

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GREATER VANCOUVER REGIONAL DISTRICT

(the "Employer")

AND:

GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES' UNION

(the "Union")

ARBITRATION BOARD:

Stephen Kelleher, Q.C.
Chair

John Collison
Nominee of the Employer

Ray Haynes
Nominee of the Union

COUNSEL:

Alan J. Hamilton
for the Employer

John Hodgins
for the Union

DATE OF HEARING:

July 19, 2001

PLACE OF HEARING:

Vancouver, B.C.

DATE OF AWARD:

November 15, 2001

I

This is a claim for overtime for three employees who were scheduled to work on “Swing Shifts”. The project to which they were assigned came to an end sooner than anticipated and they reverted to dayshift, their usual shift. The Union argues that they are entitled to overtime for a period of 21 days following the notice of reassignment.

II

Although the events occurred in the summer of 1999, the chronology begins in 1997. At that time, Article 2 read as follows:

WORK SCHEDULE

2.01 Working Week

Unless otherwise noted herein:

- (a) A work week shall consist of five (5) days of eight (8) hours, Monday through Friday, between the hours of 7:00 a.m. and 4:30 p.m., except that Housing Resident Caretakers will work eight (8) hours daily between the hours of 7:00 a.m. and 5:30 p.m.
- (b) Employees will be paid in accordance with Schedule “A”
- (c) Employees will be paid for the hours worked.
- (d) The hourly rate for salaried employees will be the biweekly rate divided by eighty (80).
- (e) Payday will fall on every second Friday.

2.02 Work Week - Housing Corporation Personnel - Stanley Newfountain

Housing Corporation personnel working at Stanley New Fountain shall operate on a 24-hours day, 7-day per week basis.

2.03 12-Hour Shifts

Calculation of 12-Hour Shift:

- (a) Under a continuous shift schedule the average working time is 7 1/2 hours.
- (b) In 1980 there are 251 working days and therefore the hours to be worked exclusive of annual holidays are $251 \times 7.5 = 1882.5$ hours.
- (c) On a 12-hour shift schedule the average time worked is 11 1/2 hours and therefore the number of shifts to be worked exclusive of annual holidays is $1882.5 \div 11 \frac{1}{2} = 163.7$
- (d) For the purposes of this schedule, statutory holidays will be considered as beginning at 6:00 a.m. on the declared statutory holiday and ending at 6:00 a.m. the following day. Compensating time for statutory holidays worked will be credited at six (6) hours for each 12-hour shift worked.
- (e) Annual vacation and sick leave entitlement will not change. Each 12-hours shift taken as annual vacation, sick leave or statutory holiday compensation time will be considered as 1 1/2 days (i.e. 12 hours).

2.04 Swing Shifts

- (a) Shift work will apply on projects involving two or three shifts per day for six or more shifts. Shift work will be considered as in effect from the time the Superintendent declares it so, otherwise overtime rates will be applicable. When swing shifts are worked on any project, a day shift will consist of eight hours working time, the evening shift will consist of seven and one-half hours working time, and the mid-night shift will consist of seven hours of working time.
- (b) Where operation of sewage treatment plants requires continuous attendance, the day shift shall start at 7:00 a.m. and stop at 3:30 p.m. including a one-half hour lunch break, afternoon shift shall start at 3:30 p.m. and stop at 11:30 p.m. Night shift shall start at 11:30 p.m. and stop at 7:00 a.m. At the request of the operators these times may be advanced or retarded a uniform amount.
- (c) Operators on continually rotating shifts at sewage treatment plant or other installation where there is continuous operation on a 7-day, 24-hour basis will

receive a shift differential of 3 1/2 % of their bi-weekly pay. Shifts will be scheduled to limit the average number of shifts for each operator to five per week throughout the year or such other lesser period as mutually agreed. In the preparation of schedules for rotating shifts, there will be a period of forty-eight (48) hours between shift tour changes unless otherwise agreed to by the parties concerned. (1978).

Thus the normal shift was Monday to Friday between 7:00 a.m. and 4:30 p.m. The rest of Article 2 refers to several exceptions.

In May of 1997 the Employer's Sewer and Drainage Department was undertaking several projects. These projects require low flow. This occurs in the drier season, the summer, and at night when there is less usage of the system. On May 20, 1997, the Employer wrote to some 30 employees, placing them on swing shifts pursuant to Article 2.04:

Increasingly work must be scheduled during periods of low flows to carry out a number of maintenance projects within the sewer collection system. This places the scheduling for that work generally in the May through October season and often at night. As this trend will continue the District must adjust its work practices to match what has become a regular business need. The District must be able to undertake this work on a cost competitive basis and with proper consideration for safety. In the past much of this work has been done on an overtime basis, often extending from 12:00 a.m. to 3:30 p.m. Working these long hours is a major safety concern and should be avoided to reduce risks to the crews and the public.

To address these needs the District will be implementing Swing Shifts for several crews for the period of June to October this year to undertake projects that must be carried out during periods of low flow. The maintenance projects that have been identified for the 1997 Low Flow season include:

1. Collection System Flushing
2. Columbia Street Grit Removal & Re-lining
3. FSA Collection System Mechanical Maintenance

Project plans and schedules have been prepared identifying crews and individuals for working shifts. The shift schedule incorporates the current holiday schedules of staff for the crews identified, the work week will start at 00:00 hours Monday morning and will end at 15:30 hours Friday. Hours to be worked on night shift will be 00:00 to 07:00 hours and dayshift will be 07:00 to 15:30 hours. The shifts rotations are scheduled in periods of 1 week duration. Week 1 of the schedule will commence June 2.

These schedules may be delayed, advanced or canceled depending on the progress of the work, weather and unforeseen events. However the Employer will make best efforts to respect the Employees schedules by minimizing changes to the shift schedule, and by providing as much notice as possible if changes are required. The project plans and schedules will be reviewed weekly with respect to progress and conditions and updates issued thereafter.

If you have questions with respect to your shift schedule please discuss with your supervisor.

Bill Eastwood is the President of the Union. He testified this letter represented a departure from past practice. Instead of paying overtime for such work, the Employer sought to save money by implementing swing shifts under Article 2.04.

He explained that Article 2.04 had been used little in the past. It was used for construction and, in the early 1980's, for a particular repair problem.

The crew was upset by this development. They were not accustomed to being directed to work on shift without receiving overtime. The Union Executive met with the employees and with management of the department. The Union expressed its concern in a letter dated May 26, 1997:

We are in receipt of the memo you sent to Field Operations Staff dated May 20, 1997 in which you propose the implementation of swing shifts for maintenance work over the summer months and into fall. The Union has received many calls over your proposal from Operations Staff . These

employees are concerned that the swing shifts are a way of scheduling work that previously would have drawn overtime premiums.

This situation is unacceptable for our members working in Sewer Field Operations. These members are Monday to Friday dayshift employees who have always received overtime premium payments for work done on evening and night shifts. This is a change in practice and appears to be part of your reorganization of the department. The Union recognizes your concerns for the increased costs of doing business with regards to overtime but does not concur with your plan to perform what amounts to scheduled maintenance at our members' expense. The language in the Collective Agreement pertaining to swing shifts appears to have been used only in the case of special or emergency projects in the Sewage and Drainage department and not for the purposes of regularly scheduling work. Your proposal contradicts the intent of this language, as well as language contained under Clause 3.03 of the Collective Agreement.

If, as a result of your misinterpretation of these provisions contained within the Collective Agreement, you intend to implement your plan to impose swing shifts on our members, we will be forced find a more equitable solution for our members through collective bargaining.

The parties were already in the midst of collective bargaining in May, 1997. The issue was therefore referred to the bargaining table. The affected employees were paid overtime, on a without prejudice basis, while these discussions went on.

A Letter of Understanding developed gradually during negotiations. The Employer's first proposal was presented in December, 1997. The proposal took effect immediately for any newly-hired employees. Existing employees would receive overtime premiums for the first three years. At the end of three years the proposal would apply to all employees.

The Union's approach to bargaining was described by Bill Eastwood. The Union felt that this was overtime work. If the Employer insisted on this shift for non-emergency and non-construction work, the Union aimed to place as many road blocks as

possible in front of it. The Union's purpose was to make it easier for the Employer simply to pay overtime rather than follow the procedures for this shift.

On January 21, 1998, the Union put forward a proposed provision respecting Swing Shifts. As well it proposed a Letter of Understanding:

Modify 2.04 Swing Shifts to read:

Swing shift work is work done on construction or emergency projects outside the routine, day to day, operations and maintenance of the district. Shift work will apply on projects involving two or three shifts per day for six or more shifts. Shift work will be considered as in effect from the time the Superintendent has declared it so, and after thirty days (30) notice has been given to the affected employees, otherwise overtime rates will be applicable. When swing shifts are worked on any project, a day shift will consist of eight hours working time, the evening shift will consist of seven and one-half hours working time, and the mid-night shift will consist of seven hours of working time.

Establish a Letter of Understanding to read:

1. In order to help met the Employer's needs to have other work done for a limited duration that it feels needs to be scheduled outside the standard Working Week definition as described in Clause 2.0 1(a). Special Shifts may be arranged by mutual consent of the Union and the Employer, through Standing Committee and such consent shall not be unreasonably withheld by the Union.
2. Qualified employees will be invited to volunteer for positions on a shift by way of Notice of shift posted no later than sixty (60) days prior to its implementation. The content and format of the Notice will be agreed to by the Standing Committee. A further notice of shift will be given to all designated employees at least twenty-one (21) days before the shift implementation.
3. In the event that there are more volunteers than are required, the Employer will choose from the qualified volunteers based upon seniority, starting with the most senior employee and working down.

4. In the event that there are no, or insufficient numbers of qualified volunteers, the Employer will choose from the qualified employees, (who did not volunteer), based upon seniority, starting with the least senior employee and working upwards.
5. Employees who volunteer or who are required to work on a Special Shift retain the right to return to their original position following completion of the Special Shift with no diminishment of status or benefits as a result of their time worked on the Special Shift.
6. When Special Shifts are worked on any project, a day shift will consist of eight hours working time, the evening shift will consist of seven and one-half hours working time, and the midnight shift will consist of seven hours of working time.
7. Only the minimum number of employees required to do the scheduled work will be designated to work Special Shifts.
8. Work week will consist of four (f) consecutive days of work followed by three (3) consecutive days off.
9. Employees will continue to receive their normal bi-weekly salary.
10. Employees designated to work special shifts will receive
3 1/2% shift differential for the entire Notice of Shift period.
11. For each week worked on shifts ending before 12:00 midnight employees will receive an extra four (4) hours pay deposited in their Compensating Time Off (CTO) bank. For each week worked on shifts ending after 12:00 midnight employees will receive an extra eight (8) hours pay deposited in their Compensating Time Off (CTO) bank.
12. Employees who work outside scheduled Special Shift hours will receive overtime rates.
13. Employees who work Special Shifts will continue to be eligible for all benefits as described in the collective agreement unless specifically altered by the letter of understanding.

The proposal has the characteristics described by Mr. Eastwood in his evidence: there must be 60 days' notice; the final shift arrangements must be made 21 days before implementation; and Section 7 of this proposal was designed to prevent the Employer from assigning too many employees to the project.

The Union did not see the shift as desirable: it was to be filled by qualified employees who would volunteer for the position (Section 2). If the number of volunteers were more than the number needed, seniority would prevail. But if the Employer obtained an insufficient number of volunteers the shifts would be assigned to the least senior employee (Section 4).

The parties eventually reached agreement. The following is found in the current Collective Agreement:

2.04 Swing Shifts

(a) Shift work will apply on projects involving two or three shifts per day for six or more shifts. Shift work on projects involving Construction Department work or projects deemed as "emergency work" will be considered as in effect from the time the Superintendent declares it so. Shift work for projects not deemed Construction Department work or "emergency" work shall be considered in effect following sixty (60) days' notice. When swing shifts are worked on any project, a day shift shall consist of eight (8) hours of working time, the evening shift will consist of seven and one-half (7 1/2) hours of working time, and the midnight shift will consist of seven (7) hours of working time. Where sixty (60) days' notice is served, the conditions outlined in the Letter of Understanding #8 - Notice of Project Schedule shall be adhered to.

The parties also agreed to a letter of understanding.

Soon after the April 1, 1998 settlement, a complication developed. A swing shift was posted for a particular project. The Employer decided on the length of the shift. The only additional payment was 3 1/2 per cent shift differential.

The employees felt that the shifts could not be determined unilaterally. The Employer's announcement led to job action. This prompted emergency meetings which eventually led to rewording the letter of understanding. Letter of Understanding #8 in its final form reads as follows:

LETTER OF UNDERSTANDING #8

NOTICE OF PROTECT SCHEDULE

A Notice of Project Schedule shall include language to address the following:

Project description and schedule will identify the work required to be done for a defined duration and scheduled outside the standard Working Week definition as described in Clause 2.0 1(a). Through consultation between the Union and the Employer, hours of work other than those identified in Clause 2.04 may be arranged if there is mutual consent. Such arrangements may include shorter work weeks or other schedules deemed by the parties to be appropriate for the work in question.

A staffing schedule will identify those employees required to work. When identifying employees, preference will be given to assigning those with the least seniority, providing skills, ability, experience and availability are suitable. In the event an employee, identified on the staffing schedule, lets it be known his preference is not to be assigned to shift work, qualified volunteers will be considered as a replacement. Such volunteers must make their intentions known in writing no more than fifteen (15) days following Notice of project Schedule. A volunteer's eligibility will be evaluated by the Employer based on skills, ability, experience and availability from their normal assignment.

The originally scheduled employees will be replaced, in order of their seniority, by the eligible volunteers. In the event that there are more eligible volunteers than required, the Employer will select based on seniority, starting with the most senior employee and working down. The originally scheduled employee, replaced by a qualified volunteer, may be assigned to an alternative position for the duration of the shift assignment.

A final staffing schedule will be provided at least twenty-one (21) days before the shift implementation.

All employees affected by the “Notice of Project Schedule” will retain the right to return to their original positions following completion of the assignment with no diminishment of status or benefits as a result of their time worked on the shift.

All employees will continue to receive their normal bi-weekly salary. Employees working shifts will receive 3 1/2 % shift differential for all scheduled hours worked on shift.

Work weeks based on a 2.04(a) shift will be scheduled for any five (5) consecutive days followed by two (2) consecutive days off. When these shifts are worked on any project a day shift will consist of eight (8) hours’ working time between the hours of 7:00 a.m. and 4:30 p.m.; evening shift will consist of seven and one-half (7 1/2) hours’ working time between the hours of 3:30 p.m. and 12:0 midnight; and midnight shift will consist of seven hours’ working time between the hours of 11:30 p.m. and 7:30 a.m. In all cases these working times will be exclusive of the one-half (1/2) hour meal break.

Employees assigned to shift work pursuant to Clause 2.04(a) and the modifications herein will not receive call-out premiums for scheduled project work.

Employees who work shift will continue to be eligible for all benefits as described in the Collective Agreement unless specifically altered by the Letter of Understanding.

When scheduling project shift work, the Employer will endeavour to schedule in such a manner as to affect the least number of employees.

The Union achieved several of its goals. Article 2.04(a) refers to 60 days’ notice; the fifth paragraph of Letter of Understanding #8 refers to 21 days’ notice of the final staffing schedule; and the last paragraph requires that the number of employees be kept to a minimum.

Mr. Eastwood also made reference to the term “defined duration” in the second paragraph of Letter of Understanding #8. It was important to know how long the

shift would be in force. A change in shift can affect an employee's life in a variety of ways -childcare and car pools are examples - so certainty of duration was in his words "central" to discussions.

There was other evidence respecting collective bargaining. Mr. Eastwood recalls one conversation, but not the date of it. He said that a member of the management bargaining committee, Rudy Polsonberg, asked "What if we cancel?" Eastwood recalls answering "Pay overtime". He went on to say:

This is all about you not doing what you should. We're not trying to make it easy.

Eastwood said there was no reply. Polsonberg and the chief spokesperson, Mark Leffler, just looked "disgusted". Mr. Eastwood's evidence is that the Employer never asserted at the bargaining table that they could cancel the shift without notice.

Johnstone Hardie is the Employer's Administrator of Human Resources. He was at the bargaining table as well. His evidence is that the Union's emphasis in bargaining was on employees not being required to work the shift.

He was asked about Mr. Eastwood's recollection that he said "Pay overtime" if the swing shift is cancelled. Mr. Hardie does not recall such a conversation. His bargaining notes do not disclose such a conversation. Mr. Hardie testified that his reaction to the grievance was as follows:

I was confounded by the fact we didn't address [cancellation of the shift]. It's almost as though our thinking stopped at the front end.

Mr. Hardie agreed in cross examination that his notes are not a transcript and that the exchange possibly took place. He agreed as well that the Employer did not assert that it could cancel the shift at anytime.

III

There has been one grievance respecting this provision. In June of 1998 Bryan Webber was informed that he would be placed on the graveyard shift from August 16 to August 27, 1998, pursuant to Article 2.04(a). Mr. Webber was on vacation during the period immediately preceding August 16. His supervisor called him on August 13 and notified him that he would be working afternoon shift rather than graveyard shift. Mr. Webber took the position that he was entitled to overtime because he had had less than 21 days' notice.

Mr. Eastwood wrote to the Employer in this regard on August 31, 1998:

On behalf of Mr. Bryan Webber, the Union is grieving an improper change in Mr. Webber's hours of work between the dates of August 16 and August 27, 1998. Mr. Webber informs us that you telephoned him at home on August 13, 1998, while he was on Annual Vacation, and informed him that his posted hours of work would be changed from night shifts to afternoon shifts upon his return to work on August 16.

This decision violates Letter of Understanding #8 of the Collective Agreement. The language contained in the fourth bullet of LOU #8 requires a twenty-one day advance notice of final staffing schedule, and even in the case of the modifications to this revision contained in the addendum dates June 19, 1998, this notice was shortened for the current schedule's shifts to fourteen days. Your notice via the telephone to Mr. Webber was only three days.

As a resolution to this grievance, the Union requires that Mr. Webber be paid overtime rates for the work done on shift where proper notice was not provided.

Tom Heath is the Manager, Operations and Maintenance. He allowed the grievance in a letter dated November 13, 1998:

Further to our meeting of November 12, 1998, and after hearing Mr. Webber's statements regarding the circumstances of his shift change, it is decided that the grievance will be allowed. Mr. Webber will be eligible for overtime payment as applicable where the minimum notice of shift change was not provided.

It is noteworthy that Mr. Heath's grievance decision does not include any reference to the decision being on a without prejudice or precedent basis. Moreover, there was no evidence that the Employer disagreed with the decision.

IV

There is no dispute about the facts that led to the grievance before us. On April 12, 1999, the Employer gave notice to the Union pursuant to Letter of Understanding #8 that it was going to assign shift work between July 4, and August 20, 1999:

Be advised that the Operations and Maintenance Department is planning to conduct shift work for sewer system maintenance between July 4 and August 20, 1999. Please accept this letter as formal Notice of project Schedule as required under Letter of Understanding #8 between the GVRD and the GVRDEU. Attached for your information is the proposed work schedule including the individuals planned to participate in the work program.

Operations Supervisors met with all Wastewater Collection Operations and maintenance staff on February 18, 1999, to review the work to be done. Shortly afterwards six (6) staff members volunteered to work the shift work, leaving an additional nine (9) staff to fill out the required crews. After reviewing holiday schedules, and taking into consideration the required skills, abilities and seniority, the remaining individuals have been selected.

Planned working hours for the shifts will be from 2330 hours to 0700 hours and staff will be paid in accordance with the requirements of LOU #8.

Please review the schedule (attachment) and call me at [telephone number] if you have any questions or comments.

This complied with the requirement of 60 days' notice. On June 21, the Union was advised of a change in schedule:

An additional change has been made to the shift work schedule for sewer maintenance work planned for this summer. Item E related to manhole construction work on Columbia Street has been removed due to uncertainty around the Sky train Project. If this work must be carried out during the summer, on short notice, we will reschedule and pay the prevailing rates outside of this notice of project.

A modified schedule has been attached for your information. Please feel free to call me at [telephone number] if you wish to discuss any part of this work.

This notice, again, was timely.

In late July the Employer made a further change. Three employees who were scheduled to work on shift from August 2 to August 20, were told on July 26, that this would not occur. Instead they reverted to their usual shift under Article 2.01.

None of these three employees gave evidence. However it appears from the Union's opening that at least one of them was inconvenienced by the change. He had planned to paint his house during the days that he was working graveyard shift.

V

The Union's argument is that this Collective Agreement is a restrictive one regarding hours of work. Article 2.04 is an exception to the restrictive language of Article

2.01. Counsel argues that it would be anomalous if the Employer were under strict constraints regarding the establishment of the swing shift but had carte blanche to cancel the same schedule.

The Union relied on the term “defined duration” in the first paragraph of Letter of Understanding #8. The term “duration” denotes a specific start date and a specific end date.

We were urged to give a purposive interpretation to the language: See *Board of School Trustees of School District No. 39 (Vancouver) -and- Vancouver Teachers’ Federation*, unreported, May 29, 1995 (McPhillips). The employees required notice of change of shift for a reason. Childcare and carpooling arrangements cannot always be made at the last minute.

The Employer takes a different view: the employees in question were reassigned back to their standard workweek. The Employer argued that the Letter of Understanding #8 becomes irrelevant. It only applies, as the first paragraph of the Letter indicates, to “work ... scheduled outside the standard working week definition.” Unlike Mr. Webber’s grievance, there was no shift change. They were no longer working under the Letter of Understanding.

In our view what occurred is consistent with what Mr. Hardie testified: He was confounded by the fact that the parties simply did not address what would happen in these unanticipated circumstances. This should be addressed in collective bargaining. It may be, for example, that employees in these circumstances have the option of staying on the shift or returning to dayshift.

There is no express reference to the Employer’s obligation if the project is cancelled or comes to an end earlier than scheduled. In the absence of such language the fourth paragraph of the Letter of Understanding must be what applies:

A final staffing schedule will be provided at least twenty-one (21) days before the shift implementation.

In our view if the schedule changes, the Letter of Understanding contemplates twenty-one days' notice. The employees did not receive this. This is a breach of the Letter of Understanding #8.

VI

The next issue is remedy. The Union's position is that the employees in question are entitled to overtime for shifts worked on the regular shift for a period of 21 days after the July 26 notice.

Counsel for the Employer does not accept that overtime is an appropriate remedy. He argues that the employees had the advantage of returning to their regular, and more desirable, shift. To pay them overtime would be to deliver a windfall.

That may or may not be the case. As we stated above, employees make personal commitments and arrangements based on their work schedule. Although we have no evidence of the particular circumstances of these employees, the remedy should not depend on the effect of the change on each particular employee.

The general principle in cases of this kind has been to award overtime as a remedy: see *Ottawa Citizen and Ottawa Newspaper Guild Local 205*, (1978) 17 L.A.C. (2d) 342 (Brown); *Dominion Bridge Co. Ltd. and United Steelworkers Local 3390*, (1980) 27 L.A.C. (2d) 399 (Adams); and *Domglas and United Glass and Ceramic Workers Local 203*(1984) 19 L.A.C. (3d) 156 (Kennedy).

Arbitrator Don Munroe, Q.C. described those Awards in *City of Vancouver and for Vancouver and Municipal and Regional Employees Union*, unreported, July 13, 1988:

Collectively, those Awards demonstrate an arbitral tendency to enforce agreed hours-of-work limitations by directing compensation at overtime rates for all hours scheduled outside the hours stipulated - even though the number of hours worked has not exceeded the straight time norm.

We see no compelling reason to depart from that principle here.

In the result we direct the payment of overtime for hours worked by the three employees between August 2 and 16, 1999.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this day of November, 2001.

STEPHEN KELLEHER, Q.C.

RAY HAYNES

JOHN COLLISON