VOLUNTARY LABOR ARBITRATION TRIBUNAL
FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of:

___, **Holiday Pay Grievance**

Union,

and **FMCS ___**

___,

Arbitrator Lee Hornberger

Employer.

DECISION AND AWARD

1. APPEARANCES

For the Union: **___**

For the Employer: **___**

2. INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between [Union] and [Employer]. The Union contends that the Employer violated the CBA when it did not pay 12 hours of holiday pay for certain holidays. The Employer maintains that it did not violate the CBA when it paid 8 hours, rather than 12 hours, of holiday pay to employees for those holidays.

Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on December 18, 2012, in ___. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and

for introduction of relevant exhibits. The dispute was deemed submitted on January 30, 2013, the date the post-hearing submissions were received.

The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

The advocates did an excellent job of presenting their respective cases.

3. ISSUE

The parties stipulated that the issue to be resolved in the instant arbitration is: Did the Employer violate the CBA when it did not pay employees 12 hours holiday pay where they were scheduled to work on a holiday and the plant did not operate?

4. RELEVANT CONTRACTUAL LANGUAGE

ARTICLE VII – WORKING HOURS

Sec 5. Employees regular work schedule will be posted no later than 2:00 PM Thursday preceding the regular work week. … .

ARTICLE XVII – PROCEDURE FOR HANDLING DISPUTES

Sec 4. Arbitration: …

> **D.** All expenses necessarily incurred by the Arbitrator in the conduct and hearings of an arbitration case, excluding the fees of the Company and Union representatives on the Board, and excluding also the express and fees of witnesses and counsel for the parties, shall be borne by the losing party, and the Arbitrator in making the Award shall stipulate according to that principle which party shall pay the costs and fees. …

ARTICLE XXXI – SPECIAL PROVISIONS

Sec 9. Memorandum of Understanding – 12 Hour Weekly Rotating Shift Schedule.

The Company and Union agree that if a 12 hour weekly rotating shift schedule is implemented the following parameters apply: …

B. Holiday pay: If an employee is scheduled to work on a holiday and the plant does not work the employee will receive 12 hours of holiday pay. If the plant is operating and the employee is scheduled to work or if the employee is not schedule[d] to work, holiday pay is 8 hours. …

With the exception of the parameters outlined above, all other contract language applies to 12 hour weekly rotating shift schedules.

5. REVIEW OF THE FACTUAL PRESENTATIONS

This case results from the implementation of the "White Pine" schedule at the Employer's ___ facility. Under the White Pine schedule, there are four Teams. Each employee works three 12 hour shifts one week, and four 12 hour shifts the next week.

Prior to January 2012 the Employer utilized regular five day, eight hour scheduling. The White Pine schedule started January 2, 2012. Previously there were Teams with 8 hour shifts.

The issue has arisen as to how many hours of holiday pay should an employee be paid when the employee's Team would otherwise work the holiday but the employee is not listed on the prior Thursday's document for working that holiday and the plant does not work that holiday.

The Union filed a grievance on January 12, 2012, which indicated:

> Violation of [CBA] … : Article [31], Sec 9.B; Article [7,] Sec 1; any other articles; Federal or State laws that may apply.
>
> Complaint: Some employees received an incorrect amount of holiday pay for 1-2-2012.

Union President [1 ___] testified that it was the intent from the 2011 CBA negotiations to allow employees to be made whole by having holiday pay when the plant does not operate on a holiday. "I made this painfully clear to everyone to make them know what the Union wants."

According to President [1 ___], if the plant operates, there is no problem because the employee gets double time on a holiday.

Under the White Pine schedule, the schedule cycles every 28 days. Generally an employee can forecast weeks, if not months, ahead of time what days the employee would work.

An issue arose with the January 2, 2012, holiday. The plant was closed on that holiday. The Team employees who would have normally worked that day were not scheduled to work that day. The Employer paid these employees 8 hours for the holiday rather than 12.

The issue also arose with the November 15, 2012, opening day of hunting season, which was a recognized holiday. The plant did not operate that day. There were employees who would normally work that day because of their Team assignment. The Employer did not schedule these employees to work November 15 on the prior Thursday's posted schedule.

The schedule is almost always posted the Thursday before the work week in question.

The Union proposed the 12 hour shift idea. In response to this Union proposal, the Employer at the negotiating table talked about cost neutrality. According to President [1 ___], "cost neutrality has to go both ways."

According to President [1 ___], he "made it perfectly clear" during negotiations that when an employee would normally rotate schedule the employee would be paid 12 hours for the holiday. According to [1 ___], two Teams are scheduled to work for a given day and there was no discussion of "costing of 12 hour shifts."

Union Business Representative [2 ___] testified that the Union was looking for an alternative shift schedule. There was the question of, if on a 12 hour shift, what will

employees receive for holiday pay. The Employer said 8 hours. The Union wanted 12 hours. It went back and forth. Some firm proposals went back and forth. The problem was that, if an employee gets paid only 8 hours when the plant closed, the employee is losing 4 hours of pay that week. The employees who work on a holiday get double time.

The Union wanted to make sure that if the employee's shift falls on a holiday, regardless of the posted schedule, if the plant does not operate, the employee would get holiday pay without being "shorted."

According to Business Representative [2 ___], nowhere during the negotiating process did the Employer say the change of language from "shift" to "schedule" meant a change of meaning.

The Union understood that, if the plant did not operate, the employee would get 12 hours, and it was not tied to the weekly schedule.

There was discussion about cost analysis with the Employer. The Union gave up Sunday premium and daily overtime. The Employer did not mention holiday pay to the Union in any of its cost analysis discussions.

The wage patterns ended up better. There was no discussion that the wage increase was linked to holiday pay.

According to Business Representative [2 ___], an employee can look at the "schedule" for a year with a White Pine schedule. The days off would stay the same.

Quality and Administrative Manager [3 ___] testified that the way employees are notified of the schedule has not changed with adoption of the 12 hour shift. The meaning of "scheduled to work" has not changed with adoption of the 12 hour shift. The Employer believed "scheduled to work" meant as posted the Thursday before.

According to [3 ___], the employee gets 12 hours pay if scheduled to work on the prior Thursday schedule, and after that the Employer decides to not work the plant on the holiday. The extra four hours make up for the inconvenience of the employee planning to work.

Concerning Memorial Day of 2012, the Employer scheduled employees to work Memorial Day. The Employer then decided to not operate the plant on Memorial Day. Those employees were paid 12 hours of holiday pay.

Employees were not scheduled to work for January 2 and November 15, 2012.

Director of Labor Relations [4 ___] testified that the 12 hour shift idea was an early proposal from the Union. The Employer said it had to take a hard look at the costs of proposals and had to look at the various costs in a 12 hour schedule.

The Employer looked at a "budget" for a "package" cost. It was part of an economic analysis. The holiday pay situation was a benefit cost, not a pay for work cost.

It involved "shift" versus "scheduled to work" situation.

After August 25, 2011, all proposals said "scheduled to work." It was the Employer's "intent" that would be tied to the posted Thursday work schedule.

This would impact on the ultimate wage package presented to the Union. The ultimate wage package was an increase of 2 ¼ percent, 2 ¼ percent, and 3 percent per annum.

The Exh 23 analysis was not presented to the Union during the bargaining. Not all 103 employees would get paid 12 hours. Exh 23 is worst case scenario.

Plant Manager [5 ___] testified that it is the Employer's practice to post schedules on a weekly basis. The intent of the "scheduled" language was that if the plant

were closed there would be a penalty to the Employer to pay 12 hours. There was no agreement by the Employer to pay an employee unless the employee scheduled to work that day on the Thursday schedule and subsequently cancelled. There was no change in the CBA wording of shift schedules, other than when does the work week begin. If an employee were paid 12 hours, it "would not be a cost neutral provision."

6. CONTENTIONS OF THE PARTIES

a. For the Union

The Union contends that the evidence shows that the Employer violated the CBA by not paying 12 hours holiday pay to certain employees when the plant did not operate on holidays, and the evidence clearly shows that the Employer agreed with the Union regarding the intent of the holiday pay provision during contract negotiations in 2011. There was no evidence provided that showed the intent of the parties changed during the negotiations. The Employer did not discuss concerns of the costs of the holiday pay provision during negotiations, and the Employer also did not provide cost information regarding holiday pay to the Union to support the Employer's cost concerns. The evidence clearly shows that the Union's claim has minimal financial impact on the Employer, and that the Employer provided inaccurate financial information during the hearing that grossly exaggerated the financial impact on the Employer.

The Union requests that I grant the grievance and that I rule that the Employer make affected employees whole for any losses on any applicable holiday where the Employer did not pay the 12 hours holiday pay.

b. For the Employer

The Employer contends that CBA, Art 7, Sec 5, specifically provides that an employee's work week is scheduled when it is posted the Thursday preceding the work week. The plain language of the CBA, past practice concerning what is meant by "scheduled to work," and the negotiations leading up to adoption of a 12 hour weekly work rotation all support that, on the two dates in question, January 2, 2012, and November 15, 2012, no employees were "scheduled to work" at the Plant on those days. Accordingly, no employees are entitled to 12 hours of holiday pay on those days.

The Employer also contends that CBA is clear and unambiguous in that the CBA provides that an employee must be "scheduled to work" and the plant is not operated in order to be entitled to 12 hours rather than 8 hours of holiday pay, and that the undisputed testimony at the hearing was that employees are not "scheduled to work" until the Thursday preceding the following work week.

The Employer requests that I deny the grievance.

7 DISCUSSION AND DECISION

The instant case involves a contract interpretation in which I am called upon to determine the meaning of some portion of the CBA between the parties. I may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the CBA. My essential role, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the CBA. Indeed, the validity of the award is dependent upon my drawing the essence of the award from the plain language of the CBA. It is not for me to fashion my own brand of workplace justice nor to add to or delete language from the CBA.

In determining the meaning of the instant CBA, then, I draw the essence of the

meaning of the CBA from the terms of the CBA of the parties. Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, I will first examine the language used by the parties. If the language is ambiguous, I will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, I will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative.

For the reasons that follow, I conclude that the word "scheduled" in Art 31, Sec 9(B), means to be put on the Art 7, Sec 5, "regular work schedule" document created the prior Thursday, rather than being on the Team that would usually work that holiday.

This is a contract interpretation case. The basic issue revolves around whether the word "scheduled" in Art 31, Sec 9(B), means "scheduled to work" on the prior Thursday's posted work schedule or does it mean being part of the Team that is anticipated to work whether actually listed on the Art 7, Sec 5, prior Thursday posted schedule or not. The Union maintains that the definition of "scheduled" should mean being on the Team that would work if the plant were open. The Employer maintains that the definition of "scheduled" should mean those employers who were listed on the prior Thursday's posted work schedule. What is at stake, assuming the employee is on the Team that would otherwise work on the holiday but whose name was not listed on the prior week's posted schedule, is whether such employee receives 12 hours holiday pay or eight hours holiday pay for the holiday when the plant does not operate.

This issue derives from the 2011 CBA negotiations. The plant historically operates 24/7. Prior to the present CBA employees generally worked eight hour shifts.

Under the present CBA employees are generally assigned to Teams that work 12 hour shifts, 36 hours one week and 48 hours the next week.

There is a written history of the 2011 proposals concerning the relevant wording. It is important that I review this history coupled with my comments concerning most parts of the history. "[M]inutes of bargaining meetings provide important evidence, as well as the actual text of the proposals exchanged by the parties during negotiations. Elkouri and Elkouri, How Arbitration Works (7th ed), p 9-30.

Here is the history. I have bolded the arguably more crucial words. After each proposal, I have inserted my comments.

August 16, 2011 Union "Add: on a 24/7 four shift **schedule**, go to 12 hour shifts (TBD), with a six (6) month trial period." Exh 6.

In my viewpoint, this is the Union's opening bid concerning its four Team idea. This opening does not address the issue of what will the word "schedule" mean.

August 18, 2011 Employer "Six month trial period, study it. This proposal is a major undertaking. We need to look at this from the standpoint of **whether this can be a cost neutral proposal** compared to our current schedule. We will study this and report back on this next week." Exh 7.

The Employer's initial response to the Union's opening does not address the ultimate definition of "schedule" issue. It does signify though that the Employer is looking for a "cost neutral" situation.

August 23, 2011 Employer "Six month trial period, study it. This proposal is a major undertaking. We need to look at this from the standpoint of **whether this**

can be a cost neutral proposal compared to our current schedule. We will study this and report back on this next week." Exh 8.

The Employer repeats its immediately prior position.

August 24, 2011 Employer "Holiday Pay **8 hours of pay** (**stays the same**)[.]" Exh 9.

> The Employer's proposal without addressing any prospective "schedule" definition issue emphasizes that in the Employer's viewpoint the prior CBA eight hours of holiday pay situation must stay the same.

August 25 AM, 2011 Union "Holiday Pay: For those **scheduled** to work a **12-hour shift** on a holiday and plant is not operated employee will receive **12 hours pay.**" Exh 16.

> The Union's proposal provides for 12 hours of holiday pay to an employee who is scheduled but the plant does not operate. This proposal is of little, if any, aid in interpreting what the word "scheduled" means.

August 25 PM, 2011 Employer "[H]oliday pay: 12-hours of pay if employee's **shift** falls on a holiday and plant is not working. If the plant is working and employee is **scheduled** to work or employee not **scheduled** to work, holiday pay is **8 hours**." Exh 17.

> This is an extremely important proposal from the Employer. This Employer proposal indicates that, if the employee's "shift" falls on a holiday and the plant is not working. the employee gets 12 hours of pay. Under this Employer proposal it apparently might be a question of the "shift," not of the individual employee to be scheduled. There might be no

need to define the word "schedule." There is no evidence of what the Employer meant "shift" to mean in this proposal, or whether "shift" meant "Team" or "schedule."

September 17 AM, 2011 Union "Holiday Pay: For those **scheduled** to work a 12-hour shift on a holiday and plant is not operated employee will **receive 12 hours pay**." Exh 10.

This is an extremely important proposal from the Union. The Union's proposal rejects the Employer's "12-hours of pay if employee's **shift** falls on a holiday … " proposal. The Union goes back to historic "scheduled to work" language. According to the Union, the Union believed its "scheduled" version of the language was simpler and clearer than the Employer's "shift" proposal.

September 17 PM, 2011 Employer "Holiday pay: 12-hours of pay if employee is **scheduled** to work on a holiday and the plant does not operate. If the plant is operating and employee is **scheduled** to work or employee is not **scheduled** to work, holiday pay is 8 hours. Other conditions governing the payment of holiday pay are covered under Article XIII." Exh 11.

This Employer proposal basically accepts the Union's immediately prior "scheduled" language proposal.

September 18 AM, 2011 Union "**Holiday Pay: Company's language[.]"** Exh 18.

The Union accepts the Employer's acceptance of the Union's "scheduled" proposal.

September 18 PM, 2011 Employer "Holiday pay: 12-hours of pay if employee is **scheduled** to work on a holiday and the plant does not operate. If the plant is operating and employer is **scheduled** to work or employee is not **scheduled** to work, holiday pay is 8 hours. Other conditions governing the payment of holiday pay are covered under Article XIII." Exh 21.

Ditto.

September 18 PM II, 2011 Union **"Holiday Pay: Company's language[.]"** Exh 12.

Ditto.

September 18 PM III, 2011 Employer "Holiday pay: 12-hours of pay if employee is **scheduled** to work on a holiday and the plant does not operate. If the plant is operating and employer is **scheduled** to work or employee is not **scheduled** to work, holiday pay is 8 hours. Other conditions governing the payment of holiday pay are covered under Article XIII." Exh 13.

Ditto.

September 18 PM IV, 2011 Union "Holiday Pay: Company's language[.]" Exh 14.

Ditto.

September 18 PM V, 2011 Employer "MOU for the 12 Hour Weekly Rotating Shift Schedule – Putting in Language to make the 12-hour schedule functional – see proposed language[.]" Exh 22.

Ditto.

From the written documentary history it is clear that the Employer's goal was to pay 8 hours of holiday pay to employees in situations where the plant was not operating or the employee did not otherwise work. It was the Union's goal that, if an employee had been "scheduled" in such a situation when the plant ends up not being worked, the employee would be paid 12 hours holiday pay. There is nothing in the documentary negotiating history that the definition of "scheduled" meant anything other than the historic Art 7, Sec 5, prior Thursday posted schedule definition. There is nothing in the documentary negotiating history that the definition of "scheduled" meant "a member of the Team who would have worked the plant that day if the plant had been open that day."

There is one document that proposes a word other than "scheduled." That is the Employer's August 25 PM, 2011, "12-hours of pay if employee's shift falls on a holiday and plant is not working" proposal. The Union rejected this "shift" language proposal and took the negotiating back to the "scheduled" language which ended up in the CBA.

The documentation shows that the Employer believed the parties "need[ed] to look at this from the standpoint of whether this can be a cost neutral proposal.. ."

The oral testimony recollections of the negotiating are more divergent than the documentary history.

According to Union President [1 ___], he "made it perfectly clear" that when an employee would normally rotate schedule the employee would be paid 12 hours for a holiday, and he "made this painfully clear to everyone to make them know what the Union wants."

According to Business Representative [2 ___], nowhere during the negotiating process did the Employer say the change of language from "shift" to "schedule" meant a

change of meaning, and the Union understood that, if the plant did not operate, the employee would get 12 hours, and it was not tied to the weekly schedule.

According to Quality and Administrative Manager [3 ___], the way employees are notified of the schedule has not changed with adoption of the 12 hour shift, the meaning of "scheduled to work" has not changed, and "scheduled to work" meant as posted the Thursday before.

According to Director of Labor Relations [4 ___], after August 25, 2011, all proposals say "scheduled to work, and "[i]t was the Employer's "intent" that "scheduled" would be tied to the posted Thursday work schedule.

All of the witnesses testified honestly and to the best of their recollections. The good faith testimony of the witnesses does not resolve the definition of the word "scheduled" in the first sentence of Art 31, Sec 9(B). The negotiating documentary history proposal provides little guidance.

This means I have to look at how the word "scheduled" is used elsewhere in the CBA. There is a presumption that a word has the same meaning when it is used several times in a CBA. Disputed portions of the CBA should be read in light of the entire CBA. Elkouri and Elkouri, pp 9-25 to 9-34.

All words used in a CBA should be given effect. *Id*, p 9-35. The Art 31, Sec. 9(B) word "scheduled" should be read in context with the CBA as a whole.

> The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. *Riley Stoker Corp*, 7 LA 764, 767 (Platt, 1947).

The word "schedule" or "scheduled" is used at least four times in the CBA portions cited by the parties.

It is used once in the first sentence of Art 7, Sec 5. This use of "schedule" definitely means the Thursday paper schedule. It does not mean being on a particular work Team.

It is used once in the first sentence of Art 31, Sec 9(B). That is the utilization of the word that I am discussing in this case.

The word "scheduled" is used twice in the second sentence of Art 31, Sec 9(B). The first use in this second sentence is "[i]f the plant is operating and the employee is scheduled to work … holiday pay is 8 hours." If "scheduled" means on the "historic work Team" for that day, rather than scheduled the prior Thursday, that would mean that an employee who is a not on the historic Team for that holiday, but still works that day because such employee was incidentally put on the pre-Thursday schedule, would not get holiday pay even though such employee worked that holiday. The utilization of the word "scheduled" in this case has to mean being on the prior Thursday posted document. The second use in this second sentence is "[i]f the plant is operating and … or the employee is not schedule[d] to work, holiday pay is 8 hours." If "schedule" means on the "historic work Team" for that holiday, rather than scheduled the prior Thursday, an employee who is not on the Team originally predicted for the holiday, but the employee is incidentally put on the prior Thursday document, such employee would have to work that holiday, but would not be paid any holiday pay for the holiday because such employee is not on the historic Team for that holiday. The utilization of the word "scheduled" in this case has to mean being on the prior Thursday posted document.

The fact that the parties used the word "schedule/d" several times in the CBA, including in locations where the word could not possibly mean "on the Team," very strongly suggests that the parties intended that the word means being on the Art 7, Sec 5, document rather than being a member of a particular Team. Elkouri and Elkouri, pp 9-25 and 9-34.

It is reasonable to believe that the meaning of "scheduled" in the first sentence of Art 31, Sec B, was intended to be the same as its meaning in the two times that "schedule/d" is used in the second sentence of the same paragraph. Otherwise, the parties would not have used the same word "schedule/d" three times in the same paragraph about the same subject. Elkouri and Elkouri, pp 9-25 and 9-34.

The Employer's August 25, 2011, proposal contains language that might arguably have entitled an employee to be paid 12 hours of holiday pay "if employee's shift falls on a holiday and the plant is not operating." Significantly, that is not the language that was memorialized and became part of the parties' CBA. Furthermore, the fact that this was not the language that was eventually agreed to be used by the parties in Art 31, Sec. 9(B) supports the inference that the language adopted by the parties is that which controls. Elkouri and Elkouri, p 9-27.

It was the Union, based on the documentary negotiating history, that rejected the Employer's use of the word "shift" and returned the negotiating to the word "scheduled."

All words of the CBA have to be given meaning. "Ordinarily, all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning … ." Elkouri & Elkouri, , p 9-35. Each word and phrase of a contract is to be given meaning. This situation involves an analysis of the

meaning of the word "scheduled." The word "scheduled" must have been put in the CBA for a reason.

In the absence of evidence of mutual understanding of the CBA, dictionary definitions of the word "schedule/d" can be considered. Elkouri & Elkouri, p 9-23.

The common meaning of "schedule" is "a written or printed statement of details; list … make a schedule of; enter in a schedule … ." *Thorndike-Barnhart High School Dictionary*, p 841 (4th ed)(1965). Schedule has been defined as "[A] list or plan of intended events, times, etc. A plan of work (*not on my schedule for next week*)… ." *Oxford Illustrated American Dictionary*, p 735 (1998). Italics in the original.

The CBA provides, concerning employees who are on a 12 hour weekly shift rotation, that if they are "scheduled to work on a holiday and the plant does not work, the employee will receive 12 hours of holiday pay." Art 31, Sec 9(B). This language is clear and unambiguous. The CBA provides that an employee must be "scheduled to work" and the plant is not operated in order for such employee to be entitled to 12 hours rather than 8 hours of holiday pay. Employees are not "scheduled to work" until the Thursday before the following work week. Art 7, Sec 5. I do not "not have power nor authority to add to, subtract from, alter, or modify any of the terms of this Agreement." Art 17, Sec. 4(E).

The CBA does not contain any language indicating that "scheduled to work" means that in determining if an employee is entitled to be paid 12 hours of holiday pay one looks at an employee's "Team."

The Employer argues that 12 hours holiday pay would involve a high cost to the Employer. This argument does not control because although certain cost factors were discussed between the parties during the negotiations, there is no evidence that specific

alleged costs of the 12 hour versus 8 hour holiday pay situation were provided to the Union during the negotiations. Apparently neither Exh 23 nor the information in Exh 23 was provided to the Union during the negotiations. Because of this I have not used the Employer's alleged cost analysis argument as a basis for my ultimate analysis in this case. Elkouri and Elkouri, p 9-7.

The Employer argues that use of 8 hours holiday pay rather than 12 hours holiday pay was tied to the wage increase in the CBA. This argument does not control. I have not used this argument as a basis for my ultimate analysis in this case. The Employer maintained that perhaps the Union agreed to the Employer's 8 hour holiday pay interpretation in return for a better wage offer. The Union reached tentative agreement with the Employer on the holiday pay language at 8:45 a.m., September 18, 2011. Apparently the wage settlement was agreed to later. I have not used any attempt to link the holiday pay language with wage proposals in reaching my decision. Elkouri and Elkouri, p 9-7.

The Union makes several serious arguments concerning the situation. I have seriously considered all of them.

The Union argues that there is probably a reasonable assumption that the Employer also has a vacation schedule, a holiday schedule, a training schedule, and possibly other schedules that it uses in managing its operations. This argument does not control because, assuming that there are other hypothetical "schedules," these other schedules are not mentioned or cited to me as being in the CBA. My decision is based on the meaning of words in the CBA. The defining or effect of hypothetical other

"schedules" that are neither in the record nor cited to me as being in the CBA is not relevant. Elkouri and Elkouri, pp 9-34 to 9-36.

The Union argues that the evidence shows that the Employer agreed with the Union regarding the intent of the holiday pay provision during the 2011 CBA negotiations. This argument does not control because the Employer's consistent position has been that an employee who does not work on a holiday would get 8, not 12, hours of pay; the Employer's goal was a "cost neutral" situation; the Union, not the Employer, declined the utilization of "shift" language in favor of "scheduled" language; neither the documentary evidence nor the testimonial evidence show that the Employer and the Union agreed about the definition of "scheduled;" and it is linguistically and interpretatively reasonable to conclude that the word "schedule/d" means the same thing each time it is used in the CBA, including its historic use in Art 7, Sec 5.

The Union argues that during negotiations the Employer agreed to pay 12 hours holiday pay to those employees "that would normally have been scheduled to work" on a holiday and the plant does not operate; and employees "that were not normally scheduled" would only get 8 hours holiday pay. This argument does not control because neither the CBA nor any of the negotiating proposals say "would normally have been scheduled to work." The CBA and most of the negotiating proposals say "scheduled." The CBA utilization of the phrase "would normally have been scheduled to work" might result in a different analysis in this case. The hypothetical "would normally have been" language arguably removes the analysis from having to come up with a different definition of "scheduled" from how "scheduled" is used elsewhere in the CBA, including

elsewhere in Art 31. If the parties had wanted to say "would normally have been," they could have. They did not. Elkouri and Elkouri, pp 9-27 to 9-28.

The Union argues that there was no evidence that showed the intent of the parties changed during the negotiations. This argument does not control because, as indicated above, the parties had two different goals during negotiations. The Union had a 12 hour holiday pay goal. The Employer had an 8 hour holiday pay goal. Neither party expressly surrendered its goal. There is a possibility that both parties believed they had achieved their goal. Since the parties had two different goals, I have to interpret the word "scheduled" in Art 31, Sec 9, utilizing traditional contractual interpretation means.

The Union argues that the Employer did not discuss concerns of the costs of the holiday pay provision during negotiations, and the Employer did not provide cost information regarding holiday pay to the Union to support the Employer's cost concerns. This argument does not control because, in part, the Employer stated that its goal was a "cost neutral" situation. Cost neutrality was discussed at length. As indicated earlier, the Employer did not provide either Exh 23 or the information in Exh 23 to the Union. Holiday pay was not a cost that the Employer figured into the calculations provided to the Union. Therefore, I have not taken the Exh 23 information into consideration in my analysis or decision. Elkouri and Elkouri, p 9-28 to 9-31.

The Union argues that the evidence shows that the Employer provided inaccurate financial information during the hearing that grossly exaggerated the financial impact on the Employer. This argument does not control because, as indicated above, I have not taken the Exh 23 information into consideration in my analysis or decision.

The Union argues that the evidence shows that the Union's claim has minimal financial impact on the Employer. This argument does not control because the Employer's goal was a "cost neutral" situation and it is linguistically and interpretatively reasonable to conclude that "schedule/d" means the same thing each time it is used in the CBA, including its utilization in Art 7, Sec 5.

The crucial points in this case include (1) the desirability and interpretative assumption of having the same definition of "schedule/d" for all instances in which "schedule/d" is used in the CBA, and, in particular, in Art 31, Sec 9(B), (2) the common meaning of the word "schedule/d," (3) the historic meaning of "schedule" in this plant, (4) clear and unambiguous language that is interpreted consistent with the parties' intent as reflected by clear and explicit terms, (5) ordinary meaning given to words unless they are clearly used otherwise, (6) CBA language that is consistent with and supported by the negotiating history, (7) the totality of the circumstances, and (8) the wording of the CBA.

In conclusion, I find that the word "scheduled" in Art 31, Sec 9(B), means to be put on the Art 7, Sec 5, "regular work schedule" document created the prior Thursday, rather than to be on the Team that would usually work that holiday.

The Employer did not violate the CBA when it did not pay employees 12 hours holiday pay where such employees were not on the Art 7, Sec 5, document scheduled to work on that holiday and the plant did not operate.

CBA Art 17, Sec 4(D) provides that:

> All expenses necessarily incurred by the Arbitrator in the conduct and hearings of an arbitration case, excluding the fees of the Company and Union representatives on the Board, and excluding also the expense and fees of witnesses and counsel for the parties, shall be borne by the losing party, and the Arbitrator in making the Award shall stipulate according to that principle which party shall pay the cost and fees.

This language unambiguously requires that all "expenses" incurred by me in the conduct and hearings of this arbitration case shall be borne by the losing party.

Based on clear and unambiguous CBA language, I require the losing party to pay my expenses. The Union is the losing party and, pursuant to Art 17, Sec 4, shall pay my expenses.

"All expenses … incurred by the Arbitrator" does not include per diem fees. I was selected via the auspices of the Federal Mediation and Conciliation Service. The FMCS Arbitrator's Report and Fee Statement, FMCS Form R-19, designates "Fee" and "Expenses" as separate items. Expense has been defined as "… costs incurred in doing a particular job, etc. (*will pay your expenses*)." *Oxford Illustrated American Dictionary*, p 281 (1998). Italics in original.

If the parties had wanted me to assess all of my fees to the losing party, they would have drafted Art 17, Sec 4(D), to say "All fees and expenses [of] … the Arbitrator," rather than "[a]ll expenses [of] … the Arbitrator… ."

My per diem fees shall be paid fifty-fifty by the Employer and Union.

This decision neither addresses nor decides issues not raised by the parties.

8. AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I deny the grievance.

In addition, pursuant to Art 17, Sec 4(D), I stipulate that the Union is the losing party, and the Union shall pay my expenses. My per diem fee shall be paid fifty-fifty by the Employer and the Union.

Dated: February 11, 2013

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Lee Hornberger
Arbitrator