In re the Arbitration between: | FMCS File No. 15-51888-3

CenturyLink,

Employer,

GRIEVANCE ARBITRATION
OPINION AND AWARD

and

Communications Workers of America,

Union.

- Pursuant to **Article 16** of the collective bargaining agreement effective October 7, 2012, the parties have brought the above matter to arbitration.
- There are no procedural issues to be addressed and the matter is properly before the arbitrator for a final and binding determination.
- The grievance before the arbitrator is a "regional grievance", which was submitted by letter dated July 31, 2014.
- An Arbitration hearing was conducted on September 23, 2015 and September 24, 2015 in Denver, Colorado.
- Briefs were submitted by e-mail transmission on October 30, 2015 and the record was closed.
- The parties agreed that if the Union prevails, the arbitrator should retain jurisdiction to assist the parties with the remedy, if necessary.

APPEARANCES:

FOR THE EMPLOYER
Howard Rubin, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, PC
222 SW Columbia Street, Suite 1500
Portland, OR 97201

FOR THE UNION
Stanley M. Gosch, Esq.
Rosenblatt & Gosch, PLLC
8085 E. Prentice Avenue
Greenwood Village, CO 80111

ISSUE:

Did the Employer violate Section 4.5 of the 2012 Collective Bargaining Agreement in how it compensated employees at the premium rate for each overtime hour worked after working 49 hours in a calendar week?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE 2 – Hours and Days of Work

2.1 Weekly schedules and daily tours shall be arranged to fit the needs of the business and with consideration for the needs of the employees. The basic workweek shall be any assigned forty (40) hours in one (1) calendar week, Sunday through Saturday inclusive. Saturday and Sunday assignments shall be done on a rotational basis among the qualified group unless otherwise agreed to by the local union and Company. Weekly assignments will consist of five (5) daily tours of eight (8) consecutive hours; four (4) daily tours of ten (10) hours; or four (4) daily tours of nine (9) consecutive hours and one (1) daily tour of four (4) consecutive hours; unless otherwise agreed to under Flexible Work Arrangements. …

An employee's tour on a particular day is his or her scheduled or assigned hours. Except as otherwise provided in this Agreement, employees shall not be paid for time not worked.

For scheduling purposes and purposes of wage administration, all tours shall be considered as falling within the calendar day on which the tour commences. …

2.3 Flexible work arrangements will comply with all federal and state wage and hour laws.

2.4 Daily overtime will be paid according to **Article 4**, **Section 4.3**. If a full-time employee is working a tour under a flexible schedule, the employee shall only receive premium payment for those hours worked in excess of the employee's scheduled tour.

ARTICLE 4 – Premium Payments

General

4.1 A premium payment is money added to the basic wage rate as outlined in the following Sections. No more than one (1) premium payment shall be paid for the same hours worked by an employee. …

Daily Premium

4.3 Premium shall be paid to employees at the rate of one and one-half (1 1/2) hours pay for each hour worked in excess of the employee's scheduled tour for that particular day. Regular Part-Time employees, scheduled for less than forty (40) hours in a week, shall be paid daily premium in accordance with this Section, provided that the scheduled tour is at least eight (8) hours. The following time will be included when computing the scheduled tour:

(a) All actual work time.

(b) All time paid for by the Company in connection with Union-Management meetings.

(c) All time paid for by the Company in problem solving and grievance meetings.

(d) Actual time spent during any part of an employee's normally scheduled

tour for absence due to jury duty.

Forty-Hour Premium

Section 4.4 Premium shall be paid at the rate of one and one-half (1½) hours pay for each hour worked after working forty (40) hours in a calendar week.

For purposes of this Section, the following shall be included in computing the forty-(40) hours worked in a calendar week:

(a) All actual work time, except time worked for which employee received a premium payment under Sections 4.3, 4.8 and 4.10.

(b) All time paid for but not worked on contractually authorized holidays and/or Company designated personal days.

(c) All time paid for by the Company in connection with Union Management meetings.

(d) All time paid for by the Company in attending problem solving and grievance meetings.

(e) All paid personal days. Personal time counting toward the forty (40) hour calculation does not impact actual pay treatment for a personal day. When taken, personal days are always paid at straight time.

(f) Actual time spent during any part of an employee's normally scheduled tour for absence due to jury duty.

Premium—Forty-Nine Through Fifty-Five Hours

4.5 Premium shall be paid for each hour worked after working forty-nine (49) hours in a calendar week. The premium rate of pay for each hour worked shall be determined based on whether the time worked is considered voluntary or mandatory overtime,

subject to the following:

(1) Voluntary: Employees who voluntarily work overtime shall be paid premium at the rate of one and one-half (1 ½) hours pay for each hour worked on a voluntary basis after working forty nine (49) hours in a calendar week.

(2) Mandatory: Employees who are required to work mandatory overtime shall be paid premium at the rate of two (2) hours pay for each hour worked on a mandatory basis after working forty nine (49) hours in a calendar week.

Employees who initially accept a voluntary overtime work assignment may subsequently decline the opportunity when a minimum of twenty-four (24) hours notice is provided to the Company prior to the start of the scheduled overtime. Under extenuating circumstances, the Company may, at its discretion, release the employee from working the voluntary overtime work assignment when less than twenty-four (24) hours notice is provided.

For purposes of this Section, the following shall be included in computing the forty-nine (49) hours worked in a calendar week:

(a) All actual work time.

(b) All time paid for but not worked on contractually authorized holidays and/or Company designated personal days.

(c) All time paid for by the Company in connection with Union-Management meetings.

(d) All time paid for by the Company in attending problem soling and grievance meetings.

(e) All paid personal days. Personal time counting toward the forty-nine (49) hour

calculation does not impact actual pay treatment for a personal day. When taken, personal days are always paid at straight time.

(f) Actual time spent during any part of an employee's normally scheduled tour for absence due to jury duty.

Premium – Over Fifty-Five Hours

Section 4.6 Premium shall be paid at the rate of two (2) hours pay for each hour worked after working fifty-five (55) hours in a calendar week. …

FACTUAL BACKGROUND:

The collective bargaining agreement between the Communication Workers of America, CWA, the Union, and CenturyLink[1], the Employer, has multiple premium pay provisions covering overtime work. One and one-half (1 ½) hours is paid for each hour of daily overtime worked [**Section 4.3**] and each hour worked after 40 hours in a calendar week [**Section 4.4**]. Premium pay for hours worked after working fifty-five (55) hours in a calendar week is at the rate of two hours pay for each hour worked [**Section 4.6**]. **Section 4.5** of the agreement provides for premium pay for overtime hours worked after forty-nine (49) hours through fifty-five (55) hours. The premium rate of pay after working forty-nine (49) hours through fifty-five (55) hours in a calendar week depends upon whether the hours worked are voluntary or mandatory.

Negotiations over the 2012 collective bargaining agreement between CenturyLink and the Communications Workers of America resulted in a change to **Section 4.5** of the collective bargaining agreement. In the 2008 collective bargaining agreement **Section 4.5** provided for premium pay at the rate of two (2) hours pay for each hour worked after

---

[1] Predecessor, Employer was Qwest Communications.

working forty-nine (49) hours in a calendar week. When the new **Section 4.5** provision was negotiated, the parties designed the provision to reduce overtime costs for the Employer. Initially, the Employer proposed raising the threshold for "double time" from forty-nine (49) hours in a calendar week to fifty-five (55) hours in a calendar week. The Union resisted the change. Ultimately, the parties arrived at a compromise provision whereby the Employer continued to pay double time to employees who worked mandated overtime, after forty-nine (49) hours in a calendar week were worked but was able to gain some savings when the overtime hours worked between forty-nine (49) hours and fifty-five (55) hours were voluntary.

Shortly after the 2012 collective bargaining agreement went into effect employees from the various CWA locals within the Western Region governed by the collective bargaining agreement questioned the way the Employer was calculating overtime. Multiple grievances were filed and the Union consolidated the grievances into a "regional grievance" dated July 31, 2014. The response to the regional grievance cited seventeen local grievances involving the same issue and indicates that additional grievances involving the same issue were filed, after the regional grievance was submitted.

The dispute centers on whether regularly scheduled hours worked by an employee, after the employee has worked forty-nine (49) hours in a calendar week are subject to the overtime provision. The Union contends that double-time should be paid, when an employee passes the forty-nine (49) hour threshold, during his/her regularly scheduled tour. The Employer believes that all hours during a regular tour are to be paid at straight time.

The parties were unable to resolve the dispute and the matter was brought to

arbitration for a final and binding determination.

SUMMARY OF UNION'S POSITION:

Over the past twenty-three (23) years the first sentence of **Section 4.5** has contained the same (virtually the same)[2] language. **Section 4.5** begins "Premium shall be paid for each hour worked after working forty-nine (49) hours in a calendar week." In the 2012 collective bargaining agreement the voluntary/mandatory language at paragraph (1) and paragraph (2) replaced the phrase "at the rate of two (2) hours." The agreement over when a premium would be paid did not change. Premium pay is to be paid, "after working forty-nine (49) hours in a calendar week." For twenty-three years the calculation of premium pay was made by looking back over a calendar week and determining, when forty-nine (49) hours had been worked. If, for example, an employee had worked forty-nine hours by the end of the fourth day of a regularly scheduled tour, hours worked on the last day of the regular tour were compensated at double time.

The Union acknowledges that only mandatory overtime is to be compensated at two (2) times the hourly rate, between the forty-ninth (49th) and fifty-fifth (55th) hours worked. However, the new language did not exclude regularly scheduled hours for eligibility for double time payment.

The Employer unilaterally determined that scheduled hours are not paid at double-time until fifty-five (55) hours have been worked in a week. Rather than using the method for calculating overtime eligibility that was utilized for twenty-three (23) years, the Employer decided that "the employee receives no premium payment under **Section 4.5** for hours that are part of the employee's basic 40-hour week." (**Joint Ex. 8, p. 2**)

---

[2] "In any calendar week" was replaced by "in a calendar week" but the provision has always been given the same meaning.

There is no evidence that a new method distinct from the method utilized over the past twenty-three (23) years for determining whether an employee is due premium pay after working forty-nine (49) hours and fifty-five (55) hours in a calendar week was negotiated between the parties. The first sentence of **Section 4.5** directs when premium pay is earned between forty-nine (49) and fifty-five (55) hours. Based on the interpretation that has always been given to the first sentence of **Section 4.5**, premium pay is earned, after forty-nine (49) hours have been worked. There is no exception for "regularly scheduled hours" or the employee's "regular tour". The Union's method of calculating overtime is based upon the custom and practice of the parties in interpreting the meaning of the first sentence of **Section 4.5**.

The Employer cannot unilaterally change the meaning of contract language that has been interpreted by the parties consistently for twenty-three (23) years without addressing the change at the bargaining table. There is no evidence that the Employer proposed or discussed a plan to exclude regularly scheduled tour hours from double-time payment.

The manner in which the Employer has been paying overtime denies employees who consistently work mandatory overtime, double time premium pay, until they work fifty-five (55) hours per week. In other words, the Employer's new way of calculating overtime results in no payment of two (2) hours for each hour worked, until an employee has worked fifty-five (55) hours, which the Union rejected in bargaining. The Employer should not be allowed to gain in arbitration what it was unable to gain through negotiations.

The Union's interpretation would lead to a just and reasonable result, while the

Employer's interpretation would result in an unreasonable result. Under the Union's interpretation, the Employer achieved significant cost savings from employees who worked voluntary overtime between forty-nine (49) and fifty-five (55) hours, because premium pay for those hours worked would be at one and one-half (1 ½) times the hourly rate, rather than two (2) times the hourly rate. Union employees gained the opportunity to volunteer for some overtime opportunities but not be compelled to work overtime in all instances. The Union's understanding of the provisions reflects a situation where both parties gained something and gave up something.

Under the Employer's interpretation, the Union not only gave up double-time for voluntary overtime after working forty-nine hours and double time for employees who are required to work, when the forty-ninth (49th) hour is passed during their regularly scheduled shift. Essentially, the Employer's interpretation results in implementation of the fifty-five (55) hour language that the Union rejected on four (4) occasions during negotiations.

The Union asks the Arbitrator to find that the Employer violated the collective bargaining agreement by failing to pay double –time to employees who passed the forty-nine (49) hour threshold during their regularly scheduled hours. Additionally, it asks that the Arbitrator order the Employer to do an accounting to find each and every incident where it wrongly denied paying double-time to an employee under the above circumstances. Finally, the Union notes that the parties agreed that the Arbitrator should retain jurisdiction over the appropriate remedy in this case.

SUMMARY OF EMPLOYER'S POSITION:

The Employer argues that **Section 4.5** of the collective bargaining agreement

establishes two forms of overtime. Paragraph 1) of **Section 4.5** defines "voluntary overtime" and paragraph 2) defines "mandatory overtime." The two forms of overtime opportunities are manifestly different that an employee's "tour", which the contract defines as "an employee's scheduled or assigned hours on a particular day." **Section 4.5** sets rates for premium pay for "voluntary" and "mandatory" overtime. The section does not address payment for an employees' regular scheduled "tour."

In a letter dated December 3, 2014, which was submitted into evidence as Joint Exhibit 8, at page 2, the Company position is explained:

> Based on the above, only those overtime hours worked beyond 49 hours (through 55), if voluntary, are paid at one and one-half times; and if mandatory overtime is worked, those hours are paid at two times the employee's wage rate. This is exactly the context and meaning of the verbiage contained in **Section 4.5**. *If an employee is working his/her regularly scheduled hours of work when 49 hours are exceeded, because the employee worked incidental, voluntary or mandatory overtime (as defined by Section 4.7) prior to reaching 49 hours in a calendar week, the employee receives no premium payment under* ***Section 4.5*** *for hours that are part of the employee's basic 40-hour week*[3]. The incidental, voluntary or mandatory overtime worked *prior to reaching 49 hours*[4] in a calendar week has already [been] paid at the appropriate premium rate, based on the applicable provisions of **Article 4.**

The Employer contends that the way it has calculated overtime does not violate any provision of the collective bargaining agreement. Also, the Union's position is

---

[3] Emphasis added.
[4] Emphasis added.

inconsistent with the unambiguous meaning of **Section 4.5** of the 2012 contract. The Employer has paid premium wages based on whether the time worked is considered voluntary or mandatory overtime. The Company has paid a premium of one and one-half (1 ½) times the hourly wage for voluntary overtime between 49 and 55 hours and has paid a premium of two times the hourly wage for mandatory overtime between 49 and 55 hours.

The new language of **Section 4.5** must be read in is entirety. While the first sentence which says "Premium shall be paid for each hour worked after forty-nine (49) hours in a calendar week is a "partial hold-over" from the first sentence of **Section 4.5** of the 2008 contract, it can only be understood in light of the following provisions setting different premium rates for overtime worked after the 49th hour in a calendar week, depending on whether the overtime is voluntary or mandatory. The Employer contends that the Union's reading of the first sentence in **Section 4.5** is out of context and inconsistent with the intentions of the parties.

Citing a prior arbitration award from 2006, the Employer argues that its' interpretation of **Section 4.5** is based upon clear and unambiguous language and should be upheld as the clear and unambiguous language in the prior grievance was upheld. There is no support in the contract for the position that regularly scheduled hours should be paid at double-time, if the employee has as already worked a cumulative total of 49 hours in the calendar week. The Employer adds that the Union is attempting to gain in arbitration what it was unable to gain through negotiations.

The Employer asks the Arbitrator to deny the grievance and uphold the plain language of the collective bargaining agreement.

OPINION:

The Union's interpretation of **Section 4.5** of the collective bargaining agreement is supported by a preponderance of the credible evidence. In this case, the plain language of the collective bargaining agreement constitutes the primary source of evidence. **Section 4.5** directs that once an employee has worked forty-nine (49) hours in a calendar week, the employee shall be paid at either the premium rate of one and one-half (1 ½) times each hour worked or two (2) times each hour worked, depending upon whether the overtime was voluntary or mandatory. Hours in an employee's "regular tour" that are worked by an employee, after the employee has worked forty-nine hours are not excepted from the overtime provision. **Section 4.5** directs that

For purposes of this Section, the following shall be included in computing the forty-nine (49) hours worked in a calendar week:

All actual work time

The section also directs that "*Premium shall be paid for each hour worked after working forty-nine (49) hours in a calendar week.*" Since premium shall be paid each hour worked after working forty-nine (49) hours in a calendar week, whether the hours worked are part of the employee's "regular tour" does not factor into the agreement. The collective bargaining agreement does not provide that "the employee receives no premium payment under **Section 4.5** for hours that are part of the employees basic 40-hour week." See **Joint Exhibit 8.** While the premium to be paid for each hour worked after working forty-nine (49) hours in a calendar week is dependent upon whether the hours worked are mandatory or voluntary, once the forty-nine (49) hour threshold is passed the employee is to receive premium pay for each hour worked. The requirement that each hour worked

after forty-nine hours in a calendar week be compensated at premium rates eliminates the possibility that straight time can be paid for any time worked beyond the forty-nine (49) hour threshold.

The Union's interpretation of **Section 4.5** is supported by twenty-three years of custom and practice. The parties have consistently interpreted the directive that "*Premium shall be paid for each hour worked after working forty-nine (49) hours in a calendar week*" to mean all hours, including regularly scheduled tour hours, worked after forty-nine (49) are to be paid at a premium rate. The change to **Section 4.5** in the 2012 agreement relates only to the rate of premium to be paid, not to the method used to determine whether premium pay has been earned. Moreover, the sentence is not being taken "out of context" by the Union. The directive is "the context" wherein the parties agreed that either a time and one-half pay premium or a double time premium shall be paid.

When an employee has worked forty-nine hours and has hours remaining on his regularly scheduled tour, the remaining hours on his tour shall be compensated at either the premium rate of time and one-half or double time. If the employee is required/expected to work the balance of his tour and he has already worked forty-nine hours, the time through fifty-five hours shall be compensated at the double time rate. If the employee has been given the option of not completing the scheduled tour, the time through fifty-five hours shall be compensated at the rate of time and one-half.

Grievant, Bryan Running, a Customer Service Representative from Kent Washington produced time records wherein he was not compensated at the double time rate for regular tour hours he worked, after he worked forty-nine (49) hours in a calendar

week. Since Mr. Running was in all instances required to complete his regular tour, he should have been paid double time for all of the hours he worked beyond forty-nine (49) hours through fifty-five (55) hours.

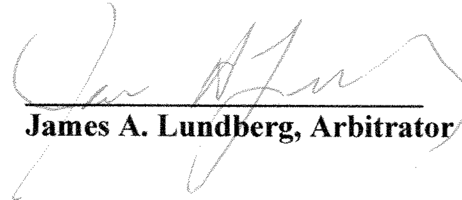
AWARD:

1. ***The Arbitrator finds that the Employer violated Section 4.5 of the 2012 collective bargaining agreement by failing to pay employees at the appropriate premium rate for each overtime hour worked, after working forty-nine (49) hours through fifty-five (55) hours in a calendar week.***
2. ***The Employer is directed to review and recalculate all bargaining unit employees wage statements, wherein employees worked more than forty-hours from the date of the first grievance that ultimately became this regional grievance to the present.***
3. ***Premium pay shall be paid for each hour worked after forty-nine and through fifty-five hours in a calendar week shall be made without regard to whether the hours worked after forty-nine hours in a calendar week were part of the employee's regularly scheduled tour. If hours worked after forty-nine hours in a calendar week are part of an employees regular tour and the employee is required to complete the tour, the hours shall be deemed mandatory and premium pay shall be at the rate of two (2) hours pay for each hour worked. If the employee is given the option of not completing the tour, the hours shall be deemed voluntary and premium pay shall be at the rate of one –half (1 ½) hours pay for each hour worked.***
4. ***The employer is directed to follow the above standard for all future calculations***

of premium pay for employees who have worked more than forty-nine hours through fifty-five hours in a calendar week, under the 2012 collective bargaining agreement.

5. *As requested by the parties the Arbitrator shall retain jurisdiction to help the parties resolve and disputes over the remedy.*

Dated: November 12, 2015



James A. Lundberg, Arbitrator