Date: 20230503

File: 569-02-41614

Citation: 2023 FPSLREB 46

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

FEDERAL GOVERNMENT DOCKYARD TRADES AND LABOUR COUNCIL (EAST)

Bargaining Agent

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Federal Government Dockyard Trades and Labour Council (East) v. Treasury Board (Department of National Defence)

In the matter of a policy grievance referred to adjudication

Before: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Ronald Pink, counsel

For the Employer: Larissa Volinets Schieven, counsel

Decided on the basis of written submissions, filed June 30, July 22, October 7 and 28, and December 23, 2022, and January 13 and 23, 2023.

REASONS FOR DECISION

I. Introduction

[1] This policy grievance was referred to the Federal Public Sector Labour Relations and Employment Board ("the Board") for adjudication on February 27, 2020. (Note that in this decision, "the Board" refers to the current Board and any of its predecessors.)

[2] The grievance is about the proper interpretation of the term "the applicable overtime rate".

[3] This term appears in the provisions that govern travel by bargaining unit members in the collective agreement between the Federal Government Dockyard Trades and Labour Council (East) ("the bargaining agent") and the Treasury Board ("the employer") for the Ship Repair Group (East) that expired on December 31, 2022 ("the collective agreement").

[4] The bargaining unit consists of tradespersons engaged in the repair and maintenance of ocean-going vessels owned and operated by the Department of National Defence. Among other tasks, the bargaining unit members maintain and repair vessels that are stationed or deployed in distant locations, which requires them to travel away from their normal place of work.

[5] The bargaining agent's position is that the term "the applicable overtime rate" in clause 17.03 of the collective agreement must mean the overtime rates set out in clause 15.10, which is the overtime compensation provision. It claims that "the applicable overtime rate" can mean double or triple time, depending on the total number of hours worked or travelled in a continuous period.

[6] The employer's position is that "the applicable overtime rate" for time spent travelling cannot mean the overtime rates defined in clause 15.10 since time spent travelling is not time "worked". It relies on the definition of "overtime", which means time **worked** by an employee outside the employee's regularly scheduled hours. It argues that since travel is neither work nor overtime, the collective agreement is silent on the rate applicable to travel outside an employee's regularly scheduled hours. Thus, the employer can exercise its management rights to determine the rate of overtime to be paid for time spent travelling outside regularly scheduled hours.

[7] The parties agreed to proceed by written submissions.

[8] In its submissions, the bargaining agent provided two examples of scenarios that illustrated how the collective agreement should be applied. In its response to these examples, the employer identified numerous areas of disagreement. These included, but were not limited to, the proper interpretation to be given to the term "the applicable overtime rate". In its reply submissions, the bargaining agent did not respond to any of the other areas of disagreement raised by the employer.

[9] The grievance form, dated April 26, 2018, and presented to the employer on June 29, 2018, details the grievance as follows: "The employer has failed to pay us as per Article 17.03 / Applicable rate". It states that the breach dates from April 28, 2011. As corrective action, the grievance requests: "Pay us as per the intent of "Applicable rate" in Article 17.03".

[10] This decision addresses only the issue that the bargaining agent identified as the basis for its policy grievance, which is the proper interpretation of the term "the applicable overtime rate" in clause 17.03 of the collective agreement.

[11] For the reasons provided in this decision, I am of the opinion that "the applicable overtime rate" as it relates to time spent travelling refers to the rates set out in clause 15.10.

II. The relevant clauses of the collective agreement

[12] Clause 2.01 of the collective agreement defines the following relevant terms:

…	[…]
f. ***"daily rate of pay"***	*f.* ***« taux de rémunération journalier »***
means an employee's hourly rate of pay multiplied by eight (8);	*désigne le taux de rémunération horaire de l'employé multiplié par huit (8);*
g. ***"day"***	*g.* ***« journée »***
means a twenty-four (24) hour period:	*désigne une période de vingt-quatre (24) heures :*
i. commencing at 2345 hours and ending at 2345 hours the following	*i. commençant à 23 h 45 une journée et se terminant à 23 h 45 le*

day for employees subject to paragraph 15.02(a),	*lendemain dans le cas des employés assujettis à l'alinéa 15.02a);*
ii. commencing at 0000 hours and ending at 2400 hours for employees subject to paragraph 15.02(b),	*ii. commençant à 00 h 00 et se terminant à 24 h 00 dans le cas des employés assujettis à l'alinéa 15.02b);*
and	*et*
iii. commencing at 0015 hours and ending at 0015 hours the following day for employees subject to paragraph 15.02(c);	*iii. commençant à 00 h 15 une journée et se terminant à 00 h 15 le lendemain dans le cas des employés assujettis à l'alinéa 15.02c);*
h. ***"double time"***	*h.* ***« tarif double »***
means two (2) times the straight-time rate;	*désigne le taux des heures normales multiplié par deux (2);*
…	[…]
o. ***"overtime"***	*o.* ***« travail supplémentaire »***
means time worked by an employee outside of the employee's regularly scheduled hours;	*désigne tout travail exécuté en dehors de l'horaire de travail d'un employé;*
…	[…]
r. ***"straight-time rate"***	*r.* ***« taux des heures normales »***
means the hourly rate of pay;	*désigne le taux de rémunération horaire;*
s. ***"time and one half"***	*s.* ***« tarif et demi »***
means one and one half (1 1/2) times the straight-time rate;	*désigne le taux des heures normales multiplié par une fois et demie (1 1/2);*
t. ***"triple time"***	*t.* ***« tarif triple »***
means three (3) times the straight-time rate;	*désigne le taux des heures normales multiplié par trois (3);*
…	[…]

[13] Article 5 of the collective agreement describes managerial responsibilities as follows:

5.01 *The Council recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage its operation in all respects and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this agreement shall remain the exclusive rights and responsibilities of the Employer. Such rights will not be exercised in a manner inconsistent with the expressed provisions of this agreement.*	***5.01*** *Le Conseil reconnaît et admet que l'employeur a et doit continuer d'avoir exclusivement le droit et la responsabilité de diriger ses opérations dans tous leurs aspects et il est explicitement entendu que les droits et responsabilités de ce genre qui ne sont ni précisés ni modifiés d'une façon particulière par la présente convention appartiennent en exclusivité à l'employeur. L'exercice de tels droits ne doit pas être incompatible avec les dispositions explicites de la présente convention.*
…	[…]

[14] Clause 15.02 of the collective agreement provides for the following hours of work:

15.02 *The hours of work shall be scheduled as follows:*	***15.02*** *La durée du travail est fixée comme suit :*
a. the first (night) shift shall be from 2345 hours to 0815 hours with an unpaid meal period from 0345 hours to 0415 hours;	*a. le premier poste (nuit) s'étend de 23 h 45 à 8 h 15 avec une pause repas non payée de 3 h 45 à 4 h 15;*
b. the second (day) shift shall be from 0745 hours to 1615 hours with an unpaid meal period from 1200 hours to 1230 hours;	*b. le deuxième poste (jour) s'étend de 7 h 45 à 16 h 15 avec une pause repas non payée de 12 h à 12 h 30;*
c. the third (evening) shift shall be from 1545 hours to 0015 hours with an unpaid meal period from 1945 hours to 2015 hours.	*c. le troisième poste (soir) s'étend de 15 h 45 à 0 h 15 avec une pause repas non payée de 19 h 45 à 20 h 15.*

[15] Clause 15.10 of the collective agreement sets out these overtime compensation rates:

15.10 Overtime compensation	***15.10 Rémunération des heures supplémentaires***
Subject to clause 15.14, overtime shall be compensated at the following rates:	*Sous réserve du paragraphe 15.14, les heures supplémentaires*

	effectuées sont rémunérées aux taux suivants :
a. double (2) time for all hours worked in excess of eight (8) hours in a continuous period of work or in excess of eight (8) hours in a day to a maximum of sixteen (16) hours in a continuous period of work; and for all hours worked on a day of rest to a maximum of sixteen (16) hours;	*a. deux (2) fois le taux normal pour chaque heure effectuée en sus de huit (8) heures au cours d'une période de travail ininterrompue ou en sus de huit (8) heures au cours de la même journée jusqu'à un maximum de seize (16) heures au cours d'une période de travail ininterrompue, ainsi que pour toutes les heures effectuées un jour de repos jusqu'à concurrence de seize (16) heures;*
b. triple (3) time for each hour worked in excess of sixteen (16) hours in a continuous period of work or in excess of sixteen (16) hours in any twenty-four (24) hour period, and for all hours worked by an employee who is recalled to work before the expiration of the nine (9) hour period referred to in clause 15.11.	*b. trois (3) fois le taux normal pour chaque heure effectuée en sus de seize (16) heures au cours d'une période de travail ininterrompue ou en sus de seize (16) heures au cours d'une période de vingt-quatre (24) heures, ainsi que pour toutes les heures effectuées par un employé qui est rappelé au travail avant l'expiration de la période de neuf (9)heures dont il est question au paragraphe 15.11.*

[16] Clause 17.03 of the collective agreement sets out as follows the compensation structure for employees who are required to travel for work:

17.03 *Where an employee is required by the Employer to travel to a point away from the employee's normal place of work, the employee shall be compensated as follows:*	***17.03*** *Lorsqu'un employé est tenu par l'employeur de se rendre à un endroit qui est éloigné de son lieu de travail normal, il est rémunéré dans les conditions suivantes :*
a. on any day on which the employee travels but does not work, at the applicable straight-time or overtime rate for the hours travelled, but the total amount shall not exceed fifteen (15) hours' straight time;	*a. Durant n'importe quel jour pendant lequel il voyage mais ne travaille pas, il est rémunéré au taux des heures normales ou au taux des heures supplémentaires applicables durant ses heures de trajet, mais le montant total ne doit pas dépasser quinze (15) heures normales.*
b. on a normal workday in which the employee travels and works:	*b. Durant une journée de travail normale où il voyage et travaille :*

i. during the employee's regular scheduled hours of work at the straight-time rate not exceeding eight (8) hours' pay,	*i. pour les heures de travail normales prévues à son horaire, il est rémunéré au taux normal et ne touche pas plus de huit (8) heures de rémunération;*
ii. at the applicable overtime rate for all time worked outside the employee's regular scheduled hours of work,	*ii. au taux des heures supplémentaires pour toute heure effectuée en dehors des heures de travail normales prévues à son horaire;*
iii. at the applicable overtime rate for all travel outside the employee's regular scheduled hours of work to a maximum of fifteen (15) hours' pay at straight time in any twenty-four (24) hour period;	*iii. au taux des heures supplémentaires applicable pour tout trajet effectué en dehors des heures de travail normales prévues à son horaire jusqu'à un maximum de quinze (15) heures de rémunération calculées au taux normal dans toute période de vingt-quatre (24) heures.*
c. on a rest day on which the employee travels and works, at the applicable overtime rate:	*c. Durant un jour de repos où il voyage et travaille, au taux des heures supplémentaires :*
i. for travel time, in an amount not exceeding fifteen (15) hours' straight-time pay,	*i. pour tout temps de trajet et pour un montant ne devant pas excéder quinze (15) heures de rémunération au taux normal,*
and	*et*
ii. for all time worked;	*ii. pour toute heure travaillée.*
d. notwithstanding the limitations stated in paragraphs 17.03(a), (b) and (c), where an employee travels on duty, but does not work, for more than four (4) hours between 2200 hours and 0600 hours, and no sleeping accommodation is provided, the employee shall be compensated at the applicable overtime rate for a maximum of fifteen (15) hours' straight-time pay.	*d. Nonobstant les restrictions énoncées aux alinéas a), b) et c) du paragraphe 17.03, l'employé qui voyage en service commandé, mais ne travaille pas, durant plus de quatre (4) heures au cours de la période allant de 22 heures à 6 heures, sans que le coucher lui soit fourni, est rémunéré au taux des heures supplémentaires applicable, jusqu'à concurrence de quinze (15) heures de rémunération au taux normal.*

III. The facts

[17] The parties provided a brief agreed statement of facts, which stated that the disagreement as to the correct interpretation of clause 17.03 had been ongoing and that several individual grievances had been filed on the issue.

[18] In their respective submissions, both parties took the position that the language is unambiguous and that as such, it was not necessary to lead any extrinsic evidence or evidence of past practice. The parties did, however, make the following factual claims in their respective submissions.

[19] The bargaining agent stated that it understood the employer's position to be that "the applicable overtime rate" under clause 17.03 can never be triple time and must always be interpreted as "double time". It stated that the employer is ignoring the plain language of the collective agreement, is continuing to ignore "applicable overtime rate", and is ignoring the clear language of clause 15.10(b) — "triple time".

[20] The bargaining agent provided a few examples in its submissions and stated that its understanding was that the employer would only pay double time when the bargaining agent believed that triple time should be paid.

[21] The employer stated that in the collective agreement that expired on December 31, 1999, those parts of clause 17.03 that state "15 hours" read "8 hours" and that in the one entered into in 2000, those parts of clause 17.03 that state "15 hours" read "12 hours".

[22] The employer stated that since the collective agreement is silent on the overtime rate applicable to travel outside an employee's regularly scheduled hours, it can exercise its management rights to determine that double time will be paid for time spent travelling outside regularly scheduled hours.

[23] The employer added that it pays employees for regular workdays that fall between travel days on a journey that requires an overnight trip, even if they are not required to work or travel on those days. It stated that although the collective agreement provides that there is no guarantee of minimum or maximum hours of work, it exercises its management rights to provide this benefit to employees, about which the bargaining agent has never complained.

[24] In its reply submissions, the bargaining agent stated that the old payroll system included a code for payment at triple time for travel that was used in the situations that it described in its submissions; however, the code for triple time for travel ceased with the introduction of the Phoenix pay system.

[25] Neither party commented on the other party's factual claims.

[26] Based on the above, it appears that currently, the employer is compensating employees at only the double-time rate for time spent travelling. However, it is unclear how long it has been doing so and whether it has been a consistent practice since April 28, 2011, which is the date on which the bargaining agent claimed that the breach began.

[27] The Board invited the parties to comment on whether the collective agreement language could reasonably be viewed as susceptible to more than one meaning and, if so, the impact of the lack of evidence of a past practice. The Board referred the parties to *Public Service Alliance of Canada v. Parks Canada Agency*, 2013 PSLRB 16, for comment.

[28] The bargaining agent responded that the only two facts that the Board requires to render its decision are that the bargaining unit members are required to travel and that they are currently being compensated based on the employer's interpretation of clause 17.03, precisely the term "the applicable overtime rate". The employer agreed.

[29] Both parties took the position that the language of article 17 is clear and is not susceptible to more than one meaning. They both stated that in the absence of any ambiguity, there is no basis upon which to refer to extrinsic evidence, such as evidence of bargaining history or past practice.

IV. Summary of the submissions

A. For the bargaining agent

[30] The bargaining agent's position was that the term "the applicable overtime rate" in clause 17.03 must mean whatever overtime applies per clause 15.10. That is, "the applicable overtime rate" can mean double or triple time, depending on the total number of hours worked in the period at issue.

[31] The bargaining agent stated that it did not dispute that clause 17.03 provides for maximum amounts of pay for travel equivalent to 15 hours of straight-time pay during a 24-hour period.

[32] The bargaining agent referred to *Beese v. Treasury Board (Canadian Grain Commission)*, 2012 PSLRB 99, as providing the prevailing approach to collective agreement interpretation, which was summarized at paragraphs 23 and 24 as follows:

> *23 … Unlike the rule in* Halsbury's Laws of England *which relies heavily on "the intention of the parties",* ***the modern principles of interpretation focus on the words, in their grammatical and ordinary sense, within the entire scheme of the agreement, its object and the intention of the parties****. The modern principles of interpretation are a method of interpretation rather than a rule and encompass many well-recognized interpretation conventions.* ***The modern principle directs interpreters to consider the entire context of the agreement, read its words in their entire context and in their grammatical and ordinary meaning, harmoniously with the scheme and object of the agreement and the intention of the parties****.*
>
> *24* ***To understand the entire context of the collective agreement, one provision cannot be understood without understanding its connection to the whole agreement. What is written in one provision is often qualified or modified elsewhere****.…*
>
> [Emphasis added]

[33] The bargaining agent argued that the adjudicator should focus on the collective agreement's plain language, read in context. A single provision cannot be read in isolation — the agreement should be read as a whole.

[34] The bargaining agent argued that article 17, on travelling, cannot be properly understood without referring to clause 15.10, on overtime compensation. Clause 17.03 provides for when it might be necessary to determine "the applicable overtime rate". In particular, clause 17.03(b) provides for overtime pay, at the applicable rate, when an employee is required to travel or work on a workday, outside their regular hours of work. Clause 17.03(c) provides for overtime pay, at the applicable rate, when an employee is required to travel or work on a rest day.

[35] The bargaining agent argued that the applicable overtime rate in any given circumstance is found in clause 15.10. Employees are entitled to double time for hours

worked or spent travelling in excess of 8 hours in a continuous period and to triple time for that in excess of 16 hours in a continuous period.

[36] The bargaining agent argued that clause 15.10 provides **how** to determine "the applicable overtime rate" for the purposes of clause 17.03.

[37] It argued that time spent travelling is work for the purposes of clause 15.10 as otherwise, there would be no reason to refer to "the applicable overtime rate" for travel time in clause 17.03.

[38] In support of this argument, the bargaining agent relied on *Hutchison v. Treasury Board (Department of National Defence)*, 2015 PSLREB 32. It argued that travel is time spent captured by the employer's operation, and as such, it should be considered as work for the purpose of overtime.

B. For the employer

[39] The employer argued that the overtime rates set out in clause 15.10 apply specifically — and exclusively — to time worked and not to time travelled, which is governed only by clause 17.03. Clause 2.01(o) confirms that the definition of "overtime" means time worked.

[40] Thus, according to the employer, although "the applicable overtime rate" as it pertains to time worked can mean double or triple time, depending on the total number of hours worked, per clause 15.10, it does not follow that overtime in accordance with clause 15.10 is payable for time spent travelling.

[41] The employer took no issue with the basic principles of interpretation stated by the bargaining agent. However, it added that more recently, the Board summarized those principles in *Professional Institute of the Public Service of Canada v. Treasury Board*, 2019 FPSLREB 108 at para. 56 ("*PIPSC*"), as follows:

> *[56] … The parties' intention is to be found in the express written provisions of the collective agreement… words are to be given their ordinary meaning, provisions within an agreement or contract are to be read as a whole, effect must be given to every word, and specific provisions are to take precedence over general principles.*

[42] The employer further relied on *Cruceru v. Treasury Board (Department of Justice)*, 2021 FPSLREB 30 at para. 84, in which the Board summarized the following canons of interpretation to guide its analysis:

> *[84] … (1) the parties are assumed to have meant what they said, (2) the meaning and intent of the collective agreement is to be sought in its express provisions, (3) the words of a collective agreement must be given their grammatical and ordinary sense, (4) they must read in their entire context, in harmony with the scheme of the collective agreement, and (5) when the same words reappear, they are to be given the same interpretation.*

[43] The employer relied on Brown and Beatty, *Canadian Labour Arbitration*, 5th ed. ("*Brown and Beatty*"), at paragraph 4:20, and argued that when faced with a choice between two linguistically permissible interpretations, an adjudicator may be guided by "… the purpose of the particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies."

[44] It further argued that recently, in *Nowlan v. Canada (Attorney General)*, 2022 FCA 83 at para. 46, the Federal Court of Appeal reiterated that when a collective agreement's language is clear, it must be applied, even if the result may seem unfair.

[45] Finally, the employer relied on *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112, in which the Board stated this at paragraph 50:

> *50 I start with the trite but true observation that my authority as an adjudicator is limited to and by the express terms and conditions of the collective agreement. I can only interpret and apply the collective agreement. I cannot modify terms or conditions that are clear. Nor can I make new ones. The fact that a particular provision may seem unfair is not a reason for me to ignore it if the provision is otherwise clear ….*

[46] The employer argued that the bargaining agent's interpretation would result in the Board amending the collective agreement to provide a greater benefit than what the parties bargained. It stated that that is prohibited by s. 229 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "*FPSLRA*"), which prevents the Board from rendering a decision that has "… the effect of requiring the amendment of a collective agreement or an arbitral award."

[47] The employer argued that clear language is required to establish a monetary benefit. It stated that the bargaining agent had the burden of proof of demonstrating on a balance of probabilities that the employer was violating the collective agreement and that the employer's interpretation should be preferred (see *Arsenault v. Parks Canada Agency*, 2008 PSLRB 17 at paras. 22 and 29; *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 56 at para. 37; *PIPSC*, at para. 12; and *Cruceru*, at para. 75).

[48] The employer argued that it was incumbent on the bargaining agent to prove clearly and unequivocally that the requested monetary benefit — triple time for time spent travelling — was the intended result of the parties' bargaining. The parties' intention is discerned from the clear language of the collective agreement and not by reference, implication, or wishful thinking.

[49] In support of its arguments, the employer referred to *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55 at paras. 26 to 28; *Denboer v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 58 at para. 53; *Bedard v. Treasury Board (Canadian Grain Commission)*, 2019 FPSLREB 76 at para. 38; and *Forbes v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 110 at para. 67.

[50] The employer argued that when the collective agreement is silent, management rights prevail. It argued that this point of law is settled and that when exercising its duties, the employer may do anything not expressly or implicitly prohibited by statute or the collective agreement. It stated that the collective agreement neither mandates the outcome the bargaining agent demands, nor prohibits the employer from paying double time for time spent travelling outside regular work hours.

[51] In support of its position that management rights prevail when the collective agreement is silent, it referred to *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board (Department of National Deference)*, 2020 FPSLREB 117 at paras. 3 and 7 (upheld in 2022 FCA 69; "*IBEW*"), in which the Board stated that silence did not indicate an ambiguity but rather that "… the parties did not address the issue …" and concluded as follows:

…

> *[47] Given the collective agreement's silence on the issue and the fact that the employer's interpretation is not inconsistent with the collective agreement's express language or* Ducey*, the employer can exercise its residual management rights to determine the overtime compensation rate after a mandatory 10-hour rest period reset.*
>
> …

[52] The employer argued that similarly to *IBEW*, since the parties did not set out the rates applicable to travel time outside an employee's regularly scheduled hours, there is no contractual obligation to pay triple time for time travelled as distinct from time worked. As such, the employer is within its rights to determine the compensation rate that applies during such a period. The employer also relied on *Public Service Alliance of Canada v. Treasury Board (Department of Veterans Affairs)*, 2013 PSLRB 165 at para. 83 (upheld in 2014 FC 1152).

[53] The employer argued that the collective agreement also defines "time and one half" in addition to the straight-time rate, double time, and triple time, such that the employer could have determined that travel time outside an employee's regular hours of work would be compensated at time and one half. Instead, it applies the double-time rate, up to the maximums set out in clause 17.03.

[54] The employer argued that article 17 is a complete code with respect to travelling. It is the only provision in the collective agreement that deals with compensating an employee who is required by the employer to travel to a point away from their normal workplace. It argued that while clause 17.03 addresses compensation for time spent travelling, clause 15.10 addresses overtime, which clause 2.01(o) defines as "means time worked by an employee outside of the employee's regularly scheduled hours".

[55] The employer argued that in addition to establishing different compensation standards for overtime work and travelling time, the parties gave the terms "work" and "travel" mutually exclusive meanings. The collective agreement clearly distinguishes between "work" and "travel", such that clause 15.10, which addresses compensation for time worked, does not apply to time spent travelling under clause 17.03.

[56] When the parties defined "overtime" in clauses 2.01(o) and 15.10 of the collective agreement in terms of time or hours "worked", they clearly intended that time spent travelling would not be considered overtime.

[57] Clause 15.10 sets out the applicable overtime rate for time worked in excess of regularly scheduled hours. The double- and triple-time overtime rates in clause 15.10 are premised on "hours worked" to the exclusion of hours travelled. Clause 15.10(a) provides that double time is payable for "… all hours worked in excess of eight (8) hours in a continuous period of work …", and clause 15.10(b) specifies that triple time is payable for "… each hour worked in excess of sixteen (16) hours in a continuous period of work …".

[58] Clause 15.10 does not state — or imply — that double or triple time is payable for hours worked or travelling in excess of 8 or 16 in a continuous period; nor does overtime include time spent travelling outside an employee's regularly scheduled hours, contrary to what the bargaining agent claims.

[59] According to the employer, clearly, the parties agreed that work and travel are two distinct concepts and that compensation for time spent travelling would be dealt with under article 17, not article 15. To hold otherwise, the employer submitted, would be to ignore the parties' obvious intention, as evinced in clauses 2.01(o), 15.10, and 17.03.

[60] The employer argued that each provision of clause 17.03 confirms the parties' agreement that work and travel are not the same. The maximums set out in clause 17.03 reinforce the distinction between work and travel. By placing a cap on the amount paid for time spent travelling, the parties envisaged — and reduced to writing — a distinction between time spent travelling, which is capped, and time spent working, for which employees are paid in full.

[61] The employer argued that since travel is neither work nor overtime, the collective agreement is silent on the overtime rate applicable to travel outside an employee's regularly scheduled hours. Thus, the employer can exercise its management rights to determine that double time will be paid for time spent travelling outside regularly scheduled hours, as described above.

[62] The employer argued that the Board has repeatedly concluded that work and travel are distinct concepts when a collective agreement contained similar or identical provisions to those in the collective agreement at issue in this case. It relied on *Langis v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-02-6450 (19800121); *Hunt v. Canada (Treasury Board - Fisheries & Oceans)*, 1986 CarswellNat 1358; *Lichter v. Canada (Treasury Board - Health & Welfare)*, 1987 CarswellNat 1576; *Adams v. Treasury Board (Transport Canada)*, 1988 CarswellNat 1681 (upheld in 1989 CarswellNat 749 (FCA)); *Widdifield v. Canada (Treasury Board)*, 1991 CarswellNat 1525; *Farrow v. Treasury Board (Department of National Defence)*, 2014 PSLRB 43; and *Canada (Attorney General) v. Paton*, 1990 CanLII 7953 (FCA).

[63] The employer argued that in the face of the dichotomy in the collective agreement between travel and work and the cited case law, the bargaining agent's interpretation cannot prevail. Had the parties intended that travel be treated like work, they would have said so. The distinction they instead established prevents paying overtime for time spent travelling under clause 15.10, which is explicitly reserved for time "worked".

[64] Since specific provisions take precedence over general principles, article 15 (hours of work and overtime) is supplanted by the specific provisions of clause 17.03 as they pertain to compensation for time spent travelling.

[65] The employer argued that the captive-time concept does not apply. It argued that the specific language in clauses 2.01(o), 15.10, and 17.03 stipulates that travel is distinct from work, thus excluding the captive-time concept.

[66] The employer argued that the bargaining agent's reliance on *Hutchison* is misplaced. That case addressed whether an employee on a sea trial (governed by an entirely different section of the collective agreement) was considered "at work" and therefore entitled to be compensated (including at the overtime rate) while sleeping one hour after the vessel had crossed the harbour limits.

[67] It argued that the bargaining agent in *Hutchison* submitted that clause 17.03 did not apply in the circumstances, since the grievor had not been "travelling" in the sense contemplated in that clause. As such, the Board did not consider whether clause 17.03 applied.

[68] It agued that as the Board in *Hutchison* pointed out, express limits on when or how "non-work" time is to be compensated must be found in the collective agreement itself.

[69] Finally, in *Hutchison*, the Board pointed out that the Federal Court of Appeal's decision in *Paton* somewhat criticized an adjudicator's failure to pay close heed to a collective agreement clause that dealt with travel time. The employer argued that the conclusion in *Hutchison* does not apply to time spent travelling under clause 17.03, which clearly establishes limits on pay for time travelled and ousts the captive-time concept.

C. Issue agreed to by the parties

[70] Both parties agreed that a "day", for the purposes of clauses 17.03(a) and (c), means the workdays defined in clause 2.01(g), so if an employee is entitled to travel pay under clauses 17.03(a) or (c), the 15-hour maximum in those provisions is calculated based on the employee's regular workday, which begins at 11:45 p.m., 12:00 a.m., or 12:15 a.m.

V. Reasons for decision

[71] The issue to be determined is the proper interpretation of the term "the applicable overtime rate" in clause 17.03.

[72] The bargaining agent claims that the applicable overtime rates are in clause 15.10. It further claims that time spent travelling should be considered as work, based on it being captive time within the employer's operation. Each argument will be addressed in turn.

A. Did the parties intend that the term "the applicable overtime rate" mean the rates set out in clause 15.10 of the collective agreement for time spent travelling?

[73] Both parties claim that the collective agreement language is unambiguous as it relates to the interpretation of this term. Despite that, they provided two competing, yet plausible, interpretations of it.

[74] The bargaining agent claims that the rates referred to in the term "the applicable overtime rate" are those contained in clause 15.10, which notably are the only overtime rates defined in the collective agreement. On the other hand, the

employer claims that "the applicable overtime rate" cannot mean the rates contained in clause 15.10 since overtime as set out in the collective agreement is reserved for time worked. Thus, it claims that the collective agreement is silent on the meaning of "the applicable overtime rate" and that therefore, it is free to set the rate based on its reserved management rights, pursuant to clause 5.01.

[75] At first glance, both appear to be linguistically permissible interpretations.

[76] As the employer indicated, when faced with a choice between two linguistically permissible interpretations, *Brown and Beatty* (at paragraph 4:20) states that an adjudicator may be guided by (1) the purpose of the particular provision, (2) the reasonableness of each possible interpretation, (3) the administrative feasibility, and (4) whether one of the possible interpretations would give rise to anomalies.

[77] Summarizing first my review of each of these elements, clearly the purpose of clause 17.03 and of the term "the applicable overtime rate" is to enable the parties to determine the compensation to provide to an employee when travelling. As that term dictates compensation, it is an important one. This leads to the point on reasonableness. Is it reasonable to conclude that the parties intended that the term "the applicable overtime rate", which is used multiples times in the collective agreement to refer to the rates in clause 15.10, would, for the purposes of clause 17.03, be left solely for the employer to determine? As I will explain, I do not believe so.

[78] In terms of administrative feasibility, it is my opinion that both interpretations can be applied. However, the employer's interpretation would give rise to additional anomalies as will also be explained in this section.

[79] Turning now to the more detailed analysis of the four elements cited above from *Brown and Beatty*, starting with a review of the construct of clause 17.03.

[80] The introductory phrase in clause 17.03 provides that when an employee is required to travel, "… the employee shall be compensated as follows …". This reinforces that it was the parties' intention to describe in the subsequent provisions of clause 17.03 how an employee would be paid when required to travel. Clause 17.03 has one purpose — to establish how to pay employees for their time spent travelling.

[81] The subsequent clauses contained in clause 17.03 reveal essentially two structures for payment. The first is for days on which an employee only travels, and the second is for days on which an employee both travels and works.

[82] Clause 17.03(a) addresses days on which an employee only travels but does not work. In these instances, the employee is to be compensated "… at the applicable straight-time or overtime rate for the hours travelled …". It reads as follows:

17.03 *Where an employee is required by the Employer to travel to a point away from the employee's normal place of work, the employee shall be compensated as follows:*	***17.03*** *Lorsqu'un employé est tenu par l'employeur de se rendre à un endroit qui est éloigné de son lieu de travail normal, il est rémunéré dans les conditions suivantes :*
a. on any day on which the employee travels but does not work, at the applicable straight- time or overtime rate for the hours travelled, but the total amount shall not exceed fifteen (15) hours' straight time;	*a. Durant n'importe quel jour pendant lequel il voyage mais ne travaille pas, il est rémunéré au taux des heures normales ou au taux des heures supplémentaires applicables durant ses heures de trajet, mais le montant total ne doit pas dépasser quinze (15) heures normales.*
…	[…]

[83] In its submissions, the bargaining agent referred to an example of the application of clause 17.03(a). It was based on an employee whose regular shift is 07:45 to 16:15, such that their hours of work are set out at clause 15.02(b), and, in accordance with clause 2.01(g), their "day" is the 24-hour period beginning at 00:00. In the example, an employee travels but does not work, from 07:45 to 01:15 on the following day.

[84] Both parties analysed this example and agreed that compensation would be capped at 15 hours of straight-time pay on Day 1 of travel as a result of the cap in clause 17.03(a). They differed with respect to compensation on Day 2. The bargaining agent's position was that it should be paid at triple time since the employee had been travelling for more than 16 continuous hours.

[85] In its submissions, the employer explained its rationale and stated that the employee would be paid 8 hours at straight time for travel from 07:45 to 16:15, which was the employee's regular shift. The employee would then be paid at double time from 16:15 until midnight, which represents a period of 7.75 hours (7.75 x 2 = 15.5

hours (double time)) but would be paid for only 15 hours on Day 1 as a result of the 15-hour straight-time maximum per day in clause 17.03(a). The employee would then be paid at double time for the time spent travelling from midnight to 01:15, which represents a period of 1.25 hours (1.25 x 2 = 2.5 hours (double time)). Therefore, the employee would be entitled to 2.5 hours of pay for this period since it falls on Day 2.

[86] The employer summarized its rationale in the following table, which provides an easier understanding:

Period	**Applicable rate**	**Hours**	**Clause**	**Actual hours paid**
07:45 to 16:15	Straight time – travel (no double time for eating period, since travelling, not working)	8	17.03(a)	15
16:15 to 00:00	Double time – travel	15.5 (7.75 x 2)	17.03(a)	
00:00 to 01:15	Double time – travel	2.5 (1.25 x 2)	17.03(a)	2.5
Total pay for travel: 17.5 hours = 15 hours (17.03(a)) on the first day + 2.5 hours (17.03(a)) on the second day				

[87] The employer's response to this example is interesting, for a couple of reasons.

[88] First, it is notable that the language of clause 17.03(a) refers only to "the applicable straight-time or overtime rate". It makes no mention of the **quantity** of hours to be compensated at the straight-time rate versus at the overtime rate. However, the quantity of hours is set out in clause 15.10, which establishes that

overtime shall be compensated for all hours worked in excess of eight hours in a continuous period of work.

[89] Based on the employer's rationale, did the parties also intend to leave it to the employer's discretion to determine the quantity of hours that should be paid at the straight-time versus the overtime rate? In other words, does the employer pay overtime after 8 hours only because it chooses and not because the collective agreement requires it to?

[90] A second interesting point about the employer's response to the example is that it states that the employee is to be paid at double time for the hours worked on Day 2. Again, there is no mention in clause 17.03(a) that an employee is entitled to continue to be paid at the overtime rate on Day 2 if the period is continuous. But once again, this detail is found in clause 15.10.

[91] And so again, based on the employer's rationale, did the parties also intend to leave it to the employer's discretion to determine whether overtime should continue to be paid on a second day of travel if the travel is continuous?

[92] These are rather glaring examples of anomalies that would arise were I to agree with the employer's interpretation.

[93] I note that the employer provided what it referred to as another example of when it exercises its management rights to provide a benefit to employees despite the collective agreement being silent. The example cited was when it pays employees for regular workdays that fall between travel days on a journey that requires an overnight trip, even if they are not required to work or travel on such days, despite that the collective agreement provides no guarantee of minimum or maximum hours of work. However, the employer did not refer to the two examples just noted with respect to the application of clause 17.03(a).

[94] I can only infer from this that the employer's statement that an employee is entitled to be paid at the double-time rate after 8 hours of travel and that the overtime rate continues on Day 2 of the continuous period of travel is precisely because it knows to follow the rates set out in clause 15.10. Indeed, clause 17.03 simply cannot be applied without referring to the terms specified in clause 15.10.

[95] Moving to clauses 17.03(b) and (c), they deal with when an employee both works and travels and provide that the employee shall be paid "at the applicable overtime rate" for all hours worked or travelled, with the only distinction being that compensation for time travelled is capped (i.e., at the equivalent of 15 straight-time hours). They read as follows:

…	[…]
b. on a normal workday in which the employee travels and works:	*b. Durant une journée de travail normale où il voyage et travaille :*
i. during the employee's regular scheduled hours of work at the straight-time rate not exceeding eight (8) hours' pay,	*i. pour les heures de travail normales prévues à son horaire, il est rémunéré au taux normal et ne touche pas plus de huit (8) heures de rémunération;*
ii. ***at the applicable overtime rate*** *for all time worked outside the employee's regular scheduled hours of work,*	*ii.* ***au taux des heures supplémentaires*** *pour toute heure effectuée en dehors des heures de travail normales prévues à son horaire;*
iii. ***at the applicable overtime rate*** *for all travel outside the employee's regular scheduled hours of work to a maximum of fifteen (15) hours' pay at straight time in any twenty-four (24) hour period;*	*iii.* ***au taux des heures supplémentaires applicable*** *pour tout trajet effectué en dehors des heures de travail normales prévues à son horaire jusqu'à un maximum de quinze (15) heures de rémunération calculées au taux normal dans toute période de vingt-quatre (24) heures.*
c. on a rest day on which the employee travels and works, ***at the applicable overtime rate****:*	*c. Durant un jour de repos où il voyage et travaille,* ***au taux des heures supplémentaires*** *:*
i. for travel time, in an amount not exceeding fifteen (15) hours' straight-time pay,	*i. pour tout temps de trajet et pour un montant ne devant pas excéder quinze (15) heures de rémunération au taux normal,*
and	*et*
ii. for all time worked;	*ii. pour toute heure travaillée.*
…	[…]

[Emphasis added]

[96] There is no disputing that clauses 17.03(b) and (c) make a distinction between work and travel. In fact, this is the very foundation of the employer's argument. It argues that the term "the applicable overtime rate" should be given a different meaning depending on whether it refers to work or travel since these terms are distinct.

[97] In support of its position, the employer referred to numerous decisions that concluded that "travel" was not "work".

[98] *Hunt* was one such decision, which the employer cited, and it summarizes this point well. The grievance concerned Mr. Hunt's claim that the time spent travelling on a day of rest to attend training in another city should have been compensated under the overtime provisions of the collective agreement. Mr. Hunt argued that "travelling time" was not at all applicable since he had been required to drive a colleague and cargo. On the other hand, the employer argued that Mr. Hunt had been properly compensated for "travelling time" subject to the maximum allowance for any one day.

[99] The relevant provisions of the collective agreement in that case were notably similar to those in the present case, and they stated as follows:

> …
>
> *18.04 If an employee is required to travel as set forth in clauses 18.02 and 18.03:*
>
> *(a) On a normal working day on which he travels but does not work, the employee shall receive his regular pay for the day.*
>
> *(b) On a normal working day on which he travels and works, the employee shall be paid:*
>
> *(i) his regular pay for the day for a combined period of travel and work not exceeding seven and one-half (7 ½) hours, and*
>
> *(ii) at the applicable overtime rate for additional travel time in excess of a seven and one-half (7 ½) hour period of work and travel, with a maximum payment for such additional travel time not to exceed seven and one-half (7 ½) hours' pay at the straight-time rate in any day.*
>
> *(c) On a day of rest or on a designated holiday, the employee shall be paid at the applicable overtime rate for hours travelled to a maximum of seven and one-half (7 ½) hours' pay at the straight-time rate.*
>
> …

[100] The Board made the following comments on compensation for travelling time:

…

> *25 … it is noted that there is a definite plan of construction to Article 18 of the collective agreement. According to clause 18.01 travelling time is compensated only in the circumstances and to the extent provided for in the collective agreement. Next, clause 18.02 states that the time of departure and means of travel shall be determined by the employer. Clauses 18.03 and 18.04 then go on to outline the times eligible and the rate of compensation applicable. Clauses 18.05 and 18.06 outline when compensation for travelling is not applicable. Nowhere in the construction or sense of Article 18 is it suggested that the employer's exercise of its right to determine the time of departure and means of transport necessarily or automatically places the employee in the position of being "at work". On the contrary, paragraph 18.04(a) refers to a normal working day on which an employee travels but does not work while 18.04(b) refers to a normal working day on which he travels* and *works.* ***This can only be construed as creating a definite distinction in the minds of the signatories between travelling and working. The parties have therefore bound themselves to an agreement in which travel must be regarded as travel and work as work. Hunt, therefore, cannot be said to be working simply because he was required by the employer to travel.***
>
> …
>
> [Emphasis added]

[101] The Board denied the grievance, concluding that Mr. Hunt had been properly compensated for his travel time since he had not been working.

[102] The conclusions reached in *Hunt* also apply to this case. Clearly, the parties made a distinction between time spent travelling versus working such that they cannot be said to be the same. However, I do not believe that travel must be **work** for travelling time to be paid at the overtime rates set out in clause 15.10. Indeed, clause 17.03 does not state that time spent travelling **is** overtime; rather, it states that the compensation for time spent travelling **shall be paid** at the applicable overtime **rate**. Clause 15.10 of the agreement speaks to these rates of compensation.

[103] Turning now to examine more closely the language in clause 15.10, its introduction states that "… overtime shall be compensated at the following rates …" thereby emphasizing that the subsequent clauses define rates. Had the parties not wished to place the emphasis on the rates, they would have stated "overtime shall be compensated as follows".

[104] Clause 15.10 goes on to set the "rate" of double time after 8 hours in a continuous period and the "rate" of triple time after 16 hours in a continuous period.

[105] I agree with the employer that work and travel are two distinct activities and that an employee who is only travelling cannot be said to be working, unless there were express language to the contrary in the collective agreement.

[106] However, the question at hand is to determine the proper interpretation of the term "the applicable overtime rate" in clause 17.03, rather than the meaning of the word "overtime" as a stand-alone term. The term "the applicable overtime rate" changes the emphasis to **the rates** that are applicable versus whether the time spent working or travelling is considered overtime.

[107] It is my opinion that the rates referred to in clause 17.03 are those set out in clause 15.10. Indeed, clause 15.10 is the only provision in the collective agreement that sets out overtime rates.

[108] This interpretation is consistent with the conclusions reached in *Langis*. Moreover, of all the decisions that the parties cited, *Langis* is the only one that dealt specifically with the meaning of the term "the applicable overtime rate".

[109] In *Langis*, an employee sought to obtain reimbursement for travel time that occurred on a day on which he was required for his work to drive from his residence in Québec to Ottawa and back on the same day. The issue was whether a new collective agreement clause that had been imposed via an arbitral award prohibited reimbursing his travel time. The clause in question stated that individuals in positions classified at the DS-5 and 6 levels, which Mr. Langis occupied, were not entitled to compensation for any overtime worked during a normal workweek. The question before the Board was whether travel time was included as part of overtime.

[110] The relevant provisions of the collective agreement were these:

> …
>
> *2.01 For the purposes of this Agreement:*
>
> *(n) "overtime" means work performed by an employee in excess of his normal weekly hours of work or on his day of rest.*
>
> …
>
> *Hours of Work and Overtime*

> *10.05 Except as provided in Article 12 (Field Work Allowance),* ***when an employee works overtime*** *authorized by the Employer,* ***he shall be compensated*** *on the basis of time and one-half (1½)* ***for all hours worked*** *in excess of seven and one-half (7½) hours per day.*
>
> ***Employees at the DS-5 and DS-6 levels shall not be entitled to compensation for any overtime worked in any normal work work*** [*sic*] ***week.***
>
> …
>
> *11.04 If an employee is required to travel as set forth in clause 11.02 and 11.03:*
>
> *(a) On a normal working day on which he travels, the employee shall be paid:*
>
> …
>
> *(ii) at the applicable overtime rate for additional travel time in excess of seven and one-half (7½) hours of work and/or travel, with a maximum payment for such additional travel time not to exceed eight (8) hours' pay at the straight-time rate in any day.*
>
> *(b) On a normal working day on which he travels and works, the employee shall be paid:*
>
> …
>
> *(ii)* ***at the applicable overtime rate for additional travel time*** *in excess of an eight (8) hour period of work and travel, with a maximum payment for such additional travel time not to exceed eight (8) hours' pay at the straight-time rate in any day.*
>
> …
>
> [Emphasis added]

[111] The employer in *Langis* argued that the concept of travel time was subordinate to that of overtime. It argued, "The former cannot exist alone because it does not provide for any mechanism of payment. It is absolutely essential to refer to article 10 [overtime]. Article 11 [travel time] is subordinate to article 10. The two articles must be read together."

[112] Counsel for Mr. Langis argued that travel time and overtime are two distinct concepts that should not be confused and that while the arbitral award had amended the overtime clause in the collective agreement, the travel-time clause was not amended. It argued that the use of the word "rate" would necessitate referring to the overtime clause only for the purpose of determining the rate of pay and not for interpreting the concept of travel time or the right to compensation.

[113] The Board agreed. It determined that the concepts of work and travel are distinct and that it is clear that when an employee is travelling, he or she is not working. But it concluded that the reference to "the applicable overtime rate" was meant to determine the rate of pay that was applicable. It recognized that travel-time compensation was not overtime compensation since overtime was limited to compensation for time worked. At pages 6, 7, and 8, the Board stated as follows:

> …
>
> *In short, the essential question to be raised is whether the interpretation of subparagraph 11.04(b)(ii) requires reference to clause 10.05 and, underlying this first question, whether travel time in excess of an eight-hour combined period of travel and work, which period would constitute a normal working day, constitutes overtime for the purposes of compensation within the meaning of article 10 of the collective agreement.*
>
> *As we mentioned earlier, "overtime" and "travel time" are concepts found under separate articles and titles in the agreement. Clause 11.01 (travelling time) stipulates as follows:*
>
> > *For the purposes of this Agreement travelling time is compensated for only in the circumstances and to the extent provided for in this Article.*
>
> *Subparagraph 11.04(b)(ii) stipulates generally that when an employee travels - in accordance with the definition given to the expression "travel time" - and works on a normal working day, he is entitled to be paid "at the applicable overtime rate for additional travel time in excess of an eight (8) hour period of work and travel, with a maximum payment for such additional travel time not to exceed eight (8) hours' pay at the straight-time rate in any day".* ***Consequently, it is very clear that the said subparagraph read by itself provides for compensation for travel time in the circumstances of the case before us. According to the said subparagraph, this compensation will be calculated at the "applicable overtime rate", which rate is not mentioned anywhere in the subparagraph but rather in clause 10.05****. Likewise paragraph 11.04(c), which concerns travel on a day of rest or designated holiday, does not specify what rate of pay is applicable. It is necessary to refer to clause 10.06, which stipulates that after the first day of rest, compensation is calculated on the basis of double time. It is appropriate to specify furthermore that clause 10.06 does not contain an exclusion like the one included in 10.05 and that consequently, the right to compensation for travel time on a day of rest or a designated holiday cannot be questioned.* ***In the case of sub-paragraph 11.04(b)(ii), like that of paragraph 11.04(c), it is clear however that once the rate of the compensation has been determined, the amount cannot be determined solely by referring to clause 10.05 or 10.06. In effect, subparagraph 11.04(b)(ii), like paragraph 11.04(c),***

> ***provides that the said compensation for travel time in excess of normal working hours cannot exceed eight hours' pay at the straight-time rate.*** *This means that depending on the day on which the employee travels, the number of remunerable hours of travel time will vary.* ***It seems therefore that the reference in subparagraph 11.04(b)(ii) to the "overtime rate" is made solely for the purpose of establishing a method of calculation in relation to the method of providing compensation for hours of travel time in excess of normal hours of work and travel during a working day.****…*
>
> *…*
>
> [Emphasis added]

[114] I find that the collective agreement language in *Langis* is similar enough to the language in clauses 17.03, 15.10, and 2.01(o) to justify the same conclusion in this case. As in *Langis*, I believe that the term "the applicable overtime rate" is used solely to establish the calculation method in relation to the method of compensating for travel-time hours.

[115] I also take notice that *Langis*, as in this case, involved the Department of National Defence. Therefore, it is to be expected that it would have had knowledge of this interpretation during subsequent rounds of collective bargaining when using the term "the applicable overtime rate" as it concerns time spent travelling.

[116] On the broader issue of the general rules of interpretation, the employer pointed to *Cruceru*, a recent Board decision in which it reviewed the rules and summarized the following canons of interpretation to guide its analysis (see paragraph 84):

- the parties are assumed to have meant what they said;
- the meaning and intent of the collective agreement is to be sought in its express provisions;
- the words of a collective agreement must be given their grammatical and ordinary sense;
- the words must be read in their entire context, in harmony with the scheme of the collective agreement; and
- when the same words reappear, they are to be given the same interpretation.

[117] Applying these principles, I believe that interpreting clause 15.10 as providing "the applicable overtime rate" referred to in clause 17.03 provides meaning to these words in their entire context and in harmony with the scheme of the collective agreement.

[118] Indeed, the term "the applicable overtime rate" is also found in clauses 15.13, 15.15, and 18.01, which read as follows:

15.13 *When an employee is required to report for prescheduled overtime and reports to work on a designated paid holiday which is not the employee's scheduled day of work, or on the employee's day of rest, the employee shall be paid the greater of:*	***15.13*** *Lorsque l'employé est tenu d'effectuer des heures supplémentaires prévues à l'avance et qu'il rentre au travail un jour férié désigné payé qui n'est pas un jour de travail prévu à son horaire, ou un jour de repos, il touche le plus élevé des deux montants suivants :*
a. compensation ***at the applicable overtime rate*** *for all hours worked,*	*a. la rémunération payable,* ***au taux des heures supplémentaires****, pour toutes les heures effectuées,*
or	*ou*
b. compensation equivalent to four (4) hours' pay at the employee's hourly rate of pay, except that the minimum of four (4) hours' pay shall apply the first time only an employee is required to report for prescheduled overtime during a period of eight (8) hours, starting with the employee's first reporting.	*b. une rémunération équivalant à quatre (4) heures de salaire à son taux horaire de rémunération; cependant, ce minimum de quatre (4) heures de salaire s'applique seulement la première fois que l'employé est tenu de se présenter au travail pour effectuer des heures supplémentaires prévues à l'avance pendant une période de huit (8) heures, à compter du moment où l'employé s'est présenté au travail pour la première fois.*
…	[…]
15.15 *When management requires an employee to work through his/her regular meal period, the employee shall be paid* ***at the applicable overtime rate*** *for the period worked therein, and the employee shall be given time off with pay to eat commencing within one half (1/2) hour immediately prior to the regular meal period or commencing within one half (1/2) hour of the termination of the regular meal period.*	***15.15*** *Lorsque la direction exige d'un employé qu'il travaille pendant sa pause repas normale, il est rémunéré* ***au taux des heures supplémentaires applicable*** *pour la période dudit travail et il doit bénéficier du temps libre payé pour prendre son repas au cours de la demi-heure (1/2) qui précède immédiatement la pause repas normale ou au cours de la demi-heure (1/2) qui suit la fin de la pause repas normale.*
…	[…]

18.01 *When an employee is called back to work overtime after he/she has left the Employer's premises:*	***18.01*** *Lorsqu'un employé est rappelé pour faire des heures supplémentaires après avoir quitté les locaux de l'employeur :*
a. on a designated paid holiday which is not an employee scheduled day of work, or	*a. un jour férié désigné payé qui n'est pas un jour de travail prévu à son horaire,*
	ou
b. on an employee's day of rest,	*b. un jour de repos de l'employé,*
or	*ou*
c. after the employee has completed his/her work for the day, and returns to work the employee shall be paid the greater of:	*c. après la fin de sa journée de travail et qu'il revient au travail, il touche le plus élevé des deux montants suivants :*
i. compensation ***at the applicable overtime rate*** *for time worked,*	*i. la rémunération* ***au taux des heures supplémentaires applicable****,*
or	*ou*
ii. compensation equivalent to four (4) hours' pay at the straight-time rate,	*ii. la rémunération équivalant à quatre (4) heures de rémunération calculées au taux des heures normales,*
provided that the period worked by the employee is not contiguous to the employee's scheduled shift and the employee was not notified of such overtime requirement prior to completing his/her last period of work.	*à la condition que la période de travail effectuée par l'employé ne soit pas accolée à son poste à l'horaire et qu'il n'ait pas été avisé de cette exigence avant d'avoir terminé sa dernière période de travail.*

[Emphasis added]

[119] All three clauses use the same terminology, "the applicable overtime rate". They do not refer the reader to clause 15.10 to determine those rates. But it is reasonable to expect that the parties would know to turn to clause 15.10 to determine the applicable overtime rate as it is the only collective agreement clause that sets them out. As stated in *Cruceru*, when the same words reappear, they are to be given the same interpretation. Thus, the term "the applicable overtime rate" should be given the same

meaning throughout the agreement; i.e., employees are to be compensated at the rates set out in clause 15.10.

[120] As also highlighted in *Cruceru*, the parties are assumed to have meant what they said. Had the parties intended that "the applicable overtime rate" in clause 17.03 mean something different, it is reasonable to expect that they would have used different words. Having decided to use the same words, it is assumed that they intended that term to have the same meaning.

[121] Indeed, had the employer intended to reserve its management rights, it could have explicitly stated as such as is found in other clauses of article 17. Clauses 17.02 and 17.07 contain the following explicit references:

17.02	***17.02***
a. Where an employee is required by the Employer to work at a point outside the employee's headquarters area, the employee shall be reimbursed for reasonable expenses ***as defined by the Employer****.*	*a. Lorsqu'un employé est tenu par l'employeur de travailler en un endroit situé à l'extérieur de la région de son lieu d'affectation, il est remboursé de ses dépenses raisonnables* ***au sens où l'entend l'employeur****.*
b. When an employee is required by the Employer to travel to points within the headquarters area, the employee shall be paid a kilometric allowance or transportation expenses ***at the rate paid by the Employer****.*	*b. Lorsqu'un employé est tenu par l'employeur de se rendre à un endroit situé à l'intérieur de la région de son lieu d'affectation, il lui sera versé une indemnité de kilométrage ou les frais de transport* ***au tarif versé par l'employeur****.*
c. When an employee travels through more than one (1) time zone, computation will be made as if he or she had remained in the time zone of the point of origin for continuous travel and in the time zone of each point of overnight stay after the first day of travel.	*c. Lorsqu'un employé en voyage parcourt plus d'un (1) fuseau horaire, le calcul sera effectué comme s'il était demeuré dans le fuseau horaire du point de départ, pour les voyages ininterrompus, et dans le fuseau horaire de chaque point où il fait une escale d'une nuit, après le premier jour de voyage.*
…	[…]
17.07 Travel status leave	***17.07 Congé de déplacement***
a. An employee who is required to travel outside his or her	*a Il sera accordé huit (8) heures de congé payé à l'employé tenu de*

*headquarters area on government business, **as these expressions are defined by the Employer**, and is away from his permanent residence for forty (40) nights during a fiscal year shall be granted eight (8) hours of time off with pay. The employee shall be credited with eight (8) additional hours of time off for each additional twenty (20) nights that the employee is away from his or her permanent residence to a maximum of eighty (80) nights.*	*voyager hors de sa zone d'affectation, pour affaires du gouvernement, au sens que l'employeur donne à ces expressions, s'il s'absente de sa résidence permanente pendant quarante (40) nuits, au cours d'un exercice financier. Huit (8) heures de congé additionnelles lui sont créditées pour chaque bloc de vingt (20) nuits additionnelles où l'employé s'absente de sa résidence permanente, jusqu'à un maximum de quatre-vingts (80) nuits.*
…	[…]

[Emphasis added]

[122] Thus, it is reasonable to conclude that since three other clauses in article 17 explicitly refer to the employer's right to unilaterally set terms that are tied to compensation, the parties would similarly have stated "at the applicable overtime rate as defined by the employer", or perhaps more precisely "at an overtime rate defined by the employer" had they intended it to be as such.

[123] Finally, as indicated in *Cruceru*, the collective agreement's words are to be given their grammatical and ordinary sense.

[124] The *Oxford English Dictionary* defines "applicable" as meaning "relevant or appropriate" and "rate" as "a measure, quantity, or frequency, typically one measured against some other quantity or measure".

[125] When referring to "the applicable overtime rate" in clause 17.03, from a purely grammatical standpoint, the words "applicable" and "rate" would refer to the relevant or appropriate measure or quantity that would enable calculating the compensation owed for time spent travelling. It is my opinion that the ordinary and plain interpretation is that this measure or quantity is meant to refer to the double- or triple-time rate set out in clause 15.10.

[126] The French collective agreement language also supports this interpretation as it does not contain the same emphasis on time "worked" in clause 15.10. It reads as follows:

15.10 Rémunération des heures supplémentaires	***15.10 Overtime compensation***
*Sous réserve du paragraphe 15.14, les heures supplémentaires **effectuées** sont rémunérées aux taux suivants :*	*Subject to clause 15.14, overtime shall be compensated at the following rates:*
*a. deux (2) fois le taux normal **pour chaque heure effectuée** en sus de huit (8) heures au cours d'une période de travail ininterrompue ou en sus de huit (8) heures au cours de la même journée jusqu'à un maximum de seize (16) heures au cours d'une période de travail ininterrompue, ainsi que **pour toutes les heures effectuées** un jour de repos jusqu'à concurrence de seize (16) heures;*	*a. double (2) time **for all hours worked** in excess of eight (8) hours in a continuous period of work or in excess of eight (8) hours in a day to a maximum of sixteen (16) hours in a continuous period of work; and **for all hours worked** on a day of rest to a maximum of sixteen (16) hours;*
*b. trois (3) fois le taux normal **pour chaque heure effectuée** en sus de seize (16) heures au cours d'une période de travail ininterrompue ou en sus de seize (16) heures au cours d'une période de vingt-quatre (24) heures, ainsi que **pour toutes les heures effectuées** par un employé qui est rappelé au travail avant l'expiration de la période de neuf (9)heures dont il est question au paragraphe 15.11.*	*b. triple (3) time **for each hour worked** in excess of sixteen (16) hours in a continuous period of work or in excess of sixteen (16) hours in any twenty-four (24) hour period, and **for all hours worked** by an employee who is recalled to work before the expiration of the nine (9) hour period referred to in clause 15.11.*

[Emphasis added]

[127] A strict translation of the words "*pour chaque heure effectuée*" in English means "for each hour performed". This stands in contrast to the words in the English version of the collective agreement and supports the conclusion that the parties wished to emphasize the **rates** in these clauses, more so than the need for it to be work. Having said this, I also note that the French version of clause 17.03(b)(ii) appears to use the word "*effectuée*" interchangeably with "*travaillée*" such that the distinctions between the English and French versions would not be enough to be determinative on their own in establishing the correct interpretation of either clause 17.03 or clause 15.10.

[128] However, the totality of the analysis detailed in this section leads me to conclude that the reference to "the applicable overtime rate" was intended to mean

that an employee who is travelling is entitled to be paid at the same **rate** as those in the overtime provisions of the collective agreement.

[129] It is important to underscore that the reference to "the applicable overtime rate" in clause 17.03 does **not** mean that all time spent travelling **is** overtime since "overtime" is defined in the collective agreement as time worked. Indeed, the distinction in clause 17.03 between travel and work is important. It is necessary since compensation for time spent travelling is capped at the equivalent of 15 straight-time hours, while time spent working is not. This is in essence the reason why the clause makes the distinction between work and travel. But, it is my conclusion that the distinction between travel and work was not made by the parties to establish that "the applicable overtime rate" was to be compensated at management's sole discretion. Had the parties intended that, they would have used different language or language similar to that in clauses 17.02 and 17.07, in which management explicitly reserved its right to set the terms of compensation.

[130] This is not to say that an employer must in all instances explicitly state when it can use its management rights over an issue. Indeed, the Board has held otherwise. In *IBEW*, the issue before it was whether overtime at triple time reverted to overtime at time and one half or double time after a mandatory 10-hour rest period. This was the collective agreement language:

…

> *(e) Where an employee is entitled to triple (3) time in accordance with paragraph (d) above, the employee shall continue to be compensated for all hours worked at triple (3) time until he or she is given a period of rest of at least ten (10) consecutive hours.*

…

[131] In *IBEW*, the Board concluded that the collective agreement was silent on the issue, which indicated that the parties had not addressed it. As a result, management could use its residual management rights to set the overtime rate to be paid.

[132] I believe that the facts are quite different in the case at hand. The very purpose of clause 17.03 is to establish compensation for employees who are travelling. I do not believe that the parties simply did not address the issue as was the case in *IBEW*. Rather, the parties in this case laid out the terms of how this compensation was to be

calculated. When doing so, they used the same language used throughout the collective agreement to establish the rate at which to set this compensation. For that reason, I conclude that had the parties intended the term "the applicable overtime rate" to be given a different meaning, they would have used different words and would have stated so explicitly.

[133] The employer also raised the argument that clear language is required to establish a monetary benefit. It relied on *Wamboldt*, in which the Board made the following comments after summarizing the principles of interpretation:

> …
>
> *[26] However, those are only some of the principles to be relied upon when interpreting a particular provision in a collective agreement. In my opinion, two others are relevant to this case.*
>
> *[27] First, a benefit that has a monetary cost to the employer must be clearly and expressly granted under the collective agreement ….*
>
> *[28] Second, parties to a collective agreement are generally considered to have attempted to arrive at an agreement that is easy to apply in daily practice… In short, an interpretation that makes applying the provision easy in practice as a rule is to be preferred over one that makes that application difficult if not impossible.*
>
> …

[134] I agree with those statements. However, I reach the opposite conclusion to that suggested by the employer. It is my opinion that interpreting "the applicable overtime rate" as meaning the same throughout the collective agreement makes applying the provisions of clause 17.03 easier in practice. As stated in *Wamboldt*, this, as a rule, is to be preferred over one that makes that application difficult, if not impossible. I am not suggesting that the employer's interpretation is impossible, however, using the same words to mean different things certainly makes the application more difficult.

[135] I also agree with the employer that when seeking to benefit from a monetary entitlement, one must have clear language to this effect. For the reasons already articulated, I believe that the collective agreement language is sufficiently clear to meet this requirement.

[136] Finally, the employer argued that s. 229 of the *FPSLRA* prohibits the Board from making a decision that would require amending the collective agreement. My

determination that the term "the applicable overtime rate", used throughout the collective agreement, should be given the same meaning and that it refers to the rates set out in clause 15.10, does not amend the collective agreement. It is based on the collective agreement's context as a whole and on the plain meaning of the words used. I cannot conclude that the term "the applicable overtime rate" as it relates to travel time in clause 17.03 was left undefined by the parties as it is not supported by the collective agreement language. In my opinion, doing so would be an unreasonable interpretation of the collective agreement, read in its entire context.

B. Is time spent travelling captive time such that travel should be considered work?

[137] The bargaining agent claims that time spent travelling should be considered time worked on the basis of the captive-time jurisprudence. It relied on *Hutchison*, in which the Board confirmed that time spent captured by the employer's operation was "work" for the purposes of overtime. It referred to paragraph 66, which stated this:

> *[66] I appreciate that the grievor was not actually working between roughly midnight when the ship crossed the harbour limits and roughly 9:00 a.m. when it docked–he was sleeping. But the captive time jurisprudence–which the employer must be taken to have been aware of–is clear. What matters is not what the employee was or was not doing during that time, even if they did exactly what they would have done had their time been their own. What matters instead is that their time is trapped within the employer's scope of operation. It is enough that they are captive.*

[138] The employer argued that the bargaining agent's reliance on *Hutchison* was misplaced as that case dealt with special collective agreement provisions that governed sea duties aboard vessels. Indeed, the bargaining agent in *Hutchison* even took the position that the travel-time provisions of the collective agreement did not apply in that case.

[139] The employer pointed to the following additional statements of the Board in *Hutchison*:

> …
>
> *[51] By way of summary then, one may say then that, in the case of hourly paid employees, the definition of "work" in a collective agreement is not necessarily limited to that time during which an employee performs the tasks for which he or she has been employed. In the appropriate situation (subject to anything to the*

> *contrary in the collective agreement), it may be extended to include non-work time that is nevertheless no longer truly the employee's own, whether because they must travel away from their base of normal operations in order to perform the task, or because their freedom of action is restricted or limited by the employer for its own purposes in some way: see the Federal Court of Appeal decision in* Paton.
>
> …
>
> *[53]* ***One obvious way around this problem is to establish express limits–or definitions–of when or how such "non-work" time is to be compensated, if at all. However, at least in the case of unionized work, such limits must be found in the collective agreement itself.***
>
> …
>
> [Emphasis added]

[140] Having carefully reviewed the parties' arguments and the Board's statements in *Hutchison*, I agree with the employer that the concept of captive time does not apply in this case.

[141] Indeed, in the case at hand, the parties have specifically included in their collective agreement terms as to when and how time spent travelling (i.e., the "non-work" time referred to in *Hutchison*) will be compensated. As such, I cannot conclude that travel should be considered as work simply because the employee's time is not his or her own when travelling. When the parties negotiated clause 17.03, they agreed to how this time would be compensated, thus supplanting any captive-time argument.

VI. Conclusion

[142] I find that the employer's interpretation of "the applicable overtime rate" found in clause 17.03 is in violation of the collective agreement. As such, the grievance is allowed.

[143] The parties requested that should the grievance be allowed, they be provided the opportunity to make submissions as to the appropriate remedy in the circumstances.

[144] I urge the parties to take the opportunity to resolve the remedy question without resorting to a further hearing. However, should they be unable to, I believe that the outstanding remedy matters can be addressed through written submissions.

[145] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[146] The grievance is allowed.

[147] If requested by the parties, a process for written submissions on the question of remedy will be established by the Board's registry.

[148] I remain temporarily seized of this matter for the sole purpose of determining the remedy, if requested by the parties.

[149] If the parties do not request a process for written submissions within 180 days of the issuance of this decision, the Board file 569-02-41614 shall be closed by the Board's registry and I shall cease to be seized of this matter.

May 3, 2023.

Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board