

**FINDINGS AND DECISION
IN A DISPUTE
between**

**HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND
REPRESENTED BY TREASURY BOARD AND THE
NEWFOUNDLAND AND LABRADOR HEALTH BOARDS ASSOCIATION
ON BEHALF OF CENTRAL REGIONAL INTEGRATED HEALTH AUTHORITY
("the Employer")**

**AND
THE NEWFOUNDLAND AND LABRADOR NURSES' UNION
(the Union)**

A Group/Policy Grievance

For the Union: Mr. David Conway, Presenter
Ms. Nancy Dove, Branch President, Advisor

Witnesses: Ms. Millie Guzzwell, RN
Ms. Nancy Dove, RN

For the Employer: Ms. Jodi Saunders, Presenter
Ms. Patricia Bridgeman, Advisor

For the Union: Mr. Mark Gill, Director of Strategic Human Resources Management
Ms. Hope Maloney, RN Nurse Manager of the Operating Room

The Arbitrator: Dr. John A. Scott

Statement of Grievance "employer paying stand-by rates in 8 & 12 hr increments to staff members who work 8 hr shifts"

Corrective Action requested "pay 8hr shift workers stand-by in 8 hr increments. Full Retro & Full Redress

The Hearing was held in Gander on July 6, 2010.

THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed and had authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final Award will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the Collective Agreement, were properly observed or are waived;
- issues of quantum, if any, would be considered separately and if the parties do not reach agreement within sixty (60) calendar days after publication of the Award they will be referred to the Arbitrator, within the same sixty (60) calendar days, for resolution;
- the Arbitrator will remain seised of the matter for sixty (60) calendar days after publication of the award to deal with matters of interpretation should they arise.

DOCUMENTS TAKEN INTO EVIDENCE:

- Consent #1 Grievance, dated August 14, 2009
- " #2 Collective Agreement, expiring June 30, 2012

COLLECTIVE AGREEMENT ARTICLES DIRECTLY CONSIDERED

Article 2 - Interpretations and Definitions

2.01 For the purpose of the Agreement:

(t) **"Shift"**

(i) Eight (8) Hour Shifts

"Shift" means the normal consecutive working hours scheduled for each employee which occur in any twenty-four (24) hour period. In each twenty-four (24) hour period there will normally be three (3) shifts, viz, day, evening, and night. The first shift of each day shall commence at 0001 hours.

(ii) Twelve Hour Shifts

"Shift" means the normal consecutive working hours scheduled for each employee which occurs in any twenty-four (24) hour period. There will normally be two (2) shifts in a twenty-four (24) hour period viz, day and night. The day shift shall start between the hours of 0730 and 0830. The night shift shall start between the hours of 1930 and 2030.

Article 4 - Management Rights

4.01 The Union recognizes and agrees that all the rights, powers and authority both to operate and manage the hospital under its control and to direct the working force is vested exclusively with the Employer except as specifically abridged or modified by the express provisions of this Agreement. Should a question arise as to the exercise of management's rights in conflict with the specific provisions of this Agreement, failing agreement by the parties, the matter shall be determined by the Grievance and Arbitration Procedure.

Article 8 - Hours of Work

*8.01 Hours of Work

(a) **Eight (8) Hour Shifts**

The normal hours of work for employees working an eight (8) hour shift schedule shall be thirty seven and one-half (37 ½) hours per week or seventy five (75) hours a fortnight divided into seven and one half (7 ½) hour shifts excluding a one half (½) hour unpaid meal period but including a rest period of fifteen (15) consecutive minutes in the first half and second half of the shift. The meal period and rest period(s) may be combined by mutual agreement between the employee and her/his supervisor.

(b) **Twelve (12) Hour Shifts**

The hours of work for employees working a twelve (12) hour shift schedule shall be seventy five (75) hours a fortnight divided into eleven and one quarter (11 ¼) hours or a combination of seven and one half (7 ½) and eleven and one quarter (11 ¼) hours. The work schedule may be changed by mutual consent between the employees and the Employer. The seven and one half (7 ½) hour shifts (*sic*) excludes a thirty (30) minute unpaid meal period but includes a rest period of fifteen (15) consecutive minutes in the first half and second half of the shift. The eleven and one quarter (11 ¼) hour shift excludes a forty five (45) minute unpaid meal period but includes a rest period of fifteen (15) consecutive minutes during each third of the shift. The meal periods and rest period(s) may be combined by mutual agreement between the employee and her/his supervisor.

* (c) **Flexible Hours of Work Community Health**

(i) **Work Schedule**

The work schedule (minimum of 4 weeks schedule) showing the shifts and days of rest shall be communicated to employees at least two weeks in advance.

(ii) **Hours of Work**

Recognizing the unique needs of clients requiring community based nursing and the unpredictable nature of the work, the parties agree that the work day for employees shall operate on a flexible basis in the interest of client care and/or efficiency of the overall operations.

(a) It is intended that the base work schedule to which flexibility will be applied will be seven and one-half (7 ½) hour work days (or a seven (7) hour workday applicable to those nurses grandparented) excluding a thirty (30) minute unpaid meal period (or a one (1) hour unpaid meal period applicable to those nurses grandparented but including a rest period of fifteen (15) consecutive minutes in the first half and second half of the day.

(b) The hours of work for nurses shall be one hundred and fifty (150) hours (or one hundred and forty (140) applicable to those nurses grandparented) within a four (4) week period, or a shorter designated period as agreed to by the employer and union. As of the date of signing of this agreement the parties will agree that an initial four week period will

be designated for each employee which will correspond with a specific payroll period. Once start dates are agreed upon the designated four week periods will continue thereafter.

- (c) The seven and one-half (7 ½) hour workday (or the seven (7) hour workday applicable to those nurses grandparented) may be flexed to ten (10) hours per day in the interest of client care and/or efficiency and/or to complete work. The shift shall not begin before 0700 hours or extend beyond 2200 hours.
- (d) The employer shall make every reasonable effort to notify an employee of any anticipated changes to the length of his/her workday.
- (e) It is agreed that no premium or overtime shall apply where an employee chooses to work:
 - 1) on his/her scheduled day of rest; or
 - 2) in excess of ten (10) hours per day; or
 - 3) outside the hours of 0700 to 2200 hours; or
 - 4) in excess of one hundred and fifty (150) hours in a four (4) week designated period (or one hundred and forty (140) hours applicable to those nurses grandparented)....

(x) **Overtime**

(a) When a full-time or part-time nurse is required by the employer to work:

- 1) on her scheduled day of rest; or
- 2) in excess of ten (10) hours per day; or
- 3) outside the hours of 0700 to 2200 hours; or
- 4) in excess of one hundred and fifty (150) hours in a four (4) week designated period (or one hundred and forty (140) hours applicable to those nurses grandparented),

she or he shall be granted at her/his option compensatory time off or overtime at the applicable rate.

(b) When a casual employee is required by the employer to work:

- 1) in excess of ten (10) hours per day; or
- 2) in excess of one hundred and fifty (150) hours in a four (4) week designated period,

she/he shall be paid at the applicable overtime rate.

(c) Employees shall be entitled to maintain a maximum of forty (40) hours of compensatory time. All compensatory time in excess of forty (40) hours will be paid.

***8.03 Working Schedule**

The working schedule (minimum of four weeks schedule) showing the shifts and days of rest shall be posted in an appropriate place at least two (2) weeks in advance.

8.04 **Rotation of Shifts**

(a) **Eight (8) Hour Shifts**

The rotation of shifts shall be carried out in an equitable manner. Each employee shall receive at least eight (8) days of day shifts in a month provided she/he may waive this right.

(b) **Twelve (12) Hour Shifts**

The rotation of shifts shall be carried out in an equitable manner. Each employee shall receive at least seven (7) days of day shifts per month provided she/he may waive this right. Where the current twelve (12) hour shift scheduling provides a greater benefit, this benefit will not be reduced during the term of this agreement.

8.05 **Consecutive Shifts**

(a) **Eight (8) Hour Shifts**

No employee shall be compelled to work more than seven (7) consecutive day shifts or more than six (6) consecutive evening or night shifts unless otherwise agreed by mutual consent between the employee and her/his supervisor.

(b) **Twelve (12) Hour Shifts**

No employee shall be compelled to work more than three (3) consecutive shifts. In any case, employees, by mutual consent with their supervisor may agree to work a greater number of consecutive shifts.

*8.08 **Exchanging Days of Rest**

Employees may exchange their days of rest with the approval of the manager or designated representative.

8.09 **Weekends Off**

(a) **Eight (8) Hour Shifts**

Employees, including part-time employees, shall receive a minimum of every third weekend off and the Employer shall endeavour to grant every second weekend off, unless otherwise agreed by mutual consent between the employee and her/his supervisor. The weekend off shall mean a Saturday and the Sunday immediately following, ensuring the employee a minimum of fifty-six (56) hours off duty.

(b) **Twelve (12) Hour Shifts**

Employees, including part-time employees, shall receive a minimum of two (2) weekends off out of every four (4) weekends and the Employer shall endeavour to grant every second (2nd) weekend off, unless otherwise agreed by mutual consent between the employee and her/his supervisor. Where the current twelve (12) hour shift schedule provides for every second (2nd) weekend off, this benefit shall be maintained during the term of the current agreement. A weekend off shall be a period including Saturday and Sunday from at least Friday at 0800 hours to Monday at 0800 hours or from at least Friday at 2000 hours to Monday at 2000 hours.

8.10 Rest Between Scheduled Shifts

(a) Eight (8) Hour Shifts

There shall be at least sixteen (16) hours between scheduled shifts (excluding overtime) unless otherwise agreed between the employee and her/his supervisor. Where sixteen (16) hours of rest (excluding overtime) are not provided, the employee shall receive pay at the rate of time and one half (1 ½) for each hour worked on the scheduled shift which infringes on the sixteen (16) hour rest period.

(b) Twelve (12) Hour Shifts

There shall be at least twelve (12) hours between scheduled shifts (excluding overtime) unless otherwise agreed between the employee and her/his supervisor. Where twelve (12) hours of rest (excluding overtime) are not provided, the employee shall receive pay at the rate of time and one half (1 ½) for each hour worked on the scheduled shift which infringes on the twelve (12) hour rest period.

***8.12 Differentials**

***(a) (i) Shift Differential (Eight (8) Hour Shifts)**

Effective date of signing, a shift differential of two dollars and thirty cents (\$2.30) per hour shall be paid for each hour the employee works between the hours of 1600 hours on one day and 0800 hours on the following day, excluding those employees working on a recognized day shift.

(ii) Shift Differential (Twelve (12) Hour Shifts)

Effective date of signing, a shift differential of two dollars and thirty cents (\$2.30) per hour shall be paid for each hour the employee works between the hours of 1600 hours on one day and 0800 hours on the following day.....

8.15 Two Shift Rotation (Eight (8) Hour Shifts)

Through mutual consent the Union and the Employer may agree to institute a two shift rotation in places of employment. The two shift rotation shall be either evenings and nights, days and evenings or days and nights.

8.16 Twelve (12) Hour Work Schedule

(a) The Employer and the Union may agree that employees in a particular work area may work a twelve (12) hour shift schedule. The request for a twelve (12) hour shift schedule may come from seventy five (75) percent of the employees in that work area or the Employer, and if agreed upon by the parties, all employees in that work area shall work a twelve (12) hour shift schedule. This twelve (12) hour shift schedule shall remain in effect in the work area until either of the parties gives the other thirty (30) calendar days notice of its intention to terminate this agreement. The request to terminate the twelve (12) hour shift schedule by the Union must have the support of seventy-five (75) percent of the employees in the work area.

Only employees holding permanent positions in the work area, including those permanent employees on leaves of absences, will be eligible to vote. Casual employees, employees holding temporary positions in the work area, and employees occupying permanent float positions, shall not be eligible to vote.

- (b) The first twelve (12) weeks of the twelve (12) hour shift schedule shall be considered a trial period. Prior to the completion of the trial period, a meeting of the employees in the particular work area will take place to review the twelve (12) hour shift schedule. Assuming the Employer and seventy five (75) percent of the employees in the work area wish to continue the twelve (12) hour shift schedule, it shall be continued.
- (c) All clauses designated Twelve (12) Hour Shifts shall apply to employees working the twelve (12) hour shift schedule. All other clauses of the agreement, which have not been amended for "Twelve (12) Hour Shifts" shall apply to employees who work on a Twelve (12) Hour Shift schedule as they do to all other employees.

9.11 Consecutive Work Premium

- (a) **Eight (8) Hour Shifts**
Subject to clause 8.05, all work performed on the seventh (7th) consecutive evening or night shifts (or any combination of evening or night shifts) shall be paid for at the rate of time and one half (1 ½) and work performed on the eighth (8th) and subsequent consecutive shifts shall be paid for at a double time rate. This clause shall not apply to those consecutive shifts worked subject to the written and signed request of the employee.
- (b) **Twelve (12) Hour Shifts**
Subject to clause 8.05, employees who work under a twelve (12) hour shift schedule will be paid time and one half (1 ½) for all work performed on the fourth (4th) consecutive shift and double (2) time for the fifth (5th) and subsequent consecutive shifts. This clause shall not apply to those consecutive shifts worked subject to the written and signed request of the employee.

Article 10 - Standby

*** 10.01 Standby Duty Rates**

- * (a) **Eight (8) Hour Shifts**
Effective date of signing, employees performing standby duty shall be paid at the rate of twenty dollars and forty cents (\$20.40) per eight (8) hour shift or part thereof.
- * (b) **Twelve (12) Hour Shifts**
Effective date of signing, employees performing standby duty shall be paid at the rate of thirty dollars and sixty cents (\$30.60) per twelve (12) hour shift or part thereof.

Article 11 - Callback

11.01 Callback Pay Rate

When an employee is called back to work and reports for work, she/he shall be paid for a minimum of three (3) hours at the applicable overtime rate.

Article 13 - Escort Duty

13.02 (i) Eight (8) Hour Shifts-Returning Within Seven and One-Half Hours

If the employee on escort duty commences her/his return to her/his hospital with equipment, drugs or documents and if none, then to her/his residence, within seven and one-half (7 ½) hours following relief of escort duty, she/he shall receive time off or pay, at her/his option, at the applicable overtime rates for all time spent in return travel in excess of her/his normal seven and one-half (7 ½) hour shift.

- (ii) **Twelve (12) Hour Shifts-Returning Within Eleven and One Quarter (11 ¼) Hours**
If the employee on escort duty commences her/his return to her/his hospital with equipment, drugs or documents and if none, then to her/his residence, within eleven and one-quarter (11 ¼) hours following relief of escort duty, she/he shall receive time off or pay, at her/his option, at the applicable overtime rates for all time spent in return travel in excess of her/his normal eleven and one-quarter (11 ¼) hour shift.

13.03 No Loss of Days of Rest

- (i) **Eight (8) Hour Shifts**
Subject to clause 13.02, if an employee is detained following relief of escort duty due to weather or other transportation difficulties, she/he shall not lose her/his day(s) of rest. The time she/he is so detained and the time spent travelling back to her/his hospital shall be deemed to be time worked with a maximum of seven and one-half (7 ½) hours at straight time in a twenty four (24) hour period.
- (ii) **Twelve (12) Hour Shifts**
Subject to clause 13.02, if an employee is detained following relief of escort duty due to weather or other transportation difficulties, she/he shall not lose her/his day(s) off. The time she/he is so detained and the time spent travelling back to her/his hospital shall be deemed to be time worked with a maximum of eleven and one-quarter (11 ¼) hours at straight time in a twenty four (24) hour period.

13.04 Return to Work Following Escort Duty

- (i) **Eight (8) Hour Shifts**
No employee returning from escort duty will be required to commence another regular seven and one-half (7 ½) hour shift within twelve (12) hours of her/his return unless otherwise agreed between the Employer and the employee concerned. In cases where a nurse is required to work beyond 0200 hours, and who has not had a sufficient rest period, she/he will be entitled to up to an eight (8) hour rest period without loss of pay.
- (ii) **Twelve (12) Hour Shifts**
No employee returning from escort duty shall be required to commence another regular eleven and one-quarter (11 ¼) hour shift within twelve (12) hours of her/his return unless otherwise agreed between the Employer and the employee concerned. In cases where a nurse is required to work beyond 0200 hours, and who has not had a sufficient rest period, she/he shall be entitled to up to a twelve (12) hour rest period. The first eight (8) hours of the rest period shall be without loss of pay and the remainder shall be granted at her/his option, as compensatory overtime or annual leave.

16.04 Jurisdiction of the Board

An arbitration board may not alter, modify or amend any provisions of this agreement but shall have the power to set aside or modify a decision of the Employer. No arbitration board shall make an award which would amend or change a collective agreement, a judgement or an earlier award.

Article 17 - Vacation

17.01 Length of Vacation

(a) Eight (8) Hour Shifts

An employee, other than Public Health Nurses employed by the Province of Newfoundland and Labrador, shall receive an annual vacation with pay in accordance with her/his years of employment as follows:

- (i) less than one (1) year - one and two-thirds ($1\frac{2}{3}$) working days for each month of service;
- (ii) one (1) year or more but less than ten (10) years - four (4) weeks;
- (iii) more than ten (10) years but less than twenty five years of service - five (5) weeks,
- (iv) more than twenty-five (25) years of service - six (6) weeks.

(b) Twelve (12) Hour Shifts

An employee, other than Public Health Nurses employed by the Province of Newfoundland and Labrador, shall receive an annual vacation with pay in accordance with her/his hours of employment as follows:

- (i) Less than one thousand nine hundred and fifty (1,950) hours - twelve point five (12.5) working hours for each one hundred and sixty-two point five (162.5) hours of service;
- (ii) One thousand nine hundred and fifty (1,950) hours or more but less than nineteen thousand five hundred (19,500) hours, one hundred and fifty (150) working hours;
- (iii) Nineteen thousand five hundred (19,500) hours of service but less than forty-eight thousand seven hundred and fifty (48,750) hours - one hundred and eighty-seven point five (187.5) working hours;
- (iv) More than forty-eight thousand seven hundred and fifty (48,750) hours of service - two hundred and twenty-five (225) working hours;
- (v) The minimum period of vacation that can be taken is one (1) hour.

17.10 Maximum Annual Leave Accumulation

(a) Eight (8) Hour Shifts

An employee may carry forward to another year any proportion of annual leave not taken by her/him in previous years until, by so doing, she/he has accumulated a maximum of:

- (i) Twenty (20) days annual leave, if she/he is eligible for twenty (20) days in any year;
- (ii) Twenty-five (25) days annual leave, if she/he is eligible for twenty-five (25) days in any year;
- (iii) Thirty (30) days annual leave, if she/he is eligible for thirty (30) days in any year. Employees who are prohibited from taking annual leave because of workers' compensation benefits or extended sick leave shall be allowed to carry forward additional days.

(b) Twelve (12) Hour Shifts

An employee may carry forward to another year, any proportion of annual leave not taken by her/him in previous years, until by so doing she/he has accumulated a maximum of:

- (i) One hundred and fifty (150) hours annual vacation, if she/he is eligible for one hundred and fifty (150) hours in any year;

- (ii) One hundred and eighty-seven point five (187.5) hours annual vacation, if she/he is eligible for one hundred and eighty-seven point five (187.5) hours in any year;
- (iii) Two hundred and twenty-five (225) hours annual leave if she/he is eligible for two hundred and twenty-five hours in any year.

Employees who are prohibited from taking annual leave because of workers' compensation benefits or extended sick leave shall be allowed to carry forward additional hours.

Article 19 - Sick Leave

19.10 Extension of Sick Leave

(a) Eight (8) Hour Shifts

An employee with more than five (5) years of service who has exhausted her/his sick leave credits may be allowed in the event of illness, an extension of her/his sick leave to a maximum of fifteen (15) working days. This sick leave extension shall be repaid by the employee upon her/his return to duty from her/his normal monthly accumulation.

(b) Twelve (12) Hour Shifts

An employee with more than five (5) years of service who has exhausted her/his sick leave credits may be allowed in the event of illness, an extension of her/his sick leave to a maximum of one hundred and twelve point five (112.5) hours. This sick leave extension shall be repaid by the employee upon her/his return to duty from her/his normal monthly accumulation.

OPENING STATEMENTS

FOR THE UNION Mr. Conway introduced the grievance by noting that it deals with the Collective Agreement's requirements concerning standby pay. The Agreement describes nurses as working either an eight hour shift or twelve hour shift. There are no other shifts contemplated. The Agreement also sets out benefits, including annual leave and extended sick leave, based on employees' hours of work, the shifts they actually work. All these calculations are based on the shifts worked by nurses.

The amounts of standby pay due, as set out at Article 10.01, are based on whether a nurse is an eight hour or twelve hour shift worker. The Union also notes that the subheadings "eight (8) hour shifts" and "twelve (12) hour shifts" as used in Article 10.01 are quite significant.

Despite the clear requirements of the Collective Agreement, the Employer is, in certain cases, treating the eight hour shift workers as though they were twelve hour shift workers. Normally an eight hour shift worker's standby pay is calculated in eight hour blocks. However, when assigned for a twelve hour period, rather than pay the employee two eight hour minimum blocks, the Employer is paying on the basis of a twelve hour block, which minimizes the benefit to eight hour employees.

Factually there is little or no dispute between the parties. There are even some points of agreement. The Union acknowledges that the Employer is free to change the standby periods, if it

chooses. It is free even to change to twelve hour periods. That is not in contention. It is also agreed that there are minimum blocks: either eight or twelve hour shifts. However, the question does arise whether an eight hour shift worker can be paid a twelve hour standby block, not the eight hour block. The twelve hour block would be due to a twelve hour shift worker, not to those who work eight hour shifts.

The Newfoundland and Labrador Nurses's Union (NLNU) argues that the Agreement's language is clear, unequivocal, and consistent. Eight hour shift workers do not work twelve hour shifts. Eight hour shift workers are due the benefits due to those working eight hour shifts. The Collective Agreement clearly intends to confer monetary benefits in accordance with with employees' hours of work. Eight hour workers get paid eight hour standby blocks.

There is no onus to determine in this dispute, since it does not involve a finding of fact. This is an interpretation issue for the Arbitrator to determine.

FOR EMPLOYER Ms. Saunders confirmed that the issue before the Arbitrator relates to pay for standby as set out in Article 10. The Union asserts that there are eight hour versus twelve hour shift workers. The Employer, however, holds that the hours of work are covered under Article 8 which says that eight hour shifts are normal, and also defines the hours of work for a twelve hour schedule.

The Employer argues that the normal hours of work as set out in Article 8.01 cannot be interpreted to mean that an employee who normally works an eight hour shift can *only* work an eight hour schedule. Such employees may also work other schedules: for example, twelve hours. Article 10, which deals with standby duty rates, addresses precisely this issue. The pay does not relate to normal hours of work, but to issues distinctly different for NLNU employees. Such employees do standby *after* working blocks of eight or twelve hours. Article 10 is not about "hours of work". That is set out in Article 8. Article 19 clearly relates just to standby, and the rates of pay involved in "standby", not in "work".

Standby is linked to call back, which may be for as little as fifteen minutes or for as long as four hours or twenty-four hours. (The call back duty rates are paid for a minimum of one hour.) That is not the same as providing "standby" following an eight hour or twelve hour shift of work. Standby is standby. It is not "work" despite the fact that it may create an inconvenience.

The Employer agrees that this is an interpretive matter, and will lead evidence of the daily

operation and arbitral jurisprudence in that respect. In the Employer's view, the language is absolutely clear. When read as a whole, the Collective Agreement is clearly consistent with the Employer's interpretation. The Employer argues that the grievance must, therefore, be denied.

EVIDENCE

THE FIRST UNION WITNESS was Ms. Millie Guzzwell, a Registered Nurse of thirty-four years experience, who has worked with Central Health for thirty years. She has served as Staff Nurse in the operating room at the James Paton Memorial Hospital for the last eleven years.

Ms. Guzzwell testified that she works eight hour shifts: "...either from 7:45 in the morning 'til 3:45 in the afternoon, or from 10:00 AM until 6:00 PM. And sometimes it's from 12 noon until 8:00 PM." Ms. Guzzwell works regular shifts from Monday to Friday, but also has to do...

"standby during the week, and one in every six weekends. During the week, Monday to Friday, when I work the 10:00 AM to 6:00 PM shift, then from 6:00 PM to 8:00 AM I do fourteen hours standby. When I do the 12 noon to 8:00 PM shift, standby is from 8:00 PM to 8:00 AM, which is twelve hours. And then from 7:45 in the morning to 3:45 there is no standby attached to that shift. That's our regular day shift."

Ms. Guzzwell also went on to explain that when she does the 6:00 PM to 8:00 AM standby her pay is calculated as two eight hour blocks, which means she gets paid at a rate equivalent to 16 hours for the 14 hours standby. When she works the 12 noon to 8:00 PM shift, and then does the associated standby (from 8:00 PM to 8:00 AM), that amounts to twelve hours of standby required. Despite the fact that when she does the fourteen hour (6:00 PM to 8:00 AM) standby she gets two 8 hour blocks of standby pay, the standby pay she receives for the 12 hour standby period (8:00 PM to 8:00 AM) is calculated as just one block of twelve hours.

Ms. Guzzwell also provided an example of her situation by saying that, on the one in six weekends she is required to do standby...

I might be scheduled from 10:00 AM to 6 :00 PM, and at 6:00 PM start a standby until 8:00 PM on Saturday morning. That would be paid as two blocks of eight hour standby, despite the fact that the actual duration is only fourteen hours. Sometimes there might even be three blocks of eight over a weekend, from 8:00 AM Sunday to 8:00 AM Monday... If I'm scheduled from 12 noon to 8:00 PM I'll continue from 8:00 PM Friday to through to 8:00 AM Saturday and get one block of twelve hour standby, and then for the rest of the weekend (from 8:00 AM on Saturday to 8:00 AM on Sunday" I get three blocks of eight ... or from 8:00 AM Sunday to 8:00 AM Monday another three blocks of eight.

But if I'm working the 12 noon to 8:00 PM shift according to my schedule and then do a twelve hour standby, I should get two eight hour blocks. That is what I should get, as with all other blocks. There are no twelve hour shifts in the OR (Operating Room). There are never twelve hour shifts in the OR.

Asked why standby is assigned in the OR, Ms. Guzzwell said:

It's required duty. It's an accepted part of our duty. The busiest time is between 8:00 AM and 4:00 PM; so standby is the easiest way to handle for the period from 8:00 PM to 8:00 AM to deal with injuries with a beeper, traffic accidents, c-sections, *etc.*

Asked whether she necessarily does any work on standby, and whether there is a minimum pay for call back, Ms. Guzzwell answered:

Occasionally it can be a lot of hours... Yes there is a minimum of three hours pay, so it depends on the circumstances.

ON CROSS EXAMINATION Ms. Guzzwell confirmed that there is no mathematical difference between 3 x 8 and 2 x 12. "No difference whatsoever." Ms. Guzzwell also confirmed that the dispute arises because the standby pay for the 8:00 PM to 8:00 AM standby period is being calculated as a single twelve hour block when, in her view, that pay should be calculated as two eight hour blocks.

Asked to explain why pay for twelve hours of standby should be calculated as two eight hour blocks rather than as a single twelve hour block, Ms. Guzzwell pointed to Article 10.01(a) of the Collective Agreement, which reads as follows:

Article 10 - Standby

***10.01 Standby Duty Rates**

***(a) Eight (8) Hour Shifts**

Effective date of signing, employees performing standby duty shall be paid at the rate of twenty dollars and forty cents (\$20.40) per eight (8) hour shift or part thereof.

***(b) Twelve (12) Hour Shifts**

Effective date of signing, employees performing standby duty shall be paid at the rate of thirty dollars and sixty cents (\$30.60) per twelve (12) hour shift or part thereof.

Asked whether that article references eight or twelve hour shift workers, she agreed that it did not.

Ms. Guzzwell testified, however, that:

We've been paid in blocks of eight hours for every shift. The basis of calculation is two eight hour shifts. They go if that policy is allowed. We are supposed to be paid in blocks of eight hours when I am an eight hour shift worker... As far as twelve hour shifts are concerned they will never be in the OR."

Asked who has the responsibility to schedule shifts, Ms. Guzzwell answered: "Our Manager and us. We make it jointly. She does not dictate to us."

Asked whose responsibility it is to determine a work schedule, Ms. Guzzwell again answered: "Mrs. Hope Maloney and the OR staff."

Asked whether scheduling is one of her duties, Ms. Guzzwell answered: "Between us. We do it between us because she can't do it." Asked, again, who actually has the responsibility, she said:

I can't answer you more than I have. She as Manager is to break any tie situation. She listens to us. She is not in the OR with us. She's got a good head.

Asked, again, if scheduling is included among her duties, Ms. Guzzwell answered, "No."

Asked whether it falls within the duties of any other Staff Nurse, Ms. Guzzwell answered: "A Nurse 1 would, yes; she does it on a daily basis."

Asked whether changes actually occur on the schedule, and how these are handled when the schedule is posted, Ms. Guzzwell answered; "Yes to accommodate sick leave, *etc.* We are told if a shift has to be changed." Asked whether employees sometimes trade normal hours or standby hours, Ms. Guzzwell answered, "Yes that's done." Asked whether the trades are always done in eight hour blocks, Ms. Guzzwell answered: "That's how we do our blocks." Asked whether trade of standby is done in hours more than or less than eight hour blocks, Ms. Guzzwell said:

We can do parts of weekends to switch, and that could be twelve hours, yes; but it's standby. I'm home with a beeper in my pocket.

ON REDIRECT EXAMINATION Ms. Guzzwell explained her comment that there would, in her view, "never be" twelve hour shifts in the OR, by saying: "Look at Article 8.16." Asked whether there has been a request from employees to switch to a twelve hour shift schedule, Ms. Guzzwell answered, "Never." Asked whether there has ever been a twelve hour work schedule in the OR, Ms. Guzzwell again said, "Never."

THE SECOND UNION WITNESS was Ms. Nancy Leah Dove, RN for eighteen years and an employee of Central Health with the current Employer for seventeen years. She works at the J.S. Paton Memorial Hospital in the OR in the post anaesthetic care unit, and has done so for eleven years. She is Nurse 1. Ms. Dove works the same pattern of hours described by Ms. Guzzwell (7:45 AM to 3:45 PM, 10:00 AM to 6:00 PM, or 12:00 PM to 8:00 PM) over a Monday-to-Friday schedule in eight hour blocks. She also confirmed that she does standby "except for the 7:45 to 3:45 shift", and that:

The standby period for the 10:00 AM to 6:00 PM shift is from 6:00 PM to 8:00 AM the following morning on a weekday. On a weekday, for the 12:00 to 8:00 PM shift the standby session will be from 8:00 PM to 8:00 AM the following morning. When we are on standby from 6:00 PM to 8:00 AM the pay is in two blocks of eight hours.

Ms. Dove confirmed she had filed the grievance. "I am the Branch 8 President for the NLNU."

Asked to explain why she had filed the grievance, Ms. Dove said:

We are eight hour shift workers. The shifts are eight hours or twelve hours. We are naturally being paid in eight hour and twelve hour units. Our interpretation is that it should be continued with eight hour pay units for eight hour shift workers. So, for the fourteen hour standby from 6:00 PM to 8:00 AM it is appropriate to get the two blocks of eight hours. I'd expect to get two blocks of eight hours.

Ms. Dove confirmed that the period from 8:00 PM to 8:00 AM is twelve hours but added:

I'd expect to get two blocks of eight hours for that, rather than one block of twelve hours. I'm an eight hour worker... On Fridays, I do the 10:00 AM to 6:00 PM shift and then I'm on call until 8:00 AM the next morning. The problem is that, if I work from the 12:00 PM until 8:00 PM shift on Friday, I get paid in one twelve hour block for standby and the rest is in eight hour blocks.

ON CROSS EXAMINATION Ms. Dove confirmed that whether the period involved is from Friday evening to Saturday evening, or from Saturday night to Sunday evening, there are still twenty-four hours are involved. Ms. Dove also confirmed that if she has standby duty for fewer than the eight hours she, nonetheless, gets eight hours standby pay. Similarly, if she exceeds eight hours but is less than twelve hours she does now get twelve hours standby pay. However, if it exceeds twelve hours, but is less than sixteen hours she does get the two eight hour blocks.

Ms. Dove confirmed that nurses generally learn their standby schedule by its being posted in a twelve week rotation. She also confirmed that changes do occur to the schedule.

For instance, on an evening call, if someone asks 'Can someone do this shift to cover the calls for me tonight?' there are trades possible and allowed... If I've got to write an exam for a couple of hours, I can ask a colleague to cover for me. We do not go to the Employer. I'll get the eight hour block of call, and next time I will cover for her... As long as its covered by an appropriate nurse. It has to be an appropriate trade. The Manager is fine with that... It can also be for full shifts, but for someone to do a call like that we tell Ms. Maloney, so that person gets paid.

Asked how frequently such changes occur, Ms. Dove said:

It changes. Lately, I have had to switch because of courses I'm doing. The employees use this to their benefit. Yes, it benefits everybody.

Asked how the nurses, themselves, discriminate between when an employee actually gets paid on the books for such a trade, or it is done just simply as a favour, Ms. Dove answered:

If someone is doing eight hours of call, and if its an eight hour person ... but if it's for just hours it's a favour. We're not trying to run up costs to the Employer, so we do it as a favour.

Ms. Dove confirmed that the nurses also trade twelve hour blocks. "A nurse did my twelve hours of call last night." Ms. Dove acknowledged that Article 10.01(b) refers to eight hour *shifts*, not eight hour shift *workers*. Ms. Dove also confirmed that, when one is called back from standby the nurse is paid an overtime rate as set out in the Collective Agreement,

That is different from the normal wage rate. The duration of call backs can vary. There is a call back rate which is distinct from the standby rate... There is a three hour minimum. We get a three hour call back at the applicable overtime rate. If it is greater than three hours we're paid the actual time there at the applicable overtime rate.

ON REDIRECT EXAMINATION Ms. Dove confirmed that the schedule ...

is determined by our Nurse 2, and Ms. Maloney approves it and may change it, but it is the Nurse 2 who does it.

Asked whether the Employer has to allow any standby that is switched, Ms. Dove answered: "I don't have to go to my supervisor, but I have to find an appropriate cover for it."

THE FIRST EMPLOYER WITNESS was Mr. Mark Gill, Director of Strategic Human Resource Management since November 2009. Mr Gill described his various duties and responsibilities and confirmed that he is familiar with the grievance (Consent #1).

I attended a meeting a few days after I got the form. I decided to send it to arbitration and signified this on the back.... It is my responsibility, yes: ultimately, in consultation with others. Ultimately, it is my responsibility.

Mr. Gill explained that, in the Employer's view, Article 10 is clear.

If you are on standby for twelve hours you get the twelve hour rate. It is clear as that. Eight hour workers do work twelve hour shifts. It only makes sense that they get paid the shift that is outlined in 10.01(b).

Mr. Gill's attention was directed to the second page of the grievance form where, in his reply the word "works" is underlined. Mr. Gill confirmed that he had underlined the word and intended to specify by doing so that it is "working at the work place that is at issue Work and standby are different. Standby duty is not "work".

Asked whether the Employer's interpretation of the Collective Agreement is applied across the region consistently, Mr. Gill answered:

Yes. In fact, in our other facilities we have eight hour types paid twelve hour standby rate. So this grievance is specific to the James Paton Memorial Hospital work place.

Mr. Gill also confirmed that the Management Rights Clause, Article 4.01, was relevant in his decision to deny the grievance.

In my view, it is unequivocal that Article 10.01(b) calls for twelve hour rate for the twelve hour standby... Our practice, consistent as it is across the region, is that it is management's right to do so.

Mr. Gill acknowledged that his response addressd the possibility that the Arbitrator might find some ambiguity. I n the Employer's view, there is no ambiguity on tis point in the Agreement.

Asked who schedules shifts, Mr. Gill answered:

Ultimately, it is the Employer, or a management person for the Employer. It's very collaborative at the James Paton Memorial Hospital; but, ultimately, it is management's responsibility, and it is management nurses who do it.

ON CROSS EXAMINATION Mr. Gill confirmed that a nurse who is on standby for eight hours under Article 10.01(a) receives \$20.40 as a pay rate for one eight hour block. Asked what the pay would be for four hours under 10.01(a) Mr. Gill answered:

The same \$20.40 ... and under Article 10.01(b) someone working eleven hours would receive twelve hour pay block of \$30.60, since eleven hours is part of twelve hours.

Mr. Gill also confirmed that work for fourteen hours would be paid at the rate of twice eight, but would not be paid at the rate of twelve hours plus an eight hour. "No, because that would be more expensive." Asked whether this means that the Employer can choose which pay rate applies, Mr. Gill answered, "Absolutely." Asked whether this choice is based on which is less costly, Mr. Gill answered, "Yes. Right." Mr. Gill also confirmed that Article 2.01(t) defines "shift" and that there are only two types of shift there defined, distinguishing eight hour shifts from twelve hour shifts.

Mr. Gill was asked whether, in his view, Article 8.16, the eight hour shift is the norm and that the twelve hour shift is, in fact, the exception under this Collective Agreement. He answered, "Not necessarily." Mr. Gill, however, did agree that the eight hour shift is "the default".

Mr. Gill also agreed that in Articles 8.04(a), 8.05(a) , 8.09(a), and 8.10(a) reference is made in each case to employees working eight hour shifts as distinguished from those working twelve hour

shifts. He also acknowledged that the same distinction continues to be applied in workplace and scheduling situations in Articles 9.11(a) & (b), 13.02(i) & (ii), 13.03(i) & (ii) and 13.04(i) & (ii) and 17.01(a) & (b). Mr. Gill pointed out, however, that in Article 17.10(a), while it applies to eight hour workers, the same benefit applies to twelve hour workers as it does in Article 19.10(a) & (ii). Mr. Gill noted that "We split it to make it more clear. There is no difference in benefits in these articles."

Asked why the Employer treats Article 10.01(a) & (b) as special or different in the application of the distinction between eight hour and twelve hours shifts, Mr. Gill said:

I don't know that the word "special" applies. Yes, all the others do make a distinction. It is my view, however, that 10.01(b) is less expensive and the Employer will pick which ever makes most sense.

Mr. Gill agreed that when the Collective Agreement refers to shifts it is referring to hours worked by employees. Asked whether the word "shift" applies to standby periods, Mr. Gill answered: "Yes. It is a shift of standby, but not a shift of work."

Mr. Gill was invited to review Article 9.11 which requires a premium be paid for any excess shifts worked in a row. The trigger set out in 9.11(a) is seven shifts. He confirmed that the total number of accumulated hours amounts to 56 (less ½ hour work breaks for a total of 52.5 hours of work. He was then asked to explain the reason for Article 9.11(b) which places the trigger effectively at 45 hours for those working twelve hour shifts. Mr. Gill acknowledged that the Agreement does provide for a different premium rate in these circumstances. He also acknowledged that this may provide an exception to his earlier general statement, but does not apply to standby.

The simple fact is that the rate of pay is cheaper. The simple fact is that twelve hours equals twelve hours.

He also confirmed that his interpretation is based on the need to manage the costs, "Yes, absolutely."

ON REDIRECT EXAMINATION Mr. Gill testified that Article 9.11 requires that if an employee who normally works eight hour shifts does actually work three twelve hour shifts, Article 9.11(b) applies, not 9.11(a). "The reason is that the fourth triggers the premium."

THE SECOND EMPLOYER WITNESS was Ms. Hope Maloney, who for fifteen years has been Nurse Manager of the OR. She testified she is responsible for scheduling standby and other duties. Asked how scheduling is arranged, Ms. Maloney said that:

For the past eight to ten years it's been computerized. It rotates on a six or twelve

week rotation. There has been the same staffing problem over the past twelve to eighteen months now. We need people on call. We started trying different approaches and ended with one in six on call weekends. We've tried a variety of attempts and are now doing it manually. We want to get it back into the system. I've been doing it myself with the team, and once it is down on paper we input it into the computer for access.

Ms. Maloney confirms that the scheduling includes standby. Asked whether changes are made once the schedule is set, how the changes get made, and how hours are determined, Ms. Maloney said:

Basically, no but people do change; a lot of changes... a lot of time in lieu of pay. So it does get changed, particularly weekends... If it's a shift, people will normally come and ask for permission and I'll approve it. On occasion people have changed their shifts... Hours are based on 1½ time. Call back is three hour minimum at time and a half and weekends it's double time with a minimum of three hours.

Asked whether a whole shift must be changed when changes are made and what other kinds of shift changes occur, Ms. Maloney said:

Generally, if it is a shift it is a full shift. People often change among themselves, but it's a personal issue changing calls. Nancy asked someone to take her call last night... Where the 10:00 to 6:00 shift is concerned – followed by the 6:00 PM to 8:00 AM fourteen hour standby period – we were paying hourly, fourteen hours. But then they had to do it by shifts. I started paying two eight hour shifts. Now there is twelve hours, and they got paid for the twelve hours. There are no eight hour or twelve hour blocks used for call back. No, it is a minimum of three hours or time worked.

Asked who actually has the authority to approve the changes, Ms. Maloney said: "I'm responsible. My Team Lead has helped me out." Asked whether changes to the schedule are her responsibility whose responsibility it is to change the schedule, Ms. Maloney said:

Myself or my Team Lead. I have someone who records things, but I myself or the Team Lead do the scheduled approval. If there is a sick call I usually look for a volunteer. I've never had to order anyone to do it, but it would have to be me. It works both ways.

Asked whether there is any restriction on the number of hours an employee can switch with another employee for standby, Ms. Maloney answered:

I try to do full shifts only. People are picking up bits. Years ago they were all coming to see me.. not really tell me, and they're not being paid for it. If it is a full shift then they do tell me. I've not been paying them for the two or three hours. I have a lot of senior staff. I see no problem in flexibility. It's worked, and it's not a big issue.

ON CROSS EXAMINATION Ms. Maloney confirmed that she could refuse any changes.

Yes, I could say that I didn't want any informal changes, yes. And I've done it once or twice. Normally in the OR the pattern of work is eight hours.

Asked whether anyone works twelve hours, Ms. Maloney answered:

Not unless it's overtime. No one is scheduled for twelve hour shifts in advance.

With regard to Article 11, Ms. Maloney confirmed that standby is paid ...

in blocks because of Article 10.01. Because of the fourteen hours we are not paying them hours now; so it's two times eight. There are different issues.

ARGUMENT

FOR THE UNION Mr. Conway repeated his opening statement that there is not a lot in dispute factually. Standby is an expected part of the work that can be required by the Employer, and can also be required for periods other than eight or twelve hours. Standby is also paid in blocks of time. Further, it's also agreed that employees in the OR and Recovery Room normally work eight hour shifts.

However, the issuing in this grievance relates to the twelve hour period from 8:00 PM to 8:00 AM when an eight hour worker suddenly is being treated as a twelve hour employee, and getting the pay of a twelve hour employee.

There is an illusion at play here. The Arbitrator should look carefully at the wording of Article 2.01(t), the definition of "shift". In the Union's view, the definition is instructive. It clearly shows that the Agreement operates on the assumption of a distinction between eight hour and twelve hour shifts. It makes it clear that some employees only work eight hour shifts, while other employees work only twelve hour shifts. This is also confirmed in Article 8.01(b) which clearly sets out the twelve hour shifts under hours of work for those "for employees working a twelve (12) hour shift schedule". Mr. Conway also called attention to the fact that Article 8.01(a) specifies the "normal hours of work for employees working an eight (8) hour shift schedule..." This language reinforces the norm used in this Collective Agreement with respect to the distinction between eight and twelve hour schedules.

In Mr. Conway's view, the headings used through the Agreement are significant. The same pattern of subheadings repeats itself throughout, and is particularly clearly set out in Article 10.01(a) with the respect to the standby duty rates. The distinction is consistent. When the Agreement speaks of shifts, it is quite clear that those who normally work eight hour shifts do not become twelve hour shift employees when they are working a twelve hour "standby" period. Employees can't pick and choose.

The Employer cannot do so either. The eight hour shift employee who is scheduled for eight hours of standby cannot expect to receive the twelve hour standby pay. This situation is one where the benefit of being considered as a twelve hour shift worker provides less to the employee than that which is due as an eight hour employee. Article 9.11(b), dealing with consecutive work premium, provides different benefits to those who "work under a twelve hour shift schedule" in contrast to the eight hour shifts described under 9.11(a).

The Collective Agreement, as a whole, is clearly framed in terms of different hours of work, and this has to be given meaning. If the Employer's interpretation were to be preferred the word "shift" and "shifts" in 10.01 would not have the meaning specified in the Collective Agreement. It would make no sense in terms of the consistency prevailing throughout the document.

Mr. Gill's testimony concerning each of the articles involved would make its understanding of the Article 10.01 exceptional. If the Parties wanted Article 10.01 to be different they would have used different wording, or somehow indicated that this clause was to be interpreted differently.

The Collective Agreement makes sense by understanding that eight hour blocks of standby pay are due to those who normally work eight hour shifts, and twelve hour blocks are available to those who normally work twelve hour shifts.

The Union acknowledges that twelve hour shift workers may be able to work eight hour shifts as well but that is not pertinent to the instant dispute.

Mr. Conway then introduced case law and jurisprudence, as follows: *The Government of British Columbia and The British Columbia Government Employees' Union, Donald H. York's Standby Pay Grievance* [1987] B.C.C.A.A.A. No. 119, 6 C.L.A.S. 101; Mr. Richard B. Bird, Q.C. (Arbitrator) 1987; *The Grace Hospital, represented by the Newfoundland Hospital and Nursing Home Association & the Newfoundland and Labrador Nurses' Union Policy Grievance, Dr John Scott (Chair)*, 1988; *Dorno and Treasury Board (Health and Welfare Canada) Public Service Staff Relations Act* [1994] C.P.S.S.R.B. No. 3 [1994] C.R.T.F.P.C. no 3 (1994) 25 PSSRB Decisions 34 (Digest) PSSRB File No. 166-2-24749 J.B. Turner, Board Member Heard: Winnipeg, Manitoba, Decision: January 4, 1994; *Government of the Province of Alberta, and Alberta Union of Provincial Employees Policy Grievance (Standby Pay)* [2009] A.G.A.A. No. 37 Panel: Allen Ponak (Chair); Vern Bartee (Union Nominee); Paul Workman (Employer Nominee) July 10, 2009.

How the Employer actually chooses the standby is the Employer's business, but once it is scheduled the Collective Agreement makes it clear how the standby pay is to be determined. Eight hour shift workers are paid in eight hour shift blocks.

In the Union's, view the Arbitrator should sustain the grievance on the basis of the plain language of the Collective Agreement, and direct the Employer to change its practice in this regard. FOR THE EMPLOYER Ms. Saunders confirmed that there are several points of agreement between the Parties on this matter. There are, however, interpretative issues that need to be addressed. In the Employer's view, the NLNU agrees that nurses who normally work eight hour shifts can indeed work twelve hour shifts, including twelve hour shifts of standby. But, as the Employer understands it, the NLNU argues that a nurse who normally works eight hour shifts should not be paid a 12 hour standby block when he or she works 12 hours standby, even though that rate is specifically provided for in the Collective Agreement at Article 10.01(b).

It is obvious that the Collective Agreement is the result of the Parties' having acceptance of the language in it, and that the language is as it is for a reason. "Standby" is not normal hours of work. Obviously, this is reflected in the difference in pay. A nurse is paid a great deal less for eight or twelve hours of standby when compared with pay for eight or twelve hours of work.

Article 8(a) deals clearly with hours of work as set out for those normally working eight hour shifts, and 8.01(b) for those doing twelve hour shifts. It is Article 8.01(a) that is most in focus in this issue. It does not say that these are the only hours of work. The evidence shows that we have hours of work or call back that can be different. Nonetheless, call back with a minimum of three hours does attract the premium rate or it is paid as overtime with no minimum.

The standby rate is set out in two blocks, eight hour or twelve hour with the minimum being eight hours. The Union claims that payment of nurses who work twelve hours at the twelve hour standby rate is an anomaly. In the Employer's view it is merely the appropriate block to use as the payment for that period of standby. Similarly, when a nurse works more than eight hours, but fewer than twelve, the twelve hour is the appropriate block.

Ms. Saunders pointed to the fact that Ms. Maloney confirmed Ms. Guzzwell's testimony concerning the shifts from 10:00 AM to 6:00 PM and from 12:00 AM to 8:00 PM. The start and finish times of shift are set by the best use of revenues. Under management rights that best use of

revenues is to pay twelve hour standby as it is currently doing. In the Employer's view the payment for the twelve hour standby is in a twelve hour standby block.

The analogy with overtime is fair. There is no objection to the Employer paying for hours not worked on standby when a more appropriate twelve hour mode is available to the employee. Note that there is no situation in which an employee, under this Collective Agreement, would be paid for fewer hours than the duty actually performed.

Ms. Saunders then presented a number of cases drawn from the arbitral jurisprudence, as follows: *Re Lewisporte Wholesalers Ltd. and U.F.C.W., Loc.* 1252, [1988] Nfld. L.A.A. No. 2 3 L.A.C. (4th) 338 L. Harris, 1988; *United Food and Commercial Workers' Union, Local 401 v. Real Canadian Superstore* [2008] A.J. No. 588, 2008 ABCA 210, 88 Admin. L.R. (4th) 46 [2008] CLLC para. 220-038, 432 A.R. 212, 172 L.A.C. (4th) 289, 2008; R.L. Berger, P.T. Costigan and P.A. Rowbotham J.J.A., 2008; *Re Teck Corona Operating Corp. and U.S.W.A., Loc.* 9165 [2002] O.L.A.A. No. 1007, 110 L.A.C. (4th) 52, D.A. Harris; *Health Employers Assn. of British Columbia v. Nurses' Bargaining Assn.* [2002] B.C.C.A.A.A. no. 225, 109 L.A.C. (4th) 161, S. Kelleher, Arbitrator 2002.; *United Utility Workers Assn. of Canada v. Altalink Management Ltd. (Scheduling Grievance)* [2009] A.G.A.A. No. 52, 189 L.A.C. (4th) 408 J. Leslie Wallace (Sole Arbitrator) 2009.

In the Employer's view, the Union's interpretation does not give meaning to the words of the Collective Agreement, but relies simply on apparent similarities between the articles which are not substantiated by the plain ordinary meaning of the words as set out in Article 10.01(a) & (b). The Employer's interpretation preserves the integrity of the Collective Agreement as a whole. Had the Collective Agreement specified that 10.01(b) does not apply to the eight hour group, the distinction could have been made. The Employer has adopted the proper approach.

The Employer asked that the Arbitrator pay particular attention to *Lewisporte Wholesalers* (Arbitrator L. Harris), and note that the wording of Article 8.01(a) does not say that those working eight hour shifts shall do so exclusively but only "normally". This does not prevent the Employer from using twelve hour block to recompense employees when they are working twelve hour standby periods. It is not required to pay two eight hour rate blocks for only twelve hours work on standby.

There is no reason to find that the Employer has treated any Article of this Agreement as in conflict with any other article. The Employer's interpretation preserves the integrity of the Collective

Agreement as a whole. Had the Union's interpretation been intended by the Parties to this Collective Agreement it would have, and could have, specified that Article 10.01(a\b) does not apply to the eight hour group in Article 10.01(a).

It is the language of the Collective Agreement that must be observed, not language that might have been worked out at the bargaining table. If there are changes to the Collective Agreement then they must be made at the bargaining table.

Ms. Saunders also provided the Employer's commentary on the cases provided by Mr. Conway for the Union. It is certainly clear that proportioning blocks is not the same as requiring the Employer to pay when no duty was performed. That, effectively, is what is required according to the Union's interpretation.

In the Employer's view it is important that the Arbitrator keep his eye on the Collective Agreement. The jurisprudence advanced supports the Employer's interpretation. The language is clear. Reading the relevant articles in the context of the Collective Agreement as a whole brings no inconsistency into the Employer's practise. The grievance should be denied.

The Employer also noted that the Collective Agreement at Article 16.04 precludes the Board's introducing any changes to the Collective Agreement. In the Employer's view to accept the Union's interpretation is, in fact, to violate Article 16.04 which would, in effect, alter or modify the Collective Agreement.

IN REBUTTAL ARGUMENT FOR THE UNION Mr. Conway pointed out that the Employer's attempt to draw a distinction between the rate of pay for work and rate of pay for standby is an irrelevancy. The Collective Agreement requires that certain duties be performed, whether it is in the form of work or of standby.

Similarly, the Employer's reliance on call back versus standby has no bearing on the instant dispute. The Union also pointed out that standby from 6:00 PM to 8:00 AM for a period of fourteen hours does attract sixteen hours standby. What the Union is requesting here is no different.

Management rights remain intact. It is simply a matter of what pay applies to what block of standby. Even if the Employer is entitled to schedule eight hours or twelve hours of standby the question remains at what pay rate?

The jurisdiction of the Arbitrator is fully intact. The matter is one of interpretation which is

entirely within the jurisdiction of the Arbitrator. The Employer's cases do say what they say, but the issue before the Arbitrator is what did the Parties intend? That question is to be addressed.

CONSIDERATIONS

At issue between the Parties is a group/policy grievance dispute over the interpretation of Article 10.01 (a) and (b). The Article reads:

*** 10.01 Standby Duty Rates**

***(a) Eight (8) Hour Shifts**

Effective date of signing, employees performing standby duty shall be paid at the rate of twenty dollars and forty cents (\$20.40) per eight (8) hour shift or part thereof.

***(b) Twelve (12) Hour Shifts**

Effective date of signing, employees performing standby duty shall be paid at the rate of thirty dollars and sixty cents (\$30.60) per twelve (12) hour shift or part thereof.

The Background: I note the asterisks used in this Article indicating that it is newly introduced, in this form at least, in this Collective Agreement. I also understand the novelty of the situation is confirmed by Ms. Hope Maloney, Nurse Manager of the OR, who also pointed to the longstanding practice of eight hour shifts in the OR, an issue emphatically underlined by Ms. Guzzwell during her testimony. Ms. Guzzwell, in fact, referred in her testimony to Article 8.16 which sets out conditions governing changes between eight and twelve hour shifts.

The Union complains that the Employer is "paying stand-by rates in 8 & 12 hr increments to staff members who work 8 hr shifts". According to the Union's evidence and argument, the Employer is misinterpreting article 10.01, specifically by incorrectly compensating those Nurses who work the eight hour shift from Noon to 8:00 PM for the 12 hours Standby duty (from 8:00 PM to 8:00 AM the following morning) associated with that Noon to 8:00 PM shift. The Union claims that these Nurses should receive two eight hour rate blocks Standby pay for doing that 12 hours Standby duty.

In partial justification of its argument, the Union points claims the Employer effectively accepts the principle underlying the Union's position in that it pays two eight hour rate blocks of standby pay to Nurses who do the 14 hour standby duty from 6:00 PM until 8:00 AM the following morning. (That 14 hour standby period is linked to the shift that runs from 10:00 AM until 6:00 PM.)

The Union complains that the single twelve hour standby pay the Employer is now paying for the 12 hours standby duty performed by those completing the Noon to 8:00 PM shift misinterprets

Article 10.01(b) and the Collective Agreement as a whole.

The Union further argues that the language of the Collective Agreement is unambiguous and sustains its position.

The Employer argues that the plain and unambiguous language of Article 10.01 sustains its Management right to pay the Nurses as it does. The Employer points to Article 10.0(b) which clearly provides that "... employees performing standby duty shall be paid at the rate of thirty dollars and sixty cents (\$30.60) per twelve (12) hour shift or part thereof."

The Employer relies also on the obvious fact that, as Mr. Gill testified, ..."twelve hours equals twelve hours". In the Employer's view, the Collective Agreement language would need to be different to support the Union's claim to a financial benefit that overcompensates employees, paying them for sixteen hours standby when they actually only perform 12 hours.

The Employer also noted that Article 16.04 specifies that:

An arbitration board may not alter, modify or amend any provisions of this agreement but shall have the power to set aside or modify a decision of the Employer. No arbitration board shall make an award which would amend or change a collective agreement, a judgement or an earlier award.

The Collective Agreement Language is critical in this matter.

The Employer's position is based not only on the obvious and common sense view that it should pay a 12 hour rate for 12 hours of work, but also on the actual wording of 10.01(b) which, in its view, expressly reasserts this obvious and common sense position.

The Union challenges the Employer's argument by pointing, not only to its own already established practice of compensating the 14 hours standby duty performed by Nurses completing the 10:00 AM to 6:00 PM shift in two eight hour rate blocks, but also to the Collective Agreement's repeated use of a distinction between "Eight Hour Shifts" and "Twelve Hour Shifts" and to the Agreement's definition of "shift" at Article 2(t).

In the Union's submission, the Collective Agreement is grounded in the assumption that there are two employment patterns, an eight hour pattern and a twelve hour pattern, that govern pay rates not only for shifts of "work" but also for other duties performed and and benefits received. This alleged grounding principle is reflected, in the Union's view, in the repeated use of the distinction between "Eight Hour Shifts" and "Twelve Hour Shifts" in different contexts throughout the

Agreement.

But is there an inconsistency in the Union's position? Is the Union's interpretation fatally flawed because it appears to sanction different standby periods (14 hours for those completing the 10:00 AM to 6:00 PM shift and 12 hours for completing the Noon to 8:00 PM shift) attracting the same standby rate? Would this not, in effect, disadvantage those doing the 14 hours standby, since they would be paid only the same as those doing the 12 hours Standby?

In my view there is no anomaly, for two reasons.

First, in both cases the employees are being paid at a rate that compensates them for more time on standby than they actually spend. I note that both 10.01 (a) and (b) contain the phrase "or part thereof" thus acknowledging and accommodating variations in duration. Neither group is disadvantaged in absolute terms.

Second, Article 10.01 specifies rates set for the performance of a "Duty". I note that Article 10.01 is titled "Standby Duty Rates". The Article describes standby as "duty". It does not speak of pay for work, which is governed by Article 8, "Hours of Work". The Parties have agreed to standby compensation being calculated on a differential rate for the performance of that duty. There is no anomaly in the same "duty" being compensated by the same rate.

The Agreement's definition of "shift" at Article 2(t) has a direct bearing here. It reads, in part, as follows:

"Shift"

(i) Eight (8) Hour Shifts

"Shift" means the normal consecutive working hours scheduled for each employee which occur in any twenty-four (24) hour period. In each twenty-four (24) hour period there will normally be three (3) shifts, viz, day, evening, and night. The first shift of each day shall commence at 0001 hours.

The Employer argued its position by claiming that the use of the term "shifts" in the sub-headings in Article 10.01(a) and (b) must be interpreted, as Mr. Gill put it, as denoting "shifts of Standby" rather than as markers for distinct employment patterns that the Union sees as governing the Parties thinking in framing the Collective Agreement. Thus, the Employer argues that Article 10.01(a) requires that anyone who does an 8 hour "shift" of standby shall be paid \$20.40, and anyone who does a 12 hour "shift" *of standby* shall be paid \$30.60.

On the other hand, as I understand it, in pointing to Article 2(t) the Union is claiming its support for the view that, in this Collective Agreement, "Shift" is tied explicitly to "work", and its appearance in Article 10.01 must maintain that bond. Thus, in the Union's view, the Employer is wrong when it interprets Article 10.01(b), for instance, as saying that anyone who does a 12 hour "shift" of standby shall be paid \$30.60. Thus, in the Union's view, Article 10.01 says, rather, that those who have done 12 hour "shift" *of work* shall be paid \$30.60 for the standby duty associated with that 12 hour "shift" of work.

With respect, I find that the Union's reading of the Collective Agreement accords more closely with what Article 2(t) actually says. The word "shift" as formally used in the Collective Agreement refers explicitly and expressly (Article 2(t)) to the "normal consecutive working hours scheduled for each employee" The Article then more precisely states that "... there will normally be three (3) shifts, viz, day, evening, and night." The undisputed evidence before me is that there are normally not "three (3)", but two, periods of standby: one associated with the 10 AM to 6:00 PM shift and the other to the Noon - 8 PM shift. There is no standby associated with the day shift.

I find that the reference in the subheadings in Article 10.01 to "shifts" are not to be interpreted as "Shifts" standby, but as referring to periods of "normal consecutive working hours scheduled for each employee" (Article 2(t)).

??? I note, however, that the word "shift" also occurs in the concluding phrase of each subclause (... "per ... hour shift") of Article 10.01. Consistency within the Agreement requires that these uses of the term "shift" be understood in light of the definition given in Article 2(t). It must be asked therefore, what shift means in these two locations.

Does the term "shift" there used mean that the payment is based on the duration of the Shift *of standby*? If so, then the Employer's position is strengthened, since it may provide evidence that the Collective Agreement does countenance shifts *of standby* as well as shifts of work as defined at Article 2(t). I do not, however, read the word "shift" as it appears in the concluding phrase of each subclause any differently from its sense in the headings of each subclause. The phrase, relates back to the heading and confirms that the rate is set "per" the 12 or 8 hour "shift" to which the standby duty relates.???

Thus, Article 10.01(b) does not require that *anyone* doing 12 hours of standby shall be paid

\$30.60. Rather, it requires that those who have worked a twelve hour shift shall be paid for the standby period associated with it "at the rate of thirty dollars and sixty cents (\$30.60) per twelve (12) hour shift or part thereof."

In the instant fact situation in evidence before me it is clear that the group on whose behalf this policy grievance is brought were not, in fact, employees who had worked a twelve hour shift as defined at Article 2(t). They had worked 8 hour shifts. Therefore, their appropriate rate is that as set out in Article 10.01(a).

DECISION

In light of the foregoing I therefore find that the

**GRIEVANCE IS SUSTAINED. THE EMPLOYER IS DIRECTED
TO CHANGE ITS PRACTICE ACCORDINGLY.**

Respectfully submitted as the decision of the Arbitrator.

John A. Scott, Ph.D,
Arbitrator.

September 8, 2010