

IN THE MATTER OF ARBITRATION BETWEEN

CENTERPOINT ENERGY
(Employer)

and

GAS WORKERS UNION LOCAL NO. 340
(Union)

DECISION
(Contract Interpretation -
Application: Work Schedules)
FMCS Case No. 11-58675-3

ARBITRATOR: Frank E. Kapsch, Jr.

DATE AND PLACE OF HEARING: The Hearing was held on February 19 and March 22, 2013 in a conference room at the offices of the Federal Mediation and Conciliation Service located in Minneapolis MN.

RECEIPT OF POST-HEARING BRIEFS: Both Parties submitted timely post-hearing briefs on May 15th, 2013.

REPRESENTATION

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JURISDICTION

The Parties have stipulated that this Arbitrator has been properly selected and appointed, pursuant to the provisions of Article 5, Section 3, of the applicable labor agreement and thereby possesses the authorities, responsibilities and duties set forth therein to hear and determine this dispute.

THE ISSUE

As determined by this Arbitrator, with the concurrence of the Parties, the Issue to be decided is; *Did the Employer violate the provisions of the applicable labor agreement, when in June, 2011, it scheduled certain of its newly created afternoon Construction & Maintenance Department crews for work on Saturdays as part of their regular workweek? If so, what is the appropriate remedy?*

THE EMPLOYER

CenterPoint Energy, Inc. is headquartered in Houston TX. Its business services include the service and distribution of natural gas in six states, including Minnesota. The Minnesota service area covers much of the central and southwest portions of the state including the City of Minneapolis and its suburbs. CenterPoint provides natural gas service to residential, commercial and business customers within its service areas and is deemed a public utility and thereby subject to regulation by the MN Public Utilities Commission (PUC).

CenterPoint and its predecessor companies have had an ongoing collective bargaining relationship with Gas Workers Union, Local No. 340 (the Union) dating back to at least 1940. The Union essentially represents all of the skilled and unskilled employees working in the Company's various operating departments within Minnesota.

THE UNION

Gas Workers Union, Local No. 340, located in Minneapolis MN and affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, has been the recognized collective bargaining representative for certain skilled and unskilled employees of CenterPoint Energy (and its predecessors) working in the State of Minnesota for more than 70 years.

COLLECTIVE BARGAINING HISTORY

As noted above, the collective bargaining relationship between this Employer and Union goes back many, many years and the stability of that relationship has been reflected in an ongoing and successive series of labor agreements. Based upon my observations during the course of the hearing, the Parties have a mature, relaxed and friendly relationship based on mutual respect and a recognition that their separate roles do require close cooperation to insure that their "customers" receive the highest quality service possible. The Parties have stipulated that the relevant and applicable agreement in this matter is the labor agreement that was effective May 1, 2011 and scheduled to expire on April 30, 2015.

BACKGROUND FACTS - A SUMMARY

The following is an outline of generally undisputed relevant facts and contract language:

The essence of this disagreement between the Parties involves what is referred to as the Construction and Maintenance (also referred to as C & M) Department of the Employer's Field Operations Division. The C & M section consists of approximately 500 employees who are responsible for the installation, maintenance and repair of all the natural gas piping and lines that run underground from the Company's gas facilities to the homes, buildings and businesses of its customers.

The busiest period in a typical calendar year for the C & M Department is the "construction season" which nominally runs from spring through the summer and into the fall, depending upon the weather, of course. This is the season when building, construction and renovation/remodeling projects by building and construction contractors are in full blossom. At certain points in the progress of these individual projects, the C & M crews are called upon to install, disconnect, hookup or relocate the gas piping and service lines in order to provide, modify or discontinue gas service to the specific construction site or project. The crews also face emergency situations where contractor activities or other events have resulted in a break or cut in a main or service gas line and immediate action is required to prevent a catastrophic explosion or fire.

The Parties are in agreement that the specific work schedules of C & M work crews are set forth in and covered by *Article 14, Hours of Work and Overtime* in the current applicable labor agreement:

Article 14 HOURS OF WORK AND OVERTIME¹

Section 1. Five-day Workweek:

a. The regular workday shall be eight (8) hours and the regular workweek shall be forty (40) hours. The workweek shall consist of five (5) consecutive days or shall contain two (2) consecutive days off. The regular shift shall start after 6:00 a.m. and before 8:30 a.m. The regular calendar day for all employees starts at midnight and the shifts shall be numbered accordingly.

b. Monday shall be considered the first day of each week and Sunday as the last day of each week when computing the number of hours worked in any one week. In the case of shift workers, their first off day shall be considered as their Saturday and their second

¹ Any "emphasis" shown in the following contract language is as it appears in the original document.

scheduled day off shall be considered as their Sunday. However, the workweek for shift workers in the Home Service Plus Division shall begin at 12:01 a.m. on Saturday and end Friday at midnight.

Section 2. Four-Day Workweek: *It is understood by the parties that a voluntary 4-day, 10-hour workweek may be appropriate. The Company and the Union will meet in advance of implementing a 4-day, 10-hour workweek to discuss and answer questions. The Company will inform employees in the affected classifications (by posting) of the start of and end dates for the 10-hour, 4-day workweek and will specify the daily start and stop time for the ten-hour day. The following rules will apply to employees who work ten-hour shifts, unless the Company and the Union agree otherwise in writing:*

- a. Employees shall bid for and be awarded the ten (10) hour shifts based on foreperson seniority if both members of a crew desire to work such shift.*
- b. Employees assigned to ten (10) hours will not rotate into other shifts while so assigned.*
- c. Overtime, when assigned, will be paid for hours in excess of the 10-hour day or over the forty-hour week. Overtime will be paid at the rate of one and one-half straight time unless otherwise provided by the labor contract.*
- d. Normal days off will be Friday, Saturday, Sunday for approximately one-half of the department and Saturday, Sunday and Monday for the remaining one-half. These days off will be alternated on a three-week basis unless otherwise agreed upon between the affected employee and the Company, however, Management will have the right to designate the division of personnel in order to accommodate workloads and maintain crew integrity.*
- e. Sick leave and vacations will be charged on a ten-hour basis. Funerals will be charged on an eight-hour basis, plus two hours of vacation time.*
- f. During the week when a holiday occurs, all employees (choose one) will revert to an eight-hour schedule or work three ten-hour days and be charged two hours vacation time.*

Section 4. Amount of Overtime for Eight-Hour Workdays: *For employees who are regularly scheduled to work eight hours a day, overtime shall be paid as follows: Overtime at the rate of time and one-half shall be paid for all time worked in excess of the regular workday and the regular workweek. Double time shall be paid for all time worked in excess of the regularly scheduled workday falling on calendar Sundays and holidays. Double time shall be paid on hours worked on Contract*

defined Sunday or the employee's assigned holiday. Double time, in addition to regular straight time pay eight hours, shall be paid for all time worked on any of the named contract holidays. However, where an employee is scheduled to work on a contract holiday, the holiday shall be a part of the scheduled forty hours work and the employee shall be paid triple time for the eight hours worked and shall not be assigned a day off in lieu of such pay.

Section 7. Work Schedules Posted:

a. Schedules of shift work shall be posted in each department two weeks in advance, subject to change required by absences or unforeseen change in work. Tentative schedules shall be posted in each department as far in advance as possible.

b. All night shift work after 9:00 p.m. in the Home Service Plus Division shall be emergency work or customer contract work. All night shift work after 5:00 p.m. in the Construction and Maintenance Department **for the rotating 1:00 p.m. crew** shall be emergency work. However, after 5:00 p.m., the Company may assign the rotating **1:00 p.m. crew** to productive work in the yard to which assigned.

c. The start times for C & M repair crews afternoon shifts will be established during the construction season between 11:00 a.m. and 4:00 p.m., with a limit of five (5) crews, including the crew designated by the Company as the rotating 1:00 p.m. shift (Saturday may be a day shift with a start time between 8:00-10:00 a.m. for the rotating 1:00 p.m. shift). The rotating 1:00 p.m. shift will be rotated through all repair crews.

If not filled voluntarily based on Foreperson seniority, reverse Foreperson seniority will be used to fill all afternoon crews, except the rotating crew. The Union and Company will meet to review prior year results to determine the effectiveness of these schedules.

Section 9. On-Call Coverage:

a. The Company, with input from the Union, may establish an on-call overtime schedule **in any department with more than eight (8) employees in a job classification** to provide emergency response coverage overnight and on weekends and the on-call **employee/crew** may be called (by pager) and required to work. **Pagers will be offered on a seniority basis and if not filled voluntarily, will be assigned in reverse seniority order. If more than one on-call crew is established, the Company may establish such crews on a District basis.**

c. If an on-call schedule is established for Construction crews in the C&M Department, the on-call assignment for the workweek will first be offered to the crew scheduled for the rotating 1:00 p.m. shift. If not accepted voluntarily by both members of such crew, the option to fill the on-call obligations for the workweek will be offered on the same basis to both crew members using the Foreperson's callout overtime list starting with low overtime and if still not filled, the on-call obligation will be assigned to the original rotating 1:00 p.m. shift crew.

The Union notes that the basic language of *Article 14, Hours of Work and Overtime and Section 1. Five Day Work Week* can be traced back in time to at least the 1984-1987 labor agreement between the Parties;

Article 14 (1984-1987 contract)
HOURS OF WORK AND OVERTIME

Section 1. Five Day Work Week: *The regular workday shall be eight hours and the regular work week shall be forty hours. The work week shall consist of five consecutive days or shall contain two consecutive days off. The regular shift shall start after 6:00 a.m. and before 8:30 a.m. The regular calendar day for all employees starts at midnight, and the shifts shall be numbered accordingly.*

Monday shall be considered the first day of each week and Sunday as the last day of each week when computing the number of hours worked in any one week. In the case of shift workers, their first scheduled day off shall be considered their Saturday and their second scheduled day off shall be considered as their Sunday. However, the work week for shift workers in the Customer Service Department shall begin at 12:01 a.m. on Saturday and end Friday at midnight.

Article 14 in the 1984-1987 labor agreement contained no provisions for a "10-hour, four-day shift", a "rotating shift" or for "on-call" employees. C & M crews routinely worked a regular Monday through Friday workweek with daily eight (8) hour shifts commencing between 6:00 a.m. and 8:30 a.m. "Emergency work", falling outside of the regular C & M work schedules, was apparently handled on a case-by-case basis as overtime work.

Over the course of subsequent contract negotiations the Employer, however, offered a number of proposals to change the language of Article 14, Section 1 to give itself more discretion in establishing shifts and work schedules for the C & M employees.

In the negotiations for the 1987-1990 contract, the Parties did agree to add language to Article 14, Section 1 to allow consideration of a possible four-day, 10-hour day shift schedule. The contract provision specified that a majority of the employees potentially affected by a four-day, ten-hour workweek option in a particular department would determine whether a four-day, ten-hour workweek will be implemented. The language further specified that, if approved by the affected employees, a formal written agreement outlining the terms of the new shift schedule would be signed by designated representatives of the affected parties. This proviso was continued in Section 1 of subsequent contracts and eventually became "Section 2" of Article 14 (see Section 2 of Article 14 in the current labor agreement, as above)

In the negotiations for the 1990-1993 contract, the Employer also proposed to amend Article 14, Section 1 to change the regular shift start time from 6:00 a.m. and before 8:30 a.m. to after 6:00 a.m. and before 11:59 a.m. That change was rejected by the Union and was not included in the final contract.

During the negotiations for the 1993-1996 collective bargaining agreement, the Employer presented a proposal to modify Article 14, Section 1 to permit it to unilaterally schedule second and third shift operations, where necessary to meet operational needs. The Union rejected that proposal and it was not adopted in the 1993-1996 contract.

In the negotiations for the 1996-1999 labor agreement, the Employer proposed a change to Article 14, Section 1 which included language to change the existing language, "...the regular shift shall start after 6:00 a.m. and before 8:30 a.m." to "...the regular day shift shall start after 6:00 a.m. and before 8:30 a.m." That proposed change was rejected by the Union and was not included in the 1996-1999 contract.

During the course of negotiations for the 1999-2002 labor agreement, the Employer again presented proposals to amend or modify Article 14. With respect to Section 1, the Employer proposed that the section be amended to provide that the starting times of shifts will be established by the Company as necessary to meet operational needs. It also proposed to delete Section 5(b) of Article 14; which required that all night shift work after 9:00 p.m. in the Home Services Department be "emergency work" and that all night shift work after 4:00 p.m. in the C & M Department be "emergency work". Those proposals were rejected by the Union and were not included in the 1999-2002 contract.

However, the Parties did agree to add language to Section 5 of Article 14 in that 1999-2002 contract that provided the Company with the ability to schedule a limited number of C & M crews to work afternoon-evening shifts until 7:30 p.m. during the May-October construction season. This became what is referred to as the "rotating" crew schedule.

Additionally, in that contract, the Parties agreed to include language in Section 7 of Article 14 providing for an On-Call system for C & M employees to provide a response for emergency situations arising during nights and weekends.

In May, 2001 the Company began assigning the rotating afternoon-night crew; which was established to cover emergency work on nights and Saturdays, to perform routine work on Saturdays. The Union subsequently filed a grievance to protest the assignment of routine, non-emergency work after 4:00 p.m. on Saturdays. The dispute proceeded to the arbitration step of the grievance procedure and by the fall of 2001, the Parties had selected an arbitrator. On November 2, 2001, the Parties reached an agreement to cancel the arbitration and to refer the issue to the next contract negotiations, which were to begin in early 2002.

In August, 2001 the Company informed the Union that it was establishing and implementing a new shift that would run from 10:00 a.m. to 6:30 p.m. in the C & M Department. The Union subsequently protested the Company's action and a formal grievance was filed. In about early 2002, prior to arbitration, the Parties agreed to postpone the arbitration and negotiated a settlement of the grievance. By letter dated April 8, 2002, the Parties resolved the matter as follows:

1. *Article 14, Section 1, of the current Minnegasco/Local 340 contract will be interpreted and applied to mean that day shift starting times for employee within the C & M Department must start within the time frame from 6:00 a.m.-8:30 a.m. The company may have different start times for employees in the same classification(s) within the 6:00 a.m.-8:30 a.m. timeframe.*
2. *The Company agrees that the 10:00 a.m. start time is outside the established timeframe for day shift within the C & M Department and that it cannot establish such a start time in the C & M Department without the written agreement of the Union.*
3. *The 4:00 p.m. limitation on emergency work within the C & M Department contained in Article 14, Section 5, does not apply to day shift employees with start times within the 6:00 a.m.-7:30 a.m. timeframe.*
4. *This settlement is binding on the C & M Department but is without precedent and will not prejudice the position of either the Company or Union on shift starting time issues in other departments or divisions.*

It should be noted that on February 20, 2002, prior to the above grievance settlement, the Company sent the Union an Opening letter for the negotiations that were about to commence for a new labor agreement. That letter contained the following provision:

The Company expressly repudiates and terminates any implied or established practice, past or present, which has not been specifically

acknowledged and agreed to in writing between the parties and which in any way limits the Company's rights to manage the property and business, direct the working forces, plan and carryout operations and determine and establish policies and rules, including but not limited to the following rights:

- 1. The right to assign routine, non-emergency duties to crews who are scheduled to work any shift or any workday, except insofar as such rights are expressly restricted by the language of Article 14, Section 5, of the contract.*
- 2. The right to establish shift-starting times as it deems necessary to meet operational needs.*
- 3. The right to make daily work assignments to employees as necessary to meet operational needs.*

The Company followed up on the above notice by orally advising the Union that if they had any items, questions or issues based solely on a contention of "past practice", they needed to bring them up in negotiations for discussion and, if agreement was reached, for inclusion in the contract. There is no record evidence to indicate that the Union did, in fact, present any "past practice" items or issues for discussion in the subsequent negotiations.

During the course of the subsequent negotiations, the Parties did, however, engage in lengthy and substantial discussions concerning shifts, start times and other issues related to providing C & M crew coverage for emergency and non-emergency work. The Union specifically rejected the Company's demand for language in Article 14 that would permit it to establish the starting times of shifts, the number of shifts and whether the shifts are fixed or rotating, at its discretion.

The Union did agree to change the contract restriction that mandated that the rotating shift could only perform emergency work after 4:00 p.m. With the change, they could be assigned routine or non-emergency work until 5:00 p.m. If no emergency work was available after 5 PM, the contract language permitted the Company to assign the crew to "...productive work at the yard to which assigned."

With respect to the Union's grievance regarding the Company's assignment of non-emergency work to the rotating crew after 4:00 p.m. on Saturdays, as noted above, the Parties had agreed in the fall of 2001 to defer that issue to the 2002 negotiations. According to the Union, there was no specific contract language change or written settlement of that specific issue during the negotiations, because it understood that the Company, had, in the meantime, ceased assigning non-emergency work to the Saturday crew after 4 p.m. Accordingly, the Union subsequently withdrew the grievance.

The negotiations for the 2006-2009 contract did not involve any changes to the existing language relative to the creation of shifts, starting times, work schedules or other work coverage issues in the C & M Department.

During the negotiations for the 2009-2011 contract the only significant agreed upon change in Article 14 was the adoption of more specific and detailed language concerning the ability of the Company to adopt four-day, 10-hour shifts, starting at 8:00 a.m. and ending at 6:30 a.m. during the construction season (May through October).

As the Parties prepared to enter into negotiations for the 2011-2015 contract, the Company had some internal discussions about the need for different scheduling for the C & M Department because of a "changing regulatory environment." The Company is regulated locally in Minnesota by the Minnesota Office of Pipeline Safety (MOPS) and Federally through the Pipeline and Hazardous Materials Safety Administration (PHMSA). These regulatory bodies are responsible for insuring that this and other similar gas utility companies are operating "in the best interest of the public and delivering a safe and reliable product to their customers every day."

The Company noted that while the regulators appeared to be satisfied with the response times for the Company's Home Service Plus personnel in their role as "first responders" to reports of gas leaks or problems, but they were less satisfied with the Company's ability to get the gas shut off faster because its the C & M Department that is ultimately responsible for doing most of the repairs to get the gas off in the event of a cut main or service line. Only the C & M crews have the tools and heavy equipment to deal with such events. MOPS had told the company that it needed to continue to shore up its response times for these situations.

MOPS has also been more closely monitoring the Company's meter inspection system. The Company has some 150,000 gas meters installed in customer's home and facilities. MOPS wants those meters inspected once every three years or 50,000 meter inspections per year. The Company currently uses an outside contractor to perform these inspections and the contractor is performing inspections six days a week.

One of the major concerns for the inspectors is "atmospheric corrosion". Such corrosion occurs due to a chemical reaction between the steel gas line and the concrete foundation of the home or building where the gas line enters the foundation. If the corrosion goes undetected for a lengthy period of time, the result will ultimately be a break in the gas line and gas escaping around and/or into the building. With sufficient buildup of the escaped gas and a "trigger", an explosion may result.

A corrosion-caused break in a gas line is typically beyond the capabilities of the Home Service first-responders and typically requires the expertise and equipment of a C & M crew. That crew can determine the significance of the

apparent leak and determine if and what immediate action is required to fix the problem.

During its internal discussions, the Company noted that, because of the beefed up meter inspection program, it was experiencing a significant increase in the number of calls that required an immediate response by a C & M crew. The increasing number of such calls was becoming overwhelming for the Rotating crew, both during the week and on Saturdays.

Because of those internal discussions, the Company concluded that it needed to enlist additional C & M resources to be available later in the day and at least six days a week to field a consistent response and satisfy the regulators.

In its Opener letter, dated March 9, 2011, to the Union for the coming contract negotiations, the Employer stated regarding *Article 14, Hours of Work and Overtime*:

The Company believes it has the right to establish shift start times and to create fixed or rotating shifts as necessary to meet operational needs. The Company fully intends to exercise these rights following negotiations and is prepared to discuss any clarifications to the contract or concerns that the Union may have in that regard. The Company proposes to clarify Section 1 to add the following sentence: "The number of shifts and shift starting times will be established by the Company as necessary to meet operational needs."

As it entered into the 2011 negotiations, the Company was confident that it already possessed the ability under the contract to schedule the days of the week that it wanted employees to work and that it could determine the number of crews to work which schedules. What the Company wanted to talk about in negotiations was the provision in Article 14, Section 1 that restricted the Company to setting start times only after 6:00 a.m. and before 8:30 a.m.

As expected, the Union essentially declared the Employer's opening proposed language change to Article 14, Section 1 to be dead on arrival. However, the Parties continued discussions about the scheduling situation and the Employer's need for increased immediate response C & M staffing in the evenings and on Saturdays. Over the course of the ensuing negotiation meetings, the Parties exchanged various proposals and counter proposals in an honest effort to reach some kind of mutually acceptable solution to the C & M workshift scheduling situation.

In the negotiations on April 7, 2011, the Employer submitted a proposal to the Union with language that would allow the Company to create and schedule C & M crews, during the construction season, for shifts that would start work between 1:00 and 4:00 p.m. There were subsequent discussions and conversations between the Parties with respect to the number of crews to be created and at

one point, the Union proposed adding language to the Employer's proposal to limit the afternoon crews to working Monday through Friday. At the next scheduled negotiating session on April 13, 2011, The Employer informed that Union that it would not accept the proposal to limit the afternoon crews to a Monday through Friday work schedule and presented another written proposal deleting the Monday through Friday language.

Later that day, at about 2:43 p.m., the Company submitted another modified proposal for *Article 14, Section 7 (c)*:

The start times for C & M repair crews afternoon shifts will be established during the construction season between 11:00 a.m. and 4:00 p.m., with a limit of five (5) crews, including the crew designated by the Company as the rotating 1:00 p.m. shift (Saturday may be a day shift with a start time between 8:00 - 10:00 a.m. for the rotating 1:00 p.m. shift). The rotating 1:00 p.m. shift will be rotated through all repair crews.

If not filled voluntarily based on Foreperson seniority, reverse Foreperson seniority will be used to fill all afternoon crews, except the rotating crew. The Union and Company will meet to review prior year results to determine the effectiveness of these schedules. (NOTE: Prior to opening the trucks for the first time following DOS, allowance will be made for current forepersons to post back to the Advanced Mechanic Operator position. If necessary as part of this process to fill crews, Advanced Mechanic Operators may be forced in reverse seniority order into a Foreperson position. This Note will not be printed in contract.)

The following day, April 14, 2011, the Union reviewed the Company's April 13, 2:43 p.m. proposal and initialed off on it as a "tentative agreement" or "TA". The TA held through the course of the rest of the contract negotiations and the language appears in Article 14, Section 7c of the current contract. (See current Article 14, as above) There were no other changes in Article 14.

The Parties formally signed the new contract for 2011-2015 on May 17, 2011, but the contract was effective back to May 1st.

Shortly after the contract signing, but before the contract had been printed and distributed, the Company notified the C & M employees that, pursuant to the provisions in Article 14 of the new contract, it would be establishing a new 11:00 a.m. - 7:00 p.m. shift and that there would be two crews to start. According to the Company, one of the crews would work 11:00 a.m. to 7:00 p.m. Monday through Friday and the other crew would work Tuesday through Saturday as their regular workweek.

When the Union learned of the Company's intent to assign a new afternoon crew to a Tuesday through Saturday schedule, it noted that schedule would require

the crew to perform routine or regular work on Saturday for straight time pay, rather than overtime pay. Accordingly, the Union notified the Company that such a shift had not been negotiated or agreed to in the recent contract negotiations. When the Company refused to modify its plan for the Tuesday-Saturday crew, the Union filed the grievance underlying this matter.

THE GRIEVANCE

On June 27, 2011, the Union filed its formal, written grievance with Roger Brandel, the Employer's Construction and Maintenance Department Manager. The grievance cited the Nature of the Complaint as "*Saturday Work*". The provisions of the contract considered violated were stated as "*Article 14 and all other provisions that may apply including past practice.*" Adjustment Desired: "*Emergency work only performed by rotating 1-9 crew (night crew) or by call out. All Saturday work performed prior to the settlement of this grievance be paid at time and one half.*"

Mr. Brandel responded in writing on July 8, 2011 stating; "*Although the contract provides that all work assigned to the rotating 1-9 crew after 5pm shall be emergency work or yard work, there are no contractual provisions that reserve or restrict emergency work on Saturdays exclusively to the 1-9 crew. The company has the right under the contract to schedule both day and afternoon straight time shifts on a Saturday and crews working such shift may perform any work assigned to them, including emergency work. The grievance is denied.*"

In addition, the Company views this grievance as frivolous and an abuse of the grievance process. If pursued to arbitration, the Company hereby counter-claims and alleges that the filing and pursuit of this grievance violates the terms of Article 25, Mutual Pledges, Sections 1 and 2; Article 5, Grievance Procedure, Sections 1, 2 and 5 and the Union's obligation of good faith and fair dealing under the contract. As a remedy, the Company requests that it be awarded damages from the Union in the amount that reimburses the Company for all costs and attorney fees incurred in presenting this case to arbitration."

Apparently Mr. Ian Browne, the Union President, and Mr. Michael Fahey, the Employer's Director of Labor Relations met on August 17th, 2011 for a further review of the grievance. Following that meeting, Mr. Fahey sent a letter, dated August 31, 2011, to Mr. Browne. Mr. Fahey acknowledged the Union's argument that it claimed that the Company was in violation of Article 14 when it established the Saturday Straight time work shift for C & M crews working from 1:00 to 9:00 p.m. and that all Saturday work must either be call-out overtime work or must be limited to emergency work assigned exclusively to the rotating 1:00 to 9:00 p.m. crew.

Fahey went on to point out that Article 14, Section 1a clearly states that the "...workweek shall consist of five (5) consecutive days or shall contain two consecutive days off." He noted that the crew in question is working Tuesday through Saturday (five consecutive days) with Sunday and Monday off. The Company's decision to do so in this case is to reduce overtime costs and provide better operational coverage on Saturday did not violate the contract. He concluded by denying the grievance.

The Parties are in agreement that the grievance was properly and timely filed and subsequently processed in accordance with Article 5, Grievance Procedure, of the applicable labor agreement.

Ergo, here we are in arbitration.

SUMMARY OF THE PARTIES' POSITIONS AND MAJOR ARGUMENTS

The Union:

A. The Company's assignment of C & M crews to work shifts that included Saturdays, subsequent the signing of the 2011-2015 contract constitutes a clear violation of that agreement; it also violates the Parties' well established past practice and the intent of the agreement reached as a result of the Parties' negotiations for that contract.

1. The National Labor Relations Act (NLRA) defines the mandatory subjects of bargaining to be *wages, hours and other terms and conditions of employment*. Work schedules and shifts are mandatory subjects of bargaining that cannot be changed unilaterally by the Employer.

Throughout the collective bargaining history of these two Parties, the subject of shifts and work schedules have been routinely and vigorously discussed and negotiated during contract negotiations. During the course of negotiations over the past 20 years or more, the Employer has consistently and repeatedly asked the Union to give it total discretion to create and schedule shifts within the departments covered by the labor agreement. The Union, over the course of that same period, has consistently and steadfastly rejected any proposal for including language in the contract that would waive its rights to bargain over the creation and scheduling of shifts or work schedules.

Article 14, Section 1 of the contract includes a general statement or definition of what constitutes a "regular" workday. It does not, however, give the Company a blank check to create any schedule it chooses. It has been the past practice of the Parties to meet and negotiate and come to an agreement with regard to any proposed changes in working hours,

days, or schedules that are not already in place or are not specifically permitted under the contract.

As the record reflects, the C & M employees have historically worked regular day shifts, with the exception of the night shift or "rotating 1-9 p.m. crew" that was negotiated to cover emergency work and calls that occurred after 4:00 or 5:00 p.m. from Monday through Friday and on Saturdays. Historically, since all of the C & M crews, except the rotating crew worked a regular day shift, all additional work after the end of the regular shift, from 2:30-5:00 p.m., depending on what time the employee's shift began, and on Saturdays and Sundays was considered overtime and paid at the overtime rate.

Finally, the Parties have always understood and agreed that work after 5:00 p.m. on Fridays to 6:00 p.m. on Mondays (the earliest time the Company could start a day shift crew) could only be emergency work performed by the rotating crew or by other crews working overtime.

2. The Bargaining History and History of Disputes Regarding the Company's Attempts to Create Shifts and Work Schedules Support the Union's Position.

A thorough review of the Parties' bargaining history clearly indicates that the Company does not have and has never had the right to unilaterally create new shifts or work schedules. That history demonstrates that all shifts and work schedules for at least the past 40 years have been established with the Union's agreement and consent after negotiations between the Parties. That history also reflects that each time, in the past, when the Company has tried to unilaterally establish new shifts or work schedules or tried to assign non-emergency work to the rotating crew on Saturdays the Union has grieved and the Company has subsequently rescinded its action. This appears to be the first situation, in the past 40 years, where the Company has refused to discontinue its action after the Union grieved it.

In the negotiations for the 2011-2015 contract, the Union agreed to allow the company to establish an afternoon shift with starting times between 11:00 a.m. and 4:00 p.m., Monday - Friday. It did not agree, however, that the Company could establish a shift with a starting time between 11:00 a.m. and 4:00 p.m. working Tuesday through Saturday.

During the processing of this grievance, the company has not contended that it has the right to establish these shifts as a result of the Parties' negotiations and agreement for the 2011-2015 contract. Instead, it claimed to have the right to unilaterally create such shifts and work schedules, apart from those shifts that had been previously negotiated.

Accordingly, any claim made now made by the Company that the language of the applicable labor agreement gives it the right to create these shifts must be rejected.

3. The Wording of Article 14, Section 7c Supports the Union's Position. That contract language allows the Company to establish up to four additional crews to work shifts beginning between 11:00 a.m. and 4:00 p.m., but makes no reference to Saturday work. It does, however, mention Saturday as a work day for the rotating/night shift. The Section clearly distinguishes between the four additional crews created by the new language and the rotating/night crew that has existed for over 40 years for the specific purpose of providing coverage on nights and weekends when the regular crews are not working.

It is the Union's view that the purpose in allowing the Company to establish up to four additional crews with later start times was to provide coverage for the work that the Company needed to have done beyond the normal work day, e.g. after 3:30 - 4:00 p.m. from Monday through Friday. If the purpose of Section 7cm, as negotiated, was to provide the same type of coverage as that provided by the rotating night crew, then it would have made sense that the Parties would have also referred to Saturday work in connection with that shift. It would have also agreed to allow such crews to work their Saturday shift as a day shift, the same as the rotating night crew. Note: In fact, after the grievance was filed, the Company did let the afternoon shift crews, assigned to a Saturday schedule, work Saturdays as a day shift, the same as the rotating crew.

Since it does not make any sense that the Parties would allow the Rotating crew - which is normally the regular night crew - to work Saturday as a day shift, but not provide the same opportunity for the newly created 11:00 a.m. - 7:00 p.m. shift. It is clear that the Parties did not intend to have the 11:00-7:00 crews working on Saturdays.

4. The company is Attempting to Gain Through Arbitration What It Has Been Unable To Gain Through Contract Negotiations.

a. The Company is attempting to gain the right to unilaterally establish shifts and shift schedules. Based upon the entire record before the arbitrator in this matter, it should be abundantly clear that the Company has never had the right to unilaterally establish new shifts, new work schedules, or starting times without the Union's specific agreement or consent. Union Representatives, John Hennessy, Charles McCoy and Ian Browne, each credibly testified, based on their experience and knowledge of more than 40 years of bargaining history between the Union and the Company, that there has never been a situation in which the Company

unilaterally created a shift or changed a work schedule, other than as specifically permitted by the contract, without the Union's consent.

As previously noted, the Company, over the years has made numerous attempts try to unilaterally establish new shifts or create new work schedules. As the record shows, in each such instance, until now, the Company discontinued their action after the Union challenged it via the grievance procedure.

The Company is obviously hopeful that it will achieve, via this arbitration, that which it has been unable to attain through contract negotiations - the right to exercise its sole discretion in the creation or change of shifts and work schedules. This arbitrator must reject the Company's position in this matter and sustain the grievance.

b. The Company is attempting to gain the right to assign the afternoon C & M crews to a Saturday shift. The record in this matter also firmly establishes that the Company deliberately refused to inform the Union of its plan to schedule an afternoon shift to work Tuesday through Saturday, when the Parties were negotiating over the Company's request for additional afternoon shifts in the C & M Department.

Charles McCoy, the Union's lead negotiator in the negotiations for the 2011-2015 contract testified that the issue of Saturday work by C & M crews has always been a huge bone of contention throughout the history of the Parties' bargaining relationship. He noted that, over the course of his approximately 40 years of employment with the Company, the Union had never agreed to allow C & M crews to perform work on Saturdays, except on an overtime basis and except for the rotating shift; which was limited to performing emergency work only.

Both McCoy and Union President Ian Browne testified that if the Company had told the Union, during the negotiations for the Section 7c language, that it intended to schedule one of the afternoon shifts to be created for work on Tuesday through Saturday, with a straight time pay for Saturday work, the Union would never have agreed to it.

Mr. Fahey's testimony, in response to questions by the arbitrator concerning the negotiations regarding the proposed language for Section 7c, he conceded that the Company made no specific mention of having newly created afternoon crews work Saturdays. He acknowledged that the idea of having potential afternoon cre

work on Saturday had been discussed within the Company and was under consideration at the time of the negotiations. However, he said it was decided that given that no specific decision had yet been made about Saturday work being assigned to possible afternoon crew, he saw no reason to inject that speculation. Fahey did point out that the Company had clearly put the Union on notice at the outset of negotiations that the Company was not coming out of those negotiations without the shift coverage that it needed and that limitations would not be acceptable. He further noted that the Union negotiators were "experienced folks" and were well aware of what the Company was seeking out of those negotiations.

Mr. Fahey's testimony makes several things very clear; 1) the Company did not tell the Union that it was considering assigning the afternoon work crews to work Saturdays, 2) the Company knew that telling the Union of its plan to have the crews work Saturdays would have been met with extreme objection and would have been a huge stumbling block to reaching a complete, final contract agreement, 3) the Company deliberately withheld information from the Union regarding its plans for the afternoon crews and 4) the Company, knowing that it would not have been successful in convincing the Union to give it the right to assign the afternoon crews to work Saturdays, if that fact had been disclosed in negotiations, it is now attempting to establish that right through this arbitration. For these reasons, the grievance must be sustained.

B. The Company's Arguments Lack Merit.

1. Article 14, Section 1 does not give the Company the authority to unilaterally establish or change shifts, shift starting times or any other aspect of employees work schedules. Contrary to the Company's assertions, there is nothing in the language of Article 14, Sections 1a or 1b that says the Company may establish any workweek or shift that it chooses.

Section 1a says that the regular workday shall be eight (8) hours and the regular workweek shall be forty (40) hours, but it does not say that the Company may establish any work schedule or shift it chooses, as long as the days are 8 hours and the weeks are 40 hours. The Section also states that the workweek shall consist of five (5) consecutive days or shall contain two (2) consecutive days off, but it does not say that the Company may establish any shift or work schedule it chooses, as long as the workweek consists of five consecutive days or contains two consecutive days off. The Section also says that the regular shift shall start after 6:00 a.m. and before 8:30 a.m., but it does not say that the Company may establish any other shift that it chooses, outside of the regular shift.

The Section also states that the regular calendar day for all employees starts at midnight and the shifts shall be numbered accordingly, but does not say that the Company has the unilateral right to create whatever shifts and work schedule it chooses, so long as the regular day starts at midnight and the shifts are numbered accordingly. Section 1 of Article 14 goes on to set additional parameters and requirements for work schedules, but nowhere in the Section does it state that the Company may create any shifts or work schedules that it wishes.

It is absolutely clear that Section 1 of Article 14 simply establishes that the regular workweek goes from Monday to Friday, that the regular shift begins between 6 a.m. and 8:30 a.m. and goes for 8 hours and that any other shifts must be negotiated with the Union. Additionally, it is clear the purpose of Article 14, Section 1 is to establish guidelines and limitations on any shift created pursuant to the agreement of the Parties relative to days off, and the designation of Saturdays and Sundays so that overtime and days off can be properly determined and allocated.

This interpretation of Article 14, Section 1 is the only interpretation that is consistent with the Company's legal duty and obligation to bargain with the Union over hours of work and work schedules, the bargaining history between the Parties, the practice of the Parties in work performed in the C & M Department as well as other departments and the filing and settlement of past grievances when the Company has attempted to unilaterally assign employees to work and schedules outside the parameters specifically negotiated and agreed to by the Union.

If the Company's current interpretation of Article 14, Section 1 were correct, then it would not have had to negotiate with the Union over the course of the past 30 years or so regarding the creation of shifts and work schedules - it could have acted at its own discretion. Obviously, based on the past bargaining history of the Parties, it knew it could not do that.

2. The Company's claim that it has the inherent right to create shifts and starting times as part of a Reserved Management Rights argument is without merit. As previously noted, employees' hours of work and work schedules are a mandatory subject of bargaining. No employer, subject to the NLRA, has any option to ignore or negate that legal obligation to bargain and any refusal may well result in an Unfair Labor Practice Charge of failing and refusing to bargain.

Accordingly, it is the Union's position that the Company is required to bargain with the Union any time it desires to make a change from the established work schedules. As noted, the Company has, over the course of the years, consistently requested that the Union agree to contract language that would give it the right to make such changes without the Union's consent. Just as consistently, the Union has firmly rejected all such proposals.

The Company asserts that there is nothing in the contract language of Article 14 that prohibits it from scheduling the C & M crews working the afternoon shifts to work a Tuesday through Saturday schedule. The Union would agree with that assertion. However, there is also nothing in Article 14 or elsewhere in the applicable agreement that specifically says that the Company has the right to assign the afternoon shift to work a Tuesday - Saturday schedule.

It is well recognized in arbitral law that in the absence of specific contract language, an arbitrator may find implied restrictions on an employer's ability to act unilaterally with regard to changing shifts or work schedules by examining the parties' entire contract, bargaining history and their past practice. Such a review, by this arbitrator, should show more than ample evidence to find an implied, if not specific, restriction on the Company's ability to establish shifts and/or work schedules.

3. The Company's claim that the Grievance should be denied because it only changed a work schedule and did not create a new shift is without merit. The Company's claim that it did not create a new "shift" when it scheduled the afternoon crews to work Tuesday - Saturday, rather than Monday - Friday is likewise without merit. The concept of a "shift" covers more than just the hours of the day employees are assigned to work; it covers the specific days of the week as well.

This situation is specifically confirmed by the practice of the Parties with respect to the employees working in the Home Services Department. That department is a 24/7 operation and the Parties, over time, have discussed and agreed to a system of schedules that involve some 100 different "shifts." Some employees work the same hours but different days, others different hours, but the same days, shifts that include four 10-hour days, and shifts that include eight 10-hour days, etc. In the Home Services Department, each configuration of days and hours is considered a separate shift and they are all given a number from 1 to 100, or whatever the total number of shifts might be.

Regardless of the semantics regarding a work "shift" v. a "schedule", it is obvious that either term falls into the category of "*wages, hours and other terms and conditions of employment*" and are, therefore, mandatory subjects of bargaining. Accordingly, the Parties' past practice of negotiating the creation of work shifts or work schedules applies to this situation and there is no basis for denying the grievance.

4. No emergency, exigent circumstances or changed conditions justify the Company's unilateral establishment of the Tuesday-Saturday shift. Although the Company never made such a claim in its written response to the grievance, in the hearing, the Company appeared to claim that it needed to create a Tuesday-Saturday shift for the afternoon crews to cover potential emergencies that might arise on Saturdays. This claim is completely without merit.

At no time during the Parties' contract negotiations did the Company ever claim that it needed an additional crew, beyond the rotating crew, to cover potential emergencies on Saturdays. If the Company truly believed that it needed an additional crew to work Saturdays to provide coverage for emergency work not being met by the rotating/night crew or the on-call coverage provided in Article 14, Section 9, that is something that the Company surely would have raised and emphasized during negotiations. It did not do so.

Finally, the fact that the Company moved within weeks after the contract was finalized to unilaterally create the Tuesday-Saturday shift, makes it clear that any circumstances that existed to justify that action were in existence at the time the Parties were negotiating, but nothing was ever mentioned by the Company about any such circumstances.

5. The Company's claim that its rejection of a Union Proposal granted it permission to schedule afternoon shift to work Saturdays is without merit. In its response to the grievance, the Company did not claim that it had secured the right to schedule the afternoon crews to work Saturdays by virtue of its negotiations concerning such crews. In the grievance discussions with the Union, Mr. Fahey told the Union that the Saturday crew schedule wasn't a result of the recent contract negotiations, but that the Company had the inherent right to schedule the crews to work on Saturdays as part of management responsibility. The Company specifically asserted that it had the right to create such a schedule pursuant to Article 14, Section 1.

Based on the hearing record, it is clear that when the Company submitted its proposal for the creation of the afternoon crews to the Union on April 13, 2011 that it did so on the basis of its claimed need to provide additional coverage for calls that came in after 3:00 p.m. on Monday-Friday. It claimed that the additional coverage was necessary as a result of construction work being done by outside contractors during the construction season.

The Union, in turn, submitted a counterproposal that provided for two (2) afternoon crews, rather than four (4) as proposed by the Company. The Union's proposal also specifically referenced the Monday-Friday schedule for the shifts, because that was what the Company had asked for. The Union also proposed that if the Company accepted its proposal, it would be included as a "side letter" to the contract. The Company said that if agreement was reached on the afternoon shifts, they wanted the language included in the body of the contract, rather than in a "side letter". It also proposed to delete the specific reference to Monday-Friday in the Union counterproposal. The Union subsequently acceded to both of those requests by the Union. Both Parties agree that during the course of the discussions regarding the afternoon shift proposal, the company made no mention of the afternoon shifts working Saturdays and the Union, on its part, made no mention of or asked any questions of the Company regarding Saturday work by the proposed afternoon crews.

If the Company is now arguing that the Union's acceptance of the language permitting the Company to establish the afternoon shifts, without reference to the days of the week that they would be assigned, as an acceptance of the Company's right to schedule these employees to work Saturdays or Sundays, that position is unreasonable, unwarranted and inconsistent with the record. If the Company intended for its rejection of the Union's proposal to mean that it could schedule the afternoon shifts to work Saturdays or even Sundays, on a straight time basis, then it had a good faith obligation to inform the Union of that intent. But, it did not do so and it did not do so because it well knew that the Union would not accept the proposed language, if it knew the Company intended to give it such meaning. Accordingly, the Company's argument must be rejected and the grievance must be sustained.

Conclusion: The Union filed the grievance in this matter and has gone through a lengthy arbitration procedure because it knows that the Company has violated the collective bargaining agreement by unilaterally establishing a Tuesday-Saturday shift for the afternoon crews in the C & M Department. If the Union had agreed that such a shift could be established as a result of its acceptance of the

Company's proposal relative to the creation of the afternoon shift in the 2011-2015 contract, it would not be pursuing this matter. However, the record shows that those are not the facts and that the true facts regarding the actual language of the contract, the Parties' bargaining history and the Parties' past practice clearly support the Union's position in this matter.

The Company is required to bargain with the Union over the terms and conditions of employment under the NLRA and the case law related thereto. This includes work schedules and shifts. For over 20 years the Parties have negotiated on these issues and for 20 years the Union has firmly rejected the Company's attempt to secure the right to unilaterally establish shifts, shift starting times and work schedules, in general. The Company and the Union negotiated the provision allowing the Company to establish an afternoon shift in the C & M Department during the construction season, but they did not agree that the afternoon shift crews could then be assigned to work on Saturdays. The Company deliberately withheld its plans to make such an assignment because it knew that the Union would reject it. The Company is trying to obtain through this arbitration that which it has not been able to obtain through negotiations. It cannot be allowed to succeed.

Based upon the foregoing facts, arguments and authorities, the Union respectfully requests that the Arbitrator sustain the grievance, order the Company to immediately cease the assignment of C & M afternoon crews to work a Saturday shift unless they are paid at the overtime rate (other than the established rotating/night crew) and award those C & M employees who have been forced to work on Saturdays, as a result of the Company's actions since he assignment began, an amount of back wages equal to what they would have earned if they had been paid overtime for the Saturday work.

The Employer:

The Union cannot carry its burden of proving that the Employer violated the contract because; 1) the Employer has the management right to establish which days of the week constitute the "regular workweek" because there is no express limitation in the Agreement prohibiting it from doing so, 2) language in the Agreement supports the Employer's position, not the Union's, 3) the Employer specifically rejected the Union's counterproposal during the 2011-2015 negotiations to limit the afternoon crew to Monday through Friday, 4) there is no such thing as a binding past practice to *not* exercise a right and 5) any past practice was expressly repudiated by the Employer in the 2002-2006 contract negotiations. Accordingly, the Union's grievance must be denied.

A. The Union Must Prove That The Employer Has Violated The Contract.

To be clear, the Union bears the burden of demonstrating that the Employer has, in fact, violated the contract, as alleged. Moreover, it is the Union's burden

to come forward with contract language that clearly establishes that the Employer may **not** establish a Tuesday-Saturday workweek schedule.

For the reasons discussed below, the Union falls far short of carrying its burden here.

B. The Employer has the Managerial Right to assign the days of the week that employees shall work. *Article 27, Management Responsibilities* of the applicable Agreement states;

"Except as stipulated by this Agreement, the Company shall manage the property and business, direct the working forces and plan and carry out operations. The Company has the right to establish reasonable rules covering employee conduct."

There is no more fundamental management rights than that of an employer to operate its business efficiently and control the workforce and these rights are limited only to the extent that the employer has yielded those specific rights through the collective bargaining agreement itself.

Here, there is nothing in the Agreement that prohibits the Employer from scheduling the afternoon crew to work a Tuesday-Saturday regular workweek. In contrast, there have been long-standing limitations in Article 14, Section 1 as to the ability of the Employer to schedule shift Start Times for regular shifts.

It is also undisputed that the Employer's scheduling of the Tuesday-Saturday workweek for the afternoon crews was motivated by pressure from the public regulators to speed up response times, which ultimately is intended to insure the safety of the Employer's customers. Additionally, it is also undisputed that the response times have actually improved since the implementation of the Tuesday-Saturday workweek shift. The Tuesday-Saturday workweek constitutes a legitimate exercise of managerial discretion and should not be disturbed.

The Union intimated during the hearing that it somehow supported its position that Mr. Fahey denied the Grievance based on it being management's inherent right, as opposed to being some *new* right that the Employer achieved in the course of the 2011-2015 negotiations. To the contrary, Fahey's position is entirely consistent with the Employer's theory of the case; the Employer has always had the right to schedule Saturday work and the Employer has never proposed modifying this language, and, as discussed *infra*, it was the **Union** who failed to negotiate such a limitation in 2011.

C. Contract language supports the Employer's position. Further, not only is there no provision of the Agreement that limits the Employer's authority to take the challenged action, pursuant to the management rights clause, there is language in the Agreement which further supports the Employer's position. Since the 1940's, the Parties' contracts have defined the "regular workday" as

eight hours and the "regular workweek" as forty hours - without reference to specific days. Additionally, since the 1940's, the contract has stated that, for shift workers, their first day off is considered "**their** Saturday" and their second day off should be considered "**their** Sunday." From this language it is clear that the Parties' historical agreement has recognized a distinction between a "Saturday", as defined by the contract and a "Saturday" on the calendar. See *Article 14, Section 4* providing for certain overtime for "**calendar** Sundays" and "**Contract-defined** Sunday." (emphasis added)

In a similar vein and further supporting the Employer's position is *Article 28, Wages, Section 7, Premium Pay* which contemplates that a shift worker's "standard week" may include a Saturday (or a Sunday), "*When a Sunday...is scheduled as part of an employee's standard week...*"; "*When a Saturday is scheduled as a part of an employee's standard week...*"

Indeed, the only "Monday to Friday" workweek limitation that the Employer has ever agreed to relates to employees outside of the C & M Department and only with respect to employees with **twenty years of seniority**. *Article 14, Section 11* provides that "*Employees hired prior to May 1, 1993 in the Home Services Plus Division (excluding ARPS) **who obtain 20 years or more of active service in the department may work day shift only, Monday through Friday.**" This language indicates that the Parties understood that if they wanted a Monday to Friday limitation, it needed to be via an express limitation in the Agreement. This also underscores the fact that absent such limiting language, the Employer remains free to schedule a Saturday as part of the C & M Department's regular workweek "*of five consecutive days with two consecutive days off.*"*

Union Representative McCoy testified that in 1984, the Employer proposed a Saturday routine-work proposal for the contract; which was rejected by the Union. The Union failed to introduce any documentary evidence to support this claim and should not be credited over Mr. Fahey's specific testimony to the effect that the Employer has "***never proposed in negotiations to change the language that deals with our ability to determine days off.***" (emphasis added)

D. The Union may not be awarded in arbitration what it failed to obtain in negotiations. During the 2011 contract negotiations, the Union, as a counterproposal to the Employer's proposal for afternoon shifts, added language that specified that the afternoon crew work "Monday through Friday." The Employer rejected that specific limitation and it was **not** included in the final language of Article 14, Section 7c. The Union is now seeing through this arbitration process what they failed to obtain in negotiations - a specific Monday - Friday work schedule limitation for the afternoon crews.

In a futile attempt to dilute the significance of its failure to negotiate their Monday - Friday proposal into the Agreement, the Union attempts to distract the Arbitrator by arguing that, 1) their proposal had no real purpose and 2) the Employer did

not explain why it rejected the Union's proposed limitation. Neither of these theories is supported by credible evidence. However, even if assuming *arguendo* that their contentions are true and correct, they are essentially irrelevant to resolving this grievance because the Union is still left with the simple fact that its proposed Monday - Friday limitation did not make it into the final Agreement.

First, incredibly, Mr. Browne, the Union President and a member of the Union negotiating Committee in the 2011 negotiations, **denied** that the Union made the Monday-Friday counterproposal because it thought this limitation was an important issue.

Second, the Union denied that the Employer stated that it was not willing to accept the Union's proposed Monday-Friday limitation language. Regardless, the record is clear that the Employer did not accept the Union's proffered limitation proposal and counter-proposed the language, without the limitation; which was agreed to by the Union and which is now in the contract in Article 14, Section 7c.

The Union also suggests that the Employer somehow violated the Agreement because it did not specifically advise the Union that the new afternoon crews would be working a Tuesday - Saturday regular workweek. This contention is irrelevant.

The Employer did not state during the negotiations, for the afternoon shift language, that there would be a Tuesday through Saturday shift for those crews for the simple reason that it had not been decided yet. What is significant is that the Union witnesses admitted that the Employer never stated that a Monday-Friday limitation would be acceptable, even though the Union had sought that limitation.

Clearly, the Union sought to include a "Monday-Friday" limitation in the language for the afternoon shifts, but the Employer refused to accept that limitation and the Parties subsequently adopted the language, without the limitation. Ergo, the Union was unsuccessful in its effort to obtain the Monday-Friday limitation in negotiations and because of its failure, it would be improper for the arbitrator to impose it upon the Employer now.

E. There is no "Past Practice" Even conceding the absence of any specific contractual language to support its position, the Union argues past practice. It attempts to establish the existence of a binding past practice by claiming that the Employer is somehow precluded from requiring Saturday work because it has not required it in the past. As an initial issue, the Union misapplies the doctrine - there is no such thing as a binding past pattern of practice to NOT do something. Further, any past practice was expressly repudiated by the Employer at the

outset of the 2002 negotiations. The arbitrator should not sustain the grievance based on the Union's past practice theory or contention.

"[C]ustom and past practice may be held enforceable through arbitration as being, in essence, a part of the parties' 'whole agreement.'"² "A 'practice' as that concept is understood in labor relations refers to a pattern of conduct which appears with such frequency that the parties understand that it is the accepted way of doing something."³ To establish the existence of a past practice, however, the Union must show "clarity, consistency and acceptability"⁴

To endorse here the Union's claim that a binding "past practice" exists **prevents** the Employer from exercising its rights in this area and would conflict with a long line of persuasive arbitral reasoning. Simply because the Employer may not have had a business need before 2011 to schedule Saturdays as part of a regular workweek does **not** mean that it forfeited the right to do in the future. *"But caution must be exercised in reading into contracts implied terms, lest arbitrators start re-making contracts which the parties have themselves made. The mere failure of the Company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right... Mere non-use of a right does not entail a loss of it."*⁵

Relatedly, *"The basic and primary function of management is to operate on the most efficient basis attainable, to see that unnecessary costs are eliminated and that the labor force is efficiently and productively utilized. Unless restricted by the labor agreement or by oral understandings, interpretations and/or mutual commitments of the parties which have grown up over the course of time so as to form an implied term of the contract, management cannot and should not be put in a straight jacket, preventing it from exercising its basic responsibility and legitimate function to control methods of operation and to direct the work force."*⁶

F. Any "Past Practice" was formally repudiated by the Employer in 2002. Even if there ever was a past practice of not including Saturdays in the "regular workweek, the Employer expressly repudiated it in the 2002 negotiations.

*"[A]n impressive line of arbitral though holds that a practice...is subject to termination at the end of said term [of a collective bargaining agreement] by giving notice of intent not to carry the practice over to the next agreement; after being so notified, **the other party must have the practice written into the agreement to prevent its discontinuance**"⁷ (emphasis added)*

² Elkouri & Elkouri, *How Arbitration Works* at 12-2 (7th Ed. BNA 2012) (hereinafter "Elkouri")

³ *Weyerhaeuser Co.*, 105 LA 273, 276 (Nathan, 1995)

⁴ Elkouri at 12-4.

⁵ *Esso Standard Oil Co.*, 16 LA 73, 74-75 (McCoy, 1951)

⁶ *Shell Oil Co.*, 44 LA 1219, 1222-1224 (Turkus, 1965)

⁷ Elkouri at 12-15.

The Union was given the opportunity to negotiate this alleged "practice" into the contract, but it failed to do it. Again, the Union cannot gain here in the arbitration process; that which they were unable to achieve at the bargaining table.

Conclusion: For the above reasons, the Union has failed to meet its burden of proof in establishing that the Employer violated the express terms of the applicable labor agreement, as alleged. Accordingly, this Grievance must be dismissed in its entirety.

ANALYSIS, DISCUSSION AND FINDINGS

For labor arbitrators, one of their most important functions and duties is resolving disputes, between parties to a collective bargaining contract, over the meaning, interpretation and application of the contract language. That function is, of course, not limited to the labor-management sphere, but arises wherever two or more parties have negotiated some form of agreement requiring certain actions by each party. Those other types of agreements involve anything from an agreement among roommates to a construction contract for a home or building.

Regardless, of the type of contract or agreement, it is almost a certainty that during the life of the agreement, questions or problems will arise between the parties as to the meaning and/or application of specific provisions. In most cases, the parties will discuss the dispute and will resolve it informally in a mutually satisfactory manner. If the parties are unable to resolve the matter themselves, they may seek a resolution through the courts or, as in this instance, through arbitration.

Labor arbitrators have typically adopted the rules, common law and standards and principles developed by the courts to resolve disputes over the meaning of terms used in ordinary commercial or other non-labor relations contracts. That jurisprudence includes two opposing theories of interpretation; 1) the Objective Approach and 2) the Subjective Approach.

The Objective Approach in its simplest form says that the meaning of the disputed provision or language is that meaning that would be attached to the integration by a reasonably intelligent person acquainted with all the operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration. "Integrations" are the writings that reflect the intentions of the parties to express their final agreement on a subject contained in the contract. The Objective Approach does not assess or weigh the meaning that the parties, themselves, may have attached to their language.

The Subjective Approach, on the other hand, says that "interpretation" is the ascertainment of the meaning of the agreement or a provision thereof as

intended by at least one party.⁸ However, "*the intention of a party is the intention manifested by him, rather than any different undisclosed intention.*"⁹ To the question, "Whose meaning prevails?" The answer is,

*"Where the parties have attached different meanings to an agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement made that party did not know, or have reason to know, or had no reason to know, of any different meaning attached by the other, and the other knew, or had reason to know the meaning attached by the first party."*¹⁰

I typically find that use of the Subjective Approach, as an analytical tool, is more effective in dealing with labor agreements. This approach is better able to recognize the fact that collective bargaining agreements are typically successive and evolutionary in nature and are negotiated in the context of an ongoing collaborative relationship between the parties.

In this situation, the Union is contending that the Employer acted unilaterally and in violation of the applicable labor agreement, when in about June 2011, it implemented a Tuesday through Saturday regular workweek for certain C & M crews working the newly created afternoon shifts.

The Union acknowledges that it bears the sole burden of proof in this matter and that it is solely responsible for establishing by a preponderance of evidence that its allegations and contentions are, indeed, true and correct.

Turning to the specifics of the Union's arguments and evidence, as summarized above, I am going to try to further clarify and simplify them as follows:

1. The Union argues that the Employer had no contractual authority to unilaterally create or implement a C & M afternoon crew shift and assign them to a regular workweek of Tuesday through Saturday.

I find that I am in full agreement with the Employer's argument that, in general, the employer, in the absence of a collective bargaining obligation, inherently possesses and is free to exercise all of its rights as it manages its business. In that situation, the only limitations on the employer's exercise of those rights would be relevant laws, regulations and ordinances that may impact upon the business and its employees. When that employer enters into a collective bargaining relationship, the law places further restrictions upon the employer's inherent rights to manage its business. As noted previously, the employer must now bargain in good faith with the designated union about any proposed changes with respect

⁸ RESTATEMENT (Second) OF CONTRACTS §200, §220 cmt. b (1979)

⁹ Id. §200 cmt. 6, §212, cmt. a (1979)

¹⁰ Id. RESTATEMENT (Second), §201(2).

to the "*wages, hours and other terms and conditions of employment*" of its employees. For an employer to "unilaterally" make such changes, without first bargaining in good faith with the union about the proposed changes would constitute a possible violation of law. The negotiated and agreed upon changes, as reflected in the written labor agreement, serve as limitations and restrictions on the employer's inherent rights to manage its business and its employees.

There is an old axiom in labor relations to the effect that, "*if you can't find it in the contract, then you probably don't have it.*" The Parties herein, incorporated the substance of that axiom into their Agreement as *Article 27, Management Responsibilities*:

"Except as stipulated by this Agreement, the Company shall manage the property and business, direct the work forces and plan and carry out operations..." (emphasis added)

With that principle in mind, we will examine the language of the applicable agreement, to determine if there are restrictions on the Employer's ability or authority to assign C & M crews, working the afternoon shift, to a Tuesday through Saturday regular workweek.

In looking at *Section 1a of Article 14*, there are definitions of what constitutes a "regular workday" - 8 hours and what constitutes a "regular workweek" - 40 hours and five consecutive days or two consecutive days off. Strikingly absent from Section 1 is any restriction or limitation mandating "Monday through Friday" as the only "regular workweek" that the Employer may choose to create or schedule.

Continuing through Article 14 to Section 7c, the provision which authorizes the Employer to create up to five (including the Rotating crew) C & M crews to work afternoon shifts during the construction season; I again find no language that restricts or limits the Employer from setting a Tuesday through Saturday "regular workweek" for certain of those afternoon crews.

Having reviewed the complete applicable Labor Agreement at least three (3) times, I have been unable, as noted by the Employer, to find any contract language that could be construed as a restriction, limitation or prohibition on the Employer's ability to create and schedule C & M afternoon crews to work Tuesday through Saturday as their regular workweek. Notably, in my review, while there are numerous references and provision to shifts, schedules and start times, I found no instances of ambiguity or conflicting language and certainly no language that could be construed, in any way, to constitute a limitation on the regular scheduled workweek for the afternoon crews.

The Union also argues that the Employer's creation and scheduling of the Tuesday through Saturday shifts for the C & M afternoon crews violates the contract; because there is no specific contract language permitting it to do so. As indicated by the axiom and Article 27, as above, if the contract doesn't specifically restrict or limit the Employer's right to take that action, then the Employer can exercise its inherent rights to manage its business and direct the work forces. Again, we are back to the concept that the Employer inherently possesses a broad set of rights to manage its business and employees. The provisions of the applicable labor agreement are **not** the sources of those rights, but may serve, depending upon the specific language, as restrictions or limitations on the Employer's exercise of those rights.

Accordingly, in view of the foregoing, I find no contractual language in the applicable labor agreement which restricts or limits the Employer's authority or right to schedule the C & M afternoon crews to work Tuesday through Saturday (or even Sunday) as their "regular workweek".

From the record testimony and evidence, it is abundantly clear that the Union, in the April 13th, 2011 negotiation session, it did propose language to specifically restrict or limit the workweek of the proposed afternoon C & M crews to Monday through Friday. The Employer subsequently rejected that proposed language and, for whatever reason, the Union withdrew that proposal and agreed to the Employer's language for the afternoon crews, without any schedule restriction as to what constituted a "regular workweek" beyond the definitions set forth in Article 14, Section 1. I cannot now restore to the contract, language that was withdrawn by the Union in negotiations.

2. The Union argues that during the specific discussions that took place in the 2011 negotiations concerning the Employer's proposal to create afternoon schedules for certain C & M crews; that the Employer purposely failed to disclose that it intended to schedule some of those crews to work a Tuesday through Saturday regular workweek. The Union contends that if the Employer had made that disclosure, the negotiations would have likely gone differently.

In reviewing that argument and contention, I note that the Parties have been routinely discussing the subject of C & M crew coverage for nights and weekends for at least the past twenty years or so. The Employer, for its part, has made it clear to the Union that it would like additional discretion in the creation of work schedules for the C & M crews to more efficiently address those time periods. The Union, for its part, appears to have routinely rejected giving the Employer any broad discretion in scheduling evening and weekend work. However, it has, over the years, agreed to allow the Employer certain limited schedules or shifts to provide

coverage during those periods, e.g. the Rotating/night crew and the On-Call system. These accommodations typically involved overtime price tags.

At the outset of the 2011 negotiations, the Company advised the Union that it was again seeking broader discretion and authority to create or establish work schedules in Article 14.

In the hearing, the Employer acknowledged that it made no mention of "Saturday work" during the course of the negotiations concerning the proposed language for the afternoon shifts. It said that, at that time, it had no specific plan to schedule the afternoon crews to work Saturdays. On the other hand, the Union conceded, in the hearing that they made no mention nor asked any questions as to whether the Employer contemplated having the afternoon crews work weekends. However, as previously noted above, the record evidence shows that in its counterproposal to the Employer's initial proposal regarding the afternoon crew shifts, the Union inserted language that would have specifically restricted the scheduling of those crews to Monday through Friday. The Union subsequently dropped that restriction from the final language, as adopted by the Parties. In the hearing, when asked if the Union had proposed the Monday through Friday restriction because it believed that provision was important, Union President Browne answered, "No".

At this point, the Union's argument sounds like a form of "Buyer's Remorse" As the Employer notes, the Union negotiators were experienced, seasoned veterans and should have reasonably contemplated and considered the full ramifications of adopting the Employer's afternoon shift provision. They were also fully capable of asking the Employer whatever clarifying questions they deemed appropriate, before agreeing to the provision. They obviously, for whatever reason, chose not to do so. As the Employer argues, the Union cannot use this arbitration to try to now obtain the Monday through Friday restriction on the afternoon crew scheduling, which they abandoned during negotiations.

In view of the foregoing, I find this Union argument to be clearly without merit and irrelevant to the Issue.

3. The Union also argues that there has existed a clear past practice within the C & M Department that the "regular workweek" is restricted to Monday through Friday, with the exception of the negotiated Rotating shift and the On-Call system. The Union notes that for at least the past 40 years or so the standard, regular workweek for employees in the C & M Department has been Monday through Friday. It also points out that on those several occasions where the Company attempted to unilaterally

create a different schedule, it always discontinued its action as soon as the Union grieved the situation. Further, the Employer has always fully negotiated any work schedules involving night or weekend work by C & M crews, such as the Rotating crew and the On-Call system and has never scheduled crews to work outside the "regular workweek" of Monday through Friday, without the Union's full consent.

The Employer points out that it has never acknowledged nor accepted any past practice to the effect that the only "regular workweek" for C & M crews is Monday through Friday. To the contrary, the Employer has continually reminded the Union on numerous occasions over at least the past twenty years that it possesses the inherent managerial right and authority to schedule the work of the C & M crews as necessary to meet operational needs. The fact that, historically, it has not chosen to exercise that right, until the creation of the afternoon shifts and making Saturday (or even Sunday) part of their regular workweek, does not mean that right was either waived or forfeited.

I am in full agreement with the arbitral sources cited by the Employer in its brief, to the effect that, 1) The scheduling the work of employees is an inherent managerial right, as management is responsible for maintaining the operational efficiency and effectiveness of the business; 2) absent specific contractual restrictions or limitations, the employer is free to invoke or not invoke its right to schedule employees, at its discretion and 3) The fact that the employer may choose not to invoke that right for a significant or lengthy period of time cannot be construed as a "waiver" of the right. However, the employer, for whatever reason, can choose to formally "waive" its right, but such a waiver must be clear and unequivocal. In this instance, there clearly has been no waiver.

The Employer also points out that at the outset of the contract negotiations in 2002, it formally notified the Union, in writing, that it was repudiating any and all "past practices" that might arguably exist between the Parties. That repudiation put the Union on notice that if it had any arguable past practices that it wished to preserve, it had to negotiate them into the labor agreement. No provision to the contract was subsequently negotiated that specified the "regular workweek" for C & M crews was "Monday through Friday"

Based upon the analysis and reasoning as set forth above, I find that there is insufficient evidence to establish that a "past practice" exists restricting the "regular workweek" of C & M crews to "Monday through Friday" only. Accordingly, I find this Union argument to be without merit.

4. The Union argues that, historically, any work performed by C & M Department employees and crews on Saturdays has always been paid as

overtime and contends that the Employer is violating the labor agreement by paying the C & M afternoon crew who work Saturdays only straight time.

An examination of Article 14, Section 1 indicates that employees working a regular workweek shall receive overtime pay only for hours worked in excess of 8 hours in a day or in excess of forty hours in a week. There is no requirement that the Employer pay for regular scheduled work on weekend days (Saturday and/or Sunday) at the overtime rate. Section 7c, itself, makes no mention of overtime pay for weekend work by the afternoon crews. However, *Article 28, Wages, Section 6 - Shift Differential Pay and Section 7 - Premium Pay* may apply to the afternoon crews working Saturdays as part of their regular workweek, but there is no provision in that Article which requires overtime pay for those crews.

Accordingly, in view of the foregoing, I find this Union argument to be without merit.

In summary, I can find no basis, from either a Plain Language or a Subjective Assessment analysis, to support the Union's grievance arguments or allegations.

CONCLUSION

In view of my analysis, discussion and findings, as above, I conclude that the Union has failed to establish by a preponderance of evidence that the Employer has violated the provisions of the applicable labor agreement by unilaterally creating and scheduling C & M Department crews to work Saturdays as part of their "regular workweek" Accordingly, the grievance in this matter is without merit.

DECISION

Having concluded that the grievance in this matter is without merit, it is hereby dismissed in its entirety.

Dated this 17th day of June, 2013 at Minneapolis, Minnesota.

/s/ Frank E. Kapsch, Jr.
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of fourteen (14) calendar days from the issuance of this Decision to address any questions or issues related thereto.