

possible for him to decide to work a night shift instead of a regular Day shift.

Since the grievor's entitlement to the option of double time under the first sentence has not been confirmed for the relevant number of hours worked on his regular Day shift on September 9th that were less than ten (10) hours of rest between regular hours, the grievance is denied.

Respectfully submitted as the decision of this arbitrator.

Dated at Mount Pearl, Newfoundland and Labrador, this 21st day of September, 2009.

David L. Alcock
Sole Arbitrator

Hillier did not decide to work it “instead of a regular day shift,” a notion which presumes that there was a Day shift that the grievor could have worked on Monday, but he decided to forego working that shift and chose instead to work the Night shift. It was simply not within his power to decide to work the Night shift instead of a regular Day shift on September 8th because no regular Day shift existed for him after it was originally cancelled and it was not restored by the Employer’s offer for him to work the remaining hours left on the Day shift that had already started.

In the result, since the grievor’s acceptance of the Employer’s offer of the Night shift on September 8th was not a decision to do so “instead” of a regular Day shift, his decision would not have rendered article 10.05 inapplicable to him. On the facts presented, the second sentence would have permitted Mr. Hillier to have his circumstances assessed to determine whether he would be entitled to the option expressed in the first sentence of article 10.05.

However, that assessment has already been made, with the finding that the grievor’s unfortunate circumstances did not entitle him to the option expressed in the first sentence.

DECISION

On the basis of the evidence and by the foregoing considerations, I find that the application of the grievor’s circumstances to first sentence of article 10.05 does not establish his entitlement to the option of receiving payment of double time for the number of hours his rest period was less than ten (10) hours between regular shifts when he reported for work on September 9th at his regular starting time.

I further find that the application of the grievor’s circumstances to the second sentence of article 10.05 did not disqualify him from being assessed for entitlement to the option expressed in the first sentence. Since a regular Day shift did not exist for him on September 8th, it was not

work at another job in a separate department for the remainder of that shift.

To answer the grievance before me, I deem it unnecessary to delve into the issue of how or by what process employees are called to fill positions on shifts other than their own. The role of seniority and whether a call process exists as a management right in the collective agreement or as a matter of past practice, which the parties have discussed at length, do not need to be dealt with in this decision. The parties' disagreement on those issues will have to wait for another day. Similarly, I find it unnecessary to decide whether the common law doctrine of estoppel applies in this case because of what the supervisor might or might not have said to Mr. Hillier or Mr. Peach. It is sufficient for this grievance that the parties agree that the issue is whether article 10.05 applied to the grievor's particular circumstances.

The evidence is that the grievor was called by the supervisor and offered a chance to work some hours on the Day shift that would partially offset the regular hours he would lose because his own regular Day shift had been cancelled. He declined the initial offer because his supervisor's alternative offer of working the full Night shift instead of the remaining hours of the Day shift provided him with an opportunity to recover all, rather than some, of his cancelled work hours. How or by what process he was called and offered such work is irrelevant in this case.

In my view, Mr. Hillier's regular Day shift on September 8th was not restored. If it had been, he would have been obliged to come to work and the Night shift would not have been a factor. The fact is that it was left entirely up to him to decide whether to accept the Employer's offer of working less than 8 hours on loading trucks in the Shipping Department. His decision not to accept that offer had nothing at all to do with establishing that shift as his regular Day shift. The offer was for him to work a remaining number of hours on that Day shift. It was not an offer for him to work the full regular Day shift that had been cancelled. In essence, no regular Day shift was available to him on September 8th. In deciding to accept the Night shift, Mr.

the employee's decision".

I note that no such disqualification is contemplated where less than 10 hours of rest occurs for any other reason, for example, when overtime (which is normally voluntary) has been worked between regular shifts.

Since the focus of the second exception in article 10.05 is solely where an employee decides to work another shift instead of his regular shift, this tends to lend support to the suggestion that purposeful shift-hopping for an employee's own benefit may have been the primary reason for insertion of the bold type sentence. But whatever may have been the reason or reasons for inserting this language, the fact remains that its effect is to absolutely and unequivocally bar entitlement to article 10.05 for employees who decide to work another shift instead of their regular shift and who cannot attain 10 hours rest as a result.

As for what is meant by "the employee's decision," I am satisfied that it is not merely limited to situations where it is the employee who initiates the shift change and thereafter obtains the Employer's express or tacit approval. In my view, this language contemplates that, no matter who initiates the idea in the first place, i.e., the employee by volunteering, or the Employer by offering, as long as the employee has the right to exercise the final decision whether he will work another shift instead of his regular shift, he will immediately disqualify himself from having article 10.05 apply to him should he decide to do so and subsequently receive less than 10 hours of rest "between shifts," which includes the time between any shifts, be they regular shifts or otherwise.

Did the grievor's particular circumstances meet the criteria for application to article 10.05?

The grievor's regular Day shift on September 8th was cancelled because production was delayed. No production was undertaken on that Day shift. Part way through the Day shift during the morning of September 8th, his supervisor initially offered him an opportunity to come in and

September 8th regular Day shift available for him to work, thereby significantly expanding the period “between regular shifts,” and making it certain that he had at least 10 hours rest between regular shifts, it is not within my jurisdiction to make the wording of the first sentence say anything different than it does. I could also suggest the same unfortunate circumstance might occur if an employee happened to miss his regular A shift because of sickness or another type of leave. However, the parties do not appear to have contemplated the adverse effect of such scenarios on employees’ entitlement to the article 10.05 option. As a general premise, it should not be presumed that fairness must be guaranteed by every collective agreement provision. It might well be absent by mistake or by deliberate intent. Whatever the case, the wording of the relevant provision is all that may be relied upon to determine whether entitlement is established.

In the result, on the facts of the grievor’s circumstances as applied to the first sentence of article 10.05, I find that Mr. Hillier’s situation on September 8th and 9th did not entitle him to the option expressed in that clause.

The second section of article 10.05

Essentially, the second sentence in bold type establishes a second exception to entitlement. This language clearly contemplates a situation where an employee decides to work another shift instead of working his regular shift. In contrast to the first sentence, which deals with receiving less than 10 hours rest between regular shifts, the second sentence deals with receiving less than 10 hours rest between a shift and a regular shift. In other words a distinction is drawn between a shift and a regular shift. As per the analysis above for the first sentence, in my view, a regular shift is synonymous with the weekly shift assigned to a particular employee, i.e., one will be on either Days or Nights. Clearly, what would create an entitlement in the first sentence for an employee working “such hours” as a shift other than his regular shift between his regular shifts would constitute a disqualification in the second sentence if the loss of rest hours is the “result of

first sentence and a different meaning in the second sentence. On balance, I am satisfied that the parties have contemplated in the first sentence of article 10.05 that the notion of receiving less than 10 hours rest “between regular shifts” presumes that an employee will work his regular shift one day and be scheduled to work the same regular shift the next day, but that a period of work will be inserted between those regular shifts that results in less than 10 hours rest being available. That would trigger entitlement to the option expressed. For example: an employee might work his regular Day shift on Monday (A) and be scheduled to work his regular Day shift on Tuesday (C), but actually might work some time period in between (B) that results in less than 10 hours of rest between A and C. Therefore, entitlement to the option would be triggered.

I stress that the wording of the first sentence does not contemplate that the receiving of less than 10 hours rest must necessarily occur between B and C. Rather it must occur between A and C, those being the employee’s regular shifts.

In the grievor’s particular circumstances, his regular shift for the week in question was Days, starting with Monday September 8th. Under normal circumstances, he would have been scheduled to work Day shift for each of 6 days. But Mr. Hillier’s regular Day shift on Monday was cancelled. He did not work that shift. The period between regular shifts that he worked was the Night shift (B) on Monday the 8th. Therefore, to determine whether he worked such time as to receive 10 hours work between regular shifts, the relevant period of assessment would not be between B and C, or A and C, but rather between the end of the last regular shift he worked (which could have been on the previous Friday or Saturday) and the commencement of his regular Day shift on Tuesday (C). By any conceivable calculation of his actual circumstances, he had much more than 10 hours rest between regular shifts and, therefore, did not qualify for entitlement to the option in the first sentence.

While it might not seem fair that Mr. Hillier’s entitlement under article 10.05 should be disqualified because he was caught in the unfortunate situation of not having his Monday

loss by requiring the employee to “work such hours,” or because the employee caused the loss by volunteering to “work such hours.” Put another way, whether an employee was compelled to work or volunteered to work, there would be entitlement to the option. For example, the work causing the loss of hours of rest might occur because of working a call in, or overtime (which is voluntary except for the 9th hour), or another shift between regular shifts (which could be compelled or voluntary).

The grievor’s circumstances as determined solely by the first sentence of article 10.05

It is common ground that regular shifts are either Days or Nights. It is also common ground that each employee is scheduled weekly on one of the two regular shifts and has a regular starting time. The evidence is that, in the week in question, the grievor’s regular shift was Days and his regular starting time was 0600 hours.

I am satisfied that there is no evidence indicating that there was an urgent need for the grievor’s services when he accepted the call to work the Night shift on September 8th. If one’s presence on a shift were to be considered urgent because there was a need for such staffing, then all the employees who work a shift would be exempted from article 10.05 entitlement. In my view, that is not what the first sentence contemplates. As far as the first sentence is concerned, under normal regular shift working conditions, regardless whether the grievor’s assignment to that Night shift was required or voluntarily, his working of such hours would have resulted in him not receiving ten (10) hours rest between regular shifts. But normal regular shift working conditions did not apply in the grievor’s circumstances. His regular Day shift on Monday September 8th was cancelled. From an interpretation perspective, this presents a problem in determining what is meant by the expression “between regular shifts”.

Since the second sentence of article 10.05 distinguishes between “shifts” and “regular shifts,” as a matter of interpretation, I am not inclined to give regular shifts one meaning in the

In the result, the arbitrator is respectfully requested to rule in the grievor's favour.

CONSIDERATIONS

The question before me is whether the Employer violated article 10.05 by denying the grievor payment of double time for 3.75 hours worked on his regular Day shift on September 9th, i.e., for the number of hours of rest less than 10 that he received between the commencement of that shift and the end of the previous Night shift. The answer to that question begs another question, namely, whether the grievor was entitled to double time under article 10.05 in these particular circumstances. That is a matter of interpretation and the application of the relevant facts.

As a matter of interpretation, I note that there are two primary sections to article 10.05, the first sentence in plain type and the second sentence in bold type. Both sections are somewhat more complex than the parties have argued.

The first section of article 10.05

With the single exception of where there is "urgent" need for an employee's services, the first sentence establishes that "an employee who works such hours as to not receive ten (10) hours rest between regular shifts," is entitled to two options: 1) "remain home for 10 hours and then return to work or" 2) "report to work at his regular starting time at the rate of double time for the number of hours his rest period was less than ten (10) hours." Other than "urgent need for his services," this sentence does not limit or restrict any employees from entitlement to the option for any reason as long as they work such hours so as to not receive 10 hours of rest between regular shifts. If this language was the only sentence in Article 10.05, an employee who loses rest hours between his regular shifts would be entitled whether the Employer caused the

home if they will fall short of a most progressive benefit of 10 hours rest due to this switch in shifts.

The Union urged the arbitrator not to read too much into the expression “regular shift” as the Employer has done. It should be remembered that the Employer called nobody to give evidence on what regular shift means. Only the grievor testified on what were his regular shifts. While regular shifts are contemplated by the collective agreement, the fact is that irregular shifts can happen.

In the Union’s view, there is no such thing as an opportunity being given to an employee to be paid overtime. The offer to the grievor had nothing whatsoever to do with the Company’s good graces. Mr. Hiller had a right to be called to fill the vacancy on the Night shift in accordance with his seniority. He did not schedule himself on the Night shift; the Company did so. They needed him on that shift. Had he not been present, the shift would not have worked as intended. Since he was needed for the work in question, he was required by the Company.

To uncomplicated the interpretation of article 10.05, the Union suggested reading the first sentence by temporarily ignoring the expression “unless there is an urgent need for his services.” What remains is that an employee will have the option of staying home for 10 hours rest or being paid double time on his next shift for the number of hours of rest he received less than 10.

The grievor worked at the end of the line; he was an important employee; he was needed to do that work on the evening shift. It is not the case that the Employer was not compelled to call the grievor on the basis of seniority, but did so only because there was a practice to that effect. In the Union’s view, the parties agreed that calls should be made that way and wrote same into the collective agreement.

Finally, despite having a progressive collective agreement entitling employees to the option in article 10.05, the grievor was denied his entitlement to double time when he reported for his regular Day shift on Tuesday September 9th.

And article 10:01(d) Vessel Discharge, sub (v) states:

If such work ends at a time that is less than ten (1) hours before the employee's next period of work, Article 10.05 shall not apply and doing such work will not cause any other overtime premium e.g. will not count towards an employee's time so as to exceed 40 hours of work in that work week.

Also submitted by the Employer was *Re Inco. Ltd. and U.S.W.A., Local 6166* (1990), 18 L.A.C.S. 299, 1990 CLB 10829 Manitoba (Chapman). This case deals with the meaning of the expression "regularly scheduled shift" and the arbitrator found that employees who worked voluntarily on weekend shifts were not on regularly scheduled shifts. In the instant case, Max Hillier's regularly scheduled shift on September 8th and 9th was Days. He volunteered for a Night shift for which he was not regularly scheduled.

Council referred to AR#1, the e-mail by Bruce Burt to Kevin Hillier, pointing out that this correspondence occurred on September 11, 2008, just a few days after the event complained of. Yet it made no mention that Mr. Burt had made a promise to the grievor.

Union Rebuttal

No weight should be given to AR#1 because the author did not testify and could not be cross examined.

It is clear that the Employer suggests that article 10.05 is a highly structured complex clause that will only apply to employees when the Employer feels like it. The Union's position is that the clause is simple: it is designed to pay all employees who find themselves short of 10 hours rest.

Labour Standards legislation provides the barest minimum requirements that employers must follow without breaking the law. In contrast, a collective agreement is progressive, providing employees with much greater benefits. In the instant collective agreement, article 10.05 provides employees with an option of accepting a new shift and being paid for it or staying

It has often been stated that the fundamental object in construing the terms of a collective agreement is to discover the intention of the parties who agreed to it. As one arbitrator, quoting from *Halsbury's Laws of England*, stated in an early award:

The object of all interpretation of a written instrument is to discover the intention of the author, the written declaration of whose mind it is always considered to be. Consequently, the construction must be as near to the minds and apparent intentions of the parties as is possible, and as the law will permit.

And further:

But the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purposes of interpretation, equivalent to the intention.

....

In the instant collective agreement, management's rights are enumerated at length in the first paragraph of article 3.01 and the issue of past practice is specifically dealt with in the second paragraph, viz:

The above enumeration of rights is by way of example and is not a limitation of the Company's rights to manage the enterprise and its business without interference, which rights are solely and exclusively the rights of the Company, and the continuance or discontinuance of any past practice or benefit not enumerated in this Agreement is vested solely in the discretion of the Company.

Article 8:04 establishes a distinction between Day shift and Night shift workers for the purposes pay envelopes.

Article 10.01(b) also indicates the following bold print in respect of the hours of work in Clam Processing, viz:

Eight (8) hours per shift, forty-eight (48) hours per week, Monday through Saturday, to be performed between the hours of 7:00 a.m. and **3:30 pm and 3:45 and 12:00 midnight**. Shift startups and finishes may be staggered up to thirty (30) minutes for certain employees to allow for staggered starts and finishes. N.B.: **This change does not preclude the Company from staggering the shift, for example from 7:30 am to 4:00 pm.**

between them. Article 10.05 acts as a disincentive for the Company to compel employees to work their regular shifts in such a way as to not get 10 hours work. The bold print in article 10.05 refers to employees who do not receive 10 hours rest between “shifts” as a result of the employees’ decision. In the instant case, the Employer decided to offer an additional night shift to two employees whose Day shift on Monday was cancelled. The grievor willingly decided to accept that shift. Mr. Peach agreed that the Employer does not have to fill a temporary vacancy on any shift. He also could not point to any collective agreement provision that would give the grievor the right to fill such a vacancy.

On September 8th, the Employer had the right not to fill the vacancies on the Night shift. However, there is a practice (not specifically expressed in the collective agreement) which is supported by the bold print section of article 10.05, that the Company may offer work on another shift to an employee. This practice is used by the Employer to give its valuable senior employees the opportunity to minimize their loss of a shift, or to make up such time on another shift. Although the collective agreement did not require the Employer to do so, it voluntarily provided the grievor with an opportunity to minimize the loss of his Day shift on Monday, September 8th by working the Night shift on that date. Max Hillier had a choice to accept work on that shift knowing that he would receive less than 10 hours work before he started his Day shift on Tuesday morning, or to not accept that shift and stay home all night. In essence, the grievor voluntarily chose to be short on his 10 hours rest. If the Employer had compelled him to work on that Night shift, the overtime provision in article 10.05 would have applied to him. Since he was not compelled to work the Night shift, the double time provision did not apply to his circumstances.

In support of its position on the issue of interpretation of the collective agreement, the Employer submitted Para 4.2100 Canadian Labour Arbitration, 4th edition, viz:

The Object of Construction: Intention of the parties

The Employer

Article 18.01(g) states:

The decision of the majority of the Arbitration Board on the matter at issue shall be final and binding on both parties, but in no event shall the Arbitration Board have the power to add to, subtract from, alter or amend this Agreement in any respect.

The allegation is that the Employer has breached article 10.05. The Union does not argue that there is ambiguity in the language of that provision. Therefore, there is no need to refer to bargaining history evidence. Even if that were done, the arbitrator would find that there were various reasons for the way 10.05 is worded and structured. Employees hopping from shift to shift was not the only reason. Mr. Roff said that the bold type was designed to deal with employees making the operative decision to switch shifts.

With respect to the Union's claim that the Employer has to go down the seniority list to call employees for another shift, Mr. Roff's evidence was that, at any point in time, the Employer can make a decision to fill a vacancy or not to fill it. However the more likely scenario is that the supervisor may decide that somebody is needed to fill a shift vacancy. When the Company then compels someone to come to work, then there will be no exception to the application of article 10.05.

It was Mr. Roff's evidence that the Fork Lift Operator and the Maintenance Workers were compelled to come to work on the Night shift on September 8th. No option was available to them; they had no choice in the matter. Therefore, it would be no different if someone at the end of the list is compelled to come to work

Article 10.05 is initially a personal clause peculiar to the individual for any employee who is affected by not getting 10 hours rest between "regular" shifts. Regular shifts are specifically referenced in articles 10.05, 10.06, 10.07, 15.11 and 25.04. Max Hillier's regular shift during the week in question was Day shift, which, if worked normally, would provide 10 hours of rest

happens when an employee does not get 10 hours rest between shifts. If an employee is compelled to come to work because the Employer needs work done, then he is required to come in. The grievor was required to come to work in these circumstances. However, the Company has decided to stop paying overtime when less than 10 hours rest is obtained. The bold print in article 10.05 was placed in the agreement to cover employees who hopped from their own shift to another one for their own purposes. In other words, they would ask the Employer to permit them to switch, and they would not receive overtime for their next shift if they did not receive 10 hours rest. That was not what happened in the grievor's case. If the Company wanted special circumstances for Maintenance Workers or for the Fork Lift Operator or for employees to work on a production line, it could have negotiated language for them. It did not do so. Rather the collective agreement treats all employees the same as far as not receiving 10 hours rest is concerned. The agreement also has separate language for overtime and how to attain it. The same goes for the application of seniority.

What Mr. Roff said in his testimony about the Employer paying overtime for certain employees who do not obtain 10 hours rest is not in the collective agreement. The payment of overtime is not made simply out of the goodness of the Employer's heart. The agreement establishes how vacancies are to be filled and how seniority lists are to be used. There are no distinctions for this among employees in the agreement.

Once the supervisor made the decision to have a certain number of employees on the Night shift on September 8th, a need for staffing was established. To fill that need, the grievor was called in order of seniority and offered the work. If he refused, then the Employer would have to ask each person on the seniority list in turn. If nobody accepted, then the last person would have to come in to work. The grievor did accept. Therefore, he was required to come to work on the Night shift. By refusing to pay him overtime on his next shift for the number of hours of rest he received less than 10, the Employer violated the collective agreement.

ARGUMENT

The Union

Article 10.05 speaks to what happens when an employees does not have 10 hours rest between shifts. This clause was violated in the grievor's situation.

Mr. Hillier tracks his work hours and time paid. He was asked to come to work on the Night shift on September 8th. Instead of agreeing to work a short Day shift (which he was not obliged to accept), he accepted the full Night shift. He was aware that overtime would be involved on the next Day shift if he worked the Night shift and he asked his supervisor if he too was aware. His supervisor said yes. When he came to work on the 9th, he was short of 10 hours rest by a few hours, but he was not paid overtime as intended by article 10.05.

Had Bruce Burt been available to testify, his answers would have been beneficial, but he was not asked to attend the hearing. However, Cecil Peach was aware of the production delay, the cancellation of the Day shift on the 8th, and he raised the possibility of overtime with Bruce Burt and with Kevin Hillier. In the Union's view, this evidence is significant. Mr. Peach also testified how calls are made to senior employees to fill temporary vacancies on another shift. The grievor was a senior employee. Mr. Peach also disclosed that a Fork Lift Operator and two Maintenance Workers received overtime when they had less than 10 hours rest between shifts. However, the grievor was singled out in a separate category as someone who should not receive overtime pay when his rest period was cut short.

Alvin Roff's evidence was disconcerting to hear. It is the Union's position that the collective agreement covers all aspects of the work in dispute. If the agreement were to be silent on overtime, and rest periods, etc., then management's rights would prevail. However the collective agreement is not silent on those matters. In particular, the parties have agreed on what

that it would be paid. What supervisor Burt did on September 8th was follow the procedure of calling the senior people on the list. Mr. Burt did speak to him about overtime and so did Kevin Hillier, but he could not recall the date, although it was after Tuesday, Wednesday or Thursday.

The situation with Maintenance Workers is that they get paid overtime when the Packing Department finds itself in abnormal circumstances that require a second shift and requires maintenance coverage for part of the second shift. Mr. Burt would not have asked for overtime for those individuals because they are in a different department. The Fork Lift Operator is in the Cold Storage Department. When David Warren was needed for work, Mr. Burt made the decision to pay him overtime because he was required to work. Essentially, Bruce Burt did not have to speak to anybody about overtime for the Maintenance Workers or the Fork Lift Operator, but he did have to speak to somebody in authority about the grievor.

Mr. Roff reiterated that the Employer did not require a person from the Day shift to work the Night shift. The grievor was called because of past practice. Although a person was needed to work the Night shift, no particular person was needed. There were approximately 20 people on the Night shift. Mr. Burt would decide whether to fill the two (2) vacancies. He was not compelled to fill them, and he was not compelled to fill them by seniority or ability. This was not an article 14.05 situation for permanent vacancies. It was a matter of temporary vacancies.

The grievor was not required to work. He had a choice to come in or not come in. If he refused, he could have simply stayed home and come to work on Tuesday morning.

In answer to the arbitrator's questions about the practice of filling of vacancies, Mr. Roff explained that the offer is first made to the most senior person on the seniority list. If that person refuses to accept the shift, the next senior person is contacted. Should nobody on the list accept, at that point the Employer would make the decision whether or not to require someone to fill the vacancy, or to leave the position vacant.

As for Mr. Peach's claim that the bold type in Article 10.05 came about to deal with a specific matter, Mr. Roff felt it was designed to deal with situations such as persons working 2 night shifts (Monday and Tuesday), who do not work on the 3rd night, in which case the Employer may offer them Day shift on Wednesday, but no extra pay for doing so, unless they were required to work the relevant shift. Essentially, some people were hopping from Nights to Days and then claiming overtime because they did not have 10 hours rest. That was the reason for the bold type.

The expression "unless there is an urgent need for his services" in article 10.05 means an absolute need to transfer someone from one shift to another. If such a need does exist, the Employer will pay overtime costs. In Mr. Roff's view, an urgent need would be less likely for employees not in Maintenance or in specialty positions like Fork Lift Operator. Although the Company cannot operate without Graders, overtime would be paid only if the Employer's decision is urgent that a particular Grader be required on another shift.

Mr. Roff declared that Supervisor Bruce Burt was working the day of the arbitration hearing.

He testified that the number of people on shift is predetermined by the budget in October. When a shift has been left short staffed, the Union has expressed its concerns, but has not challenged the decision by filing a grievance. When calling in for replacements, Mr. Roff said that, although he is not required to do so, he would follow the seniority list and offer the opportunity to the senior employees first. If he wished to do so, he could contact any employee rather than starting with the most senior person. He could not recall paying out to people who were not called properly. During the past 10 years, Mr. Roff has had six (6) grievances in which he has paid out to employees rather than bearing the expense of arbitration. In each of the grievances, the merits were discussed before coming to a resolution on a without prejudice basis.

On September 5th, Mr. Roff conversed with Cecil Peach about overtime, but never told him

conversation did not take place.

In explaining the offers that were made to the grievor for the shifts in question, Mr. Roff introduced AR#1 the September 11, 2008 letter from Bruce Burt to Kevin Hillier, viz:

Eddie Hyde and Max Hillier has informed me he would like to put in A grievance for the double time he feels he should have gotten for working on Tuesday morning. He feels he is owed four (4) hours double time because he did not receive his ten (10) hours rest between regular shifts.

I must also state when I called him for work I asked if he wanted to come in to work. I gave him A choice, and he chose to come in. According to article 10.05 of the collective agreement, if an employee decides to work A day shift instead of A night shift or A night shift instead of A day shift, the employee must work the shift for his/her regular rate.

In other words, the first offer to the grievor was to come in to work in the Shipping Department, which he declined. The second offer was to work on the evening shift in the Grading Department, which he accepted. Essentially, the grievor had a choice to come in or not to come in. He chose to come in. He was not required to do so.

Commenting on filling shift vacancies, Mr. Roff testified that there have been times when the Employer has not filled all the positions on a shift. The Union has complained that the vacant positions were not filled by senior people from other shifts, but the Union has never grieved the matter. However, when the Employer does decide to fill such vacancies, seniority is followed, as was the case on September 8, 2008.

Commenting further on the Union's letter of October 15th, which states that the grievor was required to work, Mr. Roff noted that the grievance dated September 18th makes no mention of the grievor having been required to come to work.

With regard to the allegation by Mr. Peach that others were paid overtime, Mr. Roff explained that David Warren was on the Day shift and was required to come to work on the Night shift. He was not offered the same choices that the grievor was. Similarly, the Maintenance workers were not given a choice. They were required to work during the Night shift, did not receive 10 hours rest, and were paid overtime accordingly on their next shift.

to work during that shift. Similarly, the Maintenance people were also required to work. In the second paragraph of the Union's letter to the Employer on behalf of the grievor, Mr. Peach agreed that the Union's position was that the grievor had been required to work the Night shift on the 8th. Although he agreed that Mr. Hillier had not been specifically required to work, the Employer required two (2) vacancies to be filled and asked Mr. Hillier to fill one of them. Therefore, he worked a required vacancy on a required shift.

In answer to questions by the arbitrator, Mr. Peach testified that, when he became aware that there would be no Day shift on Monday the 8th, he knew that two (2) employees from the Day shift would be called to fill positions on the night shift. He mentioned this to Kevin Hillier (Production Manager) saying "you're aware they'd get overtime for some time on the next day shift," and Mr. Hillier replied that he was aware that there could be double time. It was Bruce Burt who later told him that "It was all straightened out." In answer to Counsel's question arising, Mr. Peach confirmed that Mr. Hillier did not say that overtime would be given, just that the issue of double time would come up.

Mr. Alvin Roff, Plant Manager, testified that with respect to things said by Mr. Peach and the grievor to Bruce Burt, the supervisor, Mr. Burt did not have authority to bind the Company.

On September 5, 2008, Mr. Peach mentioned a possible claim of overtime to him (Roff), not Kevin Hillier the Production Manager. A call from Mr. Peach in such circumstances was not unusual. Mr. Peach was aware of the production delay and the cancelled Day shift on Monday the 8th. Since he could foresee a need for two (2) employees to be called in on the Night shift and there was a potential for overtime, Mr. Peach left the matter in his hands. Mr. Roff told him that he was aware that there could be an overtime issue, but he did not say he agreed that overtime would be paid.

In a January 20, 2009 meeting, the alleged "not a problem" comment by Mr. Burt was mentioned by the grievor. Mr. Burt was present at that meeting and said that the alleged

8:00 pm and the other one comes back from 8:00 pm to 12:00 midnight or 12:30 am. In such circumstances, both workers receive overtime pay at the beginning of the next Day shift for the hours of rest they had been unable to receive. This practice has occurred before and since Mr. Hillier's grievance,

Commenting on Article 10:05, Mr. Peach indicated that the language in regular type had always been in the collective agreement, but in the last round of negotiations, Clearwater put in the bold type to cover a specific matter, namely, those employees who, of their own choice, decide to work a shift that would preclude them from having 10 hours rest, would not receive overtime pay on their next shift.

Commenting further on how employees are called to fill vacancies on other shifts, Mr. Peach testified that the practice has been for seniority to prevail in those circumstances if the Company decides to fill the vacancies. If a shift is short, the supervisor will call someone in by seniority and ability. This is not written into the collective agreement. For example, if Mr. Hillier had declined to work the Night shift on the 8th, the practice would have been for the Employer to call in somebody else by seniority who would have been entitled to double time for the number of rest hours he received less than 10. He further explained that it has always been the Union's position that, if the Employer skips the senior man, he would still be paid full pay for the shift he missed. In the grievor's case, he had no choice. Because of the production delay, he lost a shift, so he came in on Nights to replace the 8 hours he had lost. If he decided not to work the Night shift, somebody else would have been called to do that work.

In cross examination, Mr. Peach agreed that the grievor was not forced to work the Night shift. He could have decided not to do so. However, he volunteered for the Night shift so that he would be able to replace his lost shift.

With respect to David Warren, since he was the Fork Lift Operator, Mr. Peach said the Employer needed him to come to work on the Night shift on the 8th. Therefore, he was required

Night shift. He also confirmed that, in a later meeting on the matter, he said he volunteered for the Night shift. With regard to Bruce Burt's comment to him about overtime made during his phone call, Mr. Burt said at the later meeting that he couldn't recall a conversation about overtime.

Supervisor Burt did not testify and was not present at the hearing.

In redirect examination, the grievor testified that he recalled the telephone conversation clearly because his habit is to record all matters regarding his hours and his pay. He reiterated that Bruce Burt told him that there would be no problem with overtime as a result of not having enough rest hours before the Day shift. Although Mr. Burt puts his time in and others actually authorize overtime payment, the grievor testified that there was no one else around when he spoke to Mr. Burt – his supervisor was the boss at that time.

Cecil Peach, Union Vice Chair, testified that he was aware on Friday September 5th, 2008 that there would be no production for the Day shift on Monday the 8th, and that there would be two (2) people needed to fill vacancies on the Night shift on that date. He spoke to the grievor on the 5th, telling him that overtime would apply for him if he came to work on the Night shift on the 8th. He also spoke to Bruce Burt on the floor about overtime being paid in that event and Mr. Burt said "Yes, it was all straightened out."

On the 9th, Mr. Peach learned that the grievor was denied 3.75 hours overtime, i.e., for the time his rest period was less than 10 hours. Mr. Peach also investigated whether others had been treated the same or differently. He discovered that David Warren, a Fork Lift Operator, had worked the Day shift on the 8th and also had been called in on the Night shift, but when he started work on the Day shift next morning without 10 hours rest, he received double time for the number of rest hours he lost.

Mr. Peach also explained that the two (2) Maintenance workers normally come in at 6:00 am and go home at 5:00 pm. When there are two (2) shifts operating, one of them stays on until

What follows is the most relevant and essential elements of the evidence adduced:

Max Hillier, an employee with 42 years operations experience in the plant (which has seen several employers, including Clearwater Seafoods Limited Partnership) was a rotating shift worker in Clam Processing at the time of the event in dispute. Day shift hours were 7:00 AM to 3:45 PM (Mr. Hillier started at 6:00 AM); night shift hours were 3:45 PM to 11:45 PM, and the production operation ran Monday through Saturday.

On September 8, 2008, the grievor's regular weekly shift was Days. Clams were due to be processed that week. However, on the previous Friday, samples had been sent away for lab tests, and operations were delayed until the results were communicated. Eventually it was decided that on Monday the 8th, the Day shift would not work, but production would begin on the Night shift.

Shift complements were determined annually based on budget considerations. On Monday the 8th, it was determined that the Night shift was short by 2 people. Although not expressed in the collective agreement as such, past practice was to offer that work to the senior people on the Day shift. At about 10:00 AM on Monday the 8th, Max Hillier was contacted by supervisor Bruce Burt and was offered the remainder of the Day shift loading a truck in the Shipping Department, or filling one of the Night shift vacancies working as a grader. Since 3 hours of the Day shift had already elapsed, Mr. Hillier elected to come in on the night shift where he would be able to work a full 8 hours.

The grievor testified that, when he was called, he asked Mr. Burt whether he would have to work the subsequent Day shift and was told that there would not be a problem with overtime if he could not get 10 hours rest. When he did report for work on Tuesday morning, he told Mr. Burt not to forget to put in his overtime pay. Since Mr. Burt told him that "They aren't going to pay it," Mr. Hillier grieved the matter.

The grievor confirmed in cross examination that he was not forced to come to work on the

- 4) that witnesses would not be excluded;
- 5) that the statutory and/or collective agreement time limits for filing the award were extended.

The arbitrator incurred a medical problem post hearing, which made it impossible for him to complete the award within a reasonable time frame as initially intended. Under the circumstances, the parties agreed with the arbitrator's proposal that he would submit an abbreviated award as he was able to manage by working infrequent short periods of time. The arbitrator gratefully acknowledges the parties' patience and understanding in this matter. Though a significantly abbreviated award was originally intended, the large number of "returns to the drawing board" that occurred ultimately resulted in a longer award.

Appearances for the Union

Mr. Max Hillier, grievor
Mr. Cecil Peach, Union Local Vice Chair

Appearances for the Employer

Mr. Alvin Roff, Plant Manager

The following documents were introduced by consent:

1. Collective agreement Aug 1, 2006 to Dec. 31, 2009;
- 2(a) Grievance form, September 18, 2008
- 2(b) Employer's response, September 22, 2008;
- 2(c) Union's response, October 15, 2008.

The relevant collective agreement provision is as follows:

10.05 - An employee who works such hours as to not receive ten (10) hours rest between regular shifts will, unless there is an urgent need for his services, have the option of remaining at home for ten (10) hours and then return to work or report to work at his regular starting time at the rate of double time for the number of hours his rest period was less than ten (10) hours. **Notwithstanding the foregoing, if an employee does not receive ten (10) hours rest between shifts as a result of the employee's decision to work a day shift instead of a regular night shift or to work a night shift instead of a regular day shift, this Article 10.05 will not apply and the employee must work the additional shift at the employee's regular rate.**

BACKGROUND AND EVIDENCE

Findings and Decision in a Dispute

Between

GRAND BANK SEAFOODS
(a Division of Clearwater Seafoods limited Partnership)
(hereinafter referred to as "the Employer" or "the Company")

And

FISH, FOOD AND ALLIED WORKERS UNION (CAW)
(hereinafter referred to as "the Union")

THE GRIEVANCE

On September 18, 2008, Maxwell Hillier filed an individual grievance claiming that

[t]he Company violated Article 10; Hours of Work; 10:05 and the collective agreement by scheduling grievor for work at 6:00 AM on Sept. 09/08, after the grievor had worked the preceding night shift, until 11:45 PM.

Therefore, grievor never had 10 hours rest between shifts & had the option to remain home for 10 hours or return to work at the rate of double time for hours less than 10 hours rest – 3 ¾ hours

Full redress was requested.

The hearing was held at St. John's, Newfoundland and Labrador, on May 30, 2009.

For the Union: Mr. Greg Pretty, Representative of FFAW (CAW), *et al.*
For the Employer: Mr. Eric Durnford, LL.B., *Q.C.*, *et al.*
Sole Arbitrator: Mr. David L. Alcock

The parties agreed:

- 1) to the selection of the arbitrator;
- 2) that the arbitrator had jurisdiction to deal with the dispute;
- 3) that the arbitrator would remain seized of the matter to deal with issues of clarification arising out of the award: