IN THE MATTER OF AN ARBITRATION

BETWEEN: GREATER VANCOUVER REGIONAL DISTRICT
(the "Employer")

AND: GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES' UNION
(the "Union')

(Overtime Policy Grievance)

ARBITRATOR: David C. McPhillips

COUNSEL FOR THE EMPLOYER: Alan J. Hamilton

COUNSEL FOR THE UNION: David Tarasoff

DATES AND PLACE OF HEARING: June 22, 1999
Vancouver, B.C.

DATE OF AWARD: July 20, 1999

The parties agree this Board has jurisdiction to determine this matter which involves a policy grievance filed by the Union in June of 1998. The Union objects to a position taken by the Employer concerning when overtime rates should be paid if an employee works within eight hours of having completed an overtime shift.

FACTS

The issue in dispute involves an interpretation of Article 3.0 1(e) of the Collective Agreement which is in effect between April, 1977 to March, 2000. Article 3.01 states as follows:

> 3 **OVERTIME AND PREMIUM PAYMENTS**
>
> 3.01 Overtime Allowed
>
> Unless otherwise noted herein, overtime ages will be paid as follows:
>
> (a) at one and one-half (PA) times Schedule "A" rates for the first two (2) hours of overtime and at twice times Schedule "A" rates for overtime hours thereafter;
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> (b) at twice times Schedule "A" rates for overtime work not connected to a regular shift;
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> (c) at twice times Schedule "A" rates for any overtime hours worked beyond four (4) hours' overtime in a week;
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> (d) at twice times Schedule "A" rates for overtime work done from 7:00 a.m. Saturday to 7:00 am. Monday;
>
> (e) at twice times Schedule "A" rates for work done within eight (8) hours of having completed an overtime shift.
>
> (f) Except as provided in (e) above, at no other time will overtime rates be paid for work which is part of the normal daily or weekly hours of work.
>
> (g) Overtime pay will be calculated to the nearest one-half ('A) hour of time worked.

The parties concluded their negotioation of the existing Collective Agreement in May of 1998. Although Article 3.01(e) was not changed (it was preciously Article 3.01(c)) during this round of bargaining, other changes were made to Article 3.01. The previous Agreement stated:

3. OVERTIME AND PREMIUM PAYMENTS

3.01 Overtime Allowed

(a) at one and one-half (11/4) times Schedule "A" rates for the first four (4) hours after an eight (8) hour work period and at twice times Schedule "A" rates for hours thereafter and for any and all hours in excess of forty-four (44) hours per week;

(b) at twice times Schedule "A" races for work done from 7:00 a.m. Saturday to 7:00 am. Monday;

(c) at twice times Schedule "A" rates for work done within eight (8) hours of having completed an overtime shift;

(d) at one and one-half (1 1/2) times Schedule "A" rates for work done before 7:00 a.m. and after 4:30 p.nt, excepting double time rates will be paid after forty-four (44) hours per week.

(e) Overtime pay will be calculated to the nearest one-half (1/2) hour of time worked.

Mark Leffler, the Manager, Human Resources and Labour Relations for the Greater Vancouver Regional District ("G.V.R.D.") testified that in May, 1998 following the negotiation of the Collective Agreement, discussions occurred among management concerning the effect of the changes to Article 3.01. The major change to the provision had been to the end of Article 3.01(a) which had previously resulted in employees being paid at double overtime rates for regular shifts later in the week if they had worked enough overtime earlier in the week to exceed the weekly 44 hour limit. During discussions of these changes, however, it came to Mr. Leffler's attention that there were also issues around Article 3.01(e), the former Article 3.01(c). As a result, Mr. Leffler wrote to Bill Eastwood, the President of the Greater Vancouver Regional District Employees' Union ("G.V.R.D.E.U.") setting out the Employer's position on how that clause would be administered. Mr. Leffler's letter stated:

> Due to the fact that our new collective agreement includes a significant re-write of Clause 3.01, several questions have arisen regarding appropriate payments. The most significant arc those which have been raised concerning the application of Clause 3.01(e) which provides that overtime will be paid "at twice times Schedule "A" rates for work done within eight (8) hours of having completed an overtime shift." Among the questions raised:
>
> 1. What constitutes an "Overtime shift"?

2. When an overtime shift has been worked and there is a period of less than 8 hours between the end of the overtime shift and the next piece of work (normally the regular shift), what is the appropriate calculation of overtime for the next piece of work?

The purpose of this letter is to advise you of our intent to deal with those questions in the following manner:

1. We have reviewed the agreement in some detail regarding references to shifts, and the shortest shift duration we can find is seven hours. Therefore, for purposes of administration of Clause 3.01) an "overtime shift" will be considered to be a period of overtime work with a minimum duration of seven (7) hours;

2. When an overtime shift has been worked and there is a period of less than 8 hours between the end of the overtime shift and the start of the regular shift, then that portion of the regular shift which falls within 8 hours of the end of the overtime shift will be paid at double time; the remainder of the regular shift will be paid at straight time.

In view of the fact that these questions arose during preparation of time sheets for the first couple of pay periods after the May 01 ratification date, you may find that there have been some variations from the applications described above. If you have any questions or require clarification regarding our intended administration of this clause, please call me.

Mr. Eastwood discussed the matter with a number of Union officials and was informed that in their view the approach set out by Mr. Leffler violated the past practice which had been followed up to that time by the G.V. R.D. On June 5, 1998 Mr. Eastwood outlined the Union's position to Mr. Leffler in the following letter:

On May 22nd 1998 you wrote a letter to us describing your intent with regards to interpreting the new language contained in Clause 3.01. It will probably come as no surprise to you that the Union does not concur with the Employer's concept of what constitutes an overtime shift. Notwithstanding your inability to identify a shift that is shorter than seven (7) hours in the collective agreement, that does not in any way imply that blocks of overtime shorter than seven hours will not consti tute an overtime shift. On the contrary, overtime by its very nature is irregular and often unpredictable in duration. We are at a loss to understand how the Employer can rationalize its position based on any language contained within the Collective Agreement.

Further we say that all hours worked on a regular shift that is performed within eight (8) hours of having completed an overtime shift must be paid at twice dines Schedule "A" rates. Not as you have suggested, that double dine be paid for only

> those actual hours contained within the span of the eight hour gap between over time shift and any other hours.
>
> The Union requires that the Employer recognize all blocks of overtime work as an overtime shift regardless of duration and that all work done on a regular shift that begins within eight hours of having completed an overtime shift be paid at twice times Schedule "A" rates. I will be happy to arrange a meeting to discuss this matter fluther if you are still in disagreement with our interpretation.

The parties could not come to an agreement on this issue and the matter has now been referred to this Board. At the bearing the Board heard evidence from three individuals, Mr. Eastwood, Mr. Leffler and Mike Kelder, an area operator in Central South-Sewer Operations.

With regard to bargaining history, Mr. Eastwood and Mr. Leffler agreed that Article 3.0 1(c) has remained unchanged for over twenty years and was not discussed, directly or indirectly, during the last round of bargaining.

With regard to past practice, Mr. Eastwood testified that he could remember one occasion when he personally had received double time for an entire regular shift but he could not recall whether that was a result of the old Article 3.01(a) (the 44 hour rule] or the old Article 3.01(c), the provision in dispute here. He also testified that when the issue with management arose in May, 1998, he spoke with many Union officials and shop stewards and was told there were instances where employees had received double time for an entire regular shift as a result of having worked overtime within eight hours. He agreed he never discussed the details of the overtime worked with any of the individuals with whom be spoke. His evidence was of a very general nature and no specific examples were provided.

Mr. Kelder's evidence is that he had often received double time for entire regular shifts, both as a result of the 44 hour rule and as a result of Article 3.01(e). He indicated that he had always preferred to work overtime early in the week because then his regular Friday shift would be paid double time due to the 44 hour rule, However, he stated that on many occasions, he and his crew received double tine for an entire regular shift early in the week (prior to having worked 44 hours) as a result of having worked overtime within eight hours of the shift commencing. He testified this was

done on any occasion where be bad worked at least four hours overtime and he could not recall ever being paid double time for the subsequent regular shift if he had not worked at least four hours of overtime.

Mr. Leffier testified that when be investigated this issue in late May and early June of 1998, be was informed by the operations people that there was no common approach taken with regard to Article 3.0 1(e). He did discover that in a couple of departments and particularly in the sewer area, a rule bad developed whereby a "four hour trigger" had come into effect. That is, if an employee worked more than four hours overtime and then commenced a regular shift within eight hours, he would be paid double time for the entire regular shift.

Mr. Leffler testified that to his knowledge no one in Human Resources, including Johnstone Hardy who bad primary responsibility for the G.V.R.D.E.U. Agreement, had any knowledge of thc various practices that had been followed at the operations level with regard to this provision.

The Union seeks a declaration from this Board that Article 3.01(e) of the Collective Agreement should be interpreted in the manner suggested by the Union and seeks compensation for any employee who has been denied overtime by the Employer under its interpretation of that provision from May 22, 1998 to the date of this Award.

In this case, there are two aspects to the interpretation question which is before this Board. They were set out as follows by the Union:

1. Is an "overtime shift" a period of time of not less than 7 hours that is worked at overtime rates or is an "overtime shift" a period of time of any duration that is worked at overtime rates?

2. When an "overtime shift" is worked, and a second shift is then worked that is partly within the 8 hour period following the conclusion of the "overtime shift", are overtime rates payable for all hours worked during the second shift or only for those hours that are within the 8 hour period following the conclusion of the "overtime shift"?

On these points, the Union submits that any overtime work constitutes an "overtime shift" and that if a second shift then commences within eight hours, that entire second shift must be paid at double time. On the other hand, the Employer submits that to constitute an "overtime shift", the employee

must work at least seven hours of overtime as that is the shortest shift referred to elsewhere in the Agreement. Further, if the employee has worked in excess of seven hours of overtime and then commences a second shift within eight hours, it is only that portion of the second shift which occurs within the eight hour period which is paid at double time.

To put some context on these legal issues, an illustration is helpful. An employee is required to work two hours overtime after a shift and then commences his next shift within seven hours of finishing that overtime. The Union would claim first, that the two hours of overtime constitutes an overtime shift and second, as his next shift commenced within eight hours, he is to be paid double time for the entire second shift.

The Employer would argue that two hours does not constitute an overtime shift and that no overtime is payable for the second shift. Second, if overtime at double time is found to be payable under Article 3.01(e), then the overtime rate would only apply for the first hour of that second shift as that is all that falls within the eight hour period.

DECISION

With interpretation questions, an arbitration board must begin with the express language of the collective agreement and it is the language of the agreement which is the 'priamary resource" in a disputed interpretation: Vancouver Police Board, July 17, 1987 (Hope); University of British Columbia -and C.U.P.E., [1977] 1 C.L.R.B.R. 13 (B.C.L.R.B.). Moreover, the words of a collective agreement must be given, where possible, their plain, ordinary meaning: Delta River Inn November 5, 1984 (Kelleher); Greyhound Lines of Canada Ltd., 5 L.A.C. (2d) 1 (Forsyth).

Article 3.01 states that "Unless otherwise noted herein, overtime wages will be paid as follows: ... (e) at twice times Schedule 'A' rates for work done within eight (8) hours of having completed an overtime shift". First of all, it is the opinion of this Board that the term "overtime shift" in Article 3.01(e) must refer to any overtime which has been worked. There is absolutely nothing anywhere in this Collective Agreement which indicates that to qualify as a "shift" a particular number of hours must be worked. Indeed, the term "shift" is modified by various meanings in this Agreement, including day shift, night shift, afternoon shifts, 12 hour shifts, and rotating shifts.

Therefore, there is no one specific meaning that can be attached to the term “shift”. If the parties had wished to define a specific requirement for an amount of overtime work to constitute a shift, they could have done so but they did not: Re Larsen Packers Ltd. 39 L.A.C. (4th) 256 (Outhouse); Brockville Chemicals Ltd., 16 L.A.C. 378 (Weatherill); Dominion Bridge Co. Ltd., 27 L.A.C. (2d) 399 (Adams); Central Precision Ltd., 2 L.A.C. (2d) 85 (Brown). When such a restriction is not included, then the word “shift” should not be given a restrictive meaning and must be read to include any period of work: Brown and Beatty, Canadian Labour Arbitration, Third Edition, para 5:3100; Electric Reduction Co. of Canada Ltd., 24 L.A,C. 248 (Gorsky); Dominion Bridge Co Ltd., supra.

As a result, an “overtime shift” under this Agreement must be interpreted to refer to whatever the amount of time an employee works as overtime, whether it be one hour, five hours, seven hours or twelve hours. Certainly, there is no basis whatsoever to indicate that an “overtime shift” must be of at least seven hours duration. That is a completely arbitrary conclusion on the part of management and cannot be sustained by anything that is contained in this Collective Agreement. Therefore, on this first point, this Board agrees with the Union that any overtime work, regardless of duration, constitutes an “overtime shift” within the meaning of Article 3.0 1(e).

In my view, the resolution of the second issue is equally clear, given the plain meaning of the words in Article 3.01(e). The provision indicates that double time will be paid “for work done within eight (8) hours of having completed an overtime shift”. The expression “work done within the eight hours” can only have one meaning, that is the actual time worked within that eight hour period. The provision does not refer to any work or shift commenced or started within that eight hour period which is the meaning the Union wishes to give the Article. To arrive at that conclusion, this Board would have to alter the meaning of the words used by the parties and that is not within an arbitrator’s jurisdiction. Therefore, on this second aspect of the interpretation this Board agrees with the position of the Employer.

Therefore, the grammatical, plain, and ordinary sense of the words in Article 3.01(e) must be adhered to and it is the conclusion of this Board that the clear meaning is that any overtime worked

constitutes it “overtime shift” and that double time must be paid only for the work that occurs within the eight hour period after the completion of the overtime shift.

Despite the clear meaning of the words, this Board must consider the past practice of the parties: University of British Columbia -and- C.U.P.E., supra; Greater Vancouver Regional District, September 17, 1994 (Bluman); John Bertram and Sons Co. Ltd., 18 L.A.C. 362 (Weiler); Vancouver Police Board, supra; Nanaimo Times Ltd., B.C.L.R.B. No. B 40/96, upheld in B.C.L.R.B. No. B 15 1/96.

In John Bertram and Sons, supra, Arbitrator Weiler stated, at pp.367-8, that the use of past practice as an aid to interpretation would require four conditions

> (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attrib uted to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that mem bers of the union or management hierarchy who have some real responsibil ity for the meaning of the agreement have acquiesced in the practice.

At the very least in this case, the first two criteria have not been met. First, as indicated above, there is a clear preponderance in favour of one meaning of Article 3.0 1(e). Second, the character of the past practice evidence which is before this Board can only be described as very ambiguous. There is no evidence whatsoever as to its universality or to its consistency. To the extent that there is any practice, it appears that a “four hour” trigger was arbitrarily created and put into effect in certain areas of the operation. Further and in any event, that practice is not in line with the interpretation put forward by either of the parties in this arbitration so it is not helpful as an aid in the interpretation of the clause.

The final issue to be addressed is the Union’s alternative argument that the doctrine of estoppel should be applied: City of Penticton, 18 L.A.C. (2d) 307 (B.C.L.R.B.); Commissioner of Northwest Territories, 24 L.A.C. (3d) 132 (Hope); Eurocan Pulp and Paper Co., 14 L.A.C. (4th) 103 (Hickling); Vancouver Police Board, supra; Board of School Trustees of School District No. 62 (Sooke), January 23,1995 (McPhillips).

The doctrine is described in John Bertram and Sons, supra, wherein Arbitrator Weiler stated, at p.367:

> The earlier situation may involve a representation, by one party (express or tacit), which is relied on by the other. The latter may change his position in such a way that it would not be harmed if the other were to change its position about the meaning of the agreement. The effect of such conduct is variously described as "promissory estoppel" or "waiver", and precludes repudiation of the representation if, and to the extent that, the party which has relied on it would suffer harm from steps taken prior to repudiation.

Similarly, in City of Penticton, supra, the British Columbia Labour Relations Board stated, at p.317:

> In its classic form, the application and the attractiveness of the notion of estoppel is quite easy to appreciate. One party enjoys a legal right under a contract, that party says that it is not going to enforce that right on a particular occasion. The other party relies on that representation and acts accordingly. Then the first party changes its mind and decides that it does want to enforce its strict legal rights; but only after its counterpart has irretrievably committed itself. The equitable doctrine of estoppel is designed to prevent such an unfair tactic. In the words of a noted Canadian arbitrator, Dean Arthurs, "to use a common metaphor, you are not allowed to let someone go out on a limb so that you can saw him off": see Re City of Toronto and Civic Employees Union Locall 43 (1967), 18 L.A.C. 273 at p.380.

The Union asserts in this alternative position that if Article 3.01(e) is clear, then the past practice of this Employer has been at odds with that provision. It is then submitted that through its conduct the District has created an estoppel which should exist until a new Collective Agreement is entered into.

The law is clear that for this equitable doctrine to apply, three elements must be present:

(i) There must be a representation, promise or assurance by the other party through words or conduct (including silence).
(ii) The representation was intended to be relied upon and was relied upon (intended to alter the legal relations between the parties).
(iii) There must have been a detriment or prejudice to the side who relied on the representation.

In this case, it is my opinion that neither of the first two conditions have been met. First, there has been no representation or commitment by the Employer, either in words or by conduct, to the effect that it was foregoing its legal rights to apply Article 3.01(e) as it is written. At best, there is some evidence that there was a practice in one area (the sewers department) in that supervisors on their own initiative instituted a policy that once four hours of overtime had been worked and an employee then had to commence work again within eight hours, the entire second shift would be paid at double time. However, this behaviour alone cannot be used to bind the Employer. (Similarly, it could not be used to bind the Union on the issue of whether less than four hours of overtime within the eight hour period would create potential overtime payments during the second shift.) First of all, the conduct has not occurred throughout the organization and Mr. Leffler, who is in charge of Labour Relations, acknowledges that was no common practice at all in the organization. Second, the limited conduct that was described does not even reflect the claim the Union is trying to establish, namely that the double time for the entire second shift must be paid if there had been any overtime whatsoever worked in the eight hours preceding the commencement of that shift. If the Union was asserting that this provision only applied in the sewers area and was advocating that there was a four hour trigger, there may have been a case that the conduct met the first criteria required for the doctrine to apply.

With regard to the second requirement, specifically that there was acquiescence and a reliance which was intended to alter the legal relations, there is no compelling evidence before this board. Indeed, neither the Human Resource Department or the Trade Union (including their chief negotiators) were even aware of the practice which was occurring in one part of the organization. On that basis, it can hardly be said that the Employer's conduct was such that it had intended to alter the legal relations between these parties.

For these reasons, this Board concludes that the doctrine of estoppel does not apply in the circumstances of this case.

AWARD

This Board has concluded based on the language of Article 3.01(e) of the Collective Agreement that the Union is correct in its argument that any overtime worked constitutes an overtime shift and the Employer is correct that it is only work within the eight hour period after that overtime shift which attracts the double time payment. The Board has also concluded that the limited evidence of past practice is not of such character as to aid in the interpretation of the terms of this Agreement or to form the basis for an estoppel.

The Board hereby issues a declaration to that effect and orders that any employees who have been inappropriately denied overtime payments between May 22, 1998 and the date of this Award should be compensated accordingly.

This Board reserves jurisdiction to deal with any issues arising out of the implementation of this Award, including the assessment and calculation of damages.

Dated this 20th day of July, 1999.

(Original Signed)

David C. McPhillips

Arbitrator