REDACTED SAMPLE ARBITRATION OPINION
Is the Grievance Arbitrable?

In the Arbitration Between:

LOCAL UNION 7 AFFILITATED WITH _____	X
_____	X
	X
Claimant,	X
	X
-and-	X
	X
_____ REFINERY,	X
	X
Respondent.	X
	X
Grievance: H-34-10 - RROP	X

OPINION OF ARBITRATOR
ON ARBITRABILITY

Procedural Background

The Parties

Local 7, affiliated with the _____ (the "Union" or "Local 7") is a labor organization representing operating, mechanical, and maintenance employees at the _____ Refinery and Terminal ("Company" or the "Refinery"). The Refinery is located in _____. A Collective Bargaining Agreement governs the labor-management relationship for the period starting April 15, 2009 and ending at midnight on October 1, 2013. ("labor Agreement".) (Arbitrator Exhibit 1.)

The Grievance

On March 5, 2010 the Union grieved that the Company changed pay rates without its consent and in violation of the labor Agreement. (Union Exhibit A & Company Exhibit 2.) In January 2012, the undersigned was notified of his designation as the "impartial arbitrator under the parties' collective bargaining agreement."

The Arbitration

During the course of protracted efforts to schedule a hearing, the undersigned became aware of a procedural arbitrability dispute that was first voiced by the Company on November 7, 2011. (Union Exhibit I & Company Exhibit 10.) The parties thereafter agreed in writing that arbitrability would be addressed "on the papers." This procedure is in keeping with the American Arbitration Association's Labor Arbitration Rules, which govern this matter. (See labor Agreement, Section 20-4.) AAA Rule 33 states,

> The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

Briefs were due, and timely filed, on August 3, 2012. Reply briefs were due, and timely filed, on August 24, 2012. As agreed between the parties, the Award and Opinion on arbitrability consequently became due by August 30, 2012. If the matter was declared arbitrable, they further agreed that a hearing would promptly be scheduled.

Applicable Contract Provisions

ARTICLE 19
Grievance Procedure

19-2 Definition

A grievance is a claim by an employee or the Union that the Company has violated an express provision of this Agreement

19-3 Procedure

When an employee, group of employees, or the Union has a grievance it shall be handled in this way:

First Step

The employee and/or employee's steward or Union representative must present the grievance in writing an confer with the appropriate supervisor and one other supervisor…

If the grieved supervisor does not hear the grievance within two days, or satisfy it within three days thereafter, the steward or representative may appeal the grievance to the second step.

Second Step

A maximum of six (6) officials of the Union has the right to meet with the Department Manager provided:

a. the grievance has been appealed from the first step, or

b. it is a grievance concerning employees in more than one department and the Union requests that it be brought to this step

If the grievance is appealed to the second step, the Union will present the grievance in writing on the Grievance Form to the Department Manager.

If the Department Manager does not hear the grievance in three days or satisfy it in four days thereafter, the Union may appeal the third step by notice to the Refinery Manager.

Third Step

A maximum of six (6) officials of the Union has the right to meet with the Refinery Manager provided:

a. the grievance has been appealed from the second step, or
b. the grievance concerns a discharge

The Refinery Manager or the Manager's designee must hear the grievance in five days and answer it in ten days, thereafter.

Attendance

The Union officials in attendance at the second step and the third step grievance meetings on a given day shall be the same persons for each grievance heard with the exception of the grievant.

19-4 Not a Grievance

Although the Company hears a claim as a grievance, it does not waive its right to take the position that the claim is not a grievance.

19-5 Time Limits

The time limits specified may be extended by mutual agreement of the Union and the Company. Waiver of the time limits by the Company for any grievance shall not prejudice the Company from insisting on strict compliance with the time limits in subsequent grievances…

19-7 Grievance Forfeited

If at the end of any step no appeal is taken by the Union within ten days the grievance is forfeited.

19-8 Days Counted

The time limits for the settlement of a grievance exclude Saturday, Sunday and observed holidays.

19-9 Time to File

A claim that this Agreement has been violated is forfeited, *unless* it is properly presented within 30-days after the alleged violation occurs…

Article 20
Arbitration Procedures

20-1 Arbitrable Subjects

If the Refinery Manager does not hear the grievance in five days or does not satisfy it in ten days thereafter, the Union may request arbitration in writing setting forth the question it desires to arbitrate.

20-2 Arbitration Forfeited

The Union forfeits and waives its right to arbitrate a grievance if it does *not*:

a. Notify the Company in writing of its intent to arbitrate within **sixty (60) calendar days** following the expiration of the time limits as provided in Article 19, **or** within **sixty (60) calendar days** following receipt of the Company's answer to the grievance at the third step of the grievance procedure, whichever is later. However, *if* the Company and the Union agree, the time limits may be extended an additional thirty (30) days…

20-3 Limits on Arbitrators

The arbitrator shall not have the power to add to, subtract from, change or alter any term of this Agreement.

In the event this Agreement is opened for negotiation, the subject matter of such negotiation shall not be subject to arbitration….

20-4 Conducting the Arbitration

The arbitration shall be conducted under the rules and regulations of the American Arbitration Association. The representatives of the parties on the board of arbitration will work with the impartial arbitrator and hold themselves available for consultation with him/her. The decision of the arbitrator shall be final and binding upon both parties.

20-5 Expense

The Company and the Union shall each bear the expense of its own representatives and share equally the expense of the arbitrator.

(Emphasis added.)

The Facts

Grievance H-34-10 progressed thought the--above stated--contractual grievance/arbitration system. The nature and dates of each party's movements are uncontested.

The Grievance was filed on March 5, 2010. Local 7 alleged, in full, that the employer "changed pay rates without union consent and in violation of [several articles] of the contract." This charge moved through the grievance

procedure, as follows:

Date of Act	Days Since Grv. Filing	What Happened?	Next Formal Act Under CBA
03/05/10	---	Grievance Filed	1st Step Hearing
03/8/10	3	1st Step Meeting	1st Step Answer
03/19/10	14	Grv. Denied	Appeal to 2nd Step
03/22/10	17	Moved to 2nd Step	2nd Step Hearing
12/03/10	264	2nd Step Meeting	2nd Step Answer
01/14/11	305	Grv. Denied	Appeal to 3rd Step
01/20/11	311	Moved to 3rd Step	3rd Step Hearing
03/04/11	349	3rd Step Meeting	3rd Step Answer
08/26/11	527	Grv. Denied	File Intent to Arb., or Seek Consent For 30-Day Extension
09/23/11	555	Union Sought Reconsideration of 3rd Step Denial	File Intent to Arb. or Seek Consent For 30-Day Extension
10/28/11	590	3rd Step Answer "stands as written"	File Intent to Arb., or Seek Consent to 30-Day Extension
11/03/11	596	Union Requested an Additional 30-Days "to make its decision of intent to arbitrate"	File Intent to Arb.
11/07/11	600	Response that the Grievance Process Is Closed	File Intent to Arb.
12/08/11	631	Union Gave Notice of Intent to Arbitrate	
01/10/12	664	Company Agreed to Participate in Arbitrator Selection, Without Waiving its Defenses	

Throughout the 664 days following the Grievance's filing, the parties communicated--orally and in writing--about their dispute. One of these exchanges started on November 1, 2011 when Local 7 sent a multipart information demand to HR Manager KL. (Union Exhibit G & Company Exhibit 8.) The listed information, the Union explained, was required to "better ascertain the strengths and weaknesses of the above grievance." (Union Exhibit G; Company Exhibit 8.) Six days later, KL inquired about the relevance of the Union's Information request. (Company Exhibit I0; Union Exhibit I.) He also wrote further that, "The 60 day time frame for the Union to request arbitration expired in October, 2011." Id. Within two days later, Vice President – elect JT countered, "The Union does not believe that an arbitration of the matter would be untimely, and is prepared to so demonstrate to the arbitrator." (Union Exhibit J; Company Exhibit 11.)

The Parties' Positions

The party challenging arbitrability has the burden of proof.

The Company's Position

The Refinery seeks the dismissal of Grievance H-34-10 as untimely. It contends that this matter "was not moved to arbitration or processed through the grievance machinery within the confines of the parties' collective bargaining agreement." (Company Position Statement, page 1.) Articles 19 and 20 of this contract, it emphasizes, place the Union in charge of advancing grievances through the steps. Indeed, "the entire onus [is on Local 7] to move the process forward." (Company Position Statement, page 9.) Should the Company fail to respond then the Union is "compelled to move the process forward if not heard or satisfied." (Company Position Statement, page 8.) Not adhering to expressly

stated contractual time limits places it at risk of forfeiting the right to pursue a grievance to the next step. See Labor Agreement, Article 19-7.

Local 7 also "bears the burden of moving the matter to arbitration." (Company Position Statement, page 9.) Under Article 20-2 this right is waived and forfeited if the Union does not timely notify the Company of its intent to arbitrate. This notice must be in writing, and given within 60-calendar days.

This 60-day boundary may be calculated in one of two ways, with the later of the two dates being applicable. These contractual methods are:

> A. 60-days following the *expiration* of the time limits as provided in Article 19, **or**
>
> B. Within 60-days following *receipt* of the Company's answer to the grievance at the third step of the grievance procedure.

Again, the applicable date is whichever one falls later on the calendar.

The Company asserts that Local 7 absolutely failed to submit the requisite notice of intent to arbitrate Grievance H-34-10 within 60 calendar days. Since the application of Article 20-2 requires use of the later date, the Company focuses its timeliness challenge on the second method.

The Refinery reminds that its Third Step Answer is dated August 26, 2011. Applying Rule 6(d) of the Federal Rules of Civil Procedure[1] this answer should be deemed received by the Union on August 29, 2011. Sixty calendar days from this presumptive delivery date fell on October 28, 2011. The Union's notice of intention, however, was not tendered by this date. Indeed, "it did not file for arbitration [for another 41-days] until December 8, 2011." (Company Position

[1] Rule 6(d) states "When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a)." (Rule 6(a) applies to time periods specified in the FRCP, "in any local rule or court order, or in any statute that does not specify a method of computing time."

Statement, page 10.) Accordingly, the Union is in breach of the express contractual limits.

Nor, did Local 7 seasonably request a 30-day extension for submitting the matter to arbitration. Its November 3rd call for an additional 30-Days "to make its decision of intent to arbitrate" was also untimely. It came after October 28th and after the Company had closed its grievance file.

In any instance, the extension request was denied[2]. Yet, even if it had been granted "the Union did not file for arbitration until December 8, 2011...some 34 days after the extension request and 100 days after imputed receipt [on August 29th] of the Step 3 decision from the Company."

In cases like this, "when a CBA designates the consequences for failing to follow the prescribed time limitations, the Arbitrator must apply the consequences for which the parties have bargained and negotiated." (Company Position Statement, page 11.) The Company supports this proposition by citing two reported arbitration decision. I.e., Big Sandy Healthcare, Inc., 126 Lab. Arb. Rep. (BNA) 1815, 1820 (2009) (Sellman, Arb.) (contract clauses permitting mutually agreed waivers indicate intention otherwise to strictly construed time limits), and In re Invista, 121 Lab. Arb. Rep. (BNA) 961, 963 (2005) (Allen, Arb.) ("specific requirements that must be followed before it can be determined that a matter is properly before an arbitrator…requirements cannot be ignored.")

The Company respectfully submits that given Article 20-3's stricture barring arbitrators from altering contract terms, the arbitrator must follow the letter of the labor Agreement.

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[2] The Company, in its Reply, stresses, "the only manner by which an extension to move for arbitration can be extended is 'by mutual agreement of the Union and the Company.'...The Union concedes that such an extension never occurred." (Company Reply, page 2.)

The Union's Position

The *sequence of events* preceding the filing of the notice of intent on December 8, 2011 makes it "abundantly clear," Local 7 asserts, that the Union's actions throughout the grievance procedure were prompt and timely. Any digressions from these criteria were of the same order of magnitude as those of the Refinery. "The Company's fulminations as to the necessity of strict compliance with procedural requirements disregard its own unilateral arrogation of additional time to respond, with no reason whatsoever provided for this delay, on this very grievance." (Union Reply, page 1.)

In large measure, the wording of Grievance H-34-10 drove the historical sequence of events. The Union characterizes the initial filing as "not a model of clarity." (Union Letter Brief, page 3.) In turn, the Company's Third Step Answer of "August 26, denied a grievance that the Union had not in fact filed." (Union Letter Brief, page 3.) (Emphasis added.)

The grievance--as stated on the March 10, 2010 form--simply alleged that management unilaterally changed pay rates. The matter, however, is more complex; as summarized in the Union's Letter Brief. I. e.,

> The Company is paying a disparate higher-than-specified wage to certain members of the bargaining unit, who are performing identical work to others who receive the contracted-for rate. This situation comes about as a result of the Company's administration of the Regular Rate of Pay (RPOP) payroll system for certain temporary supervisors. The Company is free to designate certain bargaining unit Union members as temporary supervisors – during their time out of the bargaining unit, these temporary supervisors are paying an ""uprate" of 25% above the contractual rate.
>
> The ending period of temporary supervision often does not

> coincide with a particular pay period...should this member work overtime while a member of the bargaining unit during the week, the Company is administering the RPOP system such that the former temporary supervisor receives an overtime hourly rate that is in excess of the amount called for in the CBA. In other words, the former temporary supervisor and a bargaining unit member can both be in the same classification with the same contractual pay rate, and the former will be receiving a higher, extra-contractual overtime premium.

Id. at 1 & 2. In short, the "CBA does not permit the Company to pay extra compensation to favorites within a classification." (Union Exhibit E.)

The Company's Third Step Answer dated August 26, 2011, in the eyes of Local 7, misconstrued the nature of Grievance H-34-10[3]. By referencing the creation of a new classification, and/or new pay schedule the Company's Third Step Answer was wide of the mark, and a "non-response." (Union Reply, pages 2 & 3.) In its reply dated September 23, 2011, the Union accordingly sought to clear up this apparent misunderstanding, and requested the Refinery to reconsider the decision at Step 3. (See Union Reply, page 2, & Union Exhibit E.)

Local 7 asserts that "having been apprised in writing [in the September 23rd letter] of the true nature of the grievance, the Company [thereafter] provided its Third Step answer on October 28, 2011." (Union Letter Brief, page 4.) Coming less than 60-days from this denial, the Union's December 8th notice of intent to arbitrate was timely.

Given the Company's frequent delays, "it would be inequitable in the highest degree if the Company's untimeliness were ignored, and the grievance not be heard on the merits." (Union Letter Brief, page 6; see also Union Reply, page 2.) Finally, Local 7 quotes Elkouri & Elkouri, How Arbitration Works, (6th ed.

[3] As summarized above.

2003) at 221 that "all doubts should be resolved against forfeiture of the right to process the grievance."

Discussion

While Grievance H-34-10 is not arbitrable, the Union is not precluded from reasserting its claims in a new grievance.

While arbitrators would often prefer to avoid rejecting grievances on "technical" grounds, they are bound to honor the parties' jurisdictional grant by staying within a CBA's procedural rules. As Arbitrator George T. Roumell, Jr. cautioned, timeliness challenges to reaching a grievance's merits "should not be undertaken without a careful analysis of the particular contractual language and factual situation before the arbitrator." *Roumell's Primer on Labor Arbitration* (1982). Stated more generally, "an arbitrator is confined to the interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." *United Steelworkers v Enterprise Wheel & Car Corp.*, 363 US 593, 597 (1960). Where does this leave us?

. Time limits within collective bargaining agreements are not mere formalities. Employers and labor organizations fix intervals between each step of the grievance procedure: to facilitate prompt settlement of grievances; to assure that bargaining unit members will not be frustrated by unresolved disputes; to prevent stale grievances from being arbitrated; and to foster orderly administration of the collective agreement. For these, and similar reasons arbitrators usually have enforced time limits in grievance procedures. See Precision Extrusion, Inc., 49 Lab. Arb. (BNA) 338 (1967) (Stouffer, Arb.) (grievance not arbitrable given union's failure to file notice of intention to arbitrate

within the 2-weeks allowed by CBA).

This said, if established, a limited number of defenses exist that may otherwise allow untimely grievances to be considered on their merits. These defenses include: substantial compliance; employer failure to challenge arbitrability during the grievance process, i.e., prior to arbitration; and detrimental reliance.

In this matter, under the express language of Article 20, Grievance H-34-10 was not timely advanced to arbitration.

. The Refinery's Third Step Answer--dated August 26, 2011--baldly stated, "This grievance is denied." (Company Exhibit 5.) On receiving this unequivocal statement[4], the Union had 60-days to file a notice of intent to arbitrate. It did not act for more than two months, and otherwise had not substantially complied with the contractual schedule. Indeed, even had Hurricane Irene delayed receipt of the Third Step Answer by four (4) weeks, i.e. until September 23rd, the notice of intent would have been due by November 22nd, not December 8th.

The Union's strongest argument in support of the Arbitrator assuming jurisdiction of Grievance H-34-10 is that the Refinery acted inequitably by not responding in a timely manner at Steps 2 and 3. Prompt replies would have benefited the labor-management relationship, and perhaps helped to cure the Union's growing frustration with the Company[5]. However, management correctly argues that its slowness in responding to the Union does not excuse Local 7's own delays in advancing the grievance to the next appropriate level. See Articles 19-3, 19-5 and 20-2. Throughout the grievance procedure the next step can be

[4] The arbitrator neither accepts, nor rejects the Company's adoption of the FRCP to determine a presumptive delivery date.

[5] As evidenced in Grievance Committee Chairman's January 13, 2012 E-Mail to KL. (Company Exhibit 15.)

climbed within the permitted time limits in the absence of management action. Should the Company not respond, the Union might move to the next step simply by giving notice. As designed, the procedure penalizes Company delays by not forcing the Union to wait for behind schedule grievance answers.

Any arguments not specifically addressed in this Opinion have been considered and weighed. However, one additional question merits review concerning the nature of Grievance H-34-10. The Grievance Committee Chair in an E-Mail to management observed, “this is an ongoing situation and I can file another grievance to replace this one.” (Employer Exhibit 15.) The Company has not rejected this assertion, which touches arbitrability from a “what happens next?” vantage.

In this case there is not necessarily one starting point to pursue the grievance. By challenging multiple transactions over a prolonger interval, it alleged a “continuous violation.” Accordingly, Local 7 is not precluded from again grieving its RPOP issues so as long as the challenged acts have continued to persist.

Conclusion

Grievance H-34-10 was submitted to arbitration outside of the time limit expressly permitted in the labor Agreement, and is declared not arbitrable. Local 7 may file a new grievance advancing the same issues under a continuing violation theory.

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Labor Arbitrator