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*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

FRANK NITSCHMANN ET AL.

Grievors

and

**TREASURY BOARD
(Department of Public Works and Government Services)**

Employer

Indexed as
Nitschmann et al. v. Treasury Board (Department of Public Works and Government Services)

In the matter of grievances referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievors: Edith Bramwell, Public Service Alliance of Canada

For the Employer: John Jaworski, counsel

Decided on the basis of written submissions
filed June 15 and July 3 and 11, 2007.

REASONS FOR DECISION

I. Grievances referred to adjudication

[1] This decision relates to the implementation of a decision issued on February 28, 2007 (2007 PSLRB 25). In that decision I dealt with the damages that flowed from an earlier decision (2005 PSLRB 69) in which I found that there had been a breach of the collective agreement provisions relating to the establishment of a variable hours of work schedule. The parties have been unable to agree on the methodology for calculating the damages.

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, these references to adjudication were dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35.

II. Background

[3] This decision results from the failure of the parties to come to an agreement on the appropriate damages for the breach of the collective agreement. In my February 28, 2007 decision, I concluded as follows:

...

[47] Damages are awarded to all the grievors on the basis of the difference in overtime and other applicable premiums between the improperly imposed 12-hour/5-week shift schedule and the 12-hour/12-week shift schedule for the period from October 28, 2002, to July 4, 2005.

...

[4] I also made the following comments on the methodology to be used for calculating the damages:

...

[42] . . . the best estimate of the damages to be awarded to the grievors is based on the difference between the 12-hour/12-week shift schedule and the 12-hour/5-week shift schedule. To calculate the damages, the parties will have to lay the 12-hour/12-week shift schedule that the grievors would have worked on top of the 12-hour/5-week shift schedule the grievors did work. What will flow from this is payment of certain amounts, such as shift premiums, loss of

weekend premiums and overtime when working on statutory holidays. In addition, any losses related to meal allowances and travel premiums on a day of rest may be applicable. I did not receive detailed submissions from the parties on how all the provisions of the collective agreement would be affected by overlaying the 12-hour/12-week shift schedule over the actual hours worked.

...

III. Summary of the arguments

[5] The parties made detailed written submissions. I have summarized those submissions below. I have not included the appendices or attachments, including the shift schedules, although I have retained the references to them. The full submissions are on file with the Public Service Labour Relations Board.

A. Submissions of the bargaining agent

...

3. The Order of the Board clearly requires that one schedule be compared to another. The 12-hour/12-week schedule takes 12 weeks to complete; the 12-hour/5-week schedule takes 5 weeks to complete.

Comparison of Schedules

4. Attached are two sample months for which the laying of "the 12-hour/12-week shift schedule that the grievors would have worked on top of the 12-hour/5-week shift schedule the grievors did work" has been undertaken. The comparison between the two schedules is found at .. appendix A.

5. As can be seen from the two sample months provided, there are large variances in damages on a month by month basis depending on where in the cycle the two schedules happen to be. In the case of the November 2002 schedule, the schedules vary on almost every single day, resulting in several instances of overtime, consequent travel entitlements, and differences in eligibility for shift and weekend premiums. In the case of the December 2003 schedule, the schedules are nearly identical, resulting in almost no damages under any heading. These two schedules represent extreme poles of the range of possibilities on a month by month basis when the two schedules are laid side by side.

6. The 12-hour/5 weeks schedules submitted for each month are those actually worked by the grievor, Frank Nitschmann. The November, 2002 schedule was entered into evidence in the hearing on the merits of the grievance as part of

exhibit G-4. The 12-hour/12-week schedules are the hours which would have been worked by Mr. Nitschmann had the employer not improperly imposed the 12-hour/5-week schedule.

7. In referring to the schedules, it is useful to be aware of the following facts:

- The night shift begins at 19:00 of the day before the day for which it is scheduled, and ends at 7:00 of the day scheduled. For example, on the November, 2002 chart, the night shift for November 5, 2002 (12-hour/12-week schedule) would actually have begun on November 4 at 19:00 and ended on November 5 at 7:00.
- The day shift runs from 7:00 - 19:00.

...

Damages

8. The following is a detailed analysis of the consequences under the collective agreement which ensue from the comparison of the two schedules in each of the sample months. ...

Overtime (Article 28.06(d))

9. Under the collective agreement, the employer was entitled to schedule employees for work based on the 12-hour/12 week schedule. Instead, it scheduled employees for work based on a 12-hour/five-week schedule. Any hours worked outside of those which the employer was entitled to schedule, under the Order of the board and the operation of the collective agreement, now attract an overtime premium.

10. As employees have already been paid at their straight-time rate for these hours worked, there is no need for them to be compensated at their straight-time rate once again. However, no overtime on those hours worked outside of the hours of work the employer was entitled to schedule has yet been paid. The universal overtime premium under the collective agreement is .75, or "three-quarter" time. Thus all hours worked outside of the hours which the employer was entitled to schedule now attract an over-time premium of .75.

11. The attached charts document all days of rest on the 12-hour/12-week schedule for which Mr. Nitschmann reported to work, as well as all shifts worked other than the shifts which the employer was entitled to schedule. We see that in the month of November, 2002, none of the shifts

scheduled match those which the employer was entitled to schedule. In December, 2003, the situation is almost entirely the opposite, and almost all the shifts on the two schedules match.

12. In November 2002, the total hours worked outside of those which the employer was entitled to schedule is 128. Damages payable are then calculated by multiplying the employee's hourly rate by the overtime premium rate of .75, and then multiplying the resultant hourly overtime premium rate by 128.

13. In December 2003, the total hours worked outside of those which the employer was entitled to schedule is 16. Damages payable are then calculated in the same way as above, by multiplying the employee's hourly rate by the overtime premium rate of .75, and then multiplying the resultant hourly overtime premium rate by 16.

Shift Premium (Articles 27.01 & 5.01 (group specific))

14. Shift premium is a \$2.00/hour premium payable on hours worked outside of the hours of 8:00-16:00. The charts for both months show the differences in the premium which would have been earned on the different schedules.

15. As the night shift begins at 19:00 of the day before the day for which it is scheduled, and ends at 7:00 of the day scheduled, a night shift scheduled on a certain day will give rise to a premium earned based on the 5 hours actually worked on the day previous .. , as well as the 7 hours worked on the day scheduled to complete the shift.

16. As all grievors have already earned shift premium for hours worked, there is no claim in damages for shift premium which has already been paid. However, in each of the sample months presented, the grievors would have earned additional shift premium had they been working the 12-hour/12-week schedule. The premium payable under both schedules is listed under each shift, and the total hours for which a premium is payable under each schedule. The consequent damages are summarized below.

17. November 2002

Shift premium was payable under the two schedules as follows:

12-hour/12-week 108 hours

12-hour/5-week 68 hours

The difference of 60 hours, at a rate of \$2.00/hour, is payable as damages.

18. December 2003

Shift premium was payable under the two schedules as follows:

12-hour/12-week 136 hours

12-hour/5-week 112 hours

The difference of 24 hours, at a rate of \$2.00/hour, is payable as damages.

Weekend Premium (Articles 27.02 & 6.01 (group specific))

19. Weekend premium is a \$2.00/hour premium payable on hours worked between midnight Friday night and midnight Sunday night. The charts for both months show the differences in the premium which would have been earned on the different schedules. As all grievors have already earned weekend premium for hours worked, there is no claim for weekend premium which has already been paid. However, in one of the sample months presented, the grievors would have earned additional weekend premium had they been working the 12-hour/12-week schedule. The premium payable under both schedules is listed under each shift, and the total premiums payable for each month are indicated in the far right-hand column.

20. November 2002

Weekend premium was payable under the two schedules as follows:

12-hour/12-week 48 hours

12-hour/5-week 31 hours

The difference of 7 hours, at a rate of \$2.00/hour, is payable as damages.

21. December 2003

Weekend premium was payable under the two schedules as follows:

12-hour/12-week 48 hours

12-hour/5-week 48 hours

There is no difference in the hours, and so no damages result.

Mileage

(Articles 29.10, 30.05 & National Joint Committee Travel Directive)

23. When an employee is required to report for work on a day which would otherwise have been a day of rest, the employee is entitled to a mileage allowance for their travel to and from home. The rates for compensation are set by the NJC travel directive.

24. On those dates where a night shift on the 12-hour/12-week schedule would have required the employee to report for work on the day previous to the date scheduled, no travel time has been claimed. An example is November 4, 2002.

25. On the charts for the two months provided, incidents where the employee reported to work on a day of rest are documented. In November, 2002, the total is 9 incidents. In December, 2003, the total is 2 incidents. Each of these incidents gives rise to a claim in damages for mileage.

Statutory Holidays

26. Neither of the schedules submitted show any damages in respect of statutory holidays. If over the life of the 12-hour/12-week schedule, there is a reduction in statutory holiday compensation when compared to the 12-hour/5-week schedules covering the same 12 week period, the difference is compensable as damages for the entire period covered by the Order.

Conclusion

27. The accurate calculation of damages will require a month by month analysis of all hours which were worked on the 12-hour/12-week schedule and all hours which would have been worked on the 12-hour/5-week schedule. This calculation will be highly labour intensive, given that the period of damages is from October 28, 2002 to July 4, 2005. The bargaining agent remains agreeable to determining an appropriate lump sum figure which could be generally applied.

28. As was noted at the hearing, the Mr. Doug Chappel is an exception to the above analysis, in that he was a day worker prior to the imposition of the 12-hour/5-week schedule. Accordingly, the basis of comparison against hours worked on the improperly imposed 12-hour/5-week schedule will be his previous regular schedule of straight eight-hour days.

29. Any calculation of damages which ignores the entitlement to damages in the form of overtime is in direct violation of the Order of February 28, 2007.

30. Despite the fact that it has now been more than three years since this matter was first heard, the bargaining agent once more respectfully requests that Adjudicator Mackenzie remain seized in respect of any difference of interpretation which arise from his Order.

...

[Sic throughout]

B. Submissions of the employer

...

1. ... the Adjudication decision dated February 28, 2007 states at paragraph 42:

“... the best estimate of the damages to be awarded to the grievors is based on the difference between the 12-hour/12-week shift schedule and the 12-hour/5-week shift schedule. To calculate the damages the parties will have to lay the 12-hour/12-week schedule that the grievor's would have worked on top of the 12-hour/5-week schedule that the grievor's did work.”

2. To be able to make this calculation one must start with the original grievance as well as apply the terms of the Collective Agreement, but one must do so in light of the balance of the Adjudicator's decision.

The Original Grievance

3. The original grievance complained of the change from the 12-hour/12-week shift schedule to a 12 hour/5 week shift schedule. The difference between the two schedules was two-fold:

1. That the schedule 'rotation' was reduced from 12 weeks to 5 weeks;
2. That employees were no longer just working 12 hour 'Day' or 'Night' shifts, but were also working four (4) standard 8 hour 'Days', once every five (5) weeks.

4. Each of the grievances also requested as part of their 'Corrective Action' that the grievor be compensated at 12 hours per day at their regular rate of pay and when applicable at the designated paid holiday rate, including shift premiums etc.

The Collective Agreement

...

6. Article 25.02 (b) of the Collective Agreement provides that when hours of work are scheduled for employees on a "rotating" or "irregular" basis, the employer shall schedule the hours of work so that employees work an **average** of hours as specified in the 'Group Specific Appendix'.
7. Article 25.02 (c) provides that the implementation of hours of work other than those specified in paragraphs 25.02(a) or (b) are subject to the provisions of Article 28, 'Variable Hours of Work'.

...

9. Article 28.04 states that, notwithstanding anything to the contrary contained in this Agreement, the implementation of any variation in hours shall not result in any additional overtime work or additional payment by reason only of such variation, nor shall it be deemed to prohibit the right of the Employer to schedule any hours of work permitted by the terms of this Agreement.
10. Article 28.05 states that:
 - (a) The scheduled hours of work of any day may exceed or be less than the daily hours specified in the Group Specific Appendix; starting and finishing times, meal breaks and rest periods shall be determined according to operational requirements as determined by the Employer and the daily hours of work shall be consecutive.
 - (b) Such schedules shall provide an average of work per week over the life of the schedule as specified in the Group Specific Appendix.
 - (i) The maximum life of a shift schedule shall be six (6) months.

(c) Whenever an employee changes his or her variable hours or no longer works variable hours, all appropriate adjustments will be made.

...

12. *Hours of work are dealt with by Clause 3 of "Appendix D". Article 3.04, Appendix D, states that when, because of the operational requirements of the service, hours of work are scheduled for employees on a "rotating" or "irregular" basis:*

a. they shall be scheduled so that employees:

i. on a weekly basis work an average of 40 hours and an average of 5 days per week and;

ii. on a daily basis work 8 hours per day.

...

14. *Article 3.05 (a) [of Appendix D] states that, notwithstanding the provisions of this Article, employees with the approval of the employer may complete their weekly hours of employment in a period other than 5 whole days, provided that over a period to be determined by the employer, employees work an **average** of 40 hours per week. In every such period employees shall be granted days of rest on days not scheduled as normal work days for them.*

15. *Article 3.05 (b) states that, notwithstanding anything to the contrary contained in this Agreement, the implementation of any variation in hours shall not result in any additional overtime work or additional payment by reason only of such variation, nor shall it be deemed to prohibit the right of the employer to schedule any hours of work permitted by the terms of this Agreement.*

...

Employer's Position

18. *Whether on a 12-hour/12-week schedule or a 12-hour/5-week shift schedule, the grievors were still required to work certain hours. If they were working standard hours, they would work five (5) eight (8) hour days for a total of forty (40) hours per week. If they were working 12 hour shifts, they would do so over a shift schedule, which would ensure that*

they did not work more than an average of 40 hours per week over the life of the shift schedule. When the shift schedule was the 12-hour/12-week schedule that 40 hours per week was averaged over the entire 12 week cycle; when the shift schedule was the 12-hour/5-week schedule, that 40 hours per week was averaged over the 5 weeks.

19. Both the 12-hour/12-week shift schedule and the 12 hour/5-week schedule were created to ensure that the employees in the various plants would work the appropriate hours as set out in Article 28 of the Collective Agreement, that section that dealt with Variable Hours of Work.
20. It is the Employer's position that the appropriate method to calculate the damages between the two types of schedules to, as Adjudicator Mackenzie stated in paragraph 38 **"...put the aggrieved party in the same position it would have been had their been no breach"** ... is to compare the total hours worked as well as the types of shifts worked between the two different schedules.
21. In either shift schedule (12-hour/12-week or 12-hour/5-week), the grievors were already working 12 hour 'Day' or 'Night' shifts over seven (7) days a week for four (4) of the five (5) weeks in each rotation during the 12-hour/5-week rotation. Therefore on the 12-hour/5-week shift schedule, except for the one week every fifth week (where they worked a 32 hour week over four 8 hour standard work days) the grievors were working either a 12 hour 'Day' shift or 12 hour 'Night' shift, which is what they were working on the 12-hour/12-week schedule.
22. The only difference is that once every fifth week the grievors would work five (5) eight (8) hour days (as opposed to three (3) 12 hour shifts (total 36 hours v. 40 hours)). This therefore would cause a potential loss of shift and weekend premiums, as once every five weeks the employees would carry out their duties over a period of 5 days where they would not be entitled to any shift or weekend premiums. In addition there may be a loss incurred with respect to Statutory Holidays due to the introduction of the standard work day/week once every fifth week.

Employer Calculation

23. In order to calculate the compensation amount for employees [management] developed a template that could be used to calculate the compensation for each

individual grievor. Counsel for the grievor's provided the time sheets for a particular grievor, which the employer has used to make the enclosed calculation. The grievor has been identified as the 'sample employee'.

24. In completing both calculation "[management]" used the both the highest hourly rate and premium rate to ensure fairness to all.
25. The following is an explanation of each of the columns in the Template Appendix 1 and Sample Spreadsheet Appendix 2 which have been included:

a. Complete / Partial

Since a complete cycle of 12-hour 12-week schedule covers a period of 480 hours and a complete cycle of a 12-hour 5-week schedule covers a period of 200 hours, the lowest common denominator to both shifts is 2400 hours or 60 weeks. This is the fewest number of weeks required for both schedules to complete their entire cycles fully.

The adjudication decision states the compensation will cover the period from October 28, 2002 to July 4, 2005 (paragraph 47). This period is made up of two complete 60-week cycles (120 weeks) plus a partial cycle of 20 weeks. In the analysis we have labelled the 120-week period from October 28, 2002 to February 13, 2005 "**Complete**" as both schedules run completely through their rotations.

The remaining time from February 13, 2005 until July 4, 2005 is called "**Partial**" because both shifts do not run completely through their cycles.

...

i. Stat Indicator

This column is used to identify days that are identified as statutory holidays. If an employee was not scheduled to work on the statutory holiday, the statutory is moved to the employee's first day back at work to ensure they received the statutory premium. While on the 5-week schedule, if a statutory holiday fell on the employee's maintenance shift the employee was given the day off instead of receiving statutory premiums.

...

q. Actual Employee Timesheets

Using the template [management] inputted the 'sample employee's' actual timesheets, which were provided by the grievor's Counsel. Some assumptions were required when factoring in the actual leave that was taken on the 5-week schedule into the 12-week schedule. The same leave was applied to the 12-week schedule by assuming that the employee would have taken the same dates off whether on the 12-week or the 5-week schedule.

The timesheets provided contained some gaps in the information. The summary sheets that accompanied the provided timesheets were used to fill in four weeks of missing timesheets. It should be noted that the actual time worked did not always follow the rotation. In particular, there was a 5-week period that the employee worked only maintenance. These issues could help explain the difference in the total number of hours worked in the period identified as complete.

26. After compiling all of this data, our findings are as follows:

a. Lost Shift Premiums

- The 'sample employee' worked 119 fewer night premium hours during the "Complete" section of the schedule and 11 fewer night premium hours during the "Partial" section of the schedule. Therefore, for the entire period from October 28, 2002 to July 4, 2005 the 'sample employee' worked 130 fewer night premium hours than he would have worked on the 12-week schedule.
- The 'sample' employee worked 123 fewer evening premium hours during the "Complete" section of the schedule and 33 fewer evening premium hours during the "Partial" section of the schedule. Therefore, for the entire period from October 28, 2002 to July 4, 2005 the sample employee worked 156 fewer evening premium hours than he would have worked on the 12-week schedule.
- The 'sample' employee worked 84 fewer weekend premium hours during the "Complete" section of the schedule and 48 fewer weekend premium hours during the "Partial" section of the schedule. Therefore, for the entire period from October 28, 2002 to July 4, 2005 the sample

employee worked 132 fewer weekend premium hours than he would have worked on the 12-week schedule.

Therefore this 'sample' employee received a total of 418 fewer shift premium hours by working the 5-week schedule as apposed to the 12-week schedule.

b. Lost Statutory Holiday Hours

Since the 'sample employee' received 64 hours of paid time off when a statutory holiday fell on a maintenance shift when working the 5-week schedule, the statutory holiday premiums were calculated as follows:

- The difference between stat hours on 12-week schedule and the 5-week schedule is 108 hours stat holiday pay;
- Since the employee received 64 hours paid leave on the 5-week schedule that he would not have received on the 12 week schedule this amount must be deducted from the 108 hour difference.
- Therefore the 'sample' employee received 44 hour less statutory holiday premiums because of the shift change ($108 - 64 = 44$).

c. Total Losses (Premiums and Holidays)

Using this methodology and the timesheets of the 'sample employee' we calculate the total compensation amount at \$1,848.44. Since the timesheets were only provided for one of the employees only one calculation was completed based on actual timesheet information. This process can be completed for every grievor based on their timesheets.

Employer's Submissions with respect to the Grievor's Submissions

Comparisons of Schedules

27. The employer agrees with the comments of the bargaining agent that the two-sample months they provided in their materials dated June 15, 2007 contains large variances. As pointed out by the bargaining agent, when comparing November 2002 almost every single shift differs between the two schedules yet almost every shift is nearly identical when comparing December 2003.

28. *The employer believes that this is the very reason schedules cannot be compared on a month-by-month basis. In order to accurately compare the two schedules, both schedules must have cycled through a complete rotation. Since one schedule runs 5 weeks and the other 12 weeks, a period of 60 weeks would be the lowest common denominator so that both the 5 week and 12 week schedule can complete their cycles.*
29. *As part of our detailed explanation of the compensation calculation, the employer has identified the shifts in the period of October 28, 2002 and July 4, 2005 as either a 'Complete' period or a 'Partial' period. The complete period covers a total of 120 weeks starting on October 28, 2002 and ending February 13, 2005. During these 120 weeks both the 5 & 12-week schedules run through complete cycles. An identical total of 4800 hours would be scheduled on either of the schedules. The remaining period from February 14, 2005 until July 4, 2005 does not allow both schedules to complete their cycle therefore there is a difference of 8 hours between both schedules.*

Damages

Overtime

30. *. . . Overtime is defined [in the collective agreement] as follows:
 - q) **"overtime"** means
 - (i) *in the case of a full-time employee, authorized work in excess of the employee's scheduled hours of work;**
31. *The employer's detailed explanation of the compensation calculation clearly shows that the standard daily or weekly hours of work of the hours did not change because of the schedule change from 12 week rotation to a 5 week rotation. As shown in the explanation the total hours worked when comparing the schedules over a period of 120 weeks from October 28, 2002 and ending February 13, 2005 are identical at 4800 hours. Because each schedule did not run through complete cycles from February 14, 2005 until July 4, 2005 there is a difference of 8 hours between the two schedules for this period.*
32. *The employer has compensated all employees that were affected and met the conditions . . . in*

“Appendix D” of the Collective Agreement which states that:

[3.04(b)] “. . . when an employee is required to change his or her position on the schedule without seven (7) calendar days' notice in advance of the starting time of the change he or she shall be paid for the first (1st), changed shift which he or she works at the rate of time and one-half (1 1/2). Subsequent shifts worked, as part of the change, shall be paid for at straight time subject to the overtime provisions of this agreement.”

33. *The employer has prepared their submission based on paragraph (42) of the decision of Adjudicator Mackenzie dated February 28, 2007 which clearly address the overtime entitlement.*

*[42] All this leads me to conclude that the best estimate of the damages to be awarded to the grievors is **based on the difference between the 12-hour/12-week shift schedule and the 12-hour/5-week shift schedule.** To calculate the damages, the parties will have to lay the 12-hour/12-week shift schedule that the grievors would have worked on top of the 12-hour/5-week shift schedule the grievors did work. What will flow from this is payment of certain amounts, **such as shift premiums, loss of weekend premiums and overtime when working on statutory holidays.** In addition, any losses related to meal allowances and travel premiums on a day of rest may be applicable.*

34. *As stated above the only reference to overtime pertains to loss only if the shift change affected the employee's working on statutory holidays. The employer has completed this calculation as part of our detailed explanation of the compensation calculation.*
35. *If one were to accept the Grievor's submissions, one would be paying each grievor based on a day to day and month to month comparison of a 12-hour/12-week schedule which didn't exist as against a 12-hour/5-week schedule that does exist.*
36. *As there was no actual 12-hour/12-week schedule after October of 2002, one cannot assume that the grievors would have worked the exact days and shifts each week and month even if the breach had not occurred. The schedule would have changed. What*

would have remained would be that each grievor would work on average the same number of shifts (all being 12 hour shifts) with some landing at night and some on weekends and statutory holidays.

37. If one were to accept the Grievor's submissions, one would compensate an individual grievor for 12 hours of overtime when that Grievor worked a Day shift instead of a Night shift. It is the Employee's submission that the only difference is a shift premium for working night or evening.
38. If one looks at the Grievor's material (the November 2002 schedule comparison) from November 14 through to November 19, the Grievor's are claiming Overtime for a change from a Day Shift to a Night shift. In addition, they are claiming as Overtime for days that they worked claiming that they were not required to work those days on the old (12-hour/12-week) shift schedule. This though does **not** take into account that they are not required to work other days instead (on the actual 12-hour/5-week schedule). Although they worked different days, they didn't work more days, they actually worked less. What happened was the days were different but they were still 12 hour shifts.

Shift Premiums

39. The employer has completed this calculation as part of our detailed explanation of the compensation calculation.

Weekend Premiums

40. The employer has completed this calculation as part of our detailed explanation of the compensation calculation.

Mileage Claims

41. The bargaining agent has identified a mileage claim based on their overtime claim. Since the employer has discounted any overtime claim as stated herein based on the paragraph 42 of the decision, the employer also discounts any mileage claim based on the same argument.

Statutory Holidays

42. The employer has completed this calculation as part of our detailed explanation of the compensation calculation.

Conclusions

43. *With respect to items 2.1-Overtime we refer to paragraph 42 of the decision of the Board dated February 28, 2007. The employer has clearly demonstrated within our detailed explanation that the hours worked are identical in number (total of 4800 hours) from October 28, 2002 to February 13, 2005 and a difference of only 8 hours for the period from February 14, 2005 until July 4, 2005.*
44. *For items 2.2-Shift Premiums, 2.3-Weekend Premiums, and 2.5-Statutory Holidays above, the employer has included these calculations as part of our detailed explanation of the compensation calculation.*
45. *The Employer respectfully submits that the damages be calculated as shown in Appendix 1 & 2 and as submitted herein.*

[Sic throughout]

C. Reply of the bargaining agent

...

1) Applicable Shift Schedules

1. *At paragraph 20 of its arguments, the employer notes that Mr. Mackenzie cited the well-established principle that the purpose of damages is to return a party to the position which they would have been in had there been no breach of the contract, in paragraph 30 of his decision.*
2. *Mr. Mackenzie found, at paragraph 42 of his decision, that had the 12-hour/5-week schedule not been improperly imposed by the employer, the grievors would have continued to report to work based on a 12-hour/12-week schedule.*
3. *Contrary to the employer's comments at paragraph 36 of its submissions, there is nothing speculative in the determination of the hours the grievors would have worked had they remained on the 12-hour/12-week schedule, rather than the schedule improperly introduced by the employer when it breached the contract.*
4. *A precise shift schedule of the hours of work for which the grievors would have reported had the 12-hour/12-week schedule been respected by the*

employer can be established by reference to the schedules entered as exhibit G-4 in the hearing of this matter on the merits. It is these schedules which form the basis of the sample monthly schedules submitted by the Bargaining Agent in its written submissions with respect to damages.

5. *12 hour/12-week schedules follow a predictable and unvarying pattern, as do 12-hour/5-week schedules. It is because of this that it is possible to undertake an exact comparison on a day by day basis of the hours which actually were worked on the 12-hour/5-week schedule and the hours which would have been worked on the 12-hour/12-week schedule.*
6. *The submissions on behalf of the grievors undertake this day by day comparison in respect of two sample months, in order to demonstrate the correct method for the calculation of damages. This day by day comparison must be undertaken for the entire period for which damages are payable (October 28, 2002 to July 4, 2005) in order to arrive at an accurate calculation of the damages in this matter.*
7. *The employer's calculation of damages ignores the above reality, and, in contravention of the order of Mr. Mackenzie incorrectly asserts at paragraph 28 that a month by month comparison is impossible. A month by month, day by day comparison is not only possible, as has been demonstrated by the bargaining agent, it is also necessary to fulfill Mr. Mackenzie's direction that "the parties will have to lay the 12-hour/12-week shift schedule that the grievors would have worked on top of the 12-hour/5-week shift schedule the grievors did work."*

2) **Overtime and Mileage**

8. *The employer's calculation of damages is in contravention of the Order of Mr. Mackenzie and the provisions of the collective agreement, in that it asserts that the employer may schedule employees for hours of work outside of those contemplated in the collective agreement without paying any overtime premium, or associated mileage costs. The employer's disingenuous remarks with respect to overtime at paragraphs 30 to 38, and in respect of mileage at paragraph 41, clearly demonstrate that its calculation method is not in accordance with that directed by the Order of the Board.*
9. *In breaching the contract, the employer regularly scheduled employees outside of the hours of work which it was entitled to schedule. Employees had no choice but*

to comply with the employer's direct order to report to work.

10. *The definition of the overtime under the collective agreement renders all hours worked outside an employee's scheduled hours of work compensable as overtime.*

Article 2 (q) "overtime" means

(i) in the case of a full-time employee, authorized work in excess of the employees scheduled hours of work.

11. *Further, article 4.02 provides as follows:*

4.02(a) An employee who reports for work as directed in a day of rest shall be paid for the time actually worked, or a minimum of three (3) hours, whichever is the greater.

12. *As such, it is clear that the employer's breach of the contract resulted in the grievors reporting for work in hours outside of the appropriate regularly scheduled hours of work, and on days of rest. This is compensable as overtime under the contract.*

3) Doug Chappell

13. *Exhibit G-4 . . . clearly shows that the grievor, Doug Chappell, was a day worker prior to the improper imposition of the 12-hour/5-week schedule.*
14. *The documentary evidence demonstrating that Mr. Chappell was a day worker was not contested at any point in the proceedings before the Board.*
15. *Mr. Chappell's situation has also been raised in respect of both the final arguments on the merits of this matter and the final arguments on damages of this matter.*
16. *Mr. Chappell's damages must be calculated on the basis that he was a day worker prior to the employer's breach of the contract through the improper imposition of the 12-hour/5-week schedule.*

IV. Reasons

[6] The parties have been unable to come to an understanding on the appropriate methodology for calculating the damages that flow from the finding of a breach of the collective agreement. After reviewing their detailed submissions I have concluded that the methodology for calculating damages put forward by the bargaining agent in its

submissions is, in general, the appropriate one. However, I do not agree with the bargaining agent's position on transportation expenses (mileage) and statutory holiday premiums, for the reasons set out below.

[7] The employer's position is that the appropriate method for calculating damages is to compare the total hours worked as well as the types of shifts worked between the two different schedules. In the employer's view, the only difference between the two schedules occurred every fifth week, when the grievors worked 8-hour day shifts. The employer's position is that the two schedules cannot be compared on a month-by-month basis and that to accurately compare the two schedules, each must have gone through its cycle. Commencing at paragraph 35 of its submissions, the employer states:

35. *If one were to accept the Grievor's submissions, one would be paying each grievor based on a day to day and month to month comparison of a 12-hour/12 week schedule which didn't exist as against a 12-hour/5-week schedule that does exist.*
36. *As there was no actual 12-hour/12-week schedule after October of 2002, one cannot assume that the grievors would have worked the exact days and shifts each week and month even if the breach had not occurred. The schedule would have changed. What would have remained would be that each grievor would work on average the same number of shifts (all being 12 hour shifts) with some landing at night and some on weekends and statutory holidays.*

...

[8] The bargaining agent's position is that my order clearly requires that one schedule be compared to another on a month-by-month basis.

[9] In my decision of February 28, 2007, I concluded that damages were to be awarded based on the difference in overtime and other applicable premiums between the improperly imposed shift schedule and the schedule that the grievors were working prior to the breach of the collective agreement. Damages were to be calculated for the period from October 28, 2002 to July 4, 2005 (para. 47 of that decision).

[10] In that decision, I came to the following conclusion on the methodology to be used for calculating the damages:

...

[42] . . . To calculate the damages, the parties will have to lay the 12-hour/12-week shift schedule that the grievors would have worked on top of the 12-hour/5-week shift schedule the grievors did work. . . .

...

[11] Calculating damages is necessarily speculative since it is impossible to come to any definitive conclusions on what might have happened if the collective agreement had been respected. I addressed the speculative nature of determining the damages in my February 28, 2007 decision. I was clear in that decision that it would be necessary to compare the two schedules by laying one over the other. That was the method the bargaining agent used in its calculations (contained in its submissions). The employer's position that the grievors should only be compensated for the difference in total hours worked is not in accord with this methodology. If that were the only consequence of an improper change in variable hours of work, there would be little cost to the employer in breaching the collective agreement. The result of the improperly imposed schedule was that the grievors worked on days they would not have worked under the previous schedule. That represents a loss suffered by the grievors for which they should be compensated.

[12] In my decision I also made comments about the types of damages that would flow from the laying of one schedule on top of the other:

...

What will flow from this is payment of certain amounts, such as shift premiums, loss of weekend premiums and overtime when working on statutory holidays. In addition, any losses related to meal allowances and travel premiums on a day of rest may be applicable. . . .

...

[13] The finding on the type of damages that would flow from this methodology was not exhaustive, as shown by my use of the phrase "such as." I also noted in the decision that I had not received detailed submissions from the parties on how all of the provisions of the collective agreement would be affected by overlaying the two

schedules. I therefore reject the employer's contention that only overtime premiums are to be considered.

[14] Counsel for the grievors has argued that they are entitled to a mileage allowance for those days they worked under the new schedule that would have been a day of rest under the previous schedule (clause 29.10 of the collective agreement terms these "transportation expenses"). The employer has argued that the mileage allowance is not payable, as overtime was not payable on these occasions. I have concluded that overtime is payable but it does not follow that mileage is payable in this case. The clause reads as follows:

29.10 Transportation Expenses

- (a) *Where an employee is required to report to work overtime on a day of rest or to work overtime which is not contiguous to the employee's scheduled hours of work, and reports, and is required to use transportation other than normal public transportation services, the employee shall be reimbursed for reasonable expenses*

[15] The intent of this provision is to compensate employees for transportation expenses on a day of rest. In this case, the grievors were receiving days of rest - just not necessarily the day of rest they would have received under the previous schedule. There was no evidence of additional transportation expenses incurred as a result of the improper schedule. Accordingly, I find that the grievors are not entitled to claim transportation expenses.

[16] The employer has also argued that clause 3.04(b) of Appendix D should be applied in calculating damages (paragraph 32 of the employer's submissions). This clause applies to situations where an individual employee's shift is changed and is not meant to apply to situations where there is a total change in the schedule for all employees. It is certainly not designed to act as a limitation on damages when the employer has breached the collective agreement.

[17] Although the calculation done by the grievors' counsel has not shown any difference in statutory holiday premiums between the two schedules, counsel has argued that payment for statutory holidays may be required:

If over the life of the 12-hour/12-week schedule, there is a reduction in statutory holiday compensation when compared to the 12-hour/5-week schedules covering the same 12 week period, the difference is compensable as damages for the entire period covered by the Order.

[18] Counsel for the employer submitted that the difference in hours worked on a statutory holiday between the two schedules should be reduced by the number of hours for which the employee received paid leave. The employer states that when a statutory holiday fell on a day when the grievors were working the 8-hour maintenance shifts, the grievors received paid time off. The grievors do not dispute this.

[19] The grievors have not demonstrated that there are any statutory holiday premiums owing. Any difference in statutory holiday premiums between the two schedules would be the result of the grievors not working on a statutory holiday. Accordingly, I see no reason to compensate grievors at the premium rate for those hours.

[20] Doug Chappell was not working a 12-hour, 12-week shift but was a day-shift worker (8-hour shifts, 5 days per week) before the 12-hour, 5-week shift schedule was imposed. The employer does not dispute this fact. Accordingly, Mr. Chappell's damages are to be calculated by comparing the schedule he was working before the collective agreement was breached to the 12-hour, 12-week schedule imposed by the employer, on the same basis as I have outlined above.

[21] Calculating the damages is undoubtedly labour intensive and tedious. However, unless the parties can come to an agreement, it remains the only way to calculate the damages suffered by the grievors. The bargaining agent has indicated in its submissions that it is "agreeable to determining an appropriate lump sum figure which could generally be applied." This would require a negotiated arrangement between the parties, and it is outside the scope of my jurisdiction. I encourage both parties to find their way to a quick resolution of this matter so that they can move on and work towards rebuilding their relationship.

[22] The bargaining agent has asked that I retain jurisdiction to address any implementation issues. The purpose of retaining jurisdiction is to address any issues that have not been canvassed at the hearing. In my view, the issues have been fully canvassed and I have given sufficiently specific directions to the parties. There is

therefore no purpose served by retaining jurisdiction. Accordingly, I will not retain any further jurisdiction over this matter.

[23] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[24] The damages to be calculated for each grievor are for the following collective agreement provisions: overtime (28.06(d)), shift premiums (27.01 and 5.01 of the group specific agreement) and weekend premiums (27.02 and 6.01 of the group specific agreement).

[25] Mr. Chappell's damages are to be calculated by comparing, on a month-by-month basis, the 8-hour shift schedule he worked before the change with the 12-hour/5-week schedule that was imposed, for the period of October 28, 2002, to July 4, 2005.

[26] Damages owing to each of the remaining grievors are to be calculated by comparing, on a month-by-month basis, the 12-hour/5-week schedule imposed on the grievors with the 12-hour/12-week schedule that was worked before the schedule change, for the period of October 28, 2002, to July 4, 2005.

September 20, 2007.

**Ian R. Mackenzie,
adjudicator**