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File: 569-02-34

Citation: 2009 PSLRB 66

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)

In the matter of a policy grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Bargaining Agent: Susan Ballantyne, counsel

For the Employer: Richard Fader, counsel

Heard at Toronto, Ontario, February 5 and 6 and October 1 and 2, 2008,
and at Ottawa, Ontario, October 20 and 21, 2008, and March 3 to 5, 2009.

I. Policy grievance referred to adjudication

[1] On February 27, 2007, the Public Service Alliance of Canada ("the bargaining agent") filed a policy grievance against the Treasury Board ("the employer") on behalf of certain employees of the Canada Border Services Agency (CBSA) who work at Pearson International Airport ("Pearson"). The bargaining agent made the following allegation:

. . .

> *The employer has implemented a shift schedule that is not in compliance with the provisions of clauses 25.13, 25.14, 25.16 and 25.17 of Article 25 (Hours of Work) of the Program and Administrative Services collective agreement.*
>
> *Further, the employer has purported to establish and implement the shift schedule pursuant to clause 25.22(b), but has failed to establish that the shift schedule is required to meet the needs of the public and/or the efficient operation of the service.*

[2] As corrective action, the bargaining agent proposed that the ". . . shifts be immediately changed to conform with the provisions of clauses 25.13, 25.14, 25.16 and 25.17 of the collective agreement."

[3] The collective agreement having its interpretation and application at issue in this policy grievance applies to the Program and Administrative Services (PA) Group, and it expired on June 20, 2007 ("the collective agreement").

[4] The provisions of the collective agreement cited by the bargaining agent read as follows:

. . .

> *25.13 When, because of operational requirements, hours of work are scheduled for employees on a rotating or irregular basis, they shall be scheduled so that employees, over a period of not more than fifty-six (56) calendar days:*
>
> *(a) on a weekly basis, work an average of thirty-seven decimal five (37.5) hours and an average of five (5) days;*
>
> *(b) work seven decimal five (7.5) consecutive hours per day, exclusive of a one-half (1/2) hour meal period;*
>
> *(c) obtain an average of two (2) days of rest per week;*

> *(d) obtain at least two (2) consecutive days of rest at any one time, except when days of rest are separated by a designated paid holiday which is not worked; the consecutive days of rest may be in separate calendar weeks.*
>
> *25.14 The Employer will make every reasonable effort:*
>
> *(a) not to schedule the commencement of a shift within sixteen (16) hours of the completion of the employee's previous shift;*
>
> *and*
>
> *(b) to avoid excessive fluctuation in hours of work.*
>
> *. . .*
>
> *25.16 The Employer shall set up a master shift schedule for a fifty-six (56) day period, posted fifteen (15) days in advance, which will cover the normal requirements of the work area.*
>
> *25.17 Except as provided for in clauses 25.22 and 25.23, the standard shift schedule is:*
>
> *(a) 12 midnight to 8 a.m.; 8 a.m. to 4 p.m.; 4 p.m. to 12 midnight;*
>
> *Or, alternatively*
>
> *(b) 11 p.m. to 7 a.m.; 7 a.m. to 3 p.m.; 3 p.m. to 11 p.m.*
>
> *. . .*
>
> *25.22(b) Where shifts are to be changed so that they are different from those specified in clause 25.17, the Employer, except in cases of emergency, will consult in advance with the Alliance on such hours of work and, in such consultation, will establish that such hours are required to meet the needs of the public and/or the efficient operation of the service.*
>
> *. . .*

[5] The Public Service Labour Relations Board ("the Board") convened an adjudication hearing beginning on February 5, 2008. Shortly after the hearing began, the parties agreed to attempt to resolve the matters in dispute through mediation. The hearing adjourned, and the mediation process that ensued resulted in the conclusion of a memorandum of settlement that was subject to ratification by the bargaining agent's membership.

[6] On April 23, 2008, following the failure of its membership to ratify the settlement, the bargaining agent requested that the Board reconvene the hearing.

[7] On June 19, 2008, the employer requested that I as adjudicator issue a declaration that the policy grievance is moot.

II. Summary of the arguments on the preliminary matter — mootness

A. For the employer

[8] The employer referred to the terms of the memorandum of agreement ("the MOA") signed by the parties as a result of the mediation process that took place starting on February 5, 2008. It stated that the MOA committed the bargaining agent to put a vote to its membership for a Variable Shift Schedule Agreement ("VSSA") proposed for implementation at Pearson. In the event that the employees represented by the bargaining agent rejected the proposed VSSA, the MOA committed the employer to share certain information about the scheduling of hours of work with the bargaining agent. It then required the parties to consult under clause 25.22(b) of the collective agreement.

[9] The employer indicated that, after the bargaining agent's membership at Pearson voted to reject the VSSA, it provided information as required by the MOA, and a consultation committee was struck. The employer outlined its perspective on the resulting consultations and the reasons why it believes that the subsequent breakdown in discussions was attributable to positions taken by the union local and its representative, John King.

[10] In the employer's submission, the renewed consultations that did occur are directly relevant to the policy grievance. The employer argued as follows:

. . .

> *. . . these most recent events have overtaken the original consultation that led to the implementation of the current shift schedule. The jurisprudence is clear that clause 25.22 is a consultation clause. The collective agreement does not require the consent of the bargaining agent for the employer to create shifts under clause 25.22. At most, the adjudicator has jurisdiction to issue a declaration that the employer failed to consult and to order consultation. However, the*

> *employer is prepared to consult and it is the bargaining agent that is refusing!*
>
> *As a result, the employer requests a declaration that the policy grievance is moot and that the better course of action is for the parties to return to the MOA Committee where the employer is prepared to share relevant information and continue to consult on this issue. While it is recognized that the employer seeks a discretionary remedy it is respectfully submitted that there is no useful purpose in arguing whether there was or was not meaningful consultation leading to the existing shift schedule when the employer remains committed to consultation.*
>
> . . .
>
> [Footnotes omitted]

B. <u>For the bargaining agent</u>

[11] The bargaining agent argued that two concerns underlay its policy grievance. The first was that the employer failed to consult meaningfully before it "unilaterally implement[ed] shifts" that involved starting times different from those provided under clause 25.17 of the collective agreement. Second, the employer did not meet the conditions precedent under the collective agreement for changing starting times.

[12] The second concern, according to the bargaining agent, was independent of the first. Even had there been meaningful consultation, the second issue would still, and does still, remain live. The bargaining agent contended that, contrary to what clause 25.22(b) of the collective agreement requires, the starting times imposed by the employer ". . . are not necessary either to meet the 'needs of the public' or the 'efficient operation of the services'.

[13] For a discussion of the "doctrine of mootness," the bargaining agent referred me to the Supreme Court of Canada's decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, beginning at page 353.

C. <u>Employer's rebuttal</u>

[14] The employer argued that the bargaining agent's position erroneously assumes that clause 25.22(b) of the collective agreement requires consent rather than consultation: *Bernier et al. v. Treasury Board (Transport Canada)*, PSSRB

File No. 166-02-13603 (19840522); and *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 169-02-49 (19741113).

[15] The employer contended that the only condition precedent under the collective agreement to creating different shifts was meaningful consultation, which has occurred. As the only live issue before the parties is whether meaningful consultation had taken place, there is no purpose in continuing the hearing.

III. Reasons - mootness

[16] The Registry of the Board informed the parties on August 7, 2008 that I had denied the employer's request for a declaration that the policy grievance is moot. The Registry indicated to the parties that my reasons for denying the request would be included with the final decision. My reasons follow.

[17] The original grievance stated in the first instance that "[t]he employer has implemented a shift schedule that is not in compliance with the provisions of clauses 25.13, 25.14, 25.16 and 25.17 of article 25 (Hours of Work) of the Administrative Services [*sic*] collective agreement." At the time that I decided against the employer's request, it was unclear whether there was a live issue of non-compliance with any of those clauses independent of, or in addition to, the issues concerning clause 25.22(b). In the absence of an explicit indication that the bargaining agent had withdrawn the first allegation, the matter of interpreting clauses 25.13, 25.14, 25.16 and 25.17 potentially remained before me.

[18] When the hearing subsequently reconvened on October 1, 2008, the bargaining agent clarified that it was not, in fact, alleging that the employer independently violated any of clauses 25.13, 25.14, 25.16 and 25.17 of the collective agreement. The reference to those clauses in the original statement of the grievance was to the effect that the employer had changed the shift schedule in violation of clause 25.22(b) so that it did not conform to the norms established under clauses 25.13, 25.14, 25.16 and 25.17.

[19] On clause 25.22(b) of the collective agreement, the parties continue to take different positions about the interpretation of the requirement that the employer ". . . will establish that such hours are required to meet the needs of the public and/or the efficient operation of the service." I judged that further submissions and evidence were required from the parties before determining the correct interpretation to be

given to the other elements of clause 25.22(b). In sum, I concluded that the dispute addressed by the policy grievance was not resolved and that I needed to reconvene the hearing to consider the matter.

[20] For those reasons, I found that the policy grievance was not moot.

IV. Other preliminary matters

[21] The hearing reconvened on October 1, 2008. At the beginning of the hearing, the bargaining agent indicated its concern that the employer had not disclosed all the documents in its possession that the bargaining agent had requested during the consultation process that flowed from the MOA signed in February 2008. I received brief submissions from the parties on the state of disclosure and then delivered a verbal ruling from a prepared text. The most salient parts of the ruling were as follows:

. . .

> *I have previously* [in a pre-hearing conference] *tried to address some of the disclosure issues that arose following the failure of the tentative settlement agreement. . . . I alerted the parties to my concern about the relevance of information pertaining to events or facts post-dating the grievance. Some of the disclosure issues arise from undertakings made in the MOA. I have not been asked to enforce the MOA . . . .*
>
> *. . . What is my task here? While I am sensitive to the interest of the parties in a decision which helps them administer clause 25.22(b) in the future — that arguably being part of the purpose of a policy grievance — I must still define and conduct these proceedings within the parameters of the grievance that has been placed before me.*
>
> *That grievance was originally dated February 27, 2007. It alleged,* inter alia*, that the employer had failed in its obligation to meet the condition or conditions precedent when it took action in February 2007 under clause 25.22 to implement a new shift schedule with new starting times.*
>
> *It is my view that my task is to determine whether the employer in what it did in February 2007 complied at that time with clause 25.22(b). . . . I might in fact err in law by considering after-the-fact evidence other than for the purpose of assessing credibility or determining a remedy.*
>
> *My ruling on disclosure is that I will entertain any specific requests for disclosure provided that I am satisfied that the information sought is directly relevant to determining*

> *whether the employer complied with clause 25.22(b) during the timeframe relevant to the grievance.*
>
> . . .

[22] After the ruling, the parties confirmed that no further disclosure issues required a decision by the adjudicator.

[23] The employer submitted an objection that the scope of the policy grievance should be limited to matters relating to passenger operations at Pearson and that it should not include commercial operations. The employer argued that the original grievance did not address commercial operations and that, according to the principle established in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), the bargaining agent was not entitled to alter the fundamental nature of its grievance at adjudication to encompass commercial operations in addition to passenger operations.

[24] After receiving the testimony of two witnesses called by the employer and one witness called by the bargaining agent, the employer asked to withdraw its objection based on *Burchill*. I accepted the request.

V. Summary of the evidence on the merits

[25] The parties presented separate evidence on passenger operations and commercial operations.

[26] The admissibility of evidence became an issue on a number of occasions. I referred several times to the ruling outlined in paragraph 21 of this decision to address objections regarding the relevance and admissibility of information about what occurred after the bargaining agent filed the policy grievance.

[27] On several occasions, I also ruled that evidence was not relevant or might not reasonably be given significant weight on grounds summarized as follows: the issue under clause 25.22(b) of the collective agreement is whether the employer met the requirement to establish that additional shifts are required to meet ". . . the needs of the public and/or the efficient operation of the service." In my view, the question to be answered is not whether the employer could have met that requirement if it had done A, B or C but whether the facts show that what it actually did or said conformed to what the collective agreement requires. Thus, for example, information that the

employer had in its possession but did not actually provide to the bargaining agent in consultations may not have great probative value.

[28] I granted a motion for the exclusion of witnesses.

A. Passenger operations

[29] Dianne Farkas, the bargaining agent's first witness, has worked in customs for 28 years. Since 2003, she has been a border services officer processing passengers at Pearson. She has also served as a local steward for the bargaining agent since November 2001.

[30] Ms. Farkas recounted that there were three VSSAs in place in passenger operations before the employer imposed a new "6 and 2" schedule in February 2007; one each for the customs, immigration and food inspection "legacy groups" from former departments that came together with the creation of the CBSA. She recalled that the employer gave notice in spring 2006 that it intended to cancel the immigration and food inspection VSSAs at some point. Mr. King, on behalf of the bargaining agent, informed the employer in December 2006 that the bargaining agent was cancelling the customs legacy VSSA in passenger operations (Exhibit G-3, tab 1). Ms. Farkas testified that management acted on its previously announced intention to cancel the immigration and food inspection VSSAs once Mr. King cancelled the customs VSSA.

[31] Following Mr. King's notice cancelling the customs VSSA, Norman Sheridan, District Director, Passenger Operations, Pearson, formally requested consultation with the bargaining agent under clause 25.22(b) of the collective agreement on the need for additional standard-length shifts (Exhibit G-3, tab 4). He also sent an email to all employees indicating that the employer would be pursuing its interest in a "6 and 2" schedule, either in a new VSSA or in consultations concerning the implementation of new shifts under clause 25.22(b) (Exhibit G-3, tab 5). Mr. Sheridan described the "6 and 2" schedule of interest to the employer as follows:

. . .

> *The resultant schedule, commonly called a 6 and 2, follows the below pattern, over a period of each 56 day schedule, with all shifts being 7.5 hours in length:*
>
> - *6 days of work followed by 2 days of rest*

- *6 days of work followed by 2 days of rest*
- *6 days of work followed by 2 days of rest*
- *5 days of work followed by 3 days of rest*
- *5 days of work followed by 3 days of rest*
- *6 days of work followed by 2 days of rest*
- *6 days of work followed by 2 days of rest*

. . .

[32] Ms. Farkas testified that the employer had not previously discussed the option of a "6 and 2" schedule with the bargaining agent. She indicated that such a schedule is unpopular with employees for various reasons, including an excessive fluctuation in starting times and reduced time between shifts for recuperation. In her view, the employer should have known about employee concerns about the "6 and 2" model.

[33] In response to Mr. Sheridan's email, Ms. Farkas stated that Mr. King had, in an email, reminded Mr. Sheridan that there were different ways to meet operational needs and encouraged him to consider previous proposals from the customs legacy union-management VSSA committee for ". . . an improved 5 & 4, 4 & 4 or continental shift schedule . . ." (Exhibit G-3, tab 6). According to Ms. Farkas, Mr. Sheridan did not respond to Mr. King's request. Mr. King had also tried a number of times, but failed, to secure hard numbers from Mr. Sheridan on the number of employees needed to process the passengers arriving at customs on any given day and hour so that the union could have meaningful discussions about schedule options and staffing levels (for example, Exhibit G-3, tab 8). She recalled that Mr. Sheridan told the bargaining agent that he could not provide the data it requested because the numbers were always changing with evolving developments at Pearson. Mr. King had continued to insist on receiving detailed information. He finally agreed to attend the consultation meeting on January 12, 2007 ". . . for the purpose of obtaining all information available and as previously requested which defines operational requirements. . ." (Exhibit G-3, tab 11).

[34] Ms. Farkas recounted that Mr. Sheridan and Mr. King were the spokespersons for their respective sides at the consultation meeting. She testified that management did not spend any time exploring the alternatives proposed by Mr. King over the course of the two-and-a-half-hour session. She recalled that Mr. Sheridan stated that the previous customs "5 and 3" schedule had been inefficient for a number of years

and indicated that the employer now wanted all three business lines — the three legacy groups — on one schedule. Ms. Farkas said that Mr. Sheridan tabled a document that outlined shift pattern options at Pearson (Exhibit E-5, tab 31) as well as Primary Inspection Line Operational Totals System (PILOTS) data for three one-week periods (Exhibit E-6). She testified that no time was spent discussing either document in detail and that management offered no explanations for its proposals. There was, according to Ms. Farkas, an exchange between the parties over Mr. Sheridan's proposal to establish a new shift starting time at 5 a.m. allegedly to address "early hour arrivals" that had previously been covered using overtime. "Early hour arrivals," in Mr. Sheridan's view, would become the "way of the future." Ms. Farkas noted the bargaining agent's view that officers on the existing midnight shift could be used to process those early flights but testified that the employer said that it did not need all the people on the midnight shift.

[35] Ms. Farkas discussed the nine other shift starting times contemplated by the employer in Mr. Sheridan's options document (Exhibit E-5, tab 31). She testified that there was either no discussion at the meeting of why they were needed or no other information provided as justification. She did recall the employer saying that there was a 6 a.m. starting time under the existing "5 and 3" VSSA.

[36] A second consultation meeting took place on January 19, 2007. Ms. Farkas stated that the employer provided no further information at the second meeting about the need for new shift starting times. She recalled that there was some further discussion, either at the second meeting or on January 12, 2007, about "high risk" flights. She said that she did not understand the point that the employer was trying to make because, in her view, almost every flight has the potential of being "high risk" and that such flights could be covered by standard shifts.

[37] In cross-examination, the employer asked Ms. Farkas if she recalled that Mr. King briefly looked at the options document provided by Mr. Sheridan (Exhibit E-5, tab 31) at the meeting of January 12, 2007 and then pushed it back across the table saying "No thanks, Norm." Ms. Farkas testified that she did not recall that that had occurred. She also testified that she could not recall receiving coloured charts from the employer at the meeting (Exhibit E-5, tab 12, and Exhibit E-7) but accepted that it was possible that Mr. Sheridan gave the charts to the bargaining agent

representatives. Ms. Farkas said that she flipped through the options document at the meeting but that she did not review the package after the meeting.

[38] Referring to an analysis of the shift options that she prepared one week before the hearing based on the PILOTS data (Exhibit G-4), Ms. Farkas agreed that she could have provided such a document to the employer before it implemented the "6 and 2" schedule but that she did not. She said that she had not been involved in any discussion of the "6 and 2" model before January 12, 2007 and that she was not aware that any such discussions had occurred.

[39] The employer asked Ms. Farkas if she agreed that Mr. King was not interested in discussing the shift options presented by Mr. Sheridan in his document at the meeting of January 12, 2007. Ms. Farkas testified that the bargaining agent took the position that the employer had to justify any non-standard shift. She agreed that the bargaining agent did not attempt to review the shifts proposed by Mr. Sheridan at the meeting. She also agreed that the bargaining agent did not subsequently ask for more information or seek any clarification about the proposed shift starting times. She referred to an email sent by Mr. King to Mr. Sheridan on January 18, 2007 that conveyed the position of the Customs Excise Union Douanes Accise (CEUDA) in response to the meeting of January 12, 2007 (Exhibit E-5, tab 33) and stated that the bargaining agent did not provide the employer with anything else about a "6 and 2" schedule.

[40] Ken Kirkpatrick, the bargaining agent's second witness, works as an intelligence officer at Pearson. He has served as a bargaining agent steward since 2000 and is currently the second vice-president for the CEUDA local.

[41] Mr. Kirkpatrick attended the consultation meeting of January 12, 2007. He testified that he remembered receiving the employer's shift options document (Exhibit E-5, tab 31) at the meeting but could not specifically recall whether he received any other documents. He stated that he could not recall any discussion on the specific proposed starting time other than 6 and 7 p.m. He remembers that he challenged the need for those shifts and told the employer that there had not been shifts in passenger options that ended as late as 2 a.m. in over 10 years. He testified that he thinks that the employer replied that the operation had not been efficient because it did not use those shifts and that they were required ". . . to run a cost effective operation."

[42] Pressed further, Mr. Kirkpatrick mentioned that there was also some discussion about the need for a 5 a.m. starting time. He stated that Mr. King told management that flights at 5 a.m. had always been covered by calling in officers on overtime. Mr. Kirkpatrick could not recall how management responded to what Mr. King said. He then stated that he could not remember "one way or the other" whether there were any further discussions about the need for new start times.

[43] With respect to the second consultation meeting on January 19, 2007, Mr. Kirkpatrick testified that it focused on the employer's VSSA proposal and that no further information was given or sought about the need for new starting times.

[44] During cross-examination, Mr. Kirkpatrick stated that he did not work on the material provided by Mr. Sheridan after the January 12, 2007 meeting. He accepted that it was possible that management also provided colour charts at the meeting (Exhibit E-7). On the CEUDA reply document (Exhibit E-5, tab 33), Mr. Kirkpatrick stated that he had no role in its preparation and that he only recalled it "somewhat." He agreed that he was not familiar with any other written or verbal communication by the bargaining agent on the "6 and 2" schedule nor any request by the bargaining agent for information.

[45] The employer's first witness, Mr. Sheridan, manages the workforce of approximately 750 employees, 625 of whom are border services officers, that delivers the passenger operations program at Pearson. Mr. Sheridan testified that Pearson is the busiest airport in Canada with approximately 300 flights per day. In 2007, 9.66 million passengers arrived at Pearson on trans-border and international flights and passed through the customs, immigration and food inspection screening processes for which Mr. Sheridan is responsible.

[46] Mr. Sheridan described the efforts by the CBSA to integrate and harmonize the legacy groups that it inherited from the Canada Customs and Revenue Agency ("customs"), Citizenship and Immigration ("immigration") and the Canadian Food Inspection Agency ("food inspection") so that there is a "single face at the border." Since July 2005, all new recruits have received cross-training in each of the three legacy business lines. By 2010, the CBSA expects to have provided comparable cross-training to all "legacy employees" as well. The current common work description for the position of Border Services Officer (FB-03) (Exhibit E-12) reflects the integrated responsibilities that all officers now have.

[47] In passenger operations, Mr. Sheridan inherited several different VSSAs that continued in effect. Food inspection staff worked "4 and 4" (4 days on and 4 days off) providing coverage for 17 hours of each 24-hour period. Work required during the unscheduled seven hours was performed on an overtime basis. Immigration staff worked a "continental schedule" of "3 and 2" followed by "2 and 2." Each officer worked 28 days during the total 56-day schedule. The "continental schedule" provided 19 hours of coverage each day and, as under the food inspection VSSA, officers performed work required during the 5 unscheduled hours on overtime status. The customs legacy VSSA involved a 56-day "5 and 3" schedule with 24-hour coverage. Each officer worked a total of 35 days over the course of the 56-day schedule. Under the respective VSSAs, individual shifts averaged 10.71 hours for food inspection staff, 10.5 hours for immigration staff (9.5 hours on Saturday and Sunday) and 8.57 hours for customs officers.

[48] According to Mr. Sheridan, the concept of a common border services officer job and the introduction of cross-training, both necessary to accomplish the goal of an integrated approach to delivering services, creates the opportunity to move staff between business lines on any given day and, by doing so, to enhance efficiency and effectiveness. That approach could not work if the different schedules under the legacy group VSSAs remained in place. The immigration and food inspection VSSAs, for example, do not provide 24-hour coverage and incur overtime when services must be delivered during unscheduled hours. Mr. Sheridan also noted his understanding that employees were themselves interested in changing scheduling arrangements. Some officers working under the customs VSSA, for instance, might be attracted to features of the other VSSAs that provided more days off over the life of a schedule.

[49] Mr. Sheridan testified that management decided to address all three VSSAs, using the customs VSSA as a template, some time after the food inspection staff moved over to the CBSA, joining the customs and immigration legacy groups. Mr. Sheridan outlined a series of previous communications with the bargaining agent on schedules, some dating as far back as 1999. He concentrated, in particular, on customs VSSA consultations that began in February 2006 when he signalled to Mr. King by email management's interest in implementing standard shifts in passenger operations and in establishing the need for additional non-standard starting times under clause 25.22(b) of the collective agreement (Exhibit E-5, tab 11). Mr. King responded by emphasizing the bargaining agent's expectation that the collective

agreement obligated the employer to establish why it needed to operate outside the standard shifts provided under clause 25.17. He also repeated the bargaining agent's request for precise information depicting required staffing levels on all shifts.

[50] Mr. Sheridan recounted that he met with bargaining agent representatives, led by Mr. King, on February 15, 2006 and presented them with charts based on PILOTS data depicting passenger volumes by time of day (Exhibit E-5, tab 12). He discussed management's view that it needed more starting times to meet operational needs and to ensure adequate overlap between shifts. He presented a shift schedule option for common implementation across the three legacy groups that featured 10 starting times within a "6 and 2" model configured over a 56-day period.

[51] On February 24, 2006, the parties signed, as an interim measure, an updated customs VSSA that incorporated "cosmetic" changes to terminology but that did not alter the substance of the customs legacy VSSA (Exhibit E-5, tab 14). Management and bargaining agent representatives continued in the following months to work together on a VSSA committee to explore more substantial revisions to the VSSA. To allow the committee to do its work, management decided not to act on the notice that it gave to the bargaining agent in April 2006 that the employer intended to cancel the VSSAs in place in passenger operations.

[52] Mr. Sheridan testified that he received a proposal from the customs VSSA committee in October 2006 that he described as "encouraging" but that still had "some problems" vis-à-vis the employer's principles of cost effectiveness, harmonization and common coverage. According to Mr. Sheridan, the other important considerations were whether the proposed VSSA reflected employee preferences, was consistent with the collective agreement and could be ratified by affected employees as required by that agreement. He stated that he received a final proposal from the customs VSSA committee on November 1, 2006 (Exhibit E-5, tab 21). The proposal advocated a "5 and 4" schedule with 9.65-hour shifts. It did not include a 5 a.m. shift starting time. The absence of a 5 a.m. starting time, according to Mr. Sheridan, increased the overtime costs of the proposal and fell short of his objective to ensure regular shift coverage to process early-arriving flights. Mr. Sheridan later expressed why he could not recommend acceptance of the committee's final proposal in an email to Mary Parente, a committee member (Exhibit E-5, tab 23). He summarized his reasons by

stating that ". . . [u]nfortunately, [the proposal] . . . sacrifices coverage and entails an increase in operating costs that are [*sic*] untenable."

[53] Mr. King notified the employer on December 6, 2006 that the bargaining agent was cancelling the customs VSSA but not the immigration, food inspection or commercial operations VSSAs or an additional pre-existing VSSA that covered cashiers in passenger operations (Exhibit E-5, tab 22). In view of the failure of the customs VSSA consultation process to reach agreement, management, for its part, informed the bargaining agent that it was going ahead with cancelling the other VSSAs as originally contemplated in April 2006. All the existing schedules were deemed to end on February 11, 2007.

[54] On December 28, 2006, Mr. Sheridan invited Mr. King to consult under clause 25.22(b) of the collective agreement about the need for additional shifts and about having the new schedule take effect on February 12, 2007 (Exhibit E-5, tab 24). Mr. King's reply of January 4, 2007 questioned the possibility of meaningful consultation at Mr. Sheridan's level given Mr. Sheridan's alleged inability to ". . . to give CEUDA a hard number of FTE's . . ." required across the employer's operation in the Greater Toronto Area (GTA) (Exhibit E-5, tab 26). Mr. Sheridan testified that it was difficult to give the bargaining agent a "hard number" for shift staffing levels to quantify operational requirements, as it had requested on a number of occasions. The requirement for services was continually changing. Other factors needed to be considered such as language needs, male-female officer requirements, the time of day or hour of the week, the season, and whether special enforcement initiatives were underway. Mr. Sheridan stated that he could offer an estimate of the range of resources required but not a hard number. Mr. Sheridan added that Mr. King overstated the feasibility of transferring other resources from elsewhere in the GTA to meet specific service requirements in passenger operations at Pearson.

[55] In an email dated January 8, 2007, Mr. King formally requested that the CBSA secure the Treasury Board's interpretation of the meaning of the phrase "efficient operation of the service" in clause 25.22(b) of the collective agreement and, specifically, whether that phrase included efficiency in costs (Exhibit E-5, tab 27). Mr. Sheridan testified that he replied by telling Mr. King that a representative of CBSA management had previously provided the Treasury Board's views on the matter to the bargaining agent. He stated in his reply that he found it ". . . only reasonable that cost

would necessarily be a consideration in our discussions — together with the needs of the public" (Exhibit E-5, tab 28).

[56] An email from Mr. King dated January 11, 2007, sent one day before a scheduled consultation meeting, closed with the following statement:

> . . .
>
> *Until such a time that* [*sic*] *there is mutual agreement on the interpretation of "efficient" I fail to see any merit to consulting on additional shifts which CEUDA is adamantly opposed* [*sic*] *and which the employer intends on implementing regardless . . . .*
>
> . . .
>
> (Exhibit E-5, tab 29)

[57] In a second email later the same day, Mr. King expressed his willingness to meet with the employer on January 12, 2007 as follows:

> . . .
>
> *. . . for the purpose of obtaining all information available and as previously requested, which defines operational requirements. The number of officers required to process a given number of travelers over a given period of time* [*sic*].
>
> . . .
>
> *If the current VSSA (5 & 3) for customs legacy has satisfied "efficient operation of the service" for the past twenty years or so, similar to the legacy immigration continental shift schedule and Agriculture legacy 4 & 4 shift schedule, and if the employer maintains it has the unilateral authority to maintain such without union consent in the spirit of operational requirements and/or cost efficiency, why is the CBSA not willing to maintain status quo if the alternative is having to revert to Article 25.17?*
>
> . . .
>
> (Exhibit E-5, tab 30)

[58] The consultation meeting took place as scheduled on January 12, 2007. Mr. Sheridan recounted that he gave the bargaining agent representatives a package that included his rationale for a proposed "6 and 2" schedule with 10 starting times, a sheet that depicted existing shifts and coloured bar charts showing traffic flows by

time of day for several dates (Exhibit E-5, tab 31, and Exhibit E-7). Mr. Sheridan outlined that Mr. King, who was acting as spokesperson for the bargaining agent, asked him what the package was and then pushed it back across the table saying, "I don't need this," and, "You can't do that."

[59] Mr. Sheridan testified that he discussed the issue of a new 5 a.m. starting time. He recalled describing the emerging need for covering flights that arrived as early as 5 a.m., citing two flights, from Caracas and Port-of-Spain. He told the bargaining agent representatives that he also understood that there were several other early-arriving flights that might soon require service. He stated that adding officers to the existing midnight shift to cover the 5 a.m. flights was not an efficient option and that it would result in reduced coverage at other times of the day. He also stated that using staff on overtime to provide the service would not be a proper solution and that "structured overtime" was inappropriate. He mentioned as well that the requirement for a 5 a.m. shift was seasonal and that it involved only one terminal at Pearson. Mr. Sheridan outlined that it was Mr. King's view that management could not implement additional shifts under clause 25.22(b) of the collective agreement without the bargaining agent's consent. Mr. King also challenged whether cost could be a legitimate reason for an additional shift. He indicated that staff would not come in for an earlier shift at 5 a.m. and that the employer would incur huge extra overtime costs as a consequence.

[60] Other than some brief discussion of the proposed shifts starting at 6 p.m. and 7 p.m., Mr. Sheridan stated that he had no opportunity to go through his proposal shift-by-shift at the meeting because Mr. King was not interested in discussing the details. Mr. Sheridan stated that the bargaining agent did not ask for any data or for newer information either at the meeting or after the meeting. At its conclusion, Mr. Sheridan requested written comments from the bargaining agent on the proposed starting times because he had not received comments during the session.

[61] Mr. King forwarded the CEUDA's position on January 18, 2007 (Exhibit E-5, tab 33). The CEUDA document noted that both immigration and food inspection legacy employees had voted to maintain their existing shift schedules. It indicated that the CEUDA was ready to consult on a new customs VSSA in passenger operations that did not contain "5 & 3 provisions." However, it also stated that

". . . [w]ithout a valid VSSA agreement the employees will not accept new start times, outside of 25.17."

[62] The parties met again on January 19, 2007. Mr. Sheridan offered his view that some progress was achieved at the meeting when Mr. King accepted that harmonizing shifts across the three legacy groups was appropriate and agreed with having the same number of hours for each shift. Nonetheless, he reiterated the CEUDA's view that the employer could not implement the proposed "6 and 2" schedule. Mr. Sheridan testified that there was no discussion at the meeting of the information that he provided at the January 12, 2007 consultation session. He also indicated that Mr. King subsequently changed his position on the concept of harmonized shift lengths and stated that each legacy group should vote on the concept.

[63] Mr. Sheridan testified that management proceeded to post the new "6 and 2" schedule with 10 starting times on January 25, 2007 to take effect on February 12, 2007. He explained the events that led management do so in an email to staff on the same date (Exhibit E-5, tab 37). The employer manages the "6 and 2" schedule over a 56-day period with each employee working 40 days during that period and taking 16 days off. Employees receive at least two consecutive days of rest per week unless they change their schedules with the agreement of management.

[64] The bargaining agent cross-examined Mr. Sheridan in detail. In my view, the most relevant evidence from the cross-examination is detailed in the paragraphs that follow.

[65] Mr. Sheridan agreed that Mr. King had asked for staffing information as early as the meeting of February 15, 2006. He also identified two emails sent by Mr. King immediately before the meeting containing that request (Exhibit E-5, tabs 10 and 11). He confirmed that, at the meeting, he did not provide Mr. King with what he wanted.

[66] Mr. Sheridan did not agree that the discussion at the February 15, 2006 meeting focused more on a new VSSA than on the need for additional starting times. He stated that the issues are similar and that they cross over and that the parties addressed both subjects together at a number of meetings.

[67] Mr. Sheridan outlined that the parties signed a new customs VSSA nine days after the February 15, 2006 meeting. He confirmed that the new VSSA did not include

the 5 a.m. starting time that he had presented as necessary at the meeting nor any of the proposed 8:30 a.m., 2 p.m. or 6 p.m. starting times that he had also said were necessary.

[68] The bargaining agent asked Mr. Sheridan what the employer considered in January 2007 when it decided to proceed with its "6 and 2" schedule with additional shifts beyond the charts previously given to the bargaining agent at the February 15, 2006 meeting. Mr. Sheridan indicated that he looked at the existing customs VSSA as well as the VSSAs for the two other legacy groups, the PILOTS data, the passenger operations budgets and the collective agreement. He confirmed that the employer did not provide the bargaining agent with PILOTS data for every day and that he could not recall whether he had examined all the monthly summaries of the PILOTS data in preparing for consultations. He also confirmed that the employer did not provide monthly budget reports to the bargaining agent at the January 12, 2007 meeting, but did say that it shared budget reports with the bargaining agent in previous VSSA discussions.

[69] Mr. Sheridan testified that he also considered updates from Air Canada on scheduling changes as well as data from the Greater Toronto Airport Authority (GTAA). He did not provide copies of the information from those sources to the bargaining agent but did discuss the information at the consultation meeting.

[70] Asked about the impact of implementing only the three standard shifts provided by clause 25.17 of the collective agreement, Mr. Sheridan maintained that the lack of overlap between the shifts would lead to situations where there were wholesale staff changes at the same time with a resulting impact on the travelling public. A three-shift system would also result in significant additional overtime payments for an estimated 150 to 200 extra hours of work each day. Mr. Sheridan suggested that such a system would have a negative impact on officers and would place the employer in jeopardy of violating the prohibition in the collective agreement against scheduling excessive overtime.

[71] Mr. Sheridan referred to the 2 a.m. curfew in effect at Pearson for flight arrivals and departures. In reality, flights do arrive after 2 a.m. and can be as late as 3 a.m. or 4 a.m. The schedule, however, shows such flights as arriving at 1:59 a.m. to comply with the curfew.

[72] Management determines the number of officers needed for each shift based on passenger volume over the course of the shift. Management looks at the periods of the biggest demand for service and staffs accordingly, sometimes choosing to use overtime where it makes financial sense to do so. There may be as many as 25 to 30 officers staffing a shift at a terminal or as few as 5 to 8 officers. At the maximum end, passenger volume can range from 25 000 to 32 000 daily. Management attempts to match staff levels to the peak levels "as best as it can." Over time, the peaks and valleys in passenger volume do not change to too great a degree.

[73] Mr. Sheridan disagreed with the bargaining agent that the staffing levels roughly equalled one officer per 1 000 passengers per day per shift. He insisted that there was no strict relationship of that nature. There is no hard number for the ratio of passenger volume to the number of officers. Asked to define a range, he testified that 25 to 35 officers may be required on an afternoon shift on a busy day in August with a passenger volume at Terminal 1 of between 28 000 and 32 000 to 33 000. On a Tuesday morning in November at Terminal 3 when the volume is about 14 000, only 6 to 8 officers may be needed to conduct primary inspections.

[74] The bargaining agent referred to notes from a meeting in May 1999 that discussed "desirable," "acceptable" and "survival mode" staffing levels (Exhibit E-17). Mr. Sheridan indicated that a desirable level for a busy August day might be 30 to 35, that 25 to 32 was acceptable, and that 23 to 25 were needed for survival mode. On the quieter November day at Terminal 3, six to seven would be desirable, five to six acceptable and four were required for survival mode. Referred by the bargaining agent to notes taken by Marlene Underwood at the January 12, 2007 meeting (Exhibit E-20), Mr. Sheridan agreed that the employer did not provide such ranges to the bargaining agent. He stated that he could not recall the bargaining agent asking for ranges at the meeting and maintained that the purpose of the meeting was to discuss the need for additional shifts, not how to populate those shifts.

[75] Mr. Sheridan agreed that the relationship between the employer and the bargaining agent in January 2007 was "not at its best" and that there was a lack of trust between the parties. He accepted the proposition that Mr. King, in particular, was not content with being told a fact and that, instead, he wanted to see proof of the fact.

[76] In redirect examination, Mr. Sheridan spoke further about why he could not meet Mr. King's repeated demands for precise staffing level information. Mr. Sheridan

reiterated that clause 25.22(b) of the collective agreement does not address the staff required for a given volume of passengers. In his view, the concept of "operational requirements," as used by Mr. King, cannot be assessed just in terms of the number of officers. There is much more to it than that. For example, an arriving international flight with passengers using many different languages requires more processing time and resources than a business flight from Boston or New York.

[77] Concerning his use of the same passenger volume information in January 2007 as was discussed with the bargaining agent in February 2006, Mr. Sheridan testified that traffic patterns were consistent for the most part. There was some change in arrivals at 5 a.m. and an overall volume increase of approximately 3 percent from 2006 to 2007. Overall, however, the changes were not material. The charts that he used remained 97 percent accurate.

[78] Mr. Sheridan also outlined that, depending on the time of day, moving officers from one terminal to another may not be feasible. It can take as much as 15 to 30 minutes for staff to walk from the inspection posts in Terminal 3 to their posts in Terminal 1.

[79] In January 2007, Ms. Underwood was a labour relations officer (PE-03) for the CBSA in the GTA. Ms. Underwood took contemporaneous notes of the meetings between the parties on February 15, 2006, January 12, 2007 and January 19, 2007. She subsequently transcribed her handwritten notes for the purpose of the hearing (Exhibits E-21, E-20 and E-22, respectively).

[80] In examination-in-chief and cross-examination, Ms. Underwood answered questions about numerous references in her notes. I have decided not to summarize her detailed evidence. I draw on her testimony only very briefly in the reasons section of this decision and will elaborate any required references. In many areas, the transcribed notes are replete with contractions and rendered in such an abbreviated form as to make them rather difficult to decipher. While Ms. Underwood was sometimes able to draw on her own memory to offer a more comprehensible version of what was said, it was apparent that she also at times searched to make sense of certain of the more cryptic references. To that extent, I believe that it is appropriate to adopt a conservative approach regarding the weight that should be given to her testimony.

B. Commercial operations

[81] Mr. Kirkpatrick testified that he attended a consultation meeting on January 23, 2007 to discuss shift arrangements for commercial operations. The bargaining agent and employer spokespersons were, respectively, Mr. King and Gerry Roussel, District Director, Commercial and Postal Operations.

[82] Mr. Kirkpatrick could not recall how many new starting times Mr. Roussel presented at the meeting but indicated that the employer subsequently implemented 8 to 10 start times. Mr. Kirkpatrick recalled that there was "zero" discussion of the need for the new start times and that Mr. Roussel simply stated several times that the new shifts were going to be implemented in order to run commercial operations. He remembered Mr. King talking about how service agreements with courier companies had been covered in the past through overtime but that his comments had not changed Mr. Roussel's position.

[83] In cross-examination, Mr. Kirkpatrick stated that he was not sure how many non-standard shift times were implemented for commercial operations. He could not recall whether management provided an information package at the meeting nor whether the bargaining agent representatives challenged Mr. Roussel's proposal for a 6 a.m. starting time. He accepted that it was "possible" that officers had performed required work with the courier companies under a shift starting at 6 a.m. rather than through overtime.

[84] Elise Butterworth, the lead bargaining agent steward in commercial operations at that time, was also part of the bargaining agent's team at the January 23, 2007 consultation meeting for commercial operations, and she took notes of what transpired (Exhibit G-5).

[85] Ms. Butterworth testified that discussion of shift starting times consumed 10 minutes at most of the meeting. Mr. Roussel only discussed the 6 a.m. starting time, referring to the employer's obligations to support the FedEx operation at that hour. The bargaining agent did not accept Mr. Roussel's explanation. Mr. King stated his belief that the service contract with FedEx required that it pay a premium rate to have the service of officers outside regular hours of work. He requested a copy of the contract, but the employer did not provide a copy until after the employer imposed the new start time.

[86] Ms. Butterworth could not recall the employer presenting any other information to justify the 6 a.m. starting time. No information was presented on a 12 noon starting time.

[87] According to Ms. Butterworth, management proceeded to impose both the 6 a.m. and the 12 noon starting times, in the latter case for the Passenger Targeting Unit (PTU) on the third floor of the commercial operations building.

[88] In cross-examination, Ms. Butterworth stated that the employer provided a mock-up of the new "6 and 2" schedule at the consultation meeting but that the mock-up did not include the 12 noon shift. The employer also provided a chart showing arrival times for "high-risk" flights, but she could not recall any discussion of those flights at the meeting, only the FedEx situation. Pressed further by the employer on the point, Ms. Butterworth conceded that it was possible that Mr. Roussel talked about high-risk flights but that she could not recall.

[89] Ms. Butterworth confirmed that the bargaining agent cancelled the commercial operations VSSA after its members in that sector voted against keeping the "5 and 3" shift schedule in that VSSA. At the meeting, Mr. King told Mr. Roussel that the "5 and 3" VSSA could remain in place in the interim if the employer agreed to discuss a new VSSA with the bargaining agent. The bargaining agent suggested that a "5 and 4" or a "4 and 4" schedule had possibilities. Mr. Roussel said that the parties could discuss those options but not at that time. His focus was on the employer's "6 and 2" proposal.

[90] Mr. Roussel, now retired, worked for more than 34 years in the CBSA and its predecessor organizations. He headed commercial operations at Pearson between August 2002 and December 2007.

[91] Mr. Roussel testified that there were four VSSAs in his mandated area of responsibility before the "6 and 2" shift schedule was implemented in February 2007: one each for commercial operations, the PTU, the Passenger Analysis Unit (PAU) and postal operations. The commercial operations VSSA (Exhibit E-8, tab 1) was signed in 1996 and provided a "5 and 3" shift schedule similar to the schedule in passenger operations but with fewer shifts. The VSSA included a clause permitting either party to terminate the agreement on 30 days' notice.

[92] After the parties agreed to a new VSSA with updated language in passenger operations in March 2006, Mr. Roussel invited Mr. King to a meeting on March 28, 2006 to discuss similar changes to the commercial operations VSSA and to talk about developments in the work undertaken in the commercial district. That meeting went well, according to Mr. Roussel, and the parties agreed that discussions on VSSA language changes would continue with local bargaining agent representatives. Mr. Roussel stated that, at the meeting, Mr. King did not raise any issue about a 6 a.m. starting time for commercial operations.

[93] Mr. Roussel outlined that he discussed specific revisions to the commercial operations VSSA at a meeting with local bargaining agent representatives on April 20, 2006 and that he then provided a copy of the proposed text of the updated VSSA by email the next day (Exhibit E-8, tab 6). During the meeting, he did not sense that the representatives had any issues with what he proposed. They undertook to get back to him with comments at a later date.

[94] After some time passed without hearing back from the bargaining agent, Mr. Roussel asked one of its local representatives what was happening and was told that the proposal to revise the commercial operations VSSA was on hold pending approval by Mr. King. Mr. Roussel did not subsequently receive any indication of Mr. King's position on the updated VSSA.

[95] Mr. Roussel received an email from Mr. King dated January 15, 2007 (Exhibit E-8, tab 7) in which Mr. King wrote that ". . . CEUDA has served notice of cancellation of the current shift schedule . . . ." Mr. Roussel testified that he was surprised that the CEUDA membership voted against the existing VSSA in commercial operations because he thought that his staff were generally happy with the existing "5 and 3" shift schedule, although he recognized that it required some "fine tuning." He stated that the exchange of emails marked the first time he had received a communication from Mr. King on the subject. Mr. Roussel confirmed that there had been no prior consultation with the bargaining agent on cancelling the existing VSSA.

[96] Mr. Roussel sent an email to his staff informing them that the cancellation of the VSSA left commercial operations with no option other than to revert to using the standard shifts provided by the collective agreement (Exhibit E-8, tab 8). He informed employees that management believed that additional standard-length shifts were required to meet the needs of the public and for the efficient operation of the service

and noted that he would shortly consult with the bargaining agent about additional starting times in accordance with clause 25.22(b) of the collective agreement. He confirmed that he also wanted to synchronize shifts in commercial operations with shifts in passenger operations, given the ongoing harmonization of business lines and cross-training of staff.

[97] At the resulting consultation meeting on January 23, 2007, Mr. Roussel presented an information package (Exhibit E-8, tab 9) depicting the distribution of "high risk" flights by time of day and offered three proposed shift schedule options (two "6 and 2" proposals and one "5 and 3" proposal), each of which included a non-standard shift starting at 6 a.m. to accommodate the early morning workload. Mr. Roussel stated that the bargaining agent representatives did not want to go through the employer's proposals and instead stated that they wished to discuss alternative "5 and 4" and "5 and 3" arrangements.

[98] After a break, Mr. Roussel told the bargaining agent representatives that the employer was not interested in the "5 and 4" and "5 and 3" models but was prepared to continue discussions. He told Mr. King that having a harmonized approach in both passenger and commercial operations was an important principle and tried to justify the need to incorporate an earlier starting time into the harmonized "6 and 2" schedule. He outlined that it was not feasible or effective to increase staff on the midnight shift to cover early morning flights or to shift staff involved in early morning flights to cover courier operations starting at 7 a.m. as suggested by the bargaining agent. He indicated that the parties also discussed the use of overtime for those purposes but that he told the bargaining agent representatives that increased use of overtime was neither needed nor appropriate. He noted that the representatives did not "push back" against the prospect of a 6 a.m. starting time but instead concentrated their efforts on explaining to the employer why either a "5 and 4" or "5 and 3" arrangement was better than a "6 and 2" schedule.

[99] According to Mr. Roussel, there were no other "6 and 2" discussions between management and the bargaining agent after the meeting of January 23, 2007. The bargaining agent did not request further consultations and did not ask for more information about the implementation of a "6 and 2" schedule. Ms. Butterworth sent him proposals for a new VSSA based on either a "5 and 4" or "5 and 3" model, both of which included a 6 a.m. shift starting time. Mr. Roussel replied to the proposals

explaining why he could not accept the models preferred by the bargaining agent (Exhibit E-8, tab 12).

[100] On February 12, 2007, the new "6 and 2" schedule took effect and included a 6 a.m. starting time. It also featured a new 12 p.m. starting time for the PTU. Mr. Roussel conceded that he had not discussed the PTU at the January 23, 2007 meeting with the bargaining agent and that there should have been a consultation meeting concerning the new starting time for the PTU. He explained that the PTU had been part of passenger operations until spring 2006. He thought that the passenger operations discussions would have covered the PTU situation. He accepted that his failure to address the change implemented for the PTU was an oversight on his part.

[101] In cross-examination, Mr. Roussel indicated that the VSSA for postal operations remained in place as employees in that unit had voted to retain the existing shift arrangements. With respect to the PAU and the PTU, the bargaining agent suggested to him that the employer cancelled the VSSAs. He replied that it had been his belief that the PAU and PTA VSSAs were cancelled by the bargaining agent.

[102] Mr. Roussel confirmed that a management-bargaining agent committee had been established after the April 20, 2006 meeting to look at changed wording for the commercial operation VSSA as well as at the needs of the operation. He indicated that the committee did not meet frequently, "did not really get anywhere" and did not produce a report.

[103] In response to questions about the service agreements that commercial operations had with courier companies, Mr. Roussel explained that the companies wanted officers on site by 7 a.m. as a rule. He indicated that that there was a need for a shift starting at 6 a.m. to cover early arriving high-risk flights in commercial operations from departure points such as Sao Paulo and Buenos Aires. Officers assigned to that shift could move over to the 7 a.m. courier operation after processing the 6 a.m. flights. If the courier companies required officer coverage before 7 a.m., the companies were required to pay a premium rate for the extra service.

[104] With respect to the 12 noon starting time for the PTU, Mr. Roussel testified that he inherited the noon shift when the PTU came over to his district from passenger operations. Employees in the PTU maintained the shifts that they had brought with them.

VI. Summary of the arguments on the merits

A. For the bargaining agent

[105] Clause 25.17 of the collective agreement establishes the standard shifts for employees in the bargaining unit. The collective agreement provides only two exceptions: under clause 25.23, the parties may agree on a VSSA whose shifts differ from the standard shifts outlined in clause 25.17. Alternately, the employer may change shifts under clause 25.22(b). The latter clause is a consultation clause with a difference. The employer must not only consult with the bargaining agent in advance of changing hours of work but must also, by means of that consultation, "establish" that the changed hours ". . . are required to meet the needs of the public and/or the efficient operation of the service." Clause 25.22(b) is a mandatory procedural requirement. It imposes a condition precedent on the implementation of non-standard shifts.

[106] To meet the condition set by clause 25.22(b) of the collective agreement, the employer does not have to convince or persuade the bargaining agent or secure its agreement. However, if the negotiated words of the clause are to be given their plain meaning, the employer must demonstrate conclusively in consultations that non-standard starting times are required either to meet the needs of the public or to meet the needs of an efficient operation of the service, or both. (The bargaining agent later clarified that it does not take the position that the employer is precluded from looking at financial considerations as part of the "efficient operation of the service.")

[107] The key word to interpret in clause 25.22(b) of the collective agreement is the verb "establish." The word is strong, as shown in the following dictionary definitions:

> Merriam-Webster Online Dictionary
>
> ***establish*** *. . .* ***7.*** *to put beyond doubt; PROVE . . . .*
>
> Oxford Concise Dictionary
>
> **establish** *. . .* ***4.*** *validate; place beyond dispute . . . .*

[108] The bargaining agent submits that the employer had to put beyond doubt or place beyond dispute the need for all eight starting times under the "6 and 2" schedule that are not standard starting times identified by clause 25.17 of the collective agreement. The employer's onus applies to each starting time. The employer could

establish the need for one or more shifts but not for the others, in which case it has breached clause 25.22(b). The required analysis must proceed on a shift-by-shift basis. The key question to answer is: "What did the employer do or say about each non-standard shift during the consultations that occurred under clause 25.22(b)?"

[109] The bargaining agent maintains that the employer is not entitled to rely on any information presented at the consultation meeting in February 2006, almost a year earlier, to justify its decision in January 2007 to implement new starting times. Things said before different people at a different time with a different end in mind cannot qualify as meeting the consultation requirement under clause 25.22(b) of the collective agreement. Under clause 25.22(c), notice of consultation triggers a requirement that the parties inform each other of the names of their representatives for consultation within five days. Mr. Sheridan gave Mr. King notice to consult in December 2006. The employer may not, therefore, claim that its compliance with clause 25.22(b) can be judged based on a longer record of discussions dating back to February 2006, many months before the parties identified representatives under clause 25.22(c) to discuss the new starting times. The obligation under clause 25.22(b) to establish the need for changed hours applied in January 2007 once notice of consultations was given. It was the consequence of the employer's stated desire to make changes at that time, not earlier. As a result, the employer's compliance with the collective agreement must be evaluated during that immediate period — hence, the primary focus on what happened at the consultation meetings in January 2007 in passenger and commercial operations.

[110] In the alternative, the bargaining agent argues that nothing provided as a result of the February 2006 consultations adds anything to what the employer said in January 2007.

1. <u>Passenger operations — 5 a.m. starting time</u>

[111] According to the document tabled by the employer at the meeting of January 12, 2007, a shift starting at 5 a.m. ". . . is a new operational need with the introduction of the early hour arrivals from Air Canada" (Exhibit E-5, tab 31).

[112] The supporting information provided by the employer at the meeting (the passenger volume data in Exhibit E-5, tab 12, or Exhibit E-7 and the PILOTS data in Exhibit E-6) establishes only that there was very little going on at 5 a.m. Ms. Farkas testified, without being contradicted, that the employer told the bargaining agent

that 5 a.m. flights were the "way of the future," yet the employer provided no timeframe for the new requirement nor the information that Mr. Sheridan stated that he had received from Air Canada and the GTAA about early-arriving flights. The only passenger volume data provided were two years old — from February, July and October 2005. Two-year old data showing that only a few flights arrive at 5 a.m. on a few days of the week, together with the assertion that there will be more such flights in the future, does not put beyond doubt or place beyond dispute that a non-standard shift starting at 5 a.m. is ". . . required to meet the needs of the public and/or the efficient operation of the service. . . ."

[113] According to Mr. Sheridan, standard shifts that provide no overlap have a negative impact on the travelling public. If the ability to handle the travelling public is an important consideration under clause 25.22(b) of the collective agreement, then it is understandable that the bargaining agent and Mr. King would ask for staffing information. The employer provided the bargaining agent with limited and dated information to support its proposal but nothing about the key missing piece of the puzzle — how many officers it takes to process X number of passengers. There are a number of variables that influence staffing requirements but, as a bottom line, there has to be some method to determine staffing levels for an anticipated volume of passengers. Although asked repeatedly for staffing figures, Mr. Sheridan would not share them. He testified at the hearing that he could only ever provide a range. The ranges that he did mention in his testimony were not given to the bargaining agent at the January 12, 2007 meeting.

[114] The employer led evidence that Mr. King showed little interest in the information that the employer provided at the January 12, 2007 consultation meeting. It is not surprising that Mr. King was frustrated. To have meaningful discussions about changing hours of work, the bargaining agent needed to know how many of its members would be required or would be affected. Without that staffing information, consultations are one sided. The employer acted inappropriately by refusing Mr. King's repeated requests for staffing information — before the February 2006 meeting, after the February 2006 meeting, several times before the January 12, 2007 meeting and at the January 12, 2007 meeting.

[115] Given the employer's unwillingness to provide staffing information, the bargaining agent asks for a ruling that, unless that information is provided, it will be

very difficult for the bargaining agent to know whether the employer has established or placed beyond doubt the need for new starting times, as required by clause 25.22(b) of the collective agreement.

2. Passenger operations — 6 a.m. starting time

[116] The evidence shows that there was virtually no discussion of the 6 a.m. starting time at any meeting. Ms. Farkas' un-contradicted testimony was that the only information given about the 6 a.m. starting time by the employer at the January 12, 2007 meeting was that a shift beginning at 6 a.m. had been included in a prior VSSA. The fact that the parties were prepared in the past to live with a 6 a.m. starting time as part of a negotiated VSSA says nothing about whether such a shift was ". . . required to meets the needs of the public and/or the efficient operation of the service . . ." in January 2007. It does not put beyond doubt or place beyond dispute the requirement to implement a shift beginning at 6 a.m. If the employer had more reasons to do so, it would have stated those reasons. It did not.

3. Passenger operations — 8:30 a.m. starting time

[117] The employer's explanatory document presented at the January 12, 2007 meeting (Exhibit E-5, tab 31) states simply that an 8:30 a.m. shift is required for training. Ms. Farkas testified that the employer did not present any other information about the 8:30 a.m. starting time at the meeting. Nothing in either Mr. Sheridan's testimony or in Ms. Underwood's meeting notes indicates that the employer provided further information.

[118] A single-sentence assertion is not sufficient to put beyond doubt or place beyond dispute the need for a 8:30 a.m. starting time ". . . to meet the needs of the public and/or the efficient operation of the service. . . ." It does not establish, for example, why the standard 7 a.m. to 3 p.m. shift could not accommodate the stated training requirement.

4. Passenger operations — 1 p.m. and 2 p.m. starting times

[119] Ms. Farkas testified that the employer did not discuss the 1 p.m. or 2 p.m. starting times at the January 12, 2007 meeting. Her testimony was not challenged in the employer's evidence. The employer's explanatory document (Exhibit E-5, tab 31) states without elaboration that the shifts are needed for the efficient operation of the

service and to meet the needs of the public. The passenger volume data (Exhibit E-5, tab 12) show a variety of activity levels at that time of day, but it is not apparent why the standard 7 a.m. to 3 p.m. shift cannot handle those volumes. The PILOTS data (Exhibit E-6) do not provide information after 1 p.m. or 2 p.m. for most days.

[120] Once more, the employer did not put beyond doubt or place beyond dispute the need for either a 1 p.m. or 2 p.m. starting time ". . . to meet the needs of the public and/or the efficient operation of the service . . ."

5. <u>Passenger operations — 5 p.m. starting time</u>

[121] The employer identified the need for a non-standard shift starting at 5 p.m. to handle late-arriving flights in a fiscally responsible fashion (Exhibit E-5, tab 31). There was evidence of some discussion at the meeting of January 12, 2007 about late flights and about the overtime costs that can be incurred when holding staff on the existing standard shift past midnight. Mr. Sheridan explained that management was also concerned about downtime between 2 a.m. and 5 a.m. were it to increase staff levels on the midnight shift to deal with late-arriving flights.

[122] While that limited evidence comprises some justification for a 5 p.m. shift, it remains insufficient. For the 5 p.m. shift, in particular, it was essential that the employer provide the bargaining agent with the staffing information that the latter was seeking. How many passengers arrive after Pearson's 2 a.m. curfew and how often and how many officers would be needed to handle the late-arriving flights? If there is downtime, can employees be deployed to another terminal where there is greater need? It may be that answers to such questions would have established that standard shifts were inadequate to handle late-arriving passenger volumes, but without providing the answers, the employer did not put beyond doubt or place beyond dispute the need for a 5 p.m. starting time ". . . to meet the needs of the public and/or the efficient operation of the service . . ."

6. <u>Passenger operations — 6 p.m. and 7 p.m. starting times (seasonal)</u>

[123] Once again, Ms. Farkas' undisputed testimony proves that the employer did not discuss the seasonal 6 p.m. and 7 p.m. starting times at the January 12, 2007 meeting.

The employer's explanatory document refers only to late-arriving charter flights during the winter season as justification (Exhibit E-5, tab 31).

[124] The bargaining agent accepts that there is late-arriving charter activity in the winter. However, it does not agree that the employer complied with the requirements of clause 25.22(b) of the collective agreement regarding the proposed 6 p.m. and 7 p.m. shifts. The employer provided no rationale, for example, as to why the existing midnight shift did not meet the operational need to service late-arriving charter passengers.

7. Commercial operations

[125] The employer proposed two non-standard starting times for commercial operations, 6 a.m. and 12 noon. Mr. Roussel testified that the 6 a.m. shift was needed to provide services under the employer's contract with FedEx. He indicated that management did not want to bring staff in on an overtime basis for that requirement.

[126] Mr. Roussel admitted that there was no consultation about the proposed 12 noon starting time.

[127] At the commercial operations consultation meeting on January 23, 2007, Mr. King asked for copies of the service contracts with courier companies because he believed that they included provisions that required the courier companies to pay a premium rate for early morning coverage. Mr. King did not receive the contracts at the meeting, but they were later supplied by management. During his testimony, Mr. Roussel confirmed Mr. King's understanding that the commercial contracts required premium payments for early morning work by officers. The rationale for the 6 a.m. shift based on the issue of overtime thus did not apply.

[128] Therefore, the bargaining agent maintains that the employer did not put beyond doubt or place beyond dispute the need for a 6 a.m. starting time in commercial operations ". . . to meet the needs of the public and/or the efficient operation of the service . . ." Management could use staff, for example, from the standard 7 a.m. shift to cover the early courier business and recover the overtime costs under the terms of its contracts with the companies.

[129] After its review of each of the non-standard starting times, the bargaining agent turned to the case law as follows: In *Public Service Alliance of Canada v.*

Treasury Board, PSSRB File No. 169-02-49 (19741113), the adjudicator examined a similar clause that included the requirement that the employer ". . . establish that such shifts are required to meet the needs of the public and/or the efficient operation of the service." Focusing on the verb "establish," he wrote the following at page 41:

. . .

> *In my opinion the word "establish" represents an effort to emphasize that in a consultation pursuant to 25.08 the employer must disclose reasons, and they must be reasons of substance, neither frivolous nor capricious, relating directly and significantly to "the needs of the public and/or the efficient operation of the service." A somewhat similar effect (with an equally equivocal word) has been attempted in other agreements, which resort to the term "meaningful consultation."*

. . .

The bargaining agent submits that the adjudicator's comments support its contention that "establish" means to place beyond doubt or dispute that changes are necessary.

[130] The decision in *Power v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-17064 (19880225), examines the term "operational requirements of the service." The adjudicator found that the employer cannot back itself into a financial corner and then assert that it cannot honour a collective agreement right (in that case, the right to carry over annual leave shifts) because it cannot afford to do so. In the current case, the employer could have provided additional resources to avoid imposing non-standard starting times. It could either have moved employees from terminal to terminal to meet changing workloads or assigned more employees to the existing 11 p.m. shift to cover as many 5 a.m. flights as might occur.

[131] The bargaining agent referred me to decisions to support, among other propositions, the requirement that consultations have meaning and substance: *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, PSSRB File No. 169-02-11 (19710713); *Burrard Yarrows Corporation, Vancouver Division v. International Brotherhood of Painters, Local 138* (1981), 30 L.A.C. (2d) 331; *Eldorado Nuclear Ltd. v. Public Service Alliance of Canada* (1975), 5 L.A.C. (2d) 94; *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union* (1999), 82 L.A.C. (4th) 1; and *Delta Toronto East Hotel v. Hotel Employees Restaurant Employees Union, Local 75* (2001), 98 L.A.C. (4th) 31.

[132] The bargaining agent also tendered case law on the issue of awarding damages to remedy a breach of the collective agreement. Subsequent to the hearing, the bargaining agent notified the Board that it was not seeking corrective action in the form of damages.

[133] The bargaining agent concluded by asking me to issue a decision declaring that the employer violated clause 25.22(b) of the collective agreement. In the bargaining agent's submission, the evidence clearly reveals that the employer did not put beyond doubt or place beyond dispute the need for new starting times ". . . to meet the needs of the public and/or the efficient operation of the service . . ."

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

[134] The bargaining agent bears the burden of establishing that the employer breached the collective agreement.

[135] At issue is a consultation clause. The principal question is: "Did the employer consult on the establishment of additional shifts as required by clause 25.22(b) of the collective agreement?" The case is not a *de novo* debate about shifting the burden to the employer to establish now that each additional shift is necessary.

[136] The evidence shows that there was a long history of discussions in passenger operations between the parties about the three different VSSAs for the legacy groups. The CBSA wished to implement an integrated port strategy under which staff could work across all three business lines. Harmonizing the pre-existing VSSAs was an important objective for the future success of the strategy.

[137] Mr. Sheridan testified that Mr. King advised the employer on February 2, 2006 that the bargaining agent was cancelling the customs VSSA at passenger operations (Exhibit E-5, tab 8). According to Mr. Sheridan, there were ongoing discussions from that point about new VSSAs and additional shift starting times (Exhibit E-5, tab 9). The employer maintains that the entire context of those discussions should be considered in weighing whether the employer met its obligations under clause 25.22(b) of the collective agreement. The fact that the parties had an ongoing relationship and a well-worn road of discussions on the necessity for various shifts cannot be ignored.

[138] The employer presented a significant amount of information explaining its position on additional shifts in passenger operations at the consultation meeting of

February 15, 2006 (Exhibit E-5, tab 12). A few days later, the bargaining agent signed a customs VSSA identical to the VSSA that it cancelled, with only minor changes in nomenclature. The new VSSA contained eight shift starting times, as in the past. It clearly signified that the parties agreed at that time on the need for additional, overlapping shifts (Exhibit E-5, tab 14). Subsequently, a joint VSSA committee continued to examine scheduling issues with the objective of concluding a revised VSSA (Exhibit E-5, tab 19). On November 1, 2006, the committee forwarded a "final proposal" to Mr. Sheridan that also included non-standard shifts (Exhibit E-5, tab 21). Ultimately, Mr. Sheridan rejected the proposal because it sacrificed coverage and entailed increases in operating costs (Exhibit E-5, tab 23).

[139] The bargaining agent cancelled the customs VSSA on December 6, 2006 (Exhibit E-5, tab 22). The shift schedule in effect at that time was due to run out on February 11, 2007. Because the collective agreement required the posting of a new schedule 15 days in advance, only a short window of time remained for consultations. In the absence of a customs VSSA — the agreement that covered the largest group of border service officers — the employer indicated that all employees would revert to standard-length shifts effective February 12, 2007 in accordance with the collective agreement. With the VSSAs for all the legacy groups thus cancelled, the employer initiated consultations under clause 25.22(b) of the collective agreement to implement the new starting times for standard-length shifts that it believed were necessary and that would achieve the desired harmonization of shift arrangements in passenger operations across the three legacy groups.

[140] In commercial operations, the VSSA in place since May 1996 provided for 6:00 a.m. and 11:00 p.m. shift starting times (Exhibit E8, tab 1). In early 2006, the parties worked together to modernize the language of the VSSA. The bargaining agent did not take issue with either existing starting time. In April 2006, the parties reached a tentative agreement for a new VSSA, pending approval by Mr. King (Exhibit E-8, tab 6). While Mr. King's approval remained outstanding, the existing VSSA continued in force. On January 15, 2007, the bargaining agent cancelled the commercial operations VSSA (Exhibit E-8, tab 7). Mr. Roussel testified that a new schedule had to take effect on February 12, 2007 and had to be posted by January 15, 2007, leaving only 11 days for the consultations required under clause 25.22(b) of the collective agreement.

[141] In both passenger operations and commercial operations, the issue in this case crystallized when the employer posted a new schedule on January 25, 2007 consisting of standard-length shifts with additional starting times. The task of the adjudicator is to weigh the evidence to determine whether the employer met the requirement under clause 25.22(b) of the collective agreement to consult with the bargaining agent on the need for additional shifts in advance of posting the new schedule.

[142] Staffing levels are not an issue. Clause 25.22(b) of the collective agreement does not require that management identify the number of employees required for a given shift nor does it use the term "operational requirements," a term that the union frequently used to refer to staffing levels. Had the parties intended to include "operational requirements" as part of the consultations required by clause 25.22(b), they would have included the term in that clause, as they did, for example, in clause 25.23(d), where the operation of VSSAs is expressly linked to operational requirements.

[143] Clause 25.15 of the collective agreement provides further that staffing a schedule is the exclusive responsibility of the employer, as follows:

> ***25.15.*** *The staffing, preparation, posting and administration of shift schedules is the responsibility of the employer.*

[144] Taking clauses 25.15 and 25.22(b) of the collective agreement together, it is clear that the parties are required to consult on the need for shifts and not on how those shifts are populated. The required consultation addresses whether shifts are needed to meet the needs of the public or for the efficient operation of the service, not operational requirements or staffing levels.

[145] The uncontradicted evidence shows that management brought its case for additional shifts in passenger operations to the bargaining agent, but the bargaining agent was not interested. Instead, the bargaining agent demanded a precise formula to define staffing levels. It also argued that cost was not a factor in assessing the need for additional shifts. In both respects, the bargaining agent was "dead wrong."

[146] Contrary to the bargaining agent's allegation that Mr. Sheridan repeatedly refused to provide information about staffing levels, his testimony shows that he was willing to provide Mr. King with a range to depict staffing requirements. What he could not produce was an exact formula, on which Mr. King insisted, for legitimate reasons

that Mr. Sheridan outlined in his testimony. It is thus not open to the bargaining agent to argue that the employer breached the requirements of clause 25.22(b) of the collective agreement by failing to meet Mr. King's demand for a precise staffing formula.

[147] The bargaining agent also cannot rely on the position that costs were not a legitimate concern when the employer developed its proposal for a new shift schedule. Case law establishes that costs do form part of an evaluation of the "efficient operation of the service": *Rice v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-21070 (19910401); and *Public Service Alliance of Canada v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 169-02-568 (19970702).

[148] *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 169-02-49, cited by the bargaining agent, is the most important case on the interpretation of the collective agreement language at issue in this case. At pages 39-41, the (then) Chief Adjudicator closely examined the argument that the word "establish" connotes a requirement to prove or to place beyond dispute. He wrote as follows:

> . . .
>
> *It has been argued that the word "establish" in 25.08 means "prove." In certain contexts the equation is undoubtedly correct. Nevertheless, the verb "establish" has many uses. The Oxford Universal Dictionary, 3rd edition, gives seven different meanings, of which only one has a forensic connotation: "To place beyond dispute; to prove." Thus, in the context of a contest between two parties, where one is expected to "establish" or prove his case before a third party, who has been vested with authority to determine whether it has been proved --- in that context the word is highly appropriate.*
>
> *If Article 25.08 used the word "establish" in the forensic sense, then by whom is it to be ruled or decided that the case has been "established" or proved? It seems to me that the word is highly inappropriate and an offence against the English language unless the case is before a court or tribunal or other body with decision-making powers.*
>
> . . .
>
> *The verb "establish" must be read in association with the verb "consult," . . . . The words "consult" and "consultation" clearly signify a discussion between parties,*

> *neither of whom has arbitral or judicial authority and both of whom are by definition interested parties, dedicated to advancing or defending the aims and welfare of those they respectively represent. . . .*
>
> *. . .*
>
> *In my opinion the word "establish" represents an effort to emphasize that in a consultation pursuant to 25.08 the employer must disclose reasons, and they must be reasons of substance, neither frivolous nor capricious, relating directly and significantly to "the needs of the public and/or the efficient operation of the service." A somewhat similar effect (with an equally equivocal word) has been attempted in other agreements, which resort to the term "meaningful consultation."*
>
> *. . .*

[149] Later, at page 46, the Chief Adjudicator stated that ". . . There is no need for me to determine whether the employer's case was proved 'beyond a reasonable doubt'. The employer submits that the bargaining agent's argument that clause 25.22(b) of the collective agreement required the employer to place the need for the additional shifts "beyond dispute" resembles the "beyond a reasonable doubt" standard, a threshold for proof rejected by the Chief Adjudicator.

[150] The decision in *Public Service Alliance of Canada v. Treasury Board,* PSSRB File No. 168-02-76 (19751124), echoed those findings. The Board concurred with the view that the collective agreement requires only that the employer provide "reasons of substance" for the introduction of changed shifts. *Treasury Board v. Public Service Alliance of Canada*, PSSRB File Nos. 169-02-409 and 412 (19850613), also applied a lower threshold to evaluate the employer's compliance with a consultation requirement.

[151] The employer referred me as well to *Bernier* and to *Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File No. 169-02-458 (19871207).

[152] Given the interpretation in the case law of the requirement to "establish" the need for additional shifts, there is no doubt that the evidence shows that the employer complied with clause 25.22(b) of the collective agreement. With respect to passenger operations, emails from Mr. King before January 12, 2007 clearly showed that the bargaining agent was not interested in consulting on additional shifts (Exhibit E-5, tab 29). Mr. King repeatedly demanded that the employer provide precise

staffing-level information as a precondition to consultations (Exhibit E-5, tabs 22, 24 and 30). Mr. Sheridan reiterated that he could not do so. He nonetheless met with bargaining agent representatives on January 22, 2007 to initiate discussions based on a proposal package, accompanied by supporting information that explained the requirement for additional shifts (Exhibit E-5, tab 31). The employer tried to go through its package and the supporting information, but it was rebuffed. The bargaining agent remained uninterested. Mr. King pushed back the employer's package. He argued that management could not introduce new shifts without the bargaining agent's agreement, held to the position that costs cannot be considered as part of "efficiency" and stated that the employer should use overtime rather than introduce new shifts such as the 5 p.m. starting time.

[153] When Mr. Sheridan closed the meeting, he asked for written comments from the bargaining agent concerning the additional shifts. He testified that the bargaining agent never asked for additional information about the shifts after the meeting and before the new schedule was posted.

[154] Ms. Farkus, one of the bargaining agent representatives that attended the meeting, testified that she did not spend much time going over the employer's package and did not look at it after the meeting. She confirmed that the bargaining agent never requested more time to review the package and that it never asked for more information.

[155] The bargaining agent replied in writing on January 18, 2007 (Exhibit E-5, tab 33). It did not submit comments on the specifics of the employer's proposal. It simply took the position that ". . . [w]ithout a valid VSSA agreement the employees will not accept new start times, outside of 25.17."

[156] The parties met again on January 19, 2007 to discuss VSSA proposals. The bargaining agent did not ask any questions about the employer's package from the January 12, 2007 meeting and simply reiterated its opposition to the introduction of new shifts.

[157] The employer continued its submissions by reviewing in some detail the meeting transcripts prepared by Ms. Underwood. Those transcripts, according to the employer, confirm the employer's efforts beginning in February 2006 to establish the need for additional shifts with the bargaining agent (Exhibits E-20, E-21 and E-22).

(As stated earlier, material from the transcripts will be referenced only very briefly in the reasons section of this decision.)

[158] With respect to commercial operations, Mr. Roussel's testimony shows that the employer met with the bargaining agent on January 23, 2007 and presented a series of charts to support its view that additional shifts were required (Exhibit E-8, tab 9). Mr. Roussel explained to the union that the 6 a.m. starting time was required because of high-risk flights arriving shortly after 6 a.m. and because of the need to have officers on the FedEx line. The bargaining agent did not press back on the need for a 6 a.m. shift. It did not subsequently ask for further information.

[159] Mr. Roussel testified that the employer's failure to discuss the 12 noon starting time at the consultation meeting of January 23, 2007 was an oversight.

[160] The employer takes the position that the bargaining agent violated the terms of the existing commercial operations VSSA by not giving sufficient notice of its cancellation on January 15, 2007 of that agreement. The bargaining agent's action gave management only an extremely short time to conduct consultations before the date that it was required to post a new schedule. The employer should not now be penalized for doing the best that it could in consultations given the time constraints that it faced.

[161] In summary, the employer maintains that the grievance must be dismissed. The employer met its requirement to consult in advance in both passenger operations and commercial operations. As the case law requires, it provided substantive information to the bargaining agent to justify the need for additional shifts ". . . to meet the needs of the public and/or the efficient operation of the service . . ." It was not required to secure the bargaining agent's agreement or to put beyond doubt or place beyond dispute the merits of the proposed starting times. It complied with what clause 25.22(b) of the collective agreement required.

[162] On the issue of remedy, the employer referred to the following provision of the *Public Service Labour Relations Act* ("the *Act*"), which limits the remedial authority of an adjudicator in the case of a policy grievance:

> ***232.*** *If a policy grievance relates to a matter that was or could have been the subject of an individual grievance or*

> *a group grievance, an adjudicator's decision in respect of the policy grievance is limited to one or more of the following:*
>
> > *(*a*) declaring the correct interpretation, application or administration of a collective agreement or an arbitral award;*
> >
> > *(*b*) declaring that the collective agreement or arbitral award has been contravened; and*
> >
> > *(*c*) requiring the employer or bargaining agent, as the case may be, to interpret, apply or administer the collective agreement or arbitral award in a specified manner.*

[163] The employer offered a number of further comments in response to the bargaining agent's argument, including the following: (1) At the January 12, 2007 meeting, the employer was prepared to go through its proposal on a shift-by-shift basis. The bargaining agent did not want to do so. It cannot argue now that the employer must have established at that meeting the need for each and every additional shift to comply with clause 25.22(b) of the collective agreement. (2) The bargaining agent stresses that the data offered by the employer to establish the need for additional shifts were two years old. Mr. Sheridan testified that the same peaks and valleys in passenger volumes revealed by those data continued at the time the new shifts were introduced and that the data remained 97 percent accurate. (3) The bargaining agent urges the adjudicator to ignore earlier discussions between the same parties about the same shifts when assessing the employer's compliance with clause 25.22(b). However, that clause does not presume that the entire slate of the parties' prior relationship is wiped clean. The bargaining agent's argument in that regard is highly formalistic and is not consistent with good labour relations. (4) With respect to the premium payments by FedEx and the other courier companies, the employer's counsel stated that he thought that Mr. Roussel testified that those monies were paid to the Consolidated Revenue Fund and that they were not available to support the staffing budget. (5) Moving staff from terminal to terminal is not practical on an ongoing basis. (6) Increasing staff on the midnight shift creates more dead time and has the effect of reducing coverage at other times of the day.

C. <u>Bargaining agent's rebuttal</u>

[164] The employer infers that it was prevented from presenting information about some of the additional shifts because Mr. King did not allow it at the January 12, 2007

meeting. In reality, the employer had no other pertinent information to present beyond what it actually tabled at the meeting. The fact that Mr. King could have taken a more flexible approach is simply not relevant. The adjudicator must judge the quality of the disclosure of information by the employer, not the behaviour of both sides.

[165] Even if the bargaining agent did violate the commercial operations VSSA by failing to provide the required cancellation notice, that failure did not absolve the employer of its obligation to meet the requirements of clause 25.22(b) of the collective agreement. It certainly cannot be cited to justify the employer's own failure to consult about the 12 noon starting time proposed for commercial operations.

[166] It is not accurate to state that the bargaining agent did not request any information about additional shifts after the January 12, 2007 meeting. At the second consultation meeting in January, Mr. King once more requested, and did not receive, the staffing information that he needed to evaluate additional shifts.

[167] The absence of the term "operational requirements" from clause 25.22(b) of the collective agreement is not significant. The language of the clause has the same effect as including the concept "operational requirements," with the further reference to "the needs of the public" giving it broader meaning.

[168] On the issue of the adjudicator's remedial authority, this case comprises a true "union grievance" or "policy grievance." Section 232 of the *Act* does not apply.

VII. Reasons

[169] The preamble of the *Act* recognizes that ". . . commitment from the employer and bargaining agents to mutual respect and harmonious labour-management relations is essential to a productive and effective public service . . . ."

[170] It is not difficult to infer from the evidence adduced in this case that the real problem between the parties during the period relevant to the policy grievance had more to do with the absence of mutual respect and of a commitment to harmonious labour-management relations than with the interpretation of a specific provision of the collective agreement. Clause 25.22(b) of the collective agreement has to do with what labour relations practitioners commonly call "meaningful consultations." I left the hearing with the strong sense that the climate of labour-management relations at Pearson in 2006 and early 2007 was such as to sometimes present a serious barrier to

meaningful consultations on any subject. Where the issue between the parties involved a subject as charged as shift scheduling, the likelihood that there would be productive consultations under clause 25.22(b) in January 2007 was not great.

[171] I indicated to the parties at the end of the hearing that I was uncertain that my ruling in this matter — either to declare a breach of the collective agreement or not — would contribute at all to an improvement in their workplace relations. Whether one interpretation or another of clause 25.22(b) of the collective agreement prevails will not effect the sea change that may well be required in how the two parties work together and, in particular, what they do to resolve disputes when their interests seriously diverge. I draw some optimism from statements made by both spokespersons at the conclusion of the hearing that they believed that the situation at Pearson was recently beginning to improve. I certainly hope that is the case.

[172] However little a ruling in this case may contribute to better relations, I am nonetheless seized of the dispute and must render a decision within the parameters of the evidence and arguments that the parties placed before me. I have organized the task by posing the following questions:

1) How is the issue in this dispute properly defined?

2) What evidence am I entitled to consider in addressing the issue?

3) Does the obligation expressed in clause 25.22(b) of the collective agreement apply separately to each additional shift proposed by the employer?

4) What does the evidence reveal?

A. <u>How is the issue in this dispute properly defined?</u>

[173] Once again, clause 25.22(b) of the collective agreement reads as follows:

> *25.22(b) Where shifts are to be changed so that they are different from those specified in clause 25.17, the Employer, except in cases of emergency, will consult in advance with the Alliance on such hours of work and, in such consultation, will establish that such hours are required to meet the needs of the public and/or the efficient operation of the service.*

[174] The bargaining agent alleges that the employer violated clause 25.22(b) of the collective agreement when, in February 2007, it implemented a “6 and 2” schedule in

both passenger and commercial operations at Pearson that included non-standard starting times. The bargaining agent bears the onus of proving a breach of clause 25.22(b), on a balance of probabilities. Being clear about the location of the onus is important in this case. Given the wording of the clause in dispute, it might seem that the employer bears some responsibility to prove that it complied with what clause 25.22(b) requires. As a matter involving the interpretation of the collective agreement, however, it is the bargaining agent's burden to prove non-compliance. That remains the case even if it seems that the bargaining agent must prove a negative — that the employer did not do X or Y.

[175] Clause 25.17 of the collective agreement specifies as the contractual standard two different schedules for shift workers, each consisting of three shifts: 12 midnight to 8 a.m., 8 a.m. to 4 p.m. and 4 p.m. to 12 midnight or, alternatively, 11 p.m. to 7 a.m., 7 a.m. to 3 p.m. and 3 p.m. to 11 p.m. As required under clause 25.06(b), employees work seven-and-a-half hours during each standard shift. Clause 25.22(b) came into play in this case when the employer decided that there was a need to implement standard-length shifts beginning at times other than those specified in clause 25.17.

[176] Clause 25.22(b) of the collective agreement is a provision concerning consultation but, as urged by the bargaining agent, it is a consultation provision with a difference. Rather than simply stating a requirement that the employer consult with the bargaining agent ". . . where shifts are to be changed so that they are different from those specified in clause 25.17," it goes further to indicate what the employer must do in consultation. The employer ". . . will establish that such hours are required to meet the needs of the public and/or the efficient operation of the service."

[177] Broadly speaking, the case before me is about whether the employer engaged in meaningful consultations — again using that term in its common labour relations sense — before it implemented its new "6 and 2" schedule at Pearson in February 2007. The case departs somewhat from others where meaningful consultation is at issue inasmuch as the parties have stipulated in their collective agreement a specific standard for judging the meaningfulness of the required consultations. Should the employer not ". . . establish that such hours are required to meet the needs of the public and/or the efficient operation of the service," the consultations undertaken by the employer fall short of what the parties have agreed

must occur. The challenge for the bargaining agent is to prove that the employer did not meet the collective agreement standard.

[178] Both parties at times offered evidence at the hearing that can reasonably be characterized as either challenging or supporting the merits of the "6 and 2" schedule implemented by the employer and of its component starting times. In my view, the task in this decision is not to serve as an arbiter of the merits of any or all of the shifts proposed and then implemented by the employer. My opinion about the pros and cons of any given shift is irrelevant. Looking closely at the wording of clause 25.22(b) of the collective agreement, I believe that the test is different in nuance. What is required is an examination of the facts to determine what the employer actually said and did in consultations in the period leading up to implementation of the new schedule. That evidence might include opinions but only those opinions that the parties actually shared with each other in the meetings and communications that occurred. Looking at the body of factual evidence, the bargaining agent must prove, on a balance of probabilities, that the statements and actions of the employer during the period relevant to the grievance did not "establish" — whatever "establish" means — that the changed shifts were required to meet the needs of the public and/or the efficient operation of the service.

[179] The words used in clause 25.22(b) of the collective agreement, given their normal and ordinary meaning, and understood within the wider framework of the collective agreement, cannot be interpreted to mean that the employer must secure the agreement of the bargaining agent that the proposed non-standard shifts are required to meet the needs of the public and/or the efficient operation of the service. The bargaining agent conceded that point in argument. The parties elsewhere in the collective agreement have been quite clear and specific in the language that they have chosen to convey that a bilateral agreement must exist before a given action or situation can proceed. In the very next clause of the collective agreement, for example, the parties stipulate that a VSSA must be mutually agreed as acceptable at the local level and then be submitted to the employer and to the headquarters of the bargaining agent before implementation may proceed. The relevant sections of clause 25.23 read as follows:

> *25.23 Variable Shift Schedule Arrangements*
>
> *(a) Notwithstanding the provisions of clauses 25.06 and 25.13 to 25.22 inclusive, consultation may be held at the local level with a view to establishing shift schedules which may be different from those established in clauses 25.13 and 25.17. Such consultation will include all aspects of arrangements of shift schedules.*
>
> *(b) Once a mutually acceptable agreement is reached at the local level, the proposed variable shift schedule will be submitted at the respective Employer and Alliance headquarters levels before implementation.*
>
> . . .

[180] With the clarification offered by the bargaining agent during argument, the parties now agree that the employer is not precluded from relying on financial considerations when addressing "the efficient operation of the service," as referenced in clause 25.22(b) of the collective agreement.

[181] What exactly the parties intended when they used the verb "establish" in clause 25.22(b) of the collective agreement obviously lies at the heart of the dispute. The bargaining agent submits that I should interpret clause 25.22(b) as requiring the employer "to put beyond doubt" or "to place beyond dispute" that the proposed shifts ". . . are required to meet the needs of the public and/or the efficient operation of the service." It relies on the authority of several dictionary definitions for its interpretation of the employer's requirement to "establish" in clause 25.22(b) as well as on comments of the adjudicator in *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 169-02-49 that examined a similar collective agreement provision.

[182] With respect, I find that the threshold standard proposed by the bargaining agent is too high and perhaps draws too selectively from available dictionary definitions. Furthermore, in my view, the adjudication decision cited by the bargaining agent as supporting its perspective is more persuasive to the opposite effect.

[183] I note that the *Merriam-Webster Online Dictionary*, cited by the bargaining agent, also suggests "to put on a firm basis" as a definition of "establish." The *Oxford Concise Dictionary* definition, offered as well by the bargaining agent, refers to the verb "validate" before mentioning "place beyond dispute." Turning to other authorities, the *New Shorter Oxford English Dictionary* includes the verbs "ascertain" and "demonstrate" alongside "place beyond dispute" and "prove" in its definition of

"establish." *Webster's Third New International Dictionary* does specify "make acceptable beyond a reasonable doubt" as a definition but it also includes "to provide strong evidence for," "confirm, validate" and "to found or base securely." With respect to the term *établir* in the French text of clause 25.22(b) of the collective agreement, *Le Petit Robert* includes *fonder sur des arguments solides, sur des preuves* as well as *démontrer, montrer, prouver* among its definitions.

[184] As indicated in the longer excerpt from the decision in *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 169-02-49, cited above at paragraph 148, the adjudicator specifically disputed giving "establish" the sense of "placing beyond dispute" or "proving" in the context of consultations where there is no decision maker who can determine whether a proposition has been proven or placed beyond dispute. The Board's decision in *Public Service Alliance of Canada v. Treasury Board,* PSSRB File No. 168-02-76, concurred, stating that "establish" required that the employer provide "reasons of substance" for the introduction of changed shifts. As a further precedent, I suggest that the same interpretive approach appears to underlie the adjudicator's assessment of evidence in *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 169-02-448 (19870611).

[185] While none of the former decisions are binding on me, I accept that I should have good reason to depart significantly from how other adjudicators have interpreted collective agreement language that is equivalent to, or similar to, clause 25.22(b) of the collective agreement. I find that there are not good reasons to do so. Looking on balance at the range of definitions given to the verb "establish" in a number of dictionaries and taking into consideration the most relevant case law, the bargaining agent's position does not persuade me. Its argument has the flavour of demanding of the employer something approaching indisputable proof or proof "beyond a reasonable doubt" about the need for additional shifts. In my view, that cannot be what the parties intended the obligation "will establish" to mean. Within the context of a consultation process where one party attempts to persuade the other of the merits of a proposition with the hope — but not the requirement — of securing the other party's agreement or understanding, the more appropriate sense of "establish," in my view, revolves around notions of demonstrating, validating, justifying or providing reasons for a proposition.

[186] As indicated in the case law, the position that the employer advances in consultations under clause 25.22(b) of the collective agreement must be substantively based. It must disclose reasons that relate directly to "the needs of the public and/or the efficient operation of the service." The reasons cannot be frivolous or capricious nor, I would add, simply an expression of the employer's preferences. The reasons should be such as to lead a reasonable and disinterested observer to conclude that the employer has outlined a basis for the position that it proposes to pursue and has been prepared to discuss it. In others words, did it conduct meaningful consultations?

[187] Answering that question requires an examination of the specific facts and context of the case. There is no standard measuring tape to gauge whether the employer's conduct in a given set of consultations meets the threshold set by clause 25.22(b) of the collective agreement. Every situation where clause 25.22(b) is at issue will require a unique analysis that is sensitive to the nuances of the specific situation.

[188] In sum, I define the issue before me as follows: Did the bargaining agent prove, on a balance of probabilities, that the employer did not provide substantive reasons for its position that additional shifts were ". . . required to meet the needs of the public and/or the efficient operation of the service" before it implemented the new "6 and 2" schedule in February 2007 that included those shifts?

B. <u>What evidence am I entitled to consider in addressing the issue?</u>

[189] The bargaining agent submits that I should not take into consideration evidence adduced by the employer about events that occurred before the cancellation of the existing VSSAs led it to initiate consultations under clause 25.22(b) of the collective agreement in January 2007. The employer counter-argues that clause 25.22(b) does not wipe clean the slate of the parties' interactions before January 2007 concerning shift scheduling. According to the employer, I am entitled to, and should, take into account evidence of previous events when I consider whether the employer complied with clause 25.22(b) before implementing additional shifts in February 2007.

[190] I agree with the position of the bargaining agent, with a caveat. The consultation process envisaged by clause 25.22(b) of the collective agreement is not a continuing process. It has a beginning and an end. It begins when ". . . shifts are to be changed so

that they are different from those specified in clause 25.17." It has ended once the employer has decided whether to proceed with the changes.

[191] The employer may well have contemplated making the same or similar shift changes at Pearson on one or more previous occasions and discussed that possibility with the bargaining agent. To be sure, the evidence in this case is that Mr. Sheridan, at least, had in mind a "6 and 2" schedule with additional non-standard shifts for some time, at least as far back as early 2006. The question, however, is when did the employer's intent to change shifts become a reality requiring that it invoke clause 25.22(b) of the collective agreement to achieve its purpose? In this case, it is clear that the employer's intent to change shifts under the authority of clause 25.22(b) became a reality in passenger operations when Mr. Sheridan communicated with Mr. King by email on December 28, 2006 (Exhibit E-5, tab 24), stating as follows:

. . .

> *. . . management is formally requesting our initial meeting commence with the consultation envisioned by clause 25.22 – consultation on the need for additional,* ***standard length*** *shifts, other than those already provided for in clause 25.17. . . .*
>
> . . .
>
> [Emphasis in the original]

[192] Therefore, what I must judge, in the case of passenger operations, is the employer's compliance with clause 25.22(b) of the collective agreement during the period from its notice to the bargaining agent on December 28, 2006 until it made its decision to proceed to implement a new shift schedule pursuant to clause 25.22(b) effective February 12, 2007. In practical terms, I consider the consultation process to have ended on January 25, 2007 when Mr. Sheridan sent a memorandum to his section chiefs for distribution to employees explaining the new shift schedule (Exhibit E-5, tab 37), and the employer posted the new schedule on that date. The key event during that period was the meeting of January 12, 2007.

[193] In commercial operations, the comparable launch of the consultation process can be set as January 16, 2007, when Mr. Roussel sent an email to Mr. King (Exhibit E-8, tab 7) that included the following statement:

. . .

> *. . . management is requesting a meeting to consult on additional standard length shifts in accordance with article 25.22 (b), other than those that are already provided for under article 25.17.*
>
> *. . .*

The consultation process had ended with the common posting of a new schedule on January 25, 2007. The key event during the period was the consultation meeting of January 23, 2007.

[194] The caveat in examining both consultation processes is that parties do not come to consultations without a history. To the extent that evidence from the period before December 28, 2006 or January 16, 2007, respectively, may help to clarify or to provide necessary context for something that either party did or said during the resulting consultations under clause 25.22(b) of the collective agreement, I believe that it is open to me to use that evidence as an aid to understanding. The employer may not, however, claim that facts associated with prior actions or events is substantial evidence in and of itself of compliance with the collective agreement in consultation processes that did not occur until after December 28, 2006 and January 16, 2007, respectively.

C. Does the obligation expressed in clause 25.22(b) of the collective agreement apply separately to each additional shift proposed by the employer?

[195] The bargaining agent takes the position that I must examine the employer's compliance with clause 25.22(b) of the collective agreement in the case of each non-standard shift proposed as part of the new "6 and 2" shift schedule. In effect, it argues that I must find that the employer violated the collective agreement even if it only failed to establish that one of the proposed non-standard starting times was ". . . required to meet the needs of the public and/or the efficient operation of the service."

[196] While the employer did not specifically address the bargaining agent's position in that regard, it does seem apparent from its submissions that it views the requirements of clause 25.22(b) of the collective agreement as applying more holistically. Taking all the evidence together, did the employer consult as it was obliged to by the collective agreement?

[197] On balance, I find that the language crafted by the parties for clause 25.22(b) of the collective agreement tends to support the bargaining agent's perspective. The

provision states that the employer will consult "on such hours of work" and that it will establish that "such hours are required." While the provision does not use wording such as "each of the proposed changes" or "all such hours," neither does it specify that the subject of consultation is the "shift schedule" or "such hours of work taken together," or that the employer must establish that "the shift schedule is required" or that "such hours of work taken together are required." The latter types of formulation would have more clearly conveyed the sense that the clause 25.22(b) requirement applies to a shift schedule as a whole or to "such hours" considered as a whole. Without words to that effect, the more conventional construction of the wording is that the plural phrase "such hours" should be interpreted to mean "each of such hours" — which, in the context, means each changed shift or each additional starting time (vis-à-vis the standard stipulated in clause 25.17).

[198] If it were not the case that the parties intended that the consultation requirement apply to each changed shift or to each additional starting time, what decision-making rule would apply were the evidence to suggest that, for example, the employer established that four additional starting times were needed ". . . .to meet the needs of the public and/or the efficient operation of the service", but that it failed to do so for three other additional starting times? The dilemma for the decision maker seems obvious.

[199] Therefore, I rule that the consultation requirement in clause 25.22(b) of the collective agreement applied to each non-standard shift in passenger and commercial operations. I must determine whether the bargaining agent has proven that the employer did not comply with the requirements of clause 25.22(b) in the case of each non-standard shift in passenger and commercial operations.

[200] The analysis of the evidence should consider all the facts about what occurred, including those facts that might tend to mitigate an alleged breach of the collective agreement by the employer regarding one or more of the non-standard shifts. For example, I do not entirely accept the bargaining agent's rebuttal submission to the effect that I ". . . must judge the quality of the disclosure of information by the employer, not the behaviour on both sides." Both parties in this case shared an underlying obligation to participate in consultations with some minimum measure of good faith and cooperation. If it were the case that the actions of the bargaining agent had the effect of frustrating the employer's effort to establish the need for each

additional shift, then those actions are not irrelevant in assessing the employer's compliance with clause 25.22(b) of the collective agreement on a shift-by-shift basis.

D. <u>What does the evidence reveal?</u>

1. <u>Passenger operations</u>

[201] The bargaining agent's case is based largely on the assertion that what Mr. Sheridan said at the meeting of January 12, 2007 and what he provided to the bargaining agent as supporting information at that meeting failed to meet the requirements of clause 25.22(b) of the collective agreement in respect of each of the non-standard starting times that were eventually imposed. The case that the employer breached clause 25.22(b) stands on several interrelated themes that apply to one or more of the non-standard shifts. I express those themes as follows: (1) that the reason stated by the employer in its rationale document (Exhibit E-5, tab 31) was insufficient or inadequately supported by the information that it provided; (2) that there was no information provided to support the need for certain shifts; (3) that the employer did not discuss certain shifts; (4) that the information provided by the employer was dated or incomplete (Exhibit E-5, tab 31, or Exhibits E-6 and E-7); (5) that the employer could not expect the bargaining agent to assess the additional shifts without providing it with the information about staffing levels that it repeatedly requested but never received; and (6) that the employer did not demonstrate why requirements could not be met in other ways, such as through the use of overtime or by deploying officers from terminal to terminal according to passenger volumes.

[202] Weighing the evidence, I am not persuaded that the bargaining agent has made a case, on the balance of probabilities, for allegations (4), (5) and (6) above.

[203] Mr. Sheridan's evidence was that the information provided about flight arrivals at Pearson (Exhibit E-5, tab 12, or Exhibit E-7), while depicting the situation for three different months in 2005, essentially remained relevant and useful. He testified that the peaks and valleys in passenger volume depicted in the charts had not substantially changed in the intervening months and that the data were still 97 percent accurate. The bargaining agent did not offer concrete evidence to dispute Mr. Sheridan's evidence. The bargaining agent did advance a valid observation that the PILOTS data for 2006 provided by the employer (Exhibit E-6) did not indicate the number of passengers that passed through primary inspection at certain hours of the day on

certain dates. That observation, however, does not necessarily invalidate the data that were made available in the PILOTS compilation, data that illustrated passenger volume trends arguably relevant to some of the additional shifts.

[204] The bargaining agent's interest in securing information about staffing levels is understandable. Shifts are not simply abstract concepts. A shift is more than a period of time within which employees perform work. In concrete terms, it involves the assignment of employees to perform duties at certain times or for certain periods. How shifts are populated is clearly part of the puzzle of understanding the implications of implementing non-standard arrangements. Mr. Sheridan's evidence on the difficulty of providing the bargaining agent with a precise formula for staffing struck me as quite credible. On the other hand, there were elements in his testimony that indicated that he took a rather hard position about providing staffing information given his view that clause 25.22(b) of the collective agreement did not oblige him to do so. That posture, in my view, did not contribute to effective consultations.

[205] That said, I cannot accede to the bargaining agent's request that I issue a ruling to the effect that it will be very difficult for the bargaining agent to know whether the employer has established or placed beyond doubt the need for new starting times, as required by clause 25.22(b) of the collective agreement, if the employer does not provide information about staffing levels. While I might agree with that proposition, it is not a matter for a ruling *per se*. The employer was entitled to choose to share with the bargaining agent whatever information the employer wished to "establish" that the additional shifts were ". . . required to meet the needs of the public and/or the efficient operation of the service." Clause 25.22(b) does not prescribe how the employer establishes the need or with what type of information. It is thus not for me to say definitively that a specific type or form of information must be shared with the bargaining agent so that the employer may comply with the collective agreement. Instead, the role in adjudication is to make a finding based on what the employer actually did and what it actually provided.

[206] I note also that the parties have recognized the employer's exclusive right to staff shifts under clause 25.15 of the collective agreement as follows:

> ***25.15.*** *The staffing, preparation, posting and administration of shift schedules is the responsibility of the employer.*

[207] I take a somewhat similar view about the bargaining agent's position concerning the employer's alleged failure to consider other options for meeting requirements, such as through the use of overtime or by deploying officers from terminal to terminal according to passenger volumes. An effective consultation process would certainly have encouraged an open and candid discussion of alternatives. There is some indirect evidence that Mr. Sheridan may have had strong convictions in advance about the new "6 and 2" schedule and its additional starting times that were unlikely to be changed by what the bargaining agent had to say in consultations. On the other hand, the evidence also shows that Mr. Sheridan did try to indicate why, from the employer's perspective, the options preferred by the bargaining agent did not satisfy the needs of the public and of an efficient service. On balance, the bargaining agent did not convince me why or how the employer's consideration of other options — or failure to consider other options — proves a breach of the requirement to establish that the non-standard shifts ". . . meet the needs of the public and/or the efficient operation of the service." I accept that the logic of establishing that additional shifts are needed to ". . . meet the needs of the public and/or the efficient operation of the service" also suggests some requirement to address why the existing standard shifts and other normal arrangements do not satisfy those factors. Looking at the evidence as a whole, however, I find no proof that the employer did not turn its mind to the possibility that operating within the existing standard shifts and arrangements could continue to work. Right or wrong, it reached a conclusion that it could not and then proceeded to identify what changes were required. When the bargaining agent questioned the employer along the way about alternate measures, the evidence of how the employer responded suggests that it was neither so obdurate nor so unwilling to substantiate its position as to place in serious question its good faith or render the consultations that did occur a sham.

[208] I return then to themes (1), (2) and (3) raised in the bargaining agent's argument and outlined in paragraph 201 of this decision. My findings are as follows: Themes (1) and (2) question the sufficiency of the substantiating information provided by the employer or assert that none was provided. Looking at the documentary information that the employer shared with the bargaining agent in the form of flight arrival lists (Exhibit E-5, tab 12, or Exhibit E-7) and PILOTS passenger volume data (Exhibit E-6), there is certainly a legitimate question as to how that information is helpful in understanding the need for the 8:30 a.m. training shift and the seasonal 6 p.m. and

7 p.m. starting times proposed by the employer. As to the other five proposed non-standard starting times, reasonable persons could well debate the usefulness of the information, its completeness or how it is to be best interpreted. The important issue, however, is whether the tendering of such information, taken on its face, can be viewed as providing a reason(s) of substance under clause 25.22(b) of the collective agreement to establish that the shifts were required to ". . . meet the needs of the public and/or the efficient operation of the service?"

[209] On balance, I judge that the bargaining agent has not proven that the documents do not offer a reason of substance relevant to the 5 a.m., 6 a.m. and 5 p.m. shifts. Those documents, on their face, contain evidence that Pearson has early arriving and late arriving flights that a reasonable person could view as justification for the additional shifts proposed by the employer. I am somewhat less certain how the documents address the proposed 1 p.m., and 2 p.m. shifts but it remains the case that a reasonable person could conclude that information about the distribution of flights arrivals during the day, taken on its face, provides a substantive basis for establishing the need for those shifts. The bargaining agent has not convinced me to the contrary.

[210] On themes (1) and (2) argued by the bargaining agent, therefore, I cannot find that there is proof, on balance, that the employer failed to offer a reason of substance in the form of documentary information pertinent to establishing the need for the 5 a.m., 6 a.m., 1 p.m., 2 p.m. and 5 p.m. shifts.

[211] The 8:30 a.m. training shift and the seasonal 6 p.m. and 7 p.m. starting times remain. The evidence given by Ms. Farkas, largely uncontradicted, shows that there was little or no discussion by the employer at the meeting of January 12, 2007 or at any other time that could be characterized as meeting the requirement to offer a reason of substance for those three shifts (theme 3). Reviewing the documents as well as the record of the January 12, 2007 meeting (Exhibit E-20), I agree. I also concur with the bargaining agent that there is no evidence that the employer provided a reason of substance for the proposed 8:30 a.m. training shift beyond the one-sentence statement in its rationale document (Exhibit E-5, tab 31).

[212] There is, therefore, grounds for finding that the employer breached clause 25.22(b) of the collective agreement by failing to provide a reason of substance why the 8:30 a.m. training shift and the 6 p.m. and 7 p.m. seasonal shifts were

required to ". . . meet the needs of the public and/or the efficient operation of the service."

[213] Nonetheless, I find that the breach is perhaps more technical than one that constitutes a serious violation of the collective agreement. There is some countervailing evidence that suggests that the situation would have been little different had the employer met the requirement under clause 25.22(b) of the collective agreement to advance reasons of substance for the 8:30 a.m. training shift and the 6 p.m. and 7 p.m. seasonal shifts. As argued by the employer, it does appear that the bargaining agent, and particularly Mr. King, was not really interested in discussing the employer's proposal on a shift-by-shift basis and made it clear to the employer that it did not want to participate in a substantive conversation under clause 25.22(b) that did not conform to its own expectations of the information that it felt the employer must provide, its own view that financial considerations were not relevant and its assertion that bargaining agent agreement was required.

[214] In the lead up to consultations, Mr. King sent a number of messages to the employer with the following typical content:

> January 1, 2007 email (Exhibit E-5, tab 25)
>
> . . .
>
> *It must be clearly understood that via consultation, the employer will provide/define operational requirements, which identifies the number of BSO's at any given time to process a given amount of travelers over a given period of time.*
>
> *. . . . additional cost incurred by the employer that results from reverting back to either set of three standard shifts with a 6 & 2 schedule will not be accepted as justification for the arbitrary implementation of additional variable shifts by the employer. Any such attempt will be viewed as a blatant attempt to violate our members contractual rights and an issue that will be raised through the PSAC as a matter of bad faith bargaining.*
>
> . . .
>
> January 8, 2007 email (Exhibit E-5, tab 27)
>
> . . .

> *. . . the employer* ***cannot arbitrarily add language*** *to the Agreement or change the intent of Article 25.22 as meaning* ***cost efficient****, for accepting such an interpretation would make Article 25.17 redundant.*
>
> [Emphasis in the original]
>
> . . .
>
> January 11, 2007 email (Exhibit E-5, tab 29)
>
> . . .
>
> *Until such a time that there is mutual agreement on the interpretation of "efficient" I fail to see any merit to consulting on additional shifts which CEUDA is adamantly opposed* [*sic*] *and which the employer intends on implementing regardless . . . .*
>
> . . .
>
> January 11, 2007 email (Exhibit E-5, tab 30)
>
> . . .
>
> *I am willing to meet tomorrow at 13:30 for the purpose of obtaining all information available and as previously requested which defines operational requirements. The number of officers required to process a given number of travelers over a given period of time* [*sic*].
>
> . . .
>
> *. . . . By the tone of recent e-mails received from the employer, this proposed consultation in good faith you offer is viewed by CEUDA as nothing more than a meeting in which the employer intends to brief the union on how it intends to manage, already assuming our permission is not required.*
>
> . . .

[215] At the consultation meeting of January 12, 2007, Mr. King's first statement was to request information about "operational requirements" (Exhibit E-20). He returned to the same theme repeatedly as well as to the position that cost was not a legitimate factor for the employer to consider under clause 25.22(b) of the collective agreement. On balance, the evidence of the meeting indicates that Mr. King did not wish to entertain a discussion of the employer's proposal on a shift-by-shift basis and that he held to the strong view that the needs of the public and of the operation could be met

by the standard shifts using overtime and other arrangements, if the parties could not agree to a new VSSA.

[216] Evidence such as the foregoing perhaps places the employer's non-compliance with the requirements of clause 25.22(b) of the collective agreement in fuller context. Reasonable observers might well understand that the employer did not take further steps to explain or provide more information to substantiate the need for additional shifts at the meeting of January 12, 2007, or at other times during the consultation period, because it faced a party across the consultation table that was unlikely to be swayed. It is not uncommon in a conflicted labour-management situation that parties take a more conservative view of what they are required to do to conform with a requirement in the collective agreement or, conversely, a more aggressive posture about what the other party must do. Cooperation is strained, and forthcoming gestures are infrequent or absent entirely. Normally, both parties share responsibility for the less-than-ideal climate that results. To be sure, none of that relieves the employer in this case of the requirement that it comply with clause 25.22(b). I suggest that, nonetheless, it mitigates to some extent the seriousness of the employer's shortcomings in meeting what clause 25.22(b) required it to establish regarding some of the proposed additional shifts.

2. <u>Commercial operations</u>

[217] The employer proposed two additional shifts for commercial operations, starting at 6 a.m. and 12 noon.

[218] As admitted, the employer overlooked discussing the 12 noon shift in consultations with the bargaining agent.

[219] The employer argued that there should not be a penalty for that oversight given the failure of the bargaining agent to give it earlier notice of cancellation of the VSSA in accordance with the terms of the VSSA. I understand the concern of the employer for the resulting abbreviated window of opportunity to meet its obligations under clause 25.22(b) of the collective agreement. The fact remains that it offered no reason of substance to establish the need for a 12 noon shift in commercial operations before it proceeded to implement that shift. It thus violated the collective agreement.

[220] Balancing the evidence given by Mr. Kirkpatrick and Ms. Butterworth against the testimony of Mr. Roussel, I find that the bargaining agent did not prove that the employer failed to provide reasons of substance for the additional 6 a.m. starting time in commercial operations. At the consultation meeting of January 23, 2007, I am satisfied that Mr. Roussel discussed both the requirement to support the CBSA's service contracts with one or more courier companies as well the issue of "high-risk" flights. I am also satisfied that he tendered documentary information pertinent to the latter issue (Exhibit E-8, tab 9). Once more, the question is not whether a reasonable person would agree with the information provided to the bargaining agent by the employer. The issue is whether Mr. Roussel's comments and the documentary information that he provided comprise evidence that the employer offered reasons of substance for the 6 a.m. shift as required by the collective agreement. On balance, I find in the affirmative. (Whether monies paid by the courier companies to the CBSA were available to compensate it for providing required services using standard shifts does not alter the analysis. The evidence about the CBSA's income from service contracts was incomplete, at best, and insufficient in and of itself to prove a breach of the collective agreement.)

[221] The bargaining agent has not proven, on balance, that the employer breached clause 25.22(b) of the collective agreement regarding the 6 a.m. shift in commercial operations.

VIII. Summary of findings

[222] The burden of proof in this case rested with the bargaining agent to prove that the employer failed to provide reasons of substance for its position that additional non-standard shifts/starting times were required to ". . . meet the needs of the public and/or the efficient operation of the service" as required by clause 25.22(b) of the collective agreement.

[223] I have found that the bargaining agent did, on balance, make the case that the employer breached the collective agreement regarding the 8:30 a.m. training shift and the 6 p.m. and 7 p.m. seasonal shifts in passenger operations as well as the 12 noon shift in commercial operations.

[224] To some extent at least, the contextual evidence mitigates the seriousness of the employer's violation of the collective agreement in the case of passenger operations.

[225] The corrective action sought by the bargaining agent at the hearing was limited to a declaration that the employer breached clause 25.22(b) of the collective agreement. Declaring a breach of the collective agreement is within the remedial authority of an adjudicator whether or not the policy grievance is of a nature covered by section 232 of the *Act* (see paragraph 162). I thus need not make a finding here to confirm that the facts of this case bring it within the ambit of section 232.

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

(The Order appears on the next page)

IX. Order

[227] The employer's application to declare the policy grievance moot is denied.

[228] The policy grievance is allowed in part.

[229] I declare that the employer breached clause 25.22(b) of the collective agreement regarding three shift starting times in passenger operations and one shift starting time in commercial operations.

May 29, 2009.

Dan Butler,
adjudicator