

IN THE MATIER OF AN ARBITRATION

BETWEEN:

THE CITY OF SCARBOROUGH
(the "Employer")

-AND-

SCARBOROUGH PROFESSIONAL FIREFIGHTERS ASSOCIATION, Local626
(the "Union")

Policy Grievance: Health & Safety Certification Course-
Hours of Work and Denial of Overtime

SOLE ARBITRATOR: Pamela Cooper Picher

APPEARANCES FOR
THE EMPLOYER:

L. Bertuzzi -Counsel
P. Kelly
S. Gray
R. Forfar

APPEARANCES FOR
THE UNION:

Paul Cavalluzzo -Counsel
Barry Pappalao -Union President
Veena Verma -Student

A hearing in this matter was held in Toronto on April 30, 1998

AWARD

The Union has filed a group grievance alleging that the Corporation acted in breach of articles 401, 402 and 804 of the collective agreement. The Union asserts that the violation occurred when the Corporation scheduled a number of employees in the Operations Division to attend a Health and Safety Certification Course on their scheduled days off, re-scheduled their days off to other days and then compensated them at straight time, as opposed to overtime rates. It is common ground that attendance at the Health and Safety Certification Course constituted hours worked for the purposes of the overtime provisions of the agreement.

By a memorandum dated January 28, 1997, a number of employees in the Operations Division were advised that they had been registered to attend a Health and Safety Certification Course on February 4 and 5, 1997 from the hours of 8:30 a.m. to 4:30p.m. each day. For the grievors, February 4th and 5th had been their scheduled days off. The memorandum further provided as follows:

As compensation for attending the course, you will be provided with Thursday, February 6th and Friday February 7 as days off and will not be required to report to your regular shift until Saturday, February 8th, 1997.

The Department realizes this is short notice, but would appreciate your cooperation in attending.

According to the Union, the Corporation unilaterally altered the agreed upon system of scheduled days off to avoid the requirement to pay overtime rates for work on a

scheduled day off. It is the position of the Union that this action was taken in direct violation of articles 401, 402 and 804 of the collective agreement.

The Corporation, on the other hand, maintains that it acted within its management rights in altering the employees' scheduled days off and that it was not required to pay overtime for the work performed on the originally scheduled days off because, in the end, the average hours worked in the week did not exceed 42 hours. The Corporation asserts that management has the inherent right to avoid overtime by rescheduling and altering shifts.

The issue in this matter is whether the Corporation acted within the terms of the collective agreement when it altered the scheduled days off of the grievors and declined to pay overtime rates for the work performed (i.e. required attendance at a job related course) on the grievors' originally scheduled days off.

The employees in the Operations Division have a 28 day shift schedule that is printed on laminated, wallet-size, year-at-a-glance calendars. The 28-day cycle is as follows:

4 days on.....10 hour shift.....7:30 a.m. start
 6 days off
 4 nights on.....10 hour shift.....17:30 (5:30 p.m.) start
 4 days off
 3 days on.....10 hour shift.....7:30 a.m. start
 3 nights on.....14 hour shift 17:30 start
 4 days off

For the grievors, the Corporation altered this schedule by unilaterally inserting scheduled days to be worked for scheduled days off and unilaterally substituting scheduled days off for previously scheduled days worked. Since the work days at the Certification Course involved 8 hour days instead of 10 hour days, the employees ended up working fewer hours in the week but received the same weekly pay.

The relevant provisions of the collective agreement are set out below:

Article 301

MANAGEMENT RIGHTS

The Association acknowledges that it is the exclusive function of the Corporation to maintain order, discipline and efficiency and to manage its offices and departments, subject to the provisions of this Agreement.

The Corporation shall have the right to make rules necessary to the efficient operation of the department and not inconsistent with the terms and conditions of this collective agreement

Article 401

HOURS OF WORK

Shifts shall commence at 07:30 and 17:30 hours respectively. Notwithstanding the above, the present practice of relieving on a man for man basis up to one-half hour before the change of a shift will continue. Also notwithstanding the above, hours of work for other departmental divisions shall be: *Captains Assigned to the Planning and Buildings Department*, 0800- 16:30 hours Monday to Thursday and 0800- 16:00 hours Friday; *Night Inspector- Fire Prevention Bureau* 1400 – 22:30 hours Monday - Friday; *Director of Operational Communications and Stock Supply* 0800- 16:30 hours Monday- Thursday and 0800 – 1600 hours Friday.

[Note that it is common ground that the grievors do not fall within one of the "other departmental divisions"]

When members of the Fire Prevention Bureau are attending job related courses or seminars they shall be required to work the hours and days scheduled for the particular course or seminar. Any hours worked in excess of 42 will be subject to Article 804-Overtime.

[Note that it is common ground that the grievors are not "members of the Fire Prevention Bureau".]

Article 402

Days off shall be on a system mutually agreed upon by the Corporation and the Association. This system must allow all fire fighters a minimum of two (2) consecutive days off per calendar week.

Article 804

Overtime provisions for fire fighters are set forth in Appendix "C".

[emphasis added]

It is the position of the Corporation that the last paragraph of article 401, set out above, is applicable to all employees, inclusive of the grievors, and not just to "members of the Fire Prevention Bureau." Accordingly, the Corporation asserts that just as this provision enables the Corporation to unilaterally substitute days off for scheduled days worked and days worked for scheduled days off for members of the Fire Prevention Bureau when they attend job related courses, so it enables the Corporation to do so for employees, such as the grievors, who are in the Operations Division, when they are scheduled to attend job related courses.

In direct contrast, the Union submits that the last paragraph of article 401 of the collective agreement is a narrow exception to the broad restriction on management's right

to schedule which is set out in both article 401 and 402. The Union argues that the narrow exception in the last paragraph of article 401 is expressly limited to "members of the Fire Prevention Bureau" only. The Union maintains that, accordingly, the stated exception only permits the Corporation to unilaterally adjust the work schedule of "members of the Fire Prevention Bureau". The Union submits that because the exception is expressly limited to the "members of the Fire Prevention Bureau," it is clear that the Corporation is not entitled to unilaterally alter the work schedule for persons in other departments (such as the grievors who are in the Operations Division) when they are scheduled to attend work related courses.

The Corporation seeks to rely on past practice to clarify what it asserts is a latent ambiguity in the provisions of the agreement. Some of the alleged examples of past practice include the following:

A. Ontario Fire College Two-Week Course in Gravenhurst:

The employees who attended this course were given counter balancing days off to keep their average hours worked within the 42 hours a week standard.

The Corporation asserts that this is an example of the Corporation unilaterally adjusting the employees' days off for attendance at a seminar. The Union, on the other hand, contends that the circumstances are distinguishable because the employees applied for the training course, as

opposed to being required to attend the training, and because the employees had six month's notice of the course, as opposed to notice of just a few days.

B. High Angle Rescue Training

This was a two week course in Toronto for which there were two volunteers.

The Corporation maintains that this is a further example of the practice of the parties agreeing that the Corporation may unilaterally adjust employees' days off for attendance at training courses. The Union, on the other hand, asserts that this is not an example of past practice relevant in the instant situation because the employees volunteered for the training and were *not* required to attend.

C. Cross Shifting on Promotions or Lateral Transfers:

When a fire fighter on one crew is promoted to another shift or when a fire fighter is laterally transferred to another shift, the hours in the week of transfer may be unusually high or low because of the change-over. It would appear that the parties have agreed to make adjustments to the scheduled days on and off to maintain an overall average of 42 hours a week during the cross-over without triggering overtime provisions.

The Corporation maintains that this is another example of the Union acquiescing in the Corporation's unilateral adjustment of the scheduled days on and off.

The Union asserts, on the other hand, that this situation is distinguishable from the instant matter because it involves a permanent change to the employee's shift and does not constitute an adjustment of hours within a permanent shift to avoid the payment of overtime.

DECISION:

Article 402 stipulates that "[d]ays off shall be on a system mutually agreed upon by the Corporation and the Association". The evidence establishes that the system of days off that has been mutually agreed to by the parties is a 28 day rotating shift schedule that sets out in colour codes the employees' days on and days off for the entire year and is printed on year-at-a-glance laminated wallet size cards.

On its face, the language of article 402 stipulates that the days off shall be in accordance with the mutually agreed upon system, which we conclude is in accordance with the 28 day rotational schedule published on the card. The language of article 402 clearly implies that the days off shall not be altered unilaterally. Article 402 has

effectively fettered management's right to re-schedule the system of days off mutually agreed upon, as set out above, without the concurrence of the Union.

The last paragraph of article 401 establishes an exception to (1) the stipulation in article 402 that the days off shall be in accordance with the "system mutually agreed upon" and (2) the stipulation in article 401 that the shifts shall commence at 07:30 and 17:30. In clear and unambiguous language, however, the exception in the last paragraph of article 401 is expressly limited to "members of the Fire Prevention Bureau" which, the parties agree, does not encompass the grievors. It is not a generalized exception; nor is it an exception which covers the grievors' Operations Division.

If the Corporation wanted to have the right to unilaterally alter the scheduled days off of employees in the Operations Division when it requires them to attend job related courses or seminars" it would be open to it to negotiate a provision for members of the Operations Division that is similar to the provision it has already negotiated for the "members of the Fire Prevention Bureau." In the absence of such a provision extending the exception set out for "members of the Fire Prevention Bureau" to members of the Operations Division, the Arbitrator cannot conclude that the parties intended the Corporation to have the unilateral right to alter the scheduled days off for the Operations employees when it requires them to attend job related courses.

The evidence does not establish to the satisfaction of the Arbitrator that there is either a latent or patent ambiguity in the relevant language of the collective agreement. In

the opinion of the Arbitrator. The language of the parties in articles 401 and 402 is clear and unambiguous. That language conveys the agreement of the parties that the days off shall be "on a system mutually agreed upon by the (parties]" which the Arbitrator has found is the 28 day rotational schedule established a year in advance and printed on the year-at-a glance calendar cards. The conclusion that the parties have agreed to a system of days off that will not be altered upon requirement to attend job related courses or seminars is underscored by the last paragraph of article 401 since it establishes an exception for "members of the Fire Prevention Bureau" which would not be necessary if management was not otherwise restricted in its ability to unilaterally alter the scheduled days off for attendance at such courses. Moreover, the fact that this exception, on its face, is limited to "members of the Fire Prevention Bureau" unequivocally implies that there is no such exception for others, such as the grievors in the Operations Division. The provision is not ambiguous and clearly is not applicable to others than "members of the Fire Prevention Bureau."

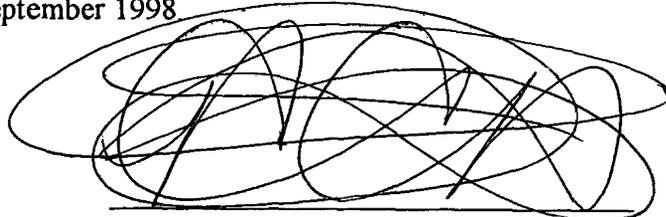
Even if there were a latent ambiguity such that past practice were admissible (a conclusion the Arbitrator has not reached), the Arbitrator could not find in the instant matter that the evidence of alleged past practice is sufficiently clear and consistent to establish an intention of the parties to permit the Corporation to effectively extend the application of the last paragraph of article 401 beyond the "members of the Fire Prevention Bureau" to the grievors, as Operations employees, and unilaterally alter their scheduled days off when they were required to attend the two day course on some several days notice. The examples of alleged past practice are not sufficiently similar to

the instant circumstances to establish a clear and consistent practice acquiesced in by the Union that would support the Corporation's unilateral alteration of the days off in the instant circumstances.

In the result, for the reasons given, the Arbitrator concludes that the Corporation acted in breach of the collective agreement when it unilaterally altered the scheduled days off of the grievors when they were required to attend the Health and Safety Certification Course on February 4th and 5th of 1997. Accordingly, it is hereby directed that the grievors be compensated in accordance with the overtime provisions of the agreement.

The Arbitrator remains seized in the event that a dispute arises in respect of the implementation of this Award.

Dated at Toronto this 15th day of September 1998

A large, complex, and somewhat illegible handwritten signature in black ink, consisting of multiple overlapping loops and lines.

PAMELA COOPER PICHER, Arbitrator