

**IN THE MATTER OF ARBITRATION BETWEEN**

**International Brotherhood of Teamsters,  
Chauffeurs, Warehouseman and Helpers,  
Local Union 160**

**OPINION AND AWARD  
FMCS Case #140730-03014-8**

**And**

**Kemps, LLC**

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**ARBITRATOR**

Joseph L. Daly

**APPEARANCES**

On behalf of Teamsters, Local 160  
Frederick Perillo, Esq.  
The Previant Law Firm  
Milwaukee, Wisconsin

On behalf of Kemps, LLC  
John J. Toner, Esq.  
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Washington, DC

**JURISDICTION**

In accordance with the agreement between Kemps LLC, Rochester, Minnesota, and Chauffeurs, Teamsters, Warehouseman and Helpers, Local 160, 1/1/2011-3/31/2014; and under the jurisdiction of the United States Federal Mediation and Conciliation Service, Washington, DC, the above grievance was submitted to Joseph L. Daly, Arbitrator, on May 6, 2015, in Rochester, MN. The parties filed post-hearing briefs on June 5, 2015, [Kemps] and June 15, 2015, by Teamsters Local 160. The arbitrator rendered the decision on July 10, 2015.

**ISSUES AT IMPASSE**

The union states the issue as:

Did the company violate past practice by not treating third shift maintenance hours worked in the ice cream plant starting at 11 p.m. Saturday toward earning overtime in the following week commencing at 12:01 a.m. Sunday? If so, what is the remedy?

The employer states the issue as:

Whether the company's enforcement of its long standing policy, that day of the week credited for a work shift is determined by the day of the week in which the shift started, violate the collective bargaining agreement.

## **POTENTIALLY RELEVANT CONTRACT LANGUAGE**

### **Article V, Clause "G"**

G. Overtime. The senior qualified employee in a department having the same rate as any overtime work requires shall have the first opportunity to work the overtime. Such an employee must be immediately qualified to perform the job. No employee shall be required to take time off in lieu of being paid overtime.

### **Article XIII, Clause "A"**

A. Overtime Pay: All hourly rated employees shall be paid time and one-half (1 ½) for the time worked in excess of their normally scheduled shift (8 hours for an employee on a 5/8 schedule and 10 hours for an employee on a 4/10 schedule), or in excess of 40 hours in one (1) week, whichever is higher, but not both. All such employees shall be scheduled at least seven (7) days in advance in reference to rest day. Employees on vacation relief will assume the schedule of the person relieved. Employees, except those on vacation relief, shall receive time and one-half for all time worked on scheduled rest days if changed on less than seven (7) days' notice. If majority of the scheduled shift is on Sunday then the hours worked for that shift will be paid at twice the hourly rate for hours worked.

There shall be no pyramiding of premium or overtime pay.

### **Article XIV, Clause "Pay Day"**

Pay Day: All regular hourly rated employees shall receive paychecks bi-weekly on the Friday following the second week of the pay period. Any claim for overtime must be mad within a period of forty-eight (48) hours after receipt of pay checks. If a controversy arises in regard to wages, the Union shall have the right to inspect the time card of the individual whose wages are in dispute.

### **Article XV, Clause "Work Week"**

Work Week: The work week will be Sunday 12:01 am through Saturday midnight.

### **Article XV, Clause "Weekly Hourly Guarantee"**

Weekly-Hourly Guarantee: All hourly rated regular employees, except when laid off, shall be guaranteed the opportunity to earn a minimum weekly wage equal to forty (40) times their basic hourly rate of pay.

The standard work day for regular hourly rated employees shall be eight (8) hours and the standard work week forty (40) hours. There shall be no split shifts which is defined as a work day interrupted by more than a one (1) hour lunch period.

The Company has the right to transfer new checker and general worker employees in progression (while they are in progression) between jobs, between plants, and between master seniority groups. This will be done in order to provide as much work as possible for new employees to fulfill the forty hour guaranty.

## **ARTICLE XXI**

### **Grievance And Arbitration:**

The authority of the arbitrator shall be limited to making an award relating to the interpretation of or adherence to the written provisions of this Agreement, and the arbitrator shall have no authority to add to, subtract from, or modify in any manner the terms and provisions of the Agreement. The award of the arbitrator shall be confined to the issues raised in the grievance, and the arbitrator shall have no power to decide any other issues.

## **INTRODUCTION**

In January 2012, Kemps LLC changed its practice concerning whether hours worked by maintenance crews in the ice cream plant on the third shift on Saturdays counted toward earning overtime in the following week. In the previous 20 years Kemps had a longstanding policy that the day of the week for which a work shift is credited is determined by the day of the week that the work shift began. For example, if an employee begins his shift at 8 p.m. on a Saturday and continues to work another three hours on Sunday, it is considered a Saturday work day. Likewise, if an employee began a shift at 11 p.m. on a Saturday and continued to work another seven hours on Sunday, it was considered a Saturday work day.

In January 2012, Kemps LLC began counting the Saturday 11 p.m. shift toward hours worked on Sunday for the following week. This new practice was initiated by a supervisor and was followed for the next two years. The Kronos electronic payroll system, used by Kemps LLC, is set up to automatically define the work day as the day in which the shift begins. The Kemps supervisor for a number of months during 2012 and 2013 manually over-rode Kemps electronic payroll system in order to change the Saturday 11 p.m. shift toward hours worked on Sunday for the following week. In other words, the supervisor changed the credited work day from Saturday to Sunday. During this two-year period, workers often brought their time cards to the attention of the payroll department. The payroll department approved the payment of overtime hours, which were earned solely because the hours worked on the third shift on Saturday counted toward the following week. The union contends the “new practice thus repeated and continued for a long period, was consistently enforced, and was acceptable to both

parties.” [Post-hearing brief of union at 1] Kemp LLC contends “it was certainly not accepted by both parties because the company was not even aware that the involved supervisor [since terminated for other reasons] was acting contrary to company policy and put a stop to the supervisor’s practice upon its discovery.” [Post-hearing brief of Kemps LLC at 7]. The company further contends “there is absolutely no evidence that any of the supervisor’s superiors were aware of his inappropriate manual overriding of the company’s electronic payroll system—let alone that anyone in authority approved of or acquiesced in the supervisor’s actions. Indeed, there is no evidence that anyone outside the maintenance department was aware that the supervisor, for whatever reason, was manipulating the system.” [Id. at 8].

**POSITION OF UNION**

The company has two plants: a milk plant and an ice cream plant. There are about 300 bargaining unit employees; of these, 15 are ice cream plant maintenance persons.

Jeff Doberstein was a third shift maintenance man who moved from the milk plant to the ice cream plant in January 2012. Per article XV of the collective bargaining agreement, the work week begins on the calendar day of Sunday (i.e., at 12:01 a.m.). After Mr. Doberstein moved, he began his week at 11 p.m. on Saturday night, one hour before the technical starting time of the week. Because the majority of his 8-hour shift occurred on Sunday, he was paid double time for the entire 8-hour shift which commenced on Saturday at 11 p.m., and continued until Sunday, 7 a.m. in accordance with Article XIII A.

From January 2012 until November 2013, or nearly two full years, shift maintenance men like Mr. Doberstein worked from 11 p.m. Saturday night to the following Saturday at 7 a.m., often seven (7) days per week. Throughout this two-year period, the shift that commenced on Saturday at 11 p.m. was counted as if it had commenced on Sunday, that is, it counted toward earning overtime in that week which commenced on Sunday morning at 12:01 a.m.

As a result, maintenance persons qualified for overtime on the Friday of that week as shown in the chart below:

Saturday	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	7am	7am	7am	7am	7am	7am	7am
11pm	11pm	11pm	11pm	11pm	11pm	11pm	
	8 hours	8 hours	8 hours	8 hours	8 hours	8 hours	8hours

	worked	worked	worked	worked	worked	worked	worked
Pay:	Double time 16	Straight 8	Straight 8	Straight 8	Straight 8	Overtime 12	Overtime 12
Cumulative	8	16	24	36	40	48	56

In other words, the employees commenced working on Saturday night at 11 p.m., but this shift counted as a Sunday shift for all purposes. After five consecutive shifts, (40 hours), the employee would qualify for overtime on Thursday at 11pm (that is, on the employee’s sixth consecutive shift that week). Both Kemps LLC and the Union stipulate to the above facts.

This practice of counting the 11 p.m. Saturday shift as the first shift of the week continued from January 2012 when Mr. Doberstein moved from the milk plant until November 2013. At that time, Kemps changed the practice and began counting the shift that commenced at 11 p.m. on Saturday as the last shift of the preceding week. As a result, all employees lost one day of overtime, as shown on the following chart:

Saturday	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
	7am							
11pm	11pm	11pm	11pm	11pm	11pm	11pm	11pm	11pm
	8 hours worked							
Pay:	Double time 16	Straight 8	Overtime 12	Double time 16				
Cumulative	Not counted	8	16	24	32	40	48	56

The employee’s work on the first Sunday shown in the chart, even though seven (7) of the eight (8) hours in the shift occurs on the first day of the work week, actually counts as if it had occurred on the last day of the preceding week. While the last Sunday shown on the chart is counted, because it is already paid at double time, the employee loses one entire day of overtime work as a result of the change in the practice.

This change back to the old practice created a difference in treatment between the first and second shift start on Sunday, while the third shift commences on Saturday night, one hour before the technical start of the work week on Sunday at 12:01 a.m. As a result, the Sunday shift for the first and second shift maintenance men always counted toward crossing the overtime

threshold on Friday; they always received the extra overtime at the end of the week. The third shift's Sunday no longer counts, and they lose overtime on their Friday shift.

Mr. Doberstein's payroll records (Union exhibits 1 and 2) illustrate that Kemp's LLC indeed counted the Saturday 11 p.m. shift as the first "Sunday" shift of the week for the two-year period of the new practice. For example, the first record in Union Exhibit 1 shows that Mr. Doberstein earned in a two-week period: 25.93 double time hours (two 12-hour Sundays), 64.56 regular hours (eight 8-hour straight time days) and 37.45 overtime hours (four 9-hour days paid at time-and-one-half). In other words, for two consecutive weeks, he worked a 12-hour Sunday, four 8's from Monday to Thursday, and then 9 hours of overtime on Friday and Saturday. If the Sunday double time hours were not counted toward the 40-hour threshold for earning overtime, it would have been impossible for Mr. Doberstein to achieve more than 37 overtime hours in two weeks. There is no real dispute that for two years, Kemp's LLC did count the shift commencing on Saturday at 11 p.m. as the first "Sunday" shift of the week, which triggered the 40-hour overtime threshold for ice cream plant maintenance workers on Fridays.

Management clearly knew about and approved the new practice, as is shown by Mr. Doberstein's payroll records. There are repeated occasions where he sought payroll adjustments<sup>1</sup> and received "retro pay" as shown on the payroll record, for an incorrect statement of earnings. Necessarily, to approve these amounts, which range in the hundreds of dollars, someone in management must have reviewed and approved the change to Mr. Doberstein's pay, which means that someone in management must have known Mr. Doberstein was receiving overtime due to having his Saturday night shift counted as the first shift of the week.<sup>2</sup>

It is also undisputed that prior to January 2012, for some period of years, Kemp's LLC followed the opposite practice; that is, it counted the Saturday 11 p.m. shift as the last shift of the preceding week, not the first shift of the following week. As a result, employees would not earn overtime until the following Saturday, even though they had worked on the preceding Sunday.

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<sup>1</sup> For example, on p. 11 of U. Exh. 1, for the pay date 8/9/2013, there is an adjustment of \$207.97; on p. 18, for pay date 11/15/2013, there is a further adjustment of \$104.60. On pp. 3-6 of U. Exh. 2, for pay dates 1/24/2014, 2/21/2014, 5/30/2014 and 12/26/2014, there are adjustments of \$520.06, \$124.00, \$232.23, and \$30.26. Thus on several occasions, management reviewed Doberstein's time cards.

<sup>2</sup> For example, on p. 11 of U. Exh. 1, when management adjusted Doberstein's pay, it did so in a two-week period where he earned 40 hours of overtime, and so must have counted his Sunday hours toward the threshold.

It is not clear how long the older practice had prevailed, because the parties did not always have continuous three-shift, seven-days-a-week operation. It is clear however that a Kemps LLC supervisor changed the former practice in 2012 to the new practice of counting the Saturday night shift as the first shift of the week. This supervisor was terminated for unrelated reasons in late 2013. Kemps stated that the supervisor must have manually overridden its Kronos payroll system to do so, but there is nothing to show that employees were aware of what the supervisor was doing.

After the firing of the supervisor who changed the old practice to the new one, the HR department took over his payroll responsibilities and discovered what Kemps LLC contends was the supervisor's "mistake" in changing the practice. It apparently took several weeks to discover the "mistake." Kemps LLC then reverted back to the old practice, causing a loss of overtime earnings to the ice cream plant maintenance men, and prompting the grievance herein.

Kemps LLC submitted payroll documents from 2011 (Company Exhibits 1, 2, and 3) showing that prior to the new practice, the Saturday night shift did not count toward the following week's work. Exhibit 4 shows that for non-maintenance employees, the practice never changed (that is, the Saturday night shift never counted toward the following week for non-maintenance employees). Only maintenance employees were beneficiaries of the new practice that started in January 2012.

Kemps also introduced notes from the grievance meeting on this matter (Company Exhibit 8). As is shown by the notes, when Kemps reverted to the old practice at the end of 2013, it also thought that the matter was a change in past practice. The fourth paragraph in the notes refer to the change as "we say this was changed the new schedule was implemented [sic]."

Essentially the union argues:

- A. The new past practice established by Kemps LLC in January 2012 is binding upon Kemps LLC. It was Kemps LLC itself that initiated the change in the practice to counting the entire shift as if it fell upon a Sunday. There is no question that this change was not a "mistake" as Kemps LLC attempts to characterize the change. A supervisor deliberately made this choice; he was an agent of Kemps LLC, not an agent of the employees or the union. He had to override the Kronos system to do so, which cannot be done inadvertently. The change persisted for two years, and Kemps repeatedly and consistently applied the change, triggering overtime for the third shift maintenance men

in the same way as if it is triggered for first and second shift maintenance men. The practice thus had longevity, repetition, clarity and consistency.

There is no question that management knew about and acquiesced in the new practice. Mr. Doberstein repeatedly sought pay adjustments during this period, and someone in authority had to approve the retro pay he received while the practice was in effect. Because on some of these occasions, Mr. Doberstein received overtime solely because the Saturday/Sunday shift counted toward that work week, it is clear that management must have known about, and approved, the practice of treating the Saturday 11 p.m. shift as belonging to the following work week.

Management did not “discover” the practice for the first time after it fired the supervisor for other reasons. Management had clearly been aware of the practice, and had been applying it, for two years. Kemps LLC unquestionably created a past practice in January 2012. After it terminated the supervisor in December 2013, it reverted to the prior practice, which then took away significant overtime earnings of the third shift maintenance men. Kemps LLC unilaterally canceled a practice it no longer likes. Yet this was a clear past practice binding upon Kemps LLC.

B. Kemps LLC was not justified in reverting to the prior practice. Article XV specifies that the work week begin on Sunday, but it does not say what to do with a shift that straddles the divide between one week and the next. The new practice, which allocated the Saturday 11 p.m. shift to the oncoming week, was in effect a practical construction of ambiguous language. A mid-term change in such an established past practice is not permitted.

C. Kemp LLC’s claim that it paid overtime for two years by mistake is not credible. While there are numerous cases finding that no past practice is created by an isolated incident, or by random occasional incidents, it is incredible in this case to assert that a consistent, repetitive, two-year course of conduct, initiated by an agent of the company deliberately, and approved repeatedly by management, constituted a “big mistake.” Whether Kemp LLC understood the implications of the practice they created does not matter. Once established they are bound to the past practice. Yet here, it is clear that the actions of the supervisor were not “mistaken” but rather “deliberate.” The fact that the supervisor needed to override the programming of the Kronos system to achieve the

implementation of the practice necessarily means his actions were not “mistakes.” While they may have been undesirable from the perspective of Kemp LLC, he was their agent, not the employee’s agent or the union’s agent. Kemps cannot disavow his actions. It is also incredible for Kemp LLC to assert that a two-year course of conduct was “big mistake.” Arbitrators expect responsibility on management’s part to detect wholesale errors of large magnitude on a continuing and repetitive basis, right under their noses. An occasional mistake is understandable, a systematic change in what a week shift for overtime purposes, repeated for multiple employees, many times for two years is not a mistake, but a practice.

D. If no past practice is applicable here, then the work week should be construed literally to begin at 12:01 a.m. Sunday. It is the clear language of the contract. The arbitrator can split the days that straddle midnight for pay purposes, counting the hours worked as occurring on the actual calendar day into which they fell and the work was performed. Only the first hour is technically in the preceding calendar week. Seven of the eight hours fall into the next day. Even if there is no binding practice, Kemp LLC should not be allowed to declare unilaterally where these hours shall count for overtime purposes. It should be required to count overtime based upon the calendar dates upon which those hours of work are actually performed.

Kemps LLC is bound to the past practice it created in 2012 of treating the 11 p.m. shift as a first of the week, for overtime purposes. The alternative, if this practice is not binding, then the literal language of Article XV mandates that the shift be split between the work weeks according to when the hours were actually worked, such that the seven hours worked on Sunday count toward crossing the overtime threshold in the following week. The appropriate remedy is to award the third shift ice cream plant maintenance workers additional overtime pay for each incident where counting the third shift Saturday hours or Sunday hours properly triggers the 40 hour threshold. The union also requests that the arbitrator retain jurisdiction to resolve any disputes over a remedy.

### **KEMPS LLC POSITION**

A. Despite the company’s well established standard policy, the validity of which the union does not challenge, a single supervisor for a number months during 2012 and 2013 took it

upon himself to manually override the company's electronic payroll system in order to change for a small group of employees the day credited as the work week.

- B. Article XXI shows that the arbitrator is without authority to decide a past practice issue.
- C. The grievance must be denied because no binding past practice was created. The burden is on the union to establish the existence of a binding past practice and it has failed to do so. In order to establish a binding past practice, the actions must be 1) unequivocal; 2) clearly enunciated and acted upon; 3) readily ascertainable over a reasonable period of time as a fixed, and well-established practice accepted by both parties. Both parties certainly did not accept it because the company was not even aware that the involved supervisor was acting contrary to company policy and put a stop to the supervisor's practice upon its discovery. This was based on the actions of a single rogue supervisor who acted contrary to the established 20-year practice that the union has not challenged and his actions impacted approximately 1% of the bargaining unit over at best an 18 month period. There is actually no evidence that any of the supervisor's superiors were aware of his inappropriate manual overriding of the company's electronic payroll system—let alone anyone in authority approved of or acquiesced to the supervisor's actions. There is no evidence that anyone outside of the maintenance department was aware that the supervisor, for whatever reasons, was manipulating the system. Consequently, the union has failed to establish a violation of the collective bargaining agreement.

## **DECISION AND RATIONALE**

### **A. Role of Arbitrator in interpreting past practice**

Article XXI states “a grievance is hereby defined as any claim relating to the interpretation of or adherence to the terms and provisions of this written Agreement.” The article goes on to define “[t]he authority of the arbitrator shall be limited to making an award relating to the interpretation of or adherence to the written provisions of this Agreement, and the arbitrator shall have no authority to add to, subtract from, or modify in any manner the terms and provisions of the Agreement. The award of the arbitrator shall be confined to the issues raised in the grievance.” Kemps LLC argues in its post-hearing brief that the arbitrator has no authority to decide a past practice issue. “This [past practice] argument must fail because the arbitrator is

without authority to decide this matter.” Why? The company contends past practice does not rely on the ‘interpretation of or adherence to the written provisions’ of the collective bargaining agreement and, the arbitrator does not have authority to ‘add to, subtract from, or modify... the terms and provisions’ of the collective bargaining agreement.” Finally the company argues that the past practice argument was not raised in the original grievance and the grievance was never amended in writing or orally to include that issue.

“[C]ustom and past practice of the parties constitute one of the most significant evidentiary considerations in labor-management arbitration.” [Elkouri and Elkouri, **How Arbitration Works 6<sup>th</sup> Edition**, 605 [BNA 2003]. Past practice is introduced in this case “to support allegations that the ‘clear language’ of the written contract has been amended by mutual agreement to express the intention of the parties to make the written language consistent with what they regularly do in practice in the administration of their labor agreement.” [Id.] When past practice is asserted and proven, it constitutes an implied term of the contract. In the absence of a written agreement, past practice, to be binding on both parties must be “1) unequivocal; 2) clearly enunciated and acted upon; 3) readily ascertainable over a reasonable period of time as a fixed, and established accepted practice by both parties.” [Id. at 608, citations omitted].

Does the language of Article XXI preempt this arbitrator from interpreting the contract to determine if by past practice an implied term of a contract now exists?

The key role of an arbitrator is to interpret a contract. In this case a grievance was filed claiming past practice has added an implied term to the contract. The grievance itself relates to the interpretation of overtime pay and the work week. How does the change the supervisor made affect the interpretation of the contract? The exact job this arbitrator is empowered to do in this arbitration proceeding is to interpret the written provisions of this agreement. He is authorized to do that under Article XXI of the collective bargaining agreement. By doing so, the arbitrator is not adding to, subtracting from, or modifying in any matter the terms and provisions of the agreement. He is simply confining himself to issues raised in the grievance. The grievance alleges violations of Articles V, XIII, XIV, and XV. The only way to interpret the meaning of these articles is to determine if a past practice has given rise to an implied term, which fosters an understanding of how these articles relate to one another. Consequently, the arbitrator has jurisdiction and authority to interpret whether past practice exists.

**B. Does a past practice exist?**

The union contends the company has violated past practice by not treating the third shift maintenance hours worked in the ice cream plant starting at 11 p.m. Saturday toward earning overtime in the following week commencing at 12:01 a.m. Sunday. The company contends it has had a longstanding policy that the day of the week credited for a work shift is determined by the day of the week in which the shift started. The only reason a past practice question arises is because of the actions of a rogue supervisor who manually overrode the company's Kronos electronic payroll system. The company alleges it did not even know about the rogue supervisor doing so until the supervisor was terminated for other reasons and later discovered, contrary to Kemp LLC's policy, that the supervisor had changed the credited work day from Saturday to Sunday. This, argues the company, was an unauthorized practice and cannot constitute a past practice.

The union counters this "rogue employee/unauthorized actions" argument with the facts that the actions lasted for almost 2 years, was done by a supervisor who was an agent for Kemps LLC, and had "apparent authority" to do so. Further, the union points out that Mr. Doberstein, on a number of occasions, went to payroll to have reviewed and approved mistakes in his overtime pay due to not having his Saturday night shift counted as the first shift of the week. Someone in management, at least in the payroll division, responded by altering his pay and reflecting the change by the supervisor making his Saturday night shift count as the first Sunday shift of the week. The union contends that it is simply not "credible" that it was a "mistake" or an "isolated incident." Someone in the payroll division, and in the supervisory position, had to understand that their agent, the terminated supervisor, had manually altered the Kronos electronic system in order to pay Mr. Doberstein for the overtime. This was an almost two-year course of conduct, alleges the union, and was not a "big mistake." An occasional mistake is understandable, but this was a "systematic", "clearly enunciated" and "acted upon" change by Kemp LLC in what week a shift is counted for overtime purposes, repeated for multiple employees, many times, over an almost two year process. This was not a "mistake", but a "practice", contends the union. Arbitrators expect some responsibility on management's part to detect errors of such a large magnitude on a continuing and repetitive basis. This was "right under their noses." [Post-hearing brief of union at 15]. The union argues that the corporation

can only act through its agents. The supervisor had apparent authority to do what he did. The payroll division had to understand what he did. The actions of the former supervisor cannot be dismissed as a “mistake.” “Actions have legal consequences, and here, the consequences [are] that Kemps [LLC] is bound to a past practice that makes the Saturday 11 p.m. shift the first day of the work week.” [Id. at 16].

The arguments of the union are compelling. Employers are responsible for the acts of their agents, especially agents who have apparent authority. When an agent has apparent authority, even if he lacks actual authority, it may bind the employer. In this case, by admission of Kemps LLC, the unauthorized practice began sometime after May 19, 2012, and continued until December 2013. There was both longevity and repetition of the benefit granted to the three employees in the maintenance department working the Saturday 11 p.m. to Sunday 7 a.m. shift.

Was Kemps LLC unaware of the actions of its supervisor? Was there mutuality and acceptance by Kemps? Mr. Doberstein repeatedly sought pay adjustments during this period and someone in authority approved the retro pay while the practice was in effect. Someone in management knew or should have known that Kemps LLC acquiesced in this new practice. The supervisor had apparent authority to override the Kronos system and did so. He could not have done it inadvertently. It is clear that management must have known or should have known about, and approved, the practice of treating the Saturday 11 p.m. as belonging to the following work week. By doing so, the requirements for past practice of longevity, repetition, clarity and consistency have been fulfilled. This became by past practice an implied term in the collective bargaining agreement. At that point, Kemps LLC did not have the right to unilaterally change what is now an implied term of the collective bargaining agreement. The practice had been in effect for almost two years; payroll had reviewed and approved pay adjustments for the third shift maintenance workers. That necessarily brought the practice to the attention of management. Management did not “discover” the practice for the first time in December 2013. It had been aware, or should have been aware, and had applied the practice for a considerable time. Kemps LLC created this past practice in at least May 2012. It then terminated that practice in December 2013 and reverted to the prior practice. Kemps LLC does not have authority to unilaterally cancel a past practice that has become an implied term of the collective bargaining agreement. This past practice is binding upon Kemps LLC. The criteria - for the establishment of a past practice - of longevity, repetition, clarity, mutuality, acceptance, and

consistency have been fulfilled considering the facts of this case. The benefit given to these specific employees constitutes a past practice. The supervisor in question was fired for reasons completely unrelated to the past practice. The practice of treating the Saturday 11 p.m. shift for ice cream plant maintenance workers as their first shift of the following week is now an unwritten term of the collective bargaining agreement binding upon Kemps LLC.

As a remedy, the third shift ice cream plant maintenance workers are awarded additional overtime pay for each incident where counting the third shift Saturday hours or Sunday hours properly triggers the 40-hour threshold. The arbitrator shall retain jurisdiction until December 10, 2015 to resolve any disputes over this remedy.

\_\_\_\_\_  
July 10, 2015  
Date

\_\_\_\_\_  
Joseph L. Daly  
Arbitrator