

LABOR RELATIONS CONNECTION

In the Matter of the Arbitration Between

CONSOLIDATED COMMUNICATIONS, INC

And

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, T-9

Case No: SCT-01—19, LRC No. 525-19

Date Issued: March 27, 2021

Gr: Calculation of Overtime

Arbitrators: Sharon Henderson Ellis, Esq.

Ryan Taylor

For the Company

Peter McLaughlin

For the Union

Appearances:

Robert T. Dumbacher, Esq.

For the Company

Alfred Gordon O'Connell, Esq.

For the Union

ARBITRATOR'S DECISION AND AWARD

An arbitration in the above matter was held virtually on November 9, 2020, to consider a matter of contract interpretation in the parties' 2018 collective bargaining agreement. Both sides were provided a full and fair opportunity to call and examine witnesses and to submit evidence. The parties' written arguments were received by the Arbitrator on or about January 8, 2021. At the Arbitrator's request, the due date for this Draft Award was extended to the above date. The Executive Session with the tripartite panel of arbitrators was held on March 12 and extended to March 26, 2021.

The Issue

Did the Company violate Article P1.04 and/or P3.01 of the 2018 collective bargaining agreement with regard to the pay treatment for work on Sunday? If so, what shall be the remedy?

DECISION AND AWARD

To illustrate the issue and their differing interpretation of the 2018 Collective Bargaining Agreement, the parties draw on a work week of Plant employee [REDACTED]. During the week ending August 1, 2020, [REDACTED] worked 42.5 hours, 8 of which were on a Sunday. The Union argues that any and all work carried out on a Sunday must be compensated at time and one-half; in the Union's view, [REDACTED] was owed 10.5 hours of overtime pay for that week, not 2.5 hours.¹

The Company paid [REDACTED] 2.5 hours of overtime for that week, asserting that his overtime hours had been tallied correctly.

It is the 2018 Agreement that requires interpretation. Reference to language in the predecessor 2015 Agreement also comes into play.

The Parties' Positions: The Contract Language

As noted above, it is the Union's position that any and all time worked on a Sunday must be compensated at time and one-half. To support its position, the Union substantially relies upon Article P1.04 of the 2018 Agreement. Article P1.04 reads in relevant part:

. . [A]ll time worked on Sunday will be excluded from the normal work week. Employees who are required to work on Sunday will be scheduled to work five additional days at straight time.

¹ [REDACTED] earned 2.5 hours of overtime pay during the regular work week.

According to the Union, the above provision makes clear that all Sunday work is overtime because Sunday is not part of the normal work week. It asserts,

P1.04 is thus the beginning and ending of this case. The Company cannot count Sunday as anything other than overtime hours because to do so would violate the FLSA. It would have people working more than 40 hours in a week without overtime pay for that.²

According to the Company, however, Article P1 and specifically Article P1.04, the language the Union relies upon, relates not to overtime and pay but instead simply governs scheduling and what constitutes a normal work week. The subheads encompassed in Article P1 are “Work Schedules and Tours”, “Schedules”, “Changes in Schedules”, and “Training Differential”.

In contrast, the Company points out, and relies upon, the section of the Agreement addressing and governing overtime that appears four pages later at Article P3, specifically, P3.01, “Overtime Payments”.

P3.01 Except as otherwise provided in Articles P1, G21 and P11 of the Agreement, time worked in excess of eight hours in a day or forty hours per week, as computed in paragraph P3.02 below, shall be compensated at the rate of time and one-half the regular straight time hourly rate. To the extent that such overtime hours actually worked in a week and paid at time and one-half the straight time hourly rate (including those hours actually worked in a week under the provisions of Articles P1, G21 and P11 which are paid at time and one-half the straight time hourly rate) exceed 12 overtime hours, such excess hours will be paid at two times the straight time rate. . . .

² The Union also argues that employees in, for example, the Traffic and Sales divisions of the Company are always paid overtime for Sunday work and that the Company would not have given that benefit to those divisions without giving it to all employees. The Union calls such “discrimination” illogical.

At the hearing the Company stated, “[M]ost of the time the employee who works on Sunday will, in fact, work the rest of the week, and so that employee will hit in excess of 40 hours. But what [P1.04] won’t support is an employee who doesn’t work the 40 hours and yet somehow claims that he should be paid premium pay when that’s just simply not provided for in the contract.”³

The Company points out that during the negotiations for the current Agreement, it introduced a significant language change to Article P3.01. Whereas the Article formerly stated that work “outside of the normal scheduled tours” would be paid at the overtime rate, the current version of Article 3.01 states that work “in excess of eight hours in a day or forty hours per week . . . shall be compensated at the rate of time and one-half the regular straight time hourly rate”.

As seen in the example of [REDACTED]’s work week in August 2020, the language change, as implemented, amounted to a significant difference in pay for him. Under the prior agreement, the 8 hours [REDACTED] worked on Sunday were hours outside his normal scheduled tour and therefore would have been compensated at the rate of time and one-half. According to the Company, under the 2018 Agreement, overtime pay is due for work on Sunday or on any other day *only when* the time worked exceeds 8 hours in a day or 40 hours per week. In this

³ That said, the Company acknowledges that pursuant to the predecessor Agreement, all hours worked on a Sunday **were** paid at the overtime rate.

instance, [REDACTED]'s work hours in excess of forty per week or eight per day were 2.5 hours, not 10.5.

The Parties' Positions: Exceptions in Section 3.01

The Union points to the exceptions noted in Section P3.01 as language buttressing its position that, based on Article P1.04, Sunday work stands alone and must be compensated at time and one-half. Article 3.01 identifies three exceptions: P1, G21, and P11.

The Union is emphatic that P1 is a reference to Section P1.04; the Company asserts that P1 is, instead, a reference to P1.07. P1.07 reads as follows.

P1.07 When an employee is given advance notice to work hours outside of and not continuous with the employee's normal scheduled tour, the employee shall receive a minimum of four hours pay at the regular straight time hourly rate for such work, if notice is given during the employee's normal scheduled tour. If such overtime is continuous with the employee's normal scheduled tour, it will be treated in accordance with Article P3.

ANALYSIS

Each party interprets the language and exceptions of Article 3.01 differently. And each party's position is arguably tenable. In the final analysis, however, I conclude that, when considered as a whole, the bargaining history and the contract language better support the Union's position.

In resolving this case it's important to understand what each party believed was being negotiated as regards P3.01. It is abundantly clear from the Union's testimony and brief that it believed the hours worked in a "week" used to calculate overtime were those worked between Monday and Saturday. The Company's stated intention to solve the "Saturday problem"—with no mention of Sundays⁴—implies that the parties were basically on the same page. Yet, when the payroll software had been updated and employees were informed about how it would work (on the day before the new CBA took effect), the true impact of the language change at P3.01 became apparent.

As argued in the Union's brief, an important consideration in determining the meaning of contract language, especially new contract language, is the way the parties frame the language to each other during the negotiations – both what they say and what they leave unsaid.⁵ In that regard, the "intent manifested by the parties to each other during negotiations by their communications and their responsive proposals – rather than undisclosed understandings and impressions – is considered by the arbitrators in determining contract language."⁶ It follows that a party's need to explain its intent is particularly important and poignant when the party is seeking, as here, to change many decades of past practice between the parties.

⁴ Undisputed testimony indicated that in negotiations the Company claimed that the language change was to solve "the Saturday problem"—that is, that someone scheduled to work Monday through Friday could take an unpaid (e.g., FMLA) day off during the week and then work Saturday at time and one half.

⁵ See Elkouri at 9-26–9-32.

⁶ Union Brief at p. 16 citing *Kahn's & Co.*, 83 LA 1225, 1229030 (Murphy 1984); *City of Lackawanna*, 134 LA 774 (Glertner, 2014).

Since at least 2015 and apparently for prior decades, plant employees were always paid time and one-half for work on Sundays. It strains credulity that the Union would knowingly give up this longstanding benefit for the sole reason that it was helping the Company solve what the Company described in negotiations as the “Saturday” problem.⁷ The Company has offered no convincing explanation as to why the Union would agree to a change so contrary to its interests.

It seems clear to me that both parties would have been well served by more precise language regarding “week” at P3.01.

Further, for the Company to prevail, it must demonstrate how or why the reference to P1 in Article 3.01 is singularly a reference to P1.07 and not the remainder of P1 or in particular P1.04.

The clear purpose of Article P3.01 is to dictate when plant employees are entitled to overtime pay at the rate of time and one-half. In the 2015 agreement, a plant employee earned overtime if s/he worked hours outside his/her normal scheduled tour. As of the 2018 agreement, overtime is paid for hours in excess of eight hours in a day or forty hours per week.⁸ The enumerated exceptions indicate times of work when the rule of 8 and 40 does not apply.

While P1.07 is more similar to G21 than it is to P1.04, it does not necessarily follow that P1.04 is not *also* an exception. P1.04 implies, by setting

⁷ See Tr. at pp. 67-69

⁸ Again, the kind of week or tour is not specified.

Sundays aside as regards schedules, that it is an exception, even if not exactly in the same way that P1.07 and G21 are exceptions. Unlike the other articles listed as exceptions, P1.04 does not specify a minimum number of hours to be compensated for Sunday work because all Sunday work was paid at time and a half.

Given the issues enumerated in the above analysis, I must find that the Union's interpretation prevails over the Company's.

AWARD

The Company's interpretation of P1.04 and P3.01 violated Article p1.04 and/or p3.01 of the 2018 Agreement with regard to the pay treatment for work on Sunday. In this regard, they should return to the *status quo ante*. To the extent employee [REDACTED] or others were not correctly compensated for their Sunday work, they shall be made whole.

Date: March 27, 2021

Arbitration Panel

/s/Sharon Henderson Ellis, Chair

Ryan Taylor, Company Arbitrator
Concur / Dissent

Peter McLaughlin, Union Arbitrator
Concur / Dissent

CONTRACT PROVISIONS

2018 AGREEMENT

ARTICLE P1

Work Schedules and Tours

TOURS

P1.01 All employees – Eight hours work shall constitute a normal tour.

...

SCHEDULES

P1.04 All employees – Five days of eight hours each or five nights of eight hours each shall constitute a normal work week. However, all time worked on Sunday will be excluded from the normal work week. Employees who are required to work on Sunday will be scheduled to work five additional days at straight time.

....

P1.07 When an employee is given advance notice to work hours outside of and not continuous with the employee's normal scheduled tour, the employee shall receive a minimum of four hours pay at the regular straight time hourly rate for such work, if notice is given during the employee's normal scheduled tour. If such overtime is continuous with the employee's normal scheduled tour, it will be treated in accordance with Article P3.

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ARTICLE P2

Night Work

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ARTICLE P3

Overtime

OVERTIME PAYMENTS

ALL EMPLOYEES

P3.01 Except as otherwise provided in Articles P1, G21 and P11 of the Agreement, time worked in excess of eight hours in a day or forty hours per week, as computed in paragraph P3.02 below, shall be compensated at the rate of time and one-half the regular straight time hourly rate. To the extent that such overtime hours actually worked in a week and paid at time and one-half the straight time hourly rate **(including those hours actually worked in a week under the provisions of Article P1, G21 and P11 which are paid at time and one-half the straight time hourly rate)** exceed 12 overtime hours, such excess hours will be paid at two times the straight time rate.

OVERTIME LIMITATIONS

P3.04 An employee will be required to work no more than a total of 12 hours overtime in any payroll week except in case of emergency, long term service difficulties or if the employee consents to such overtime.

2015 AGREEMENT

ARTICLE P1

Work Schedules and Tours

TOURS

P.1.01 Group I employees – Eight hours work shall constitute a normal tour. . .

P1.02 Group II employees – Seven and one-half hours work shall constitute a normal tour. . .

P1.03 The hours constituting a day tour shall be assigned between 7:00 A.M. and 6:00 P.M.

. . . .

SCHEDULES

P1.05 Group I employees – Five days of eight hours each or five nights of eight hours each shall constitute a normal work week. However, all time worked on

Sunday will be excluded from the normal work week. Employees who are required to work on Sunday will be scheduled to work five additional days at straight time.

P1.06 Group II employees – Five days of seven and one-half hours each or five nights of seven and one-half hours each shall constitute a normal work week.

ARTICLE P3 Overtime

OVERTIME PAYMENTS

ALL EMPLOYEES

P3.01 Except as otherwise provided in Articles P1, P4 and P11 of the Agreement, time worked outside of the normal scheduled tours shall be compensated at the rate of time and one-half the regular straight time hourly rate. To the extent that such overtime hours actually worked in a week and paid at time and one-half the straight time hourly rate (including those hours actually worked in a week under the provisions of Articles . . . which are paid at time and one-half the straight time hourly rate) exceed 12 overtime hours, such excess hours will be paid at two times the straight time rate. . . .