ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7070 HOUSE LABOR & COMMERCE

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CS FOR HOUSE BILL NO. 283 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE LABOR & COMMERCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to brokers and managers who act as reinsurance intermediaries, to duties of insurers who use a reinsurance intermediary, and defining certain terms related to insurance."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 21 is amended by adding a new chapter to read:

CHAPTER 28. REINSURANCE INTERMEDIARIES.

Sec. 21.28.010. LICENSING OF REINSURANCE INTERMEDIARY BROKERS AND REINSURANCE INTERMEDIARY MANAGERS. (a) A person may not act as a reinsurance intermediary broker or reinsurance intermediary manager with an office located in this state or act as a reinsurance intermediary broker or reinsurance intermediary manager for a domestic company located in this state or another state unless the person is licensed under this chapter.

(b) A person who acts as a reinsurance intermediary broker or reinsurance intermediary manager for a foreign insurer in this state or for a domestic insurer, but who does not maintain an office in this state, must be licensed under this chapter as a nonresident reinsurance intermediary broker or nonresident reinsurance intermediary manager.

(c) The director may require a reinsurance intermediary manager or reinsurance intermediary broker to

(1) file a bond in an amount from an insurer acceptable to the director for the protection of the reinsurer; and

(2) maintain an errors and omissions policy in an amount acceptable to the director.

(d) The director may issue a reinsurance intermediary broker or reinsurance intermediary manager license to a person who has complied with the requirements of this section. A license issued to a firm or association authorizes all members of the firm or association and all designated employees to act as reinsurance intermediaries under the license if the member or employee is named in the application and any supplements. A license issued to a corporation authorizes all officers of the corporation, and all of the corporation's designated employees and directors, to act as reinsurance intermediaries on behalf of the corporation if the employee or director is named in the application and any supplements.

(e) If the applicant for a reinsurance intermediary broker or reinsurance intermediary manager license is a nonresident, the applicant shall file the power of attorney required by AS 21.27.270(c) and appoint the director as agent for process of service as required by AS 21.27.280.

(f) The director may refuse to issue a reinsurance intermediary broker and reinsurance intermediary manager license if, in the director's judgment, the applicant, a person named on the application, a member, principal, officer, or director of the applicant, or a controlling person of the applicant is not trustworthy to act as a reinsurance intermediary or has failed to comply with a prerequisite for the issuance of the license.

(g) A reinsurance intermediary broker or reinsurance intermediary manager shall be subject to examination by the director. In conducting an examination, the director shall have access to all books, bank accounts, and records of the reinsurance intermediary broker or reinsurance intermediary manager in a form usable to the director. A reinsurance intermediary manager may be examined in the same manner as the reinsurer.

(h) A reinsurance intermediary, insurer, or reinsurer who is found by the director, after hearing, to be in violation of a provision of this title shall

(1) be subject to suspension or revocation of license or fines under AS 21.27.440 and any other penalties lawfully available to the director; and

(2) make restitution to the insurer, reinsurer, rehabilitator, or liquidator of the insurer or reinsurer for the net losses incurred by the insurer or reinsurer attributable to the violation.

(i) This section does not apply to a person licensed as an attorney at law in this state when the person is acting as an attorney.

Sec. 21.28.020. OPERATING REQUIREMENTS FOR REINSURANCE INTERMEDIARY BROKERS. (a) Transactions between a reinsurance intermediary broker and a represented insurer may only be entered into under a written contract specifying the responsibilities of each party. The contract must, at a minimum, provide that

(1) the insurer may terminate the reinsurance intermediary broker's authority at any time;

(2) the reinsurance intermediary broker shall render accounts to the insurer accurately detailing all material transactions, including information necessary to support all commissions, charges, and other fees received by, or owing, to the reinsurance intermediary broker and remit all funds due to the insurer within 30 days of receipt;

(3) all funds collected for the insurer's account shall be held by the reinsurance intermediary broker in a fiduciary capacity required under AS 21.27.360 in a bank that is a qualified United States financial institution;

(4) the reinsurance intermediary broker shall comply with the written standards established by the insurer for the cession or retrocession of all risks; and

(5) the reinsurance intermediary broker shall disclose to the insurer any relationship with a reinsurer to which business is ceded or retroceded.

(b) For at least 10 years after expiration of each contract of reinsurance transacted by the reinsurance intermediary broker, the reinsurance intermediary broker shall keep a complete record for each transaction showing

(1) the type of contract, limits, underwriting restrictions, classes or risks, and territory;

(2) the period of coverage, including effective and expiration dates, cancellation provisions, and required notice of cancellation;

(3) the reporting and settlement requirements of balances;

(4) the rate used to compute the reinsurance premium;

(5) the names and addresses of assuming reinsurers;

(6) the rates of all reinsurance commissions, including the commissions on retrocessions handled by the reinsurance intermediary broker,

(7) the related correspondence and memoranda;

(8) the proof of placement;

(9) the details regarding retrocessions handled by the reinsurance intermediary broker including the identity of retrocessionaires and the percentage of each contract assumed or ceded;

(10) the financial records of premium and loss accounts; and

(11) if the reinsurance intermediary broker procures a reinsurance contract on behalf of a licensed ceding insurer,

(A) written evidence directly from any assuming reinsurer that it has agreed to assume the risk; or

(B) written evidence, if placed through a representative of the assuming reinsurer other than an employee, that the reinsurer has delegated binding authority to the representative.

(c) The insurer shall have access and the right to copy and audit all accounts and records maintained by the reinsurance intermediary broker related to the insurer's business in a form usable by the insurer.

Sec. 21.28.030. DUTIES OF INSURERS UTILIZING THE SERVICES OF A REINSURANCE INTERMEDIARY BROKER. (a) An insurer may not engage the services of a person to act as a reinsurance intermediary broker on the insurer's behalf unless the person is licensed under AS 21.28.010.

(b) Notwithstanding (a) of this section, a domestic insurer may use a reinsurance intermediary broker that is not licensed under this chapter, if the reinsurance intermediary broker meets the licensing requirements for a reinsurance intermediary broker imposed by the state, territory, or country of residence.

(c) An insurer may not employ an individual who is employed by a reinsurance intermediary broker with which it transacts business unless the reinsurance intermediary broker is under common control with the insurer and subject to AS 21.22.

(d) The insurer shall annually obtain a copy of statements of the financial condition of each reinsurance intermediary broker with which the insurer transacts business.

Sec. 21.28.040. OPERATING REQUIREMENTS FOR REINSURANCE INTERMEDIARY MANAGERS. (a) Transactions between a licensed reinsurance intermediary manager and the reinsurer it represents in that capacity may only be entered into under a written contract, specifying the responsibilities of each party, that is approved by the reinsurer's board of directors. At least 30 days before the reinsurer assumes or cedes business through the manager under a contract, a copy of the contract shall be filed with the director for approval if

(1) the reinsurer is a domestic insurer; or

(2) the reinsurance intermediary manager has an office in the state.

(b) The director may not approve the contract unless at a minimum the contract provides that

(1) the reinsurer may terminate the contract for cause upon written notice to the reinsurance intermediary manager; the reinsurer may immediately suspend the authority to assume or cede business during a dispute regarding the cause for termination;

(2) the reinsurance intermediary manager shall render accounts to the reinsurer accurately detailing all material transactions, including information necessary to support all commissions, charges, and other fees received by, or owing to, the reinsurance intermediary manager and remit all funds due under the contract to the reinsurer on at least a monthly basis;

(3) all funds collected for the reinsurer's account shall be held by the reinsurance intermediary manager in a fiduciary capacity under AS 21.27.360 and in a bank that is a qualified United States financial institution; the reinsurance intermediary manager may retain not more than three months estimated claims payments and allocated loss adjustment expenses; the reinsurance intermediary manager shall maintain a separate bank account for each reinsurer that it represents;

(4) the reinsurer shall have access and the right to copy all accounts and records maintained by the reinsurance intermediary manager related to the reinsurer's business in a form usable by the reinsurer;

(5) the contract may not be assigned in whole or in part by the reinsurance intermediary manager;

(6) the reinsurance intermediary manager shall comply with the written

underwriting and rating standards established by the insurer for the acceptance, rejection, or cession of all risks;

(7) all the rates, terms, and purposes of commissions, charges, and other fees that the reinsurance intermediary manager may levy against the reinsurer are listed;

(8) if the contract permits the reinsurance intermediary manager to settle claims on behalf of the reinsurer

(A) all claims shall be reported to the reinsurer in a timely manner;

(B) a copy of the claim file shall be sent to the reinsurer at the insurer's request or as soon as it becomes known that the claim

(i) has the potential to exceed the lesser of an amount determined by the director or the limit set by the reinsurer;

(ii) involves a coverage dispute;

(iii) may exceed the reinsurance intermediary manager's claims settlement authority;

(iv) is open for more than six months; or

(v) is closed by payment of the lesser of an amount set by the director or an amount set by the reinsurer;

(C) all claim files shall be the property of both the reinsurer and reinsurance intermediary manager; upon an order of liquidation of the reinsurer, the files will become the sole property of the reinsurer or the reinsurer's estate; the reinsurance intermediary manager shall have reasonable access to and the right to copy the files on a timely basis; and

(D) settlement authority granted to the reinsurance intermediary manager may be terminated for cause upon the reinsurer's written notice to the reinsurance intermediary manager or upon the termination of the contract; the reinsurer may suspend the settlement authority during a dispute regarding the cause of termination;

(9) if the contact provides for a sharing of interim profits by the reinsurance intermediary manager, the interim profits may not be paid until one year after the end of each underwriting period for property business and five years after the end of each underwriting period for casualty business, or a later period set by the director for specified lines of insurance, and not until the adequacy of reserves on remaining claims have been verified under AS 21.28.050(c);

(10) the reinsurance intermediary manager shall annually provide the reinsurer with a financial statement prepared by an independent certified public accountant;

(11) the reinsurer shall at least semiannually conduct an on-site review of the underwriting and claims processing operations of the reinsurance intermediary manager;

(12) the reinsurance intermediary manager shall disclose to the reinsurer any relationship with an insurer before ceding or assuming business with the insurer under the contract; and

(13) within the scope of actual or apparent authority, the acts of the reinsurance intermediary manager are the acts of the reinsurer on whose behalf the reinsurance intermediary manager is acting.

(c) Subsection (a) of this section does not require the director to approve a contract that the director determines to be hazardous to the financial standing of an insurer or reinsurer.

(d) For at least 10 years after expiration of a contract of reinsurance transacted by the reinsurance intermediary manager, the reinsurance intermediary manager will keep a complete record for each transaction showing

(1) the type of contract, limits, underwriting restrictions, classes, or risks, and territory;

(2) the period of coverage, including effective and expiration dates, cancellation provisions and notice required of cancellation, and disposition of outstanding reserves on covered risks;

(3) reporting and settlement requirements of balances;

(4) the rate used to compute the reinsurance premium;

(5) the names and addresses of reinsurers;

(6) rates of all reinsurance commissions, including the commissions on retrocessions handled by the reinsurance intermediary manager;

(7) related correspondence and memoranda;

(8) proof of placement;

(9) details regarding retrocessions handled by the reinsurance intermediary manager, as permitted by (e) of this section, including the identity of retrocessionaires and percentage of each contract assumed or ceded;

(10) financial records, including premium and loss accounts; and

(11) when the reinsurance intermediary manager places a reinsurance contract on behalf of a ceding insurer,

(A) written evidence directly from an assuming reinsurer that the reinsurer has agreed to assume the risk; or

(B) written evidence, if placed through a representative of the assuming reinsurer other than an employee, that the reinsurer has delegated binding authority to the representative.

(e) The reinsurance intermediary manager may not

(1) cede retrocessions on behalf of the reinsurer, but the reinsurance intermediary manager may cede facultative retrocessions under obligatory facultative agreements if the contract with the reinsurer contains reinsurance underwriting guidelines that include a list of reinsurers with which the automatic agreements are in effect and, for each reinsurer, the coverages and amounts or percentages that may be reinsured, and commission schedules;

(2) commit the reinsurer to participate in reinsurance syndicates;

(3) appoint an agent or broker without assuring that the agent or broker is licensed to transact the type of reinsurance for which the agent or broker is appointed;

(4) without prior approval of the reinsurer, pay or commit the reinsurer to pay a claim, net of retrocessions, that exceeds the lesser of an amount specified by the reinsurer or one percent of the reinsurer's policyholder's surplus as of December 31 of the last complete calendar year;

(5) collect a payment from a retrocessionaire or commit the reinsurer to a claim settlement with a retrocessionaire without prior approval of the reinsurer; if prior approval is given, a report must be promptly forwarded to the reinsurer;

(6) jointly employ an individual who is employed by the reinsurer unless the reinsurance intermediary manager is under common control with the reinsurer as defined in AS 21.22; or

(7) transfer the authority as a reinsurance intermediary manager to other persons.

Sec. 21.28.050. DUTIES OF REINSURERS UTILIZING THE SERVICES OF A REINSURANCE INTERMEDIARY MANAGER. (a) A reinsurer may not use a person to act as a reinsurance intermediary manager on the reinsurer's behalf unless the person is licensed under AS 21.28.010.

(b) The reinsurer shall annually obtain a copy of statements of the financial condition of each reinsurance intermediary manager that the reinsurer has used, prepared by an independent certified public accountant in a form acceptable to the director.

(c) If a reinsurance intermediary manager establishes loss reserves, the reinsurer shall annually obtain the opinion of an independent qualified actuary attesting to the adequacy of loss reserves established for losses incurred and outstanding on business produced by the reinsurance intermediary manager. This opinion is in addition to any other required loss reserve certification.

(d) Binding authority for all retrocessional contracts or participation in reinsurance syndicates rests with an officer of the reinsurer who may not be affiliated with the reinsurance intermediary manager.

(e) Within 30 days of termination of a contract with a reinsurance intermediary manager, the reinsurer shall provide written notification of the termination to the director.

(f) A reinsurer may not appoint to its board of directors any officer, director, employee, controlling shareholder, or subagent of its reinsurance intermediary manager. This subsection does not apply to relationships governed by AS 21.22.

Sec. 21.28.900. DEFINITIONS. In this chapter,

(1) "qualified United States financial institution" has the meaning given in AS 21.12.020(f);

(2) "reinsurance intermediary broker" means a person, firm, association, or corporation, other than an officer or employee of the ceding insurer, who solicits, negotiates, or places reinsurance cessions or retrocessions on behalf of a ceding insurer with or without the authority or power to bind reinsurance on behalf of the insurer;

(3) "reinsurance intermediary manager" means a person, firm, association, or corporation, including an insurer, who has authority to bind or manage all or part of the assumed reinsurance business of a reinsurer, including the management of a separate division, department, or underwriting office, and who acts as an agent for the reinsurer whether known as a reinsurance intermediary manager, manager, or other similar term; the following persons are not considered a reinsurance intermediary manager, with respect to the reinsurer, for the purposes of this chapter:

(A) an employee of the reinsurer;

(B) a manager of the United States branch of an alien reinsurer;

(C) an underwriting manager that, under a contact, manages all the reinsurance operations of the reinsurer, is under common control with the reinsurer, and whose compensation is not based on the volume of premiums written; in this subparagraph, "under common control with" has the meaning given in AS 21.22.200; or

(D) the manager of a group, association, pool, or organization of insurers that does joint underwriting or joint reinsurance and that is subject to examination by the authorized insurance official of the state in which the manager's principal business office is located.

* **Sec. 2.** AS 21.90.900 is amended by adding new paragraphs to read:

(29) "cession" means a unit of insurance passed to a reinsurer by a primary company that issued a policy to the original insured that may transfer part or all of a single risk, a defined policy, or a defined group of business as agreed to in a contract of reinsurance;

(30) "financial statement prepared by a certified public accountant" means a written presentation purporting to show the condition or results of operations for a stated period of a person, firm, association, or corporation that is audited or compiled or reviewed with all disclosures necessary to conform to generally accepted accounting principals by a licensed individual or firm of certified public accountants;

(31) "independent qualified actuary" means an actuary who is a member of the American Academy of Actuaries or Casualty Actuarial Society and who is not affiliated with, nor an employee, principal, or the direct or indirect owner of, or in any way controlled by the insurer broker;

(32) "office in this state" means a location in the state where a person conducts the business of insurance or a representative receives mail regarding the business of insurance;

(33) "reinsurance" has the meaning given in AS 21.12.120;

(34) "reinsurance intermediary" means a person, firm, association, or corporation who acts as a producer in soliciting, negotiating, or procuring the making of a reinsurance contract or binder on behalf of a ceding insurer or acts as a producer in accepting a reinsurance contract or binder on behalf of an assuming insurer;

(35) "retrocession" means a transaction where a reinsurer cedes to another reinsurer all or part of the business the reinsurer has previously assumed.

HOUSE LABOR AND COMMERCE COMMITTEE
ALASKA STATE LEGISLATURE P.O. BOX Y, JUNEAU 99811
(907) 465-3892

December 13, 1990

M E M O R A N D U M

To: Rep. David Finkelstein, Chair-Designate
House Labor and Commerce Committee
17th Alaska State Legislature

From: Rep. Dave Donley, Chair
House Labor and Commerce Committee
16th Alaska State Legislature

DD

Re: Proposed Committe Legislation

Enclosed is a copy of draft legislation modeled after HB 430, a measure sponsored by the House Labor and Commerce Committee last year.

The differences between this draft and the final version of last year's bill are that changes to language governing overtime pay for long haul truck drivers has been deleted (it passed in another bill), and new provisions relating to "flex time" have been added.

State law requires that workers be paid overtime for hours worked in excess of eight hours a day. However, under current "flex time" provisions, an employee can work four ten hour days a week and not be entitled to overtime so long as the hours don't exceed 40 hours a week. The new language in the enclosed draft requires that the four ten hour days must be consecutive to qualify for the "flex time" exemption from overtime pay and cannot include a Sunday.

This measure was the number one priority for organized labor last year and is of critical importance to all the working men and women of Alaska. It would be appropriate for it to be reintroduced by the House Labor and Commerce Committee next year. I'd be happy to offer any assistance I can toward this end. Please let me know.

Enclosure

dd/gb
a:davidf

considerations, I'd be most

7-LS0243\D
Cramer
12/10/90

AFL-CIO wants to break this up.

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act requiring that overtime wages at one and one-half times the regular rate of pay be paid for certain work following the fifth consecutive day of work; defining 'day' and 'week' for overtime wages; removing certain employees on public works projects from an exemption from overtime wage requirements; limiting the exemption from overtime wage requirements for voluntary flexible work hour plans; and relating to food and housing for certain workers on public works projects at remote sites."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 23.10.060(a) is amended to read:

(a) <u>Except as provided in (b) and (e) of this section, an</u> [AN] employer who employs employees engaged in commerce or other business, or in the production of goods or materials in the state may not employ an employee for a workweek longer than 40 hours or for more than eight hours a day. This section does not apply to the employment of a person acting in a supervisory capacity.

* Sec. 2. AS 23.10.060(d) is amended to read:

(d) This section does not apply with respect to

(1) an employee employed by an employer employing less than four employees in the regular course of business, as "regular course of business" is defined by regulations of the commissioner; **however, this exemption does not apply to an employee who is employed on a public works project for any day on which the employee performs work on the project;**

(2) an employee employed in handling, packing, storing, pasteurizing, drying, preparing in their raw or natural state, or canning agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;

(3) an employee of an employer engaged in small mining operations where not more than 12 employees are employed, if the employee is employed not in excess of 12 hours a day or 56 hours a week during a period or periods of not more than 14 workweeks in the aggregate in a calendar year during the mining season, as the season is defined by the commissioner;

(4) an employee engaged in agriculture;

(5) an employee employed in connection with the publication of a weekly, semiweekly, or daily newspaper with a circulation of less than 1,000;

(6) a switchboard operator employed in a public telephone exchange that has fewer than 750 stations;

(7) an employee of an employer engaged in the business of operating taxicabs;

(8) an employee in an otherwise exempted employment or proprietor in a retail or service establishment engaged in handling telegraphic, telephone, or radio messages for the public under an agency or contract arrangement with a telegraph or communications company where the telegraph message or communications revenue of the agency does not exceed $500 a month;

(9) an employee employed as a seaman;

(10) an employee employed in planting or tending trees, cruising, or surveying, or bucking, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by the employer in the forestry or lumbering operations does not exceed 12;

(11) an individual employed as an outside buyer of poultry, eggs, cream, or milk

in their raw or natural state;

(12) casual employees as may be liberally defined by regulations of the commissioner;

(13) an employee of a hospital whose employment includes the provision of medical services;

(14) work performed by an employee under a flexible work hour plan if the plan is included as part of a collective bargaining agreement;

(15) work performed by an employee under a voluntary flexible work hour plan if

(A) the employee and the employer have signed a written agreement and the written agreement has been filed with the department; and

(B) the department has issued a certificate approving the plan which states the work is for 40 hours a week, [AND] not more than 10 hours a day**, and the days are consecutive and do not include a Sunday**; for work over 40 hours a week or 10 hours a day under a flexible work hour plan not included as part of a collective bargaining agreement, compensation at the rate of one and one-half times the regular rate of pay shall be paid for the overtime;

(16) an individual employed as a line haul truck driver for a trip that exceeds 100 road miles one way if the compensation system under which the truck driver is paid includes overtime pay for work in excess of 40 hours a week or for more than eight hours a day and the compensation system requires a rate of pay comparable to the rate of pay required by this section.

* Sec. 3. AS 23.10.060 is amended by adding new subsections to read:

(e) An employer who employs an employee for at least 40 hours of work at the regular rate of pay in more than five consecutive days without a day off shall pay compensation to the employee for the employee's hours of work on the sixth and seventh consecutive days at the rate of one and one-half times the regular rate of compensation. This subsection applies regardless of the number of weeks in which the consecutive days worked by the employee occur.

(f) In this section,

(1) "day" means 24 consecutive hours;

(2) "public works" has the meaning given in AS 36.95.010;

(3) "week" means the period of time from a Sunday at 12:01 in the morning to

the following Saturday at 12:00 midnight.

* Sec. 4. AS 23.10 is amended by adding a new section to read:

Sec. 23.10.440. FOOD AND HOUSING AT REMOTE SITES. (a) Except as provided in (b) of this section, an employer shall provide food and housing to an employee working at a public works project remote site. The housing must meet safety and health standards for housing set out in the Standards for Occupational and Industrial Structures adopted by the department. The employer may not consider the cost of the food and housing in setting wages for the employee or in meeting wage requirements under AS 23.10.065 or AS 36.05.

(b) An employer who provides adequate transportation to employees is exempt from the requirement to provide food and housing under (a) of this section. Transportation is adequate under this section if it

(1) is available daily at reasonable hours to and from the remote site to a location that provides access to adequate commercially-available housing;

(2) takes no more than 30 minutes to transport the employee from the departure point to the worksite; and

(3) meets applicable transportation safety standards.

(c) The requirements of this section are considered a part of every contract for hire for a public works project in the state. The advertised specifications for the public works project shall contain a provision stating the requirement for providing food and housing at remote sites.

(d) An employee may waive the employee's right to food and housing under this section. An employer may not require an employee to live in housing provided under this section.

(e) The department shall implement this section by regulation.

(f) In this section

(1) "employee" and "employer" have the meanings given in AS 23.10.430;

(2) "public works" has the meaning given in AS 36.95.010;

(3) "remote" means a work site that is either more than 50 road miles or inaccessible by two-wheel-drive vehicles from a place that has adequate, commercially-available food and housing that meet the standards set out in (a) of this section.

RECEIVED OCT 0 5 1987

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LABOR

LABOR STANDARDS & SAFETY DIVISION

3301 EAGLE STREET
P.O. BOX 107021
ANCHORAGE, ALASKA 99510-7021
PHONE: (907) 264-2452

September 30, 1987

Ms. Helene Antel
IBEW Local 1547
2702 Denali Street
Anchorage, Alaska 99503

Dear Ms. ~~Antel:~~ HELENE

RE: Ketchikan Pulp Mill

The Department of Labor investigated the pay plan of the Ketchikan Pulp Mill (KPM) when it first came to our attention last year. It is our understanding that the mill changed its workweek so that it now begins on Wednesday and ends on Tuesday. This was a one-time change and has remained the same since that time.

However, the company does change its shifts so that employees may work seven consecutive days by working 5 days in one workweek and 2 in the next. We have consulted our attorney general on this circumstance and have been advised that this does not constitute a violation of the Wage and Hour Act. As you know, the Act requires overtime when an employee works over eight hours in a day or 40 in a work week. There is no requirement for premium pay on a 6th or 7th consecutive day of work. Our regulation defines workweek as "a fixed and regularly recurring period of 168 hours...[which] may not be artificially adjusted for the purpose of avoiding the payment of overtime."

The change KPM undertook was a one-time change and is not considered an "artificial adjustment" to avoid overtime. Rather, multiple adjustments are the type of thing the Department considers "artificial" and in violation.

The KPM workweek remains the same; within that framework the company adjusts the work schedule of its employees. Such actions are not a violation of law that the Department can act upon. While I cannot disagree that this may not be fair, it is nontheless legal under state law according to our attorney. Further, in checking with the U.S. Department of Labor we are advised that their interpretation is identical to ours.

If you have further questions, please feel free to contact me.

Sincerely,

Thomas E. Stuart

Thomas E. Stuart, Jr.
Director
Labor Standards & Safety

TES/JRC:ras
0624W

Louisiana-Pacific Corporation

Interdepartmental Communication

date: September 13, 1988

to: Clyde Johnson location: Ketchikan

from: Chris Biencourt location: Portland

subject: Grievance No. 2-88
Overtime claim for hours over forty in seven consecutive days

Upon review of federal and state wage law and our collective bargaining agreement with the IBEW, I find no merit in the IBEW's claims for overtime for employees who work seven consecutive days which straddle two separate work weeks.

Federal Wage-Hour law requires employers to pay overtime for all hours over 40 worked by an employee in a "workweek." "Workweek" is defined as seven consecutive days which need not coincide with the calendar week and may begin on any day and at any time of day. See Pappas v. Kerite Co., 8 WH Cases 756 (Conn. C.P. 1949) (Copy attached as Exhibit A). In Pappas, for example, the court held that a security guard who worked alternate weeks of seven 12-hour nights from Thursday to Thursday for an employer whose prevailing workweek was Monday to Sunday was properly paid for 48 hours the first company workweek (8 hours overtime) and 36 hours during the next.

Alaska Wage and Hour law largely parallels federal law and provides:

> [I]f the employer finds it necessary to employ an employee in excess of forty hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid. . . .

Alaska Stat § 23.10.060 (Copy attached as Exhibit B) (emphasis added). Like its federal counterpart, the term "week" is not defined in the state statute, but Alaska's Department of Labor has interpreted the term to mean the employer's established workweek. (Per 9/13/88 telephone conference with James Sanwick, Regional Supervising Investigator, Department of Labor Standards, Wage and Hour Division).

Nor does the collective bargaining agreement require a different conclusion:

PAPPAS v. KERITE CO.

Connecticut Court of Common Pleas, New Haven County

PAPPAS v. KERITE COMPANY, No. 59378, April 26, 1949

FAIR LABOR STANDARDS ACT

—Hours worked—Overtime standard —Workweek • 58.900 • 70.320

Employer who hired night watchman to work alternate weeks of seven nights at 12 hours a night from Thursday to Thursday in factory in which the prevailing workweek was from Monday to Monday did not violate the statutory overtime-compensation provisions by paying watchman for 48 hours during one company workweek from Thursday through Sunday and for 36 hours during the next company workweek from Monday through Wednesday, and refusing to pay him on basis of an 84-hour workweek from Thursday to Thursday.

Act does not control the right of employer to determine the beginning or end of a workweek.

Action by employee to recover overtime compensation under Fair Labor Standards Act. Judgment for employer.

James F. Rosen, of New Haven, Conn., and Morris B. Straka, of Seymour, Conn., for plaintiff.

John L. Ely and Wiggin & Dana, of New Haven, Conn., for defendant.

BOARDMAN, Judge:—Plaintiff was hired on Thursday, January 10, 1946, by the defendant as a night watchman and fireman to work alternate weeks from Thursday 6:00 p.m. to the following Thursday 6:00 a.m.; namely, seven nights at 12 hours a night and was so employed until July 31, 1947. He was paid, however, according to the prevailing work week in the defendant's factory; namely, Monday to Monday, during which hours in the daytime the production workers were employed. Plaintiff accordingly was paid for 48 hours during one company work week (Thursday, Friday, Saturday and Sunday), and for 36 hours during the next company work week (Monday, Tuesday and Wednesday). Plaintiff has claimed that his work week was from Thursday to Thursday and that he should be paid on the basis of 84 hours during his work week, and accordingly instituted suit under Section 16b of the Fair Labor Standards Act of 1938.

The provision of the Fair Labor Standards Act relevant to this case is Section 7, which provides in part as follows:

"(a) No employer shall * * * employ any of his employees * * * (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The term "workweek" is not defined anywhere in the Fair Labor Standards Act.

[INTERPRETATIVE BULLETIN]

Interpretative Bulletin No. 4 [WHM 50:91] issued in November, 1938 by the Wage and Hour Division, Office of the Administrator, United States Department of Labor, states:

"(3) The 40-hour standard in Section 7(a) is a limitation upon the number of hours that may be worked in any workweek free of time and one-half overtime compensation. A workweek consists of seven consecutive days. It need not coincide with the calendar week but may begin on any day and at any time of any day. The beginning of the workweek may be changed if the change is intended to be permanent and not to evade the overtime requirements of the Act."

A ruling by the Wage and Hour Administrator reported in Official Answers to Questions Wage and Hour Manual, Cumulative Edition 1944-1945 [see page 213], states in part [WHM 45:201]:

"A workweek, consisting of any consecutive seven days, may begin on any day and at any time of any day. *The employer may select any time desirable to begin and end the employee's workweek* * * *." (Italics added)

Section 11(c) of the Fair Labor Standards Act states in part:

"Every employer * * * shall make, keep and preserve such records * * * and shall make such reports therefrom to the administrator as he shall prescribe by regulation * * *."

[RECORD KEEPING]

Pursuant to this statutory direction, the Wage and Hour Administrator has issued detailed record keeping regulations. These are set forth in Code of Federal Regulations, Title 29—Labor, Chap. V—Wage and Hour Division—Part 516—Records to be kept by Employers [WHM 70:3]. The provisions of these regulations relating to the work week are as follows:

"Sec. 516.2. Every employer shall maintain and preserve payroll or other records containing the following information and data on each and every employee * * *.

(5) Time of day and name of the day on which the employee's workweek begins. * * *"

(Footnote to sub-para. 5) "If the employee is a part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice. If, however, any employee or group of employees has a workweek beginning and ending at a different time, a separate notation shall then be kept for that employee or group of employees."

The Wage and Hour Division has issued an "Explanatory Bulletin on the Employer's Records Regulations". With respect to the workweek record, this states in part [WHM 70:20]:

"e. Time of day and name of day on which the employee's workweek begins. * * * This item does not require that the employer show the exact moment the employee actually begins work in the workweek or the moment he ceases work. The employer may select any time desirable to begin and end the employee's workweek, as for instance, midnight Saturday or high noon Wednesday. This may be done, even though the employee ceases work, in the first instance, at 1 p.m. Saturday and does not begin work the next week until 7:30 a.m. Monday; or even though the employee, in the second instance works all day Wednesday, thereby throwing Wednesday morning's hours of employment into one workweek. A workweek, however, must be established and it may not then be varied for purposes of evasion of either the minimum wage or overtime provisions of the Act."

[DETERMINATION OF WORKWEEK]

The Fair Labor Standards Act does not control the right of the employer to determine the beginning or end of a work week. In the instant case the prevailing work week in the defendant's factory was from Monday to Monday and no additional overtime pay is due the plaintiff under such a computation. The Court is of the opinion that there was no violation of the act by the defendant and no subterfuge employed to defeat plaintiff's right to overtime pay. Sloat v. Davidson Ore Mining Co., 71 F.Supp. 1010 [2 WH Cases 602], 1942; Harned v. Atlas Powder Company, 301 Ky. 317, 192 S.W.2d 378 [5 WH Cases 943], 1946; Barclay v. Magnolia Petroleum Co., 203 S.W.2d 626 [7 WH Cases 1082] Tex. Ct. Civ. App., 1947.

Judgment may be entered for the defendant.

• locates related rulings in Wage-Hour C

Exhibit A

> Any employee paid on an hourly basis will, in addition to his straight time pay, receive overtime at one-half the straight time hourly rate of the job for:
>
> . . . .
>
> B. All work performed in excess of forty (40) straight time hours in any one week.

Labor Agreement § 5 (emphasis added). "Week" is elsewhere defined to mean a period of seven calendar days beginning at 1:00 A.M. Monday. Id at § 4. Thus, even under the language of the current labor agreement the work in question falls into 2 workweeks and overtime should be calculated accordingly.

In conclusion, the IBEW's claim to overtime based on the number of hours worked in a snapshot of seven consecutive days is erroneous. State and federal law is unmistakably clear in instructing that you look to the number of hours worked in the regular workweeks established by the employer.

Please do not hesitate to call if I can be of further assistance.

C.J.B.

CJB:lkc
Exhibits

cc: Martin Pihl
Ralph Lewis
Steve Hagan

Connie
Please make copies + distribute
✓

goods or materials in Alaska may not employ an employee not acting in a supervisory capacity, either male or female, for a workweek longer than 40 hours or for more than eight hours a day, except that if the employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid, and this provision is considered included in all contracts of employment. This section does not apply with respect to

(1) an employee employed by an employer employing less than four employees in the regular course of business, as regular course of business is defined by regulations of the commissioner;

(2) [Repealed, § 33 ch 127 SLA 1974.]

(3) [Repealed, § 1 ch 243 SLA 1970.]

(4) an employee employed in handling, packing, storing, pasteurizing, drying, preparing in their raw or natural state, or canning agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;

(5) an employee of an employer engaged in small mining operations where not more than 12 employees are employed, if the employee is employed not in excess of 12 hours a day or 56 hours a week during a period or periods of not more than 14 workweeks in the aggregate in a calendar year during the mining season, as the season is defined by the commissioner;

(6) [Repealed, § 1 ch 45 SLA 1972.]

(7) an employee engaged in agriculture;

(8) an employee employed in connection with the publication of a weekly, semiweekly, or daily newspaper with a circulation of less than 1,000;

(9) a switchboard operator employed in a public telephone exchange which has fewer than 750 stations;

(10) an employee of an employer engaged in the business of operating taxicabs;

(11) an employee in an otherwise exempted employment or proprietor in a retail or service establishment engaged in handling telegraphic, telephone, or radio messages for the public under an agency or contract arrangement with a telegraph or communications company where the telegraph message or communications revenue of the agency does not exceed $500 a month;

(12) an employee employed as a seaman;

(13) an employee employed in planting or tending trees, cruising, or

surveying, or bucking, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by the employer in the forestry or lumbering operations does not exceed 12;

(14) an individual employed as an outside buyer of poultry, eggs, cream, or milk in their raw or natural state;

(15) casual employees as may be liberally defined by regulations of the commissioner;

(16) an employee of a hospital whose employment includes the provision of medical services;

(17) work performed by an employee under a flexible work hour plan if the plan is included as part of a collective bargaining agreement;

(18) work performed by an employee under a voluntary flexible work hour plan if

(A) the employee and the employer have signed a written agreement and the written agreement has been filed with the department; and

(B) the department has issued a certificate approving the plan which states the work is for 40 hours a week and not more than 10 hours a day; for work over 40 hours a week or 10 hours a day under a flexible work hour plan not included as part of a collective bargaining agreement, compensation at the rate of one and one-half times the regular rate of pay shall be paid for the overtime. (§ 3 ch 171 SLA 1959; am § 1 ch 3 SLA 1962; am § 1 ch 243 SLA 1970; am § 1 ch 45 SLA 1972; am § 33 ch 127 SLA 1974; am § 1 ch 31 SLA 1980; am § 3 ch 47 SLA 1983)

Sec. 23.10.065. Minimum wages. An employer shall pay to each employee wages at a rate of not less than 50 cents an hour greater than the prevailing Federal Minimum Wage Law or $2.60 an hour, whichever is greater, for hours worked in a pay period, whether the work is measured by time, piece, commission or otherwise. An employer may not apply tips or gratuities bestowed upon employees as a credit toward payment of the minimum hourly wage required by this section. Tip credit as defined by the Fair Labor Standards Act of 1938 as amended does not apply to the minimum wage established by this section. (§ 4 ch 171 SLA 1959; am § 2 ch 2 SLA 1962; am § 1 ch 41 SLA 1974)

Sec. 23.10.070. Exemptions from minimum wage. To the extent necessary to prevent curtailment of opportunities of employment, the commissioner may by regulations or orders provide for the employment at wages lower than the minimum wage prescribed in AS 23.10.050--23.10.150 of

(1) an individual whose earning capacity is impaired by physical or mental deficiency, age, or injury, at the wages and subject to the restrictions and for the period of time which is fixed by the commissioner; and

Exhibit B

ARTICLE 3.

ALASKA WAGE AND HOUR ACT

Section
50. Public policy
55. Exemptions
60. Payment for overtime
65. Minimum wages
70. Exemptions from minimum wage
71. Wages for work therapy
75. Labor standards and safety division
80. Powers and duties of division
85. Scope of administrative regulations
90. Administrative procedures
95. Adoption of federal regulations
100. Employer to keep records
105. Posting summary required
110. Remedies of employee
115. Enforcement by injunction
120. Enforcement of subpoenas
125. Collective bargaining
130. Statute of limitations
135. Violations
140. Penalty
145. Definitions
150. Short title

Sec. 23.10.050. Public policy. It is the public policy of the state to

(1) establish minimum wage and overtime compensation standards for workers at levels consistent with their health, efficiency and general well-being, and

(2) safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hour standards which do not provide adequate standards of living. (§ 1 ch 171 SLA 1959)

Sec. 23.10.055. Exemptions. The provisions of AS 23.10.050--AS 23.10.150 do not apply to

(1) an individual employed in agriculture which includes farming in all its branches and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices, including forestry and lumbering operations, performed by a farmer or on a

farm as an incident to or in conjunction with the farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market;

(2) an individual employed in the catching, trapping, cultivating or farming, netting or taking of any kind of fish, shellfish, or other aquatic forms of animal and vegetable life;

(3) an individual employed in the hand picking of shrimp;

(4) an individual employed in domestic service, including a baby-sitter, in or about a private home;

(5) an individual employed by the United States or by the state or political subdivision of the state including prisoners not on furlough detained or confined in prison facilities;

(6) an individual engaged in the activities of a nonprofit religious, charitable, cemetery or educational organization where the employer-employee relationship does not, in fact, exist, and where services rendered to the organization are on a voluntary basis;

(7) an employee engaged in the delivery of newspapers to the consumer;

(8) an individual employed solely as a watchman or caretaker of a plant or property that is not in productive use for a period of four months or more;

(9) an individual employed in a bona fide executive, administrative or professional capacity or in the capacity of an outside salesman or a salesman who is employed on a straight commission basis;

(10) an individual employed in the search for placer or hard rock minerals;

(11) an individual under 18 years of age employed on a part-time basis not more than 30 hours in a week; or

(12) employment by a nonprofit educational or child care facility to serve as a parent of children while the children are in residence at the facility if the employment requires residence at the facility and is compensated on a cash basis exclusive of room and board at an annual rate of not less than

(A) $10,000 for an unmarried person; or

(B) $15,000 for a married couple. (§ 2(1) ch 171 SLA 1959; am § 1 ch 2 SLA 1962; am § 1 ch 90 SLA 1972; am § 2 ch 124 SLA 1978; am § 1 ch 115 SLA 1982)

Sec. 23.10.060. Payment for overtime. An employer who employs employees engaged in commerce, or other business, or in the production of

Exhibit B

International Brotherhood of Electrical Workers
Local 1547

2702 DENALI STREET
ANCHORAGE, ALASKA 99503-2779

TELEPHONE (907) 272-6571
DISPATCH (907) 276-1547

GARY BROOKS
BUSINESS MANAGER • FINANCIAL SECRETARY

JOSEPH HODGE
PRESIDENT

September 9, 1987

Thomas Stewart
Director of Labor Standards & Safety
State of Alaska
P.O. Box 107021
Anchorage, Alaska 99510

Re: Ketchikan Pulp Mill -- failure to pay overtime

Dear Tom:

It has come to my attention that Ketchikan Pulp Mill ("KPM") is requiring several IBEW-represented employees to work on 7-day shifts without paying them overtime. The shifts begin on a Wednesday and continue through the weekend to Tuesday of the following week. It is my understanding that KPM will claim that because the 6th and 7th day are in a new "work week" that KPM is not obligated to pay the employees overtime for those two days. As far as I know, however, there are no legitimate economic or business reasons which would mandate this kind of schedule.

While I understand that certain exceptions are made, I am unaware of any current, compelling reasons that would justify what appears to be a blatant effort on the part of KPM to avoid the provisions both of state law and the Fair Labor Standards Act. The arbitrary scheduling of employees' work so that the employee's work week straddles that of KPM's is clearly designed for the sole purpose of avoiding overtime compensation. I believe this to be a direct violation of 8 AAC 15.910 and would request an immediate investigation. It is also an undisputable violation of both the letter and spirit of FLSA. Regardless of staggered shifts, for example, the Anchorage Police Department pays overtime to everyone required to work in excess of five consecutive days. KPM has been engaged in this practice for several years and previous complaints have not resulted in a successful resolution of this matter. Accordingly, I look forward to your cooperation and a prompt response. Should you need any assistance whatsoever, please do not hesitate to contact me.

Very truly yours,

IBEW LOCAL UNION 1547

Helene M. Antel
General Counsel

HMA:csd

cc: Commissioner Sampson
Deputy Commissioner Erickson
Bob Garza, Acting Business Representative, Ketchikan

IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
BETWEEN	)	OPINION
KETCHIKAN PULP COMPANY	)	AND
"THE COMPANY" OR "THE EMPLOYER"	)	AWARD
AND	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547	)	
"THE UNION" OR "LOCAL 1547"	)	Unit Grievance - Overtime AAA File 75 L300 0254 88

HEARING: October 6, 1989
Ketchikan, Alaska

BRIEFS: Union's Received: November 20, 1989
Employer's Received: November 17, 1989
Employer's reply brief: December 4, 1989
Union's reply brief: (Arbitrator informed on December 12, 1989 no reply brief)

HEARING CLOSED: December 12, 1989

ARBITRATOR: Timothy D.W. Williams
9 Monroe Parkway, Suite 280
Lake Oswego, Oregon 97035-1425

REPRESENTING THE EMPLOYER:

Chris Biencourt, Attorney at Law

REPRESENTING THE UNION:

Helene Antel, General Counsel
Vera Plumb, Assistant Business Manager

APPEARING AS WITNESSES FOR THE EMPLOYER:

Clyde L. Johnson, Industrial Relations Manager

EXHIBITS

Joint

1. 1989 Labor Contract
2. Grievance Document
3. A. Shift Schedules, July 1988 - March 1989
   B. Shift Schedules, March 1989 to November 1989
4. Rotating Shift Schedule, 4-week cycle
5. Alaska Wage and Hour Act
6. Fair Labor Standards Act
7. Wage and Hour Manual, 94:51
8. 1984 Labor Contract
9. 1981-84 Labor Contract
10. Language proposal from IBEW, April 20, 1989

Company

1. April 26, 1989 letter to Thomas Stewart
2. April 28, 1989 response of Thomas Stewart
3. Wage and Hour Manual 94:515

Union

1. Union bargaining notes, September 22, 1987

BACKGROUND

Ketchikan Pulp Company (hereafter "the Company" or "the Employer") and International Brotherhood of Electrical Workers Union, Local 1547) (hereafter "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy D.W. Williams in Ketchikan, Alaska on October 6, 1989. During a pre-hearing conference the parties agreed that the issue was properly before the Arbitrator and should be decided on its merits.

At the hearing the parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made a tape of the hearing but notified the parties that it was not an official transcript, just a supplement to his notes.

At the close of the hearing, the parties were offered an opportunity to file closing arguments in the form of a post-hearing brief. Both parties accepted and the briefs were received in a timely fashion. An opportunity was also provided to file reply briefs. The Employer accepted that offer and the Union declined. Thus the award, in this case, is based on the evidence and arguments presented during the hearing, and the arguments presented in the post-hearing briefs and the reply brief.

STATEMENT OF THE FACTS

Ketchikan Pulp Company and International Brotherhood of Electrical Workers, Local 1547, are parties to a collective bargaining agreement effective July 4, 1988 to and including May 31, 1989 (Joint Exhibit #1, page 2). The grievance in the instant dispute arose under that agreement.

The grievance was filed by Tony Alenskis on behalf of the IBEW bargaining unit (Joint Exhibit #2). The labor agreement calls for a Monday through Sunday workweek (Joint Exhibit #1, page 12). Within that workweek, a substantial number of bargaining unit members work a rotating shift. In other words, the days that are worked within the workweek change from week to week. A complete review of this schedule is reproduced below:

	Workweek 1	Workweek 2	Workweek 3	Workweek 4
Shift	M T W Th F S Su	M T W Th F S Su	M T W Th F S Su	M T W Th F S Su
11 PM - 7 AM (graveyard)	D D A A A A A	A A B B B B B	B B C C C C C	C C D D D D D
3 PM - 11 PM (swing)	C C C C D D D	D D D D A A A	A A A A B B B	B B B B C C C
7 AM - 3 PM (day)	B B B B B C C	C C C C C D D	D D D D D A A	A A A A A B B
Day Off	A [illegible] D D [illegible]	B D A [illegible] D C C	C C B B A D D	D D C C B A A
Calculation of Regular and Overtime Hours for "A" Crew				
Regular Hours	0 0 8 8 8 8 8	8 8 0 0 8 8 8	8 8 8 8 0 8 0	8 8 8 8 8 0 0
Overtime Hours	0 0 0 0 0 0 0	0 0 0 0 0 0 0	0 0 0 0 0 0 8	0 0 0 0 0 0 0

(Joint Exhibit #3.B.)

With the exception of a couple minor changes in shift starting time and a brief period in the mid-1980's when shift rotation was reversed, KPC's Industrial Relations Manager Clyde Johnson testified that the above schedule has remained essentially unchanged since the pulp mill commenced operations in 1954. At various times since 1954 this work schedule has led to discussion between the parties with the last such discussion occurring as part of the negotiations over the 1988 agreement (Union Exhibit #1). The Union has never particularly liked this schedule, but no specific language has been negotiated to alter the Employer's practice. The language in the 1988-89 labor agreement covering workday and workweek remained unchanged from the prior agreement (Joint Exhibit #8, page 14).

The Union's grievance claims that the Employer's shift scheduling practice violates the existing labor agreement because it violates state and federal wage and hour laws. Specifically, the grievance states:

> Article VII, Section 5, Subsection 1-B and Article X -- State and Federal Laws are incorporated within the contract requiring the Company to comply with the Fair Labor Standards Act. Company is in violation by requiring employees to work seven consecutive days without paying overtime. Week defined in Article VI, Section 5.
>
> (Joint Exhibit #2)

The parties processed this grievance through the steps of the grievance procedure but were unable to resolve it. Thus it was set for arbitration.

STATEMENT OF THE ISSUE

The parties gave the Arbitrator two different statements of the issue. The Union framed the issue as follows:

1. Is the Employer violating the collective bargaining agreement by consistently scheduling bargaining unit employees to work other than a Monday through Friday workweek?

   (a) If so, what is the appropriate remedy?

2. Is the Employer violating the collective bargaining agreement by scheduling bargaining unit employees to work seven consecutive days without paying overtime?

   (a) If so, what is the appropriate remedy?

3. Is the Employer violating State or Federal Law by scheduling employees to work seven consecutive days without paying overtime?

   (a) If so, what is the appropriate remedy?

The Employer argues to state the issue as follows:

> Does the manner in which the Company calculates overtime for rotating shift employees violate the parties' labor agreement?

In the absence of agreement on the issue statement, the Arbitrator frames the issues as follows:

1. Is the Employer violating Article VII, Sections 4 and/or 5 of the collective bargaining agreement by scheduling bargaining unit employees to work a rotating shift during a Monday through Sunday workweek without paying overtime?

2. Is the Employer violating Article VII, Sections 4 and/or 5 of the collective bargaining agreement by scheduling bargaining unit employees to work seven consecutive days without paying overtime?

3. Is the Employer violating Article X of the collective bargaining agreement by assigning employees to work a rotating schedule within a Monday through Sunday workweek and/or to work seven consecutive days without paying overtime?

4. If any of the above three issues is answered in the affirmative, what is the appropriate remedy?

APPLICABLE CONTRACT LANGUAGE

PREAMBLE

* * * * *

The Company retains all rights except as those rights are limited by the subsequent Sections of this agreement. Nothing anywhere in this agreement (for example, but not limited to, the Recognition and/or Arbitration Sections) shall be construed to impair the right of the Company to conduct all its business in all particulars except as modified by the subsequent Sections of this agreement.

* * * * *

ARTICLE 1
Effective Date-Termination-Amendments-Arbitration

* * * * *

SECTION 4. ARBITRATION

* * * * *

5. The arbitrator shall not have the authority to modify, add to, alter or detract from the provisions of this agreement or to impose any obligation on the signatory union or signatory company not expressly agreed to by the terms of this agreement.

* * * * *

ARTICLE VII
Wages-Definitions-Overtime-Holidays

* * * * *

SECTION 4. DEFINITIONS

1. The word "Day" for the purpose of payroll computation means a period of twenty-four (24) hours beginning at 0701 or at the regular hour of changing shifts nearest to 0701.

2. The word "Week" means a period of seven (7) calendar days beginning at 0701 Monday morning or at the regular hour for changing shifts nearest to 0701 for the purpose of payroll computation.

SECTION 5. OVERTIME

1. Any employee paid on an hourly basis will, in addition to his straight time pay, receive overtime at one-half (1/2) the straight time hourly rate of the job for:

   A. All work performed in excess of eight (8) straight time hours in any one day or all work performed in excess of eight (8) consecutive hours when an employee works across the end of a day into the following day.

   B. All work performed in excess of forty (40) straight time hours in any one week.

* * * * *

ARTICLE X
Governmental Regulations

It is the intention of the parties hereto to comply with all applicable provisions of State or Federal Laws, and they believe that each and every part of this contract is lawful. All provisions of this contract shall be complied with unless any of such provisions are declared invalid or inoperative by any court of last resort and final jurisdiction. In the event any provisions are declared invalid as set forth in this ARTICLE, the Union may, at its option, require re-negotiation of said invalid provisions for the purpose of reaching an adequate replacement thereof.

POSITION OF THE UNION

The Union advanced four primary arguments in support of the grievance. <u>First</u>, the Union notes the language of Article X which pledges that the parties will "comply with all applicable provisions of state or federal laws,..." Alaska

Administrative Code, notes the Union, requires that the workweek not be artificially adjusted for the purpose of avoiding the payment of overtime. The sole purpose for implementing the rotating shift schedule was to avoid overtime. Thus the rotating schedule is in violation of Alaska Statute, and as a consequence is in violation of Article X of the parties' labor agreement.

Second, the Union turns to the definitions of the work day and workweek in the collective bargaining agreement and emphasizes that the parties have agreed on a standard workweek. However, bargaining unit members are not being assigned to a standard workweek, argues the Union. Rather their workweek is being constantly shuffled around. The Union asserts that its membership has the right to expect the Employer to abide by the terms of the collective bargaining agreement and those terms require either the standard workweek or the payment of overtime when the standard workweek is not used.

Third, the Union contends that the work schedule is a mandatory subject of bargaining and thus the Employer cannot unilaterally impose whatever schedule it wishes. Rather it must negotiate the schedule with the Union. Since the Union has a history of disagreeing with the rotating shift schedule, that schedule has never been properly put into place. As a consequence the Employer should rescind the schedule or pay overtime, and negotiate with the Union over this issue.

Finally, the Union takes exception to the Employer's claim of a past practice. The Union emphasizes that the practice which has never been agreed to by the Union, and has been frequently contested. Moreover, the Union strongly emphasizes that employees consistently receive work schedules that include active duty for seven days in a row. The Union believes that a schedule of seven days in a row, under Alaska Statute, becomes the workweek as opposed to any "paper" workweek. Therefore even under the Employer's practice, employees would be entitled to overtime compensation for the sixth and seventh day of their workweek.

In summary, based on the above four arguments the Union urges the Arbitrator to sustain the grievance and rule that the Employer's rotating work schedule is a violation of statute and consequently a violation of the collective bargaining agreement. As a remedy the Union urges the Arbitrator to direct the Employer to make, "all employees who have been denied overtime as a result of working the rotating shift should be made whole for all lost overtime and all lost wages and benefits" (Union's brief, page 17).

POSITION OF THE EMPLOYER

The Employer advanced three primary arguments in support of its position that the grievance was without merit and should be rejected by the Arbitrator. First, the Employer contends that its rotating shift schedule is consistent with the parties' collective bargaining agreement. Specifically the agreement requires overtime payment of time and one-half if an employee works in excess of 40 straight-time hours in any one week. A week is defined in the contract as seven calendar days beginning on Monday morning. A close review, argues the Employer, of the 28 day work cycle shows there is only one week in which employees work greater than 40 hours within the Monday through Sunday cycle. The employee is compensated at the overtime rate for those hours. In each of the other three weeks employees work only 40 hours and therefore no overtime pay is owed.

Second, the Employer takes the position that the Arbitrator should not take upon himself the judicial role of interpreting state and federal statute. That is a role reserved for the legal system. Moreover, there is nothing in this case, insists the Employer, which requires the Arbitrator to assume this role. In fact, Article X of the labor agreement specifically indicates that a court of last resort should determine whether or not provisions of the labor agreement were consistent with external law. This arbitration proceeding is obviously not such a court and therefore should not assume that duty.

Third, the Employer indicates that if the Arbitrator should undertake a review of external law, he would find the Company's practice consistent with and not in violation of both state and federal statute. A workweek is defined in statute as a fixed, recurring seven day cycle. The Employer is prohibited from working its employees for more than forty hours during that week unless overtime compensation is paid. The Employer contends that it has a fixed seven day cycle (Monday through Sunday) which has remained unchanged since 1954 and that it always pays overtime wages for any hours worked in excess of 40 during that fixed cycle. Therefore it is in full compliance with statute.

The Employer further emphasizes the fact that its rotating schedule of seven days active duty without overtime compensation has been declared by the courts to be legal under Fair Labor Standards Act (FLSA) if the seven days span two fixed weekly cycles. That is precisely what his current work schedule provides, insists the Employer, and therefore the seven continuous days of duty without overtime compensation does not violate the law.

In summary, based upon the above three arguments the Employer urges the Arbitrator to deny the grievance.

ANALYSIS

There are three different interrelated issues before the Arbitrator in this case. All of these issues focus on the bargaining unit members' workweek and the extent to which the workweek is in compliance with both the language of the labor agreement, and federal and state statute. Specifically the issues focus on: 1) whether the rotating schedule violates Article VII, Sections 4 and/or 5, 2) whether the work schedule that calls for seven continuous days of work without overtime compensation violates Article VII, Sections 4 and/or 5, and 3) whether either the rotating schedule and/or the seven consecutive day schedule violates Article X of the collective bargaining agreement. The Arbitrator will discuss each of these issues separately.

Rotating Schedule

The work schedule that is in question is reproduced on page 4 of this award. It is clear from the schedule that if you track the work assignments for any given employee, the days of the week and the shift that is worked change from week-to-week. The schedule provides for a Monday through Sunday workweek, but the employee works seven continuous days. This rotating schedule is based on seven days on and two days off, seven days on and one day off, and seven days on and four days off. However, the seven days are worked in such a way that in most cases at least two of the seven are part of a separate workweek. With this schedule there is only one week out of four that an employee works a sixth day. For this week an employee is compensated for 48 hours with eight of the hours coming at overtime wages. The other three weeks an employee is given 40 hours of straight time pay.

The Union argues that this schedule violates the collective bargaining agreement because the parties agreed to a standard workweek. This rotating schedule which involves continuous periods of seven days active duty is not a standard workweek. A standard workweek is five days on and two days off.

The Employer argues to the contrar that the parties have negotiated a standard Monday through Sunday workweek and for 40 hours of work within that week. Anything over the 40 hours is to be compensated at time and one-half. The rotating schedule, asserts the Employer, fully complies with that agreement.

The Arbitrator carefully reviewed the language of the agreement and the above arguments of the parties and finds the position of the Employer the more persuasive. The labor agreement is silent as to the specifics of the employees' daily work schedule. The agreement does define a workweek as seven calendar days beginning on Monday morning (VII,4,2). The agreement also provides for overtime compensation for more than eight hours of work in a single day (VII,5,1,A) and for all work performed in excess of 40 straight-time hours (VII,5,1,B). Absolutely nothing in the agreement, however, places a restriction on the Employer's right of scheduling the eight hours in a day or the 40 hours in a week. The parties might have agreed to language such as, *an employees' workweek will consist of five consecutive days of work within the workweek*. However the parties did not place any such language in the agreement and the Arbitrator is prohibited by Article I,4,5 from modifying, altering or adding to the agreement.

Moreover, the Preamble to the labor agreement specifically reserves to the Employer all rights except as "are limited by the subsequent sections of this agreement" (Joint Exhibit #1, page 1). Since there is no language in the agreement that places a limit on the right of the Employer to schedule workdays within the workweek, with the exception that a workday of longer than eight hours must be compensated at the overtime rate for all hours beyond the eight, then the Arbitrator concludes the Employer has the contractual right to schedule those hours as it determines.

The Arbitrator emphasizes that his conclusion that the rotating schedule does not violate the labor agreement is not intended as an endorsement of that schedule. In fact, the Arbitrator has some sympathy for the Union's position primarily because the rotating schedule clearly places a greater burden on individual employees than does the fixed, Monday-Friday schedule. But, in the Arbitrator's view, the language of the agreement is clear and thus the above conclusion evolves from an application of the language of the agreement to the facts of this case.

Seven Day Schedule

For most of the IBEW bargaining unit members, their work schedule involves three seven day periods within a 28 day cycle. For the 21 days they work, the employees are given only one day at the overtime rate. It is the Union's contention that seven consecutive days of work requires the payment of two days of overtime. Thus the employee should be receiving six days at the overtime rate rather than one day. The Employer argues to the contrary that the number of consecutive days of work are not addressed in the labor agreement, the only issue is the number of days of work within the designated workweek. Since there is only one work week in the 28 day cycle that has more than five actual days of work then that is the only week in which overtime wages are owed.

Having reviewed the parties' evidence and arguments on this issue, again the Arbitrator finds the Employer's position the more convincing. His rationale with regard to the contract language is essentially similar to that under the prior issue. The labor agreement is clear as to when overtime is owed within the workweek-hours beyond eight in the workday and more than 40 hours in the workweek. The contract is completely silent as to the question of consecutive days of work beyond five which extend into a second workweek. Had the parties intended that the agreement be read such that a sixth or seventh consecutive day of work, or work on Saturday and Sunday be paid for at the overtime rate, language establishing that right ought to have been placed in the labor agreement. Article I, Section 4,5 clearly bars the Arbitrator from adding that language on his own authority.

As to the Union's contention that an employee's workweek starts with the first day in the seven consecutive days, the Arbitrator finds no support for this contention within the language of the agreement. There is nothing in the agreement that requires the first day of the designated workweek to be an actual workday. It is true that the standard workweek for most employees consists of a Monday through Friday work schedule. But the contract does not provide any overtime penalties for a schedule that begins on other than a Monday. Overtime penalties occur only when the employee works more than eight hours in a workday or when the cumulative hours in a workweek are greater than 40.

As the Arbitrator has previously indicated, he is sympathetic with the Union's concern over this issue because the rotating work schedule, with repeated intervals of seven continuous days of work, is substantially more difficult than the standard five on two off schedule. However, the Arbitrator cannot place restrictions, that go beyond those found in the labor agreement, on the Employer's right to schedule employees. The Managements Rights' clause of the Preamble and the specific language of Article VII lead the Arbitrator to conclude that the Employer has the right to use a seven continuous day work schedule, which is divided between two designated workweeks, and not pay overtime.

Fair Labor Standards Act

Article X of the parties' labor agreement establishes that, "It is the intention of the parties hereto to comply with all applicable provisions of state and federal laws" (Joint Exhibit #1, page 18). It is the Union's contention that by failing to pay overtime wages for the sixth and seventh day of the seven day work schedule, the Employer is in violation of federal and state statute and therefore in violation of the above language from the labor agreement. The Employer argues first that the Arbitrator has no jurisdiction to interpret federal and state statute but, second, if he did he would find that the existing work schedule is in full compliance with federal and state statute.

The Arbitrator begins his analysis[1] of this third and final issue by emphasizing that it is far more complex than the first two issues. What is at dispute are the federal and state versions of wage and hour legislation. Additionally, the Union raises the issue of whether the work schedule is a mandatory subject of bargaining under the National Labor Relations Act (NLRA) and not subject to the unilateral discretion of the Employer. The Arbitrator will continue his analysis by first looking at applicable wage and hour legislation and then examining the Union's claims with regard to the NLRA.

A basic claim of the Union is that the workweek is established by the days actually worked not by an artificial setting of a beginning and ending point (Union's Brief, page 13). Moreover, contends the Union, since bargaining unit

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[1]The Arbitrator considered the Employer's claim that he is without authority to review federal and state statute to determine compliance. The Arbitrator concludes that the Employer misread the language of Article X. The language pledges the parties to comply with applicable provisions of state or federal law and further provides that all parts of the contract will be complied with unless "declared invalid or inoperative by any court of last resort" (Joint Exhibit #1, page 18). The Arbitrator agrees with the Employer that he has no authority to declare any portion of the contract "invalid" or "inoperative." However, there is nothing in the language of Article X which indicates that the Arbitrator has no authority to provide a ruling on whether the Employer's practices with regard to work scheduling is in compliance with state or federal law. In making such a ruling, the Arbitrator is not out to invalidate any portion of the agreement but rather is attempting to determine whether the Employer's practice is appropriate. Thus it is the Employer's practice under scrutiny to determine compliance. The Arbitrator is not reviewing the agreement to see if it should be invalidated. Article I, Section 4 makes it clear that the Arbitrator has full authority to resolve any dispute "arising under the terms of this agreement" (Joint Exhibit #1, page 3). Article X is part of the agreement and there is a dispute over whether the Employer has violated this provision in the way that it schedules work assignments. Thus the Arbitrator has jurisdiction over this matter.

members do not work the workweek described in the collective bargaining agreement, that provision serves only a limited accounting or payroll purpose.

The Arbitrator can find no support in federal or state law for the above position. The Arbitrator finds nothing in statute which indicates that the days actually worked by the employee defines the workweek. If this were true then each employee could have a different workweek and the beginning and ending point of each workweek would constantly change.

In fact, the Arbitrator believes that it is the Union's interpretation of the work schedule that is inconsistent with both federal and state wage and hour legislation. The Arbitrator points specifically to the Wage and Hour Manual put out by the Department of Labor in which it sets out the following definition of a workweek:

> An employee's workweek is a fixed and regularly recurring period of 168 hours-seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under the Fair Labor Standards Act, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act.
>
> Joint Exhibit #7, page 15

The Arbitrator takes special not of two specific portions of the above language. First is the phrase, "regularly recurring period of 168 hours. . . .once...established, it remains fixed regardless of the schedule of hours worked by him." The Arbitrator believes this language requires that, whatever the start of the workweek, it must consist of seven full days and, once established, recurs over-and-over.

The second phrase of importance from the Wage and Hour Manual is the words "the beginning of the workweek may be changed if the change is intended to be permanent." Under the Union's scenario, an employee's workweek begins with the first of the seven consecutive days of work. This means that the day an employees workweek starts would change for each new workweek. In the Arbitrator's view, this directly contradicts the language that permits change in the start of the workweek but only if that change is intended to be permanent. Moreover, the schedule for employees is a 7-2, 7-1, 7-4. Under the Union's analysis, the 2, 1 and 4 days off are never placed in a workweek. This is true because by statute the workweek is but seven days. Since there is a seven day workweek that proceeds each of the group of days off and a seven day workweek that follows; there is no place to put the days off. The Arbitrator knows of no ruling of federal or state wage and hour legislation that allows for the omission of calendar days from the work schedule. Moreover, as it should be, under the Employer's practice and the language of Article VII of the agreement, every calendar day of the month is accounted for.

The conclusion by the Arbitrator that a workweek under wage and hour legislation is not created by seven consecutive days of work is made after carefully evaluating the court cases cited by the Union. The key case is one involving a dispute over whether an employee was in a position which would exempt him from overtime compensation. The Employer had taken the position that he was not and failed to provide overtime pay for work beyond 40 hours in the workweek. The courts ruled that he ought to have been given overtime compensation and thus was faced with the problem of determining which of the hours worked were overtime (Musaara, 602 P.2d 1240 (1719)).

The Arbitrator does not find the above case relevant in the instant dispute. In that case the court was not ruling on the makeup of the workweek. Rather the court was ruling on whether the damages awarded by a jury should have been doubled. Thus the courts off-handed reference to the workweek can hardly be considered a specific legal definition.

Moreover, the second case cited by the Union also does not involve a dispute over the definition of a workweek. In that case (Roland Electric Co. v Black 163 f.2d 417 (4th Cir. 1947)[2] is concerned with whether bonuses can be counted as overtime payment. As in the first case, the reference to a workweek is in an off-hand manner and can hardly be an attempt by the court to specifically define whether days worked is the equivalent of the workweek. As such, the Arbitrator finds no support for the Union's position in the cases cited.

[2]Copies of both of the cases are attached as an appendix to the Union's brief.

In addition to its emphasis on the seven consecutive days of work as defining the workweek, the Union also notes the language of Alaska Administrative Code which emphasizes that "the workweek may not be artificially adjusted for the purpose of avoiding the payment of overtime" (Union Brief page 10). The Union claims that the rotating shift schedule was put into place specifically for the purpose of avoiding overtime and therefore is in violation of the above provision.

The Arbitrator cannot agree. The Arbitrator finds that the word workweek as found in Alaska Administrative Code is not intended to be defined to include the work schedule within the workweek. Arbitral note is taken of the fact that employers regularly attempt to schedule work during the workweek to avoid overtime compensation. This is particularly true in organizations that require 24 hour operations such as hospitals, police departments, etc. While the days that employees work may get changed from week-to-week, overtime is owed only if the total hours in each designated week exceeds 40.

What the Employer is prohibited from doing by the above cited section of AAC is to set a designated workweek, such as a Monday through Sunday week, and then to alter the designation for the purposes of avoiding overtime payment. As was noted under the Federal Wage and Hour Manual quoted on page 19 of this award, change in the designated workweek is permitted only if the change is intended to be permanent and if it is not made simply to avoid overtime payment. But, nothing within the cited Alaska Administrative Code or federal statute puts an overtime restriction on the manner in which the hours of work are scheduled within the designated workweek.

The second statutory claim raised by the Union involves the National Labor Relations Act. The Union argues that the work schedule is a mandatory subject of bargaining and thus the fact that the Employer has unilaterally implemented the rotating schedule violates the requirements of the National Labor Relations Act. Any work schedule must be negotiated with the Union before implementation.

The Arbitrator agrees with the Union that the work schedule is a mandatory subject of bargaining. However, he disagrees with the Union that the continued use of the rotating work schedule by the Employer, without the approval of the Union, in the instant case is a violation of statute. There are some unique dimensions of this case which, in the Arbitrator's view, permit the Employer to continue using the existing, rotating work schedule without subjecting it to mid-term negotiations. First is the fact that the existing schedule has been in place since 1954 (testimony of Clyde Johnson). During that time the IBEW and the Employer have negotiated numerous labor agreements. At each of those negotiations the Union had full opportunity to place a proposal on the table with regard to the work schedule and demand negotiations, but there is no evidence of any such negotiations or agreement based on these negotiations.

In this regard, the Arbitrator notes Union Exhibit #1 which demonstrates that discussions did occur over work schedules during the negotiations for the labor agreement which was in place at the time the instant grievance arose. The evidence indicates that the Union objected to the work schedule, the Employer defended the existing work schedule and the parties agreed to retain the language covering the workweek and overtime compensation as found in the prior agreement. No agreement was reached to incorporate any new language into the labor agreement on work schedules; and the Employer continued, without change or interruption, its established practice with regard to the work schedules.

Thus it appears to the Arbitrator that the Union had the opportunity to negotiate a new work schedule but failed to achieve its negotiation goals. Having failed in its objectives, the Union cannot now turn around and ask the Arbitrator to implement what it could not acquire at the bargaining table.

The above conclusion by the Arbitrator is made after carefully reviewing the National Labor Relations Board Rulings found in the Appendix to the Union's brief. The Arbitrator could not find any of those cases to be applicable to the instant dispute. In each of them the issue was not the continuation of a 25 year practice with regard to work schedules but rather the unilateral implementation of a new work schedule. Had the Employer, in the instant dispute, implemented a new work schedule after the parties had signed the labor agreement, then the Union under the National Labor Relations Act would have the full right to demand to bargain the new schedule. It is the Arbitrator's conclusion that the right to a mid-term negotiation over a mandatory subject of bargaining is predicated on either a change in the Employer's practice with regard to that subject and/or the implementation of a new program involving a mandatory subject. However, where the Employer has a clearly established, long-term practice with regard to a mandatory subject of bargaining, where the Union has had repeated opportunities to negotiate over that practice during the time of regular negotiations of successor agreements, and where the Employer does not alter that practice; then there is no right for the Union to demand negotiations over the practice during the term of the agreement.

This conclusion by the Arbitrator clearly leaves it open to the instant Union to place proposals related to the work schedule before the Employer during the negotiations for the next successor agreement and demand that those proposals be negotiated. However, from the Arbitrator's prospective, the Employer did not violate the National Labor Relations Act by continuing, during the term of the existing labor agreement, its long-term practice of using rotating work schedules for members of the IBEW bargaining unit.

CONCLUSION

Based on the Arbitrator's finding that the rotating schedule does not violate Article VII, that a work schedule calling for seven continuous days of work over two designated workweeks without overtime compensation does not violate Article VII, and that the Employer's rotating shift schedule/seven continuous days of work does comply with applicable provisions of state and federal law; he denies the grievance and rules for the Employer in this dispute. An award consistent with these findings and conclusions will be entered.

IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
BETWEEN	)	AWARD
KETCHIKAN PULP COMPANY	)	
"THE COMPANY" OR "THE EMPLOYER"	)	
AND	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547	)	
"THE UNION" OR "LOCAL 1547"	)	Unit Grievance - Overtime AAA File 75 L300 0254 88

After careful consideration of all arguments and evidence, it is awarded that:

1. The Employer did not violate Article VII, Sections 4 and/or 5 of the collective bargaining agreement by scheduling bargaining unit employees to work a rotating shift during a Monday through Sunday workweek.

2. The Employer did not violate Article VII, Sections 4 and/or 5 the collective bargaining agreement by scheduling bargaining unit employees to work seven consecutive days without paying overtime, as long as at least two of those days are in a separate Monday through Sunday workweek.

3. The Employer did not violate Article X of the collective bargaining agreement by assigning employees to work a rotating schedule within a Monday through Sunday workweek and/or to work seven consecutive days without paying overtime.

Respectfully submitted on this the 21st day of January, 1990 by,

Timothy D. W. Williams

Timothy D. W. Williams
Arbitrator

BEFORE ARBITRATOR TIMOTHY D. W. WILLIAMS

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1547,	)	
and	)	"Overtime Grievance"
KETCHIKAN PULP COMPANY.	)	AAA File 75 L300 0254 88

POST-HEARING BRIEF

I. INTRODUCTION.

This case involves the alleged violation of rights protected both by law and by contract. The two, however, equally serve as the basis for the argument that there is a class of bargaining unit employees working at Ketchikan Pulp Company's pulp mill (the "Employer") who have been unjustly and illegally deprived of overtime compensation which is their due.

The legal question is whether, under the facts of this case, the Employer may require employees to work seven consecutive days without paying overtime. A question even more compelling, however, is whether the Employer may establish a workweek not provided for under the Collective Bargaining Agreement ("CBA") between the parties and thereby avoid paying the effected employees overtime. A significant part of the latter question is also whether the Employer's actions are rendered even more violative of the CBA by virtue of the fact that they have resulted in the creation of two classes of employees.

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One class of bargaining unit employees works within the standard workweek as defined by the CBA and is thus paid overtime when there is work in excess of 40 hours. There is, however, another group of bargaining unit employees who may work the same number of hours in their seven-day "workweek" but who do not receive proper overtime compensation. The latter group has been disenfranchised as a result of the employer's unilateral implementation of a rotating workweek for them that is not provided for in the parties' CBA. It is to make the latter group whole for lost overtime compensation and benefits that this grievance was filed and processed. The International Brotherhood of Electrical Workers, Local 1547 ("IBEW") also seeks an order prohibiting the Employer from continuing to work any bargaining unit employees in violation of the CBA.

II. STATEMENT OF THE ISSUES.

The issues as stated by the IBEW are as follows:

1. Is the Employer violating the CBA by consistently scheduling bargaining unit employees to work other than a Monday through Friday workweek.

   (a) If so, what is the appropriate remedy?

2. Is the Employer violating the CBA by scheduling bargaining unit employees to work seven consecutive days without paying overtime?

   (a) If so, what is the appropriate remedy?

3. Is the Employer violating state or federal law by scheduling employees to work seven consecutive days without paying overtime?

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(a) If so, what is the appropriate remedy?

III. <u>RELEVANT CONTRACT PROVISIONS</u>.

The CBA has been submitted as JT. Exhibit 1. However, the most relevant sections are excerpted below:

Article 1.

Section 3. <u>Amendments</u>:

This Agreement shall be subject to amendment at any time <u>by mutual consent of the parties hereto</u>. Such amendment shall be reduced in writing, state the effective date of the amendment and be executed in the same manner as in this Agreement. (emphasis supplied)

Section 4. <u>Arbitration</u>. In pertinent part provides:

5. The arbitrator shall not have the authority to modify, add to, alter or detract from the provisions of this Agreement or to impose any obligation on the signatory union or signatory company not expressly agreed to by the terms of this Agreement.

6. The decision of the arbitrator shall be <u>final and binding</u> on both parties. (emphasis supplied)

Article VI.

Section 5. <u>Vacation Week</u>.

A vacation week is defined as seven (7) calendar days and may begin on any day of the week consistent with the employee's work schedule. At the request of the employee, he shall be given his vacation pay before the scheduled vacation.

Article VII.

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Section 4. Definitions.

1. The word "Day" for the purpose of payroll computation means a period of twenty-four (24) hours beginning at 0701 or at the regular hour of changing shifts nearest to 0701. (emphasis supplied)

2. The word "Week" means a period of seven (7) calendar days beginning wit 0701 Monday morning or at the regular hour for changing shifts nearest to 0701 for the purpose of payroll computation. (emphasis supplied)

Section 5. Overtime.

1. Any employee paid on an hourly basis will, in addition to his straight time pay, receive overtime at one-half (1/2) the straight time hourly rate of the job for:

   (a) All work performed in an excess of eight (8) straight time hours in any one day or all work performed in excess of eight (8) consecutive hours when an employee works across the end of a day into the following day.

   (b) All work performed in excess of forty (40) straight time hours in any one week. (emphasis supplied)

Section 6. Night Shift Differential.

A Night Shift Differential of fifty cents (50 cents) shall be paid in addition to the straight time hourly rate for all hours worked between 1600 hours and 0800 hours or the time nearest to the hour of an employee's regular sift change.

Article X. Government Regulations. Provides in pertinent part as follows:

It is the intention of the parties hereto to comply with all applicable provisions of State or Federal Laws, and they believe that

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each and every part of this contract is lawful. All provisions of this contract shall be complied with unless any of such provisions shall be declared invalid or inoperative by any court of last resort and final jurisdiction. In the event any provisions are declared invalid as set forth in this ARTICLE, the Union may, at its option, require re-negotiation of said invalid provisions for the purpose of reaching an adequate replacement thereof.

It is the policy and practice of the Company and the Union to provide equal employment opportunity to all persons without regard to race, color, religion, sex, national origin or age as defined in applicable federal and state laws. This includes hiring, assigning, training, promotion, transfers, terminations, compensation, employee benefits and all other conditions of employment.

The Union agrees on behalf of the employees to strict compliance with all Electrical Safety codes, Federal and State Ordinances, and the State of Alaska General Safety Code.

IV. RELEVANT STATUTORY PROVISIONS.

The Arbitrator has been provided with a complete copy of Alaska Statute, Title 23, "Labor and Workers' Compensation" as well as the Fair Labor Standards Act. However, for the convenience of the Arbitrator, the Sections thought most relevant to these proceedings are excerpted below:

> **AS 23.10.060.** Payment for Overtime. An employer who employs employees engaged in commerce, or other business, or in the production of goods or materials in Alaska my not employ an employee not acting in a supervisory capacity, either male or female, for a workweek longer than 40 hours or for more than eight hours a day , except that if the employer fines it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid,

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> and this provision is considered included in all contracts of employment. This section does not apply with respect to . . . . (emphasis supplied)
>
> **AS 23.10.125.** Collective Bargaining. AS 23.10.050 -- 23.10.150 do not limit the right of employees to bargain collectively through representatives of their own choosing to establish wages or conditions of work in excess of the applicable minimum under AS 23.10.050 -- AS 23.30.150 or to establish hours of work shorter than the applicable maximum under AS 23.10.050 -- 23.10.150.

In addition, the Arbitrator should note at p. 19 of JT. Exhibit 5, under Notes to Decisions, that the State of Alaska is not bound to follow federal regulatory definitions. AS 23.10.050 through 23.10.150 do not evince an intent to bind the State Wage & Hour Division to federal regulatory law. See Dresser Industries, Inc. v. Alaska Dept. of Labor, 633 P.2d 998 (1981). Accordingly, the administrator's interpretative bulletin submitted by the parties as JT. Exhibit 7 is of arguably minimal if any guidance as to the appropriate decision in this case. Nonetheless, a copy of the Fair Labor Standard Acts has also been provided as JT. Exhibit 6, and those sections most relevant to these proceedings are excerpted here:

> **29 U.S.C. 207** Maximum Hours.
>
> (a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
>
> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an

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> enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. (emphasis supplied)

Notwithstanding the fact that the State is not obligated to follow the federal interpretative bulletins referenced above, even they are very clear about the proper method of calculating overtime in any given workweek. Section 778.105, "Determining the Work Week" appears at JT. Exhibit 7 and provides as follows:

> An Employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under the Fair Labor Standards Act, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. The proper method of computing overtime pay in a period in which a change in the time of commencement of the workweek is made, is discussed in §§ 778.301 and 778.302. (emphasis supplied)

V. **STATEMENT OF FACTS.**

The relevant facts are undisputed. The facts, however, are, in a certain sense, inseparable from the argument in this case. For example, neither the State nor Federal Wage & Hour

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statutes permit an employer to work its employees in excess of 40 hours per workweek without paying overtime. AS 23.10.060. State and federal law in fact expressly prohibit the Employer from employing an individual <u>for a workweek longer than 40 hours</u> unless the Employer pays overtime. <u>Id</u>. <u>See</u> <u>also</u> 29 U.S.C. 207(a)(1). Parties to a CBA may establish more favorable terms for their effected employees only; the CBA may not operate so as to afford less protection than the law. <u>See</u> AS 23.10.125. We would argue, neither can it be utilized or interpreted to do so.

There is also no dispute that in the CBA the parties have provided for only one workweek as set forth in Section 4. The CBA, in fact, is quite specific in distinguishing between the standard workweek and a vacation week, for example. <u>See</u> Section 5. Had the parties agreed to a rotating workweek, a provision commemorating that agreement would have been included in the CBA. The CBA, however, does not contain the shift schedules set forth in JT. Exhibit 3(a) and 3(b), nor anything that resembles the illustration set forth in JT. Exhibit 4.

The CBA does not give the Employer the authority to work bargaining unit employees other than as provided for in Section 4 of the CBA. There is no provision in the CBA affording management the right to change the workweek or the standard work scheduled unilaterally. In addition, any modification of the CBA must be by mutual consent under Section 3. Protests by the IBEW prior to and during negotiations, both for the current CBA as well as in the past have not been effective; the Employer has insisted upon

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maintaining its unlawful practice. See Exhibit U-1.

Both the Administrative opinions, submitted as Exhibit C-3, and the Administrative Interpretative Bulletin, submitted as JT. Exhibit 7, recognize that the establishment of a workweek and work schedules is a matter subject to agreement between the Employer and the representative of its employees. See Exhibit C-3, Administrative Opinions, at p. 2. The fluctuating schedule unilaterally imposed in this case by the Employer would thus be a matter requiring "a clear mutual understanding of the parties." See e.g. 29 CFR Chapter 5, §§ B, § 778.114 of JT. Exhibit 7 at p. 19. The facts, however, reveal no such mutual understanding.

The Employer concedes that there is one group of bargaining unit employees who do work within the contractually-defined workweek or the seven-day period between Monday and Sunday. Accordingly, when these individuals work more than 40 hours in that seven-day period, they receive overtime compensation as provided for in Section 5 of the CBA. The Employer also concedes that there is another group of bargaining unit employees with the same skills, working within the same classification represented by the same union under the same CBA who do not regularly work within a seven consecutive day period between Monday and Sunday. These individuals fail to receive overtime as provided in Section 5 of the CBA for their sixth and seventh consecutive days of work.

In addition, the Employer concedes through Mr. Johnson that it has devised the "straddled shifts" or rotating schedules set forth in JT. Exhibits 3(a) and 3(b) for the express purpose of

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keeping overtime costs down. There is no practical impediment, he noted, that would prohibit the Employer from completing all necessary work with the entire bargaining unit working within the contractually established workweek. Finally, both parties have noted for the record that the rotating shifts at issue are nonetheless relatively stable; but for the changes described in JT. Exhibit 4, the shift changes are predictable. Hence, in a certain sense, at least for the employees working it, the rotating shift has become the standard workweek. The "straddled shift" is the regularly accruing period of 168 hours or seven consecutive 24-hour periods for the employees at issue in this case.

VI. ARGUMENT.

However viewed, this case is shocking. It is well-established that actions by the Employer intended to avoid its overtime obligations are indefensible. In the Alaska Administrative Code at 8 AAC 15.910(a)(15) for example, the workweek is defined as follows:

> "workweek" means a fixed and regularly recurring period of 168 hours, i.e. seven consecutive 24-hour periods. It may begin on any day of the week and need not coincide with the calendar week; an individual employee's workweek is the statutory <u>or contract</u> number of hours that he is to regularly work during that period; <u>the workweek may not be artificially adjusted for the purpose of avoiding the payment of overtime</u> . . . (emphasis added)

Yet the only rationale offered by the Employer for its conduct is precisely that. The reason for the rotating shifts at issue is the desire to avoid overtime. For this reason alone, then, the

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grievance should be sustained.

An even more telling argument, however, is a based upon very fundamental concept. Parties to a CBA are entitled to the benefit of their bargain. There is no dispute but that the parties have agreed to a standard workweek and for overtime compensation for hours worked in excess of 40 hours within a standard workweek. Certainly, IBEW should be entitled to assume that its members would be worked in accordance with those mutually agreed to terms and principles. In the other words, it should have been safe for IBEW to assume that the practical effect of the CBA upon its members could be predicted by reading the printed document. There is no page, however, on which a description of the Employer's conduct in this case can be found.

The standard workweek is defined by this CBA to mean a 40-hour workweek, anticipating both state and federal legal requirements. In 1938, the standard workweek was 44 hours; in 1939 the standard workweek was 42 hours. It was fixed at 40 hours in 1940. The purpose of the Federal Wage and Hour Act, which predated the Alaska Wage and Hour Statute, was to define a workweek to require the Employer to pay overtime at an employee's regular rate of pay for hours worked beyond the standard or regular work week.

The imposition of any shift schedule inconsistent with the CBA should also have been a mandatory subject of bargaining; it is a matter with respect to which the Employer does not have unilateral rights. See Timken Roller Bearing Company, 18 LRRM 1370 (1946), enforcement denied on other grounds. 20 LRRM 2204 (CA 6,

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1947). See also Camp & McInnes, Inc., 30 LRRM 1310 (1952). In Weston & Brooker Co., 60 LRRM 1015 (1965), the National Labor Relations Board, relying upon Gregory Company, 44 LRRM 1249 (1959), held that the length of the workday, for example, was a mandatory subject of bargaining and that the employer's unilateral change constituted a Section 8(a)(5) violation. An employer may not unilaterally change the work schedule from what is provided in the CBA. See American Oil Company, 99 LRRM 1253 (1978), enforced. 602 F.2d 184, 101 LRRM 2981 (CA 8, 1979).

Viewed from another perspective, if the Employer argues it has created a "past practice" by successfully ignoring IBEW's concerns for a sufficient period, the Employer's defense still fails. In that case, the employees' actual workweek would become the contractual workweek and they would still be entitled to overtime for their sixth and seventh consecutive days. The fact that their shift does not start on Monday would be irrelevant. Since the Employer has consistently failed to comply with the contract, its consistent failure has, in fact, established a consistent practice that nonetheless obligates it to pay overtime despite its obvious intentions to avoid doing so. In other words, if an employee has been consistently required to work from Wednesday to Tuesday, his actual workweek has become Wednesday to Tuesday and thus any work on Monday and Tuesday should be compensated at the overtime rate. The Alaska Supreme Court has recognized that numerous cases consider a workweek to consist of seven consecutive days in which work is performed. See Musarra,

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602 P.2d 1240, 1244, n. 7 (1979). See also Roland Electric Co. v. Black, 163 F.2d 417 (4th Cir. 1947), cert. den. 333 U.S. 854 (1948).

The Employer cannot have it both ways. The Employer cannot be permitted to agree to a workweek and then not follow it and thereby avoid paying overtime. Nor can it be permitted to establish a different workweek for one unfortunate group of employees so as to deprive them of the benefit of the overtime provision negotiated by the IBEW into this CBA on their behalf.

The ultimate question, then, is what is the contractual workweek? It is undisputed that the lion's share of the bargaining unit does not actually work from Monday through Sunday. The contractual designation of a workweek in this light, then, is no more than a definition for accounting purposes. For example, if the definition of workweek is read carefully, it does not describe the workweek of the effected employees. Since the provision merely defines a "week" for accounting or payroll purposes, the definition is in one sense a mere formality.

Under this scenario, the Monday through Sunday workweek provided for in Section 4 of the CBA, is thus irrelevant to the question whether overtime is due for the sixth and seventh consecutive day of actual labor. The employee's workweek is defined by his regularly recurring seven consecutive day work period. On the other hand, if the definition here is not construed as one intended solely for accounting purposes, then it is clear that the Employer's failure to use it in scheduling work is a

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violation of the CBA.

As noted above, we presume the Employer will argue its actions are justified as a past practice. The practice, however, has been challenged, albeit unsuccessfully by the IBEW since negotiations in 1987, and earlier. In addition, the CBA itself does not permit practices or provisions found to be contrary to law to be maintained. Hence, it is impossible to maintain an illegal past practice once challenged regardless of its long-standing status. Furthermore, even if it has become a past practice, as noted above, AS 23.10.125 prohibits a CBA to afford the effected employees any rights less than those secured by state or federal law. Hence, even if the practice is not inherently illegal, to the extent the CBA has been interpreted and utilized by the Employer to deprive the effected bargaining unit employees of rights otherwise guaranteed them by state and federal statute, the Employer's practices must be stopped. We are also under a new CBA and with each new CBA, both parties' rights to protest or accept each other's conduct are renewed.

The Employer may also argue that the premium pay set forth in Section 6, for night shift work,somehow compensates the disenfranchised group for their inability to access the overtime provisions of the CBA. In <u>Brighten Electric Steel Casting</u>, 47 LA 518 (1966), however, the Arbitrator ruled that where a contract provides shift differential for second shift work, an employee who regularly works that shift is entitled to shift differential in addition to overtime premium for the two hours of work in question.

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In so ruling, the Arbitrator explained as follows:

> [P]ayment of overtime alone is sufficient for first shift employees who only occasionally work overtime into the second shift. But the additional shift differential must be paid to employees who work overtime into the second shift on a regularly scheduled basis.

From this, we argue that the overtime entitlement of the disenfranchised group not permitted to work the Monday through Sunday schedule should be calculated based upon a wage rate which includes their additional shift differential. See also Public Service Electric and Gas Company, 2 LA 2, where the Arbitrator upheld the union's view that the differential for late shift work becomes an integral part of the employee's wage, therefore an employee who worked overtime was entitled to receive compensation for those hours at the rate of one and one-half times (1-1/2) his full hourly wage, including the shift premium.

VII. SUMMARY.

In determining what is the "prevailing workweek" in this case, the Arbitrator must consider the difference between the union and non-union workplace. In the non-union context, and Employer may well be able to select any day it desires to begin or end the workweek for its employees. See e.g. Pappus v. Kerite Company, 8 WH 756 (1949). However, in the union context, the scheduling of work as referenced above is a mandatory subject of bargaining. The Employer, in the union context, does not have the right to unilaterally implement a work schedule that has not been mutually agreed to by the parties. Thus here, the only permissible workweek

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is Monday through Sunday. In the alternative, if the test for prevailing workweek is the actual prevailing schedule of the majority of employees, then it is clearly not Monday through Sunday. The prevailing workweek in this case is a rotating workweek as established by the parties' JT. Exhibits 3(a) and 3(b).

According to these shift schedules, the Monday through Sunday workweek prevails only 25% of the time at best. Since a rotating workweek is the prevailing norm, there is thus no justification for overtime calculated on a Monday through Sunday basis. Either the Employer's practice must be changed to fit the CBA or the payment of overtime adjusted to reflect the Employer's consistent practice.

The Employer is clearly perpetrating a fraud. The Monday through Sunday workweek agreed to by the parties is for the Employer merely a creature of accounting. It is not the prevailing workweek for the majority of effected bargaining unit employees. If the contract prohibits any workweek other than Monday through Friday, the Employer's conduct is impermissible. If the rotating workweek has become a contract modification, then the Employer's underpayment of overtime becomes even more egregious. With the workweek redefined to reflect its rotating nature and the employer's consistent practice, there is no excuse for paying overtime based upon the illusion of a non-existent Monday through Sunday workweek.

The Employer has illegally and unfairly manipulated this CBA with impunity for far too long. All employees who have been

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denied overtime as a result of working the rotating shift should be made whole for all lost overtime and all lost wages and benefits. The grievance should be sustained.

RESPECTFULLY SUBMITTED this 14th day of November, 1989.

IBEW LOCAL UNION 1547

Helene M. Antel
General Counsel

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This is to certify that a copy of the foregoing was mailed to:

Christopher Biencourt
Timothy D.W. Williams

on this 15th day of November, 1989.

Cyndi Dickson

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB0286a

Revision Date: ____

Department Affected: DCED

Title: Regulation of Local Exchange telephone utilities

BRU: APUC

Component: ____

Sponsor: Rep. Ivan, Jacko

Requestor: Rep. Ivan, Jacko

COMPONENT SERIAL NO.

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: ____

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact for FY91

Prepared By: ~~Ray Wiegelman, Acting Exec. Director~~ Phone: 276-6222

Division: Alaska Public Utilities Commission Date: 4/26/91

Approved by Commissioner: Glenn A. Olds Com. [signature] Asst Com

Agency: Department of Commerce & Economic Development Date: 4-26-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

No. 1
Bill Version: CSHB 286(CRA)
(H) Publish Date: 5/1/91

Revision Date:
Department Affected: DCED
Title: Regulation of Local Exchange telephone utilities
BRU: APUC
Component:
Sponsor: Rep. Ivan, Jacko
Requestor: Rep. Ivan, Jacko
COMPONENT SERIAL NO.

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
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CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year Impact:

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact for FY91

Prepared By: Ray Wickerman, Acting Exec. Director
Phone: 276-6222
Division: Alaska Public Utilities Commission
Date: 4/26/91
Approved by Commissioner: [signature] Comm. [signature] Asst Comm
Agency: Department of Commerce & Economic Development
Date: 4-26-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

Page ___ of ___

Alaska State Legislature
House of Representatives

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Representative Ivan M. Ivan

MEMORANDUM

APR 1991

TO: Representative David Finkelstein, Chair
House Labor and Commerce Committee

FROM: Representative Ivan M. Ivan

DATE: Apruil 30, 1991

RE: Request for Hearing

Please consider this request to hear House Bill 286; An Act relating to regulation of local exchange telephone utilities; and providing for an effective date.

The main parts of the bill are as follows:

* Allows telephone utilities to adjust rates in compliance with regulatory orders issued by the Federal Communications Commission or the APUC. Under current procedures whenever a shift in cost allocation among the interstate toll, intrastate toll and local jurisdictions, companies must go through rate case procedures just to comply with required adjustments. The language in the bill allows the shifts to take place without the expense of a rate case.

* Provides the procedure for local exchange telephone utilities to alter rates up or down within an 8% range without going through the complete rate case process. Consumer notification and a method for consumers to respond through the APUC is provided in the bill. The 8% range is in keeping with the figure already allowed by the electric utilities.

I appreciate your consideration of my request. If I can be of assistance or answer any questions, please do not hesitate to contact me or Tom Wright of my staff at 4527.

Thank you.

IMI:tw

CS HB 286

- Applies to ALL local phone utilities, not just small utilities
- Requires consumers to regulate monopolies by petition
- Allows for rate increases, whether they are needed or not, even if the monopoly is overearning

CS HB 286

Potential Impacts

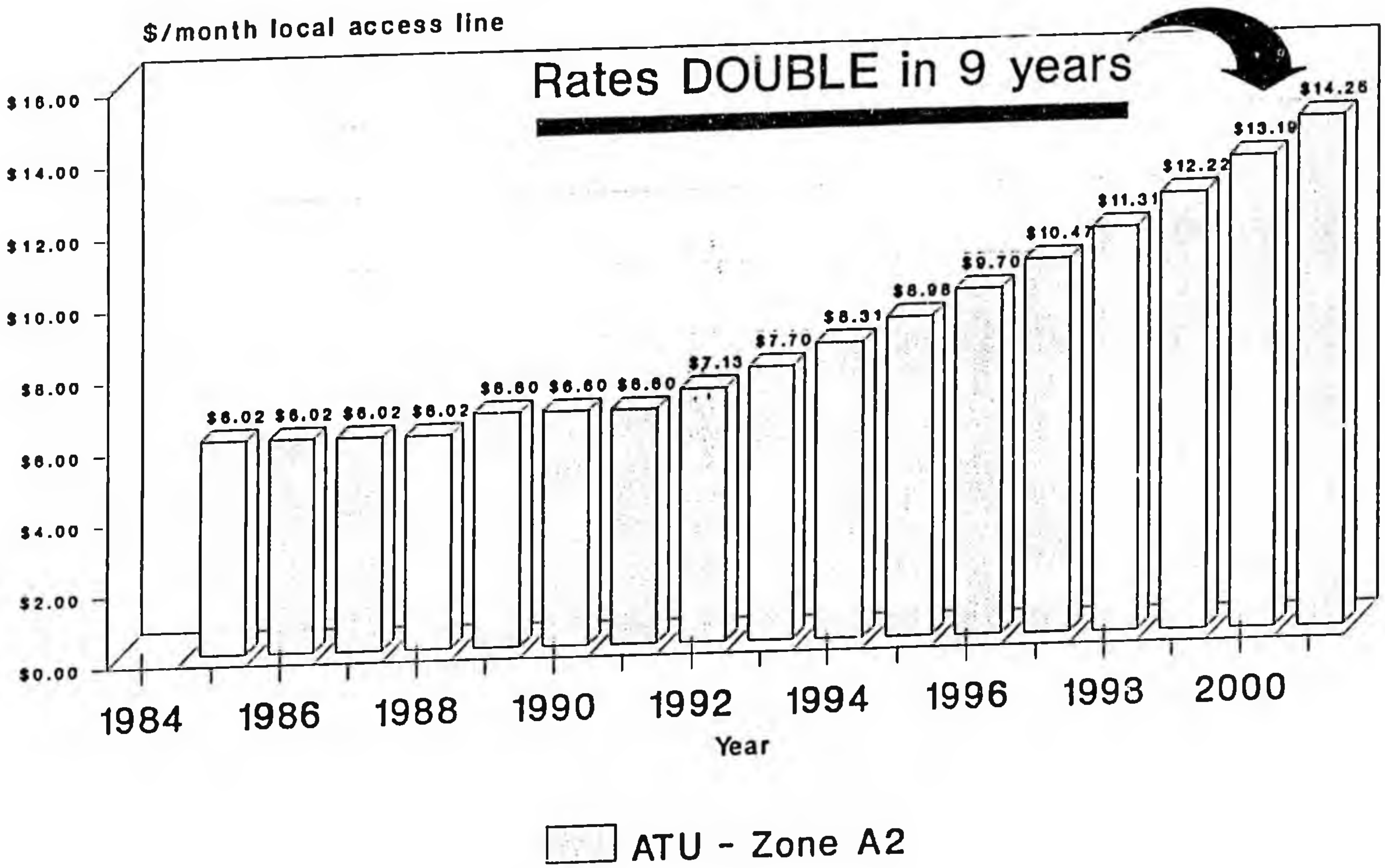
- 8 percent annual increases allowed
- Potential DOUBLING of rates in 9 years
- Additional rate increases without regulatory review (section 1)

CSHB286(CRA) 5/1/91

CS HB 286
COMMISSION ALTERNATIVE

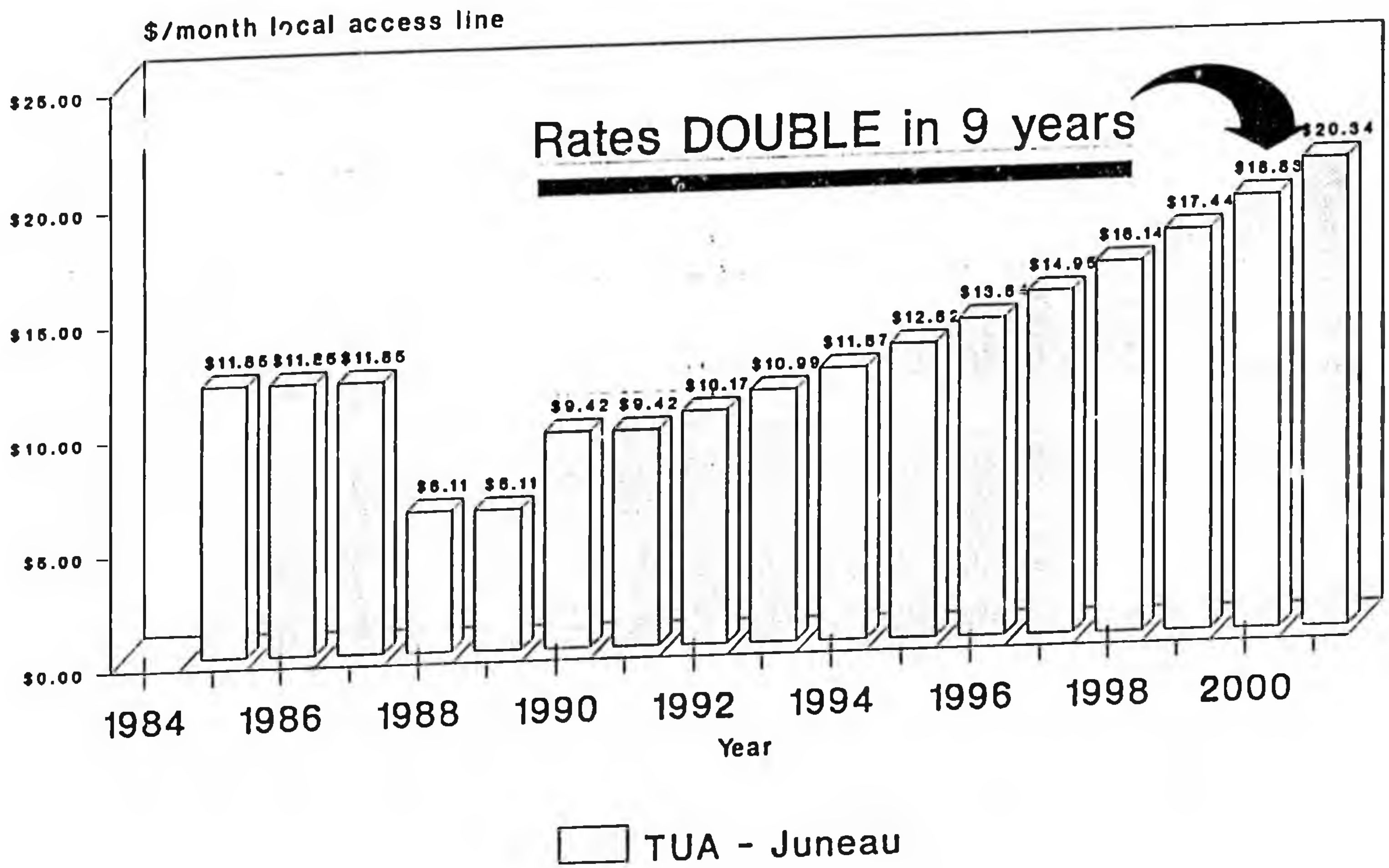
- Sets deadline for regulations of January 1992
- Allows exploration of alternatives
- Allows for broad consumer input
- Provides simplified ratemaking, not deregulation
- Parallels process in other states

Potential Impacts on Rates (HB 286)
Anchorage Telephone Utility



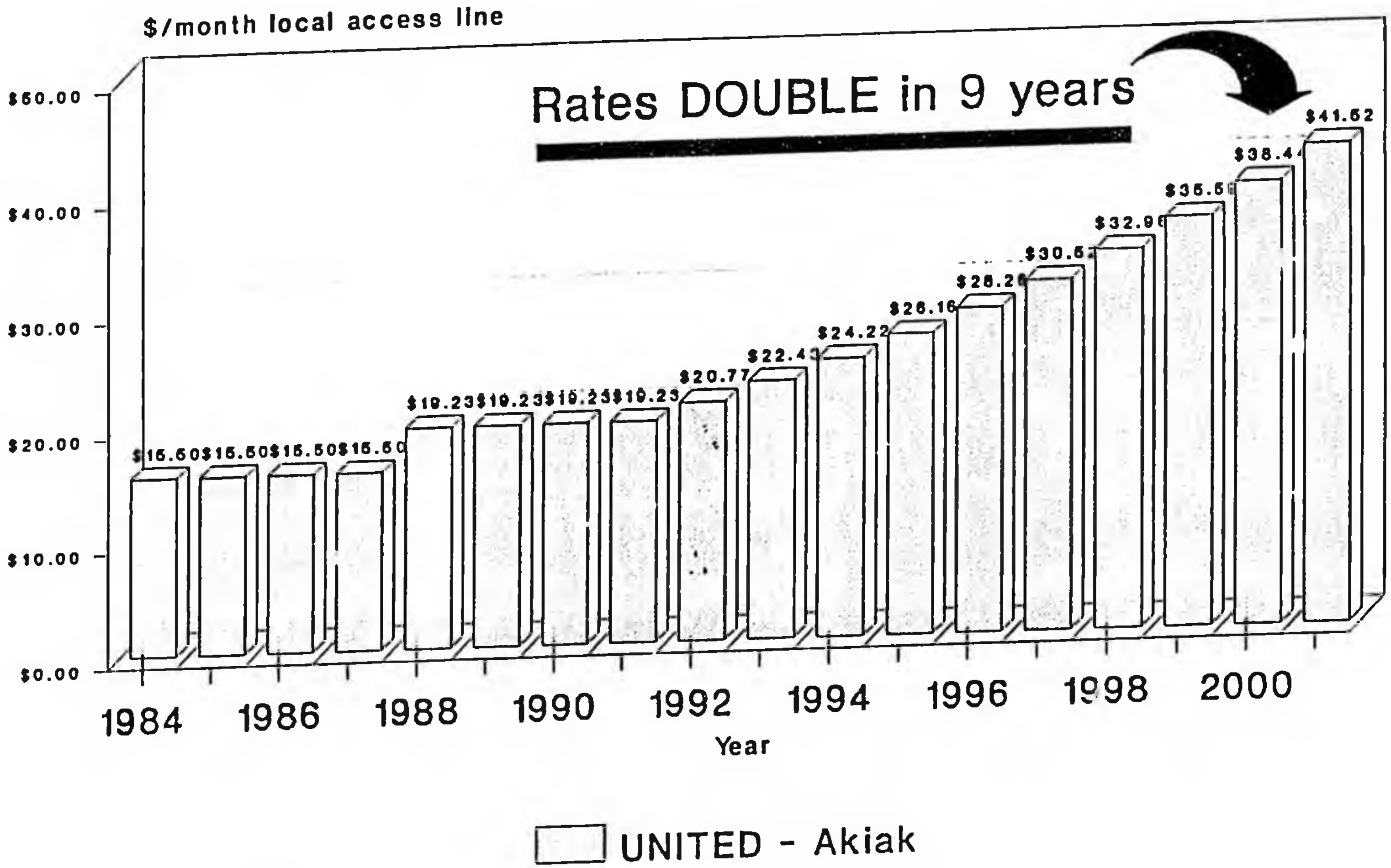
Actual Rates thru 1991
8% annual increases commence in 1992

Potential Impacts on Rates (HB 28)
TUA - Juneau



Actual Rates thru 1991
8% annual increases commence in 1992

UNITED - Akiak



Actual Rates thru 1991
8% annual increases commence in 1992

7-LS1207\J
Cramer
5/9/91

CS FOR HOUSE BILL NO. 286 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES IVAN, Jacko, Zawacki

A BILL

FOR AN ACT ENTITLED

"An Act relating to regulation of rate changes of local exchange telephone utilities; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 42.05.381 is amended by adding a new subsection to read:

(f) A local exchange telephone utility may adjust its rates in conformance with changes in jurisdictional cost allocation factors required by either the Federal Communications Commission or the Alaska Public Utilities Commission upon a showing of

(1) the order requiring the change in allocation factors;

(2) the aggregate shift in revenue requirement, segregated by service classes or categories, caused by the change in allocation factors; and

(3) the rate adjustment required to conform to the required shift in revenue requirement.

* Sec. 2. AS 42.05 is amended by adding a new section to read:

Sec. 42.05.383. SMALL LOCAL EXCHANGE TELEPHONE UTILITY RATE

CHANGES. (a) No more than once in a 12-month period, a local exchange telephone utility that serves fewer than 2,500 access lines may adjust its monthly recurring local exchange rates and local private line rates by increasing the rates no more than eight percent or decreasing the rates no more than eight percent. The telephone utility shall publish notice of the change, as required by regulations adopted by the commission, at least 60 days before the date of the change. The notice must include

(1) the reasons for the rate change;

(2) a description of the affected service; and

(3) an explanation of the right of a subscriber to petition the commission for a hearing on the rate change.

(b) At least 60 days before the date of the rate change, the local exchange telephone utility shall file with the commission a statement of intent to change rates containing

(1) a copy of the notice required by (a) of this section;

(2) the date of the most recent previous rate change made by the telephone utility; and

(3) the increase in total gross annual local revenue expected to be produced by the proposed rates.

(c) The commission may require a local exchange telephone utility that proposes to change rates under this section to provide additional notice to subscribers of the utility as the commission considers appropriate. If the commission receives a petition or individual written requests from at least five percent of the subscribers of a local exchange telephone utility proposing a rate change under this section within 60 days after the notice was given to the subscribers, the commission shall review the proposed rate change. After notice to the local exchange telephone utility, the commission may suspend the rates during the pendency of the review and may reinstate the rates previously in effect.

* Sec. 3. No later than January 1, 1992, the Alaska Public Utilities Commission shall adopt regulations under AS 42.05.381(e) for local exchange telephone utilities that serve 2,500 access lines or more setting a range for adjustment of rates by a simplified rate filing procedure.

* Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

CS FOR HOUSE BILL NO. 286 (CRA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES IVAN, Jacko

A BILL

FOR AN ACT ENTITLED

"An Act relating to regulation of local exchange telephone utilities; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 42.05.381 is amended by adding a new subsection to read:

(f) A local exchange telephone utility may adjust its rates in conformance with changes in jurisdictional cost allocation factors required by either the Federal Communications Commission or the Alaska Public Utilities Commission upon a showing of

(1) the order requiring the change in allocation factors;

(2) the aggregate shift in revenue requirement, segregated by service classes or categories, caused by the change in allocation factors; and

(3) the rate adjustment required to conform to the required shift in revenue requirement.

* Sec. 2. AS 42.05 is amended by adding a new section to read:

Sec. 42.05.383. LOCAL EXCHANGE TELEPHONE UTILITY RATE CHANGES. (a)

No more than once in a 12-month period, a local exchange telephone utility may adjust its monthly recurring local exchange rates and local private line rates by increasing the rates no more than eight percent or decreasing the rates no more than eight percent. The telephone utility shall publish notice of the change, as required by regulations adopted by the commission, at least 60 days before the date of the change. The notice must include

(1) the reasons for the rate change;

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* Sec. 3. This Act takes effect immediately under AS 01.10.070(c).