

Subject:  
– Change of Shift Schedule  
- Premium Pay

**ARBITRATION AWARD**

BETWEEN: UNITED STEEL WORKERS OF AMERICA, LOCAL 5795  
(hereinafter called the “Union”)

AND: IRON ORE COMPANY OF CANADA  
(hereinafter called the “the Company or the Employer”)

GRIEVOR: BRAD ELLIOT

COUNSEL: For the Union: Tom Harris  
For the Employer: Darren Stratton, LL.B.

SOLE ARBITRATOR: David G.L. Buffett, QC

**INTRODUCTION**

The hearing was held in Labrador City on the 22<sup>nd</sup> and 23<sup>rd</sup> days of November, 2010.

The Grievor filed a grievance on September 16, 2009 grieving that his schedule was changed without giving him 24 hours notice and that he was not paid at the appropriate rate of pay given that this schedule change occurred without 24 hours notice.

The grievance cited Articles 3, 7 and 11.07 and other relevant Articles of the Collective Agreement or Letters.

The settlement sought was that the Grievor be paid at the appropriate rate and that the Employer cease any practice of not paying the appropriate rate.

The following exhibits were received as consent exhibits:

- Consent 1 - The Collective Agreement;
- Consent 2 - Documentation reflecting the step 1 meeting on September 14, 2009;
- Consent 3 - The Grievance itself dated September 16, 2009;
- Consent 4 - The Answer at step 2 denying the grievance;

The following additional exhibits were received through witnesses:

- BE No. 1 – Brad Elliot’s shift schedule from August 31 – September 27, 2009;
- CH No. 1 – A statement of earnings and deductions for Collin Hartson with a payment date of 2007 09 13 and a pay end of 2007 09 02;
- TV No. 1 - A series of statements of earnings for Terrence Vardy, one with a payment date of 2009 10 08 and a pay end date of 2009 09 27, a second with a payment date of 2008 07 03 and a pay end date for 2008 06 22, a third with a payment date of 2007 12 20 and a pay end date of 2007 12 09, a fourth with a payment date of 2007 09 27 and a pay end date of 2007 09 16, and a fifth with a payment date of 2007 07 05 and a pay end date of 2007 06 24.

At the outset of the hearing the parties agreed as follows:

1. That I as Arbitrator am a properly constituted tribunal and have authority to hear the Case.
2. That I as Arbitrator would take notes and in the event of a conflict as to the evidence or as to what transpired at the hearing, my notes would prevail.
3. That all parties likely to be affected by the outcome of the hearing had received adequate notice and been informed of their right to appear.

4. That all matters pertaining to the grievance procedure and all time limits whether statutory or arising from the Collective Agreement had been properly observed or were waived.
5. That there were no preliminary points to be raised as to arbitrability and no other preliminary objections.
6. That issues of quantum, if any, would be considered separately, and that if the parties do not reach an agreement within 60 days after publication of the award, they will be referred back to me as arbitrator.
7. That I as arbitrator will remain seized of the matter for a period of 60 days after publication of the award to deal with any matters of interpretation should they arise.
8. That any witnesses to testify may remain in the hearing room and need not be excluded before their testimony has been heard.
9. That any time limits for the publication of the award were waived.

### **THE EVIDENCE**

The Union called three witnesses, the Grievor, Brad Elliott, Collin Hartson, and Terry Vardy.

The Employer called one witness, Tracey Dumaresque.

All witnesses were sworn.

### THE UNION EVIDENCE

The Grievor testified that he works with the Employer as a Heavy-duty Equipment Mechanic and that he has been employed by the Employer for three years. He works in the mine maintenance facility. He is part of shift 2.

Being on shift 2 means he works Monday and Tuesday on day shift, and then has Wednesday and Thursday off, resumes working a shift on Friday and works nights on Friday, Saturday and Sunday. He next has Monday and Tuesday off, works days on Wednesday and Thursday and has Friday, Saturday and Sunday off. In the following week he works nights on Monday and Tuesday, has Wednesday and Thursday off and works days, Friday, Saturday and Sunday. The following Monday and Tuesday he has off and he works nights on Wednesday and Thursday and has Friday, Saturday and Sunday off. The cycle then repeats itself. The days he works in one week become his days off the following week.

His shifts are 12 hour shifts.

The Grievor testified that one Thursday, September 10, 2009, the team leader asked the workers on his shift if anyone wanted overtime. No person indicated yes. Towards the end of the shift, the team leader told the Grievor that he had to work the next day which was a scheduled day off for the Grievor. It was a Friday and the first of three scheduled days off for him.

The Grievor had made plans with his family to go to the cabin commencing the following morning. The Grievor had to cancel these plans.

The Grievor did not receive double time for the time he worked on September 11, 2009. He believed that he should because his shift was changed on less than 24 hours notice.

Consequently he grieved. He testified that this had never happened to him before or since.

In cross examination the Grievor said this was the only time he was ever scheduled to work on what was not his regular shift.

He said that there had been times where he had been called and asked if he wanted to come in. He was asked if he would get double time if he was called in. His reply was it depended on when he was called in.

He said sometimes its double time and sometimes its time and one half.

His pay period starts on a Monday and goes for two weeks.

There is a long week and a short week. In the long week he works five 12 hour shifts. During the short week he works two 12 hour shifts.

He confirmed that what is at issue is the rate of pay he received for working on September 11, 2009.

The worker said that he had a long week commencing August 31, 2009, 2 days and 3 nights, a short week commencing September 7, 2009 of 2 days, a long week commencing September 14, 2009 of 2 nights and 3 days and a short week commencing September 21, 2009 of 2 nights.

He received time and one half for the time worked on September 11, 2009 as opposed to straight time and he reported to work on September 14, 2009, his first day of work following September 11, 2009 as regularly scheduled.

In terms of shift rotation, his next long week remained the same.

On redirect examination he said on September 11, 2009 his personal life was disrupted.

Collin Hartson was the second union witness to testify. He is a Stationery Engineer who has been with the Employer for many years and holds a union position of Guard. He also co-chairs the Grievance Committee for the pellet plant.

Mr. Hartson said the situation that is the subject of this Arbitration is something that he has experienced before.

He identified CH No. 1 as his pay slip. He pointed out that three lines down it reads: "SC WO 24" meaning a change of shift with less than 24 hours notice.

He said in this instance he was working his regular shift, a day shift when he got called up to his boss's office. This is when the change occurred. Around 2:00 pm he was told to go home at 3:00 pm, have an 8 hour rest period and come back that evening at 11:00 pm and work until 7:00 am the next morning.

He testified that the \$55.60 in the rate column on the pay record is double time.

He said because he worked in the night on that day, a Friday, he had to work a night shift on Saturday when he was scheduled to work a day.

He indicated he would also have had to work a night shift on Sunday had he not previously arranged to have Sunday off to attend a wedding. As it was he was still required to change his time for leaving to go out of town for the wedding.

Mr. Hartson noted he worked a schedule similar to that of the Grievor except that his days on are the Grievor's days off. He was on "the different side of the wheel" as it is referred to by employees at the company.

During cross examination, Mr. Hartson was asked how he remembers the details concerning CH No. 1 when it is only a direct deposit confirmation and it goes back to 2007, more than three years ago and two years before the grievance before me arose.

He said it sticks in his mind because he was upset in that it disrupted his wedding trip.

He said that his days became nights. He worked a night shift on Friday and on Saturday and would have worked a night shift on Sunday as well except that he had permission to be away on Sunday for the purposes of attending the wedding.

On redirect Mr. Hartson said his two days off that week were Wednesday and Thursday and the following week he continued with his regular days off that week, Monday and Tuesday.

The final union witness was Terrence (Terry) Vardy. Mr. Vardy is a long time employee of the Employer having worked for the Employer for 24 years. His job is Maintainer Operator. His primary job is to collect and analyze vibration data. He is also the co-chair of the Grievance Committee for the concentrator and has been for 8-9 years.

He said 8:00 a.m. to 4:00 p.m. Monday to Friday is his regular shift.

He testified that which happened to the Grievor has happened to him before.

He was referred to the five pages in TV No.1.

The page reflecting a payment date of 2009 10 08 with a pay end date of 2009 09 27 was referred to. SCWO 24 was pointed out. He said it signified that he was required to work 16 hours on a change of shift without 24 hours notice.

Mr. Vardy said he reported for his regular shift and the team leader asked him to report to a Mr. Maynard who informed him that he is now scheduled to work 16 hours for that shift.

He said Maynard had 12-15 mechanics doing annual maintenance during an annual maintenance shut where it lasted for a week.

He said he had plans with visiting relatives that were disrupted by virtue of his having to work the additional time. He had plans for the evening. His schedule was changed from working 8 hours to working 16.

Mr. Vardy also referred to the document with a 2008 07 03 pay date and a 2008 08 22 pay end date. Again this reflects a time when there was a maintenance shut down. He and two others were scheduled to work 8 hours but the team leader said he would like Mr. Vardy to stay and asked what would it take to get Mr. Vardy to stay? The pay stub shows he was paid a change of shift schedule (without 24 hours notice) premium.

The 2007 12 20 payment date document was also referred to. Mr. Vardy said he was scheduled to work in the concentrator on a liner change. The shift schedule changed to nights whereby he would be working 4:00 p.m. to 12:00 midnight.

The job was running behind. He was told he had to work extra hours. Again the payment records show he was in receipt of a change of shift schedule (without 24 hour notice) premium.

The 2007 09 27 pay date record was referred to and he testified it showed he received a schedule change (without 24 hours notice) premium as well.

The 2007 07 05 pay date record was the last referred to. He said he was scheduled to work a 13 hour shift because of a liner change. The job took longer than scheduled from

3 days to 4 and he was kept on an extra night. He was paid at the appropriate change of shift schedule (without 24 hour notice) premium rate in that instance.

He said there are many instances where such things happened to him. These are just examples.

During his cross examination Mr. Vardy was questioned on the events surrounding the 2009 10 08 pay date document in TV No. 1. He confirmed he was working day shifts 8:00 a.m. to 4:00 p.m. Monday to Friday. In the morning the concentrator supervisor told him he was changing his schedule from 8:00 am to 4:00 pm to 8:00 pm to 12:00 midnight, 16 hours and this lasted for three shifts, Tuesday, Wednesday and Thursday.

He said he was paid 16 hours at double time for Tuesday, he was paid 8 hours at his regular time on Wednesday and time and one half for 4 hours on that date and then double time for the next 4 hours.

In cross examination he was also referred to the 2008 07 03 pay date document. In that instance he was working his 8:00 a.m. to 4:00 p.m. regular shift but was asked to work until midnight. He said the job was extended and went on for an extra day. His team leader asked him what it would take to get him to stay. The team leader told the Grievor he would get double time for 16 hours.

In the case of the events surrounding the pay date 2007 12 20 document, he was taken off the 8:00 am to 4:00 pm shift and required to work the 8:00 pm to 8:00 am shift. He did not work that day at his regular time and said he was probably told about it before he left work the day before.

In the case of the 2007 09 27 pay date document, he said he was scheduled for his regular 8:00 am – 4:00 pm shift and the change happened on Tuesday. He reported for work at 8:00 am and assumed he would be working until 4:00 p.m. At around 3:30 he was told that they wanted him to stay until midnight and that he would get 16 hours double time.

He worked until midnight and then reported for work at 8:00 am the next day. He agreed that he received double time for 8 hours and not 16.

He acknowledged that this was a different approach to the same situation as reflected in the document with the 2009 10 08 pay date. In that instance he received double time for 16 hours whereas in the case of the 2007 09 27 pay date events, he worked 16 hours but only got double time for 8.

The cross examiner also referred Mr. Vardy to 2007 07 05 pay date document. He said he was scheduled to work 13 hours at the beginning of the schedule. He said the schedule got changed in the last shift. He got paid 13 hours at the change of shift schedule (with less than 24 hour notice) rate of double time.

He testified that 16 hour shifts are common during shut downs for maintenance and there will often be 13 hour shifts during liner changes.

### **THE EMPLOYER EVIDENCE**

The one employer witness was Tracey Dumaresque. She is the Superintendent of Employee Relations with the company. She has been with the Employer for slightly longer than 11 years. For all of that period she has been involved in the HR Department and for a period had responsibility for personnel administration, data entry and benefits administration.

She said the data is entered into a system she called SAP. SAP contains all personnel records, payroll records and maintenance records.

She is familiar with payroll administration and how wages get paid to an employee.

She described the company as having three separate divisions. These are:

1. Primary Ore;

2. Product Manufacturing; and
3. Central Service.

She says mine maintenance where the Grievor works is in the Primary Ore Division. Mr. Hartson would work with the Central Services Division as would Mr. Vardy.

The number of unionized employees at the company is around 1,240 with around slightly over 1,200 being represented by the union who is party to this dispute.

Team leaders are front line supervisors and not part of the bargaining unit. They have about 100 team leaders on site.

She explained that for every employee in the system there is a schedule.

She said the schedule is either an 8 hour a day schedule, a 12 hour a day schedule or a 10 hour a day schedule.

There are some variations where some employees who work a 12 hour shift, work no nights, or where combined crews work shifts of varying durations but for the most part it is these three categories, 8 hours, 12 hours and 10 hours.

She said that the hours worked are translated into pay by the team leader going into the system and recording the hours worked with a code 0001. This system is programmed to pick up the appropriate pay for each individual by virtue of the fact that it knows the person's schedule. It would know for instance that Mr. Vardy works from 0800 hours to 1600 hours normally from Monday to Friday. If he was called in on a Sunday the system would pick it up and trigger the appropriate rate of pay because it recognized he worked on a day that he was not scheduled to work.

The same thing would apply to persons working a 12 hour shift. They work from 0800 hours to 2000 hours or from 2000 hours to 0800 hours the following day. The system

would recognize this as normal. If they work outside their schedule the system is programmed to pick it up and pay them at the appropriate rate.

If the employee is called in less than 4 hours before the start of a shift, the team leader has to enter a special code as the system would not recognize whether someone, for instance, was contacted 2 hours previous or 10 hours previous.

She testified that SCWO 24 represents a code that is used in pay system H08. It is a code to be used when there is a change of shift schedule without 24 hour notice. It triggers double time pay.

She said if an 8:00 am to 4:00 pm person stayed 8 hours past his shift end, for the first 4 he would receive time and one half and for the last 4 double time.

She referred to Article 11.03 a) as dealing with 8 hour shifts. She described the system as automatically picking up the extra time of the 8 hour shift persons.

Some things like time worked without 24 hours notice of a shift schedule change have to be manually entered.

The same holds true of the 12 hour shift persons.

She said that in the Grievor's case when he worked September 11, a day he was supposed to have off, the system would automatically trigger pay for the hours worked that date at time and one half.

She referred to Article 11.03b) which deals with 12 hour shifts. She indicated that the system would recognize the Grievor as working on the other side of the wheel when persons on shifts 1 or 4 were working.

As for Mr. Vardy's case, she said the Collective Agreement recognizes 8 and 12 hour shifts but there will be times when the individual's hours which are posted do not match the 8, 10 or 12. She said the system picks up his pay for the first 8 hours at the regular rate, the next 4 at time and one half, and the remainder at double time. If he worked 13 hours, his first 8 would be his regular rate, his next 4 would be at time and one half, and his last one at double time.

She said that in Mr. Hartson's case, he was appropriately paid. He had his shift changed without 24 hours notice. He was sent home and asked to report back on somebody else's shift. She said he would get double time for the entire shift.

She referenced some of the examples Mr. Vardy has referred to in TV No. 1. She claimed that in a number of instances something was posted incorrectly. If he was scheduled to work 13 hours, his schedule would pay him straight time for 8 hours then time and one half for 4 hours and double time for only 1 hour.

She said that HO8 should be used for a change of shift schedule only and not if he just works beyond the end of his shift. In the latter case the system would automatically kick in and pay him at the appropriate overtime rate.

If there was a change of shift schedule such that the override had to be used, the number of hours entered would match that person's schedule. In Mr. Vardy's case he works 8 hours Monday to Friday so if his schedule changed such that a manual override was used she would expect to see 8 hours entered as the time. If he has a schedule change and not overtime then the system needs a manual override to address it.

She admitted on cross examination that if they can't get persons to volunteer overtime that they will force somebody to do so and if the person did not report for work under such circumstances they would be subject to discipline.

She contended that there was a difference between the Grievor's situation and that of Mr. Hartson. Mr. Hartson's schedule was disrupted and replaced with something different. The Grievor's was not.

The question was asked "Days off are not part of the schedule?" and the response was "Mr. Elliott (the Grievor) had the same regular flow of days."

She responded yes to the question was there a different shift working on September 11, when he worked.

### **UNION ARGUMENT**

The Union said 11.07c) of the Collective Agreement deals with what happens when a person's shift schedule is changed without 24 hours notice. It requires and it is common practice that the person receive double time for the time worked.

The Union submitted that the evidence shows that Mr. Vardy received it 5 times in the past 3.5 years.

It is submitted that he received 11.07c) pay in one instance for 16 hours and this was during a maintenance shutdown.

During a mill liner change he had four 13 hour shifts and for the last one was paid 11.07c) premium pay.

In another instance he had 3 shifts of 13 hours scheduled which resulted in 11.07c) double time pay.

It submitted that Mr. Hartson was called in on a Friday and told his shift was being changed from day to night. He received double time for the first changed shift and straight time for the second changed shift.

The Union invited me to compare that to the case of the Grievor. The Grievor was working on the 12 hour shift schedule. He was asked to work on Friday the 11<sup>th</sup> day of September, his scheduled day off. He wouldn't volunteer to do so but was then required to do so.

The union submitted that according to Ms. Dumaresque's testimony the Grievor had to work the other side of the wheel with persons who normally worked when he was off.

On Thursday, Mr. Vardy was told his day shift was changed to a night shift. It asked me to compare that to the case of the Grievor who was told that they were taking away his day off. It is submitted that days off were part of the shift schedule and that the Grievor should receive double time rather than time and one half.

In 11.07a)(i) a shift off is recognized as part of the shift schedule. In the Grievor's case this was changed without 24 hours notice.

It submitted that both Mr. Hartson and the Grievor were inconvenienced. It said that if the Employer's position was adopted the ridiculous situation would pertain that a shift change from one working shift to another results in double time yet a shift change from a day off to a working shift where ones family life is significantly disrupted is not double time. It is submitted that this does not make sense and is not right. Family life and quality of life are important. The Grievor planned a trip on his day off to a family cabin. The Union asked me to imagine the disappointment experienced by his young son at being told that they were not able to go.

It submitted that the Grievor was denied proper pay for a shift schedule change without 24 hours notice and that he should have been paid double time rather than time and one half.

In support of its position it cited seven cases. The first was Fletcher Challenge Canada Limited and Communications, Energy and Paper Workers Union, Local 1123, B.C. Collective Agreement Arbitration Award No. A-80/97, a 1997 decision of Arbitrator C. Taylor, which deals with overtime, callout and premium pay.

It also cited Toronto Police Services Board and Toronto Police Association, a 2001 decision of Arbitrator William A. Marcotte. This case dealt with premium pay and call-back.

The case of Markham Stouffville Hospital and Canadian Union of Public Employees, Local 3651, a decision of Albertyn, Lanigan Gilmour, and Herbert, issued December 3, 2007 was referred to. It also dealt with premium pay and call-back. The Union argued that the same rationale as is expressed in that case for call-back is the rationale for Article 11.07c), namely to compensate for a disruption in one's non working life.

With regard to all these cases, it submitted that the same rationale that gave rise to the call-back provisions and that resulted in the decisions in those cases allowing the grievances, should be applied in the instant case.

The Union also cited a series of decisions and disputes between it and the Employer.

The first of these was the Iron Ore Company of Canada and United Steel Workers of America, Local 5795, Fagan, dated June 27<sup>th</sup>, 2005. It concerned the contracting out of crane services. A practice which had been in effect for some time was arbitrarily changed by the Employer and the change was challenged in arbitration. The Union's position was upheld.

The second was Iron Ore Company of Canada and United Steel Workers of America, Local 5795, Fagan, dated October 30<sup>th</sup>, 2001. The case had to do with whether statutory holiday pay hours were to be considered time worked in calculating overtime. The

Employer notified the Union that it would not be considering it for such purposes and the Union successfully grieved.

The third was Iron Ore Company of Canada and United Steel Workers of America, Local 5795, Clarke, dated July 3<sup>rd</sup>, 2005. This case concerned the contracting out of work at the Dolomite Quarry and an assurance made by the Employer in settlement of a strike about not doing so.

The final case was Iron Ore Company of Canada and United Steel Workers of America, Local 5795, Fagan, dated March 11<sup>th</sup>, 2004. This case concerned the scheduling of vacations where the Employer ignored contract language and the grievance was upheld.

The Union asked that the Grievance be allowed.

### **EMPLOYER ARGUMENT**

Counsel for the Employer, Mr. Stratton, reiterated his view of what the question before me is:

“Has IOC by its actions done anything to trigger the Article 11.07c) benefit”.

If yes, I have to allow the grievance because the Grievor received only time and one half and not double time.

The Employer submitted though, that the answer to the above question was clearly that the Employer had done nothing to trigger the application of that provision. The Employer's position is that the benefit provided by 11.07c) was not triggered because there was not a change of shift schedule in the Grievor's case.

It put forth the position that this case can be resolved simply by looking at Article XI itself. The Toronto Police Services case cited by the Union makes it clear that there is no need to rely on anything other than the express language of the collective agreement. The

same holds true for this matter. The Employer submitted that the parties have established “the rules of the road” for dealing with overtime in Article XI.

Ms. Dumaresque testified that this Article was plugged into the SAP system such that unless overridden manually in certain circumstances entry of employee hours of work compared to his/her schedule will result in the person getting paid in accordance with Article XI.

There is a difference between overtime and change of shift schedule premium pay.

Overtime results from working outside one’s normal hours of work or outside one’s normal working schedule. It attracts premium pay. Its purpose is to protect a person’s personal time by imposing a financial penalty on the Employer if the Employer requires a person to work during their personal time. Another purpose is that it may provide an incentive to employees to work extra time. Overtime premiums are a fact of life. It may cost the Employer more but it is unavoidable or at least it’s the least costly of alternatives.

Article 11.03a), b), and c), were referred to by Ms. Dumaresque. Some overtime results in time and one half and other in double time. a) applies to 8 hour shifts, b) to 12 hour shifts, and c) to 10 hour shifts. a), b), and c) are written as if someone asked the parties what is to be paid in certain instances. What happens if someone works on an assigned day off is expressly covered in a), b), and c).

In the Grievor’s case one would go to 11.03b) and one would see that the Grievor gets paid time and a half for the first 12 hours that he worked on Friday, September 11, his assigned day off. 11.03b) kicks in to determine his rate of pay on that date.

The Employer submitted that 11.07c) has no application in the Grievor’s case and it is only triggered if a shift schedule is changed without 24 hours notice. It argued that in this case there was no change in the Grievor’s shift schedule. He remained on the same

schedule. He worked before the 11<sup>th</sup> when he was supposed to. He worked after the 11<sup>th</sup> when he was supposed to.

The Employer disagrees with the argument put forward by Mr. Harris for the Union, that days off are part of the shift schedule. It suggested such an interpretation is unreasonable. It said that there are a couple of reasons why this is the case.

The first is that it creates an inconsistency and redundancy.

It referred to the Toronto Police Services case as a good example of arbitrators saying that the parties are assumed to have intended what they said. Even if what results is oppressive it has to be applied. One looks at the agreement as a whole and avoids inconsistencies and absurdities.

If I find as the Union alleges, it will result in an inconsistency. The day off working rule is explicitly set forth. We would be faced with an inconsistency between Article 11.03b) and 11.07c). If we are talking about Sunday, it would be a redundancy. It queried "Why would one have to put in the part about Sunday, if 11.07c) would have triggered the double time anyway?"

11.07c) was intended to address something other than merely working on an assigned day off.

The second argument is that the flood gates would be opened and the parties would be headed down a slippery slope. If work on an assigned day off constitutes a change in shift schedule so must extra hours even when worked on a day scheduled to work.

11.07c) does not define change in shift schedule. Working extra hours on a day you are scheduled to work can also disrupt ones personal life and one cannot artificially distinguish between personal after work hours on a scheduled work day from personal hours on an assigned day off.

Any encroachment on personal hours would single a shift schedule change and the overtime hours in Article 11 become meaningless.

The Employer submitted that the Grievor's shift was not changed and he was compensated as expressed in Article 11.03b). Nothing happened to trigger 11.07c).

As to the practice of paying double over time and the evidence called in that respect by the Union, Article 8.05 makes it clear that past practice does not become binding unless the practice is set forth in writing and agreed to between the parties. The Employer argued that even if there was a past practice because of Article 8.05, the Employer is not bound by it.

However, the Employer argued that what the Union called past practice can hardly be described as that. It said that we were told of six situations, one respecting Mr. Hartson and 5 respecting Mr. Vardy. It submitted that this is two employees out of more than 1,200, hardly what could be described as a practice. It submitted that the evidence shows nothing more than how these two persons were coded and treated by a very small group of team leaders out of approximately 100 such leaders. It is hardly something which could be called a practice.

Looking at the nature of the incident it becomes clear that Mr. Hartson's case is very different from the Grievor's. Mr. Hartson had a shift change from days to nights. He did not work days as he was scheduled to on Friday, Saturday and Sunday but nights. He had what could be described as a classic change in shift schedule and he was entitled to 11.07c) pay. The Grievor didn't.

The Employer submitted that two of the situations described by Mr. Vardy clearly triggered an HO 8 code entry and legitimate 11.07c) pay.

He finished at 9:00 am Thursday expecting to come back 4:00 pm and was told he would work a difference schedule. This is reflected in the statement with a payment date of July 2007. On another occasion he agreed to a change in shift and moved from 8 hour days to 12 hour nights. This is reflected on the record with a payment date of December 20, 2007.

The Employer submitted that a number of the instances concerning Mr. Vardy were puzzling and inexplicable except for the fact that there must have been an encoding error on the part of the team leader. It is submitted that this is the only possible explanation.

It also cited one incident where Vardy admitted negotiating double time with his team leader in order to work beyond his normal hours.

In one instance where he had eight hours added to an eight hour shift he was treated differently than was the case where this occurred in another instance.

The Employer submitted that all we are left with is 2 or 3 instances where Mr. Vardy was the beneficiary of mistakes in coding.

In any event, based on Article 8.05, none of this qualifies as a binding past practice, unless it is put in writing and agreed to by the parties. This is not the case.

The Employer submitted that the cases submitted by the Union which were between these same two parties are of no help as they do not deal with Article 11.07c). As to the other cases, each deals with call-back pay and minimum payments required when one is at home with their feet up and is called back to work, which is different from the case before me.

It cited 2 cases, Barrick Gold Corp. and U.S.W.A. Local 6409 77 C.L.A.S. 189, 2004 CLB, 2408, Ontario, Hinnegan, April 27, 2004, and Espanola General Hospital and O.N.A. 98 C.L.A.S. 297, 2009 C.L.B. 10551, Ont., W.A. Marcotte, July 29, 2009.

In Barrick Gold, two hours were added to the scheduled shift. The Employer submitted that this case may be more relevant to Mr. Vardy's situation but it is relevant in terms of the approach taken by the arbitrator.

It submitted that the arbitrator found that there was another collective agreement provision which fit that situation exactly and he had chose to apply that. It submitted that in our case, the provision in Article 11.03b) about what one gets paid one for working on a scheduled day off fits exactly what happened to the Grievor and 11.03b) should be applied in this case.

It submitted that the Grievor simply worked overtime and received what he was entitled to, namely time and one half.

This was not a change of shift schedule situation. A change in shift schedule means something more.

Espanola is a nursing case which canvasses several cases closer to that of the Grievor. An additional period of work being required was held not to be part of an employees posted schedule.

On September 11, 2009, the Grievor worked hours in addition to his posted shift. This does not constitute a change in shift schedule and does not trigger the application of Article 11.07c). Article 11.03b) fits this situation perfectly as it describes what happens when one works on an assigned day off. It is a typical or ordinary overtime situation.

The Employer asked that the grievance be dismissed.

## UNION REBUTTAL

In rebuttal the Union argued that the Employer's argument about Sunday is without merit as 11.07c) cannot be triggered in some instances. If one looks at the Monday to Friday working arrangement and one was required to work on a Sunday, if a person was told even on a Friday it would be a 24 hour notice. Thursday notification would be more than a 24 hour notice and 11.07c) only deals with less than 24 hours notice. This is why the Sunday provision is in Article 11.03b). The only way to ensure the extra pay for working on a Sunday is to explicitly deal with it as Article 11.07c) would not be triggered with respect to a Sunday. There is not therefore a redundancy as suggested by the Employer.

It referred to the Barrick Gold case and said in that case the Employer is not just prolonging a regularly scheduled shift. It is causing a change for some significant time.

It also referred to Espanola General Hospital and distinguished it by saying the situation described therein is not the situation before me. Here, the Grievor was changed to a full day shift on his days off.

Article 11.04 relates to voluntary overtime and the hours of work and overtime are subject to the employees agreeing to work.

In Article 11.07a)(i) there is recognition by the wording of that provision that shifts off are part of the shift schedule.

The Union submitted that there is a big difference if it is voluntary or forced.

Whether one is scheduled for regular time or overtime with less than 24 hours notice, there is an entitlement to premium pay.

## **FINDINGS, CONSIDERATIONS AND REASONS FOR DECISION**

The relevant sections of the Collective Agreement are as follows:

### **ARTICLE VIII**

#### **ARBITRATION**

8.05 – The arbitrator shall have jurisdiction and authority only to interpret and apply the provisions of this Agreement so far as shall be necessary to the determination of the grievance and shall not have any power to alter or change in any way the provisions of the Agreement or to substitute any new provisions for any existing provisions, nor to give any decision inconsistent with the terms and provisions of this Agreement; nor shall any past practices or customs become binding unless they are in writing between the Company and the Union. Where the arbitrator determines that an employee has been disciplined for just cause, he/she may review and modify the penalty imposed.

### **ARTICLE XI**

#### **HOURS OF WORK AND OVERTIME**

11.01 – The following paragraphs are intended to define the normal hours of work and shall not be construed as a guarantee of hours of work per day or per week, or days of work per week.

11.02 a) - For the purpose only of computing overtime and not as a limitation upon the scheduling of employees for work, the work week shall be a period of seven (7) consecutive days commencing with the beginning of the day shift on Monday and the work day shall be a period of twenty-four (24) hours commencing at the beginning of the day shift of the plant as scheduled by the Company.

11.02 b) - Where a twelve (12) hour schedule applies, it is understood that it will not result in any additional cost to the Company or loss of regular earnings to the employee over the same period with the same coverage.

11.03 a) - 8 hour shifts

The first four (4) hours worked in excess of eight (8) hours in any day or hours worked in excess of forty (40) in any work week or on assigned days off shall be paid at the rate of one and one half (1 ½) times the regular rate. Hours worked in excess of twelve (12) in any day shall be paid at the rate of twice (2) the regular rate.

Work scheduled and performed on Sunday will be paid for at the rate of time and one half (1 ½). Work performed on Sunday in excess of eight (8) hours, or in excess of forty (40) straight time hours in the work week will be paid for at double (2) time.

11.03 b) - 12 hour shifts

The first four (4) hours worked in excess of twelve (12) hours in any day shall be paid at the rate of one and one half (1 ½) times the regular rate. Hours worked in excess of sixteen (16) in any day shall be paid at twice (2) the regular rate. Hours worked on an assigned day off shall be paid as follows: the first twelve (12) hours at one and one half (1 and 1/2) times the regular rate. Work scheduled and performed on Sunday will be paid for at the rate of time and one half (1 1/2) for the first eight (8) hours and double (2) time for all hours in excess of eight (8). Work performed on an assigned day off on Sunday will be paid for at double (2) time rates should the employee have worked eighty (80) straight time hours in the pay period (two weeks). Should he/she not have eighty (80) straight time hours in the pay period, the first twelve (12) hours worked on his/her assigned day off on Sunday shall be paid at time and one half (1 ½).

11.07 - For the purposes of ensuring equitable distribution of overtime, the Company will review with the Union Overtime Committee, once per month if necessary, overtime records and methods of recording overtime credits. This committee may also review if necessary.

11.07 a) (i) – Existing work schedules to ensure the proper distribution of shifts by day, afternoon, night and shifts off. In the distribution of shifts, it is the intention of the parties to respect the structure of the normal week.

11.07 a) (ii) - Proposed changes in scheduling or the scheduling system.

11.07 b) – Such schedules or changes mentioned in (i) and (ii) will be posted when possible seventy-two (72) hours prior to the change taking effect.

11.07 c) - Should an employee’s shift schedule be changed without having given him/her at least twenty-four (24) hours notice of the change, he/she will be paid at the rate of double time (2) for hours worked on the first shift of the changed schedule.

Three tables are contained in the Collective Agreement at pages 38 and 39, after 11.08 and before Article XII under the heading “Rates of Pay”. One is for the 8 hr. shift schedule, one for the 12 hr. shift schedule and one for the 10 hr. shift schedule. The one for the 12 hr. shift schedule is reproduced herein.

<b>12 Hour Shift Schedule</b>			
		<b>Monday to Saturday</b>	<b>Sunday (Premium)</b>
<b>Daily</b>	0 – 8 hours	1.0	1.5
<b>Daily</b>	8.01 – 12 hours	1.0	2.0
<b>Daily</b>	12.01 + hours	1.5	2.0
<b>Weekly</b>	0 – 80 hours	1.0	1.5
<b>Weekly</b>	80.01 + hours	1.5	2.0 (if 80 in pay period)
<b>Scheduled Day Off</b>	0 – 8 hours	1.5	2.0 (if 80 in pay

			period)
<b>Scheduled Day Off</b>	8.01 - 12 hours	1.5	2.0 (if 80 in pay period)
<b>Scheduled Holiday</b>	0 – 8 hours	1.5	1.5
<b>Scheduled Holiday</b>	8.01 – 12 hours	1.5	2.0
<b>Scheduled Holiday</b>	12.01 – 16 hours	2.0	2.0

Neither of these tables are referenced in the text of the Articles of the Collective Agreement.

Having reviewed all the evidence, the authorities submitted by the parties and the relevant provisions of the Collective Agreement, it is my decision that the Grievance should be allowed. The following are my reasons for having arrived at that decision.

I agree with Counsel for the Employer that this case turns on an interpretation of Article XI of the Collective Agreement and on whether or not Article 11.07c) was triggered by and applicable because of the events that happened to the Grievor on September 10<sup>th</sup> and September 11<sup>th</sup> 2009.

By reason of Article 8.05, the experiences of Mr. Hartson and Mr. Vardy do not give rise to a binding practice in the sense that they would preclude the Employer from relying on the Collective Agreement provisions. By Article 8.05 a past practice becomes binding on the parties only if it is set forth in writing and agreed to by the parties. Such is not the case here. Thus, the alleged past practice cannot and does not factor into my decision.

The cases which were cited dealing with overtime, call back pay, and change of schedule issues, are, as one might expect, of somewhat limited value in the sense that they deal with differently worded collective agreement provisions. In addition to this they are also very much factually distinctive.

As much as can be said is that they signify arbitral attitudes. For instance, in Toronto Police Services the situation was one of a police officer having to be available one half hour ahead of his shift start time to attend court. The ruling was that he was entitled to a call back premium because he had to attend court during his off duty hours within the Collective Agreement wording.

In Espanola General Hospital Arbitrator Marcotte canvassed a number of hospital cases and concluded:

“The above awards indicate, relevant to our purposes, arbitrators have consistently determined that a shift or overtime hours, whether or not worked on a voluntary basis, that are in addition to a nurse’s posted schedule of shifts do not trigger premium pay for the next (or otherwise specified) shift identified in the posted schedule. Rather, it is only in the circumstances where the additional hours worked changed the nurses posted schedule such that premium pay is required to be made. I concur with those determinations.

Espanola involved changing a worker’s start time on a work day to an earlier time and changing a worker’s stop time on that day to a later time. This is different than expecting that on ending a shift one is not going to have to return to work for the next three days but finding out prior to the end of this shift that you are going to have to return the next day.

Markham Stouffville Hospital involved the issue of whether mechanics working on standby are entitled to a call back premium when they are contacted at home and are able to diagnose and fix the problem remotely from their home through the use of a laptop or whether attendance at the place of employment is necessary before the call back premium entitlement arises.

Barrick Gold Corporation dealt with the issue of whether two additional hours worked by the Grievors after their regularly scheduled shift on a regular work day were overtime hours or whether they constituted a change in shift schedule that one day.

It was held in that case that they were simply entitled to overtime hours and that the change of shift schedule was not triggered. The case before me is qualitatively different in that there was a break between the end of one stint of work on Thursday and commencement of the next stint of work on the scheduled day off Friday.

I therefore did not place reliance on these cases in arriving at my decision.

My decision is based strictly on what I have found the parties to have said in Article XI.

The Grievor was informed on September 10<sup>th</sup> 2009, a Thursday, that he was going to be required to work on September 11<sup>th</sup>, 2009, a Friday. The worker had been scheduled to have the 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> of September off. He was given less than 24 hours notice of the fact that he would be required to work on the 11<sup>th</sup>, a day off.

The question before me is whether Article XI entitles him to Article 11.03b) time and one half for the 12 hours he worked on September 11<sup>th</sup>, 2009 or to Article 11.07c) double time for the 12 hours worked on September 11<sup>th</sup>, 2009.

The Grievor argues that the situation fits 11.07c) perfectly. The day off is part of the shift schedule and the fact that less than 24 hours notice was given of the fact that the 11<sup>th</sup> was to be a shift that had to be worked rather than a shift off constitutes a change of shift schedule and triggers 11.07c). The fact that it is a day off should not matter. The union maintained that surely losing a day off affects a worker's personal life as much or more than being moved from working a day shift to a night shift and surely Article 11.07c) is applicable in such circumstances.

The Employer arguments are that 11.03b) was designed to deal with what happens when one works a day off. The fact that this is dealt with explicitly in Article 11.03b) signifies the parties intention that when one is required to work a day off one gets 11.03b) pay and 11.07c) is not involved. The Employer maintains that it signifies that being required to work a day off was not contemplated by the parties as being a change in shift schedule.

The Employer also argues that there would be an inconsistency or clash between what 11.03b) says and what 11.07c) stipulates if I were to interpret 11.07c) in the way the Union advocated.

It also argued that there would be a redundancy in that 11.07c) would be addressing what the Sunday time provision already addresses in Article 11.03. Its position is, were 11.07c) to be interpreted the way argued for by the Union, there would not have been a need for the Sunday provisions in Article 11.03. The fact that the Sunday provisions exist in Article 11.03 signify that Article 11.07c) means something more than having to work on a day off or on a Sunday.

With respect, I do not agree with these arguments. Article 11.03b) clearly applies to provide for a special rate of pay when one works on a day off. This applies if 24 hours or greater notice is given. The rates specified for working on a Sunday applies if 24 hours or greater notice is given. There is not anything about the 11.03b) provision that suggests it applies where less than 24 hours notice is given of the fact that one is going to have to work on a day off or on a Sunday.

As the Union stated, one can see the need for a specific provision dealing with Sunday. For instance, a person who worked from Monday to Friday if he were told on a Friday that he was going to have to work on a Sunday would necessarily have greater than 24 hours notice and if the Union were insistent on having a special rate apply for having worked on a Sunday, they would need to write it specifically into the Collective Agreement as they would not in such an instance be able to rely on Article 11.07c). I therefore do not agree that a redundancy exists.

The question comes down simply to what is meant by a change of shift schedule in Article 11.07c).

Article 11.07a)(i) speaks of shift by day, afternoon, and shifts off. A day off is expressed as having a shift off. This suggests to me that the parties intended to treat a day off as part of the shift schedule.

Article 11.07a)(i) says that in the distribution of shifts, it is the intention of the parties to respect the structure of the normal week not the normal work week or not the normal working shifts.

Article 11.07b) requires posting of changes in scheduling where possible, 72 hours prior to the change taking effect.

In the tables in Article XI the words day off are preceded by the words “scheduled” and read “scheduled day off”, suggesting that a day off is part of the schedule.

If one thinks about the issue why should one be seen as being inconvenienced any more by being changed from a day shift to a night shift, as was the case with Mr. Hartson, than by being required to work on a scheduled day off.

Why would working other than one’s regular shift on returning to work after having worked the day off be necessary to trigger 11.07c)? Why would there be a magic attached to working a day other than your regular shift on your first time back after having worked on a day off. Article 11.07c) is designed to compensate persons when their routine is disrupted on short notice. The disruption is present when one is required to work on a day off.

Article XI in its entirety contemplates that there will be changes required from time to time. It even recognizes that it will not always be possible to post or give notice of the changes 72 hours in advance. When the change is accompanied by 24 hour notice or greater than 24 hour notice one set of rules apply. When less than 24 hours notice is given the parties have specified that another set of rules will apply. The parties have agreed for

extra compensation where less than 24 hours notice is given of the fact that a change is being required to their shift schedule.

Article 11.03b) makes sense even if Article 11.07c) was interpreted in the manner argued for by the Union. On the other hand, Article 11.07c) standing alone does not make a great deal of sense if it doesn't apply to situations such as the one before me.

While Article 11.03b) works even if Article 11.07c) is interpreted as advocated for by the Union, on the other hand it is not clear what exactly Article 11.07c) would apply to if it does not apply to a situation such as the one before me. If it does not apply to a situation such as the one before me exactly when one crosses the line so that Article 11.07c) is triggered is not clear. As well it is not clear that it makes any sense that it be triggered in a case such as Mr. Hartson's of being changed from a day shift to a night shift but not in the case of the Grievor being required to work on a shift that he has off. I do not see that there is the sort of qualitative difference that would prompt the parties in the Collective Agreement to treat one in the situation of the Grievor less generously than one in Mr. Hartson's situation. If anything, it is arguably the reverse.

The Grievor in this case worked on the other side of the wheel with persons other than he is accustomed to working with. He worked a different shift.


I accept the Employer's position that something else must be present before being required to work on a day off triggers 11.07c) double time rather than 11.03b) time and one-half. That something else is being given less than 24 hours notice of the fact that one is going to be required to work on a day off.

For the foregoing reasons, I conclude that the Grievance must be allowed.

**ORDER**

The Grievance is allowed. The parties have agreed that I reserve jurisdiction to deal with quantum for a period of sixty (60) days should the parties be unable to agree on the amount to which the Grievor is entitled and I do so. Either party is free to request that I deal with quantum. The Employer shall cease and desist from treating persons in the circumstances of the Grievor as if Article 11.07c) is not applicable to them.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this <sup>14<sup>th</sup></sup> day of *December*, A.D., 2010.

  
DAVID G.L. BUFFETT, QC  
Sole Arbitrator