IN THE MATTER OF AN ARBITRATION

BETWEEN

INSURANCE CORPORATION OF BRITISH COLUMBIA

AND

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES' UNION, LOCAL 378

(Work Schedule Seniority Issue)

Arbitrator	:	Donald R. Munroe, Q.C.
For the Corporation	:	Bruce M. Greyell
For the Union	:	Leo McGrady, Q.C.
Dates and place of hearing	:	December 9-10, 2005 Vancouver, B.C.

Introduction

In the collective bargaining leading to the 2003-06 collective agreement, the parties accepted a mediator's recommendation for inclusion in the agreement of a Letter of Understanding respecting Hours of Work (which became LOU No. 19). As the opening paragraph of LOU No. 19 states, the Corporation would now be permitted to propose "...changes to the normal work hours [for certain work areas] from the specific work hours set out in the collective agreement to hours, Monday to Friday, which could have normal start times from 6 a.m. and which could have normal finish times up to 8 p.m." (sometimes described by the parties as "extended hours"). Where the Corporation does propose such changes, LOU No. 19 directs that certain information be provided to the Union; and that discussions occur between the Corporation and the Union with a view to reaching agreement. Lastly, LOU No. 19 provides for the appointment of an Umpire for the resolution of disagreements according to stipulated criteria.

In May, 2005, the Corporation notified the Union of its intention, pursuant to LOU No. 19, to implement extended hours at various locations. In the period June 1-14, 2005, representatives of the parties met and discussed the matter. A tentative agreement was reached in those discussions, but the agreement was rejected by the Union Executive. Accordingly, on June 20-21, 2005, the matter was placed before me as Umpire. At the commencement of the Umpire hearing, the Union applied for an adjournment. Following argument, I adjourned the Umpire proceeding to April 5-7, 2006. The adjournment was on the understanding, to which the Union agreed, that the Corporation would in the meantime be at liberty (subject to later ruling by the Umpire), to implement the extended hours which it had earlier proposed at any of the locations which it had earlier identified.

Subsequently, the Corporation decided to implement extended hours at six Claim Centres and four Driver Service Centres (one of the locations is a combined

Claim Centre and Driver Service Centre). More specifically, at each of those ten locations, the Corporation decided to establish three daily shifts spanning the period 6:45 a.m. to 8:00 p.m. The three daily shifts are the "early shift" which is from 6:45 a.m. to 3:15 p.m., the "core shift" which is from 8:30 a.m. to 5:00 p.m., and the "late shift" which is from 11:30 a.m. to 8:00 p.m.

The Corporation also decided that all employees at each of the ten affected locations, regardless of relative seniority, would be required to work one or more "late shifts" per week.

Therein lies the present dispute. The Union says that even assuming the Corporation's decision to implement extended hours at the ten locations can generally pass muster under LOU No. 19, the Corporation's requirement that all affected employees at each location must work one or more "late shifts" each week comprises a violation of the collective agreement. The Corporation does not agree.

Collective Agreement History

The 1986-91 collective agreement prescribed a set work day of 8:30 a.m. to 5:00 p.m. for virtually all employees in the then-departments and classifications with which I am here concerned. Those fixed hours of work were found at Article 12.01 (Claims Department Claim Centre Employees) of the collective agreement.

Article 12.01 underwent revision in the 1991-93 collective agreement, so that it would now read as follows:

> The hours of work for all Claims Centre employees except for Claim Centre Caretakers are as follows:
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> (a) Work Day – 7 hours 50 minutes, Monday to Friday, broken by a forty (40) minute unpaid lunch period at or near the

mid-point of the employee's work day. Work may be scheduled to provide coverage from 7:30 a.m. to 6:00 p.m.

(b) Work Period – 9 days every 2 weeks. All employees will work Monday to Thursday each week with one-half of the employees being scheduled off each Friday on a rotating basis. In the case of a statutory holiday falling on a Friday when an employee is scheduled off, the employee will be scheduled off on the preceding day.

(c) Work Scheduling and Assignment – Regular work periods will commence not earlier than 7:30 a.m. and end not later than 6:00 p.m. Starting times will be offered to employees on the basis of seniority within the applicable job classifications (subject to operational requirements respecting Trainees, and the need to provide an adequate balance of resources).

Thus, the Corporation secured the right to have extended business hours at Claim Centres covering the period 7:30 a.m. to 6:00 p.m., Monday to Friday (Article 12.01(a)). The "regular work periods" could commence as early as 7:30 a.m. and could end as late as 6:00 p.m. (Article 12.01(c)). "Starting times" were required to be offered to employees on the basis of seniority within the applicable job classifications, subject to certain provisos (Article 12.01(c)).

At the same time as the parties made the 1991-93 changes to Article 12.01, they also negotiated new Letter of Understanding No. 36 (LOU No. 36), which was self-described as providing certain terms and conditions for the administration of Article 12.01. Paragraph 4 of LOU No. 36 said, in effect, that within the daily business hours of 7:30 a.m. to 6:00 p.m., there would be three permissible "work periods": 7:30 a.m. to 4:00 p.m., 8:30 a.m. to 5:00 p.m., and 9:30 a.m. to 6:00 p.m. Also in paragraph 4, the parties agreed that despite the extended business hours, the Corporation would "...continue to schedule the majority of employee work periods (working hours) between the hours of 8:30 a.m. to 5:00 p.m. in any given Claim

Centre, resulting in no change in start or finish times for most employees in the Claim Centre". Paragraph 5 of LOU No. 36 stated that, "Work schedules will be prepared and posted within each affected Claim Centre for sign-up by employees in affected classifications, by seniority"; and paragraph 6 provided that "Work schedules will cover periods of not less than three (3) calendar months".

In the negotiations leading to the 1993-96 collective agreement, the parties agreed to incorporate the language of LOU No. 36 into the main body of the agreement, as additional sub-articles of Article 12.01. In that same set of negotiations, the parties agreed to the inclusion in the collective agreement of new Article 12.10 (Work Scheduling) in the following terms:

> The following provisions will be applicable to employees in positions covered under the hours of work provisions outlined in Articles 12.03, 12.04, 12.05 and 12.06:
>
> (a) Employee work schedules (i.e., start/stop times) will be established so as to provide for adequate coverage during business hours.
>
> (b) Work schedules will be prepared and posted within the Department for sign-up by employees on a seniority basis.
>
> (c) Work schedules will cover periods of not less than three (3) calendar months.
>
> (d) Employees will be provided not less than two (2) clear weeks notice of schedule changes prior to the effective date of implementation, except for individual adjustments that may occur on a voluntary basis as a result of employee attrition or absence.

As can be seen from the introductory words of the new Article 12.10, its provisions did not apply to employees covered by Article 12.01 (although the additional sub-articles of Article 12.01, having their origin in the predecessor LOU

No. 36, contained substantially corresponding provisions for the employees covered by Article 12.01). That, however, changed in the 1996-99 collective agreement. In that agreement, Article 12.01 was amended by the deletion of what initially was the content of LOU No. 36; and Article 12.10 was amended to now say that, "Except for employees covered under the provisions of Article 12.02 and 12.06, the following provisions will be applicable to all employees...."

Thus, by virtue of the 1996-99 collective agreement, and for purposes of Claim Centre employees, the Corporation's right to extended business hours (7:30-6:00) was retained, but no longer with the limitation of only three "work periods" as had initially been described in LOU No. 36 (7:30-4:00; 8:30-5:00; 9:30-6:00), and as carried forward into the 1993-96 collective agreement. Neither was there any longer a requirement that the Corporation schedule a majority of the Claim Centre employees in each Centre to work the 8:30-5:00 work period.

Insofar as material to the present proceeding, and except for minor clerical adjustments, today's collective agreement (2003-06) is the same as the 1996-99 collective agreement, with the addition of LOU No. 19. As observed near the outset of this award, LOU No. 19 establishes a process and criteria by which the extended hours of operation at certain work locations might now be enlarged to 6:00 a.m. to 8:00 p.m.

The Posting & Bidding of Work Schedules

As recounted above, until the 1991-93 collective agreement, all the employees in the departments and classifications with which I am here concerned worked 8:30 a.m. to 5:00 p.m. Accordingly, there was no need for a system for the posting and assignment of work schedules. However, commencing with the 1991-93 collective agreement, such need *has* existed. Both Article 2.01(c) of the 1991-93 collective agreement, and the companion LOU No. 36, stated that the starting times

of the work periods falling within the extended business hours (7:30-6:00) must be offered to employees on the basis of seniority within the applicable job classification. That same language has been carried forward in Article 12.01 ever since. In addition, Articles 12.10(a) and (b) state that, "Employee work schedules (i.e., start/stop times) will be established so as to provide for adequate coverage during business hours"; and that such work schedules "...will be prepared and posted within the department for sign-up by employees on a seniority basis". Article 12.10(c) states that work schedules will cover periods of not less than three calendar months.

Typically over the years at the affected locations, there have been three daily shifts or work periods: 7:30 a.m. to 4:00 p.m., 8:30 a.m. to 5:00 p.m., and 9:30 a.m. to 6:00 p.m. These have been posted as blocks. That is to say, the employees have picked, by seniority, either the 7:30 a.m. to 4:00 p.m. shift, or the 8:30 a.m. to 5:00 p.m. shift, or the 9:30 a.m. to 6:00 p.m. shift -- for the full duration of the period covered by the posted schedule (not less than three calendar months). For Fridays, there have been separate sign-ups by seniority at some locations because of the absence at those locations of a Friday late shift (9:30 a.m. to 6:00 p.m.).

The Union would describe the historical posting and bidding regime, as I have just described it, as one in which the employees have had the right to choose which start time they wish to have for their daily work shift on the basis of seniority. The Corporation, on the other hand, says that employees have never been afforded the right to choose daily shift times on the basis of seniority; rather, the employees' seniority rights have always been exercised to choose a work schedule, as posted by the Corporation, for the duration of the schedule.

In a sense, both parties are right. The affected employees have not in the past exercised their seniority to pick, for example, one start time for Mondays and a

different start time for Tuesdays, etc. But neither, in the past, has the Corporation purported to create work schedules which effectively forced all employees, regardless of their seniority, to work a mixture of shifts; and which thus deprived the senior-most employees of their desired starting time on one or more days each week.

In late 2005, when the Corporation implemented the enlarged business hours pursuant to LOU No. 19 at the ten work locations, it created three shifts: the "early shift" which is from 6:45 a.m. to 3:15 p.m., the "core shift" which is from 8:30 a.m. to 5:00 p.m., and the "late shift" which is from 11:30 a.m. to 8:00 p.m. Using the classification of Estimator at the Surrey Claim Centre as an example, the Corporation then created nine "shifts", which are actually weekly blocks of shifts for the duration of the schedule (six months). Shifts 1-4 are each comprised of four "early shifts" and one "late shift" (for example, shift 1 is comprised of "early shifts" on Tuesdays-Fridays and a "late shift" on Mondays); shifts 5-8 are comprised of four "core shifts" and one "late shift"; and shift 9 is comprised of four "late shifts" and one "core shift". The Corporation's directive to the employees, which is what prompted this grievance, was that they must use their seniority to select from amongst the blocks of shifts as thus created and posted. At a few work locations, the blocks of shifts contained a minimum of two "late shifts". For all locations, then, the result was that all employees, without regard to seniority, were required to work at least one "late shift" each week -- despite the fact that for some employees, their relative seniority, under the traditional sign-up system, would have allowed them to work their preferred shift exclusively (which for most would be either the "early shift" or the "core shift").

Briefly, the Corporation's rationale for the enlarged hours of operation generally is to meet the needs and wishes of its clientele in an increasingly competitive environment. The rationale for requiring certain classifications of

employees to work at least one "late shift" each week is to give the clients greater ease of access to "their" adjuster or estimator, etc. The Union accepts the rationale for the enlarged hours of operation generally, but disputes the rationale for the requirement that each employee work at least one "late shift" each week. While the resolution of a dispute of that sort may be relevant to the criteria for Umpire decision-making under LOU No. 19, it is not, in my view, relevant to the determination of the issue at hand: which is whether the Corporation is precluded in all instances from doing what it has done and which prompted the present grievance.

Collective Agreement Re-Visited

I begin with the observation that in my view, LOU No. 19, while providing the context in which this dispute has arisen, is not directly material to the proper outcome of the dispute. There is nothing in LOU No. 19 which in any way affects the interpretation or application of the pre-existing provisions of the collective agreement as regards the issue at hand.

In my earlier narrative of collective agreement history, I have reproduced Articles 12.01(a) and 12.10, which are the two provisions of the collective agreement having the most direct bearing on the matter. However, for convenience, they are reproduced once more in their present form:

12.01

(a) Claims Department – Claim Centre Employees

The hours of work for all full-time regular Claims Centre employees are as follows:

i) Work day – 7 hours 50 minutes, Monday to Friday, broken by a forty (40) minute unpaid lunch period at or near the

mid-point of the employee's work day. Work may be scheduled to provide coverage from 7:30 a.m. to 6:00 p.m.

ii) Work period – 9 days every 2 weeks. All employees will work Monday to Thursday each week with one-half of the employees being scheduled off each Friday on a rotating basis. In the case of a statutory holiday falling on a Friday when an employee is scheduled off, the employee will be scheduled off on the preceding day.

iii) Work scheduling and assignment – regular work periods will commence not earlier than 7:30 a.m. and end not later than 6:00 p.m. Starting times will be offered to employees on the basis of seniority within the applicable job classifications (subject to operational requirements respecting trainees, and the need to provide an adequate balance of resources).

12.10 Work Scheduling

Except for employees covered under the provisions of Article 12.02 and 12.06, the following provisions will be applicable to all employees:

(a) Employee work schedules (i.e., start/stop times) will be established so as to provide for adequate coverage during business hours.

(b) Work schedules will be prepared and posted within the department for sign-up by employees on a seniority basis.

(c) Work schedules will cover periods of not less than three (3) calendar months.

(d) Employees will be provided not less than two (2) clear weeks notice of schedule changes prior to the effective date of implementation, except for individual adjustments that may occur on a voluntary basis as a result of employee attrition or absence.

Also important, says the Corporation, is the management rights clause found at Article 0.10 of the collective agreement:

0.10 Management Rights

> All management rights heretofore exercised by the Corporation, unless expressly limited by this Agreement, are reserved to and are vested exclusively in the Corporation.

As the Corporation argued the matter, there is nothing in the collective agreement that expressly limits the traditional management right to alter the shifts of its employees (within the agreed business hours), nor anything in the agreement that specifically circumscribes the shifts to which the employees can be assigned. Hence, says the Corporation, the Union's grievance is not well-founded.

But of course, that argument simply drives one back to a consideration of Articles 12.01(a) and 12.10. What is now Article 12.01(a)(iii) first appeared in the collective agreement in 1991-93, in conjunction with LOU No. 36. Article 12.01(a)(iii) uses the phrase "work periods" in the sentence providing that, "Regular work periods will commence not earlier than 7:30 a.m. and end not later than 6:00 p.m." (which must now be read in the light of LOU No. 19 which contemplates the possibility of daily business hours spanning the period 6:00 a.m. to 8:00 p.m.). In the companion LOU No. 36, the permissible "work periods" were described as 7:30 a.m. to 4:00 p.m., 8:30 a.m. to 5:00 p.m., and 9:30 a.m. to 6:00 p.m. Clearly, then, "work periods" in Article 12.01(a)(iii) meant daily work periods, in the sense of daily shifts. And thus, when Article 12.01(a)(iii) went on to say that, "Starting times will be offered to employees on the basis of seniority within the applicable job classifications…", it was referring to the starting times of the daily work periods (or shifts).

LOU No. 36, or its equivalent, is no longer part of the collective agreement. Since the 1996-99 collective agreement, the Corporation has not been limited to just

the three "work periods" as previously therein described. However, there is nothing in the collective agreement history or the parties' practices which suggests that the phrase "work period" in Article 12.01(a)(iii) would now have some meaning other than daily work period in the sense of daily shift; nor that the requirement that "starting times" be offered to employees on the basis of seniority would now be understood as referable to something other than the starting times of those daily work periods.

I turn now to Article 12.10. Article 12.10(a) states that, "Employee work schedules (i.e., start/stop times) will be established so as to provide for adequate coverage during business hours". Thus, Article 12.10(a) effectively defines "work schedules" as meaning "start/stop times".

Article 12.10(b) states that, "Work schedules will be prepared and posted within the department for sign-up by employees on a seniority basis". The phrase "work schedules", as it appears in Article 12.10(b), was clearly intended to have the same meaning as in Article 12.10(a): that is to say, "start/stop times".

It would appear, then, that employees who are covered by Article 12.10 (which includes all the employees with whom I am concerned in this proceeding) are entitled to select their start/stop times on a seniority basis.

In my view, that construction of Article 12.10 puts it in harmony with Article 12.01(a)(iii), as well as being in harmony with the parties' practice as earlier described.

The Corporation argued that were I to accept the Union's view of the matter, it would mean that employees would now be entitled to something never before claimed on their behalf: the right to use their relative seniority to select a different

work period (shift) for every day of the work week. I do not agree: firstly, because I do not think that such an interpretation or application of the material provisions of the collective agreement would be consonant with their history or with the parties' practices; and secondly, because it would be an unreasonable and frankly bizarre interpretation and application of the collective agreement which could not properly attract arbitral sanction. Over the years, the parties, by their conduct, have evidenced an intention that employees will exercise their seniority to select a single start time, from the available options, for the duration of the particular work schedule (which, by virtue of Article 12.10(c), must be for a period not less than three calendar months). The Union could not now successfully argue that employees have the right to use their seniority to pick, from the available options, a mixed array of start times.

The Corporation says that management (not the Union or the employees) has the exclusive right under Article 12.10 of the collective agreement to establish the work schedules; and, more directly to the present point, that seniority rights have always been exercised to choose work schedules that have been established by the Corporation pursuant to Article 12.10.

I generally agree with those observations. However, the right possessed by the Corporation to fix and post work schedules pursuant to Article 12.10 cannot be exercised in a way that infringes on the affected employees' right to select the "starting times" of their daily "work periods" (Article 12.01(a)(iii)), or their "work schedules (i.e., start/stop times)" (Article 12.10), on a seniority basis.

Conclusion

I agree with the Union that the Corporation is in breach of the collective agreement by its requirement at the ten locations in question that all employees,

regardless of their relative seniority, work one or more "late shifts" per week. I so find and declare.

I make the following remedial direction. Within 45 days of the date of this award (or such other period as the parties may agree), the Corporation shall re-do the work schedules for the ten locations in question, and shall have completed the posting thereof and resulting assignments, in a manner consistent with this award. The new work schedule shall be for a period not less than three calendar months. The succeeding work schedules shall likewise be consistent with this award.

Jurisdiction is retained to resolve any disputes that may arise concerning the proper implementation of this award.

In view of my conclusion and declaration aforesaid, it is unnecessary for me to address the Union's alternative argument of an estoppel.

DATED THE 20th DAY OF JANUARY, 2006.

"DONALD R. MUNROE"
Donald R. Munroe, Q.C.
Arbitrator