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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN WASTE SERVICES INC.

- The Employer

-and-

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175

- The Union

AND IN THE MATTER OF a policy grievance regarding overtime pay

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Martin K. Denyes	- Counsel
Tom Beaumont	- Site Manager, Recycling
Dan Columbus	- Site Manager, Solid Waste
Kevin Cinq-Mars	- District Manager

On behalf of the Union:

Colin B. Johnston	- Counsel
Julie Marentette	- Union Representative
William Rollo	- Steward
Joseph Mikhail	- Witness

Hearing held August 27 and October 5, 1999 in Windsor, Ontario.

AWARD

I. INTRODUCTION

This Employer's business is collecting recyclable materials. The collective agreement provides for both an hourly rate and an incentive pay system for the recycling drivers. The Employer normally pays the drivers on the incentive system based on the number of tonnes of materials collected. The issue is whether overtime pay for drivers is to be calculated using the hourly rate or the incentive rate.

II. THE EVIDENCE

The Employer operates a waste management business in Essex County. The Employer collects both garbage and recyclable materials for the Essex-Windsor Solid Waste Authority. The two operations are separate and this grievance relates solely to the Employer's recycling operation.

The contract for collecting the recyclable materials was originally obtained in 1996 by another company, Waste Management. The Employer took over Waste Management in June of 1997 and the contract for collecting the recyclable materials was assigned to the Employer. Under that contract Waste Management and, more recently, the Employer have been paid to pick up the recyclable materials and deliver them to the Solid Waste Authority. The contract specified that the Solid Waste Authority was the owner of all the recyclable materials. The Employer was required to obtain appropriate licenses and has obtained licenses under the *Truck Transportation Act*, R.S.O. 1990, c. T-22, as well as other relevant licenses.

Before it secured the contract for the recycling operation in 1996, Waste Management had

collected the garbage in Essex-Windsor and it had a collective agreement with the Union covering the garbage side of its business. After Waste Management obtained the recycling contract it met with the Union and discussed how the collective agreement would apply to those employees hired for the recycling contract. The initial pay rate for the drivers who picked up the recyclable materials from the blue boxes was set at $10.50 per hour with a possibility of additional incentive payment. Some of the drivers had worked for the previous holder of the contract and felt the pay rate was too low. Further discussions took place and a new incentive program was introduced. It was described in a memo dated August 29, 1996, from Tom Beaumont, Operations Supervisor for Waste Management, to the recycling drivers. The relevant portions of that memo are as follows:

> Below is the incentive program we have set up for recycling drivers. If after (1) one month there are any problems with this system we can meet to discuss any of your concerns. However, the company maintains, at its sole discretion, the right to alter or eliminate this incentive plan at any time. The plan will remain in effect until the end of 1996.
>
> **Base rate:** 11.00/hr
> **Incentive Pay:** 11:00/hr or 32.50/per tonne collected (whichever is greater)

Under its contract, Waste Management received $65.00 per tonne for the recyclable materials it collected and the incentive rate for drivers was one-half that amount.

Waste Management, the Union and the drivers were satisfied with the new incentive rate. In a later discussion between Mr. Beaumont and Joseph Mikhail, a driver and then the Union's steward for the recycling employees, the parties agreed to continue the incentive program indefinitely.

The above incentive rate included all the work which a driver did from the time of punching in until punching out at the end of the shift and included all driving time, emptying the blue boxes, paper work, etc. Some drivers always received their pay based on the incentive rate. While the other drivers' pay was usually based on the incentive rate, it was based upon the hourly rate during those weeks the incentive rate was less than the hourly rate.

The drivers received a weekly statement of earnings indicating the hours the driver worked in that week and the total pay (being in nearly every instance the multiple of the number of tonnes of recyclable materials collected and the incentive rate per tonne). In addition, the statements included a "rate" which was the weekly earnings divided by the number of hours worked and the rate thus represented the amount of money a driver received per hour during that week. As the number of hours and the number of tonnes varied each week, so did each driver's rate. For example, Mr. Mikhail testified that his rate fluctuated between $19.00 and $23.00. In the week ending August 21, 1999, Mr. Mikhail's rate was $20.72.

The Union's collective agreement in force with Waste Management in 1996 called for overtime at time and one-half "the employee's regular hourly rate of pay" for all hours worked in excess of 44 in a week. When drivers worked overtime the overtime pay was one and one-half times the rate included on the driver's statement of earnings for the week in question. Thus, for example, if Mr. Mikhail had worked overtime in the fall of 1996 and his rate had been $20.72 that week, he would have been paid one and one-half times his rate of $20.72, or $31.08, for each hour worked beyond 44.

The drivers of recycling trucks only infrequently worked overtime. However, Mr. Mikhail testified that he worked two or three hours of overtime, three or four times per year, and that until November 1998 he had always been paid for the overtime using the incentive based rate shown for that week on his statement of earnings.

The incentive pay system relevant to this dispute remained unchanged under the Employer following its takeover of Waste Management in June 1997. In particular the Employer, operating under the old Waste Management collective agreement and Mr. Beaumont's August 29 memo, continued to calculate overtime in the same manner as Waste Management had.

Negotiations for a renewal of the collective agreement took place in early 1998. The Union

initially sought a significant increase in the recycling drivers' hourly rate but the Employer rejected that change. The parties then agreed to continue the incentive system and included it in the agreement, but with an increase in the amount per tonne. The parties accepted that, on average, drivers collected one tonne of recyclable materials in two hours and increased the incentive pay per tonne by $0.90 and then 2% and 2%. Hourly rates for other employees in the new three year agreement were increased by $0.45 per hour followed by 2% and 2%.

During the negotiations there was no discussion of overtime pay for drivers working under the incentive system. The overtime provisions in the old Waste Management collective agreement were continued unchanged.

However, during the negotiations Kevin Cinq-Mars, the Employer's District Manager and chief negotiator, expressed his general concern about practices which had grown up outside the collective agreement and practices regarding items dealt with in the agreement which were in conflict with the agreement. He testified that he expressed the view that if the Union wished to continue any of these practices, the Union had to negotiate the practice into the agreement, otherwise the Employer would follow the collective agreement as written. Mr. Mikhail also testified about this but Mr. Mikhail understood that Mr. Cinq-Mars had indicated that "if we have not gotton to it, it stays the same". Mr. Mikhail understood the overtime provisions for the drivers were unchanged since neither party proposed a change and the parties had not addressed the issue.

Under the new collective agreement, the Employer continued to pay overtime to the drivers using the approach described above which relied on the incentive rate. However in November 1998 Mr. Cinq-Mars reviewed this issue with Mr. Beaumont who had originally written the incentive pay memo in August 1996 for Waste Management and had since become the Employer's Site Manager for the Recycling Facility. Mr. Beaumont explained to Mr. Cinq-Mars how overtime pay was calculated. Mr. Cinq-Mars concluded that the

approach was inconsistent with the collective agreement and asked Mr. Beaumont to change it. The Employer then began to pay the drivers overtime based on the hourly rate in the collective agreement. The Union brought this grievance.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT AND STATUTE

The relevant provisions of the collective agreement are as follows:

ARTICLE 14 - WAGES AND CLASSIFICATIONS

14.01 Job classifications and wages are set out in Schedule "A" of this Agreement.
. . .

ARTICLE 15 - HOURS OF WORK AND OVERTIME
. . .
15.03 **Overtime**

(a) Time and one-half (1 1/2) the employee's regular hourly rate of pay shall be paid for all time worked in excess of forty-four (44) hours per week. . . .

. . .

(d) All time worked on Sunday and Statutory Holidays will be at time and one-half (11/2) the employee's hourly rate of pay.

. . .

ARTICLE 17 - PAID HOLIDAYS
. . .
17.02 Employees . . . shall be paid eight (8) hours' pay at the regular straight time hourly rate for the above Statutory Holidays. . . .
. . .
17.05 Employees with perfect attendance . . .shall receive an attendance bonus equal to three (3) hours' pay . . .

SCHEDULE "A"
Wages and Classifications

Classifications	**Jan. 1/98**	**Jan. 1/99**	**Jan. 1/2000**
. . .			
Blue Box Driver (Hourly Rate 24 months)	11.95	12.19	12.43
Blue Box Driver (Hourly Rate 90 days)	11.45	11.68	11.91

Blue Box Driver start	10.95	11.17	11.39
Blue Box Driver per Tonne Incentive rate	*33.40	34.07	34.75

. . .

Sections of the *Employment Standards Act* are as follows:

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

. . .

"contract of employment" includes a collective agreement;

. . .

"overtime rate" means the hourly rate of pay that an employee is entitled to receive for hours of work in excess of,

(a) the hours of work in a week prescribed in section 24 or the regulations, or

(b) the regular hours of work in a day or a week under a contract of employment that under subsection 4 (2) prevails over the provision of section 24,

and "overtime pay" has a corresponding meaning;

. . .

"regular rate" means,

(a) the wage rate of an employee for an hour of work in a regular non-overtime work week,

(b) where clause (a) does not apply, the average hourly rate calculated by dividing the wages of an employee earned in a week by the number of hours the employee worked in that week where the employer has made and kept in accordance with this Act complete and accurate records thereof, or

(c) where clauses (a) and (b) do not apply, the hourly rate determined by an employment standards officer;

. . .

4 (2) **Greater benefit to prevail** - A right, benefit, term or condition of employment under a contract . . . that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard.

PART VI - OVERTIME PAY

24. (1) **Overtime Pay** - Except as otherwise provided in the regulations, where an employee works for an employer in excess of forty-four hours in any week, the employee shall be paid for each hour worked in excess of forty-four hours overtime pay at an amount not less that one and one-half times the regular rate of the employee.

(2) **Idem** - In complying with subsection (1), no employer shall reduce the regular rate of wages payable to an employee.

. . .

Sections of the Regulations made under the *Employment Standards Act* are as follows:

R.R.O. 1990 Regulation 325
17. (1) Despite Part VI of the Act, an employer shall pay to an employee who is a driver of a vehicle or who is a driver's helper overtime pay for each hour worked in excess of fifty hours in a work week at an amount not less than one and one-half times the employee's regular rate.
(2) Subsection (1) applies to employees who are drivers of vehicles used in the business of carrying goods for hire within a municipality or to any point not more than five kilometres beyond the municipality's limits and to employees who are drivers' helpers on such vehicles.

[Note: Section 18 then provides that overtime is payable after sixty hours for long haul drivers not covered by section 17.]

IV. POSITION OF THE UNION

The Union advanced three separate arguments in support of its grievance.

First, the Union submitted that the language of Section 15.03(a) of the collective agreement was clear and required the payment of a multiple of the incentive rate, as was done during the previous agreement and in the early months of this collective agreement. The Union noted the use of "regular" and the fact that the drivers' ordinary or "regular" pay was based on the incentive rate. The Union submitted that the use of the singular "employee's" in describing regular rate supported its position. Schedule "A" included a base rate but that rate could not be described as a driver's "regular" rate. The Union submitted that the collective agreement had to conform with the *Employment Standards Act.* The interpretation advanced by the Union conforms with the *Act*, whereas the interpretation of the Employer does not conform because Section 24(1) uses regular rate and Section 24(2) prevents an employer from reducing that rate when calculating overtime pay.

Secondly, the Union submitted that I had the authority to enforce the *Employment Standards Act* itself and that under that *Act* the drivers were entitled to overtime pay after 44 hours based on the multiple of the incentive rate. Under the second part of the definition of "regular" rate, the recycling drivers' regular rate was their total weekly earnings divided by the hours worked, a calculation the employer included on every weekly statement of

earnings. The Employer could not reduce that rate for the purposes of calculating overtime pay. In addition, the Union submitted the Employer's approach was in not in accordance with the purpose of premium overtime pay as it neither compensated the employee for the extra work nor penalised the Employer for using more overtime.

In the alternative, the Union submitted that the Employer was estopped from changing its practice of paying overtime based on the incentive rate, a practice it had followed for more than a year and during the bargaining of a new agreement. The Union said that, if the Employer had advised the Union of its plans regarding overtime before the negotiations, the Union could have addressed this problem in bargaining.

The Union referred to the following authorities: *Employment Standards Act*, R.S.O. 1990, c. E. 14, as amended; extracts from *Employment Standards Act of Ontario, Policy and Interpretation Manual*, Carswell; *Asarco Exploration Co. of Canada Ltd. and Fanaken*, February 26, 1985, unreported (Saltman); *Wen-Hal Limited and Hansen*, August 22, 1979, unreported (MacDowell); *Becker Milk Co. Ltd.*, February 19, 1974, unreported (Carter); R*e Becker Milk Co. Ltd. and Director of Employment Standards et al.* (1975), 8 O. R. (2d) 616 (Div. Ct.); *Dominion Blueline Inc. and Graphic Communications International Union Local 500M* (December 22, 1998) unreported (Beck); *Re CN/CP Telecommunications and Canadian Telecommunications Union* (1981), 4 L.A.C. (3d) 205 (Beatty); *Canadian National Railway Co. et al. v. Beatty et al.* (1981), 34 O.R. (2d) 385 (Div. Ct.); *Re Sterling Place and United Food and Commercial Workers International Union, Locals 175/633* (1997), 62 L.A.C. (4th) 289 (Pineau); *Re Beatrice Foods Inc. and Retail, Wholesale & Department Store Union, Local 440* (1994), 44 L.A.C. (4th) 59 (MacDowell); and *Re Kemptville District Hospital and Ontario Nurses' Association* (1988), 1 L.A.C. (4th) 360 (Burkett).

V. POSITION OF THE EMPLOYER

The Employer responded to each of the Union's three submissions.

The Employer submitted that the Section 15.03(a) reference to "the employee's regular hourly rate of pay" was a reference to the hourly rates specified in Schedule "A". The parties understood the difference between the hourly rates in the Schedule and the incentive rate in the Schedule. The Employer noted the references in Sections 15.03(d), 17.02 and 17.05 where pay rates were described using other terminology and submitted that the parties did not intend four different concepts when they used four different terms. The Employer noted as well that the amount earned by drivers fluctuated based on the weight of the materials collected and that the rate varied depending on weight and hours. Thus the Employer said the incentive based rate which is included on the weekly earnings statement cannot be said to be the employee's "regular hourly" rate; instead the reference is to the hourly rate in Schedule "A".

As for the *Employment Standards Act*, the Employer noted that Section 24 (1) begins with "Except as otherwise provided in the regulations". Regulation 325 provides for overtime after 50 hours for drivers engaged in local cartage, and after 60 hours for long haul drivers. The Employer submitted that, whether they were engaged in local or long haul work, under the *Employment Standards Act* these recycling drivers were not entitled to overtime on the facts disclosed here of occasional 2-3 hours work beyond the normal 44 hours work. The *Act* was thus of no assistance to the Union's grievance.

Finally, the Employer submitted there was no basis for an estoppel. The Employer said there was no long term representation and, more importantly, there was no detrimental reliance by the Union.

The Employer referred to the following authorities: *United Electrical, Radio & Machine Workers of America and Amalgamated Electric Corp., Ltd.* (1952), 3 L.A.C. 949 (Laskin); *R.R.O. 1990 Reg. 325, Sections 17 and 18*; *Truck Transportation Act*, R.S.O. 1990, c. T-22, as amended; extracts from *Employment Standards Act of Ontario - Policy and Interpretation Manual*, Queen's Printer; *Re 754644 Ontario Ltd. (c.o.b. Nicholson's Waste Haulage)* [1992] O.E.S.A.D. No. 101 (Wacyk); *Re Alston Cartage Ltd.* [1996] O.E.S.A.D. No. 66 (McKellar); *Re Arpin Trucking Ltd.* [1981] E.S.C. 1108 (Sheppard); *Re CFTO-TV Ltd. and National Association of Broadcast Employees and Technicians, Local 79* (1983), 10 L.A.C. (3d) 232 (Kennedy); *Re Victoria Times Colonist and Victoria Newspaper Guild* (1984), 17 L.A.C. (3d) 284 (Hope); and *Re Eurocan Pulp & Paper Co. and Canadian Paperworkers Union, Local 298* (1990), 14 L.A.C. (4th) 103 (Hickling).

VI. CONCLUSIONS

I begin with the parties' collective agreement. The issue in dispute is the meaning of "the employee's regular hourly rate of pay" in Section 15.03(a). What did the parties mean when they agreed to pay the drivers based on a multiple of that amount? The Employer says it is a multiple of the hourly rate whereas the Union says it is a multiple of the incentive based rate calculated each week for each driver. Both submissions are plausible but they cannot both be correct.

In interpreting a collective agreement my objective is to determine the parties' intention. Their intention can be determined in a variety of ways. I begin, as always, with the wording of the section. Next I consider the wording of the rest of the agreement. I then examine the negotiation of this provision, followed by a consideration of the conduct of the negotiations generally. After that I review the practice of the parties in administering the pay scheme. Finally, I consider the general purpose of such an overtime provision.

I begin with the phrase itself. Does it suggest either one conclusion or the other? The word "hourly" is suggestive of the hourly rates in the Schedule A. However the evidence was that most employees regularly received their pay based on the incentive rates, and some employees were paid exclusively based on the incentive rate. Thus the word "regular" in the phrase is suggestive of the incentive rate. The meaning of "the employee's regular hourly rate of pay " is not something I am able to determine looking only at the wording of the section - the words could support either meaning and it is necessary to examine other possible indicators of the parties' intention.

This phrase is not used in a vacuum, but rather is part of an entire collective agreement and I have looked at other related provisions in the agreement to see whether other similar phrases shed any light on this issue. In particular, I have examined the somewhat similar phrases in Sections 15.03(d), 17.02 and 17.05, the other provisions referred to by the parties. I am unable to detect any clear intention to use the four different phrases to mean four different concepts, nor can I see that the parties intended the four phrases to mean the same thing. More importantly, the other three phrases do not shed light on the proper meaning of the disputed phrase in Section 15.03(a), and thus do not help me to resolve this dispute.

The negotiations themselves are sometimes helpful in resolving an ambiguity of this type. What was said by the parties sometimes sheds light on the meaning of a provision. But the parties did not discuss the meaning when they agreed to this in 1998. The language had existed in the prior agreement and had applied to other employees who did not earn their wages based on an incentive system. When the parties agreed in the last round of bargaining to apply this overtime language to the drivers working under the incentive system, there was no discussion between them as to what was meant by "the employee's regular hourly rate of pay" in Section 15.03(a).

It is, however, of some assistance to look at the negotiations more generally. During the

negotiations the Union proposed a major change in pay for the drivers and the Employer resisted. The existing incentive system was then continued with increases in the amount per tonne. Neither party suggested a change in the manner of calculating overtime pay. Article 15.03(a) had existed in the past and was continued unchanged, although it now clearly included the drivers since the parties included the recycling employees in the wording of the agreement. Mr. Cinq-Mars did not intend to negotiate a change, as he testified he did not know how overtime pay was calculated. The Union did not seek a change in this area. The conduct of the negotiations as a whole, as distinct from what was said about this phrase, suggests that the parties intended to continue the overtime arrangement as it had been and that the Union interpretation is thus correct.

There was other evidence regarding the practice of the parties which helps to clarify the meaning. The former employer, Waste Management, through Mr. Beaumont, prepared the memo on the incentive system. Mr. Beaumont was then involved in administering it and he administered the incentive system described in his memo as meaning that overtime was based on the incentive rate. Mr. Beaumont remained involved under the new Employer and the incentive system continued to be interpreted in this same manner, the way the Union submits it should be interpreted.

After the agreement was signed, the Employer continued for several months to interpret the agreement as meaning overtime was based on the incentive rates. This also suggests the parties did not intend to make any change in the overtime pay system under which overtime was based on incentive rates.

Given the ambiguity of the phrase, I think it both appropriate and helpful to look at and rely upon the history of the parties' incentive system, on the parties' general intentions in negotiations on this issue, and on the Employer's interpretation immediately after the agreement was signed, each of which was discussed above. All three of those are strongly

suggestive of the Union's interpretation.

I now consider the purpose of overtime pay to see whether this helps to support one interpretation or the other. While the agreement does not express any particular purpose regarding the nature of premium overtime pay I think it reasonable to consider the common purposes of overtime pay. I believe the requirement to pay a premium rate (one and one-half times in this instance) for work beyond the normal hours has a dual purpose. First it is intended to compensate the employee for the inconvenience and extra effort involved in working additional hours. Secondly, it is intended to act as a deterrent against employers asking, or requiring, employees to work extra hours. I note that in *Ken-Hal*, *supra*, referee MacDowell expressed a similar opinion about the purposes of the overtime provisions in the *Employment Standards Act*, stating that the purpose there was "twofold: to discourage the use of overtime and to compensate an employee for the additional effort which he must expend." (at p. 6).

Given that these drivers are normally paid based on the incentive rate, an overtime rate which is based on the hourly rate might well be no increase. Mr. Mikhail, for example, normally earns between $19.00 and $23.00 per hour based on the incentive rate. One and one-half times his hourly rate is $12.19 x 1.5= $18.29, an amount below his normal incentive based rate. An overtime rate based on a multiple of the hourly rate would not be an increase. I agree with the Union submission that it would provide no compensation for the inconvenience or extra effort and would not act as a deterrent for the Employer in having Mr. Mikhail work overtime. Thus an overtime premium based on the hourly rate would fulfill neither of the two above purposes of overtime pay, whereas one based on the incentive rate would fulfill both.

I thus conclude that the phrase "the employee's regular hourly rate of pay" in Section 15.03(a) means a multiple of the incentive based rate, as the Union has submitted, during

those weeks that a driver is paid based on the incentive rate. If the driver's pay for that week is based on the hourly rate in Schedule "A", then the overtime is a multiple of that rate. In more general terms I conclude that the parties intended overtime pay to be a multiple of the amount the recycling driver actually earned each hour during the week in question.

I note that Mr. Cinq-Mars testified that he warned the Union in negotiations that any practices had to be in the collective agreement. While there was a disagreement between Mr. Cinq-Mars' testimony and Mr. Mikhail's testimony, given the overall context and given Mr. Cinq-Mars' stated frustrations about past practices outside the agreement or in conflict with the agreement, I find Mr. Cinq-Mars' testimony more likely to be an accurate statement of what he said. Does his comment in negotiations assist the Employer? Since I have concluded the Union interpretation is correct, this entitlement is included in the collective agreement and Mr. Cinq-Mars' comment has no impact on this grievance.

It is not necessary to consider the Union's other two submissions.

The grievance is allowed for the above reasons. I direct the Employer to compensate any driver paid overtime under its recent interpretation by paying that driver the difference between the amount already paid and the amount which would have been paid using the multiple of the incentive rate for that week. Finally, I remain seised to deal with any difficulties in implementing this award.

Dated at London, Ontario this 29th day of October, 1999.

Howard Snow, Arbitrator