee/dependent contribution level referenced in paragraph 106 must be maintained as a condition of maintaining all coverage including Dental Coverage during the term of this [A]greement. Provided, however, that employees who do not receive at least 32 hours of pay in a week will not be required to make the weekly employee contribution for that week.

Paragraph (106) provides:

Each active employee will pay $15 per week for the first two years of the Agreement. Employee increases after the second year of the Agreement will be a maximum of 10% of their contribution in each remaining year of the Agreement. The Company will pay the remainder of the premium and will absorb the remainder of the premium increases.

Negotiations for Current Contract

Thomas P. O'Brien, Senior Vice President, Human Resources, from the Chicago office, served as chief negotiator for the Company during the sessions leading to the current Contract. The Union negotiating committee included Local Union President James Carlisle, and International Representative, Thomas Ballard. Barton, Inc. is a division of Constellation Brands. Barton employees, at various facilities, were covered by the Constellation Brands insurance plan. There are approximately 900 employees (hourly and salaried) in the Barton Division; approximately 200 at the Owensboro facility, with approximately 130 at that facility being covered by the Collective Bargaining Agreement. O'Brien testified that due to the escalating cost for health insurance, it was his position that everyone had to pay something toward the costs. O'Brien said the Company never modified its position throughout negotiations, that everyone had to contribute something to health insurance. The Company's initial proposal was to eliminate the language in paragraphs 105 and 106, and substitute the following language in paragraph 105:

. . . Employee/dependent health contribution level shall mirror the schedule (subject to change from time to time) of the PPO *plans* during the term of this agreement. All eligible employees on the seniority list shall be required to make such contributions, regardless of hours worked/paid.

O'Brien said that within the last couple of days of negotiations the Union offered a counterproposal, that employees working at least 16 hours in a week would pay the regularly scheduled contribution amount. Employees who worked less than 16 hours in a week would pay one-half of the scheduled amount. This met the company's demand that everyone contribute something toward health insurance so it was acceptable to the Company.

Carlisle has worked at the Owensboro facility for 22 years. He has served as president of the local Union for nine years. He testified that under the previous Contract, if an employee worked less than 32 hours in a week there was no requirement for the employee to contribute to the insurance premium. He testified that prior to the current Collective Bargaining Agreement, employees on certified disability absence were not charged anything for health insurance coverage for up to 24 months. He referred to the Seniority provision, Article IV, paragraph 59, which provides that if an employee is prohibited from working solely by reason of a properly certified disability condition, such employee's seniority shall not be broken until they have not worked for a period of 24 consecutive months.

Carlisle testified that during the 2003 negotiations the Company proposed that all eligible employees on the seniority list be required to make contributions toward health insurance regardless of hours worked. The Union rejected that proposal. The Union eventually agreed to the current 16-hours language. The question regarding employees on certified disability was not brought up by either side at the time the current language was negotiated. Regarding the language in paragraph 108, Carlisle considers "active employee" to mean an employee who has punched a time card and is at the facility working. He acknowledged that the term "active employee" also was not discussed during negotiations.

The current Contract became effective April 7, 2003. Carlisle testified that he was on certified disability absence from November 15, 2003 to the end of December, and he never received any billings from the Company for health insurance. He first learned the company was attempting to charge employees on certified disability for health insurance when the Company sent a letter to Ramonda Towery, on January 23, 2004, billing her for one-half of the scheduled amount for health insurance.

O'Brien acknowledged that, after negotiations concluded, there was a breakdown of communications regarding charging employees who were on certified disability leave. In the Company's post-hearing brief, a portion of O'Brien's testimony is set forth:

And so, there were some errors made early on after the contract went into place and we were able to identify those errors and we corrected the situation and we also had some changes in people at the time, that's not an excuse . . . but there was some confusion in terms of what happened or what should have happened. But we went back . . . and started taking those contributions from employees and interestingly enough, no one really complained, you know, in terms of having to make payments. There was [the instant] grievance, obviously, that we received, but in general employees didn't really say or do anything. . . .

The Company's position is that employees who work less than 16 hours in a week includes employees who work zero hours in a

week and, thus, employees on certified disability leave are required contractually, to pay one-half of their scheduled amount for health insurance.

Discussion and Opinion

In *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 [34 LA 569] (1960), the Supreme Court held that:

> . . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. . . .

It is well established that when the terms of the contract are clear and unambiguous, the arbitrator must apply the terms of the contract as written. In *East Liverpool Board of Education and East Liverpool Education Association*, 113 LA 1127, 1129 (Fullmer, 1999), the arbitrator stated:

> As with any contract interpretation case the first reference is to the specific terms of the parties' agreement. If they unambiguously resolve the point at issue, the arbitrator has no choice but to apply them as written.

As a general rule, language is ambiguous if it is reasonably susceptible to more than one meaning. Based on the language changes from the prior Contract, and the different meanings attached thereto by the parties, the arbitrator concludes that the language in Article XVI, paragraphs 104 and 108 could have a different meaning to reasonable people, with reference to the issue presented in this case. Therefore, the arbitrator will look to the "Rules of Contract Construction" for resolution of the issue.

The Rules of Contract Construction are set forth in *Fairweather's Practice and Procedure in Labor Arbitration*, 4th ed., Editor Ray J. Schoonhoven, BNA 1999, pp. 246-249. The Rules are:

> A. Interpretation Compatible with other Contract Language
>
> B. Specific Governs General Language
>
> C. Avoidance of Harsh, Inequitable, and Absurd Results
>
> D. Expressions of One Thing Excludes Another

Arbitrators have consistently held that the terms of a collective bargaining agreement are to be applied in a logical manner, consistent with the language, intent of the parties, and with the entire agreement. *Cooper/T. Smith Stevedoring Co.*, 99 LA 297, 304 (Massey, 1992). In Elkouri & Elkouri, *How Arbitration Works*, 6th edition, pp. 462, 463, Ruben, Editor-in-Chief, BNA, 2003, the construction of an agreement by considering the contract as a whole is discussed as follows:

> The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. (Citations omitted).
>
> * * *
>
> Sections or portions cannot be isolated from the rest of the agreement and given construction independently of the purpose and agreement of the parties as evidenced by the entire document. . . . The meaning of each paragraph and each sentence must be determined in relation of the contract as a whole. (Citations omitted).

Both O'Brien and Carlisle acknowledged that the question never came up, during negotiations, as to whether employees on certified disability would be included in the group of employees who would be required to pay one-half of the employee's share of the health insurance premiums. Had the question been raised, by either side, surely clarifying language would have been inserted in paragraph 108. Paragraph 104 clearly states that the Company will provide health insurance to employees on certified disability for as long as they remain on the seniority list in accordance with paragraph 59; this could be up to two years. There is no mention of the employee having to pay any portion of the premium. Indeed, prior to the current Contract, employees on certified disability were not charged anything towards the insurance premiums.

During negotiations for the current Contract, according to testimony by O'Brien and his negotiation notes, he proposed that everyone contribute something towards health insurance "regardless of hours worked/paid".

The Union submitted copies of the Company's formal proposal that has the 32-hour provision lined out of paragraph 105, with the following in its place:

> . . . Employee/dependent health contribution level shall mirror the schedule (subject to change from time to time) of the Constellation Standard PPO during the term of this agreement. All eligible employees on the seniority list shall be required to make such contributions regardless of hours worked/paid.

The proposal was not accepted by the Union.

The Union also submitted a copy of a Company proposal to change the language in paragraph 101, as follows:

> . . . During the term of this agreement the Company will continue to provide certain group health, life and disability benefits for eligible employees on the seniority list. Health benefits shall mirror the attached PPO Plan (subject to change from time to time). In addition, Life and AD&D Insurance in the amount of $50,000 and Weekly Disability benefits will be provided. Weekly Disability benefits will be $300 for the term of this agreement. Laid off employees will be covered only for the last month worked, with coverage resuming upon their return to work (employee paid COBRA offered in the interim). Employees prohibited from working for certified disability conditions and who remain on the seniority list in accordance with paragraph 57 will be provided health insurance for the shorter of six months or the date they are no longer on the seniority list. All benefits shall begin on the first of the month following the probationary period.

The Union also rejected the proposal to change paragraph 101.

The Union points out that under paragraph 106, of the prior Agreement, and paragraph 108, of the current Agreement, each "active employee" is obligated to pay or share the cost of insurance premiums. The Union argues that the Contract nowhere obligates employees who are not "active employees" to pay any share of health insurance premiums. According to the Union, the last sentence of paragraph 108 means that "active employees" who work less than 16 hours in a week pay one-half of their scheduled amount.

It is noteworthy that, in the Company proposals that were rejected, the Company used the term "eligible" employees instead of "active" employees. The Union notes the following in its post-hearing brief:

> . . . All eligible employees includes, of course, not only employees who are actively working but also employees who are on disability or lay off. They are eligible for coverage. *The Company, however, was not successful in getting this language in the contract.*
>
> Instead, what the Company got was the language that now appears in paragraph 108, namely, that each *active employee* will make cost sharing contributions. Clearly, the term "active employees" is less comprehensive than the term "eligible employees".
>
> Company counsel argued at the hearing that the term "active" employees includes employees on layoff or disability. To make such an assertion is to make the term "active" a meaningless adjective. The Company is virtually arguing that *all* employees are active employees. The clear meaning of the term, to distinguish it from all employees or all eligible employees, is that it refers to employees who are actively working during that particular week. . . .

The Union cites *U.S. Postal Service v. Postal Workers*, 204 F.3d 523, 530 [163 LRRM 2577] (4th Cir. 2000), where the court held that a party may not obtain through arbitration what it could not acquire through negotiation. In *Superior Products Co.*, 42 LA 517, 523 (Smith, 1964), Arbitrator Smith stated:

> Arbitrators are constantly required and expected to give meaning to contract provisions which are unclear, in situations which were not specifically foreseen by the contract negotiators. So long as this is done by application of principles reasonably drawn from the provisions of the Agreement, and not by treating of a subject not covered at all by the Agreement, arbitral authority is not being improperly assumed.

The focus of the parties' arguments, in the instant case, is on the meaning of "active employee" and "work" as used in paragraph 108 of the Contract. The Union maintains that employees on certified disability are not "active employees". The Company's position is that "active employees" include employees on certified disability.

There was no evidence presented by the Company, or discovered by the arbitrator in his research, that reflects a consistent application of the term "active employee".

In *Rockwell Spring & Axle Co.*, 23 LA 481, 483, 486 (Dworkin, 1954), the company maintained that certain employees on layoff were not entitled to vacations with pay under the terms of the contract, for the reason that they were not "actively employed" on the qualifying date. The qualifying date is set forth in the collective bargaining agreement as follows:

> On June 1 of each year any employee who is in the active employ of the Division and who has six (6) months or more Division service shall be eligible for vacation with pay in accordance with the following provisions. . . .

It was the company's interpretation and construction of the language "actively em-

ployed" as requiring that the employee be "actually at work" as distinguished from being merely "in the employ" or "on the payroll" or "on the seniority list". In rejecting the company's argument, Arbitrator Dworkin wrote:

> . . . It is the conclusion of the arbitrator that the employees involved in this grievance were in the active employ of the company on June 1st, notwithstanding that they had been laid off prior to said date and, accordingly, having met the other qualifying conditions and requirements, they were entitled to the vacation benefits specified in the contract. To hold otherwise would lead to an absurd and untenable result, and it is an established rule of construction that where one interpretation of the language of the contract would lead to an absurd result, while an alternative interpretation would lead to a just and reasonable result, the latter interpretation will be used. . . . The status of an employee who is laid off by reason of lack of work is entirely different from an employee who had quit or been discharged, for the employer-employee relationship continues and he retains his seniority to his job classification on the basis of his plant seniority—. . .

In *Mid-America Canning Corp.*, 85 LA 900 (Imundo, 1985), the collective bargaining agreement provided that:

> . . . After one full calendar year of active employment, an employee is entitled to take seven (7) days off with pay per year for sickness or to take care of personal and family business. . . . 85 LA 901

The parties' positions are stated as follows:

> . . . The Union believes the portion of the defined calendar year the Grievants worked prior to being laid off should be credited towards the full year requirement. Management believes that the partial year of service time was lost when the Grievants were laid off. Management has contended that employment was terminated and the Grievants were rehired. The result being that the date each returned was their seniority date with respect to sick leave accrual. 85 LA 904

The Arbitrator wrote:

> . . . In the Arbitrator's opinion the words "active employment" mean an employee is identified in the Company's personnel records as a current employee. An employee who has been laid off would not be listed as a current or active employee. . . .
>
> . . . the words "one full calendar year of active employment" mean a total of twelve months whether or not active service was interrupted so long as seniority was not terminated. . . . 85 LA 904-905

A distinction is sometimes made between employees on long term disability and active employees. In *City of Duluth and International Association of Fire Fighters, Local 101*, 94-1 ARB ¶4143 (Bognanno, 1993), long term disability recipients were treated similarly to "active" employees for purposes of health care coverage. The distinction implies that employees on long term disability are not active employees.

In the instant case, employees on certified disability could be absent for a short period or as long as 24 months before their seniority is broken. There is no specific language in the contract to indicate whether an employee on certified disability is considered an active employee or an inactive employee. Indeed, the Company makes a good argument in pointing out that under the Union's interpretation, an employee could be active and inactive over a period of several weeks and, possibly, in the same week. It is unlikely that the parties would have intended such a result in negotiating the language in Article XVI, paragraph 108 of the Contract.

[1] According to the grievance, the Union claims that the last sentence of paragraph 108 is intended to refer to employees who work some hours less than 16 in a week, rather than employees who do not work any hours in a week due to being on certified disability. The arbitrator is not convinced by the Company's argument that an employee can work zero hours and be obligated, by paragraph 108, to pay one-half of their scheduled amount towards the health insurance cost. Even if employees on certified disability are considered to be active employees, a review of the Contract as a whole convinces the arbitrator that the last sentence in paragraph 108 requires that said employees must work some hours in a week to be obligated for the cost-sharing contributions. No doubt, the testimony of Company chief negotiator Thomas O'Brien is credible, that it was his intent that everyone had to contribute something towards the health insurance cost. However, there is insufficient evidence to convince the arbitrator that the Union ever agreed to such a requirement. The Company's proposals were rejected by the Union. The counter-proposal by the Union, with the 16-hour provision, does not indicate the Union was agreeing that employees on certified disability would begin to pay towards the insurance premiums with the new

Contract. The fact that employees on certified disability had not been required to share in the cost of health insurance premiums before the current Contract weighs in favor of the Union's position. It is significant that Company proposals, which contained the following language, were rejected by the Union:

> . . . All eligible employees on the seniority list shall be required to make such contributions <u>regardless of hours worked/paid.</u> (Underlining added)

[2] A past practice has not been established by the Company's failure to charge employees on certified disability for health insurance costs for a period of time after negotiations. However, it is an indication that the local Human Resource personnel who participated in negotiations did not come away with a clear understanding that said employees were to be charged their share of health insurance premiums under the new Contract.

Merriam-Webster's Collegiate Dictionary, Eleventh Edition, Merriam-Webster Incorporated, 2003, p. 1442, defines "work" as follows:

> . . . activity in which one exerts strength or faculties to do or perform something. . . .

At page 1443, "working" is defined as:

> . . . engaged in work esp. for wages or a salary.
>
> . . .

Black's Law Dictionary, Eighth Edition, Bryan A. Garner, Editor-in-Chief, Thompson-West, 2004, defines "work" as "physical and mental exertion to attain an end. esp. as controlled by and for the benefit of an employer."

. . .

Roberts' Dictionary of Industrial Relations, Third Edition, Harold S. Roberts, BNA, 1986, defines "work" as, . . . "an activity that produces something of value for other people."

In *Tiger Maintenance Corp.*, 89 LA 276 (Hockenberry, 1987), the arbitrator stated:

> What is readily apparent from the credible testimony of both chief spokespersons is that there was never a meeting of the minds as to the same interpretation of the disputed language "for each regular hour worked". The Company took the language which they proposed at its face value, actual time spent performing work exclusive of overtime or vacations, etc. . . . 89 LA 278
>
> * * *
>
> . . . the Company was entitled to assume that the terms of "regular hours worked" would be granted their general meaning. . . . While the intent between the parties remains ambiguous, the language used is clear and entitled to its apparent, rational definition as advanced by the Company; that insurance contributions would be made by the Employer to the Union Health and Welfare Fund based upon actual hours worked by the employee and not upon an inflexible standard of 2080 hours per year. 89 LA 279

[3] In the instant case, Article XVI (104) provides, in part:

> . . . Employees prohibited from working for certified disability conditions and who remain on the seniority list in accordance with paragraph 59 will be provided health insurance for as long as they remain on the list. . . .

It is inconsistent to say that employees who are prohibited from working due to a certified disability are also considered employees "who work" less than 16 hours in a week.

The arbitrator concludes that the language in paragraph 108 requires that an employee on certified disability be engaged in some activity for which he receives wages from the Company before the employee is required to pay one-half of their scheduled contribution to health insurance premiums for any given week. The language in the last sentence of paragraph 108 refers to employees who work some hours less than 16 in a week, rather than employees who do not work any hours in a week due to being on certified disability.

AWARD

The grievance is granted. The Company violated Article XVI, paragraphs 104 and 108, by requiring Ramonda Towery, and other employees on certified disability, to pay one-half of the employee's share of health insurance premiums. Towery, and other employees who have been charged premiums while on certified disability, shall be reimbursed. Employees who are prohibited from working, for certified disability conditions, shall not be charged their scheduled amount for insurance premiums for the duration of the Contract period, or until otherwise agreed by the parties.

The arbitrator will retain jurisdiction for 60 days from the date of this Award, in the event the parties need direction in complying with the remedy.

but when the senior did, there has never been a claim for higher pay for rank.

Arbitrability

The City raised an issue of arbitrability for the first time at the arbitration level. A grievance followed a three step procedure. As a matter of practice, the Safety Director and the Union would go directly to step three and by pass one and two. This was done in this case.

The Collective Bargaining Agreement specified that a grievance is a dispute between the city and the Union or an employee or group of employees for among other things the interpretation of any terms or provisions of the Agreement.

There is no provision when a defense that there is a non-arbitrable issue must be raised. In the absence of language, to the contrary, my decision is that this defense may be raised at any time prior to the hearing before the arbitrator.

This defense is very much like the defense of "lack of jurisdiction" in a Court of law. Either a Court has jurisdiction or it does not. It must entertain challengers to its jurisdiction when raised.

An arbitrator likewise no longer has jurisdiction if the issue between the parties is not arbitrable.

The Union stated that this grievance questioned the Article that required that all exercises of management rights shall be made in accordance with a "Fair and Prudent Management Standard". The Agreement then set out that "This standard shall provide the basis for grievance by members of the bargaining unit".

The claim of pay for rank may conceivably involve the exercise of the management rights of the employer and therefore it is found that the grievance is properly before this arbitrator and the issue is arbitrable.

Discussion

Equal pay for equal work certainly sounds fair and equitable as a general proposition.

The Agreement, however, is silent as to this issue. The same Agreement is specific in spelling out that an arbitrator has no power to add to or subtract from or modify any of the terms of the Agreement.

The pay for rank benefit got no where at the collective bargaining table. The City says that this grievance is an attempt to bootstrap the benefit and obtain the benefit in arbitration that was lost in negotiations.

Though some of the work of the officer with more seniority parallels that of a lieutenant, there was no question that a patrolman was ever an O.I.C. (Officer In Charge). Overtime had to be approved by the shift commander. At all times, the jail was under the shift commander's control.

Custom and practice existed for senior officers to take more responsibility then a junior patrolman.

The verbal remark of the major merely reiterated what has always been done.

No member of the Union at any time in the fifteen (15) month period grieved that the City abused its management rights when it entrusted the jail keepers to perform their duties without a lieutenant or at least a sergeant being present.

The Agreement has no pay for rank provisions and in the absence of such language the grievance can not be sustained.

AWARD

The grievance is denied and the costs of this arbitration shall be borne by the Union.

BAY MEDICAL CENTER —

Decision of Arbitrator

In re BAY MEDICAL CENTER [Bay City, Mich.] and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 79, AAA Case No. 54-300-00837-94, March 7, 1995

Arbitrator: Erwin B. Ellmann

WAGES

— General increase ▸114.22 ▸114.84 ▸24.37 ▸24.757

Nurses' bargaining unit is not entitled to wage increase given to 45 salaried employees, despite collective-bargaining contract "me too clause" stating that negotiated rates remain in effect "subject only to any general wage increase given to salaried and non-represented employees," where raise was given to less than six percent of salaried, professional, and non-represented employees and cannot be considered general increase, and parties had not agreed to language incorporating union's proposal allowing any increase to trigger wage increase for unit but had specified that only "general wage increase" did so.

Appearances: For the employer — Joseph Lyons, vice president, human resources; Kathy Roberts, human resources manager; Marilyn Bostick, employee relations assistant; Gary Klotz, attorney. For the union — Mary Gibson, local president; Luann M. Toyzan, secretary; Lee J. Offenbecker, vice president; Janet M. Neveau, steward; Jane Bowen, grievance chairman; David F. Claxton, local 79-legal affairs.

GENERAL INCREASE

ELLMANN, Arbitrator: — The Bay Medical Center has some 1,800 employees of whom about 825 are nonunionized while 975 are in three separate labor organizations. The Professional Registered Nurses Staff Council is the exclusive bargaining representative for some 350 registered nurses employed by the Center. Each nurse is placed at an appropriate step on the wage schedule reflecting prior experience. In Section 1 of Article XXXIX of the collective bargaining agreement negotiated and signed by the Union and the Employer the parties set forth wage rates for the various steps for each of the three years covered by the agreement. For the first year it was expressly indicated:

> These rates remain in effect through January 21, 1995, subject only to any general wage increase given to salaried and non-represented employees for payroll year 1994 or any general wage increase negotiated after ratification with any other bargaining unit for payroll year 1994, but excluding any wage increases for payroll year 1995.

The meaning to be given to this quoted language has divided the parties and precipitated this grievance filed by Mary Gibson in behalf of all members of the bargaining unit.

Due to loss of revenue and a precarious budget condition, the Center management saw fit, in the spring of 1994, to eliminate some 129 positions, including those of about 25 nonrepresented hourly employees and 35 salaried employees. Remaining salaried employees were assigned additional duties. Acknowledging this fact as well as competitive conditions, the Center then decided to increase the compensation of some 45 affected salaried workers by one to four dollars per hour. The amounts were determined by individual evaluation on a case by case basis and the adjustments became effective in the latter part of May. The Union, though it did not represent any of the affected workers, was duly notified of these wage adjustments. It emphasizes that it did not agree to this action.

Under the quoted language of Article XXXIX, which has been referred to as a "me too clause," it was the Union's position that if any employee received an increase in rates, an equal percentage increase was payable to all members of the bargaining unit. Accordingly, the increase granted to the 45 salaried employees constituted a "general wage increase" which required an equal percentage increase in the compensation of each union member.

The Center rejected the claim, contending that it was contrary to the language of the agreement and the negotiating history of the provision itself. Union witnesses in turn emphasized their firm understanding that the contract embodied their intention that if any employee received an increased benefit, all members of the bargaining unit were entitled to a corresponding increase.

Opinion

During the negotiations of the current collective bargaining agreement, which extended over some months, there was basis for the Union's interpretation in some writings which the Center submitted at the bargaining table. Thus, the Center's Revised Proposals, dated March 1, 1994, indicated that there would be no increase in compensation the first year but "*subject to any increase* given to salaried and non-represented employees." I am satisfied that both before and after March 1st Union representatives articulated what they intended by the "me too clause" and that representatives of the Center acknowledged that they "understood" that position. There was no credible evidence that the employer concurred in that interpretation, however. On the contrary, on March 3rd the Center presented Revised Proposals. With respect to wages, the proposal read:

> 1st year - 0%; subject only to any *general wage increase given to salaried and non-represented employees* in July 1994, but excluding any other general wage increases that may be negotiated with any other bargaining unit. (Emphasis added.)

Later in March a comprehensive enumeration of some 55 separate "Contract Changes" was prepared. Under Wages, the Center recited:

> 1st year - 0%; subject only to any *general wage increase given to salaried and non-represented employees* in July 1994, but excluding any other general wage increases that may be negotiated with any other bargaining unit. (Emphasis added.)

On March 15, 1994 representatives of both parties formally signed a Thir-

teenth Partial Agreement which once again reiterated under Wages:

1st year - 0%; subject only to *any general wage increase given to salaried and non-represented employees* for payroll year 1994 or *any general wage increase* negotiated after ratification with any other bargaining unit for payroll year 1994, but excluding any wage increases for payroll year 1995. (Emphasis added.)

This document bears the signature of Union president Gibson and another Union representative, G. P. McCarty. It was then incorporated in the collective bargaining agreement in the final printed version.

Analysis of these documents leaves no doubt that the kind of wage increase which would trigger an adjustment for the nurses was not "any" increase, as originally suggested, but a "general" increase to both salaried and nonrepresented workers. Wittingly or unwittingly, the Union ultimately agreed to that language regardless of what "intention" some or all of the Union representatives may have privately harbored. The controlling principle was formulated almost a century ago by Mr. Justice Holmes in *The Path of the Law*:

"The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs,—not on the parties' having *meant* the same thing but on their having *said* same thing."

See *Social Security Administration*, 85 LA 874, 876 n. 4 (Ellmann, 1985); *Michigan Chandelier Company*, 297 Mich. 41, 49 (1941). Under Section 5 of Article VIII of the labor contract the parties explicitly confined the powers of an arbitrator to "applying and interpreting this Agreement *as written*." The power to alter or modify it was withheld.

The adjustment in compensation given in May to forty-five employees, principally managers and directors, represented a significant increase for a significant number of employees. Whether regarded as a one-time bonus, or recognition of special merit or special competitive conditions, it could reasonably have been viewed by the Union as an upward adjustment in the compensation of these affected employees, but it was not a "general wage increase." True, it did not have to be universal for the Center itself in July granted a 1% adjustment "across the board" which it acknowledged was a "general wage adjustment" although it excluded the forty-five who had already received special attention in May. But less than 6% of the salaried, professional and non-represented employees of the Center were affected by that adjustment. The Union's contention that "general" can mean even an insignificant part of the whole finds no support in either dictionary or common usage. As defined in Webster's Ninth Collegiate Dictionary, "general" refers to "every member of a class" or to at least a "majority of individuals involved." The Random House Dictionary of the English Language (2nd ed 1987) defines "general" as "pertaining to or true of such persons or things in the main, with possible exceptions, common to most." Black's Law Dictionary indicates the word refers "to the whole kind, class, or order." It is "directed to the whole, as distinguished from anything applying to or designed for a portion only." Application to only 6% of the group does not meet even the most idiosyncratic notion of a "general" increase." No such modification of ordinary language was ever suggested in the course of bargaining. For this reason, the grievance cannot be sustained.

AWARD

The grievance is denied.

CONE MILLS CORP. —

Decision of Arbitrator

In re CONE MILLS CORPORATION, WHITE OAK PLANT, Greensboro, N.C. **and** AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, LOCAL 1391, FMCS Case No. 94/25461, April 24, 1995

Arbitrator: Dennis R. Nolan, selected by parties through procedures of the Federal Mediation and Conciliation Service

DISCHARGE

— Safety ▸118.659

Employer did not have just cause to discharge employee for not wearing face shield while pumping chemicals, where employer failed to prove that employee knew of its supposed rule requiring face masks when handling any chemicals; no documents distributed to employees contained such a rule, training video communicated opposite message by showing employees handling chemicals while wearing only goggles, and supervisor who testified that he told employee of rule was unreliable witness.

EVIDENCE

— Credibility — Safety ▸94.60505 ▸118.659 ▸94.60519

Supervisor who testified that he told employee of supposed rule requiring face mask when handling any chemicals was unreliable witness, even though employee who was discharged for not wearing mask while pumping chemicals had interest in denying he had been told of rule, where supervisor had interest in demonstrating that he carried out his superior's orders, supervisor was unable to keep his story straight about whether employee had told him of his medical problem about wearing masks, and date of note purportedly recording substance of conversation in which supervisor allegedly told employee of rule differed from date supervisor claims conversation occurred.

Appearances: For the employer — Charles P. Roberts, III (Haynsworth, Baldwin, Johnson and Greaves, P.A.), attorney. For the union — Phil Cohen, district manager, Central North Carolina District.

SAFETY

Statement of the Case.

NOLAN, Arbitrator: — The Union filed this grievance on January 5, 1994 to protest the discharge of R— the previous day for a safety violation. The parties could not resolve the dispute in the grievance procedure, and the Union demanded arbitration.

II. Statement of the Facts

A. Background

Until his discharge in January of 1994, the Grievant had worked for the Company's White Oak plant for nine years, the last three as a sulfur dye mixer in the dye house. An immigrant from Pakistan, he learned English as his fourth language. He rose to supervisory status at another company before starting work at Cone. So far as the record shows, his performance was completely satisfactory until March of 1993, when the series of incidents leading to his discharge began. Because the case concerns facts rather than interpretations, a careful statement of the background and of the discharge incident is essential.

Dye mixers use dyes, caustics, acids, and various other chemicals in their work. Among other things, they have to pump, weigh, and mix the ingredients for the Company's dyes. Many of the chemicals are potentially toxic, so employees have to follow detailed safety regulations. Pursuant to federal law, industrial chemicals come with a Material Safety Data Sheet (MSDS) listing harmful ingredients, safety precautions, and first aid treatments in cases of accidental exposure. Occupational Safety and Health Administration regulations oblige employers to provide a safe workplace for their employees. One method used by Cone to ensure safety is a Job Safety Analysis, or JSA. This document lists the hazards and control measures for each duty. The Company also posts or distributes other safety rules.

B. The Applicable Rules

This case concerns the safety rules applicable to the dye mixers, in particular the requirements for employees to use personal protective equipment, or PPE, to prevent injuries from exposure to toxic chemicals. Section XIX of the Agreement requires employees to observe all posted shop rules. That section also obligates the Company to discuss proposed changes in the rules with the Union, although it may then implement changes without the Union's consent, subject to the Union's right to grieve the changes. The critical rule is Class B, number 7: it requires employees to wear "mandatory personal protective equipment in designated areas, and on jobs and tasks

immediate supervisor of the grievant, or his delegate, shall meet with the grievant and the Union to review the progress of the grievant and any problems encountered in his performance and training. The Company shall make assessments of his performance using appropriate methods. The performance and assessments of the grievant shall be documented and kept on file to show instances of both effective and ineffective performance.

After twelve weeks the Company shall make a decision regarding the ability of the grievant to perform the work of mechanic B. The Company shall inform the grievant and the Union of its decision. The arbitrator retains jurisdiction of this matter pending this Company decision and any grievance filed by the grievant or the Union regarding it.

CITY OF MATTOON —

Decision of Arbitrator

In re CITY OF MATTOON and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 31, LOCAL 3821, FMCS Case No. 95/01506, May 17, 1995

Arbitrator: Robert G. Bailey, selected by parties through procedures of the Federal Mediation and Conciliation Service

DISABILITY

— Light duty ▸100.08 ▸24.368

City's denial of light-duty assignment to injured employee did not violate collective-bargaining contract, where contract did not require city to create light-duty assignment as accommodation, and seven instances of giving of light-duty assignments in past 10 years, with only two in past five, do not constitute binding past practice.

HOLIDAY PAY

— Work after holiday ▸100.4815

Injured employee who was instructed not to come to work on day after holiday because no light duty was available should have been given holiday pay, even though collective-bargaining contract required employees to work scheduled workdays before and after holiday to be eligible for holiday pay, where contract also provided for holiday pay if absence from work on either day was approved by city, and city's instructing employee not to come to work is equivalent to approval.

Appearances: For the employer — Robert D. Shuff, attorney; Wayne Bolson, street superintendent; Wanda Ferguson, mayor; Michael E. Misner, superintendent of water department. For the union — Catherine Struzynski, attorney; Donald L. Osborne, president; David Leroy Harrington, vice president; Gary Olsen, street foreman; Rick Purcell, janitor; Tim Daly, laborer; Steve Camden, maintenance.

LIGHT DUTY

I. Issues

BAILEY, Arbitrator: — There are two issues to be resolved in this dispute: (1) Whether the Company violated the collective bargaining agreement or any related past practice when it denied the Grievant, Kenneth King, light duty; and, if so, what remedy shall issue? (2) Whether the Company violated the collective bargaining agreement when it denied the Grievant holiday pay for Memorial Day; and, if so, what remedy shall issue?

II. Applicable Contract Provisions

ARTICLE II
MANAGEMENT RIGHTS

Section 1 — Management Rights
Subject to the provisions of this Agreement the management of the operations of the Employer, the determination of its policies, budget, and operations, the manner of exercise of its statutory functions and the direction of its work force, including but not limited to, the right to hire, promote, demote, transfer, allocate, assign and direct employees; to discipline, suspend and discharge for just cause; to relieve employees from duty because of lack of work or for other legitimate reasons; to make and enforce reasonable rules of conduct and regulations; to determine the departments, divisions and sections and work to be performed therein; to determine quality; to determine the number of hours of work and shifts per work week, if any; to establish and change work schedules and assignments, the right to introduce new methods of operations, to eliminate, relocate, transfer or subcontract work; to maintain efficiency in the department and to take such actions as are necessary in an emergency is vested exclusively in the Employer provided the exercise of such rights by management does not conflict with the provisions of this Agreement.
Section 2 — Reservations
It is understood and agreed that any of the rights, powers, or authority the City or Union had prior to the signing of this Agreement are retained by the City or Union except those specifically abridged, granted, or modified by this Agreement.

ARTICLE IX
HOLIDAYS

Section 1. Amounts
All employees shall have time off with full salary payment on the following days:
New Years Day
Good Friday
Memorial Day
Fourth of July
Labor Day
Veteran's Day
Thanksgiving Day
Day after Thanksgiving Day
Christmas Eve
Christmas Day
Employee's Birthday
If a holiday falls on a Saturday, then the preceding Friday shall be observed as the holiday. If a holiday falls on a Sunday, then the following Monday shall be observed as the holiday.
Section 6. Eligibility
To be eligible for holiday pay, the employee shall work the employee's last scheduled workday before the holiday and first scheduled workday after the holiday, unless absence on either or both of these workdays is approved by the Employer.

ARTICLE XI
SICK LEAVE

Section 1. Use
Sick Leave may be used for illness, disability, or injury of the employee, appointments with Doctor, Dentist or other professional medical practitioner, and in the event of illness, disability, or injury of a member of an employee's immediate family or household. For purposes of definition, the "immediate family or household" shall be husband, wife, mother, father or children (including stepchildren). Such days may be used in increments of no less than one-half day at a time.
The Department Head or any authorized supervisor may direct an employee who appears ill to leave work to protect the health of other employees.
Employees who are unable to return to work upon expiration of sick leave benefits must request a leave of absence without pay. Notice of an employee's desire to return to work after an extended illness must be given to the Department Head no less than twenty-four (24) hours in advance.
Section 2. Accumulation
Sick leave will be accrued at the rate of 10 days per year. Sick leave may be accumulated and carried over from year to year up to one hundred twenty (120) days.

ARTICLE XII
LEAVES OF ABSENCE

Section 5. Work Related Injuries
Leave for work related injuries shall be consistent with current practice.

ARTICLE XXVI
MISCELLANEOUS

Section 1. Personnel Codes, Ordinances, Rule and Regulations
This Agreement incorporates by reference the City of Mattoon personnel Code, City of Mattoon Ordinances, and any rules and regulations now in effect. To the extent that this Agreement is inconsistent with the City of Mattoon Personnel Code, City of Mattoon Ordinances, rules and regulations the terms of this Agreement shall control, provided however that the Personnel Code, Ordinances, rules and regulations may be amended from time to time provided such changes are not mandatory subjects of bargaining.

III. Facts

The City of Mattoon (City) and The American Federation of State, County and Municipal Employees (Union) negotiated for nearly two years before entering into their first collective bargaining agreement on May 3, 1994. Kenneth King, the Grievant, and a member of the Union, commenced his employment with the City on June 1, 1985. The Grievant is a laborer with the City.

On Wednesday, May 25, 1994, the Grievant injured his right elbow while working on his car during his non-duty hours. The Grievant went to the Sarah Bush Lincoln Health Center where he was treated and placed on light duty for three to four days. On May 26, the Grievant called his supervisor, Wayne Bolsen, and requested light duty. Supervisor Bolsen informed the Grievant that there was no light duty available. The Grievant reported for work anyway, but was sent home by his supervisor. The Grievant received a half-day credit from his remaining sick leave.

After being sent home, the Grievant contacted Union Steward Harrington. The Grievant advised Harrington of his conversation with Supervisor Bolsen. Harrington then spoke with Supervisor Bolsen. Bolsen advised Harrington that he did not want an injured employee on the streets. Harrington questioned Bolsen about past light duty assignments and Bolsen indicated that he wanted to see if he had to provide light duty. Union President Osborne also spoke with Supervisor Bolsen about a light duty assignment for the Grievant. Bolsen also told Osborne that he wanted to determine if he had to provide a light duty assignment for the Grievant.

Supervisor Bolsen contacted Special Labor Counsel Shuff to discuss the situation. Bolsen was informed by Shuff that the City was under no obligation to create light duty assignments for employees injured during non-duty hours.

On Friday, May 27, the City janitor called in sick for work and Supervisor Bolsen called the Grievant to come to work as light duty work was available. The next Monday was the Memorial

Day holiday and the Grievant did not work. On Tuesday, May 31, the Grievant telephoned Supervisor Bolsen to request light duty work. Supervisor Bolsen advised the Grievant that he did not have any light duty work available.

On June 1, the Grievant returned to his doctor for a check-up. The doctor did not release the Grievant to perform his full duties, but rather he excused the Grievant from the rest of the week's work. The Grievant received sick leave pay for this time as his sick leave days had been renewed on June 1, 1994. The Grievant returned to work on Monday, June 6. During the period from May 26 to June 3, the Grievant had his non-dominant right arm in a sling.

On June 8, 1994, the Union filed a grievance with the City on the Grievant's behalf. The grievance stated that past practice required assigning light duty to the Grievant. The Union requested that the Grievant be compensated for lost wages. On July 20, the Union filed a grievance with the City on the Grievant's behalf requesting holiday pay for the Memorial Day holiday. The Union noted that the Grievant had been told to stay home on May 31, 1994. On August 3, 1994, the City advised the Union that the grievances were denied.

IV. Position of the Parties

A. Union

The Union insists that the City violated Article XXVI of the agreement by unilaterally eliminating the past practice of assigning light duty to the Grievant. The Union contends that the agreement incorporated the parties' past practice of assigning light duty. The Union asserts that the parties' past practice of assigning light duty is an implied provision of the agreement. Elkouri and Elkouri, *How Arbitration Works* 437 (4th ed. 1985). The Union maintains that arbitrators most frequently apply one of two tests to determine whether a past practice has become an implied provision of the agreement. The two tests are a five factor test or the methods of operations/employee benefits test. Jaffe, *Past Practice, Maintenance and Benefits, and Zipper Clauses*, 1 Lab. and Empl. Arb., §18.01 at 18-2 (February 1995); Elkouri and Elkouri, *How Arbitration Works* at 440.

The Union argues that under the five factor test, the past practice became a binding implied provision of the agreement. The Union notes that at least six times in the last ten years the Company has assigned light duty to employees injured while being off their jobs. The Union claims there was a consistency of practice which was never challenged by the City. Moreover, the Union submits that the Grievant was a test case under the new agreement and that the denial of light duty to the Grievant was a significant departure from the parties' past practice. The Union points out that the past practice has been adhered to for ten years and should easily meet the longevity factor. The Union insists that there has been no change in the circumstances warranting the discontinuance of the parties' practice. Further, the Union asserts that there was no threat to safety which would justify the past practices discontinuance. Finally, the Union maintains that no notice of the City's intent to modify or eliminate the past practice was provided to the Union during the contract negotiations. Indeed, the Union declares that the agreement contains a specific provision, Article XXVI, Section 1, which incorporates past practice. As a consequence of fulfilling all five factors, the Union argues that a past practice of assigning light duty became an implied provision of the agreement and must be given binding effect. *Pacific and Arctic Railway*, 77 LA 1017 (Council 1983).

As to the second test, the Union submits that the methods of operations bear directly on the employer's core business functions, while employee benefits only impact those core functions indirectly, if at all. The Union states that if the past practice has no direct bearing on the efficiency or adequacy of producing the employer's goods or services, then unilateral modification or elimination of a past practice is a breach of the agreement. The Union contends that this is especially so if the past practice may be deemed to be of personal value to the employee. The Union insists that under the facts of this case, the past practice was of great personal value to the employee and had at most an indirect effect on the City's core business functions.

As to the City's denial of pay to the Grievant for Memorial Day, the Union argues that the City violated Article IX, Section 6 of the agreement because the meaning of an "approved" absence was not discussed during negotiations. The Union notes that the Grievant worked on the Friday before Memorial Day, so the only issue should be whether his absence on Tuesday, after Memorial Day, was approved by the City. The Union points out that the Grievant made himself available for light duty on Tuesday but the City refused to assign him. The Union contends that if the Grievant had had any more sick days, he would have been eligible for holiday pay. However, since he had used his yearly allotment of sick days, the Union submits that he is being unfairly penalized for being injured at the end of the benefit period and that such lack of sick days should not work a penalty on the Grievant. The Union suggests that Article IX, Section 6 was designed to discourage employees from using holidays to create extended vacations, not to penalize an employee who is injured. In addition, the Union points out that any other interpretation could well create a double standard between laborers and non-laborers as non-laborers can still perform their duties with minor injuries and thus collect holiday pay while a laborer cannot do so.

In conclusion, the Union requests that the grievances be sustained and that the Grievant be made whole by granting one and one-half days back pay for lost regular time, one day holiday pay and restoration of three and one-half sick days. Further, if the Arbitrator decides against the Union on the first issue, the Union requests that the Grievant be made whole by granting him his one lost day of holiday pay.

B. City

The City contends that the parties' agreement is silent with respect to the issue of light duty for non-work related injuries. Further, the City notes that for a past practice to become an implied contract term, the practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable for a reasonable period of time as a fixed and established practice accepted by both parties. Elkouri and Elkouri, *How Arbitration Works* 435 (4th ed. 1985). The City asserts that it has not agreed to or accepted a practice of providing light duty for employees injured due to non-work related conditions.

Moreover, the City maintains that the best evidence of the parties' agreement is their written contract. The City insists that the agreement's management's rights clause provides the City with the right to establish methods of operation and to direct the working force. The City contends that during the contract negotiations, work related injuries and non-work related injuries were discussed and thus the Union must establish by strong evidence the existence of any additional implied term of the agreement. The City insists that the Union has failed to meet its burden of proof and that the contract is clear as to the parties' intent.

Furthermore, the City claims that the Union's evidence as to past practice involves allegations of remote incidents which occurred prior to 1991. The City declares that the alleged past practice was not unequivocal as the Mayor and two City department heads testified that no unequivocal past practice existed regarding light duty due to a non-work related injury. Further, the City asserts that during negotiations for the agreement many issues related to light duty were discussed and at no time did the Union seek clarification of any of these related terms.

In addition, the City points out that work safety issues were discussed and incorporated into the Mattoon safety policy. The City contends that this policy was the result of meetings between the City and the Union. This policy specifically provides for rules for light duty work. The City notes that no grievances were filed by the Union after this policy was enacted.

The City argues that it has not mutually agreed to any provisions in the contract concerning light duty work for non-work related partial disability and that no clear, unequivocal evidence has been presented to indicate an implied term of the agreement.

Further, the City submits that it is not required to create a job for an employee. The City maintains that since the employee was physically incapable of performing his normal duties, the department had properly decided that for safety reasons there was no other work available for the Grievant. The City claims it had no duty to create light duty work for the Grievant and that its decision was reasonable and made in good faith.

As to the Grievant's request for Memorial Day pay, the City contends that the Grievant did not fulfill the terms of the contract and was therefore not entitled to vacation pay for Memorial Day. The City insists that since the Grievant did not have an excused absence for May 31 and as he did not work on May 31, then the Grievant is not contractually entitled to Memorial Day pay.

In conclusion, the City requests that the grievances be denied as the Grievant was not entitled to light duty during the period of May 26, 1994 to June 5, 1994 and the Grievant did not meet the requirements for holiday pay for Memorial Day, 1994.

V. Decision and Analysis

The first issue to be resolved in this dispute is whether the City violated the agreement, or a related past practice, when it denied the Grievant light duty assignments in late May and early June.

This is the party's first collective bargaining agreement. As Arbitrator Miller stated in a 1986 light duty case:

> The duty of the arbitrator in construing the relevant provisions of the Collective Bargaining Agreement is to give effect to the intent of the Parties as it can be ascertained from their negotiated language, the nature of their collective bargaining relationship and permissible extrinsic aid to interpretation. In their daily interactions, the Parties must act then react or reach agreement on many matters, all of which cannot be anticipated or included in the Contract. Implied conditions and covenants, the reserved rights of management, the inherent rights and obligations of the Parties by reason of their relationship, unwritten practices and customs mutually agreed to by the Parties, all may be as much a part of the Collective Bargaining Agreement as the written word. As Arbitrator Arthur T. Jacobs observed in *Coca Cola Bottling Company*, 9 LA 197 (1947):
>
> > A union-management contract is far more than the words on paper. It is also all of the oral understandings, interpretations and mutually acceptable habits of action which have grown up around it over the course of time.

Clark County, 87 LA 1085, 1087 (Miller 1986).

This pronouncement is relevant here because both parties acknowledged that the agreement does not discuss light duty. Thus, there was no express contractual obligation requiring the City to create a light duty assignment to accommodate the Grievant. *Oden Allied Plant Maintenance Company of Oklahoma*, 101 LA 467, 470 (Harr 1993). However, the Union asserts that a past practice existed for light duty assignments which Article XXVI incorporated as part of the parties' agreement. As expected, the City denies that past practice existed for light duty assignments and argues that the agreement's management's rights clause empowers the City to direct the working force and to establish and assign work schedules.

The City correctly points out that the Union bears the burden of proving that a binding past practice existed concerning the assignment of light duty. *Delaware Police Department*, 102 LA 627, 630 (Heekin 1994); *Pepsi Cola Bottlers of Akron, Inc.*, 82 LA 1026, 1029 (Feldman 1984). It is a well-established arbitral principle that to establish the existence of a past practice, the proponent of such practice must show that the practice was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable time as a fixed and established practice accepted by both parties. *Curved Glass Distributors*, 102 LA 33, 36–7 (Eischen 1993); *City of St. Clair Shores*, 103 LA 630, 633 (Daniel 1994).

The evidence and testimony in this case do not establish the existence of a binding past practice on the assignment of light duty. The Union cited seven instances of light duty assignments for a non-duty related injury during the past ten years. The evidence indicated one such instance in 1985, 1988 and 1990 and two such instances in 1987. Further, the evidence established that the Grievant received light duty in 1993 and 1994 for a shoulder injury. These seven instances of light duty assignment during the past ten years, with only two such occurrences in the past five years, do not meet the test for a clearly enunciated and readily ascertainable practice. The infrequency of these incidents does not clearly establish a readily ascertainable practice. This is especially so as the credible City testimony was that the City had not accepted the practice of assigning light duty work for a non-duty injury. Further, the evidence indicated that for the Grievant's light duty assignments in the recent past, there had been light duty work available, while in this dispute the City credibly maintained that there was no light duty work available. Moreover, because the elected City Council members act as the department heads for the various City departments, establishing that the light duty assignments were a fixed and established practice accepted by the department heads proved to be a significant burden which the Union failed to meet.

There did not exist a binding past practice of assigning light duty work for an employee who had suffered a non-work related injury. The evidence did not demonstrate that there was a regular course of conduct by the City establishing such a binding past practice and accordingly, the grievance relating to light duty assignments must be denied.

The second issue raised in this arbitration is whether the City violated the agreement by failing to pay the Grievant for the Memorial Day holiday in 1994. Article IX of the agreement delineates the days constituting holidays and Memorial Day is one such designated day where an employee "shall have time off with full salary payment." In Section 6 of Article IX, the parties' describe the eligibility requirements to receive holiday pay.

As Arbitrator Eischen discussed in *Curved Glass Distributors*, the first review of a holiday pay provision should be as to whether the eligibility requirement is one designed to "require an employee to work 'his' last and first scheduled work days around the holiday as opposed those which require an employee to work 'the' last and first scheduled work days. The former language refers to the last and first work days of the employee whereas the latter refers to the last and first work days of the plant." 102 LA 33, 35 (Eischen 1993).

The language in the parties' agreement clearly calls for the last and first work days of the employee. The Grievant worked the last day before the Memorial Day holiday in 1994 and called in to work the first day after the holiday, but the City told the Grievant not to report to work on May 31, the day after the Memorial Day holiday, as the City did not have any light duty assignment for him. Therefore, the Grievant was absent from work on the day after the Memorial Day holiday.

However, the parties' agreement in Article IX, Section 6, stipulates that an employee shall be eligible for holiday pay if the absence on "either or both of these work days is approved by the employer." So the gravamen of this inquiry is the meaning of the word "approved" in the eligibility section. The parties did not provide a definition for the word "approved." The City argues that the absence was not approved because the absence was not excused. The City insists that since the Grievant did not apply for a leave of absence subsequent to the expiration of his medical leave, then the absence was unexcused. The Union, on the other hand, contends that since the City instructed the Grievant not to come in for work, then the City approved his absence and the Grievant remained eligible for holiday pay.

Meriam Webster's Collegiate Dictionary defines "approved" as "to accept as satisfactory" or "to give formal or official sanction to." Pg. 59 (10th ed. 1993). Unquestionably, the City officially sanctioned the Grievant's absence from work in that Supervisor Bolsen told the Grievant not to come in for work as the City had no light duty assignment for him. The Grievant was ready and willing to work, but he was not able to work because of his light duty status and the unavailability of a light duty assignment. The Grievant's absence from work was approved or sanctioned by the City as the "decision to alter [the Grievant's] assigned work schedule emanated" from the City. *Hospital Linen Service Facility*, 92 LA 228, 230 (Stoltenberg 1989).

Further, a reason for a holiday eligibility section is to discourage employees from using the holiday to create an extended vacation. The Grievant was not trying to create an extended vacation. Indeed, he desired to work on the day following the Memorial Day holiday. The Grievant was not malingering or trying to extend his holiday into a vacation.

Since the City "approved" the Grievant's absence from work on May 31, 1994, the Grievant should have received his Memorial Day holiday pay.

VI. AWARD

The grievance relating to light duty assignment is denied. The grievance for holiday pay for the Memorial Day holiday, 1994 is sustained. The City is ordered to pay the Grievant one day of holiday pay.

CITY OF KENTWOOD —

Decision of Arbitrator

In re CITY OF KENTWOOD, MICHIGAN and KENTWOOD GENERAL EMPLOYEES ASSOCIATION, September 5, 1995
Arbitrator: Nathan Lipson

PROMOTIONS

— Internal applicants ▸100.70

City's bypassing of three internal applicants and filling of police records clerk/receptionist position with terminated officer, who had filed workers' compensation and handicap discrimination claims, violated collective-bargaining contract, where all applicants had desired prerequisites for job, two had police experience, which was not required, and one had been in job for substantial period of time, applicants were never interviewed nor advised of their status before vacancy was filled, and former officer did not apply for job, but was approached by city about filling it.

— Internal applicants ▸100.70

City, which violated collective-bargaining contract by filling police records clerk/receptionist position with terminated officer whom it approached to take job, is ordered to consider internal applicants and if one or more of them is qualified, to fill position with most acceptable applicant, where contract requires city to give bargaining unit employees "an opportunity to apply for the vacancy," and then to consider those from

tions; given the undisputably unskilled nature of work performed by the general labor class. On that the Company's brief argues:

Not only is picking on a piece-rate basis rather than an hourly basis, as is the case with general labor, but the contract specifically separates the two classifications of picker and general labor. 'Mushroom picker' is described on page 23 of the contract and 'General Labor' reads as follows: 'Specific operations that pertain to the General Labor classification are described below.' Mushroom picking is not described in the listed operations.

It is true that mushroom picking is not included in the operations listed under "General Labor". But there is no reason why it should be so included. For the job description for general labor itself provides in pertinent part:

The [general labor] classification includes . . .*picking. . .and other related unskilled jobs.* [Emphasis added.]

It seems quite evident that picking was not included in the job descriptions under general labor for the simple reason that a description of picker duties is described in the contract under the job description for "Mushroom Picker.". The parties avoided superfluous language in their agreement by not repeating the description of picker duties under general labor operations, after describing "picking" as part of the general labor classification.

That pickers are paid on a piece-rate basis and general labor workers on an hourly basis, is not relevant. The question for decision is not whether pickers' work requires more skill than that of general labor workers, but whether pickers' work requires skill and experience. Reading together the job description for general labor, Article 3-E (with the enlightenment provided by the practice of hiring inexperienced pickers), it must be concluded that the agreement does not permit the Company to reject inexperienced pickers who are dispatched from the Union's hiring hall.

III

The Union's brief suggests an appropriate remedy. Without necessarily agreeing with all of the details outlined in the Union's proposed remedy, I do agree that a make-whole back pay remedy is appropriate. Eligible for back pay are those pickers who were later hired as pickers or for other work, following their rejection as inexperienced pickers. Also eligible for back pay are those grievants who were rejected for lack of experience as pickers and not subsequently hired by the Company for any work. Interim earnings may be deducted. Consistent with the prevailing practice in arbitration proceedings, interest will not be awarded. Also rejected is the Union's request that the "Arbitrator advise the Company to follow the contractual procedures of notification and negotiation prior to implementing any unilateral changes." Some unilateral changes may not violate the agreement, for any number of reasons. Some unilateral changes by the Company might, for example, be permitted because the Union has waived its right to object to them.

No hiring offer has been requested by the Union. Presumably, the Union is aware that with this decision, the Company, under current terms of the agreement, may not reject pickers dispatched from the Union's hiring hall because they lack experience as pickers. Grievants will become eligible for employment on being dispatched from the Union's hiring hall in due course and consistent with the agreement's hiring hall provisions.

AWARD

(1) West Foods, Inc., violated the contract by refusing to hire inexperienced pickers.

(2) Grievants shall be made whole with compensation for lost earnings, if any, and with no loss of seniority or other benefits they would have received but for the violation described in paragraph (1) of this award. Interim earnings, if any, shall be deducted.

KILSBY TUBESUPPLY CO.—

Decision of Arbitrator

In re KILSBY TUBESUPPLY COMPANY, a Division of FLUOR CORPORATION and WAREHOUSE, PROCESSING & DISTRIBUTION WORKERS UNION, LOCAL 26, I.L.W.U., FMCS No. 80K/02861 May 28, 1981

Arbitrator: Leo Weiss, designated in accordance with procedures of Federal Mediation & Conciliation Service

DISCIPLINE

—Insubordination — Refusal to sign altered time card ▶ 118.6521 ▶ 118.6565

Employer did not have proper cause for suspension of employee who refused to sign time card that had been altered by supervisor to exclude two hours spent by employee in grievance meeting, under newly-posted plant rule requiring employees to sign cards and stating that "signature is understood to be his acknowledgement that the time clock hours are correct." Supervisor's insistence upon obtaining grievant's signature, in face of grievant's fear of signing away his claim for two hours' pay, served no legitimate purpose and did not constitute valid work order; therefore, grievant's refusal to obey order did not constitute insubordination.

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Appearances: For the employer — Anthony J. Oliver, Jr., counsel. For the union — Billy Hudggins, business representative.

SIGNING TIME CARD

WEISS, Arbitrator: — This arbitration arises under a collective bargaining agreement between the parties named above and covering the period of March 14, 1980 to March 13, 1983.

The evidence shows and the Arbitrator finds the following facts:

The Company operates a warehouse and distribution center in the City of Industry, California. For purposes of collective bargaining, the Union represents the Grievant and others in the Grievant's job classification. The Grievant is a saw operator.

On June 26, 1980, the Company promulgated a series of new work rules designed to deter employees from punching other employees' time cards and to curb sick pay abuses. The first such rule provided:

1. *All* time cards must be signed by the employee. A signature is understood to be his acknowledgement that the time clock hours are correct.

Within a day or two, the rules were posted on the Company bulletin board adjacent to the warehouse time clock, the one normally used for posting notices. One meeting of day shift employees was held specifically to cover the June 26th memo. Thereafter, several other meetings were held, during which the rules were discussed. Some employees, including the Grievant, expressed vocal opposition to the new rules. For a period of several weeks, the Grievant and a number of others declined to sign their time cards at week's end, necessitating the supervisor to seek them out the following Monday to secure their signatures. The recalcitrant employees would then sign their cards.

On Wednesday, July 23, 1980, the Grievant, a day shift steward whose shift ends at 2:30 p.m., attended a grievance meeting from 2:00 to 4:00 p.m., along with the night shift steward, the Union Business Representative and two Company representatives. After the meeting, the Grievant clocked out at 4:03 p.m. Subsequently, the supervisor, upon instructions from the Warehouse Manager, scratched out the "4:03" entry on the time card and wrote in "2:00." This would result in the Grievant being paid for 7½ hours, rather than eight hours, for that day. The Grievant, as had become his custom, did not sign the card that Friday afternoon. On Monday, July 28th, the supervisor took the Grievant's time card to him, but this time the Grievant refused to sign it, claiming that the card had been tampered with. At this point the Warehouse Manager intervened. He asked the Grievant at least three times to sign the time card. When the Grievant steadfastly refused, the Warehouse Manager suspended him for the rest of that day and for the balance of the week (four days).

The following day the Union filed a grievance on behalf of the suspended employee.

Issues

At the hearing, both parties stipulated that the issue herein is as follows:

1. Did the Company violate the collective bargaining agreement when it suspended the Grievant on July 28, 1980?

2. If so, what remedy is appropriate under the collective bargaining agreement?

Union's Position

As quoted in full from its post-hearing brief:

The position of the Union is that (the Grievant) should not have been suspended for refusing to sign the time card. It had not been made mandatory as to when or where he was supposed to sign the time card. However, (the Grievant) has never actually refused to sign a time card. He did disagree with the contents of the time card of July 23, 1980.

Company's Position

The Company maintains that "the Grievant was guilty of insubordination in that he refused the direct order of the Warehouse Manager to sign his time card, not one, but at least three times." The Company cites the following section of the collective bargaining agreement:

Article V *Management*

Section 1. ". . . the management of the Company's plant and the direction of its working forces, including . . . the right to . . . suspend, demote, discipline or discharge for proper cause, . . . shall be rested exclusively with the Company."

According to the Company, the Grievant's proper recourse, given his unwillingness to sign the altered time card, would be to sign it, then file a grievance. By his refusal to sign, the Grievant's behavior, in the Company's view, constituted clear-cut insubordination which would have justified not only the suspension that resulted but, had the Company so chosen, immediate discharge of the Grievant.

Discussion

The Company is correct in arguing that an employee who objects to an order of his supervisor normally cannot engage in self-help. Instead, he is required to obey the order, then file a grievance. That is the customary form which an employee complaint must take. Simple refusal to follow instructions vitiates the strength of the grievance procedure and runs against the basic concepts of the collective bargaining process.

Needless to say, there are exceptions. Employees need not first obey orders which place their health or safety in jeopardy. They need not engage in criminal acts. These are the oft-cited examples of situations in which an employee is not required to "Obey now, grieve later." Nothing like this is involved in our case, however, and we must get into the gray area in order to resolve the dispute.

What we have here is an accusation of insubordination, based on the Grievant's refusal to sign his time card. We also have a work rule — which the Grievant is alleged to have violated — requiring every employee to sign his time card and stating that "A signature is understood to be his acknowledgement that the time clock hours are correct."

Thus, the incident of July 28th, for which the Grievant was disciplined, turns out to be a dispute over whether the time card was correct. The Company said it was — as amended by the supervisor. The Grievant said it was not — that it had been correct before the supervisor changed it, but it was now wrong.

Under these circumstances, the Grievant could reasonably be apprehensive that signing the time card would be not only an "acknowledgement that the time clock hours are correct," but that he was also signing away his claim for pay to attend the grievance meeting.

Can it then be said that the Grievant's conduct was an unjustified refusal to obey a valid work order — which is what "insubordination" is? I think not.

The order itself, although it was somewhat related to work — did not involve the Company's production or the Grievant's job performance. It had no effect on customers or other employees. It did not affect management functions — one way or the other. The Company was free to calculate the Grievant's pay as it thought proper, whether or not the Grievant signed. The card itself, as amended by the supervisor, already reflected the Company's view of its obligation under the contract. The Grievant's signature was not required to complete the transaction. Therefore, the supervisor's insistance upon obtaining the Grievant's signature, in the face of his fear of signing away his claim, served no legitimate business purpose and did not constitute a valid work order.

"Obey now, grieve later" cannot be used to deprive an employee of fundamental rights to which he is otherwise entitled. It is designed to take labor disputes off the work floor and put them where they belong — into the grievance procedure. Here, the Company sought to resolve the dispute on the work floor by obtaining the Grievant's signature. This it could not do.

In MGM Grand Hotel, 68 LA 1284 (1977), I refused to uphold discipline of a food server in a night club who had refused to sign an authorization to deduct $68.00 from her pay. The Company claimed she owed the money because some of her customers had walked out without paying their check. The Grievant denied she was liable. I questioned there whether refusal to admit liability for a disputed debt constitutes insubordination. The same question exists here.

In that case, also, I found there was no just cause for discipline. I stated that "just cause requires each case to be evaluated from the point of view of the seriousness of the Grievant's conduct." I held as follows:

The Grievant's conduct in this case — even if it is called "insubordination" and even if it violated House Rules — simply was not serious enough to warrant termination. Nor was her refusal to sign an authorization for payroll deduction — which is the real reason why she was discharged — sufficient grounds for imposing a lesser penalty, such as a suspension or warning notice.

In evaluating the instant case, I find that the contractual requirement of "proper cause" for suspension of an employee has not been met. No harm has been shown to have befallen the Company as a result of the Grievant's conduct. The incident was essentially trivial. Such conduct — no mater what label is placed upon it — cannot be the "proper cause" of serious discipline.

Arbitrator Lee Modjeska in Defense Language Institute, 64 LA 498, (1975), overturned a 28-day suspension of an employee accused of insubordination. Her alleged misconduct was an insistence on answering her supervisor's questions about an argument with another employee in writing, rather than orally. The Arbitrator there stated:

Again, as stated earlier, this case does not involve (the Grievant's) work performance or any flagrant and unjustified refusal on her part to comply with a valid work order. Further, the entire matter involved a trivial incident over the newspaper, in which (the Grievant) had done nothing improper. It is unfortunate that the matter was not resolved or otherwise disposed of at earlier stages which could have precluded precipitation of the incident into something totally out of proportion.

In other words, a trivial incident ought not result in serious consequences for the participants.

There having been no proper cause for the suspension of the Grievant, I find that the Company violated the collective bargaining agreement when it suspended him. The grievance will be sustained.

The Company will be directed to make the Grievant whole for any losses in pay and benefits he may have suffered as a result of the suspension.

With the consent of the parties, I will retain jurisdiction of this matter for a period of 60 days from the date of issuance of this Opinion and Award, in the event they are unable to agree on its proper implementation.

AWARD

The Company having violated the collective bargaining agreement when it suspended the Grievant on July 28, 1980, the grievance is hereby sustained.

The Company is directed to make the Grievant whole for any losses in pay and benefits suffered as a result of his suspension.

With the consent of the parties, I hereby retain jurisdiction of this matter for a period of 60 days from the date of issuance of this Opinion and Award, in the event the parties are unable to agree upon its proper implementation.

ALLIED CHEMICAL CORP.—

Decision of Arbitrator

In re ALLIED CHEMICAL CORPORATION, BALTIMORE WORKS and PETROLEUM, CONSTRUCTION, TANKLINE DRIVERS AND ALLIED EMPLOYEES, LOCAL 311, IBT, FMCS Case No. 80K-24127, May 1, 1981

Arbitrator: James M. Harkless, selected in accordance with procedures of Federal Mediation & Conciliation Service

DISCHARGE

—Facial hair rule — Claim of illness — Doctor's verification ▶ 118.6564 ▶ 118.655 ▶ 118.303

Employer did not have just cause for discharge of employee who had been suspended for refusal to shave facial hair in compliance with new plant rule and who was directed to furnish medical proof of inability to work when he later came to plant to get sickness benefits forms. (1) Although grievant had not shaved beard when he appeared at plant to pick up forms, he was not reporting for work at that time; (2) grievant had almost 14 years of prior satisfactory service; (3) request for verification of illness was unusual in that employee normally is required to produce proof of inability to work due to sickness when he is cleared to return to work; (4) employer's failure to explain to grievant why doctor's slip he presented subsequently was inadequate and to give him opportunity to supplement it with further evidence makes discharge action arbitrary and precipitous.

PROOF OF ILLNESS

HARKLESS, Arbitrator: — In this grievance, the Union protests the discharge of Scrub Attendant R__ on May 23, 1980. The issue to be determined is:

"Was the grievant, R__, discharged for just cause, and, if not, what shall be the remedy?"

The grievant began his employment with the Company in 1966, and prior to May 1980 it appears his work was satisfactory. Because the employees at this plant are exposed to various toxic substances in their work, all of them including the grievant, always have been required to wear respirators and suits in the plant to protect their health. In April 1980, however, Management became concerned because many more employees were wearing beards and goatees which could interfere with the fit of their respirators and thereby increase their risk of exposure. Therefore, on April 29th, H.T. King, the local Manager of Employee Relations and another Company official met with Union representatives, told them of these concerns and announced that re-

as total pay for the work is concerned, the grievant actually lost nothing by the Company's mistake. On this basis, I must agree with the Company. If Mr. Cook had taken the run of Mr. Darby, he would not have left later in the evening on the run which he actually received. Consequently, if the Company had properly assigned him according to his extra board seniority, he would have received no more money for his week's work than he actually received, as a matter of fact, he would have received a little less. Consequently, what we have is that the Company technically breached a right of Mr. Cook, as far as the contract is concerned, but as far as his monetary income for the week, he actually lost nothing. This is not to say that since he receives no money, it follows in effect that he has no rights. As a matter of principle, it may well be that under another set of facts and other circumstances a reassignment or a mis-assignment would result in a loss of pay. All that I am saying in this case is that as a result of what the Company did, Mr. Cook in this case, suffered no actual loss in wages. But there is another aspect to this case which deserves serious consideration. Mr. Cook testified that at the time the understanding with reference to work assignments of extra board employees was agreed upon between the parties, the Company indicated that every effort would be made to assign employees by their seniority in order that they may not have to work on Sunday or at least could finish as early as possible on Saturday. In this particular case, had Mr. Cook taken the run received by Mr. Darby, he would have had his week end free; however, as a result of leaving at night on Friday, he actually did have to work on Saturday. So what the grievant actually lost here was not money, but the inconvenience and interference with his week end time, a possibility which the Company indicated they would seek to avoid if at all possible. So Mr. Cook's grievance boils down to this—if the Company had not violated the contract he would have had a free weekend in which he could have enjoyed more leisure time than he received as a result of the Company's breach. Now I fully realize that in courts of law and in jury cases, a jury is authorized to award damages for pain and suffering, but as arbitrator, I believe that I am limited in awarding damages to compensation which is measurable in terms of the contract. In other words, if a company breaches a contract and fails to award an employee holiday pay, then it is my responsibility to award that employee the holiday pay which he did not receive. By the same token, if an employee is not properly assigned overtime, he should get the overtime through the arbitrator's award. If the employee is discharged improperly or laid off, then all lost wages are due him. But where as here the employee actually ended up with as much money as he would have received had the Company properly assigned him but his loss as here was the taking away of free time on a weekend, it is my opinion that for me to attempt to assess in money what the loss amounts to on behalf of the grievant would be to extend the arbitration process beyond that which is normally and customarily contemplated by the parties. In other words, there are two tasks which the arbitrator has in a typical grievance. In the first place, he must look to see if a particular provision of the contract has been violated. After having found a violation if one exists, he must then reimburse the employee in question for lost earnings. In brief, it is the responsibility of the arbitrator to make the employee whole for any breach. But unlike a jury, it is my conclusion that the arbitrator is limited to those standards of compensation which are expressly or impliedly found in the contract negotiated by the parties. By this standard, I believe it is beyond my authority to attempt in this case to assess damages for the loss of a portion of the employee's free time.

AWARD

Although the Company violated the seniority rights of George D. Cook on September 4, 1959, when they improperly assigned another employee to take an extra board run which under the facts would have been assigned to Mr. Cook, based on the foregoing reasoning and analysis, it is my conclusion that Mr. Cook is not entitled to the extra day's pay since his total earnings for the week amounted to at least what he would have received had not the Company improperly assigned him.

SHELLER MFG. CORP.—

Decision of Arbitrator

In re SHELLER MANUFACTURING CORPORATION, DRYDEN RUBBER DIVISION [Keokuk, Iowa] and UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, LOCAL UNION No. 444, Grievance Nos. [illegible]-83, July 2, 1960.

Arbitrator: Whitley P. McCoy.

DISCIPLINE

—Insubordination—Refusal to obey foreman's order—Direction to revise time card ⊳118.652

Employer was not justified in disciplining for insubordination employees who refused to obey foreman's order to change their time cards to indicate that work they had put down as piecework was done on day-work basis. Exception to general principle that employer's order must be obeyed and challenged through grievance procedure is applicable here, since time card represents claim to proper pay and, as such, constitutes definite right or interest of employee to be protected; moreover, situation involved no unseemly argument, no interference with production, and no challenge to proper authority and dignity of supervisors. (W. McCoy)—Sheller Mfg. Corp., 34 LA 689.

Appearances: For the company—Owen Fairweather, attorney; John L. Bradley, director of industrial relations. For the union—Donald R. Johnson, president, Local 444; J. C. Long, treasurer, Local 444; Ernest E. Payne, international representative.

INSUBORDINATION

McCOY, Arbitrator:—At a hearing held in Keokuk, Iowa, on May 27, 1960, three grievances were submitted to arbitration which can best be treated together in one decision because they arose out of a single incident. The incident resulted in the discharges of Carl Soper and Orin Workman for alleged insubordination, and a written reprimand to Donald Johnson, the President of the Local Union, for abetting that alleged insubordination. The Company later modified the discharges to suspensions of 10 working days. The issue therefore is whether the suspensions and the reprimand should stand. The Union filed briefs at the hearing, and the Company has filed a post-hearing brief.

Before stating the facts it may be well to restate certain fundamental principles which are so well established, by the decisions of the writer as well as of many other arbitrators, as to be now beyond question in my mind. The grievance procedure, ending when necessary in arbitration, is set up for the express purpose of providing means, times, and places for proper argument and disposition of disputes, thus eliminating the necessity for such forms of "self-help" as strikes, slowdowns, refusal to obey orders, and even unseemly argument on the plant floor. When an employee is told by a supervisor to do something, his duty, perhaps after preserving his rights by a protest, is to do it. He then has the right to file a grievance and have the propriety of the order tested. No plant could operate if the employees were free to obey or disobey orders according to their own notions of their contract rights.

Exceptions to Principle

Certain exceptions to this principle are equally well recognized. No employee is bound to obey an order which would involve an unreasonable hazard to life or limb; no employee is bound to obey an order which would humiliate him or which has no reasonable relation to his job duties—such as to shine a foreman's shoes or to withdraw a grievance. Arbitration decisions have established these and other exceptions.

This case presents the question whether the facts here involved bring it within the scope of the general principle or the scope of the exceptions. In considering this question it is important to bear in mind the *reasons* for the general principle: the necessity for the efficient, orderly, uninterrupted operation of production; elimination of unseemly argument on the plant floor; and the practical necessity, for reasons of efficient operations, of maintaining the proper authority and dignity of those entrusted with supervisory duties. Since these are the reasons for the general principle, absence of such reason in a particular case (such as the shoeshine case), or the existence of an overriding right or interest in the employee (such as to life or health), may form the basis for a legitimate exception. A weighing of the conflicting interests may be necessary on a given state of facts. But certainly caution

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down 7910-01-213, the operation number for oven no. 7, there would be a duty to correct. Such corrections are a part of their job as much as would be the reworking of bad work.

But insofar as the time sheet is a *claim*, or a "bill', as it was referred to by a Union representative during the grievance meetings, and not a mere record, it seems to me that a different principle applies. If a man has made 500 pieces, and a foreman should arbitrarily order him to change his claim for piecework pay to 300 pieces, I see no duty to obey. If there is a valid reason for making the change, in the foreman's opinion, he can disapprove the time sheet. But he has no right to expect the employee to relinquish what the employee thinks is a valid claim. Or if an employee has had down time, approved by the foreman at the time, and at the end of the shift the foreman orders it struck from the time sheet, I see no valid reason for compliance. The keeping of a true and accurate record, and correction of errors of fact in it, are duties owed to the Company. But the making of claims for pay are no duties owed the Company; they are rights of the employees. It is the employee's right to make the claim; it is the foreman's right to disapprove and refuse payment. That this is common practice is shown by the testimony of the foremen. They testified that when they find an error in a time sheet affecting the pay, they turn in a slip calling for payment at daywork until they get it straightened out with the employee.

The Company loses nothing by this procedure, except perhaps that a little extra work is made for the foreman and the Payroll Department.

The Company argues that the employees should have changed their claim on the time sheet, as ordered, and then filed a grievance. If they had, they might have found that they had prejudiced the grievance. It was suggested at the hearing that the employees might avoid such prejudice by writing on the time sheet "Changed under protest". That is true, but it is a thought more likely to occur to a lawyer than to the average worker in a plant.

Withdrawal of Claim

I see nothing more of insubordination in refusing to withdraw a claim from a time sheet than in refusing to withdraw a grievance. The order must be one relating to job duties before there can be insubordination. Referring back to the reasons stated earlier for the general principle, there was no unseemly argument, there was no interference with production, and the *proper* authority and dignity of the supervisors were not jeopardized. The men turned in time sheets making the claim for piecework pay, the foremen rejected the claim and sent in a slip for daywork pay. That was all there was to it. On the other hand, looking at the reasons for the exceptions to the general principle, there was here quite definitely a right or interest in the employees to be protected—the right to proper pay.

Obiter dicta in arbitration decisions are not in favor, but in order to make clear the limits of what is being decided here, I feel it necessary to state that if the facts had been just a little different, the outcome would be quite different. If the foremen had directed the men to enter on the time sheets the number of the bun cuts and slab cuts separately, such order should have been obeyed. It is for supervision to decide in what form the facts should be recorded. The employees could have obeyed that order without prejudice, for they could still have claimed the bun price for the slabs. (Though the work had been finished they could have segregated the slab cuts from the bun cuts by referring to the truck list of slab cuts loaded. Whether they could have segregated the time involved was not brought out.) In its brief the Company interprets the evidence as indicating that an order to segregate the slab count from the bun count was given. I find no evidence to justify such conclusion. As I understand the testimony, even of the foremen, no such order was given. This testimony is verified by the written reports of the foremen (Company Exhibit 14). The only order given was to turn in the time consumed on sawing slab as worked on "02", daywork. This was an order to change a claim, not to amend the record of facts.

The Company further appears to argue that the commingling of the slabs and buns in one count occurred only after the employees had been told that the slabs were to be paid for at day rate, and that such commingling therefore was insubordinate. This point was not made at the hearing, where the sole contention for insubordination was based upon a failure to *change* a claim already made. I do not find the new point raised in

the Company's brief sustained by the evidence. Admittedly the evidence as to the jobs performed by these men throughout the shift was quite vague, but the impression was certainly created in my mind that they sawed buns intermittently throughout the shift, not just after finishing the slab job, and so the intermingling of the count of slabs and buns had started before the men were ordered to change their claim. So I find that they were not told, either directly or by necessary inference, to keep a separate count of bun cuts and slab cuts. (See Record, pp. 56 and 57)

For the reasons stated I cannot find the action of Soper and Workman insubordinate. There was not even a contention that their action was taken in an insubordinate manner. There was no loud talk, no abusive language, no offensive tone of voice, no excited gestures. There was merely a firm but quiet persistence in not withdrawing a claim for pay.

It follows from the above findings that Johnson could not have been guilty of advising insubordination. All three grievances must therefore be sustained.

AWARD

Grievances Nos. 31, 32 and 33 are sustained. The reprimand issued to Donald Johnson is set aside and cancelled; the suspensions imposed on Orin Workman and Carl Soper are set aside and cancelled, with back pay for time lost.

ROCKWELL-STANDARD CORP.—

Decision of Arbitrator

In re ROCKWELL-STANDARD CORPORATION, TRANSMISSION AND AXLE DIVISION [New Castle, Pa.] and UNITED STEELWORKERS OF AMERICA, LOCAL UNION No. 4194, June 24, 1960.

Arbitrator: Milton H. Schmidt.

VACATIONS

—Vacation shutdown — Employer's right to specify vacation period ▷116.152

Under contract stating that employees will be given preference as to vacation periods in order of seniority but reserving to employer "final right to specify when a vacation is to be taken in order to insure the orderly operation of the plant and to not adversely affect production in any department," employer had right to specify two-week shutdown as vacation period for all eligible employees after determining in good faith and upon convincing evidence that production efficiency would be adversely affected by permitting staggered vacation schedule in accordance with employees' stated preferences. Employer's "final right to specify" is a right to fix or designate vacations in an affirmative manner and not merely a veto power over vacation choices of individual employees; parties' elimination from earlier contract of provision authorizing vacation shutdowns without any limitations does not negate right to specify shutdown if conditions set forth in present contract are met. (M. Schmidt)—Rockwell-Standard Corp., 34 LA 693.

Appearances: For the company—Harry E. Jones, Jr., assistant vice president industrial relations; Everett Vallier, plant superintendent; D. Robert Bastian, personnel manager. For the union—Daniel W. Skelly, staff representative; Virgil Livermore, president, local union; Earl Mills, grievance committee chairman.

VACATION SHUTDOWN

The Grievance

SCHMIDT, Arbitrator:—This grievance, filed on April 1, 1960, on behalf of all employees in the unit challenges the right of the company to compel the employees to take the vacation periods to which they are entitled under the Agreement during the period from July 25 through August 7, 1960, during which two week period the company proposes to shut down the plant. The union claims that the proposed action of the company violates Article XVI, Sections 5(a) and 5(b) of the Local Supplement Agreement.

Opinion

The issue raised in this case is one of contract interpretation. The essential facts are not in dispute.

The New Castle plant manufactures front axles for large automotive vehicles. It has approximately 311 production and maintenance employees.

It has had bargaining relations with the union since 1949 and the parties have entered into various agreements

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radic but continuing basis and being reacted to by the parties in a consistent fashion over a continuing period of time can then be considered a practice. Thus, while the initial status of the 1954 result was that of a rule, it appears that both parties acquiesced to that rule and its use for a period of years so as to cause that rule to become a practice at the facility with the same meaning and intent as any written term of the contract. That being the case, it appears to me, that the practice can be negotiated away the same as any other contract term. Futhermore, it appears that if the Company or the Union, during the hiatus period between contract and the negotiations taking place for the new contract, should indicate that they no longer desire to follow the practice, then in that event the unwritten condition of employment heretofore indicated between the parties must come to an end since the practice has no greater life than the contract under which it was last used. From all of this it can be seen that a practice does not have any super tenure over and above any contractual term. A timely denial by one party or the other at contract anniversary time before the new contract is entered into is the proper time to repudiate any prior employment condition or practice that may have arisen during any prior period and continued until the conclusion of the prior contract."

Thus, from all of this it can be seen that a practice was in use at the facility; that its use was continued in the 1981 contract; that the terms of the 1981 contract did not outlaw the practice; that a practice cannot be repudiated during the term of the contract in which it is used unless by mutual consent or by some special contractual indication and that the discipline in this case must therefore fall since the practice was a part of the relationship of the parties not only prior to the 1981 contract but also during the 1981 contract. The method of retiring a practice is best indicated in 79 LA 1333, and the company practice in this matter does not follow those indications. If the method of the company were used, then any practice between the parties could be brought to an end by a simple letter or posting at anytime. Such cannot be the case in this matter at this time and I so hold.

From all of this therefore, the grievance must be granted.

AWARD

The grievance is granted.

TRANSAMERICA DELAVAL, INC. —

Decision of Arbitrator

In re TRANSAMERICA DELAVAL, INC., WIGGIN CONNECTORS DIVISION and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 509, FMCS Case No. 84K/24253, January 18, 1985

Arbitrator: C. Chester Brisco, selected by parties through procedures of Federal Mediation & Conciliation Service

OVERTIME

— Past practice — Intermittent use — Mandatory overtime on Saturdays ▸24.356 ▸115.305

Employer had right to schedule employee for eight hours mandatory overtime on Saturday under past practice of scheduling mandatory Saturday overtime that it had begun seven years earlier, but had not used on widespread basis until filing of grievance. Practice has not been destroyed by intermittent use or by changes in contract language. While extended workweeks may result in employee inefficiency and will cut into recreational activities, it is not for arbitrator to correct work schedule which may be ill-advised.

Appearances: For the company — Rod Hoover, For the union — Tony Rodriguez, international representative.

MANDATORY OVERTIME

Background

BRISCO, Arbitrator: — The Company produces a special line of products for the military and various aircraft companies. They are specialty products manufactured on order and the rate of production is determined by the orders received. For many years employees have, on a more-or-less regular basis, worked substantial amounts of overtime. Working hours have been scheduled during the last three years for 10 hours Monday through Thursday, 8 hours Friday and 6 hours Saturday (10, 8 and 6). But the employees have also worked five 10 hours days and 6 hours on Saturday, and, some years past, five 9 days and 8 hours on Saturday. There has been occasional Sunday work.

In 1984, the Company scheduled work Saturday, April 28th for 8 hours in the Assembly and Assembly and Test classifications and required that the employees work the full 8 hours or they would not be allowed to work at all that day. A grievance was timely filed claiming that the Company had called for mandatory 8 hours of overtime on Saturday in violation of the contract and past practice and that the Company could only require a

maximum of 6 hours overtime on Saturday. The remedy sought was that the Company should be required to abide by the 6 hour maximum and "that any early departure slips after 6 hours be pulled from the employee's files and that they be made whole." When the matter could not be resolved in the grievance steps it was referred to arbitration.

Issues

The parties stipulated to the following statement of the issues:

1. Did the Company violate the collective bargaining agreement by scheduling 8 hours mandatory overtime on Saturday?
2. If so, what shall be the remedy?

Pertinent Contract Provisions

ARTICLE V — MANAGEMENT

Section 2. It is recognized and agreed that the . . . schedules of production . . . are solely Company prerogatives.

ARTICLE XI — OVERTIME

Section 6. The Company agrees to give as much advance notice as possible to employees involved when overtime work is required. . . . Failure of the Company to give notification of overtime as required heretofore shall make such overtime voluntary.

Overtime is voluntary after ten (10) hours, Mondays through Thursday, and after eight (8) hours on Fridays. For employees working in the job classifications of Assembler, Deburrer, Stock Clerk and Shipping/Receiving Clerk, Saturday overtime will be voluntary. If sufficient employees do not volunteer for Saturday overtime, the Company will draft employees for such overtime in the reverse order of seniority from among those employees in the job classification involved who are qualified to perform the work required. The drafted employees must accept the overtime. For all employees other than those designated above, Saturday overtime will be voluntary for 5 of 13 scheduled by the Company. The Company will desginate which Saturdays are required in order to meet production requirements.

Positions of the Parties

Position of the Union: The Union asks the arbitrator to find that the Company violated past practice when it required 8 hours manadatory overtime on Saturday, April 28, 1984. The remedy sought is for the employees who were not allowed to work 6 hours, instead of the 8 hours demanded to be "made whole." The Union alleges that when employees offered to work 6 hours instead of 8 hours, they were intimidated by the Company by not being allowed to work at all. At no time, says the Union, did the Company post any notice that Saturday overtime was to be mandatory. The evidence of past practice is that for the past 11 years the Company has required no more than 6 hours overtime on Saturday.

Position of the Company: The Company contends that it acted within its rights when it imposed a mandatory schedule of 8 hours overtime on Saturday. The contract in Article XI does not limit the number of hours of mandatory overtime which can be scheduled on a Saturday. The Company claims that it followed past practice under the current and previous collective bargaining agreements when it scheduled the mandatory overtime. It is the Company "that is responsible for making sound, efficient cost conscious decisions . . . [and] the Company only requires overtime when business necessity dictates and then tries to obtain volunteers. *Only as a last resort* does it make overtime mandatory in order to meet production requirements.

The Company concludes that the Union has not proved that the Company violated the labor agreement or past practice and, therefore, the grievance should be denied.

Opinion

The arbitral principles which govern resolution of the case may be stated generally as follows. Management has the right to require reasonable amounts of overtime in the absence of any prohibition in the collective bargaining agreement. The obligation to work overtime, unless the agreement provides otherwise, may be made mandatory when there are insufficient volunteers to meet production requirements.[1] Where, as here, the parties have negotiated language into the collective bargaining agreement relating to overtime, the Company, of course, must abide by those provisions.

The task of the arbitrator in this case is to determine whether the collective bargaining agreement restricts the Company's right to require 8 hours overtime on Saturday or, conversely, whether the employees have the right to insist that Satuday overtime in excess of 6 hours is voluntary and, when asked to work 8 hours overtime, they may as a matter of right work only 6 hours as the Union claims. Both parties rely on past practice to support their position.

Past practice is one of the most useful and frequently resorted to guides

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[1] Elkouri and Elkouri, How Arbitration Works, 494-497 (3rd ed. 1973).

in resolving contract interpretation grievance disputes. However, not all evidence of past conduct rises to the level of a binding past practice. Furthermore, past practice is not admissible, according to most arbitrators, when the obligations of the parties are governed by unambiguous contract language.

A practice, to be binding on the parties must be sufficiently definite by reason of its longevity, repetition and acceptability so that in relation to the underlying circumstances it may be said to have become the established way of doing things.[1] A past practice, found to be sufficiently definite may be used as a guide to interpreting ambiguous contract language and, according to some arbitrators, in extremely strong cases it may be used to modify or amend apparently unambiguous language. In addition, when the contract is silent, past practice may estabish a distinct and binding condition of employment which cannot be changed without mutual consent of the parties.

In all of these applications of past practice, the arbitrator is endeavoring to determine the intent of the parties by looking beyond the words they used in the collective bargaining agreement to their conduct as a manifestation of their income. If the contract language is clear, the intent of the parties is manifest and past practice generally cannot be used to alter or amend clear contract language. It is the intent of the parties which governs resolution of contract interpretation disputes, not the predilection of the arbitrator who, in this case, is subject to the usual admonition that he may not "add to nor subtract from nor modify any of the terms of this agreement, and all decisions must be within the scope and terms of this collective bargaining agreement."

We now examine the contract language in Article XI, Section 6, to determine if it restricts the Company's right to mandate 8 hours Saturday overtime. The first paragraph pertains to notice requirements when' 'overtime work is required." The penalty for failure to give notification is that the overtime shall be voluntary. The evidence in this case is that the Company gave proper notice and this issue need not be considered further.

The second paragraph of Section 6 raises difficult questions which penetrate to the heart of this dispute. The second sentence declares that "Saturday overtime will be voluntary" for the listed classifications. This is clear enough. If this language stood by itself, the required conclusion would be that the Company had no right to require mandatory Saturday overtime of whatever length on Saturday for the classification of Assembler, Deburrer, Stock Clerk and Shipping/Receiving Clerk. But the sentence does not stand by itself because the very next sentence appears to impose a condition that "If sufficient employees do not volunteer for Saturday overtime, the Company will draft employees for such overtime in reverse order of seniority from among those employees qualified to perform the work required." "The drafted employees must accept the overtime."

Reading these two sentences raises the ambiguity of whether the word "employees" in the second sentence is intended to include employees in the classifications listed in the previous sentence. Under ordinary principles of contract interpretation, specific language controls over general language and the answer to this question would be "No." But the words "work required" could certainly include work requiring the assembler classification. Did the draftsmen intend that employees in the named classifications for whom Saturday overtime is voluntary, be subject to mandatory overtime if there were insufficient volunteers because of the Company's particular difficulty in planning production schedules?

Further, is this ambiguity resolved by the next sentence which provides that "For all employees other than those designated above, Saturday overtime will be voluntary for 5 of the 13 [Saturdays] scheduled by the Company?" The words "all employees other than those designated above" would appear to refer to employees not in the enumerated classifications. But do these words also refer to employees necessary to perform the "work required?" Otherwise, it would not have been necessary to provide for voluntary overtime for 5 of 13 Saturdays of which overtime was scheduled by the Company because the listed classifications are already accorded voluntary Saturday overtime — unless of course, the listed classifications are indeed subject to draft if there are insufficient volunteers.

Perhaps this tortured language reflects the presssure of negotiations over the years as the parties attempted to accommodate the need of the Company to meet production schedules and the desire of the employees to avoid extended work weeks. Whatever the reason, the second paragraph of Section 6 is a marvel of ambiguity. It is proper, therefore, to refer to past practice in an effort to devine the intent of the parties.

Firstly, we observe that the language in Section 6, must be read in the light of the Union's argument that the evidence of past practice is that the Company has for many years mandated no more than 6 hours overtime on Saturday and that the objection raised by this grievance is that the Company cannot require 2 additional hours of Saturday overtime for a total of 8 hours. In raising this grievance the Union admits that the Company has the right to require 6 hours Saturday overtime in the listed classifications. "The reason for Frank Penunuri filing grievance #43690 was because the company's past practice has been six (6) hours for Saturday work, especially in the Assembler, Deburrer, Stock Clerk and Shipping/Receiving departments, and in most cases voluntary." The central dispute in this case, therefore, is what version of past practice — the Union's or the Company's — should be accepted to interpret the ambiguous language of Section 6.

The Union called four witnesses to establish its contention that the practice for a number of years was to not require mandatory overtime in excess of 6 hours on Saturdays and that it was solely voluntary for employees to work 8 hours on Saturdays. The first to testify was Frank Penunuri, an Assembly and Test Inspector with 11 years seniority, who filed the grievance and was, at that time, Chairman of the Bargaining Committee. Mr. Penunuri stated that for the first 2 or 3 years of his employment there was mandatory overtime of 8 hours on Saturday in conjunction with a schedule which also required 10 hours Monday through Friday. The Company then changed to 8 hours on Friday and 6 on Saturday because employees were getting tired of working 58 hours a week. It was not until April 1984 that the Company told the employees in his department that they had to work 8 hours on Saturday and if they could not work the full 8 hours, they could not work at all. It is this last requirement that the employees work 8 hours or none at all which is the basis for the allegation of intimidation of employees.

The next to testify was Gloria Medina, Machine Parts Inspector with 7 years seniority, who stated that she has never been forced to work 8 hours on Saturday until after the instant grievance was filed. George Cantu, Cri-Dan S/U Operator, testified that he is the only operator on that machine and that prior to the grievance being filed he has had to work 8 hours overtime on Saturday "or it would go on my record." In the assembly area, he does not remember any 8 hour mandatory overtime. "Sometimes it has been 6 or 8, but mostly 6 hours" overtime and that the only discipline is that "if you don't work 8 hours, you are not allowed to work 6."

Andrew Gonzalez testified that as a Numerical Control S/U Operator he has never been required to work 8 hours Saturday overtime and that no employees have been disciplined for not working 8 hours mandatory overtime on Saturday. Mr. Gonzalez works on the second shift and has 7 years seniority.

From this evidence the arbitrator concludes that employees in the assembly department have been required to work mandatory Saturday overtime of 8 hours at some times during the period ending approximately 7 years ago and that the practice, which apparently had extended over some period of time and was accepted by the employees, was not resumed until April 1984, triggering the grievance which is the basis for this arbitration.

The Company's response to this evidence included submission of a copy of a notice dated July 16, 1982, which announced, "Due to heavy workload from customer requirements it has become necessary to schedule the AB/AC's and Turrets on *mandatory overtime* through the following dates and times." The dates were "July 26, 1982 through August 22, 1982." This mandatory overtime schedule was canceled on August 13, 1982. There was one instance of Saturday mandatory overtime, to which Manufacturing Manager Vic Giarratano testified, on December 18, 1982, involving a Tool and Die Maker, Sr.

In addition, George Ramirez, Senior Foreman, who has worked for the Company for 34 years, testified that while he was Union Chairman from June 1978 to June 1981 (preceding the present Union Chairman, Frank Penunuri), he never processed a grievance complaining about Saturday mandatory overtime, and that such overtime was worked occasionally. In addition, before he became Union Chairman he had worked mandatory Saturday overtime "occasionally."

There is one other bit of evidence, disputed, which deserves discussion. Frank Penunuri testified that during the October 1982 contract negotiations he discussed with Corporate Director of Industrial Relations Les Swavely

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[1] Mittenthal, "Past Practice in the Administration of Collective Bargaining Agreements" Pollard, ed., *Arbitration and Public Policy*, 30-63 (BNA 1961).

the issue of 6 hours versus 8 hours mandatory Saturday overtime. While Mr. Penunuri's testimony is not entirely clear, apparently he desired to insert language into the collective agreement limiting mandatory overtime on Saturday to 6 hours. According to Mr. Penunuri, Swavely responded that they should not "muddy up" the contract with additional language "because we did not have any problems with it." This conversation is denied by Mr. Swavely.

The discussions during contract negotiations "comprise a kind of practice that gives meaning to language in dispute."[1] The conversation between Penunuri and Swavely was undoubtedly a brief exchange which looms larger in the mind of the former than the latter, and it is probable that Mr. Swavely simply does not remember it. The arbitrator concludes that Mr. Penunuri did raise the issue. The Company's response was, in effect, to reject the Union's proposal. The proper inference to be drawn from these facts is that the Union's attempt to incorporate language into the agreement limiting Saturday overtime to 6 hours establishes that it had knowledge of the mandatory 8 hours Saturday overtime practice and that the Union is now seeking from the arbitrator an interpretation of the agreement that it was unable to obtain in negotiations.

Conclusion

The testimony of some of the witnesses in this case has not been entirely consistent and the brief arguments made by the parties have been somewhat difficult to interpret, leaving the arbitrator with a decision making task of more than ordinary difficulty. The apparently clear declaratory sentence that "For employees working the job classifications of Assembler, Deburrer, Stock Clerk and Shipping/Receiving Clerk, Saturday overtime will be voluntary," simply cannot be taken to mean what it says when read in the light of the succeeding sentences in Section 6 of Article XI. The resulting ambiguity is resolved by the Union's own argument that 6 hours Saturday overtime may be made mandatory, its admission of a past practice of 8 hours mandatory Saturday overtime during a period ending some 7 years ago, and the Union's request during negotiations in October 1982 that the practice of which it now complains be eliminated.

[1] Prasow and Peters, Arbitration and Collective Bargaining 133-164 (1970).

The arbitrator concludes that the Company's failure to employ, at least on a widespread basis, mandatory Saturday overtime during the period commencing some 7 years ago until April 1984, does not imply that management's discretion has been limited by that hiatus. There was a period of time during which 8 hours mandatory Saturday overtime was the established way of doing things and that practice has not been destroyed by the fact of intermittent use or by changes in contract language. Extended work weeks may result in employee inefficiency and they certainly cut into recreational activities during which employees may enjoy the increased earnings, but it is not up to the arbitrator to correct work schedules which may be ill-advised; his task is to determine, as best he can, the intent of the parties and that has been the arbitrator's effort in this case.

AWARD

The Company did not violate the collective bargaining agreement by scheduling 8 hours mandatory overtime on Saturday.

E-SYSTEMS, INC. —

Decision of Arbitrator

In re E-SYSTEMS, INC., ECI DIVISION [St. Petersburg, Fla.] **and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 298**, FMCS Case No. 84K/21901, Grievance No. AC-6-84, January 7, 1985

Arbitrator: H. Ellsworth Steele, selected by parties through procedures of Federal Mediation & Conciliation Service

PROMOTION

— Selection of junior — Qualifications — Criteria for selection ▸119.1221 ▸24.362

Employer properly awarded position of maintenance group leader to mechanic who it determined could do most, if not all, specific tasks of job, instead of senior employee who union claimed was qualified, under long established past practice resolving ambiguities in use of criteria for selecting group leader by allowing employer to select maintenance group leaders based on ability to lead, guide, and instruct, rather than seniority. Evidence establishes that employer considered junior to be most qualified of six mechanics and was only one whose qualifications were acceptable, and so long as employer's selection process is not arbitrary or discriminatory, employer does not violate agreement by continuing use of this process.

Appearances: For the company — Mike Baranowski, plant employee relations manager; Timothy B. Harris, director, employee relations; Jim Cerny, director, manufacturing; Jack Waldron, section head, facility maintenance; Tom Burdett, facilities manager; Jim Williams, maintenance group leader. For the union — John C. Barnette, international representative; Deloras Knight, local president; Pat Whyte and Art Alling, committeepersons; Jack Ferguson.

SENIORITY

Grievance (Filed April 23, 1984):

STEELE, Arbitrator: — [The grievance is: —]

"The Union charges the Company with violation of Art. VIII sec. 10 by bypassing 5 'more senior' qualified employees to the LG15 Maintenance Group leader position.

"The Union request(s) the Company follow the contractual provision of Art. VIII and the appropriate person be made whole."

Issue

Did the Company violate the contract in promoting Jim Williams from Maintenance Mechanic to Maintenance Group Leader ahead of more senior Maintenance Mechanics? If so, what shall be the remedy?

Facts of the Case

The ECI Division of E-Systems develops and manufactures sophisticated electronic communications equipment and systems for military installation. The workers in the bargaining unit at the St. Petersburg, Florida, plant, which is 27 years old, are represented by UAW Local 298.

On April 16, 1984, the Company promoted James Williams, who is black, from Mechanic in Labor Grade 13 to the position of Maintenance in Labor Grade 15 although there were five other Mechanics, all white, in the unit with greater seniority. Three of these workers signed the present grievance which is now properly at arbitration.

Union Position

The employees who were bypassed are as qualified as James Williams and are senior to him. Mel Shine has consistently refused promotion. Henry Blow has also declined promotion in the past, but now wishes to be considered along with Frank Ferguson, Glenn Allan and James Bowman for the position of Maintenance Group Leader.

The Maintenance Group Leader classification has been in the contract since 1958 and the Company has always promoted employees into the classification as they were needed. The classification of Working Group Leader was inserted into the contract in 1971. The language in Article X, Section 4, other than the last sentence dealing with the wage differential, has no application to the Maintenance Group Leader.

The Company relies upon past practice as giving it the right to promote Group Leaders out of line of seniority, but the language of Article VIII, Section 1 dealing with promotion by seniority and qualifications is clear and unambiguous and should be controlling.

The Company did not bring Williams to the stand and the Union challenges his qualifications. When asked whether or not Williams could perform work on various types of equipment, Jack Waldron, the Section Head who was largely responsible for his promotion, "did not know whether he was qualified to do this work or not." Williams has worked as a Mechanic in Labor Grade 13 for about two years; the aggrieved employees have been in the classification much longer.

The Company argues that the work of the Group Leader is divided into two categories and Williams is assigned to one of these. The job description, however, does not reflect such a division.

The Union takes the position that to be promoted to Group Leader, a worker must be qualified and that "Ferguson, Bowman and Allan were qualified." The Company's use of their records on discipline and attendance to disqualify them is improper. Waldron's remarks that race was a factor leading to the grievance are "despicable and not worthy of further comment."

If Article VIII, Sections 1 and 10, which provide that the senior, qualified employee shall be promoted, are at odds with Article IV Management's Functions, the general must give way to the specific. Management may not use its prerogatives to circumvent the employees' seniority rights. The most senior qualified employee should be assigned to the job and made whole for all losses.

277 NLRB No. 88, 277 NLRB 882, 120 L.R.R.M. (BNA) 1291, 1985-86 NLRB Dec. P 17547, 1985 WL 46102 (N.L.R.B.)

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)
**1 *882 Bechtel Power Corporation
And
Peter Pitzo

Case 4-CA-14361

November 27, 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND BABSON

On 16 January 1985 Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed a brief in response to the cross-exceptions.[FN1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

Peter Pitzo, the Charging Party, an electrician with some 24 years of craft experience, was employed by the Respondent in its construction of a nuclear power plant, called the Hope Creek Generating Station, in Hancocks Bridge, New Jersey.[FN2] Pitzo's version of the critical events is substantially as follows.

On Monday, 12 March 1984,[FN3] Pitzo and his partner, Murphy, were working in the south bay crane area of the turbine building on a scaffolding above the entry through which cranes and other heavy equipment entered the building. In the afternoon, a piece of heavy equipment began to emit strong fumes. Pitzo and Murphy climbed down the scaffolding and talked to the employees operating the machine, who said they would be through shortly. The machine operators urged Pitzo and Murphy to stop working until they were through with the machine. Pitzo and Murphy then reported to their foreman, Bruce Wilson, who told them not to worry about the problem and that he would look into it the next morning.

Wilson sent Pitzo and Murphy back to the same job on Tuesday, instructing them to take fresh air breaks if the fumes persisted. Both men took such breaks, but in the afternoon Pitzo felt sick

from the fumes, and again reported to Wilson, who said he was attempting to correct the problem. Pitzo then went to the first aid department.

On Wednesday, Wilson again sent Pitzo and Murphy to the same work station, saying that he was looking into the fumes problem. He urged them to take fresh air breaks as necessary and to try to get the job finished. Pitzo and Murphy discussed the fumes with other employees at their work station. Employee Gould said he knew who to contact and called Safety Officer Alexander on the intercom. Alexander said he would come around and check the situation out, although the employees did not see him do so. Pitzo again felt sick from the fumes, visited the first aid department, and returned to work. Pitzo also unsuccessfully tried to contact his union steward. At the end of the day Wilson urged Pitzo and Murphy to try and get the job finished so they could move to a new location.

On Thursday, Pitzo and Murphy found the fumes unbearable, and Pitzo called Alexander, who said he would be right around. On Friday, Pitzo stayed home feeling ill. Murphy stayed home as well.

**2 On Monday, 19 March, Pitzo was sent to work at a different location and under a different foreman. The fumes did not cause a real problem until Wednesday of that week, when Pitzo again called Alexander to complain. Alexander said he was trying to correct the problem and asked Pitzo to obtain information about the machine causing the problem, which Pitzo did. The fumes had not abated by Thursday, and Pitzo again called Alexander, who said he was doing his best to correct the problem.

On Friday morning, 23 March, Pitzo and employee Sanchez discussed the fumes. Sanchez called Alexander and told him that "there are a lot *883 of employees around here who are complaining" about the fumes. Alexander replied that he would be around. When Alexander had not shown up by the afternoon, Pitzo again called Alexander to complain.

On Monday, 26 March, the fumes were still present. Pitzo attempted to call Alexander, who was not in, and then tried to reach Alexander's superior, Brian Dowdy, who also was not in. Later that afternoon, Pitzo reached Alexander, who said that he was doing all he could and that he was going to write a letter to the operating engineers. Pitzo told Alexander that he had the authority to shut down the machine or vent the smoke outside, but Alexander replied that he wanted to go through the proper channels. Pitzo then accused Alexander of wasting time and of waiting until the job was completely finished before doing anything about the fumes. Pitzo also said that he was getting nowhere with Alexander and that he ought to speak to Dowdy.

On 27 March, the fumes problem persisted. Pitzo called Dowdy, who was unavailable, and then called Alexander to ask whether Alexander had sent the letter to the operating engineers. Alexander said that he had not as yet done so, but would do it at the first opportunity. Pitzo again accused Alexander of wasting time.

On Wednesday, 28 March, Pitzo saw Alexander walking down an aisle and asked Alexander if he had sent the letter to the operating engineers. Alexander had not. Pitzo said Alexander was just wasting time and did not want to correct the situation. He said, "All you are worrying about

our [sic] hard hats, you are worried about our glasses, our eyes, but you are not too concerned about the air that we breathe." Alexander, instead of responding to Pitzo's accusation, informed Pitzo that he was violating the safety rules with his hardhat and gave him until 2 p.m. to get a new liner for his hardhat. Pitzo replied, "I could correct my hat and I could wear safety glasses. But can you do something about the fumes?" Alexander said, "I am working on that."[FN4]

Pitzo went to get a new liner, put it in his hardhat, and started back to his work station about 9:15 a.m. On the way, he passed Alexander and asked if Alexander had corrected the smoke problem. Alexander asked if Pitzo had corrected his hardhat problem. Pitzo, instead of showing Alexander that he had done so, said, "Why do you keep on asking me about my hardhat all the time? It seems like you are bribing me. That you are not going to do anything about the fumes unless I fix my hardhat." Alexander allegedly replied, "Well, you are doing so much complaining. Why don't you and I go talk to your supervisor." Pitzo replied that he did not want to talk to his supervisor, but did want to talk to his steward and had been trying to call him. The conversation ended.

**3 About 10:30 a.m., Wilson, Pitzo's foreman, and the area foreman told Pitzo that he was discharged for not having his hardhat properly adjusted. Pitzo protested that Alexander had given him until 2 p.m. to fix his hardhat and showed them that the hat was fixed. The area foreman said he knew nothing except that Electrical Superintendent Nicholson said Pitzo was fired, and he gave Pitzo his written notice of termination. The notice gave two reasons for the discharge: "disregard of safety instructions" and "insubordination to safety officer." Pitzo made various attempts to obtain reinstatement, including talking to his union steward and to the project foreman. Both said Pitzo was being fired for not properly adjusting his hardhat.

Alexander's version of the 28 March incident and the events leading up to it differed significantly from Pitzo's version. Alexander claimed that fumes had been a problem in the south bay crane area off and on for as long as he had been employed there (some 5-1/2 years), but that sometime in mid-March the problem grew worse and there were numerous complaints from numerous employees. Alexander did not recall that Pitzo had ever complained to him prior to their meeting on the morning of 28 March. Alexander admitted, however, that he had a bad memory for names and dates.[FN5]

Alexander testified that when Pitzo complained to him about the fumes on the morning of 28 March, Alexander said they were trying to develop procedures to eliminate the problem. He then told Pitzo his hardhat was in violation of the safety rules and told him to get a new liner. According to Alexander, Pitzo "said that he would not do it." As far as Alexander could remember, that was the complete conversation.

*884 Alexander reported the incident to Pitzo's foreman, to the area foreman, and to Superintendent Nicholson. Alexander conceded that he saw Pitzo again that morning, but claimed he did not talk to Pitzo or notice whether Pitzo had fixed his hat, since he felt he had taken all the action necessary and "left the superintendent to perform his duties."

Foreman Wilson and Superintendent Nicholson also testified, both claiming that Alexander said Pitzo had told him to "get screwed" when told to fix his hat.[FN6] The judge concluded that Nicholson's testimony was untrustworthy for a number of reasons. In this regard, the judge noted

that Nicholson did some "pronounced position-shifting" on the number of times he claimed to have instructed Wilson to tell Pitzo to fix his hardhat. Additionally, Nicholson testified that he knew Wilson had relayed his instructions to Pitzo because Wilson told him so. Wilson, however, firmly denied that he ever reported back to Nicholson. In addition, Nicholson testified that he fired Pitzo because altering safety equipment was an "automatic termination." When it was pointed out to him that on the prior occasions when he claimed to have noticed the violation he did not fire Pitzo, Nicholson said he was not in the habit of going around firing people. He also stated that a written warning instead of discharge would have been inappropriate for Pitzo's violation, but testified later he had once prepared a written warning for Pitzo for the same offense. No such written warning was produced and the judge concluded that none existed. Moreover, Nicholson testified inconsistently regarding the principal reason for Pitzo's discharge. He claimed first that Pitzo was discharged for violation of the safety rules, but then agreed that it was "really" the "insubordination" which prompted the discharge.[FN7] The judge also discredited Wilson, who gave inconsistent testimony, and whom the judge found to be nervous and under considerable "internal pressure" at the hearing.

**4 Faced with the conflicting accounts and poor credibility of the various witnesses, the judge credited Pitzo in finding that Pitzo initiated the conversation with Alexander on the morning of 28 March and was reiterating his complaints about the fumes when Alexander attempted to divert the conversation to Pitzo's hardhat. The judge found that Pitzo refused to be put off, and said, "All you are worrying about our [sic] hardhats ... but you are not too concerned about the air we breathe." Nevertheless, the judge found that, despite Pitzo's testimony to the contrary, it was "likely" that Pitzo, when told to fix his hardhat, refused to do so.

Based on these findings, the judge concluded, under *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), that Pitzo was engaged in concerted protected activity when he complained about the fumes to Alexander, and that Pitzo continued to engage in protected activity when Alexander attempted to divert the conversation to Pitzo's hardhat. He further found that although Pitzo's "likely" refusal to fix his hardhat "smacked of insubordination," Pitzo did not engage in activity which forfeited his right to claim the protection of the Act since Pitzo did not engage in a real act of disobedience, but promptly fixed his hat. The judge, relying on *Thor Power Tool Co.*, 351 F.2d 584 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964), found Pitzo's statement of refusal to be the sort of impulsive behavior for which some leeway may be permitted when an employee is engaged in concerted protected activity.

We agree with the judge that Pitzo, in pressing his complaints about the fumes to Alexander, was engaged in concerted protected activity under City Disposal for the following reasons. As an initial matter, the Board's *Interboro* doctrine establishes that when an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce the contract provisions in the interest of all the employees covered by that contract. The Board has found that such activity is concerted and protected under the Act, and the discharge of an individual for engaging in such activity violates Section 8(a)(1) of the Act. *City Disposal Systems*, 256 NLRB 451, 454 (1981); *Roadway Express*, 217 NLRB 278, 279 (1975); *Interboro Contractors*, 157 NLRB 1295 (1966). We note further that an employee engaged in making safety complaints need not make an explicit reference to the relevant contract for his actions to be protected by the Act. *Roadway Express*,

supra. The Board requires, however, that the employee's belief that the working conditions are unsafe be honestly held. United Parcel Service, 241 NLRB 1074 (1979).

**5 Significantly, the Supreme Court in *City Disposal* concluded that the Board's *Interboro* doctrine was a reasonable interpretation of the Act. The Court stated:

As long as the nature of the employee's complaint is reasonably clear to the person to *885 whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement. In the context of a workplace dispute, where the participants are likely to be unsophisticated in collective-bargaining matters, a requirement that the employee explicitly refer to the collective-bargaining agreement is likely to serve as nothing more than a trap for the unwary. [465 U.S. at 840.]

And we note in this regard that in *City Disposal*, there was no direct evidence concerning whether or not the employee there actually knew that he was asserting rights under a specific provision of the contract.

In this case the nature of Pitzo's complaint, that the fumes were so heavy as to make breathing uncomfortable and unsafe, was indisputably clear to Alexander. This is borne out by Alexander's testimony that he had received numerous complaints from numerous employees, that he had shut down the machinery at times when the fumes were very heavy, and that he was working on a long-range solution to eliminate the problem-causing fumes.

Further, we find that while Pitzo did not actually mention the contract, his complaints did concern a reasonably perceived violation of the collective-bargaining agreement.[FN8] As noted previously, Pitzo was a longtime union member. His attempts to complain to his union steward about the fumes and his remark to Alexander that he wanted to speak to his union steward[FN9] make it clear that Pitzo perceived his complaints about the fumes to be a union as well as a company matter. Moreover, Pitzo's statement to Alexander, "All you are worried about [our] hardhats ... our glasses, our eyes, but you are not too worried about the air that we breathe," makes it abundantly clear that Pitzo viewed the fumes as involving the safety of working conditions, which plainly brings his complaint within the scope of the applicable provisions of the collective-bargaining agreement. Further, there is ample evidence in the record supporting the judge's finding that Pitzo's belief that the working conditions were unsafe was honestly held. We thus conclude that Pitzo was engaged in protected concerted activity when he complained about the fumes to Alexander.[FN10]

Having found that Pitzo engaged in protected concerted activity under *City Disposal*, we must determine whether that activity lost its protection because of Pitzo's conduct. As noted previously, the judge, in determining the facts of the critical conversation between Pitzo and Alexander on 28 March, credited Pitzo over Alexander. Nevertheless, despite Pitzo's testimony to the contrary, the judge found that it was "likely" that Pitzo said he would not fix his hardhat when ordered to do so by Alexander. In so finding, the judge apparently did not rely on Alexander, whose testimony the judge virtually discredited completely. Instead, the judge appears to have relied on Wilson's hearsay testimony that Alexander told him Pitzo had refused to get his hardhat fixed.

**6 Contrary to the judge, we credit Pitzo's account of the conversation in its entirety for the following reasons. First, only Pitzo and Alexander were parties to the conversation, and Alexander's abbreviated account of the conversation was properly discredited. Pitzo's version is thus the only direct evidence of the conversation. Second, we find no logical basis for concluding that Pitzo threatened to disobey Alexander based on Wilson's testimony, which was also largely discredited. Wilson was not a party to the conversation and his knowledge of the incident is hearsay derived solely from Alexander, whose unreliability has been established. Finally, Pitzo testified plausibly about the conversation. We find no reason to discredit his account, and accordingly find no probative evidence that any refusal to obey an order or other act of insubordination occurred. Thus, Pitzo's conduct remained protected as well as concerted.

We conclude, based on all the evidence, that Pitzo's repeated demands that Alexander take action to resolve the fumes problem, which were coupled with Pitzo's attempts to complain to his union steward and to Dowdy, Alexander's superior, prompted Alexander to seize on Pitzo's violation of safety rules to rid himself of Pitzo's persistent complaints. Moreover, as found by the judge, Superintendent Nicholson, who made the decision to discharge Pitzo, was aware that Pitzo's conduct which was the basis for Alexander's report to Nicholson arose in the context of a safety complaint.[FN11] We therefore conclude that the Respondent,*886 by discharging Pitzo, violated Section 8(a)(1) of the Act. Accordingly, we shall adopt the judge's recommended Order as modified.[FN12]

City of Southfield

Decision of Arbitrator

In re CITY OF SOUTHFIELD [Mich.] and TECHNICAL, PROFESSIONAL AND OFFICE WORKERS ASSOCIATION OF MICHIGAN

Case No. 07-409

February 3, 2009

Arbitrator: Patrick A. McDonald

EMPLOYEE BENEFITS

[1] **Retiree health insurance — Premiums — Past practice ▶ 100.5925 ▶ 100.0235 ▶ 24.361 ▶ 100.01 ▶ 100.58 ▶ 112.10**

City violated collective-bargaining agreement when it required that retired part-time employee pay 25 percent of health insurance premium for coverage of herself and her husband plus $20 monthly, even though two similar employees who recently retired pay this amount and active part-time employees pay 25 percent of premium, where agreement unambiguously states that "retiree portion" of retirement health insurance payment "shall be" $20 per month for married retiree, no one raised issue of premiums for retiring part-time employees in negotiations, city unilaterally imposed monthly charge when first two part-time employees retired, and these cases were not known to union or grievant and are not past practice.

Appearances: For the employer—Elizabeth Rae-O'Donnell, city attorney's office. For the union—Wayne Beerbower, business agent.

RETIREE HEALTH INSURANCE

McDONALD, Arbitrator.

Introduction

This particular dispute arose when, in the autumn of 2007, the grievant, a career part-time employee of the City of Southfield, filed a grievance challenging the City's interpretation of Article 34.1B of the Collective Bargaining Agreement concerning retiree health insurance. The grievance was denied and was not able to be settled through the initial steps of the grievance procedure set forth in the Collective Bargaining Contract. Ultimately, the matter was submitted for final and binding arbitration.

Facts

In August of 2007, the grievant, part-time career employee with the City of Southfield, made application to retire from the City of Southfield. She is a member of the TPOAM bargaining unit. In September of 2007, Ms. Manning was advised that she would be required to pay twenty-five percent (25%) of the health insurance premiums in retirement, as she was a three-quarter (75%) time employee. Ms. Lauri Siskind, Assistant Human Resources Director, pointed out that as an active employee, Ms. Manning had paid twenty-five percent (25%) of her healthcare premiums. Hence, she would continue to pay the same percentage amount in retirement. According to Ms. Manning, she researched the Collective Bargaining Agreement, as well as other City documents, and could find nothing supporting the City's claim for her to be responsible for twenty-five percent (25%) of the healthcare costs.

Manning testified that at a meeting with the City, held on December 1, 2005, concerning retirement benefits, she recalls being told that she would probably have to pay twenty-five dollars ($25.00) rather than twenty dollars ($20.00) because she was a three-quarters, or 75% employee. Manning said she then filed the grievance, which is the subject matter of this preceding.

The second witness for the Union was Ms. Nancy Kusch, an employee of thirteen years, a Vice President for the Union and a member of the negotiation team for both contracts. Ms. Kusch said that Section 34.1B has not changed. In negotiations, nothing was mentioned regarding part-time employees paying more than regular full-time employees.

Ms. Kusch referred to the fact that during the grievance procedure, City officials told her and the Union of the Nikki Black situation. Ms. Black was retired as a three-quarter employee and paid twenty-five percent (25%) of her healthcare costs. Ms. Kusch said that case did not set any precedent because the Union certainly wasn't aware of this matter. Had it been, a grievance would have been filed.

On cross examination, Ms. Kusch said that during negotiations, she did not recall any discussions regarding part-time retiree benefits. She indicated that the vast majority of TPOAM employees are full-time. She believes only a few employees working for the City are part-time employees. As a result, neither party proposed language regarding part-time regular career employees. According to Ms. Kusch, the parties did not differentiate between part-time and full-time employees for retirement purposes.

The City presented four witnesses. The first was Ms. Valerie Crump, Director of Human Resources and Staff Services. She indicated that the City has 650 full-time employees, 300 temporary employees, and only 6 part-time employees. The City negotiates with nine different unions.

In this case, according to Ms. Crump, the grievant, Ms. Manning, retired effective November 14, 2007. The grievant was on family medical leave effective July 28, 2007 prior to her retirement. The grievant pays twenty-five percent of health insurance rates and has done so since 1995 when she achieved career employee status. Ms. Crump said she was involved approximately one-half way through the contract negotiations for the 2005-2009 contract. According to her, health benefits were not discussed concerning part-time employees. Presently, in addition to Ms. Manning, there are two part-time employees who are retired. Ms. Nikki Black, who retired in January 2006, is paying twenty-five percent of the costs plus twenty dollars, and Mr. Leonard Yourist, who retired in October 2008, is paying a like amount.

On cross examination, Ms. Crump indicated that her department administers benefits under the contract. She acknowledged that there is nothing in the contract regarding part-time employee retirement benefits. There were no written communications to the Union or to employees concerning part-time status as a retiree. Likewise, there were no verbal communications to employees generally on this subject.

The second witness for the City was Ms. Ann Howlett, who retired in July of 2006 after twenty-eight years as an employee. She is the former HR Director for a long number of years. She handled staff benefits. Ms. Howlett said she was on the negotiation team for the 2005-2009 contract.

She recalls the December 2005 conference regarding employee benefits. She introduced two speakers, one of which was Ms. Lauri Siskind. She recalls there being a question and answer session. As of that time, no part-time career employees had retired. Nikki Black was going to retire in January 2006. She ultimately paid twenty-five percent plus twenty dollars per month for her retirement health benefits. According to Ms. Howlett, there were no language changes in Section 34.1B during the second set of negotiations.

The third witness for the City was Ms. Lauri Siskind, a twenty-nine year employee and Assistant HR Director. She handles retirement plan administration and benefits. She recalls meeting with the grievant prior to her retirement and went over possible benefits in September of 2007. At that time, she informed Ms. Manning that she would have to pay twenty-five percent of the health benefit cost plus twenty dollars as set forth in Section 34.1B of the contract.

Ms. Siskind recalled being a presenter of information for retirement benefits at the December meeting in 2005. The session lasted approximately one and one-half hours and there was a Q&A session following it. She did review the tape of the meeting, but did not recall any questions posed by the grievant at that time. Ms. Siskind did acknowledge that the tape only covers what the camera hears and sees. The grievant could have asked someone else a question out of camera range. Ms. Siskind also admitted that she did not notify the Union of the City proration of benefits. Siskind said she did encourage employees to contact her on specific questions regarding benefits at the December 2005 meeting. When asked how the policy was developed, she indicated that the benefit administrators discussed the situation and developed the policy in late 2005.

The final witness for the City was Mr. Thomas Marsh, the Director of Labor Relations for the last twenty-two years. Mr. Marsh is present in labor negotiations for all contracts. He was present for the negotiations leading to both contracts with this unit. He indicated that the Union was represented by Mr. Wayne Beerbower in both negotiations. Mr. Marsh testified that both parties submitted proposals during negotiations and had the full opportunity of doing so. According to Marsh, the Administrative Civil Service (ACS) procedures

were to be implemented on a status quo basis in the first contract.

In reviewing Ms. Manning's record, Mr. Marsh stated that the grievant was a career part-time employee. As an active part-time career employee, she paid twenty-five percent of her healthcare premiums because she was a seventy-five percent full-time employee.

Mr. Marsh recalled Article 34 being proposed by the Union in February of 2005. Basically, that proposal was intended to incorporate the status quo of the parties at that time. He did not recall any proposals or discussions regarding part-time career employees by either party.

Relevant Contractual Language

ARTICLE 8
MANAGEMENT
RIGHTS AND RESPONSIBILITIES

8. Except as expressly modified or restricted by a specific provision of this Agreement, all statutory and inherent managerial rights, prerogatives, and functions are retained and vested exclusively in the City, including, but not limited to, the rights in accordance with it sole and exclusive judgment and discretion: to reprimand, suspend, discharge, or otherwise discipline employees for cause; to determine the number of employees to be employed; to hire employees, determine their qualifications and assign and direct their work; to promote, demote, transfer, lay off, recall to work employees; to set the standards of productivity, the products to be produced, and/or the services rendered; to determine the amount of overtime to be worked; to maintain the efficiency of operations; to determine the personnel, methods, means, and facilities by which operations are conducted; to set the starting and quitting time and the number of hours and shifts to be worked; to determine the amount of supervision necessary; to use independent contractors to perform work or services; to subcontract, contract out, close down or relocate any part of the City's operations; to expand, reduce, alter, combine, transfer, assign, or cease any job, department, operation, or service; to control and regulate the use of machinery, facilities, equipment, and other property of the City; to introduce new or improved research, production, service, distribution, and maintenance methods, materials, machinery, and equipment; to determine the number, location, and operation of departments, divisions, and all other units of the City; to issue, amend, and revise policies, rules, regulations, and practices; to take whatever action is necessary or advisable to determine, manage, and fulfill the mission of the City and to direct the City's employees. (Language is the same in 2004-2005 Agreement, and 2005-2009 Agreement.)

ARTICLE 34
RETIREE HEALTH INSURANCE

34.1 Effective July 1, 2004, employees who retire and their eligible spouses or eligible surviving spouses will be eligible to receive health insurance from the City. The insurance offered by the City is Michigan Blue Cross/Blue Shield Traditional Suffix 909, with 80%-20% master medical co-pay, master medical deductible of $100 per year for an individual and $200 per year for a family, and a prescription drug rider of $5 for generic and $10 for brand name drugs (whether or not there is a generic equivalent). Retiree may participate in the annual open enrollment selection of healthcare providers. The selection of providers currently comprises traditional BC/BS, HAP, M-CARE, and Community Blue PPO. The selection of providers is subject to change at the sole discretion of the City.

Health insurance is offered subject to the following conditions:

A. In order to be eligible to participate in the City-provided retiree health insurance, the employee and eligible spouse (if the employee elects coverage for the spouse) must participate continuously from the time the employee begins receiving a pension. Retirees or spouses who terminate their participation will lose their eligibility to participate again. This Subsection A does not apply to the possible interruption in City-provided retiree health insurance set forth in Subsection F below.

B. The retiree portion of the post-retirement health insurance payment shall be Ten Dollars ($10.00) per month for a single retiree and Twenty Dollars ($20.00) per month for a married retiree and eligible spouse.

C. When the retiree and/or covered spouse become eligible for Medicare, they must apply for Medicare A & B. Upon receipt of Medicare coverage, the City-provided insurance will change to Medicare Supplemental insurance. The Medicare recipient shall be responsible for any Medicare premium.

D. An eligible spouse or surviving spouse is one to whom the member was legally married at the time of retirement. If an employee does not elect a survivorship option for pension, a surviving spouse is not eligible for health insurance coverage under the City's policy after the retiree's death. Coverage for a spouse terminates upon divorce.

E. This benefit is not paid for individuals who terminate service prior to vesting or who withdraw their contributions from the retirement system prior to retirement. This benefit is not paid to individuals whose employment terminated or who retired prior to January 1, 2003.

F. The City-paid health insurance shall terminate in the case of a retiree and a surviving spouse if that individual assumes employment elsewhere and that employer provides health coverage to its employees which does not substantially differ from that offered by the Plan; provided that should the individual lose such coverage from the other employer for any reason, including voluntary or involuntary separation of employment, upon production of proof of such loss to the City and satisfaction of eligibility elsewhere under the Plan, the City's obligation to provide health coverage under the Plan shall recommence immediately upon satisfactory production of such proof-of-loss.

G. The benefits of this Section are not vested. The employee shall be eligible for retiree health insurance coverage according to the conditions in effect on the date the employee retired or on the date the employee terminated service with a vested pension. Eligible employees who terminate service with a vested pension will be eligible for retiree health insurance coverage when they begin to receive their pension. The health insurance plans available to retired employees through the City shall be as determined by the City.

Except as otherwise provided in this Collective Bargaining Agreement, participation in City-paid, retiree health insurance shall be subject to the conditions set forth in the Code of the City of Southfield in the Chapter designated "Retiree Health Care Benefits Plan and Trust." Section 34.1(B) is the same in both Agreements.

ARTICLE XII
GRIEVANCE AND
ARBITRATION PROCEDURES

12.3 Grievance Procedure

Step 4(B) The power of the arbitrator stems from this Agreement and her or his function is to interpret and apply this Agreement and to pass upon alleged violations thereof. The arbitrator shall not have the power to add to, subtract from, or modify any of the terms of this Agreement, nor shall the arbitrator have any power or authority to make any decision which shall require the commission of an act prohibited by law or which violates the terms of this Agreement. The decision of the arbitrator shall be final and binding upon all parties. The fee of the American Arbitration Association and the fees and expenses of the arbitrator shall be shared equally by the Union and the City; otherwise, each party shall bear its own arbitration expense.

Contentions of the Parties

A. For the TPOAM

The Union in this case submits that the con tract language is clear and unambiguous. I states the retirees pension for health care is te dollars for a single or twenty dollars for married couple. That language was estat lished in the first contract between th TPOAM and the City. The language has re mained the same in the successor agreemen According to the Union, in both negotiation the parties had ample opportunity to chang the language or propose a change. Neith party exercised this right. All of the witness in this case agreed that there were no oth documents or policies in the City which cou termanded the exact contract language. Tl Union was not presented with any notice, e ther in written or verbal form, setting forth tl City policy concerning part-time career er ployee retirement health benefits.

Nothing was said during negotiations r garding part-time retiree career employe sharing costs or having a different cost stru ture than full-time career retirees. If there w to be a differentiation of benefits, then the should have been listed in the body of t contract.

The City witnesses were unable to identi exactly who proposed or originated the c sharing of part-time employees of retireme When Nikki Black retired in January 2006 appears that a unilateral decision was made City officials to charge the retiree a percenta amount plus the contractually stipulated dollars or twenty dollars. At that time, Union leadership was not consulted or notif of this decision. The Union maintains t there is no need for interpretation of phrases in Article 34.1B, as the terms are qu clear. The Union therefore requests that specific language of this case should gov and that the arbitrator has a duty to enfo the language agreed to by the parties. It quests that the grievance be sustained.

B. For the City of Southfield

The city cites the late Scholar, Archit Cox, who stated, "*when negotiating a la agreement, the parties cannot reduce all of rules governing a community like an inc trial plant to fifteen or even fifty pages.*" L wise, according to the City, not every prac between the City and the TPOAM group

reduced to a complete catalog or contract. Instead, what we have here, according to the City, is a fair practice, which does not amount to an unjust enrichment to the former employees and fulfills the City's mission as being an even-handed employer.

The City cites several arbitration decisions which it believes support its argument that the employer is usually considered the have broad authority to determine levels of benefits and types of coverage.[1]

According to the City, at first, the Union's position seems simple and uncomplicated. While acknowledging that the grievant, Ms. Manning, was a dedicated employee during her tenure at the City, the fact is that the City has a duty to see that all of its employees, both present, past and future, are treated even-handedly. As a result, there is not a reasonable expectation that a retired part-time employee would receive a retiree health and insurance benefit equal to that of a retired full-time employee. Moreover, there is not a reasonable expectation that a retired employee would pay less for their health insurance than she paid as an active employee.

According to the City, to grant the Union's request is to ignore the actual circumstances that neither side addressed health insurance eligibility requirements for part-time retirees during contact negotiations. In addition, neither side discussed adding new and improved benefits for part-time employees once they retire. As a result, the City requests that the grievant's request for relief be denied and the grievance dismissed.

Issue

1. Did the City of Southfield violate the Collective Bargaining Agreement when it required a part-time career employee to pay the same percentage of her health insurance premium during her retirement as was paid during her active employment plus twenty dollars per month for a married retiree and eligible spouse?

Discussion and Decision

In this particular case, Article 34 entitled, "*Retiree Health Insurance*," has been the focal point of this dispute. In particular, Article 34.1B is to be interpreted.

As has been stated many times, perhaps no function in labor management relations is more important for an arbitrator than that of interpreting a collective bargaining agreement. Most cases involve contract interpretation.

If the words are plain and clear and convey a distinct idea, there is no need to resort to technical rules of interpretation.[2]

A contract is not ambiguous if an arbitrator can determine its meaning from the general knowledge of the facts of the situation. Language is considered ambiguous if plausible contentions can be made for conflicting interpretations.[3]

Both parole evidence and evidence of past practices are available as an aide in the interpretation of an *ambiguous* contract provision. The rationale underlying such a principle is based upon the fact that the parties are bound by their clear written agreements. These agreements should not be changed by oral agreements or contentions. To allow a clear contact to be modified by oral contentions would involve the arbitrator in making a contract for the parties. Such misuse of authority by an arbitrator would create much mischief. Arbitrators are present to recite the clear agreement of the parties or to construe the intent of ambiguous contracts. They are not supposed to be in a position where they make new contracts and agreements for the parties. In *Pana Refining Company*, 47 LA 193 (1966) the arbitrator stated this principle quite well.

> This case primarily concerns an interpretation of a contract which the parties have written for themselves. It is a general proposition of law that where the terms of a writing are plain and unambiguous, there is no room for construction since construction is for the purpose of removing doubt and uncertainty. The language of the contract is plain and unambiguous the intentions expressed and indicated thereby controls rather than what may be claimed to have been the actual intention of the parties. It is only were the language of the contract is ambiguous and uncertain and susceptible of more than one construction that one must construe the contract in order to reach a proper construction.

In dealing with past practices of the parties, it is important to note that a practice, to be binding, must be *unequivocal, clearly enunciated, and acted upon as well as being readily ascertainable over a reasonable period of time.*[4]

While acknowledging the plain language of Article 34.1B concerning payment of post retirement health insurance, the City maintains that since the parties did not discuss payments to be made by part-time career employees, it had the right to impose a fair rule and practice. Hence, it followed the same percentage of payment that the grievant had during her career as an active employee. That practice does not amount to an unjust enrichment to either party to this dispute.

The difficulty I have with this assertion is the fact that Article 34.1B is quite clear. It states, "*the retiree portion of the post retirement health insurance payment shall be . . . twenty dollars ($20.00) per month for a married retiree and eligible spouse.*" The plain meaning of this language is clear.[5] Under normal rules of interpretation, a contract term is said to be ambiguous if it is susceptible of more than one meaning, that is, if "*plausible contentions may be made for conflicting interpretations.*"[6] In this case, no such plausible contentions are being made. The City does cite the example of former employee Nikki Black, who retired in January of 2006, approximately ten months before the grievant retired. However, that one example, according to the testimony received, was not known to either the Union or the grievant, and hence, does not set a precedent or create a past practice.

What we have here is the parties agreeing to the clear express language of Article 34.1B regarding retiree health premiums. Apparently, the parties did not discuss part-time career retirees.[7] Had they done so, they may well have come to a different conclusion and set forth different terms. On the other hand, they may not have done so. It does little good to speculate as to what the parties might o[r] might not have done. The fact is that some administrators, realizing that there was a perceived "*gap*" in part-time and full-time retire[e] benefits, created a rule that they believed wa[s] fair. Unfortunately, while it may be fair, it wa[s] contradictory to the express language of th[e] contract in Section 34.1B. As an arbitrator, [I] cannot ignore clear cut contractual languag[e] and legislate new language, since to do so, [I] would be usurping the role of both the labo[r] organization and the employer.[8] This is par[-]ticularly the case since the parties themselves in Article 12.3 of the grievance procedure, ex[-]pressly state that "*the arbitrator shall n[ot] have the power to add to, subtract from, o[r] modify any of the terms of this agreement. . .*"

[1] As a result of this analysis, I do there[-]fore conclude that the City of Southfield vi[o-]lated Article 34.1B in this case involving th[e] grievant, Catherine Manning. Article 34.1[B] continues in force until June 30, 2009. As [o]f that date, when the contract expires, new co[n-]tract language may well be proposed by o[ne] or both parties. In the interim, however, th[e] plain meaning of Article 34.1B is controllin[g].

AWARD

1. The grievance is sustained. A violation [of] Article 34.1B has been demonstrated.

2. The City of Southfield is therefore [or-]dered to follow the language of Article 34.1[B] in charging the grievant, Catherine Mannin[g] the retiree portion of the post retireme[nt] health insurance payment at a rate of "*twe[nty] dollars ($20. 00) per month for a married r[e-]tiree and eligible spouse.*"

3. Any monetary amounts paid by the grie[v-]ant over and above that rate per month are be returned to the grievant as soon as reas[on-]ably possible, but no later than thirty (3[0]) days following receipt of this decision a[nd] award.

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[1] *Seminal Fire Rescue*, 104 LA 222 (Sergent, 1994). *Mason City School District*, 109 LA 1125 (Hoh, 1997).

[2] *Aro Corporation and IAMAW, Lodge 1349*, FMCS Case No. 84K/17266 dated 9/9/85.

[3] Elkouri and Elkouri, *How Arbitration Works*, 6th Edition, p. 434-436 (2003). If the language of an agreement is clear and unequivocal, an arbitrator generally will not give it a meaning other than that expressed. As Arbitrator Fred Witney has stated, "*An arbitrator cannot ignore clear cut language, since to do so would usurp the role of the labor organization and employer. Even though the parties to an agreement disagree as to its meaning, an arbitrator who finds the language to be unambiguous will enforce the clear meaning.*"

[4] *Social Security Administration*, 76 LA 569 (McDonald, 1981).

[5] *City of Taylor*, 84 LA 522 (McDonald, 1985); Elkouri & Elkouri, "*How Arbitration Works*," 6th Edition, at Page 434.

[6] *Armstrong Rubber Company*, 17 LA 741 (Gorder, 1952); *City of St. Petersburg, Florida*, 115 LA 615 (Deem, 2001); *Bay City, Michigan*, 111 LA 1124 (Allen, 1998).

[7] Since there are only 6 part-time career employ[ees] versus 650 full-time employees, according to Val[...] Crump, this is understandable.

[8] *Clean Overall Supply*, 47 LA 272 (Witney, 19[..]) *City of Bainbridge Island, WA*, 115 LA 747 (L[...] 2001). See also cases collected in Elkouri & Elko[uri] "*How Arbitration Works*," 6th Edition, at page 436

CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Sacramento, State of California. I am over the age of eighteen years old and not a party to the within action. My business address is 515 12th Street, Sacramento California 95814.

On May 17, 2013, I served the within Appellant's Motion For Judicial Notice In Support Of Reply Brief; Memorandum of Points And Authorities In Support Thereof; Declaration of Stephen E Goldberg In Support Thereof; Proposed Order in *Paratransit, Inc. v. Unemployment Insurance Appeals Board (Craig Medeiros),* California Supreme Court Case Number S204221 [Third Appellate Dist. Ct. of Appeal Case No. C063863; Sacramento County Sup. Ct. Case No. 34-2009-80000249-CU-Wm-GDS] by placing a true copy enclosed in a sealed envelope, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 17th day of May 2013, at Sacramento California

____
Alexa C. Garza