BEFORE
ANDREW M. STRONGIN
ARBITRATOR

June 30, 2022

In the Matter of the Arbitration between-	:	
	:	
ARCELORMITTAL USA	:	
	:	**Grievance No. 0959**
-and-	:	
	:	
USW LOCAL 979	:	Case 127

APPEARANCES:

For the Employer:

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For the Union:

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This grievance concerns the proper overtime pay treatment of grievant James Mealler, employed as a Service Technician in the Cleveland Works' Hot Mill, for the week ending December 4, 2021. Specifically, the parties dispute whether grievant properly was paid a total of eight hours of overtime for the week as the Company maintains, or whether he should have been paid 24 hours of overtime for the week as the Union maintains.

BACKGROUND

Pursuant to the parties' Basic Labor Agreement ("BLA"), the normal work week for unit employees, referenced as a 5/2 schedule, is comprised of five consecutive eight-hour workdays beginning on the first day of any seven-day consecutive period. Sec. 5.C.1(a). The weekly work schedule for employees working a 5/2 schedule is to be posted no later than 2 PM on the Friday of the week preceding the week in which it becomes effective. Sec. 5.C.1(b). So far as the record shows, these posted schedules routinely reflect certain planned or anticipated changes to employees' normal schedules, such as pre-scheduled vacations – which may be taken as multi- or single-day ("SDV") – recognized holidays, and overtime.

For normal 5/2 scheduled employees, Sec. 5.D.2 provides for the payment of overtime for, among other bases, hours worked in excess of eight in a workday or 40 in a payroll week. By special agreement of the parties, and irrespective of this 8/40 overtime rule, "shifts not included on the originally posted schedule shall be considered overtime shifts." Sec. 5.C.1(d).

In addition to the foregoing "normal" overtime provisions, and for many years, the BLA also has provided for the establishment of alternative work schedules ("AWS"). Sec. 5.C.6. Specifically, the Company maintains the right to

adopt certain alternative schedules "with the approval of the Local Union President/Unit Chair and the Grievance Chair and sixty percent (60%) of the Employees who are impacted by the alternative schedule." So far as the record shows, there are numerous variations of AWS established at the several locations covered by the BLA pursuant to this provision, and each variation of AWS has an established rotation.

The parties negotiated a side letter on Payroll Guidelines years ago, now set forth as an attachment to the BLA. In addition to providing guidance on overtime payment for those employees working normal 5/2 schedules, the parties agreed to three special provisions for those working AWS schedules, conditioned on the understanding that if an AWS schedule "does not meet the criteria then it must follow the rules of a normal workday and workweek, and the overtime rules outlined in Article Five – Section D will apply." The AWS guidelines provide first that overtime ordinarily is to be paid "[f]or hours worked in excess of the agreed to (ten (10) or twelve (12) hours) AWS hours in a workday." Second, as is the case with the overtime rule for 5/2 schedules, the AWS guidelines provide for payment of overtime for all "hours worked after reaching forty (40) hours in a payroll week." Third, and of particular relevance here, the AWS guidelines provide for payment of overtime for, "All hours worked in excess of normal agreed to AWS hours in a payroll week, provided the employee has worked as scheduled."

Finally, as to overtime entitlement for those employees working either a normal or AWS schedule, the Guidelines provide that "holidays whether worked or not shall be counted as time worked for the purpose of calculating overtime." The Guidelines makes no such provision for SDV.

Turning now to the facts of this case, on the week in question grievant was assigned to an AWS, by which he normally would have worked a 12-hour shift

on Sunday, Monday, and Friday night (for Saturday), for a total of 36 weekly AWS hours payable at his regular straight time rate. As grievant's posted schedule for the week shows, however, grievant's normal agreed to 36-hour week was to be affected that week by a scheduled vacation and assignment of two additional shifts:

Date	Schedule	Hours
Sunday, 11/28	**SDV**	**8**
Monday, 11/ 29	**6A-6P**	**12**
Tuesday, 11/30	**6A-6P**	**12**
Wednesday, 12/1	**6A-6P**	**12**
Thursday, 12/2	**Off**	**0**
Friday, 12/3 (for Saturday 12/4)	**6P-6A**	**12**

The parties' dispute centers on the pay impacts of grievant's use of the SDV on Sunday, November 28, and his assignment to the two additional 12-hour shifts that week, which he worked on Tuesday and Wednesday, November 30 and December 1.

As matters stand, the parties' positions on proper pay treatment are as follows:

Date	Company Position on Pay	Union Position on Pay
Sunday, 11/28	**8 Hours Vacation**	**Agreed**
Monday, 11/29	**12 Hours Regular**	**Agreed**
Tuesday, 11/30	**12 Hours Regular**	**12 Hours Overtime**
Wednesday, 12/1	**12 Hours Regular**	**12 Hours Overtime**
Thursday, 12/2	**n/a**	**n/a**
Friday, 12/3 (for Saturday 12/4)	**4 hours Regular; 8 hours Overtime**	**12 Hours Regular**

Grievance Committee Chair Anthony Panza testifies that grievant worked as scheduled for the week in question – he was off on an SDV on Sunday but worked the other two days of his agreed to AWS schedule – and therefore should have been paid overtime for the extra Tuesday and Wednesday shifts that were not part of his regular AWS schedule. According to Panza – and it is undisputed – the Company historically paid overtime for such extra shifts up until November 2021 at least in the Hot Mill and Finishing Departments of the Cleveland Works, if not elsewhere. Panza testifies that such pay practice survived changes in the Company's payroll administration, including through the use of a manual code by payroll administrators – known as a "MOOT" code – to override the new electronic system, Day Force.

Further, Panza testifies that at the Step 2 meeting, the Company agreed with the Union's professed understanding that overtime historically has been paid for such shifts and never said at either the Step 2 or Step 3 meeting that the practice has been limited to the Hot Mill. He testifies that this was confirmed by Hot Mill Payroll Administrator Lillian Ross, who ultimately told the Union that she was newly instructed in November 2021, contrary to earlier instruction from her predecessor that she followed throughout her tenure, that SDV days take an employee out of AWS overtime rules and into "normal" overtime rules. Panza testifies that if an SDV day takes an employee out of the AWS overtime rules as the Company now appears to argue, then the Company must revert to all of the non-AWS overtime rules, meaning it must pay overtime not just for those hours worked in excess of 40 in a week, but also all hours worked in excess of eight within a workday, which in grievant's case would have totaled 16 for the week, not just the eight for which he has been paid.

Panza notes, too, that employees pick their SDVs long in advance and rely on the pay rules as they have been administered for years. To deprive them of expected overtime now, without notice or bargaining, shortchanges them and is improper.

Finally, Panza testifies that the Union did not request any payroll records to support its position here because the Company admitted during the earlier steps of the grievance procedure that it had paid overtime as the grievance asserts.

In support of Panza's testimony regarding the scope of the Company's historic payment of AWS overtime, Local Union Vice President Sam Moyer testifies that the parties reached a settlement regarding the same issue in the Finishing Department. According to Moyer, the parties agreed that taking a SDV would not remove an employee from AWS overtime rules and the payment of overtime for working shifts outside the normal AWS schedule, whereas taking a sick day and missing a regular AWS turn would take the employee out of AWS overtime rules.

Mike Mormile, former Contract Coordinator for the Local, testified to his experience establishing the AWS overtime rules alongside the Company's counterpart, Mickey Day, back in 2003. According to Mormile, the Side Letter was intended to be simple to understand and was the product of substantial give-and-take. The Union, he says, accepted the establishment of AWS schedules and ceded the right to the 40-hour guarantee and plus-eight daily overtime as a quid pro quo for payment of overtime for all shifts worked outside the applicable AWS schedule. He agrees with Moyer that taking an SDV does not take an employee out of the AWS overtime rules, whereas taking a sick day that causes a missed AWS turn would.

The Company's Area Manager of Human Resources and Labor Relations, Janet Jordan, acknowledges that the payroll administrator for the Cleveland Works' Hot Mill in fact was paying overtime as the Union says until

corrected in November 2021. Jordan explains that after noting what she regarded to be overtime anomalies in the department – including instances in which employees were being paid weekly overtime despite working fewer than 40 hours in a week, *e.g.*, an employee scheduled for only 12 hours in a week received 48 hours of overtime – she discovered that unworked vacation hours were being counted as worked for purposes of overtime calculations. Upon further investigation, Jordan learned that other locations covered by the BLA were not calculating overtime as was the Cleveland Works Hot Mill.

Relating to the specific facts of this case, Jordan testifies that because grievant took an SDV on Sunday, he was taken out of the AWS overtime provision and entitled only to over-40 weekly overtime that week per Sec. 5.D.2(b), which was not earned until after his fourth hour worked on Friday. Further, Jordan asserts that grievant's Tuesday and Wednesday shifts, which were not part of grievant's normal AWS turn that week, nevertheless were not "callout" days, and therefore not guaranteed overtime per Art. 5.C.1(d).

Jamie Wolf, Manager of Payroll and Projects, likewise testifies that other BLA locations were not calculating overtime as was the Cleveland Works Hot Mill, and notes also that the BLA provides that holidays, unlike vacations, expressly are counted for overtime purposes even if not worked. She testifies, too, that it makes no contractual difference whether the vacation hours relate to a normal 5/2 or AWS schedule: either way, vacations are not "worked" for overtime calculations purposes.

Finally, Michelle Hattendorf, Senior Labor Relations Representative at relevant times, testifies that a MOOT code would need to be used to override the computerized system, which is not programmed automatically to provide overtime in circumstances such as grievant's, suggesting the understanding that overtime

normally is not expected to be paid in this circumstance. She testifies that, to her knowledge, there have been seven instances since 2017, spread between at least two departments, in which employees have been paid overtime in weeks such as the one in question. In so testifying, Hattendorf agrees that grievant's Tuesday and Wednesday shifts were not part of his normal AWS schedule. As she understands the overtime provisions, if grievant had worked his Sunday instead of taking it as an SDV, he would be entitled to overtime for the Tuesday and Wednesday, but because he did not work that day, he did not "work as scheduled."

THE PARTIES' POSITIONS

The Union contends that the BLA provides that grievant is entitled to overtime payments for the hours he worked on Tuesday and Wednesday of the disputed week, as all those hours were in excess of his normal AWS schedule. The Union argues that grievant's use of a SDV on Sunday of that week has no bearing on his overtime entitlement, as he worked all hours for which he was scheduled and always has been paid overtime as the Union claims, pursuant to a contractual understanding and practice that the Company acknowledges it consistently followed at least at the Cleveland Works Hot Mill and Finishing departments until it unilaterally altered course in November 2021. The Union adds that denial of overtime for the hours worked on those extra shifts is a disincentive to accepting them, contrary to the parties' shared intention when establishing AWS schedules and overtime rules.

The Company contends that neither the law nor the BLA requires payment of overtime for the hours grievant worked on Tuesday and Wednesday of the week in question. The Company argues that, unlike holidays, vacations are not

"worked," and therefore not countable towards overtime calculations. Thus, the Company argues that grievant did not "work" his regular schedule. Therefore, the Company asserts, the AWS overtime rules do not apply and grievant's situation is governed by the normal 5/2 over-40 overtime rule. The Company characterizes this approach as Company-wide and consistent with the clear language of the BLA, and argues that there is no established practice requiring the Company to make permanent what it characterizes as a limited series of mistakes at one department, or at most two, at one of multiple locations covered by the BLA. The Company also argues that the Tuesday and Wednesday shifts were on the posted schedule, and therefore not subject to automatic overtime under Art. 5.C.1(d).

DISCUSSION

At issue in this proceeding is the narrow question whether grievant is entitled to overtime payments for his "hours worked" on the Tuesday and Wednesday of the workweek in question. That question must be answered in light of the overlapping patchwork of provisions addressing the payment of overtime for employees working both normal and AWS schedules, found both in the main provisions of the BLA and the appended Guidelines, together with evidence that historic understanding of the relevant provisions at the Cleveland Works is countered by a contrary understanding at other locations covered by the BLA. For the reasons that follow, the Arbitrator finds the Union's proffered interpretation of the applicable provisions to be the more reasonable and therefore that grievant is entitled to be paid overtime for the 24 hours he worked on Tuesday and Wednesday of the disputed workweek, as grievant worked as scheduled that week and those 24 hours were in excess of his normally agreed to weekly AWS hours.

As the several provisions of the BLA and Guidelines establish, overtime can be earned in a number of different, defined circumstances, including by exceeding a set number of hours in a workday and/or workweek, or by working a sixth and/or seventh consecutive day, the specific rules for which can depend on whether the employee works a normal or AWS schedule. Thus, as an initial matter in determining overtime entitlement, it must be determined whether the employee is working a "normal" schedule under Sec. 5.C.1 or an AWS under Sec. 5.C.6.

Here, grievant's regular "agreed to" schedule is an AWS schedule consisting of 12-hour shifts on Sunday, Monday, and Friday night (for Saturday), normally subject to AWS overtime rules. The parties differ over the question whether grievant's use of an SDV in lieu of working his regular Sunday shift operated to remove him from the AWS overtime rules set forth in the Guidelines and placed him, instead, under the "normal" overtime rules of Sec. 5.D. As indicated, the Guidelines provide that if an AWS schedule "does not meet the criteria, then it must follow the rules of a normal workday and workweek, and the overtime rules outlined in Article 5 – Section D will apply." On this initial question, the Union has the stronger position that grievant's schedule for the disputed workweek is subject to the AWS overtime provisions of the Guidelines, the presumptive rule for those working AWS schedules. Nothing in the language of the BLA or Guidelines, even as interpretation is aided by the Company's testimony, states or reasonably implies that use of an SDV signifies for purposes of the Guidelines that a schedule somehow fails to "meet criteria" so as to remove it from the AWS overtime rules.

Thus, as an employee working an AWS schedule consisting of three 12-hour daily shifts on Sunday, Monday, and Friday (for Saturday), for a total of 36 weekly hours, subject to the AWS overtime rules of the Guidelines, grievant could earn overtime in one of three distinct ways:

- Grievant could work in excess of his agreed to 12 AWS hours in a single workday, which he did not during the workweek in question;

- Grievant could work in excess of 40 weekly hours, which he indisputably did; and/or,

- Grievant could work "in excess of normal agreed to AWS hours in a payroll week," which in his case is defined as 36 weekly AWS hours spread over three 12-hour daily shifts, provided he "worked as scheduled." It is this provision that serves as the centerpiece of this dispute, requiring determination of the number of hours grievant "worked" during the disputed workweek and, separately, whether grievant worked "as scheduled."

For purposes of the applicable overtime provision, grievant worked a total of 48 hours during the disputed workweek, spread over four workdays falling on Monday, Tuesday, Wednesday, and Friday (for Saturday). Grievant's SDV on Sunday, November 28 – the first day of the workweek in question – does not count as time worked for the purpose of calculating overtime. In common usage, vacations are earned and paid, but they are not normally considered to be "worked." Also, other negotiated terms of the BLA demonstrate conclusively that the parties know how to count such non-worked time toward overtime calculations: In the immediately preceding provision of the Guidelines, which echo the provision of Sec. 5.D.3, the parties establish that, "Holidays whether worked or not shall be counted as time worked for the purpose of calculating overtime." That the parties did not express a similar rule for SDVs is conclusive evidence that they did not intend SDVs

to be considered as worked for the purpose of calculating overtime. This finding, however, is not determinative of grievant's overtime entitlement for the week.

Notwithstanding the finding that grievant did not work on Sunday, November 28, the express and unambiguous contractual precondition to overtime entitlement is not whether grievant worked his regular agreed to AWS schedule without variation, but whether he worked, literally, "as scheduled." This record shows, without any dispute, that he did work as scheduled. In the parties' own usage, SDVs must be scheduled in advance through a formal scheduling process, and once granted, employees are scheduled off and not expected to work on an SDV. In common parlance and as the BLA makes plain, there is an established difference between an employee's "normal," or in the case of an AWS employee, "agreed to," schedule, and the actual weekly schedule posted by the Company. Posted schedules can and do reflect departures from the norm, whether as originally posted or changed after posting. This separate meaning is express in the Guidelines, which in the same sentence refer separately both to the "agreed to AWS hours" and working "as scheduled."

Grievant's posted schedule for the disputed workweek demonstrates conclusively that what is posted is not necessarily the same as what is normally agreed for AWS employees like grievant: For the week in question, grievant's posted schedule included a prescheduled SDV on Sunday, for which he was not expected to work, his regular Monday AWS shift, two additional 12-hour shifts on Tuesday and Wednesday that are not part of his normal "agreed to" 36-hour workweek, and his regular Friday (for Saturday) AWS shift. Grievant worked the entirety of that schedule and therefore cannot reasonably be regarded as having failed to work "as scheduled."

It remains to identify the hours grievant worked in excess of his normal agreed to AWS hours in the payroll week. The Union seeks a total of 24, comprising all hours worked by grievant on Tuesday and Wednesday, all of which hours fell on workdays that are outside of and not a part of his normal 36-hour weekly AWS schedule. The Union's proffered interpretation is clear and workable and consistent with Mormile's testimony regarding the intended meaning of the provision; other contractual provisions without rendering any of them superfluous; the limited albeit undisputed evidence of practice offered from the Cleveland Works; and bolstered considerably by the testimony of the Company witness, recounted above, that if grievant had worked his Sunday instead of taking it as an SDV, he would be entitled to overtime for the Tuesday and Wednesday. As discussed, grievant's use of an SDV on Sunday, November 28, does not preclude him from receiving AWS overtime for all 24 of his Tuesday and Wednesday hours.

The Company's contrary understanding is undermined by an apparent internal inconsistency. If it is true that grievant should have been removed from the AWS overtime rules and treated under the "normal" rules, then seemingly he should have been paid overtime for all hours worked over eight in a workday and 40 in the workweek, consistent with Secs. 5.D.2(a) and (b). Payment of such daily and weekly overtime, the Arbitrator observes, would not conflict with the non-duplication rule of Sec. 5.D.4. Thus, if the Company were correct that grievant's overtime entitlement on the week in question was covered by the normal terms of Sec. 5.D, then grievant would have been entitled to four hours of overtime for each of the four 12-hour shifts he worked that week, but by the Company's estimation, he was only entitled to the over-40 weekly overtime. The Arbitrator cannot reconcile the Company's application of the over-40 rule but exclusion of the over-eight rule with the language of the BLA.

Further, the fact that a MOOT code would need to be used to provide for payment of overtime in this case does not persuade the Arbitrator to a contrary result. As the record shows, MOOT codes are available for provision of overtime in circumstances where the automated system is not programmed to provide it, signifying an expectation that complete automation of overtime coding is not possible. As the Company witness admits, MOOT codes routinely if infrequently were used at the Cleveland Works to permit the payment of overtime under the circumstances presented by this case. The use of such codes, as designed, is not sufficient to overcome the strength of the Union's presentation.

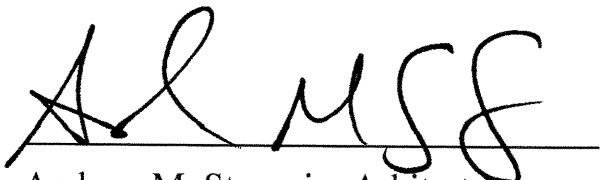
In crediting the Union's position over the Company's, the Arbitrator is mindful of the Company's concern that it is left in scenarios like this to pay overtime to employees who do not exceed 40 hours in a week. The Company identifies this as "anomalous," but the contract does not include any overarching 40-hour contractual precondition to payment of overtime. Overtime is payable in a variety of scenarios without regard to the total weekly hours worked by an employee, including when an employee exceeds a certain number of hours in a day, or works a sixth or seventh day, or works an added shift.

Finally, it bears note that this dispute arises at the Cleveland Works, where the parties agree they always provided overtime as the Union seeks under the circumstances of this case prior to the Company's unilateral determination in November 2021, without notice to the Union, that such previously shared understanding of the requirements of the Guidelines is inconsistent with what is described but not proved to be the pay practice at other facilities covered by the BLA. This Award holds only that, for the above-discussed reasons, the BLA and the Guidelines require that grievant, who worked as scheduled at the Cleveland

Works during the disputed workweek, be paid overtime for all 24 hours that he worked in excess of his normally agreed to AWS hours.

DECISION

The grievance is sustained. Grievant shall be paid overtime for the 24 total hours he worked on Tuesday, November 30 and Wednesday, December 1, which amount shall be offset by the eight hours of overtime he erroneously was paid for Friday, December 3. The Arbitrator retains jurisdiction to resolve any questions that may arise over application or interpretation of the remedial provisions of this Award.



Andrew M. Strongin, Arbitrator

Takoma Park, Maryland