IN THE MATTER OF AN ARBITRATION

BETWEEN

KNOLLCREST LODGE
- the Employer

and

HEALTH, OFFICE & PROFESSIONAL EMPLOYEES, A DIVISION OF LOCAL 175, UNITED FOOD AND COMMERCIAL WORKERS
- the Union

AND IN THE MATTER of individual grievances of Ada Schmidt, Terry Lynn Gropp, and Sharron MacFarlane, and of a Union policy grievance, all regarding shift schedules

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Malcolm Winter	- Director, Employee & Client Relations, Diversicare; Spokesperson
Susan Rae	- Administrator and Environmental Services Manager
Ruth Ann Woods	- Director of Nursing

On behalf of the Union:

John L. Stout	- Counsel
Larry Bain	- Union Representative
Sharron MacFarlane	- Grievor
Rochelle Ryter	- Steward
Connie Cassel	- Steward
Betty Jones	- Steward

Hearing held in Stratford, Ontario on September 27, 1995.

AWARD

I. INTRODUCTION

These four grievances involve the same issue - to what extent can Knollcrest Lodge (the Employer) schedule employees for shifts of less than eight hours? The principal provision in the collective agreement addressing this issue states "The regular work shift shall be eight (8) hours per day." (Article 19.02) The Agreement includes several other related provisions and the parties submitted that these other provisions helped to clarify the meaning of Article 19.02. The Employer and the Health, Office & Professional Employees, a Division of Local 175, United Food and Commercial Workers (the Union) disagreed on the meaning of Article 19.02 and the other related provisions.

The Union sought a declaration that the shorter shifts recently introduced by the Employer were in violation of the Agreement and also sought a direction that the Employer schedule and staff in accordance with the Agreement. In essence, the Union sought a return to the practice of staffing through eight hour shifts.

II. THE EVIDENCE

The resolution of this dispute requires primarily an interpretation of the parties' collective agreement, a task which is largely independent of the evidence. The evidence provided the context in which the dispute arose and in which I was asked to interpret the provisions of the Agreement.

Susan Rae, currently the Administrator and Environmental Services Manager and an employee at the Lodge since 1989, testified. Knollcrest Lodge is a not-for-profit home for the aged in Milverton. It provides long term care for a maximum of seventy seven (77) residents. Its funding comes largely from the provincial Ministry of Health, with some

additional funding received from residents.

Ms Rae testified that the Employer had a year end deficit of some $390,000. for the 1994 fiscal year and an accumulated deficit of about $500,000. In an effort to address its financial situation, the Employer made several changes in the manner in which it operated. Among these changes, the Employer reduced the number of management staff positions and laid off some of the employees represented by the Union. In addition, the Employer reduced the number of scheduled work hours for some of those employees who remained. In particular, the Employer reduced the number of eight (8) hour shifts and increased the number of shorter shifts such as four (4) hour shifts.

Ms Rae provided general information on the scheduling of staff from 1988 through to the time of the hearing. In 1988, the Dietary Department staff worked four (4) eight hour shifts per day and three (3) four hour shifts per day. In a restructuring done in 1989 one (1) of the four hour shifts was eliminated. Following the 1995 changes, there were three (3) eight hour shifts and one (1) six hour shift per day. In Housekeeping, the 1988 staffing had three (3) eight hour shifts per day plus an occasional four hour shift either for additional cleaning or due to a call-in (see Article 19.16, *infra*). After the 1995 changes, in Housekeeping there were two employees working a total of ten (10) eight hour shifts per week, and occasionally there was an additional four hour shift. In Maintenance, there was one (1) eight hour shift per day in 1988, and in 1995 this was changed to one part-time employee working three (3) eight hour shifts per week. In the Laundry Department there had been one (1) eight hour shift and one (1) four hour shift per week. There has been no change in the Laundry Department. In Nursing, Ms Rae indicated there had been some "short" shifts for several years and mentioned short shifts for student nurses. Following the 1995 changes there were ten (10) eight hour shifts, four (4) four hour shifts, and one (1) four and a half hour shift per day.

Ms Rae also testified that the reason for the larger number of short shifts was to provide improved services for the residents given the unfavourable financial situation which existed at the Lodge. At certain times of the day the demands placed on the staff by the residents were greater and those demands could be met more effectively by scheduling staff specifically to meet those peak demands rather than maintaining constant staff levels.

Ms Rae agreed that during her period of employment at Knollcrest Lodge the shorter shifts were usually given to part-time employees, or to those employees who were at the bottom of the seniority list.

Sharron MacFarlane, one of the grievors, testified. She is a Health Care Aid and has been employed by the Employer since 1988. She worked part-time until January, 1995 when she became full time. She has generally worked eight hour shifts with an occasional four hour shift. In particular, she testified that from July 1994 through June 1995 she worked only two (2) four hour shifts (both in December) and the rest were eight hour shifts. However, as a result of the recent changes, in July 1995 she had four (4) or five (5) scheduled four hour shifts, in August five (5) more, in September nine (9), and for October was scheduled for ten (10) four hour shifts. She testified that she was aware of the existence of shorter shifts in nursing "off and on" throughout the period of her employment. In particular, she indicated she was aware of a 9:00 to 1:00 "RPN shift" but that she had never worked it. In addition, she was aware of a 5:30 to 9:30 shift, which she described as a twice per week bathing shift. She testified that as a part-time employee she seldom received four hour shifts, that the less senior employees had worked the short shifts.

Larry Bain, the union representative for the Knollcrest unit, also testified. He said that in his view all shifts were to be of eight hours, that the Agreement spoke to that throughout, and that there could not be shorter shifts. He has been the representative at Knollcrest for

approximately one year.

In addition, I heard evidence about negotiations and about other problems related to scheduling, but in my view that evidence does not affect the ultimate outcome. Suffice it to say that there has been no waiver of rights, and there is no estoppel applicable. The issue of interpretation must be resolved on the basis of the written agreement.

I conclude from the evidence that there were shorter shifts in earlier years, but the evidence of these early shorter shifts was not detailed. There is no doubt however that there were shorter shifts and that Union Stewards, persons recognized under the Agreement, knew of them. The shorter shifts in previous years were generally given to junior part time employees. There has been a recent increase in the number of shorter shifts, especially in nursing. With respect to those recent changes, there was no indication that the recent increase in the number of shorter shifts was temporary in nature. I conclude that the Employer intends to continue the shorter shifts on an on-going basis for the foreseeable future.

III. THE AGREEMENT

The principal article in dispute is Article 19. However, I set out below all those Articles to which I refer in this Award.

ARTICLE 4 - MANAGEMENT RIGHTS

4.01 Except where specifically abridged by the terms of this Agreement, it is the exclusive right and function of the Home to manage and direct its operations and affairs in all respects and, without limiting or restricting this right and function:

...

c) ...to schedule the work and services to be provided in the interest of the safety and well-being of the Home, patients, and the public.

ARTICLE 19 - HOURS OF WORK, OVERTIME, ETC.

19.01 The following is intended to define the normal hours of work for employees but shall not be interpreted as a guarantee of hours per day or per week, or days of work per week. However, in the scheduling of the normal hours of work, the Home agrees that hours will be scheduled as follows:

a) first, to full-time employees, by seniority, to a maximum of eight (8) hours per day and eighty (80) hours bi-weekly, provided they have the ability, qualifications, and skills to perform the work required, then,

b) to part-time employees, by seniority, to a maximum of eight (8) hours per day and twenty-four (24) hours per week, provided they have the ability and skills to perform the work required; then,

c) hours of work that become available due to employees not reporting for work as scheduled, or additional hours of work required by the Employer, shall, if required, be scheduled in accordance with a) and b) above.

d) When an employee is on vacation or off sick, her hours shall be offered to the part-time employees in her Department in order of seniority first.

19.02 The regular work shift shall be eight (8) hours per day.

19.03 Employees shall receive one-half (1/2) hour for lunch during their shift. Such lunch period shall be with pay, and shall be considered as time worked. Every effort will be made to afford employees an uninterrupted luncheon period.

19.04 a) There shall be a paid fifteen (15) minute break period in each half of the shift for all employees.

b) Shifts shall be arranged so that no employees will work more than seven (7) consecutive days on with two (2) consecutive days off. Employees shall have a minimum of every other weekend off.

c) No employee will be required to work more than eighty (80) hours in any two (2) week period.

19.05 The Union recognizes that the Home's obligations to residents will make overtime work necessary from time to time. Therefore, the employee is encouraged to cooperate by working overtime when it is requested.

19.06 Overtime shall be paid for all hours worked over the employee's scheduled shift at the rate of

time and one-half (1 1/2) the employee's regular rate of pay.

19.07 In the event employees, of their own accord for their own personal convenience, wish to change shifts with appropriately qualified other employees presently in the employ of the Home, they shall first submit such request (twenty-four (24) hours in advance of the proposed change), in writing, signed by both employees to their Department Supervisor, or his/her authorised Deputy, for his/her written approval. The Home shall not be responsible or liable for overtime claims and noncompliance with the above provisions that might arise or accrue as a result of the exchange of shifts.

19.08 Overtime shall be based on the employee's regular rate of pay.

19.09 Any legitimate complaint in connection with the distribution of overtime or working on overtime days, as provided in the preceding paragraphs, will be adjusted by allocating additional overtime when same is available.

19.10 All overtime declined by an employee shall count as overtime worked for the purpose of equal overtime distribution.

19.11 An employee who reports for work at her assigned starting time and who works less than four (4) hours on any day shall be paid for at least four (4) hours' straight time, but this Clause does not apply when the Home is unable to provide work for the employee because of fire, lightning, power failure, storms, or like causes of work stoppage beyond the control of the Home. The Home shall not incur any obligation under this Clause where the employee has failed to keep the Home informed of her current address and telephone number.

19.12 The days of work for an employee, the starting and quitting times each, and the time and duration of lunch period, and time of rest periods will be determined by the Home in accordance with its requirement. Employees will be notified two (2) weeks in advance if their shift schedule is to be changed.

For the Nursing

The Home shall attempt to rotate shifts bi-weekly where practical. However, this shall not apply to present positions that do not rotate.

19.13 Shift schedules of a four (4) week duration will be posted two (2) weeks in advance and not changed, except in accordance with the provisions of this Article.

19.14 The principle of equal pay for work of equal value shall apply, regardless of sex.

19.15 Appendix "A" is hereby made a part of this Agreement.

[**NOTE:** Appendix "A" sets out the wage schedules and is not relevant to a resolution of these grievances.]

19.16 **Call-back/Call-in Pay**

All employees called back to work after completing a shift shall be guaranteed a minimum of four (4) hours' pay at the appropriate overtime rate for each such call-back or call-in, provided that there shall be no pyramiding of overtime payments under this Article.

19.17 A shift commencing at or about midnight shall be considered the first shift of each working day. The shift shall be deemed to be entirely within the calendar day in which the majority of hours falls regardless of what calendar day any part of that shift was actually worked.

19.18 There shall normally be a minimum of sixteen (16) hours off between shifts of work, except as may be mutually arranged between the Employer and the employees. There shall be no split shifts for employees.

19.19 Employees on shift at the beginning or conclusion of daylight saving time will be paid at the regular rate of pay for actual hours worked.

ARTICLE 21 - VACATIONS

21.01 Effective January 1, 1992:

Vacations with pay will be granted by the Employer in accordance with the following:

a) **Full-time Employees**

- employees with less than three (3) years of employment shall receive two (2) weeks off with two (2) weeks' pay at their current hourly rate;

[**NOTE:** employees with 3 to 7 years receive three weeks off with three weeks' pay, and those with more seniority receive more weeks off with more "weeks' pay".]

b) **Part-time Employees**

- employees with less than three (3) years of employment shall receive two (2) weeks off with vacation pay at four percent (4%) of their previous year's T4 gross earnings; [**NOTE:** other employees receive six, eight or ten percent of their prior year's earnings]

ARTICLE 22 - PAID HOLIDAYS

22.01 The following days shall be recognized as paid holidays:
[**NOTE:** there are twelve (12) listed days]

22.02 a) ...

b) Payment for the abovenamed holidays is as provided below:
Full time Employees: Eight (8) hours at their regular hourly rate of pay.

Part-time Employees: Total number of hours worked in the twenty-eight (28) days immediately preceding the abovenamed holidays divided by twenty (20) equalling the number of hours to be paid at the employee's regular hourly rate of pay.

ARTICLE 30

30.05 **Part-time Guarantee**: Whenever the work is available, the Employer shall endeavor to provide a minimum of three (3) days' work per week.

LETTER OF UNDERSTANDING

Part-time employees, requesting to, may work less than twenty-four (24) hours per week as per past practice.

IV. POSITIONS OF THE PARTIES

I set out below, in summary fashion, the positions of the parties.

1. The Union Submission

The Union submitted that all shifts were to be eight hours. The general language of Article 19.01 must be modified by the specific language of Article 19.02. Article 19.02 was clear and mandatory, and contemplated only eight hour shifts. The other provisions in the Agreement also contemplated only eight hour shifts - see for example Articles 19.03, 19.04, and 22.02.

The Union conceded that there had been shifts under eight hours but said they were not the

norm, were not regular and there had been no representation by the Union that they were allowed.

The Union relied on the following authorities, which are discussed more fully later: *New Webster's Dictionary*, 1990 edition, published by P.S.I. & Associates, Inc.; *Re St. Clair Chemical Ltd. and Oil, Chemical and Atomic Workers, Local 9-14*, (1973), 5 L.A.C. (2d) 50 (H. D. Brown); *Re Parking Authority of Toronto and Canadian Union of Public Employees, Local 43*, (1974), 5 L.A.C. (2d) 150 (Adell); *Re Molson's Brewery (Ontario) Ltd. and Canadian Union of United Brewery Workers, Local 304*, (1971), 21 L.A.C. (2d) 48 (Weatherill); *Re Ballycliffe Lodge Ltd. and Service Employees Union, Local 204*, (1984), 14 L.A.C. (3d) 37 (Adams); and *Re Harvey & Co. Ltd. (St. John's Branch) and Transport & Allied Workers Union, Local 855*, (1992) 29 L.A.C.(4th) 164 (Alcock). To summarize, the Union said the cases supported its view that there can only be eight hour shifts with very occasional shorter shifts.

The Union asked for a declaration that the shorter shifts were in violation of the Agreement and a direction that the Employer cease and desist from the violation and staff in accordance with the Agreement. The Union sought a return to eight hour shifts.

2. The Employer Submission

The Employer submitted that the key provision was Article 19.01, not 19.02. Article 19.01 provided for scheduling to "a maximum of" eight (8) hours per day and either eighty (80) hours bi-weekly or twenty-four (24) hours per week. Thus the Article imagined a variety of scheduling options. Article 19.01 also provided that it "shall not be interpreted as a guarantee of hours." Article 19.02 said that while 19.01 was flexible, the normal or "regular" shift was eight hours per day. Article 19.02 permitted some latitude and was consistent with

the rest of the Agreement. Short shifts have existed at least since 1988. Article 4, Management Rights, said scheduling was to be done in the interests of the safety and well-being of the Home, patients and the public. The new scheduling was done for those reasons.

The Employer submitted that Article 19.02 meant that the norm was eight hour shifts. If the normal pattern showed a predominance of eight hour shifts then Article 19.02 was met. On the evidence, most shifts were eight hour shifts and thus eight hour shifts were the norm. Articles 19.03 and 19.04 were meant to describe what happened with eight hour shifts and should not be used to suggest that there can only be eight hour shifts. Article 19.12 also provided for flexibility as it contemplated changes in the starting and quitting times, and in the lunch breaks. Similarly the Employer submitted that Article 22.02(b) was also consistent with part timers receiving shifts other than eight hour shifts, and was not consistent only with eight hour shifts as the Union had suggested. Likewise Article 30.05 was consistent with shorter shifts being allowed.

In essence, the Employer said that the Agreement allowed the number of shorter shifts which had been introduced with the 1995 changes. The language of the Agreement permitted the flexibility in scheduling which the Employer had instituted.

V. CONCLUSION

The arguments advanced by both parties as to the proper meaning of the collective agreement on this issue were reasonable. There was clearly a genuine, and not surprising, disagreement about what was permitted. Nevertheless, the parties cannot both be correct in their interpretation of Article 19.02 which provides that "The regular work shift shall be eight (8) hours per day."

A resolution of these grievances requires me to address two separate issues, as follows:

1. What does Article 19.02, in the context of the entire agreement, mean?
2. Having determined the meaning of Article 19.02, did the Employer violate this Article in instituting the new shift arrangements?

I address each question in turn.

1. What does Article 19.02 mean? What was most likely to have been the intention of the parties when they negotiated these provisions?

The intention of the parties must ultimately be found in the words they have used in their Agreement, and that necessitates, in this instance, the review of a number of other related provisions in the Agreement. However, before I undertake a detailed examination of the Agreement I will review the authorities cited. In doing so, I note that I agree with the Employer that the collective agreements which were considered in each of the arbitrations differed from the one before me. Thus the precise interpretation of those other agreements can be of little assistance in determining what these two parties intended. However, the arbitral decisions all dealt with provisions which were similar, although not identical, to the ones in this Agreement and dealt with questions which were similar to the ones in this arbitration. Thus if the authorities indicate a common approach to the interpretation of this type of provision, then I think it would be reasonable for me to follow that common approach. When parties adopt provisions which are similar to provisions found in other collective agreements, then I think implicitly they have also agreed to the common approach to interpreting those provisions.

In *Re St. Clair Chemical, supra,* the agreement called for normal hours to be scheduled from Monday to Friday. The Employer altered the schedule to run from Wednesday to Sunday. The employees grieved, seeking overtime pay for Saturday and Sunday. The Board allowed

the grievance and noted that:

> There is no question that the scheduling of hours is a management function and that management can schedule hours which are not "normal" ... That however, is not the same as establishing such abnormal hours as normal or regularly scheduled, in which case the overtime provisions might possibly never be applicable. (page 52)

In *Re Parking Authority, supra,* the Agreement stated that the normal working week consisted of five eight hour days. The Employer had a long standing practice of scheduling some employees over six days. The Board concluded that the meaning of "normal working week" was "the working week in normal circumstances." The Board accepted that in abnormal circumstances different patterns of hours could be set, but the Board was not called upon to decide what circumstances would be abnormal, or whether the circumstances confronting it were abnormal.

Re Molson's Brewery, supra, also dealt with "regular" shifts. The Employer had instituted a new work schedule and the Union asserted it was a new regular shift and thus prohibited by the Agreement. In this context the Board concluded as follows:

> The use of the term "regular" ... serves not merely to distinguish straight time from overtime bonus, as might be the case under some collective agreements, but has the effect instead of restricting the company in the exercise of its management rights in this respect. Thus while [employees] may be assigned to work, on occasion, on Saturdays or Sundays, their regular shift schedule is to be from Monday to Friday. The schedule in question here was to be in effect for a number of weeks and was, as I find, a "regular" shift schedule.... the regular schedule is to be from Monday to Friday. The schedule in question did not meet this requirement, and therefore was not one which it was open to the company to schedule on a regular basis. (pages 50-51)

In *Re Ballycliffe Lodge, supra,* the Agreement provided for normal hours of work on a daily basis and noted that this was not a guarantee of hours to be worked. The Employer had reduced the hours per day for a period of several months. The Board discussed the normal hours provision as follows:

> ... it has been held that a provision specifying normal hours of work does not constitute a guarantee of hours to be worked ... However, [it] is itself subject to the parallel understanding

> that a new norm cannot be established by unilateral management initiative ... Nevertheless, [the agreement] stipulates what the normal hours of work per day are to be, and by this stipulation, management is precluded from establishing a new norm by the indefinite or ongoing scheduling of hours per day and different from those set out in [the agreement]. (page 44)

The Board concluded that the new reduced hours of work had been established as normal hours of work and were in violation of the normal hours provision in that Agreement.

In *Re Harvey & Co., supra,* the Agreement provided that the regular work week was forty hours made up of five days of eight hours each. The Agreement provided that the intent was to define the normal hours of work and that there was no guarantee of the hours of work. The Employer had, due to the poor state of the economy, reduced the hours from eight to seven and a half. In discussing the provisions establishing a regular work schedule, Arbitrator Alcock commented as follows:

> The employer is free to schedule employees' hours of work differently as long as legitimate reasons exist and as long as the change is abnormal or irregular. What we are talking about here is flexibility for the employer to react to short-term production or service situations by briefly departing from the scheduling norm. That is permitted by the language as long as the change does not actually become the norm or create a different regular work week. In this manner, short-term excess or reduced work requirements can be accommodated either daily or weekly. However, the fundamental integrity of the regular working hours, as expressed in the collective agreement, must be preserved at all times. That means that changes must be relatively brief anomalies, aberrations, irregularities, or abnormalities. The risk for the employer is making changes that effectively create new norms or regular work weeks. At that point there will be a violation of the collective agreement. (pages 175-176)

Arbitrator Alcock concluded that the employer had breached the Agreement in establishing the seven and a half hour day, as it had established a new norm or regular work week.

These authorities indicate the approach followed by other arbitrators in similar cases. In general terms, arbitrators have concluded that a specification of regular or normal hours will permit some alteration, that there is no guarantee of hours of work (a point made explicitly in this Agreement), but that, at some point, new or altered work schedules can become

regular. If those new regular schedules are different from the regular hours specified in the agreement, then they are in violation of that agreement.

With that background, I now move to an examination of this Agreement. As noted, precisely what is required by this Agreement necessitates a careful review of all its provisions.

The first sentence of Article 19.01 says "The following is intended to define normal hours of work ..." but does not provide a "guarantee of hours." In my view, the words "The following" as used in Article 19.01 refer not simply to the rest of Article 19.01 but rather to the rest of the entire Article 19. After this introductory statement, Article 19.01 itself goes on to deal with one part of the normal hours; in particular it addresses scheduling. Work is scheduled first for full time employees to a "maximum of eight (8) hours per day", etc. Article 19.03 also deals with defining normal hours of work and provides for a paid half hour lunch. On its face Article 19.03 appears to apply to all shifts. Article 19.03 makes the most sense if the shifts are for eight hours, or at least more than four hours. It shows no indication that the parties contemplated shifts of four hours. Likewise, Article 19.04 deals with defining normal hours of work and provides for a fifteen minute break in each half of the shift for "all employees". Again it applies to all employees and all shifts and makes the most sense if shifts are of eight hours. It, likewise, shows no indication that the parties contemplated shifts of four hours. Article 19.06 deals with overtime hours and requires overtime pay "for all hours worked over the employee's scheduled shift". It also makes the most sense if all shifts are scheduled for eight hours, for otherwise overtime pay will begin after four hours where there was a four hour shift. Further, since one half hour of that four hour shift would have been a paid lunch period under Article 19.03, and since there were two paid fifteen minute breaks under Article 19.04, overtime pay would start after only three hours of actual work. While this could have been the parties' intention, I do not think it likely. Thus in my view, Article 19.06 also shows no indication that the parties contemplated

shifts of less than eight hours.

Article 22.02 b) calls for the payment for holidays of eight hours at the regular hourly rate of pay for all full time employees. It seems to be consistent with the view that the parties contemplated only shifts of eight hours. Had the parties expected shifts of less than eight hours, they may well have provided, as they did for part-time employees, that the holiday pay would reflect the actual hours worked, not simply that all will receive eight hours pay. But they did not do so - they provided simply for eight hours holiday pay for all full time employees who qualify under Article 22.01 a).

Likewise, the provision for vacations in Article 21 which, for full time employees, provides for time off with a certain number of "weeks' pay at their current hourly rate" seems to assume a known and certain number of hours in a week in order to determine a week's pay. It seems to assume forty hours per week as the basis for the calculation of a week's vacation pay. Again I think the only length shift which was clearly contemplated by the parties was the eight hour shift. If full time employees were to work shifts of varying lengths, or regularly work short shifts, there is no indication as to how the "weeks' pay" would be calculated.

The "Part-time Guarantee" in Article 30.05 also suggests that the parties contemplated only eight hour shifts. I believe that the intent of this provision was to provide a full week of work for part-time employees, whenever the work is available. Article 19.01 suggests that a full work week for part-time employees is 24 hours. In calling for three days work per week whenever the work is available, Article 30.05 seems consistent with the Union view that all shifts were to be eight hours.

As noted, I heard evidence of the use of shorter shifts in earlier years, but the evidence of

these shorter shifts was not detailed. However, there were shorter shifts and Union Stewards, persons recognized under the Agreement, knew of them. The evidence indicated that such shifts went generally to junior part-time employees, that some of the shifts occurred only sporadically, and in addition the Letter of Understanding suggests that there had been a practice for some part-time employees to work fewer than twenty-four hours per week. I heard no evidence about the practice which has been continued by the Letter of Understanding, and it may be that employees work fewer than three shifts per week, rather than shifts of fewer than eight hours. But it is also possible that what was contemplated by the Letter of Understanding was to permit those employees who wished to continue to work short shifts, to continue to do as they had done. Thus I am unwilling to draw any conclusions, for or against either interpretation, from the evidence of the shorter shifts. There was no argument of waiver or estoppel, and I conclude that the evidence on past practice in this case is neutral in its impact.

The Employer argument rested heavily on the use of the words "to a maximum" in Article 19.01. The Employer said this language was used in order to show that shorter shifts were contemplated. However, Article 19.02 says the "regular work shift shall be eight (8) hours per day." Thus on a narrow reading, Article 19.01 says simply that the "regular shift" is also the maximum. The Employer submission that the words "to a maximum" were designed to indicate that shorter shifts were allowed is only one possible explanation. When Articles 19.02, 19.04 c), 19.06 and 19.11 are considered together with Article 19.01, I am of the view that another possible explanation for the inclusion of the words "to a maximum of" in Article 19.01 is to indicate that:

1. Full time employees cannot be scheduled to work more than eighty hours in a bi-weekly period and do not have to work more than eighty hours in that period (See Articles 19.01 a) and 19.04 c),
2. Part-time employees cannot be scheduled to work more than twenty-four hours per

week and do not have to work more than eighty hours in a bi-weekly period (See Articles 19.01 b) and 19.04 c),

3. Employees cannot be scheduled for more than eight hours per day and do not have to work more than eight hours a day (See Articles 19.01 a), b), 19.06, and 19.10),
4. All hours worked beyond those scheduled in a day are paid at overtime rates (See Articles 19.01 and 19.06).

In other words, one of the effects of the use of the phrase "to a maximum of" is to trigger overtime payments and to make overtime voluntary after eight hours work in a day, or eighty hours in a bi-weekly period. Thus while the Employer submission has merit, there is another possible explanation. That other explanation is also consistent with what I have concluded is the more reasonable interpretation of several other Articles in the Agreement.

I do not think the Employer submission that Article 19.02 calls for a norm or most common shift length of eight hours can be preferred to the Union view. This submission is consistent with Article 19.01 but it is very difficult to reconcile with Articles 19.03, 19.04, 19.06, 21.01, and 22.02, each of which has been discussed above. Taken as a whole the Agreement makes more sense if I conclude not simply that the parties intended eight hour shifts to be the most common shift in terms of frequency, but that the Employer has to utilize eight hour shifts in all but either (a) the most unusual circumstances, or (b) those circumstances where other shifts are clearly contemplated in the Agreement (such as Articles 19.11, 19.16, and, perhaps, the Letter of Understanding).

I am thus of the view that in "defining" normal hours (Article 19.01) and providing that the regular shift "shall be" eight hours per day (Article 19.02), the parties have done more than simply describe the most common or most frequent shift length. I prefer the position of the Union as to the interpretation of the Agreement. Thus, on a regular ongoing basis, the Agreement requires the Employer to utilize only eight hour shifts.

I do not, however, suggest that the Employer can never schedule shorter shifts. Some may be contemplated by the Letter of Understanding (although I make no finding on this issue). The Agreement itself, in both Article 19.11 and Article 19.16, contemplates employees working less than eight hours. Others may be used on an irregular or abnormal basis to cover unforseen circumstances of a temporary nature. However, these shorter shifts can not be scheduled on a continual or ongoing basis, for if they are so scheduled they become "regular" shifts and the Agreement specifies that the "regular" shift shall be eight hours.

I agree with the approach of arbitrator Alcock in *Re Harvey & Co., supra,* that

> ... the fundamental integrity of the regular working hours, as expressed in the collective agreement, must be preserved at all times. That means that changes must be relatively brief anomalies, aberrations, irregularities, or abnormalities. The risk for the employer is making changes that effectively create new norms or regular work weeks. At that point there will be a violation of the collective agreement. (page 176)

To this statement, I would only add my earlier conclusion that shorter shifts are permitted where contemplated by this Agreement.

2. Were the actions of the Employer in instituting its new shift arrangements in violation of the Article? In other words, has the Employer scheduled on an ongoing basis shifts different from the eight hour "regular" shifts called for in Article 19.02? As I noted in the earlier section on the evidence, the evidence indicated that the Employer has instituted shorter shifts which are to continue on an on-going basis for the foreseeable future. There was no indication that the recent increase in short shifts was temporary in nature. There was no evidence to suggest that this new approach to scheduling was a temporary anomaly or an aberration. There was no suggestion that it was authorised by any provision in the Agreement other than Article 19.01. I thus conclude that the Employer has instituted a new schedule in which work shifts of less than eight hours occur on a continuing basis, and that they have become "regular" shifts in violation of Article 19.02.

The issue of remedy remains. The Union asked for a declaration that the Employer was in breach of the Agreement. I have found that in instituting the larger number of short shifts the Employer has established other length shifts as regular shifts, in violation of the Agreement. I thus declare that the Employer has acted in breach of the Agreement in its scheduling and staffing.

The Union also sought a declaration that the Employer cease and desist from breaching the Agreement. This request was of a general nature. The parties indicated at the hearing that they primarily sought an interpretation of their Agreement and would proceed on the basis of limited evidence. As a result, I am not in a position to indicate clearly what changes would have to be made to bring the Employer back in conformity with the Agreement. Thus any order must, like the Union request, be of a general nature. I direct the Employer to schedule and to staff in accordance with the Agreement.

Finally, I remain seised to deal with any problems in the implementation of this award.

In summary,

1. I declare that the Employer has breached the Agreement;
2. I direct the Employer to cease breaching the Agreement in its scheduling; and,
3 I remain seised to deal with any difficulties which may arise in the implementation of this Award.

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

_____

Howard Snow, Arbitrator