IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

IMT - A DIVISION OF CANRON INC.

- The Employer

-and-

THE UNITED STEELWORKERS OF AMERICA
and
LOCAL 2918 of THE UNITED STEELWORKERS OF AMERICA

- The Union

AND IN THE MATTER OF a grievance regarding shift schedules

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Edward T. McDermott	- Counsel
Fred Schmeiss	- Vice President - Manufacturing
Katherine Pennacchietti	- Personnel Manager

On behalf of the Union:

John Beveridge	- Union Representative
Kelly Hoskin	- President, Local 2918
Dan Countryman	- Chief Steward, Local 2918

Hearing held October 28 and December 22, 1997 and January 12, 1998 in Ingersoll, Ontario.

AWARD

I. INTRODUCTION

In September of 1997 the Employer re-instituted a midnight shift in the axle department. The shift was largely staffed with employees who volunteered to regularly work the midnight shift. However, no forklift operator volunteered for the midnight shift and thus two forklift operators were required to rotate the midnight shift and the day shift.

The Union grieved that in a two-shift operation:

1. The shifts had to be the day shift and the afternoon shift;
2. Unless all employees agreed to no rotation, everyone was required to rotate shifts; and,
3. The time worked on Sunday was to be paid at overtime rates.

In addition, both parties alleged that the other was estopped from enforcing its interpretation of the collective agreement because of representations made in 1994 when the midnight shift had first been implemented in the axle department.

II. THE EVIDENCE

The Employer operates a plant in Ingersoll. Of the plant's three departments, the axle department is involved in this grievance. In the early 1990's the axle department production line operated with just one shift; however, by 1994 the work had increased to the point that another shift was needed on the production line.

Two-shift operations in the plant have generally been a day shift followed by an afternoon shift, and the employees have generally rotated the day and afternoon shifts. In 1994 when it became known that another shift might be added in the axle department, several employees

expressed an interest in that new shift being a midnight shift on which the employees would work permanently without having to rotate to the day shift.

In 1994 the Employer discussed the idea of a non-rotating midnight shift with the Union. The Employer then implemented a midnight shift staffed entirely with volunteers, including a forklift operator. No employee rotated to the day shift. During the 1994-97 period the midnight shift operated with volunteers without any complaint or grievance and without any claim for overtime from the Union or the employees.

In the spring of 1997 the supervisor of the midnight shift in the axle department resigned. The Employer tried to continue the midnight shift by having the axle department employees supervised by the night supervisor from another department. However, the Employer soon determined that this arrangement would not work successfully. Thus in June, 1997 the Employer moved the midnight axle department workers to the afternoon shift where the supervision was better.

When the Employer changed the shift from a midnight to an afternoon shift, it indicated to the Union that the move was temporary and would last only until a new supervisor could be hired and trained for the midnight shift. When a new supervisor was in place the shift would return to midnights.

A new supervisor was hired, trained, and ready to supervise the midnight shift by early September of 1997. In August the Employer posted a notice inviting an expression of interest from employees wishing to work permanently on the night shift. A sufficient number of production employees were interested that the Employer implemented the midnight shift and staffed it with those production employees who had volunteered for the shift.

However, the work of the axle department required a forklift operator and neither of the two forklift operators in the axle department wanted to work a permanent midnight shift. The Employer required the two forklift operators to take turns on, or rotate between, the day and midnight shifts. The two forklift operators raised their concerns about this arrangement with the Union and the Union initiated this grievance.

Because of the estoppel argument, there was considerable evidence regarding the 1994 and 1997 discussions between the Employer and the Union. Three witnesses testified about the discussions - Kelly Hoskin (President of the Local Union), Fred Schmeiss (Employer Vice President - Manufacturing), and Rudy Wosing (Supervisor in the axle department).

Mr. Hoskin testified that it had always been understood by the parties that when there were two shifts those shifts were to be days and afternoons. He said he had first been informed of the possibility of a permanent midnight shift when several employees asked if the Union would permit them to work only midnight shifts contrary to the collective agreement. Several employees were involved in other businesses and preferred to work steady midnights rather than rotate shifts. Mr. Hoskin discussed this issue with Mr. Schmeiss and Mr. Wosing who wished to know if the Union had a problem with employees working regular midnights. Mr. Hoskin said that he advised Mr. Schmeiss and Mr. Wosing that the midnight shift would require all volunteers - some volunteers for steady days and other volunteers for steady nights - and that if one person objected to the new shift arrangement the shifts would have to revert to days and afternoons. Mr. Hoskin emphasised that he had made it clear that in the Union's view the arrangement required 100% volunteers and that he also made it clear to Mr. Schmeiss and Mr. Wosing that if an employee working nights wanted to revert to a rotation arrangement the shifts would have to be day and afternoon shifts.

In cross-examination, Mr. Hoskin agreed that the issue discussed was whether employees

could work a steady midnight shift rather than rotate. He reiterated that he had made it clear to Mr. Schmeiss that if one person on midnights wished to rotate then the shifts would be changed to day and afternoon. Mr. Hoskin was uncertain when these conversations took place other than they were held shortly before the Employer implemented the change and thus he believed it was 1992, or 1993, or 1994. I note that the implementation was in 1994. The midnight shift then continued until some point in 1997 which Mr. Hoskin estimated to be March. I note that it was June.

Mr. Hoskin agreed that many employees were unhappy with the 1997 change to day and afternoon shifts and that many employees were anxious to revert to the earlier day and midnight shift arrangement. He agreed that when the change to afternoons occurred he had been advised by the Employer that the afternoon shift was temporary and when a supervisor was hired and trained the shift would revert to midnights. Mr. Hoskin said that in 1997 he repeated to Mr. Schmeiss the Union view that the arrangement must be entirely voluntary.

Mr. Wosing, the axle department supervisor, testified that in 1994 neither the Union nor Mr. Hoskin had advised him that the midnight shift required 100% agreement. Similarly neither Mr. Hoskin nor the Union said that the shift would have to revert to afternoons if one person objected.

Mr Schmeiss agreed that in 1994 Mr. Hoskin had acknowledged the importance of employee wishes but said that the idea of 100% volunteers had not been discussed and he denied that Mr. Hoskin had communicated to him the Union's opinion that if one person objected the shift would have to change to afternoons. He agreed that in 1997 several employees were upset with the change to the afternoon shift and wanted the Employer to revert to the midnight shift. Mr. Schmeiss testified that he had consulted with the Union when the move to afternoons was made in June of 1997 and that he had again consulted with the Union prior

to reverting to the midnight shift. Mr. Schmeiss described Mr. Hoskin's reaction when told of the plan to return to the midnight shift with the words "he was fine with it." Mr. Schmeiss denied that Mr. Hoskin had told him in 1997 that it would require 100% volunteers or that if one person objected the shift would have to revert to an afternoon one.

Apart from the 1994-1997 arrangement in the axle department in which employees did not rotate shifts, I heard evidence regarding other employees who did not rotate. For a number of years certain specialised operations have operated on two, or even three, shifts. In at least one instance involving a three-shift operation one employee worked steady midnights while the other two employees rotated days and afternoons. In other instances no employee rotated. In each of these instances the decision that employee(s) would not rotate was based on the wishes of the employee(s) and was done with the agreement of the Employer.

Finally the Union provided me with information about a 1987 grievance together with the Employer's reply which resolved the matter. The grievance had raised a concern that only three of five toolmakers in the toolroom were required to rotate to the afternoon shift, while two worked only days. In its reply to this grievance the Employer provided its view of the requirement in the collective agreement for rotation of employees. The Employer response noted that while three did work common to the day and afternoon shifts the other two employees did work that was unique to the day shift. Under the agreement, only those employees "involved" in the work done on both shifts were required to rotate. Thus in the grievance only the three toolmakers who were involved in the work done on both shifts were required to rotate; those employees who did work unique to the day shift did not have to rotate shifts.

III. THE PROVISIONS OF THE COLLECTIVE AGREEMENT

The following are the relevant provisions of the 1995-1998 collective agreement:

ARTICLE 5 - RESERVATION OF MANAGEMENT FUNCTIONS

5.01 Subject to the terms of this Agreement, the Company reserves the right to maintain order, discipline, and efficiency . . .

5.02 The Company further reserves to itself the undisputed right to operate and manage its business in all respects subject to its obligations herein . . .

ARTICLE 14 - HOURS OF WORK AND OTHER WORKING CONDITIONS

14.01 The parties hereto have mutually agreed upon this schedule of hours of work for each department, conditions governing overtime work, and conditions governing reporting for work when work is not available.

14.02 This schedule is intended to provide a basis for calculating overtime and shall not be construed as a guarantee to any employee for such hours or any other hours.

14.03 The following are the starting and stopping times for the various departments in the plant but any changes in the starting and/or stopping times in any department or section of the plant will be put into effect only after consultation with the Union, except in cases of extreme emergency in which instance the meeting will take place at the earliest possible opportunity.

14.04 (a) Regular Shifts:

Day Shift From:	7:30 am - 12:00 noon
	12:30 pm - 4:00 pm
Afternoon Shift From	4:00 pm - 8:30 pm
	9:00 pm - 12:30 am

Each of the above shifts with a half hour unpaid lunch break.

(b) The three shift rotation will be as follows: midnight's to afternoons, afternoons to days, days to midnight's.

Three Shift Operation:

First Shift From:	7:30 am - 12:00 noon
	12:20 pm - 3:30 pm
Second Shift From:	3:30 pm - 8:00 pm
	8:20 pm - 11:30 pm
Third Shift From:	11:30 pm - 4:00 am

4:20 am - 7:30 am

Note: On the above three shift operations a paid twenty (20) minute lunch period will be allowed.

(c) When there are two or more shifts in operation, all employees involved will be required to take their turn on the other shifts for equal periods, the length of which periods shall be determined by agreement between the employees involved and the Company and the Union will be notified. All employees who rotate shall rotate at the same time (that is day). During the term of this Agreement, shifts shall rotate on a two week basis.

14.05 Where a third shift commences upon either a Sunday or a statutory holiday, the hours worked on such days notwithstanding anything to the contrary in this Agreement, shall be paid at regular straight time plus the appropriate shift premium.

14.06 (a) The regular working week shall consist of five (5) days of 8 hours from Monday to Friday inclusive, or 40 hours per week for all employees subject to this arrangement.

. . .

ARTICLE 15 - OVERTIME

15.01 Overtime will be paid on a daily basis at one and one-half (1 1/2) times basic hourly rate for all hours worked in excess of eight (8) hours per day. There shall be no pyramiding of overtime payments. For example, an employee who started work at 11:30 pm on Sunday night and then came back at 3:30 pm on Monday afternoon would be entitled to overtime pay for all hours in excess of eight (8) hours that he worked within the twenty-four (24) hour period beginning at 11:30 pm on Sunday. However, in such a case it is likely that the employee would, in actual fact, work six (6) shifts during that week, not five (5), and the last shift which would finish at 11:30 pm on Friday evening would, having started at 3:30 pm on Friday, be the normal Friday afternoon shift and thus could not be claimed for overtime.

15.02 Except where agreement to the contrary is reached between Management and the Union Negotiating Committee, overtime will be paid for all work performed on . . .Sundays at the rate of twice the employee's regular hourly rate. . . .

. . .

ARTICLE 17 - WAGE RATES AND RANGES OF WAGE RATES AND JOB CLASSIFICATIONS

. . .

17.03 Shift Premiums - Effective February 26, 1993, the second shift premium will be thirty-six (36) cents per hour and the third shift premium will be forty (40) cents per hour.

. . .

IV. POSITION OF THE UNION

The Union submitted that the "regular" two shifts were described in Article 14.04 (a). "Regular" meant just that. The Union submitted that the day and midnight shift arrangement was inconsistent with the regular two shift pattern in 14.04 (a). The three shift pattern was described in 14.04 (b) and included a midnight shift.

Article 15 dealt with overtime and used regular hourly rate. This referred to Article 14.04 and, if the Employer was allowed to operate a midnight shift in this way, then the hours were no longer regular and would be subject to an overtime premium under Article 15.

The original 1994 midnight shift had been implemented following conversations between the Employer and Union in which the Union had raised its concerns that the staffing would have to be on a 100% voluntary basis as the Union did not object to accommodating the interests of its members. In 1997 when it was not possible to obtain 100% volunteers the Union grieved and thus the issue of the interpretation of the agreement was raised at the first available time.

As an alternative position the Union submitted the Employer was estopped from enforcing its right to implement a midnight shift. The Union submitted the Employer had represented to the Union that a midnight shift required 100% volunteers, the Union had relied upon that representation and had not attempted to change the collective agreement during bargaining for the current collective agreement. It would now be unfair to allow the Employer to enforce its view of the collective agreement.

Finally, the Union submitted that if the Employer could operate a day shift and midnight shift, then under Article 14.04 (c) all the employees were required to rotate. The notion

described in Article 14.04 (c) in which the employees and the Employer agree to the length of the period for rotation was contrary to the *Labour Relations Act, 1995*. The final sentence in Article 14.04 (c) thus governed and the rotation must take place on a two week basis.

V. POSITION OF THE EMPLOYER

The Employer submitted that it had the right to schedule employees. That basic right was contained in Article 5, subject to any limitations found elsewhere in the collective agreement. Under Article 14.01 the parties have agreed upon a "schedule of hours of work". However, Article 14.02 indicated the purpose for the schedule of hours of work was to provide a basis for calculating overtime. Article 14.03 indicated that changes in hours were allowed after consultation with the Union - here the Union was consulted before the hours were changed. Article 14.04 described shifts, but those shifts were not locked-in and the Employer was not limited to those shifts. Instead the Employer had the right to set and change shifts.

As for the issue of rotation, under Article 14.04 (c) the Employer and employees were allowed to set the rotation schedule. When the employees on one shift and their counterparts on the opposite shift preferred not to rotate they could agree with the Employer that they would not rotate shifts. That arrangement was allowed by the collective agreement, although the Union was entitled to be notified. When there was no agreement about rotation, the Employer submitted that the last sentence was intended to set the period of rotation as every two weeks.

In the alternative, the Employer submitted there was a patent ambiguity involving the issue of shift rotation which should be resolved by extrinsic evidence. In the 1987 grievance regarding toolmakers the Union accepted that not all toolmakers had to rotate. In this instance the Employer required only the two forklift operators who work in the axle

department to rotate - a position entirely in keeping with the 1987 settlement. Thus the Union had already agreed that it was possible to have some employees rotate and others not, even among employees within the same job classification. Here all the forklift operators involved in the work of the axle department rotated.

In the further alternative, the Employer submitted the Union was estopped from enforcing its interpretation of the agreement. In 1994 the Union knew the Employer had established a midnight shift and the employees would not rotate but did nothing about it. In reliance upon that the Employer sought no changes for the 1995-1998 collective agreement.

As for the claim for overtime pay for the work prior to midnight on Sunday, the Employer submitted the Union was estopped from raising this issue now. The Union should have raised this matter before the 1995 round of bargaining and its failure to do so had prejudiced the Employer. In the alternative, the agreement provided an answer directly. Article 15.01 clearly contemplated that there was to be no overtime payment in this situation and Article 14.05 specifically required only straight time pay.

The Employer relied upon the following: Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., looseleaf (Aurora: Canada Law Book, 1997) Section 5:3100 - Work Hours and Shifts; *Re United Steelworkers, Local 2847, and General Steelwares Ltd.* (1966), 17 L.A.C. 304 (Lande); *Re International Chemical Workers' Union, Local 279 & Rexall Drug Company Ltd.* (1957), 7 L.A.C. 121 (Fuller); *Distillery, Rectifying & Wine Workers International Union Local 48 and Joseph E. Seagram & Sons Ltd.* (1954), 7 L.A.C. 1808 (Lang); *Re Int'l Chemical Workers Union, Local 582, and Exolon Co. of Canada Ltd.* (1967), 18 L.A.C. 26 (Weatherill); *Re City of Vancouver and Vancouver Fire Fighters' Union, Local 18* (1995), 52 L.A.C. (4th) 89 (Munroe); *Homewood Health Centre and Health, Office & Professional Employees (H.O.P.E.) A Division of Local 175, United Food & Commercial*

Workers International Union (March 25, 1996) unreported (Snow); and *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, and Canadian Acme Screw and Gear, Limited* (1954), 5 L.A.C. 1665 (Cross).

VI. CONCLUSIONS

This grievance raises a number of issues requiring the interpretation of the collective agreement. In addition, each party submitted that if the other party's interpretation of the agreement was correct then that other party should be estopped from enforcing its interpretation. I deal first with the issues of interpretation and then consider any relevant arguments on estoppel.

The issues of interpretation of the agreement can be conveniently considered by addressing three questions:

1. Can the Employer establish a day/midnight shift arrangement?
2. Can the Employer and employees agree that employees will not rotate?
3. Are employees on the midnight shift who start work late Sunday evening entitled to be paid overtime rates for their Sunday hours?

1. Can the Employer establish a day/midnight shift arrangement?

The answers to all questions of interpretation of a collective agreement require a determination of the intention of the parties. The first place to search for the intention of the parties is always within the language of the parties' collective agreement. Many questions of interpretation can be resolved through this examination. If the question cannot be answered from a thorough review of the language, only then is it necessary to try other approaches to determine the parties' intention and thereby interpret the agreement.

Article 5 reserves to the Employer, in general language, "the undisputed right to operate and manage its business in all respects subject to its obligations herein." The right to "operate and manage" would include the right to schedule employees for a midnight shift, unless its obligations elsewhere in the agreement restrict the Employer's right to do so. The authorities relied upon by the Employer dealing with like provisions in other collective agreements reach a similar interpretation regarding employers' rights in scheduling employees.

Nothing in Article 14 expressly limits the Employer's right to establish a midnight shift. Is the right limited by implication? Article 14.01 states that the parties have agreed to a "schedule of hours of work." However, I note that in Article 14.01 the parties agreed on conditions "governing" overtime and on conditions "governing" reporting for work, but that "governing" is not used in relation to the schedule of hours of work, suggesting that the nature of the parties' agreement on the schedule of hours was intended to be different than their agreement in the other two areas. The nature of the difference is clarified by Article 14.02 which indicates that the "schedule [of hours of work] is intended to provide a basis for calculating overtime" and not "as a guarantee" of those hours or any other hours.

Article 14.04 (a) does describe what is termed the "regular shifts" but the Article reads more as a statement of fact than as a restriction on future hours. Article 14.04 (a) is simply a list of times of "regular shifts" and does not appear to restrict the Employer in any way. This conclusion is reinforced by Article 14.03, the preceding section of the agreement, which provides that the starting and stopping times can be changed in any department or section and put into effect "after consultation with the Union". Given the other related provisions in Article 14, I do not read Article 14.04 (a) and the statement that the day shift and the afternoon shift are the "regular shifts" as preventing the Employer from scheduling a midnight shift as it did here.

Thus, subject to the argument on estoppel, I conclude nothing prevented the Employer from implementing the day/midnight shift arrangement in the axle department.

2. Can the Employer and employees agree that employees will not rotate?

It is clear that as a general rule the employees on two or more shifts are required to rotate. This is expressed in clear language in the first sentence of Article 14.04 (c) which states "all employees involved will be required to take their turn on the other shifts for equal periods". There are two difficulties in applying Article 14.04 (c) to these facts - first, what is the meaning of "involved" in this context and secondly, what is the effect of the apparent conflict between the statement that rotation will be on a two week basis and the statement that employees and the Employer will determine the length of the periods of rotation by agreement?

With respect to the first difficulty, looking only at the language of Article 14.04 (c) the word "involved" may have been intended to restrict the rotation to those employees who were doing work similar to that done on the other shift, and thus limited the requirement for rotation to those employees for whom rotation made practical sense. However, such an interpretation is not obvious nor is it clear what the parties intended as the limit to such an approach.

Regarding the second issue (the period of rotation) while the words used in describing agreement about the rotation period can be read in different ways, in my view the intention was that the employees and Employer agree with one another and the Union is then to be notified. As with the word "involved", it is not possible by looking simply at the language of the agreement for me to resolve the apparent conflict between a two week rotation and the provision that the employees and the Employer will agree on the rotation period.

With respect to these two issues, I can find nothing elsewhere in the collective agreement which would assist me in determining the parties' intention. I thus conclude that Article 14.04 (c) is ambiguous and the intention of the parties' cannot be determined from simply examining the language.

As I indicated above, when unable to determine the intention of the parties from the language of the agreement alone, it is necessary to search elsewhere for an indication of it. When the intention of the parties is determined from evidence outside the language of the collective agreement itself, that evidence is generally referred to as "extrinsic" evidence.

There are several types of extrinsic evidence. For example, many provisions in collective agreements are applied by the parties on a regular basis. One approach thus used by arbitrators when unable to determine intention from the language of the agreement directly is to examine the manner in which the parties have applied the agreement in the past. If the parties have over a period of years acted as though the meaning of a provision was "X" then arbitrators sometimes accept "X", as demonstrated by their "past practice", as the meaning which was intended by the parties. A second example of extrinsic evidence arises when the parties have settled an earlier grievance on a similar issue. That settlement is sometimes helpful in determining the parties' intention.

On the issue of who must rotate, both types of evidence about intention are available. First I consider the settlement of the 1987 toolmaker grievance. The Employer's response to the grievance, accepted by the Union, stated that only employees who were "involved" in work done on the two shifts, not everyone in the toolmaker classification, had to rotate. Thus it is clear that there is no general requirement that all employees on the two shifts have to rotate. In the situation before me, the Employer's requirement that the forklift operators rotate, while agreeing to no rotation of production employees, is thus similar in some ways

to the settlement of the 1987 grievance in which some, but not all, toolmakers rotated.

Secondly, there is the evidence of other situations in which rotation did not occur. The primary example was during 1994-97 when the Employer implemented a midnight shift in the axle department. Both the production work and the forklift work were similar on the two shifts, and the employees were thus "involved" in similar work. However, no employee on the midnight shift rotated to the day shift and no one from the day shift rotated to the night shift, notwithstanding the provision of Article 14.04 (c) that employees "involved" should rotate. That experience, together with the other examples of employees who did not rotate, indicate that the parties have in the past accepted that where employees on one shift and their counterparts on the other shift agree that they will not rotate, even though they are "involved" in similar work, then no rotation need take place.

The evidence before me did not clarify the limitations on this "no rotation" approach. However, it appears that if employees on the less popular shifts (those shifts for which a shift premium is paid under Article 17.03 - that is the second or afternoon shift and the third or midnight shift) do not wish to rotate to the day shift and their counterparts on the day shift do not wish to work afternoons or midnights then they are free to work their less popular shift on a regular basis. If all the production employees on the midnight shift wish to work that shift on a permanent basis and do not wish to rotate to the day shift (and no production employee on the day shift wants to rotate to work midnights), and the Employer agrees, then no rotation is required. Moreover, some employees may work a regular midnight shift while other employees on that same shift rotate to the day shift - if some, but not all, employees on the midnight shift do not wish to rotate and the day shift employees do not seek equal time on midnights, and the Employer agrees, then only the remaining employees would rotate with the employees on the day shift. The Union is, of course, required to be notified.

This is not the obvious meaning of the language used in Article 14.04 (c) but it is the interpretation which the parties have placed on the words through their actions over the years. I conclude on the basis of the settlement of the earlier grievance and the actual scheduling practice that the above was the intention of the parties and therefore those production employees on the midnight shift who do not wish to rotate are not required to do so. Since none of the production employees wished to rotate there is no requirement that rotation occur among the production employees, as opposed to forklift operators, and the Employer's failure to compel rotation was not, subject to the submission on estoppel, a violation of the agreement.

On a policy basis I think this interpretation and approach makes sense. The afternoon and midnight shifts are generally less desirable and thus, for example, the collective agreement requires the payment of a shift premium for the second and third shifts. If employees prefer to work steadily on these less popular shifts and the employees with whom they would ordinarily rotate are prepared to work only days, then it is not surprising that the agreement provides a way that all the employees' wishes can be accommodated.

The Union submitted that to permit the Employer and the employees to agree that employees would not rotate, or to permit them to agree on the period of rotation, would violate the *Labour Relations Act, 1995*. Under the *Act* an employer is required to recognize and deal with a union, not individual employees, about terms and conditions of employment. Thus, in the absence of a specific provision in the collective agreement authorising such negotiations, it may be a violation of the *Act* for the Employer to negotiate with employees, rather than with the Union, about such a matter as the period of rotation. However, in this case in agreeing to Article 14 the Union specifically authorized such an arrangement and thus it is not a violation of the *Act* for the Employer to reach an agreement with employees on this issue.

3. Are employees on the midnight shift who start work late Sunday evening entitled to be paid overtime rates for their Sunday hours?

This issue was not raised until argument and there was no clear evidence as to the time the midnight shift begins on Sunday. However it appears that the shift starts shortly before midnight, probably 11:00 pm. The Union submitted that the Sunday work was thus work which attracted overtime rates under Article 15.02.

The parties contemplated employees beginning work on Sunday in this sort of situation. In Article 15.01, in the example of an employee who started work at 11:30 pm Sunday, it is clear that the parties expected that the employee would not receive overtime rates for the Sunday work. In addition I view the midnight shift as a "third shift" as that term is used under this agreement (see, for example, Article 17.03), and the issue of overtime rates for a "third shift" in such a situation is expressly dealt with under Article 14.05. Article 14.05 states that when a third shift commences on a Sunday the hours on Sunday are to be paid at regular straight time rates plus the appropriate shift premium. I thus conclude that the parties did not intend that overtime rates should be paid for the Sunday hours in this situation.

Estoppel

Both the Employer and the Union submitted that the other party was estopped from enforcing its interpretation of the agreement. As I have concluded that the Employer was correct as to the meaning of the agreement, I consider only the Union submission that the Employer should be estopped.

The doctrine of estoppel has three essential elements as follows:

- 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 those three elements are present, then the doctrine of estoppel may be used to prevent the first party from later reversing its position and attempting to assert its full contractual rights, to prevent the first party from engaging in this type of unfair conduct.

Regarding the first requirement, the parties have a contractual relationship through the collective agreement. I have difficulty with the second aspect of the doctrine - the representation by the Employer that it would not exercise its contractual rights. In 1994 the Employer exercised its contractual rights, did exactly what it now asserts it was entitled to do. I concluded above that under the collective agreement the Employer was entitled to do what it did. As the Employer exercised its contractual rights in this area in both 1994 and 1997, the submission that the Employer represented to the Union that it would not exercise its contractual rights is contradicted by the Employer's actions.

The Union submitted that when the Employer implemented the midnight shift in 1994 it did so in such a way that the Union was left with the understanding that the Employer acknowledged both that the Employer could only implement the midnight shift if all employees volunteered and that if even one employee dissented the shift would be moved to the afternoon. While Mr. Hoskin, the Union President, may have had that understanding, the evidence does not demonstrate that he obtained his understanding from a representation by the Employer to that effect - instead he testified that this was his view from the beginning and that it was he who communicated this view to the Employer. Precisely what Mr. Hoskin said to the Employer was not clear. Mr. Hoskin's testimony was as to the meaning of the message he communicated, and he did not recall the precise words which he used. While Mr. Hoskin felt quite clear as to his message, his memory of the times and other details of the conversations was poor. Both Mr. Schmeiss and Mr. Wosing testified that Mr. Hoskin

had not communicated to them either his opinion that the midnight shift was dependent on 100% volunteers or that if one person changed his mind the shift would have to be moved to afternoons. They denied that Mr. Hoskin had told them this was the Union view. I conclude that while Mr. Hoskin thought he was conveying a particular message, that message was not effectively conveyed to either Mr. Wosing or Mr. Schmeiss.

More importantly, both Mr. Wosing and Mr. Schmeiss denied that they had communicated the above opinions to Mr. Hoskin as being the Employer position. I conclude that neither Mr. Wosing nor Mr. Schmeiss represented to Mr. Hoskin or to the Union that the Employer would only implement the midnight shift if every employee volunteered. Similarly, I conclude that neither Mr. Schmeiss nor Mr. Wosing represented to Mr. Hoskin or to the Union that the midnight shift would be moved to afternoons if any employee wished. Thus, considering all the evidence I find no representation by the Employer that it would not exercise its contractual rights and no basis for the application of the doctrine of estoppel.

In summary:

1. The collective agreement permits the Employer to implement a day/midnight shift arrangement as it did in the axle department.
2. The collective agreement does not require that all employees rotate shifts and thus the Employer's failure to compel rotation was not a violation of the agreement.
3. The parties did not intend that overtime rates should be paid for the Sunday hours at the start of a midnight shift and thus the Employer did not violate the collective agreement in failing to pay Sunday overtime.
4. The Employer was not estopped from enforcing its interpretation of the collective agreement.

For the above reasons, the grievance is denied.

Dated at London, Ontario this 3rd day of February, 1998.

Howard Snow, Arbitrator