IN THE MATTER OF AN ARBITRATION

BETWEEN

CUDDY FOOD PRODUCTS
- the Employer

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175
- the Union

AND IN THE MATTER of a grievance of Jeff Page

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

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| Irene L. Wolfe | - Counsel |
| Mark Bossy | - Human Resources |
| Randy Dietrich | - Supervisor, Distribution Department |

On behalf of the Union:

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| Cynthia D. Watson | - Counsel |
| Wendy Absolom | - Union Representative |
| Jeff Page | - Grievor |
| Gord Gripp | - Chief Steward, Plant A |
| Hanna Baddaoui | - Chief Steward, Plant B |
| Betty Pardy | - Chief Steward, Plant C |

Hearings held in London, Ontario on April 11, May 15 and June 12, 1995.

# AWARD

## I. INTRODUCTION

In this grievance Jeff Page (the grievor) seeks redress for a lost overtime opportunity on October 30, 1994. The grievor's Department, the Distribution Department, operates with three shifts per day, five days per week. The night shift is usually staffed by two employees, but by the middle of the week prior to the events giving rise to the grievance, that is by Wednesday October 26, it was known that one of the two night shift workers had decided to leave the Distribution Department in order to return to his former Department. That worker, Dennis Fudge, had recently transferred into the Distribution Department on a trial basis. Mr. Fudge's departure would leave the night shift short by one person for the shift which would begin at 10:00 p.m. on Sunday, October 30.

The Department had two supervisors, one of whom worked on the day shift and one of whom worked on the afternoon shift. Each supervisor had his own crew, and each supervisor and his crew rotated every two weeks. In October 1994 the two supervisors were Randy Dietrich and Mike Habash. While the two supervisors had held discussions during the week of October 24 with their manager about how to deal with the impending shortage of employees for the night shift, ultimately nothing was done until Saturday, October 29. The Departmental employees were involved in taking inventory on Friday and Saturday, and sometime during Saturday afternoon the supervisor then at work for inventory, Mr. Habash, began to take steps to staff the shift which would begin on Sunday at 10:00 p.m. He had discussions with the other supervisor, Mr. Dietrich, and they then sought two additional workers for the 10:00 p.m. shift Sunday.

The supervisors called the departmental staff in order of seniority, as is required in the overtime Article of the Agreement when the Employer seeks overtime workers. Two employees were ultimately found and worked during the Sunday shift. One, Rob Lall,

worked the full eight hour shift. The other, Joe Amaral, worked four hours, left and returned later on Monday for another four hours of work. Neither was paid overtime. The Union asserted that under the Agreement the work should have been offered as overtime in order of seniority before 10:00 p.m. on Friday, October 29, and that if the Employer had done so the grievor would have organised his weekend differently, would have accepted the overtime opportunity, and would have worked the overtime. The Union thus sought a ruling that the Employer violated the Agreement, and sought an order of compensation for the grievor.

The parties agreed that the grievor was qualified to do the work in question and that he was senior to the two employees, Lall and Amaral, who worked on October 30. Some employees senior to the grievor were telephoned to be offered the opportunity to work, but they were either not at home or declined the offer. In any event, no employee senior to Mr. Page grieved.

The disagreement between the parties can best be outlined by summarising the Employer's position. The Employer argued that:

1. There was no overtime work on October 30.
2. If there was overtime, the Employer sought volunteers and the grievor refused.
3. If there was overtime, there was no requirement to give advance notice of the overtime except in a case where the Employer ordered an employee to work overtime, and that did not happen here.
4 If there was a requirement to give notice in a situation like this, the Employer met the requirement by telephoning the grievor before 7:30 p.m. Saturday.
5. If the Employer was in violation of the Agreement, the grievor had a duty to mitigate and the grievor did not do so in the best way possible, that is by working the overtime he was offered for the Sunday evening.

I set out below the relevant provisions of the Agreement. The principal Articles involved in the submissions of the parties were 13.02, 14.05(a), and 14.06 but all those provisions which are related to the issues in the grievance are included below as they provide the context in which I have to interpret the disputed provisions. The key questions dealt with in the argument were:

1. Was this a "call in" under 13.02?
2. If there was an overtime opportunity, did it fall on a week day, so as to be dealt with under 14.05(a)(i), or did it fall on Sunday so as to be dealt with under 14.05(a)(ii)?
3. If there was an overtime opportunity, do the notice provisions in 14.06 apply to volunteers, or only to those employees who are compelled to work overtime - i.e. only to those who are assigned overtime under 14.05(a)(iii)(1) or (2)?
4. If there was a notice requirement, how much notice was needed?

Finally I note that there was no dispute that it would have been possible to have given employees notice of the overtime by Friday, October 28 - the disagreement was whether there was an obligation on the Employer to have done so.

The Agreement provisions are as follows:

ARTICLE 13 - SHIFT PREMIUM AND REPORTING ALLOWANCE

13.01 An employee reporting for work shall be given a minimum of four (4) hours work or in lieu thereof, four (4) hours pay at the applicable rate of pay.

13.02 An employee who, after leaving the Company's premises, is specifically called in at any time outside his normal working hours, shall be paid a minimum of four (4) hours at his applicable overtime rate.

13.03 Shift premium shall be paid as follows:

*[The details are not relevant here]*

ARTICLE 14 - HOURS OF WORK AND OVERTIME

14.01 The standard work week will be forty (40) hours per week comprised of five (5) eight (8) hour days, Monday through Friday.

14.02 (a) Employees shall be paid one and one-half times (1 1/2 x) their regular rate for all hours worked or paid by the Company in excess of eight (8) hours per day, or for all hours worked or paid by the Company in excess of forty (40) hours per week.

(b) Employees shall be paid one and one half times (1 1/2 x) their regular rate for all hours worked or paid by the Company on Saturday, unless such work is to complete the employee's last shift of the standard work week.

(c) Employees shall be paid two times (2 x) their regular rate for all hours worked or paid by the Company between 12:01 a.m. Sunday and 10:00 p.m. Sunday.

14.03 Double the straight time rate shall be paid for all work performed in excess of twelve (12) consecutive hours.

14.04 The Company does not guarantee to provide work for any specified number of hours on either a daily or weekly basis. The Company will pay for hours worked except where otherwise stated in this Agreement.

14.05 (a) Divisions "A", "B" & "C":

i) During the standard work week (Monday through Friday) when overtime is required within a Department, such overtime shall be offered on a voluntary basis from [sic] among qualified senior employees within the Department on the shift (in the order of seniority).

In the event the Company is unable to fill its staffing requirements as outlined above, then such overtime shall be offered by seniority to qualified employees on the following basis:

First, to senior qualified employees within the Department who are at work and are available; then to senior qualified employees within the Division who are at work and are available.

ii) Subject to 14.08, the opportunity to work overtime on Saturday or Sunday shall be offered first on a voluntary basis from [sic] qualified senior employees in the order of seniority within the Department; then

To employees within the Division; then

To employees within other Divisions (based upon combined seniority lists)

iii) If the Company cannot fill its overtime requirements on a voluntary basis as outlined in Article 14.05(a)(i) and (ii), the Company will assign the overtime work and such employee(s) will be required to perform the work on the following basis:

(1) Overtime work required under Article 14.05(a)(i) will be designated to the most junior qualified employee within the Division who is at work and who is available.

(2) Overtime work required in accordance with 14.05(a)(ii) will be designated to the most junior qualified employees in the Divisions.

iv) No employee will be required to work an unreasonable amount of

overtime.

(b) Division "C" Only - Boning Line Weekend Overtime:
*[The details are not relevant here]*

14.06 Employees in Division "A", "B" or "C" who are designated to work overtime in accordance with Article 14.05, must, whenever possible, be provided with advance notice as follows:

(a) Week Day Overtime
Notice of such designation prior to 12:00 noon (day shift) or 7:30 p.m. (afternoon shift) each day.

(b) Weekend Overtime
Saturday Overtime - Notice of such designation at least twenty-four (24) hours in advance.
Sunday Overtime - Notice of such designation at least forty-eight (48) hours in advance.

14.07 Employees shall not be transferred from one Department to another to the extent that it reduces the regular straight time hours of work of seniority employees in such Department, unless such transfer is required to maintain the Company's staffing requirements.

14.08 Employees will not be required to report for their scheduled shift unless a minimum of nine (9) hours has elapsed since the completion of their last scheduled shift.

The parties disagreed as to the facts and as to the proper meaning of their Agreement. I deal first with a review of the evidence, then deal with the submissions and conclusions regarding the evidence, and finally I turn to an examination of the issues that arise under the Agreement.

## II. THE EVIDENCE

The parties expressed considerable disagreement in their submissions as to what happened, but there was much less disagreement in the actual evidence which was produced before me. I heard from six witnesses and their evidence on the matters in dispute follows. There was also considerable evidence on whether the grievor was qualified, on whether he was senior to those who worked, and as to when the Employer knew Mr. Fudge was leaving the

Department, but ultimately there was no dispute on those points, and I do not recount that evidence here.

The grievor testified he was called at home around 7:10 Saturday evening and asked to come to work Sunday night to load trucks. The grievor declined due to prior family commitments. He said he recalled the time of the telephone call, in part because he felt the Employer had known earlier of the need for extra employee(s) on this shift, and in part because he had been involved in earlier disagreements about overtime issues. He further said that if he had received more notice he would have arranged his plans differently and accepted the Sunday work. In particular, he said that if he had known about the offer of the Sunday work before he had left work on Friday, he would have accepted. He said he was not asked to switch shifts when he was called on Saturday, and he assumed the work he was being offered was overtime.

Pat Bayliss is a lead hand, the senior employee on his shift, and a union steward. Mr. Bayliss said he was approached early the next week (there was some dispute as to exactly the time that this happened, but in my view nothing turns on the precise time) by the grievor who asked him to file a grievance. Mr. Bayliss determined that the grievor was senior to the two employees who worked and he spoke to Mr. Lall about what arrangements had been made with Mr. Lall for the work on Sunday. Mr. Bayliss said Mr. Lall told him he was asked to cover a man's shift Sunday by working four hours, and then return for his own shift on Monday. Mr. Bayliss said he learned from Mr. Lall that he had not actually worked that shift but instead had worked an eight hour shift, and he thought that Mr. Lall had advised him that he had been telephoned by Mr. Dietrich. Mr. Bayliss said the usual practice regarding overtime which starts at 10:00 p.m. Sunday is for notice to be given at work on Friday. As the senior employee he said he was always offered four hours on Sunday and then he would return for his own shift, so that his own shift was not short staffed.

Paul Lunn testified that he was called at home on Saturday evening around 7:00 and was asked to work Sunday from 10:00 p.m. until Monday at 2:00 a.m., and then to come back for his regular shift in the afternoon. Mr. Lunn declined the work.

Rob Lall said he was called while he was at home on Sunday and that he was asked if he wanted four hours of overtime. He accepted, and went to work at 10:00 p.m. Sunday. However, he said that while at work he called one of the supervisors and asked to work eight hours and not return later the next day (i.e. Monday). He could not recall which supervisor called him on Sunday, nor could he recall which supervisor he telephoned to arrange to work the eight hours. He said he was not asked to switch shifts or to work a split shift (i.e. to work four hours and return later for four more hours).

Randy Dietrich, one of the supervisors, said he had realised by the middle of the week of October 24 that they would be short staffed. Mr Dietrich testified about various staffing issues which were considered in the week before October 30, including having someone work overtime. However, no plans were put in place and on the afternoon of Saturday October 29, Mr. Habash called him at home. By that time, Mr. Habash had nearly finished inventory and had decided that there should be three workers on the shift beginning at 10:00 p.m. Sunday. Mr. Dietrich testified about conversations he then had with employees by phone that day seeking a worker to work starting at 10:00 p.m. Sunday.

I pause to note that in the Employer's opening statement I was advised that the only employee Mr. Dietrich had called was the grievor. Mr. Dietrich remained in the hearing as the Employer's advisor and, as the case progressed and he heard the testimony recounted in part above, he recalled telephoning employees other than the grievor, and testified about those conversations, as well as the one he had with the grievor.

Mr. Dietrich said he called Mr. Bayliss and got no answer. He then called Mr. Lunn. He could not recall the details of his conversation with Mr. Lunn but said it was along the lines of "Would you be interested in working the Sunday night shift?". Mr. Lunn declined. Mr. Dietrich then called the grievor and said the conversation was roughly "Would you be interested in coming in for the Sunday night shift?". Mr. Dietrich said his intention had been to find a person to work an eight hour shift, but he could not recall saying that to anyone. Mr. Dietrich did not telephone either Mr. Lall or Mr. Amaral, the two who eventually worked. Mr. Dietrich also said they should have put someone in place earlier for Sunday. Finally, Mr. Dietrich testified as to his views on various practices and about provisions in the collective agreement, but he also indicated that, within the Employer's organization, Human Resources had the responsibility for administering the Agreement.

Mike Habash testified that during the inventory on Saturday he decided there was a need for three workers on the shift starting at 10:00 p.m. Sunday. He started looking for "a third guy" and then realised there was no second person. He recalled that he spoke to Mr. Dietrich and that he spoke to Mr. Amaral but he could not recall any details.

Finally, several of the witnesses testified that shifts have been switched in the past, sometimes at the request of the Employer and sometimes at the request of the employee involved.

## III. SUBMISSIONS AND CONCLUSIONS REGARDING THE EVIDENCE

### 1. Submissions regarding the evidence

The Union asked me to find that employees were asked to work overtime on October 30, that no employees were asked to switch shifts or to work split shifts. The Employer asked me

to find that no worker was asked to work overtime.

The Employer noted various differences in the testimony of the witnesses called by the Union and asked me to draw an adverse inference from the Union's "failure to call" Mr. Amaral. The Employer noted that the grievor said he was asked to come in to load trucks, and that he had perceived it was overtime. The Employer asked me to find Mr. Lall's evidence unreliable, and likewise with Mr. Lunn's evidence. As for Mr. Bayliss, the Employer said his uncertainty as to when he spoke to the grievor, when contrasted with the recollection of what he discussed with the grievor, indicated that his evidence was contrived. Thus the Employer said the Union witnesses had not proven that overtime was being offered.

2. Conclusions regarding the evidence

Had the Employer witnesses, or anyone, testified as to facts which were contrary to the evidence of the Union witnesses, or contrary to the conclusions the Union asked me to draw, then the Employer submissions that I ought to discount various evidence might be more persuasive. However, the evidence of the Union witnesses was uncontradicted. The evidence was all consistent as to timing and content. While the word "overtime" appears not to have been used in the call to the grievor, as neither the grievor or Mr. Dietrich recalled it being used, I find that it was used in the call to Mr. Lall. Similarly the request to Mr. Lunn to work four hours and come back for his regular shift clearly appears to have been an overtime offer. I thus find that the grievor properly concluded he was being offered an overtime opportunity. I have concluded on all the evidence that the Employer offered overtime work to other workers, specifically to Lunn and Lall, and that what was offered to the grievor was overtime work.

The Employer has a discretion as to how it schedules work. It seems clear that the Employer

could have scheduled for the work on this shift to be performed without offering overtime to any worker. However, the issue before me is not whether the Employer could have organized the work without offering overtime, but rather whether the Employer did in fact organize the work in that manner. In this situation the evidence simply persuades me that the Employer intended this to be overtime work when it was offered to the grievor and he declined, in the same way as it was described as overtime work when it was offered to, and accepted by, Mr. Lall.

In my view, the fact that the Employer ultimately staffed the work without paying any overtime is not persuasive. Mr. Lall explained that it was his decision to switch to an eight hour shift. As for the arrangements with Mr. Amaral, I did not hear from Mr. Amaral. Mr. Habash, who seems to have contacted Mr. Amaral, was not able to testify as to any of the details of the arrangements. Given the evidence which had already been led by the Union, I do not find any need for the Union to have called Mr. Amaral, who had accepted some offer to work, to testify before me. I do not draw an adverse inference from this, although the Employer asked me to do so. The Employer referred me to *Levesque et al. v. Comeau et al.* (1970), 16 D.L.R. (3d) 425 (S.C.C.) and to *Re Canada Post Corp. and Canadian Union of Postal Workers (Seymour)* (1992), 25 L.A.C. (4th) 137 (Shime) on the drawing of adverse inferences from a failure to call a witness. Those cases do not, however, suggest that in a case like this there is any obligation on a party to call all possible witnesses, and do not, in my view, assist the Employer. There was no gap in the Union case and I cannot conclude that there was any reason for the Union to have to call Mr. Amaral. It was open to both the Union and the Employer to call Mr. Amaral, but neither side called him to testify.

Thus I conclude that the Employer was offering overtime to the grievor, and that the offer was for four hours. The grievor said he would have accepted the work if he had received more notice. The grievor said he had a young family and was always in need of money, and

that if he had received more notice he could have rearranged his plans for attending the planned family gathering. I had no evidence to the contrary and I note that the grievor worked fifty hours in the following week in any event, working overtime on the following Wednesday, Thursday and Saturday. I therefore accept the grievor's evidence on these points. As a result I conclude that the grievor would have accepted the work if it had been offered on Friday before he left work (his shift finished on Friday at midnight).

## IV. THE ISSUES

In light of my conclusion that the Employer offered the grievor the opportunity to work overtime, the next questions have to do with whether the way in which it was offered was in violation of the Agreement.

Many issues were canvassed in argument. The parties have not arbitrated any grievances under these Articles of their Agreement and there were many points on which the parties disagreed. While all of the issues canvassed before me are of considerable interest I am only going to address those issues which, in my view, are necessary for a resolution of this grievance. The parties specifically asked me not to deal with some of the issues which were canvassed in argument, and I have concluded that those remaining issues which are not necessary for a resolution of the grievance are best left for resolution in another grievance, or for the parties to resolve in collective bargaining. In particular, I am not dealing with the issue of whether this was a "call in" under 13.02. I have concluded that a resolution of that issue is not necessary for a resolution of this grievance.

I address three issues, as follows:

1. Does the Agreement impose on the Employer a notice requirement when seeking

volunteers for overtime - that is, does the Employer have to seek volunteers by a certain time?

2. Was this work Sunday or week day work for purpose of calculating notice?

3. What, if any, remedy is the grievor entitled to in this instance?

In this section I outline those three issues. My conclusions on those issues are in the following section.

1. Is there a requirement for notice in seeking volunteers?

Having concluded that the Employer was offering overtime work, the first question is whether there is any requirement in the Agreement for the Employer to offer the overtime work by a particular time, that is to give the employees, including the grievor, a particular amount of notice. Article 14.06 says that "Employees ... who are designated to work overtime in accordance with Article 14.05, must, whenever possible, be provided with advance notice as follows" and then specifies the amount of notice. The parties disagreed as to whom this provision applies, and in particular as to whether it applies to senior workers who are asked to volunteer for overtime.

The Union said anyone who is offered and accepts overtime under 14.05(a)(i) or (ii), as well as anyone who is "assigned" overtime under 14.05(a)(iii) is "designated ... in accordance with Article 14.05", and is thus entitled "whenever possible" to notice under 14.06. The Employer said that only those employees who are "assigned" overtime under 14.05(a)(iii) are "designated" under 14.05, and relied heavily on the use of the word "designated" in Article 14.05(a)(iii), noting that "designated" is not used in either 14.05(a)(i) or (ii).

The Union submitted that past practice indicated the notice provisions in Article 14.06

applied to both groups, and also argued that the doctrine of estoppel applied.

2. Was this Sunday or week day work?

Article 14.06 provides for differing periods of notice depending on whether it is week day or weekend work. The parties disagreed on whether this work was properly considered as Sunday work or as Monday work.

The Union submitted that by its plain meaning Sunday at 10:00 p.m. is still Sunday. Both parties relied in part on the views of witnesses. While the work was to start on Sunday at 10:00 p.m. there was some evidence that it is sometimes considered to be Monday work, and clearly the full eight hour shift includes more working hours on Monday than on Sunday. On the other hand, the witnesses seemed to refer to it most frequently as "the Sunday night shift". For example, in the portions of his testimony quoted above, Mr. Dietrich used that term when he described the content of his telephone calls to the grievor and to Mr. Lunn.

The Employer drew my attention to 14.02(c) which calls for double time for work before 10:00 p.m. Sunday. The Employer asked me to conclude that work after 10:00 p.m. Sunday would be on Monday for the purpose of the notice requirement in Article 14.06 of the Agreement.

If it was Sunday work, the argument for the Union was that under 14.06(b) "forty-eight (48) hours" notice was required - that is notice by 10:00 p.m. Friday, October 28. If, however, it was Monday work the Union said notice was still required by about the same time under 14.06(a), that is by 7:30 p.m., Friday. The Employer, however, said if it was, as the Employer submitted, Monday work, then notice only had to be given under 14.06(a) by 7:30 p.m. on Saturday, October 29 (and notice was given by then).

3. What is the appropriate remedy?

The Union sought compensation for the lost overtime opportunity. The Employer submitted that this was not an appropriate remedy as the Employer had offered work and the grievor declined, and because the grievor did not mitigate his damages.

## V. DECISION

1. Is there a requirement for notice in seeking volunteers?

The question of whether the 14.06 notice provisions apply to volunteers is fundamental. The parties suggested two approaches to the interpretation of the Article. The Union, in substance, urged me to adopt a purposive approach. The Employer, in substance, urged me to adopt a more technical approach, relying heavily on the use of "designated" elsewhere in the Article. While both approaches have merit, there are difficulties with each of them and I am not prepared to adopt one to the exclusion to the other.

Dealing first with the difficulties in using the purposive approach, there are a number of points in the Article on which the parties are in disagreement. It is thus impossible to work from any detailed shared view of the purpose of Article 14. And as I have noted, both parties asked me not to resolve some of those disagreements on matters which, if resolved, would assist in developing a clearer view of the purpose. Thus I cannot rely too heavily on the purposive approach. On the other hand, a more technical approach would suggest that the Article was drafted with care and precision and, without intending any criticism, I do not believe the Article was so carefully drafted as to give me confidence to adopt the more technical approach. Thus I do not think I can rely too heavily on the use of particular words in other sections as determining the meaning when that same word is used in Article 14.06.

I first examine Article 14.06 within the general overtime scheme to determine how it fits. In the context of the entire Article 14 it seems to me that, at a very general level, the parties' intention was to first offer overtime to employees in some order of seniority. Only if employees do not volunteer can the Employer move on to assign overtime work to the junior employees. If overtime is to be assigned, then the Employer must assign it "whenever possible" by a certain time. I believe there is an inconsistency in saying that the Employer can seek volunteers at any time prior to the work in question and at the same time accepting that the Employer has a deadline in the Agreement for assigning overtime work to junior employees. The Employer can only assign overtime work after it has already sought volunteers. Since the Employer must seek volunteers before assigning, and since assigning must be done "whenever possible" with the notice specified in 14.06, then, leaving aside for the moment the precise language used in 14.06, it seems to me that there is considerable force in the view that the parties intended that the seeking of volunteers must also be done "whenever possible" prior to the time for notice in Article 14.06.

However, is that what Article 14.06 says? If the parties had used a more neutral word than "designated", or if they had used the stronger word "assigned" rather than "designated", the interpretation of Article 14.06 would be much clearer. Volunteers are not "assigned." But can both those who volunteer and those who are assigned be said to be "designated"? As noted, the Employer submitted that only those employees who are assigned are "designated".

I have concluded that for purposes of 14.06, employees can be "designated" under 14.05 either by having been offered overtime and accepting it under 14.05(a)(i) or (ii) or by being assigned overtime under 14.06(a)(iii). There are three reasons which lead me to this conclusion, and I set them out below.

First, the word "designated" does not appear in the volunteering sections [(14.05(a) (i) and

(ii)] but it seems to me that a person who has been offered and has accepted overtime work can be said to have been designated as the worker who will do that overtime work, in the same way that when overtime is assigned to employees under 14.05(a)(iii), a particular junior employee is to be "designated" as the person to do the overtime work.

The Employer submitted that the more common use of the word designate is similar to the word "assign", as that word is used in 14.05(a)(iii). However, The Shorter Oxford English Dictionary provided to me in argument also includes definitions for designate of "point out, indicate, specify", all of which seem to me to describe what is happening as a result of the volunteering process, in the same way as it is used to indicate or specify who will do the assigned overtime work. Workers can either volunteer to do particular overtime work or they can be assigned to do particular overtime work - in both situations the process is designed to lead to an indication or specification or "designation" of who will do the needed work.

Secondly, I note that in 14.05(a)(iii) it is the work that is designated to employees, whereas the reference in 14.06 is to "employees who are designated to work overtime." Work which is designated is different from employees who are designated. Given my view of the general overtime scheme, I am not persuaded that the use of "designated" to describe employees in 14.06 was intended to limit the scope of that Article to those situations in which work is said to be "designated" to employees in 14.05(a)(iii). In addition, the reference in 14.06 is to 14.05 generally, without any express limitation to a particular part of 14.05. As a result, I conclude that the notice provisions in 14.06 are broad enough to apply both to workers who volunteer to work overtime and to workers who are assigned to work overtime.

Thirdly, apart from the more technical analysis of 14.06, given that the Employer could have provided the requisite notice under 14.06 had it been necessary to assign workers, and given that the Employer must first canvass for volunteers under 14.05, I think it more likely that

the parties intended that the Employer had a duty to conduct its canvass under 14.05 before the time by which it was obligated to provide notice to any workers assigned to do the overtime. In other words, since the canvasing must in any event precede the assigning, I think it more probable that the parties intended that the Article require the canvassing for volunteers to take place "whenever possible" at a time which precedes the time specified for giving notice to those assigned to work overtime.

On the issue of past practice, while the practice has been to give notice of overtime for the Sunday evening while at work on the Friday, in my view the evidence did not make it clear that this was due to the requirements of 14.06. It may have been simply because it was easier to ask a worker to work overtime at a time when both the worker and the supervisor were in the plant, than it was to contact that worker by phone over the weekend when neither the worker or the supervisor were at work. Thus, while the Article is ambiguous, I do not feel I can rely on the evidence of past practice as a guide to the interpretation of 14.06.

Finally, the Union submitted that the doctrine of estoppel applied, but, as with the past practice submission, in my view the evidence did not support the application of the doctrine. In particular, there was no evidence of the type of representation or the detrimental reliance which are necessary to support an estoppel.

In the result, I conclude that the Employer had to canvass for volunteers before the time at which it could have assigned overtime. The parties did not, however, agree as to when the deadline would have arisen for the Employer to have assigned overtime, and thus did not agree as to when the canvassing for volunteers would have had to have taken place. That difference turns on whether the work was Sunday or Monday work. I now turn to that issue.

2. Was this week day or Sunday work?

The work in question has to be either Sunday work or Monday (i.e. week day) work. There is no question that it was to start at 10:00 p.m. on Sunday. But was it Sunday overtime or week day overtime?

The reference in 14.02(c) to paying at double the regular rate for work on Sunday before 10:00 p.m. does not itself suggest that the next two hours are Monday hours. Instead it seems to me as much to reflect that work on Sunday from 10:00 p.m. until 12:00 midnight would attract a Sunday premium pay rate, unless of course the rate of pay is clarified. Article 14.02(c) clarifies the rate of pay but it does not seem to me to mean that 10:00 p.m. Sunday should be regarded as Monday for purposes of notice, and thus of canvassing for volunteers. A clearer provision than this would be needed in order for me to conclude that overtime at 10:00 p.m. Sunday is other than Sunday overtime.

I conclude that the work in question here, which was to start on Sunday at 10:00 p.m., was Sunday work for the purposes of the provisions in 14.06. In my experience, shifts are usually described by when they start and this shift started on Sunday. There is nothing in the Agreement to persuade me that this shift which started on Sunday should be regarded as Monday for the purpose of notice. It follows that notice had to be given "whenever possible" forty-eight hours in advance, that is by 10:00 p.m. on Friday October 28.

The Employer could have canvassed for at least one worker on Friday and the grievor was, as noted, senior to both those who worked. In light of my conclusion above as to the requirement for notice and this conclusion that it was Sunday work, it follows that the grievor should have been offered the overtime opportunity by 10:00 p.m. on Friday, October 28. He was not offered the work by that time.

3. What is the appropriate remedy?

The next question is whether the grievor is entitled to any remedy. The overtime provisions are such that the senior worker has a right to overtime (and I leave aside any question as to senior to whom). It is not an Agreement which calls for equalisation or for rotation of overtime work. It thus would seem that the grievor should be compensated for the overtime hours and overtime income which he missed. The common practice of the Employer seems to have been to have a worker come in for four hours on the Sunday shift; that was what both Mr. Lunn and Mr. Lall testified they were asked to do; and four hours is what I earlier concluded was offered to the grievor. Thus the grievor would ordinarily be entitled to be compensated for four hours of overtime. The grievor worked forty (40) hours in the previous week and fifty (50) hours in the week which began on October 30. Thus if the grievor had worked an additional four (4) hours starting at 10:00 p.m. on Sunday, he would have qualified for the overtime pay rate under 14.02(a) regardless of in which week, for pay purposes, the work took place.

The Employer, however, submitted that this normal remedy ought not apply. First the Employer said it was seeking volunteers and the grievor declined. As the grievor declined, the Employer said he should get no remedy. I accept that the Employer was seeking volunteers, as is the requirement in the Agreement, but it did so at a time that I have concluded was in violation of that Agreement. I do not find anything in this submission which would alter the usual remedy. The fact that the Employer sought volunteers, as it is obligated to do, does not affect the conclusion that it was in violation of the provisions as to when it should seek those volunteers, and the fact that the grievor declined the offer which had been made outside the time prescribed in the Agreement, does not in my view disentitle the grievor to a remedy.

The Employer also submitted that the grievor had a duty to mitigate and, as part of the duty to mitigate here, had to work the overtime hours offered, hours which I have concluded were offered in violation of the notice provisions of the Agreement. As for the duty to mitigate, if every employee who was asked to work overtime outside the time specified in the Agreement had to work those hours as a condition of obtaining a remedy, there would be very little in the way of a remedy left to be obtained, and very little to encourage the Employer to abide by the terms of the Agreement. I do not think the duty requires every employee to accept all work in order to properly mitigate. Instead, I believe the extent of the activity required to meet the duty to mitigate depends on the particular fact situation. The grievor testified in some detail as to the family gathering he was committed to attend on the Sunday evening in question, that he felt he could not cancel so close to the event, but that if he had more notice he would have arranged to work. In this situation, I do not find any failure on the part of the grievor to mitigate, and thus there is no reason why he should not receive the normal remedy.

## VI. SUMMARY

To summarize my conclusions, I find:

1. The Employer offered overtime work to the grievor on Saturday October 29, 1995, with the work to begin at 10:00 p.m. on Sunday October 30, 1995.
2. When canvassing for volunteers, there is a duty under the Agreement for the Employer to do the canvassing, "whenever possible", by a particular time depending on the nature of the overtime.
3. The overtime in question here was Sunday overtime, and thus the canvassing could have and should have been done by 10:00 p.m. Friday, and it was not.
4. If the grievor had been offered the overtime by 10:00 p.m. Friday, he would have accepted the offer, and would have worked four (4) hours overtime.

5. There is nothing which would disentitle the grievor to the normal remedy of compensation for the overtime hours he missed due to the Employer's breach of the Agreement.

Thus, I order the Employer to compensate the grievor for the lost overtime opportunity on October 30, 1995, an opportunity which I find was four hours of overtime work. I will remain seised to deal with any difficulties which may arise in the implementation of this award.

Dated in London, Ontario, this _____ day of June, 1995.

_____

Howard Snow, Arbitrator