

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

UFCW Canada Local 175

- and -

Post Foods Canada Inc.
(Cobourg, Ontario)

[Mandatory Overtime Scheduling Grievance]

Before: Michael McFadden, Arbitrator

Appearances:

For the Union: Brittany Ross-Fichtner, Counsel
Morrison Watts

Paul Hardwick
Sean Carroll
Amanda Bevan
Ken Barlow
Pat McIvor

For the Employer: Kathryn Bird, Counsel
Hicks Morley Hamilton Stewart Storie LLP

Doug Campbell
Craig Byers

Arbitration held by videoconference on July 9, 2021.

Introduction

1. This matter involves a grievance filed by UFCW Canada Local 175 ("the Union") objecting to Post Foods Canada Inc. ("the Employer") requiring a mandatory, regular overtime shift be worked by full-time employees.
2. The grievance proceeded to an arbitration hearing on July 9, 2021 by videoconference, at which time because of the cooperation of counsel and their respective clients the parties were able to complete the presentation of their evidence and submissions, commendably completing the case in one productive day.
3. For all the reasons set out more fully below, I am satisfied that the Grievance should be sustained.

Facts

4. The parties were able to present to me a catalogue of undisputed facts, set out further below, which counsel agreed would form a sufficient basis for each of them to present their respective legal submissions.
5. The Employer operates a food production factory at Cobourg, Ontario ("the Plant"), where it produces a variety of breakfast cereals and other products.
6. The Employer and the Union are bound to a collective agreement that covers all the hourly production employees (among others) employed at the Plant, with a term of 2018 – 2023 ("the Collective Agreement"). Immediately following ratification of the Collective Agreement by the Union in 2019, the Employer informed the Union that it was going to operate the Plant under a 24 hour/7-day continental shift schedule ("24/7 Schedule") and did so from January of 2019 until approximately August of 2020.
7. Shortly before August of 2020, the Employer informed the Union that it would be reverting to a "5/24 schedule" (as the Plant had operated prior to January of 2019). Under the 5/24 schedule, production crews are scheduled to work on a rotating basis through three eight-hour shifts each workday, Monday through Friday. Under the 5/24 schedule, the last scheduled shift of each week is Friday from 3:00 pm to 11:00 pm. Apart from the circumstances that gave rise to the grievance as

described below, in the normal course the last shift of the work week is used as a "clean-up" shift.

8. On or about March 9, 2021, the Employer informed the Union that it wished to fully utilize the weekly 5/24 schedule for production, and would therefore be scheduling a clean-up shift to occur each week commencing on Friday at 11:00 pm continuing through to Saturday at 7:00 am. This "extra shift" (my terms, I should state) would be staffed by full-time production employees and paid on an overtime basis. The Employer told the Union it anticipated that the extra shift would last for approximately eight to ten weeks. The extra shift started in fact on March 29, 2021 and ended on May 23, 2021. The Employer has not ruled out implementing a further period of similar clean up overtime shifts.
9. The Union did not consent to the extra shift, and filed the instant grievance objecting to it on March 10, 2021 ("the Grievance").

Relevant Collective Agreement Provisions

10. Among their agreements, counsel agreed on the most germane provisions of the Collective Agreement relevant to deciding the Grievance. For the purposes of convenience, I have set out the provisions counsel referred to in their submissions in numerical order below (I have omitted reproducing those parts and sub-sections of the various articles and appendix that neither counsel referenced). As will be obvious, the parties focussed their submissions on parts of what I will refer to as the "main Collective Agreement" and the Appendix B (a section dealing specifically with the 5/24 schedule). I will use the term "main" Collective Agreement only for the purposes of convenience and to avoid confusing the repetition of article numbers between the two sections. There is no dispute between the parties that Appendix B forms part of the Collective Agreement.

Article 3 Management Rights

3.01 It is the exclusive function of Management:

- a) To manage the enterprise in which it is engaged; determine the products to be manufactured, methods, processes and means of manufacturing. Schedules of productions; kinds and locations of machines, equipment and tools to be used; the control of materials, parts, extension, limitation, curtailment or cessations of operation; location number and size of plants direction of the working forces; assignment of work; maintain order and efficiency of all matters concerning the operation, management, supervision, GMP and control of the Company and its business, works,

plants and operations, make and alter reasonable rules, regulations and systems and to contract out work. Management reserves the right to change the schedule of hours of work by reducing the hours of work per day, days per weeks, weeks per month and by changing the daily starting and stopping time.

b) Without restricting the generality of the foregoing and subject only to the express provisions of this Agreement to main discipline, hire, discharge, classify, direct, transfer, promote, lay-off, suspend and otherwise discipline employees.

3.02 Management rights shall not be limited in any way except as provided for specifically by the terms of this Agreement.

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Article 10 Arbitration

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10.02 The Arbitrator shall not have any power to alter, delete, or add to any of the provisions of this Agreement, nor to give any decision contrary to the terms of the Agreement.

...

Article 16 Hours of Work

16.01 This article is for the purposes of providing a basis for calculating overtime and shall not be construed as a guarantee of hours of work per day or per week nor of any minimum nor as a restriction on maximum number of hours to be worked.

16.02 The normal hours for shift workers will be as follows:

Day Shift
7am - 7pm

Midnight Shift
7pm - 7am

16.03 24/7 Shift Patterns

Shift Pattern A

Mon		Tu		Wed		Th		Fr		Sa		Su	
D	M	D	M	D	M	D	M	D	M	D	M	D	M
x		x						x		x		x	

Mon		Tu		Wed		Th		Fr		Sa		Su	
D	M	D	M	D	M	D	M	D	M	D	M	D	M
				x		x							

Mon		Tu		Wed		Th		Fr		Sa		Su	
D	M	D	M	D	M	D	M	D	M	D	M	D	M
	x		x						x		x		x

Mon		Tu		Wed		Th		Fr		Sa		Su	
D	M	D	M	D	M	D	M	D	M	D	M	D	M
					x		x						

Shift Pattern B

Mon		Tu		Wed		Th		Fr		Sa		Su	
D	M	D	M	D	M	D	M	D	M	D	M	D	M
	x		x						x		x		x

Mon		Tu		Wed		Th		Fr		Sa		Su	
D	M	D	M	D	M	D	M	D	M	D	M	D	M
					x		x						

Mon		Tu		Wed		Th		Fr		Sa		Su	
D	M	D	M	D	M	D	M	D	M	D	M	D	M
x		x						x		x		x	

Mon		Tu		Wed		Th		Fr		Sa		Su	
D	M	D	M	D	M	D	M	D	M	D	M	D	M
				x		x							

16.04 The regular scheduled hours of shift workers shall be twelve (12) hours per day in a two (2) week rotation.

16.05 Employees shall be at their work place and ready to assume their duties at the commencement of their work day.

16.06 Break Pattern

Shift Workers shall be allowed five (5) paid breaks as shown. During these periods employees shall continue all necessary supervision of plant and equipment under their control and such lunch and such breaks will be schedule in a manner so as not to interfere with production or cost of operations.

Break	Lunch	Break	Break	Break
15 mins	25mins	15 mins	20 mins	15 mins

16.07 Except in an emergency, unless an employee has been notified forty-eight (48) hours beforehand not to report to work, upon reporting for work at their scheduled time, they shall be provided with four (4) hours work or pay in lieu thereof calculated at their regular straight time rate.

16.08 If at the request of Management an employee's assigned shift is changed during the course of a week's posted schedule, the employee has the right to refuse such transfer, but subject to the overriding priority of an emergency situation.

16.09 The Company will endeavor to ensure that work schedules shall be posted each week on Wednesday by no later than 2pm. The schedule shall indicate the shift and the job an employee will be working on the following week. It is understood that job assignments are subject to change due to operational needs.

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Article 18 Overtime 24/7

18.01 Overtime will be paid for hours worked over forty four (44).

18.02 All hours before or after an employee's regularly scheduled work day or a call will be paid at one and one half (1½) times the regular rate. Except in an emergency, employees will not be requested to work more than twelve (12) hours.

18.03 An employee who works on their scheduled day(s) off will be paid one and one half (1½) times their regular rate.

18.04 When overtime is required, Management will ask the job incumbent with the lowest overtime hours based on the following criteria:

- i) Incumbent with the lowest overtime hours
- ii) Bid job – individuals with the lowest number of hours
- iii) Anyone with skills in the plant – with the lowest numbers of hours

Where no one volunteers for overtime opportunities, skilled part-time employees will be utilized to fill the production requirements.

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Appendix B

5/24 SHIFT LANGUAGE

The main body of this document applies unless there is a conflict between the main body and this appendix, in which case this appendix prevails to cover off all aspects of language.

Article 5 Definitions

5.6 An “employee” is any person coming within the bargaining unit and covered by this Agreement as defined in Article 4.

5.7 A day is any period of twenty-four (24) hours beginning at 12:01 a.m.

5.8 A “week” is a period of seven (7) days beginning with the shift commencing at 11pm on Sunday.

5.9 “Vacation week” is a period of seven (7) days beginning Sunday 11pm to the following Friday at 11pm.

5.10 “Payroll week” is defined as Monday to Sunday

5.06 “Working day” is defined as a business day (Mon-Fri)

5.07 “Calendar day” is defined as Monday to Sunday

5.08 A “Grievance” is an alleged violation of the terms of this Agreement

5.09 A "Shift worker" is any employee who is scheduled in advance to work rotating hours of work between different shifts.

5.10 An "Emergency" is an Act of God, catastrophe, disaster, or occurrence wherein immediate action is necessary to prevent spoilage or loss of product or loss of production, or to prevent danger to persons, property, or plant.

Article 16 Hours of Work

This article is for the purposes of providing a basis for calculating overtime and shall not be construed as a guarantee of hours of work per day or per week nor of any minimum nor as a restriction on maximum number of hours to be worked.

The normal hours for shift workers will be as follows:

Night Shift
11pm – 7am

Day shift
7am – 3pm

Midnight Shift
7pm - 7am

The regular scheduled hours of shift workers shall be eight (8) hours per day for five (5) consecutive days to provide forty (40) hours per week and shall commence on a Monday.

Employees shall be at their work place and ready to assume their duties at the commencement of their work day.

Shift workers shall be allowed one paid half ($\frac{1}{2}$) hour for lunch and two (2) fifteen (15) minute coffee breaks during which time they shall continue all necessary supervision of plant and equipment under their control and such lunch and such breaks will be scheduled in a manner so as not to interfere with production or cost of operations.

Article 18 Overtime

Overtime will be paid for hours worked over forty (40) hours.

Overtime shall be all authorized time worked in excess of either:

- (i) eight (8) hours in one (1) day; or
- (ii) forty (40) hours worked in a scheduled five (5) day work week Monday to Friday.
- (iii) all hours worked on a Saturday shall be paid for at one and one-half (1½) times the employee's regular hourly rate.
- (iv) eligible full time employee(s) will be offered overtime prior to Part time employee(s)

All authorized overtime work shall be paid for at one and one half (1-1/2) times the employee's regular hourly rate except that:

- (i) any employee required to work in excess of twelve (12) consecutive hours shall after the twelfth hour of work be paid at two (2) times the employee(s) regular hourly rate for all hours worked in excess of twelve (12) hours on such hours of duty.
- (ii) all hours worked on Sundays shall be paid at two (2) times the employee's regular hour rate.

Employees shall not be paid for both daily and weekly overtime for the same overtime hours worked.

Should an employee be requested to work unscheduled overtime of more than two (2) hours after their regular scheduled shift they will be paid a seven (\$7.00) dollar meal allowance. This payment is non-taxable and will be made to the employee through bank transfer and the amount shown on their payslip. Unscheduled overtime shall be defined as overtime where less than 24 hours notice has been given.

Article 22 Vacation

Vacation pay will be calculated as two (2%) percent of the years earnings or forty (40) times the employee's hourly base rate for each complete week of vacation, whichever is greater.

All employees hired on or before August 1, 2018 shall be entitled to vacation with pay as follows:

- i) employee with less than one (1) year service shall be entitled to one (1) day of vacation for each completed month of employment to a maximum of ten (10) days;

ii) employees with more than one (1) year of service and less than five (5) years of service shall be entitled to two (2) weeks of vacation;

iii) employees will be entitled to three (3) weeks of vacation commencing in the year which they complete five (5) years of service;

iv) employees will be entitled to four (4) weeks of vacation commencing in the year in which they complete ten (10) years of service;

v) employees will be entitled to five (5) weeks of vacation commencing in the year in which they complete twenty (20) years of service.

vi) employees will be entitled to six (6) weeks of vacation commencing in the year in which they complete twenty (25) years of service.

All employees **hired on or after August 1, 2018** shall be entitled to vacation with pay as follows:

i) employee with less than one (1) year service shall be entitled to one (1) day of vacation for each completed month of employment to a maximum of ten (10) days;

ii) employees with more than one (1) year of service and less than five (5) years of service shall be entitled to two (2) weeks of vacation;

iii) employees will be entitled to one hundred and twenty (120) hours of vacation commencing in the year which they complete five (5) years of service;

iv) employees will be entitled to four (4) weeks of vacation commencing in the year in which they complete fifteen (15) years of service.

Article 23 Bereavement

Employees shall be granted a paid leave of absence for the purposes of making arrangements and/or attending the funeral as follows:

a) five (5) days without loss of pay, as applicable, for the death of a spouse, recorded common-law spouse, child, step-child or parent;

b) three (3) days without loss of pay for the death of a brother, sister, brother/sister-in-law, step-parent, parent-in-law, grandparent or grandchild;

Article 24 Plant Holiday

Holiday pay will be paid at the employee's regular job rate for the number of hours in the employee's regularly scheduled shift.

An employee who works on a paid plant holiday will receive holiday pay and in addition, the employee will be paid at the rate of two (2) times the employee's regular rate for all hours worked.

If a paid plant holiday falls on a day on which work is not normally scheduled, the work day before or after such holiday shall be observed as a substitute holiday at the Company's discretion.

Submissions

Union

11. Counsel for the Union submitted that the Collective Agreement precludes Plant management from scheduling a mandatory weekly overtime shift staffed by full-time employees in the manner that gave rise to the filing of the Grievance. Counsel was at pains to say that nothing in the Union's view precludes Plant management from requiring part-time employees to work a mandatory weekly overtime shift (part-time employees are a category explicitly identified in the Collective Agreement and there is an Appendix dealing with their terms and conditions of employment).
12. Counsel drew attention to Article 18.04 of the main Collective Agreement, and in particular the sentence "Where no one volunteers for overtime opportunities, skilled part-time employees will be utilized to fill the production requirements". In counsel's submission, the necessary result of the words the parties used is that overtime for full-time employees is necessarily voluntary and cannot be required. Counsel acknowledged that Article 3 (Management Rights) of the main Collective Agreement, when read in isolation, could be read as permitting Plant management to schedule mandatory overtime, but that implicit power is negated by Article 18.04, and counsel notes that Article 3.02 of the main Collective Agreement says explicitly that management rights are constrained by specific provisions to the contrary, and that arises in these circumstances.
13. Counsel for the Union noted that Appendix B provides that any conflict between it and the main Collective Agreement must be resolved in favour of Appendix B. However, she submitted, articles 16 (hours of work) and 18 (overtime) of Appendix B nowhere state that

regular full-time employees working a 5/24 schedule may be required to work overtime, and therefore the voluntariness of such assignments for such workers described at article 18.04 of the main Collective Agreement continues to prevail, as there are no conflicts between the sections in this regard. In counsel's submission, the hours of work and overtime provisions of Appendix B operate only to set out the basis for payment and calculation of, for example, when overtime is payable for 5/24 schedule employees (after 40 hours per week for 24/5 schedule employees, as opposed to after 44 hours per week under the main Collective Agreement provisions), but do not change the essentially volunteer character of overtime work for full-time employees. Further, counsel submitted, article 18.04 of Appendix B says only that overtime will be "offered" to full-time employees before it is offered to part-time employees. In counsel's submission, if the parties intended that overtime work that is clearly voluntary for full-time employees under the main Collective Agreement should become mandatory for full-time employees under Appendix B, the parties would have used much different terms than they did in Appendix B.

14. In summary, the Union submits that when the Collective Agreement (including Appendix B) is read as a whole, and when considering the purpose and function of both the main Collective Agreement and Appendix B, and when focussing on the actual terms the parties used throughout and their ordinary meanings, there can be no doubt that a weekly overtime shift for full-time employees cannot be mandatory. As remedies, the Union requested that I: declare that the Employer is in breach of the Collective Agreement, and in particular in breach of articles 3 and 18 of the main Collective Agreement and articles 16 and 18 of Appendix B; declare that the Employer cannot require full-time employees working a 5/24 schedule to work overtime; and issue a "cease and desist order".

15. In the course of her submissions counsel for the Union made reference to a number of authorities, including: *Brown & Beatty* 5:3210 – Overtime: Voluntary or Compulsory; *Ontario Power Generation v Society of Energy Professionals*, 2012 CanLII 90054 (Ont. Arb.); *Pacific Press v. G.C.I.U., Local 25-C*, [1995] 41 C.L.A.S. 488 (B.C. Arb.); *Canadian Pacific Railway and Teamsters Canada Rail Conference (Becker), Re*, 2014 CarswellNat 2696, 119 C.L.A.S. 241 (Can. R.O.A.); *Canadian Pacific Railway v. Canadian Railway Office of Arbitration*, 2016 CarswellAlta 532, 2016 ABQB 179 (Alb. Q.B.); *Quebec & Ontario Paper Co. v. C.P.U., Local 101*, 1992 CarswellOnt 1167, [1992] 25 C.L.A.S. 398 (Ont. Arb.); and *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada* -

CSN (UCCO-SACC-CSN) v. Treasury Board (Correctional Service of Canada), 2021 FPSLRB 22 (CanLII) (Can. P.S.L.R.E.B.). I have reviewed and considered the content of these authorities in coming to the result in this case. Counsel for the Union also had an opportunity to comment on the authorities submitted by counsel for the Employer, listed further below, and I have considered her comments in this regard.

Employer

16. Counsel for the Employer submitted that, under the terms of Appendix B, the Employer can require overtime be worked by full-time employees.
17. Counsel for the Employer made several various submissions in support of this proposition, but fundamentally emphasized three substantive ideas. First, counsel said that Appendix B is specifically directed at employees who work a 5/24 Schedule, unlike for example the overtime provisions set out at article 18 of the main Collective Agreement, which are expressly directed at persons working a 24/7 Schedule. Second, there is nothing in Appendix B that restrains the Employer's management rights set out at Article 3 of the main Collective Agreement as pertains to the scheduling of mandatory overtime for 5/24 schedule full-time employees. In other words, counsel said, assuming without accepting that article 18.04 of the main Collective Agreement can be read as a restriction on a management right in article 3 of the main Collective Agreement to require overtime work of full-time employees working a 24/7 Schedule, it is significant and determinative that the parties did not use the same "voluntary" terminology when writing the overtime articles applicable to persons working on a 5/24 schedule pursuant to Appendix B. Finally, counsel submits that the terms, headings and titles the parties used in the main Collective Agreement and Appendix B were intentional, and it is plain that the parties intended that 5/24 schedule employee terms and conditions be determined by reference to Appendix B.
18. In these circumstances, counsel for the Employer requested that the Grievance be dismissed.
19. In the course of her submissions counsel for the Employer commented on the authorities submitted by counsel for the Union and also made reference to a number of additional authorities, including: *Casco Inc. v. U.F.C.W., Local 175*, 2012 CarswellOnt 7581; *Ontario Power Generation and Society of Energy Professionals (Xu)*, Re 2015

CarswellOnt 10247; *U.A.W., Local 397 v. Brantford Cordage Co.* (1963) 14 L.A.C. 61; *U.S.W.A., Local 2251 v. Algoma Steel Corp.* (1960) 11 L.A.C. 118; The Object of Construction: Intention of the Parties, *Brown & Beatty* 4:2100; Management rights, *Brown & Beatty* 4:2310; Overtime, *Brown & Beatty* 5:3200; Overtime, Voluntary or compulsory, *Brown & Beatty* 5:3210. I have reviewed and considered the content of these authorities in coming to the result in this case.

Decision

20. There was no dispute between counsel as to the general interpretive principles that should be applied in this case, referenced in the various authorities cited above. Those principles include:

(i) the terms used in a collective agreement should be given their plain and ordinary meaning, having regard in a labour relations context to the intentions of the parties as expressed in the collective agreement, both in its individual parts and as revealed in the integrated whole (see, for example, The Object of Construction: Intention of the Parties, *Brown & Beatty* 4:2100 and the cases cited therein, particularly *Imperial Oil Strathcona Refinery* (2004) 130 L.A.C. (4th) 239 at paragraph 40);

(ii) the parties should be presumed to not have intended to contradict themselves within the collective agreement, meaning that arbitrators should ascribe where possible an overall harmonious intent to the construction of a collective agreement (see, for example, *Pacific Press, supra*, at paragraph 27);

(iii) management rights, where expressed in the manner as in the instant case, are intended to be broad and restrained only where the collective agreement expressly does so (see, for example, Management rights, *Brown & Beatty* 4:2310; Overtime, *Brown & Beatty* 5:3200); and

(iv) as a general matter, absent an express restraint in the collective agreement to do so, an employer may require employees (of all categories) to work overtime (see, for example, Overtime, Voluntary or compulsory, *Brown & Beatty* 5:3210; and *Algoma Steel Corp., supra*).

21. Although each counsel cited some cases where the result was the same that she was urging in this case, I am satisfied that those case arose from the specific collective agreements and facts at issue in those cases, and none are especially similar to the case before me.

22. In my view there can be no doubt that full-time employees working a 24/7 Schedule cannot be required to work overtime, and such work is voluntary on their part. The central issue in this case is whether the right of full-time employees to decline overtime work as expressed in the main Collective Agreement also applies to 5/24 schedule employees. The main argument of Employer counsel, that this cannot have been the intention of the parties because they specifically categorized the overtime terms and conditions for 24/7 Schedule employees at article 18.04 of the main Collective Agreement, then differently for 5/24 schedule employees at Appendix B, while at first blush appealing in its elegance, cannot prevail because it does too much damage to the principle that a collective agreement should be read as a whole in anticipation of a harmonious intent.
23. Under Appendix B, the only reference to the assignment and distribution of overtime (as opposed to the calculation of premium entitlement, for example) is set out at article 18 (iv) of Appendix B, which states "eligible full time employee(s) will be offered overtime prior to Part time employee(s)". In my view, this provision does not conflict with Article 18.04 of the main Collective Agreement, which states "Where no one volunteers for overtime opportunities, skilled part-time employees will be utilized to fill the production requirements.". The absence of the word "voluntary" (in its possible various forms) in Appendix B, article 18 does not necessarily mean that the assignment of such overtime may be made on an involuntary basis, especially in light of the parties use of the term "offered" in that article.
24. The parties themselves expressly set out the interpretive principles to be used in integrating the terms set out in the main Collective Agreement and Appendix B in these words: "The main body of this document applies unless there is a conflict between the main body and this appendix, in which case this appendix prevails to cover off all aspects of language." I take this to mean that when the employees at issue are working a 5/24 schedule, only where a conflict arises as between the main Collective Agreement and Appendix B does exclusive reference to Appendix B prevail. In my view, the interpretive direction set out by the parties themselves is not a call to consider the main Collective Agreement and Appendix B to be complete and comprehensive codes, mutually exclusive from each other. Quite the opposite, in my view.

25. Contrary to the spirited argument made by counsel for the Employer, I do not take a different view because the parties used the headings "Overtime 24/7" at the outset of article 18 of the main Collective Agreement and "5/24 SHIFT LANGUAGE" at the top of Appendix B. While I agree with counsel for the Employer that all the terms used by the parties should be given effect, I do not agree with counsel in this case that the effect of the headings is to create two mutually exclusive regimes for determining the terms and conditions applicable to employees working the different shift arrangements. That argument clashes up against the interpretive direction the parties themselves set out at the outset of Appendix B, cited above.
26. In sum, I am satisfied that the parties intended that overtime work for full-time employees may be assigned only on a voluntary basis, that this restraint on management rights to otherwise schedule and staff overtime work as it sees fit is expressly restrained by the specific terms of the Collective Agreement, and there is nothing in Appendix B that conflicts with this apparent intention.

Disposition

27. I am satisfied that the mandatory overtime shift that the Employer required be worked by full-time employees in the circumstances described at paragraph 8, above, was a violation of the Collective Agreement and the Grievance is sustained in that regard.
28. Based on the facts as they were described to me, and in particular that the disputed shift had ended by the time the arbitration hearing was held (and there were no money damages issues arising from the Grievance), I see no utility in making any of the other declarations or orders requested by the Union in this matter.

Dated at Toronto Ontario this 18th day of August, 2021

Michael McFadden
Arbitrator