BUYING EMPLOYEES' TIME: GUARANTEED PAY UNDER COLLECTIVE AGREEMENTS

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I. INTRODUCTION

When an employer and a union enter into a collective bargaining agreement, they anticipate that disputes will arise over the interpretation and application of the terms they have set to order their workplace. Some provisions are ambiguously phrased, either by design or inadvertance. Established practices may not be stipulated in the contract, although one or both parties may expect that they will continue unaltered. Some issues are purposefully avoided, postponed for later resolution if they should arise during the term of the contract. Disputes are foreseeable because management will continue to manage and make decisions which will affect important employee and union interests. The express agreement will not always supply a clear answer to these controversies.

Almost universally, parties to a collective agreement establish an arbitration procedure for the resolution of the disputes that do arise during the contract term. Labor arbitrators selected by the parties play an essential role in the industrial relations system. By resolving grievance disputes, arbitrators facilitate the peaceful resolution of workplace controversies. The availability of arbitration secures the promises made during negotiations.

In resolving grievance disputes, labor arbitrators are guided by a well-established body of arbitral principles.¹ Labor and management can anticipate that their chosen neutral will decide their dis-

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pute in accordance with these known standards of adjudication. This common law of the labor agreement can be restated and critically analyzed.

The typical collective bargaining agreement is a complex document with provisions covering all forms of compensation, rules for allocating available jobs, management prerogatives, and union status and security. For example, parties commonly include provisions in their agreement guaranteeing employees a minimum amount of work or pay in specified situations. The two most common types of guaranteed pay provisions are those for call-in pay and reporting pay. Examining the treatment of disputes arising under guaranteed pay provisions will demonstrate the principled basis of arbitral jurisprudence.

This Article will address the most significant issues that arise under call-in pay and reporting pay clauses. After discussing in general the different situations covered by the two types of guarantee clauses, the Article will address problems concerning the application and calculation of pay under a call-in provision. The following sections examine qualification for reporting pay, the interpretation of contractual exceptions to the guarantee, and management's obligation to notify employees not to report if it wishes to avoid liability under a guaranteed pay clause.

II. GUARANTEED PAY PROVISIONS IN GENERAL

Normally an employer need pay employees only for work they actually perform or for time they are obligated to follow the employer's work direction. Nevertheless, an employer and a union may agree that under certain circumstances employees should be guaranteed a minimum number of hours of work or pay. These guarantees are included in the bargaining agreement as call-in pay and reporting pay clauses. Under these provisions, employees

2. See infra notes 8-22 and accompanying text.
3. See infra notes 23-39 and accompanying text.
4. See infra notes 40-48 and accompanying text.
5. See infra note 49-64 and accompanying text.
6. See infra note 65-169 and accompanying text.
7. See infra notes 170-187 and accompanying text.
10. Reporting pay sometimes is referred to as "show-up pay." See National Homes

who are called in to work by their employer or who report at their scheduled time are guaranteed pay for a specified minimum number of hours—typically four hours—even if there is insufficient work for all of those hours. Many clauses also stipulate exceptions to the reporting pay guarantee and specify a procedure for notifying employees not to report or to report at other than scheduled times.

Arbitrator Dallas Young explained the genesis of guaranteed pay provisions in Niagara Machine & Tool Works. The "long-accepted thought [was] that the non-working-hours period of an employee's life was unimportant." Young elaborated:

What difference did it make if he spent thirty minutes getting to the place at which picks would be made from a lineup and, not being picked for work, he spent another thirty minutes getting back home? He could repeat the process again tomorrow, couldn't he? And, especially when there were large numbers of unemployed persons[,] if he did not come back on his own[,] wouldn't others be there? What difference did it make if a supervisor failed to tell a man, before his shift ended one day, that he would not be scheduled for the following day if he would come in and be told that morning? The idea that a man's free time should not be taken lightly, or be abused by others, had a long gestation period.

Guaranteed pay provisions were demanded by unions to redress the unfairness of this uncertainty. Call-in and reporting pay clauses are now included in a large majority of collective agreements.

Call-in pay and reporting pay situations should be distinguished. A call-in pay clause is applicable in a situation where management directs an employee to report for work at some time other than his regularly scheduled time. Management typically
uses a call-in procedure in an emergency situation. Call-in denotes an unusual, unanticipated, or irregular circumstance. It is the antithesis of a regular scheduled shift. For example, if maintenance employees who regularly work the 7 a.m. to 3 p.m. shift are called in at midnight to repair a malfunctioning machine, the call-in pay provision, and not the reporting pay provision, would be applicable.

In a call-in situation, management disturbs the employee’s expected leisure time. In the absence of contract restriction, management generally has the right to direct the working forces, including the prerogative to call in an employee at any time. A call-in provision discourages management’s use of this prerogative. Under such a provision, management may purchase the employee’s off-duty hours only by guaranteeing the employee a minimum amount of pay for coming in to work at an unscheduled time. Many call-in guarantee clauses also require that the employee be compensated at premium rates.

A reporting pay provision, on the other hand, contemplates a situation in which employees who have reported for work at their regularly scheduled time are sent home because of a lack of work, either before performing any work or at some point during the course of their regular shifts prior to the expiration of the guarantee period. For example, if maintenance employees report for their 7 a.m. to 3 p.m. shift but are sent home at 10:00 a.m. because of a power failure in the plant, reporting pay would be due under a standard reporting pay clause.

In a reporting pay situation, management disturbs the employee’s expectation of work during regularly scheduled hours. Reporting pay clauses typically provide that an employee who reports for work will be guaranteed a certain number of hours’ work, or will receive a certain number of hours’ pay in lieu thereof, at regular rates of pay. One purpose of a reporting pay provision is to compensate employees for the expense and inconvenience incurred in reporting to work. The most common contract formulation provides for a four-hour reporting pay guarantee at the regular rate of pay.

An employer should normally be able to foresee when the full complement of employees will not be needed. If machinery malfunctions or raw materials do not arrive, management may know that there will not be sufficient work to occupy the regular work force productively. In such circumstances, prudent management will attempt to notify the unneeded employees not to report. If the employer fails to manage properly the work to be performed so that employees are not given timely notification of a change in scheduling, a reporting pay agreement will mandate pay for those employees who report for work and find none available.

Unforeseeable circumstances beyond the control of management may cause a lack of work. If a machine suddenly breaks down just before the commencement of the shift or if the independent trucker carrying raw materials has an accident on the road that morning, management cannot foresee or avoid the lack of work. Parties to a collective bargaining agreement generally recognize these unusual situations—where it cannot be said that the employer mismanaged the scheduling of work—by including express exceptions to the reporting pay clause. By agreeing to exceptions from the reporting guarantee, “the workers have agreed to share some of the risks of doing business.”

III. CALL-IN PAY PROVISIONS

A. Application of Call-In Provisions

Employers and employees generally anticipate that work will be performed within regularly scheduled shifts. Work of an unusual or emergency nature may require use of employees at times

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19. Monsanto Research Corp., 70 Lab. Arb. (BNA) 530, 532 (1978) (Gibson, Arb.); see also Lebanon Steel Foundry, 43 Lab. Arb. (BNA) 1052 (1964) (Crawford, Arb.); General Fin. Corp., 3 Lab. Arb. (BNA) 653, 655 (1946) (Updegoff, Arb.) (reporting pay provisions are “calculated to meet a longstanding complaint of workers that sometimes they are compelled to waste time and carfare in reporting for work when the latter was not available.”).
20. The Bureau of National Affairs reports that 70% of all reporting pay clauses provide for a four-hour guarantee. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) § 934 (1983).
other than their normal shifts, and contractual call-in provisions may be applicable in such situations. "[I]n essence 'call-in' pay represents in a very real sense the price of availability" outside the employee's regular shift.23 Parties anticipate that call in pay will be due in the typical situation where an employee is called in to complete emergency work and then returns home for some period of time prior to returning to work for his regular shift.24 Call in pay thus compensates the employee for the inconvenience of making an extra unscheduled trip to work.25

Most call in pay grievances arise in situations that vary from the typical off-shift call in. These cases usually involve the choice between compensating employees by means of call-in pay with a guarantee or by overtime pay without a guarantee. The arbitrator's primary guide must be the parties' contract, but agreements do not always provide an adequate roadmap. Moreover, call-in provisions are not fungible; the specific language used by the parties must be closely examined in order for the arbitrator to assess their intention accurately.26

Consider first the common case of the employee who is directed during his regular shift to work extra hours after his shift. This is overtime work and not a call-in. What if the employee has clocked out, but is still at the plant when asked to perform work? Does the call-in provision apply? The answer is that "[o]ne cannot be called-in to a place where he already is."27 The call-in provision should apply only when the employee is called to work from a place away from the Company's premises.28

A more difficult problem arises when the employee is contacted while off-duty and directed to report to work before his regular reporting time. The employee begins work early, does not leave the premises, and continues to work through his regular shift. Is this an overtime or a call-in situation? Some arbitrators have reasoned that since an extra trip to the plant was not required, the call-in provision is inapplicable.29 There is, however, a second and more fundamental rationale for the guarantee clause—to compensate the employee for the sudden, unexpected and unscheduled use of his leisure time. An employee who is contacted away from the plant during his off-duty hours and is directed to report early is entitled to call-in pay.30

When an employee reports for work, he anticipates a normal shift consisting of a predetermined number of hours. Having reported, the employee also knows that, unless the collective agreement makes overtime voluntary, the employer may extend that shift into overtime hours. While the employee certainly expects leisure hours to follow the completion of the normal shift hours, that expectation is conditioned by the possibility that the employer may order the employee to work overtime. By comparison, it can be posited that the employee's expectation of a certain number of leisure hours until work begins again becomes fixed once he leaves work. The physical act of leaving the workplace has great significance. Now the employee's time is his own. The employer can disturb this expectation at a price, that is, at the cost of the guarantee under the call-in provision.

On the other hand, when an employee is notified during working hours to report early the following day, the pre-shift work is "scheduled" or "prearranged" and does not constitute a call-in "upon the spur of the moment."31 The employee does not leave work with the same expectation of a period of undisturbed leisure until the next period of work begins. The scheduled pre-shift work presents an overtime situation, not a call-in situation, and the call-in pay guarantee is not applicable.

In resolving the overtime/call-in conflict, an arbitrator must focus carefully on the terms of the contract.32 For example, in Morton-Norwich Products, Inc.,33 Arbitrator James Cox applied a call-in provision which stated: "An employee called in one hour or less

31. Id.
32. See Whippamomy Paper Board Co., 69 Lab. Arb. (BNA) 1247, 1249 (1977) (Sirefman, Arb.) (call-in provision "is clearly and distinctly worded, and stands separately and discretely as an additional pay requirement.").
33. 70 Lab. Arb. (BNA) 940 (1978) (Cox, Arb.).
before his regular shift shall be considered as working ordinary overtime. In upholding the grievance claiming call-in pay for an employee summoned to work almost two hours before her shift, the arbitrator reasoned that, under the clause, “[a] call in prior to the one hour period is, by implication, compensated by payment of the call in allowance.”

Not all arbitrators fully appreciate the importance of fidelity to the contract. For example, Arbitrator Harold Klaiber in Furr’s Inc. that the call-in guarantee at premium rates was not applicable when employees volunteered to report on an unscheduled day when contacted off-duty by their employer. He reasoned that the volunteers were not “inconvenienced” and, therefore, the call-in clause did not apply. His constricted reading of the guarantee clause is questionable. Call-in pay should not necessarily be tied to a showing of inconvenience. Although parties certainly anticipate that a call-in situation will be inconvenient to most employees, the terms of the call-in clause do not limit applicability to reluctant employees. There would be no reason for labor and management to reserve the guarantee for those who valued unpaid leisure time more than a work opportunity. An employee’s willingness to accept the opportunity to earn additional money at premium rates should not result in forfeiture of a bargained-for guarantee. The parties have set the terms of minimum payment for the purchase of unscheduled off-duty work, and the arbitrator should apply that bargain.

B. The Calculation of Call-In Pay

Disputes over the calculation of the amount of call-in pay due an employee who is directed to report early have produced considerable confusion and numerous arbitration decisions. The typical case involves the employee who works a few hours—but not the full guarantee period—prior to the commencement of his regular shift and continues to work through his regular shift. As discussed above, the call-in provision, and not the overtime provision, is applicable when the employee had not been scheduled to start work early. Is the employee entitled to the full guaranteed number of hours at the premium rate? Should the employee, in addition to the guarantee, receive eight hours’ pay at regular rates for completion of his normal shift?

Some arbitrators have ruled that the called-in employee should receive his normal pay for his regular shift plus pay at the premium rate specified by the call-in provision only for the hours actually worked prior to the shift. For example, in Spreckels Sugar Co., Arbitrator Clarence Updegoff interpreted a clause which provided that a called-in employee “shall be guaranteed not less than four (4) hours’ compensation at one and one-half times his straight-time rate . . . .” The grievant was called in to work two hours before the start of his shift and then worked his normal eight-hour shift. He was paid at time-and-a-half for his first two hours of work and regular pay for the eight hours of his regular shift. The Arbitrator ruled that the grievant’s total of eleven hours of pay satisfied the guarantee of not less than six hours’ pay. This narrow reading of the call-in guarantee shortchanged the employee and diminished the value of the negotiated clause. The called-in employee legitimately expected that four hours of his work would be paid at premium rates. Under Arbitrator Updegoff’s approach, only two hours were paid at those rates.

At the other extreme, some arbitrators have required payment of the full guaranteed period at the premium rate provided in the call-in clause plus eight hours of pay at regular rates for the employee’s shift work. They have reasoned that if the employee had finished earlier and been able to leave work and return for a full shift, the employee would have been entitled to the full guarantee plus his normal eight-hour pay. The fact that the time periods fortuitously overlapped should not disadvantage the employee. This approach is also troubling. In effect, the employer is required to

40. See infra notes 29-39 and accompanying text.
42. 47 Lab. Arb. (BNA) 720 (1966) (Updegoff, Arb.).
43. Id. at 721.
44. Id.
45. See id. at 723.
pay the employee two-and-one-half times the normal rate of pay for work performed during the regular shift until the completion of the guarantee period. In the absence of clear contract direction that this mode of compensation was the parties' intention, this approach should be rejected as punitive.

Unless the parties' call-in provision stipulates how payment is to be calculated, the preferable approach in calculating pay for the pre-shift call-in is to require payment of the full guarantee period at premium rates with the remaining hours of the employee's regular shift paid at regular rates of pay. The arbitrator in this type of situation must interpret and apply both the call-in pay and regular pay provisions. Employees who are called in must neither be shortchanged nor overcompensated. The arbitrator must reach a reasonable result consistent with the intent of the parties as evidenced by the provisions of their agreement read as a whole. Where the negotiated agreement contains a call-in guarantee, it should be harmonized with the regular pay provision to produce a balanced approach to this type of dispute. Neither provision can be ignored; the middle approach is an appropriate accommodation.

IV. REPORTING PAY PROVISIONS

A. Qualifying for Reporting Pay

Under a reporting pay clause, an employee is guaranteed a minimum amount of pay simply for reporting to work. Without such a guarantee, the reporting employee is not entitled to payment when he finds no work available at his scheduled time; when he is sent home prior to completion of his scheduled shift, he is entitled to pay only for the time actually worked. When the contract contains no reporting pay clause, unions often support a claim for pay by citing the common contract provision defining the regular, normal, or standard shift or day. Arbitrators uniformly rule that such a definition creates no guarantee:

When a contract provides for an eight-hour day and a five-day week, it means usual, normal or regular and not a minimum or a maximum. It is within the discretion of the Company to work the employees more or fewer hours than those considered "standard."


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Standard is in no way synonymous with either minimum, maximum or guarantee.60

As might appear obvious, in order to qualify for reporting pay an employee must actually report for work. Reporting is "a condition precedent to compensation."61 Does an employee forfeit reporting pay if he is tardy? It does appear harsh to deny reporting pay to an employee who is a few minutes tardy, but if the reporting pay clause stipulates that employees must be punctual in order to qualify for the guarantee, the arbitrator must apply the parties' bargain.62 In the absence of a clear contract reference, however, enforcement of punctuality is better left to a progressive disciplinary system.

Have employees "reported for work" when they have not clocked in? Again, an express contract reference will control,63 but arbitrators should not imply a technical requirement that employees must actually clock in to be entitled to reporting pay. To allow management to escape a pay guarantee by requiring a formality would undermine the purpose of the reporting pay clause. It is more reasonable to assume that the parties contemplate that showing up at the plant, ready and able to work, satisfies the reporting requirement.

For the same reason, unless the contract so specifies, employees should not be required to wait at the plant once they have "positively ascertained" that there is no work available at their scheduled time.64 On the other hand, if employees arrive early, find the plant locked, and leave before their scheduled reporting time, no reporting pay should be due.65 Employees must first receive

53. See, e.g., United Parcel Serv., 74 Lab. Arb. (BNA) 191, 193 (1980) (Gershenfeld, Arb.) (clause requires employee to have "started work" in order to qualify for reporting pay).
“positive information” that there is no work available.  

Employees should be held to have waived their guarantee when they start work but leave voluntarily prior to the expiration of the guarantee period. When the evidence indicates that the employees have caused their own loss, they are not entitled to benefit under the guaranteed pay clause.  

Employees should not be held to have waived reporting pay, however, when management instructs them to go home and the employees comply without objection. As Arbitrator William Belshaw noted in Manco Manufacturing Co., employee silence in such a situation does not indicate a knowing waiver of contract rights. “In the labor-management sphere, many employees do not have any desire to stay at work, and accordingly would seldom express any such wish.” Reporting pay was due in Manco even though management told the employees to go home out of concern for their safety and well-being in the face of increasingly dangerous blizzard conditions.  

In Lawntite Co., Arbitrator George Savage King applied a reporting pay clause in the “very troublesome” Christmas party situation. The company had scheduled only a half-day’s work, but the celebrating began early for some employees. Management did not seek to resume full production by threatening to discipline the offending parties. Instead, it halted all work after three hours. Although the company had no obligation to pay those employees who had in fact stopped work early, it did not attempt to identify the culprits. No work was provided for the fourth hour of the reporting pay guarantee period, so the arbitrator enforced the clause and ordered pay for all employees for one hour.

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60. 69 Lab. Arb. (BNA) 240 (1977) (Belshaw, Arb.).
59. Id. at 243 (emphasis in original).
60. See id. at 240, 243.
61. 66 Lab. Arb. (BNA) 1122 (1976) (King, Arb.).
62. Id. at 1124.
63. Id. at 1122-24.
64. See id. at 1124.

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B. Reporting Pay Exceptions

The typical reporting pay clause includes exceptions to the guarantee of pay. Guaranteed pay clauses often include one or more general exclusions. For example, the guarantee may not apply when lack of work is caused by an act of God, a condition beyond the control of management, or an emergency situation. In addition to, or in lieu of, such general exceptions, reporting pay clauses may list more specific exceptions. For example, management may be excused from the pay obligation when the lack of work results from an equipment breakdown or a power failure. Other common exceptions excuse payment when employees are sent home because of weather, natural calamities, or a work stoppage.  

In interpreting and applying contract exceptions to a reporting pay guarantee, the arbitrator must follow the contract language. The arbitrator’s obligation is to interpret the language of the clause and determine the intent of the contracting parties. For an arbitrator to imply exceptions to a pay guarantee would be “to write new language into the contract.” Arbitrator Sol Yarovsky implied an exception for an “act of God”—in this instance a heavy snowfall—in Bunny Bread Co., because it was “practically impossible to continue operations on a regular basis.” Arbitrator Yarovsky’s approach should be avoided. Although the agreement contained a full forty-hour workweek guarantee, management must have appreciated its potential financial exposure when it agreed to the provision in negotiations. “Impossibility” caused by severe weather conditions is the type of contingency parties typically consider in negotiations. An arbitrator should not give management

66. See infra notes 86-120 and accompanying text.
67. See infra notes 121-135 and accompanying text.
68. See infra notes 136-147 and accompanying text.
69. See infra notes 148-162 and accompanying text.
70. See infra notes 163-169 and accompanying text.
73. American Car & Foundry Co., 3 Lab. Arb. (BNA) 461, 466 (1943) (Larkin, Arb.).
75. Id. at 57.
76. See infra notes 148-162 and accompanying text.
a better deal than it obtained through bargaining.

On the other hand, if an express contractual exception is applicable, the arbitrator should enforce the contract, even if general considerations of fairness and equity might point toward a contrary result. See Blairsville Mfg. Co., 72 Lab. Arb. (BNA) 845, 848 (1979) (Robins, Arb.). The arbitrator's "natural sympathy" for the employees who lost a day's pay through no fault of their own cannot create a contract right. The question before the arbitrator "is not what the Company should have done from an ethical or moral point of view but what it was obligated to do" under the agreement.

While exceptions to a pay guarantee should neither be implied nor ignored, there are two situations where arbitrators rightfully conclude that a facially applicable exception should not free management from its pay obligation.

First, management should not be allowed to benefit from a contractual excuse when it was responsible for creating the exceptional situation. Parties include exceptions to the reporting pay guarantee because they appreciate that, at times, management cannot reasonably avoid situations where no work is available. But where management acts imprudently, and that failure is the direct and immediate cause of the no-work situation, the exceptions should not apply. The parties could not have intended their express pay guarantee to be voided by unilateral management carelessness.

It should be emphasized that management should be held to forfeit its right to rely on a contract exception only if it is shown that the employer acted unreasonably under the circumstances and caused the exceptional situation. All managers make mistakes, but not all mistakes are caused by carelessness. For example, a lack of raw materials might have been prevented by earlier orders, but if the reasonably prudent manufacturer would not have ordered ear-

lier, an applicable contract exception should be enforced. On the other hand, if reasonably prudent management would not have delayed ordering and this failure caused the lack-of-work situation, the contractual exception should not free the employer from its guarantee obligation.

Second, management also will be held to have waived its contractual right to assert an excuse to the guarantee by unreasonably delaying its decision whether to operate. For example, in Simonds Saw & Steel Co., management "gambled" that machinery could be quickly repaired, and the arbitrator ruled that employees who waited for one and one-half hours were entitled to the full four-hour guarantee when the company finally determined to send the employees home. Although the employer had the right to ascertain the extent of the damage to the machine, it was required to make a "reasonably expeditious decision." When it failed to act promptly, it waived its protection. "[T]he prerogatives and duties of management require that it assume the risks and balance the probabilities," and not shift those risks unfairly to the employees.

In analyzing the waiver situation, it is important to focus on the interests the parties intend to protect under a reporting pay clause. The guarantee is created to compensate employees when they actually report for work and find no work available. Employees incur costs in traveling to work and then lose the opportunity to work. Where the reporting pay clause contains exceptions, the employees, through their union, have agreed to bear the stated risks.

In the Simonds Saw situation, for example, the company knew of the excusing circumstances that would make normal operations impossible, had an adequate opportunity to decide whether to call off work and inform the employees, and failed to do so. Management's indecision, not the excusing circumstances, caused the employees to incur the cost of reporting. When management failed to take reasonable steps to avoid this situation, the contractual excuse will be held to have been waived.

82. 40 Lab. Arb. (BNA) 1173 (1963) (Thompson, Arb.).
83. See id. at 1178-79.
84. Id. at 1176.
1. Conditions Beyond the Control of Management and Acts of God

Two common general exceptions that will excuse payment under a reporting pay clause are when the lack of work results from a condition beyond the control of management or from an act of God. Arbitrator Thomas McDermott explained the difference between these two formulations in *Miller Printing Machinery Co.*86

These provisions are not interchangeable, and with rare exceptions, they have not been treated as such in arbitration. In the absence of a contractual definition, "an act of God" is substantially more restrictive in designating cause of an interruption of work circumstance than is something "beyond the control of Management." The former relates to an act or event that is due to an extraordinary force of nature that is beyond control by human beings, and from the effects of which reasonable measures of prevention cannot be taken. On the other hand, the latter type of exclusionary provision relate [sic] to a condition which could not be reasonably anticipated, or if it could be anticipated, could not be protected against through the exercise of reasonable care and foresight.87

The arbitrator concluded that a bomb scare, which certainly was a matter beyond the control of management, was a human intervention and not an act of God, the stated excuse to the reporting pay requirement under the parties' agreement.88

Although the exception for conditions "beyond the control of management" is broad, it is not without limits. Arbitrator David Wolff, in *Chrysler Corp.*,89 defined those limitations as follows: "[I]t must mean either a cause not falling within the general area of the Company's responsibilities or, if falling within this area, a cause which could not be anticipated or, if anticipated, could not have been guarded against at all or except by unreasonably burdensome, or unrealistic measures."90

Applying Arbitrator Wolff's test, Arbitrator Arthur Ross concluded in *Federal Mogul Bower Bearings*,91 that the exception for a condition beyond the control of management did not apply when a power failure was caused by the carelessness of an employee who drove a forklift into the guy wire of a power pole.92 Since it would have been "practical, reasonable and expedient" for the employer to have prevented the accident or to have provided for its possibility through alternative sources of power, Arbitrator Ross held the exception inapplicable.93 Similarly, in *Walker Manufacturing Co. of Wisconsin*,94 employees were held entitled to reporting pay when they were sent home as a result of a power failure due to the negligence of a roofing subcontractor.95 The evidence showed that the employer was aware of the subcontractor's failure to guard against the falling objects that caused the outage, so Arbitrator Luskin ruled that the condition was not beyond the control of the company.96

By comparison, in *Erie Artisan Corp.*,97 Arbitrator Roland Straschofer decided that a power failure fell within the contractual exception "when the Company [was] not able to operate the plant because of reasons beyond its control."98 The burn-out in the main electric feeder line could not have been anticipated: "There was no evidence that the Company had failed to correct a previously known defect, had failed to heed any warning of an impending power failure or had negligently failed to maintain a reasonable program of preventive maintenance."99

Another common reason for lack of work is a shortage of material or parts. Arbitrator Edward Krinsky denied a claim for reporting pay in *Tecumseh Products Co.*,100 in a situation where employees were sent home because of a temporary shortage of carburetors caused by defective machining of the parts on preceding shifts.101 The arbitrator ruled that the company followed its

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86. 64 Lab. Arb. (BNA) 141 (1963) (McDermott, Arb.).
87. Id. at 145.
89. 21 Lab. Arb. (BNA) 573 (1953) (Wolff, Arb.).
90. Id. at 579.
91. 43 Lab. Arb. (BNA) 12 (1964) (Ross, Arb.).
92. See id.
93. See id. at 14-15; see also Bunker Hill Co., 51 Lab. Arb. (BNA) 873, 876 (1968) (Locke, Arb.) (company's negligence caused blast furnace flue to collapse).
94. 28 Lab. Arb. (BNA) 288 (1977) (Luskin, Arb.).
95. See id. at 289-91.
96. See id.
97. 51 Lab. Arb. (BNA) 850 (1968) (Straschofer, Arb.).
98. Id. at 852.
99. Id. at 853.
100. 61 Lab. Arb. (BNA) 274 (1973) (Krinsky, Arb.).
101. See id. at 278-79.
standard procedure and "had no reason to expect the sudden production problems which developed." Arbitrator Krimsly's approach ignores the fact that reasonable managers should be able to monitor and control the internal production of parts. He concluded that management's action in this case was not "so negligent or lax that it would clearly be an injustice to allow the Company to use the [exception]." but the standard should not be whether management was grossly negligent or whether it would be "unjust" to apply the exception. A company must follow reasonable operating procedures. That a company followed its normal operating procedures may or may not indicate that it was acting reasonably. If something extraordinary occurs that could not have been foreseen or avoided through the use of reasonable operating procedures, management is entitled to the benefit of the contract exception for lack of work due to circumstances beyond its control. The exception to the guarantee makes sense only if it is read to cover circumstances beyond the reasonable control of management. Ordinary prudence suffices, but lack of reasonable conduct exposes the employer to liability under a reporting pay provision.

Civil disturbances of the 1960's gave rise to a number of reporting pay disputes when companies cancelled scheduled operations. In Koppers Co., Arbitrator Clair Duff ruled that the lack of work which resulted from a civil disturbance was a "classical illustration" of the reporting pay exception for a cause "beyond the control of the company." In similar civil disturbance situations, arbitrators have denied reporting pay on the basis that employees were not sent home because of lack of work, but rather because of governmental demand.

Weather conditions are generally beyond the control of management. When such conditions render operation of the plant impossible, the exception applies. On the other hand, when management chooses to close down when operating would be possible and employees report for work as scheduled, reporting pay may be due. For example, in Ingalls Iron Works Co., Arbitrator Samuel Krimsly held that sub-zero weather, while a "condition beyond the control of the company," did not warrant cancellation of work. The evidence showed that the company had previously operated in similar conditions and the company did not meet its "burden of showing that the temperature had indeed reached a point where [the company] could not put out its product."

Similarly, in Hamilton Press, Inc., Arbitrator William Belshaw ruled that a provision excusing payment when lack of work was caused by a condition beyond the control of the company that "affects plant operations" was not applicable in a snowstorm situation. He reasoned that the parties intended that the effect on plant operations must be substantial in order to qualify for the exclusion:

There are many, many things that could merely affect plant operations. A hot day, a new superintendent, a recent adverse labor-management relationship, or even the fact that a particular working day was the day before Christmas are examples. On a hot day, the operations would be slow, and with a new boss they might be uneasy; on the afternoon before Christmas, there is often excessive absenteeism, and sometimes drunkenness, both of which certainly affect plant operation.

Since the snowstorm did not have a substantial effect on plant operations, the exception was held inapplicable and reporting pay was due.

By comparison, in Textron, Inc., where a snowstorm kept thirty percent of the employees from reporting, Arbitrator Robert Grabb ruled the exception applicable. The evidence showed that the assembly line could not operate with such a level of absenteeism, and that the absenteeism was directly caused by the excusing circumstance.

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102. Id. at 279.
103. Id. at 278.
104. 54 Lab. Arb. (BNA) 408 (1970) (Duff, Arb.).
105. Id. at 410-11.
108. 51 Lab. Arb. (BNA) 246 (1968) (Krimsly, Arb.).
109. See id. at 248-49, 251.
110. Id. at 248.
111. 65 Lab. Arb. (BNA) 274 (1975) (Belshaw, Arb.).
112. See id. at 276-77.
113. Id. at 276 (emphasis in original).
114. See id. at 276-77.
115. 70 Lab. Arb. (BNA) 656 (1978) (Grabb, Arb.).
116. See id. at 660.
117. Id.
Arbitrator Harry Erbs defined an act of God as “an irresistible disaster, the result of natural causes, such as earthquakes, violent storms, lightning and unprecedented floods.” Such severe weather conditions will excuse payment of a reporting pay guarantee if the plant cannot be operated. Arbitrators have emphasized that the negotiated exception excuses payment, “regardless of the equities involved.”

2. Emergency

Another common exception to a reporting pay guarantee frees management from the pay requirement when work is not available because of an “emergency” situation. Arbitrators must determine what excusing events the parties intended to cover by their contract exception. Certainly, an “emergency” cannot be the product of the exercise of discretion by the management, for that would defeat the purpose of the pay guarantee. On the other hand, an “emergency” need not be a “notable disaster.” Instead, “[i]t is only a sudden unexpected happening, an unforeseen occurrence or condition . . . involving a pressing necessity.” A situation that involves mere inconvenience is not sufficient to constitute an emergency. The event must be such as to render production impossible.

In Monsanto Research Corp., Arbitrator Rankin Gibson ruled that a fuel shortage in the community did not constitute an “emergency” within the contract exception to the reporting pay guarantee. The Governor of Ohio had requested businesses in the Dayton area to close early on the day in question because a severe winter storm was anticipated and fuel supplies were low.

Because the prospect of a shortened shift was not unforeseen by the company, the Governor’s request did not constitute an “emergency.” On the other hand, in another case where a company was abruptly given notice by the state commission to close down because of a coal shortage, and thus the circumstance was unforeseen, the emergency exception was held applicable.

Does the breakdown of machinery constitute an emergency? In Mrs. Fay’s Pies, Arbitrator Adolph Koven ruled that in some instances problems with equipment may constitute an emergency: “An employer is on notice that machines inevitably reflect their use, wear out, and fail to function, and in order for a failure of equipment to qualify under the escape emergency provision, it must affirmatively and conclusively appear that the Company was in no way answerable for its failure.” Because the evidence reflected no faulty maintenance of the company’s pie machine and the employer acted prudently by having a spare (albeit ultimately defective) part handy, the exception applied.

Two cases in which an employer described absenteeism as an “emergency” situation illustrate possible meanings of the term. In Calvine Cotton Mills, Inc., Arbitrator Charles Livengood interpreted the guarantee exception for “an emergency shutdown . . . due to causes beyond the Company’s control” as not applicable when high absenteeism unrelated to any emergency situation caused management to curtail production. In Westinghouse Electric Corp., Arbitrator David Altrock stated baldly that the term “emergency” denotes a “natural, physical or climatic” event so that high absenteeism would not fall within the exception even if it were shown to have impaired the efficiency of the operation. Arbitrator Altrock’s definition of “emergency” is unduly narrow. An emergency is a major, sudden and unforeseen circumstance that precludes normal operations. In most instances, the term would not cover high absenteeism because attendance trends
would reasonably predict the impact of absenteeism on normal production. Parties would not usually intend the term "emergency" to cover absenteeism. On the other hand, an unexpectedly high incidence of employee absenteeism caused, for example, by a public health emergency, might very well constitute a situation covered by the contract exception. In that case, however, it is the external event—the health emergency—and not the absenteeism that triggers the applicability of the excuse.

3. Power Failure and Equipment Breakdown

Two common specific exceptions to a reporting pay guarantee excuse management's obligation when work is not available due to a power failure or equipment breakdown. Parties may specifically except such occurrences because a general exception for "emergencies" may not cover them.

The exception for a power failure is commonly applied in a situation where electricity is interrupted. Because normal operation of the facility is impossible as a result of the excusing circumstance, no pay is due. It will also apply to interruptions of other power sources. In General Electric Co., arbitrator David Altrock addressed a claim for reporting pay which arose during "the memorable winter of 1977." The plant was closed due to a shortage of natural gas. Was this a "power failure," one of the express excuses included in the reporting pay provision? The parties had never discussed the possibility of a gas shortage, but that was "because it was considered to be such limitless supply . . . that it practically fell in a category with air to breathe and water to drink." The arbitrator concluded that, almost by definition, a gas shortage which makes production impossible constitutes a power failure. While denying reporting pay, Arbitrator Altrock expressed sympathy for the employees who did report for work: "It is not their fault that God did not put enough gas in the right places or that man elected to abuse a resource simply because it seemed to be abundant. Neither is it the company's fault."141

137. Id.
138. Id. at 331.
139. Id.
140. See id.
141. Id.

In applying the common specific exception for lack of work resulting from an equipment breakdown, an arbitrator must be guided by the parties' intention and must excuse the guarantee only if management is not responsible for the machinery breakdown. Similarly, if management gambles that equipment can be repaired in time to make productive use of the employee's time but loses its gamble when the machinery is not repaired, reporting pay may be due. In this situation, management effectively waives its right to rely on the contractual excuse.

In Chase Bag Co., arbitrator Clyde Emery employed a most creative interpretation of the contractual exception excusing reporting pay when lack of work was the result of a "breakdown." In Chase, a Christmas party began early and the situation deteriorated rapidly. Drunk employees sauntered around moving machinery, and production was halted before the expiration of the four-hour guarantee period. The arbitrator ruled: "There was a breakdown as complete as though all the power . . . had been cut off . . . . There is nothing in the [clause] to limit 'breakdown' to machinery that won't function; the word fits the human participants fully as well."147

4. Weather or Natural Calamities

Exceptions to reporting pay agreements are sometimes expressed in terms of specific weather conditions or, more generally, as "natural calamities." The arbitrator must apply the exception as best he can to excuse the guarantee if work is not available as a result of the stipulated circumstance.

In American Cyanamid Co., arbitrator Robert Carson, Jr., dealt with a reporting pay provision excusing payment if the employee is prevented from working because of flood, fire, hurricane, explosion, power failure, major equipment breakdown, or other

143. See American Steel & Wire Co., 7 Lab. Arb. (BNA) 417, 419 (1947) (Blumer, Maurice & Kelly, Arb.).
144. See supra notes 81-85 and accompanying text.
145. 60 Lab. Arb. (BNA) 544 (1973) (Emery, Arb.).
146. See id. at 544-45.
147. Id. at 546-46.
149. 75 Lab. Arb. (BNA) 649 (1980) (Carson, Arb.).
factors beyond the control of the Company.” A hurricane had struck some time before. Although the hurricane was over, “its effects were everywhere.” While the employees who reported for work “showed an unusual amount of loyalty and dedication,” they knew that the exception was part of the reporting pay clause, they lived through the storm, and “they must have known that they were taking a chance when they reported.” The exception was held to apply and no pay was due. Similarly, in Bethlehem Steel Co., Arbitrator Paul Dodd applied an express exception for “bad weather” to a situation where heavy rains were experienced and were expected to continue.

Arbitrator Harold Ainsworth implied an exception for “rain” to a reporting pay provision in Stephens Ready Mix Concrete. The company had a longstanding but unwritten and unilateral rule that employees were not to report when heavy rain occurred overnight. Applying what he termed “a rule of reason,” the arbitrator concluded that the grievant drivers created the problem by reporting when they knew their services would not be needed. The difficulty with Arbitrator Ainsworth’s approach is that the agreement carefully enumerated a series of exceptions to the reporting pay guarantee—“strikes, work stoppages, war, fire, flood, tornadoes, and other unforeseen catastrophes which prevent work from being performed”—but did not include rain. Arbitrators should refrain from implying exceptions when the parties have indicated with such specificity those exceptional circumstances that will excuse payment of the guarantee.

A tornado, hurricane, or major snowstorm would generally constitute a “natural calamity” if the weather conditions interrupted the normal operation of the plant. Arbitrator Bernard Dobranski defined “natural calamity” in National Homes Corp.

5. Strikes

Another common exception to a reporting pay guarantee excuses payment if the lack of work is the result of a strike or work stoppage. Management must demonstrate the causal nexus between the excusing circumstance and the lack of work. For example, in United Trucking Service, Arbitrator Barry Brown found the exception for “strikes and work stoppages against the Employer” would not be applicable if the lack of work flowed from a nationwide Teamsters’ strike against other companies. In fact, the evidence convinced the arbitrator that the lack of work was caused by the Teamsters’ strike and, therefore, held that the contractual forty-hour guarantee applied.

In the absence of an express excuse for strikes, the arbitrator must apply the clause as written and not “read into the agreement the . . . language which is not there.” On the other hand, even in the absence of such an express excuse, employees must report as scheduled to be entitled to the guarantee. Where a non-striking employee refuses to cross a picket line, “that employee has voluntarily made himself unavailable for work. The choice was that of the employee and not that of management.” As Arbitrator Bur-

150. Id. at 650.
151. Id. at 651.
152. Id.
153. Id.
154. See id.
155. 2 Lab. Arb. (BNA) 187 (1945) (Dodd, Arb.).
157. 70 Lab. Arb. (BNA) 1020 (undated) (Ainsworth, Arb.).
158. See id. at 1021.
159. See id.
160. 71 Lab. Arb. (BNA) 1106 (1978) (Dobranski, Arb.).
ton Turkus stated in *American Smelting & Refining Co.*168 "It is of no real consequence . . . whether the . . . employees genuinely desired to come to work . . . ."169 Reporting is a condition precedent to reporting pay.

C. Notification Requirements

Many reporting pay provisions make reference to the issue of notice. Some of these clauses expressly oblige management to notify employees of the lack of work. Others excuse payment of the guarantee when management has used reasonable means to notify employees not to report. Still other clauses excuse the guarantee only if employees have received actual notice not to report. An arbitrator must read and apply the particular notification requirement or notice excuse adopted by the parties in order to resolve their reporting pay dispute.

If the reporting pay clause does not mention notification, should the arbitrator imply such a requirement? Although arbitrators often have required management to give employees reasonable notice not to report, even when the contract mentions nothing of the sort, they rarely supply an adequate rationale for doing so. Management certainly has the option of not notifying employees, as long as it is willing to bear the costs of the reporting pay guarantee.170

Under a contract provision containing exceptions to the reporting pay guarantee, however, management may be held to waive its right to rely on an excusing circumstance if it fails to act reasonably to notify the employees not to report.171 The relevant question should be: What is the effect under the parties’ agreement of a failure to give notification to the employees? Only if management knows of an excusing situation and has adequate opportunity to notify the workers not to report should failure to give such notification constitute a waiver. Reporting pay is due because manage-

169. Id. at 813.
170. See Blairsville Mfg. Co., 72 Lab. Arb. (BNA) 845, 847 (1979) (Robins, Arb.) (findings state that "[g]iven a situation in which there is sufficient time to provide notice of a closing, a company may be at risk if it fails to give it.").
171. See supra notes 81-83 and accompanying text; see also Sheller-Globe Corp., 49 Lab. Arb. (BNA) 84, 86 (1967) (Kates, Arb.).

172. 22 Lab. Arb. (BNA) 328 (1954) (Rosenfarb, Arb.).
173. See id. at 331-32.
174. See id. at 331.
175. See Goulds Pumps, Inc., 71 Lab. Arb. (BNA) 551, 553-54 (1978) (Dean, Arb.);
ees would have no reason to be listening to the radio for such an alert.179 In most cases management would be held to have fulfilled its reasonable notice obligation by telephoning employees at the phone numbers on file, even if some of the employees do not receive the call. On the other hand, if the company knows an employee does not have a phone, alternative reasonable means must be used.180

Even if reasonable means are employed, the employer must give the employees timely notice not to report. In Goulds Pumps, Inc.,181 Arbitrator Irwin Dean ruled that a radio announcement one hour before the beginning of the shift was not timely, since the company knew that the employees left early for work and could not reasonably be expected to have heard the announcement prior to leaving for the plant.182

When parties indicate that employees must receive actual notice, the arbitrator must follow their contract direction.183 Accordingly, "[t]he amount or intensity of the effort the Company puts forth—or does not put forth—is not pertinent. There is no way for management to shift this responsibility to the employee."184

Some arbitrators have expressed concern that requiring the payment of reporting pay based on the failure to meet notice obligations might encourage management to "jump the gun" and cancel work rather than incur liability under the guarantee provision.185 This fear is unfounded. The employer needs production and will call off work only when the costs of opening work outweigh the benefits. It is true that management may incur additional costs as a result of a reporting pay guarantee provision when it calculates risk and attempts to operate. That is the deal the parties have made. Management will cancel operations when the chances of useful production are less than the potential cost of guessing incorrectly. While management may be taking a risk when it allows employees to report to work, "that is the very essence of management—the task of decision making."186 Management may not shift that risk to the employees.187 The parties have set the terms of the trade-off in their reporting pay clause, and it is the arbitrator's responsibility to follow their direction.

V. CONCLUSION

Disputes arising under reporting pay and call-in pay clauses present arbitrators with difficult problems of contract interpretation, but useful principles have been established to resolve these types of controversies. While both call-in and reporting pay clauses are intended to create guarantees, they are applicable in different situations and protect different employee interests. A call-in pay clause protects the employee's expectation that leisure time will be available during off-duty hours. A reporting pay clause protects the employee's expectation that work will be available during regularly scheduled hours.

Under a reporting pay clause, parties to a collective agreement allocate the risk of potential loss when work is not available. When a guarantee is expressed without exceptions, management bears the total risk, including a monetary obligation to employees, when work cannot be provided to employees at their regularly scheduled times. Normally parties provide exceptions to their guarantee and thus share the risk when work is unavailable as a result of one of the excusing circumstances. The employees must bear their own loss of pay and the costs of reporting; management must bear its own loss from lack of production.

The arbitrator's primary duty is to remain faithful to the parties' bargain as expressed in their collective agreement. Applicable exceptions should excuse payment even if the result seems unfair in some general sense of the term. In the absence of applicable excuses, guarantees should be enforced and exceptions should not be implied, even if management did nothing to create the lack of work and could not have avoided it. Labor and management know

Twin Coach Co., 34 Lab. Arb. (BNA) 141, 142-43 (1960) (O'Rourke, Arb.).
181. 71 Lab. Arb. (BNA) 551 (1978) (Dean, Arb.).
182. See id. at 554.
184. See also National Pneumatic Co., 23 Lab. Arb. (BNA) 834, 835, 837-38 (1954) (Myers);
how to bargain over these matters, and the arbitrator should not usurp their power to order their work relationship.