BEFORE SHIANNE SCOTT, ARBITRATOR

IN THE MATTER OF THE ARBITRATION BETWEEN

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, affiliated with the AFL-CIO, on behalf of Eugene Eppard, Frank Trujillo, Terry Barry, Ryan Gonzales, Chad Baumgardner, and Russell Garrett (Grievants) (Holiday Pay Grievances),

Union

and

HILL CRANE SERVICE, INC., a member of the Mobile Crane Operators Group, Inc.,

Employer

ARBITRATION OPINION AND AWARD

FMCS Case No. 231207-01668

Date Issued: February 9, 2024

February 9, 2024

BNA Headnotes

LABOR ARBITRATION

SUMMARY

[1] Contract Interpretation – Premium Pay – Holiday Work Premiums – Past Practice ►24.45 ►115.52 ►115.71 ►24.356

Arbitrator Shianne Scott upheld the grievance of the IUOE representing a group of machine oilers and operators, ruling that Hill Crane Service, Inc. had not properly paid them the amount of money owed for working on a day specifically designated as a union holiday. While Arbitrator Scott acknowledged that Hill Crane's interpretation of the contract clause directly related to the issue would, in a vacuum, be most commonly interpreted as paying only for the hours actually worked, as it did. However, based on related language elsewhere in in the contract, as well as past arbitration cases involving Hill Crane and the IUOE on the issue of premium pay, the interpretation of the general language has been that workers are owed for at least a full days' worth of the premium pay whether they actually worked the full day or not. As a result, Arbitrator Scott ordered Hill Crane to provide the proper full payment to each affected worker, minus what they'd already been paid, which comes to double eight hours' pay for each worker.

APPEARANCES:

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INTRODUCTION

This arbitration arises pursuant to the Master Labor Agreement (the Truck Crane Agreement, or simply, the Agreement) between the International Union of Operating Engineers, Local Union No. 12 (the Union, or Local 12), on behalf of six (6) individually-named grievants, Eugene Eppard, Frank Trujillo, Terry Barry, Ryan Gonzales, Chad Baumgardner, and Russell Garrett (the Grievants), and Hill Crane Service, Inc. (the Employer or Hill Crane), a signatory to the Truck Crane Agreement, and a member of the multi-employer Mobile Crane Operators Group, Inc. (the Group) (collectively, the Parties), under which Shianne Scott was appointed to serve as Arbitrator, and under which this Arbitration Opinion and Award (the Award) shall be final and binding amongst these Parties.

THE HEARING

An in-person hearing was held on October 2, 2023, in Pasadena, California (the Hearing). The Parties had the full opportunity to examine and cross-examine witnesses, introduce exhibits, and make opening arguments concerning the issues in dispute. A transcript of the Hearing was provided.

THE PARTIES' STIPULATIONS

At the Hearing, the Parties stipulated:

- Joint Exhibits 1 and 2 are admitted.
- Union Exhibits 1, 2 and 4 are admitted.
- Employer Exhibits 1 and 2 are admitted.
- The court reporter will serve as the official custodian of the record.
- The Union has the burden of proof and the burden of production.

• This matter is properly before the Arbitrator, and there are no issues as to whether this matter is arbitrable.

• The acronym "BA" stands for Business Agent (or Business Representative).

• The Parties will meet-and-confer on a due date to submit Post-Hearing Briefs once the Parties receive the transcript, and will inform the Arbitrator of the date Post-Hearing Briefs will be due.

• Once the Arbitrator receives the Post-Hearing Briefs, the Arbitrator is allowed to frame the issues based on the Parties' proposed statements of the issues.

• The Parties will submit their Post-Hearing Briefs to the Arbitrator in both Word and PDF format.

• The Parties will exchange their briefs amongst themselves.

• The Arbitrator shall have forty-five (45) days from receipt of the Post-Hearing Briefs to issue the Award.

THE WITNESSES

The following witnesses testified under oath at the Hearing:

For the Union:

1. Danny Bryan, Business Agent for Local 12

2. Ken Hunt, Vice President for Local 12

For the Employer:

1. Ronald Hill, Chief Executive Operator, Hill Crane, Inc.

2. John Buksa, IV, Vice President of Operations, Hill Crane, Inc.

3. Steven Paden, Operations Manager, Maxim Crane

THE EXHIBITS

The following exhibits**[*2]** were admitted at the Hearing.

1. Joint Exhibits

Exhibit Number	Description
J-1	Truck Crane Master Labor Agreement for 2019-2022

Exhibit Number	Description
J-2, 2-A through 2-F	Grievance documents at issue for this Award

2. Union Exhibits

Exhibit Number	Description
U-1A	Opinion and Award of Arbitrator Mark Burstein dated July 2, 2003
U-1B	Truck Crane Master Labor Agreement for 2001-2004
U-1C	Harry Scott Grievance dated July 8, 2002
U-1D	Union notes re Step 2 Joint Adjustment Meeting regarding Harry Scott Grievance dated July 17, 2002
U-1E	Check No. 30029923 from Bragg Crane Service Inc. to Harry Scott for ?PAYMENT OF 4 HOURS TRIPLE TIME FOR GRIEVANCE AWARD DATED JULY 2, 2003?
U-2	Joint Adjustment Board Decision for Case No. JAB-86-2
U-3	Joint Adjustment Board Decision for Case No. JAB-87-1
U-4	Cover and back page, and Article III. of the Truck Crane Master Labor Agreement for 1985-1988

3. Employer Exhibits

Exhibit Number	Description
1	Daily Timecard for Frank Trujillo and Eugene Eppard for June 3, 2022
2	Daily Timecard for Terry Berry, Ryan Gonzales, Russ Garrett, and Chad Baumgarner for June 4, 2022
3	Daily Timecard for Richard Brunst and Kevin Duqet for December 2, 2018
4	Daily Timecard for Cory McQuade, Chad Baumgarner and Eugene Eppard, for June 2, 2017
5	Daily Timecard for Chris Trevizo and Richard Brunst, for June 3, 2016

POST-HEARING MATTERS

On October 2, 2023, following the close of the Hearing, the Employer provided a legible copy of the Employer's Exhibit 3, per the Arbitrator's ruling that Employer's Exhibit 3 was admitted, with the caveat that the Employer would supplement the record with a legible copy. Additionally, per the Arbitrator's request, the Parties submitted electronic copies of the Joint Exhibits, Union Exhibits, and Employer Exhibits the Arbitrator received at the Hearing.[1]

The Parties originally agreed to submit Post-Hearing Briefs on or before December 15, 2023. On January 22, 2024, after several agreements to extend the due date, the Parties agreed to submit Post-Hearing Briefs to the Arbitrator by no later than midnight (12:00 A.M.) Pacific on January 22, 2024. The Employer timely submitted its Post-Hearing Brief on January 22, 2024.

On January 23, 2024, the Union submitted its Post-Hearing Brief to the Arbitrator at 1:31 A.M. Pacific. Obviously, the Union's Post-Hearing Brief was submitted an hour and thirty-one (31) minutes past the date and time the Union agreed to submit its Post-Hearing Brief. In the Union's cover e-mail, the Union's attorney of record admitted he did not timely submit the Union's Post-Hearing Brief to the Arbitrator because "I fell asleep." On January 23, 2024 at 9:16 A.M. Pacific, the Arbitrator acknowledged receipt of the Union's Post-Hearing Brief. The Arbitrator indicated that, though the Union's submission of its Post-Hearing Brief was late, the Arbitrator "will read it and will consider it."[2]

On January 31, 2024, the Arbitrator e-mailed the Parties to inquire whether the Parties would be willing to stipulate that the Arbitrator is the "Impartial Chairman"**[*3]** referenced in Article XV. at paragraph G. On or before February 2, 2024, both Parties so stipulated. The record was then closed. This Award is timely issued.

ISSUES TO BE DECIDED

The Parties did not stipulate to a statement of the issues to be decided. The Parties stipulated that the Arbitrator may frame the issues to be decided based on the Parties' proposed statements. At the Hearing, the Union proposed the following statement of the issues:

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5 Did Hill Crane Service violate

6 Article 3, Section B, of the Master Labor

7 Agreement between the International Union of

8 Operating Engineers Local 12 and the Mobile

9 Crane Operators Group, Inc., by not paying six

10 members eight hours of pay for work performed

11 on June 4th, 2022? And if so, what is the

12 remedy?

In its Post-Hearing Brief, the Union clarified that the proper section is Article III, Section B.[3]

During the Hearing, the Employer proposed that the issues to be decided are:

9

16 Did Hill Crane violate

17 Article 3B4 of the Collective Bargaining

18 Agreement by the way it paid employees in the

19 identified grievances? If so, what is the

20 appropriate remedy?

The Employer's Post-Hearing Brief clarifies that the proper section is Article III., Section B., subsection 4.[4]

Based on the Parties' stipulations, the undersigned Arbitrator frames the issues as:

1. Did the Union establish that the Employer violated the Truck Crane Agreement at Article III.B.1. and Article III.B.4., by failing to pay the six (6) Grievants a minimum of eight (8) hours of Holiday Pay at the double (2) time rate of pay, for working on June 4, 2022, a Union Holiday?

2. Did the Employer establish that a longstanding past practice existed, that was mutually agreed upon, and/or, acquiesced to, that differed from the plain and unambiguous language in Article

III.B.1. and Article III.B.4., thereby changing the meaning or application of the specific terms of the Truck Crane Agreement?

3. If the Employer failed to establish a past practice, what shall the remedy be?

RELEVANT AGREEMENT PROVISIONS

The Employer and the Union are Parties to the Truck Crane Agreement, in effect July 1, 2019, through June 30, 2022,[5] which contains the following relevant articles:

ARTICLE II

Union Recognition

A. The Group recognizes the Union as the exclusive representative of the employees covered by this Agreement for collective bargaining.

ARTICLE III

Working Rules

B. Holidays:

1. A minimum of eight (8) hours at triple (3) time the regular rate of pay as herein provided shall be paid for all work performed under this Agreement on the following holidays:

New Years's Day

Presidents' Day (San Diego County Only)

Memorial Day

Independence Day

Labor Day

Veterans' Day

Thanksgiving Day

Day after Thanksgiving

Christmas Day

4. If work is performed on the first (1st) Saturday following the first (1st) Friday in the months of June and December of each year, all time worked shall be paid at the double (2) time rate of pay.

E. Rest Periods

2. The Arbitrator shall have full authority**[*4]** to fashion such remedies and award relief consistent with limitations under federal and state law, and precedent established thereunder, whether by way of damages or the award of attorneys' fees and other costs, orders to cease and desist, or any and all other reasonable remedies designed to correct any violation which the Arbitrator may have found to have existed, including such remedies as provided under applicable state or federal law or regulation. The decision of the Arbitrator is final and binding upon the parties and is enforceable in a court of competent jurisdiction.

The Arbitrator shall not have authority to award relief that would require amendment of the Master Labor Agreement or other agreement(s) between the Union and a Contractor or the Contractors, or which conflicts with any provision of any Collective Bargaining Agreement or such the agreement(s).

ARTICLE XV

Grievances

Business Representatives and Job Stewards

F. In cases of violation, misunderstanding or difference in interpretation of this Agreement by either party, there shall be no stoppage of work. No dispute or grievance shall be recognized unless called to the attention of the Group, and the Union,in writing, within thirty (30) days after the alleged violation has occurred. Both parties pledge their immediate cooperation to reach a mutually satisfactory settlement of the above, in accordance with the following procedures:

***

3. The Joint Adjustment Board and the Impartial Chairman shall meet within two (2) working days and render a decision within five (5) working days thereafter. The time limitations may be waived by mutual agreement between the Group and the Union. Any and all decisions made by either the regularly constituted Joint Adjustment Board or the Joint Board and the Impartial Chairman, shall be final and binding upon both parties to this Agreement.

G. All expenses incurred and approved by the Joint Adjustment Board, excluding the fees and expenses of the Impartial Chairman, necessary for the consideration and decision of grievances and disputes submitted to it, shall be borne equally between the Union and the Employer. The Impartial Chairman's fee shall be paid by the losing party.

FINDINGS OF FACT

After a thorough review and careful consideration of the testimony and documentary evidence presented by the Parties, I make the following Findings of Fact.

The Parties

Hill Crane Services, Inc. (the Employer, or Hill Crane) "is a full service rental crane and rigging company that is based in Long Beach, California and performs work in California and Arizona."[6] The Employer is also a member of the Mobile Crane Operators Group, Inc. (the Group), and is a signatory employer to the 2019-2022 Truck Crane Agreement. Per Article II.A., the Union is the exclusive representative of all employees covered by the Truck Crane Agreement. Ronald**[*5]** Hill, Chief Executive Officer (CEO) for the Employer, credibly testified that Hill Crane employees perform work as operators, oilers, apprentices, heavy-duty repairmen and mechanics. These classifications are covered by the Truck Crane Agreement. More likely than not, there are other classifications covered by the Agreement that Mr. Hill did not testify to. What matters is that all of the Grievants (referenced below) are covered by the Truck Crane Agreement that was in effect for 2019-2022.

Bargaining unit members Eugene Eppard, Frank Trujillo, Terry Barry, Ryan Gonzales, Chad Baumgarner, and Russell Garrett (collectively, the Grievants), were employed by the Employer as of the date the grievances were filed (collectively, the Grievances). All of the Grievants worked in Southern California as of the date each of the Grievances were filed. This Award concerns the Employer's alleged failure to pay a minimum of eight (8) hours of "Holiday Pay" to the Grievants for work performed on Saturday, June 4, 2022, a "Union Holiday," defined below.

The Holiday Language in Article III.B.

The crux of these Parties' dispute is the proper interpretation of Article III. — Work Rules, at Section B. — Holidays. The 2019-2022 Agreement, which is specific to this Award, provides, at subsections 1. and 4.:

> Section B.1.
>
> A *minimum* of *eight (8) hours* at triple (3) time the regular rate of pay as herein provided *shall* be paid for all work performed under this Agreement on the following holidays:
>
> New Years's Day
>
> Presidents' Day (San Diego County Only)
>
> Memorial Day
>
> Independence Day
>
> Labor Day
>
> Veterans' Day
>
> Thanksgiving Day
>
> Day after Thanksgiving

Christmas Day

Section B.4.

If work is performed on the first (1st) Saturday following the first (1st) Friday in the months of June and December of each year, all time worked shall be paid at the double (2) time rate of pay.[7]

The Union has designated the two (2) days referenced in Article III.B.4. to be a "general membership meeting day," which the Union refers to as a "holiday." The Employer does not dispute that a general membership meeting day is a "Union Holiday" under the Truck Crane Agreement.

The Importance of Union Holidays

Danny Bryan, who has worked as the Union's Business Agent since May 2020, credibly testified about why bargaining unit members' attendance at general membership meetings, held on Union Holidays, are important:

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24 A. This is a holiday that we have negotiated

25 in our agreement for the Union to gather all the

32

1 members together with the — with the officers to

2 hear updates, work updates, to vote on contract

3 negotiations, to vote on our benefit package, to

4 allocate money from our wages into a benefit

5 package, to hear from our — to hear from our

6 representatives that handle the trust for our

7 retirement, to get an update from that, to get an

8 update from people that sit on the trust for our

9 medical, dental, and optical prescription.

Beginning in or about 2014,**[*6]** Ken Hunt began working as a Business Agent for the Union. In or about September 2022, Mr. Hunt was elected as Local 12's Vice President. Before he was elected Vice President, Mr. Hunt worked as the District Manager, overseeing the thirteen (13) Business Agents that work in the Los Angeles, California, area, including Mr. Bryan. It is unclear from the record exactly when Mr. Hunt transitioned from working as a Business Agent to working as the District Manager. What is clear

is that Mr. Hunt participated in negotiations for the Truck Crane Agreement when he was the District Manager.
Mr. Hunt expanded on why it is important for the general membership to attend these general membership meetings, held twice a year:

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7 So the idea behind it is to serve as a

8 deterrent, is to incentivize the members to get to

9 the meetings, and for the contractors, who are

10 supposed to be partners with us, to say, "We

11 understand how important these are to your members."

12 You talk about things that happen at these meetings,

13 like the rejection or acceptance of contracts that

14 have been negotiated. You have strike books that

15 happen at these meetings where the members are

16 asked, "Do you want to accept this contract? If

17 not, do you want to give us strike authorization?"

18 where the elected officials at that point can call a

19 strike, if need be.

I find both Mr. Bryan's and Mr. Hunt's testimony concerning the importance of these Union Holidays to be credible, particularly considering the Union's significant concessions made during 2013 bargaining, addressed below.

The Union's Definition of the Word "Day"

At the Hearing, the Union provided credible testimony by both Mr. Bryan and Mr. Hunt that the Union defines the word "day" to mean all hours worked up through, and until, midnight (12:00 A.M.). The Union refers to this definition of a "day" as "12:01 is a new day;" meaning, any time worked *after* 12:01 A.M. is the start of a "new day." Both Parties agree that the term "12:01 is a new day" is not found anywhere in the Truck Crane Agreement.
Mr. Hunt credibly testified that, in or about October 2022, the Union voluntarily withdrew nine (9) grievances filed against Hill Crane that alleged that bargaining unit employees were owed double time for hours worked beginning on a Sunday, and going into the following Monday (Sunday-to-Monday work). Mr. Hunt further credibly testified that the Union conceded that the employees were not owed

the double time rate for the hours worked *after* 12:01 A.M. on Monday, based on the Union's definition of a "day" to mean, "12:01 is a new day."
Mr. Hill buttressed Mr. Hunt's testimony concerning the Union's voluntary withdrawal of the grievances filed in/about October 2022, when he testified:

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Q. Okay. And do you understand that Local 12

7 withdrew that because of the understanding that

8 12:01 is a new day, and, in fact, once they — that

9 shift moved in to Monday, they were**[*7]** no longer owed

10 double time?

11 Do you recall that?

12 A. Yes, I do.

When asked on cross-examination, whether he had heard the term, "12:01 is a new day," Mr. Hill testified that he had heard of that term. When asked, further, on cross, what his "understanding" is of what "12:01 is a new day" means, Mr. Hill credibly testified, "that would be a new calendar day."[8] Based on Mr. Hill's and Mr. Hunt's credible testimony, both Parties appear to mutually agree on what "12:01 is a new day" means.

The Parties' Positions Regarding the Proper Interpretation of Article III.B.1. and III.B.4.

1. The Union's Position. The Union's position is that, under Article III.B.1., and III.B.4., when a bargaining unit member works on a Union Holiday, the employee is entitled to be paid "a minimum of eight (8) hours at the double (2) time rate" for working on the Union Holiday, regardless of the number of hours the employee *actually worked*, up through, and until, midnight on that day. Again, the Union's interpretation of the language in Article III.B.1. and III.B.4. is based in part on its definition of a "day" to mean "12:01 is a new day." The Union also bases its interpretation on previous Joint Adjustment Board Awards (the Board Awards) and the previous Arbitration Award issued by Arbitrator Marc Burstein (the Burstein Award) (collectively, the Previous Awards), discussed in more detail below.
2. The Employer's Position. On the other hand, the Employer's position is that bargaining unit employees who work on Union Holidays are eligible for pay at double their hourly rate, but only for *all hours worked* on a holiday, for a *maximum* of eight (8) hours. The Employer includes the hours worked before the Union Holiday and after the Union Holiday as part of the eight (8)-hour maximum. Mr. Hill credibly testified that Hill Crane developed this practice as to how Holiday Pay should be paid for working on a Union Holiday based on advice he received from former Union Business Agent Jim Phillips, sometime in 2016, during a meeting Mr. Hill and Mr. Phillips had in Mr. Hill's office:

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Q. Okay. And what did Mr. Phillips explain

9 to you regarding how to pay the Union holiday?

10 A. When a Union holiday comes up, 8 hours of

11 double time, and then you backfill — you can spill

12 that back into whatever applicable premium time they

13 had, like on the pre-shift and the following shift.

14 Q. Okay. So, for example, if somebody starts

15 working on a Friday at 7:00 P.M. and ends on a

16 Saturday at 5:30 A.M., so they have 10 hours that

17 they worked, how many hours would you pay them for?

18 A. We would pay them for 10 hours.

19 Q. And how many of those hours would be

20 double time?

21 A. Eight of those hours would be double time.

22 Q. And then how many of them would be at

23 another premium rate?

24 A. The applicable premium rate at that time,

25 which would be overtime.

The Union objected to Mr. Hill's above testimony on grounds that it is hearsay, and therefore, not admissible. The Arbitrator overruled the Union's objection, as the Employer**[*8]** correctly pointed out that Mr. Hill's testimony falls within an exception to the hearsay rule; that is, Mr. Phillips' alleged statements to Mr. Hill were made by a "party opponent."[9]

The Employer offered testimony from other management witnesses, including Operations Manager Steven Paden of Maxim Crane, and Vice President John Buksa, IV, Vice President of Operations for Hill Crane, both of whom testified that, they, too, understood that Holiday Pay for working on a Union Holiday should be paid in the same manner that Mr. Hill testified to, based on what Mr. Phillips *told* them.

I found Mr. Paden's testimony in particular to be compelling, because when the Union objected on grounds of hearsay to Mr. Paden's testimony, Mr. Paden immediately stated (quite passionately) on the record, "I was there, I was there"[10] and, "I raised my hand."[11] The Arbitrator instructed Mr. Paden to "go ahead and continue your answer, sir."[12] Following that exchange, Mr. Paden testified that when he was a bargaining unit member, Mr. Phillips told him:

A. So I was there. I had a conversation with

10 Jim Phillips. I said, "Hey, I was shorted 4 hours

11 of triple time for my Saturday holiday pay." And he

12 told me they are allowed to back up your time and

13 pay you triple time for 8 hours total and back up

14 into your overtime pay. And that's how I was paid.

15 And that was it.

The Arbitrator regrets that she did not ask the Employer's counsel of record to have Mr. Paden clarify exactly who Mr. Paden was testifying about when he used the pronoun"they." More likely than not, Mr. Paden was referring to Mr. Crane, the signatory employer he was working for when Mr. Paden had this conversation with Mr. Phillips. The bottom line is, I do not doubt Mr. Paden's sincerity, and find Mr. Paden's testimony to be entirely credible.

In further support of its position, the Employer presented timecards that showed that the Employer paid bargaining unit employees in the same manner testified to by Mr. Hill, Mr. Paden and Mr. Buska, going back at least as far as June 3, 2016. Six (6) of the timecards established how the Grievants were paid for working on June 4, 2022. The Arbitrator admitted the remainder of the timecards not pertaining to the Grievances over the Union's objection on the grounds of relevance, as the Arbitrator held that these timecards were business records maintained by the Employer,[13] and "could show what has been happening in the past."[14] Two (2) of the timecards unrelated to the underlying Grievances showed that the Employer paid Grievants Mr. Baumgarner and Mr. Eppard in the manner described by the Employer's witnesses on or around June 2, 2017.

The Union's Archives

Mr. Bryan credibly testified that when he became the Union's Business Agent, he took over the position from former Business Agent Jim Phillips—the *same* Mr. Phillips each of the Employer's witnesses testified about in the Employer's case-in-chief. Mr. Bryan credibly testified that part of his responsibilities**[*9]** as the Business Agent is to be the Union's "historian,"[15] which requires him to maintain copies of previous Truck Crane Agreements, grievances, Joint Adjustment Board decisions, arbitration awards, and Union notes taken during Step 2 meetings. Mr. Bryan also credibly testified that before he became the Business Agent, Mr. Phillips was in charge of maintaining the Union's archives. The Union introduced portions of the 1985-1988 Truck Crane Agreement, admitted as the Union's Exhibit 4, and the 2001-2004 Truck Crane Agreement, admitted as the Union's Exhibit 1B. The Arbitrator will address the relevant language in those Agreements below.

The Bargaining History of Article III.B.4.

Going at least as far back as the 1985-1988 Truck Crane Agreement, the language in Article III.B.4.stated:

No work shall be performed on the first Saturday following the first Friday in the months of June and December of each year, except when life or property is in imminent danger. When a permit is obtained from the Union to work because life or property is in imminent danger, time worked shall be at the double (2) time rate. Any time worked on these Saturdays without a permit shall be at the triple (3) time rate of pay.

In or about 2013, the Parties mutually agreed to change the language in Article III.B.4. Mr. Bryan provided credible testimony concerning the language changes to Article III.B.4.:

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6 BY MR. TZEC:

7 Q. What were the changes?

8 A. We removed "no work shall be performed."

9 "Life or property" was removed.

10 And the permit process was removed.

11 And the "triple time" was removed. It now

12 just states that "double time shall be paid."

Mr. Hunt testified as to the reasons why the Union agreed to these significant language changes:

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6 A. There's been a natural progression in the

7 deterioration of that language. And it's because

8 the contractors recognize that the customary

9 holidays that fall under B1, the normal holidays

10 that most of American citizens celebrate —

11 Christmas, Thanksgiving, et cetera — that even

12 contractors and their workers that are non-Union

13 generally recognize those holidays.

14 So the competition gets to be much closer

15 to apples and apples with the non-Union contractors

16 and the Union contractors or the Union crane

17 companies and the non-Union crane companies.

18 But when it comes to the Union holidays

19 that are June and December, the Union contractors

20 don't recognize them whatsoever, because they

21 don't — they don't — they're not engaged in it.

22 They're only for our Union contractors. And so,

23 therefore, our Union contractors have come back to

24 us year after year after year, cycle after cycle

25 after cycle, and said, "We have to have some relief.

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1 We can't compete. We're losing all of this work,

2 because every time we turn around, if we need to

3 work somebody on that day, we've got to pay them

4 triple time."

5 We used to have to get a permit. We used

6 to have to get permission. In fact, there was a day

7 where it wasn't allowed at all. There was no work.

8 There**[*10]** wasn't even a provision to pay triple time.

9 It just simply said, unless it's a case of life or

10 death, you can't work that day.

11 And it has progressed to where it's at

12 now, which is just simply, hey, you've got to pay

13 double time, but it's a minimum of 8 hours.

The Employer offered no evidence or testimony that contradicts Mr. Hunt's credible testimony concerning the reasons why the Union made all of the language concessions in Article III.B.4. Based on the Arbitrator's review of the 2019-2022 Truck Crane Agreement, the language in Article III.B.4. has not changed since the 2013-2016 Truck Crane Agreement went into effect.

The Previous Awards

The Previous Awards were admitted as Union exhibits at the Hearing over the Employer's hearsay objections, as the Previous Awards were clearly maintained by the Union as business records. Mr. Bryan credibly testified that although he had no firsthand knowledge about any of the Previous Awards, he found the Previous Awards in the Union's archives, and he filed the Grievances based, at least in relevant part, on the underlying facts and findings in the Previous Awards.

1. The Joint Adjustment Board Award for Case No. JAB-86-2

On or after January 8, 1986,[16] the Board issued an award in Case No. JAB-86-2 concerning an alleged violation of Article III.B.1. and Article III.B.4. by Bob Hill Hydraulic Crane Rentals (Bob Hill),[17] a signatory employer to the 1985-1988 Truck Crane Agreement.

The Union filed the underlying grievance on behalf of two (2) operators. The Union alleged that the first operator worked on a Union Holiday, December 7, 1985, for six (6) hours. The Union alleged that the second operator worked on the same day, December 7, 1985, for a total of five (5) hours. The Union alleged that Bob Hill (the company, not the person), violated the 1985-1988 Truck Crane Agreement by failing to pay both operators Holiday Pay "for a *minimum* of *eight (8) hours*" for working on a Union Holiday (emphasis added).

The cover of the 1985-1988 Agreement states that it went into effect on "July 1, 1985." As of that date, Article III.B.1. and 4. provided:

> B. Holidays:
>
> 1. A minimum of eight (8) hours at triple (3) time the regular rate of pay as herein provided shall be paid for all work performed under this Agreement on the following holidays:
>
> New Year's Day
>
> Washington's Birthday
>
> (San Diego County only)
>
> Decoration Day
>
> Independence Day
>
> Labor Day
>
> Veteran's Day
>
> Thanksgiving Day
>
> Day after Thanksgiving Day
>
> Christmas Day
>
> ***

> 4. No work shall be performed on the first Saturday following the first Friday in the months of June and December of each year, except when life or property is in imminent danger. When a permit is obtained from the Union to work because life or property is in imminent danger, time worked shall be at the double (2) time rate. Any time worked on these Saturdays without a permit shall be at the triple (3) time rate of pay.

The employer's position for Case No. JAB-86-2 was that the operators were only owed Holiday Pay for the hours the operators actually worked on the Union Holiday.[18] The employer acknowledged that**[*11]** an employee is entitled to an eight (8)-hour minimum of Holiday Pay for working on one of the traditional holidays listed in Article III.B.1.; however, the employer asserted that a Union Holiday is distinguishable from the traditional holidays, and therefore the eight (8)-hour "minimum" requirement in Article III.B.1. simply did not apply.[19]

The Union's position on rebuttal was that the operators were owed a minimum of eight (8) hours' Holiday Pay, regardless of the number of hours they actually worked, based on the plain language in Article III.B.1. The Union also asserted that there should be no difference whether the bargaining unit member worked on a traditional holiday, or worked on a Union Holiday.

The Board sustained the grievance and voted to pay both grievants the difference between what the grievants already received for Holiday Pay, and what they should have been paid. Based on the Board's holding, more likely than not, the Board rejected Bob Hill's argument that traditional holidays should be treated differently than Union Holidays.

Unfortunately, the Union did not provide a copy of Article XV. from the 1985-1988 Agreement. Having said that, I found Mr. Hunt's testimony that "a Joint Adjustment Board decision is final and binding, equal to an arbitrator's decision"[20] to be credible, particularly since the Arbitrator's review of the other Agreements in evidence supports his testimony. For example, the Agreement in effect for 2001-2004, provided, at Article XV.F.3.:

> Any and all decisions made by either the regularly constituted Joint Adjustment Board or the Joint Board and Impartial Chairman, shall be final and binding upon both parties to this Agreement.

The Agreement for 2019-2022, which applies to this Award, has the exact same language as the 2001-2004 Agreement. Thus, based on the overall evidence, more likely than not, the Board's Decision for Case No. JAB-86-2 is "final and binding."

2. Joint Adjustment Board Decision for Case No. JAB-87-1.

About a year later, on January 21, 1987, the Board issued an award for Case No. JAB-87-1. The underlying grievance alleged that the applicable employer failed to pay an operator a minimum of eight (8) hours' Holiday Pay for working on a Union Holiday on Saturday, December 6, 1986. Interestingly, the employer in Case No. JAB-87-1 was Bob Hill, the *same* employer in Case No. JAB-86-2. Again, the 1985-1988 Truck Crane Agreement would have been in effect at the time the grievance was filed for Case No. JAB-87-1.

Bob Hill repeated its argument from Case No. JAB-86-2, that Union Holidays should be treated separately from traditional holidays. The employer also asserted that the Board's decision in Case No. JAB-86-2 was made in "haste," and was "not the proper interpretation..."[21] While the employer made other arguments

as to why the underlying grievance should be denied, what matters is that the Board sustained the grievance, based specifically on the Union's interpretation of Article III.B.1., that a bargaining unit member is entitled to a "*minimum*" of eight (8)-hours of Holiday Pay for working on**[*12]** a Union Holiday. Ultimately, the Board voted to pay the operator four (4) hours of Holiday Pay, which would equate to the minimum of eight (8) hours' Holiday Pay the operator should have received, had Bob Hill paid the operator in compliance with the 1985-1988 Agreement. Again, more likely than not, the Board's decision for Case No. JAB-87-1 is "final and binding."

3. The Burstein Award

There were four (4) sets of documents admitted as part and parcel of the Burstein Award. The first set of documents were a copy of the underlying grievance and a copy of the Union's notes concerning the Step 2 meeting (the Underlying Grievance). The second document was a copy of the Burstein Award; the third document established that Bragg Crane, Inc. (Bragg Crane), the signatory employer in that instance, promptly complied with the Burstein Award. Lastly, the 2001-2004 Truck Crane Agreement was admitted as part of the Burstein Award documents.

a. The Underlying Grievance.

On July 8, 2002, former Business Agent Jim Phillips filed a grievance on behalf of bargaining unit member Harry Scott[22] against Bragg Crane, a signatory employer to the 2001-2004 Truck Crane Agreement. Again, Mr. Phillips is the same person the Employer testified about during its case-in-chief. At the time the grievance was filed, the language in Article III.B.1., and III.B.4. read:

B. Holidays:

1. A minimum of eight (8) hours at triple (3) time the regular rate of pay as herein provided shall be paid for all work performed under this Agreement on the following holidays:

New Year's Day Washington's Birthday

(San Diego County only)

Decoration Day

Independence Day

Labor Day

Veteran's Day

Thanksgiving Day

Day after Thanksgiving Day

Christmas Day

***

> 4. No work shall be performed on the first (1st) Saturday following the first (1st) Friday in the months of June and December of each year, except when life or property is in imminent danger. When a permit is obtained from the Union to work because life or property is in imminent danger, time worked shall be at the double (2) time rate. Any time worked on these Saturdays without a permit shall be at the triple (3) time rate of pay.

The grievance alleged that Mr. Scott worked four (4) hours on Saturday, June 8, 2002, a Union Holiday. Bragg Crane paid Mr. Scott four (4) hours of Holiday Pay, the number of hours Mr. Scott worked on the Union Holiday. Mr. Phillips alleged that Mr. Scott was entitled to "*8 HRS MINIMUM* AT THE TRIPLE TIME RATE FOR (SAT) 6-8-2002" (emphasis added).
Mr. Phillips, along with another Union representative, attended the "Labor Management Adjustment Board Second Step Grievance Meeting." It is unclear from the record which Union representative took the meeting notes. In any event, the second step grievance meeting notes state that the Union's position was:

> THE TRUCK CRANE AGREEMENT STATES IN ARTICLE II PARAGRAPH B, HOLIDAYS, THAT A *MINIMUM* OF *EIGHT (8) HOURS* AT THE TRIPLE TIME RATE WILL BE PAID FOR HOLIDAY WORK. LOCAL 12 IS SEEKING**[*13]** FOUR (4) HOURS AT THE TRIPLE TIME THAT THE MEMBER WAS NOT PAID (emphasis added).

b. The Burstein Award.

On July 2, 2003, Arbitrator Burstein issued the Burstein Award. Arbitrator Burstein noted that the parties stipulated to the following statement of the issues:

> Did Bragg Crane Service violate Article III, Section B of the Agreement by not paying Harry Scott eight hours of pay for June 8, 2002?
>
> If so, what is the remedy?[23]

The Union's position before Arbitrator Burstein was that "Article III, Section B(1) of the Agreement *unequivocally* required the Company to pay *a minimum* of *eight hours* at triple time an employee's regular rate of pay whenever the employee worked on a holiday..."[24]

On the other hand, Bragg Crane asserted that Mr. Scott was only entitled to Holiday Pay for the hours he worked on the Union Holiday. Based on the underlying facts, and the applicable language in the Truck Crane Agreement, Arbitrator Burstein found:

> The *clear and unambiguous* language of Section B(l) of Article III of the Agreement requires the Company to pay a *minimum* of *eight hours* at triple time the regular rate of pay on a holiday. Since the uncontradicted evidence established that Grievant work on Saturday, June 8 and the parties stipulated that the day was a holiday, I find that Grievant was entitled to the contract benefit unless another provision of the Agreement or some other factor constituted a bar.[25]

Again, as provided for in Article XV.F.3 of the 2001-2004 Truck Crane Agreement, the Burstein Award was final and binding.

c. Bragg Crane's Compliance with the Award.

On July 24, 2003, Bragg Crane issued a check payable to Mr. Scott in the net amount of $329.27. The check states in all caps: "4 HOURS TRIPLE TIME FOR GRIEVANCE AWARD FROM JUNE 8, 2002."

The Incidents at Issue

We now turn to the underlying facts for this Award. On the outset, the Arbitrator takes "official notice"[26] that June 4, 2022 was "the first (1^{st}) Saturday following the first (1^{st}) Friday in the month of June." Thus, June 4, 2022, was a Union Holiday. There are two (2) sets of underlying facts that led to the Grievances at issue. The Arbitrator refers to the first set of facts as the "Friday-to-Saturday Facts," and to the second set of facts as the "Saturday-to-Sunday Facts."

1. The Friday-to-Saturday Facts

a. Eugene Eppard. Beginning on Friday, June 3, 2022, Grievant Eugene Eppard worked as an oiler from 7:00 P.M. through 5:30 A.M. the following day, Saturday, June 4, 2022. The Employer paid Mr. Eppard five and a half (5½) hours of Holiday Pay for the actual hours he worked on the Union Holiday. The Employer did not pay Mr. Eppard a minimum of eight (8) hours of Holiday Pay.

b. Frank Trujillo. Beginning on Friday, June 3, 2022, Grievant Frank Trujillo worked as an operator for crane #77, from 7:00 A.M. through 5:30 A.M. the following day, Saturday, June 4, 2022, for a total of thirteen (13) hours. For the hours worked on Saturday, June 4, 2022, Mr. Eppard hand wrote on his timecard:

> Holiday pay 8 hour min.
>
> Gen Mem Meeting

The Employer paid Mr.**[*14]** Trujillo five and a half (5½) hours of Holiday Pay for the actual hours he worked on the Union Holiday. The Employer did not pay Mr. Trujillo a minimum of eight (8) hours of Holiday Pay.

2. The Saturday-to-Sunday Facts

a. Terry Barry. Beginning on Saturday, June 4, 2022, Grievant Terry Barry worked as a "third (3^{rd}) man" from 10:00 P.M. through 6:00 A.M. the following day, Sunday, June 5, 2022. The Employer paid Mr. Barry for two (2) hours of Holiday Pay for the actual hours he worked on the Union Holiday. The Employer did not pay Mr. Barry a minimum of eight (8) hours of Holiday Pay.

b. Ryan Gonzales. On Saturday, June 4, 2022, Grievant Ryan Gonzales also worked as a "third (3^{rd}) man," from 10:00 P.M. through 6:00 A.M., the following day, Sunday, June 5, 2022. The Employer paid Mr. Gonzales two (2) hours of Holiday Pay for the actual hours he worked on the Union Holiday. The Employer did not pay Mr. Gonzales a minimum of eight (8) hours of Holiday Pay.

c. Chad Baumgarner. On Saturday, June 4, 2022, Grievant Chad Baumgarner worked as an oiler, from 10:00 P.M., through 6:00 A.M., the following day, Sunday, June 5, 2022. The Employer paid Mr. Gonzales two (2) hours of Holiday Pay for the actual hours he worked on the Union Holiday. The Employer did not pay Mr. Baumgarner a minimum of eight (8) hours of Holiday Pay.
d. Russell Garrett. On Saturday, June 4, 2022, Grievant Russell Garrett worked as an operator, from 10:00 P.M., through 6:00 A.M., the following day, Sunday, June 5, 2022. The Employer paid Mr. Garrett two (2) hours of Holiday Pay for the actual hours he worked on the Union Holiday. The Employer did not pay Mr. Garrett a minimum of eight (8) hours of Holiday Pay.

The Grievances

1. The Friday-to-Saturday Grievances.

On June 14, 2022, Mr. Bryan filed grievances on behalf of Mr. Eppard and Mr. Trujillo. Both grievances allege:

> According to *Article 3, Section B paragraph 1 and 4* of the Truck Crane Master Labor Agreement, I should be paid a *minimum eight (8) hours* of the double (2) time the rate of pay (emphasis added).

2. The Saturday-to-Sunday Grievances.

On June 17, 2022, Mr. Bryan filed grievances on behalf of Mr. Barry, Mr. Gonzales, Mr. Baumgarner, and Mr. Garrett. Again, the grievances filed for Mr. Barry, Mr. Gonzales, Mr. Baumgarner, and Mr. Garrett allege:

> According to *Article 3, Section B paragraph 1 and 4* of the Truck Crane Master Labor Agreement, I should be paid a *minimum eight (8) hours* of the double (2) time the rate of pay (emphasis added).

The Joint Adjustment Board Fails to Reach Agreement

Mr. Hunt acted as the Chairman of the Board for these Grievances. The Board consisted of three (3) Union representatives and three (3) Employer representatives, one of whom was Mike Vlaming. At the Hearing, Mr. Hunt credibly testified about one of the reasons the Parties were unable to reach agreement:

220

13 Mr. Vlaming stated that the biggest issue

14 they were having is that we — he had contractors

15 within his association that were paying certain

16 conditions under the agreement,**[*15]** including this

17 holiday pay, one way; and he had other contractors

18 within his association that were paying certain

19 provisions out of the agreement, including this

20 holiday provision, a different way.

21 And he felt like arbitrating it is going

22 to give him a final answer on this is the direction

23 he can give all of his employers that belong to the

24 association and say, "This is how we are all going

25 to pay for this arbitration ruling."

Mr. Hunt's above testimony is an exception to the hearsay rule, again, because Mr. Vlaming's statements were the statement of a party opponent.[27]

Having been unable to mutually resolve the Grievances at the Board level, the Union referred the Grievances to arbitration. The Hearing was held on October 2, 2023, and the Arbitrator received the Parties' Post-Hearing Briefs on or before January 23, 2024. Following confirmation that both Parties stipulated that the Arbitrator is the "Impartial Chairman" referenced in Article XV. at paragraph G., the record was closed as of February 2, 2024. This Award is timely issued.

DECISION

The Burden of Proof in a Contract Interpretation Case

In general, in a contract interpretation case, the union has the burden of proof.[28] At the Hearing, the Parties stipulated that the Union has both the burden of proof and the burden of production.
The Employer presented testimony and evidence that suggests there could be a "past practice" between these Parties that could alter how the disputed language should be interpreted. The general rule is that the burden of proving a past practice is on the party asserting it.[29] Thus, while the Union has the burden of proving that its interpretation of the disputed language is correct, the Employer, also, has the burden of proof concerning its past practice argument.
It is well-established in labor law jurisprudence that the standard of proof for contractual disputes is preponderance of the evidence.[30] Preponderance of the evidence is defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.[31]

For purposes of this Award, the undersigned applies the preponderance of the evidence standard concerning both Parties' burden of proof.

The "Plain Meaning Rule," from an Objective Standard, Is Applicable to this Award

The Arbitrator agrees with the majority of labor arbitrators that:

> ...applying the plain and most common meanings of the words promotes stability in contractual relationships and minimizes the need for extended factual inquiry into what the parties may have intended or believed.[32]

It follows, then, that "[a] fundamental rule of contract interpretation is that clear and unambiguous language needs to be given its plain meaning."[33] Indeed,**[*16]** as famously stated by Arbitrator Carlton J. Snow:

> Application of what has been characterized as the plain meaning rule as a standard of contract interpretation requires that the meaning of contractual language be determined solely by attaching the plain or usual meaning to words that appear clear and unambiguous on the face of an agreement.[34]

Additionally, this Arbitrator has long-espoused to the idea that a contract case must be interpreted from the lens of the objective standard of a "reasonable person," rather than from a subjective standard. For example, if the Arbitrator were to interpret contract language based on what one of the parties subjectively intended the words to say, there would likely be very divergent outcomes. For this reason, the Arbitrator simply *cannot* interpret contract language based on the subjective meanings of either one the Parties.
It is well-recognized that the treatise "*How Arbitration Works*" edited by Frank Elkouri and Edna Elkouri, is the leading labor arbitration treatise in the United States.[35] In fact, the Elkouris' treatise has been considered the "Bible of Labor Arbitration" since at least 1957.[36] The Elkouris' most recent edition of *How Arbitration Works* states:

> [W]hatever their views on the 'plain meaning' principle, arbitrators are in agreement that a party's uncommunicated or 'subjective intent' is *irrelevant*.[37]

The Arbitrator Has *No Authority* to "Legislate" New Language for the Parties

As the Employer correctly pointed out in its Post-Hearing Brief,[38] the 2019-2022 Truck Crane Agreement provides at Article III.E.2. that the Arbitrator "shall *not* have authority to award relief that would require *amendment* of the Master Labor Agreement or other agreement(s)."[39] Based on this language, absent *evidence* that the disputed language is vague, ambiguous, or so unclear that the language is simply unenforceable,[40] the Arbitrator's authority to interpret the disputed language is strictly limited to the four (4) corners of the Truck Crane Agreement.[41] This same concept was recently distilled in an Arbitration Award issued by Arbitrator Richard Van Kalker on January 19, 2024:

> Another basic principle of labor law is that an arbitrator is empowered *only* to interpret the subject collective bargaining agreement. An arbitrator is *not* empowered to reject the wording of a collective bargaining agreement and apply his or her own brand of industrial justice.[42]

This Arbitrator agrees with Arbitrator Van Kalker. Simply put, the Arbitrator recognizes she literally has *no power* to legislate new language based on what she may think the language should say, "since to do so would usurp the role of the labor organization and the employer."[43]

Do the Previous Awards Have Persuasive Effect on this Award?

Yes. On the outset, it is important to address whether the Previous Awards have any bearing on this Award. In that regard, the Employer asserts:

> The Union...attempts to cite to a 2003 arbitration award issued by Arbitrator Mark**[*17]** Burstein (the "Award") in support of its position. The Union's reliance on the Award is misplaced. As an initial matter, these decisions were issued prior to the parties' negotiation of new Article III, Section B(4) language in the 2013-2016 Agreement. Accordingly, even if the Union's authority squarely supported its position, the decisions are not binding on the parties with regard to the substantially different language in the 2019-2022 Agreement at issue in this matter. Moreover, as fully set forth herein, in the intervening years since the 2003 arbitration award, the parties' conduct under similar circumstances has not reflected the Union's suggested interpretation of the award, but instead has reflected the unambiguous language of the agreement.[44]

The Employer's above legal argument is very well-written, and I would totally agree with the Employer, if the *facts* and the preponderant *evidence* supported the Employer's position. Unfortunately, concerning the question whether the Previous Awards have persuasive effect on this Award, the answer is an *unequivocal* yes, for the following reasons.

First, the language in the 2019-2022 Agreement at Article XV., section F.3. provides, in relevant part:

> Any and all decisions made by either the regularly constituted Joint Adjustment Board or the Joint Board and the Impartial Chairman, *shall* be *final and binding* upon *both* parties to this Agreement (emphasis added).

This language has remained unchanged, at least since the 2001-2004 Agreement, when the Burstein Award was issued. Further, while there is no *direct* evidence that the same language was in the 1985-1988 Agreement (because the Union did not produce a copy of Article XV.F.3. for that version of the Agreement), based on the overall record, more likely than not, the same or similar language was also in the 1985-1988 Truck Crane Agreement.

Use of the word "*shall*" in Article XV.F.3. is telling. *Black's Law Dictionary* is a dictionary recognized by the Library of Congress as the "leading legal dictionary in the United States."[45] *Black's Law Dictionary* defines "shall" to mean:

> As used in statutes, contracts, or the like, this word is generally *imperative* or *mandatory*.[46]

Moreover, a reputable dictionary defines the term "*final and binding*" to mean:

> If a decision or agreement is final and binding, it has been decided for the last time and *cannot* be discussed or *changed again*

- They further agreed to accept the arbitration award as *final and binding*[47]

Based on the plain and ordinary meaning of the words "*shall*," and "*final and binding*," these words mean exactly what they are intended to say.

Third, the Employer is correct that the language in Article III.B.4. has changed since the Previous Awards were issued. However, as more fully addressed below, the Employer's entire argument against sustaining the Grievances overlooks the uncontroverted *fact**[*18]*** *t*hat the language in Article III.B.1.—language which is *completely relevant* to this Award—has remained *unchanged*, since at *least* July 1, 1985, *thirty-eight (38)* years ago. Per *Black's Law Dictionary*:

> Binding precedent is a legal rule or principle that lower courts must follow. It is a ruling or law that ensures consistency and certainty in the application of laws.[48]

While the Arbitrator declines to hold that the Previous Awards constitute "binding precedent," the Arbitrator does find that these Previous Awards are highly persuasive, especially since the language in Article III.B.1. has *not* changed since any of the Previous Awards were issued. Again, Article III.B.1. provides:

> A *minimum* of *eight (8) hours* at triple (3) time the regular rate of pay as herein provided *shall* be paid for all work performed under this Agreement on the following holidays[.] (emphasis added).

Lastly, and most importantly for purposes of *this* Award, the Union's position in each of the Previous Awards is that its bargaining unit members were entitled to "a *minimum* of *eight (8) hours*" of Holiday Pay, based on the above-quoted language in Article III.B.1. Here, thirty-eight (38) years later, the Union is making the exact same argument. Specifically, each of the Grievances allege:

> According to *Article 3, Section B paragraph 1 and 4* of the Truck Crane Master Labor Agreement, I should be paid *a minimum eight (8) hours* of the double (2) time the rate of pay (emphasis added)

On the other hand, each of the signatory employers previously asserted that bargaining unit employees were only entitled to Holiday Pay for the *actual hours* the employee worked on the Union Holiday. And again, here, the Employer makes the exact same argument. While it is understandable that employers who are signatory to the Agreement could find the language requiring them to pay a "*minimum* of *eight (8) hours*" Holiday Pay to be cost prohibitive, put simply, the language says what the language says.

The bottom line is, in each and every Previous Award, whether it was issued by the Board, or by Arbitrator Burstein, the outcome was *unanimous*: that is, each of the Previous Awards held that the Union's interpretation of the language in Article III.B.1. and Article III.B.4. was the correct and proper interpretation, and the Union prevailed in all three (3) Previous Awards. The Elkouris' perhaps said it best when they specified:

> Any well-reasoned and well-written prior arbitration opinion has *persuasive* qualities where it is "on point" with the subject matter of a current grievance; however, to be given preclusive effect it must be between the same parties, must invoke the same fact situation,

> must pertain to the same contractual provisions, must be supported by the same evidence, and must concern an interpretation of the specific agreement before the arbitrator.[49]

To sum it up, the Previous Awards were between the *same* parties, invoked the *same* fact patterns, pertained to the *same* contractual provisions, and are supported by the *same* or similar *evidence**[*19]*** . Moreover, the Parties are now taking the same positions, and making the *same* arguments as their predecessors did from thirty-eight (38) years ago. Thus, while the Arbitrator stops short of holding these Previous Awards have "binding precedent" or "preclusive effect" on this Award, the undersigned Arbitrator is *obligated* to acknowledge that the Previous Awards are *highly persuasive* in this instance.

What Does the Word "Day" Mean?

Another issue the Arbitrator must address upfront concerns the Union's definition of the word "day" to mean "12:01 is a new day." In that regard, the Employer asserts:

> Here, the plain meaning of Article III(B)(4) of the Agreement does not align with the Union's alleged application of the language. Notably, in presenting its case, the Union placed substantial emphasis on the phrase "12:01 is a new day," a phrase that does not appear anywhere in the Agreement.[50]

The Employer makes an excellent legal argument, and indeed, both Parties agree that the Union's term, "12:01 is a new day" is not found anywhere in the Agreement.

Having said that, the underlying facts for each of the Grievances all occurred within the State of California. For this reason, the Arbitrator consulted *The California Style Manual: a handbook of legal style for California courts and lawyers* (the *California Style Manual*),[51] as that manual is widely recognized as the best guidance for legal matters within the State of California.[52]

The *California Style Manual* refers to *Black's Law Dictionary* and *Ballentine's Law Dictionary* as "standard" legal dictionaries.[53] I thus consulted these "standard" legal dictionaries to determine what the legal definition of the word "day" means. *Ballentine's Law Dictionary* defines the word "day" to mean: "The period between one midnight and the next"[54] *Black's Law Dictionary* ever so slightly changes the definition of the word "day" to mean: The space of time which elapses between two successive midnights.[55]

In the Arbitrator's opinion, both legal definitions of the word "day" in these law dictionaries say essentially the same thing; that is, a "day" occurs between one midnight, and the next midnight. Thus, for purposes of this Award, the Arbitrator takes "official notice" of these legal definitions of the word "day," based on guidance from the *California Style Manual*.

Mr. Hunt credibly testified that the Union withdrew nine (9) Sunday-to-Monday double pay grievances in or about October 2022, based on the Union's concession that the grievants were not entitled to double pay as of 12:01 A.M. on the Monday following the Sunday worked. Mr. Hill buttressed Mr. Hunt's testimony when he credibly testified that he recalled that the Union withdrew those grievances, again, based on the Union's reasoning that "12:01 is a new day." Moreover, when questioned on cross, Mr. Hill credibly testified that the Union's term "12:01 is a new day" means, "that would be a new calendar day."[56] Based on Mr. Hill's and Mr. Hunt's credible testimony, both Parties appear**[*20]** to mutually agree. Thus, while it is true that "12:01 is a new day" is not in the Truck Crane Agreement, the Parties agree on what the Union's expression means.

Based on the overall evidence, the Arbitrator finds that the legal definition of the word "day" comports with the Parties' mutual understanding of what a "day" means. Thus, while it is true that "12:01 is a new day" can be found *nowhere* in the Truck Crane Agreement, unfortunately, the Employer's excellent legal argument that the plain language in the Agreement does not support the Union's definition of the word "day" fails.

What is the Plain and Unambiguous Meaning of Article III.B.1. and III.B.4.?

Having addressed these preliminary matters, we get to the heart of this Award; which is, what is the proper interpretation of the disputed language? In its Post-Hearing Brief, the Employer emphasizes certain words or phrases, such as "*all time worked*" in Article III.B.4., yet completely *ignores* other words or phrases; specifically, the words "*minimum*," "*eight (8)-hour*" and "*shall*" in Article III.B.1.[57] In fact, the Employer's Post-Hearing Brief appears to totally disregard the fact that Article III.B.4 *must* be read in *conjunction* with Article III.B.1. For this reason, I agree with a fellow arbitrator, when he held, in *Northshore Exteriors, Inc*:

> The best way I know to determine what unambiguous language in an agreement says, is to break each phrase of the disputed language down, hopefully, to more understandable parts.[58]

Like the arbitrator in *Northshore Exteriors, Inc.*, this Arbitrator will parse out what Article III.B.1 and Article III.B.4. actually says, "hopefully to more understandable parts," to determine the proper interpretation of the disputed language.

1. Article III.B.1. Article III.B.1. provides:

> *A minimum of eight (8) hours* at triple (3) time the regular rate of pay as herein provided *shall* be paid for all work performed under this Agreement on the following holidays:
>
> New Years's Day
>
> Presidents' Day (San Diego County Only)
>
> Memorial Day
>
> Independence Day
>
> Labor Day
>
> Veterans' Day
>
> Thanksgiving Day
>
> Day after Thanksgiving
>
> Christmas Day[59]

Merriam-Webster's Dictionary defines the word "minimum" to mean:

1: the least quantity assignable, admissible, or possible

- Keep expenses to a bare minimum.
- He was sentenced to a minimum of 10 years in prison.

2: the least of a set of numbers specifically: the smallest value assumed by a continuous

3 a: the lowest degree or amount of variation (as of temperature) reached or recorded

B: the lowest speed allowed on a highway[60]

Synonyms for the word "minimum" include:

lowest; slightest; smallest; minimal; smaller; small; fewest; low; minor; tiniest; lesser; minutest; littlest; slight; fewer; modest; infinitesimal; micro; irreducible; submicroscopic; ultramicro[61]

Based on the definition of the word *minimum* (and the synonyms for minimum), the Employer's position that it is not required to pay *more* than the amount of hours an employee *actually worked**[*21]*** on a Union Holiday, and in any event, a *maximum* amount of eight (8) hours' Holiday Pay, is simply *incorrect*. While I'm sure the Employer would love to insert the word "maximum" where the word "minimum' is in Article III.B.1., again, the language says what it says, and the Arbitrator cannot legislate new language for the Employer.

Also, as fully addressed in detail above, use of the word "shall" in Article III.B.1. means that the eight (8)-hour minimum Holiday Pay is *mandatory*, and not a "nice to have." Put simply, use of the words "minimum," "eight (8)-hour" and "shall" in Article III.B.1. means that when a bargaining unit member works on a Union Holiday, the employee *shall* receive a *minimum* of eight (8) hours' Holiday Pay. Indeed, any reasonable person would *objectively* read the plain and unambiguous language in Article III.B.1. the same way.

This also means that the employee must receive the minimum of eight (8) hours pay, *regardless* of the number of hours the employee *actually worked* on a Union Holiday. So, for example, if the employee only works two (2) hours on a Union Holiday, the employee is entitled to receive the *minimum* of eight (8) hours' pay for working on the Union Holiday. Further, importantly, based on the legal definition of the word "day," a bargaining unit employee is not precluded from receiving *more than* eight (8) hours' Holiday Pay if he or she actually works more than eight (8) hours on a "day" that falls on a Union Holiday.

Having said that, there is one other issue to address regarding Article III.B.1., and that is, whether a Union Holiday, defined in Article III.B.4., is included as a "holiday" under Article III.B.1. The answer to that question is rather simple, given that all of the Previous Awards addressed that question. The Burstein Award specifically addressed that issue head-on, when Arbitrator Burstein held:

> The *clear and unambiguous* language of Section B(l) of Article III of the Agreement *requires* the Company to pay a *minimum* of eight hours at triple time the regular rate of pay on a holiday. Since the uncontradicted evidence established that Grievant work [sic] on Saturday, June 8 and the parties stipulated that the day was a holiday, I find that Grievant

> was entitled to the contract benefit unless another provision of the Agreement or some other factor constituted a bar.[62]

I agree with Arbitrator Burstein, as the language in Article III.B.1. is *clear* and *unambiguous* and specifies that the Employer is *required* to pay a bargaining unit member a *minimum* of eight (8) hours' Holiday Pay for working on a "holiday," which includes a Union Holiday.

In conclusion, while the Employer may find this outcome to be harsh or unexpected,[63] the Arbitrator really has no choice but to interpret the language based on the plain and unambiguous meaning of the words in Article III.B.1., as well as the Previous Awards that are highly persuasive to the interpretation of the same language at issue in this Award.

2. Article III.B.4. Having determined that the Union correctly interpreted what**[*22]** Article III.B.1. means, the next step is to determine what Article III.B.4. means.

a. The Historical History of Article III.B.4. The language in Article III.B.4. originally provided:

> No work shall be performed on the first Saturday following the first Friday in the months of June and December of each year, except when life or property is in imminent danger. When a permit is obtained from the Union to work because life or property is in imminent danger, time worked shall be at the double (2) time rate. Any time worked on these Saturdays without a permit shall be at the triple (3) time rate of pay.

In 2013, as credibly testified to by Mr. Bryan and Mr. Hunt, the Union made several concessions in Article III.B.4., based on the signatory employers' legitimate concerns about being competitive in the labor market with non-Union contractors.

Post-2013, a signatory employer is no longer required to undergo what probably was a very tedious, and costly task to obtain a "permit" in order to require a bargaining unit member to work on a Union Holiday. Moreover, the severe restrictions around "life or property" and being in "imminent danger" were removed from Article III.B.4. Lastly, the Union reasonably agreed to change the rate of pay for working on a Union Holiday to "double time," rather than "triple time." One cannot help but point out that all these language concessions were made in *every* signatory employer's favor, including this particular Employer.

b. The current language in Article III.B.4. The language in Article III.B.4. now simply reads:

> If work is performed on the first (1st) Saturday following the first (1st) Friday in the months of June and December of each year, *all time worked* shall be paid at the double (2) time rate of pay (emphasis added).

With regard to the current language, the Employer asserts that the words "all time worked" means that the Union's interpretation that an employee is entitled to a "minimum" of eight hours' Holiday Pay is simply incorrect.[64] Yet again, the Employer makes an excellent argument, and again, the undersigned is impressed by this argument, and agrees with the Employer that, objectively speaking, the phrase "all time worked" can be reasonably interpreted to mean that the employee is *only* entitled to Holiday Pay for the hours the employee *actually works* on a Union Holiday. Having said that, the Employer's interpretation is based on an *isolated* reading of Article III.B.4., and does not account for the language in Article III.B.1.

In that regard, when interpreting contract language, it is well-established that:

> If an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision *meaningless or ineffective*, the inclination is to choose the interpretation that would give effect to all provisions.[65]

Simply put, while the Arbitrator understands the Employer's position (which is completely**[*23]** reasonable), Article III.B.4. *cannot* be read in a vacuum. For that reason, here, the words "all time worked" in Article III.B.4., *must* be read in the context of Article III.B.1., which clearly requires a signatory employer to pay "a *minimum* of eight (8) hours" Holiday Pay to a bargaining unit employee for working on a Union Holiday. To isolate the language in Article III.B.4., and not read or apply the language in the context of Article III.B.1., would mean that the terms of Article III.B.4. *cancels out* the language in Article III.B.1.

On this issue, I found Mr. Hunt's testimony very compelling when he testified that, despite all the Union's concessions in the 2013-2016 Agreement:

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> 11 And it has progressed to where it's at
>
> 12 now, which is just simply, hey, you've got to pay
>
> 13 double time, but it's a *minimum of 8 hours*.[66]

Again, the Employer is arguing that, based on all of the language changes in the 2013-2016 Truck Crane Agreement, a bargaining unit employee is *limited t*o Holiday Pay for "*all time worked*." However, the one (1) thing the Union did *not* concede during 2013 bargaining is that a bargaining unit employee *must* receive minimum of eight (8)-hours of Holiday Pay as provided for in Article III.B.1.

Again, the record reflects that the Parties made *no changes* to the language in Article III.B.1. in 2013, and the record is clear that the Parties also did not do so in the 2019-2022 Agreement. Thus, the Employer's argument, while very interesting, well-written and really smart, simply fails, as again, the language in Article III.B.1. has not changed in *thirty-eight (38) years*. This is a classic example of a party attempting to get through arbitration "what it could not acquire through negotiation."[67] Indeed, even the *Employer* correctly pointed out:

> It is axiomatic that a party may not gain through arbitration what it has failed to obtain in bargaining.[68]

While the Employer received the benefit of its bargain in the 2013-2016 Agreement, the Union *also* received the benefit of its bargaining. Put simply, the Union did not concede that bargaining unit employees are not entitled to a *minimum* of eight (8) hours' Holiday Pay for working on a Union Holiday.

The bottom line is, while I appreciate the Employer's *isolated* reading of Article III.B.4., if I were to accept the Employer's reading of the applicable language, that would be *nonsensical*, as the Employer's interpretation totally and completely disregards what Article III.B.1. actually says.[69] Additionally,

unfortunately, the Employer's interpretation of Article III.B.4. does not comport with the highly persuasive effect of the Previous Awards, *all* of which interpreted Article III.B.4. *in conjunction* with Article III.B.1., and all of which *unanimously* held that a bargaining unit employee who works on a Union Holiday is entitled to "[a] *minimum of eight (8) hours*" of Holiday Pay.
For all of these reasons, the Arbitrator finds that, while Article III.B.4. certainly reduced the rate of Holiday Pay for working on**[*24]** a Union Holiday from triple (3) time, to double (2) time, and further reduced the restrictions on signatory employers surrounding, when, or even if, a bargaining unit member can work on a Union Holiday, the proper interpretation of Article III.B.4. requires that Article III.B.1 *must* be read in conjunction with Article III.B.4. Again, practically speaking, this means that the Employer *must* pay a bargaining unit member a "*minimum*" of "eight (8) hours' Holiday Pay for working on a Union Holiday, *regardless* of the number of hours the employee *actually worked* on the Union Holiday.

Did the Union Prove that the Employer Violated the Truck Crane Agreement at Article III.B.1. and III.B.4.?

Yes. It likely goes without saying at this point, but the Arbitrator wants to be perfectly clear. Based on the plain and unambiguous language in *both* Article III.B.1. and Article III.B.4., which *must* be read in conjunction with each other, the Arbitrator specifically finds that the Union met its burden of proving that the Employer violated the 2019-2022 Truck Crane Agreement by failing to pay the eight (8)-hour *minimum* Holiday Pay to each of the Grievants for working on the Union Holiday on June 4, 2022.

Did the Employer Establish a Past Practice?

No. In its Post-Hearing Brief, the Employer makes an excellent legal argument concerning whether "past practice" modifies how the disputed language should be properly interpreted:

> The parties' practice has consistently been to pay eight hours at the double time rate to bargaining unit members who work on Union Holiday, counting all hours worked on the Union holiday, as well as hours work [sic] the day before or after the Union Holiday, towards the eight hours. The Company introduced into evidence timecards and testimony that establish that the Union's interpretation of the Union Holiday pay does not align with the way the premium has historically been paid.[70]

I found *all* of the Employer's arguments to be very thoughtful and well-written. In particular, the Employer's above past practice argument, out of all the arguments the Employer made, was, in this Arbitrator's humble opinion, *stellar*. Having said that, in order to prove that a past practice exists, the party asserting the past practice must prove:

> ....the practice is unequivocal, clearly enunciated and acted upon, and reasonably ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.[71]

The Employer's primary evidence concerning its "past practice" argument was testimony elicited by management, that, based on former Union Business Agent Mr. Phillips' advice, the Employer's *practice* is to pay a *maximum* (not a *minimum*) of eight (8) hours' Holiday Pay for working on a Union Holiday. These witnesses all testified that Mr. Phillips *told* them that the Employer could "back up" or "backfill" an employee's time for working on a Union Holiday to "overtime" for any hours worked beyond**[*25]** eight

(8) hours. Based on the example Mr. Hill testified to, if a bargaining unit employee works ten (10) hours on a Union Holiday, the Employer's *practice* is to pay eight (8) hours at the double time rate, and two (2) hours at the overtime rate.

During the Hearing, the Employer's counsel of record asserted that the testimony as to what Mr. Phillips advised management witnesses is an exception to the hearsay rule, because the alleged statements were "certainly a statement by a party opponent."[72] I agreed with Employer's counsel, which is why I allowed all three (3) of the management witnesses to testify about what Mr. Phillips told them. The Employer also provided timecards, dating back to June 2016, that establishes that the Employer paid bargaining unit employees for time worked on a Union Holiday in accord with the Employer's practice, described above. Unfortunately, while the Employer's counsel of record did an *outstanding* job presenting the Employer's past practice case, both at the Hearing and in the Employer's Post-Hearing Brief, I cannot find that the Employer met its burden of proof, for the following reasons.

First, there is documentary evidence maintained as business records in the Union's archives that establishes that Mr. Phillips did *not* interpret Holiday Pay in the manner described by the Employer's witnesses. Rather, the documentary, *historical* evidence from the Union's archives show that Mr. Phillips interpreted Article III.B.1. and III.B.4. in the same manner as the *Union* has interpreted the *unchanged* language from Article III.B.1., since *at least* July 1, 1986. And again, July 1, 1986 is at least *thirty-six (36) years ago*. Specifically, in the Underlying Grievance Documents admitted as part of the Burstein Award, it was *Mr. Phillips* who filed the grievance on behalf of Mr. Scott, it was *Mr. Phillips* who advocated for Mr. Scott, and it was *Mr. Phillips* who asserted that Mr. Scott was entitled to "*8 HRS MINIMUM* AT THE TRIPLE TIME RATE FOR (SAT) 6-8-2002" (emphasis added).

Second, there is no preponderant evidence that the *Union* knew, or, at the very least, *acquiesced*, to the Employer's alleged practice of paying Holiday Pay in the manner described by the Employer's witnesses, nor is there *any* evidence that at least two (2) of the Grievants, Mr. Baumgarner and Mr. Eppard, knew of, or acquiesced to Hill Crane's practice of paying Holiday Pay for working on a Union Holiday. Indeed, if the Employer called members Mr. Baumgarner and Mr. Eppard to testify under *oath*, and both of those Grievants testified that they knew that and understood they were paid for working on a Union Holiday in the manner described by the Employer's witnesses, the outcome on the issue of past practice may have been very different. As it stands, there simply is no *evidence* that the Union or these individually-named Grievants knew, comprehended, or even understood that Hill Crane paid them in accordance with this "past practice" asserted by the Employer.

Third, while the**[*26]** Employer established that the Employer has, *at times*, paid bargaining unit employees in the manner testified to by the management witnesses, there is simply no evidence in the overall record that the Employer *consistently* applied Article III.B.1. and Article III.B.4. in that manner. Presenting a smattering of timecards *not related* to the underlying Grievances, while interesting, is simply *insufficient* to establish a consistent, longstanding practice. Again, this is especially true since two (2) of the Grievants, Mr. Baumgarner and Mr. Eppard, did *not* testify under oath at the Hearing, that they knew, understood, or acquiesced, to the Employer's practice of paying them Holiday Pay for working on a Union Holiday in this manner since June 2, 2017.

Moreover, the question of whether the Employer consistently paid bargaining unit members in the manner described above, was further "muddied by the waters"[73] when Mr. Hunt credibly testified about a conversation he had with Mike Vlaming, an Employer representative, when the underlying Grievances for this Award were at the Joint Adjustment Board level:

13 A. Mr. Vlaming stated that the biggest issue

14 they were having is that we — he had contractors

15 within his association that were paying certain

16 conditions under the agreement, including this

17 holiday pay, one way; and he had other contractors

18 within his association that were paying certain

19 provisions out of the agreement, including this

20 holiday provision, a different way.

21 And he felt like arbitrating it is going

22 to give him a final answer on this is the direction

23 he can give all of his employers that belong to the

24 association and say, "This is how we are all going

25 to pay for this arbitration ruling."

Like the Employer's witnesses, Mr. Hunt was testifying about a statement made by a party opponent, an exception to the hearsay rule. Indeed, based on Mr. Hunt's credible testimony, more likely than not, there really is no *standard practice* amongst *any* of the signatory employers to the Truck Crane Agreement as to how Holiday Pay for working on a Union Holiday is paid under the Truck Crane Agreement.

Lastly, and most importantly, the Employer *could* have, and *should* have, called Mr. Phillips to testify about his "advice" concerning how Holiday Pay should be paid. Unfortunately, the Employer presented no *evidence* that Mr. Phillips was "unavailable as a witness,"[74] nor did the Employer present *evidence* that the Employer unsuccessfully attempted to subpoena Mr. Phillips to testify at the Hearing.[75] If the Employer had at least established that it unsuccessfully *attempted* to subpoena Mr. Phillips, the Arbitrator may have been more forgiving of the fact that Mr. Phillips did not testify. As it stands, given the importance of Mr. Phillips' testimony, while I did not disbelieve any of the Employer's witnesses, and in fact found Mr. Paden's testimony in particular to be credible and compelling, weighing the Employer's *anecdotal* evidence over the *plain* and *unambiguous**[*27]*** meaning of the language at issue, along with the persuasive effect of the Previous Awards, regrettably, while I really admired and respected the Employer's past practice argument, the Employer simply failed to prove its case.

What is the Appropriate Remedy?

Having determined that the Employer failed to prove that a past practice exists that may have altered the plain and unambiguous meaning of the disputed contractual language, the next issue to address is the appropriate remedy. With regard to the remedy, the Employer argues:

> The Union asserts that the Agreement requires Hill Crane to pay an *additional* eight full hours for any time worked on the Union holiday. *No provision in the Agreement requires this*.[76]

While I agree that there is no provision in the Truck Crane Agreement that would require the Employer to pay an *additional* eight (8) hours of Holiday Pay, this is the one argument the Employer made that confused the Arbitrator, as there is not even a *scintilla*[77] of evidence that the Union is seeking an *additiona*l eight (8) hours of Holiday Pay.

Rather, the Union does not even *dispute* that the Employer paid Holiday Pay to each of the Grievants in an amount equal to the amount of hours the Grievants *actually worked* on the Union Holiday. Thus, like its predecessors in the Previous Awards, the Union is *simply asking* that each Grievant receive an additional payment that, coupled with the Holiday Pay already received, would *equate* to a *minimum* of eight (8) hours' Holiday Pay. Again, the underlying Grievances allege:

> According to the Article 3, Section B paragraph 1 and 4 of the Truck Crane Master Labor Agreement, *I should be paid minimum eight (8) hours of the double (2) time the rate of pay* (emphasis added).

While I truly sympathize with the Employer for the outcome of this Award, based on the *plain* and *unambiguous* meaning of the words in Article III.B.1. and Article III.B.4., as well as the *highly persuasive* effect of the Parties' Previous Awards, the Union's interpretation of Article III.B.1. and Article III.B.4. is the correct and accurate interpretation. Thus, the record *dictates* that the Union is entitled to its proposed remedy of payment of Holiday Pay to each of the Grievants, in an amount representing the *difference* between what the Grievants *already* received for Holiday Pay, versus what the Grievants *should have been paid*, had the Employer been in compliance with the Truck Crane Agreement, as of June 4, 2022.

CONCLUSION

I might be over-effusive at this point, but the Employer's counsel was professional, prepared, and did an excellent job presenting the Employer's case. Unfortunately, while counsel for the Employer did an outstanding job, and comes from one of the most *prestigious* nationwide law firms, no amount of good lawyering helps the Employer in this instance. Unfortunately, in this instance, the Union met its burden of proof and established that the Employer violated the 2019-2022 Truck Crane Agreement by failing to pay the *eight (8)-hour minimum* Holiday Pay to the Grievants**[*28]** for working on June 4, 2022, a designated Union Holiday. For this reason, the Arbitrator has no choice but to sustain the Grievances and award the Grievants Holiday Pay in the amount that would equate to the eight (8)-hour minimum Holiday Pay the Grievants should have received under the 2019-2022 Truck Crane Agreement.

THE AWARD

The Grievances are sustained. Within fourteen (14) business days from the date of this Award, the Employer *shall*:

1. Pay Grievant Eugene Eppard two and a half (2½) hours of Holiday Pay, retroactive to June 4, 2022, the date Mr. Eppard earned his Holiday Pay, to ensure that Mr. Eppard receives the *eight (8)-hour minimum* Holiday Pay he is owed;
2. Pay Grievant Frank Trujillo two and a half (2½) hours of Holiday Pay, retroactive to June 4, 2022, the date Mr. Trujillo earned his Holiday Pay, to ensure that Mr. Trujillo receives the eight *(8)-hour minimum* Holiday Pay he is owed;
3. Pay Grievant Terry Barry six (6) hours of Holiday Pay, retroactive to June 4, 2022, the date Mr. Barry earned his Holiday Pay, to ensure that Mr. Barry receives *the eight (8)-hour minimum* Holiday Pay he is owed;
4. Pay Grievant Ryan Gonzales six (6) hours of Holiday Pay, retroactive to June 4, 2022, the date the Holiday Pay Mr. Gonzales earned his Holiday Pay, to ensure that Mr. Gonzales receives the *eight (8)-hour minimum* Holiday Pay he is owed;
5. Pay Grievant Chad Baumgarner six (6) hours of Holiday Pay, retroactive to June 4, 2022, the date the Holiday Pay was earned, to ensure that Mr. Baumgardner receives the *eight (8)-hour minimum* Holiday Pay he is owed; and
6. Pay Grievant Russell Garrett six (6) hours of Holiday Pay, retroactive to June 4, 2022, the date the Holiday Pay was earned, to ensure that Mr. Garrett receives the entire *eight (8)-hour minimum* Holiday Pay he is owed.

This Award is provisional in nature and shall become final forty-five (45) days from today's date, to allow the Parties time to address any issues related to the remedy. Pursuant to the Parties' stipulation, and in accordance with Article XV.3.G., all fees and expenses charged by the Arbitrator shall be borne by the Employer, the losing Party. The Arbitrator's fees and expenses *shall* be paid within thirty (30) days of today's date.

DATED this 9th day of February, 2024.

Shianne Scott, Arbitrator
Irvine, California

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fn 1 The Arbitrator notes that the electronic copy of Joint Exhibit 1 was the wrong agreement, and did not even apply to the underlying Grievances. Having said that, the Arbitrator received a hard copy of the 2019-2022 Truck Crane Agreement at the Hearing.

fn 2 As an aside, even if the Arbitrator had decided not to consider the Union's Post-Hearing Brief, the outcome of this Award would not be any different, as the Union successfully established at the Hearing that its interpretation of the disputed language is the correct and accurate interpretation.

fn 3 Union's Post-Hearing Brief at page 3.

fn

4 Employer's Post-Hearing Brief at page 2.

fn

5 The most current Truck Crane Agreement**[*29]** is in effect from 2022-2024. However, the underlying Grievances were filed while the 2019-2022 Truck Crane Agreement was still in effect.

fn

6 Employer's Post-Hearing Brief at page 4.

fn

7 Emphasis added.

fn

8 Transcript at 167:3.

fn

9 *See*, *Fed. Rules Evid.*801(d)(2) .

fn

10 Transcript at 188:3.

fn

11 Transcript at 188:6. Presumably, when Mr. Paden said "I raised my hand," he was referring to the fact that the Arbitrator placed him under oath before he began testifying.

fn

12 Transcript at 188:8.

fn

13 *See Fed. Rules Evid.* 801(6)(B) ; transcript at 152:1-2.

fn

14 Transcript at 148:24-25.

fn

15 Transcript at 22:11-12.

fn

16 The Board Award for Case No. JAB-86-2 is undated; however, Case No. JAB-87-1 (discussed below) states that Case No. JAB-86-2 was presented to the Board on January 8, 1986.

fn

17 I found it interesting that Mr. Hill referred to Mr. Bob Hill, the owner of Bob Hill, as "Uncle Bob," now deceased (Transcript at 159:18). While it is interesting that Hill Crane and Bob Hill have a family connection, there is no evidence that Mr. Hill has any historical knowledge of the disputed language based on his familial connection with the former owner of Bob Hill.

fn

18 The Board's Award for Case No. JAB-86-2 at pages 3-4.

fn

19 The Board's Award for Case No. JAB-86-2 at pages 3-4.

fn

20 Transcript 219:7-9.

fn

21 Joint Adjustment Board Award for Case No. JAB-87-1, at pages 1-2 (emphasis added).

fn

22 As an aside, and as full disclosure, Mr. Harry Scott has no apparent relation to the undersigned Arbitrator.

fn

23 Burstein Award at page 2.

fn

24 Burstein Award at page 5 (emphasis added).

fn

25 Burstein Award at page 6 (emphasis added).

fn

26 *See e.g.*, *Black's Law Dictionary* (11th ed. 2019), defining "official notice" to mean: "A recognition by an administrative decision maker of a material fact not in evidence on which a decision may be based."

fn

27 *See, e.g.*, *Fed. R. Civ. Proc. 801(d)(2)* .

fn

28 *School City of Hobart*, 109 LA 527 (1997); *Canteen Corp.*, *101 LA 925* (1993).

fn

29 *See, e.g.*, *Reynolds Packaging Group, Reynolds Consumer Products and Bellwood Printing Pressmen*, *38 LAIS 134* , *2010 WL 6777140* (Etelson, 2010) (held: the burden of proof is on the party alleging the existence of a binding past practice to establish that one exists).

fn

30*See, e.g.*, *Linn County*, 136 BNA LA 616, 621 (Gaba, 2016).

fn

31 *Black's Law Dictionary*, (9th ed. 2019).

fn

32 *See*, *Anchor Glass Container Corp.*, 136 LA 823 (Miles, 2016).

fn

33 *International Paper*, 137 LA 373 (Van Kalker, 2017).

fn

34 Carlton J. Snow, *Contract Interpretation: The Plain Meaning in Labor Arbitration*, 55 Fordham L. Rev. 681 (1987).

fn

35 St. Antoine, Theodore J. "The Bible of Labor Arbitration: Tribute to Professor Frank Elkouri." Oklahoma Law Review 65, no. 3 (2013): xiv-xvi.

fn

36 St. Antoine, Theodore J. "The Bible of Labor Arbitration: Tribute to Professor Frank Elkouri." Oklahoma Law Review 65, no. 3 (2013): xiv-xvi.

fn

37 Elkouri and Elkouri, *How Arbitration Works*, Chapter 9, Section 9.2.A.I., "Criticisms," page 6 (8th ed. 2020) (emphasis added).

fn

38 *See* Employer's Post-Hearing Brief at page 8.

fn

39 Article III.E.2. of the 2019-2022 Truck Crane Agreement (emphasis added).

fn

40 *See, e.g. Toledo Edison Co.*, *94 LA 905, 910* (Richard, 1990) (held: it is possible that a word or phrase in a collective bargaining agreement is so vague or ambiguous as to be unenforceable).

fn

41 *See*, e.g., *Department of Veterans Affairs*, 121 LA 833, 834 (Kilroy, 2005) (held: although "the law abhors a forfeiture...the Arbitrator is confined to the four corners of the Agreement. . . .[W]here the Agreement is specific and unambiguous as to its terms, they must be applied.").

fn

42 *EMD Millipore Corporation*, 2024 BL 31068 , 2024 BNA LA 2 (Van Kalker, 2024) (emphasis added).

fn

43 *Clear Coverall Supply Co.*, *47 LA 272, 277* (1966).

fn

44 Employer's Post-Hearing Brief at page 11 (references to exhibits and footnote omitted).

fn

45 https://guides.loc.gov/law-secondary-resources/definitions

fn

46 *Black's Law Dictionary* (11th ed. 2019) (emphasis added).**[*30]**

fn

47 *Cambridge Dictionary* (3rd ed. 2015).

fn

48 *Black's Law Dictionary* (11th ed. 2019) (emphasis added).

fn

49 Elkouri and Elkouri, *How Arbitration Works*, Chapter 11, Section 11.2.A, page 4 (8th ed. 2020) (footnotes omitted; emphasis added).

fn

50 Employer's Post-Hearing Brief at page 9 (reference to the transcript omitted).

fn

51 *California Style Manual*, published by Edward W. Jessen (4th ed. 2000).

fn

52 *See* the most recent edition of the *California Style Manual*, issued in 2000, at page iii, where former Chief Justice Ronald M. George stated that the *California Style Manual:*

> ....provides a *guide* to *standard* legal style in the appellate courts, and benefits litigants and jurists alike by establishing a common stylistic base that permits readers to focus readily on substance rather than form (emphasis added).

fn

53 *Id.* at page 39 (emphasis added).

fn

54 *Ballentine's Law Dictionary* (3rd ed. 1969).

fn

55 *Black's Law Dictionary* (11th ed. 2019).

fn

56 Transcript at 167:3.

fn

57 Employer's Post-Hearing Brief at pages 2 and 8.

fn

58 *Northshore Exteriors, Inc.*, 2020 BL 205175 , 2020 BNA LA 1096, at page 35 .

fn

59 Emphasis added.

fn

60 *Merriam-Webster's Dictionary* (New ed. 2022).

fn

61 *Merriam-Webster's Dictionary* (New ed. 2022).

fn

62 Burstein Award at page 6 (emphasis added).

fn

63 *See, e.g.*, *Seattle School District*, 119 LA 481 (Gaba, 2004).

fn

64 *See* e.g., Employer's Post-Hearing Brief at page 2 and 8.

fn

65 Elkouri and Elkouri, *How Arbitration Works*, Chapter 9, Section 9.3.A.Viii.A., Giving Effect to All Clauses And Words, page 16 (8^{th} ed. 2020) (emphasis added).

fn

66 Emphasis added.

fn

67 *U.S. Postal Serv. v. Am. Postal Workers Union*, 204 F.3d 523, 530 (4th Cir. 2000).

fn

68 Employer's Post-Hearing Brief at page 13 (case law citations omitted).

fn

69 *See*, e.g., *Portland Water District*, *87 LA 1227* (Chandler, 1986), where the arbitrator interpreted the contract so as to avoid a nonsensical result in favor of a result that was just and reasonable.

fn

70 Employer's Post-Hearing Brief at pages 9-10 (references to case law, exhibits and the transcript omitted).

fn

71 *Grand Haven Stamped Products Co.*, 107 LA 131, 137 (Daniel, 1996).

fn

72 *See* transcript at page 156:8-9.

fn

73 *See, e.g.*, *Cambridge Dictionary* (3^{rd} ed. 2015), which defines the term "muddy the waters" to

mean: "to make a situation *more confused* and less easy to understand or deal with" (emphasis added).

fn

74 *See, e.g.*, Cal. Evid. Code § 240 .

fn

75 While I have no idea if I will ever preside as the Arbitrator for these Parties again, going forward, I am putting these Parties, and anyone else reading this Award, on notice that the Arbitrator is more than willing to sign a subpoena that requires a witness to appear and testify at a hearing held before this Arbitrator, particularly when the witness' testimony is crucial to prove the party's case.

fn

76 Employer's Post-Hearing Brief at page 8 (emphasis added).

fn

77 The word "s*cintilla*" is Latin for "[a] spark; a remaining particle; the least particle." *Black's Law Dictionary* (11th ed. 2019).