IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ALERT CARE CORPORATION
c.o.b. as OXFORD MANOR RETIREMENT HOME
- The Employer

-and-

CHRISTIAN LABOUR ASSOCIATION OF CANADA
- The Union

AND IN THE MATTER OF grievances involving a new work schedule

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

R. Aaron Detlor	- Student-at-law
Robert Ezer	- Manager of Human Resources
Avril Davies	- Manager of Human Resources

On behalf of the Union:

Ed Grootenboer	- Executive Director
Sharon Vandriel	- Ontario Representative
Mary Burwell	- Steward

Hearings held June 26, July 2, and July 24, 1997 in Ingersoll, Ontario.

AWARD

I. INTRODUCTION

On June 1, 1997 the Employer implemented a new work schedule at its retirement home in Ingersoll. The Union filed eight grievances. The Union grieved that the Employer was unable to implement a new schedule without the agreement of the Union. In addition, the Union alleged that in the implementation of the new schedule the Employer had violated provisions of the collective agreement dealing with job posting, seniority and layoff.

II. THE EVIDENCE

Alert Care Corporation operates eighteen retirement homes in Ontario. The Union represents employees in three homes - those in Tillsonburg, Woodstock, and Ingersoll. The employees of these homes are covered by a common collective agreement. The events which gave rise to these grievances occurred in the Employer's home in Ingersoll - the Oxford Manor Retirement Home.

For a number of years the employees at Oxford Manor have worked a particular shift pattern or schedule. Under that shift schedule, employees worked their way up to their preferred shifts. Vacancies were advertised and employees were able to post into preferred jobs, largely on the basis of their seniority. For example, Mary Burwell, currently the most senior employee, had for a number of years worked eight day-shifts in each two-week period. Ms Burwell posted into the position when the person who had been the most senior employee retired. That person had posted into the eight day-shift position several years earlier. In addition, there were other patterns of shifts available to employees and, depending upon an employee's personal preference and seniority, an employee would gradually work her way into the position which she desired. Once an employee had attained the pattern of shifts she desired, she kept that pattern of work unless she posted into a new position which had

become vacant and was advertised under the collective agreement.

Over the past several years the Employer has made various proposals during negotiations and at other times to change the shift pattern. None were acceptable to the Union and none were implemented.

In 1996-97 the Employer invested heavily in Oxford Manor which was enlarged and renovated. Following the renovations, the Employer again considered its employee requirements and the scheduling of the employees.

One of the Employer's managers is Avril Davies. Among her various roles, Ms Davies serves as a Manager of Human Resources. Ms Davies is very experienced in scheduling employees in retirement homes. Over a period of about six weeks beginning in late March, Ms Davies reviewed the pattern of shifts at Oxford Manor and considered the possible introduction of a new shift schedule. She met frequently with other managers to discuss this. She ultimately proposed a new schedule for the employees at Oxford Manor.

Ms Davies attended a meeting at Oxford Manor on May 8 at which employees were advised of the proposed schedule. Management first advised the employees of some of the reasoning behind the new schedule. Employees then proceeded individually in order of seniority into another room where they were shown the new schedule, and the pattern of shifts that would be available under it. At that time each employee was asked to indicate which of the positions she preferred. As each employee indicated her preference, her name was entered on that line on the master schedule. Employees were advised that the schedule was not final and, if they had concerns, they could write to the Employer setting out their concerns. In addition, employees were advised that if they wished to change their selection and had sufficient seniority to do so, they would be entitled to alter their stated preference.

The Union had not been advised of this meeting and no Union staff representative was present for it. A concern was raised by at least one employee regarding the lack of Union involvement. Ms Davies testified that when she had previously implemented a new schedule in another of the Employer's homes, the union involved in that home had suggested that she begin the implementation process by advising the employees first.

The employees contacted the Union shortly after the May 8 meeting. Sharon Vandriel, a Union Representative, wrote to the Employer on May 8 and indicated that she had been advised that there was a proposal for a new shift schedule at Oxford Manor. She noted that, in her view, the changes proposed at Oxford Manor could only be implemented with the agreement of the Union. She indicated that there was to be a meeting between the parties on May 15. If the Employer wished to discuss the new schedule at the May 15 meeting, Ms Vandriel asked the Employer to provide her with a detailed outline of the proposals prior to the meeting so that she could discuss it with her members and prepare a response.

On May 9 Robert Ezer, another Manager of Human Resources, provided Ms Vandriel with a copy of the proposed schedule. However at that time Mr. Ezer provided no reasons for the proposed introduction of the new schedule.

Ms Vandriel met with the employees in advance of the May 15 meeting but, having received no indication from the Employer as to the rationale for the new schedule, she was unable to obtain informed feedback from the employees.

The meeting between the parties was held on May 15 and the new schedule was discussed. At that meeting the Employer provided the Union with the rationale for the proposed changes. On the same day Mr. Ezer wrote to Ms Vandriel and confirmed some of the reasons which had been provided orally at the meeting. The reasons were based on a general

concern to provide more efficient quality care for residents by increasing overall hours, by reorganising kitchen staff hours, by avoiding shifts in which staff both cleaned bathrooms and prepared food, and by ensuring consistency of care by having full time staff work five shifts per week, including both day and evening shifts.

The Employer's initial presentation of the new schedule was poorly received. The Union witnesses indicated in their testimony, and Ms Vandriel indicated in her correspondence with the Employer, that the Union members at Oxford Manor felt bullied and intimidated by management in the way management had proposed the new schedule. In addition, the tone of the correspondence between Ms Vandriel (on behalf of the Union) and Mr. Ezer (on behalf of the Employer) indicated a strained relationship between the Union and the Employer on this issue. There were various accusations and attempts to clarify misconceptions in the correspondence. Suffice it to say that Mr. Ezer felt that the Union was not sympathetic to the Employer's concerns and was not prepared to deal with its agenda. On the Union side, Ms Vandriel felt that the Employer intended to implement the schedule regardless of Union or employee concerns.

Following the May 15 meeting the Union met with its members at Oxford Manor on Friday, May 23. On Monday, May 26, Ms Vandriel wrote to Mr. Ezer and provided a modified schedule which the Union and the members would find acceptable. In her letter Ms Vandriel reviewed concerns raised by the Employer and indicated that the Union’s modified schedule was also intended to address the concerns which had been raised by the employees with respect to seniority and shift preferences. The letter also indicated that the schedule was based on the schedule in place in the Tillsonburg facility operated by the Employer and covered by the same collective agreement.

Further meetings had been planned to discuss the shift schedules. However, those meetings

were cancelled by the Employer. No further meetings were held by the parties regarding the proposed shift schedule changes.

There were further letters. There was a letter from Mr. Ezer to Ms Vandriel dated May 27 and a letter from Ms Vandriel to Mr. Ezer dated May 28. However, Ms Vandriel's May 28 letter was faxed to Mr. Ezer before he sent her his May 27 letter. In the May 28 letter Ms Vandriel indicated that she understood the Employer was proceeding to implement the new shift schedule. She advised the Employer that in the Union view the implementation of the schedule on June 1, 1997, would be in violation of various articles of the collective agreement and she indicated that the Union would grieve those violations. She also advised that the Union would have no further discussions with the Employer about the schedule until the Employer reverted to the existing shift patterns. Finally, she advised Mr Ezer that the employees would be informed by the Union that the Union felt individual discussions between the Employer and an employee regarding bumping or scheduling would be inappropriate.

Mr. Ezer's letter of May 27 indicated that he had received the revised shift schedule from Ms Vandriel dated May 26. Mr. Ezer indicated that the Employer had not expected to receive a revamped schedule which "gives no consideration to management's proposals". Mr. Ezer expressed displeasure regarding the process. Mr. Ezer then asserted that management rights were clearly spelled out in the collective agreement and that management had "the right to implement the most efficient Master Schedule". He advised Ms Vandriel that the Union proposal was "not reasonable". He continued as follows:

> You have not considered the requirements necessary to provide efficient, quality care to the residents. Our concerns and proposals fall on deaf ears time and time again. C.L.A.C. has consistently refused to consider in a rational, meaningful and reasonable way, the proposed changes that are necessary. This is another situation where agreement has been unreasonably withheld. We did not ask the Union to submit a completely new proposal - we asked for agreement with modifications where required. We now have no alternative other than to implement our proposed schedule effective immediately. We have attempted to deal with you

> in a reasonable way. Unfortunately, the same approach has not been applied by the Union. Please be advised that the new Master Schedule will become effective June 1, 1997. We will be advising the employees forthwith.

The new Master Schedule was implemented June 1 as Mr. Ezer indicated and as Ms Vandriel had anticipated in her letter of May 28. Under that schedule some employees worked fewer hours than they had worked under the old schedule, and some employees worked more hours. Some employees who had worked only day shifts, now had to work both day and afternoon shifts. Several short shifts were added.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

ARTICLE 3 - MANAGEMENT RIGHTS

3.01 It is the exclusive right and function of the Employer, except as modified by the terms of this Agreement, to manage and control the business in every respect and to control and direct the working force.

3.02 Without restricting the generality of the foregoing, it is the exclusive function and right of the Employer to:

a) maintain order, discipline and efficiency;
b) hire, classify, direct, approve, promote, demote, transfer, layoff and retire employees;
c) discharge, suspend or otherwise discipline employees for just cause;
d) determine the work to be done, the location, methods and schedules for the performance of such work;
e) determine the number of employees required and the duties to be performed by each from time to time;
f) make and alter, from time to time, reasonable rules and regulations to be observed by the employees;
g) contract out work after discussion with the Union subject to Article 2.05.

3.03 Management shall exercise its rights in a manner that is fair, reasonable and consistent with the terms and provisions of this Agreement.

ARTICLE 10 - JOB CLASSIFICATIONS AND RATES OF PAY

. . .

10.03 Should the Employer create a new classification in the bargaining unit, the parties shall meet to negotiate such new classification including the wage rate. If they cannot reach agreement, the matter shall be submitted to arbitration as provided for in this Agreement.

ARTICLE 12 - WORK SCHEDULES, SHIFTS AND BREAKS

12.01

a) The Employer shall post work schedules on a four (4) week basis at least one (1) week prior to the effective date of the schedule. No changes shall be made to the posted schedule except where employee absenteeism creates a need. Employees are expected to cooperate in this regard. However, no change to the posted schedule shall be made without employee consent. The schedule covering Christmas and New Year's shall be posted as soon as reasonably possible.

b) Each employee shall receive a minimum of an average of one (1) weekend off in two (2) unless agreed otherwise between the Home and employee concerned.

12.02 It is agreed that the normal shifts shall be as follows:

a) the first shift of the day shall commence at 2300 hours and finish at 0700 hours (night shift);

b) the second shift of the day shall commence at 0700 hours and finish at 1500 hours (day shift);

c) the third shift of the day shall commence at 1500 hours and finish at 2300 hours (afternoon shift).

The parties recognize that there are existing shifts, including short shifts, that vary from the times set out above and that there may be a requirement to change shifts or establish alternative shifts in the future.

Changes, if required, will be based on the need to provide efficient, quality care for residents. Changes will not be implemented without concern for and without consultation and mutual agreement with the employees involved and the Union. Such agreement shall not be unreasonably withheld.

12.03

a) The parties agree that current shift patterns will continue. Changes will be subject to mutual discussion and agreement. Where possible, employees not working a preferred shift may be scheduled to work a preferred shift (shifts on the basis of seniority). Where agreement is required, such agreement shall not be unreasonably withheld.

b) The Home's administrator may, in consultation with the stewards, transfer an employee on a fixed shift to an alternate shift for a maximum period of two (2) weeks. Such transfer shall be done with the consent of any other employee who may have to work a different shift in order to accommodate a transfer.

12.04

a) There shall be two (2) fifteen (15) minute breaks with pay for all employees during each shift of six (6) hours or more, in addition to a one-half (.5) hour unpaid lunch. The breaks will be taken at mutually agreeable times keeping in mind the needs of

resident care.

b) Employees working a shift of more than three (3) hours but less than six (6) hours shall receive a minimum of one (1) fifteen (15) minute break with pay during the middle portion of the shift.

c) Employees shall be allowed to take the full time of their break without interruption except in case of emergency.

12.05

a) Employees shall not be required to work on more than two (2) different shifts in any one (1) week. "Shifts" are as provided for in Article 12.02 above.

b) Employees shall not be scheduled to work more than seven (7) consecutive days or more than twenty (20) days in any four (4) week scheduling period.

c) Each employee shall have a minimum of twelve (12) hours off between shifts.

d) Exceptions to the provisions of Article 12.02(a), (b) and (c) may be made by mutual agreement.

12.06 For the purpose of this Agreement, a week shall be considered to begin Sunday at 2300 hours and end the following Sunday at 2259 hours.

12.07 For the purpose of scheduling days off, an employee working from 2300 hours to 0700 hours shall be deemed to have worked on the day in which the most hours falls.

12.08 Should the Employer permanently reduce the overall hours in a facility, it shall so advise the Union fourteen (14) days in advance.

12.09 Where an employee is required to work a posted schedule which involves shift rotation then that employee shall receive a premium of twenty-five cents (0.25) per hour for those hours worked between 1500 hours and 0700 hours.

ARTICLE 13 - VACANCIES AND JOB POSTINGS

13.01 Vacancies are created by the establishing of new jobs, the termination of existing employees or the temporary absence of an employee exceeding (4) weeks.

13.02 All vacancies must be posted on the bulletin board and must indicate:

a) whether the position is full-time or part-time;

b) the job classification(s);

c) the starting date of such position;

d) the number of shifts and the shift hours;

e) the qualifications required, if any;

f) the approximate duration if the position is temporary.

13.03 A vacancy shall be posted for seven (7) calendar days. Applicants must notify the administrator or her designate within that time to be eligible for the position.

13.04 When filling a job vacancy, the Employer will consider:

a) skill, qualifications and ability;

b) seniority.

Preference will be given to qualified employees with the most seniority, unless the Employer has justifiable reasons for giving greater consideration to the factors in (a).

ARTICLE 21 - LAYOFFS AND RETIREMENT

21.01 In case of layoffs the Employer will give such recognition to the seniority standing of each employee as the continued proper performance of the work permits. Ability to perform available work being relatively equal, seniority shall prevail so that the employee having the most seniority shall be laid off last and recalled first.

ARTICLE 23 - GRIEVANCE PROCEDURE

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23.05 A Policy grievance is defined as one which involves a question relating to the interpretation, application or administration of this Agreement and, when submitted by the Employer, can relate to the conduct of the Union, its representatives or stewards. A policy grievance may be submitted by either party to arbitration under Article 24, bypassing Step 1 and Step 2. Such policy grievance shall be signed by a CLAC representative or, in the case of an Employer's policy grievance, by the Employer or their representative.

ARTICLE 24 - ARBITRATION

. . .

24.08 The arbitration board is to be governed by the following provisions:

. . .

g) the board shall determine the real issue in dispute according to the merits and shall make whatever disposition it deems just and equitable.

IV. POSITION OF THE UNION

The Union reviewed various provisions of the collective agreement, some of which have been reproduced above. The Union then dealt with the various grievances and alleged violations of the collective agreement. I will not reproduce in detail the Union's submissions; instead I simply outline the Union position on the various alleged violations of the collective agreement.

Under Article 12 the Union submitted the Employer required agreement of the Union to

implement the changes which it implemented on June 1. In this situation the Employer did not seriously attempt to obtain the Union's agreement, and did not obtain agreement. The Employer was unable to implement the change in the absence of agreement. The provision requiring agreement indicated the parties contemplated a failure to agree. If the Employer felt that the Union's agreement had been unreasonably withheld, then the Employer was entitled to file a policy grievance.

The Union submitted that the question of whether the Union had been unreasonable was not properly before me as the Employer had not filed a grievance alleging that the Union's agreement had been unreasonably withheld. In the alternative, the Union had not been unreasonable in withholding consent. The Union submitted that the notion of mutual agreement requires some level of reciprocity and, as the employees and Union saw no benefit in the proposal, the Union and employees saw no reason to agree to it. That decision was reasonable.

In addition, the Union submitted that the Employer had in its implementation process violated the Union's bargaining rights (Article 10), had failed to properly post the positions (Article 13), and had improperly laid off employees (Article 21).

The Union referred to the following authorities: *Re Canadian Labour Arbitration 3rd Edition* (Brown & Beatty) Sections 6:0000 and 9:1000; *Re Thousand Islands Duty/Tax Free Store Ltd. and Ontario Liquor Boards Employees' Union* (1989), 6 L.A.C. (4th) 261 (Simmons); *Re Charlotte Eleanor Englehart Hospital and Service Employees' Union, Local 210* (1980), 25 L.A.C. (2d) 25 (Palmer); Palmer and Palmer *Collective Agreement Arbitration in Canada*, 3rd Edition, Chapter 14, Scheduling of Work and Management's Rights; *Re Kraus Carpet Mills Ltd., Chrome Plant and Verichrome Yarns and United Food & Commercial Workers, Local 175* (1991), 23 L.A.C. (4th) 84 (Marszewski); Definitions of *Reasonable* and

Unreasonable, Random House College Dictionary, Revised Edition; *Re Saugeen Valley Nursing Centre and Christian Labour Association of Canada* (March 9, 1995), unreported (Fisher); *Re Overwaitea Food Group and the United Food and Commercial Workers' International Union, Local 1518* (1996), 55 L.A.C. (4th) 300 (Bird); and *Re New Vista Care Home and British Columbia Nurses' Union* (1988), 1 L.A.C. (4th) 227 (Larson).

V. SUBMISSIONS OF THE EMPLOYER

As with the Union submission, I will not reproduce in detail the Employer submission. I simply note the substance of that submission.

The Employer submitted that it had a right to proceed with a new schedule in the absence of the agreement of the Union. The Employer submitted that Article 3 provides a broad range of exclusive management rights. In the Employer view the Management Rights Article was a "defining" article in the collective agreement and subsequent articles in the agreement should be read in light of it. Thus the rights in Article 12.01, 12.02 and 12.03 should be read in light of the exclusive and broad management rights in Article 3. Article 12 clearly contemplated changes in schedules. Article 12 contemplated that changes should be done by agreement, but that the agreement should not be unreasonably withheld.

The Employer acknowledged that it had a duty to act in a reasonable manner. Its duty to act in a reasonable manner flowed from Article 3, not from Article 12. Article 12 indicated that the Union was not to act in an unreasonable way in withholding agreement to a new work schedule.

In this instance the Employer had spent considerable money on refurbishing and renovating the facility. The Employer had acted reasonably in proposing a new schedule for the

refurbished facility. The onus then shifted to the Union. Did the Union act in a reasonable way in withholding consent? In the Employer view the Union was not reasonable in withholding its agreement for the new schedule.

The Employer submitted that Article 12 imposed a duty of reasonableness upon the Union. The Employer had concluded that the Union was not acting reasonably in withholding consent and, in that circumstance, it was reasonable for the Employer to think that it could move ahead with the new schedule. The Employer had met and discussed the schedule with both the Union and the employees.

The Employer also submitted that if the Employer was required to obtain Union agreement, then I should determine whether the agreement had been unreasonably withheld.

Finally, the Employer argued that it should be held to a standard under which it could implement the new schedule unless in so doing it acted in an arbitrary, discriminatory or bad faith manner. The Employer submitted that it had not violated this standard.

As for the other alleged violations, the Employer submitted that it had not violated the Union's representational rights, had not implemented the scheduling in violation of the collective agreement and had not implemented layoffs contrary to the collective agreement.

The Employer relied upon the following authorities: *Brown & Beatty*, 5:3100, p. 5-54 to 5-55, and 5:3200, p. 5-59; *Re Red River Valley Health District and Manitoba Nurses' Union* (1994), 40 L.A.C. (4th) 63 (Chapman); *Re Quebec & Ontario Paper Co., Thorold Division and Canadian Paperworkers Union Local 101* (1992), 24 L.A.C. (4th) 163 (MacDowell); *Re Daam Galvanizing Ltd. and Marine Workers & Boilermakers' Union, Local 1* (1993), 42 L.A.C. (4th) 276 (Greyell); *Re Union Gas Co. of Canada Ltd. and International Chemical*

Workers' Union, Local 798 (1972), 1 L.A.C. (2d) 295 (Weatherill); *Re International Chemical Workers' Union, Local 279 & Rexall Drug Company Ltd.* (1957), 7 L.A.C. 121 (Fuller); *Re National Grocers Co. Ltd. and Teamsters Union, Local 91* (1991), 20 L.A.C. (4th) 310 (Bendel); *Re Canadian Airlines International Ltd.* [1996] B.C.C.A.A.A. No. 164, Award no. C-23/96; *Re Peerless-Cascade Plastics Ltd. and Canadian Automobile Workers, Local 195* (1991), 20 L.A.C. (4th) 263 (Palmer); *Re Thompson General Hospital and United Food & Commercial Workers, Local 832* (1992), 25 L.A.C. (4th) 423 (Yost); *Re Government of Nova Scotia and Nova Scotia Government Employees Union* (1990), 13 L.A.C. (4th) 322 (Cromwell); *Re Navistar International Corp. Canada and C.A.W. Canada, Local 127* (1995), 52 L.A.C. (4th) 223 (Snow).

VI. CONCLUSIONS

At the hearing on July 24, the parties asked that I provide a letter decision indicating the outcome as soon as possible and that I provide full reasons at a later date. On July 25 I advised the parties by letter that I had concluded the Employer was unable to implement a new shift schedule as it had done on June 1 without the agreement of the Union. As the Union had not agreed, the implementation of the new schedule was in violation of the collective agreement. I directed the parties to revert to the shift schedule and pattern of shifts that had existed prior to June 1. I indicated that my reasons would be provided in due course. These are my reasons.

While there were eight grievances before me, they are all related to the Employer's implementation of the new schedule. Four of the grievances, two policy and two group grievances, alleged violations of Articles 12.02 and 12.03. In addition, there was one policy grievance alleging that the Employer failed to post the vacancies created by the new schedule in violation of Article 13.02, one group grievance and one policy grievance alleging that

there was an improper layoff in violation of Article 21, and finally one policy grievance alleging that the Employer had failed to negotiate wage rates with the Union for the classifications created under the new schedule, in violation of Article 10.03.

However, in terms of categorizing the eight grievances, there are two types. The first type of grievance (those four under Article 12) raised the issue of whether the Employer could implement the new schedule without agreement of the Union. (I note that while the collective agreement mentions the agreement of the employees and the Union, there was no dispute that the Union speaks for and represents the employees on this matter.) The other four grievances were of a second type as they raised issues as to how the Employer implemented the schedule and whether there were improper job postings, or improper layoffs, or a failure to negotiate salaries. However, if the Employer could not implement the schedule at all, then these grievances about *how* the Employer did something which it had no right to do would be of no lasting importance.

I thus turn first to the question of whether the Employer had the authority under this collective agreement to implement its new schedule. To briefly review the relevant evidence, I note that this facility has used a particular shift schedule for a number of years. Under that shift schedule employees have posted into their preferred shifts. Vacancies were posted under Article 13 and, largely on the basis of seniority, employees posted into what they regarded as the preferred jobs. Once an employee attained the desired pattern of shifts, she kept that pattern unless she posted into a new position which had become vacant and was advertised under Article 13.

I also note that in Article 12.02 there is an indication that the shifts each day have a certain pattern. The parties have agreed that in any day there will be a night shift, a day shift, and an afternoon shift and that each shift has a certain start and finish time. In relation to those

normal shifts the parties have indicated that:

> Changes will not be implemented without concern for and without consultation and mutual agreement with the employees involved and the Union. Such agreement shall not be unreasonably withheld.

Under Article 12.03 "the parties agree that current shift patterns will continue." This reference to shift patterns would cover, for example, the pattern of eight day-shifts in a two week period which had been worked by Ms Burwell, the senior employee. The parties have also agreed that "changes will be subject to mutual discussion and agreement." In addition, the parties have agreed that "where agreement is required, such agreement shall not be unreasonably withheld."

On June 1 the Employer implemented changes in both the "current shift patterns" and in "the normal shifts". The Employer had not obtained the agreement of the Union. The first issue before me is thus a question of interpretation of the collective agreement. Absent agreement by the Union, can the Employer unilaterally implement changes in the current shift patterns and shifts?

In this agreement, the language on this issue is quite straightforward. Changes require agreement. I can see no reasonable way of interpreting this collective agreement language to reach a conclusion that the Employer may proceed in the absence of the agreement of the Union. The Union's agreement to the change is a precondition to Employer action. The Union did not agree to the changes. In the absence of agreement to a new shift pattern, the parties are left with the language in the first sentence of Article 12.03(a) "the parties agree that the current shift patterns will continue."

This is not a situation where the Employer action is subjected to a standard of reasonableness. The Employer action is dependent upon having obtained the Union's agreement and, in this instance, the Employer did not have Union agreement to the changes

which it introduced.

Nor is this a situation in which the Employer can proceed to implement schedule changes when it believes that the Union has unreasonably withheld its agreement. The collective agreement imposes a separate obligation upon the Union not to unreasonably withhold its agreement.

In light of my conclusion that, in the absence of agreement, this collective agreement will not permit the Employer to implement changes, it is unnecessary to deal with the various other issues raised by the Union, issues as to how the Employer implemented the schedule change. The Employer, however, submitted that the Union had unreasonably withheld its agreement and, because of that, the Employer action was warranted. The Union submitted that the issue of whether the Union had unreasonably withheld its agreement was not properly before me as the Employer had not grieved the Union's failure to agree. There are thus two issues which need to be resolved. First, what should the Employer have done in the event it felt the Union was unreasonably withholding agreement? Secondly, did the Union unreasonably withhold agreement?

The first issue is this: *Under Article 12.02 and 12.03 if the Employer believes that the Union is in violation of its obligation not to unreasonably withhold agreement, what should the Employer do?* In this case the Employer simply proceeded without agreement. However, the Employer has a remedy available to it other than the remedy of self-help which it adopted in this instance. Under this collective agreement the Employer is clearly entitled to file a policy grievance. Under Article 23.05 the Employer could have grieved and resolved the issue of whether or not the Union had unreasonably withheld its agreement. As a remedy the Employer could have sought an order from an arbitrator that the Union agree to the change proposed by the Employer. Article 24.08(g) authorizes such a direction. Thus if an

arbitrator concluded that the Union was unreasonably withholding agreement to a change in shift schedules or patterns, an arbitrator could direct the Union to agree to those changes. If the Employer is confronted by the Union which it believes is unreasonably withholding agreement contrary to the collective agreement, the Employer is required to resolve that difference under the grievance and arbitration provisions of its collective agreement. It is improper for the Employer to simply ignore the requirement for Union agreement which is contained in the collective agreement.

The situation which confronted the Employer is not unlike the situation which confronts an employee who is faced with an order which the employee feels is contrary to the collective agreement. In that case the employee is required to "work now and grieve later". The Employer is similarly, under this agreement, required to maintain the existing schedule (work now) until the Employer obtains the Union's agreement. The Union's agreement, which is not to be unreasonably withheld, may be obtained voluntarily or it may be obtained by order of an arbitrator (grieve later). Another analogous situation is that which arises when an employee seeks a period of leave under a provision which says that the leave request is not to be unreasonably denied. If the request is denied it is improper for the employee to simply take the leave and later argue that the request was unreasonably denied.

The second question is this: *Did the Union unreasonably withhold its agreement?* The Employer suggested that if I were to conclude, as I have, that the Employer should have filed a grievance then, as I had heard the evidence on this issue, I should myself address the question of whether or not the Union had acted unreasonably. The Union submitted that as there had been no grievance regarding this matter, the issue was not properly before me.

As an arbitrator my jurisdiction arises either from the grievance(s) or from the statute. An arbitrator has jurisdiction to deal with the issue(s) raised by the grievance(s), or those issues

which must be resolved in order to deal with the grievance(s). The grievances before me are the Union's grievances. They do not allege that the Union unreasonably withheld its agreement. The Employer submitted, in effect, that the Union unreasonably withheld its agreement and the Union's actions served as the Employer's defence for what it had done. I do not agree. If the unreasonable withholding could serve as a defence then, as arbitrator, I would have jurisdiction to deal with this issue. But whether or not the Union withheld its agreement unreasonably has no bearing on these grievances and thus I do not have jurisdiction or authority from the grievances to decide this issue. Nor does the statute authorize me, or give me jurisdiction, to decide this matter. I thus agree with the Union's submission on this issue of jurisdiction.

I do not, however, wish to deal with this matter solely on the basis of an issue of jurisdiction. While I have concluded that the issue of whether the Union unreasonably withheld its agreement is not properly before me, and was not "the real issue in dispute" (Article 24.08) in the grievances which were filed by the Union, nevertheless I think my views may be of assistance to the parties, and for that reason I will express an opinion on this issue. I repeat that I do so because I think my comments on the process may be of assistance to the parties should the Employer continue to desire to change the current shift patterns.

I begin by noting that the approach which the Employer took in drafting its proposed shift patterns was reasonable - that is the concerns or business reasons raised by the Employer were reasonable. If this collective agreement simply required that the Employer have reasonable grounds to support a change in shift patterns, then the Employer would have succeeded. This collective agreement, however, requires the Employer to secure the agreement of the Union before implementing different shift patterns, not simply that the Employer have a reasonable basis for change.

I turn now to consider the Union's position. In this instance, Ms Davies, a member of the

Employer's management team who was experienced with scheduling employees, considered the new shift patterns over a period of some six weeks. The Employer proposed the shift pattern to the employees on May 8. On May 9 the Employer sent the proposal to the Union, but without any explanation or reasons for their introduction. The Union consulted with the employees prior to meeting the Employer. This meeting was less productive than it might have been if the Union had known the reasons underlying the Employer proposal. The Employer finally provided a statement of reasons at the meeting on May 15 and followed up with a letter also dated May 15. The Union, however, had concerns of its own. The Union was concerned about how the new shift schedules were to be implemented, including whether the jobs would be posted and the effect that the schedule would have on previous job postings and preferred shift schedules. In addition, because of employee preferences, some senior employees appeared likely to, and ultimately did, have their hours of work reduced under the new schedule, and some employees who had worked only day shifts had to work both day and afternoon shifts. The Union thus felt that the seniority rights of employees would not be respected under the new schedule. Nevertheless, the Union met with the employees again on May 23, the first opportunity after May 15 for the Union to do so. On the next business day (May 26) the Union forwarded to the Employer a detailed written response and an alternative shift schedule. In my view the Union's actions to this point were entirely reasonable.

The Employer appears to have been operating as though the collective agreement gave it quite different rights from those which I have concluded it had. The Employer appears to have been working towards a June 1 implementation. Mr. Ezer advised in his May 27 letter that the Employer would implement the schedule changes on June 1. While his May 27 letter was provided to Ms Vandriel after Ms Vandriel's letter to Mr Ezer dated May 28, Ms Vandriel as of May 28 clearly contemplated that the Employer planned to implement the new shift schedule, in the absence of agreement, on June 1, 1997. The Employer ultimately did of course implement the schedule on June 1. Nevertheless, I find the actions of the Union

in considering the Employer proposal to have been reasonable.

In my view the agreement of the Union certainly was not unreasonably withheld. The Union sought reasons from the Employer, met with its members and reflected its members' concerns through the proposal of a different schedule. The Union's proposal was never discussed with the Employer, in part because the Employer cancelled the meetings at which it would have been discussed and in part because the Employer implemented its own schedule. Ms Davies took six weeks to consider the schedule although she was already very experienced in such matters. The Union had less than two weeks from the time it received reasons for the proposal (May 15) until the Employer implemented the change. During that time the Union actively pursued the matter and made a proposal for a different schedule similar to one in operation in Tillsonburg. The Union's actions and concerns were reasonable.

It follows then that even if I were to have concluded that, in the absence of an Employer policy grievance, I had jurisdiction to consider whether the Union had unreasonably withheld its consent, I would find that the Union did not unreasonably withhold its agreement.

In conclusion, as there was no agreement to change the shift patterns and as the parties had agreed that the current shift patterns would continue, I thus confirm my July 25 direction that the Employer return to the shift patterns and shifts as they existed prior to June 1, 1997.

I raised at the hearing the question of the practical difficulties of reverting to the earlier shift patterns, should I order the Employer to do so. The parties suggested that a four-week period would be a reasonable time in which to return to the earlier shift pattern. I thus confirm my July 25 direction that the Employer revert to the earlier shift patterns effective Sunday, August 24, 1997, or on such other day as the parties may agree.

My conclusion that the Employer had no authority to implement the schedule in any manner

in the absence of the Union's agreement makes it unnecessary for me to consider whether or not the details of the manner in which the Employer implemented the schedule violated the agreement. Moreover I see no benefit to the parties in my providing comments on those issues.

For ease of reference, I repeat the main conclusions which I have reached above:

1. The Employer has been ordered to return to the shift schedule and patterns of shifts as they existed prior to June 1, 1997, such return to be made effective August 24, 1997, or on such other day as the parties may agree.
2. If the Employer wishes to implement a new shift pattern, it requires the agreement of the Union and employees.
3. If the Employer feels that the Union is unreasonably withholding its agreement, its remedy is not one of self-help but rather a policy grievance under the collective agreement.

I now turn to the issue of remedy for individual employees. In the event that I concluded the Employer improperly implemented the shift changes, the parties asked me to refer the question of individual remedy back to the parties for further consideration. I thus refer back to the parties the matter of remedy for individual employees who worked under the shift schedule implemented on June 1. I remain seised to deal with any matters which arise in the implementation of this award.

Dated at Port LaTour, Nova Scotia, this 23rd day of August, 1997.

Howard Snow, Arbitrator