Before Louis V. Imundo, Jr., Impartial Arbitrator

In the matter of arbitration between

Fluor-B&W Portsmouth LLC
Portsmouth Gaseous Diffusion Plant

and the

United Steelworkers, AFL – CIO
on behalf of USW Local No. 689

FMCS Case No. 191128-01893

Grievances of the following:

- D&D Unit (Group) – FBP-GEN-0007-17, 009-17, 0015-17, 0021-17, 0022-17, 0023-17, 0024-17, 0025-17, 0026-17
- 370 (approximately) individual D&D Unit employees' grievances
- P&T Unit (Group) – P&T – Gen 0004-17, 0005-17, 0006-17, 0007-17, 0009-17
- 147 (approximately) individual P&T Unit employees' grievances

This matter was heard before Louis V. Imundo, Jr., Impartial Arbitrator, in Piketon, Ohio. Post Hearing briefs were filed by the Parties the last of which was received on September 7, 2019.

1.0 Introduction

1.1 Appearing For Management
- Raymond M. Deeny, Esq., Attorney at Law
- Ronald Lee, Sr. Director, Labor Relations
- Dave Armstrong, Manager, Labor Relations
- Tony Meade, Labor Relations Generalist
- Dominica Hannah, Labor Relations Generalist

1.2 Appearing For The Union
- Julie C. Ford, Esq., Attorney at Law
- John D. Knauff, President, Local 689
- Cheshanna Williams, Vice President P&T Unit & Industrial Hygiene Associate
- Larry E. Thomas, Vice President, Local 689

2.0 Nature Of The Case

This case pertains to a dispute regarding whether four different sets of grievances from two separate bargaining units within the same Local all of whom are related to the July 4, 2018 Holiday shutdown are arbitrable.

It was Management's position that none of the general grievances that came from both of the bargaining units were timely filed. It was also Management's position that in addition to the aforementioned, even if the D&D unit's general and/or individual grievances had been timely filed they are not arbitrable because they were not timely advanced to Step 2 of the grievance procedure.

It was Management's position that notwithstanding the Union's assertion that the planned July 4th and Christmas Holidays shutdowns were subjects that had to be collectively bargained over, something Management was not required to do, proper notice was given to both bargaining units on October 12, 2017. That date was the defining date as to when a grievance should have been filed. The first of the general grievances from the D&D unit was not filed until April 17, 2018. While it could have been filed directly at Step 2 of the grievance procedure, for reasons known only to the leadership of the D&D unit at the time, it was filed at Step 1. It was Management's position that the first of the general grievances and the hundreds of individual grievances that followed were untimely filed because at Article VII, Section 5A of the Agreement a grievance is untimely if it is not filed within 10 days from the date the Union or employee has knowledge of the occurrence of the incident from which the grievance arose.

It was Management's position that Mr. Armstrong answered the first general grievance, FBP-GEN-007-17, on May 21, 2018 and the Union failed to, as required by Article VII, Section 5B of the Agreement, advance it to Step 2 within 10 days from the date of Management's Step 1 answer. The consequence of such was that the grievance was deemed to be withdrawn-settled.

It was Management's position that because the five P&T unit general grievances and the over 100 individual employee grievances were filed in July 2018 and the event that gave rise to those grievances occurred in October 2017 all of them were untimely filed.

It was the Union's position that the defining event was not the October 12, 2017 "Pending Policy Change Notification" email that was sent to the officers of both bargaining units. The Union asserted that the filing requirements go into effect when some change or event occurs that actually harms bargaining unit employees. It was the Union's position that subsequent to the pending policy change announcement, on May 2, 2018, Management notified employees that barring any major funding issues for FY19 there would be no need for the Christmas Holiday shutdown and that this decision supported the belief that the planned July 4th shutdown could possibly be rescinded too. In effect, the decision was not final until it actually occurred. It was the Union's position that the Parties have not been strict about compliance with timelines.

It was the Union's position that the D&D unit employees' grievances were timely filed because they did not know how they were going to be affected by the shutdown until the

time for it came. It was the Union's position that Management failed to comply with Step 1 of the grievance procedure for many of those grievances.

It was the Union's position that all of the P&T unit's general grievances were timely filed because they focused on the shutdown and its effects on bargaining unit employees. It was the Union's position that the actual shutdown was the triggering event for filing grievances. It was the Union's position that the Agreements contain no definitions of who are essential and who are nonessential personnel nor is there any Company policy defining such. It was the Union's position that employees had to wait until they were told they would or would not be scheduled to work during the shutdown to know for certain whether or not they would be financially harmed by it. The individuals who were harmed timely filed their grievances after they returned to work from the shutdown.

It was the Union's position that although the P&T unit moved the group and individual grievances to Step 2 Management refused to allow any of them to be heard at a Step 2 meeting.

3.0 Applicable Articles And Sections Of The Agreements

D&D Agreement

Article VII – Grievance Procedure, Rev. 4, Section 4 – General Grievances (in part)

Controversies may arise of a nature so general as to directly affect the majority of employees in a classification or department, or the majority of all employees. It is agreed that issues of this nature need not be subjected to the entire grievance procedure but may be initiated at Step 2.

Article VII – Grievance Procedure, Rev. 4, Section 5 – Time Limits, Paragraphs A, B, C, & D

A. Extension
Any grievance not taken up with an employee's immediate supervision within ten (10) days after the employee, or a certified Union representative has knowledge of the occurrence of the incident from which the grievance arose, cannot be processed through the grievance procedure. The employee or a certified union representative may request an extension of five (5) days to investigate the grievance. Such requests shall be received by the Company within the first five (5) day period. Such extension requests should be in written form (email or letter).

B. Withdrawn-Settled
A grievance shall be considered settled or withdrawn if the decision of the Company is not appealed to the next higher step in the grievance procedure within ten (10) days

after a decision has been rendered by the Company, unless this period is extended by mutual agreement between the parties.

C. Answer
Any grievance not answered within the specified time limit may be immediately taken to the next higher step of the grievance procedure.

D. Calculation of Time
In the calculation of time limits under the grievance provisions, including arbitration, “days” shall mean calendar days excluding Saturdays, Sundays, and Holidays.

Article VII – Grievance Procedure, Rev. 4, Section 6 – Grievance Steps 1&2 (in part)

Step 1: If the grievance has not been disposed of or settled satisfactorily in the Pre-Grievance discussion, it shall be reduced to writing by the steward or respective committee chairperson who shall file it with the Company. The steward or committee chairperson will provide the union with a copy. Within ten (10) days a meeting shall be held with the employee, steward, and the employee’s immediate manager, and a labor relations representative to address the matter. The manager will give a reply in writing within three (3) working days after such meeting. Copies of grievance answers to Step 1 will be delivered or faxed to the Union by the Labor Relations representative within five 5) calendar days after being signed by both parties.

Step 2: If the grievance is not settled satisfactorily at Step 1, it may be appealed at the option of the Union to Step 2. If appealed to Step 2, the written grievance shall be referred to the Union Grievance Committee, which will schedule a meeting on a monthly basis for discussion of unresolved grievances with company representatives. The Union shall advise the Company of the grievance to be presented at least five (5) days before the meeting. The employer shall fax its answer to the Union and forward a copy of its answer within ten (10) days after the completion of discussions of any grievance.

Article VII – Grievance Procedure, Rev. 4, Section 8 – Arbitration, Paragraph E

E. Decision-Time Limit

The Arbitrator shall render a decision on every grievance which has been submitted within thirty (30) calendar days from the date of hearing, unless additional time is requested by the arbitrator and is mutually agreed upon between the Company and the Union.

Article VII – Grievance Procedure, Rev. 4, Section 8 – Arbitration, Paragraph F

F. Implementation of Decision

The decision of the arbitrator shall be final and binding upon both parties and shall invoke immediate compliance by the parties. Any money due an employee, as a result of such decision shall be paid not later than two (2) weeks following the receipt of a written decision to this effect; unless a time is mutually agreed upon between the Union and the Company. It is recognized by the parties that certain rights of appeal of decisions exist.

Article VII – Grievance Procedure, Rev. 4, Section 8 – Arbitration, Paragraph G

G. Cost

The general hearing expenses and the expense and compensation of the arbitrator shall be borne by and divided equally between the Union and the Company.

P&T Agreement

Article VII – Grievance Procedure, Section 4 – General Grievances

Controversies may arise of a nature so general as to directly affect the majority of employees in a classification or department, or the majority of all employees. It is agreed that issues of this nature need not be subjected to the entire grievance procedure but may be initiated at Step 2. Attendance at Grievance Hearings initiated at Step 2 may include members of both negotiating committees.

Article VII – Grievance Procedure, Section 5 – Time Limits, Paragraphs A, B, C, D

A. Extension

Any grievance not taken up with an employee's immediate supervision within ten (10) days after the employee, or a certified Union representative has knowledge of the occurrence of the incident from which the grievance arose, cannot be processed through the grievance procedure.

B. Withdrawn – Settled

A grievance shall be considered settled or withdrawn if the decision of the Company is not appealed to the next higher step in the grievance procedure within ten (10) days after a decision has been rendered by the Company, unless this period is extended by mutual agreement between the parties.

C. Answer

Any grievance not answered within the specified time limit may be immediately taken to the next higher step of the grievance procedure.

D. Calculation of Time

In the calculation of time limits under the grievance provisions, including arbitration, “days” shall mean calendar days excluding Saturdays, Sundays, Holidays, Vacations, and the scheduled days off of the aggrieved employee.

Article VII – Grievance Procedure, Section 6 – Grievance Steps, Steps 1 & 2 (in part)

B. Step 1

If the grievance has not been disposed of or settled satisfactorily in the Pre-Grievance discussion, it shall be reduced to writing by the steward or respective committee chairperson who shall file it with the Company. The steward or other union representative will provide the union with a copy. Within ten (10) days a meeting shall be held with the employee, steward, and the employee’s immediate manager, and a labor relations representative to address the matter. The manager will give a reply in writing within three (3) working days after such meeting. Copies of grievance answers at Step 1 will be delivered or faxed to the Union by a Labor Relations representative within five (5) calendar days after being signed by both parties.

C. Step 2

If the grievance is not settled satisfactorily at Step 1, it may be appealed at the option of the Union to Step 2. If appealed to Step 2, the written grievance shall be referred to the Local Unit Vice-President, which will schedule a meeting on a monthly basis for discussion of unresolved grievances with company representatives. The Union shall advise the Company of the grievance to be presented at least five (5) days before the meeting. The employer shall fax its answer to the Union and forward a copy of its answer within ten (10) days after the completion of discussions of any grievance.

Article VII – Grievance Procedure, Section 8 – Arbitration, Paragraph E

E. Decision – Time Limit

The Arbitrator shall render a decision on every grievance which has been submitted within thirty (30) calendar days from the date of hearing, unless additional time is

requested by the arbitrator and is mutually agreed upon between the Company and the Union.

Article VII – Grievance Procedure, Section 8 – Arbitration, Paragraph F

F. Implementation of Decision

The decision of the arbitrator shall be final and binding upon both parties and shall invoke immediate compliance by the parties. Any money due an employee as a result of such decision shall be paid not later than two (2) weeks following the receipt of a written decision to this effect. It is recognized by the parties that certain rights of appeal of decisions exist.

Article VII – Grievance Procedure Section 8 – Arbitration, Paragraph G

G. Cost

The general hearing expenses and the expense and compensation of the arbitrator shall be borne by and divided equally between the Union and the Company.

4.0 Issues

The Parties agreed to a joint stipulation of the Issues to be decided by the Arbitrator. The Issues are:

- Whether the group grievances filed under the D&D contract are timely and may proceed to be heard on their merits?
- Whether the individual grievances filed under the D&D contract are timely and may proceed to be heard on their merits?
- Whether the group grievances filed under the P&T contract are timely and may proceed to be heard on their merits?
- Whether the individual grievances filed under the P&T contract are timely and may proceed to be heard on their merits?

5.0 Relevant And Pertinent Information From The Record

The following has been taken from the Arbitrator's notes, recording of the Hearing, written transcript, testimony of witnesses, documentary evidence and the briefs.

Prior to making opening statements, the Parties submitted into the record a two page document that contained three stipulated background facts, six stipulated Joint exhibits, and the stipulated Issues. The Parties subsequently submitted into the record 14 Joint exhibits and what was tabbed as 37 Company exhibits, but was actually 36 exhibits. There was no tab 8 exhibit. The exhibits will be referenced as they were tabbed.

In his opening statement, Mr. Deeny made the following points to support Management's position:

- This site is part of what is called the DOE's complex. It is highly regulated and, in more ways than one financially regulated by the DOE.
- The contractor must be cognizant of those financial regulations and must not over extend the allocated budget for decommissioning and deactivating the site.
- Similar sites around the country have been, or are in the process of being deactivated and decommissioned.
- At times, there are measures, with the DOE's approval, that need to be taken to control the budgets.
- In October 2017 it was one of those times. Expenses were far exceeding budget. Those expenses were largely labor expenses.
- The employer, the main contractor, which is Fluor FTC announced that it would be invoking a process under its policies that have been incorporated into the D&D Agreement.
- The Agreement, at Article XVI – Miscellaneous, Rev. 5, Section 7, provides the Company shall give the Union, where practicable notice of changes in policies which directly affect employees of the bargaining unit.
- On May 21, 2018, Mr. Armstrong sent a letter to Mr. Thomas, the Grievance Chair, wherein he replied to the Union's grievance and cited the relevant provisions of the Agreement that gives Management the authority to change employees' work schedules.
- On October 12, 2017 the Company gave the Union written notice of the change in work schedules. The email was sent to Mr. Potter, the Local's President, Mr. Veach, the Local's Vice President and others. It is titled: "Annual Holiday Shutdowns – Advanced Craft Notice". (Co. No. 6 at pg. 3) The two holidays involved were identified in the email.
- In May 2018 there was a change in the Local's leadership.
- The notice was consistent with the language in the Agreements.
- The notification contained attachments showing the changes in Company policies FBP-HR-POL-00005 and FBP-HR-POL-00044. The change informs employees that paid time off, PTO, can be used during the two Holiday shut downs. They could also elect to go LWOP for those hours beyond the paid holidays in the shutdown periods.
- Employees would be notified far in advance of changes in scheduled work time so they would know how to use their time.
- Proper and timely notification was given as required by the CBA. That is the defining moment as to when a grievance should be filed.
- If notification went out to all employees and was followed by periodic announcements, see Joint No. 8, they had plenty of time to think about how they were going to manage the events.

- There is nothing in the CBA that provides for a guarantee of work. There are no guarantees of any overtime.
- The business decision was made because of budget constraints and cost overruns.
- No grievance was filed by either unit in a timely manner.
- The first general grievance was filed by the D&D unit in April 2018.
- Such grievances may be initiated at Step 2 of the grievance procedure for both units.
- At Section 5 in both Agreements it provides that any grievance not taken up with an employee's immediate supervisor within 10 days after the employee or certified Union rep. has knowledge of the occurrence of the incident from which the grievance arose cannot be processed through the grievance procedure. This requirement was not met.
- There is specific language about extensions. They were not asked for or granted. At Section 5B it provides that: "A grievance shall be considered settled or withdrawn if the decision of the Company is not appealed to the next higher step in the grievance procedure within ten days after a decision has been rendered by the Company, unless this period is extended by mutual agreement of the parties." At Company No. 6, Mr. Armstrong answered the general grievance which was commenced at Step 1. He specifically made the point that the grievance was untimely because the occurrence occurred in October 2017. There was no request by the Union to move to Step 2. If there is no advancement the grievance is dead on arrival.
- Ms. Williams, the P&T unit representative, filed a virtually identical grievance. See Joint No. 4. This grievance addresses the same occurrence, but spins it a little differently. This grievance was denied.
- The individual grievances failed for the same reasons. The grievances should have been filed in the October 2017 time period.
- Management has never wavered from the view that all of the grievances were untimely filed.

In her opening statement, Ms. Ford made the following points to support the Union's position:

- The Company's position is that the initial announcement of the policy to the Union officers in October was the defining moment.
- The Union's position is that simply announcing a policy change, or actual policy change does not trigger the grievance filing requirements. The filing requirements go into effect when some change actually occurs and when some event occurs that actually harms bargaining unit members.
- At the time the policy change was issued the Union demanded to bargain. The Union repeatedly did such and tried to forestall it from happening. The Union also pursued various other means to try to herd this off.

- In fact, sometime in the Spring of 2018 the Company changed its mind about the Christmas shutdown and that did not occur. The proposed July 4th shutdown did occur.
- By the Spring of 2018, when the Company had been declining to bargain over the change and it appeared that the shutdown was going to go forward the Company notified employees and put out a policy that it said was required reading.
- The Union started to file some general or group grievances in late April and early May.
- The Parties continued to discuss the matter at meetings. In May 2018, things were complicated by the fact that new officers were elected. The new officers had discussions with Management about the shutdown in the May time period. There was a great deal of correspondence back and forth.
- When the Company issued a final notice it was going to proceed, additional grievances were filed.
- The week before the shutdown, the P&T unit filed general grievances and after the shutdown P&T unit employees filed individual grievances.
- In addition, individual Union members filed grievances, about 370 in the D&D unit and 147 in the P&T unit.
- In the Union's view, once the shutdown was certain and when it occurred, that's when the time began for filing a grievance.
- The Parties discussed things and ideas were floated. The Company may say it's going to do something and then through discussions with the Union, or for its own reason change its mind. This was done with regard to the Christmas shutdown. Rather than filing premature grievances the Union waits until something happens.
- Mr. Knauff, a Union officer for many years, will testify that in the past grievances were typically filed when something occurred, not when it was threatened or planned.
- With regard to individual grievances, an employee does not know how he or she is going to be affected until it happens.
- The Company said nonessential personnel would be required to take PTO or LWOP. People did not know if that included them or not until the time came.
- There is no contractual definition of essential, nonessential personnel, no policy about that. Ms. Williams, the Vice President for the P&T unit asked her manager or supervisor the week before the shutdown on her own behalf and that of another employee if they were essential or not.
- People did not know if they were going to be forced to take all of their PTO or LWOP. Initially the Union was notified that people would need to save their paid time off, vacation, sick leave, all paid time off, it's all bundled. But later they were told the Company would waive some of its policy restrictions on the use of LWOP.

- The Parties had been loose about their grievance procedures. The Company did not comply with all of the grievance procedures. Nobody had been strict about the timelines.
- There were three initial group grievances under the D&D Contract. In the Spring, the Company provided one grievance answer on one of them, but did not file formal answers on the others.
- When the individual Union members, 500 plus, filed individual grievances, the Union filed the six group grievances for the D&D unit, the Company did not provide answers to most of them.
- In the P&T unit, the Company provided individual answers and then later declined to discuss the P&T individual and group grievances at Step 2.
- The Union, through Ms. Williams, tried to schedule the meetings, but after one labor relations representative accepted the meeting, Mr. Lee, the Director, declined the meeting request.
- The Company refused to answer any of the 500 + individual grievances, the six new D&D grievances, sent them back and staff people said they were untimely and/or moot.
- The Union will testify that individual grievances were filed because individuals did not know for sure if they were going to be affected by the shutdown.
- If there is only a group grievance it takes a year to get a hearing as this case has, or two years to be resolved.
- In filing individual grievances there was, contrary to Management's assertion, no intention to disrupt operations.
- There is one employer, but two bargaining units. The production and maintenance employees organized first when the plant was a functioning facility for the enrichment of uranium. The other unit is the professional and technical employees, many of whom are salaried exempt employees. They organized later and are in their first Contract. The language in the two Agreements are similar, but not the same.
- The P&T grievances did not focus on the issuance of a policy, but specifically on the shutdown and the effects on bargaining unit employees.
- In the Union's view, all of the grievances are timely because they were filed at, or near the time something specific happened.
- The grievances should be held timely and proceed on their merits at a later Hearing.

Mr. Deeny called Mr. Dave Armstrong as Management's first witness. Mr. Armstrong testified that prior to the last ratification, which was December 2017, the Parties had been lax on the timeliness of grievances and responses and jointly agreed to tighten up on same. Mr. Armstrong testified that the two Agreements, except for reference to D&D or P&T, contain identical grievance and arbitration language.

Mr. Deeny directed the witness to Company No. 6. Mr. Armstrong testified that Mr. Veach, who had been the Vice President of the D&D unit, filed the grievance, but because the administration had changed the May 21st written answer was sent to Mr. Thomas. The grievance was filed on April 17th. (Jt. No. 3) Mr. Armstrong, referring to the written grievance, pointed out that the Union protested the Company's having issued an FBP wherein the printed box "Required Reading" was Xed. This pertained to all bargaining unit employees. The witness said the notice of the required reading was sent to all employees affected, or potentially affected by a change in a policy or work procedure. The Union also asserted that change of policy was a negotiable item.

Mr. Deeny directed Mr. Armstrong to Company No. 1 and asked him to identify it. The witness said it is the October 12, 2017 notification that he sent to all Union – both the guard and the USW leadership identifying that the policy was changing for 2018. The changes were attached. The witness said there were several further dissemination follow-up notifications. (Jt. No. 2)

Mr. Deeny directed Mr. Armstrong to Company No. 5. The witness said it was another memo dated May 10th from Mr. Smith, the Project Director, wherein he wrote that a Christmas shutdown was no longer being planned.

Mr. Deeny directed the witness back to Joint No. 3. Ms. Ford pointed out that it contains three grievances. Two were filed by Mr. Veach, one on April 17th and the second on May 2nd. The third, dated May 3rd, was filed by Mr. Gary Fitzpatrick on behalf of all FBP employees. In the May 2nd grievance Mr. Veach asserted that shutdown was actually a reduction-in-force. In his grievance, Mr. Fitzpatrick echoed the same thought. Mr. Deeny asked Mr. Armstrong if the Union proceeded to Step 2 and he answered no. Mr. Deeny asked the witness if there were any requests for extensions of time on filing Step 2 and he answered no. Mr. Deeny asked what is the consequence for the failure to respond, or request a move to Step 2? The witness said that after a certain period of time the grievance is considered closed, withdrawn. Mr. Armstrong testified that by mid-May most of the Union's new officers had taken their positions.

Mr. Armstrong, referring to Joint No. 4, testified that after the July 4th shutdown he started receiving grievances from the P&T unit. Mr. Armstrong said that Management's position was that they were untimely.

Mr. Armstrong testified Management repeatedly pleaded with the Union to file at Step 2, and since a grievance had been filed at Step 1 to move it to Step 2.

Mr. Deeny recalled for the witness that in her opening statement Ms. Ford pointed out that the Company failed to respond to many grievances and sent them all back. The witness said Management had gone on record saying they were untimely, but they

continued to come. He also said: “We put together a coversheet on each and delivered them to the Union hall saying they were untimely.” (Arbitrator’s recording & Tr. pg. 54)

Ms. Ford cross-examined. Ms. Ford directed the witness to Company No. 6 and asked if there was a Step 1 meeting on this grievance. He answered: “It would have been between Mr. Morton and Mr. Veach.” Mr. Armstrong was uncertain as to whether such a meeting actually occurred. Ms. Ford pointed out that in his May 21st written response it does not specifically reference such a meeting. Mr. Armstrong said that such a meeting occurred on, or about May 2nd and that Mr. Morton and he collaborated on preparing the May 21st written response. (Co. No. 6)

Ms. Ford directed the witness to Company No. 5 and after reviewing what Mr. Smith had written asked him if there is any definition in the CBA that defines minimum safe staffing? His answer was that he did not recall. Ms. Ford asked if the same exists in any policies? The witness said he did not know.

Ms. Ford questioned Mr. Armstrong about the use of LWOP. Mr. Armstrong said it is different in the D&D unit.

Ms. Ford directed Mr. Armstrong to Joint Nos. 8 and 9. Ms. Ford’s questions and the witness’s answers pertained to bargaining over the shutdowns.

Ms. Ford directed the witness to Joint No. 6 and pointed out that Management only answered one of the three original D&D grievances. The witness answered yes. Ms. Ford pointed out that there was no written answer to the other two. The witness said he did not know the answer to that. Ms. Ford directed the witness to Joint No. 3 and asked him if there was any written response to the May 2nd and 3rd grievances? The witness said he would have to check the grievance log to see. He believed the response to the general 7 would have addressed the other two. The general 7 reference was to grievance FBP-GEN-007-17, which was answered on May 21, 2018. (Co. No. 6)

Ms. Ford asked Mr. Armstrong if he could give examples where the Company took the position where a grievance was considered to be concluded when it was not taken to Step 2? Mr. Armstrong was unable to provide specific examples outside of the ones pertaining to the matter in question.

Ms. Ford directed the witness to Company No. 2 and questioned him about its contents. Mr. Armstrong, after it was pointed out to him that it was directed at salaried employees and not D&D represented employees, agreed and said that judgment was not complete. Ms. Ford, noting that the words designated personnel appear asked Mr. Armstrong who is considered such? She also pointed out that it goes on to say that as we near the holiday shutdown, the site directors will meet to discuss this. (Co. No. 2 at pg. 3) Mr.

Armstrong said that there are designated groups that have essential personnel, the levels of the number of people required would vary by the holiday or situation.

Ms. Ford directed the witness to Joint No. 11 dated June 28, 2018 and pointed out that it refers to essential personnel in some areas, informs employees to check with their manager to confirm whether they working and said that if their name is not on the authorized personnel list they are not authorized to come to work. The witness answered yes.

Mr. Deeny redirected. The witness's testimony did not materially add to what was already in the record.

Ms. Ford recross-examined. It was established that the P&T unit consists of both exempt and non-exempt employees. Ms. Ford pointed out that Ms. Williams, as the P&T unit Vice President, attempted to move all of the P&T grievances to Step 2 and that was rejected. The witness agreed and said that if they were untimely, they were not recognized as grievances.

Mr. Deeny redirected and Ms. Ford recross-examined. The witness's testimony did not add to what was already in the record.

The Arbitrator questioned Mr. Armstrong. The Arbitrator, after noting that there are four sets of grievances involved, the individuals and group for one unit and the same for the other unit, asked the witness which specific grievances or class of grievances were untimely with respect to not having gone to Step 2? Mr. Armstrong answered: "All of them from both units…" (Arbitrator's recording & Tr. pg. 96) Mr. Armstrong testified that once a grievance is reduced to writing the Company's answers have always been in writing.

The Arbitrator directed the witness to page 3 on Company No. 6 and asked him what it meant to him? He answered: "That's … this is advice that we are providing to all leaders of the bargaining units in compliance with the collective bargaining agreement for both guards and for all units of the USW that policy changes are going to be incorporated and this is their advance notification." (Arbitrator's recording) The Arbitrator pointed out that the words: "Are going to be incorporated" creates the impression that such is finalized. The Arbitrator said that in reading the document it states that the Company is planning for project shutdown and proposing draft changes. The Arbitrator asked the witness if this meant to him that it's finalized, a draft, and is subject to possible alteration or being rescinded? Mr. Armstrong answered: "I think the possibility for any of those could have existed. This … I think … I don't think there is a 30 day notification. We try to do this in advance of 30 days. When the December 12th notification came out to employees that meant it was finalized." (Arbitrator's recording & Tr. pgs. 99 & 100) December 12th is: "2018 Holiday Schedule, Holiday Shut-Down FAQS" (Co. No. 2) The

Arbitrator asked why the Christmas shutdown did not occur and the witness said it was in a different budget year and a different funding scenario. The fiscal year runs from October 1st to September 30th.

The Arbitrator asked the witness when, in his mind, the decision to have the July 4th shutdown was finalized? The witness's response was that it was in the October, November 2017 time frame, and there was no question about it when the December notification came out. (Co. No. 2) The Arbitrator asked the witness why, if he believed the decision was finalized in December, Management opened the door in 2018 to having discussions with, or listening to anything the Union proposed with respect to the shutdowns? Mr. Armstrong answered: "There was, at that time under that administration there were weekly meetings with the president, and the topic would come up occasionally. And there was never a meeting I was in where there was any deviation from the fact that we had to do it because of the deviation from the fact that we had to do it because of the fiscal situation." (Arbitrator's recording and Tr. pg. 103) Mr. Armstrong went on to say the Union never offered any proposals to avoid the shutdowns. All they did was complain during the meetings. The witness said he only attended two or three of the meetings in the January 1st to July time frame. The meetings were typically scheduled weekly.

The Arbitrator questioned Mr. Armstrong about the identifying and scheduling of essential personnel. The Arbitrator asked the witness how far in advance are essential personnel notified that they are being scheduled to work? The witness said the D&D unit CBA provides that a schedule can be changed by notification a week in advance. (Jt. No. 1)

Mr. Deeny redirected. Mr. Deeny directed Mr. Armstrong to Company No. 3 and asked him if there was any question in his mind there would be a shutdown on the 4th and he answered no.

Ms. Ford recross-examined. The witnesses' testimony did not add to what was already in the record.

Ms. Deeny called Mr. Ronald Lee as Management's second witness. The witness's testimony did not add to what was already in the record.

Ms. Ford cross-examined. The witness's testimony either did not add to what was already in the record, or was not relevant to the timeliness issue.

Mr. Deeny redirected. The witness's testimony did not add to what was already in the record.

Ms. Ford recross-examined. Ms. Ford submitted into the record; a copy of the letter dated June 14, 2018 that Mr. Lee sent to Mr. Knauff the subject of which was: “Step II Hearings”. (Union No. 1) Ms. Ford pointed out that the letter was sent between three to four weeks after the Company’s Step 1 answer on the other general grievance it answered.

Mr. Deeny redirected. Mr. Lee recalled that after the D&D Agreement was ratified there were eleven items that needed to be discussed with the Union. (Jt. No. 1) One of the items was, because of a backlog of grievances, the need to restart on a monthly basis talking about second step grievances.

Ms. Ford recross-examined. The witness’s testimony was not significant with respect to the outcome of this case.

The Arbitrator questioned Mr. Lee. The witness’s testimony did not add to what was already in the record.

Management rested.

Ms. Ford called Mr. John Knauff as the Union’s first witness. Ms. Ford submitted into the record, a copy of the cover sheet and the grievance procedure from the August 5, 1957 Agreement. (Union No. 2) Mr. Knauff testified about history of the facility and the represented employees, first by the OCAWU and then by the USW. Mr. Knauff said he became the Local’s current President on May 10, 2018. Mr. Knauff testified that in his very lengthy experience as a Union official at the facility the Union has always considered that time limits begin with the actual harm, or action against the employee.

Ms. Ford asked Ms. Knauff if he has seen any situations where FBP changed its position on whether it would or would not implement some policy with regard to bargaining unit members Mr. Knauff recalled such an event that he, as the Local’s President, was personally involved in what occurred in December 2018.

Mr. Knauff testified that in late April or early May before he took office, he first learned from senior Management about the planned July 4th shutdown. Ms. Ford submitted into the record, copies of handwritten notes from meetings held on May 17th between Union officers and members of Management. (Union No. 3) Mr. Smith was not at the May 22nd meeting. The witness said the notes were made by Mr. Larry Thomas the newly elected Vice President. Mr. Knauff, noting what is written on the notes, said there was discussion about the holiday shutdown and its impact on employees. Ms. Ford submitted into the record; a copy of handwritten notes Mr. Thomas made at the May 22nd meeting Union officials had with Mr. Smith at the union hall. (Union No. 4) The witness was at the meeting. Mr. Knauff said the July 4th shutdown was discussed. The witness recalled that Mr. Smith, as he had said on previous occasions, did not like the

idea of a shutdown and his plan was not to have one in December. He said that by the time he came to the Plant it was too late to stop the scheduled July 4th shutdown. Mr. Knauff testified about the Union's communication with elected public and government officials during the months preceding the shutdown. The witness said he did not give up on trying to avoid the shutdown until the day it actually happened.

Ms. Ford directed Mr. Knauff to Company No. 5, the May 10, 2018 memos from Mr. Smith to all Fluor-BWXT Personnel the subject being: "Budget Status". In his memos Mr. Smith told employees that a Christmas shutdown was not being planned, but the week of July 4th shutdown would take place and there would be only minimum staffing. Ms. Ford asked Mr. Knauff if he is aware of anything published regarding what employees are included in minimum safe staffing. Mr. Knauff said he was not aware of any such publication. Ms. Ford asked Mr. Knauff if, as an employee and a Union Officer he knew who was essential and nonessential and he answered: "I had no clue." (Arbitrator's recording Tr. pg. 162) The witness said there were two or three communications to either Mr. Smith or Mr. Lee asking them to identify who these people were, who would be expected to work and who would not be expected to work.

Ms. Ford directed Mr. Knauff to Joint No. 9, specifically the June 4, 2018 letter from him to Mr. Smith. At request #2, Mr. Knauff asked him for the total number of employees by unit, classification and name currently employed in both units who are to report for work for the week of July 1, 2018. There was no response and a similar letter was sent on June 13th. On June 14th, on behalf of Mr. Smith, Mr. Lee sent a letter to Mr. Knauff responding to his June 14th letter. Ms. Ford had Mr. Knauff read aloud the following from the third paragraph of the letter: "Please note that we have not yet finalized the requested listing of total number of employees by unit, classification, and name currently employed in the bargaining units (D&D and P&T) that are to report to work the week beginning July 2, 2018. We will be able to finalize that listing next week; and will provide you with that listing by close of business Thursday, June 21, 2018." (Jt. No. 9) On June 21st Mr. Lee provided the information in a letter with attachments to Mr. Knauff. The witness said he did not know if this information was received on the 21st. (Jt. No. 9)

Ms. Ford, noting that the Union filed general grievances in late April ,early May, the end of June and the first part of July asked the witness when individual employees began filing grievances. Mr. Knauff said when they returned to work from the shutdown. Mr. Knauff testified that the grievances were timely because they were filed within 10 days of when the incident affected them. Ms. Ford asked the witness what was the purpose of having the affected employees file individual grievances rather than them subsumed by the group grievances? He answered: "To make sure that we had documentation as to what harm impacted each employee. The harm could be different from other employees. As you see on the work schedule, some people might have worked part of the holiday and part of them didn't work any of the holiday. Some may have had preplanned vacation and preferred to keep it as vacation. There may have been people

off on sick leave or other issues that didn't get impacted at all. We wanted to know what was the impact to each individual employee. That way, if we get resolution of the grievances, we have a better idea of who needs to be compensated." (Arbitrator's recording & Tr. pg. 167)

Mr. Knauff testified that in the D&D unit the Vice President of the Local and the three division committee people are the grievance committee. The Vice President is the chair and they are responsible for processing all D&D unit grievances. The P&T unit has a Vice President, Ms. Creshanna Williams. She is in charge of processing all grievances within that unit with the assistance from the D&D unit committee.

Ms. Ford asked Mr. Knauff if, in his role as an officer and a representative of the Union, he had ever seen a situation where FBP, or any other company simply returned grievances back to the Union hall and he answered: "First time ever. Never have had that occur ever before." (Arbitrator's recording & Tr. Pg. 170)

Mr. Deeny cross-examined. Mr. Deeny, referring to Joint No. 9, asked Mr. Knauff if Mr. Thomas and he received letters dated July 19th, 26th and August 20th from Mr. Lee to which he answered yes. The August 20th letter was addressed only to Mr. Knauff. In the last paragraph of his July 19th letter Mr. Lee wrote: "Because each of the claimed individual grievances now totaling in excess of 250, involves the same set of facts as the General Grievance, please accept this answer to each of them as denied as described above. That is each of them is untimely, moot and constitutes an unlawful disturbance of our operations in violation of the CBA." (Joint No. 9, July 19th letter)

Mr. Deeny directed Mr. Knauff to Union No. 3 and questioned him at length about what the sentence: "Holiday Shut Down – We Against It. Our People Scared." Means. (Union No. 3) Mr. Deeny directed the witness to Union No. 4 and questioned him about it.

Mr. Deeny directed the witness to Joint No. 9, the third paragraph of the June 21st letter and asked him if either he requested a Step 2 meeting, or he instructed Mr. Thomas to do so? His answer was that he did not and instructed Mr. Thomas and the grievance committee to follow the Agreement. (Jt. No. 1)

Ms. Ford redirected. Ms. Ford directed the witness to Joint No. 3 and questioned him about the nature of the three general grievances.

Mr. Deeny recross-examined. The witness's testimony was not relevant to the issues in question.

The Arbitrator questioned Mr. Knauff. The Arbitrator directed Mr. Knauff to Joint No. 9, the fourth paragraph of the July 19th letter Mr. Lee sent to Mr. Thomas and the witness. The Arbitrator said to the witness that the first sentence suggests that a Step 2 meeting

was scheduled and asked him if he refused to attend a Step 2 meeting? He answered no. The Arbitrator asked the witness if he had any memory of a Step 2 meeting being scheduled by Management and he answered no.

Mr. Deeny recross-examined. The witness's testimony was not significant with respect to the outcome of this case.

Ms. Ford called Ms. Cheshanna Williams as the Union's second witness. Ms. Williams testified that she has been the Vice President of the P&T unit since May 15, 2018. Ms. Ford asked the witness if the Company ever refused to process grievances because they were filed by the Vice President of the Union as a whole rather than the P&T Unit Vice President. Ms. Williams said there is one case she was aware of, April 2018.

Ms. Ford asked the witness when she first submitted grievances under the P&T Agreement relating to the July 4, 2018 shutdown. Ms. Williams answered: "After the incident occurred, the first grievances I filed were on July 12th." (Arbitrator's recording & Tr. pg. 22) Ms. Ford asked the witness why five general grievances were filed under the P&T Agreement. (Jt. No. 2) The witness answered that there are five different groups under the unit. Ms. Ford asked why they were filed starting on July 12th as opposed to in December 2017, for example. She answered: "The incident had not occurred yet." (Arbitrator's recording & Tr. pg. 224)

Ms. Williams testified that the general grievances were filed at Step 2 and that at the time Labor Relations was scheduling Step 2 hearings for the P&T unit. The witness said that if grievances are submitted at Step 2, she had to make the request for a hearing and she did such. The witness said the hearings were scheduled then re-scheduled for October 4th. Ms. Williams testified that on October 2nd Mr. Lee called and told her the July 4th P&T grievances would not be heard as a result of a letter he had received from Mr. Thomas.

Ms. Ford directed Ms. Williams to Joint No. 12 and questioned her about the various pieces of correspondence in it. The documents mostly pertained to the P&T units' general grievances over the July 4th shutdown and the scheduling of step 2 hearings. Ms. Ford submitted into the record, copy of Ms. Williams' typed notes memorializing the conversation on July 25, 2018 with Mr. Tony Meade regarding the scheduling of Step 2 hearings for the shutdown grievances. (Union No. 5) Ms. Williams said it has been her practice to develop notes for her records when she has discussions with Management.

Ms. Williams testified about the various conversations she had with Labor Relations representatives regarding the general and individual shutdown grievances and her attempts to get Step 2 hearings scheduled.

Ms. Ford submitted into the record, a copy of the typed notes Ms. Williams said she prepared after her conversations on August 23rd, 30th, September 11, October 1st, 2nd and the October 4th Step 2 meeting she attended. (Union No. 6) The P&T general and individual grievances were not allowed to be heard.

Ms. Ford asked Ms. Williams why individuals filed grievances in their own name when general grievances had been submitted? Ms. Williams answered: "So we could capture the PTO that had to be taken, or leave without pay that had to be taken as a result of the mandated shut down." (Arbitrator's recording & Tr. pg. 239)

Ms. Ford submitted into the record, a copy of the email dated June 25, 2018 that Ms. Williams sent to Mr. Garrick Schomburg with a copy to Mr. Russell Browning the subject of which was: "Next Week and PTO 7/9-10." It reads: "We have never discussed what Russ and I are supposed to do about next week. It is not a limited operations situation so I am not certain whether Russ or I are essential or non-essential. Please let me know if you want either of us, both of us or neither of us to come in next week on Monday and Tuesday. Currently, there are no fittings at this time. Trainees are stating some are working due to all the project demand at this time so I wasn't certain what you wanted Russ and I to do, come in just in case we are needed or not. If we are non-essential, then please let us know how to code our time. I am not certain as well or just don't remember what we are to do if we want to take LWOP. I don't remember if we need a form or something for approval of LWOP.

Plus, as a reminder, I am on PTO on Monday, July 9 and Tuesday, July 10 which is not my fit test week. Russ will be here that week. Thanks!" (Union No. 7)

Ms. Williams testified that Mr. Garrick called her and told that she was not to report to work.

Mr. Deeny cross-examined. Mr. Deeny referred Ms. Williams to Mr. Veach's general grievance. The witness said she would not file at Step 2 on a D&D grievance. Mr. Deeny pointed out at Mr. Veach filed the general grievance on behalf of all FBT employees. (Joint No. 3)

Mr. Deeny directed the witness to Company No. 31 and asked if she recalled receiving it? The witness said she believed she did in August. Mr. Deeny pointed out that in his August 16th correspondence to her, Mr. Lee wrote that the Company had already taken the position that all of the grievances under both Agreements were untimely. (Jt. Nos. 1&2)

Mr. Deeny directed Ms. Williams to Company Nos. 9 and 10 and asserted that she knew on or about May 21st there was going to be a July 4th shutdown. Ms. Williams answered: "t was proposed." (Arbitrator's recording & Tr. pg. 252) Mr. Deeny, referring to

Mr. Knauff's May 21st letter to all officers, stewards, safety representatives and members of USW Local 1-689 wrote: "Please be advised that FBP has stated that they intend to furlough a large number of their Bargaining Unit employees in July." (Co. No. 9)

Ms. Ford redirected. Ms. Ford asked Ms. Williams why, after Mr. Veach filed grievances in April or May, she did not request a Step 2 hearing? Ms. Williams answered: "Those are not P&T unit grievances and I would not request a Step 2 hearing for those grievances." Ms. Ford asked: "Is there any mechanism under the P&T Contract that you are aware of that establishes a system for filing a grievance that covers employees governed by two separate collective bargaining agreements?" Ms. Williams answered: "I am not aware of any." (Arbitrator's recording & Tr. Pg. 255)

The Union rested.

The Parties rested and made closing arguments in written briefs.

6.0 Opinion

ISSUE NO. 1

WHETHER THE GROUP GRIEVANCES FILED UNDER THE D&D CONTRACT ARE TIMELY AND MAY PROCEED TO BE HEARD ON THEIR MERITS?

As discussed, it was Management's position that the October 12, 2017 email from Mr. Armstrong to Messrs. Potter, Davis, Veach and Ms. Patrick was the defining event for filing general and individual grievances from both units. (Co. No. 1) It was Management's position that all of the general grievances from the D&D unit were untimely.

As discussed, it was the Union's position that the filing requirements for any grievance goes into effect when some change naturally occurs and when some event occurs that actually harms bargaining unit members.

The October 12, 2017 email reads:

"Pending Policy Change Notification

Please be advised that the Company is planning for project shutdowns the weeks of July 4 and Christmas beginning in 2018. Changes are being incorporated into the two attached HR Policies. This notice of the proposed draft changes are being provided to you in accordance with current planned policy change notice provisions.

Password for each to follow." (Co. No. 1)

The two attached policies, FBP-HR-POL-00005 and FBP-HR-POL-00044 speak to the use of PTO and LWOP by affected employees so they could, in addition to the paid Holidays maintain 40 hour paid work weeks during the July 4th and Christmas shutdowns.

In Management's brief Mr. Deeny wrote: "Thus, if any breach of the agreement occurred, it occurred in October 2017. When the shutdown policy for holidays and the use of PTO and LWOP policies were announced, however, the Union did not grieve such actions until April 2018, approximately half a year later, despite the express language in the CBAs requiring that grievances be filed within ten days of the Union's knowledge of the occurrence giving rise to the grievance." (Mgt. brief pg. 11)

"The predominate view for calculating the date an occurrence (or the Union's knowledge of an occurrence) arises sufficient to trigger the Union's obligation to file a grievance is when a Union is put on notice of such occurrence. For example, when a company announces a change in policy, the predominate view is that the time to file a grievance over the policy change is upon notice of the change, not when the policy actually takes effect. Here, the Company announced the policy changes in compliance with the CBAs on October 12, 2017. Co. Ex. 2." (Mgt. brief pg. 18)

The Arbitrator would agree with Management's position if it were not for the facts that Mr. Armstrong's testimony clearly established that on October 12, 2017 the decision on the July 4th shutdown was not final and the wording of the notice itself. With respect to the cases cited in the Bibliography, in each case cited the decision appears to be final.

The Arbitrator notes that the word "Pending" is used in the title. If, as Management argued, the decision on the two shutdowns was final there was no need for the word "Pending". The Arbitrator further notes that the words: "draft changes" appears in the third sentence. This clearly means that further change in the policies will likely be coming. The policies are directly tied to the pending shutdowns. The record shows that more than once Management changed their position on whether employees would be required to used PTO time for the entire shutdown, or whether they could use LWOP without the normal limitations on the use of unpaid time off contained in the agreements and FOP policies. The Arbitrator directed Mr. Armstrong to the policy change notification and asked him if it is finalized, a draft and is subject to possible alteration or being rescinded? He answered: "I think the possibility for any of those could have existed. This … I think … I don't think there is a 30 day notification. We try to do this in advance of 30 days. When the December 12th notification came out to employees that meant it was finalized." (Arbitrator's recording & Tr. pgs. 99-100) In the Arbitrator's opinion, the above means October 12, 2017 was not the event date.

Interestingly, the December 12, 2017 "Fluor-BWXT Portsmouth LLC-2018 Holiday Schedule" with its "Holiday shut-down FAQs" was provided only to D&D unit employees.

The record shows that there were many meetings between Management and the Union in the January 1st to July 2018 time frame. Mr. Armstrong said they were typically scheduled weekly. At an indeterminable number of those meetings the pending July 4th shutdown was brought up by the Union. In the Arbitrator's opinion, the fact that the Union expressed its views about the pending shutdowns does not mean the leadership knew the decision on the pending shutdowns was final. There is nothing in the record to show that at any of those meetings Management told the Union the decision was final and they would not discuss either or both of the shutdowns. In the Arbitrator's opinion, Management's willingness to listen to the Union "complain" as they characterized what was said served to give the Union hope that the pending shutdowns might not actually happen. The record shows that the Union's efforts to avoid the possible shutdowns went far beyond talking only to Management.

The record shows that on May 2nd, in a memo to all Fluor-BXWT Personnel, Mr. Smith the Site Project Director, notified employees that the July 4th Holiday shutdown would proceed, but barring any major funding issue for FY19 the Christmas shutdown will not occur. (Co. No. 3) In the Arbitrator's opinion, this memo served to finalize Management's decision that the July 4th Holiday shutdown would take place.

The first three of the nine general grievances filed by the D&D unit were filed on April 17th, May 2nd and 3rd. (Jt. No. 3) The first two were filed by Mr. Veach and the third by Mr. Fitzpatrick. They assert that Management violated the Agreement because they refused to bargain over the planned shutdowns and its impact on bargaining unit employees. (Jt. No. 1) In the Arbitrator's opinion, although the event had not occurred and no actual harm had been suffered by individual bargaining unit members as of May 2nd the Union's leadership had determined as early as April 17th that the bargaining unit at large had been harmed.

The Arbitrator notes that Mr. Veach, the Vice President at the time, signed the grievances he filed and Mr. Fitzpatrick did not sign the one he filed. (Jt. No. 3) Generally speaking a grievance is not recognized unless it is signed and dated. However, as the record shows, a supervisor, Mr. Paynter, accepted and answered it. The record shows that those three grievances were filed at Step 1. (Jt. No. 1) Management's Step 1 written answer to the April 17th grievance was dated and signed by Mr. Armstrong on May 21st. (Co. No. 6) The May 2nd grievance, which was typed on May 4th was never answered at Step 1.

Article VII, Section 6, Step 1 of the Agreement states that: "Within ten (10) days a meeting shall be held with the employee, steward, and the employee's immediate manager, and a labor relations representative to address the matter." (Jt. No. 1) Mr. Armstrong testified that if a Step 1 meeting had occurred it would have been between Mr. Morton and Mr. Veach. Neither Mr. Veach nor Mr. Morton were at the Hearing to provide testimony as to whether such a meeting did take place and if one did occur

where and when it took place. Step 1 further requires: “The manager will give a reply in writing within three (3) working days after such meeting” The May 21st written answer was far outside of the required time. There is no evidence in the record that an extension of the time limit was ever requested no less granted. The Arbitrator notes that the Agreement does not provide for a penalty if Management fails to adhere to the time limits in Step 1. (Jt. No. 1)

In Management’s brief Mr. Deeny wrote: “The Union’s argument that the ‘occurrence’ at issue triggering its obligation to file a grievance was the July 4 shutdown itself, rather than the policy change itself, is unavailing. Every grievance the Union filed was about the policy changes. However, the Parties’ CBAs reserve for management the right to change policies and schedule changes, and only requires that the Company provide the Union with notice of changes. Jt. Ex. 1 & 2. The Company provided such notice in compliance with the CBAs on October 12, 2017. Co. Ex. 1. Thus, it is undisputable that the Union knew of the occurrence giving rise to the grievance(s) from that point forward, and should have filed them within ten days of October 12, 2017. The Union conflates the impact of the occurrence with the occurrence itself, which it cannot do. Rather, a Union must grieve when it has knowledge of the potential impact on the bargaining unit, not when such impact actually occurs.” (Mgt. brief pg. 19)

The Arbitrator respectfully disagrees with Management’s position for the reasons previously discussed. The Arbitrator further notes that the case cited at footnote 5 in the Bibliography is quite different from the situation that existed in this case. Furthermore, there was no potential impact until the decision to proceed with the pending shutdown was finalized. The policy changes regarding PTO and LWOP flowed from the shutdown decision and were subject to change up until the time employees knew they actually would not be working.

In the Union’s brief Ms. Ford wrote: “The new Union officers simply were not put on notice that FBP intended to strictly enforce the continual grievance procedures and timeliness going forward.” (Union brief pg. 13) The record establishes that during the life of the predecessor agreement the Parties had been lax in adhering to the written time limits. The current Agreement was negotiated in 2017 and became effective in December. (Joint No. 1) The Union’s leadership at the time was replaced in May 2018. In the Arbitrator’s opinion the fact that the Parties had a history of not adhering to the time limits in the past does not mean that such language could be ignored under the successor Agreement. (Joint No. 1) In the Arbitrator’s opinion, Management was under no obligation to inform the new Union officers that time limits were going to be enforced. A new Agreement is a new beginning and both Parties were obligated to comply with the negotiated time lines for processing grievances.

In the Union’s brief Ms. Ford inferred that moving the grievances to Step 2 would have been “utterly futile” because Management would not change its position on the

shutdown and the inapplicability of the Agreement's layoff language. (Union brief pg. 13) The Arbitrator respectfully rejects this argument because irrespective of whether further discussion would have been futile or not if the Union was contemplating arbitration moving grievances to Step 2 was a requirement of the path to getting to arbitration.

The record establishes that despite Management's repeated urgency the Union failed to advance the April 17th, May 2nd and 3rd general grievances to Step 2 before August 7th. (Co. Nos. 13, 15, 17, 28) Article VII, Section 5B states: "A grievance shall be considered settled or withdrawn if the decision of the Company is not appealed to the next higher step in the grievance procedure within ten (10) days after a decision has been reordered by the Company, unless this period is extended by mutual agreement between the parties." (Jt. No. 1) As stated, Management gave Step 1 written answers to the April 17th and May 3rd grievances, but not the May 2nd grievance. In the Arbitrator's opinion, the April 17th and May 3rd grievances are not arbitrable because they were not referred to Step 2 within the 10 day time limit. This leaves the May 2nd grievance, FBP-GEN-009-17. The record shows that Management denied this and all of the other grievances on July 26, 2018. (Co. No. 26) This blanket denial did not satisfy Step 1's requirement. (Jt. No. 1)

In Management's brief Mr. Deeny wrote: "The Arbitrator must hold that the Union's failure to timely process the April 2018 Grievance extinguishes it and the underlying issue(s) where the CBAs clearly articulate such result. Where a grievance is subsequently filed on the same issue as a prior grievance and the applicable CBA provides that a grievance not appealed from one step of the grievance procedure to the next within the time specified is considered settled or withdrawn, the subsequent grievances are barred." (Mgt. brief pg. 21)

The Arbitrator would agree with Management if it were not for the two following facts. The first is that there is a clear difference between the charged violations in FBP-GEN-009-17 filed by Mr. Veach on April 17, 2018 and what he charged in FBP-GEN-0009-17 on May 2, 2018. (Jt. No. 3) The second is that although the charged violation in Mr. Patrick's May 3, 2017 grievance FBP-1-0015-17 is the same as what Mr. Veach charged in his May 2nd grievance, Mr. Patrick's grievance was answered and the denial makes no mention about it being identical to one previously filled on the same issue. It is very likely that Mr. Paynter had no knowledge of Mr. Veach's May 2nd grievance.

This brings the Arbitrator to the six general grievances, FBP-GEN-0021-17, 0022, 0023, 0024, 0025 and 0026 that were filed as Step 1 on June 28th, the week of July 2nd, and the week of July 4th. (Jt. No. 14) Even though none of these grievances were signed and one was not dated they were accepted by Management and given a blanket denial, because they were untimely. (Co. Nos. 26, 27) In a broad sense, these grievances, like the three filed, one in April and two in May, pertain to the July 4th Holiday shutdown, but address how time off will be charged and not the refusal to bargain over the shutdown

itself. These six grievances, like the May 2nd grievance, were not discussed as required by Article VII, Section 6, Step 1 of the Agreement. (Jt. No. 1)

Article VII, Section 5C states that: "Any grievance not answered within the specified time limit may be immediately taken to the next higher step of the grievance procedure." (Jt. No. 1) In the Arbitrator's view, Section 5C standing alone and more importantly when read in conjunction with Section 6, Step 1 means that the grievance must be discussed with Management and a written answer must be given. The result is that if a grievance is not discussed and a written answer given at Step 1 it cannot be deemed to be withdrawn – settled if not moved to the next step within 10 days. There is also the word "may" that has to be considered. The word may means a choice to act or not whereas the word must means an obligation or necessity. In the Arbitrator's opinion, given Management's failure to satisfy the Step 1 meet and discuss requirement the Union was under no time requirement to move the seven grievances to Step 2. (Jt. No. 1) Even though Management failed to satisfy Step 1's requirement, the Union, in response toMr. Lee's July 26th and 31st letters to Mr. Knauff and Mr. Thomas moved these grievances to Step 2 on August 7, 2018. (Co. Nos. 26, 27, 28) In the Arbitrator's opinion all seven are arbitrable.

As stated, the six general grievances were filed at or near the time of the shutdown. (Jt. No. 14) These grievances along with the three previously filed were appealed to Step 2 in a letter dated August 7, 2018 from Mr. Thomas to Mr. Lee. (Jt. No. 9 & Co. No. 28) The Agreement, at Article VII, Section 5D defines days as calendar days excluding Saturdays, Sundays, Holidays, Vacation and the scheduled days off of the aggrieved employee. (Jt. No. 1) This calculation of time applies to general as well as individual grievances. Clearly, these six general grievances were timely appealed to Step 2. It was Management who refused to include them at any scheduled Step 2 meeting.

ISSUE NO. 2

WHETHER THE INDIVIDUAL GRIEVANCES FILED UNDER THE D & D CONTRACT ARE TIMELY AND MAY PROCEED TO BE HEARD ON THEIR MERTIS?

In Management's brief Mr. Deeny wrote: "Processing grievances individually about the impact of the policy changes to all bargaining unit members would violate the National Labor Relations Act. The employer is prohibited from direct dealings with individual bargaining unit members. The Union is the exclusive bargaining agent for all purposes related to the impact of contract terms. The members must live with the results of the Union's decisions about processing policy changes allowed under the CBAs that impact all bargaining unit members." (Mgt. brief pg. 22)

In the Arbitrator's opinion, when an individual employee files a grievance the grievance is owned by the Union and it is the Union that decides whether to move it through the

various steps of the negotiated grievance procedure. The negotiated Agreement is between the Union and Fluor-B&W and not Fluor-B&W and individual employees. (Jt. No. 1) The Agreement contains no language that allows Management to attempt to settle an employee's grievance without the Union's participation.

Fifteen out of the approximately 370 individual D & D unit employees' grievances were submitted into the record. (Jt. No. 5) The asserted violation is identical in those 15 grievances. There is nothing in the record to indicate that the asserted violation is any different in the other grievances. Ten of the 15 grievances state the date of violation as July 2, 2018 and three state the date as week of July 4th. All 15 read:

"Employee was told to fill out time card with either vacation or LWOP. Employee didn't want to take vacation or LWOP for the week.

In Settlement: The Employee shall be paid a week of layoff allowance, since this action was a reduction-in-force, and made whole for all benefits of employment." (Jt. No. 5)

In the Arbitrator's opinion, there is no language in the Agreement that prohibits individual Union members from filing a grievance over a decision by Management with corresponding change in policies that directly affect them. (Jt. No. 1) However, if it is determined that some or all of the individual grievances are arbitrable given that the charged violation appears to be the same in all of them a settlement of one will likely be the settlement for all of them.

As concluded, the Arbitrator agrees with the Union's position that the filing requirements go into effect when some change actually occurs and when some event occurs that actually harms bargaining unit employees. Article VII, Section 5A of the Agreement, in relevant part states: "Any grievance not taken up with an employee's immediate supervision within ten (10) days after the employee, or a certified Union representative has knowledge of the occurrence of the incident from which the grievance arose cannot be processed through the grievance procedure." (Jt. No. 1)

Five of the 15 grievances were not signed and dated by the committee person and five of the 15 were signed by a supervisor. All were answered and either denied or referred to the next step. None were denied at Step 1 on the basis of timeliness. It appears that not one of the supervisors who received and answered the 15 grievances believed they were untimely filed. The assertion that all of the individual grievances were untimely was made by Mr. Lee in his July 19 the letter to Mr. Knauff and Mr. Thomas. (Co. No. 24) In his letter, Mr. Lee wrote: "You have failed to use properly the grievance procedure of the CBA by refusing to attend a Step 2 meeting, thereby breaching the specific provisions of the Agreement which contemplate and require resolution." (Co. No. 24) While the 13 of the 15 individual grievances were appealed and only 10 of those appealed were signed and dated by a Union committeeperson, Management refused to schedule any of the

individual grievances for discussion at a Step 2 meeting. As stated, they believed every one of them was untimely filed. (Co. Nos. 24, 26, 27, 29, 30, 31, 32)

In the Union's brief Ms. Ford wrote: "Just as the Union was uncertain whether the July 4 shutdown actually would occur until just before it happened, individual employees did not know how they might be impacted – or whether they even would be required to work as normal – until just days before the start of the shutdown. As Mr. Armstrong testified, the number of individuals who would be required to work was subject to change. There is no contractual or policy definition of 'essential personnel', 'designated employees', 'minimum safe staffing' or any of the other terms the Company variously used to describe the group of employees who might be required to work during the shutdown. The Union repeatedly asked the Company to identify who would work and who would not. See Jt. Ex. 9, Letters of June 4 & June 13, 2018. As late as June 14, the Company indicated it had not yet formalized the lists of employees who would be required to work and those who would be forced off for some or all of the shutdown week; ultimately, FBP did not provide the lists until June 21, less than two weeks before the July 2 start of the shutdown. Id., Letters of June 14 & June 21, 2018; Tr. 108-11, (Armstrong), 160-65 (Knauff). The fact that there might have been one or more group grievances that addressed the same or similar issues earlier is irrelevant – and, of course, each individual's claim is different from the group grievances because each employee's circumstances and the impact of the shutdown were different. These grievances therefore were timely." (Union brief pgs. 19 & 20) The Arbitrator agrees with the above quoted.

In the Arbitrator's opinion, given that not one, no less the approximately 370 aggrieved individuals were at the Hearing to give testimony regarding the date he/she first realized that the July 4th Holiday shutdown would occur it is safe to say that all of the affected employees knew for certain when their supervisors told them they should not report for work for the entire week. While the date each was officially told such cannot be exactly determined it most likely occurred sometime before the 10 day time limit for filing a grievance had passed. Again, not one of the supervisors involved in the 15 grievances submitted into the record denied the grievances on the basis that they were untimely filed. The word "denied" as many used is open ended with respect to why it was denied. In addition, at least one of the supervisors, notably Ms. Hobbs, wrote that the grievances she answered could be taken to Step 2. (Jt. No. 5)

In his July 19th letter to Mr. Knauff and Mr. Thomas, Mr. Lee wrote: "Because each of the claimed individual grievances now totaling in excess of 250, involves the same set of facts as the General Grievance, please accept this answer to each of them as denied as described above. That is, each of them is untimely, moot and constitutes an unlawful disturbance of our operations in violation of the CBA." (Co. No. 24) Mr. Knauff gave unrebutted testimony that he had never seen or heard of an occasion where the Company simply returned grievances to the nion hall. Mr. Armstrong testified that with

respect to the individual grievances: “We put together a coversheet on each and delivered them to the Union hall saying they were untimely.” (Tr. pg. 54) The Arbitrator notes that Mr. Knauff never said anything about a coversheet being attached to each and every one of the individual grievances. However, in his August 20th letter to Mr. Knauff, Mr. Lee wrote: “All individual grievances were returned with letters citing untimeliness and confirming the Company’s assessment of the actions that were creating workplace disturbances.” (Co. No. 32) Curiously, the record does not contain a copy of the letter.

Because only 15 of the individual grievances were submitted into the record the Arbitrator has no way of knowing how many of the approximately 370 such grievances were answered by the employee’s immediate manager as referred by Article VII, Section 6, Step 1 of the Agreement. (Jt. No. 1) The 15 grievances submitted into the record were answered at Step 1. Thirteen of the 15 were appealed.

In the Arbitrator’s opinion, the individual Grievants likely knew the July 4th Holiday shutdown was very likely going to take place, but were only certain it would when they were told to fill out their time card with ether vacation, PTO, or LWOP. This was when the harm occurred and the reason for filing grievances. In the Arbitrator’s opinion, the 15 grievances were timely filed and if the other approximately 355 grievances were filed within 10 days of having been told how to fill out their time cards they too were timely filed. The 15 grievances in the record were answered at Step 1. (Joint No. 5) It is unknown as to whether or not the others were answered at Step 1.

In the Arbitrator’s opinion, Management erred when Mr. Lee, in his July 19th letter to Mr. Knauff and Mr. Thomas wrote that all of the individual grievances were untimely and denied. (Co. No. 24) For those grievances that were not answered at Step 1 Management erred because Mr. Lee’s denial did not satisfy Step1’s requirements. (Jt. No. 1) In the Arbitrator’s opinion, if Mr. Thomas’ August 7, 2018 letter to Mr. Lee included all of the individual grievances that were filed at, or near the time of the shutdown then all of them were timely appealed to Step 2 and are arbitrable. (Jt. No. 9 & Co. No. 28)

In the Arbitrator’s opinion, given the voluminous number of grievances that apparently were all filed around the same time and alleged the same violation of the Agreement, were answered at Step 1 by aggrieved employees’ immediate managers/supervisors and timely appealed, if a cover letter was attached as Mr. Lee and Mr. Armstrong said, then it is understandable why they were denied en masse. In the Arbitrator’s opinion, Management, although mistaken about the timeliness of their filing, they should have allowed them to be presented en masse at a Step 2 meeting and then, if Management decided such, be denied en masse at the meeting. There is nothing in the Agreement that gives Management the authority to refuse to schedule a timely appealed grievance from Step 1 even if they believe the original filing date was untimely. They would have

included them for a Step 2 meeting, listened to the Union, and if no new facts were introduced or arguments made simply denied them either for the first time in some cases, or a second time in others.

In conclusion, for all of the above stated reasons some of the individual grievances are arbitrable.

In Management's brief Mr. Deeny wrote: "The Arbitrator should ignore the Union's fatuous attempts to explain the later-filed grievances as somehow only about 'forcing' bargaining unit members to use PTO and/or LWOP. Tr. 207:12-209:16; 210:8-213:10. The use of PTO and LWOP during the July 4 shutdown were the policy changes established in October 2017 and belatedly grieved in the April 2018 Grievance.(9) The later-filed individual Grievances were for the stated purpose of 'captur[ing] the PTO or leave without pay' employees used during the July 4 shutdown."

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(9) The Company expects the Union will also argue that its later filed P&T Grievances cannot be barred by the April 2018 Grievance, because such grievance was solely a D&D Grievance. However, the April 2018 Grievance clearly protested the 'issuing a 'required reading' to all bargaining unit employees.' Jt. Ex. 3. (emphasis added). Thus, the Company fairly considered the Grievance to concern, as it says, 'all bargaining unit employees.' (Mgt. brief pg. 22)

The Arbitrator respectfully disagrees with the above cited. Given the fact that there are two separate and distinct bargaining units within the same Local and two separately negotiated Agreements, Mr. Veach could not speak for the P&T Unit without their expressed consent. (Jt. Nos. 1&2) The reference to "all bargaining unit employees" can only mean the D&D unit employees. The D&D unit's leadership could only think and act for the people they represent. The same can be said for the P&T Unit.

In the Union's brief Ms. Ford wrote: "Finally, the Union will address briefly the Company's assertion that the P&T unit grievances are barred by the earlier-filed grievances under the D&D Contract and the various communications from Larry Thomas, the Union's Vice-President and head of the Grievance Committee established under the D&D Contract. Mr. Meade argued on behalf of FBP that the Company 'viewed [former Local 689 Vice-President] Mark Veach as head of the Grievance Committee for all USW Units when he filed the General Grievance,' id. at 9, and told a P&T unit steward to 'get with your USW Vice President because a grievance has already been filed with LR on the UW['s] behalf.' Id. at 3. In addition, FBP asserted that its responses to Mr. Veach regarding the initial grievances filed under the D&D Contract were adequate to address the grievances filed under the P&T Contract, mainly because it used the plural "CBAs," not the singular 'CBA' when responding to Mr. Veach. See Co. Ex. 31 at 1. However, the original general grievances were filed only under the D&D

contract, with no applicability to the P&T unit. Tr. 170 (Knauff). Furthermore, as noted, it is solely the P&T Unit Vice-President who has authority to deal with grievances filed under the contract (notwithstanding that Mr. Thomas may have mistakenly included some P&T grievances in his lists of case being moved to a next step, in later correspondence). Tr. 168-69 (Knauff). The Company in its responses on the July 4 grievances did not even copy Ms. Williams, much less communicate directly with her, so it is difficult to see how it can assert that these letters served to address the grievances that she filed for the members in her unit. Jt. Ex. 9, Letters of July 26 & Aug. 8, Co. Exs. 27 & 29.

The Company correctly noted that the relevant grievance language is essentially identical in the two contracts. However, it is not exactly the same; most notably, the D&D Contract specifically provides that the Company 'shall recognize a union grievance committee, not to exceed five (5) representatives,' which is to 'function at Step 2 of the grievance procedure,' and designates the applicable Union officials who may represent members in the grievance process, including the President or designee. D&D Contract, Jt. Ex. 1, Art. VII, Sec. 1, Sec. 2(A). However, the analogous provision of the P&T Contract contains no mention of a Grievance Committee and has no similar provision in Section 1 of the grievance procedure; Section 2 recognizes the authorized Union representatives at the Union President or designee, the Unit Vice-President and the applicable steward. P&T Contract, Jt. Ex. 2, Art. VIII, Secs. 1,2; see also Tr. 168-70 (Knauff). The parties have not previously permitted the Union's general Vice-President to process grievances on behalf of the P&T unit employees. Indeed, Ms. Williams testified without contradiction that FBP previously had specifically rejected a grievance under the P&T Contract that was sent by the Union's general Vice-President rather than P&T Unit Vice-President. Tr. 222-23 (Williams)" (Union brief pgs. 22 & 23)

The Arbitrator agrees with all of the above quoted. The D&D unit's general grievances were only for D&D unit members.

ISSUE NO. 3

WHETHER THE GROUP GRIEVANCE FILED UNDER THE P&T CONTRACT ARE TIMELY AND MAY PROCEED TO BE HEARD ON THEIR MERITS?

In the Arbitrator's opinion, Ms. Williams acted in a timely manner when she waited until the incident had occurred before filing the five general grievances, four on July 12th and one on July 17th. (Jt. No. 4) The record establishes that Management spoke and acted out of both sides of their proverbial mouths. On the one side, before the P&T general and individual grievances were filed, they repeatedly urged the D&D unit's leadership to move the general grievances to Step 2. On the other side, when Ms. Williams attempted to have the P&T units general grievances that had been filed at Step 2 scheduled to be discussed at a Step 2 meeting Management, after initially coordinating a scheduled

date, changed their mind and refused to allow them to be introduced at the October Step 2 meeting. In the Arbitrator's opinion, Management cannot have it both ways. Even though Management believed the grievances were untimely filed Article VII Section 4's language clearly means that a general grievance filed at Step 2 must be discussed at a Step 2 Hearing. (Jt. No. 2) Furthermore, there is no language in Article VII that gives Management the authority to refuse to allow a general grievance to be an agenda item at a Step 2 Hearing.

In conclusion, for the above stated reasons the five general grievances were timely filed and are arbitrable. (Jt. No. 4)

ISSUE NO. 4

WHETHER THE INDIVIDUAL GRIEVANCES FILED UNDER THE P&T CONTRACT ARE TIMELY AND MAY PROCEED ON THEIR MERITS?

Fifteen out of the approximately 147 grievances filed by employees were submitted into the record. (Jt. No. 4) While the wording the grievances is exactly the same in some of them, they all allege the same violation of the Agreement. (Jt. No. 2) The Grievants charge Management with having violated Article XI, XII and others in some cases because they were mandated to take either PTO, LWOP or a combination of both because of the July 4th Holiday shutdown. (Jt. No. 6) The 15 grievances submitted into the record were filed in the July 12th – 19th time frame. Some were not signed by the Grievant's steward and 13 of the 15 were signed by Ms. Williams in the committee person capacity. Although all of approximately 147 grievances were filed at Step 1 not one of the 15 in the record was answered in writing by the immediate manager/supervisor. This is a violation of Article VII, Section 6 B's clearly stated requirement. (Jt. No. 2) The grievances and others were referred to Step 2 on August 7th. (Co. No. 28)

As previously discussed, and concluded the Arbitrator agrees with the Union's position that the alleged violations did not occur until employees knew for certain that they would not be scheduled to work during the July 4th Holiday shutdown period. In the P&T unit, employees did not know whether they had been designated as essential employees and scheduled to work during the shutdown, or designated as non-essential employees and not scheduled to work. Ms. Williams' June 25th email to Mr. Schomburg with a copy to Mr. Browning makes the argument that it was very close to the actual shutdown before P&T employees were told whether or not they would be scheduled to work. (Union No. 7)

The record establishes that Mr. Lee's July 26th letter to Mr. Knauff and Mr. Thomas was intended to be a denial of all of the grievances from both units. (Co. No. 24) Ms. Williams took issue with Mr. Lee and he clarified Management's position in an August 16th email to Ms. Williams et.al. (Co. No. 31) Ms. Williams made personal typed notes of her

conversations and written communication primarily with Mr. Meade and what transpired at the October 4th Step 2 hearing. (Union Nos. 5 & 6) Ms. Williams' notes and her testimony were not discredited. The record shows that Management's position on whether or not to schedule any of the P&T unit's grievances to be discussed at the finally scheduled October 4th Step 2 meeting either changed after August 16th, or there was miscommunication between Mr. Meade and Mr. Lee. Irrespective of whether Management's position changed, or there was some miscommunication between Mr. Meade and Mr. Lee the final outcome was Management's refusal to discuss any of the grievances.

In the Arbitrator's opinion, because, as concluded, the general and the individual grievances submitted into the record and likely all of them were timely filed and timely appealed to Step 2 Management erred in judgment in refusing to discuss them at a Step 2 meeting. The Arbitrator notes the absence of anything in the record to show that any of the approximately 132 individual grievances not put into the record were filed later than 10 days after they were told to take 24 hours of PTO, LWOP, a combination of both and/or told they would or would not be scheduled to work during the shutdown period.

In conclusion, for all of the aforementioned reasons all of the P&T unit's general and all of the individual grievances are arbitrable.

7.0 Award

D&D Unit

General grievance numbers: FBP-GEN-009-17, 0021-17, 0022-17, 0023-17, 0024-17, 0025-17, and 0026-17 are arbitrable. If Mr. Thomas' August 7, 2018 letter to Mr. Lee includes all of the individual grievances then all of them are arbitrable.

P&T Unit

The five general grievances are arbitrable. The 15 individual grievances submitted into the record are arbitrable and all of the individual grievances referred to Step 2 are arbitrable

September 19, 2019

_____ _____

Date Louis V. Imundo, Jr.
Arbitrator