

ARBITRATION AWARD

BETWEEN:

RESOURCE DEVELOPMENT TRADES COUNCIL
OF NEWFOUNDLAND AND LABRADOR
(hereinafter called the "Council")

AND:

LONG HARBOUR EMPLOYERS ASSOCIATION INC.
(hereinafter called the "Association")

GRIEVANCE: Grievance No. 057 - Board Allowance - Shepell FGI

COUNSEL: For the Council
Dana Lenehan, Q.C.

For the Association
David Clark

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on April 19 and 20, 2011. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.
5. The time limits in the grievance and arbitration procedure, including the time limit to file the Award, were waived.

The following exhibits were entered at the hearing:

Consent 1 - Collective Agreement between Long Harbour Employers Association Inc. and Resource Development Trades Council of Newfoundland and Labrador for the Construction Phase of the Vale Inco Long Harbour Processing Plant Special Project at Long Harbour, Placentia Bay, Newfoundland and Labrador

Consent 2 - Grievance Form - File No. 057 dated November 5, 2011

Nature of the Grievance

The Council grieves that Shepell FGI (the "Employer"), the medical contractor at the Long Harbour Construction site, is not permitted to change the starting day of the 7 day shift rotation for its nurses and medical attendants. The Council claims that the Shepell employees are entitled to be paid 7 days board for each week, including weeks when they do not work a day in that week. The Association submits that the Employer was entitled to change the shift rotation to start a 7 day work week on Monday and end on Sunday, with the effect that the employees are entitled to be paid the 7 day board allowance for the week in which they work and are not entitled to be paid the board allowance for the week in which they do not work.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 1 Purpose/Intention

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1.03 The purpose of this Agreement is to establish certain terms and conditions of employment of construction workers employed by Contractors on the Nickel Processing Plant. The Agreement shall apply to, among other things, rates of pay, benefits, hours of work and other working conditions so as to promote orderly and productive relations and achieve uninterrupted completion of the project, on time, within budget while maintaining an exemplary safety record.

1.04 This Agreement and its constituent Appendices, Recitals, Schedules, Letters of Understanding and Memoranda of Agreement shall constitute a Collective Agreement for the purpose of the *Labour Relations Act* when executed by the Parties and shall be administered as such.

...

1.06 The terms of this Agreement, including all Trade Appendices, Recitals, Schedules, Letters of Understanding and Memoranda of Agreement, shall take precedence over any existing or future union contracts or agreements entered into by any Union. In the event that a conflict exists between Article 1 to Article 36 of this Agreement and the Trade Appendices to this Agreement, the applicable Article in the Agreement shall prevail.

...

Article 3 Scope and Recognition

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3.05 The Association, the Contractor(s), the Council and employee(s) shall not seek to agree, or agree on any matter within the scope of this Agreement in a manner inconsistent with the terms of this Agreement. No individual agreements, whether in writing or oral are permitted. The Association and the Council may, by written mutual agreement, amend the terms of this Agreement.

...

Article 5 Management Rights

5.01 The Contractor retains full and exclusive authority for the management of its operations. The rights of management shall be exercised in accordance with this Agreement.

...

Article 19 Hours of Work, Overtime and Terms of Payment

- 19.01 a) The normal hours of work shall consist of forty (40) hours per week divided into five (5) consecutive eight (8) hour work days from Monday to Friday or four (4) consecutive ten (10) hour work days from Monday to Thursday, or such hours as shall be prescribed by regulations of the Lieutenant Governor in Council, if required, upon a submission of the Parties to extend normal work hours beyond forty (40) hours per week.
- b) The hours of work and overtime triggers for workers represented by Hotel Employees and Restaurant Employees International Union and Local Union 779 and The International Brotherhood of Teamsters and Local Union 855 are set out in the Trade Appendices for each of those trades, and the hours of work for the workers they represent shall be governed by those Trade Appendices, save and except where those Trade Appendices direct that the provisions of Article 19.00 apply.
- 19.02 Normal hours of work, including shift work, shall be paid for at straight time rate of pay.
- ...
- 19.04 The hours set forth in this Agreement do not constitute a guarantee of hours of work per day or work per week.
- 19.05 Subject to the passage of regulations as described above, overtime shall be paid as follows for the five (5) consecutive eight (8) hour work day option:
- a) all hours worked in excess of eight (8) hours per day at the rate of double the straight time of pay; and
- b) all hours worked on the Saturday and Sunday at double the straight time rate of pay.
- 19.06 Subject to the passage of regulations as described above, overtime shall be paid for any schedule utilizing the four (4) consecutive ten (10) hour work day option as follows:
- a) for all hours worked in excess of ten (10) hours per day at the rate of double the straight time rate of pay;
- b) for all hours worked up to ten (10) hours on every Friday of any schedule of ten (10) consecutive days or more, at one and one half times the straight time rate of pay; and

- c) all hours worked on Saturday and Sunday of any schedule, or on the Friday of any schedule not requiring work on ten (10) or more consecutive days, at double the straight time rate of pay.

...

Article 20 Shifts

- 20.01 The scheduling of the number of days of work in a week, the number of shifts in a day and the number of hours in a shift shall be at the sole discretion of the Contractor.
- 20.02 The Contractor shall advise the Council in respect to the matters referred to in Article 20.01.
- 20.03 A shift premium of \$3.00 per hour shall be paid for all hours worked on other than the day shift.
- 20.04 Day shift shall be defined as any shift commencing between the hours of 6:00 a.m. and 9:00 a.m.
- 20.05 No employee shall work more than one (1) straight time shift in each consecutive twenty-four (24) hour period. However, if an employee continues to work he shall receive the overtime rate for each additional shift until a break of eight (8) consecutive hours occurs.
- 20.06 An employee whose shift schedule is changed shall receive twenty-four (24) hours notice of shift change. No employee shall suffer loss of regular weekly earnings due to his/her shift schedule change.

...

Article 24 Travel and Board

- 24.01 a) There shall be a free zone of thirty-four (34) road kilometers from the Site parking lot to the town hall in the community of the employee's permanent residence. Employees living within that zone shall travel to work at their own expense.

Communities without a town hall shall have a public building selected by the liaison committee as the demarcation.
- b) Employees permanently residing at a distance greater than thirty-four (34) road kilometers but less than one-hundred (100) road kilometers from the Site parking lot to the town hall, or such other public building as may be agreed under Article 24.01 a), in the community

of the employee's permanent residence shall be paid at a rate of \$0.68 per road kilometer between the above noted two points by the most direct route to be paid for each day worked with the normal pay day.

...
24.03 a)

Any employee permanently residing outside the travel zone of 24.01 b) shall, upon hiring, and if space available, exercise his option to reside in the camp and shall have the right to exercise this option after each twelve (12) month period.

This regulation shall be subject to review by the camp committee to accommodate special cases or extenuating circumstances.

- b) Upon hiring an employee he/she shall be paid a transportation allowance equal to the actual road kilometers traveled from his/her permanent residence times the applicable road kilometer rate of travel allowance and pay at his regular rate on the basis of one hour for each seventy (70) road kilometers traveled to a combined maximum of four-hundred dollars (\$400).
- c) Subject to sub-paragraph d) hereof, if an employee, permanently residing outside the travel zone of Article 24.01 b) chooses not to or is unable by reason of lack of space, to reside in the camp, he/she shall be compensated with a board allowance of \$68.00 per day payable for seven (7) days per week in which the employee is scheduled to work.
- d) In the event that an employee is scheduled to work in a week but he/she fails to work any day or days scheduled, except where bereavement leave applies, where weather conditions have led to the closure of a principal, relevant portion of roadway by the appropriate authorities, or where the employee has the prior written consent of his/her superintendent (or his/her designate), his/her board allowance for that week shall be paid in the proportion that the days worked in that week are to the days scheduled in the same week. However, should the employee, at the time of failing to work as scheduled, be working on a scheduled rotation that exceeds one week, the amount paid shall be in proportion to the days worked to the days scheduled over the full schedule cycle of the rotation. (For example, when an employee is scheduled to work five (5) consecutive days and the employee is absent from work for a reason other than specified above, that employee shall lose twenty percent (20%) of his/her board entitlement for that one (1) week period. In the event that an employee is scheduled to work ten (10) consecutive days and the

employee is absent from work for a reason other than specified above, that employee shall lose ten percent (10%) of his/her board entitlement for that two (2) week period.)

...

Article 25 Wages and Benefits Language

25.01 Wages and benefits effective May 1, 2009, or the commencement of construction, whichever occurs first, shall be in accordance with the applicable Trade Appendices attached as Schedule "D".

...

25.04 The work week for payroll purposes shall end on Saturday midnight. Employees shall be paid on the Thursday of the following week.

25.05 The Contractor shall remit the amounts for all funds as specified in the Trade Appendices for each hour earned..

...

Trade Appendix

Hotel Employees and Restaurant Employees
International Union and Local Union 779

...

7.0 Security Special Conditions

7.01 Notwithstanding Article 19 (Hours of Work and Overtime) in the Agreement, the hours of work for Security, Crew Chief Security and Assistant Crew Chief Security employees may be seven (7) consecutive twelve (12) hour shifts and seven (7) consecutive days off. The employee, when working this schedule, shall be paid one hundred and six (106) hours at his straight time hourly rate of pay for such eighty-four (84) hours worked. When working on this schedule, the employee is to be paid the first fifty-three (53) hours in the week worked, and the other fifty-three (53) hours in his/her week off.

...

Trade Appendix

The International Brotherhood of Teamsters and
Local Union 855

1.0 Application

1.01 This Trade Appendix shall apply to the following classifications:

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Group 4 Emergency Medical Attendant

Group 5 Duty Nurse

...

Medical Supplement to Teamsters
Trade Appendix

1.0 Application

1.01 This supplement shall apply to the following:

Emergency Medical Technician (Emergency Medical Attendants)
Registered Nurse (Duty Nurse)

...

5.0 Emergency Medical Attendants and Duty Nurses Special Conditions

5.01 Hours of Work for the Emergency Medical Attendants and Duty Nurses may be made up of seven (7) consecutive twelve (12) hour shifts and seven (7) consecutive days off. The employee, when working this schedule, shall be paid one hundred and six (106) hours at his straight time rate of pay for such eighty-four (84) hours worked.

Legislation

The relevant Articles of the *Labour Standards Act*, RSNL 1990, c. L-2 are as follows:

Part III Hours of Work

...

s. 21. In this part:

...

(b) “Week” means a period of 7 continuous days designated and consistently used by an employer for the purpose of this Part or a period of 7 continuous days beginning after midnight on a day that may be prescribed by the regulations.

Part VII Pregnancy, Adoption and Parental Leave

...

s. 43.13 In this section:

...

(c) “week” means the period between midnight on Saturday and midnight on the immediately following Saturday.

The relevant section of the *Labour Standards Regulations*, C.N.L.R. 781/96 states as follows:

- s. 5 (2) For the purpose of paragraph 21 (b) of the Act, “week” means a period of 7 continuous days commencing after midnight on a Saturday.

Evidence

The witnesses called by the Council were Jim Maher, Registered Nurse and David Pearce, President and Business Manager for Teamsters, Local Union 855. The witness called by the Association was Ralph Emberley, Senior Labour Relations Manager for Fluor Canada.

The Collective Agreement between Long Harbour Employers Association Inc. and Resource Development Trades Council of Newfoundland and Labrador was signed March 24, 2009, and came into effect by operation of the *Vale Inco Long Harbour Processing Plant Special Project Order*, filed April 9, 2009 under the *Labour Relations Act*, R.S.N.L. 1990, c. L-1.

Shepell FGI was engaged in April, 2009 by the owner, Vale, pursuant to a purchase order, to provide nursing and medical services at the Long Harbour construction site. At all times relevant to this grievance, a camp for accommodations was not yet established on the site. Pursuant to Article 24.03 (c), eligible employees who do not reside in a camp are entitled to a board allowance of \$68.00 per day “payable for 7 days per week in which the employee is scheduled to work”. The parties dispute the amount of board allowance that Shepell is required to pay its nursing employees who work a rotation of 7 days on followed by 7 days off.

Jim Maher, Registered Nurse, testified that he commenced work for the Employer on site in April, 2009. At first, he worked 1 or 2 shifts every 2 weeks. He started to work more shifts in June. In July, 2009, he started to work on a rotation of 7 days on, 12 hours per day, followed by 7 days off. The 7 day rotation started on Wednesdays and ended on Tuesdays. He was paid the board allowance of \$68.00 per day for the 7 days that he worked and the 7 days that he did not work, for a total of 14 days every 2 weeks. Mr. Maher testified that Wednesday was a better day of the week to start the rotation, because Mondays and Tuesdays were too busy, with new employees arriving on site. Mr. Maher said that he understood he would be paid board allowance for 14 days even though he worked 7 days.

David Pearce testified that he participated in the negotiations for the Collective Agreement, including the Teamsters Trade Appendix, as the Teamsters' Local Union representative. His understanding of the intent of Article 5.01 of the Teamsters Trade Appendix was that employees would be paid the full 2 weeks board allowance when working a 7 day rotation. He agreed there was no specific mention of the board allowance in Article 5.01. He said he did not agree at any time that the nurses would not be paid board allowance for the full 2 weeks. At the start of the project, the nurses' shift schedule was 5 days on, starting on Mondays followed by 2 days off. When the shift rotation of 7 days on and 7 days off started, and nurses were paid the 14 day board allowance, there was no discussion between the Union and the Employer about the board allowance. Mr. Pearce explained that under Article 5.01 of the Teamsters Trade Appendix, employees are paid 106 hours pay at straight time rates for 84 hours work over 7 days. The effect of Article 5.01 is that employees are paid less than they would be paid under Article 19.04, which would be 118 hours pay, or under Article 19.05, which would be 128 hours pay. Mr. Pearce said he expected that the payment of 14 days board allowance was part of the compensation package. He said that a 14 day board allowance was paid at the Hibernia construction project and other projects, but he did not recall the wording of the relevant collective agreement language that applied to those projects.

Jim Maher testified that in October, 2010, the starting day of the shift rotation was changed from Wednesday to Monday. At the same time, the Board allowance was reduced from 14 days to 7 days. Mr. Maher understood that either Vale or Fluor Canada wanted the nurses to have the same starting day as other employees on the site. Some Shepell employees had planned vacation days on the basis of a Wednesday rotation. Shepell agreed that those employees did not need to change vacation plans, and replacement staff would be called in where necessary.

Ralph Emberley testified that Fluor Canada has the contract with the owner, Vale, for Engineering, Procurement, Construction and Management (EPCM). Mr. Emberley's role for Fluor Canada is the interpretation, application and administration of the Collective Agreement. He testified that the most common work schedule at the site is 10 days on, starting on Mondays, followed by 4 days off. Another common schedule is 5 days on, starting on Mondays, followed by 2 days off. Mr. Emberley said that employees who work the 5 days on 2 days off schedule are paid 7 days board allowance for that week. Employees who work a schedule of 10 days on 4 days off, starting on Mondays, work 7 days in the first week and are paid 7 days board allowance, and work 3 days in the second week, and are also paid 7 days board allowance. Mr. Emberley said that a tender was called for nursing services, and the contract was awarded to Shepell FGI in August, 2010. Shepell was previously

providing nursing services under a purchase order. Mr. Emberley testified that he became aware in September, 2010 that Shepell employees were working a rotation of 7 days on 7 days off commencing on Wednesdays. He said the terms and conditions under the purchase order could not be changed until a new contract was issued by tender. Payment of the 14 day board allowance to Shepell employees continued until late October, 2010. At that time the shift rotation was changed to 7 days on 7 days off, commencing on Mondays. The contract awarded to Shepell directed that the employees start work on Mondays. Employees were given 24 hours notice of the shift change, pursuant to Article 20.06. Mr. Emberley said that the rotation was changed to start on Monday in order to have a work schedule consistent with other employers on site. He said the shift schedule is at the discretion of the contractor under Article 20.01. He said that under the Teamsters Trade Appendix, the 7 day rotation is not mandatory and an employer could arrange another schedule. However, the agreement to pay 106 hours straight time wages for 84 hours of work was based on a 7 day rotation, and therefore there was a disincentive for a contractor to change the shift rotation.

Mr. Emberley said that other employers changed to a Monday starting rotation. Grievances were filed by other groups of employees with respect to payment of the board allowance. The rotation of the security staff, represented by the Hotel and Restaurant Workers, was changed from starting on a Sunday to starting on a Monday in about August, 2010. The security staff were paid the board allowance for 7 days for the week they worked but not for the week they did not work. Also, the rotation of site services staff employed by Lockerbie & Hole was changed from starting on Tuesdays, to starting on Mondays, in October, 2010. The site services employees were paid board allowance for the days they worked. Arbitration awards are pending in respect of grievances filed on behalf of the security staff and the site services employees.

Council Submission

The Council requested an order that the Employer, Shepell FGI restore the working schedule and the 14 days board allowance of nurses. The Employer initially set up a 7 day rotation starting on Wednesday and concluding on Tuesday and paid the board allowance for 14 days. The rotation was set up under Article 5.01 of the Trade Appendix. Article 20 of the Collective Agreement does not permit the contractor to change a schedule set up under the Trade Appendix. The specific provision in the Trade Appendix overrides the general provisions in Article 20, in the event of a conflict. Although Article 5.01 of the Trade Appendix stated that the Employer may follow a 7 day rotation, once the Employer established the 7 day rotation, it could not revert to another schedule under

Article 19 or any other Article. There is no provision in the Collective Agreement that permits the Employer to alter the rotation. Other employers subject to the Collective Agreement paid the board allowance for 14 days. The Lockerbie & Hole site services employees were on a 7 day rotation starting on Wednesdays and were paid the board allowance for 14 days. The rotation of the site services employees was changed to start on Mondays in October, 2010. However, those employees did not have a Trade Appendix, and their work week normally started on a Monday. The rotation of the security employees already started on a Monday. The work week of the nurses could start on any day of the week. The change of the nurses shift rotation to start on Mondays was done at the same time as the change of start date for the rotation of other employees. The change in the rotation was done to support the Association's position that only 7 days board was payable for a 7 day rotation starting on Mondays. It was not a coincidence that the change in shift rotation to Mondays occurred at the same time as the Employer stopped paying the board allowance for 14 days. There was no definition of "week" in the Collective Agreement. Ralph Emberley testified that the work week started on Monday, based on Article 19.01. However, Article 19 did not apply to the nurses who were scheduled under Article 5.01 of the Trade Appendix. The work week for payroll purposes started on Sunday and ended on Saturday under Article 25.04. In the *Labour Standards Act* a "week" started on a Sunday and ended on a Saturday. The Council also referred to dictionary definitions of "week" that stated that a week started on a Sunday. The Association accepted that 14 days board allowance was payable to an employee who worked a schedule of 10 days on and 4 days off. This position supported an interpretation that board allowance could be paid for days on which an employee did not work. The Employer could not unilaterally take away a benefit that it had previously granted. This was a site specific Collective Agreement and therefore any issue of bargaining history or long standing bargaining relationship was not relevant. The Council relied to its detriment when it signed the Collective Agreement and gave up the opportunity to negotiate language to specify the payment of 14 days board allowance. An employer may be estopped from withdrawing a gratuitous benefit when it represents that the benefit will continue (*City of Kitchener and Kitchener Fire Fighters Association I.A.F.F., Local 457* (1983) 11 L.A.C. (3d) 47 (Saltman), *Maple Lodge Farms Ltd. and U.F.C.W., Local 175* (1991) 24 L.A.C. (4th) 211 (R.M. Brown), and *Sterling Place v. U.F.C.W., Local 175/633* (1997) 62 L.A.C. (4th) 289 (Pineau)). It was reasonable for the Council to believe that the benefit would continue. A broader view of the application of estoppel is supported by text and case authorities. The signing of a new contract with Shepell and the involvement of Fluor did not change the Collective Agreement. There was no presumption that the management interpretation of the Collective Agreement is correct (*Durham Regional Municipality v. Ontario Nurses' Assn.* (2008) 170 L.A.C. (4th) 371 (Bendel)). The Council submitted

that Shepell was prohibited by the Collective Agreement and by the principle of estoppel from withdrawing the 14 days board allowance.

Association Submission

The Association submitted that the Collective Agreement, including Article 5.01 of the Teamsters Trade Appendix, permits Shepell to schedule a 7 day rotation for nurses to start on any day of the week. The nurses are not entitled to payment of board for the 7 days they are off work, regardless of when the 7 day rotation starts during the week. The nurses were paid 14 days board allowance in error for 15 months. Nurses work various schedules. Initially there were some nurses who worked a 5 day on 2 day off schedule. In July, 2009, a 7 day on 7 day off schedule, starting on Wednesday, was implemented. There was no evidence as to why the 14 days board allowance was paid. Initially Shepell provided services on site under a purchase order, or a temporary contract. David Pearce of the Teamsters Local Union agreed that the parties freely negotiated 106 hours pay for 84 hours work, and a shift rotation of 7 days on 7 days off. When Shepell was awarded the contract by tender, it was directed to change the starting date of the rotation to Monday. Under Article 5.01 of the Trade Appendix, the rotation of 7 days on 7 days off could start on any day. Ralph Emberley testified that, at the time the starting day was changed, his focus was on the requirement of Article 20.06 that employees be given 24 hours notice of the shift change. Article 3.05 had the effect that the project agreement was the entire agreement, and there could be no “side deals” with any individual union. Therefore, estoppel could not operate to change the agreement. The Employer acted within its management rights under Article 5.01 of the Collective Agreement. Under Article 24.03 (c) there was no entitlement to the board allowance for the 7 days that the employees were not working. “Week” is not defined in the Collective Agreement. The normal starting day for a weekly schedule under Article 19.01 (a) was on Monday. The *Labour Standards Act* defines a “week” to be any 7 consecutive days as agreed by the parties. For the nurses, the week can start on any day set by the contractor. The nurses were placed on the same schedule as the security employees by starting on Monday and ending on Sunday. The security employees were not paid 14 days board allowance. The Lockerbie & Hole employees did not have a Trade Appendix and were not exempt from the requirements of Article 19.01 (a). A clear expression of intention is required to confer a financial benefit (*Health Employers’ Assn. of British Columbia and Hospital Employees’ Union, Local 180* (1996) 54 L.A.C. (4th) 35 (Morrison)). There was no factual basis for an estoppel. There was no detrimental reliance by the Council or the Teamsters Local Union. Even

if there was detrimental reliance by the Union, it was the Council, and not the Union, that was the party to the Collective Agreement. The Association requested that the grievance be denied.

Considerations

The issues before the Arbitrator are as follows: (1) Did the Employer violate Article 24.03 (c) of the Collective Agreement when it reduced the board allowance from 14 days to 7 days under the Teamsters Trade Appendix? (2) Did the Employer violate the Collective Agreement when it changed the starting day of a 7 day rotation for employees to whom the Teamsters Trade Appendix applies? (3) Does the principle of estoppel operate, on the facts of this case, to prevent the Employer, Shepell FGI, from changing the starting day of the 7 day rotation, or from reducing the board allowance from 14 days to 7 days?

The Teamsters Trade Appendix applies to nurses employed by Shepell FGI at the Long Harbour project site. Article 5.01 of the Teamsters Trade Appendix states that the hours of work for emergency medical attendants and duty nurses may be made up of 7 consecutive 12 hour shifts and 7 days off. Under Article 5.01, employees working this schedule are paid 106 hours at straight time for the 84 hours worked. The Teamsters Trade Appendix does not make any reference to board allowance. When Shepell first implemented a 7 day rotation in July, 2009, the rotation started on Wednesdays and ended on Tuesdays. Jim Maher, a nurse employed by Shepell, testified that Wednesday was a better day to start the rotation than Monday or Tuesday. He said that nurses had a busier workload on Mondays and Tuesdays because more new employees arrived on site on those days. Shepell was initially engaged as a contractor under the terms of a purchase order by the owner, Vale. When the 7 day rotation started on Wednesday, the nurses were paid 14 days board allowance every 2 weeks. In other words, they were paid board allowance for the 7 days at work and the 7 days off work. When Flour Canada was engaged as the EPCM contractor on site, tenders were called for medical services and Shepell was the successful bidder. Shepell continued to provide the same services. However, the 7 day rotation was changed to start on Monday in place of Wednesday, and the board allowance was paid for 7 days and not 14 days.

The Council grieves that Shepell FGI violated the Collective Agreement, and was prohibited by operation of estoppel, from reducing the board allowance or changing the starting day of the rotation. The redress requested by the Council is that Shepell reinstate the 14 day board allowance and restore the starting day of Wednesday for the 7 day rotation.

The Arbitrator has considered the principles of collective agreement interpretation that apply in this case. The principles of interpretation are discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, and include, that the object of construction is to determine the intention of the parties from the express provisions of the collective agreement (paragraph 4:2100), that the language should be viewed in its normal or ordinary sense (paragraph 4:2110), that it should be presumed that all the words used were intended to have some meaning (paragraph 4:2120), and that the language is to be interpreted within the context of the collective agreement as a whole (paragraph 4:2150) and the industrial relations practices of the parties (paragraph 4:2300).

The entitlement to board allowance is set out in Article 24.03 (c) of the Collective Agreement. On the facts of this case, the employees resided outside the travel zone and were unable to reside in a camp because the camp was not constructed at the times relevant to the grievance. An employee is entitled, pursuant to Article 24.03 (c), to “be compensated with a board allowance of \$68.00 per day payable for 7 days per week in which the employee is scheduled to work”. Article 24.03 (c) does not state that the board allowance is payable only for each day on which the employee is scheduled to work. If such language were used, then an employee working a 7 day rotation would be entitled to board allowance for each of those days, for a total of 7 days board allowance. In that event, it would not matter which day of the week the rotation started. However, Article 24.03 (c) makes reference to the “week in which the employee is scheduled to work”. The plain meaning of the language is that if an employee is scheduled to work one or more days in a week, then the employee is entitled to be paid 7 days board allowance for that week.

The parties do not dispute how Article 24.03 (c) is applied to employees who work a schedule of 10 days on followed by 4 days off. For those employees, who are scheduled to work 10 consecutive days starting on a Monday, it is not disputed that the employees are entitled to be paid 7 days board allowance for the first week of the 10 day schedule, in which they start work on Monday, and to be paid 7 days board allowance for the next week in which they work the remainder of the 10 days. In other words, the parties do not dispute that employees are entitled to payment of 14 days board allowance in a 2 week period when those employees work less than 14 days. The Association submits that an employee who works 7 consecutive days in a 2 week period, regardless of the starting day of the 7 day rotation, is entitled to be paid 7 days board allowance and not 14 days board allowance. To give effect to such an interpretation, the starting day of the “week in which the employee is scheduled to work”, for the purpose of Article 24.03 (c), would be the starting day of the rotation. In other words, the Association submits that if a rotation starts on Monday, then the

week starts on Monday; if the rotation starts on Wednesday, then the week starts on Wednesday, and so on. The effect of the Association's interpretation is that the week would start on whatever day of the week the rotation starts. However, such an interpretation would mean that the "week in which the employee is scheduled to work" could have a different meaning for different employees. There is no language in Article 24.03 (c) to indicate that a "week" could start on different days for different employees. It is more likely that the parties intended that a "week", within the meaning of Article 24.03 (c), would have the same meaning for all employees. Such an interpretation is consistent with the ordinary meaning of the language, and the context of the language in the Collective Agreement as a whole.

The Arbitrator has considered the meaning of "week" for the purpose of determining entitlement to board allowance under Article 24.03 (c). At issue is the starting day of the 7 days that comprise a "week". Article 24 is entitled "Travel and Board". There is no definition of "week" in Article 24. The Collective Agreement does not define a week for the purpose of the work schedule. There are work schedules described in Article 19 and in Trade Appendices. Article 19.01 (a) provides that normal hours of work are 40 hours per week divided into 5 consecutive 8 hour work days from Monday to Friday or 4 consecutive 10 hour work days from Monday to Thursday. Article 19.06 provides for overtime for a schedule of 10 days work followed by 4 days off. Article 19.01 (b) states that the hours of work for workers represented by the Hotel and Restaurant Employees Union and the Teamsters Union are governed by the Trade Appendices for each trade. In this case, the hours of work of the nurses are governed by Article 5.01 of the Teamsters Trade Appendix. Article 5.01 provides for a rotation of 7 days on and 7 days off. Article 5.01 does not make any reference to the starting day for the 7 day rotation. The Association submits that a week starts on Monday for the purpose of a 7 day rotation under Article 5.01. One of the reasons stated for the Association's position is that Article 19.01 (a) provides that the normal hours of work for a 5 day or 4 day rotation commence on Mondays. However, Article 19.01 (a) does not expressly define "week". In any event, the work schedule in Article 19.01 (a) does not apply in this case. It is noted that a week does not commence on Monday for payroll purposes under the Collective Agreement. Article 25.04 states that the "work week for payroll purposes shall end on Saturday midnight". In other words, under Article 25.04, the work week for payroll purposes starts on Sunday and ends on Saturday. It would be consistent with Article 25.04 to find that a "week", for the purpose of Article 24.03 (c), starts on Sunday.

The Arbitrator has considered the definition of “week” in the *Labour Standards Act*, RSNL, c. L-2 (the “Act”). Section 21 (b) states that a “week” means a period of 7 continuous days designated and consistently used by an employer or a period of 7 days prescribed by Regulation. Section 5 (2) of the *Labour Standards Regulations* states that for the purpose of Section 21 (b), a “week” is a period of 7 consecutive days commencing after midnight on Saturday. Section 43.13 (c) of the *Act* also defines a “week” as beginning on Saturday and ending on Sunday. However, Section 21 is under Part III, Hours of Work, and is not applicable where the parties have agreed to the hours of work in the Collective Agreement. Also, Section 43.13 is under Part VII, Pregnancy, Adoption and Parental Leave, and is applicable to those leave provisions. These definitions of “week” are not applicable to the interpretation of Article 24.03 (c).

The Arbitrator has also considered dictionary definitions of “week”. Dictionary definitions may be used as an aid to interpretation. For example, in the *Merriam-Webster Dictionary* a week is defined as “any of a series of 7-day cycles used in various calendars; especially: a 7-day cycle beginning on a Sunday and ending on Saturday”. In the *Concise Oxford Dictionary*, a week is defined as “the period of 7 days generally reckoned from and to midnight on Saturday night”. Therefore, having regard to the ordinary meaning of “week” as determined from dictionary definitions, for the purpose of calculating board allowance under Article 24.03 (c), a week starts on Sunday and ends on Saturday. This meaning is consistent with Article 25.04, which defines “week” as starting on Sunday for payroll purposes.

The board allowance under Article 24.03 (c) is paid for 7 days for each week in which an employee works one or more days in that week. The starting day of a week for the purpose of the payment of the board allowance is the same for all employees. The ordinary meaning of “week”, the dictionary definition of “week”, and the effect of Article 25.04, is that a week starts on Sunday and ends on Saturday. Employees who work a 7 day rotation starting on Monday and ending on Sunday have days of work that fall within 2 weeks and are therefore entitled to 14 days board allowance for those 2 weeks.

The Council questions the authority of an employer under the Collective Agreement to change the starting day of the rotation of the nurses under the Teamsters Trade Appendix. The nurses followed a 7 day on 7 day off rotation under Article 5.01 of the Trade Appendix. Shepell changed the starting day of the rotation from Wednesday to Monday. The starting day of Monday in Article 19.01 (a) does not apply to a 7 day rotation under the Trade Appendix. There is no restriction in Article 5.01

of the Trade Appendix, or anywhere else in the Collective Agreement, on what starting day may be set by an employer under Article 5.01 for the 7 day rotation. There is no Collective Agreement prohibition against an employer changing the starting day. The change of the starting day from one day to another is an exercise of management rights under Article 5.01 of the Collective Agreement. The reason Shepell changed the starting day, based on the testimony of Ralph Emberley, was that Fluor Canada directed that the starting day for the Shepell employees be consistent with the starting day of Monday for other employees. The evidence does not establish that the change of starting day violated the Collective Agreement.

The Council submits that the Employer is estopped by its practice from changing the starting day of the 7 day rotation or from paying less than 14 days board allowance for a 7 day rotation. The Arbitrator has considered the meaning of estoppel as applied by labour arbitrators. In Palmer and Snyder, *Collective Agreement Arbitration in Canada*, 4th edition, the authors state, at page 45, as follows:

- 2.58 In labour arbitration, the most common, but by no means the only, scenario in which estoppel is raised is the following: (a) the employer leads the union to believe that a contract provision will be applied or interpreted in a particular way; (b) the union, accepting the representation at face value, signs a collective agreement without attempting to incorporate the subject matter of the representation; (c) during the life of the contract, the employer changes its position regarding the interpretation or application of the provision; (d) the union would be prejudiced by the employer's change of position since it would be unable to renegotiate the provision until it next gave notice to bargain; and (e) in the application of the estoppel principle, the employer is held to its representation until the expiry of the collective agreement when the union is able to renegotiate the provision.

The principle of estoppel was applied in the Newfoundland and Labrador Supreme Court, Court of Appeal, in *Her Majesty the Queen in Right of Newfoundland and Labrador v. Newfoundland and Labrador Association of Public and Private Employees* 2010 N.L.C.A. 37 (CanLII) commencing at paragraph 53, as follows:

- [53] Quite often in labour arbitration proceedings a union or an employer will raise the issues of past practice and estoppel as a means of supporting their respective positions. Generally past practice will not be permitted to be relied upon by either

an employer or a union unless there is an ambiguity in the provisions of the collective agreement. However, a work practice may become the basis of an estoppel. From a labour relations perspective, Brown and Beatty, *Canadian Labour Arbitration* (Vol. 1, Canada Law Book, 4th ed.) provides useful commentary on the proper application of past practice and estoppel. At p. 2-85, the writers comment:

One of the most frequently asserted bases for the application of estoppel is a long-standing practice that deviates from the terms of a collective agreement. In considering past practice in this regard, however, a distinction must be made between creating an estoppel and using it as an aid to the interpretation of the collective agreement. In the latter context, evidence of a past practice is admitted to assist the arbitrator in selecting the correct interpretation of a term in a collective agreement which permits more than one possible interpretation. Such evidence is available only if the agreement is ambiguous or capable of more than one meaning. The requirement of an ambiguity, however, is not a requirement for the admission of such evidence for the purpose of establishing the requirements of estoppel.

Nevertheless, arbitrators have been cautious in applying the doctrine of estoppel where the basis of the representation has been an established work practice. Thus, the doctrine has been held not to apply where the evidence failed to establish the practice with clarity, or that it was intended to induce reliance, or that the practice was relied upon to the detriment of the other party. It has also been held that where a deviation from a collective agreement is asserted to have been done with the other party's consent, knowing acquiescence to the deviation must be established. Moreover, in a number of cases, arbitrators have found that a particular practice at issue, not referred to in the collective agreement, was a mere "indulgence" or forbearance on the part of the employer, or that no estoppel arose because the practice was not at odds with the agreement. However, others have concluded that in some circumstances a past practice may ground an estoppel even though the subject-matter is not expressly dealt with by the collective agreement, including instances where a long-standing practice continued into the new relationship created by a first collective agreement, or when a successor employer steps into the shoes of the predecessor union (sic).

[54] This commentary demonstrates that the doctrine of estoppel has a rather fluid application in labour arbitration as compared to the consideration of past practice. The doctrine of estoppel arises in a number of different ways such as by conduct, convention or representation (see discussion of estoppel by convention and representation in *Ryan v. Moore*, [2005] 2 S.C.R. 53). However, care must be taken in the field of labour relations to ensure that undisciplined applications of this

doctrine do not undermine the integrity of the collective bargaining process and in particular the language of a collective agreements negotiated in good faith by the parties at a bargaining table. In *Ryan*, the Supreme Court at para. 50 affirmed the admonition that:

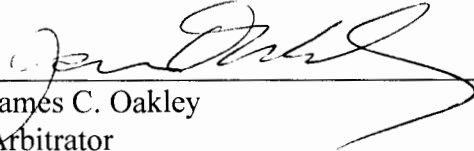
. . . it has long been accepted that estoppels are to be received with caution and applied with care (citation omitted)

There is no evidence of a representation by the Association about the board allowance or the starting day of the rotation prior to the settlement of the terms of the Collective Agreement. This distinguishes the present case from other cases where there was a longstanding work practice by an employer over successive collective agreements, and in reliance on the practice, the union did not seek to negotiate applicable language in the collective agreement. There was no evidence of detrimental reliance by the Council on a work practice when it negotiated the Collective Agreement. The practice on which the Council relies commenced after the Collective Agreement was in effect. The practice was that the Employer established a 7 day rotation starting on Wednesdays and under which employees were paid 14 days board allowance. The Employer changed the starting day to Mondays and reduced the board allowance to 7 days. In these circumstances, it is not established that the Council or the Teamsters Union relied on a practice to their detriment. Therefore, detrimental reliance, one of the essential elements of estoppel, is not proven. The principle of estoppel does not operate in the circumstances of this case.

Decision

The grievance is allowed in part. The Employer violated the Collective Agreement by reducing the board allowance under Article 24.03 (c) from 14 days to 7 days. Employees who work a 7 day rotation starting on Monday under Article 5.01 of the Teamsters Trade Appendix are entitled to 14 days board allowance. The Employer did not violate the Collective Agreement when it changed the starting day of the 7 day rotation from Wednesday to Monday. The principle of estoppel did not operate on the facts of this case.

DATED this 6th day of July, 2011.


James C. Oakley
Arbitrator