In the Matter of the Arbitration	:	
- Between -	:	Re: RDO Premium Time TWU No. 59303
NEW YORK CITY TRANSIT AUTHORITY, and MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY	:	LR No. CI-2023-0260
"Employers"	:	
- and -	:	
TRANSPORT WORKERS UNION, LOCAL 100	:	
"Union"	:	

APPEARANCES

For the Employer
Aliaa Abdelrahman, Esq., Senior Director, Labor Relations
Baimusa Kamara, Esq., Deputy Vice-President of Labor Relations
Rasheeda Baksh, Esq., Labor Relations Attorney
David Franceschini, Senior Director, Labor Relations

For the Union
Dennis Engel, Esq., Attorney
Richard Davis, President, TWU Local 100

BEFORE: HOWARD C. EDELMAN, ESQ., ARBITRATOR

A virtual hearing on this matter was held before me on October 3, 2023 at 4:00 p.m. Representatives of TWU Local 100 and the Employers were present. Both parties were afforded the opportunity to present evidence and arguments. I closed the record at the conclusion of the hearing after informing the parties that I did not require written briefs. This Opinion and Award follows.

TWU Local 100 grieves the Employers' decision to restrict payment of premium time (time and one-half) for work performed on RDOs to employees who report to and perform work at least three (3) days in the week in which the RDO falls. The contractual language at issue resides in Sections 3.5(e) and 6.2(A)(2)(d). It reads as follows:

> Notwithstanding any other rules or working conditions, for an employee to be eligible for pay at time and one-half for working on his/her regular day off, the employee must work at least three days during the week in which he/she also worked on his/her regular days off.

The Employers maintain that an Agency Audit revealed that the manner in which the above provision has been interpreted is arguably at odds with the contractual language. In response to the Agency Audit, the Employers adopted the interpretation of the language that is the subject of this dispute.

The uncontroverted facts are that prior to the pay period beginning August 27, 2023, when Local 100 members took various leaves during the week, i.e., vacation day(s), PLDs, OTO, AVA days, etc., each of those days, in any combination, would count toward the three (3) days in the week for the purposes of qualifying for premium time when they worked on their RDOs. Excluded from the leaves that counted towards the three days were other types of leaves, i.e., sick days, suspension(s), AWOL, unauthorized absence(s) and other leaves without pay. The parties agree that this has been the way the contract provision has been implemented for at least twenty (20) years.

POSITIONS OF THE PARTIES

The Employers argue that the clear and unambiguous contact language permits reversion to the plain meaning of its terms, notwithstanding the prior implementation to the contrary. The language "…[t]he employee must work at least three days during the week. . .," the Employers maintain, is not subject to differences in interpretation. While the Employers agree with the Union that the implementation of the language for many

years has been to credit the above categories of paid days off toward the three day minimum, they maintain that it was "error" to permit those days to be so credited.

The Union contends that the language of the contract is ambiguous. The crux of the dispute, asserts the Union, is the word "work," which the Union maintains is subject to varying interpretations under the Agreement. The Union argues that "work" is interpreted differently in the collective bargaining agreement (including Holidays), than physical presence at the site. The Employers, contends the Union, are seeking to introduce a new concept into the Agreement by inserting the term "actually" in between the words "must" and "work" to arrive at the conclusion that the contract requires the result the Employers seek. This new concept, argues the Union, flies in the face of decades of conduct which constitutes a "past practice" that its members are entitled to rely upon and that this Award should enforce.

DISCUSSION

The Employer is correct that clear contract language trumps practice and, where language is unequivocal, a party may revert to the provisions of such language, irrespective of practice, upon notice to the other party. Equally correct is Union's position on practice, insofar as a course of conduct that both the Union and the Employer know about and accept, either implicitly or explicitly, which is clear and consistent over a significant length of time, is binding upon the parties where the contract provision is ambiguous.

Central to this case, then, is what the parties' intended the word "work" to mean. For that, I look to how the parties have implemented the provision over a period of time to determine whether certain leave days meet the definition of work in completing an employee's entitlement to time and one-half when they perform services on their RDO. As the Union argued, and the Employer did not dispute, the Authority, for a long time, has included vacation, AVA's, OTO, PLD, etc., in the definition of days worked in a week for the purposes of counting the three days during the work week under these provisions. Indeed, though not explicitly stated, it is inferred from the arguments that this is the manner in

which both sections at issue here have been implemented since the Agreement was negotiated. While I credit the Employer's argument that it became aware of this manner of implementation as a result of an internal audit that it recently did in 2023, twenty years is a long time to have failed to noticed this. Based on the evidence presented, I conclude that the manner in which the provisions have been implemented since they were negotiated gives meaning as to what the parties' intended "work" to signify in those provisions, *to wit,* counting the controlled absences towards the three days.

The Union asserted that the Award should apply with equal force to days off taken by members under the Family Medical Leave Act. Local 100 also requested that the Award compel the Employers to compensate members who were deprived of premium pay who worked RDO(s) as a consequence of the Employers' unilaterally imposed change. Consistent with this Opinion and Award, I conclude that retroactive application is appropriate, but that the time off indicated in this Award cannot logically mean "work" as defined in Section 3.5(e) and 6.2(A)(2)(d).

AWARD

1. The Employers' unilateral action in changing the clear and consistent application of Sections 3.5(E) and 6.2(A)(2)(d) violated the collective bargaining agreement, embodied in the longstanding past practice established by the parties to the extent indicated herein. Employers shall cease and desist from its current application of the provisions at issue.

2. Employees shall be qualified for premium pay for work on an RDO where they work three days in a week in which the RDO falls, which days of work include *in any combination* vacation day(s), AVA days, OTO, Death in Family (Bereavement Leave), Civil Service exams, jury duty, PLD's, training days, instruction time/day(s), union release, etc.

3. Consistent with the past practice, excluded from the calculation of the three (3) days are other types of leave: sick day(s), IOD, suspension time, AWOL, UA and other leave(s) without pay, including unpaid FMLA.

4. FMLA that utilizes sick days shall not count towards the three days. FMLA that utilizes vacation days shall count toward the three days of work.

5. The Employers will have sixty (60) days to calculate and pay to members of the Union the amounts that should have been paid from the pay

period August 27, 2023 to the date of this Award, as the consequence of the Employers' unilateral change to the interpretation of 3.5(e)and 6.2(A)(2)(d).

6. I shall retain jurisdiction over this matter to resolve any other disputes arising out of the implementation of this Award.

Dated: 10/31/23

Howard C. Edelman, Esq.
Arbitrator

State of New York)
) s.:
County of New York)

I, Howard C. Edelman, Esq., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.

Dated: 10/31/23

Howard C. Edelman, Esq.
Arbitrator