IN THE MATTER OF AN ARBITRATION

BETWEEN

KITCHENER-WATERLOO HOSPITAL
- the Employer

and

LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220
- the Union

AND IN THE MATTER of a group grievance and a policy grievance regarding paid holidays

Arbitration Board:

Howard Snow	- Chair
Terry Hallman	- Employer Nominee
Robert Stewart	- Union Nominee

Appearances:

On behalf of the Employer:

Simon E. C. Mortimer and others	- Counsel

On behalf of the Union:

John L. Stout	- Counsel
Mary Kay Whitney	- Union Representative
Steven Cassel	- Union Steward
Charles Bronson	- Union Member

Hearing held in Kitchener, Ontario on September 12, 1995.

AWARD

I. INTRODUCTION

December 25, 1994 and January 1, 1995 were Sundays. The collective agreement between the Kitchener-Waterloo Hospital (the Employer) and the London and District Service Workers' Union, Local 220 (the Union) provided that Christmas Day and New Year's Day were paid holidays. In August, 1994 the Employer published a notice that the holidays would be recognized on the actual day, for those employees scheduled to work on December 25 and January 1. However, for those employees working a Monday to Friday schedule, Christmas Day was to be recognized on Tuesday, December 27, 1994 and New Year's Day was to be recognized on Friday, December 30, 1994.

Employees who worked on December 25 or January 1 received a regular day's pay for their holiday pay, plus time and a half for the hours worked (or double time and a half in total). Those employees for whom the holidays were recognized on December 27 and 30, and who worked on either or both of December 27 and 30, 1994 received a regular day's pay for their holiday pay, plus their regular rate of pay for the hours worked (or double time in total). Those employees who worked on neither the designated holiday nor the alternative day recognized in the notice received a regular day's pay as holiday pay.

In these two grievances the Union grieved that its members who worked on either or both of the two days on which the holidays were recognized (i.e. December 27 and December 30), but who did not work on December 25 or January 1 should receive the premium pay for the hours they worked on December 27 and/or December 30. In other words, the Union said its members were entitled to be paid at the rate of double time and a half, as opposed to the double time rate, on December 27 and 30, 1994.

II. THE EVIDENCE

We heard evidence from three witnesses and were provided with various documents. Although there appeared to be factual disputes at the start of the hearing, by the end of the hearing only one issue remained in dispute. In this section we set out the situation which prompted these grievances, and our conclusion on the one factual issue in dispute.

The Employer runs a large hospital in Kitchener-Waterloo. It operates 24 hours a day, every day of the year. There are multiple bargaining units, represented by differing unions and there are other employees who are not unionized. The total staff complement is approximately 2,000.

On August 29, 1994 the Employer newsletter "FYI" carried the following notice:

> STATUTORY HOLIDAY LIEU DAYS FOR:
> CHRISTMAS DAY AND NEW YEARS DAY
>
> Again this year, Christmas Day and New Year's Day fall on weekends. Therefore employees working a Monday to Friday schedule, **Christmas Day** will be recognized on **Tuesday December 27, 1994**, and **New Years Day** will be recognized on **Friday December 30, 1994.**
>
> For employees scheduled to work on **December 25, 1994 and/or January 1, 1995**, the holiday will be recognized on the actual day for the purposes of eligibility for statutory holiday and premium pay.
>
> Reference: Brendan Soye
> Manager, Employee Relations, ext. 3264

FYI was distributed to all departments and was posted on various notice boards throughout the Hospital. The notice was directed to all employees, not simply to those employees covered by this collective agreement.

Many of the members of the Union work a Monday to Friday schedule. Charles Bronson,

an electrician in the Building Services Department and a member of the Union, testified that he ordinarily worked Monday to Friday and that he did not work on either December 25, 1994 or January 1, 1995. However, he did work on December 30, 1994, the day on which New Year's Day was to be "recognized" for employees such as Mr. Bronson.

Employees in Mr. Bronson's Department completed time cards. The information on these time cards was then transferred to "payroll time sheets", sheets which were prepared by the Payroll Department and distributed to the various departments in the Hospital. A secretary in the Building Services Department transferred the information from Mr. Bronson's and other employees' time cards to the payroll time sheets. The information was then verified by the Department Manager who signed the payroll time sheets before they were returned to the Payroll Department.

Mr. Bronson testified that he expected to be paid, or compensated, for the holiday at regular rates plus time and a half for the hours he worked on December 30. He asked to be paid at his regular rate and to "bank" the hours worked with the intention that he would take the time off later. When he received his pay for December 30 he noticed that he had been paid at straight time for the hours worked rather than the expected time and a half. He raised the issue with his Union.

In early 1995 Steven Cassel was the co-chairperson of the Union Committee. Mr. Bronson advised Mr. Cassel that he did not receive the expected premium pay for his work on December 30, 1994. Mr. Cassel filed both a policy grievance and a group grievance over the issue of the pay for the two holidays and Mr. Cassel signed both grievances himself.

During his testimony, Mr. Cassel reviewed various payroll time sheets. He understood the sheets had come from the Building Services Department office and that the sheets indicated

the information which had been sent by the Department Head, Building Services Department, to the Payroll Department. The Building Services Department Head had forwarded several payroll time sheets with the request that union members receive premium pay (i.e. time and a half) for the hours worked on a day other than the actual holiday, in addition to their regular holiday pay.

Both Mr. Bronson and Mr. Cassel were uncertain whether they had ever received premium pay (time and a half) for their work on a day other than the named holiday. Mr. Cassel thought he had been paid a premium rate a few years ago but he was not positive. Mr. Bronson said he could not recall if he had or had not received premium pay on a day other than the named holiday.

Sheena Curwood, the Manager of Payroll Services, and an employee in the Payroll Department since 1981, also testified. She testified that her Department received the payroll time sheets from other departments and that the staff in Payroll took the information from those sheets and keyed it into the computer. When the staff in the Payroll Department noticed incorrect entries on the payroll time sheets they contacted the department concerned and advised of the error(s). The Payroll Department staff then corrected the information so that the proper information was entered in the computer system, information which was used to generate the pay cheques. In particular, Ms Curwood said that if her staff members had noticed a claim for premium statutory holiday pay on either December 27 or 30, 1994, the claim would have been changed (after the Department concerned was notified).

Ms Curwood testified that the Employer paid premium rates only on the designated holiday. As far as she knew, no Hospital employee had ever received a premium rate for work on a day other than the designated holiday. She reviewed copies of various payroll time sheets. These copies had been made after the Payroll Department had reviewed the sheets and had

entered the information in the computer system for the preparation of the employees' pay. In particular, she identified and reviewed the Payroll Department's copies of several of those payroll time sheets which Mr. Cassel had earlier reviewed in his testimony. On the copies reviewed by Ms Curwood, the claim for premium pay on a day other than the named holiday which had been forwarded from the Building Services Department had been changed. The claim for premium pay no longer appeared on those time sheets after they had been dealt with by the Payroll Department.

Ms Curwood agreed that sometimes other Department Heads have been confused as to payment for holidays and that employees in her Department have made changes to a number of payroll time sheets. She also agreed that it was possible that one or more employees had been paid a premium for a day other than a named holiday - with some 2,000 employees at the Hospital one or more such payments may have slipped through without being noticed.

The one factual issue in dispute was whether the Employer had paid premium pay on a day other than the named holidays. We conclude that the Employer has been consistent in its policy not to pay a premium rate for a day other than the named holiday. We further conclude that the Employer may have missed one or more instances and actually paid an employee a premium rate for a day other than the named holiday. However, no such instances were proven.

III. THE COLLECTIVE AGREEMENT AND STATUTORY PROVISIONS

The Article of the Collective Agreement on paid holidays reads as follows:

ARTICLE 18 - PAID HOLIDAYS

18:01 An employee who qualifies under Article 18:05 hereunder shall receive the following paid holidays:

New Year's Day	Civic Holiday
2nd Monday in February	Labour Day

Good Friday	Thanksgiving Day
Easter Monday	Christmas Day
Victoria Day	Boxing Day
Canada Day	

In addition, an employee will be granted a floating holiday to be taken at a mutually agreeable time within one (1) year following the employee's anniversary date of employment in each year.

Should the Hospital be required to observe additional paid holidays as a result of legislation, it is understood that one of the existing holidays recognized by the Hospital shall be established as the legislated holiday after discussion with the Union, so that the Hospital's obligation to provide for twelve (12) paid holidays remains unchanged.

18:02 An employee who qualifies under Article 18:05, and is required to work on any of the above named holidays will, at the option of the Hospital, which shall take into account in its decision the request of the employees, receive either:

(a) pay for all hours worked on such day at the rate of one and one half (1 1/2) times his regular straight time rate of pay in addition to his regular straight time rate of pay, or

(b) pay at the rate of time and one-half the employee's regular straight time rate of pay for work performed on such holiday and a lieu day off at regular straight time rate of pay within fifty (50) days following the holiday. Such lieu day will be selected by the employee and the Department Head by mutual agreement. Failing such mutual agreement, the lieu day will be scheduled by the Department Head.

18:03 If a paid holiday falls during an employee's regular day off, another day off shall be selected by the employee and the Department Head by mutual agreement, providing the employee qualifies for the holiday pay. Failing such mutual agreement, the lieu day will be scheduled by the Department Head.

18:04 If one of the paid holidays occurs during an employee's vacation, the employee will receive an additional day's pay in lieu thereof, or will receive an additional day off which may be added to his vacation or taken as a vacation day at a time mutually agreed to between the employee and Department Head. Failing such agreement, the holiday will be scheduled by the Department head.

18:05 In order to qualify for pay for a holiday, an employee shall complete her full scheduled shift on each of the working days immediately preceding and following the holiday concerned unless excused by the Hospital or the employee was absent due to:

(a) legitimate illness or accident which commenced within thirty (30) calendar days of the date of the holiday;

(b) layoff for a period not exceeding five (5) calendar days, inclusive of the holiday;

(c) a leave of absence for a period not exceeding five (5) calendar days , inclusive of the holiday;

(d) vacation granted by the Hospital;

(e) an employee's regular scheduled day off.

18:06 An employee who is scheduled to work on a paid holiday and who fails to do so shall lose his entitlement to holiday pay unless the employee provides a reason for such absence which is reasonable.

18:07 Holiday pay is defined as the amount of regular straight time hourly pay (seven and one half - 7 1/2 - hours) exclusive of shift premium which an employee would have received had he worked a normal shift on the holiday in question.

The following are the relevant provisions of the *Employment Standards Act*, R.S.O. 1990, c. E. 14, as amended:

1. **Definitions.** - In this Act,

...

"employment standard" means a requirement imposed upon an employer in favour of an employee by this Act or the regulations;

...

"premium rate" means the rate of pay to which an employee is entitled for each hour of employment on a public holiday, or a day that is deemed to be a public holiday, and "premium pay" has a corresponding meaning;

...

"public holiday" means New Year's Day, ...Christmas Day...

3. **Waiver, etc., to be null and void. -** Subject to section 4, no employer, employee, employers' organization or employees' organization shall contract out of or waive an employment standard, and any such contracting out or waiver is null and void.

4(1) **Employment standard deemed minimum -** An employment standard shall be deemed a minimum requirement only.

(2) **Greater benefit to prevail -** A right, benefit, term or condition of employment under a contract, oral or written, express or implied, or under any other Act or any schedule, order or regulation made thereunder that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment

standard shall prevail over an employment standard.

5(1) **Provisions of collective agreements. -** Where terms or conditions of employment in a collective agreement as defined in the *Labour Relations Act* confer a higher remuneration in money or a greater right or benefit for an employee respecting holidays than the provisions of Part VII, the terms or conditions of employment shall prevail.

...

PART VII

PUBLIC HOLIDAYS

25(1) **Application-** This section does not apply to an employee who,

(a) is employed for less than three months;

(b) has not earned wages on at least twelve days during the four work weeks immediately preceding a public holiday;

(c) fails to work his or her scheduled regular day of work preceding or his or her scheduled regular day of work following a public holiday;

(d) has agreed to work on a public holiday and who, without reasonable cause, fails to report for and perform the work; or

(e) is employed under an arrangement whereby the employee may elect to work or not when requested to do so.

(2) **Holiday with pay -** Subject to subsections (3), (4) and (5), an employer shall give to an employee a holiday on and pay to the employee his or her regular wages for each public holiday.

...

(4) **Holiday that is a non-working day -** Where a public holiday falls upon a non-working day for an employee or in the employee's vacation, an employer shall,

(a) with the agreement of the employee or the employee's agent pay the employee his or her regular wages for the public holiday; or

(b) designate a working day that is not later than the next annual vacation of the employee and the day so designated shall be deemed to be the public holiday.

...

26(1) **Premium rate for holiday -** Subject to subsection 25(5), [*not relevant here*] where an employee works on a public holiday, the employer shall pay to the employee for each hour worked a premium rate of not less than one and one-half times the employee's regular rate and, where the employee is entitled to the holiday with pay, his or her regular wages in addition thereto.

IV. POSITION OF THE PARTIES

We outline here the submissions of the parties.

1. The Union Submissions

The Union submitted that the Employer had, in its announcement in FYI, designated December 27 and December 30 as the days on which some employees would recognize the Christmas Day and New Year's Day holidays. The meaning of Christmas Day and New Year's Day were not clear and, for those employees not scheduled to work on December 25 and January 1, the days were clarified by the Employer's announcement.

If any affected employee had been scheduled to work on either of December 27 or 30, 1994 and failed to work he or she would have lost the entitlement to holiday pay under 18:06 of the Agreement. The Union therefore argued that the Agreement should be interpreted consistently by providing for premium pay on those days where failure to work after having been scheduled would have resulted in the loss of holiday pay.

Alternatively, we were asked to read the Agreement so that it would be consistent with the *Employment Standards Act* which required payment in a situation such as this. The Union noted Section 25(4) of the *Employment Standards Act* which addresses the issue of an employer designating another day as a holiday where the holiday falls on a non-working day or during an employee's vacation. This Employer had designated another day as the holiday. Under the *Act,* "premium rate" is applicable both to holidays and to days which are deemed to be public holidays. December 27 and 30 were deemed by the Employer to be public holidays for those employees who were not scheduled to work on December 25 or January 1, and should, therefore, have attracted the premium rate.

At least some of the employees who worked on December 27 or 30 had expected to receive premium pay and some department heads were confused about the issue of premium pay and had authorised premium pay in a situation like this.

In addition, the Union submitted that, to the extent that the collective agreement provided for less than the *Act*, we should enforce the provisions of the *Act.* The employment standards are minimum provisions and if the employment standards are more advantageous to employees than the collective agreement, then we should interpret and apply the *Employment Standards Act*, pursuant to our powers under Section 45(8)3 of the *Labour Relations Act*.

The Union relied on the following decisions: *Victorian Order of Nurses Windsor-Essex County Branch and Canadian Union of Public Employees, Local 3626*, (February 21, 1995), unreported (Samuels); *Re Ottawa West End Villa Ltd. and Ontario Nurses' Association* (1980), 25 L.A.C. (2d) 65 (Haladner); *Re Metropolitan Toronto Reference Library Board and Canadian Union of Public Employees, Local 1582*, (1995), 46 L.A.C. (4th) 155 (Burkett); and *Re 442952 Ontario Inc. (Bourget Nursing Home Division) and United Steelworkers of America*, (1993), 35 L.A.C. (4th) 345 (Bendel).

2. The Employer Submissions

The Employer submitted that its principal obligation under the collective agreement was to provide twelve (12) paid holidays. The employees received twelve paid holidays. However, premium pay for work was a separate matter and under Article 18:02 of the Agreement premium pay was only paid to those who worked on a named holiday. Neither December 27 or 30, 1994 were named holidays.

As for the announcement in FYI, the Employer submitted it did not deem any other day as either Christmas Day or New Year's Day. In particular, the announcement noted that both days fell on weekends, and it mentioned premium pay only in relation to the actual Christmas Day and New Year's Day. In addition the notice began "Again this year" which suggested the Employer was continuing the approach it had followed in other years. That approach has

been consistent.

With respect to the *Employment Standards Act*, the Employer noted Section 5 and submitted that Section 5(1) required that the provisions regarding holidays both in the *Act* and the collective agreement must be evaluated as a whole and that if, as a whole, the provisions in the Agreement were better than those in the *Act*, that ends the matter. The provisions in the Agreement on holidays were better than those in the *Act.* In particular, the Agreement provided for 12 paid holidays and the *Act* for only 8 paid holidays.

The Employer raised the issue of estoppel and said that if we found in favour of the Union on the interpretation of the Agreement, then the Union should be estopped from any remedy other than a declaration. The Employer submitted its practice has been consistent since at least 1981, that the Union had acquiesced in that practice, and that it would be unfair to allow the Union to assert another position now.

Finally the Employer asked us to note that the group grievance was not signed by all the employees affected as was required in Article 16:06. As the Union had also filed a policy grievance, the Employer acknowledged that, in this instance, what it felt to be a violation of the collective agreement would have no effect on the outcome.

The Employer relied on the following authorities: *The Corporation of the City of Peterborough and the Board of Park Management of the City of Peterborough and The Canadian Union of Public Employees and its Local 504, The Civic Employees Union* (December 1, 1989), unreported (Finley) and an extract from the *Employment Standards Handbook*, second edition, Robert M. Parry, published by Canada Law Book (section 2:6050).

V. CONCLUSIONS

We have concluded that the resolution of these grievances requires us to address and resolve five main questions.

1. Considering only the provisions of the Agreement, were December 27 and December 30, 1994 paid holidays, or deemed by the Employer to be paid holidays, so as require the payment of premium pay?
2. If not, then considering only the *Employment Standards Act* were those days paid holidays, or deemed to be paid holidays, so as to attract premium pay?
3. Can we as an arbitration board apply the provisions of the *Employment Standards Act*?
4. If we have the power to apply the *Employment Standards Act*, what is the effect of Section 5(1) in this instance?
5. Should our interpretation of the Agreement, under point #1 above, be revised in light of our interpretation of the *Act?*

We address each question in turn.

1. The notice in FYI indicated that for some employees the two holidays would be "recognized" on December 27 and 30. It is not clear what was intended by recognizing the holidays on those two days. There was no mention of premium pay in relation to December 27 and 30, unlike the reference to premium pay for those scheduled to work on December 25 or January 1. The notice was designed to be of general application and was not simply directed toward the members of the Union. It is perhaps not surprising, therefore, that it is difficult to fit the announcement within the provisions of the collective agreement. It would appear at first glance to be an attempt on the Employer's part to schedule another day off for those employees who would not ordinarily be at work on those two holidays. However under Article 18:03 of this Agreement alternate days off, or lieu days, are to be scheduled by

mutual agreement of the employee and the Department Head or, failing mutual agreement, scheduled by the Department Head. At the very least, the intent of the FYI announcement seems to have been to indicate the normal pay day to which the holiday pay would be attributed, so that the employees would receive a regular week's pay in each week of the holiday period.

Whatever the intent with respect to members of the Union, we find that the FYI announcement did not by itself have the effect of converting December 27 and 30 into paid holidays that would attract the premium payment specified in Article 18:02. The announcement noted that for those scheduled to work on December 25 and/or January 1 the holiday would be recognized as the actual day for the purpose of statutory holiday and premium pay. There was no mention of premium pay in relation to December 27 or 30.

The reference to "Again this year" in the announcement suggests that this situation had arisen previously. The Employer had adopted an approach for dealing with the situation. That approach, as we noted above, has been clear and uniform.

Similarly, there is nothing in the collective agreement which suggests that employees will receive the premium pay for any day other than the "named holidays". There is a provision in Article 18.03 for an alternate day off, or a lieu day, but nothing is said about premium pay if an employee works on that alternate day off. Premium pay for the actual named holidays is, however, clearly indicated in Article 18:02.

Our interpretation of the Agreement and of the FYI notice leads us to the conclusion that December 27 and 30 were not named or paid holidays. We further conclude that under the Agreement there was no entitlement to receive, or obligation to pay, holiday premium pay for any work performed on either December 27 or 30, 1995. The entitlement to a lieu day

is clearly expressed; the entitlement to premium pay on the named holidays is clearly expressed; what is missing is any requirement to pay premium rates on a lieu day.

We thus conclude that under the provisions of the Agreement the Employer was not obligated to pay premium pay on December 27 or 30, 1994.

2. The Union argued, in the alternative, that the *Employment Standards Act* provided for premium payment in a situation such as this. We have thus reviewed the *Employment Standards Act* to determine if it supports the Union position. Section 25(4) of the *Act* deals with holidays on a non-working day. Under Section 25(4), an employer is to pay regular wages or to designate another day as the holiday when a holiday falls on a non-working day. If the employer designates another working day, that other day is deemed to be a public holiday. Under the definition of "premium rate" in Section 1 the "deemed" day attracts a premium rate, and under Section 26(1) the premium rate is set at not less than time and a half plus regular wages. Thus, if we were to apply the *Act* as the Union suggested, what has taken place here has been the designation by the Employer of another day which would thus be a deemed public holiday and attract the premium rate.

We agree with the Union's interpretation of the *Act*. If the *Act* regulated the situation before us, then the Employer would be required to pay a premium rate for December 27 and 30, 1994.

3. We were appointed to resolve a dispute under the Agreement. The Agreement leads us to one result, the *Act* to another. We must thus deal with the question of the direct application or enforcement of the *Act*. There are two main issues which arise regarding a possible application of the provisions of the *Employment Standards Act*. First, can we apply the *Act*? The issue is addressed in this section. Secondly, if we can apply the *Act*, what is

the effect of Section 5(1) in this situation? This latter issue is addressed at point #4 below.

Section 45(8) of the *Labour Relations Act* gives an arbitration board the following power:

> 3. To interpret and apply the requirements of human rights legislation and other employment related statutes, despite any conflict between those requirements and the terms of the collective agreement.

The *Employment Standards Act* is clearly employment related legislation. Whatever may have been the situation before the introduction of the above amendment to the *Labour Relations Act* (and the authorities were not, in our view, unanimous on this issue), since the above amendment arbitrators have interpreted and applied other employment related statutes. For example, in the *Metropolitan Toronto Reference Library Board* case, *supra,* the Board concluded that an "arbitrator can now order and enforce compliance with [an external] statute" and "act in the place of the body charged with its administration" (at page 167). The Board in that case applied the *Human Rights Act*. Another case in which an arbitrator applied and enforced other legislation is the *442952 Ontario Inc.* case, *supra.* In that case the Board concluded that "an arbitrator ... can now order an employer to comply with the provisions of the *Employment Standards Act",* (at page 352) and ordered compliance with Section 28.

We conclude that we have the authority to "interpret and apply" the public holiday provisions of the *Employment Standards Act* in this arbitration.

4. Accepting that we have the authority to apply the *Employment Standards Act*, what is the effect of Section 5(1) of that *Act?* The Employer submitted that Section 5(1) acts as a defence to the Union claim. We set out that Section again for convenience:

> 5(1) **Provisions of collective agreements. -** Where terms or conditions of employment in a collective agreement as defined in the *Labour Relations Act* confer a higher remuneration in money or a greater right or benefit for an employee respecting holidays than the provisions of Part VII, the terms or conditions of employment shall prevail.

We have concluded that the legislative intent of this provision is to allow parties to a collective agreement some measure of flexibility in the area of public, or paid, holidays. In our view, the proper approach in applying Section 5(1) is to compare the *package* of remuneration and rights or benefits under the statutory provisions in Part VII with the *package* of remuneration and rights or benefits conferred in the collective agreement on paid holidays. When the *packages* are compared as a whole, then if the provisions of the collective agreement "...confer a higher remuneration in money or a greater right or benefit for an employee respecting holidays than the provisions of Part VII, the terms or conditions of employment [in the collective agreement] shall prevail."

The Union suggested a different approach which would allow for a comparison of the individual parts of the two packages, that is a weighing of the various components individually. We do not think it was the legislative intent of Section 5(1) that Unions, or unionized employees, be able to pick and choose parts of each so as achieve the best possible package for paid holidays. Instead we think the intent was for unions and employers to have the option of putting together a package of obligations and benefits with respect to public or paid holidays, and if the package in the collective agreement is better than that provided in Part VII of the *Employment Standards Act*, then the terms and conditions of the collective agreement "shall prevail". If the package in the Agreement is not better, then the provisions of the *Act* will apply. If the Legislature had intended simply that each of the individual provisions of the *Act* on public holidays were to be minimum standards, that objective would already be accomplished by Section 4(1) and 4(2) of the *Act*, and Section 5(1) would have no additional meaning. Thus, in our view, it is necessary to compare the two holiday *packages* in their entirety.

The extract from Parry's *Employment Standards Handbook, supra* suggests that the interpretation we have given to Section 5(1) is the proper interpretation of this Section.

Some of the authorities cited by Parry make the point more clearly. For example, in *Ontario Nurses Association v. Queen Elizabeth Hospital and Framingham,* (1991) 4 O. R. (3d) 134, the Divisional Court reviewed the decision of an employment standards officer, in a situation in which the Court concluded that the standard of review was one of correctness. The officer had also been engaged in the task of applying Section 5(1). After the officer had referred to certain differences between the collective agreement and the *Act,* the Court quoted from his decision as follows:

> There are a good number of awards directing that the *entire package* must be viewed to determine a "better benefit", and that the components must not be weighed individually... (page 136, emphasis in the original, citations omitted)

The Court noted that up to this point no objection had been taken to the officer's approach.

The Court later endorsed the approach we have adopted here in the following language in which it referred first to the differences between the two sets of provisions:

> It may be possible to make the required comparative analysis on a straight comparison of the 11 holidays under the agreement, unencumbered by the s. 26(1) restrictions and given with some advance pay, and with extra pay for holidays worked; as against the seven holidays in the *Employment Standards Act* with the s. 26(1) restrictions and no advance pay provision, without getting into a dollar by dollar comparison of the packages. That was a matter for the officer to decide. But he did not complete the comparison which he began. (page 138)

Do the provisions of this collective agreement confer greater remuneration or rights than the *Act*? We note firstly that the Agreement provides for twelve paid days as compared to the *Act's* provision for only eight days. In addition, under the Agreement when a holiday falls on a non-working day the alternate day is scheduled by mutual agreement, as opposed to the *Act's* provision that the Employer schedule the day. There are also differences between the two as to who qualifies for holiday pay and on that issue the provisions of the Agreement are at least as advantageous to employees as are the provisions of the *Act*.

The one area where the Agreement provides less for employees than does the *Act* is in the area which is at issue here, that is the provision for premium pay for alternate, or lieu, days.

We noted above that many employees work Monday to Friday. Most of the holidays fall on Mondays and thus for most holidays the issue of lieu days does not arise. Even when the issue of lieu days does arise, we assume that the employee and Department Head will schedule the lieu day on a day when the employee is not needed at work, so that the question of premium pay for work on lieu days will arise in only a limited number of instances.

Thus considering the extra four days of holidays provided in the Agreement and the other differences, the Agreement provides a better overall *package* than does the *Act* on the issue of holidays. We conclude that the benefits of the *package* in the Agreement are superior to those in the *Act*.

In summary, applying the language of Section 5(1) of the *Employment Standards Act,* when we compare the entire provisions in the Agreement with the entire Part VII of the *Act* (only portions of which have been reproduced above), we conclude that the terms and conditions of employment in this collective agreement provide a higher remuneration and a greater right or benefit than does the *Act*. Thus we conclude that the provisions of the Agreement with respect to paid or public holidays prevail over those in the *Act*.

5. The Union asked us to use the *Act* as an aid in the interpretation of the Agreement, and to interpret the latter so that the two are consistent on the issue of payment of premium pay on alternate or lieu days. We have left this issue to be addressed last as we thought it necessary to first fully interpret the provisions of the *Act* and consider the question of the *Act's* direct application, before considering whether those provisions in the *Act* might lead us to a different interpretation of the Agreement than we would otherwise have reached.

In our view the Agreement is not ambiguous on the relevant point of premium pay for alternate or lieu days. While there may be a presumption that parties in collective bargaining

intend to negotiate an Agreement that is consistent with the prevailing statute law, we do not think such a presumption can be used here. There are two reasons for that view. First, given our interpretation of Section 5(1) of the *Act*, there is no conflict between the Agreement and the *Act.* The two provide for different benefits with respect to pay on lieu days but that is contemplated by and authorised by the *Act*, which indicates that when there are differences the collective agreement prevails if it confers a higher remuneration or a greater right or benefit. Secondly, while this presumption may be of use in instances where the Agreement is ambiguous, we do not think it can be used to overcome the clear meaning of the Agreement. As a result, there is no reason for us alter the interpretation of the Agreement given in point #1 above.

In summary we conclude that:

1. The Agreement does not require premium pay in this situation.
2. The *Employment Standards Act* would require premium pay in this situation.
3. We can enforce the *Employment Standards Act.*
4. Section 5(1) of that *Act* permits parties to a collective agreement to negotiate alternative arrangements for paid holidays and if the benefits in the Agreement are better than those in the *Act*, they shall prevail. The benefits in this Agreement are better than in the *Act* and thus prevail.
5. There is no reason to interpret the Agreement so that the *Act* and the Agreement provide for the same payment for work done on alternate or lieu days.

It follows from our conclusions above that the Employer had no obligation under the Agreement to pay a premium rate for work on either December 27 or 30, 1994. Similarly, the Employer had no obligation under the *Act* to make such a payment to those employees covered by this Agreement.

For the reasons given above, the grievances are dismissed.

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

_____

Howard Snow, Chair

I concur / I dissent _____

Terry Hallman, Employer Nominee

I concur / I dissent _____

Robert Stewart, Union Nominee