

ARBITRATION AWARD

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 1615
(hereinafter called the "Union")

AND:

NEWFOUNDLAND AND LABRADOR HYDRO
(hereinafter called the "Employer" or the "Company")

GRIEVANCE: Group Grievance - Supernumerary Shifts

COUNSEL: For the Union

Robert G. Clarke

For the Employer

Darren C. Stratton

ARBITRATION BOARD: James C. Oakley, Chairperson
 David Curtis
 William Alcock

The arbitration hearing was held at St. John's on June 22, 23 and 24, 2011. The parties agreed as follows:

1. The Arbitration Board was acceptable.
2. There were no preliminary objections with respect to jurisdiction of the Arbitration Board to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. Any applicable time limits for the filing of the Award were waived.
5. The Arbitration Board would remain seized of the matter for ninety (90) days following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.
6. Witnesses were excluded from the hearing.

The following exhibits were entered at the hearing:

- Consent 1 - Excerpt from Collective Agreement between Newfoundland and Labrador Hydro and Local 1615 of the International Brotherhood of Electrical Workers, effective April 1, 2002 to March 31, 2005
- Consent 2 - Collective Agreement between Newfoundland and Labrador Hydro and Local 1615 of the International Brotherhood of Electrical Workers, Operations Unit, effective April 1, 2006 to March 31, 2010
- Consent 3 - Collective Agreement between Newfoundland and Labrador Hydro and Local 1615 of the International Brotherhood of Electrical Workers, Operations Unit, effective April 1, 2010 to March 31, 2014
- Consent 4 - Grievance form dated April 23, 2010 and related correspondence

- PP - 1 Arbitration Award between International Brotherhood of Electrical Workers, Local 1615 and Newfoundland and Labrador Hydro Corporation, May 31, 2006 (Arbitration Board - W. John Clarke, Michael Power, William Alcock)
- PP - 2 Grievance form dated February 18, 2005 and related correspondence
- PP - 3 Grievance form dated October 24, 1996

- PP - 4 Holyrood Thermal Generation Station Operations Shift Schedule 2010
- PP - 5 Operations Shift Schedule template
- PP - 6 Operations Reschedule Log form
- MH - 1 Monthly shift schedules - January, 2009 to March, 2010
- MH - 2 Shift structure arrangement operations schedule for September to December, 2009 and Operations Reschedule Log forms - March, 2009 and December, 2009
- EC - 1 Operator Rescheduling Summary - 2003 to 2011
- EC - 2 Letter dated June 5, 2002 from Dennis Eastman, Manager, Engineering and Inspection Services, Department of Government Services and Lands to Herb Dowden, Chief Engineer, Newfoundland and Labrador Hydro

Nature of the Grievance

The Union alleges that the Company is rescheduling Operators assigned to supernumerary shifts in violation of the Collective Agreement, in particular, Article 15.03 (g). The Union submits that the same issue was decided in a prior Arbitration Award between the parties dated May 31, 2006 and the Company is bound by the prior award. The Union submits that the Company is estopped from changing its past practice of rescheduling supernumerary shifts. The Employer submits that the prior award does not apply in this case because it addressed a different issue and that there is no violation of the Collective Agreement.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 6 Management Rights

- 6.01 The Union acknowledges and agrees that the Corporation has the exclusive right to operate and manage the affairs in which it is engaged and to direct its working forces. Such rights, without limiting the foregoing, include, but are not limited to: the right to hire, determine the job qualifications of employees,

promote, transfer, test, to suspend, demote, lay off, discipline or discharge for just cause to determine the number of employees to perform the work; to control and regulate the use of all equipment and to schedule the work; to determine the products, machinery and tools to be used, the right to make and alter from time to time, reasonable rules and regulations to be observed by the employees. It is understood that in the exercise of the foregoing Management Rights, the Corporation shall be consistent with the provisions of this Agreement.

...

Article 15 Hours of Work

15.01 Subject to the provisions of this Article, the workday shall be from midnight to the following midnight and the work week shall be Monday through Sunday.

...

15.03 Shift Employees (Holyrood Generating Station, Bay d'Espoir Generating Station, Provincial Control Center)

The hours of work for regular operators shall average forty (40) hours per week over a cycle of shifts, which shall be achieved by working twelve (12) hour shifts, 0800-2000 hours and 2000-0800 hours. The hours of work for supernumerary operators shall be forty (40) hours per week which shall be achieved by working eight (8) hour shifts, 0800-1600 hours. The starting and quitting times and the day of rest as applicable to all employees involved shall be in accordance with a shift schedule to be posted on the Corporation's bulletin boards at least thirty (30) calendar days before the effective starting date. Shifts shall rotate or alternate on a regular basis. Time balance adjustment will be shown on the master work schedule at the time it is posted.

- (a) The shift schedule shall be made up of five shifts.
- (b) Shifts shall rotate on a regular basis.
- (c) A schedule shall consist of regular operating shifts and supernumerary shift indicating the days, hours of work, and operating positions for each operator in the Station.
- (d) Operators working the supernumerary shift shall:
 - (i) When required relieve the 0800-2000 hours regular operators without notice and without premium rates for the first 8 hours and at double time for the remaining four (4) hours.

(ii) When required, relieve the 2000-0800 shift without notice and receive compensation at double time for all hours worked.

...

(g) Supernumerary shifts themselves may be subject to revision for purposes of training providing a minimum of forty-eight (48) hours notice is given. Failure to give the required notice shall require the payment of premium rates for the first eight (8) hours worked into the new schedule.

(h) Changing an operator's designated hours (shift) from the Master Shift Schedule, or reposting to the Master Shift Schedule, except as outlined in paragraph (g), for any reason shall require a minimum of forty-eight (48) hours notice, and in the absence of such notice, premium time will be paid for the first eight (8) hours worked in the new schedule, and the first eight (8) hours in the reposted schedule. Notwithstanding the above, in order to reschedule an employee's days off he/she shall receive not less than forty-eight (48) hours notice before leaving work to commence these days off. In the absence of his notice, he/she shall be paid premium time for any time worked on these days off.

Evidence

The witnesses called by the Union were Perry Peyton, Thermal Plant Operator and Matt Hutchings, Thermal Plant Operator. The witnesses called by the Employer were Terry LeDrew, Station Manager, Evan Cabot, Operations Specialist and Gerard Cochrane, Manager of Operations.

The Operators at the Holyrood Plant are organized into five shifts, called the A Shift, B Shift, C Shift, D Shift and E Shift. The shift schedule consists of 12 hour day shifts and 12 hour night shifts. There is a 10 week rotation. For the first eight weeks, the Operators work two day shifts and two night shifts and then have four days off. For the last two weeks, the Operators are supernumerary and are scheduled to work eight hours per day, four days per week on Monday to Thursday. Supernumerary employees may be rescheduled to work a 12 hour day shift or night shift.

The regular complement of a shift consists of a Shift Supervisor, a Lead Thermal Plant Operator (LTPO) and four Thermal Plant Operators (TPO). The Shift Supervisor position is outside the bargaining unit. The LTPO and TPO positions are within the scope of the bargaining unit. When

the Shift Supervisor is absent, an LTPO or TPO will fill the position temporarily and a supernumerary TPO may be rescheduled to fill the open TPO position. Similarly, when an LTPO is absent, then a replacement TPO will be rescheduled if necessary.

The Company reschedules Operators to fill open positions as required to meet the minimum Operator requirements of Provincial Government regulations. The Government's requirements were set out in a letter dated June 5, 2002 from the Manager of Engineering and Inspection Services, Government of Newfoundland and Labrador to the Company. The letter stated that the Certificate of Plant Registration for the power plant was subject to certain conditions which included the following: "The minimum number of fully trained operators per shift shall be one (1) Second Class Shift Engineer and five (5) Third Class Assistant Shift Engineers."

There are three units at the Holyrood plant. The minimum number of operators stated in the letter from the Government applies when all three units are operating. When there are three units in operation, the minimum number required is four TPOs, one LTPO and a Shift Supervisor. When there are two units in operation, the requirement is reduced to three TPOs, one LTPO and a Shift Supervisor. When there is one unit in operation, the requirement is further reduced to two TPOs, one LTPO and a Shift Supervisor. When three units are in operation, then a TPO may be assigned to each unit, and another TPO may be assigned to outside duties, which includes checking auxiliary equipment around the plant. The need to reschedule supernumerary employees is greatest when there is a three unit operation. The number of units in operation is determined by the energy control centre and is based on system demand, usually highest in the winter months. When there is a one or two unit operation then replacement Operators are less likely to be needed.

The Company prepares a monthly shift schedule listing the Operators on each shift and showing the shift assignments, days off and absence from assigned shifts. The monthly shift schedule is based on the established 10 week rotation, with the effect that regular shift assignments are known well in advance. A copy of the monthly shift schedule is placed in a binder in the Shift Supervisor's office.

The circumstances under which the Employer may reschedule supernumerary employees is the subject of this grievance. The issue was also the subject of prior grievances filed in 1996 and 2005. The 2005 grievance proceeded to arbitration and was resolved by an Arbitration Award in *International Brotherhood of Electrical Workers, Local 1615 and Newfoundland and Labrador Hydro Corporation*, May 31, 2006 (Arbitration Board - W. John Clarke, Michael Power, William

Alcock)(the “2006 Award”). The findings and considerations of the 2006 Award stated as follows, starting at page 19:

In this case, the Union alleges that management is rescheduling its supernumerary operators for reasons other than those set forth in the agreement and those for which traditionally it has been rescheduling.

The Collective Agreement, in Article 15.03 (g) sets forth the only reference to a reason for changing operators shift scheduling. It states that the supernumerary shifts “may be subject to revision for purposes of training provided” that defined notice is given.

Both parties concede that the course of their dealings with each other has resulted in revisions to the schedule of supernumerary schedules for a variety of reasons other than training. The reasons upon which there appears to be agreement are to deal with issues of sick leave, other approved leave and staff shortages.

The Union now alleges that the list is expanding and the Employer is rescheduling the supernumerary employees for other reasons. The Employer, while denying that this is the case, argues that, in any event, it would be within its rights under the Collective Agreement to do so. Its reasoning is rooted in its interpretation of the collective agreement management rights provision which entitles it to “direct its working forces”, to “determine the number of employees to perform the work” and “to schedule the work”. The Corporation has agreed to exercise these rights in accordance with the Collective Agreement but says there is no restriction placed on these rights in the Collective Agreement.

The Corporation goes on to argue that its management’s rights under Article 6 are enhanced by Article 15.03 (h) where it says that “changing an operator’s designated hours (shift) from the Master Shift Schedule or reposting to the Master Shift Schedule, except as outlined in paragraph (g), for any reason shall require a minimum of forty-eight (48) hours notice. . .” (emphasis added).

The use of the term “for any reason”, argues the Corporation, confirms that it has latitude to change the scheduling for any reason including and going beyond those for which rescheduling has taken place in the past.

For its part, the Union argues that, as the Agreement does not spell out the reasons for rescheduling and given that the Corporation has a history dating back over several Collective Agreements of limiting itself to a certain group of reasons for this rescheduling, it has, in fact, established a past practice from which it is now estopped from varying.

There are two issues which it seems are in need of addressing in this Award. The first is what are the parameters in the collective agreement within which the rescheduling of supernumeraries can occur and the second is what is the effect of Article 15.03 (h) on those rights?

As noted, Article 6 of the agreement is generous in its latitude to management to manage its work force. The main constraint placed upon management in this article is the directive that the exercise of the rights “shall be consistent with the provisions of this Agreement”, hence the need to examine the parameters of the collective agreement.

It is common ground that Article 15.03 (g) contains the only specific reference to a restriction on management’s powers in this regard. It talks of supernumerary shifts being subject to revision for training purposes provided 48 hours notice is given. The Union alleges that this list is expanded by the past practice which has evolved through the course of dealings between the parties over the years. It says that the list also now contains the additional reasons of relief of other shift operators in respect of illness, vacations and other approved leave. There is substantiation in the evidence for this viewpoint. It seems, frankly, that there is little dispute on that point and the nub of the dispute seems to be whether the Employer can alter these supernumerary shifts to have an extra pair of hands on the shift to ensure that all the work required of the shift can be completed in the time allotted. Management says that its right to do this comes from Article 6 of the agreement as is fortified in the phrase in Article 15.03 (h).

The wording of Article 15.03 (g) and (h) is confusing. In plain terms what it says in Article 15.03 (g) is that supernumerary shifts may be subject to revision for purposes of training upon giving certain notice or paying a certain premium. Article 15.03 (h) then goes on to say that changing the shifts of an operator except as outlined in (g) for any reason requires certain notice or a premium will be payable. It should be noted that subsection (h) does not appear to be restricted in its application to only supernumerary operators. Therefore to say that the expression “for any reason” in subsection (h) gives the Employer a carte blanche to change supernumerary shifts at will cannot be sustained because subsection (h) applies to all operators who presumably may have their shifts changed for other reasons. We therefore cannot find that this arm of the Employer’s argument is sufficient to justify its position.

Where else in the agreement is there a restraint on the Employer’s Article 6 ability to alter supernumerary shifts? No other sections of the agreement were cited. The Union’s position however, is that the Employer is estopped from changing the supernumerary shifts because of the past practice which has evolved between the parties through time. It would appear that there has indeed been a practice which has grown up between them.

In most allegations of past practice, one of the biggest hurdles for the proponent to overcome is the issue of proof of what the actual practice has been between the parties. In this case however, it seems that this is not the situation. We have the evidence of Mr. O'Shea who testified that supernumeraries can be called upon for relief when regular operators are on approved leave whether that leave be for illness, family leave or training. There is also evidence in writing from the employer in 1996 in response to a grievance in similar, if not identical, circumstances where the employer has alluded to restricting itself from rescheduling in circumstances other than for "training or relief of a regular shift operator". It seems then that the past practice has been made out. That being the case, the employer's scheduling right in Article 6 is constrained. In any event, one of the issues raised by the employer is that the grievance should be denied on the grounds that it is moot in that the employer has no intention of rescheduling supernumerary operators for anything other than shortages created by operators being at training or on approved leave. This is indeed curious. When the board provided the parties the opportunity to resolve the matter during a break, they could not do so. It is apparent then that the matters cannot be that moot or they would have been able to advise the board of success. They did not.

As a result, the grievance is allowed and the Employer is ordered to cease and desist from rescheduling supernumerary operators pursuant to Article 15.03 (g) and (h) for reasons other than to cover for shortages created by operators on leave by reason of re-training, illness, family or other approved leave.

Perry Peyton has worked as a Thermal Plant Operator since 1996. He testified that during the first eight weeks of the ten week shift rotation, when the Operators are working day shifts and night shifts, they do not usually have weekends off. During the last two weeks of the rotation, when Operators work eight hour supernumerary shifts, the Operators have three weekends off. Mr. Peyton said that the Operators look forward to having weekends off during the supernumerary part of the shift rotation. He said the Operators were concerned about the excessive number of times they were rescheduled from supernumerary to work on weekends. Mr. Peyton signed the grievance form as shop steward. He testified that the Union accepted rescheduling of supernumerary employees for reasons of retraining or approved leave such as vacation, floating holidays, banked overtime, sick leave or time off for power engineer exams. He said that it was the Union's understanding that rescheduling for those purposes was what the Company was permitted to do by the *2006 Award*. Mr. Peyton said the *2006 Award* was consistent with past practice. He testified that the Company was now rescheduling for reasons other than retraining or approved leave. The Company was rescheduling to cover shortages on a shift caused by vacancies when an Operator leaves the

Company or temporary assignment of an Operator to other duties. He said the Company was rescheduling because there was a lack of trained TPOs.

Mr. Peyton testified that Operators often took their vacation during the weeks when they were scheduled for supernumerary shifts. The advantage for the Operator was that a vacation day used less time off work when the scheduled day was an eight hour shift compared to a twelve hour shift. He said it was also an advantage for the Company when Operators took their vacation when scheduled for supernumerary shifts, because the Company did not have to reschedule a replacement for a supernumerary Operator.

Matt Hutchings, Thermal Plant Operator, testified that the grievance covers all instances of rescheduling not permitted by the Collective Agreement and not permitted by the *2006 Award*. He said the grievance applies to the situation when a vacancy is created by temporary assignment of an Operator to another position. He said that after the grievance was filed, the Company continued to reschedule supernumerary Operators when a shift has a vacancy. He said that if some of the current trainees had been hired earlier, then the vacancies the Company has filled by rescheduling likely would not have occurred.

Evan Cabot testified that he has been employed by Hydro since 1989, and has held positions at the Holyrood plant since 1997. He has held the position of Operations Specialist since May, 2009. His duties in that position include maintaining the shift schedule and rescheduling supernumerary employees. He said the need to reschedule is determined by the number of units operating and the number of leave requests. He gives the supernumerary employees the required notice of rescheduling under the Collective Agreement. He keeps a log to record the names of rescheduled Operators. He goes to the next person on the list in order to fairly distribute the rescheduling assignments. He maintains a list of rescheduling assignments called the "Operator Rescheduling Summary". The "Operations Reschedule Log" form is used to give notice to the employee rescheduled. Completed forms are posted in the Shift Supervisor's control room. Mr. Cabot testified the practice of the Company, for as long as he has worked in Holyrood, has been to reschedule supernumerary employees to fill vacancies caused by an employee leaving the Company or by an employee temporarily assigned to another position.

Gerard Cochrane has been employed with the Company since 1987. From 2002 to 2009, one of his duties was to reschedule Operators. He rescheduled supernumerary Operators if someone had just

retired and there was no replacement. He recorded each rescheduling in the Operator Rescheduling Summary. He said the Company's rescheduling practice had not changed over the years other than to cease the practices addressed by the 1996 grievance and the *2006 Award*.

Terry LeDrew, Station Manager, testified that the Company often has more Operators scheduled to work than required by the Plant Certificate. He said there are a variety of reasons why a shift complement may be short Operators, including leave granted under the Collective Agreement, absence to attend training, temporary assignment to another role, retirement, and absence on long term disability. He said that if the Company does not reschedule a supernumerary employee, then it may call in an Operator assigned to another shift on a day off and pay overtime rates, or it may keep an Operator back at work from the previous shift.

With respect to the Plant Certificate, Evan Cabot, Operations Specialist, and Gerard Cochrane, Manager of Operations both testified that a qualified trainee can be assigned outside duties. Mr. Cochrane did not recall if the Company had operated shifts with two trainees.

The Union filed a grievance regarding supernumerary employees dated October, 1996. Terry LeDrew and Gerard Cochrane testified that the event related to the grievance was that the Company assigned two or three supernumerary Operators to work on the task of cleaning a boiler using hazardous acidic chemicals. The Union grieved that it was not an appropriate assignment for supernumerary Operators because the task was not part of regular shift duties. The Company agreed to stop the practice. In his reply to the grievance on the grievance form, Tom Vatcher, Plant Manager at the time, stated as follows:

In reviewing the events surrounding this grievance it is recognized that the operators involved were rescheduled for reasons other than training or relief of a regular shift operator. It is recognized that this is outside of the past practice at Holyrood. Management will not repeat this in the future.

Terry LeDrew testified that the issue in the grievance that led to the *2006 Award* was the Company practice to schedule an additional Operator above the shift complement. He signed the step 1 response to the grievance which referred to the Company's past practice of rescheduling for staff shortages. Mr. LeDrew said that staff shortages meant any issue that caused a shortage, including a vacancy or temporary assignment. He said the practice of scheduling an additional Operator was

discontinued after the Award was issued. He said the reason to schedule an additional Operator was to reduce the need for incidental call outs and to give the supervisor more flexibility. Mr. LeDrew agreed that the Company had not followed the wording in the decision in the *2006 Award* which directed the Company not to reschedule for reasons other than retraining or approved leave.

Perry Peyton testified that the Union did not agree that the *2006 Award* only dealt with the issue of an additional Operator assigned to a shift. He said the Award also dealt with rescheduling for other reasons. He said the statement in the Award that referred to training or approved leave corresponded to the past practice.

Gerard Cochrane testified about the events that were the subject of the *2006 Award*. Mr. Cochrane was a witness at the arbitration hearing. The Company was scheduling one Operator more than the shift complement at the time. As a result of the *2006 Award*, the Company discontinued rescheduling an additional Operator. Mr. Cochrane said that Joanne Barron, Company Labour Relations Specialist at the time, told him that her interpretation of the *2006 Award* was that the Company was not permitted to reschedule an additional Operator above the complement. Mr. Cochrane believed that the Company complied with the *2006 Award* because it followed the Company's interpretation of the Award. He said the Company continued to reschedule supernumerary Operators when there was a vacancy caused by retirement or temporary assignment. He said that in response to the 1996 grievance and the *2006 Award*, the Company discontinued the specific practices addressed in those cases and there was no other change in the Company's practice. Mr. Cochrane agreed that a retirement or temporary assignment was not an approved leave.

Matt Hutchings testified with respect to specific assignments shown on the Operations Reschedule Log forms. Larry O'Shea, an Operator on the B Shift, was rescheduled for "TPO on A Shift" on January 7 and 8, 2010. Mr. Hutchings testified that the reason the A Shift was short an employee was that the A Shift had a vacant position. The vacancy was shown on the Shift Structure Arrangement form for December, 2009. Larry O'Shea was also rescheduled for "TPO (A Shift)" on March 25, 26, 27, and 28, 2009. Mr. Hutchings was in a training program at the time.

Kent Brophy, an Operator on the B Shift, was rescheduled for "C Shift - Steve Sceviour & TPO A Shift" on January 4 and 9, 2010. On January 4, 2010 Steve Sceviour was on vacation. Mr. Hutchings testified that the Union accepted rescheduling for that purpose. On January 9, 2010 there

was a vacancy on the A Shift. The Union objected to that rescheduling because it was not a case of absence for approved leave. Kent Brophy had been scheduled for a day off on January 9, 2010.

Bob Pretty, an Operator on the E Shift, was rescheduled for “B Shift for TPO”, on two night shifts on December 14 and 15, 2009. Mr. Hutchings said there was a vacant position on the B Shift because there were two trainees assigned on that shift. There was no other information on the log to explain the reason for the reassignment.

Gerard Molloy, an Operator on the E Shift, was scheduled for “A Shift for TPO” on December 14, 15, 16, and 17, 2009, consisting of two day shifts followed by two night shifts. Mr. Molloy had been scheduled for eight hour supernumerary shifts on those days. There was a vacancy on the A Shift. The Union objected to rescheduling for that reason. Gerard Molloy was also rescheduled for “C Shift as TPO (Tom C assigned to major work permit)” on March 27, 28, 29, 30 and April 1, 2009. At that time, Tom Compton was reassigned to other duties as the major permit holder. The Union did not accept that the reassignment of Tom Compton was for training, and did not accept the rescheduling.

Terry LeDrew described various reasons for temporary assignments of Operators. Temporary assignments create an opening in the shift schedule. Mr. LeDrew said that an Operator may be assigned to major work permits. This practice has occurred for the past ten years or more. He was not aware of any grievance about rescheduling a supernumerary Operator to replace an Operator absent on major work permits. Another kind of temporary assignment is work methods. This was a new initiative in the past one to two years. Mr. LeDrew was not certain if an Operator was rescheduled to replace an Operator absent for this assignment. Another temporary assignment was the asset management program, which reviews preventative maintenance routines in the Company. Jim McNeil was assigned to the program. The assignment would have created a vacancy on the shift. Mr. LeDrew was not aware of any grievances in that regard. Another assignment was the Dacum project, which was used to develop curriculum. The assignment occurred around 2000 and lasted for several months. Mr. LeDrew said the assignment likely created a vacancy. He did not recall any grievance about it. Another temporary assignment was a work protection system, a program used to drive the work permit system. Ron Tobin was temporarily assigned to the program for different periods from 2007 to 2009. Operators are also temporarily assigned to attend meetings of the Occupational Health and Safety Committee. The committee meetings are usually held between the hours of 8:00 a.m. and 4:00 p.m., Monday to Friday.

Evan Cabot testified about temporary assignments and vacancies. He testified that on December 1, 2009, Francis Skinner, an Operator on the A Shift, had retired and that created a vacancy. Also, a vacancy was created when another Operator, Kevin Burfitt, was absent on sick leave and then passed away. Also, temporary vacancies were created when Tom Compton was assigned to major work permit in March, 2009, when Gerard Molloy was assigned to work methods from March to May, 2010, and when Dave Fifield was assigned to the Dacum project. Mr. Cabot testified about particular instances of rescheduling as shown on the Operator Rescheduling Summary. In February, 2009, Steve Sceviour replaced Jim McNeil when he was assigned to the maintenance program. In March, 2009 the A Shift was short which meant there was a vacancy in the TPO position and there was a rescheduling. In March, 2004, Ron Tobin was rescheduled to a vacancy created when an Operator was assigned to check permits. In September, 2005 and February, 2007 there was a rescheduling as a result of an Operator being temporarily assigned to check permits. In January, 2008, there was a rescheduling when a vacancy was created by an Operator temporarily replacing the Operations Specialist. Mr. Cabot said the reference to “shift short” on the Summary included a vacancy caused by retirement.

Union Submission

The Union relied on the *2006 Award*, in which the Employer was ordered not to reschedule supernumerary Operators for “reasons other than to cover for shortages created by Operators on leave by reason of retraining, illness, family or other approved leave”. The Union submitted that the Company was not permitted to relitigate the prior award. The prior decision was clear. If the Company required interpretation of the *2006 Award* they could have applied to the arbitration board that decided the case. If the Company did not agree with the *2006 Award* then it had the option to apply for judicial review. The *2006 Award* addressed Articles 15.03 (g) and 15.03 (h) of the Collective Agreement. The reference in Article 15.03 (h) to rescheduling “for any reason” was ambiguous. In the *2006 Award*, past practice was applied to resolve the ambiguity. The award applied the past practice that supernumerary Operators were only rescheduled for certain reasons, such as vacation leave and other approved leave. The *2006 Award* referred to management’s response to a 1996 grievance stating that it would not reschedule for reasons other than training or relief of regular shift Operators. The *2006 Award* did not accept the Company submission that there was no restriction in the Collective Agreement on the reasons the Company could reschedule supernumerary Operators. The award did not allow the Company to use management rights in Article 6 to change the past practice. The use of supernumerary Operators to fill a hole in the

schedule caused by vacancy was not the past practice. The reference on the rescheduling summary to “shift short” did not explain the reason for the rescheduling. The grievance was filed because the Company was not following past practice and was frequently rescheduling supernumerary Operators to fill vacancies. The violation of the Collective Agreement was continuing. The Union did not see any point in filing multiple grievances. The Company’s witnesses gave different answers when asked whether the Company was following the *2006 Award*. The Company was required to comply with the award based on Section 86 (4) of the *Labour Relations Act*, RSNL 1990, c. L-1. The Union relied on the doctrines of *res judicata*, issue estoppel, collateral estoppel and abuse of process, and referred to judicial and arbitral authorities in that regard. The issue in this case was decided in the *2006 Award* and cannot be relitigated. The Union referred to the three categories of *res judicata* described in *Abitibi Consolidated Co. of Canada and CEP, Local 88* (2006) 151 L.A.C. (4th) 426 (Oakley). The requirements of issue estoppel were met as set out in *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 S.C.R. 460, namely the same question was decided, it was a final decision and the same parties were involved. It was necessary to follow the *2006 Award* to avoid an abuse of process, as described in *Toronto (City) v. CUPE, Local 79* [2003] 3 S.C.R. 77. The Union also relied on the doctrine that prior arbitration awards between the same parties should be followed unless the award can be distinguished, there is an urgent or pressing reason to depart from the prior award (*Telus Communications Inc. v. Telecommunications Workers Union* (2005) B.C.S.C. 264), or the prior award is clearly and obviously erroneous. (*Kingston General Hospital v. CUPE, Local 1974* (2004) 132 L.A.C. (4th) 283 (Stewart)). After the *2006 Award* was issued, the parties renegotiated the Collective Agreement and did not make any changes to the relevant Articles. The failure to make changes was another reason to follow the prior award (*NAPE v. Newfoundland (Department of Works, Services and Transportation)* (1994) 40 L.A.C. (4th) 372 (Oakley)). The Union requested that the grievance be allowed.

Employer Submission

The Employer submitted that the Union has the onus of proving a violation of the Collective Agreement and it had not done so. The Employer has a right under the Collective Agreement to reschedule supernumerary Operators. Articles 15.03 (g) and 15.03 (h) need to be read together and interpreted within the context of the entire Collective Agreement (*Imperial Oil Strathcona Refinery and CEP, Local 777* (2004) 130 L.A.C. (4th) 239 (Elliott)). The Employer’s right to reschedule is not limited by the *2006 Award*. In these circumstances, the Employer was not changing the shifts themselves, but was scheduling supernumerary Operators to work on their days off. The *2006*

Award does not have the effect alleged by the Union. The *2006 Award* dealt with the specific circumstances of inflating the regular shift complement and then backfilling the “extra Operator”. A different dispute was raised in this case. The *2006 Award* did not rule on anything other than the practice of scheduling an extra Operator. The award did not decide that the Employer could only reschedule supernumerary operators according to a list of circumstances. The reference in the *2006 Award* to “approved leave” was not explained in the award. By its plain meaning “approved leave” was not limited to the categories of “leave” set out in the Collective Agreement, and included temporary assignment to other duties. Statements of fact set out in the prior award are not evidence before the Board in this case. The Board could not enforce any violation of a prior award. The procedure to enforce an award under Section 90 of the *Labour Relations Act* was for the Union to file the award in the Supreme Court of Newfoundland and Labrador and seek an Order to enforce it. The Employer submitted that the evidence of past practice established that the Employer could reschedule supernumerary employees for any reason, except for the circumstance addressed in the 1996 grievance, namely, the assignment of Operators to a chemical cleaning task outside regular Operator duties, and the circumstance addressed in the *2006 Award*, namely the scheduling of an extra Operator above the shift complement. Nothing had changed in the practice of the Employer that would have triggered the filing of the current grievance. The past practice is that the Employer reschedules whenever necessary to make up the full complement on a shift. The evidence at the hearing indicated that the Employer’s past practice included rescheduling for temporary assignment and filling vacancies. In the summary document the reference to “shift short” included filling vacancies. Gerard Cochrane testified that the Employer had assigned supernumerary employees in the past to fill a vacancy caused by retirement. The annual number of supernumerary reschedules by the Employer declined from 2008 to 2010. The Employer gives at least 48 hours notice of rescheduling. The Employer fairly distributes the rescheduling assignments. The supernumerary Operators have four weekends off during the eight week, 12 hour shift part of the cycle. The Employer submitted that the doctrines of *res judicata* and abuse of process did not apply in this case and referred to authorities in that regard. The issue in the *2006 Award* was not the same as the issue raised in this case. Although it is good labour relations policy to follow prior awards between the same parties, it is not necessary to follow a prior award if it is shown to be wrong or if it deals with a different issue (*Manitoba Food and Commercial Workers Union, Local 832 v. Canada Safeway Ltd.* (1981) 120 D.L.R. (3d) 42 (Man. C.A.)). The Employer’s rescheduling practices were consistent with past practice and did not violate the Collective Agreement. The Employer requested that the grievance be denied.

Considerations

The issue before the Arbitration Board is whether the Employer violated the Collective Agreement when it rescheduled supernumerary Operators.

The hours of work and shift schedules are set out in Article 15 of the Collective Agreement. The Operators at the Holyrood plant are scheduled on the basis of a ten week cycle. During the first eight weeks of the cycle, Operators alternate between two 12 hour day shifts, two 12 hour night shifts, and four days off. During the last two weeks of the ten week cycle, Operators are scheduled on supernumerary shifts eight hours per day from Mondays to Thursdays. The regular shift complement consists of a Shift Supervisor, a Lead Thermal Plant Operator and four Thermal Plant Operators. The minimum staffing required to meet Government Regulations, and the corresponding need to schedule a replacement, depends on the number of units in operation at the plant at the relevant time. When the Employer determines that a replacement Operator is needed, then it may reschedule a supernumerary Operator or it may call in an Operator from another shift. Overtime rates apply when an Operator is called in from another shift.

A replacement Operator may be required for various reasons. An Operator may be absent due to sickness, vacation, or another type of leave authorized under the Collective Agreement. A replacement may also be required when an Operator is absent due to attendance at a training program. The Union does not object to the rescheduling of a supernumerary Operator to replace an Operator on approved leave or absent for training purposes. The Union objects to rescheduling a supernumerary Operator in the following circumstances: (1) rescheduling to replace an Operator temporarily assigned from the shift's complement to other duties, such as major work permits, and (2) rescheduling for the purpose of filling a vacancy on a shift, which may arise for various reasons, such as an employee's retirement or termination of employment.

The Employer submits that nothing has changed in its scheduling practices and that it reschedules supernumerary Operators consistent with past practice. The Union submits that past practice was decided in the *2006 Award*, and the Employer is not scheduling consistent with past practice.

The rescheduling of supernumerary Operators is addressed in Articles 15.03 (g) and 15.03 (h). Article 15.03 (g) refers to "rescheduling supernumerary shifts, for purposes of training" provided that 48 hours notice is given. Article 15.03 (h) states that changing an Operator's designated hours,

except as outlined in (g), “for any reason” shall require 48 hours notice. The Employer submits that it may reschedule supernumerary Operators for any reason, without limitation, based on Article 15.03 (h) and based on its management rights in Article 6. The Employer submits that it is not limited by past practice, but in any event, its actions were consistent with past practice.

The relevant Collective Agreement Articles have not changed since the *2006 Award*. Articles 15.03 (g) and 15.03 (h) were considered and interpreted in the *2006 Award*. The arbitration board in that case reviewed the evidence of past practice and applied it as an aid to the interpretation of “for any reason” in Article 15.03 (h). The Board will consider the effect of the *2006 Award* on the current grievance. In that regard, the Board will consider (1) what did the *2006 Award* decide? (2) do principles of *res judicata* or abuse of process apply in this case? and (3) if *res judicata* or abuse of process does not apply, should the *2006 Award* be followed as a matter of labour relations principle?

The Board will review the events related to the grievance that was decided in the *2006 Award* when considering what the award decided. The factual background to the *2006 Award* was that the Employer commenced a new practice of scheduling an “extra Operator” in addition to the regular shift complement. The Employer then rescheduled supernumerary Operators to fill the “extra Operator” position. The effect of the decision in the *2006 Award* was that the Employer was not permitted to reschedule supernumerary Operators to fill the “extra Operator” position, because it was not authorized by Articles 15.03 (g) or 15.03 (h), having regard to past practice. In the final paragraph of the *2006 Award*, the Board ordered that the Employer “cease and desist from rescheduling supernumerary Operators . . . for reasons other than to cover for shortages created by Operators on leave by reason of retraining, illness, family or other approved leave.” The order in the *2006 Award* was not worded to state that the Employer cease and desist from rescheduling supernumerary Operators to “extra Operator” positions. Although the order was not worded in that manner, it has that effect. The order has that effect because it states the circumstances in which rescheduling is permitted. The order stated that the permitted reasons to reschedule are based on past practice, and past practice does not include rescheduling an “extra Operator”. The listing in the *2006 Award* of permitted reasons to reschedule a supernumerary Operator, and the determination that scheduling an “extra Operator” is not a permitted reason, leads to the board’s decision to allow the grievance.

When describing the issue to be decided in the *2006 Award*, the arbitration board stated, at page 22, “the nub of the dispute seems to be whether the Employer can alter these supernumerary shifts to

have an extra pair of hands on the shift to ensure that all the work required of the shift can be completed in the time allotted”. The *2006 Award* refers to the Employer’s argument that the expression “for any reason” in Article 15.03 (h) means that the Employer can change supernumerary shifts for any reason without restriction. The evidence of past practice was used to interpret “for any reason”. It was an essential part of the reasoning of the board, when interpreting Article 15.03 (h), to make a finding as to the extent of the past practice. Both parties presented evidence on past practice. The award states in several places that the past practice was not in dispute. At page 23, the award states “It would appear that there has indeed been a practice which has grown up between [the parties]”. The award refers to the testimony of union witness Larry O’Shea, at page 11, that “it is acceptable to reschedule a person to replace another who was already scheduled”. The award also refers to the evidence of employer witness Kevin Dawson, former chief negotiator for the Employer, who stated at page 15 that he had rescheduled to fill vacancies caused by “annual leave, sick leave, bereavement leave and temporary assignment”. The *2006 Award* also refers to the Employer’s written response to the 1996 grievance, in which the Employer accepted the grievance and stated that rescheduling is limited to “training or relief of a regular shift Operator”. The board stated, at page 19, with respect to rescheduling that “the reasons upon which there appears to be agreement are to deal with issues of sick leave, other approved leave and staff shortages.” On the basis of its findings with respect to past practice, the *2006 Award* found that the Employer’s rescheduling right was constrained. The *2006 Award* found that rescheduling an “extra Operator” was outside the established past practice and therefore violated Articles 15.03 (g) and 15.03 (h) of the Collective Agreement.

The Arbitration Board will consider whether principles of *res judicata* or abuse of process apply in this case. The purpose of applying these principles is to prevent relitigation of an issue previously decided.

The doctrine of *res judicata* was discussed in *Abitibi Consolidated Co. of Canada and CEP, Local 88* (2006) 151 L.A.C. (4th) 426 (Oakley), starting at paragraph 20, as follows:

The applicability of the doctrine of *res judicata* to administrative tribunals and the scope of the doctrine was discussed by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 S.C.R. 460 (“*Danyluk*”). The *Danyluk* case outlined the prerequisites established at law for the application of *res judicata* and examined, in greater detail, the category of *res judicata* called issue estoppel. The *Danyluk* case also finds that even where the prerequisites for the application of the

doctrine of *res judicata* are met, that there is an overriding discretion to hear a case when it is in the best interests of justice.

...

The principle of *res judicata*, and a description of its various categories, is set out in the *Danyluk* case commencing at paragraph 18 as follows:

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. . . . A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. . . .

The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farewell v The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G.S. Holmsted and G.D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21§17 *et seq.* Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

...

The *Danyluk* case discusses the requirements for issue estoppel commencing in paragraph 24 as follows:

...

The question out of which the estoppel is said to arise must have been “fundamental to the decision arrived at” in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material

facts and the conclusions of law or of mixed fact and law (“the questions”) that were necessarily (even if not explicitly) determined in the earlier proceedings.

The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle, supra*, at p. 254:

- (1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel was final; and
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

There are two categories of *res judicata* raised in this case, namely, issue estoppel and collateral attack. The first requirement for issue estoppel is whether the *2006 Award* decided an issue that is the same as an issue raised in the current grievance. The central issue before the arbitration board in the *2006 Award* was whether or not the Employer could reschedule a supernumerary Operator as an “extra Operator” over and above the regular shift complement. The arbitration board decided that the Employer could not do so, because rescheduling an “extra Operator” was not included within the list of circumstances allowed for rescheduling, as established by past practice. The fact situation in this case is different, as there is no issue of an “extra Operator”. However, issue estoppel applies to an issue before the Board in this case, where a decision on the same issue was essential to the outcome in the *2006 Award*. In the *2006 Award*, it was essential for the arbitration board to make a finding with respect to the past practice of rescheduling supernumerary Operators in order to decide the grievance. Once it made a finding of past practice, the Board then determined that rescheduling an “extra Operator” did not fall within the past practice. Although the *2006 Award* did not address the specific circumstances raised in this case, namely the replacement of an employee on temporary assignment or filling a vacant position, it did decide the issue of the extent of past practice. Both parties presented evidence of past practice, and the issue of past practice was before the board in that case.

The issues that were decided in the *2006 Award*, that are relevant for this case, are related to the past practice of rescheduling a supernumerary Operator under Articles 15.03 (g) and 15.03 (h). The *2006*

Award decided that the list of circumstances for which a supernumerary Operator may be rescheduled is limited to the list established by past practice. The *2006 Award* also decided the extent of the past practice. Therefore, issue estoppel applies to the decision in the *2006 Award* that rescheduling is limited by past practice and the decision as to the extent of past practice. Based on the principle of *res judicata*, it is not appropriate to relitigate the issues decided in the *2006 Award*.

What did the *2006 Award* decide was the past practice? The final sentence in the award ordered that the Employer “cease and desist from rescheduling supernumerary operators . . . for reasons other than to cover for shortages created by operators on leave by reason of re-training, illness, family or other approved leave”. To determine the meaning of the final sentence, it is necessary to read the final sentence in the context of the entire award. The award stated that past practice was not in dispute. In other words, the board accepted all the evidence of past practice and did not find there was any conflict in the evidence. Therefore the board accepted evidence that past practice included replacement of a regular Operator absent from the position. The board accepted evidence that past practice included rescheduling to replace an Operator absent due to temporary assignment to other duties. The board did not state that past practice included filling a vacant position caused by such reasons as the retirement of an Operator. Therefore, the *2006 Award* decided that past practice included rescheduling to replace an Operator temporarily assigned to other duties, but did not include filling a vacant position.

The Union has also raised the issue of collateral attack on the *2006 Award*. Collateral attack is another category of *res judicata*. The finding on the “extra Operator” issue is not brought into question in these proceedings. However, a finding on past practice that differs from the findings in the *2006 Award* could bring the prior award into question. In view of the Board’s finding on issue estoppel, it is unnecessary to make a finding with respect to collateral attack.

The Union also relies on the doctrine of abuse of process. In *Toronto (City) v. CUPE, Local 79* [2003] 3 S.C.R. 77, the Supreme Court of Canada applied the doctrine of abuse of process to avoid relitigation where the same issue was decided in a prior proceeding, but the parties were different. Having regard to the Board’s findings on issue estoppel, it is unnecessary to consider the issue of abuse of process.

The Arbitration Board has also considered the principle that a prior award between the same parties should be followed unless the Board is convinced that it is clearly wrong. In *Mitchnick and Etherington, Labour Arbitration in Canada, 2006*, the authors state, at page 51, as follows:

While there is no doctrine of precedent, or *stare decisis*, obliging one arbitrator to follow the decision of another, arbitrators are of the view that, for the sake of consistency and predictability, an award involving the same parties should be followed, even if the same grievor is not involved, unless the second arbitrator has a “clear conviction that it is wrong”. This principle, which was first advanced by Arbitrator Bora Laskin in *Brewers’ Warehousing Co. Ltd. And Int’l Union of Brewery, Flour, Cereal, Malt, Yeast, Soft Drink & Distillery Workers of America, Local 278C* (1954), 5 L.A.C. 1797, has been repeatedly adopted and applied, although the words used to articulate the test have, without any discernible difference in meaning, undergone some variation over the years.

The principle that a prior award between the same parties should be followed, unless it is shown to be clearly erroneous, has also been applied in *Kingston General Hospital v. CUPE, Local 1974* (2004) 132 L.A.C. (4th) 283 (Stewart), *NAPE v. Newfoundland (Department of Works, Services and Transportation)* (1994) 40 L.A.C. (4th) 372 (Oakley) and other cases.


In this case, the Arbitration Board agrees that the *2006 Award* should be followed unless the Board is convinced that the decision is wrong. Having reviewed the *2006 Award*, the Board does not have any clear conviction that the award is wrong. Therefore the award ought to be followed. In that regard, the Board refers to its earlier discussion as to the issues decided in the prior award. The parts of the *2006 Award* that should be followed in this case are the board’s finding that rescheduling is limited by past practice and its findings with respect to the extent of the permissible reasons for rescheduling based on past practice.

In summary, it is appropriate to follow the *2006 Award* on the basis of issue estoppel and as a matter of labour relations principle because it is a prior award between the same parties. Although the dispute resolved by the *2006 Award* concerned a different fact situation, the findings in the award related to the past practice to reschedule supernumerary Operators were an essential part of the award, and the same issues are before the Board in this case. The *2006 Award* decided that rescheduling “for any reason” in Article 15.03(b) is limited by past practice. The award also decided that it was past practice to reschedule for training, approved leave and temporary assignment.

Decision

The grievance is allowed in part. The Employer is not permitted to reschedule supernumerary Operators for reasons that are beyond the extent of past practice set out in the *2006 Award*. Rescheduling to replace an Operator temporarily assigned to other duties is permitted. Rescheduling to fill a vacant position is not permitted.

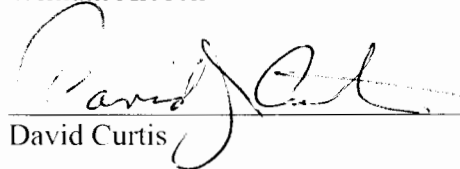
DATED this 14th day of October, 2011.



James C. Oakley
Chairperson



William Alcock



David Curtis