ARBITRATION AWARD

BETWEEN:

NEWFOUNDLAND AND LABRADOR NURSES' UNION
(hereinafter called the "Union")

AND:

EASTERN REGIONAL INTEGRATED HEALTH AUTHORITY
(hereinafter called the "Employer")

GRIEVANCE: Callback

COUNSEL: For the Union

David Conway

For the Employer

Miriam S. Sheppard

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on July 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 for sixty (60) days following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.

5. Any applicable time limits for the filing of the Award were waived.

The following exhibits were entered at the hearing:

Consent 1 - Collective Agreement between Her Majesty the Queen in Right of Newfoundland and Labrador, represented by Treasury Board and The Newfoundland and Labrador Health Boards Association and the Newfoundland and Labrador Nurses' Union, dated June 20, 2009 to June 30, 2012

Consent 2 - Grievance form submitted July 15, 2011, NLNU File # G-6566-11

Consent 3 - Letter dated July 18, 2011 from David Conway, Newfoundland and Labrador Nurses' Union to the Employer

Consent 4 - Grievance form submitted August 13, 2010, NLNU File # G-6343-10

Consent 5 - Letter dated August 31, 2010 from David Conway, Newfoundland and Labrador Nurses' Union to the Employer

The parties agreed that the evidence would consist of a Partial Agreed Statement of Facts together with any other facts stipulated and agreed by counsel during the hearing. There were no witnesses called at the hearing. The Partial Agreed Statement of Facts stated as follows:

Background

1. The Newfoundland and Labrador Nurses' Union ("NLNU") and Eastern Regional Integrated Health Authority ("Employer") are signatories to a

Collective Agreement signed June 20, 2009 (the Collective Agreement). The parties agree to tender the Collective Agreement as consent exhibit C1.

2. The Collective Agreement states:

Article 8 - Hours of Work

*8.03 Working Schedule

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

Article 9 - Overtime

9.01 Overtime Rate

When an employee is required to work in excess of her/his normal hours, she/he shall be granted, at her/his option, compensatory time off at the rate of one and one half (1½) times the number of hours worked in excess of her/his normal hours or overtime pay at the rate of one and one half (1½) times her/his regular rate of pay for the time worked in excess of the normal hours of work.

Article 11 - Callback

11.01 Callback Pay Rate

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

11.02 Transportation Expenses

An employee shall not receive any payment for transportation expenses where:

(a) she/he lives in subsidized hospital accommodation adjacent to the hospital; or

(b) transportation is provided by the Employer.

11.03 Transportation Expenses

Subject to clause 11.02, where an employee is recalled to work under the conditions described in clause 11.01, she/he shall be paid the cost of transportation to and from her/his place of work. The maximum transportation expense payable under this clause is eight dollars and fifty cents ($8.50) per callback.

11.04 Additional Duties

If it becomes necessary to assign duties on a callback which are additional to those for which the callback was made, the employee shall be paid at the applicable overtime rate with a minimum of one (1) hour at the applicable overtime rate for the time required to perform such additional duties.

11.05 Return to Work Following Callback

In cases where a nurse is required to work on a callback beyond 0200 hours and who has not had a sufficient rest period, she/he will be entitled to up to an eight (8) hour rest period without loss of pay.

28.03 In-Service Program

(a) The Employer shall provide an in-service program on a continuing basis focused on the needs of the staff for the improvement of patient care. When employees are required to attend compulsory in-service programs outside the employees' normal hours of work, all such time in attendance shall be paid at the applicable overtime rate.

(b) When selecting topics for in-service education, the Employer will give consideration to the following programs:

(i) CPR
(ii) Fire Safety
(iii) Evacuations

(c) The employer shall make available an in-service program in the Prevention of Back Injuries.

Reference: 2009 Collective Agreement

3. There are other articles of the collective agreement that may apply, and the parties will present them as required.

<u>Mandatory Education Sessions Grievance</u>

4. The Employer posts a work schedule for nurses as per article 8.03 of the Collective Agreement.

5. From time to time, the Employer requires nurses in specific areas to complete mandatory training. These are in-service programs. Mandatory training could vary in length from one hour, up to much longer sessions.

6. Training is scheduled in advance, with ample notice to the nurse (more than a few days). The training session may appear on the posted schedule in the area at the time that the schedule is posted. While there may be general e-mails sent out in relation to the requirement to complete training, employees do not necessarily receive individual e-mails, phone calls, or other communications from the employer in relation to such training sessions.

7. If attendance at the mandatory education session means the nurse works more than full-time hours over the applicable time period, the Employer direction is to pay the nurse overtime for the time spent in attendance at such a session. Managers are told not to pay the employee for a callback, i.e. a minimum of three hours at the applicable overtime rate, and transportation expenses.

8. On July 18, 2011, a Policy Grievance was filed stating "*Employees who are scheduled for mandatory education sessions in excess of their total regular hours of work are not being paid a minimum of three hours callback pay at the applicable overtime rate, nor travel expenses, in violation of the Collective Agreement.*" The redress requested was: "*(t)hat employees who are scheduled for mandatory education sessions in excess of their total regular hours of work be paid a minimum of three hours callback pay at the applicable overtime rate along with travel expenses*".

9. The Employer is in agreement with the Union's direct submission to arbitration on July 18, 2011. The Employer maintains that it has not violated the collective agreement. The parties agree that this grievance will be considered by the Arbitrator and agree to tender this grievance and the referral to arbitration as consent items C2 and C3.

10. The parties have agreed to defer the issue of whether overtime attaches to time worked over 75 hours (due to "smoothing"), or time worked over 225 hours (due to "smoothing"). The parties also agree to defer the issue of whether the employer can schedule mandatory education shifts of such short duration.

Work prior to Shifts

11. Nurses are scheduled to work as per the posted schedule.

12. Direction has been given by the Employer that, if a nurse is called in to work before the scheduled start time for her shift (with or without advance notice), and she starts work, and continues to work through her scheduled shift, she is paid overtime for the period worked prior to the scheduled start of the shift. Direction has also been given by the Employer that this is not a callback under the Collective Agreement, i.e. the Employer does not pay the nurse a minimum of three hours at the applicable overtime rate, and it does not pay transportation expenses.

13. On August 13, 2010, a Group/Policy grievance was filed, stating, "*The Employer is not paying the callback premium and transportation expenses for employees who are called back to work prior to the start of their shift.*" The redress requested was, "*that the Employer pay the minimum callback premium and transportation expenses for employees who are called back to work prior to the start of their shift. Full retroactivity. Full redress.*"

14. The Employer responded on September 2, 2010 as follows: "*There has been no violation of the NLNU collective agreement. In situations where a nurse reports to work prior to her scheduled shift and continues working the scheduled shift, callback/transportation expenses are not applicable.*"

15. On August 31, 2010, the grievance was referred to arbitration by the NLNU. The parties agree that this grievance will be considered by the Arbitrator and agree to tender this grievance and the subsequent referral to arbitration as consent items C4 and C5. The parties agree to defer the group aspect of this grievance until the arbitrator has decided the policy aspect of this grievance.

Issues

16. The Parties agree that the issues to be determined at arbitration are as follows:

    (i) On the facts as described above, do the mandatory education sessions constitute a "callback" within the meaning of the Collective Agreement?

    (ii) Does mandatory overtime prior to the start of a scheduled shift, which is contiguous/continuous with that shift, constitute a "callback" within the meaning of the Collective Agreement?

Arbitration Proceedings

17. The parties may introduce further evidence to the Arbitrator concerning these grievances through witnesses. As well, the parties' representatives may agree upon further facts and information at this hearing that the Arbitrator may need in order to make a decision.

18. The parties agree that witnesses and/or advisors will not be excluded from these proceedings.

The parties also agreed that the Arbitrator was asked to decide the policy issues and was not asked to decide any group aspect of the grievances. At the hearing, the parties referred to the following additional Articles of the Collective Agreement.

Article 8 Hours of Work

8.10 Rest Between Scheduled Shifts

(a) Eight (8) Hour Shifts

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

. . .

Article 9 Overtime

. . .

9.06 Change of Days of Rest

When an employee's days of rest are changed without having been given at least forty eight (48) hours prior notice of having to work on her/his day(s) of rest, she/he shall be paid double her/his regular hourly rate for each hour worked on the scheduled day(s) of rest. This clause shall not apply if the day(s) of rest was changed at the request of the employee.

Article 16 Arbitration

16.04 Jurisdiction of the Board

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

Union Submission

The Union submitted that employees were called back to work and entitled to a minimum of three hours pay at the applicable overtime rate for both mandatory education sessions and overtime work contiguous with scheduled shifts. There was no onus of proof on the Union to prove that its interpretation of the Collective Agreement was correct. Callback applies where the work is contiguous to a scheduled shift. There is inconvenience and disruption to an employee who has to report to work early before a scheduled shift. The purpose of callback, as described in the Brown & Beatty text and arbitral case authorities, is to compensate an employee for the inconvenience and disruption of having to work when not scheduled to work, and to deter the Employer from calling in employees and interrupting personal life when it is not necessary. There were two schools of thought in the arbitral authorities as to whether an extra trip to work was required to be entitled to callback pay. The arbitration award in *Webster Manufacturing (London) Ltd. v. International Association of Machinists and Aerospace Workers, Local 49 (Schliewinsky Grievance)* [1971] O.L.A.A. No. 7, 23 L.A.C. 37 (P. Weiler) ("*Webster Manufacturing*") stated that a second trip to work triggered the payment of minimum callback pay. However, that award did not preclude entitlement to callback pay in other scenarios. There was a line of arbitral authorities that did not follow the "two trip" principle. In *Campbell River and District General Hospital and Health Sciences Association* (1978) 20 L.A.C. (2d) 425 (MacIntyre) ("*Campbell River*"), the employee was called into work one hour before the scheduled shift started, continued to work the scheduled shift, and was entitled to the minimum callback pay of two hours. In *Campbell River* an extra trip to work was not required, and entitlement was based on the fact that the employee had to leave home early without prior warning. The Collective Agreement in this case does not specifically exclude payment of callback where the work is contiguous with the scheduled shift. The parties could have inserted such language in the Collective Agreement, as other parties had done in their collective agreements, such as in *Jashewski and Treasury Board (Transport Canada)* (1983) C.P.S.S.R.B. No. 62. Even

where the parties have agreed to pay for travel time in a collective agreement, there is still entitlement to callback pay where employees have not made a second trip (see *Re Pacific Press Ltd. and Vancouver Typographical Union, Local 226* (1983) 13 L.A.C. (3d) 238 (McColl) ("*Pacific Press*")). Callback may apply where there is either insufficient notice or an extra trip is required. In either situation, there is disruption to an employee (see *Camp Hill Medical Centre v. Nova Scotia Nurses' Union (Legatto Grievance)* (1994) 40 L.A.C. (4th) 381 (Rigg) ("*Camp Hill*") and *Metropolitan Toronto Civic Employees Union, Local 43 v. Toronto (Metropolitan) (DeMone Grievance)* [1997] O.L.A.A. No. 867 (Howe) ("*Metropolitan Toronto*")). The requirements for callback pay were met whether a literal interpretation or a purposive interpretation of the collective agreement was applied. Even when the work was scheduled well in advance, callback may apply where the collective agreement did not say that the work has to be concluded prior to the beginning of the next scheduled shift (see *Toronto Police Services Board and Toronto Police Association (King)* (2001) 96 L.A.C. (4th) 431 (Marcotte) ("*Toronto Police*")). The two schools of thought in arbitral authorities were blended in *Simcoe (County) v. Ontario Public Service Employees Union, Local 303 (Redgate Grievance)* [2008] O.L.A.A. No. 289, 93 C.L.A.S. 267 (Davie) ("*Simcoe County*"), where the emphasis was placed on the language used in the collective agreement and the purpose of the callback pay premium. Avoiding disruption of an employee's personal life was discussed as the rationale for minimum callback pay in *Newfoundland and Labrador Nurses' Union (NLNU) and Central Regional Integrated Health Authority*, unreported, May 10, 2007 (Thistle). The Union submitted that the case authorities referred to by the Employer erroneously applied the *Webster Manufacturing* case, were not consistent with recent case authorities or could be distinguished on their facts. Callback could also be paid where there was a recurring schedule (see *Newfoundland and Labrador Association of Public and Private Employees and Newfoundland and Labrador Department of Transportation and Works (Marine Services)* [2011] N.L.L.A.A. No. 2 (Oakley) ("*Marine Services*")). The reference to transportation expenses in Article 11.03 is not determinative, as an employee could be entitled to callback pay without having any transportation expenses. The payment of callback applied to mandatory education sessions under Article 28.03, which referred to payment at the applicable overtime rate. The "applicable overtime rate" incorporated the callback minimum of three hours pay. There is inconvenience and disruption to an employee who has to make a second trip to work to attend a mandatory education session. Therefore callback applied to mandatory education sessions outside scheduled shifts. The Union requested an order that employees were entitled to callback pay in both grievances.

Employer Submission

The Employer submitted that minimum callback pay did not apply to mandatory overtime prior to the start of a scheduled shift or mandatory education sessions. Overtime that is contiguous to the start of a scheduled shift is not callback under Article 11.01. According to principles of interpretation, Article 11.01 should be interpreted in the context of Articles 11.02, 11.03, 11.04 and 11.05 and the Collective Agreement as a whole. The parties intended callback to apply when there was an extra trip back and forth to work. The parties had incorporated the "two trip" principle into the Collective Agreement by the reference in Article 11.03 to the payment of the transportation costs of transportation "to and from her/his place of work". The reference in Article 11.04 to the payment of an additional minimum of one hour at the applicable overtime rate for assignment of duties additional to those for which the callback was made, and the reference in the heading of Article 11.05 to "return to work following callback", also incorporated the "two trip" principle. Where overtime work is contiguous to a scheduled shift then the employee does not have to make two trips and callback does not apply. If callback was based on inconvenience and disruption to an employee required to work when not otherwise scheduled, then there was no reason to pay callback to an employee who started work early and continued to work the scheduled shift, any more than there was a reason to pay callback to an employee who continued to work beyond the end of a scheduled shift. In both cases there could be disruption to personal or family life. The Employer submitted that this comparison provided an answer to the Union's claim that there was an anomaly when comparing the case of an employee who was called in to work at 6:00 a.m., left work at 6:30 a.m. and returned for a scheduled shift at 7:00 a.m., who would be paid callback under the Employer's interpretation, and an employee who was called in to work at 6:00 a.m. and worked continuously until the start of the scheduled shift at 7:00 a.m., who would not be paid callback under the Employer's interpretation. The reference to transportation expenses for travel "to and from her/his place of work" in Article 11.03 was similar to the collective agreement language considered in arbitral authorities where it was found that the parties had incorporated the "two trip" principle in the collective agreement. For example, in *Kawneer Co. Canada v. International Assn. of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 835 (Call-In Pay Grievance)* [2006] O.L.A.A. No. 129, 84 C.L.A.S. 343 (Burkett) ("*Kawneer*"), the parties agreed to pay for travel time "each way" and the arbitrator found that the intention of the parties was not to pay callback for assignments that were contiguous to a scheduled shift. In *Re Shell Canada Ltd. and Oil, Chemical and Atomic Workers, Local 9-848* (1974) 6 L.A.C. (2d) 422 (O'Shea) ("*Shell Canada*"), callback was defined as unscheduled emergency overtime work which is not contiguous to an employee's scheduled shift. The "two trip"

principle was applied in the *Webster Manufacturing* case, and followed in a subsequent line of arbitral authorities, including *City of Toronto v. Canadian Union of Public Employees, Local 79* (1983) 12 L.A.C. (3d) 232 (P.C. Picher) ("*City of Toronto*"). The "two trip" principle was applied in this Province in *Newfoundland and Labrador Hospital and Nursing Home Association (Dr. Charles L. LeGrow Health Centre)*, unreported, December 10, 1989 (D. Alcock) ("*LeGrow Health Centre*"), where the collective agreement provided for payment of transportation expenses in an article similar to Article 11.03 in the current Collective Agreement. The Employer referred to *Newfoundland and Labrador Nurses' Union v. Eastern Regional Integrated Health Authority (Prideaux Grievance)*, unreported, August 18, 2010 (J. Clarke) ("*Prideaux*"), where the grievor was called to work, but the call was cancelled before she arrived at work. The arbitrator decided that callback did not apply because the grievor did not report to work, and the language of the collective agreement was strictly followed. The mandatory education sessions do not constitute a callback. The parties have addressed this issue in Article 28.03, which provides for payment of overtime rates with no minimum guarantee of hours. The Union's interpretation would render Article 28.03 redundant, which would be inconsistent with the presumption against redundancy when interpreting a collective agreement. The specific provision in Article 28.03 overrides the general provision in Article 11.01. The reference to the applicable overtime rate in Article 28.03 means either time and one half under Article 9.01 or double time under Article 9.06. The parties agreed to pay for "time in attendance" at the education session, which is not consistent with minimum callback pay regardless of the length of the education session. Payment of callback pay to attend an education session would not be consistent with the rationale for callback. The Employer referred to the principle of interpretation that there must be clear language to confer a financial benefit. There was no clear language in this case. The Employer submitted an alternative argument that callback does not apply to mandatory education sessions because the requirement to attend is known by the employee well in advance. In *Helm v. Treasury Board (Health Canada)* [2003] C.P.S.S.R.B. No. 80 ("*Helm*"), it was decided that there was no callback where there was advance notice of the requirement to work. In *Rescare Premier Canada Inc. v. Industrial Wood and Allied Workers Union and its Local 700 (Call-In Pay Grievance)* [2004] O.L.A.A. (O'Neil) ("*Rescare*"), callback did not apply where there was a recurring event that was known for at least a week in advance. Where the requirement to attend at work is known well in advance, then the rationale for callback, that it has a moderating influence on the employer's decision to call an employee, does not apply. Also, the employee is not inconvenienced when the work is regularly scheduled. The Employer distinguished arbitration awards referred to by the Union on the basis that the collective agreements in those cases did not have language similar to Articles 11.02, 11.03, 11.04 and 11.05 of the current Collective

Agreement, or the language considered in those cases contained specific provisions for callback not found in the current Collective Agreement. The Employer requested that the Arbitrator uphold its interpretation of the Collective Agreement.

Considerations

The grievances concern the interpretation of Article 11.01 and other articles of the Collective Agreement, and entitlement of employees to callback in the situations of (1) mandatory overtime prior to the start of a scheduled shift, which is contiguous with that shift; and (2) mandatory education sessions. I will first discuss the general principles that apply to callback, then address the situation of overtime contiguous with the start of a scheduled shift, and finally address the situation of mandatory education sessions.

The Arbitrator refers to the principles of interpretation discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, in particular, 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), 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), and that special or specific provisions will prevail over general provisions (paragraph 4:2120).

Article 11 is headed “Callback”. Article 11.01, headed “Callback Pay Rate”, provides for a minimum payment of 3 hours pay. A minimum payment is consistent with the accepted meaning of callback applied in the arbitral authorities. When an employee is called back to work within the meaning of Article 11.01, and works for less than three hours, the employee is entitled to be paid the minimum amount of three hours pay.

Both parties referred to arbitral authorities interpreting callback provisions in collective agreements. The arbitral authorities establish general principles with respect to the purpose of callback provisions, and illustrate how the principles are applied. These principles are part of the context within which the parties negotiate the terms of the Collective Agreement. The decisions in the arbitral authorities are based on the collective agreement language in each case. The language

interpreted in an arbitration award may be compared to the language in the current Collective Agreement to determine the similarities or differences.

The rationale for callback pay, as discussed in the arbitral authorities, was described in *Simcoe (County) v. Ontario Public Service Employees Union, Local 303 (Redgate Grievance)* [2008] O.L.A.A. No. 289, 93 C.L.A.S. 267 (Davie), at paragraph 20, as follows:

> In terms of the purpose or rationale for call-in premium payment I find that there are three purposes for call-in premium provisions; (1) to compensate the employee for the additional expense of an extra trip; (2) to compensate the employee for insufficient notice and the disruption and inconvenience which may arise or is presumed to arise from insufficient notice; (3) to discourage the Employer from lightly exercising the right to require or request employees to work at a time they are otherwise not normally scheduled to work.

Any one or more of the three rationales described in the *Simcoe County* case have been applied by arbitrators in callback cases. The arbitral authorities do not require that all three rationales be present. While some arbitrators apply the "two trip" principle as a basis for callback pay, the necessity for a second trip is not a requirement in many cases where one of the other rationales is present. The "two trip" principle was applied in *Webster Manufacturing (London) Ltd. v. International Association of Machinists and Aerospace Workers, Local 49 (Schliewinsky Grievance)* [1971] O.L.A.A. No. 7, 23 L.A.C. 37 (P. Weiler), and subsequently followed in a line of arbitral authorities. In the *Webster Manufacturing* case, the employee was given notice while still at the plant that he was required to return to work before his next scheduled shift. Arbitrator Paul Weiler decided that, even though advance notice was given, the employee was entitled to the minimum callback pay because the employee was required to make an extra trip to and from work involving significant disruption and expense for the employee. The arbitrator made the comment that when an employee is asked to work overtime before the start of a shift and the employee works continuously up to the start of the shift, the overtime rate should apply and not the guaranteed minimum callback pay, because the employee did not make an extra trip. This comment by Arbitrator Weiler was not an essential part of the decision in the *Webster Manufacturing* case. However, the comment became the basis for the "two trip" principle that was followed in subsequent arbitration awards.

The *Webster Manufacturing* case and the "two trip" principle was applied by Arbitrator Alcock in *Newfoundland and Labrador Hospital and Nursing Home Association (Dr. Charles L. LeGrow Health Centre)*, unreported, December 10, 1989 (D. Alcock). The collective agreement in that case, provided for payment of the cost of transportation "to and from his or her place of work", and used language similar to Article 11.03 of the current Collective Agreement. Arbitrator Alcock considered that the article providing for payment of transportation costs clarified that the parties intended callback to require an extra trip to and from work. The collective agreement considered in the *LeGrow Health Centre* case had another article that provided for payment for time worked when an employee was recalled to the work area during the meal break. Arbitrator Alcock also relied on that article to support his finding that, without an extra trip to work, the parties had agreed to pay only for time worked.

Another case that applied the "two trip" principle is *Re Shell Canada Ltd. and Oil, Chemical and Atomic Workers, Local 9-848* (1974) 6 L.A.C. (2d) 422 (O'Shea) , where Arbitrator O'Shea defined call-out work, at paragraph 18, as follows:

> Call-out work may be defined as unscheduled emergency overtime work which is not contiguous to an employee's regular shift. Extra hours which are worked immediately preceding or following a regularly scheduled shift are not normally subject to call-out provisions but are usually paid for at regular overtime rates.

There is also a line of arbitral authorities that does not apply the "two trip" principle. In *Campbell River and District General Hospital and Health Sciences Association* (1978) 20 L.A.C. (2d) 425 (MacIntyre), the arbitrator referred to the inconvenience of an employee being required to leave home early without prior warning. Minimum callback pay applied without the need for a second trip. This line of authority was followed in *Re Pacific Press Ltd. and Vancouver Typographical Union, Local 226* (1983) 13 L.A.C. (3d) 238 (McColl) where callback pay was allowed for overtime work that was contiguous with a scheduled shift. In both the *Campbell River* and *Pacific Press* cases, the collective agreement did not have an article providing for payment of transportation expenses to attend a callback. Other cases that do not apply the "two trip" principle note that if parties want to apply the "two trip" principle they may expressly state in their collective agreement that where overtime work is contiguous with a scheduled shift, minimum callback pay does not apply. For example, in *Camp Hill Medical Centre v. Nova Scotia Nurses' Union (Legatto Grievance)* (1994) 40 L.A.C. (4th) 381 (Rigg) , the collective agreement did not specifically exclude

callback when the work was contiguous with a scheduled shift, and it was found that the parties intended the minimum callback pay to apply. The Union referred to other arbitral authorities where minimum callback pay was allowed for overtime work contiguous with a scheduled shift, including *Newfoundland and Labrador Association of Public and Private Employees and Newfoundland and Labrador Department of Transportation and Works (Marine Services)* [2011] N.L.L.A.A. No. 2 (Oakley).

Arbitral authority states that the parties may agree by express or implied language that callback does not apply to work contiguous with a scheduled shift. The parties did not include language in the current Collective Agreement to expressly exclude payment of callback pay where the work is contiguous with a scheduled shift. However, the language may imply that the parties agreed to exclude payment of callback pay in those circumstances. I have considered whether callback pay applies having regard to the context of Article 11.01 in relation to other articles of the Collective Agreement, in particular Articles 11.02, 11.03, 11.04 and 11.05. I find that these provisions, when considered together, indicate that the parties contemplated there would be an extra trip to work for a callback. Article 11.03 refers to an employee being entitled to the cost of transportation "to and from her/his place of work". Such a payment would arise when there is an extra trip to work. Article 11.04 is headed "Return to Work Following Callback", which is consistent with an employee leaving work after a callback, and then returning to work. In that event, callback would not be contiguous with a scheduled shift. Article 11.05 refers to entitlement to a rest period between the overtime work and a scheduled shift. In those circumstances, the overtime work would not be contiguous with a scheduled shift.

Having regard to the context of Article 11.01 in the Collective Agreement, I find that the parties agreed to exclude payment of callback pay for overtime work that is contiguous to a scheduled shift. The language used by the parties in Article 11, including the provision for payment of transportation expenses, distinguishes this case from the arbitral authorities relied upon by the Union, such as *Campbell River*, *Pacific Press*, *Camp Hill*, *Toronto Police*, and *Marine Services* which do not have such provisions. There are similarities in the collective agreement language used in this case and the language considered in *LeGrow Health Centre*, where callback pay did not apply.

With respect to mandatory education sessions, Article 28.03 addresses the compensation to be paid for attendance at such programs. It states that when employees are required to attend outside normal hours of work, then "all such time in attendance shall be paid at the applicable overtime rate".

Reference to payment for all "time in attendance" is not consistent with a minimum callback pay of three hours regardless of the actual length of the session. Also, the reference to payment at the "applicable overtime rate" is a reference to the rate of time and one half or double time, having regard to the overtime articles of the Collective Agreement. The Union submits that the "applicable overtime rate" in Article 28.03 incorporates a minimum callback payment. However, had the parties intended to incorporate the minimum callback payment, then they could have used express language to that effect. Instead, the parties used the word "rate" which, on its plain meaning, refers to the amount by which the overtime rate exceeds the straight time rate. Article 28.03 is a specific provision which overrides the general provision in Article 11.01 with respect to callback. Having regard to the rule against redundancy, and to give meaning to Article 28.03, its provision for payment for time in attendance at the applicable rate must be given effect. Therefore, callback does not apply to mandatory education sessions.

Decision

The issues referred to arbitration are decided as follows: (1) mandatory education sessions do not constitute a callback within the meaning of the Collective Agreement; and (2) mandatory overtime prior to the start of a scheduled shift, which is contiguous/continuous with that shift, does not constitute a callback within the meaning of the Collective Agreement.

DATED this 12th day of October, 2011.

James C. Oakley
Arbitrator