IN THE MATTER OF ARBITRATION BETWEEN

3M COMPANY, COTTAGE GROVE, MN	**) FMCS Case No. 14-53975-8**
	)
("Company" or "3M")	**) Issue: Layoffs Out of Seniority Order**
	)
	) Hearing Site: Cottage Grove, MN
&	**)**
	) Hearing Date: September 25, 2014
	)
UNITED STEELWORKERS, Local 11-418	**) Briefing Date: November 14, 2014**
	)
("Union" or "USW")	**) Award Date: January 12, 2015**
	)
	) Mario F. Bognanno, Arbitrator

I. BACKGROUND AND JURISDICTION

The Parties to the above-captioned matter are the 3M Company, Cottage Grove, MN ("Company" or "3M") and the United Steelworkers, Local 11-418 ("Union" or "USW"). 3M's Cottage Grove site is home to several manufacturing and R&D operations. The present matter involved the Coating and Converting Department's production of fiber adhesive transfer tape ("FATT") operation in Building 102, and the Specialty Additives Department in Building 110. On January 1, 2014, 3M employed 368 Production Group, Custodial Group and Maintenance Group employees, all of whom were represented by the USW. (Un. Ex. 1) The Parties are signatories to a Collective Bargaining Agreement ("CBA" or "Agreement") whose effective dates are from March 6, 2013 to August 19, 2016. (Jt. Ex. 1)

Natural gas (hereafter "gas") is the energy that fuels some of 3M's production operations, and without a steady supply of gas these operations must shut down. 3M is a 24-hour/7-day week operation, and on a regular production day it consumes enough gas to heat

approximately 2,000 average-sized homes. Its gas provider is Constellation Energy, which feeds gas to the Cottage Grove site through a network of pipelines operated by the Minnesota Energy Resources Corporation ("MERC"). (Testimony by Mike Rogers, 3M-Cottage Grove, Utility Coordinator)

January 2014 was a bitterly cold month. So much so that on two (2) occasions during that month, MERC required 3M and other large commercial customers to immediately curtail their use of gas. The heating of private homes took precedence. At least ten (10) years had elapsed since 3M last had its gas supply limited or cut.

3M's first gas curtailment event occurred on Sunday, January 5th, and the second occurred on Sunday, January 26th. (Testimony by Mike Rogers; Co. Exs. 4 and 5)The low temperature on January 5th and January 26th was -19° and -6°, respectively. (Co. Ex. 3) On both occasions 3M was forced to shut-down some gas-dependent production lines and because of the resulting loss of work, 3M also laid off their operators. (Testimony by Mr. Rogers; Co. Exs. 2 and 4)

Regarding the Sunday, January 5th gas-curtailment event, MERC e-mailed Mr. Rogers at 12:38 a.m., stating that 3M's supply of gas would be limited as of 12:00 p.m. that day and that the curtailment would continue until further notice. The e-mail goes on to state:

> Please switch to your alternative fuel source or decrease your natural gas usage to zero (0) or the contracted firm service level. Due to the bitterly cold forecasted weather over the next several days, [MERC] is curtailing High Volume interruptible customers system wide. [MERC] will continually monitor the weather and terminate the curtailment as soon as the extreme weather conditions warrant. [MERC] appreciates your cooperation during this extreme weather. …

(Co. Ex. 5) Mr. Rogers did not see the e-mail until 6:00 p.m. that evening, six (6) hours after the 12:00 noon curtailment had taken effect.[1] He immediately telephoned the management personnel responsible for the production operations that were gas-reliant, directing them to curtail its use to either "firm gas limits" or to "zero," whichever applied.[2] Next, at 7:07 p.m., he sent an e-mail, with MERC's e-mail attached, to a list of 3M managers, advising them of the curtailment notice and reviewing the steps he had taken in compliance thereto. (Testimony by Mr. Rogers; Co. Ex. 2) David L. Wakefield, General Supervisor, testified that because the FATT production in Building 102 did not have a "firm gas limit" contract, he directed that its production lines be shut down from 10:00 p.m. on Sunday, January 5th. Said shutdown continued until 2:00 p.m. on Tuesday, January 7th.[3] (Co. Ex. 11) Mr. Wakefield further stated that he personally telephoned or left messages for the FATT crew scheduled to begin work at 10:00 p.m. that night, notifying them that their shift had been cancelled – they were being laid off. At the time, he also stated, there was no alternative work to which they could have been assigned to perform.

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[1] Mr. Rogers explained this delay as follows: "Unfortunately, I did not receive notice until around 6:00 p.m. this evening when I logged into my work email to check." (Co. Ex. 2)

[2] To ensure an adequate supply of gas in the event of its curtailment, 3M had a contract with MERC to provide minimum supplies of gas (i.e., "firm gas limits") to some of its operation. The Specialty Additives department's "bubble" production operations in Building 110 was to receive a "firm gas limit"; whereas, the production of FATT products in Building 102 was not covered by the "firm gas limit" contract. (Co. Ex. 2)

[3] At 9:18 a.m. on January 7th, Mr. Rogers received an e-mail from the MERC that stated in relevant part: "The curtailment that has been in effect since 12:00 p.m., Sunday [, January] 5, 2014 will be terminated effective at 12:00 p.m. on Thursday, January 7, 2014. All customers can switch back to natural gas at that time. …" (Co. Ex. 6) Within minutes, at 9:23 a.m., Mr. Rogers forwarded this message to the relevant managers. (Co. Ex. 11)

Mr. Rogers learned that gas was being curtailed for a second time at 11:34 p.m. on Saturday, January 25th. At that time, he received another e-mail from MERC, announcing that the gas curtailment was to commence at 11:45 p.m. later that night or "penalties" would be assessed. That e-mail required 3M to curtail gas usage to either "firm gas levels" or zero, whichever applied. However, at 1:08 a.m. on Sunday, January 26th, MERC sent Mr. Rogers a second e-mail, stating that contracted "firm gas levels" would not be available; therefore, all of 3-M's gas usage was to go to zero. At 7:19 a.m. that morning, Mr. Rogers directed relevant production managers to take their gas usage to zero. As before, Mr. Wakefield shut down the FATT production lines in Building 102, laying-off their operators and, as before, he testified that there was no non-production work that needed to be done. (Testimony by Messrs. Rogers and Wakefield; Co. Ex. 4) Jessica Hayungs, Manufacturing Production Manager, testified that she shut down most of the Specialty Additives production operations in Building 110, sending home employees who were already at work and telephoning the others, announcing the layoff. Ms. Hayungs, like Mr. Wakefield, stated that at the time there was no non-production work that needed done. At 2:51 p.m. on Tuesday, January 28th, Mr. Rogers received an e-mail announcing that the curtailment would end at 9:00 a.m. on Wednesday, January 29, 2014.[4] (Co. Ex. 10)

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[4] At 11:29 a.m. on Sunday, January 26th Mr. Rogers received another e-mail, explaining that an explosion along the "TransCanada Pipeline" had interrupted natural gas service and that MERC was treating this curtailment as a "Force Majeure" (Act of God). (Co. Ex. 7)

The gas curtailment events variously affected unit employees – who numbered 368 at the site's Production Group. Both events involved employee layoffs.[5] The Union claimed that the layoffs in question were out of seniority order, in violation of Article 8 in the CBA. That is, at issue is that senior employees were laid off without having been given their Article 8 opportunity to bump into jobs held by junior employees who were not laid-off: jobs the senior employees were qualified to perform. Hence, the Union filed several grievances. The Union requested the Company "cease and desist" from further violating the CBA's seniority rule and that each of the aggrieved employees be "made whole": a remedy that includes forgone wages, overtime pay and shift differential pay. Regarding the foregoing, the Union filed the following seven (7) grievances:

- **Grievance #2014-14**: On January 13th the Union grieved on behalf of "All affected 3M Union employees" in Building 102's FATT production operations for lay-off violations that occurred on January 6th through January 8th layoffs;

- **Grievance #2014-15**: On January 31st the Union grieved on behalf of "All affected 3M Union employees" in Building 102's FATT production operations for lay-off violations that occurred on January 26th through January 28th;

- **Grievance #2014-16**: On February 2nd the Union grieved on behalf of Todd Lucas and Steve Nieman, Building 110 Specialty Additives employees, for lay-off violations that occurred on January 26th;

- **Grievance #2014-17**: On February 3rd the Union grieved on behalf of Shawn Slocum, Katrina Leonida, Keith Johnson, Shawn Colburn and David Houle, Building 110 Specialty Additives employees, for lay-off violations that occurred on January 26th;

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[5] Union Exhibit 1 is the January 1, 2014 seniority list of USW-represented employees working at the Cottage Grove site. This list includes the names and seniority dates of 281 Production Group employees and 87 Clerical Group and Maintenance Group employees. The present matter is limited to employees in the Production Group, as testified by Rita Isker, Local 11-418, Vice President.

- **Grievance #2014-18**: On January 31st the Union grieved on behalf Steve Harper, Brian Cocchiarella and Debbie Shearen, Building 110 Specialty Additives employees, for lay-off violations that occurred on January 26th and January 27th;

- **Grievance #2014-19**: On January 30th the Union grieved on behalf of Jim Dodge, Keith Hankes and Keith Bibelheimer, Building 110 Specialty Additives employees, for lay-off violations that occurred on January 26th and January 27th; and

- **Grievance #2014-20**: On January 30th the Union grieved on behalf of Ryan Simones, a Building 110 Specialty Additives employee, for lay-off violations that occurred on January 26th and January 27th.

(Jt. Ex. 2 and Un. Ex. 2)

Pursuant to the provisions of Article 11 of the CBA, the Parties met to discuss the above-list of grievances, but no settlements were reached. Hence, the Union advanced the *g*rievances to arbitration. (Jt. Ex. 1) On September 25, 2014, the undersigned heard the grievance in Cottage Grove, MN. Appearing through their designated representatives, the Parties were given a full and fair hearing. Witness testimony was sworn and cross-examined. Exhibits were introduced and accepted into the record. At the hearing, the Parties stipulated to the following: the matter was properly before the undersigned for a final and binding decision; and in the event that any or all of the grievances are sustained the Parties' intent is to meet to resolve outstanding questions pertaining to the matching junior/senior employee seniority dates and related work-ready qualifications. The Parties filed timely post-hearing briefs on or about November 14, 2014. Thereafter, the Arbitrator took the matter under advisement.

II. <u>APPEARANCES</u>

For the Union:

Gene T. Szondy	USW, Staff Representative
Mike Schanks	Local 11-418, President

Rita Isker	Local 11-418, Vice President
Joe Fuchs	Local 11-418, Former President (Retired)
David Jacobsen	Grievant & Local 11-418 Committee Member
Shawn Slocum	Grievant & Local 11-418 Recording Secretary
Todd Lucas	Grievant & Local 11-418 Unit Member

For the Company:

Joseph S. Turner	Attorney-at-Law
Courtney DaCosta	Attorney-at-Law
Vickie J. Batroot	Former Site Director (Retired)
Mike Rogers	Utility Coordinator
David L. Wakefield	General Supervisor
Jessica Hayungs	Manufacturing Production Manager
Patrick J. Somers	Human Resources Manager
Mike Bhama,	Site Director
Chongying Gao	Human Resource Specialist
Steve Long	Corporate Human Resource Manager

III. RELEVANT PROVISIONS FROM THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 4. MANAGEMENT

4.01 The UNION and its members recognize that the successful and efficient operation of the business is the responsibility of Management and that management of the plant and the direction of the working forces is the responsibility of the COMPANY provided, in carrying out these management functions, the COMPANY does not violate the terms of this Agreement.

ARTICLE 7. WAGES

7.08 TEMPORARY SERVICE IN HIGHER JOBS.

a. Temporary work or part time service in a higher classified job for periods of less than one full payroll week will not be considered a promotion or a change in classification. Wherever possible, seniority in the department will be given due consideration in assigning such temporary work.

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7.11 TEMPORARY TRANSFER BETWEEN DEPARTMENTS. When in the interest of efficient and economical operation or as a means of deferring layoffs, it is desirable to transfer employees temporarily from one department to another, such temporary transfers may be made for a maximum period of four (4) weeks if mutually agreeable to both the COMPANY and UNION, plant seniority will prevail in determining employees to be transferred providing the employee is qualified to do the work both physically and

mentally. The UNION agrees to cooperate with the COMPANY in arranging such temporary inter-departmental transfers. 3M Company agrees not to temporary inter-department transfers except in the interest of efficient and economical operation or as a means of deferring layoffs. The Union will respond to requests for temporary transfers within 24 hours of the request.

7.12 EMPLOYEES REPORTING AND NO WORK AVAILABLE. Employees reporting for work according to their regularly assigned work schedule without being notified in advance not to report and work is not available shall be allowed a minimum of four (4) hour's pay at the employee's regular straight time hourly base rate except in cases beyond the control of the COMPANY.

ARTICLE 8. SENIORITY

8.01 SENIORITY:

a. (1) Plant seniority shall be determined from the employee's earliest date of continuous employment with 3M Cottage Grove Plant within the bargaining unit as defined in Article 2. This principle of Plant Seniority shall be applied in cases of layoff, recall, promotion, demotion, reduction and transfer of employees provided the employee under consideration is qualified to perform the job in question.

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b. (1) The term qualified or qualifications used in this Article shall mean the ability to perform the job in a satisfactory manner after completing the required certification and/or training on the job as defined by the department.

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8.09 Seniority Lists.

a. Seniority lists will be kept and posted by the Company on the department boards. Lists will include the following Groups:

(1) Production
(2) Custodial
(3) Maintenance

b. For the purposes of this Article, the Cottage Grove Divisions within the Production Group currently are:

MATERIALS RESOURCE OPERATIONS

Material Handling – Building 26
Alkyd Manufacturing – Building 4
Mix & Mill – Building 6

Resin Manufacturing – Building 7
Polymer Manufacturing – Building 25
Specialty Additives – Building 110

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INDUSTRIAL ADHESIVES & TAPE DIVISION
Coating and Converting – Building 102
Material Handling – 102/111/114
Vapor Coating – Building 110

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8.07 REDUCTIONS

a. When employees are reduced or bumped from their classification, they may bump the least senior employee within the job classification and shift arrangement of their choice, available within that department.

b. Employees who are reduced or bumped from their department will use their plant seniority to replace a less senior employee in the group by bumping the least senior employee in the job classification of their choice subject to the provisions of 8.01b. Employees so reduced shall have department recall rights in accordance with 8.05b. (1), (2) and (3).

8.09 EMPLOYEES ON LAYOFF. Employees who are or shall be laid off due to lack of work shall accumulate Seniority Rights subject to 8.11. Employees shall be given three (3) working days (sic) notice of impending layoff from the plant or three days (sic) pay in lieu thereof. For a day to count, notice must be given during the first four (4) hours.

(Jt. Ex. 1)

IV. ISSUE

The Parties stipulated to the following statement of the issue:

> Whether some or all Grievants in this matter were laid off in violation of Article 8 of the CBA or any other relevant provisions therein? If so, what are the appropriate remedies?

V. POSITIONS OF THE PARTIES

A. USW's Positions: The Agreement's Article 8 precludes 3M from scheduling work for less senior employees while laying off qualified senior employees but, the Union alleged, that is precisely what it did on two (2) occasions in January 2014, when its supply of gas was interrupted. Article 8, §8.01 a. (1) states that plant seniority:

> … shall apply in cases of *layoff*, recall, promotion, demotion, *reduction* and transfer of employees provided the employee under consideration is *qualified* to perform the job in question.

(Jt. Ex. 1; Italics added) Moreover, the short-term layoffs in question were reductions-in-force: contingencies covered by Article 8, §8.07 a. and b. These provisions provide:

> a. When employees are reduced or bumped from their classification, they may bump the least senior employee within the job classification and shift arrangement of their choice, available within the department.
>
> b. Employees who are reduced or bumped from their department will use their plant seniority to replace a less senior employee in the group by bumping the least senior in the job classification of their choice subject to the provisions of 8.01b. …

(Jt. Ex. 1)

From January 5th through January 7th, 3M laid off nineteen (19) employees who worked on the FATT production lines in Building 102. (Jt. Ex. 2; Un. Exs. 1 and 4) When it did so, the Union maintained, junior employees remained on the job, performing work that the nineteen (19) senior employees were qualified to perform. For allegedly violating Article 8, §8.01 a. (1) and §8.07 a. and b. in the Agreement, the Union filed Grievance #2014-14. (Jt. Ex. 2) Later that same month, from January 26th through January 28th, 3M again laid off – out of seniority order – the same nineteen employees and, in doing so, it again violated the above cited provisions in Article 8. [6] Hence, the Union filed Grievance #2014-15. (Jt. Ex. 2)

Further, the Union maintained, during this second layoff event a number of other employees, who worked in Building 110, Specialty Additives, were also laid off out of seniority

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[6] Relevant to both lay-off events, David Jacobson, Local 11-418 Committee Member, testified that he and the other eighteen (18) laid-off FATT employees were "qualified" to perform the work of less senior employees who remained on the job. (Un. Exs. 1, 2 and 4)

order (i.e., they were laid off even though qualified to perform the work of less senior employees who remained on the job.)[7] Specifically, the laid off employees, the date or dates on which they were laid off, and the grievance number associated with their grievances are as follows:

- Todd Lucas and Steve Nieman – January 26, 2014 – Grievance #2014-16;
- Shawn Slocum, Katrina Leonida, Keith Johnson, Shawn Colburn and David Houle – January 26, 2014 – Grievance #2014-17;
- Steve Harper, Brian Cocchiarella and Debbie Shearen – January 26, 2014 and January 27, 2014 – Grievance #2014-18;
- Jim Dodge, Keith Hankes and Keith Bibelheimer – January 26, 2014 and January 27, 2014 – Grievance #2014-19; and
- Ryan Simones – January 26, 2014 and January 27, 2014 – Grievance #2014-20.

(Jt. Ex. 2)

In the present matter, junior employees worked on the above-referenced dates, while employees with more seniority were laid off. This circumstance, the Union argued, is permissible only if the senior employee is not "qualified" to perform the less senior employee's job, as clearly expressed in Article 8, §8.01 a.(1) and b.(1) in the Agreement. Whether a layoff is prompted by the curtailment of gas or because of some other emergency, and whether it is expected to be temporary or permanent, Article 8's seniority rule still applies. During periods of layoffs, the only contractual exception to the strict application of the seniority rule is when a senior laid-off employee is not "qualified" to perform the job being worked by a junior

[7] The following employees testified that during the layoffs junior employees were allowed to work even though the laid-off, senior employees were qualified to perform same: Todd Lucas, Local 11-418 Grievant; Shawn Slocum, Local 11-418, Grievant and Recording Secretary; and Mike Schanks, Local 11-418, President.

employee. Layoffs out of seniority order are permitted for this reason and only for this reason *per* Article 8's multiple provisions, as negotiated by the Parties.

That the Grievants were "qualified" to perform the scheduled work of junior employees is not seriously disputed[8] and, hence, they were denied their contractual right to "bump" designated junior employees as provided by Article 8, §8.07 a. and b. In the alternative, the Union argued, 3M, in concert with the USW, could have transferred the Grievants to different departments on a temporary basis, as provided by Article 7, §7.11.

Article 7, §7.12 provides that when employees report for work as scheduled, but work is not available, then they are be given a minimum of four (4) hours of pay unless (1) they were given advance notice that the work was not available or (2) the absence of work was beyond the control of 3M. This provision, the Union urged, is a "wage protection" promise that applies regardless of the employees' seniority status, and this provision does not permit 3M to send employees home out of seniority order. When work is not available, it is the application of Article 8, §8.07 a. and b. that determines who will work and who will not work. Further, the Union pointed out, Article 8, §8.09, *inter alia*, requires that employees who are about to be laid off due to a lack of work are to be given three (3) working days of advance notice. In the instant matter, none of the Grievants were given the referenced three (3) working days of advance notice of their layoffs. Thus, here again, the Union claimed, is another section of the CBA that 3M violated in January 2014.

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[8] See footnote 7, *supra*.

In addition to having violated the expressed terms of Article 8, the Union contended that 3M violated an enforceable past practice. On previous occasions, when there was a temporary interruption of work, 3M always found alternative work for the affected employees to perform in lieu of effecting the layoff/bidding/bumping provisions of Article 8.On point, Joe Fuchs, Local 11-418, Former President (Retired), testified that the referenced practice has existed since, at least, December 2000, when 3M laid-off certain employees and, in response, the Union grieved. Ultimately, the grievance was resolved with partial pay for scheduled time not worked going to the grievants and it involved a new shift-restructuring agreement. (Un. Ex. 8) Further, he testified, every six months or so there is lack of work somewhere on site, and 3M has always found work for the affected employees. Still further, in 2009, due to the slowdown in economic activity, the Company needed to lay off employees. In view thereof, Mr. Fuchs stated, 3M and the Union agreed to a one-time waiver of Article 8's layoff/bidding/bumping provisions, giving 3M the flexibility it needed to effect shutdowns of up to two (2) weeks within the site's numerous divisions over a several month period. (Un. Ex. 7)

In the present matter, Mike Schanks, Local 11-418, President, testified that 3M did not seek Union cooperation and waiver of Article 8's layoff/bidding/bumping protocol, as it had done in 2009. Moreover, he stated, the parties' past practice is to provide employees a 40-hour work week guarantee: 3M has always found work for employees who otherwise would have been laid off. Mr. Schanks also testified about the Parties' 2013 round of CBA negotiations. During these negotiations, he observed, the 3M's written proposals included the following partial text:

> The Company repudiates the following practices that will no longer be permitted upon the expiration of this contract into the new contract for the following areas:
>
> ***
>
> - Granting employees work when work is not available.

(Co. Ex. 1) Continuing, Mr. Schanks stated, while 3M repudiated this "40-hour work/pay guarantee", it refused to bargain said repudiation. Critically, he observed, the Union did not agree to the repudiation, which is not mentioned in the Parties' "Stipulation of Agreements: 3/01/13". (Un. Ex. 6) Indeed, the mere fact that 3M felt compelled to repudiate the referenced past practice is proof of its existence.[9]

Emergency or not, the Union argued, 3M had ample time to match seniority dates and qualifications before laying-off crew in January 2014. It was 3M's responsibility to have done so, as specifically and expressly required by Articles 7 and 8 in the CBA: provisions the Arbitrator is duty-bound to enforce *per* Article 11.05. Also, the Union noted, approximately eighteen and one-half (18.5) hours had elapsed between the time the MERC had contacted Mr. Rogers and the time he contacted the affected operation, ordering the January 5th shutdown. (Co. Ex. 2)

Finally, the Union cited arbitral precedent in support of its claimed contract violations and, as remedy, the Union requested the Arbitrator sustain its grievances and "make whole" the adversely affected employees. *Pepsi-Cola Portsmouth Bottling Co*., 95 LA 1024 (Modjeska, 1990) The Union also requested the Arbitrator retain jurisdiction over the matter to ensure remedy compliance.

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[9] Union Exhibit 8

B. 3M's Positions: Initially, the Company observed that the role of the arbitrator is to determine and give effect to the Parties mutual intent, as expressed in their Agreement. *The News-Sun,* 92 LA 713 (Heinsz, 1989) Next, it pointed out that the CBA's Article 7, §7.12 "report-in-pay" language combined with the fact that the Parties have never agreed to a "40-hour work/pay guarantee" is the Agreement's clearest expression of how the Parties intended 3M to respond to emergency or unforeseen interruptions in production. Plainly, the Union's reliance on Article 8 in this case is misplaced.

The January 2014 short-term work interruptions – caused by the curtailment of gas – were not "layoffs" within the meaning of Article 8, as the Union argued. According to the Union, if a single employee loses as little as one (1) hour of work, whether within or without 3M's control, 3M must reconfigure the entire workforce through the process of bidding and bumping. Yet, the Company urged, in the face of unforeseen emergency events, it is unrealistic to believe that said reconfiguring could be timely completed through the seniority system's bidding/bumping procedure. Thus, in the matter at hand, the Company contended, the Union is seeking, through arbitration, a 40-hour work/pay guarantee by either allowing employees to report to work as scheduled or to pay them for staying at home even when, because of the emergency, there is no work to be performed. Moreover, according to the Union, even with bidding/bumping, even laid-off "junior" employees would be guaranteed three (3) days of pay because in times of emergency they would not be given three (3) days' notice, as provided in Article 8, §8.09.

The Company argued that the Union's analysis mischaracterizes the CBA's terms. First, it is uncontroverted that the Parties have never negotiated an employee right to a 40-hour

work/pay guarantee. Second, Article 7, §7.12 provides for short-term interruptions of work. It provides a minimum of four (4) hours pay for employees who reported to work when "… work is not available", except when said employees are "notified in advance not to report" to work and when the lack of work was "beyond the control of the company." This section of Article 7 would be rendered meaningless if, as the Union claimed, 3M is obligated to find work for employees to do or to pay them for lost time regardless of circumstances. Third, citing precedent, the Company observed that Article 8's language or its equivalent has been enforced when a workforce reduction was caused by a reduction or secession in production rather than because of a temporary and unforeseen reduction or secession in production caused by such events as "inclement weather". *Kaiser Steel Corp*., 48 LA 1199 (Roberts, 1967) Further, it has also been determined that "city-wide power outage" outside of company control that resulted in having certain classifications of employees not to report to work was not a "layoff". As in the latter case, the Company argued, 3M acted within its Article 4, §4.01 rights to efficiently manage its business and to direct the workforce when it directed certain employees not to report to work during the January 2014 emergencies. To make changes in work schedules under emergency circumstances is an implied management right. *Union Camp Corp.,* 95 LA 1054 (Strasshofer, 1990) Still further, it has been found that in unforeseen/emergency situations seniority language should not be strictly applied when it yields absurd results not intended by the parties. *International Association of Machinists*, 73 LA 1127 (Zimring, 1979) Ultimately, the Company averred, the present case stemmed from unforeseen emergencies outside managerial control and, in response, 3M acted responsibly, reasonably and in good faith. Certainly, for having done so, 3M should not be penalized. In would have been manifestly

impossible for 3M to have implemented the Article 8 bidding/bumping procedure during the lay-off events that were grieved. Even Mr. Shanks affirmed that bidding/bumping under Article 8 can take up to a week to complete.

Next, the Company maintained, the Parties are not bound by a past practice that requires 3M to find work for employees adversely impacted by the interruption of production or that requires a 40-hour work/pay guarantee. First, Article 7, §7.12 belies the notion of any such practice. Second, it is uncontroverted that the Parties have never negotiated such a guarantee. Third, the Union did not present reliable evidence showing that 3M would keep employees on the job whenever production was interrupted because of a "mutual agreement" compelling it to do so. *St. Regis Paper Co.*, 51 LA 1102 (Solomon, 1968) On point, Patrick Somers, Human Resource Manager, testified that prior to the execution of the current CBA, 3M voluntarily endeavored to find productive work for employees whose production lines were down. Finally, in *arguendo*, the Company contended that any past practice that may have existed under the Parties prior CBAs was repudiated by 3M during the Parties' 2013 negotiations, resulting in the current CBA. The Company opined that a past practice does not survive a clear repudiation during the negotiation of a new labor agreement unless said practice newly appears as an expressed term in the new labor agreement. Elkouri & Elkouri, *How Arbitration Works* (6th ed., 2003)

For the reasons discussed above, the Company urged that the grievances be denied.

VI. <u>ANALYSIS AND OPINION</u>

Article 8, §8.01 a. (1) provides that plant-wide seniority shall apply in instances of

> … *layoff,* recall, promotion, demotion, *reduction* and transfer of employees provided the employee under consideration is *qualified* to perform the job in question.

(Jt. Ex. 1; Italics added). From this quote's list of nouns, only the words *layoff* or *reduction (*hereafter layoff or layoffs) are applicable herein, and not in dispute is that this language means that seniority determines the order of layoffs, provided that senior employees can do the work being performed by prospectively displaced junior employees.

In January 2014, MERC curtailed the supply of gas piped to 3M, resulting in short-term layoffs of certain employees from January 5th through 7th and, for a second time, from January 26th through 29th. The first layoff affected nineteen (19) employees who worked on the FATT production lines in Building 102. The second layoff involved these same nineteen (19) employees plus several other employees who worked in Building 110's Specialty Additives production operations. Regarding the latter personnel, Todd Lucas, Steve Nieman, Shawn Slocum, Katrina Leonida, Keith Johnson, Shawn Cloburn and David Houle lost scheduled shift work on January 26th, while Steve Harper, Brian Cocchiarella, Debbie Shearen, Jim Dodge, Keith Hankes, Keith Bibelheimer and Ryan Simones lost scheduled shift work on both January 26th and 27th. At issue in this case is that these employees were not given the opportunity to use their seniority rights to claim jobs that were being worked by junior employees: jobs they allegedly were qualified to work. Hence, at this point in the analysis, it appears as though 3M may have violated Article 8, §8.01 and Article 8, §8.07 a. and b., as the Union claimed. Stated in Article 8, §8.07 a. and b. is that,

> a. When employees are reduced or bumped from their classification, they may bump the least senior employee within the job classification and shift arrangement of their choice, available within that department.

> b. Employees who are reduced or bumped from their department will use their plant seniority to replace a less senior employee in the group by bumping the least senior employee in the job classification of their choice subject to the provisions of 8.01b. Employees so reduced shall have department recall rights in accordance with 8.05 b. (1), (2) and (3).

(Jt. Ex. 1) Thus, the Union filed grievances on behalf of the above-referenced Grievants. The precise number of scheduled hours of work that each Grievant was denied is not a matter of record. However, there is no question that work hours were lost due to the layoff events. Additionally, in general, the record supports the conclusion that either some or all of the Grievants had more seniority than junior employees who were not laid off and that either some or all of the Grievants were qualified to perform the junior employees' jobs. However, the record is void of specific information regarding same. Nevertheless, based on these *prima facie* grounds, it may be provisionally concluded that the Union's claim of CBA violations has merit.

Moreover, the Union has shown that during previous incidents of layoffs, 3M has side-stepped it obligation to apply the relatively cumbersome seniority rule of bidding/bumping by finding alternate work for the otherwise laid-off employees. This happens about twice a year, "machines go down", testified Mr. Fuchs, without contradiction. Mr. Jacobsen proffered similar testimony: "There is always work that needs to be done"; "Previously, the Company would have given us work elsewhere"; and "During holiday shutdowns, the Company would give us extra work opportunities." Moreover, he testified that in October 2012, a tanker of adhesive failed to arrive at the site on time or as planned. As a result, the "tape coating" operations were shut down for a few days and the laid off employees were given the option of going without pay for the time not worked or using vacation time. The Union grieved, claiming an Article 8 violation. The grievance was settled. The "Settlement Statement" reading, "Management agrees to settle

based on *past practice*." (Un. Ex. 5; Italics added) To further reference related testimony, Mr. Slocum stated that a "couple of times a year" a machine would go down and the company would assign the entire shift alternate work; Mr. Schanks stated that during his twenty-four (24) years at 3M, he had "… never been sent home. The company always would find something for me to do."

The Company challenged the Union's past practice claim. It argued that its occasional and *ad hoc* accommodations to avoid laying off employees should not be interpreted to mean that 3M ever acquiesced to a 40-hours work/pay guarantee for unit employees or, as a matter of past practice, that it and the Union had mutually agreed that work would always be made available to its employees, regardless of circumstances. Significantly, however, the Company argued, it effectively ended any confusion about the alleged past practice during the Parties 2013 round of negotiations. At that time, 3M unequivocally repudiated any future participation in the practice of "Granting employees work when work is not available." (Co. Ex. 1) Union witnesses Jacobson and Slocum acknowledged 3M's repudiation stance and testified that the Union rejected it. Moreover, they testified that 3M was so resolute in its position that it refused to further bargain over the matter.

Analysis of the Union's past practice claim begins with the undersigned's definition of a past practice. Namely, when a company responds to a recurring situation in the same way over an extended period of time and its response is mutually accepted by the company and union, either explicitly or implicitly, as the appropriate response, then an enforceable practice is established. Further, a proven past practice is treated like any other binding term of employment, as if written into the Agreement. In the matter at hand, the Company's position is

that even if the alleged practice had previously existed, it effectively ended with the expiration of the Parties' previous CBA. During the Parties' 2013 round of negotiations, the Company maintained, 3M withdrew, in writing, from the practice. That is, the Union was put on notice that it no longer accepted the Union-alleged 40-hours work/pay guarantee; that it no longer accepted the practice of automatically granting employees work when work was not available; that it was withdrawing from the "mutuality" element in the above-referenced definition of a past practice.

It is firmly established in labor law, labor arbitration and industrial relations that an enforceable past practice may not be changed during the term of a CBA, without mutual assent. This is the rule, whether the term of employment is implied (i.e., an enforceable past practice) or expressly stated in CBA language. However, absent mutual assent, implied and expressed terms of employment may be changed during the negotiations of a successor agreement. In the present case, 3M repudiated the practice in question (i.e., it withdrew "mutuality"), during negotiations of the current CBA. At that point, for the practice to have continued, the Union, through negotiations, would had to have the terms of the practice explicitly incorporated into the CBA or to have persuaded the Company to objectively retract its expression of repudiation. The record evidence is that the Parties neither incorporated the referenced practice into the current CBA nor did 3M recant. (Un. Ex. 6) For these reasons, the undersigned rejects the Union's claim that 3M violated an enforceable past practice when it laid off the Grievants in January 2014. However, it remains to be determined whether 3M violated any of the CBA's explicit terms.

The Company argued that the January 2014 layoffs were caused by emergencies that were beyond its control. Freezing temperatures forced 3M's supplier of gas, MERC, to limit the flow of gas to its commercial customers to ensure that adequate supplies would be available to heat residential homes. The January 2014 curtailments of gas caused 3M to shut down the gas-dependent production lines in Buildings 102 and 210 and to subsequently layoff the employees who worked on these lines. As in the instant case, where layoffs are caused by circumstances beyond the control of the employer, the Company pointed out that arbitrators have upheld the employer's disregard of seniority rules that otherwise would apply in ordinary, planned layoff situations. In response, the Union referenced arbitral precedence that reached the opposite conclusion.

Yet, the Company continued, Article 4, §4.01 grants to management the right to operate efficiently and that is what it attempted to do during the January 2014 alleged emergences. (Jt. Ex. 1) Further, said emergency circumstances made it impossible for 3M to have complied with the Article 8, §8.09 requirement that employees be given three (3) working days' notice of an impending layoff or three (3) days of pay in lieu thereof. (Jt. Ex. 1) Hence, the Company urged, both notice and pay should be excused given the present case's unplanned, unforeseen circumstances. Notwithstanding the absence of language that excuses the strict application of Article 8, §8.01, §8. 07 and §8.09 in emergency situations, the Company urged, it was never the Parties intent that Article 8 should be used to penalize 3M when, responsibly and in good faith, it laid off employees in situations beyond its control.

To support its "intent" argument, the Company observed that when work is not available, Article 7, §7.12 exempts 3M from having to pay a minimum of four (4) hours of

report-in-pay to affected employees, if the lack of work is for reasons "beyond the control of the company." In the end, the Company maintained that its January 2014 layoffs did not violate the CBA given this language, the absence of contract language guaranteeing employees 40-hours of work/pay and the abundance of arbitral precedence exempting employers from (1) issuing a layoff notice or pay in lieu thereof and, more to the point, from (2) following seniority bidding/bumping rules in emergency situations.

Consistent with precedence, the Company argued, 3M acted within its Article 4, §4.01 rights to efficiently manage its business and to direct the workforce when it told certain employees not to report to work during the January 2014 emergencies. Arbitrators have found that making changes in work schedules under emergency circumstances is an implied management right. Still further, they have found that contract language should not be strictly applied in unforeseen, emergency situations that produce unintended or absurd results. Ultimately, the Company averred, the instant case presented unforeseen emergencies outside of management's control and, in response, it acted responsibly, reasonably and in good faith and for having done so, it should not be penalized. The Company maintained that it was manifestly impossible for 3M to have implemented bidding/bumping layoff procedures, as intended by Article 8. Indeed, even Mr. Shanks affirmed that bidding/bumping under Article 8 can take up to a week to complete.

The Union challenges the Company's "manifestly impossible" contention. Consider the following facts: At 12:38 a.m. on Sunday, January 5, 2014, MERC e-mailed 3M, *via* Mr. Rogers, notifying that the site's use of gas supply would be curtailed effective 12:00 noon that same day. At 7:07 p.m. on Sunday, January 5, 2014, Mr. Rogers e-mailed the relevant business

operations, attaching MERC's curtailment notice. (Co. Ex. 2) The Union observed that approximately eighteen and one-half (18.5) hours passed between the time MERC's notice was sent to Mr. Rogers and the time the FATT production lines were shut-down. The Union claimed that eighteen and one-half (18.5) hours was enough time for 3M to have faithfully complied with the Parties' seniority rule.

However, the undersigned finds this to be an unpersuasive argument. A closer reading of Mr. Rogers' e-mail to the business units suggests that he had telephoned each prior to sending his e-mail:

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> *This evening, calls were made to each business* explaining that natural gas usage must be curtailed to either the purchased firm gas limit or zero, whichever applies. This curtailment will be until further notice. …

(Jt. Ex. 2; Italics added) Further, as Mr. Rogers explained in that e-mail, he did not read MERC's curtailment notice until 6:00 p.m. on Sunday, January 5, 2014, when he logged onto his work-based e-mail. Arguably, therefore, the referenced time lapse was not eighteen and one-half (18.5) hours as the Union argued, but only one (1) hour and seven (7) minutes. Moreover, on that Sunday, Mr. Rogers was not negligently lax in monitoring his e-mail because, as he further explained in the e-mail to the relevant business units:

> I was under the wrong assumption that curtailments are usually 9am to 9pm and further assumed that if called, it would probably be for Monday, the colder day. Wrong on two counts. I will be following up with better notification with the Utility very soon.

(Jt. Ex. 2) Testimony about this quote was not adduced at the hearing. Nevertheless, given the freezing temperatures, it is reasonable to conclude that Mr. Rogers had indeed surmised that while a curtailment of gas was possible – "… it would possibly be … "Monday, the colder day."

Because of this reason, Mr. Rogers did not open his e-mail until 6:00 p.m. Further, when he did open the e-mail, he responded immediately: the FATT production lines in Building 110 were shut down and its operators were laid off, without three (3) working days of notice *per* Article 8, §8.09, and without the opportunity to exercise seniority rights *per* Article 8, §8.07. The record suggests that the January 5th curtailment of gas was the first such occurrence in at least ten (10) years and first of its kind in her seven (7) years as Site Director, testified Vicki Batroot.

Record evidence supports the conclusion that the actual curtailment of gas on January 5th and the resulting need to close down production lines was unprecedented, or nearly so, even though Minnesota's freezing cold January weather is anything but unprecedented. Thus, even though the gas curtailment in question was a possibility, at least to Mr. Rogers, it is properly and sensibly characterized as a condition that 3M could not have reasonably expected.

As the Union accurately pointed out, the CBA does not expressly allow management to disregard Article 8, §8.01 and §8.07's seniority rules. However, as the Company accurately observed, arbitrators often hold that layoffs may be exempted from the seniority rule when unusual, unexpected, unplanned, even emergency, circumstances dictate same. Mr. Wakefield's decision to have immediately shut down the FATT production lines at 10:00 p.m. on Sunday, January 5th was a necessity. In advance of his shutdown decision, neither Mr. Rogers nor Mr. Wakefield expected that it would soon be necessary to layoff nineteen (19) FATT employees. Further, when the shutdown was ordered, it is unrealistic to conclude that 3M had enough time to permit the nineteen (19) FATT employees to use their seniority to bump junior employees – after having verified their qualifications to perform the jobs of the replaced junior employees – and to have further triggered the bumping procedure's "domino effect". That is,

the bumping process would have been repeated by the replaced junior employees as they, in turn, exercised their bumping rights, and so forth throughout the workforce.

In this and kindred incidences, seniority-based bidding/bumping procedures take time, often a considerable amount of time, to complete. The first of 3M's two (2) January 2014 layoff events was an unforeseen emergency that required 3M to immediately shutdown the FATT production lines unfettered by the seniority rule and its time-consuming procedure. Under these circumstances, to penalize 3M would be unjust and wholly inequitable. Thus, under said circumstances, the undersigned concludes, to penalize 3M would be to impose a remedy that the Parties never intended under Article 8. For these reasons, Grievance #2014-14 is denied.

On January 26th, approximately three (3) weeks later, a second layoff was triggered because gas supplies to the site were shut off, necessitating that FATT and Specialty Additives production activities be shutdown. The conditions necessitating these shutdowns did not parallel the conditions that prevailed at the time of the January 5th shutdown. First, as of January 26th, 3M had experienced a gas curtailment event only three (3) weeks earlier. Thus, the prospects of a repeat event should not have been considered remote. Second, during the week of January 19th sub-zero temperatures had again returned, which should have further alerted 3M to the fact that its gas-energized production operations were at risk. Third, with the return of sub-zero temperatures, Mr. Rogers either had or should have had "notification" conversations with MERC about curtailment prospects. Finally, the Union had filed Grievance #2014-14 on January 13th, putting 3M on notice that Article 8's layoff procedures would be enforced. For this and the other above-listed reasons, 3M should have been prepared to apply

Article 8's seniority bidding/bumping procedure; it should have done so as a matter of prudent contingency.

Well before January 26th, 3M knew or should have known that its gas-reliant production activities were at risk of being shut down. Thus, it cannot be concluded that on January 26th 3M was confronted by an unforeseen emergency situation. Such an event either was or should have been reasonably anticipated. The record evidence does not credibly explain why 3M did not, as a contingency matter, execute Article 8's bidding/bumping process among employees working in production operations that most likely would be affected by a gas curtailment. At a minimum, it should have done so during the week of January 19th. In effect, in a contract-compliant way, 3M should have pre-determined who to layoff in the event MERC again cut off its supply of gas. Under the circumstances that prevailed on January 26th, Article 8's seniority rights would have no meaning whatsoever unless, facing layoff, the affected senior employees were given the opportunity to bid jobs held by junior employees, jobs that they were qualified to work. For these reasons, Grievances #2014-15 through #2014-20 are sustained.

VII. AWARD

As discussed above, Grievance #2014-14 is denied and Grievances #2014-15 through #2014-20 are sustained. As remedy, the individual Grievants who were wrongly denied Article 8's seniority rights shall be "made whole".

For purposes of remedy-enforcement, the Parties are directed to jointly identify each Grievant who was wrongly denied Article 8 rights as well as that Grievant's number of lost scheduled work hours. Next, the Parties are further directed to determine the amount of "make whole" earnings each Grievant is due.

To oversee enforcement of this Award and to resolve any disputes that may arise during the Parties' above-ordered deliberations, the undersigned retains jurisdiction over this matter until 5:00 p.m. CST on Friday, March 13, 2015.

ISSUED and ORDERED on the 12th day of January 2015 from Tucson, Arizona.

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Mario F. Bognanno,
Labor Arbitrator and Professor Emeritus