In the matter of grievances referred to arbitration under the *Canada Labour Code*, RSC, 1985, c. L-2

Between:

United Food and Commercial Workers Canada, Local 175 and 633
(the “Union”)

and

ADM Agri-Industries Company Windsor, Ontario
(the “Employer”)

Policy Grievances regarding the improper use of contract workers and improper work schedule.

Final Award

Appearances for the Employer:

Nancy Ramalho, Counsel
Trevor Durrant, Plant Manager
Pierre-Oliver Courture-Asselin, Senior Specialist Employee and Labour Relations

Appearances for the Union:

Adam Veenendaal, Counsel
Tim Kelly, UFCW Local 175 Representative
Tony Cervini, Bargaining Unit Member

Arbitrator: Diane L. Gee

Heard on December 7, 2021

Date of Award: January 3, 2022

1) This decision concerns two policy grievances filed by the United Food and Commercial Workers Union Locals 175 and 633 (the "Union") alleging ADM Agri-Industries Company (the "Employer") violated the collective agreement when it altered the manner in which it schedules shifts. The first grievance alleges the improper use of contract workers in violation of articles 2.01 and 4.01(5). The second grievance alleges an improper work schedule in violation of articles 2.01 and 5.03. The Union seeks declaratory relief only. The Employer asserts no violation of the collective agreement has occurred and argues both grievances are untimely.

2) In this decision I have dealt with only those arguments advanced by the parties necessary for me to reach my determination. Given my finding in favour of the Union in the Improper Work Schedule grievance based on the language of the collective agreement I have not dealt with the Union's alternative arguments pertaining to bad faith and estoppel.

A. The Facts

3) No oral evidence was called. The only facts are those set out in the Agreed Statement of Facts and attachments thereto ("ASF"):

> **AGREED STATEMENT OF FACTS**
>
> **Background**
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> 1. The Employer operates a grain storage terminal located in Windsor, Ontario.
>
> 2. UFCW Local 175 is the exclusive bargaining agent on behalf of employees of the bargaining unit. There are, at present, approximately twenty (20) employees in the bargaining unit.
>
> 3. The parties are subject to a collective agreement with a term February 15, 2019 - February 15, 2023. (Tab 1)

4. The employees receive and ship grain that is delivered to the facility by rail, truck and ship.

5. Some periods during the year are busier than other periods during the year. For example, from mid-January through the end of March each year tends to be slower than the rest of the year. Ships aren't typically delivering grain to the Windsor terminal because the Detroit River is closed to shipping during this period, and as a result, this tends to be a slower period.

6. Employees at the terminal are Federally regulated and subject to the provisions of *the Canada Labour Code.* Section 173 of the *Canada Labour Code* requires that employees be free from work at least one (1) day out of seven (7) in a week. (Tab 2)

7. Pursuant to the provisions of the *Canada Labour Code* and Sections 5.08 and 5.09 of the collective agreement, the employer is permitted to mandate overtime.

8. The Employer has an excess hours permit issued by the Labour Program-Employment and Social Development Canada which allows its employees to work up to seventy-two (72) hours a week. (Tab 3)

9. Employees are assigned to one (1) of three (3) teams: A, B or C. Each team rotates through the three (3) shifts; midnights, days and afternoons. As of November 2020, there were approximately six (6) employees per team.

10. Pursuant to article 5.02 of the collective agreement the work week starts on 7am Monday and ends at 7am the following Monday. Employees work eight (8) hour shifts and when required, an employees' eight (8) hour shift could be converted to a twelve (12) hour shift, if need arose, for example, if a ship was scheduled to deliver a load of grain.

11. Pursuant to articles 5.04 & 5.05 of the collective agreement employees are paid time and one half for hours in excess of 40 hours in any one work week or eight (8) hours in a day and double time for hours worked on the 7th day of the week, typically, Sunday provided they have satisfied the forty (40) hours worked threshold. Where the Employer mandates the overtime on a Saturday, the employee will be paid their overtime rate regardless of whether they have satisfied the forty (40) hours worked threshold requirement.

12. It is common and usual for overtime work to be required on the weekends, especially during the busier times of the year. In fact, it was common for some employees to volunteer to work up to seven (7) days a week.

Scheduling Practices Prior to November 2020

13. Commencing in or about November 2020, the employer required that any employee who is scheduled to work overtime on both Saturday and Sunday, would be required to take a mandatory day of rest during the same work week that the overtime would be worked.

14. Prior to this change, employees were assigned shifts from Monday to Friday. Employees would be canvassed as to their availability to work overtime on Saturday or Sunday. Employees had the option of volunteering for overtime or, in the event there weren't enough volunteers, employees would be mandated to work overtime. Employees could choose to work up to seven (7) days a week.

New Scheduling Practice as of November 2020

15. In or around November 2020 the Employer required that any employee who worked overtime on both Saturday and Sunday would be required to take a mandatory day of rest during the same work week that the overtime would be worked. During busy periods where employees are required for both weekend shifts bargaining unit employees will be scheduled for four (4) days during Monday to Friday and two (2) shifts on Saturday and Sunday.

16. Where overtime is required for only one day of the weekend, employees are still canvassed as to their availability for weekend overtime.

17. An employee's assigned day off during the Monday to Friday weekday changes from week to week. The same employee isn't necessarily scheduled off work on the same day each Monday to Friday period. Also, there are weeks where a member of a given team may be scheduled to work all Monday to Friday shifts, for example, when not needed for both Saturday and Sunday.

18. The Union filed two grievances on February 5, 2021 in respect of the Employer's improper use of the contract workers and improper work schedule.

19. Pursuant to Section 4.01 of the collective agreement, contract labourers may be used to perform non bargaining unit work such as handling lines, flinging and clean-up.

20. As per Tab 4, contract labourers worked at the facility on Monday-Fridays when bargaining unit employees were scheduled a mandatory day off.

B. Relevant Provisions of the Collective Agreement

4) The following provisions of the Collective Agreement are relevant.

ARTICLE II. MANAGEMENT RIGHTS

Section 2.01 Management Rights

A - The Company retains any and all management rights not expressly limited by the specific terms of this Collective Agreement. Among these rights, but not intended as a wholly inclusive list, shall be the right to …. determine schedules, shift assignments, and hours of work including overtime; … to contract work out or in, including maintenance and construction work, or to have such work performed by other Company personnel; to use contract labourers; and to make any decisions or changes which in the opinion of management, the efficient operation of the grain terminal requires.

B - The Company agrees that it will not exercise its functions in a manner inconsistent with the specific provisions of this Agreement, and an alleged violation thereof shall be subject to the grievance procedure. It is understood that the express provisions of this Agreement constitute the only limitations upon the Company's rights.

ARTICLE III GRIEVANCE & ARBITRATION PROCEDURE

Section 3.01 Grievance Procedure

The parties to this Agreement shall attempt to resolve grievances as quickly as possible. No grievance shall be considered where the circumstances giving rise to it occurred or originated more than 7 full calendar days before the filing of the grievance. ….

…

ARTICLE IV JOB CLASSIFICATIONS AND RATES OF PAY

Section 4.01 Job Classifications And Rates Of Pay

….

NOTES APPLICABLE TO JOB CLASSIFICATIONS

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5. Non-employee, contract labourers may be used to supplement the Company's workforce in handling lines, flinging and clean-up work. Such contract labourers will not be used if any permanent full-time employee is in a layoff status unless such laid off employee either cannot be immediately contacted, or if contacted, the employee rejects the opportunity to perform the available work.

ARTICLE V HOURS OF WORK AND OVERTIME

Section 5.01 Intent And No Pyramiding

This Article is intended to set forth the normal hours of work and to provide a basis for computing overtime and premium pay and shall not be construed as a guarantee or limitation on overtime hours or on the hours of work per day or per week, nor shall anything in this Agreement be so construed as to permit the pyramiding or duplicating of overtime or premium payments. Hours for which overtime or premium payments are made shall not be used to compute overtime or premium pay for any other hours. Whenever more than one premium could be applied to the same hours, only the larger will be paid. For purposes of this Section, shift differentials are not considered as premium payments.

Section 5.02 Workday And Workweek

The workday is a 24-hour period running from 7 AM one day to 7 AM the following day. The workweek begins at 7 AM Monday and ends at 7 AM the following Monday. The workday and workweek may be different for some individuals or shifts in the interest of efficient or less costly operations.

Section 5.03 Starting Times, Shifts And Schedules

A - The Company may vary shift schedules, starting times and quitting times for different areas or operations of the terminal or for individual employees.

B - The normal workweek contains 5 consecutive workdays scheduled Monday through Friday. However, the Company may vary or change the number of hours scheduled, the number of shifts scheduled, the manpower requirements of the various shifts and the scheduling of workdays and hours for business reasons or efficient operations. Employees may be scheduled to eat on the job or have a 30-minute unpaid lunch period. Any area of the terminal or portion of the employees may be scheduled in more than one way.

C - Multiple shifts may be scheduled and may be rotated (for example:7-3, 3-11 and 11-7 or two 12's)

Section Note: The provisions of this Section will not be used for the sole purpose of scheduling an employee(s) off during the period Monday through Friday in order to work the employee(s) at straight time on Saturday or Sunday (the 6th and 7th days ofthe workweek). Should a continuous 4-shift operation be scheduled, the premium double-time day in place of Sunday will be the employee(s) 2nd scheduled day off during the workweek

Section 5.04 Daily And Weekly Overtime Pay

All hours worked in excess of 40 straight time hours in any one workweek or 8 straight time hours in any one workday shall be compensated for at the rate of1 1/2 times the employee's straight time hourly rate.

…

Section 5.05 7th Day Premium

During periods when the elevator is scheduled on a 1-, 2- or 3-shift operation (or any combination thereof), an employee will be paid 2 times his regular rate of pay for work performed on the 7th day in the workweek provided he has worked 40 straight time hours during the workweek.

…

Section 5.08 Overtime

The Company shall have the right to schedule overtime when it is required. Employees with the seniority, skill, ability and qualifications will perform the required work and will cooperate fully in working necessary overtime. When overtime is required, theemployees will be given notice as far in advance as possible.
.

Section 5.09 Distribution Of Overtime

…

B - Weekend Overtime will be assigned as equitably as practical among those employees qualified to perform the work. If necessary, the least senior, available, qualified employee(s) must work the overtime.

…

Section Note 4: In consideration of weekend overtime, it will be the practice to give first opportunity for weekend work to those employees who have worked, or are considered to have worked, their 5-day schedule Monday through Friday. If additional employees are needed, then those who have not worked or have not been considered as to have worked their 5-day schedule Monday through Friday because of illness or injury provided such an absence is approved subject to the sole discretion of management, without precedent, and on an incident by incident basis will be given next opportunity.

C. Relevant Provisions of the *Canada Labour Code*

5) The following provision of the *Canada Labour Code* is relevant:

> Scheduling hours of work
>
> 173 Except as may be otherwise prescribed by the regulations, hours of work in a week shall be so scheduled and actually worked that each employee has at least one full day of rest in the week, and, wherever practicable, Sunday shall be the normal day of rest in the week.

D. Decision on Timeliness

6) The Employer submits the grievance is untimely. Section 3.01 of the collective agreement provides a grievance cannot be considered where "the circumstances giving rise to it occurred or originated" more than 7 days before the grievance was filed. The Employer submits the circumstance giving rise to the grievances was the Employer's change in its scheduling procedure which took place in November 2020. The grievance was not filed until February 2021, more than 7 days later, and is thus untimely. The Employer relies on excerpts from *Brown & Beatty*, Canadian Labour

Arbitration, 5th Edition, *Toronto Parking Authority v. C.U.P.E., Local 43*, 1974 CarswellOnt 1372; *Sunnybrook Health Sciences Centre and ONA (McLeod) Re*, 2019 CarswellNS 453.

7) The Union asserts the grievances are continuing or reoccurring grievances, and relies on excerpts from *Brown & Beatty, supra*, and *Port Colborne General Hospital v. O.N.A.*, 1986 CarswellOnt 3676 in support of its argument that each time the Employer puts out a schedule that is inconsistent with the terms of the Collective Agreement, that schedule constitutes a new independent breach. The Union relies on the following excerpt from *Port Colborne*:

> 8 … It is clear from a reading of the cases that the question that must be asked is whether or not the conduct that is complained of gives rise to a series of separately identifiable breaches, each one capable of supporting its own cause of action. Allegations concerning the unjust imposition of discipline, the improper awarding of a promotion or the failure to provide any premium or payment required under the collective agreement on a single occasion, while they may have ongoing consequences, constitute allegations of discrete non-continuing violations of the collective agreement. In contrast, an allegation of an ongoing failure to pay the wage rate or any benefit under the collective agreement or an ongoing concerted work stoppage constitute allegations of continuing breaches of the collective agreement. In these cases the party against whom the grievance is filed takes a series of fresh steps each one giving rise to a separate breach. In this latter type of case the time-limits for the filing of a grievance, apart altogether from any question as to when damages commence to run, must be found to be triggered by the breach closest in time to the filing of the grievance.

8) The Union disputes the Employer's submission that the word "originated" in section 3.01 requires the grievances to have been filed within 7 full calendar days of the very first instance on which the schedules were changed. In this regard, the Union relies on *Re Parking Authority of Toronto and C.U.P.E. Local 43*, *supra*, in which the union sought a declaration that the employer's 15-year practice of requirig certain bargaining unit employees to regularly work less than 8 hours a day and more than 5 days a week was in violation of the collective agreement.

9) The collective specified “no grievance shall be considered, the alleged circumstances of which originated or occurred more than five (5) working days prior to its presentation as a written grievance….’ The employer argued, the use of the word “originated,” must indicate that the phrase “the alleged circumstances of which originated or occurred” means “if the alleged circumstances or other instances of similar alleged violations originated or occurred….” As the first alleged circumstance had occurred 15 years prior, the employer argued the grievance was out of time.

10) The majority of the Board rejected the employer’s argument and found the grievance to be timely. Beginning at paragraph 9, the majority found the grievance to be a continuing grievance “as it concerns repeated acts of scheduling of employee working hours, each such act being an alleged breach of the collective agreement.” Thereafter, the majority concluded “for the purpose of applying a time-limit provision in the case of a continuing grievance, time runs from the last recurrence of the alleged violations…” At paragraph 11, the majority turns to the employer’s argument that the use of the word “originated” rendered the continuing grievance doctrine inapplicable and at paragraph 12, rejects the argument. The majority found the word “originated” did not mean that the continuing grievance doctrine did not apply.

11) Pursuant to the finding In *Toronto Parking Authority*, the presence of the word “originated” in article 3.01 does not displace the application of the continuing grievance doctrine. Further, on the facts of the present matter, the circumstances giving rise to the grievance did not begin in November 2020 and occur consistently week after week thereafter; rather, there were weeks when the employees were scheduled in a manner consistent with what the Union asserts is required by the terms of the collective agreement and weeks when they were not. The sporadic nature of the schedules complained of makes it even more compelling that each schedule would give rise to its own

identifiable separate breach.

12) I find time, for the purposes of section 3.01, runs from the most recent schedule the Union alleges violates the terms of the collective agreement and not from the first such occurrence. Provided one occurrence took place within the time frame set out in the collective agreement, the alleged circumstance both occurred and originated within the stipulated time frame and the grievance is timely. There is no evidence before me that the grievances were not filed within 7 full calendar days of a schedule in respect of which the Union founds its challenges and accordingly, I find the grievance to be timely.

E. Decision on Grievance Concerning Improper Work Schedule

13) The issue in this grievance is whether the collective agreement requires the Employer to schedule the employees to work on 5 consecutive shifts Monday to Friday. The Employer asserts that, when the language of the collective agreement is considered, it is evident that the parties did not intend to require the Employer to schedule the employees 5 consecutive shifts Monday to Friday. For ease of reference, I will refer use the word “normal” to refer to a schedule where the employees are scheduled to work everyday Monday to Friday and “varied” to refer to a schedule where they are not scheduled to work everyday Monday to Friday. For clarity, the Employer does not argue the varied schedules are “abnormal” as that term is used in the jurisprudence, or that the varied schedules were created for business reasons or efficient operations. The Union argues the parties’ intention to establish a normal work week of 5 consecutive shifts scheduled Monday to Friday is clear on the face of the language of the collective agreement. Neither party argued the language is ambiguous.

14) The parties are in full agreement as to the facts. Prior to November 2020, employees were scheduled five consecutive days Monday to Friday. The facts pertaining to the change that was made to the schedule in November

2020, as set out in the ASF, are as follows:

> 12.It is common and usual for overtime work to be required on the weekends, especially during the busier times of the year. In fact, it was common for some employees to volunteer to work up to seven (7) days a week.
>
> **Scheduling Practices Prior to November 2020**
>
> 13.Commencing in or about November 2020, the employer required that any employee who is scheduled to work overtime on both Saturday and Sunday, would be required to take a mandatory day of rest during the same work week that the overtime would be worked.
>
> 14.Prior to this change, employees were assigned shifts from Monday to Friday. Employees would be canvassed as to their availability to work overtime on Saturday or Sunday. Employees had the option of volunteering for overtime or, in the event there weren't enough volunteers, employees would be mandated to work overtime. Employees could choose to work up to seven (7) days a week.
>
> **New Scheduling Practice as of November 2020**
>
> 15.In or around November 2020 the Employer required that any employee who worked overtime on both Saturday and Sunday would be required to take a mandatory day of rest during the same work week that the overtime would be worked. During busy periods where employees are required for both weekend shifts bargaining unit employees will be scheduled for four (4) days during Monday to Friday and two (2) shifts on Saturday and Sunday.
>
> 16.Where overtime is required for only one day of the weekend, employees are still canvassed as to their availability for weekend overtime.
>
> 17. An employee's assigned day off during the Monday to Friday weekday changes from week to week. The same employee isn't necessarily scheduled off work on the same day each Monday to Friday period. Also, there are weeks where a member of a given team may be scheduled to work all Monday to Friday shifts, for example, when not needed for both Saturday and Sunday.

15) The "mandatory day of rest" referenced in paragraph 13 is a reference to section 173 of the *Canada Labour Code* which prohibits employees working 7 days a week.

16) The principles applicable to the interpretation of a collective agreement are not in dispute. The following excerpt from *Gerdau Ameristeel*, 2012 CarswellOnt 9066, relied upon by the Union, is an apt summary:

> 57 In interpreting the agreement, it is my purpose to discover the intention of the parties, which I ought to do, whenever possible, by (amongst other rules of construction);
>
> a) giving the words used their natural and ordinary meaning;
>
> b) reading the collective agreement as a whole, and avoiding interpretations which nullify or render absurd the article in question, or any other article of the agreement;
>
> c) where two equally plausible interpretations are possible, avoiding that interpretation which leads to an unjust result; and
>
> d) giving effect to all of the words used.

17) The following excerpt from *Ideal Child Services Group v. CUPE, Local 2482.30* (Lee), Re, 2019 CarswellOnt 21153, relied upon by the Employer, is equally apt:

> The goal is to determine the intention of the parties and, if possible to do so, provide an interpretation that is based on the actual words that the parties have chosen to use in the collective agreement. In determining the intention of the parties, it is assumed that the parties meant what they said. It is my role to give the language used by the parties a meaning that it can reasonably bear and that is internally consistent. It is also a well-accepted principle that collective agreement language should be given its ordinary and plain meaning and that provisions in the agreement should be construed as a whole and interpreted in context. In determining what the parties meant when they used the term "working days" ..., I cannot accept that they would have intended it to have a meaning that gives rise to an absurd result.

18) I turn then to an examination of the language of the collective agreement with a view to discerning the intention of the parties.

19) The management rights clause provides the Employer has all rights not expressly limited by the specific terms of the collective agreement. Among the rights listed as retained to management is the right to determine

schedules. The question thus arises as to whether the terms of the collective agreement limit the Employer's otherwise retained right to determine schedules.

20) Article V is entitled "Hours of Work and Overtime." Section 5.01 entitled "Intent and No Pyramiding" begins with the statement:

> **This Article is intended to set forth the normal hours of work** and to provide a basis for computing overtime and premium pay, and shall not be construed as a guarantee or limitation on overtime hours or on the hours of work per day or per week,…
>
> [emphasis added]

21) The very title of section 5.01, "*Intent* and No Pyramiding," indicates the section sets out the parties' intentions. The very first sentence of section 5.01 clearly states Article V "is *intended* to set forth the *normal hours of work*." Section 5.02 describes a "workday" as a 24-hour period running from 7AM to 7AM the following day. The "workweek" is described as beginning at 7 AM on Monday and ending at 7 AM the following Monday. Section 5.03B then specifies "the "normal workweek contains 5 consecutive workdays scheduled Monday through Friday. However, the Company may vary or change …the scheduling of workdays for business reasons or efficient operations." Article V clearly provides it was the parties' *intention* to set forth normal hours of work and that "normal workweek" is "5 consecutive workdays scheduled Monday through Friday."

22) Each of the parties pointed to additional sections of the collective agreement in support of their respective positions. Section 5.03C, gives the Employer the right to schedule more than a single shift, including shifts that would work 7-3, 3-11 and 11-7 or two 12's. The Employer argues this provision, and specifically the reference to "two 12's," evidences the parties' intention that the Employer can create schedules that are not consistent with the "normal workweek." I am not persuaded. Section 5.02 speaks to the makeup of a

"normal workweek." It is a clear and specific statement as to what the parties intended the normal workweek to be. Section 5.03C, on the other hand, addresses the Employer's ability to schedule multiple shifts. The two sections speak to different matters. There is no language within section 5.03C to suggest it was the parties' intention, by way of a reference to "two 12's" to amend the clear definition of "normal workweek" set out in section 5.03B. If an inconsistency is created by the reference to "two 12's" in section 5.03C, the specific statement as to what constitutes the normal workweek in 5.03B must override the vague reference to "two 12's" in 503C. Further, as indicated above, Article V provides the Employer may change the scheduling of workdays for business reasons or efficient operations. As such, a reference to shifts that would not constitute a normal workweek, is not inconsistent with, or contradict, the parties' otherwise clearly stated intention that there be a normal workweek.

23) The Section Note at the end of article V provides the Employer cannot "use" the provisions of the section to avoid paying overtime on Saturday and Sunday. The section is quite short, and the only provision contained therein that the Employer could "use" is the ability to alter, amoungst other things, the scheduling of workdays for business reasons or efficient operations. The section note can only mean that, reducing overtime costs, cannot be advanced by the Employer as a "business reason or efficient operations" to avoid scheduling consistent with the normal workweek. The assumption expressed in the note, that working on Saturday or Sunday would be paid at overtime rates, supports the conclusion the parties' intended the normal workweek to be Monday to Friday. The Employer argues that this intention is negated by the final sentence of the note which provides "should a continuous 4 shift operation be scheduled the premium double-time day in place of Sunday will be the employee(s) 2nd scheduled day off during the week." For the reasons expressed above, I do not find the reference to a schedule other than a normal workweek to derogate from the parties

otherwise clearly stated intention to establish a normal workweek.

24) Finally, as the Union points out, Section 5.09B note 4 provides that "weekend overtime" is to be given to "those employees who have worked or are considered to have worked, their 5-day schedule Monday through Friday" and, if additional employees are needed, "those who have not worked ... their 5-day schedule Monday through Friday …will be given next opportunity." This language supports an interpretation of Section 5.03B that the parties intended "normal workweek" to mean "5 consecutive workdays scheduled Monday through Friday."

25) The Employer argues that, even if the language of article V does not give the Employer the ability to implement a schedule at variance to the "normal workweek" the management rights clause does. In this regard, the Employer relies on *Teck-Corona Operating Corp v. U.S.W.A., Local 9165*, 2002 CarswellOnt 4879. I do not read *Teck-Corona* as having been decided based on the management rights clause alone. In *Teck-Corona*, the employer changed the schedule from 8 hour shifts Monday to Friday to a schedule whereby two weekend shifts were worked by each crew in every three-week period. The language of article 16 of the collective agreement provided for a "standard workweek" of 40 hours made up of 5 days of 8 hours each. Article 16 further provided that "employees working steady day shift shall generally work Monday to Friday. However, other periods of coverage may be established according to the requirements of the operation." Within the same article, it was provided "the Company may develop, initiate or discontinue shift schedules in any or all parts of its operation according to the requirements of efficient operation…" At paragraph 25, the arbitrator referred to the ability of the employer to change shifts according to the requirements of efficient operation and concluded "that is exactly what the employer seeks to do here." The evidence adduced included two witnesses who testified as to the need, for operational and efficiency reasons, to make the schedule

change. The arbitrator states, at paragraph 25, that there was no dispute between the parties that "at that stage of the mine's life, there were efficiencies that must be achieved." Accordingly, *Teck-Corona* is a case where the employer sought to, and was successful in, establishing that, regardless of whether there existed a "standard workweek," the change was permissible pursuant to the provision that allowed scheduling changes for efficiency reasons. Further, and in any event, the management rights clause of the collective agreement before me states "The Company retains any and all management rights not expressly limited by the specific terms of the collective agreement." The management rights clause cannot override Article V.

26) Having regard to the foregoing, I find the provisions of the collective agreement express an intention on the part of the parties that there be a "normal workweek" of 5 consecutive workdays scheduled Monday through Friday.

27) I turn then to the significance of the collective agreement providing for a "normal workweek" and specifically whether such a provision prevents the Employer from indefinitely, for a period of at least one year, scheduling the employees in a manner not consistent with the definition contained in the collective agreement.

28) The Union relies on *Printing Specialties and Paper Products Union Local 466 v. Interchem Canada Ltd*., 1969 CarswellOnt 1102; *ES and A Robinson (Canada) Ltd. v. Printing Specialties and Paper Products Union Local 466*, 1976 CarswellOnt 140; *Ballycliffe Lodge Ltd v. SEIU Local 204,* 1984 CarswellOnt 2389; and *Robinson Solutions (Oshawa) Inc. and TC Local 938 (Reduction in hours of work) Re,* 2014 CarswellOnt 18319.

29) *Interchem Canada* considered the following collective agreement language:

> Article 6 - Hours
>
> Section 1. The provisions of this article provide for the normal hours of work and shall not be construed as a guarantee of any specified number of hours of work either per day or per week, or of work per week or as limiting the right of the Company to request any employee to work any specified number of hours either per day or week.
>
> Section 2. The regular work week for the day shift shall consist of forty (40) hours made up of five days of eight (8) hours, Monday to Friday inclusive. The said hours of work to be completed between 8:00 a.m. and 5:00 p.m., any other arrangement of hours for the day shift to be mutually agreed upon by the Union and the Company.
>
> Section 3. The regular work week for the night shift shall consist of forty (40) hours made up of five nights of eight (8) hours, Monday to Friday inclusive, hours to be mutually agreed upon.

The board of arbitration found:

> 5 Having regard to the material provisions of the collective agreement, it is clear that the company did not have the right to alter the "regular work week". By art. 6, s-ss. (2) and (3), the arrangement of hours is subject to alteration by agreement, but the general pattern of Monday to Friday work is clearly established, and could be altered only by amendment to the collective agreement. The general management right to schedule is plainly restricted by the provisions of art. 6. It is nevertheless also clear from art. 6(1) that the company could require work to be done outside the regular hours. Such work, however, periodically falls outside of the regular work week defined in art. 6 of the agreement. Certainly the company is not entitled unilaterally to alter the agreed provisions respecting the regular hours of work. If, therefore, the work now being scheduled on a regular basis outside the hours provided in the agreement is proper at all, it is proper only on the basis that such work is overtime work, and must be paid for at overtime rates. If this were not so, and the work now scheduled on a regular basis is not regarded as overtime with respect to that portion falling outside the regular hours contemplated by the agreement, then the company may simply disregard the provisions of art. 6 with impunity. For the board to reach this conclusion would be contrary to the provisions of the collective agreement and clearly wrong.

30) *Interchem Canada* stands alone amoungst the decisions relied upon as it is the only one to suggest that the time scheduled outside the hours provided for in the collective agreement “If … it is proper at all, it is proper on the basis

it is overtime work." *Interchem Canada* was decided in 1969 and none of the other cases presented suggest an employer can fail to abide by the normal hours of work provision of a collective agreement by paying the hours at overtime rates. This conclusion was in fact rejected in *Centre de counselling de Sudbury, supra.*

31) The remaining cases relied upon by the Union all provide that a "normal hours of work" provision is not a guarantee that the hours specified will not be altered and unusual circumstances may justify a departure. However, in the face of such a provision, an employer cannot change to a new "normal" schedule of hours. Whether a new "normal" schedule has been created is determined based on whether the schedule was declared to be of a finite duration when implemented and how long the schedule remains in place (see: *Robinson Solutions, supra*.) *Centre de Counselling de Sudbury, supra* considered the following language:

> ARTICLE 18 - HOURS OF WORK
> 18.01 The following sections and paragraphs are intended to define the normal hours of work and shall not be construed as a guarantee of hours of work per day, per week [sic].
>
> The normal work week shall consist of thirty-five (35) hours per week, seven (7) hours per day, Monday to Friday, inclusive. The normal hours of work shall be from 8:30 a.m. to 4:30 p.m. with a one (1) hour lunch break. The employee's daily schedule may vary, subject to the agreement of the immediate Supervisor. During the period from July 1st to August 31st, the normal hours of work shall be varied to provide for five (5) to six and one-half (6 1 /2) hour days between 8:30 a.m. and 4:00 p.m. The employee's daily schedule may vary, subject to the agreement of the immediate Supervisor.

The arbitrator commented on the import of such provisions as follows:

> 20 Arbitrators have consistently held that provisions such as Article 18.01 allow an employer only limited room for maneuver. Provisions such as these exist not solely for the purpose of defining the hours beyond which overtime compensation is due, but primarily for the purpose of restricting the employer's prerogative as regards scheduling. While the designation of "normal hours" in an agreement implicitly acknowledges that employees might be required to work "abnormal hours", these provisions are not a mere "pious hope" that

> employees will be scheduled to work the normal hours. Every employee in the bargaining unit is entitled to the benefit of such a provision, and an employer cannot therefore justify its departure from that norm for one employee by pointing to its faithful compliance with it for everyone else in the bargaining unit. Employers may depart from the normal hours, depending on the specific terms of the collective agreement, in response to sporadic "operational problems or vagaries of the marketplace", for example: see Quebec & Ontario Paper Co. v. C.P.U., Local 101, supra, at paragraph 23. However, where departures are "pre-arranged, uniform, continuous, routine and systematic", the agreement will generally be held to prohibit them: ibid. None of the awards cited by the employer in its submissions calls into question this interpretation of provisions such as Article 18.01.

32) The fact that the collective agreement provides for a “normal workweek” requires the Employer to normally schedule the Employees in accordance therewith. By scheduling the employees in a manner that was inconsistent with the definition of “normal workweek,” for a year with no stated end date, the Employer created a new “normal workweek,” that was inconsistent with article 5.03B.

33) For the foregoing reasons, I find the intention of the parties in Article V was to establish a normal workweek of 5 consecutive workdays scheduled Monday through Friday. I find the Employer to have scheduled the employees in manner that is inconsistent therewith. I find the Employer to be in violation of article 5.03B and so declare.

F. Decision On Improper Use of Contract Workers

34) The grievance states: “Improper use of contract workers.” The articles of the collective agreement alleged to have been violated are 4.01(5) and 2.01. Article 2.01 is the Management Rights clause. Section 4.01 note 5 provides:

> 5. Non-employee, contract laborers may be used to supplement the company's workforce. In handling lines, flinging and cleanup work. Such contract laborers will not be used if any permanent full-time employee is in a layoff status unless such laid off employee either

> cannot be immediately contacted, or, if contacted, the employee rejects the opportunity to perform the available work.

35) The ASF establishes there were contractors handling lines, flinging and performing clean-up work on Monday to Fridays where bargaining unit members were not scheduled to work. The Union asserts the bargaining unit members were on layoff and thus the contractors ought not to have been working. The collective agreement does not contain a definition of layoff.

36) The Employer relies on *I.B.E.W., Local 1928 v. Nova Scotia Power Inc.,* 2000 CarswellNS 453 and *York County Hospital v. O.N*.A., 1994 CarswellOnt 1253. The Union relies on *Ballycliffe Lodge Ltd., supra; Canada Safeway Ltd. v. RWDSU Local 454,* 1998 CarswellSask 298*; Battlefords and District Co-operative Ltd. v. RWDSU Local 544,* 1998 CarswellSask 296; and *CUPE Local 4000 v. Ottawa Hospital*, 2012 CarswellOnt 2084.

37) *Ballycliffe Lodge Ltd., supra*, is the earliest of the decisions. It concerns a reduction in the workday for two of three shifts of one hour. The union grieved on the basis the reduction was a violation of the provision dealing with normal hours of work as well as a layoff out of seniority. At paragraph 11, the arbitrator states: "There can be little doubt that a reduction in work hours uniformly applied across the bargaining unit does not constitute a lay-off triggering the seniority provisions of a collective agreement: see *Air-Care Ltd. v. U.S.W. et al., supra*. However, a reduction in work hours, if applied in an unequal fashion, may constitute a layoff …." At paragraph 13, the arbitrator finds the reduction in hours to have been applied on an unequal basis and finds a layoff to have occurred.

38) *York County Hospital*, *supra*, concerns the cancellation by the employer of a job-share arrangement whereby two part-time registered nurses shared a full-time position, and each worked 150 hours in an eight-week cycle. The grievance alleged that the nurses were laid off and ought to have been

afforded the right to bump into other positions. The only loss suffered by the nurses was the loss of the predictability of their work schedule and guarantee of 150 hours of work in an eight-week period, neither of which was a right or entitlement under the collective agreement or the workshare arrangement. The arbitrator concluded as follows:

> 15 Neither the full-time nor part-time collective agreement guarantees hours of work for nurses. These grievors did not have their employment relationship severed in any way. They remained as members of the part-time bargaining unit. The facts reveal a loss of pre-scheduled hours of work but not a loss of work. Their lives have been disrupted by the reassignment and loss of predictability of schedules. But neither the collective agreement nor their job-share arrangements gave them a contractual guarantee of such predictability. In short, none of the traditional indicia of a layoff exists, nor have they seemed to have lost anything which was guaranteed under the collective agreement in this case.

39) *Canada Safeway Ltd, supra, and Battlefords and District Cooperative, supra,* are companion decisions of the Supreme Court of Canada issued on the same day. The issue in *Canada Safeway,* as expressed at paragraph 40 of the majority decision, was: "is it patently unreasonable to conclude that an employee whose actual hours of work remain constant, but whose scheduled hours are reduced, was constructively laid off?" The employee in question had her scheduled hours reduced from 30 – 37 to 4, however, because of being able to pick up additional shifts, she continued to work substantially the same number of hours. At paragraph 70, the Court found "In our view, the term "layoff" as used in labour law refers to the denial of work to the employee. As a matter of law, a layoff cannot be found where the employee continued to work the usual number of hours, as here." This conclusion was reached based on the following analysis of the meaning of "layoff":

> 71 The labour agreement in the case at bar does not define "layoff". We must therefore look at the cases to see how courts and labour arbitrators have defined it. They suggest that "layoff" is used in the law of labour relations to describe an interruption of the employee's work short of termination. A "layoff", as the term is used in the cases, does not terminate the employer-employee relationship. Rather, it temporarily discharges the employee. The hope or expectation of

future work remains. But for the time being, there is no work for the employee. Such an employee, it is said, is laid off.

72 Reference to a few of the cases illustrate this use of the term. In *Air-Care Ltd. v. United Steel Workers of America*, 1974 CanLII 200 (SCC), [1976] 1 S.C.R. 2, at p. 6, Dickson J. (as he then was) adopted the following definition of layoff:

> "Lay-Off" is not defined in the Quebec *Labour Code*, R.S.Q. 1964, c. 141. However, the *Shorter Oxford English Dictionary* defines "lay-off" as follows: "Lay-off, a period during which a workman is temporarily discharged" and *Nouveau Larousse Universel*, Tome 2 "Mise à pied"; "retrait temporaire d'emploi".
>
> The controlling idea of a layoff as a disruption (as opposed to termination) of the employment relationship is echoed by Vancise J.A. in University Hospital v. Service Employees International Union, Local 333 U.H. (1986), 1986 CanLII 2911 (SK CA), 46 Sask. R. 19. Stating that a layoff occurs when the employee-employer relationship is "seriously disrupted", Vancise J.A. noted at p. 28 that Black's Law Dictionary, 5th ed., defines layoff as "A termination of employment at the will of the employer. Such may be temporary (e.g. caused by seasonal or adverse economic conditions) or permanent."

73 While in common parlance the term "layoff" is sometimes used synonymously with termination of the employment relationship, its function in the lexicon of the law is to define a cessation of employment where there is the possibility or expectation of a return to work. The expectation may or may not materialize. But because of this expectation, the employer-employee relationship is said to be suspended rather than terminated.

74 The suspension of the employer-employee relationship contemplated by the term "layoff" arises as a result of the employer's removing work from the employee. As stated in *Re Benson & Hedges (Canada) Ltd. and Bakery*, *Confectionery and Tobacco Workers International Union*, *Local 325* (1979), 22 L.A.C. (2d) 361, at p. 366:

> Arbitrators have generally understood the term "lay-off" as describing the situation where the services of an employee have been temporarily or indefinitely suspended owing to a lack of available work in the plant. . . .

75 It follows that for there to be a layoff, there must be a cessation of work. If the employee continues to work substantially the same number of hours, his or her grievance is not, whatever else it may be, a layoff. As the Arbitration Board stated in *Re Benson & Hedges*, *supra*, at p. 370, "there is . . . a general arbitral consensus that lay-off refers to cessation of work by an employee and that if it is to bear any other meaning it should be clearly spelled out by appropriate adjectival words or phrases [in the collective agreement]".

40) The reduction in scheduled hours was seen as a violation of a provision of the collective agreement that required hours to be scheduled based on seniority. Such a violation of the collective agreement was not, however, a layoff.

41) In *Battlefords, supra*, the employer decided to combine the bakery department with the deli department following which an employee who had formerly worked in the bakery department had her hours reduced from 30 – 35 down to an average of 13. While her hours were being reduced, employees from the deli department junior to her were being assigned to do tasks she had previously performed. The collective agreement provided for the assignment of hours of work based on departmental seniority and further provided that, upon layoff, a where a senior employee had the ability to do the work, seniority shall prevail. The Court found that "a significant reduction of hours, in circumstances where a particular employee is singled out, may amount to a constructive layoff" and it was not unreasonable for the arbitrator to have so found.

42) *Nova Scotia Power Inc., supra*, concerns employees who were demoted to a lower classification and suffered a 40% pay reduction. It was determined that the decision of the Supreme court of Canada in *Canada Safeway, supra,* required there to be a reduction in hours of work for a layoff to be found. On that basis the arbitrator determined no layoff had occurred.

43) Finally, *Ottawa Hospital, supra*, is a case where two individuals had their prescheduled hours reduced but suffered no reduction in working hours as they were able to pick up non-scheduled shifts. In this case, notwithstanding there had been no loss of work, it was found a layoff had occurred. I do not find the reasoning in this decision to be of assistance given the difference in

collective agreement language and the fact that the decision followed jurisprudence that directly considered that language. I note that at paragraph 48, the arbitrator describes the provisions in question as “unique.”

44) The cases relied upon by the parties establish, in the absence of a definition of layoff in the collective agreement, a layoff will not be found where there has been no reduction in hours worked. As stated by the Supreme Court of Canada in *Canada Safeway*: “if the employee continues to work substantially the same number of hours, his or her grievance is not, whatever else it may be, a layoff.”

45) I understand the Union to argue that, because the employees are required, by Article V, to be scheduled every day Monday to Friday, when they were not scheduled on a Monday to Friday, they were laid off on the day in question. The Union’s approach is to look at the “normal workweek” as defined in the collective agreement and consider whether the employees have in fact been scheduled all such days. According to the Union, where the employee has not been scheduled on a Monday to Friday, the employee has been laid off.

46) I do not consider the approach urged upon me by the Union to be the correct one. In *Canada Safeway, sup*ra, the collective agreement provided employees were to be scheduled for work in order of their seniority. The Employer violated such provision and reduced the employee’s pre-scheduled hours of work. The analysis conducted to determine whether the employee had been laid off was not to analyze what hours the terms of the collective agreement required her to be scheduled and find she was laid off each hour not so assigned. The analysis was to look and see if the employee had suffered a reduction in work. When it was found she had not suffered such a reduction due to her ability to pick up shifts it was found no layoff had occurred.

47) In the present case, the employees were given a schedule of work, that was inconsistent with section 5.03B. I have already found that to be a violation of the collective agreement. In order to determine whether the employees were, as a result of the varied schedule, laid off, the question to be answered is whether, in respect of the period of time covered by that schedule, or perhaps even a longer more representative period of time, the employee suffered a loss of hours.

48) An employee scheduled to work a normal workweek, in a manner that is compliant with section 5.03B and the *Canada Labour Code* would work, at most, 40 regular hours and 8 hours at time and a half or 8 hours at double time. The employee would work 40 - 48 hours and be paid, at most, 56 hours pay. Under the varied scheduling process, an employee would work 32 regular hours, 8 hours at time and a half and 8 hours at double time. The employee would work 48 hours and be paid for 60 hours. There may be other employees who would be working a normal workweek at the same time this employee is working the altered work week, but neither employee can be said to have suffered a reduction in work. The employee on the normal workweek is working their full hours and the employee on the altered workweek is working the identical number of hours, or more, and being paid more. No one is suffering a reduction in work.

49) Having regard to the fact that there has been no reduction in work I find no layoff has occurred.

G. Determination

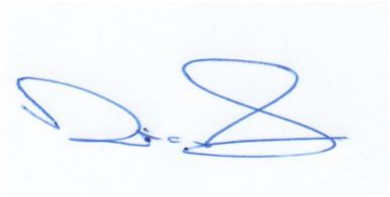
50) For the foregoing reasons I hereby:

i) find the grievances to be timely;

ii) grant grievance G30-2021-02 in respect of Improper Work Schedule and declare the Employer to be in violation of article V as a result of the adoption of a work schedule inconsistent with the normal workweek provided for in section 5.03B; and

iii) find no layoff to have occurred and dismiss grievance G30-2021-01 in respect of the Improper Use of Contract Workers;

iv) remain seized to deal with any issues arising out of this award.



Diane L. Gee