The Emergency Defense in Arbitration Cases
By Shanleigh Kennedy

Specifically, this article addresses the question: How have arbitrators ruled on employer claims that an emergency allows them to deviate from the otherwise plain terms of the labor agreement? Identify the various rulings and factors that have influenced those rulings.

I. What is an emergency?

The first question is defining an emergency. Without stopping at the most famous Supreme Court quote: "you know it when you see it," an emergency, in case law, is both evident and unclear. Emergencies include: inclement weather (but not always) "an unforeseen combination of circumstances which calls for immediate action," strikes, power outages, water main breaks, and in one case, slumping sales.

While emergencies themselves can be hard to define, the case law is not hard to delineate. As Elkouri and Elkouri explain, "Managerial freedom to act may be expanded and managerial obligations may be narrowed if management's performance is affected by an emergency, an act of God, or a condition beyond the control of management. The collective bargaining agreement may expressly provide exceptions for these situations, or an arbitrator may hold such exceptions to be inherent and necessarily implied."[1] Management has more discretion in emergencies, but limits and standards accompany this expansion. Its actions must be reasonable, and non-arbitrary, and other caveats apply. Employees can challenge the decision made under emergency situations, as shown below, and can also challenge the fairness of the wage paid them for their emergency work.[2]

One arbitrator held that limits and standards of management's increased discretion are: 1) Management must not be directly responsible for the emergency; 2) The emergency must involve a situation which threatens to impair operations materially; 3) The emergency must be of limited time duration; 4) Any violation or suspension of contractual agreements must be

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[1] Section 13.13.E. Emergencies. BNA, Elkouri & Elkouri: HOW ARBITRATION WORKS, Chapter 13. Management Rights

[2] Changes to duties and tasks in the event of an emergency may allow employees to challenge the fairness of the rate paid for the job after its change if the change is substantial. *Menasha Corp.,* 108 LA 308 (Ellmann, 1997).

unavoidable and limited only to the duration of the emergency. [3] While these are common sense, they are not universally applied.

Arbitrators determine whether a situation is an emergency on a "case-by-case, fact-intensive basis."[4] In unusual situations, management has more discretion. This includes assigning tasks across job or classification lines[5], promulgating rules, or choosing workers on a different basis than seniority, spurring layoffs or reductions, and changing shift schedules.

Elkouri and Elkouri summarize: "Management generally has been held to have considerable discretion in unusual situations to make temporary or emergency assignments of tasks across job or classification lines." In Youngstown Sheet & Tube Co., one arbitrator found it reasonable in an emergency for an employer to assign work across job titles. He explained his reasoning in a mixed metaphor:

> Many years of experience have proven to me that a plant maintenance crew is somewhat similar to the crew of a ship or a football team. Each member has a designated position or title and spends most of his team time attending to the duties and tasks associated with his designated position. However, when an emergency arises, they all respond as a crew and assist in getting the ship back on an even keel, weathering the storm, or, as in the case of the football team, advancing the ball to the opposing team's goal line.[6]

Elkouri broadens this analogy from maintenance employees to plant employees. In supporting this thesis, the chapter cites one case in which an arbitrator upheld an employer's decision to assign an emergency job to the workers scheduled that day, even though the job was outside of their classifications. The arbitrator held that management has the right to do so unless restricted by the CBA.[7]

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[3] *Canadian Porcelain Co.,* 41 LA 417, 418 (Hanrahan, 1963)., cited in BNA, Elkouri & Elkouri: HOW ARBITRATION WORKS, Chapter 13. Management Rights

[4] Section 13.13.E. Emergencies of BNA, Elkouri & Elkouri: HOW ARBITRATION WORKS, Chapter 13. Management Rights

[5] BNA, Elkouri & Elkouri: HOW ARBITRATION WORKS, Chapter 13. Management Rights Here, they are referring to *Youngstown Sheet & Tube Co*.,, 4 BNA LA 514.

[6] *Youngstown Sheet & Tube Co*., 4 LA 514, 517 (Miller, 1946).

[7] *Thompson Mahogany Co.,* 5 LA 397, 399 (Brandschain, 1946)

Arbitrators usually use a plain meaning sense of emergency. An "emergency "is generally defined as an "unforeseen combination of circumstances or occurrences that calls for or demands immediate action. Emergencies shall be defined as unforeseen, unscheduled event or circumstances beyond the control of the Company, including but not limited to illness, acts of G-d, or loss of air signal."[8]

Some emergencies, as defined by arbitrators, have been: a breakdown of a production line[9,] immediate safety concerns[10], slumping sales and rapidly declining reputation due to quality problems- to authorize performing quality assurance tests[11], a strike by some employees[12], a deliberate slowdown that halted production[13], and a failure of supplies to arrive on time[14].

Weather conditions can be an emergency. *Railroads v. Non-Operating Unions* defines emergencies as "emergency circumstances over which a Carrier has no control-such as a flood, snowstorm, hurricane, earthquake, fire, strike of its own employees and strikes of industries served by it-cause an actual suspension of all or part of its operations."[15] Other cases support inclement weather as an emergency. In *Tri-State Transit Authority*, the region got about 20 inches of snow. This closed all government buildings, schools, and prompted local newspaper headlines like "This is the Worst." The Transit Authority decided to close its operations after conferring with police. The issue here was that the authority had not followed the CBA, which mandated a week's notice before closing operations; it did allow an exception to be made in emergencies, where such notice would almost certainly not be feasible. The arbitrator held that

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[8] Labor Arbitration Decision, *WMHT/WMHQ* --, AP 96-25, 108 BNA LA 108
[9] *Virginia-Carolina Chem. Co.,* 42 LA 237, 240 (Kesselman, 1964).
[10] *Packaging Corp. of Am*., 106 LA 122, 125–26 (Nicholas, Jr., 1996) One employee brought a gun to work, shot two co-workers. Directly following this, the employer put out a rule forbidding employees to bring guns to work.
[11] *Coca-Cola St. Louis & Soft Drink Co*., 89–2 ARB ¶8326 (Marinoaza, 1989).
[12] A*merican Airlines,* 27 LA 448, 450 (Wolff, 1956); Owens-Corning Fiberglas Corp., 23 LA 603, 605–06 (Uible, 1954). Strikes were held to create emergencies or conditions beyond management's control in *Professional Golf Co*., 51 LA 312, 319–20 (Hebert, 1968) (strike threat); *Woods Indus*., 49 LA 194, 195–96 (Gorsuch, 1967) (unforeseen strike at supplier plant);
[13] *Lone Star Steel Co*., 28 LA 465, 466 (McCoy, 1957). Where a slowdown by some employees made operations impossible, a no-lockout clause was not violated when innocent employees were sent home.
[14] *Lavoris Co.,* 16 LA 173, 175 (Lockhart, 1951). For other cases in which cancellation of operations was justified because of unexpected shortage of materials, parts, or merchandise, see *Van de Kamp's*, 77 LA 611, 617 (Sabo, 1981); *Lennox Indus*., 70 LA 417, 419 (Seifer, 1978); *Tecumseh Prods. Co*., 61 LA 274, 278 (Krinsky, 1973); *Alsco, Inc*., 41 LA 970, 972–74 (Kabaker, 1963). *Cf.* Sims Cab, 74 LA 844, 846 (Millious, 1980). An interest arbitrator recommended that the new agreement provide that no notice be required in emergencies. National Airlines, 16 LA 532, 534 (Payne, 1951).
[15] *Railroads v. Nonoperating Unions*, Decision, 22 BNA LA 392

this exception applied, since it was an emergency. The arbitrator found that the employer gave as much notice as possible, and this was an emergency because it was a "condition beyond the control of the Authority."[16]

Weather conditions can justify unscheduled changes in work, or relieve management of reporting pay, or other obligation.[17] In one case, where management had the right to direct and assign workers, it was not obliged to pay employees for scheduled hours not worked, when severe weather prompted management to dismiss workers early, so they could return home safely. [603] *Southern California Edison Co.* also defines "major storms" as extended emergency situations.[18] In this case, this affected shift length and scheduling. Snow days do not necessarily qualify as an emergency.[19] Nor do severe weather conditions, such as a snowstorm.[20] Even if weather is an emergency, it does not necessarily qualify employees for additional pay. In *B&W Y-12 LLC*[21], the union requested 4 hours of overtime pay, per the CBA's clause setting 4 hours as a minimum, since the employees stayed at work for an additional 20 minutes because there was a tornado warning. The arbitrator did not agree, and held that the employer was only required to pay the workers for the 20 minutes, not the 4 hours. The employees did not work during that time, and the CBA was silent as to payment for weather-related incidents.

Manufacturing shortages can create an emergency. "Management generally has been held to have considerable discretion in unusual situations to make temporary or emergency assignments of tasks across job or classification lines."[22] This citation comes from *Youngstown Sheet & Tube Co.*, in which the government abruptly cancelled its wartime orders. That was an emergency, "because it created a situation which called for quick action." That

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[16] Labor Arbitration Decision, *Tri-State Transit Authority*, 78K/08511, 71 BNA LA 716

[17] *See, e.g., Whirlpool Corp*., 86 LA 969, 970–72 (High, 1987); *Sawbrook Steel Castings Co.,* 85 LA 763, 768 (Witney, 1985); *United Parcel Serv.,* 74 LA 191, 194 (Gershenfeld, 1980).

[18] During extended emergency situations (i.e., major storms) which require protracted work periods, a sufficient number of employees should be relieved after approximately 16 hours or prior to fatigue. Employees [*1074] would then be rotated in and out of service, while insuring a sufficient work force for the duration of the storm or emergency situation. Labor Arbitration Decision, *Southern California Edison Co.* --, 03-02-95, 104 BNA LA 1072

[19] "Where a contract granted paid leave for emergencies, the practice of not having treated snow days as emergencies controlled." BNA, Elkouri & Elkouri: HOW ARBITRATION WORKS, Chapter 12. Custom and Past Practice, *City of Beloit, Wis., Sch. Dist. Bd. of Educ*., 82 LA 177 (Greco, 1984).

[20] Westinghouse Elec. Corp., 51 LA 298, 300–01 (Altrock, 1968). *See also National Homes Corp*., 71 LA 1106, 1108 (Dobranski, 1978).

[21] 131 LA 1234 (Holley, 2013).

[22] Y*oungstown Sheet & Tube Co*., 4 BNA LA 514.

arbitrator also distinguished between: "1) those emergencies which can and should be met within the provisions of the Agreement because the dangers to production etc. are minimal, and 2) those which are so exceptional and so dangerous to the operations of a plant that measures going beyond the Agreement must be taken to cope with the problems."[23] In another case, the employer was not required to give advance notice of layoff when a shipment of materials failed to arrive on time. The arbitrator concluded that the situation was an emergency.[619]

While power outages[24] and water main breaks[25] are almost universally considered emergencies, the arbitrator in *California Department of Corrections and Rehabilitation*[26] held that burst pipes in prison were not an "emergency," since "emergencies" are usually "Acts of God," and beyond management's control. Since the piping system had needed regular repairs in the past, this burst pipe was not unusual, or unexpected. There, the arbitrator found the prison's use of non-bargaining unit members to perform bargaining unit work unjustified.

Safety issues are also often held to be emergencies. One arbitrator held an office's temporary closing due to an epidemic an emergency. He called it an act of God, and reiterated the importance of management's inability to control the circumstances, writing: "the proper focus is not whether the catastrophe or disaster is controllable by one degree or the other by human beings; but whether the circumstances are so out of control that the facilities are required to be closed."[27] In one case, an arbitrator upheld a new rule, which extended the prohibition of bringing firearms into the facility to prohibiting firearms in an employee's car. The CBA held that proposed rule changes needed to be discussed with the union, but here, this rule immediately followed the shooting of two employees by a third, who had gotten his gun from his car. The arbitrator held the rule enforceable as an emergency measure.[28] This can implicate due process

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[23] Id. (*Youngstown Sheet & Tube Co.,* 4 BNA LA 514.)
[24] "In the event of emergencies affecting the distribution lines after regular working hours, line crew members are expected to respond to calls to restore service as quickly as possible." Labor Arbitration Decision, *Alabama Power Co.,* 19 BNA LA 393 ; *Georgia Power Co.,* 94 LA 1303, 1306–09 (Baroni, 1990);
Labor Arbitration Decision, *Potomac Edison Co*., 90/27206, 96 BNA LA 1012
[25] . Labor Arbitration Decision, *Central Pa. Water Supply Co*. --, 93/14935, 101 BNA LA 873 (Called out employees for emergency repair work when main broke & customers had no water.)
[26] 136 LA 473 (Staudohar, 2016).
[27] *Erie County, Ohio, Bd. Of Mental Retardation & Developmental Disabilities,* 111 LA 1121 (Goldberg, 1999).
[28] Packaging Corp. of Am., 106 LA 122, 125–26 (Nicholas, Jr., 1996)

concerns, as well. If an employee is dangerous, or accused of sexual harassment, courts have accepted emergency suspensions.[29]

Another case reversed the dismissal of an employee for climbing a scaffold without a harness. While that policy was zero tolerance, for safety, she violated procedure in an attempt to save a co-worker's life. A piece of machinery was spraying oil everywhere, including on her co-worker, creating a fire hazard. She broke the rule to close the valve, stopping the oil spray. The arbitrator held that this was an emergency situation, and her actions were the only option in a crisis.[30]

Strikes,[31] slowdowns[32], and breakdowns[33] are also held to be emergencies. *Pennsylvania Railroad Co.* broadens this scope to "a threatened interruption of transportation in interstate commerce."[34] *Modesto Milling* defines emergency situations as "where a worker needs help with a piece of equipment or has to leave his machine briefly and needs someone to fill in."[35] In *Modesto Milling*, the practice of supervisory personnel performing bargaining unit work under these circumstances was upheld.

In one case, an arbitrator found "a company's slumping sales and rapidly declining reputation in the market area because of quality problems was considered to be a legitimate emergency so as to authorize the performance of quality assurance tests in order to protect the quality of the product.[36] In one case, the arbitrator found a shipment of material arriving late to be an emergency, and held that the employer was not required to give advance

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[29] *Gilbert v. Homar*, 520 U.S. 924, 12 IER Cases 1473 (1997). Although there are no set guidelines regarding what constitutes an " emergency," courts have accepted emergency suspensions for the removal of dangerous employees and employees accused of sexual harassment. *Id.* (employee suspended without pay immediately on being arrested by police on felony drug charges; lack of due process acceptable due to circumstances). *See also Macklin v. Huffman*, 976 F. Supp. 1090 (W.D. Mich. 1997) (emergency suspension without due process acceptable, where employee was accused of sexually harassing inmates).
[30] *ExxonMobil Ref. & Supply Co.,* 119 LA 366 (Allen, 2004)
[31] (the phrase "regular" and "usual dues" in the Agency Shop clause of the labor agreement must be considered in the light of the dictionary meaning of "regular" and "usual", and must be distinguished from " emergency dues" which last during specific strike occasions) Labor Arbitration Decision, *Tokheim Corp.*, 57 BNA LA 22; *American Airlines*, 27 LA 448, 450 (Wolff, 1956); Owens-Corning Fiberglas Corp., 23 LA 603, 605–06 (Uible, 1954). Strikes were held to create emergencies or conditions beyond management's control in *Professional Golf Co*., 51 LA 312, 319–20 (Hebert, 1968) (strike threat); *Woods Indus*., 49 LA 194, 195–96 (Gorsuch, 1967) (unforeseen strike at supplier plant); *Great Atl.& Pac. Tea Co*., 33 LA 502, 506 (Seitz, 1959)
[32] *Lone Star Steel Co*., 28 LA 465, 466 (McCoy, 1957). (An intentional slowdown was an emergency.)
[33] Labor Arbitration Decision, *Diamond Shamrock Corp.*, 70A/7939, 55 BNA LA 827; *Virginia-Carolina Chem. Co.,* 42 LA 237, 240 (Kesselman, 1964).
[34] *Pennsylvania Railroad Co.,* Decision, 25 BNA LA 352
[35] Labor Arbitration Decision, *Modesto Milling,* 78 BNA LA 249
[36] *Coca-Cola St. Louis & Soft Drink Co.,* 89–2 ARB ¶8326 (Marino, 1989).

notice of layoff.[37] In a Detroit case, the arbitrator held that about half of the police department calling in sick on an occasion with hundreds of thousands of people downtown for the Fourth of July was an emergency.[38]

Not every crisis is an emergency. In *Gallia County*, the arbitrator rejected the agency's argument that the national economic crisis and the resulting general fund shortfall was a "temporary emergency" that allowed it to deviate from the collective bargaining agreement. That arbitrator found that the "parties "had in mind situations such as epidemics, toxic spills, mass accidents, or natural disasters when they used the word 'emergency."[39] In *Tokheim Corp*., the arbitrator speculated as to possible future emergencies. He considered "a "war emergency" period of unknown duration, or a "disease epidemic emergency" of unknown duration, or …. an "economic depression emergency" of unknown duration." That arbitrator also called the World War II gasoline shortage an emergency.[40]

Emergencies are often commonly cited in reserved rights provisions, [41] concerning management's rights to assign work outside of normal categories, to lay off employees or abolish positions[42], or to call employees in to address an emergency.[43] Even reporting pay provisions

[37] *Lavoris Co.,* 16 LA 173, 175 (Lockhart, 1951). For other cases in which cancellation of operations was justified because of unexpected shortage of materials, parts, or merchandise, see *Van de Kamp's*, 77 LA 611, 617 (Sabo, 1981); *Lennox Indus*., 70 LA 417, 419 (Seifer, 1978); *Tecumseh Prods. Co*., 61 LA 274, 278 (Krinsky, 1973); *Alsco, Inc*., 41 LA 970, 972–74 (Kabaker, 1963). *Cf.* Sims Cab, 74 LA 844, 846 (Millious, 1980). An interest arbitrator recommended that the new agreement provide that no notice be required in emergencies. *National Airlines*, 16 LA 532, 534 (Payne, 1951).
[38] Labor Arbitration Decision, *City of Detroit*, 68 BNA LA 848
[39] *Gallia Cnty.,* 131 LA 329 (Franckiewicz, 2012).
[40] Labor Arbitration Decision, *Tokheim Corp*., 57 BNA LA 22
[41] "The Management shall also have the right to deviate from the regular hours above set out and to prescribe other hours when necessary in connection with breakdowns or other emergency work." Labor Arbitration Decision, *Diamond Shamrock Corp.*, 70A/7939, 55 BNA LA 827 ; Non-represented employees of the Company shall not perform duties which constitute an erosion of bargaining unit work. A non-represented employee shall not perform work covered by this Agreement except in the following types of situations: (a) In cases of emergency such as where immediate action is required in order to prevent injury to employees or damage to Company or customer property or equipment." Labor Arbitration Decision, *Lockheed Aeronautical Systems*, 91/15405, File No. 3252-JFC, 98 BNA LA 87
[42] Establish a rule or amend existing rules to provide that in the event of an emergency over which a Carrier has no control, which affects the actual operations of the Carrier, no advance notice shall be required to abolish positions or make force reduction of employees whose work has actually ceased to exist because thereof. *Railroads v. Nonoperating Unions*, Decision, 22 BNA LA 392
[43] Company employees know when they begin their employment that the Company can call them during off duty hours and require them to return to work to address an emergency power outage. Labor Arbitration Decision, *Ameren UE Corp*., 09/562-105828, 128 BNA LA 1787

often expressly exempt employers from the obligation to pay if the employees are not used because of an emergency, or condition beyond the control of management.[44]

Some cases make clear what does not qualify as an emergency, or even a circumstance outside of management's control. A power failure was held not to be beyond the control of management where the company had known of the potential danger and did not take steps to correct it.[45] Machine or equipment breakdowns have been held to be both beyond management's control, [46] and within management's control.[47] A power failure was held not to be beyond the control of management where the company had known of the potential danger and did not take steps to correct it.[48]

Bomb threats, actual and threatened riots, and civil disturbances have all been found to be outside of management's control, so employers have, generally, not needed to pay employees for

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[44] "Many reporting pay clauses state express exceptions even as to the obligation to pay if the employees are not used because of an emergency or condition beyond the control of management. Thus, in the bulk of the cases the right to make the unscheduled change in work hours has not been questioned, the dispute centering rather on the company's obligation for reporting pay where employees reported for work but were not used." BNA, Elkouri & Elkouri: HOW ARBITRATION WORKS, Chapter 13. Management Rights

[45] *See also Mead Corp*., 54 LA 1218, 1219 (Porter, Jr., 1971). In other cases, however, power failures have been found to be beyond management's control. *See E.W. Bliss Co*., 55 LA 522, 525 (Geissinger, 1970); *Erie Artisan Corp.*, 51 LA 850, 852 (Strasshofer, Jr., 1968) (trouble could not be anticipated); *Package Mach. Co.*, 41 LA 47, 51 (Altieri, 1963). In *General Electric Co*., 70 LA 330, 331 (Altrock, 1978), a shortage of natural gas making production impossible was held to constitute a "power failure" within the meaning of the agreement, notwithstanding the union's contention that the parties had never considered gas to be power. "The fact that the Union, at least, was not thinking about gas when the contract was negotiated is of interest, but many things happen to us that cannot be foreseen; otherwise, life would be a total bore." *Id*. at 331. *See also Heiner's Bakery*, 68 LA 986, 988 (Wagner, 1977). Regarding management's obligation where it detained employees longer than was reasonably necessary to investigate a power outage, see *La Favorite Rubber Mfg. Co*., 74 LA 513, 514 (Brent, 1980).

[46] *See A.O. Smith Corp*., 51 LA 1183, 1194 (Sullivan, 1968) (trouble was foreseeable); *Bunker Hill Co*., 51 LA 873, 875 (Luckerath, 1968) (failure to make reasonable inspection). *See also Rubatex Corp.,* 52 LA 1270, 1272 (Powers, 1969).

[47] *See Chase Bag Co*., 44 LA 748, 751–52 (Klein, 1965); *Mrs. Fay's Pies,* 37 LA 811, 818 (Koven, undated); *Gould-Nat'l Batteries,* 36 LA 654, 657 (Anderson, 1961).

[48] *See also Mead Corp*., 54 LA 1218, 1219 (Porter, Jr., 1971). In other cases, however, power failures have been found to be beyond management's control. *See* E.W. Bliss Co., 55 LA 522, 525 (Geissinger, 1970); *Erie Artisan Corp.*, 51 LA 850, 852 (Strasshofer, Jr., 1968) (trouble could not be anticipated); *Package Mach. Co.*, 41 LA 47, 51 (Altieri, 1963). In *General Electric Co*., 70 LA 330, 331 (Altrock, 1978), a shortage of natural gas making production impossible was held to constitute a "power failure" within the meaning of the agreement, notwithstanding the union's contention that the parties had never considered gas to be power. "The fact that the Union, at least, was not thinking about gas when the contract was negotiated is of interest, but many things happen to us that cannot be foreseen; otherwise, life would be a total bore." *Id*. at 331. *See also Heiner's Bakery*, 68 LA 986, 988 (Wagner, 1977). Regarding management's obligation where it detained employees longer than was reasonably necessary to investigate a power outage, see *La Favorite Rubber Mfg. Co*., 74 LA 513, 514 (Brent, 1980).

work canceled for these reasons. [49] Unless, employees could reasonably have been viewed as on standby- under the employer's control while a bomb search was conducted. Then, they would be entitled to pay. [50]

Elkouri and Elkouri briefly discuss "Acts of God". One arbitrator defined this as: "an act, event or occurrence which is due exclusively to an extraordinary natural force free of human interference and which could not have been prevented by the exercise of reasonable care and foresight." [627] Another noted, that "the proper focus is not whether the catastrophe or disaster is controllable by one degree or the other by human beings; but, whether the circumstances are so out of control that the facilities are required to be closed." [628] In one case, an arbitrator held a severe snowstorm to be an act of God.[51]

An "act of God" was defined by an arbitrator as "an act, event or occurrence which is due exclusively to an extraordinary natural force free of human interference and which could not have been prevented by the exercise of reasonable care and foresight." [627] Another arbitrator noted in a case involving the temporary closing of an office, because of an epidemic, that "the proper focus is not whether the catastrophe or disaster is controllable by one degree or the other by human beings; but, whether the circumstances are so out of control that the facilities are required to be closed." [628]

II. Reasonableness of Management's Actions

While management has additional discretion in emergencies, that discretion is not boundless. While arbitrators haven't made this parallel, reasoning seems to be similar to a constitutional

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[49] *See Oklahoma Chromalloy Am. Corp*., 62 LA 463, 465 (Erbs, 1974); *Chicago Bridge & Iron Co.,* 58 LA 355, 356 (Strongin, 1972); *Goodyear Tire & Rubber Co*., 55 LA 1119, 1120 (Sartain, 1970); *General Cable Corp.,* 54 LA 696, 697 (Updegraff, 1971); *Koppers Co*., 54 LA 408, 411 (Duff, 1971). In *Pennsylvania State University*, 67 LA 33, 35 (Stonehouse, Jr., 1976), the campus was closed for 1 day in order to avoid potential hazards arising from a rock concert being held in the vicinity, and it was held that the rock concert constituted an "unforeseen circumstance" within the meaning of that term in the agreement as an exception to the required 2-week notice of layoff.

[50] *See Dresser Indus*., 72 LA 1232, 1234 (Warns, 1979); *Pickwick Int'l*, 70 LA 676, 679 (Ross, 1978); *McQuay-Perfex, Inc*., 69 LA 511, 513 (Nitka, 1977).

[51] *Environmental Elements Corp*., 72 LA 1059, 1061 (Merrifield, 1979).

balancing. Were management's actions reasonable[52], tied to the nature of the emergency, and non-arbitrary?

Actions taken by management to address an emergency should be related to the emergency, and context-specific. There is some inconsistency as to whether the emergency needs to be unforeseeable. Above, that is not mentioned, and surely issues with quality, mechanical issues, and shipping problems could be foreseen- even if only from the perspective that mistakes are bound to happen. "Management shall also have the right to deviate from the regular hours above set out and to prescribe other hours when necessary in connection with breakdowns or other emergency work."[53]

In one case, where an arbitrator opined on whether a company could have a residency requirement for its employees, he held that the standard is, essentially, whether the need is compelling in terms of responding quickly to emergencies, where the emergency poses both an environmental risk and economic losses. Here, the company showed a fair relationship between the residency requirement and the employer's business interests, so the requirement was justified.[54] "Unreasonable" depends on context. In one case, giving other employees vaccines in a non-emergency situation violated the CBA, despite having done so in emergency situations, because giving flu shots was not reasonably related to usual duties.[55]

Elkouri and Elkouri give an example of one case where the CBA gave "broad discretionary powers in determining which bargaining unit employees are necessary to correct an emergency situation, regardless of their seniority." The arbitrator refined the scope of these powers by holding: "these broad discretionary powers are not without limitation because there is an implied rule of reasonableness (or non-arbitrariness) that must be a part of the Employer's decision- making process. In exercising the powers contained in Article 8.1.D. some minimal,

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[52] Even where an agreement expressly recognized a right of management to reassign duties across classification lines, the arbitrator cautioned management that a limitation was necessarily implied under the standard of reasonableness—duties must be compatible with the classification to which they are transferred. *Vickers, Inc*. 47 LA 716, 719 (Keefe, 1966). *See* also *Social Sec. Admin*., 69 LA 251, 251 (Haber, 1977). Nonetheless, where the need is sufficiently strong, employees may be assigned duties or tasks that are foreign to their regular job. *See Oshkosh Truck Corp.,*72 LA 909, 913-14 (Kossoff, 1979); *Goodyear Atomic Corp*, 45 LA 671, 680 (Teple, 1965) (all employees were required to handle emergency equipment); *Glen Rock Lumber & Supply Co.,* 38 LA 904, 906 (Turkus, 1962) (task of walking company watchdog could fall on any employee, except union steward.)

[53] Labor Arbitration Decision, *Diamond Shamrock Corp*., 70A/7939, 55 BNA LA 827

[54] Labor Arbitration Decision, *Texas Gas Transmission Corp*., 88 BNA LA 435

[55] *City of Madison Heights, Mich.,* 119 LA 390 (Sugerman, 2003).

rational basis for the particular employees selected must be articulated. Otherwise, seniority should prevail."[56]

In one case, an arbitrator upheld a new rule, which extended the prohibition of bringing firearms into the facility to prohibiting firearms in an employee's car. The CBA held that proposed rule changes needed to be discussed with the union, but here, this rule immediately followed the shooting of two employees by a third, who had gotten his gun from his car. The arbitrator held the rule enforceable as an emergency measure.[57]

Issues of whether the employer has a duty to notify employees of a change in the work schedule – even if fully justified- can also arise. This depends heavily on: the agreement, the circumstances, and whether management made at least a reasonable effort to notify employees. "If such a duty does exist, the question may remain as to whether the effort to give notice was a reasonable one when management failed to reach some employees who accordingly reported for work.[58]

In one case, where the arbitrator held a severe snowstorm to be an act of God and that "management has the right to decide when to operate or not operate the plant, in the light of weather conditions and the general capability of employees to get to work,"[59] he stated: "However, when management makes the decision not to operate the plant on a certain shift, its contractual exemption from reporting pay must be construed in a reasonable way—subject to a rule of reason. If management holds off its decision whether to operate a shift or not until a time that is so close to the actual shift starting time that all employees cannot be expected to get the word before they leave home, it is only fair that those relatively few employees in the circumstances of this case who reported for work in good faith believing that they were required to do so, should receive the reporting pay called for in the collective agreement."[60]

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[56] Labor Arbitration Decision, *Central Pa. Water Supply Co*. --, 93/14935, 101 BNA LA 873

[57] Packaging Corp. of Am., 106 LA 122, 125–26 (Nicholas, Jr., 1996)

[58] For some cases dealing with these aspects, see *Material Service Corp*., 99 LA 789, 791–92 (Petersen, 1992); *West Bend Co*., 94 LA 4, 6–7 (Baron, 1989); *Georgia-Pacific Corp*., 86 LA 1244, 1245–46 (Chandler, 1986); *Sawbrook Steel Castings Co*., 85 LA 763, 768 (Witney, 1985).

[59] *Environmental Elements Corp*., 72 LA 1059, 1061 (Merrifield, 1979).

[60] *Id*. (each case of this type "must be judged on the basis of the particular circumstances"). This also appears true of cases in which employees arrive at the plant and find it closed at their regular starting time, they leave promptly assuming that operations have been canceled, the plant is opened shortly thereafter, and the employees then request reporting pay. *See Fruehauf Corp*., 73 LA 627 (Thompson, 1979); *Wisconsin Wood Prods. Co*., 1 LA 435 (Updegraff, 1946).

III. Emergency Conflicts with CBAs

a. Overtime

There are surprisingly few cases addressing this topic, per Elkouri & Elkouri. In In *B&W Y-12 LLC,* [61] the union requested that the employer pay 4 hours of overtime, per the minimum in their CBA, since employees remained at work for 20 minutes past work hours, because there was a tornado warning. The arbitrator disagreed with this argument, and held that the employer needed to pay only for the 20 minutes that the employees remained on premises. The employees did not perform work during those 20 minutes, and there was no contractual provision calling for payment for weather-related events. Another reference to overtime in an emergency context is Stone Container Corp., where the CBA reads: "12.1 Overtime A. All overtime shall be classified as emergency work and shall not be subject to loss of time to keep within established work week regulations."[62]

Lastly, in a case addressing call-in pay, employees were credited for hours worked when they reported in during a 2-day power outage. Even though their CBA exempted payment for days with a power failure, the arbitrator held them entitled to be paid, because a separate contractual provision on overtime said that employees who are sent home are entitled to credit for time worked for overtime purposes. [63]

b. Work Duties and Scheduling

This area of law provides the most cases. Management's ability to assign work outside of typical classifications in an emergency is clear. Management is also often able to relax criteria for assigning jobs, from seniority or other method under the CBA to a discretionary choice. This can be based on ability[64], or merely availability. Generally, if management's actions are taken in good faith, are reasonable, and unscheduled/emergency, arbitrators allow them.[65]

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[61] 131 LA 1234 (Holley, 2013).
[62] Labor Arbitration Decision, *Stone Container Corp.* --, 91/23071, Grievance No. 1-3-91-1, 101 BNA LA 720
[63] *Central Aluminum Co*., 131 LA 526 (Lalka, 2012).
[64] *Central Pa. Water Supply Co.,* 101 LA 873 (Talarico, 1993) (when large water main broke, employer had the right to choose employees able to fix the problem most capably; however, employer must have a reason for choosing junior employee over senior employee and cannot make arbitrary decisions; employer did not violate seniority-overtime provisions when faced with emergency and senior employee did not perform well in high-pressure situations).
[65] BNA, Elkouri & Elkouri: HOW ARBITRATION WORKS, Chapter 13. Management Rights; *See West Bend Co.,* 94 LA 4, 6 (Baron, 1989); *FMC-Ordnance Div.,* 84 LA 163, 168 (Wyman, 1985); Weil-McLain, 81 LA 941, 942–43 (Cox, 1983); *Tri-State Transit Auth.,* 71 LA 716, 719 (Bolte, 1978).

Even if the CBA limits management's ability to make changes in the work schedule, or imposes an obligation, if there is an emergency, an act of God, or condition beyond the company's control, this often holds the obligation inapplicable.[66] Management can also temporarily reassign workers, to different departments, classifications, shifts, or overtime.[67] This ability is almost-exclusively restricted to "emergent circumstances."[68]

Even if the CBA does not specifically exempt emergencies from normal staffing decisions, or have a strong management's rights clause, emergency situations, or other unusual circumstances, may excuse an employer from following the contract's seniority provisions. [69]

One arbitrator ruled that in case of emergency or breakdown it is reasonable for an employer to require maintenance employees with certain occupational titles to assist employees with other occupational titles, given the need for everyone to work together in a crisis. [432]

For instance, an employer was upheld in assigning an emergency job that arose on a non-workday to the only two employees scheduled to work on that day, despite the fact that the work did not fall within the duties of their job classifications. The arbitrator stated that management should have the right to meet unusual situations in this manner unless restricted from doing so by the agreement.[70]

This doctrine can apply to subcontracting and assigning work outside of bargaining units. Elkouri and Elkouri list unusual circumstances as a factor in finding subcontracting proper. They define unusual circumstances as "Whether the action is necessitated by an emergency, some

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[66] *See Schuff Steel Co*., 94 LA 1248, 1251 (Thompson, 1990); *Cerro Metal Prods*., 94 LA 124, 126–27 (Lubow, 1990); West Bend Co., 94 LA 4, 6 (Baron, 1989); United Parcel Serv., 74 LA 191, 194 (Gershenfeld, 1980); *San Francisco Theatre Owners Ass'n*, 51 LA 1151, 1153 (Koven, 1969) (provision requiring notice of layoff applies to normal layoff situations, not to abnormal situation of suspension of operations due to strike); *Borden, Inc.,* 51 LA 1069, 1071 (Moran, 1968) (riot justified shutdown though riot was not one of the express contractual exceptions to notice of layoff requirement). For some general definitions, see section 13.E., "Emergencies," section 13.G., "Acts of God," and section 13.H., "Condition Beyond the Control of Management," below.

[67] *Wagner Castings Co.,* 103 LA 156 (Talent, 1994) (employer did not violate collective bargaining agreement when workers from another classification were required to complete last-minute order made for company's largest client).

[68] *County of Allegheny*, 137 LA 997 (Felice, 2017).

[69] *ARMCO, Inc.,* 94 LA 1245 (Eisler, 1990). *See also Flexible Corp.,* 94 LA 158 (Modjeska, 1990).

[70] *Thompson Mahogany Co*., 5 LA 397, 399 (Brandschain, 1946). For other cases permitting such temporary and/or emergency assignments, see *Warner Press*, 89 LA 577, 580 (Brunner, 1987) (contract that required that temporarily transferred employees be returned to regular jobs "as soon as possible" meant "as soon as practicable"; therefore, employer had right to keep employees on transfer assignment for the remainder of the shift); *Standard Register Co*., 83 LA 1068, 1071–72 (Abrams, 1984); *Dow Corning Corp*., 83 LA 1049, 1052 (Seidman, 1984); *Amax Coal Co*., 83 LA 1029, 1033 (Kilroy, 1984).

urgent need, or a time limit for getting the work done.[71] Also, the subcontracting may be justified because the work is a "special job,"[72] or because it is necessitated by a strike or other such situation.[73] For assigning work outside of bargaining unit, arbitrators have upheld emergency as a justification. Elkouri & Elkouri list such factors as: "an emergency is involved",[74] or "some other special situation or need is involved."[75]

This permission seems broad, but some arbitrators take a narrower view. While they agree that "recognition, seniority,[76] and other such contract clauses do evidence an intention to restrict the performance of unit work to unit employees," they do not read these provisions to create an absolute restriction. Arbitrators in this camp recognize that the assignment of such work outside the bargaining unit may be proper where …. there is an emergency or some other justification,[77] but may be improper if layoffs and displacements from jobs result[78] or employees suffer loss of pay.[79]

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[71] *See Illinois-American Water Co*., 117 LA 647, 653 (Suardi, 2002) (employer's decision to subcontract janitorial work at its new facility was reasonable because of the presence of dignitaries and other visitors at facility); *Eaton Corp*., 114 LA 1691, 1695 (Lalka, 2000) (subcontracting to meet customer demands was reasonable, especially because employer was faced with capacity constraints, evidenced by the fact that it had hired 10 new employees who worked overtime and no one was laid off at the time of the subcontracting); *GTE N*., 98 LA 617, 619 (Ray, 1992); Multiplex Co., 78 LA 1221, 1225 (O'Reilly, 1982).

[72] *See Lau Indus*., 114 LA 462, 466-67 (Imundo, Jr., 2000) (large commercial lawn mower required to landscape grounds was a specialized tool, further reinforcing employer's right to subcontract the work); Texas Gas Transmission Corp., 27 LA 413, 419 (Hebert, 1956). *See also M.A. Hanna Co.,* 88 LA 185 (Petersen, 1986).

[73] *See Kennecott Copper Corp*., 36 LA 510, 512 (Updegraff, 1960); *Owens-Corning Fiberglas Corp*., 23 LA 603, 605–06 (Uible, 1954); Cone Finishing Co., 16 LA 829, 831 (Maggs, 1951).

[74] *See GTE N.,* 98 LA 617, 618–19 (Ray, 1992); *National Cash Register Co.,* 46 LA 782, 789 (Begley, 1966); *Intermountain Chem. Co*., 26 LA 58, 61 (Kadish, 1956). *See also American Bemberg*, 19 LA 372, 374 (McCoy, 1952).

[75] *See Gaylord Container Corp.,* 93 LA 465, 469–70 (Abrams, 1989) (employer did not own proper equipment); Unit Parts Co., 80 LA 1180, 1184 (Nelson, 1983) (economic necessity); *National Cash Register Co*., 48 LA 400, 401–02 (Updegraff, 1967) (unit employees were absent); *Great Lakes Pipe Line Co.,* 27 LA 748, 754 (Merrill, 1956) (need for supervisor's presence); *National Supply Co.,* 27 LA 332, 334–35 (Aaron, 1956) (plant security problem); Kennecott Copper Corp., 25 LA 263, 266 (Aaron, 1955) (safety problem); *Corn Prods. Ref. Co*., 20 LA 690, 703 (Klamon, 1953) (minor preparations for reopening plant after shutdown due to strike).

[76] *MSB Mfg. Co.,* 92 LA 841 (Bankston, 1989).

[77] *Okonite Co.,* 112 LA 1060 (Abrams, 1999) (emergency exception applied where no bargaining-unit employees had volunteered to work overtime). *See* KIRO-TV, 51 LA 1221, 1223 (Peck, 1968); *Olin Mathieson Chem. Corp*., 41 LA 1348, 1350 (Oppenheim, 1964); *American Bemberg*, 19 LA 372, 374 (McCoy, 1952). *But see Citicasters Co*., WKRC-TV, 114 LA 1367 (Lewis, 2000) (no emergency where employer knew in advance that computer needed upgrade and specifically planned ahead and scheduled installation time); *Michigan Dep't of Transp*., 112 LA 1179 (Allen, 1999) (no emergency where employer created lack of skill in bargaining unit by not training replacement or deferring promotion until replacement was trained).

[78] *See Owens Ill., Inc*., 111 LA 1135 (Feldman, 1999) (purchase of new equipment did not allow employer to deprive bargaining unit of work). *See also Cleveland Elec. Illuminating Co*., 105 LA 817 (Franckiewicz, 1995).

[79] *See also Atlantic City Showboat,* 113 LA 530, 531 (Zirkel, 1999) (employer's past practice of assigning room servers to gambling area limited employer's contractually unrestricted right to assign work according to “the

As one decision held, "when a bona fide emergency occurs the Employer has the right to call out whichever employees it feels are necessary to correct the situation or to reschedule employees as it feels is necessary." The arbitrator further held that while management exercised that right, "some minimal, rational basis for the particular employees selected must be articulated. Otherwise, seniority should prevail."[80]

Asking non-bargaining unit employees to do a union job can be acceptable in an emergency. In one case, the work that needed to be done was essential, and there was no union member who could perform it. The arbitrator held that was not a violation of the CBA.[81]

Lastly, training non-bargaining unit members to perform bargaining unit work, which they would have to do in an emergency, is allowable. The arbitrator held that, since this type of emergency is rare, but real, training these employees in this work did not infringe on bargaining unit members' rights. He held that since this training for emergencies was, by definition, only for emergencies, analyzing management's assignment of the work to non-union workers should take place in that context. He denied the grievances.[82]

c. Leave

A Detroit case shows that it is reasonable for a police department to follow the CBA, and "take whatever actions are necessary to assure the proper functioning of the Department" in an emergency. In this case, the emergency was 59% of all officers scheduled to work calling in sick on one of the busiest days of the year. The Department required valid medical excuses for absences, and the arbitrator held that reasonable and justifiable by the Department. The CBA specifically gave the Department broad power, and requiring sick documentation would both induce officers feigning illness to come to work, and support officers who were genuinely ill.[83]

Another case showed that, if the CBA provides that personal leave cannot be taken contiguous to a holiday, an employer's denial of personal leave for days missed after a holiday

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requirements of business and according to skill and efficiency"); *Okonite Co.,* 112 LA 1060, 1060 (Abrams, 1999) (employer was not required to force bargaining-unit employees to work overtime, where there was a past practice of assigning such work on a volunteer basis); *City of Conneaut, Ohio,* 112 LA 899 (Richard, 1999) (union estopped from asserting in the future that city violated agreement prohibiting supervisors from performing bargaining-unit work when employees are available, where union had a past practice of allowing supervisors to do incidental bargaining-unit work that assisted employees).

[80] Labor Arbitration Decision, *Central Pa. Water Supply Co*. --, 93/14935, 101 BNA LA 873

[81] Labor Arbitration Decision, *Western Die Casting Co*., 1 BNA LA 118

[82] Labor Arbitration Decision, *Goodyear Atomic Corp*., 66A/501, 45 BNA LA 671

[83] Labor Arbitration Decision, *City Of Detroit*, 68 BNA LA 848

because of snow emergency conditions is not unreasonable. [84] Helpfully, Elkouri and Elkouri hold that, with no specific criteria for granting personal leave, the question for the arbitrator is whether the employer's denial of the leave was unreasonable or arbitrary.[85]

d. Layoffs

Emergencies can also spur layoffs.[86] Employers should also bear in mind that the entire point of seniority protections for layoffs is to "give protection as between classes of employees on the assumption that some of them may properly be suspended under conditions of lack of work, and not to guarantee work."[87] One arbitrator construed the CBA as applicable to both temporary/emergency layoffs, but not requiring the employer to follow seniority "when the emergency is such that, due to time limitations, it would be either impossible or unreasonably burdensome to give effect to these rules."[88]

e. New Rules

Management also has the discretion to promulgate new rules in emergency situations. In one case, a company published a new rule, which extended the ban on firearms in the workplace into employee cars parked on company premises. The CBA mandated that new rules be discussed with the union before issued, but since this change was made after an employee went to his car, got his gun, and shot two co-workers, the arbitrator held the rule enforceable as an emergency measure.[89] In another case, an arbitrator upheld a new rule requiring medical excuses for absences due to illness. That emergency was about 59% of all officers scheduled to work calling in sick, on a day with a gathering of hundreds of thousands planned. The arbitrator further

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[84] *Community Unit Sch. Dist. No. 303 Bd. of Educ., St. Charles, Ill.*, 88 LA 1159 (Goldstein, 1987).

[85] *American Red Cross, S.E. Mich. Blood Servs. Region,* 122 LA 1441 (McDonald, 2006) (no contract violation where accommodation would have violated agreement); *Social Sec. Admin.,* 122 LA 1317 (Owens, 2006) (citing *Los Angeles County Coll. Dist.,* 112 LA 733 (Kaufman, 1999), for proposition that employee has reasonable accommodation to comply with contract).

[86] Observance of seniority in emergency recalls was not required in *Hayes Mfg. Corp*., 14 LA 970, 976 (Platt, 1950); *Firestone Tire & Rubber Co*., 14 LA 552, 562 (Platt, 1950). *See Johnson Controls World Serv.,* 108 LA 191 (Specht, 1996) (because union was consulted prior to a furlough of government employees before a government shutdown, and union had not reserved any claims relating to the furlough, arbitrator held that union was equitably estopped from later pursuing grievances based on alleged loss of work). *See also General Dynamics*, 101 LA 187, 192–93 (Richman, 1993) (employer was required to consult and receive approval from union before laying off missile mechanic union steward, thus providing notice of a layoff)

[87] *Dow Chem. Co*., 12 LA 763, 767 (Smith, 1949).

[88] *Dow Chem. Co.*, 12 LA 763, 767 (Smith, 1949). *See also Union Camp Corp*., 95 LA 1054, 1056 (Strasshofer, 1990); *Machinists Silvergate Dist. Lodge 50*, 73 LA 1127, 1128–29 (Zimring, 1979); *Kaiser Steel Co.,* 48 LA 1199, 1201 (Roberts, 1967).

[89] *Packaging Corp. of Am*., 106 LA 122, 125–26 (Nicholas, Jr., 1996)

found the rule reasonable under the circumstances.[90] In one case involving an emergency board overseeing a railroad, the parties discussed, then implemented, a rule providing that in situations affecting the Carrier's operations or business, such as emergency circumstances or strikes, no advance notice is needed for reductions in force.[91]

[90] Labor Arbitration Decision, *City of Detroit*, 68 BNA LA 848
[91] *Railroads v. Nonoperating Unions,* Decision, 22 BNA LA 392