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Citation: 2007 PSLRB 25

Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

FRANK NITSCHMANN AND OTHERS

Grievors

and

TREASURY BOARD
(Public Works and Government Services Canada)

Employer

Indexed as
Nitschmann and Others v. Treasury Board
(Public Works and Government Services Canada)

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, counsel

For the Employer: John Jaworski, counsel

Heard at Ottawa, Ontario,
April 4 and 5 and June 22 and 23, 2006.

I. Grievances referred to adjudication

[1] I issued a decision on the merits of these grievances on July 4, 2005 (*Nitschmann and Others v. Treasury Board (Public Works and Government Services Canada*) 2005 PSLRB 69). At that time, I retained jurisdiction to deal with matters relating to the implementation of the decision, and in particular the damages that should be awarded to the grievors. Within the period that I retained jurisdiction, the parties advised the Board that they required my assistance in the implementation of the award. The hearing on this matter was delayed because of scheduling difficulties, as well as efforts at mediation.

[2] The grievors all worked as heating plant (HP) operators. The collective agreement between the Treasury Board and the Public Service Alliance of Canada provides for special arrangements of hours of work, with the agreement of a majority of the employees. In 1978, special arrangements involving 12-hour shifts had been introduced at most plants in the National Capital Region. In 2002, the employer unilaterally imposed a change in the work schedule, which I held constituted a new special arrangement. This new special arrangement was not in accordance with the collective agreement, since there was no evidence that the majority of the employees supported the change. I did not determine the remedy for this breach of the collective agreement because the parties had not fully discussed the options for hours of work. Those discussions were ultimately unsuccessful, and the employer has now imposed eight-hour shifts in accordance with the hours of work provisions of the collective agreement.

[3] In the initial decision, I came to the following conclusion:

. . .

> *[91] Accordingly, I issue a declaration that the employer breached the collective agreement in its unilateral introduction of a new special arrangement. What remedies flow from this determination will depend on how the parties respond to it. If the employer and employees cannot come to an agreement on a special arrangement, then there will be a return to eight–hour shifts. If the employer agrees to return to the previous special arrangement, there will be certain damages that flow from that. If the employees agree to the proposed special arrangement imposed by the employer in November 2002, the current special arrangement will be maintained and there will be no damages. If the employer and the employees come to an agreement on a special*

> *arrangement different from the one imposed by the employer, then there will likely be certain remedies that flow from that special arrangement. In order to put the parties in the position they would have been in without the breach of the collective agreement, it is necessary to look at what should have happened back in October 2002. If the employer had recognized that majority support for a changed special arrangement was required, what would have occurred? As noted above, the development of a special arrangement is a delicate negotiation process, given that the failure to agree is a reversion to the default hours in the collective agreement. For this reason, it is difficult to determine what the employer and the employees would have agreed to back in October 2002. As a result of this uncertainty about remedies, I will retain jurisdiction for a period of 90 days from the date of this decision to address any difficulties that the parties might have in coming to an agreement on a special arrangement.*
>
> *[92] For all of the above reasons, I make the following order:*
>
> . . .
>
> *Order*
>
> *[93] A declaration that the employer breached subclause 3.05(c) of Appendix "D" (Group Specific provisions). I will remain seized for a period of 90 days from the date of this decision to address any matters relating to the implementation of this decision.*
>
> . . .

II. Summary of the evidence

[4] The parties had discussions over a number of months about the implementation of my decision. The evidence pertaining to those discussions is below. The end result of the discussions was a failure to agree to a new variable hours of work arrangement and the imposition by the employer of an eight-hour shift cycle, effective March 6, 2006 (Exhibit G-16).

[5] Each of the grievors asked for the same corrective action in their individual grievances:

> 1. *That the employer respects Articles 25, 27, 28, 29, 30, 31, 32 and Appendix "D" of the Operational Services (all employees) collective agreement.*
> 2. *That the above-mentioned five-week shift work schedule be declared null and void and the employer*

> *respect the previously mutually agreed upon twelve-week shift work schedule.*
>
> 3. *That the employer ceases any attempts to introduce such schedules without the majority consent of the affected employees at the work unit of the C.H.P.C., Cliff Street Plant.*
> 4. *That I be compensated twelve (12) hours a day at my regular rate of pay and when applicable at the designated paid holiday rate of pay, including shift premium, for all the previously scheduled work days that I did not and will not work due to the rescheduling of my days of rest in this five-week shift work schedule.*
> 5. *That I be paid at the appropriate overtime rate, including applicable shift premium, for all the rescheduled hours of work that I worked and will work on my previously scheduled days of rest and designated paid holidays and days to which the designated paid holidays have been moved to as a result of this five-week shift work schedule.*
> 6. *Furthermore, that I receive the appropriate compensation for any/all other applicable provisions of the collective agreement violated by this five-week shift work schedule.*
>
> . . .

[6] Gerry Sander was the president of the bargaining agent local when the first decision was issued. He testified that the local executive issued a notice on August 8, 2005, to all of its members after my decision was issued explaining the decision (Exhibit G-12). The notice was posted in all plants, and included the following:

> . . .
>
> *. . . The key elements of the decision are as follows:*
> *The standard length of any shift, for a shift worker or a day worker, is 8 hours. The employer can require any employee to work 8 hour shifts.*
> *Any special arrangement requires "mutual agreement" between management and the majority of employees affected at a work unit. A work unit is a plant. The employees affected are those who will work the shifts created by the special arrangement.*
> *A special arrangement is anything different from consistent 8 hour shifts.*
> *An arrangement of 12 hour shifts is different from an arrangement which mixes 8 hour and twelve hour shifts.*
> ***What does this all mean? A majority of employees in a work unit can say "NO" to any special shift arrangement which the employer proposes. YOU HAVE THE RIGHT TO CHOOSE. The only shift schedule which the employer can***

> ***force you to work is one based on eight hour shifts.*** *The local will be posting signature sheets in August to allow all affected members to vote for the special arrangement they wish the local to propose to management.*
>
> . . .
>
> [Emphasis in the original]

[7] Mr. Sander testified that the local advised management representatives that it was proceeding to conduct votes at the plants. The proposition to be voted on at plants that had been on a 12-hour/12-week shift schedule (Exhibit G-13) reads as follows:

> . . .
>
> *Shift Proposal Ballot Poll*
>
> *Please indicate by your signature below whether you agree to return to working a twelve-hour twelve-week shift schedule. A recent decision of the Public Service Labour Relations Board has indicated that the employer cannot require you to work this schedule, or any special arrangement, without the support of the majority of the affected employees in the plant.*
>
> . . .

[8] The ballot for plants that had been on a 12-hour/5-week shift schedule ("the 12/5 schedule") reads as follows (Exhibit G-13):

> . . .
>
> *Shift Proposal Ballot Poll*
>
> *Please indicate by your signature below whether you agree to continue to work a twelve-hour five-week shift schedule. A recent decision of the Public Service Labour Relations Board has indicated that the employer cannot require you to work this schedule, or any special arrangement, without the support of a majority of the affected employees in the plant.*
>
> . . .

[9] Votes were held at all plants, and employees voted for the continuation of the previous special arrangement in place at each plant. Mr. Sander testified that management representatives were not happy with the way in which the ballot was worded and did not accept the voting process. The employer's position was that all plants should be on the same schedule.

[10] Following a discussion at a union-management committee meeting on September 20, 2005, Wendell Wilson, Manager, Utilities Management Services, set out a proposal that management wanted to be put to all those employees it considered to be affected at heating and cooling plants in the National Capital Region (Exhibit G-14):

. . .

> *UMS Management proposes that all 24/7 operational heating and cooling plants work a combination of 12 hours (operations) and 8 hours (maintenance). These hours (both the 12 hour assignments and the 8 hour assignments) will be included on the same posted work schedule which will be of 5 weeks duration.*

. . .

[11] The proposal was a continuation of the variable hours of work arrangement imposed in 2002 (the one at issue in the grievances). Mr. Wilson stipulated the following "conditions" for a vote of employees that the employer would consider acceptable (Exhibit G-15):

. . .

> ***Conditions:***
>
> *1) It must be clearly identified to all voting members (affected HP employees) that this "special arrangement" includes hours of work (operations 12 hours) and (maintenance/relief 8 hours), typical of the current 5-week schedule. It should also be made clear that this proposal does not include a "Full Rotation" at Cliff CHCP and Tunney's Pasture CHCP. However, it should be noted that the Plant Superintendents at these two (2) facilities will be ensuring that all HPs are qualified and trained to work both operations and maintenance and treated equally with opportunities for either position (operations or maintenance) on the 5-week schedule. HP-03 and HP-05 employees currently not on the operations (12 hour) section of the schedule, can and may be assigned to the rotating schedule at any time. As well, it must be recognized that all full time*

> *indeterminate and term employees must be treated fairly and equally under the Public Service Employment Act and therefore, no employee is entitled to a guarantee of being assigned to the rotating schedule on a permanent basis (at Cliff CHCP and Tunney's Pasture CHCP). It should also be mentioned that currently at plants operating with a one-man shift, a full rotation is already in place, to the extent that employees meet the certification requirements for operations.*
>
> *2) UMS Management considers all affected employees for this proposed "special arrangement" to be: all UMS HP employees covered under the collective agreement in the NCA* [*sic*] *excluding HP-06, HP-07, HP-08 and HP-09 employees. . . .*
>
> . . .

[12] Mr. Wilson testified that it was management's view that all HP group employees in 24/7 plants should be allowed to cast a vote. This would include any HP group employees who would be asked to do shift relief, as well as those who might accept longer-term acting assignments.

[13] Mr. Sander testified that it was the local's view that it was not "operationally necessary" for all employees to work shifts in order to operate a plant.

[14] Mr. Sander stated that the local could not allow all employees to vote because some employees were not affected by the proposed schedule. In particular, day workers were not affected. There were concerns about individuals not having enough experience to operate a plant and that not every employee would want to do shift work. It was also the local's position that the employer's proposed 12-hour/5-week schedule would be in breach of the collective agreement because the length of the schedule would extend beyond the limit of six months set out in the collective agreement.

[15] In cross-examination, Mr. Wilson agreed that it was not operationally necessary that all HP group employees work shifts.

[16] At the labour-management committee meeting held on November 16, 2005, the bargaining agent agreed to take management's proposal to the local's Annual General Meeting on November 29, 2005, for a decision by its members. Mr. Sander sent an email to all members on November 23, 2005, advising them of the content of a motion

on whether management's proposal should be forwarded to the members for a vote. In the email, Mr. Sander wrote (Exhibit G-19):

. . .

> *Issues*
> *Management seems to be attempting to mitigate damages by having the membership accept the 5wk/12hr schedule.*
>
> *The local cannot entertain managements* [*sic*] *proposal because the proposal in fact includes some sort of rotation through maintenance and operations for all HP-3; 4; and 5 members in each plant. This would subvert rights enjoyed by the membership included in the collective agreement which defines day workers and shift workers.*
>
> *Potential Ramifications*
> *The local should return to management requesting they revise their proposal to adhere to the collective agreement.*
>
> *Should the membership decide to bring the proposal for a vote in each plant and the 5wk/12hr schedule be turned down, management will have only one option: a return to the 8hr shift.*
>
> *Motion: The local executive forward managements* [*sic*] *5wk/12hr special arrangement proposal as written to be voted on by all HP-3; 4; and 5 members in each plant. . . .*

. . .

[17] Approximately 20 to 30 members of the local were in attendance at the meeting. The minutes of the meeting record the following result of the motion (Exhibit E-17):

. . .

> *MOTION: The local executive forward managements* [*sic*] *twelve-hour/five-week special arrangement proposal as written to be voted on by all HP-3; 4 and 5 members in each plant.*
>
> . . .
>
> *There being no seconder the motion was abandoned.*
>
> . . .
>
> *MOTION: The local executive return to management indicating that more consultation is necessary to develop a shift schedule special arrangement in each worksite for the HP group.*

. . .

[18] Mr. Sander testified that the local did not request a return to eight-hour shifts because “it was not in our interest; no one wanted to go that route”. Mr. Sander also testified that Mr. Wilson did not want to return to eight-hour shifts, although the possibility was “hanging in the air”.

[19] Approximately a week before the announcement of the new eight-hour shift cycle, a draft of the announcement and a background document were shared with the local (Exhibit G-16). The announcement to all employees was issued at some point in January (Exhibit G-16, undated announcement). The change to eight-hour shifts was effective March 6, 2006. Under the new schedule, hours of work at all 24/7 plants were to be 08:00 to 16:00 for the day shift, 16:00 to 24:00 for the evening shift, and 00:00 to 08:00 for the night shift. The maintenance shift was to be from 08:00 to 16:00.

[20] Mr. Nitschmann, one of the grievors, testified that after the announcement of the eight-hour shift schedule "everyone panicked" and he described the situation as one of hysteria. The employees did not want to go to an eight-hour shift. He testified, in cross-examination, that he felt that he had "a target on his back”. He testified that the bargaining agent local’s representatives communicated their concerns about the incompatibility of the employer's proposal with the collective agreement on many occasions. He contended that management representatives, however, were not willing to bring an alternative proposal to the table and that it was "their way or the highway”.

III. Summary of the arguments

A. For the grievors

[21] Counsel for the grievors, Edith Bramwell, submitted that this hearing was about damages, and not about the nature and quality of the negotiations entered into by the parties after the initial adjudication decision. There was a clear breach of the collective agreement – a shift cycle was imposed without the agreement of a majority of the employees at each plant. She argued that there was no evidence that such an agreement was achieved, and it was abundantly clear that there was no agreement on a special arrangement.

[22] Ms. Bramwell also asked that I issue a declaration that would clarify who is “governed” by the shift schedule. Mr. Wilson testified that it was management’s view that those governed by the shift schedule included those who “potentially” could work

the shift schedule. Ms. Bramwell submitted that the original decision does not say "potentially governed". Mr. Wilson testified that he was not aware of the operational requirement restriction (contained in clause 3.04 of the collective agreement). It was also his clear answer that it was not operationally necessary to have all employees on a shift schedule. It therefore follows that those "governed" by the shift schedule cannot mean employees who work the shift on a replacement basis or those who might be eligible for an acting position. Employees who are not working shifts are not part of the schedule, and it is clear that they are not part of the electorate for determining majority support.

[23] Ms. Bramwell submitted that it was clear that management was not interested in the vote of the shift workers and that it was the employer that cut short the negotiations.

[24] Ms. Bramwell argued that the issue is the damages that flow from the breach of the collective agreement signed in 2002: overtime for all hours worked outside of eight hours per shift. She referred me to *Copeman v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-02-21686 (19920407). She also referred me to *Larivière et al. v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-13917 (19850508), which states the principle that if an employee works hours outside of a schedule, including days of rest, that employee is paid at the overtime rate. This means that an employee is paid at the following rate: regular salary plus overtime premium. She also referred me to *Dinney et al. v. Treasury Board (Transport Canada)*, PSSRB File Nos. 166-02-16414 to 16421 (19880919), for the proposition that employees get a full premium for working on a day of rest. She also referred me to *Newfoundland Farm Products Corp. v. Newfoundland Association of Public Employees* (1988), 4 L.A.C. (4th) 343; *Longo Brothers Fruit Market Inc. v. United Food & Commercial Workers' Union, Local 633* (1995), 52 L.A.C. (4th) 113; and *Babb et al. v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2000 PSSRB 54.

[25] Ms. Bramwell submitted that it was a simple matter of taking the schedule of eight hours and comparing it to the schedule actually worked. For those hours worked in excess of eight hours, the employer was liable for overtime. On a day that would have been a day of rest under the eight-hour schedule, the employer was also liable for overtime for the first eight hours worked. The employer was in breach of the collective agreement for three and one-half years. The consequences should be appropriately

severe when the employer does not meet its obligations. The right to claim overtime was the very thing that the employees gave up when the special arrangement was first implemented.

[26] Ms. Bramwell submitted that there were two possible time periods for the calculation of damages. In a breach of a collective agreement, the damages must not be too remote, the loss must be certain and not speculative, and there is a duty to mitigate any losses. In mitigation, the bargaining agent could have demanded a return to eight-hour shifts, but it chose not to. It would have been hard for the bargaining agent to continue with negotiations if there had been a return to the eight-hour schedule. This would have ended negotiations with the employer. The employer could have mitigated damages by returning to eight-hour shifts immediately, but it chose not to. Ms. Bramwell submitted that the time period for the calculation of damages should be from the date of the breach of the collective agreement (the date on which the 12/5 schedule was implemented) to the date of the imposition of the eight-hour schedule (March 6, 2006). In the alternative, she submitted that the period for calculation of damages should be from the date of the breach until the date of the initial decision, plus two weeks for a reasonable implementation period.

[27] Ms. Bramwell noted that there are a number of provisions secondary to the overtime provision, including a meal allowance (clause 29.09) and travel premium on a day of rest (pursuant to the National Joint Council *Travel Directive*) that also need to be addressed in an award of damages.

B. <u>For the employer</u>

[28] Counsel for the employer, John Jaworski, submitted that the bargaining agent and the employer have a fundamentally different view of the issues. There is no question that the parties failed to reach an agreement on a special arrangement and there was a return to eight-hour shifts. The employer is in a difficult position, however, because its proposal did not get to the bargaining agent's members. If there is no vote, there can be no agreement.

[29] Mr. Jaworski submitted that one must read the discussion on remedy in the original decision (at paragraph 91) in conjunction with the clause of the collective agreement setting out the process for establishing 12-hour shifts. He also referred me to paragraph 75 of the original decision:

> *[75] There is no dispute that a majority of the employees at the plants in question supported a change to 12–hour shifts back in the late 1970s. It does not seem either logical or fair that the wishes of employees taken over 25 years ago should bind employees forever. A more logical interpretation is that the acceptance by a majority of the current employees of that special arrangement is determined by the fact that the bargaining agent has not proposed an alternative special arrangement (which would still require employer acceptance) and has not insisted on a return to the standard eight–hour shift.*

[30] Mr. Jaworski also submitted that it was critical to look at the original grievance language. The grievors did not want to go back to the eight-hour shift; they wanted to go back to the 12-hour/12-week shift schedule. The employer requested that damages be awarded on the basis of a 12-hour/12-week shift schedule, not an eight-hour shift schedule. Every fifth week, instead of a 12-hour shift the employees were now on an eight-hour shift. There may be damages, such as loss of shift premiums, loss of weekend premiums and overtime when working on statutory holidays. He referred me to *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109.

[31] Mr. Jaworski argued that the appropriate measure of damages is to restore employees to the positions that they would have been in had that particular breach not occurred. He referred me to *United Steelworkers of America (Local 5220) v. Alta Steel Ltd.,* 2004 ABQB 262, in which the Court held as follows:

. . .

> *[23] The Union's position was that the Board should award damages to the employees by paying them overtime for any hours they worked outside of the T schedule, without mitigation for the work actually assigned and paid for. The Board rejected the approach that certain hours would have been worked and that certain shifts at certain times would have been assigned, and refused to award damages based on a rigid application of the template when the company had no obligation to slavishly guarantee work and shifts in accordance with the template. The Board had already found that in purely wage terms the employees could not point to an ascertainable pecuniary loss, except possible loss of some overtime shifts which was not compensated for by other overtime shifts.*
>
> *[24] The Board stated the loss could not be measured with certainty and it must do its best at arriving at a fair assessment.*

> *[25] The Board found that the loss suffered by the employees was the loss of the relatively stable work schedule, fewer long weekends, and more frequent night shifts and the possible loss of some overtime shifts. These are factors which impact personal lifestyles. This kind of loss is more akin to an award for pain and suffering and as such was difficult to quantify. Given that the disruption was of relatively short duration, I do not find an award of pay for two extra eight-hours* [*sic*] *shifts was patently unreasonable. In that connection it is not my role to substitute my opinion for that of the Board. I keep in mind that the breach in this case was not tainted by bad faith, so punishment plays no part in the award.*
>
> . . .

[32] Mr. Jaworski also referred me to *Government of the Province of Alberta (Department of Recreation and Parks) v. Alberta Union of Provincial Employees* (1983), 10 L.A.C. (3d) 219, and Cheshire and Fifoot's *Law of Contract*, Ninth Edition. In the latter text, the authors note that the measure of damages is ". . . to restore as far as possible the *status quo ante* of both parties."

[33] Mr. Jaworski argued that the status quo for the employees at the time of the breach was a 12-hour/12-week shift schedule. The damages should therefore be limited to the difference between those two schedules.

[34] Mr. Jaworski requested that I remain seized in case issues arise in the implementation of the damages award.

C. Reply

[35] Ms. Bramwell submitted that it was wrong to believe that the employer would return to a 12-hour/12-week shift schedule, which would be the necessary implication of the employer's suggestion for the basis of damages.

[36] Ms. Bramwell submitted that the principle set out in Cheshire and Fifoot's *Law of Contract* was an equitable doctrine that had nothing to do with the current situation.

IV. Reasons

[37] I had left the issue of remedy open in the previous decision on the merits of these grievances in the expectation that the employer and the bargaining agent would come to a common understanding or compromise on the variable hours of work schedule. As the evidence shows, that expectation was not well founded. The parties

have not come to an understanding and the employer has established a schedule of eight-hour shifts - the default provision for hours of work set out in the collective agreement.

[38] I must now determine the damages that flow from the employer's breach of the collective agreement. The authority of an adjudicator to award damages is discretionary. The principle in assessing damages is well known: to put the aggrieved party in the same position it would have been in had there been no breach (see Brown and Beatty, *Canadian Labour Arbitration,* Third Edition, at 2:1410). This basic principle is subject to a number of qualifying factors (Casey, *Remedies in Labour and Employment and Human Rights Law* (Carswell) loose-leaf, 2006; pp.2-14):

. . .

> *1. The loss claimed must not be too remote. In accordance with the rule in Hadley v. Baxendale, damages are recoverable when they may be fairly and reasonably considered as arising naturally from the breach. The employer is responsible for all damage that it ought to have foreseen or contemplated when the agreement was made as being liable to result from the breach.*
>
> *2. There is a duty on the aggrieved person to act reasonably to mitigate their losses.*
>
> *3. It is the employee's actual loss as opposed to notional loss that is to be considered for compensation purposes. The loss must be certain and not speculative.*

. . .

[39] By its very nature, trying to predict how parties would have acted if they had known that there was a breach of the collective agreement, especially when the collective agreement requires the reaching of a mutual understanding, is a speculative exercise. The Ontario Court of Appeal has stated that in the event of difficulties in quantifying damages, the tribunal ". . . must simply do its best at arriving at a fair assessment. . . ." (*Blouin Drywall Contractors Ltd. v. C.J.A., Loc. 2486* (1975), 57 D.L.R. (3d) 199 (Ont. C.A.); leave to appeal to the S.C.C. refused November 17, 1975). The following constitutes my best efforts at quantifying damages.

[40] The bargaining agent is of the view that the damages should be calculated based on an assumption that an eight-hour shift schedule would have been imposed as of October 28, 2002. The employer's position is based on the assumption that the

previously agreed upon 12-hour/12-week shift schedule would have been maintained. Both positions are speculative, but on balance I prefer the employer's assumption, for the reasons set out below.

[41] It was clear from the evidence that neither party was satisfied with the return to the default provision of eight-hour shifts in the collective agreement. The grievors did not demand a return to an eight-hour shift schedule in their grievances, and this was not the bargaining agent's position during discussions with management on the variable-hours schedule. The employer did not impose the eight-hour shift schedule until March 2006, after lengthy discussions on a new variable-hours-of-work schedule. The employer waited over eight months before imposing the eight-hour shift schedule. I conclude that it would have been unlikely that the employer would have imposed the eight-hour shift schedule immediately had it known that imposing a new variable hours schedule was a breach of the collective agreement.

[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. 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. The parties will have to make these calculations based on the applicable collective agreement provisions. I will remain seized in the event that any disputes about the calculation of damages arise.

[43] There is an obligation on the part of the aggrieved party to mitigate any losses. In the circumstances of this case, it is difficult to assess what an appropriate mitigation of damages would be. Hindsight being 20/20, an immediate reversion to eight-hour shifts - either by the employer's action or on the bargaining agent's request - would have mitigated both the losses and the damages. However, there were ongoing discussions with a view to agreeing on a special arrangement and I accept that there were good labour relations reasons for not immediately reverting to eight-hour

shifts. An immediate reversion to eight-hour shifts would have significantly hampered efforts to discuss a new 12-hour shift arrangement. I therefore conclude that the obligation to mitigate was met, in the circumstances.

[44] With regard to the period over which to calculate the damages, I was presented with two options: from the date of the breach of the collective agreement until the imposition of the eight-hour shift schedule in March 2006, or from the date of the breach of the collective agreement until the date of the first decision (July 4, 2005). There were extensive discussions between the employer and the bargaining agent representatives after the first decision was issued and prior to the introduction of eight-hour shifts. The employer participated in these discussions in good faith, and should not be penalized for its good faith efforts to come to an agreement. As I have noted above, it was not in either parties' interest to revert to eight-hour shifts prior to exploring all possibilities for coming to a mutually acceptable resolution. Therefore, I find it appropriate to limit the duration of the award of damages from the date of the breach of the collective agreement until the date of issuance of the first decision (July 4, 2005).

[45] I will refrain from issuing any declaration of how an agreement on variable hours is to be reached, including a determination of who is governed by the schedule. I retained jurisdiction for the purpose of determining the remedy, if the parties were not able to come to an agreement. The question of who gets to vote on a special arrangement of hours of work is beyond the scope of this limited jurisdiction. Such a determination is also of no utility to the parties in the dispute before me, since the bargaining agent was not interested in putting the employer's proposal before its members in any event. In addition, in my view, such a fundamental issue as the process for the determination of hours of work is best left to collective bargaining.

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

(The Order appears on the next page)

V. Order

[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/12-week shift schedule and the 12-hour/5-week shift schedule for the period from October 28, 2002, to July 4, 2005.

[48] I will retain jurisdiction for a period of 60 days from the date of this decision for the narrow purpose of addressing any difficulties in the calculation of these damages.

February 28, 2007.

Ian R. Mackenzie,
adjudicator

PSSRB File Number	**Grievor**
166-02-32682	Frank Nitschmann
166-02-32683	Gérard L. Pineault
166-02-32684	Pierre Goulet
166-02-32685	Quirino Del Castillo
166-02-32686	David Swain
166-02-32687	Doug Chappell
166-02-32688	Eric Armstrong
166-02-32689	David Olive
166-02-32690	Gerry Sander
166-02-32691	Muzaffor Ahmed
166-02-32692	Terrance McKinnon
166-02-32693	Au Hai Nguyen