IN THE MATTER OF AN ARBITRATION

BETWEEN

HOMEWOOD HEALTH CENTRE
- the Employer

and

HEALTH, OFFICE & PROFESSIONAL EMPLOYEES (H.O.P.E.),
A Division of Local 175,
United Food & Commercial Workers International Union
- the Union

AND IN THE MATTER of a group grievance regarding shift schedules

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

B. R. Baldwin	- Counsel
David M. Chondon	- Counsel
J. E. Sheppard	- Director of Personnel
Janet Wall	- Manager, Human Resources
Mary Sullivan	- Director of Housekeeping Staff
Louie Visentin	- Supervisor

On behalf of the Union:

Joanne L. McMahon	- Counsel
Chris Taylor	- Student-at-law
Richard Woodruff	- Union Representative
W. Harbin	- Chief Steward
C. Denholm	- Grievor
K. Baum	- Grievor
A. Jain	- Grievor
A. Childerhouse	- Grievor
M. Headings	- Grievor

Hearings held in Guelph, Ontario on November 9, 1995, December 7, 1995, February 21, 1996, and March 7, 1996.

AWARD

I. INTRODUCTION

Homewood Health Centre (the Employer) operates a psychiatric hospital in Guelph. Housekeeping staff at the Homewood are part of the bargaining unit represented by the Health, Office & Professional Employees (H.O.P.E.), A Division of Local 175, United Food & Commercial Workers International Union (the Union).

The Employer operates seven days a week, but with a reduced level of operations on the weekends. This group grievance was filed in May, 1995 and involves a change in shift schedules for the housekeeping staff. The change was announced in April, 1995 and implemented in June, 1995. Under the new schedule full time housekeepers were required to work some weekends. Prior to the new schedule, full time housekeeping staff had worked only weekdays.

II. THE COLLECTIVE AGREEMENT

The relevant provisions of the Collective Agreement are as follows:

ARTICLE 4 - MANAGEMENT RIGHTS

4.01 The Union acknowledges that the Management of the Hospital is vested exclusively with the Hospital and, without limiting the generality of the foregoing, it is the exclusive function of the Hospital:

(a) ....

(b) to maintain order, discipline and efficiency and in connection therewith, to establish and enforce rules and regulations.

(c) ....

(d) to have the right to plan, direct and control the work of the employees and the operations of the facility. This includes the right to determine job content, to introduce new and improved methods, facilities, equipment and to control the amount of supervision necessary, combining and splitting up of Departments,

work schedules, and the increase or reduction of personnel in any particular area or on the whole.

(e) ...

4.02 The Hospital acknowledges that it shall not exercise its management rights in a manner inconsistent with the terms of this Agreement.

ARTICLE 19 - HOURS OF WORK, OVERTIME, AND PREMIUMS

19.01 The following is intended to define the normal hours of work for full-time employees but shall not be interpreted as a guarantee of hours of work per day or per week or days of work per week.

19.02 (a) The standard daily hours of work shall be seven and one-half (7 1/2) hours per day, except those positions currently working less than seven and one-half (7 1/2) hours shall continue to do so. Any change in normal hours of work for a position will require sixty (60) days notice to the Union.

(b) Shifts shall be arranged so that no employee will work more than seven (7) consecutive days as part of their regular schedule. Further, the Hospital will endeavor to provide one (1) weekend off in two (2) weeks. The above may be changed by mutual agreement and does not apply to employees working weekends at their own request.

[Sections 19.03 through 19.21 have been omitted.]

III. THE EVIDENCE

I heard evidence from eleven witnesses over four days. While there was disagreement about how to characterize some of the evidence and what conclusions I should draw from the evidence, there was very little factual dispute. I will thus outline the basic situation and concentrate on the few disputed issues.

For some fifteen (15) years the full time housekeeping staff have been assigned to work only during the week (that is Monday to Friday). Fewer housekeeping staff worked on the

weekends. The staff who worked weekends were primarily students and they worked every other weekend.

The Union and the Employer negotiated a first collective agreement during 1991 and 1992. The negotiations concluded with an interest arbitration under the *Hospital Labour Disputes Arbitration Act* and resulted in this first collective agreement. The first agreement was in force from July, 1991 to July, 1993, but was continued through the period of events which gave rise to this grievance.

In late 1994 and early 1995 the Housekeeping Department reviewed its operational plan and outlined its priorities in its 1995/96 "Functional Operating Plan." That plan stated that the department "strive(s) to be the best we can in providing customer-focused service." One of the particular goals for 1995/96 was expressed as follows:

> 12. To revise staffing schedules to maximize quality and productivity. The new schedule will enhance service on the weekends.

During the winter of 1995 the department's Director and the department's Supervisor developed a new staffing schedule which, among other things, required the full time staff to work one weekend in every four. This new scheduling arrangement was discussed with the Union at a meeting on March 16, 1995 and the employees in the department were advised at a meeting on April 19. Those employees who were not able to attend the April 19 meeting were informed of the new schedule shortly thereafter. The new schedule was implemented on June 22, 1995.

I heard extensive evidence about the reasons for adopting the new scheduling. The Employer had found it difficult to train the students who worked weekends and in addition there had been a high turnover rate among the student weekend staff. Largely for those reasons, the quality of the cleaning on the weekends was not of the same standard as the cleaning which

was done during the week. The Employer had received complaints about the standard of cleanliness on the weekends.

Before it introduced its new schedule, the Employer had done little to respond to the concerns regarding weekend work and the level of cleanliness. In February, 1995 in response to one particular complaint the Employer did, however, implement several changes in one part of the Hospital in an attempt to address the particular concerns raised in that complaint. Those changes improved the situation. I was advised of no other major steps which were taken prior to the scheduling changes introduced in June 1995 which were the subject of this grievance. No weekend employee was disciplined for faulty work or for any other matter.

In 1995 the Employer concluded that the best solution for the problem of inferior weekend cleaning was a package of scheduling changes which would:

1. Add additional full time staff,
2. Lengthen the weekend shifts, and
3. Rotate the full time staff so that some were at work every weekend.

The changes made with the introduction of the new schedule improved the situation, and the Employer witnesses felt the new schedule had successfully addressed the problems which the Employer had been trying to solve. It was clear that the new schedule was not implemented to save money and, in fact, it was more expensive to staff under the new schedule than it had been under the old staffing plan.

The full time staff were not pleased with the scheduling changes, especially the requirement to work one weekend in four. Following the April announcement of the new schedule which was to start in June, this grievance was filed on May 31, 1995. As noted, prior to the changes introduced in June 1995, the full time staff had only been required to work during

the week. In the years prior to the collective agreement the full time positions had been described as full time Monday to Friday positions with Saturday and Sunday off. Some of the current housekeeping staff took their jobs on that understanding, and in particular on the understanding that no weekend work was involved.

In this grievance the Union argued the scheduling changes were not permitted by the collective agreement and that, if the changes were permitted by the agreement, an estoppel nevertheless prevented the Employer from making the changes. I thus heard evidence as to the bargaining history and the intent of the parties, especially with respect to Article 19.

Wayne Harbin, the Union's Chief Steward and a member of the Union negotiating team, testified that Article 19.02(a) was intended to cover the existing practice at the time of negotiations. Many employees worked 7.5 hours but some worked only 7 hours per day. Article 19.02(b) addressed classifications where the scheduling was different. For example, the clinical and nursing staff operated with seven (7) day schedules. Mr. Harbin indicated there had been no discussion of the Monday to Friday schedule for housekeeping staff and that there had been no discussion of changing anyone's hours with the exception of those clinical staff working seven (7) days. He indicated that the intent of the last sentence in Article 19.02(a) was to protect the clinical nursing staff who had to arrange child care when the starting time of their schedule changed. He indicated that the staff in nursing worked on eight (8), ten (10) and twelve (12) week rotations and they wanted the schedules posted well in advance so they could organize child care.

In cross examination Mr. Harbin agreed that there had been negotiations between the two chief negotiators at which he was not present. He was uncertain about which parts of Article 19 had been resolved by the parties and which had gone to interest arbitration for resolution. He did not have any notes from the negotiation and could not recall any particular meetings

at which Article 19 had been discussed.

B. R. Baldwin, the Employer's chief negotiator for the first agreement, testified. Mr. Baldwin was also Employer counsel in this arbitration. On the second day of the hearing Mr. Chondon joined Mr. Baldwin as counsel. Mr. Chondon conducted the examination of Mr. Baldwin and made the Employer's submissions as to Mr. Baldwin's credibility.

Mr. Baldwin testified that Articles 19.01 and 19.02(a) had been resolved by arbitration. In both cases the article which had been awarded was exactly the article which had been proposed by the Employer. Mr. Baldwin reviewed the written submissions made to the interest arbitration board and the award itself, as well as earlier negotiating proposals from the parties on these issues. In particular, he testified that in Article 19.01 the Employer wanted to ensure that Article 19 was not to be read as a guarantee. The written submissions made in the interest arbitration do not address this issue with clarity, but it is clear that the Employer was seeking more flexibility than the Union proposal would have permitted.

Mr. Baldwin testified that in Article 19.02(a) the Employer wanted the flexibility to change hours or days of work, in fact to change anything normative, without obtaining the Union's agreement, as would have been required by the Union proposal. As noted, the award of the board of arbitration was the Employer proposal. As for Article 19.02(b), he indicated the parties had agreed to this provision in direct negotiations and that it was a modification of an Employer proposal which had been intended as a guarantee regarding the number of consecutive days of work and the number of weekends off.

Mr. Baldwin also testified as to the Employer's intentions at the time of negotiations regarding changes in shift schedules. He indicated that to his knowledge the Employer had no intention of changing shift schedules at the time of the negotiations. He also indicated

that he may have advised the Union negotiators to that effect, but that he had certainly not indicated the Employer would be maintaining shift schedules, as the right to change the shift schedules was precisely the right which the Employer was seeking to preserve in the collective agreement.

Finally, I note that some full time employees in other departments, employees who were also in the Union's bargaining unit, have worked weekends as part of their regular shift for a number of years and were doing so at the time of the negotiations. For example, the staff in Nutrition Services had been working weekends and frequently their days off during the week were not consecutive.

At the close of the Employer's evidence the Union sought to call Ron Springall, the Union's chief negotiator in the first round of bargaining. The Union indicated it wished to have him testify as to the intention of the parties and about the documents put in evidence by the Employer. The Employer objected to this and, after hearing full argument, I ruled that the Union could not call Mr. Springall for this purpose.

IV. THE PARTIES' SUBMISSIONS ON THE SCOPE OF REPLY EVIDENCE

As noted, when the Union sought to call its former chief negotiator, Mr. Springall, as a reply witness to testify about the intention of the parties and negotiating history, the Employer objected.

The Employer submitted Mr. Baldwin had been called to rebut evidence from Mr. Harbin and Mr. Baldwin had not testified about any new issues. The Union wished to call Mr. Springall to bolster Mr. Harbin's evidence, but the Union could and should have called Mr. Springall as part of its case in chief. The issues about which Mr. Baldwin had testified were

all put to Mr. Harbin and Mr. Harbin was given a chance to modify or change his evidence. If the Union wished to bolster Mr. Harbin's evidence it should have done so during its case in chief. The Union was thus attempting to split its case and arbitral authority indicated that a party should not be permitted to split its case. The Employer relied on the following authorities: *Evidence and Procedure in Canadian Labour Arbitration,* Gorsky, Usprich and Brandt (Carswell); *Re Canadian Pacific Forest Products Ltd. and International Woodworkers, Local 2693* (1993) 32 L. A. C. (4th) 18 (Mikus); *Re Goodyear Tire and Rubber Co. of Canada and United Rubber Workers, Local 232* (1976), 11 L. A. C. (2d) 161 (Adams); and *Re Consumers Gas Co. and Energy & Chemical Workers Union, Local 513* (1987), 32 L. A. C. (3d) 121 (H. D. Brown).

The Union submitted that Mr. Baldwin had given evidence as part of the Employer's case and that issues had been put to him which were not put to Union witnesses. No Union witness had been able to speak to the documents which were introduced through Mr. Baldwin. The Union asked that I hear all the evidence and make a decision based on the full facts. Mr. Baldwin had spoken of the intention of the parties and the Union sought to do the same in reply. The Union referred to the following authority: *Re Canada Post and Letter Carriers' Union of Canada (N-27-04)* (1988), 1 L. A. C. (4th) 447 (Weatherill).

In response the Employer submitted that the Employer's decision to rebut Mr. Harbin's testimony with documents as well as oral testimony was not the issue. The documents were used simply to corroborate the oral evidence. The matters about which Mr. Baldwin had testified had all been put to Mr. Harbin in cross examination.

The Employer also raised a concern about a delay in the hearing as Mr. Springall was not then available and the hearing would have to be adjourned, and raised a concern as to who would cross examine Mr. Springall. On the first concern, the Union noted that when it

agreed to the March 7, 1996 hearing date the Employer had been advised that the Union preferred to proceed on a day when Mr. Springall was available to testify but would proceed on March 7 on the understanding that this issue would be argued and, if the Union was successful, another day would be scheduled.

V. POSITION OF THE UNION ON THE GRIEVANCE

The Union argued that the problems the Employer had identified (a poor level of weekend cleanliness, turnover among student employees and difficulties in training the weekend staff) were related to the students who worked on the weekends but the solution (the new schedule) had been one which, in effect, punished the full time employees, about whom there had been no concerns. The full time staff were made to pay for the faulty work of the students and in doing so the Employer had adopted a solution which was more expensive than the former staffing arrangements had been. The Union argued the Employer had never properly addressed the issues of training and supervision on the weekend.

Full time staff had worked Monday to Friday for at least fifteen (15) years and some employees had sought and accepted their jobs on the basis that there was no weekend work. Union counsel submitted that there had been no warning there might be changes in work schedules and that Article 19.02(a) did not apply in this situation. Article 19.02(a) was directed to a change in starting and stopping times. It did not, therefore, authorize or contemplate the type of changes which the Employer had introduced here.

The Union then argued that the Employer was estopped from implementing the new schedule. The Union submitted that estoppel arises in a number of ways and need not be attached to a particular provision. It flows from an assurance given by one party to another, or from an action, or omission, or failure to act. The Union said all of these were present

here. In particular, the Union argued the collective agreement provisions and especially Article 19.02(a) did not address the issue of changing days of work, but rather just addressed changing the number of hours or the starting and stopping times. Article 19.02(b) was designed to maintain the status quo and to be all encompassing in its coverage. The Union submitted that Mr. Baldwin's assurance that no changes were being contemplated to the shift schedules was a clear representation and that the Union should have been able to rely on it. In addition, the longstanding Employer practice of scheduling the full time housekeeping staff on weekdays and its practice of describing these jobs as week day only, together with the Employer's indication in negotiations that it had no intent to change the schedules, gave rise to an estoppel.

The Union submitted it had relied to its detriment on the Employer representations, that it had no opportunity to negotiate regarding a change in schedules and that the Employer should not now be able to enforce its own interpretation of the agreement when the provision was not meant to be used to justify changes of this nature.

The Union relied on the following cases: *Re Kraus Carpet Mills Ltd., Chrome Plant and Varichrome Yarns and United Food & Commercial Workers, Local 175* (1991), 23 L. A. C. (4th) 84 (Marszewski); *Re Pacific Forest Products Ltd., Nanaimo Division and Pulp, Paper and Woodworkers of Canada, Local 7* (1983), 14 L. A. C. (3d) 151 (Munroe); *Re Domglas Inc. and United Glass and Ceramic Workers, Local 203* (1983), 9 L. A. C. (3d) 125 (Kennedy); and *Re Corporation of the City of Kitchener and Kitchener Fire Fighters' Association, International Association of Fire Fighters, Local 457* (1983), 11 L. A. C. (3d) 47 (Saltman).

VI. POSITION OF THE EMPLOYER ON THE GRIEVANCE

The Employer submitted that the ability of the Employer to change hours of work and work schedules in the way that it did was contemplated in the collective agreement. Because it was contemplated, the evidence of past practice was irrelevant. The Employer argued that Article 19 contemplated these changes and that, even if it did not, Article 4 (the Management Rights article) did.

With respect to Article 19, the Employer noted that Article 19.01 speaks of defining "normal hours of work" (but not guaranteeing hours or days). The second sentence of Article 19.02(a) in using the same phrase of "normal hours of work," and not the phrase "standard daily hours of work" as is used in the first sentence of Article 19.02(a), was intended to be broader, as Article 19.01 was intended. Article 19.02(b) bolsters this view as it sets out limits on what normal hours may be. Mr. Harbin had testified Article 19.02(b) applied to only clinical or nursing staff but clearly the employees in the nutrition department were working on the weekends at the time of negotiations. Thus the Employer said the parties' agreement on work schedules was in essence:

1. Sixty (60) days notice of changes [Article 19.02(a)],
2. No more than seven (7) consecutive work days [Article 19.02(b)], and
3. One (1) weekend off in two (2) weeks [Article 19.02(b)].

The Employer submitted that Article 4.02 provides for limitations on the exercise of management rights. The Employer must not exercise its rights in a manner which is inconsistent with the agreement. There was no inconsistency as that term is used in Article 4.02. Instead the agreement contemplated the new schedule.

The Employer reviewed the reasons for introducing the new schedule and asked me to find

that the reasons for the changes were valid business reasons, that the new schedule was not implemented arbitrarily or in bad faith.

As for the matter of estoppel, the Employer said the Union position was in essence that a fifteen (15) year practice meant the Employer can not change that practice. The Employer response was:

1. If the agreement contemplates the change it can be made; and
2. Any estoppel here is directed to an area of management rights and a management right can not be affected by estoppel.

In any event, the Employer submitted that the Union claim of estoppel must fail for three reasons:

1. Estoppel requires the practice to be contrary to the agreement,
2. There has to be a clear representation that rights will not be exercised, and
3. There has to be detrimental reliance on the representation.

The Employer said that none of these three requirements were present.

The Employer relied on the following cases: *Re Dominion Chain Inc. and International Association of Machinists and Aerospace Workers, Local 1927* (1986), 23 L. A. C. (3d) 34 (Kennedy); *Re Rothmans of Pall Mall Canada Ltd. and Bakery, Confectionary and Tobacco Workers' International Union, Local 319T* (1983), 12 L. A. C. (3d) 329 (M. G. Picher); *Re Brewers' Warehousing Co. Ltd. and United Brewers' Warehousing Workers' Provincial Board* (1985), 21 L. A. C. (3d) 327 (Brunner); *Re Hiram Walker & Sons Ltd. and Canadian Union of Operating Engineers and General Workers, Local 100* (1979), 24 L. A. C. (2d) 186 (Brent); *Labatt's Ontario Breweries Division of Labatt Brewing Company Limited and International Union of Operating Engineers, Local 772* (October 14, 1992), unreported (Barton); and *Air Canada and International Association of Machinists and Aerospace Workers, District Lodge 148* (August 12, 1986), unreported (Frumkin).

VII. CONCLUSIONS

I address three principal points in these conclusions. Firstly I briefly record the reasons which I provided orally in refusing to allow the Union to call its chief negotiator from the first round of bargaining as a witness in reply. Secondly I interpret the collective agreement and determine whether the collective agreement allowed the Employer to make the changes which it made in the housekeeping work schedules in June, 1995. Finally I determine whether the Employer was estopped from making those changes.

1. Scope of reply evidence

As I indicated earlier, I ruled orally at the hearing that the Union could not call Mr. Springall as a reply witness to testify about the negotiating history and the intention of the parties. I provided brief reasons for my ruling at that time, and I now record the substance of those reasons.

A basic rule regarding the conduct of an adversarial proceeding such as an arbitration is that one side leads all its evidence first, the other side responds, and then the first party has only a very limited right to lead further reply evidence. That reply evidence is normally limited to issues which the first party could not reasonably have anticipated at the time it was leading its evidence. When the evidence which a party seeks to lead in reply could and should have been part of the initial presentation, then the authorities [see, for example, *Evidence and Procedure in Canadian Labour Arbitration,* Gorsky, Usprich and Brandt (Carswell); *Re Canadian Pacific Forest Products Ltd. and International Woodworkers, Local 2693* (1993) 32 L. A. C. (4th) 18 (Mikus); *Re Goodyear Tire and Rubber Co. of Canada and United Rubber Workers, Local 232* (1976), 11 L. A. C. (2d) 161 (Adams); *Re Consumers Gas Co. and Energy & Chemical Workers Union, Local 513* (1987), 32 L. A. C. (3d) 121 (H. D.

Brown)] express a concern about a party splitting its case. Fairness to the second (or responding) party suggests the second party should both know what it is alleged to have done wrong and know the evidence about that wrongdoing before it is required to lead its evidence.

The limitations on reply evidence are clearer in criminal and civil proceedings conducted in the courts. In the informality of the labour arbitration process the limitations are different, or perhaps it is preferable to say that while the rule is the same, the point on the continuum as to where the decision maker should draw the line on permissible reply evidence in the conduct of a fair hearing is different [see, for example, *Re Canada Post and Letter Carriers' Union of Canada (N-27-04)* (1988), 1 L. A. C. (4th) 447 (Weatherill)]. I believe labour arbitrators are not, and should not be, as restrictive in allowing reply evidence. Arbitration is intended to resolve problems quickly and with little formality. The parties expect the arbitrator to address the real difference between the parties and not allow procedural rules which were formulated in a very different setting to be used to prevent the resolution of that difference.

The issue involved here was an issue of fairness in the conduct of the hearing. The Union desired to have a full airing of the facts and a chance to respond to the evidence from the Employer. If I did not hear from Mr. Springall the Union said I would only have available to me some of the facts - creating a sense of unfairness. On the other hand, from the Employer perspective, the hearing must have some order. The Employer asked me to apply the usual order of proceeding in which the first party is required to lead all its evidence, except for evidence it could not have reasonably anticipated, before the second party replies.

The Employer also raised another type of unfairness - a possible delay owing to Mr. Springall not being available to testify and a concern (since the Employer's lead counsel, Mr.

Baldwin, had been called as a witness) as to which counsel would cross examine Mr. Springall. I found these two issues not to be persuasive. The first was clearly known by the parties when the hearing date was accepted. The second was a procedural matter which would have to be addressed if Mr. Springall testified, but in my view the unusual circumstance of one of the counsel being called as a witness should not affect the scope of reply evidence and thus the issue of whether the Union was allowed to call Mr. Springall in reply.

The question was essentially this: Given the requirement for a fair hearing how do I reconcile these two competing values? Would it be more equitable to allow the Union to call its chief negotiator as a reply witness or would it be more equitable to say that the Employer could rely on the case which the Union had put in during its evidence in chief?

In making my decision I noted the following points. The evidence related to (1) bargaining, (2) intention of the parties, and (3) estoppel had clearly been relevant since the start of the hearing and no doubt even before that time. The issues of bargaining and the intention of the parties were put to Mr. Harbin when he testified during the morning of the first day of the hearing. The Employer indicated in its cross examination that it disputed Mr. Harbin's evidence. On the first morning of the hearing I was advised by the counsel for the two parties that Mr. Baldwin, who was then acting alone as Employer counsel, might have to testify as he had been the Employer's chief negotiator. Thus the Union clearly knew that the Employer was not in agreement with the Union evidence and that the Employer would, or might, call its own evidence through its own witness(es). The Union could have called other evidence through other witnesses, including Mr. Springall. It did not do so at that time. The Employer did call Mr. Baldwin who testified about these same issues - bargaining and the intention of the parties.

Thus while an arbitration should not, in my view, be conducted with scrupulous attention to all of the court formulated rules of process, clearly in this case the Union was not surprised by the issues of bargaining history or intention, or by the Employer's differing view of the facts. These issues went to the heart of the Union's case. The Union began with evidence on these issues. It wished to lead additional reply evidence on these same points. In light of these factors I concluded that fairness in this instance dictated that the Union should not be allowed two separate efforts at proving negotiating history or demonstrating intent. The result might have been different had the evidence been on an issue which the Union had originally thought might be of no relevance and on which the Union did not lead evidence.

On the basis of the above considerations I ruled that the Union could not call Mr. Springall to testify as a reply witness as to the matters of negotiating history or intention of the parties.

2. Interpretation of the Agreement

As noted earlier, the Employer argued that the Agreement contemplated and permitted the new work schedule. In particular the Employer argued that the last sentence of Article 19.02(a) did this. Alternatively the Employer said the new schedule fell under the general provisions of Article 4. The Union disagreed.

In interpreting Article 19.02(a) it is necessary to consider it in the context of the entire agreement. However, few other articles are of assistance in interpreting this provision. I start with Article 4 which reserves to management a general power with respect to work schedules. Article 4.01(d) is not grammatically easy to read, and in particular it is not clear what verb is to be used before "work schedules," but it is clear that a general reservation over work schedules was intended. The reference to "work schedules" in 4.01(d) is an amplification of the more general right to "plan, direct and control the work of the employees

and the operations of the facility." Article 4.02 then limits that general power by specifying that the Employer "shall not exercise its management rights in a manner inconsistent with the terms of this Agreement." Article 19 also addresses schedules, so the Employer "shall not exercise its" general Article 4 power over work schedules "in a manner inconsistent with the terms of" Article 19. What is clear from Article 19.01, is that Article 19 (which contains a total of twenty-one (21) sections) is not to be construed as providing a guarantee of hours or of days. In view of the general management power over work schedules (Article 4) and the no guarantee of hours or days provision (Article 19.01), then it seems to me that both hours of work and days of work are subject to change by the Employer.

With that as background it is then necessary to determine what was intended by the last sentence of Article 19.02(a). The Employer submitted this sentence contemplated the new schedule. It reads as follows:

> Any change in normal hours of work for a position will require sixty (60) days notice to the Union.

The term "normal hours of work" is also used in Article 19.01, that is in the "no guarantee" provision. The phrase is not, however, used earlier in Article 19.02(a) in describing the standard hours per day. If the second sentence of Article 19.02(a) was intended to take its context from, and be limited in the same manner as, the first sentence of Article 19.02(a) then the Union position would have merit. But I do not see any reason to think that the second sentence should be limited in the same fashion as the first sentence. The second sentence uses broader language, language which is used in Article 19.01 where the context is clearly broad, and not the narrower "standard daily hours of work" used in the first sentence. Article 19.01 says it is intended to define "normal hours of work" but that it does not guarantee "hours of work" or "days of work per week." In my view, then, Article 19.02(a) in addressing changes in the same term, that is changes in "normal hours of work," covers a change in the scheduled "days of work per week."

I conclude from an interpretation of the language of the agreement alone that the second sentence of Article 19.02(a) speaks of more than simply changing starting times or daily hours of work. Thus I conclude that Article 19.02(a) contemplated the type of change made with the introduction of the new schedule in June 1995, that is the new schedule which was grieved. In making the changes the Employer must of course provide the Union with sixty (60) days notice. In addition, the provision which follows, that is Article 19.02(b), clarifies the type of schedules which can be used. It expresses the principal limitations on any new shift schedules as:

1. A maximum of seven (7) consecutive work days, and
2. An endeavor [by the Employer] to provide one (1) weekend off in two (2) weeks.

The Union suggested that the new schedule was not introduced for valid business reasons. In my view, the Employer's new work schedule in housekeeping was based on valid business concerns. While the Union is correct that there may have been other solutions which would not have affected the grievors in the same fashion, there is no general requirement on the Employer to make those changes the Union would prefer or those changes which have the least impact on employees. The changes which were made here were motivated by valid business concerns (that is, the level of cleanliness on the weekends, weekend staff turnover and difficulties in training the weekend staff) and were reasonably directed to solving those business problems. In fact they appear to have been successful. The actual success of the changes is not, of course, of importance in determining whether the change was made for valid business reasons, as clearly not every business change will be successful in solving the intended problem.

I thus conclude that the collective agreement contemplated and permitted the schedule change made here. In addition, I note that the Employer gave sixty (60) days notice of the

change [see Article 19.02(a)] and that the new work schedule provides a maximum of seven (7) consecutive work days [see Article 19.02(b)] and provides at least one (1) weekend off in two (2) weeks [see Article 19.02(b)]. It actually provides for three (3) weekends off in four (4) weeks.

Finally, in light of my conclusion above about the meaning of the provision, and in particular finding no ambiguity in the provision, it is not necessary for me to address the issue of negotiating history. Negotiating history is only of assistance when the language in the agreement which must be interpreted is ambiguous. There was, however, a clear difference of opinion on the impact of the negotiating history and for that reason I will deal with it briefly.

On the disputed points I prefer the evidence of Mr. Baldwin to that of Mr. Harbin. Mr. Baldwin's recollection of the events was much clearer than Mr. Harbin's recollection, his testimony was supported by notes he made at the time, and it was supported by other documentary evidence. I find that the Employer sought a provision to ensure that it could make a change in shift schedules and that the provision in its proposals which was intended to do that was Article 19.02(a). The Employer proposal on Article 19.02(a) was awarded by the interest arbitration board and thus forms part of the parties' agreement. Thus a review of the negotiating history leads me to the same conclusion which I reached from an interpretation of the document.

3. The Issue of Estoppel

As noted, the Union argued that the Employer was estopped from making the changes it did with the new schedule. In view of my conclusions that:

- the parties' agreement includes a provision which contemplated the Employer

changing work schedules;

- the Employer followed the requirements of the agreement in implementing the new schedule;

- the negotiating history indicates the Employer sought a provision giving it the right to change schedules;

- the article which addressed this issue directly was awarded by the interest arbitration board; and

- the article awarded was the one which was sought by the Employer;

the argument for an estoppel is very difficult to make. The Union had, of course, argued that the grieved schedule changes were not contemplated or authorised by the agreement. I have found that the changes were authorised. Thus a major premise for the Union's estoppel argument is not present.

At the most basic level, the doctrine of estoppel requires three things:

- a contractual relationship,

- a representation by one party that it will not exercise its contractual rights, and

- detrimental reliance on that representation by the other party to the contract.

If the first party later reverses its position and seeks to assert its full contractual rights, the principle of estoppel may prevent it from doing so, may prevent it from engaging in this sort of unfair conduct. In this instance I have difficulty with two of the three aspects - the representation and the detrimental reliance.

The Union raised three matters as evidence of an Employer representation:

1. Mr. Baldwin's representations as to the Employer's intention at the time of bargaining;
2. The many years of scheduling only Monday to Friday; and
3. The way the jobs were described in the years prior to the arrival of the Union.

I deal with each in turn:

1. On the issue of Mr. Baldwin's representation, I conclude that, at most, Mr. Baldwin indicated what the Employer's intentions were at that time. A representation that the Employer did not then have any plans to change schedules can not be transformed or converted into a representation that the Employer will not, during the term of the agreement, exercise its rights to change work schedules. This is particularly so when the Employer was seeking to negotiate a provision permitting it to do exactly that.
2. The fact that the schedules had involved only weekday work for some fifteen (15) years can not be transformed into a representation that they will not be changed. There was nothing about this scheduling which indicated it would remain indefinitely, or for the duration of the agreement. The mere existence of an Employer practice, without anything else, does not equate with a representation that the practice will be continued.
3. Finally, the fact that the jobs used to be (accurately) described as Monday to Friday jobs can not, in my view, be transformed into a representation by the Employer that they will remain so forever, or even that they will remain for the duration of the agreement.

I am thus of the view that there was no representation that the Employer would refrain from exercising its contractual rights in scheduling.

I also have difficulty with the element of detrimental reliance. There was no evidence that the Union relied on anything the Employer said or did, or that it changed its position because of anything the Employer said or did. In particular, in light of the fact that Articles 19.01 and 19.02(a) were pursued to interest arbitration and that the Union sought its own version of these articles and was not successful (the interest arbitration board awarding the Employer version), it is difficult to find the detrimental reliance necessary to support an estoppel. Thus

even if the Union, unlike me, believed that the Employer had represented that the Employer would not exercise its rights to change work schedules, I find no evidence that the Union detrimentally altered its position in reliance on that belief.

I have carefully read the cases provided on estoppel. In my view, the cases do not assist the Union. While each arbitrator in the cases cited by the Union found that estoppel was applicable, each case clearly depends on its own facts. The facts here do not support a similar conclusion.

Thus I conclude that the Union argument of estoppel fails for two reasons:

1. There was no representation by the Employer that it would refrain from exercising its rights, and
2. There was no detrimental reliance by the Union.

VIII. SUMMARY

In summary, I have concluded that the actions of the Employer in changing the work schedules for the full time staff in the housekeeping department as it did in June, 1995 were permitted by the collective agreement. In addition there was nothing to estop the Employer from doing as it did. I thus dismiss the grievance.

Dated in London, Ontario, this _____ day of March, 1996.

_____

Howard Snow, Arbitrator