IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE CORPORATION OF THE CITY OF LONDON
- The Employer

-and-

THE LONDON CIVIC EMPLOYEES' LOCAL UNION NO. 107
- The Union

AND IN THE MATTER OF a policy grievance and a group grievance regarding winter control operations

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Geoffrey P. Belch	- Counsel
John Parsons	- Division Manager, Transportation and Roadside Operations
and others	

On behalf of the Union:

David P. Jacobs	- Counsel
Alastair Bruff	- 2nd Vice President
and others	

Hearing held May 29, September 5, September 7, October 3, October 4, October 23, October 31, November 13, November 29, December 4, and December 14, 2006, in London, Ontario.

AWARD

I. INTRODUCTION

These two grievances challenge the Employer's decision to implement a night shift for snow plow operators without paying those employees overtime pay rates. There were two main issues:

1. Does the collective agreement require the Employer to pay overtime pay when implementing a night shift for plowing; and, if not,
2. Is the Employer nevertheless prevented - estopped - from implementing a night shift without overtime pay because of representations it made in earlier negotiations.

II. THE EVIDENCE

This collective agreement between the Corporation of the City of London, the Employer, and the London Civic Employees' Local Union No. 107, the Union, covers the outside workers. Given the variety of tasks performed by the employees of this large municipal corporation working outside in all seasons, the agreement addresses many different issues.

One of the issues covered in the collective agreement is the special arrangements for clearing roads and sidewalks of snow, freezing rain, etc., referred to as Winter Control Operations. There is a letter of understanding between the parties regarding Winter Control Operations (Winter Control Operations Letter) in the collective agreement. The current Letter was entered into June 10, 2004, pursuant to Minutes of Settlement, and replaced a Letter signed in 1993.

In the winter the employees who do the snow plowing normally work during the day on road maintenance and other duties. The long practice of the Employer has been to have those

employees plow snow during the night on special overtime rates. Then, in 2006, the Employer began a night shift and paid those employees a shift premium. Although the Union conceded the Employer could operate a night plow shift, the Union asserted that the Employer must pay night shift employees overtime pay rather than a shift premium. In the alternative, the Union relied upon the principle of estoppel and said that when the parties were negotiating the most recent version of their winter control provisions, the Employer said it would not schedule employees for a night shift. The Union said it had relied upon those assurances. The Union submitted it would be unfair to allow the Employer to schedule employees for a night shift, paying them a shift differential rather than overtime, until this collective agreement expired and the Union has had an opportunity to address the issue in bargaining.

Summary of agreed facts

From November to March each winter the Employer implements "Winter Control Operations," which includes the sanding and salting of streets and plowing of snow on streets and sidewalks. Approximately 130 employees are assigned to Winter Control Operations. Of those, approximately 30 employees work shifts performing sanding and salting duties (Sander/Salter Operators), and another 10 work on a "Downtown Crew" removing snow and sanding the sidewalks in the downtown core, and these workers are not affected by these grievances. The remaining 90 employees perform plowing and snow removal duties. During the winter months, these employees are assigned road maintenance duties when they are not plowing or doing snow removal.

June 10, 2004, the parties were scheduled to participate in an arbitration hearing regarding several grievances raising other problems in the winter control operations. Among the issues raised were: the right of the Employer to send employees home early, the effects of

Provincial legislation on the maximum length of the work period, and the creation and use of spare lists (list of additional employees to be called in to plow when needed). The issue of the Employer establishing a night shift was not raised by the grievances. The parties had settlement discussions that day and were successful in settling those grievances.

As part of their settlement, the parties agreed upon a new "Letter of Understanding" to replace the 1993 Letter in the collective agreement and they also agreed the new Letter of Understanding would be included in the "next" collective agreement. The next collective agreement is the 2004-2005 agreement.

March 2005 the Employer began to consider changes to its Winter Control Operations, including the possibility of assigning employees who operate road plows to a night shift during the winter months. The possibility of changes to winter control shifts was then discussed at several meetings between the Union and Employer and in June 2005 the Employer made plans for a night shift. The Union was advised June 27, 2005.

August 2005 the Employer showed the Union a "preference form" on which employees could identify their preference for duties during the winter. The preference form indicated "A new winter plow shift will be established for this winter season." The Union objected, indicated it would grieve, and then filed these two grievances - one a policy grievance and the other a group grievance.

The two grievances were first brought before another arbitrator November 5, 2005. That arbitrator withdrew and I was selected as a replacement.

Until November 5, 2005, the Employer was unaware the Union was claiming an estoppel based on the June 2004 representations.

The Employer operated a night plow shift January - March 2006 from 11:00 p.m. to 7:00 a.m. The Employer assigned 9 plow operators and 9 wingmen (employees who operate the wing on the side of some plows) to the night shift. Those employees were paid a shift premium, rather than the overtime rates paid to those day workers called in at night.

Eight witnesses testified at the hearing and the focus of much of the testimony related to the 2004 settlement discussions and the assurances alleged to have been given by the Employer representatives.

Evidence of Michael Klug

Michael Klug was the first witness. Mr. Klug has been counsel to the Union for a number of years and he had a leading role in the settlement discussions held June 10, 2004. He reviewed the process followed in those discussions and he identified various documents which had been exchanged.

Mr. Klug testified that the parties met face to face on occasion during that day and that he and Kelly Dawtrey, Employer counsel at that arbitration, also met separately. When the parties met face to face, Mr. Klug said that others, in addition to the two counsel, spoke.

Mr. Klug testified that on more than one occasion during the June 10 settlement discussions he had reviewed the fact situation which formed the background for the discussions. He said that he highlighted that a problem arose when employees who normally worked days are called in for winter control work at night, often at 11:00 pm. For many years they had received at least 8 hours of overtime pay for their work. As many employees had routinely continued working into their normal daytime hours, one problem being considered was how long could they work and what was the impact of provincial legislation on that issue. A

concern about the matter of spare lists was also raised.

Mr. Klug testified that at some point it occurred to him that there was a possibility that the Employer would simply deem these employees to be working an 11:00 p.m. to 7:00 a.m. shift, that is working a night plow shift, and that the Employer would thereby avoid paying overtime. Mr. Klug said he raised that concern early in the discussion when all the participants were in the room and he made a comment to the following effect - "You wouldn't just declare these people to be shift employees and not pay overtime?" Mr. Klug said that after he made that comment he recalled a "bemused" look between John Parsons and Scott Stafford, the two Winter Control managers in attendance, and a comment such as "never thought of that, thanks for the good idea." Mr Klug said he then emphasised that this was not a small or amusing point, that it was in fact critical, and that the Union needed certainty that the Employer would not implement a shift in Winter Control and avoid paying employees overtime pay in the manner that overtime had been paid in the past. Mr. Klug said that he promptly received an assurance from Mr. Stafford to the effect that "We wouldn't do that," and that there was no disagreement from anyone in the room.

Mr. Klug said there were discussions on the impact of the *Employment Standards Act* and the *Highway Traffic Act*. These issues were resolved. Part of the resolution is reflected in paragraph 3 of the Letter and Mr. Klug testified that the words "usual scheduled start time" in that paragraph were used to reflect the reality that some employees usually started work at 7:00 a.m. and that others started at 7:30 a.m.

Mr. Klug said there must also have been discussion about the sanders and about the standby list but he could not recall the details. He testified that the settlement discussions continued on and off from 10:00 a.m. until into the evening hours.

At some point in the discussion Mr. Klug said that he and Ms Dawtrey talked in the hallway. He said the issue of the Employer implementing a night plow shift came up again and he advised Ms Dawtrey of his concern. Mr. Klug said that Ms Dawtrey advised that as far as she was aware the Employer had no intention of implementing such a shift. Mr. Klug said Ms Dawtrey's comment made him more concerned, as he had felt "OK" after the earlier discussion and Mr. Stafford's assurances.

Mr. Klug said that later in the settlement discussions, when the representatives of both parties were again together in one room with their counsel, he raised the issue once more. He testified that he then advised the Employer that he wanted to come back to the issue of the Employer creating a shift for Winter Control and not paying overtime. Mr. Klug testified that Mr. Stafford looked around the room and then said "point blank" that "We wouldn't do that," that Mr. Parsons nodded his head in agreement, and that Ms Dawtrey made no objection. Mr. Klug said that he felt comforted by the response and that, based on those representations, the Union entered into the settlement.

When asked what would have happened had the Employer not provided the above assurances, Mr. Klug replied that, while it would have been up to his client, he felt there would have been no settlement that day and that it would have had a negative impact upon the collective bargaining then underway.

In cross examination Mr. Klug agreed that it was easier to prove a representation when that representation was put in writing. He agreed that there was no written record of any representation that a night plow shift would not be implemented. Mr. Klug agreed that the right to implement a shift was not a matter the Union had planned to raise in the June 2004 arbitration. Mr. Klug also indicated that, in his view, paragraph 4 of the new letter was the key, that the rest was peripheral, and that paragraph 4 was the same as paragraph 1 of the

1993 letter of understanding. Mr. Klug agreed that Ms Dawtrey's comment - that as far as she was aware the Employer had no intention of implementing a shift - was plausible and was very "lawyerly."

Evidence of Larry Coughlin

Larry Coughlin is a long time plow operator. He testified about a night time operation in 2001-02. That winter, following a particularly heavy accumulation of snow, the Employer decided to remove the snow from the downtown area using employees working during the night. It was initially expected that the duration of the work would be 10 nights, but the work was actually done in 6 nights. Most employees worked 11:00 p.m. to 7:00 a.m., some worked 10:00 p.m. to 7:00 a.m., and, consistent with the Letter of Understanding, all the employees were paid overtime for their work.

Evidence of Alastair Bruff

Alastair Bruff testified. Mr. Bruff has been the Union 2nd Vice President for many years as well as Chief Steward responsible for dealing with grievances. In June 2004 Mr. Bruff was also the chair of the Union's negotiating committee involved in bargaining with the Employer for the current collective agreement. He, too, outlined the way that winter control operations had worked recently and he reviewed the issues raised by the winter control grievances which were addressed in June 2004.

As for winter control operations, Mr. Bruff said that when it snowed it was common for the plow operators and the wingmen who normally worked during the day to be called in for work starting at 11:00 pm. Those employees were then paid overtime for the first 8 hours and they had the option to stay at work beyond that, working into their normal work hours.

He said that until recently there had been no problem with that system or with the pay.

Mr. Bruff testified that during the June 2004 settlement discussions he heard Mr. Klug ask on two occasions about whether the Employer would implement a night shift for plowing. Mr. Bruff said the first time had been in the morning and that Mr. Klug raised the issue. In response Mr. Stafford said no, but that it was "not a bad idea." Mr. Bruff testified that Mr. Klug then stated that he was serious and that Mr. Stafford had again indicated the Employer would not implement a shift. Mr. Bruff testified that the second occasion was later in the day and that Mr. Klug had asked "you're not going to implement a shift, are you?" and that Mr Stafford had replied "absolutely not."

Mr. Bruff testified that if the answer to Mr. Klug's questions had been anything other than "no," the Union would have begun the arbitration and the matter would have been "tackled" in negotiations. As chair of the negotiating committee, Mr. Bruff testified that he believed the possibility of a night plow shift would have been a major issue among Union members and that he felt it would have been a strike issue. Mr. Bruff said that his advice to the members would have been to strike over this issue.

Mr. Bruff testified that when the parties met much of the discussion was between him and Mr. Stafford, as they had worked together for many years, had a good relationship, and had settled many issues. Mr. Bruff agreed that at the time of the settlement discussions he did not know whether Mr. Stafford had authority to sign on behalf of the Employer. Mr. Bruff agreed that Mr. Parsons had ultimately signed for the Employer and Mr. Bruff noted that Doug Wheeler, the Union President, had signed for the Union.

Evidence of Doug Wheeler

Doug Wheeler was the president of the Union from 1990 through 2004 and he also testified.

As noted, the parties have had a letter of understanding dealing with winter control operations since 1993. Mr. Wheeler testified that before 1993 it had been common for plow operators to be called in for work at night. Those employees had been paid overtime for their extra work outside daytime hours. However, shortly before the 1993 letter was agreed upon, problems had arisen. For example, the Employer had begun sending employees home when the plowing was finished and did not allow employees to also work their normal daytime hours. Mr. Wheeler said this led to many disgruntled employees and that some of those disgruntled employees declined to come to work at night, preferring to simply work their normal daytime hours, and that some of the snow plows sat idle due to a lack of operators.

Mr. Wheeler testified that several grievances were filed and in 1993 the parties reached a settlement of those grievances in the form of the first letter of understanding on winter control. Mr. Wheeler noted that the 1993 letter provided a minimum of 8 hours at overtime rates when employees were called in for winter control work and provided that employees had the right to work into their normal hours of work.

Mr. Wheeler also participated in the discussions which led to the June 2004 winter control settlement and the new Letter of Understanding. As for the 2004 discussions, Mr. Wheeler testified that Mr. Klug twice raised the possibility of the Employer implementing a night plow shift. On the first occasion, Mr. Wheeler said that Mr. Klug raised it in a meeting with both sides present. Mr. Wheeler said that Mr. Klug asked if the Employer had any intention of putting on a shift, to which Mr. Stafford chuckled and said that he had not thought of that but it was an interesting idea. Mr. Klug had responded that he did not find it funny, nor was it a funny issue, and again asked if the Employer would be establishing a shift. At that point, Mr. Wheeler said that Mr. Stafford said they would not be doing so.

Mr Wheeler said that the matter arose a second time later in the day, just prior to signing the settlement. Mr. Wheeler testified that Mr. Klug again asked Mr. Stafford and the other Employer representatives to be perfectly clear about the issue that they would not be establishing a shift. Mr. Wheeler said that Mr. Stafford then said that they would not be establishing a shift.

Mr. Wheeler testified that, had the Employer given a different response on establishing a shift, the Union would not have signed the draft minutes of settlement and there would have been no settlement. Mr. Wheeler said the issue would have become an important negotiating issue and may have been a strike issue.

In cross examination Mr. Wheeler said that he had a fairly clear recollection of the events of June 10, 2004. He recalled the parties meeting on three occasions through the day, for approximately 30 minutes each time. He said he recalled the two statements from Mr. Stafford as having been made in the second and third meetings. He said that he, Mr. Klug and Mr. Bruff attended all the meetings with the Employer but that Doug Lee, then the Union secretary, who had also been in attendance for part of the day, did not. Mr. Wheeler reiterated that one of the things that stood out in his mind was the discussion between Mr Klug and Mr. Stafford. Mr. Wheeler said the exchanges were important because, without such an assurance, most of the letter of understanding would have been redundant, i.e. if plowing were to be done by employees on a night shift, then the Letter which provided overtime rates for day workers who were called in to plow during the night would have had reduced impact.

Evidence of John Parsons

John Parsons is the Employer's Division Manager, Transportation and Road Side Operations.

He has been responsible for Winter Control Operations since 2000.

Mr. Parsons testified at length about the business reasons for implementing a night plow shift. Among the reasons were effectiveness, efficiency and cost.

Mr. Parsons testified that he had very little recall of the events of June 10, 2004. In particular, he said he could not recall any of the statements alleged to have been made by Mr. Klug regarding a shift being established, nor could he recall any of the alleged responses from Mr. Stafford.

Evidence of Tina Tewkesbury

Tina Tewkesbury is a Human Resources Staffing Specialist with the Employer and she attended the June 10, 2004, settlement discussions. She said she took notes in the formal face to face meeting with the Union in the afternoon. Those notes make no mention of any of the statements alleged to have been made by Mr. Klug regarding implementing a night shift, nor any replies alleged to have been made by Mr. Stafford. She said that she did not recall Mr. Klug having said anything beyond that which was recorded in her notes.

In cross examination Ms Tewkesbury agreed that June 10 was the first time she had attended an arbitration with the Union. She expressed the view that she had recorded all the discussions between the parties in the notes she had taken. If something was not in her notes she suggested that it had not happened in the formal meeting.

Evidence of Scott Stafford

Scott Stafford was the Manager of Operations for Transportation in 2004 and in that position

he reported to Mr. Parsons. He recalled meeting with the Union representatives on June 10, 2004, and testified that he had done most of the talking on behalf of the Employer and that Mr. Bruff had been the primary spokesperson for the Union. Mr. Stafford said that they had the greatest practical experience as both had done the job. Mr. Stafford said he had concerns about operational efficiency, maximum hours, the order of calling in employees, etc., and that Mr. Bruff was concerned about rights to overtime, seniority, etc.

Mr. Stafford was asked about any discussions he might have had with Mr. Klug regarding the possible establishment of a night plow shift and Mr. Stafford testified that he had no memory of any such exchange.

Mr. Stafford reviewed Ms Tewkesbury's notes of June 10 and expressed the view that those notes were incomplete. Although he indicated he felt the notes were accurate on the items which were recorded, he suggested that some things which had been discussed were not recorded.

Evidence of Kelly Dawtrey

Kelly Dawtrey was Employer counsel June 10, 2004. Ms Dawtrey testified that in June 2004 she had been working for the Employer as a solicitor for only a few months and that she relied upon Mr. Parsons and Mr. Stafford for advice on how the Winter Control Operations worked. She also outlined the process followed in reaching agreement and reviewed the issues which were discussed and resolved.

The statements alleged to have been made by Mr. Klug in the group meetings and the assurances alleged to have been given by Mr. Stafford were put to Ms Dawtrey and she testified that she had no recall of any such exchanges. As for the alleged discussion with Mr.

Klug in the hall, she agreed that the two of them did meet in the hall, but again she testified that she had no recollection of any discussion about a night shift.

III. THE AGREEMENT

The key provisions of the parties' 2004-2005 collective agreement are as follows:

ARTICLE 3 - MANAGEMENT FUNCTIONS

. . .

3.2 The Union further recognizes the undisputed right of the Corporation to operate and manage its business in all aspects in accordance with its responsibilities. . . .

3.3 The Corporation recognizes the foregoing Articles 3.1 and 3.2 are subject to such provisions, regulations and/or restrictions governing the exercise of these rights as are provided in this Agreement . . .

ARTICLE 9 - HOURS OF WORK

9.1

a) The normal work week, except for shift employees, shall consist of five (5) eight (8) hour days from Monday to Friday inclusive, for a total of forty (40) hours per week. The normal work day shall not commence before 7:00 a.m. nor finish later than 5:00 p.m.

b) Any variations during the term of this Agreement in the normal work week, normal work day or daily hours of work shall be negotiated between the parties.

c) . . .

9.2

(a) The Corporation has the sole right to schedule shifts as required.

(b) In this Agreement, "shift" shall mean hours that any individual employee is scheduled to work outside of the normal work week or normal work day as described in Article 9.1 (a).

(c) In this Agreement, "shift employee" means any employee whose normal hours of work are outside the normal work day or work week as described in Article 9.1 (a).

(d) Shift Premiums and Overtime - Under no circumstances shall any employee be entitled to receive both overtime payment and shift premium.

. . .

9.3 Where a shift employee works outside the normal work day or normal work week as described in Article 9.1 (a), such employee shall be paid a shift premium . . .

. . .

ARTICLE 11 - CALL-IN AND STANDBY

11.1 Any employee called in to work in an emergency must be paid for not less than (3) hours for such work at the applicable overtime rate. Call out time shall be calculated to allow the employee(s) a maximum of ½ hour travel to and ½ hour return inclusive of the maximum three (3) hours.

. . .

ARTICLE 26 - RIGHTS AND PRIVILEGES

26.1 All the rights, benefits and privileges which the employees now enjoy, receive or possess shall, to the extent that the same do not conflict with this Agreement, continue to be enjoyed, possessed and held by the employees.

Letter of Understanding Number: 2004-03
Original date Signed: June 10, 2004

SUBJECT: Winter Control Operations

1. In the event that Winter operations are subject to the Hours of Work provisions of the Employment Standards Act, 2000, the parties agree that it is, and will remain, the mutual position of both parties that, with regard to Winter Control Operations:

    a) employees may work in excess of the limit on daily hours set out at section 17(1);
    b) section 18(2) applies in circumstances where Winter Control Employees are on stand-by and called in before their usual starting time to plow snow (or act as a wingman); and
    c) with regard to section 19:
        i. the timing and nature of snow and/or other winter storms may be unforseen;
        ii. such storms can cause serious interference with the ordinary working of the City's general operations and particularly if not responded to appropriately by the City's Winter Control Operations; and
        iii. the City's Winter Control Operations may be necessary to ensure the continued delivery of essential public services and to ensure that other continuous processes and seasonal operations are not interrupted.

2. Regarding Regulation 04/93 of the Highway Traffic Act, the parties agree that it is, and will remain, the mutual position of the parties that:

    a) in the event of a significant snow and/or winter storm, employees driving snow plows, wingmen and sanders could be responding to an "emergency" (within the meaning of that term under the Highway Traffic Act), if that emergency has been declared by the appropriate and authorized body or individual; and

b) when on duty for 15 consecutive hours, snow plow operators and sanders typically have at least two hours "on duty" time, during which they do not drive.

3. If a Winter Control employee (not including road sander/salter operator) is called into work before the commencement of his/her usual scheduled start time, that employee shall be entitled, but not obliged, to continue working until his/her usual scheduled finish time or for fifteen (15) continuous hours, whichever first occurs. They shall also be provided with at least eight (8) hours off between shifts. The first sentence of this paragraph three (3) does not apply to a Winter Control employee where the employee's work commences on or after the end of the employee's normal work week and twelve (12) hours before the commencement of the employee's next normal work week.

4. Notwithstanding the provisions of the Collective Agreement pertaining to hours of work, overtime and surplus time bank and emergency measures and call-in, the parties agree:

   Winter Control employees (not including sander/salter operators) who are not assigned to shift work and who traditionally work a normal work week between the window hours of 7:00 a.m. and 5:00 p.m., and who are assigned outside of the aforementioned window hours for the purposes of Winter Control operations, will receive a minimum of 8.0 hours work at the applicable overtime rate, even though the hours worked may extend into the normal hours window.

5. The City shall prepare "spare lists" which will be utilized for overtime opportunities for plow operations and wingmen, where winter operations overtime is assigned beyond that assigned to the regular plow operators and wingmen. The list for plow operators will be separate from the list for wingmen.

   The spare list for plow operators shall consist first of all E2 Equipment Operators, not assigned to a snow plow beat, listed by seniority, followed by all other trained employees, listed by seniority. The City shall offer opportunities for employees to act as spare plow drivers first to E2 Equipment Operators on the list by seniority on a rotating basis, then if no E2 Operators are available, by seniority on a rotating basis to the others on the list.

   The spare list for wingmen shall consist of interested and trained employees, listed by seniority. The City shall offer opportunities for employees to act as spare wingmen to employees on the list by seniority on a rotating basis.

In addition, the 1993 Letter of Understanding was as follows:

SUBJECT: Winter Control Operations

Notwithstanding, the provisions of the Collective Agreement pertaining to Hours of Work, Overtime and Surplus Time Bank and Emergency Measures and Call-in, the parties agree without prejudice to these Minutes of Settlement pertaining to Winter control operations only:

1. Employees, who are not assigned to shift work and who traditionally work a normal work week between the window hours of 7:00 am and 5:00 pm, and who are assigned outside of the aforementioned window hours for the purposes of winter control operations, will receive a minimum of 8.0 hours work at the applicable overtime rate, even though the hours worked may extend into the

normal hours window.

2. Employees will receive standby pay, as set out in the Collective Agreement, when notified of winter control operations, regardless of the length of notification given, if previous work day was a normal work day described in 9.1 (a).
3. It is noted that this agreement specifically excludes Road Sander/Salter Operators.

IV. UNION POSITION

The Union made an extensive submission.

For many years when it snowed, employees working the normal daytime hours were called in to work at night and paid overtime rates. The Union noted that if the Employer was permitted to implement a shift and discontinue the long practice of overtime pay for these employees, then major parts of the Letter of Understanding were rendered useless. By establishing a night shift, the only change made was a substantial reduction in the employees' pay.

The Union accepted that the Employer could implement a night plow shift. However, the Union said that the Employer must abide by the Letter of Understanding if it did have a night shift and must pay those employees the overtime rates. The Union submitted that the language of the Letter of Understanding was clear and supported the Union position that the Employer could not implement a night plow shift without paying overtime.

In the alternative, the Union said that if the Letter was ambiguous then the ambiguity should be resolved by use of the 1993 letter, or by the Employer's conduct after 1993, or by the 2004 oral representations, all of which the Union said supported its interpretation.

Thirdly, and in the further alternative, the Union submitted that the Employer was prevented from implementing its night plow shift in this way both by the oral 2004 promises not to do so, and by its years of conduct, both of which formed the basis for an estoppel.

The Union then reviewed at length the evidence in support of its main submissions on the interpretation issues.

On the estoppel issue, the Union said the oral representations were made and that the Union had relied upon them. The Union also submitted that the Employer's conduct over many years in not having established a night shift also led to an estoppel.

Finally, the Union noted that Article 26 states that "all the rights, benefits and privileges which the employees now enjoy" shall continue. The Union submitted that overtime payment for plowing at night was a right which was preserved under Article 26.

The Union reviewed the extensive case law, below, which it said supported its position.

The Union sought a declaration that the Employer had violated the collective agreement by not paying the night shift employees the overtime rates under Section 4 of the Letter, and a declaration that the Employer had violated Section 3 of the Letter of Understanding by not allowing the night shift employees to work 15 hours when they began at 11:00 p.m. The Union also sought an order that the Employer cease and desist from violating the agreement, and an order that employees be fully compensated for the Employer's violations of the agreement.

The Union relied upon the following authorities: *Re Molson's Brewery (Ontario) Ltd. and Canadian Union of United Brewery Workers, Local 304* (1979), 21 L.A.C. (2d) 48 (Weatherill); *Re Canada Post Corp. and Canadian Union of Postal Workers (710-92-00611)* (1993), 38 L.A.C. (4th) 443 (Wakeling); *Re Edwards of Canada, Unit of General Signal of Canada Ltd. and United Steelworkers, Local 7466* (1974), 6 L.A.C. (2d) 137 (Adams); *Re National Paper Goods and Graphic Communications International Union, Local 100-M*

(2001), 102 L.A.C. (4th) 32 (Abramsky); *Re Corporation of the City of London and Canadian Union of Public Employees, Local 107* (1992), 31 L.A.C. (4th) 224 (Dissanayake); *Re Molson Brewery (Ontario) Ltd. and Canadian Union of Brewery & General Workers' Component 325* (1992), 30 L.A.C. (4th) 4 (Harris); *Re Spruce Falls Power & Paper Co. Ltd. and Office & Professional Employees' International Union, Local 166* (1988). 1 L.A.C. (4th) 418 (Haefling); *Re Sudbury Roman Catholic Separate School Board and Ontario English Catholic Teachers Association* (1997), 61 L.A.C. (4th) 223 (Kaplan); *Re Alcan Rolled Products Company (Kingston Works) and United Steelworkers of America, Loc. 343* (1996), 56 L.A.C. (4th) 187 (Gray); *British Columbia School District No. 52 (Prince Rupert) and Prince Rupert District Teachers' Union (Robinson Grievance)* [1996] B.C.C.A.A.A. No. 228 (Keras); *Re Navistar International Corp. Canada and C.A.W.-Canada Local 127* (1995), 52 L.A.C. (4th) 223 (Snow); *Re Maple Lodge Farms Ltd. and United Food & Commercial Workers, Local 175* (1991), 24 L.A.C. (4th) 211 (R.M. Brown); *Hamilton-Wentworth Community Care Access Centre v. Ontario Public Service Employees' Union, Local 274* [2002] O.L.A.A. No. 920 (Reilly); *Re ACF Flexible Inc. and Graphic Communications International Union, Local 500M* (1989), 8 L.A.C. (4th) 70 (Stewart); *Re City of St. John and St. John Fire Fighters' Association, I.A.F.F. Local 771* (2003), 115 L.A.C. (4th) 193 (Christie); *Re Fieldfresh Farms Inc. and Milk and Dairy Drivers, Dairy Employees, Caterers and Allied Employees, Loc. 647 (Orsini)* (1997), 61 L.A.C. (4th) 182 (Goodfellow); *Hamilton-Wentworth Public Health Unit v. Ontario Nurses' Assn. (Policy Grievances)* [2001] O.L.A.A. No. 88 (Rose); *Longo Brothers Fruit Market Inc. and United Food & Commercial Workers' Union, Local 633* (1995), 52 L.A.C. (4th) 113 (Solomatenko); *Canadian Union of Public Employees, Local 10 v. Toronto (City) (Holiday Shutdown Grievance)* [1998] O.L.A.A. No. 792 (Howe); *The City of London and CUPE Local 107* (January 11, 1989) unreported (Rayner); *Re Corporation of the City of London and Canadian Union of Public Employees, Local 107* (1974), 7 L.A.C. (2d) 46 (Hinnegan); *Re Printing Specialties & Paper Products Union, Local 466, and Interchem Canada Ltd.* (1969), 21

L.A.C. 46 (Weatherill); *Re Kraus Carpet Mills Ltd., Chrome Plant and Varichrome Yarns and United Food & Commercial Workers, Local 175* (1991), 23 L.A.C. (4th) 84 (Marszewski); *St. Gobain Abrasives Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 12 (Shea Grievance)* [2004] O.L.A.A. No. 48 (Nairn); *Re Corporation of City of London and Canadian Union of Public Employees, Local 101* (1990), 11 L.A.C. (4th) 319 (Roberts); *Re L/3 Communications/Spar Aerospace Ltd. and International Association of Machinists and Aerospace Workers, Northgate Lodge 1579* (2004), 127 L.A.C. (4th) 225 (Wakeling); and *Manac Inc. and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 1285 (Simon Grievance)* [1999] O.L.A.A. No. 469, 81 L.A.C. (4th) 375 (Rayner).

V. EMPLOYER POSITION

The Employer also made an extensive submission.

The Employer said that it has always had the general right to schedule shifts and that the Letter of Understanding had preserved that right. In interpreting the Letter it was necessary to distinguish between those employees who worked days and those who were put on the night shift. When interpreted properly, nothing in the Letter prevented the Employer from doing as it had done.

The Employer said one must start by noting that day workers who plow at night are still entitled to work 40 hours during the day under Article 9. Their night work will therefore be at overtime rates and the Letter simply makes it clear that the employees get 8 hours at overtime rates even if the 8 hours runs into their normal daytime hours.

But for those employees who were put on the night plow shift, their usual scheduled start

time while on that shift is 11:00 p.m. They, too, had a right to 40 hours work but their 40 hours were during the night. The agreement says in Article 9.3 that those employees are to be paid a shift premium for those nighttime hours. Should those employees work more than 40 hours in a week, they are also entitled to overtime pay. But there is nothing to say they are entitled to overtime pay for their first 40 hours, that is for their normal work hours. There is nothing unfair about such an outcome and, in fact, it is the result mandated by the collective agreement.

The Employer reviewed the evidence regarding the reasons for the shift and said it had been implemented in good faith for valid business reasons.

The Employer next addressed the past practice argument related to the interpretation of the collective agreement. The Employer said the collective agreement was not ambiguous and therefore the past practice should not be used.

In any event, the Employer said there was no real past practice - paying those who meet the requirements set out in what is now paragraph 4 was not evidence of a practice related to payment for those employees who were on a shift. The 6 days of downtown snow removal in 2001-02 was not a shift and it provided no evidence of a past practice. Even if the agreement was ambiguous, the evidence of past practice did not support the Union position.

As for estoppel by practice, the Employer said there was no evidence of any representation by practice.

As for estoppel by oral representation, the Employer said the settlement discussions should be privileged. Apart from that, the Employer said there was no clear representation that the Employer would not exercise its rights to establish a shift. In any event, the right to establish

a shift was conceded and the real issue was whether the Employer had to pay overtime rates. There was no clear representation that the Employer would pay overtime rates to shift employees. Moreover, there was no detrimental reliance.

The Employer also reviewed the authorities and submitted that they supported its position.

The Employer asked that the grievances be dismissed.

The Employer relied upon the following: the definition of *"Notwithstanding"* and *"Tradition;" Re Corporation of City of London and Canadian Union of Public Employees, Local 107* (1977), 15 L.A.C. (2d) 155 (Brandt); *The Corporation of the City of London and CUPE Local 107 (Policy Grievance)* (December 30, 1988) unreported (Rayner); *London Civic Employees' Union, Local 107 and The Corporation of the City of London* (January 4, 2002), unreported (Hunter); *The Corporation of the City of London and London Civic Employees' Union, Local 107* (March 12, 2002) unreported (Haefling); *Canadian Union of Public Employees, Local 107 and The Corporation of the City of London* (December 20, 2003) unreported (Watters); *Re E.S. & A. Robinson (Canada) Ltd. and Printing Specialities & Paper Products Union, Local 466* (1976), 11 L.A.C. (2d) 408 (Swan); *Re Thousand Islands Duty/Tax Free Store Ltd. and Ontario Liquor Boards Employees' Union* (1989), 6 L.A.C. (4th) 261 (Simmons); *Niagara Falls Humane Society v. Canadian Union of Public Employees, Local 133 (Niagara Falls Humane Society Unit) (Weekend Work Grievance)* [1998] O.L.A.A. No. 602 (Levinson); *Valley East (City) v. Canadian Union of Public Employees, Local 6 (Pederson Grievance)* [1998 O.L.A.A. No. 732 (Davie); *J.H. McNairn Ltd. v. United Food and Commercial Workers International Union, Local 175 (Williams Grievance)* [2004] O.L.A.A. No. 190 (Schiff); *Re United Automobile Workers, Local 195, and Bendix-Eclipse of Canada Ltd.* (1967), 18 L.A.C. 321 (Christie); *Re Sudbury District Roman Catholic Separate School Board and Ontario English Catholic Teachers' Association*

(1984), 15 L.A.C. (3d) 284 (Adams); *Kitimat Public Library Assn. v. Canadian Union of Public Employees, Local 707* [2002] B.C.C.A.A.A. No. 121, 108 L.A.C. (4th) 78 (Hope); *Cami Automotive Inc. and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 88 (Meeting Location Grievance)* [1999] O.L.A.A. No. 31 (Snow); *IMT, a division of Canron Inc. v. United Steelworkers of America, Local 2918 (Shift Schedule Grievance)* [1998] O.L.A.A. No. 104 (Snow); *Re Int'l Ass'n of Machinists, Local 1740, and John Bertram & Sons Co. Ltd.* (1967), 18 L.A.C. 362 (P.C. Weiler); *Re Dominion Colour Corp. and Teamsters Chemical, Energy and Allied Workers, Local 1880* (1997), 64 L.A.C. (4th) 366 (O'Neil); *Brookfield Management Services Ltd. and Canadian Union of Operating Engineers and General Workers (Miller Grievance)* [1999] O.L.A.A. No. 481 (Davie); *Dashwood Industries Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 3054 (Contracting Out Grievance)* [1999] O.L.A.A. No. 211 (Snow); *Re Terra Nova/Cape Freels Integrated School Board and Newfoundland Association of Public Employees* (1993), 34 L.A.C. (4th) 337 (Cooper); Communications in the Grievance Procedure, Section 3.4342 of Brown and Beatty, *Canadian Labour Arbitration*; *Re Air Canada and Canadian Auto Workers, Local 2213* (2002), 113 L.A.C. (4th) 165 (Simmons); and *Re Regional Municipality of Ottawa-Carleton and Canadian Union of Public Employees, Local 503* (1984), 14 L.A.C. (3d) 445 (P.C. Picher).

VI. CONCLUSIONS

Introductory issues

Early in the hearing there appeared to be a dispute on several issues which were no longer controversial by the end of the hearing. Nevertheless, for clarity, I note them here.

First, under this agreement the Employer has the general authority to implement shifts,

including a night plow shift. This point was conceded by the Union in its submissions. The primary issue was payment for the work done by employees working on the shift.

Secondly, the Employer began this night plow shift for valid business reasons. It was a good faith management decision. Mr. Parsons testified at length on this point and it was not disputed by the Union.

Thirdly, in the June 10, 2004, settlement discussions Mr. Stafford was the front line manager for the winter control operations, had the most experience among those persons on the Employer side in dealing with these issues, and did much of the talking for the Employer that day. I conclude he had authority to speak on behalf of the Employer and that he did speak on the Employer's behalf.

Fourthly, the notes taken by Ms Tewkesbury June 10, 2004, were not a full record of the discussions that day. The notes may accurately reflect her understanding of the parts of the discussions she recorded. However, too many other witnesses, including Mr. Stafford, recalled discussions which are not recorded in those notes for me to find that those notes were a complete record.

Interpretation of Paragraph 4 of the Letter

The first issue to be considered is the proper interpretation of the collective agreement. The question is:

> Does the collective agreement prevent the Employer from assigning employees who normally work during the day to begin their working hours at night, i.e. put them on a night shift, and thereby avoid paying those employees overtime under paragraph 4 of the Letter of Understanding?

Many approaches to determining the proper interpretation of the Letter of Understanding were suggested at the hearing. I begin in the normal manner by attempting to determine the parties' intention through a careful examination of the language they used in the Letter of Understanding which forms part of the collective agreement.

I repeat paragraph 4 of the Letter for ease of reference:

> Notwithstanding the provisions of the Collective Agreement pertaining to hours of work, overtime and surplus time bank and emergency measures and call-in, the parties agree:
>
> Winter Control employees (not including sander/salter operators) who are not assigned to shift work and who traditionally work a normal work week between the window hours of 7:00 a.m. and 5:00 p.m., and who are assigned outside of the aforementioned window hours for the purposes of Winter Control operations, will receive a minimum of 8.0 hours work at the applicable overtime rate, even though the hours worked may extend into the normal hours window.

Several points about that paragraph are clear:

1. This is a special provision which applies "notwithstanding" the normal provisions of the agreement which are listed in the preamble;
2. The paragraph does not apply to the sander/salter operators;
3. Only some employees receive the minimum of 8.0 hours at overtime rates and only in some circumstances;
4. To receive this special overtime pay arrangement, an employee must be a winter control employee, that is an employee who is involved in clearing the City roads and sidewalks. That is clear from the Letter taken as a whole and from the agreed facts;
5. The employee must also be assigned "for the purposes of Winter Control operations;" and,
6. The employee must be assigned to do that work outside of the "window hours," that is, outside of 7:00 a.m. to 5:00 p.m.

The interpretive difficulty arises from the limitation on which winter control employees who might otherwise meet the requirements in the paragraph are entitled to the overtime pay. The

special overtime pay arrangement in that paragraph applies only to those winter control employees "**who are not assigned to shift work** and who traditionally work a normal work week between the window hours of 7:00 a.m. and 5:00 p.m." [My emphasis]

Taking the second part of that limitation first, Winter Control employees have all "traditionally" worked a normal work week between the window hours, that is during the same hours that are listed in Article 9.1, above, as spanning the normal work day.

It is also clear from Article 9.2, above, which defines "shift" and "shift employee" that an employee who is "assigned to shift work" must mean an employee who is assigned to work hours outside the window hours of 7:00 a.m. to 5:00 p.m. It follows that an employee cannot at the same time be "assigned to shift work" and also "work a normal work week between the window hours."

In 2006 the Employer started a winter plow shift from 11:00 p.m. - 7:00 a.m. Some of the Winter Control employees who traditionally, that is for many years, worked a normal work week during the window hours were assigned to the night plow shift. They were therefore assigned to work "outside of the . . . window hours for the purpose of Winter Control operations." Those employees met nearly all the requirements of this paragraph 4, but can it be said that those night plow shift employees "are not assigned to shift work"? The Employer did assign those night plow shift employees to "shift work," and since the overtime payment is premised on a negative, i.e., "employees . . . who are not assigned to shift work," those employees do not meet all the qualifications listed for the special overtime payment scheme set out in paragraph 4.

Would such a result make any sense? Could that have been the intention of the parties? Recall that the paragraph was first agreed upon in 1993 (the 1993 Letter is reproduced,

above) and it was then adopted in 2004 without any change in substance (on the basis of "if its not broke, why fix it?"). Could the parties in 1993 have intended to deal only with the situation of daytime employees being called in before their normal start time and have left open the possibility that the Employer might assign some employees to work a night plow shift?

There is a long history between these parties of the Employer guarding its right to schedule shifts (see, for example, the awards between these parties of arbitrators Brandt, Rayner, Hunter, Haefling and Watters, above, the first two of which were issued before 1993). In light of that it seems reasonable to think that in 1993 the Employer would have wanted to preserve its right to schedule a shift, a right it had already defended successfully in arbitration, and that the parties would have intended by this language to preserve that right.

In any event, it is difficult for me to find some other plausible reason for the inclusion of the words "who are not assigned to shift work." That is, it is difficult to find another meaning that might have been intended by the parties. Had the parties intended that all winter control employees (who as a matter of historical fact normally worked days) who were assigned to plow at night (i.e., outside of the window hours) would get the special overtime pay, then the words "who are not assigned to shift work" would have no meaning. It is normal to assume that the parties intended that all the words in their collective agreement were to have meaning. In my view, these words were included to deal with the possibility that the Employer might in the future implement a plow shift and to provide that, if the Employer did so, the special overtime pay arrangements, now in paragraph 4 for day workers who are called in to work before their regular start time, would not apply. It follows that the night shift plow employees are not entitled to the special overtime pay arrangements.

There are two additional points which I simply note as being consistent with my above

conclusion as to the parties' intent.

First, I note that sander/salters operators are excluded from this overtime provision. Sander/salters operators work shifts and it would appear that the fact they work shift work was the basis for excluding them from this special overtime provision. An intention by the parties to exclude other winter control employees who might in the future work shift work would have been consistent with the exclusion of the sander/salter operators.

Secondly, I note that in the 2004 settlement discussions the Union simply asked whether the Employer intended to get around the overtime pay provision by operating a night shift and that the Union did not assert the Employer could not assign employees to shift work. The discussion appeared to assume that the Employer could implement a shift and avoid overtime and, instead, the issue raised by the Union was whether the Employer would do so.

In summary, I conclude that paragraph 4 of this Letter of Understanding does not compel the Employer to pay the night shift plow employees overtime.

Interpretation of Paragraph 3 of the Letter

I turn now to the interpretation of paragraph 3 of the Letter of Understanding. The Employer allowed the night shift plow employees to work only until the end of their night shift. The Union said that the Employer violated this paragraph 3 by not allowing the night shift plow employees who started work at 11:00 p.m. to work for 15 hours or until their usual (daytime) finish time.

Paragraph 3 entitles Winter Control employees (excluding sander/salter operators) to work for up to 15 hours in some situations. There are two conditions before that applies. The third

sentence makes clear that it does not apply to what would often be the weekend, that is when the employees are called in after the end of the work week and more than 12 hours before the next work week. In addition, the employee has to be "called in to work before the commencement of his/her usual scheduled start time." The question is: what is the "usual scheduled start time" for an employee who works in the window hours - i.e. during the day - for most of the year but is then assigned to work a night plow shift starting at 11:00 p.m. from January to March? Moreover, can such an employee be said to be "called in to work" when reporting to work at 11:00 p.m. for that night plow shift?

In adopting the language of "usual scheduled start time" I accept Mr. Klug's evidence that the parties had in mind the staggered start times that exist for those employees working during the window hours (between 7:00 a.m. and 5:00 p.m.) and that they adopted this wording as some of those employees begin work at 7:00 a.m. and others at 7:30 a.m. But that was in the context where, as a practical matter, all winter control employees worked during the window hours throughout the entire year.

The Union has conceded that the Employer can establish a shift for winter control employees, as the Employer has done here. Is the "usual scheduled start time" for an employee who is assigned to the 11:00 p.m. - 7:00 a.m. shift at the beginning of the shift at 11:00 p.m., or does it mean the employee's start time the other nine months of the year, that is sometime between 7:00 a.m. and 9:00 a.m.? Applying the words in the context of a night shift is very different from the context in which the parties discussed the matter when they selected this language. In the context of the "usual scheduled start time" for a shift employee working nights, I think the parties would have intended it to mean the beginning of the night shift, not the employee's start time during the other nine months of the year.

In addition, the rights in paragraph 3 arise when an employee is "called into work." I have

difficulty in concluding that the parties would have intended to describe an employee who shows up for work at the beginning of his or her scheduled shift as having been "called in" to work. The parties have used "call-in" in a more normal sense in Article 11, above, in a situation of an employee coming to work outside his or her normal hours on short notice because of an emergency. "Call in" would describe an employee scheduled for day time work who is told to come in early at 11:00 p.m. due to a snowstorm, but I do not think the parties would have intended to describe a shift employee who shows up at 11:00 p.m. for his scheduled 11:00 p.m. - 7:00 a.m. night plow shift as having been "called into work."

It follows that in not allowing the employees on the night plow shift who began work at 11:00 p.m. to work for 15 continuous hours the Employer did not violate paragraph 3 of the Letter of Understanding.

It would, however, have been a violation of the agreement if the Employer had called in a night shift plow operator to begin work early, e.g. 3:00 p.m., and then failed to let that employee work for 15 continuous hours or until 7:00 a.m., whichever occurred first. There was no evidence of any such situation.

Use of extrinsic aids

The Union urged me to make use of the past practice of the parties, as well as the oral representations made in the June 2004 settlement discussions, to assist me in interpreting the Letter. The Union asked me to find, on the basis of either the past practice or the representations made in the 2004 settlement discussions, that the parties had a different intention than that which I have found above.

Things other than the wording of the collective agreement itself used to assist in determining

the parties' intention are often referred to as extrinsic aids to interpretation. However, as the Employer noted, the use of extrinsic aids to assist in interpretation normally requires a finding that the collective agreement is ambiguous. I have not found this agreement to be ambiguous and therefore will use no extrinsic aids.

Preservation of Rights under Article 26

The Union argued in the alternative that the Employer had violated Article 26. In essence, the Union said the employees had a right to overtime pay when plowing at night and that under Article 26 that right was to be continued.

In my view, this submission misconstrues what has occurred. Employees who worked the day shift and were called in early to plow at night received overtime pay under the Letter. They still do.

The closest to a practice which might support a finding of a right to overtime when plowing on a night plow shift arose in 2001-02 when the Employer decided, on short notice, to remove the accumulated snow from the downtown area and, in so doing, had 18 employees work nights until the task was complete. The evidence did not go so far as to suggest those employees were assigned to a night shift. Instead the employees were told on fairly short notice that they were required to come to work early for the next number of nights (the number of nights needed to remove the snow, initially estimated as 10 but in fact 6) and when that overtime work was done they resumed their normal daytime hours. Although they were paid overtime rates, that does not establish that the work was a shift. A shift suggests greater advance notice and longer duration, that is, a more regular arrangement.

I conclude that the 2001-02 events were not a shift. It follows that those events do not

constitute evidence of a practice of paying overtime pay to night shift plow operators. As there was no such practice, there is no "right, benefit or privilege" to be continued under this Article 26.

Estoppel

The next issue was whether the Employer was prevented by the principle of estoppel from assigning employees, who normally worked during the day, to begin their working hours at night and paying those employees a shift premium rather than paying them overtime under the Letter of Understanding in the collective agreement. The Union said the Employer was estopped, and that the estoppel arose both from the Employer's conduct and from the representations the Employer made during the 2004 settlement discussions leading to the new Letter of Understanding.

Parties in a contractual relationship are normally allowed to exercise their rights under the contract. The same principle applies to collective agreements, which are a type of contract. However, in some exceptional situations the law says that a party cannot do what the language of the contract or collective agreement says they have a right to do. The doctrine of estoppel is one ground upon which a party can be prevented from exercising its contractual rights.

Put simply, estoppel is a concept based on fairness. Its application first requires that two parties be in a contractual relationship. As these parties have a collective agreement, and the Letter is part of their collective agreement, they meet this first requirement.

Estoppel then arises when the first party (the Employer) represents to the second party (the Union) that it will not be exercising a contractual right - e.g., for many years does not

implement a night plow shift or, alternatively, says that it will not implement a night plow shift - and the Union relies upon that representation to its detriment - e.g., signs a new Letter of Understanding. In that situation, if it would be unfair to allow the Employer to do what it represented it would not do, then the Employer is said to be "estopped" from exercising its contractual rights.

An estoppel will last as long as it would be unfair to allow the Employer to do what it is otherwise entitled to do under the collective agreement - which in the collective bargaining context normally means until the collective agreement expires and the Union has had an opportunity to address the issue through collective bargaining.

Estoppel by conduct

I consider the estoppel based on conduct submission first. The Union said that by not implementing a night plow shift before 2004 the Employer had represented to the Union that it would not do so. Clearly the Employer had represented by its conduct that it had not implemented a plow shift, but I have a general difficulty, in a situation in which an employer simply does not exercise a contractual right, in extending that into a representation that it will not in the future do what it has a contractual right to do. Put more generally, I find a failure to act unlikely to serve as a representation of the type needed to support a claim of estoppel.

For example, suppose this Employer, which has the right to dismiss employees for proper cause, did not dismiss anyone for cause for many years. Would that failure to dismiss for cause amount to a representation to the Union that the Employer would not in the future dismiss any employee for cause? I think not.

But suppose the Employer had taken some action, as distinct from merely failing to act.

Suppose, for example, that the Employer had operated a winter plow shift previously, said nothing about how it would calculate pay, but had paid night shift employees the same overtime rates as it paid daytime workers plowing at night. I would have much less difficulty in finding that action to be a representation about the Employer's approach to the operation of the collective agreement.

In the situation before me I am unable to find that the Employer's failure to implement a plow shift before 2004 amounted to a representation that it would not implement a plow shift. In addition, I see no unfairness, based on its failure to implement a plow shift earlier, in allowing the Employer to implement a shift in 2006. I find no estoppel based upon the Employer's conduct in not implementing a plow shift in the past.

Estoppel by oral representation

I now turn to estoppel by oral representation. The Union said I should find that during the 2004 settlement discussions, in response to the Union's expressed concerns about the Employer avoiding the Letter of Understanding by establishing a night plow shift, the Employer had assured the Union that it would not be implementing a night shift. Furthermore, the Union said that it had relied upon those representations to its detriment by signing the settlement in which it agreed to a new Letter of Understanding for both that collective agreement and for the next collective agreement and, in so doing, had lost the opportunity to negotiate with the Employer over the issue of a plow shift and overtime pay for such a shift.

The Employer submitted in argument that the June 10, 2004, settlement discussions which led to the new Letter were privileged and could not be admitted into evidence and used against the Employer.

Generally speaking, all evidence that will assist in resolving a grievance is admissible in arbitration. However, there are some types of evidence which, for policy reasons, are said to be privileged - that is, the evidence is exempt from disclosure. For example, it has long been felt that a person should be able to seek legal advice and speak freely and openly with his or her lawyer without any fear that the discussion will later be used against him or her. As a result, communications between lawyer and client are privileged under what is often called solicitor-client privilege. In addition, labour relations policy has long encouraged parties to resolve their grievances through the grievance procedure before reaching arbitration. As a result, communications made during the grievance procedure are often privileged.

Privilege is normally claimed before the evidence is heard, as privilege is a right not to disclose evidence. However, in this case the evidence regarding the communications made during the settlement discussions June 10, 2004, had already been disclosed when this claim of privilege was made. After the evidence had been disclosed at the hearing, it was late to submit that the evidence was privileged.

Apart from the timing of the Employer's privilege objection, some evidence of grievance discussions is admitted in arbitration. For example, if there is a dispute as to whether the grievance was resolved, evidence may be produced to establish that there was a settlement. If the settlement is acknowledged but, as here, the Union submits that the settlement was induced by representations which are the foundation for a claim of an estoppel, then the evidence of those representations is admissible in order to prove the estoppel. I find no basis to uphold the Employer claim of privilege in the June 10, 2004, discussions between the parties which led to the settlement and to the new Letter of Understanding.

Returning to the claim of estoppel based on oral representations, what, if any, representation

was made? Seven witnesses testified about the settlement discussions. Three Union witnesses recalled, in slightly different terms, that the Employer, through Mr. Stafford, had twice said the Employer would not implement a plow shift. Three Employer witnesses said they did not recall any such discussion of plow shifts or of Mr. Stafford making such a representation. Ms Tewkesbury, the fourth Employer witness, relied upon her notes and said that the representations did not happen. I have indicated above that I found those notes to be an incomplete record of the settlement discussions. Nevertheless, Ms Tewkesbury did suggest that no such representation was made.

I found the clear testimony of the three Union witnesses persuasive. How, then, could it be that the four Employer witnesses had no similar recall? I conclude that the Union representatives remembered this because it was important to them. On the other hand, these representations were of no particular importance to the Employer representatives. In addition, I note that some 17 months passed before any of the Employer representatives had any reason to recall these representations and that memories fade. I also note that Employer counsel was new to her position and that this was the first time Ms Tewkesbury had attended an arbitration with the Union.

Regardless of the above speculation as to why the Employer witnesses did not recall the discussion of a plow shift, I am left with clear and positive evidence from three credible witnesses who testified as to certain events. There is no credible evidence to the contrary.

I find that the Employer, through Mr. Stafford, did make representations to the effect that the Employer would not get around the new Letter of Understanding by implementing a night shift.

The Employer suggested that, although there may have been evidence of oral representations

not to implement a shift, there had been no evidence of any representation having been made regarding paying shift employees at overtime rates. The Employer said that, at most, the evidence only went as far as a representation not to implement a shift, and the Employer noted the Union had conceded during the hearing that the Employer could do this.

I find that to be an unduly narrow view of the representations made. I find that the issue of overtime pay was exactly the intent and impact of the representations made in the June 10 discussions. The Union was not concerned about the issue of a shift in the abstract. Instead, the Union was concerned to ensure that all the winter control workers would get the benefit of the Letter, the key part of which was understood by all the participants to be the special arrangements for 8 hours overtime pay. Mr. Klug's evidence, in relation to both of Mr. Stafford's representations, was that Mr. Klug raised a concern about the Employer avoiding the payment of overtime pay by implementing a shift. The Union was assured by Mr. Stafford that the Employer would not do so, that is the Employer would not avoid the overtime arrangements in the Letter by establishing a shift.

Did the Union rely upon the representations? I have no doubt that those settlement discussions would have been very different had the Employer said that it wished to preserve its right to implement a plow shift and, if it did so, it would pay only a shift differential and not overtime pay. In entering into this settlement I find that the Union relied upon the representations made.

Would it now be unfair to permit the Employer to do what it said it would not do? In my view it would be unfair to the Union, after the Union relied upon the assurances given by the Employer through Mr. Stafford, to allow the Employer to do that which it twice said it would not do. I find that this is a situation in which estoppel applies.

The estoppel will remain in effect until the Union has an opportunity to address this issue in collective bargaining.

Finally, I note that I find no estoppel with respect to paragraph 3 of the Letter.

Order

Until the end of the period of operation of this collective agreement, the Employer is estopped from scheduling a plow shift and paying only the shift differential. The Employer is directed to pay those employees on the night plow shift using the special overtime rates established in paragraph 4 of the Letter of Understanding - that is, "a minimum of 8.0 hours work at the applicable overtime rate" - until the end of the period of operation of this agreement. Employees who were paid less than the overtime rates are to be fully compensated by the Employer in the amount of the difference between what they did receive and the amount that they should have received.

As is common practice, I leave to the parties the task of calculating the amounts owing. I will remain seised to deal with the issue of compensation or with any other issues which may arise in the implementation of this award.

Dated at London, Ontario this 12th day of March, 2007.

Howard Snow, Arbitrator