IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE NORTHWEST TERRITORIES POWER CORPORATION

Employer

-and-

THE UNION OF NORTHERN WORKERS

Union

GRIEVANCE RE: PAY POLICY
(Grievance No. 15-P-01833)

AWARD

Before:	Tom Jolliffe, Q.C.
Representing the Employer:	Christopher Buchanan, Counsel
Representing the Union:	Michael Penner, Counsel
Hearing via Joint Book of Documents:	Received October 21, 2020
Employer's Written Submissions:	Received November 2, 2020
Union's Written Submissions:	Received November 23, 2020

Date Award Issued:
February 16, 2021

My File: 53,394

This matter concerns Grievance #15-P-NTPC-01833 referencing the Employer's published Policy HR-7-09.The Union seeks rescission or revision of the Policy and requests that I remain seized to deal with any additional remedies should the Parties be unable to resolve them based on this award. There were no preliminary procedural issues with which to deal, the Parties having acknowledged through counsel that the hearing was properly convened. They have agreed that their presentations were to be made by referencing the Agreed Statement of Facts and Book of Documents, and the written arguments which I have received. The Employer did object in argument to the Union's referencing a particular provision of the collective agreement, not specifically raised as an issue prior to hearing. It is noted that the Collective Agreement under which this grievance was filed has continued to be in force following its stated expiry date until a new agreement is entered into as per Article 50.02 of the Collective Agreement.

The Agreed Facts disclose that on August 22, 2014 the Employer issued the disputed written Policy HR-7-09 Acting Pay (the "2014 Policy"), described in the document as its "new policy". Its purpose was stated therein to be one of recognizing the process by which an employee earns additional financial remuneration for acting in a position at a higher level. The document included a general policy statement recognizing acting pay for bargaining employees "who are appointed by their immediate supervisor to take on a significant part of the responsibilities of the job that is in a higher grade than their current position for a period of one (1) day or more". The Guidelines language of the 2014 Policy pertinent to my considering this grievance reads as follows:

> **Guidelines**
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> Where a bargaining unit employee is required by the Employer to perform the duties of another position that has a higher maximum salary than the maximum salary applicable to his/her present position and where the duties are to be performed on a continuous basis for a period of one (1) day or more, the employee shall receive the

> minium salary for the acting position where his/her present salary is less than the minimum for that position or receive a salary at a rate one (1) increment higher than where his/her present salary is the same or higher than the minimum, but in no case shall receive less than one hundred and five percent (105%) of his/her present salary. The employee shall be entitled to a salary increment in the acting position if he/she remains in that position in excess of the normal probationary period for that position on return to his/her regular position be paid at the rate to which he/she would be entitled (including increments) had he/she remained in the regular position.
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> When a bargaining unit employee is acting in a management or excluded position, union dues will cease for the duration of the acting assignment. An employee acting in a management or excluded position, is generally not eligible for overtime. However, if a bargaining unit employee is acting in an excluded/management position and is called out or required to work after regularly scheduled working hours to perform work related to his/her unionized position, that employee will be entitled to such benefits as overtime and/or call back and reporting at his/her base rate of pay (not the acting rate of pay).

The Union filed this policy grievance at Level 3 on October 5, 2015 claiming that the 2014 Policy violated the Collective Agreement, citing Article 10 (Checkoff) and more specifically subparagraph 10.01; citing Article 22 (Overtime) and more specifically subparagraphs 22.06, 22.08, 22.11, 22.12, 22.18; citing Article 28 (Pay Administration) and more specifically subparagraphs 28.01, 28.03, 28.09. In response, the Employer revised its policy approach on October 22, 2015 (the "2015 Policy rewrite") said to be effective at month-end. The revised document was distributed to all managers by email on November 1, 2015. There was no change in the wording covering the paragraphs entitled Purpose and Policy Statement. The change was contained in the second paragraph of the Guidelines section to the effect that "when a bargaining unit employee is acting in a management or excluded position, the employee will continue to pay union dues for the duration of the acting assignment" which is what the Union had asserted should occur.

The next day, November 2, 2015, the Employer responded to the grievance at Level 3, claiming that the 2015 Policy rewrite was a suitable answer. Later that same month, the Union took the required additional steps to advance the matter to arbitration, in maintaining that the rewrite still

violated the Collective Agreement.

Almost two years later, without any arbitration date having yet been set, on October 24, 2017 the Employer issued another amended policy (the "2017 Policy rewrite") containing another version of the Guidelines section which document and policy driven approach has presumably remained in place since that time. This rewritten portion of the document under Guidelines contained the following pertinent current language:

> To help support employee career development, Directors and Managers should select those employees identified as successors to act in their absence. If an identified successor is not available, then the selection will be at the discretion of the Director or Manager. In cases where two successors have been identified, the acting duties should be shared throughout the year.
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> Where a bargaining unit or excluded employee is required by the employer to perform the duties of another position that has a higher maximum salary than the maximum salary applicable to his/her present position and where the duties are to be performed on a continuous basis for a period of one (1) day or more, the employee shall receive the minimum salary for the acting position where his/her present salary is less than the minimum for that position or receive a salary at a rate one (1) increment higher than where his/her present salary is the same or higher than the minimum, but in no case shall receive less than one hundred and five percent (105%) of his/her present salary. The employee shall be entitled to a salary increment in the acting position if he /she remains in that position in excess of the normal probationary period for that position on return to his/her regular position be paid at the rate to which he/she would be entitled (including increments) had he/she remained in the regular position.
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> When a bargaining unit employee is acting in a management or excluded position, the employee will continue to pay union dues for the duration of the acting assignment, and be paid as per article 28.09 in the Collective Agreement. An employee in a management position is generally not eligible for overtime. Any bargaining unit or excluded employee, acting in a management position who is requested to work overtime related to the acting position will be paid overtime at his/her acting rate of pay. However, if the overtime is related to their current position they will be paid overtime as per the Collective Agreement at their normal base rate of pay (not the acting rate of pay). An employee who is acting that is requested to work overtime will have prior approval of their Supervisor whom will determine if the overtime is related to their original position or the acting role. Where an acting employee and their Supervisor cannot agree to the classificaiton of the work, the acting employee will not be required to accept the overtime assignment.
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> . . .

> When acting in a position for less than four consecutive weeks, acting pay will cease for any vacation leave and sick leave.
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> When acting in a position for more than four consecutive weeks, acting pay will continue for vacation leave and sick leave.
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> In order for the employee "acting" to receive acting pay, the position in which they are currently acting for must claim some form of leave during the dates listed out on the Acting Pay Authorization Form. For example, they must claim annual, sick, training etc. If they claim regular the employee "acting" does not receive the acting pay.

It is to be noted that the Employer uses its form entitled "Temporary Delegation of Signing and/or Acting Authority", a policy driven document which management takes not to run contrary to any contractual requirements, to designate employees as acting. Section 1 of the form is entitled Employee Information; Section 2 is entitled Acting Authorities Granted; Section 3 is entitled Signing Authorities Granted; and Section 4 deals with Distribution and Authorization Signatures. Only Section 1 was said in argument to have any bearing on the grievance, and is set out below:

Section 1: Employee Information

Employee Name:	Employee #:
Location:	
Will Replace:	Position:
From Time:	From Date:
To Time:	To Date:
Reason:	
Is this an Interim or Term Position:	☐ Yes ☐ No

By the time of convening the arbitration, which is to say well after the 2017 Policy rewrite was distributed, the Employer had long since been deducting union dues as required by Article 10, recognized as its responsibility pursuant to its 2015 Policy rewrite. The written arguments received from the Parties' respective counsel centred on Article 22 and Article 28, focussing on the issue of

overtime payment calculation for employees who have accepted an acting position. These Articles are appended to this award in their entirety for ease of reference.

Argument – Union:

The Union in its written argument acknowledged that the 2014 Policy was aimed at establishing the process by which a bargaining unit employee would be compensated for acting in higher level position than his/her "base position". Mr. Penner submitted that what the Union takes to be the contractual basis for "acting pay" is articulated in Article 28.09 of the Collective Agreement, in providing for assignments initiated by the Employer and confirmed through the completion of the Acting Form. The Union views its first iteration, the 2014 Policy, as instituting additional terms of employment not contemplated by contractual language, namely as the Employer would have it:

- When a bargaining unit employee is acting in the management or excluded position, union dues will cease for the duration of the acting assignment.
- An employee acting in a management or excluded position is generally not eligible for overtime.
- If a bargaining unit member is acting in an excluded/management position and is called out or required to work after regularly scheduled hours to perform work related to his/her unionized position, that employee will be entitled to such benefits as overtime and/or call back and reporting pay at his/her base rate of pay (not the acting rate of pay).

Mr. Penner has submitted that the second version, the 2015 Policy rewrite, containing the following modifications was still not fully compliant with the contractual language:

- When a bargaining unit employee is acting in a management or excluded position, the employee will continue to pay union dues for the duration of the acting assignment [the Union agrees].
- An employee in a management position is generally not eligible for overtime.

- If a bargaining unit employee who is acting in an excluded/management position and is called out or requested to perform duties related to the acting management work after regularly scheduled working hours, that employee will be entitled to such benefits as overtime and/or call back at his/her acting rate of pay.

- If a bargaining unit member is acting in an excluded/management position and is called out or required to work after regularly scheduled hours to perform work related to his/her unionized position, that employee will be entitled to such benefits as overtime and/or call back and reporting pay at his/her base rate of pay (not the acting rate of pay).

- An employee who is acting that is requested to work overtime will have prior approval of their Supervisor whom will determine if the overtime is related to their original unionized position or the acting role.

- Where an acting employee and their Supervisor cannot agree to the classification of the work, the acting employee will not be required to accept the overtime assignment.

Mr. Penner submitted that the 2017 Policy rewrite, representing the currently active policy driven process provides the following, said still not to be fully compliant with the contractual requirements:

- The Corporation will pay acting pay to bargaining unit employees who are appointed by their immediate supervisor to take on a significant part of the responsibilities of a job that is in a higher grade than their current position for a period of one (1) day or more.

- When a bargaining unit employee is acting in a management or excluded position, the employee will continue to pay union dues for the duration of the acting assignment and be paid as per Article 28.09 of the Collective Agreement.

- An employee in a management position is generally not eligible for overtime.

- Any bargaining unit employee acting in a management position who is requested to work overtime related to the acting position will be paid overtime at his/her acting rate of pay.

- However, if the overtime is related to their current position they will be paid overtime as per the Collective Agreement as their normal base rate of pay (not the acting rate of pay.)

- An employee who is acting that is requested to work overtime will have prior approval of their Supervisor whom will determine if the overtime is related to their original position or the acting role.

- Where an acting employee and their Supervisor cannot agree to the classification of the work, the acting employee will not be required to accept the overtime assignment.

- In order for the employee "acting" to receive acting pay, the position in which they are currently acting for must claim some form of leave during the dates listed out on the Acting Pay Authorization Form.

It bears repeating that by the time this matter proceeded to hearing, which is to say subsequent to the 2017 Policy rewrite, the Union's initial concern regarding payment of union dues was longsince resolved by the 2015 Policy rewrite expressly stating that they would continue to be paid by the bargaining unit member placed in an Acting position. However, the Union has not resiled from its assertion that the Employer's policy approach continues to ignore Article 22 which addresses numerous overtime issues in its provisions extending Article 22.01 through 22.17, and further any Employer created policy must be compliant with Article 28 pertaining to bargaining unit members accepting temporary assignments in higher paid positions.

Mr. Penner submitted that however the Employer might like to formulate its policy, Article 28.09 provides direction, firstly that the remuneration for the Acting designation comes by way of a salary adjustment, not an allowance or premium added to one's base salary as those terms are contractually understood. He drew a contrast with such allowances as would be earned by a lead hand for "all hours worked" in that capacity. Secondly, the "incumbent" is understood in the labour relations context as the present holder of an office or position, namely the employee currently working in a particular job, which contemplates there is only one employee in the position itself who would need to be in a leave situation when temporarily replaced. In this respect the Union notes the inclusion of a specific requirement in the 2017 Policy rewrite which recognizes that during the temporary

placement into the higher position the following applies which it does not dispute as a reasonable parameter:

> In order for the employee "acting" to receive acting pay, the position in which they are currently acting for must claim some form of leave during the dates listed out on the Acting Pay Authorization Form.

The Collective Agreement's recognition of the significance of a bargaining unit member accepting an acting position, the Union takes to be reflected in Article 28.09(iii) requiring an entitlement to a salary increment increase for an employee who "remains in that position in excess of the normal probationary period for that position". Were one to think that accepting higher rated duties for a time does not amount to moving into a higher position, counsel cited the agreed definition of "position" set out under Article 2.01(p) as "an aggregation of duties, tasks and responsibilities requiring the services of one employee". Further, Article 28.09 (iv) contemplates the eventual return to one's regular position to be paid as if he/she had remained in the regular position. Further still, it cannot be overlooked, the Union contends, that Article 28.01 under the heading "Pay Administration" contemplates an employee is being paid in accordance with the hourly rates of pay for the "position". Its specific language was said to serve as the basis for the computation of overtime pay, namely entitling the employee to be paid for services being rendered in accordance with the specified hourly rate "of the position for which the appointment is made", meaning the position that one is temporarily holding.

In dealing with the overtime pay requirement, Mr. Penner cited Article 22.06 (a) as providing the definition of "authorized work performed by an employee in excess or outside of his/her scheduled hours of work", with payment of either time and one half, or double time, as contemplated thereunder flowing from the straight time hourly rates pursuant to assigned pay grades and steps under Appendix A. There is no separating out of work not associated with the usual duties of one's position

as permitting a different pay rate. No doubt the Collective Agreement contemplates circumstances where employees may be asked to perform overtime for work outside of his/her position. Article 22.08 presents a meaningful limitation in stating that employees shall not be required to work overtime on duties which are not covered by their classification except when no one is available in the appropriate classification, but notably contains no express language indicating that overtime performed by an employee working outside their usual classification will be paid at the usual rate of the instant duties, or at one's normal classification rate, even where holding a higher paid position on a temporary basis. It does not say that one's rate should be reduced from the applicable rate of the acting position in an overtime situation, whatever the rate and overtime duties. Counsel submitted that notably an employee's duration of performing the duties of the higher position is taken to contemplate days as opposed to hours, with Article 28.09(a) requiring that the duties must be performed on a continuous basis for a period of one (1) day or more. The Employer's Temporary Delegation of Signing and/or Acting Authority Form contemplates calendar days in that this document requiring various pieces of information for approval of an acting assignment in a position states that the replacement is from a specific date to a specific date. It is nevertheless an Employer generated form and is not expressly referenced in the language of Article 28.09.

In its generally considering policies formulated by the Employer, the Union concedes that as an expression of management rights under Article 6.01 it may institute policies for the direction of the workforce, but they cannot violate the Collective Agreement. In this respect, Mr. Penner submitted, its acting pay policy framework as currently reflected in the 2017 Policy rewrite, has not been incorporated into any contractual language, unlike some other policies under Appendix B, nor has it received the Union's consent either express or implied. The Union acknowledges there have been some revisions made by the Employer to issues raised by the grievance filed in October 2015,

such as reversing its stance in accepting that union dues are still payable, and going so far as at least acknowledging that an employee performing overtime work that falls within the higher classification duties will be paid the overtime based on the acting position rate of pay, but as counsel put it: "This still leaves the fundamental question of the rate of pay to be applied to an acting employee who performs overtime work related to his/her base position." Accordingly, the Union holds to the view the 2017 Policy rewrite has provided no acceptable resolution to this policy grievance.

Mr. Penner has cited what the Union takes to be a three-pronged issue for me to consider (the "three hurdle analysis") of (a) whether there was an appointment by the Employer; (b) whether the employee actually performed the duties of the higher position; and (c) whether he/she did so for the required time. The test does not separate out employees holding temporary positions doing only the assigned higher level work from those spending some of their time doing lower level work. In terms of one needing to analyse the work situation to which the temporary position holder is assigned on an acting basis, the Union cites *Yellowknife (City) and P.S.A.C.,* 1997 CarswellNWT 118 (Ready) wherein at para. 37 in his discussing the issue of whether the work performed by the aggrieved employee, while on-call, attracted the higher rate of pay, which is to say not placed formally in a position on an acting basis, the arbitrator applied the three hurdle analysis. He accepted the test set out by Arbitrator Adell in *DeHavilland Aircraft Co. and U.A.W.* (uneported January 1970) as also quoted in *Dupont Ltd. and Canadian Chemical Workers* (1979) 24 L.A.C. (2d) 121 at pp. 124-125, namely:

> I accept the burden is on the grievor in cases of this sort to prove to the civil standard that the grievor is performing the significant job duties of a higher classification a majority of his time, and I also accept that the character of the work actually performed is the essential matter to be evaluated in a grievance of this nature.

Arbitrator Ready also observed at para. 38 that in *Canada Valve Ltd. and International Molders and Allied Workers' Union* (1977), 16 L.A.C. (2d) 258, Arbitrator Burkett had applied the

test to the factual circumstances presented in distinguishing the need to perform the full range of the other job, or be qualified to perform all the other job's tasks, as opposed to the "central core" in remarking:

> The burden is one which requires a grievor to establish that the work in question is beyond his classification, that it falls within the "central core" of the higher classification and that he has the skill and "ability" to perform it.

With this analysis in mind, considering the second hurdle in the test to be applied, the Union contends that the correct analysis can be distinguished from the Employer's policy approach on acting pay for overtime, i.e., wanting to inject a pay scale in line with the duties being worked during the overtime portion of one's work day as the test. The "three hurdle analysis" should be viewed as a means of determining whether the employee ever met the threshold of an acting employee in a higher position after accepting the temporary appointment, which is to say performing the significant job duties of a higher classification a majority of the time, and once established even where some of the work being performed did not fall under the higher classification, i.e., arguably the overtime work can be performed at a lower level than the acting position, those hours should nevertheless continue to attract pay at the acting rate made plain enough from the case law driven analysis. The Employer's own Form was said to predetermine the duration of the acting assignment in terms of "days", having to be at least one day, during which time period working on any lesser duties falling outside the acting classification does not leave the Employer with the option of reducing the wage rate for those few hours, whether regular hours or overtime. It is not a situation of keeping one's base position pay intact throughout the acting term and then rewarding performance within that higher classification with an allowance.

In this context, the Union holds to the view that the review process by which the supervisor determines the classification of overtime work, i.e., different from the acting position which one has

accepted for one day or more under Article 28.09, should be viewed as infringing on the class structure negotiated between the Employer and the Union, such as contained in Article 28.13(a) and (b). Further, the Union contends that the classification of the overtime work as somehow being separate from the higher position in which he/she is working on a temporary basis, is beyond the purview of the supervisor. Presumably, it is not incumbent on the acting employee to agree to the classification of the overtime work, such agreement resting with the bargaining agent.

Argument - Employer:

In its review of this policy grievance filed in October 2015, the Employer understands the Union to have alleged firstly that there has been a failure by management in its policy formulation to require bargaining unit members to pay union dues when they are acting in an excluded position, and secondly that it has been unjustifiably paying bargaining unit members temporarily acting in a higher position their base position's overtime wages rather than their acting rate of overtime pay when the work is said to equate with their base position duties, claimed to be contrary to the Collective Agreement. The Employer holds to the view that the grievance ought to be dismissed on the basis that the Union's first allegation of wrongdoing has no doubt been resolved by the Policy rewrite, and its second allegation does not constitute a violation of the Collective Agreement.

A review of the language of the 2014 Policy, followed by the rewrites of 2015 and 2017, Mr. Buchanan submitted, discloses that all three versions "either reflect the wording of Article 28.09 of the Collective Agreement or incorporate the wording by reference. ..." in its setting out how acting pay is calculated. The 2017 Policy rewrite admittedly remains in force, and accordingly the primary issue at this point is whether the Employer has validly exercised its management rights, which it asserts that it did, in citing Brown & Beatty, *Canadian Labour Arbitration*, at topic 4:1520, which

quotes arbitrator Robinson's famous analysis from *Lumber & Sawmill Workers Union, Local 2537 v. KVP Co.*, [1965] CarswellOnt 618, 16 L.A.C. 73. This summary of the *KVP* rule-making principles from Brown & Beatty reads as follows:

> **4:1520 - Rule-making as an exercise of management's prerogative**
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> Even where such rules do not form part of the agreement, it is now generally conceded that in the absence of specific language to the contrary in the collective agreement, the making of such rules lies within the prerogative or initiative of management, and arbitrators have held this to be so whether or not an express management's rights clause exists reserving the right of management to direct the workforce. However, this rule-making power is neither absolute nor without limitation. Rather, as summarized in *KVP Co.*, a number of principles relating to this power have now become universally accepted among arbitrators. These principles provide that:
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> *I - Characteristics of Such Rule*
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> A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
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> 1. It must not be inconsistent with the collective agreement.
>
> 2. It must not be unreasonable.
>
> 3. It must be clear and unequivocal.
>
> 4. It must be brought to the attention of the employee affected before the company can act on it.
>
> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
>
> 6. Such rule should have been consistently enforced by the company from the time it was introduced.
>
> . . .

In the Employer holding to the view that the overtime payment approach came within the Employer's allowable rule-making authority, Mr. Buchanan submitted:

> *It is trite law that an employer has the ability to implement rules unilaterally and without the consent of the union in certain circumstances and if doing so is not specifically prohibited by the wording of the collective agreement. Such rule-making authority arises from the employer's right to manage the workplace.*

The Employer accordingly acknowledges that the rights of employees under the collective agreement cannot be impaired or diminished by a management generated rule, while pointing out that

management rights are specifically recognized by Article 6.01 of the Collective Agreement. There can be no doubt that the Employer can institute policies for direction of the workforce, which the Union acknowledges. That said, the Employer holds to the view that the Policy which the Union currently disputes nevertheless complies with the *KVP* principles and in particular the requirement that "it must not be inconsistent with the collective agreement". In this respect, Mr. Buchanan submitted, the policy expressly relies on the Collective Agreement by incorporating the wording of Article 28.09, and "expands" upon the wording by clarifying the following issues that were said to be "silent in the collective agreement", namely:

- Who designates an employee as Acting;
- Whether and how non-unionized employees will receive acting pay;
- Whether or not union dues must be paid during the Acting period; and
- Whether and how overtime will be paid.

In taking it to be a matter of clarifying certain issues concerning which the Collective Agreement is silent, the Employer holds to the following statement, presumably on the basis of a policy cannot contravene the collective agreement is the first step in considering the facts of the matter, as counsel put it:

> *Clarifying or expanding upon the Collective Agreement is not per se inconsistent or contrary to the Collective Agreement. There must be specific ways in which the Policy contravenes the Collective Agreement for the KVP test to fail.*

Indeed, one observes that the first step in considering the facts of a matter is whether a disputed policy component contravenes the collective agreement.

Mr. Buchanan submitted that inasmuch as the Collective Agreement is silent on the nature of work to be performed under the definition of "overtime", the Union has incorrectly assumed there to have been a violation of Article 22.08. The Employer says that inasmuch as the Policy does not

require Acting employees to perform duties on overtime not covered by the classification of the position they are filling, then when they accept such duties overtime is allowed to be paid on their base rate, not their acting rate. He submitted that the proper explanation for how the overtime payment policy component should work is as follows:

> 27. *The way the Policy works is that the Acting employee is paid acting pay for all of the work performed during the regular hours of work for the Acting Position. As per Article 22.01, the usual hours of work for most office employees are 08:00 to 17:00, Monday through Friday. It does not matter if the work being performed during regular work hours is work normally performed by the Base Position or the Acting Position; the Acting employee receives acting pay for the entire work day. This is a benefit to the employee, because if the Employer does not backfill the Base Position and the Acting employee ends up performing Base Position work for the majority of the time, then the Acting employee is still paid at the Acting rate of pay.*
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> 28. *If work is to be performed outside of the regular hours of work (i.e. after 17:00 during the weekdays or on the weekends), then the work is "overtime" work, as per the definition in Article 22.06. Under the 2015 and 2017 Policies, the Acting employee's immediate supervisor determines whether the overtime work would be performed by the Base Position or the Acting Position. The analysis is simply to ask, "If none of the employees were away from work, would the overtime work be performed by the Acting Position or the Base Position?" (This assumes that the Employer has not backfilled the Base Position). If the overtime work would be performed by the Base Position, then the Acting employee who agrees to work overtime is paid at the Base Position rate of pay; they are no longer Acting and are now performing their usual job duties. If the overtime work would be performed by the Acting Position, then the Acting employee who agrees to work overtime is paid at their Acting rate of pay.*
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> 29. *It is important to note that the Policy does not obligate the Acting employee to perform overtime work in circumstances where the Acting employee and the immediate supervisor cannot agree on whether the overtime work is work arising from the Base Position or the Acting Position. In that case, the Acting employee can refuse to work overtime.*
>
> 30. *Contrary to the submissions of the Union, an employee designated as Acting over the course of multiple days is not Acting for all periods of time during that period. The Form requires the parties to identify both the dates and times that the employee is to be Acting. It is therefore entirely possible for the employee to be designated as Acting only during regular business hours (i.e. 08:00 to 17:00), Monday to Friday. The implication is that the employee is not*

Acting outside of regular work hours. Accordingly, work performed outside of regular hours (i.e. overtime work) is not necessarily done in the employee's Acting capacity, because the employee is no longer Acting during that period of time.

31. *Because the Acting employee requires prior approval before working overtime, the Employer maintains control over whether the employee continues to be Acting outside the regular hours of work for the Acting Position. If the immediate supervisor determines that overtime work is necessary, then the nature of the overtime work will dictate whether the employee will receive overtime pay at the Base Position rate of pay or at their Acting rate of pay.*

32. *Since the Policy does not result in Acting employees performing work outside of the classification for the position they are being asked to fill, there is no violation of Article 22.08.*

33. *Furthermore, in the absence of express language setting the rate of pay for overtime work, the Employer's decision to pay overtime based on the nature of the work and the position being filled is consistent with the Collective Agreement.*

34. *The Policy also upholds the principle of equal pay for equal work. The Acting employee's rate of pay for overtime work is determined by the work there performing.*

To summarize, in dealing with the question of what constitutes the time period of an Acting position, keeping in mind what the case law suggests should be the test covering the work being performed, the Employer holds to the view, plainly put by counsel, that contrary to the submissions of the Union "an employee designated as Acting over the course of multiple days is not Acting for all periods of time during that period", which is to say not after 17:00 in the example provided were it a situation of not performing his higher-level duties past end of regular shift. Keeping in mind that the Temporary Delegation of Signing and/or Acting Authority form originating with the Employer requires the Parties to identify both the dates and times that the employee is to be Acting. This was said to allow the Employer to consider that it is "entirely possible for an employee to be designated as Acting only during regular business hours…", with the implication being that the affected

employee does not carry any acting status outside of regular work hours and therefore any work done on overtime is not necessary performed in an acting capacity. Inasmuch as the Acting employee requires prior approval as does any employee, before working overtime, the Employer was said to maintain control over whether the employee continues to be acting outside of the regular hours of work for the Acting Position. It should be left to the supervisor to determine whether overtime is necessary and whether the work falls within their Acting rate of pay on the basis of what is being performed. Accordingly, it was submitted, the Employer has not violated Article 22.08 and is only upholding the principle of "equal pay for equal work" which leads to the Acting employee's rate of pay for overtime being determined by the work they are performing.

In dealing with the Union's submission centering on Article 28.09, Mr. Buchanan submitted that the Union "does not actually argue that the Employer has acted contrary to Article 28.09". The Employer accepts that Mr. Penner's argument recapitulates the test under the "three hurdle" approach on whether the employee meets the threshold of "Acting" when performing the work of a higher level position "a majority of the time", or performing at the "central core" of the position. The Employer contends that there is no allegation in the Grievance that the Employer has failed to pay an Acting employee acting pay in circumstances where an employee is performing such work for the majority of the time, but one should recognize as significant, Mr. Buchanan submitted, that the Employer is paying Acting employees their acting pay for all regular hours of work, despite the possibility that the Acting employee may even be performing their Base Position work for the majority of the time. That said, the Employer maintains its position that overtime work can be separated out from one's regular hours in the higher position on the basis of the work being performed. Mr. Buchanan stated:

> 37. *The Policy creates a clear delineation between working periods: regular hours of work and overtime. Acting employees are paid at their Acting rate of pay for their regular hours of work during their Acting period. Acting employees are also paid overtime at their Acting rate of pay if they are*

performing Acting Position work during the overtime period. In both cases, the "three hurdle" test is met: (i) the employee was appointed by the Employer; (ii) the employee actually performed the duties of the higher position; and (iii) the employee did so for the required period of time.

38. *In the Employer's submission, the "three hurdle" test only demonstrates that the Employer is paying employees appropriately under the Policy.*

The Employer, in written argument, has also dealt with the Union's current reliance on Article 28.13, said to be a new allegation, with the Union now claiming that classification of overtime work as set out in the 2015 and 2017 Policy rewrites infringes on the exclusive duties negotiated between the Parties in Article 28.13. It takes the Union to be presently claiming that the employee's immediate supervisor has no right to assess the classification of the overtime work on the basis that it rests with the Union whether to agree to classifications and changes thereto. The Employer objects to the Union's having raised this new issue at hearing, Mr. Buchanan submitting that it should have been set out in the grievance document, presumably as initially written or in an amended form, in order for the Employer to be given the opportunity at Level 3 to consider all remaining issues associated with its Policy. Also, the Employer relies on the agreement of the Parties to jointly submit evidence, while not knowing this new allegation would be raised. Accordingly the Employer takes the position that these submissions covering Article 28.13 should be struck. But regardless of that position, the Employer contends that the Policy does not require the immediate supervisor to classify work in the way contemplated by Article 28.13. The Employer takes the purpose of Article 28.13 being to settle the process for how the Employer goes about re-organizing or re-establishing new classifications of employment, which is not the issue contemplated by this policy grievance, there being no new type of work that needs to be performed resulting in any need to identify which current or new position should perform the work, and how it should be classified. The issue here should be considered as discretely focussing on how persons in an Acting position are paid overtime where the work they are

performing on an overtime basis is associated with duties covered by their Base Position, which is why under the 2015 and 2017 Policy rewrites the supervisor identifies whether the overtime work arises from the Base Position or from the Acting Position. That person is not being called upon to create any new classification because the work is not new, nor is anyone being required to perform work outside their classification, whether it be either the work of the Acting Position or the Base Position. No doubt they remain bargaining unit members at all times.

In support of its contention that the Union should not be raising any new allegations at the arbitration stage of the proceedings, not tabling any new issues, the Employer relies on the Judgement of Richard J. in *Government of the Northwest Territories and Union of Northern Workers, Public Service Alliance of Canada*, 2011 NWTSC 32 where the Union stated its intention one week prior to the arbitration its intention to inject at commencement of hearing a contractual due process argument over the failure of a union representative to have been present at the time the aggrieved employee was terminated, previously not stated to be a problem. The Court took the approach that the Union was not entitled to inject a position invoked under a specific provision of the Collective Agreement which was newly raised at the hearing, a jurisdictional issue decided against the Union.

In all, the Employer contends that under the long-established principles set out in *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd., [1965]*, 16 L.A.C. 73 (Robinson) dealing with the sustainability of employer generated policies as cited and followed in many arbitration awards, including *Central Park Lodge Ltd. v. S.E.I.U., Local 268*, 2000 CarswellOnt 3862 (Ellis), the central issue is whether the policy concerning overtime payment being made in accordance with the duties being performed violates the collective agreement. Mr. Buchanan submitted that there is no such violation, and further that there is a realistic operational basis for same, i.e. "legitimate business reasons". It has been made clear and unequivocal, has been brought to the attention of employees, and

should be taken as consistently enforced from the time of the initial implementation following the issuance of the 2014 Policy document concerning which the Union and bargaining unit employees were well aware.

Conclusion:

The Parties have clearly and plainly set out their respective positions in this matter in written argument on the basis of agreed facts. I should do the same in providing my conclusion. I will say at the outset, the Employer arguably has a legitimate point that the 2014 Policy and subsequent 2015 and 2017 Policy rewrites concerning the overtime pay issue, with the dues' deduction requirement having been conceded in line with the contractual obligations under the Article 10 (Checkoff) language, can be considered a reasonable business approach on the basis that it was imposed for "legitimate business reasons" were there not any contractual restrictions or case law to apply to constrain its approach. In short, why would an employer want to pay more wages for certain work than the work deserves in calculating value to the employer's business on comparing it to others being paid for the same work. Notwithstanding that recognition, the central issue in this matter remains whether this policy approach is incompatible with any specific agreed terms of the collective agreement. In particular, are there any violations of the language contained in any of the various paragraphs of Article 22 or Article 28 which the Union has specifically cited in the grievance filed in October 2015?

Essentially, the Employer through its policy approach has set out to distinguish the overtime hours from the regular work hours of a person holding an Acting position as if he/she can somehow be viewed as slipping into and out of the Acting position at the supervisor's discretion after regular work hours depending on the work being performed on overtime. It would presumably mean that the

employee has separately accepted whatever assigned duties for those extra hours on that basis, including those seen by management to fall below those core duties of the Acting position. It would be the only approach possibly available under its policy dictum respecting overtime payment keeping in mind the case law indicating that a person need only to be performing the majority of the time, or performing the core duties, in the higher position in order to attract the higher pay rate. There is also the crucial fact that it is a situation where the affected employees have actually accepted temporary positions replacing incumbents whose leave situations have given rise to the availability of the Acting position in the first place. Presumably the incumbent position holder being replaced while on leave, would be receiving their usual pay scale associated with overtime work, whatever their duties.

Perhaps the appropriate starting point in reaching my conclusion is observing that Article 28.01, the first paragraph under the general heading Pay Administration confirms that "an employee is entitled to be paid for services rendered in accordance with the hourly rates of pay specified in Appendix A for the evaluation of the position to which the appointment is made. ...", they being the official rates of pay. At the same time the Employer's own devised document confirms appointment into an Acting position, said therein to extend to a stated date and time. It needs to comply with Article 28.09(a) which contemplates that an Acting incumbent required by the Employer to perform the duties of a higher paid position "on a continuous basis for at least one day, under subparagraph (i) "shall...receive the minimum salary for the acting position...", which under subparagraph (iii) even includes entitlement to a salary increment in the acting position "if he/she remains in that position in excess of the normal probationary period for that position". It is noted that Article 22.08 addresses an employee not being required to work overtime on duties which are not covered by their classification, which presumably would include the classification of the Acting position, unless no one in the appropriate classification is available. However, nowhere does Article 22 dealing with

overtime indicate that the rate to be used for that payment calculation can be lowered from the rate being received for one's regular hours associated with the position which they hold, not distinguishing someone temporarily holding a higher position on an Acting basis. Presumably, were the Employer's approach to be accepted anyone holding a position, even a full-time appointment, could be subjected to having their wage rate reduced when working overtime hours in something less demanding than their normal duties. That would contravene the contractual requirement that a person be paid in line with the position he/she holds, not in accordance with the duties they happen to be working on a particular day.

In these circumstances involving temporary appointments into Acting positions, there is no lesser requirement for a person to be paid in line with the evaluation of the position itself. The concept of wanting to pay someone in line with the lesser duties they are performing, if only on overtime, which are not duties which would have been assessed as requiring an appointment into an Acting position covering an incumbent on leave, nevertheless does not lend itself to changing pay scales in line with the duties being performed while still holding the position. The actual acceptance of appointment into the Acting position has taken the person past that stage in the analysis. He or she is entitled to the same rights and obligations as would be the incumbent holding a position were that person not on leave, including the pay scale for the Acting position.

While the existence of the Acting form devised by the Employer presents an interesting sidebar, there is no evidence that the usual means of dealing with employees accepting an Acting position to replace an incumbent on leave requires one signing an ongoing series of forms placing them in the position on each successive day, only for that day, day after day, on an in and out approach, ending each day with the completion of one's regular hours, and then being reappointed the next morning. The evidence does not support that occurring, and it would be an approach

unknown to the usual labour relations context of an employee taking an acting position to replace the incumbent on leave. Nor is it a situation of the employee being available to move up to perform certain higher duties on an infrequent or haphazard basis and being paid for that work. The general assumption here must be that the person is taking the Acting position on the usual basis of replacing the incumbent until that person's return to work. Indeed, the Employer takes the other person's being on leave as a prerequisite to anyone being offered the Acting position. Once there is acceptance that the person holds the Acting position replacing the incumbent on leave, it is a matter of applying the appropriate rate for that position. It is the higher position itself, meaning the duties of that position, which attracts the higher rate of pay while in the position; hence the famous "three-part" hurdle to qualify is not actually an issue since here it is a matter of placing the person in the Acting position with its usual attendant duties no doubt lying at the core of the placement.

In my view, the policy dictum as it has developed, which now centres on the overtime payment issue, is not compatible with the Collective agreement obligations concerning pay administration and overtime under Article 22, Article 28.09 and Appendix A, and my declaration issues to that effect. These provisions simply do not contemplate that a person's pay rate will be reduced to a lesser status on overtime, whatever duties they are performing once holding the Acting position. I will say that it is not necessary for me to consider the issue raised by the Union at commencement of hearing concerning an alleged violation of Article 28.13 concerning establishing and introducing new classes of employment. Frankly, I do not see that to be an issue in this matter and it need not be discussed, including the Employer's objection that it was improperly introduced into the Union's argument for not having been previously disclosed. This matter, once the union dues' issue was resolved, has never been about introducing new classes of employment, but rather the overtime pay calculation for those employees holding Acting positions.

At this point the Policy grievance is successful on the basis of a declaratory award that the Employer's rewritten policy dictum concerning overtime rate is not compatible with the contractual language as has been alleged, and cannot be used to deny employees in Acting positions the overtime wage rate associated with the position they are holding. I remain seized to provide whatever clarification or directions are required, and including additional remedies were there any successful argument to be made in that respect.

DATED this 16th day of February, 2021.

Tom Jolliffe, Q.C.

ARTICLE 22
HOURS OF WORK AND OVERTIME
OPERATIONAL EMPLOYEES

22.01 Hours of Work

When hours of work are scheduled for employees on a regular basis, they shall be scheduled so that employees:

(a) on weekly basis, work forty (40) hours and five (5) days a week Monday through Friday; and

(b) on daily basis, work eight (8) consecutive hours a day from 0800 hours (8 am) to 1700 hours (5 pm) exclusive of a lunch period.

(c) Notwithstanding Articles 22.01(a) and 22.01(b), at the request of the employee, the Employer may allow employees to determine their own hours of work subject to operational requirements that due to the ongoing nature of their work cannot be met by working the standard hours.

When this occurs, employees must schedule their work such that they work an average of 40 hours per week over a four week period. Employees who are required by the Employer to work outside the approved regularly scheduled employee determined hours shall be paid in accordance with the overtime provisions of this Collective Agreement. Employees who are required by the Employer to work on designated paid holidays shall be compensated in accordance with Article 16.

(d) The arrangements made in Article 22.01(c) may be terminated at any time by either the employee or the Employer with a minimum of 14 calendar days notice.

(e) Such modifications as identified in (c) and (d) above shall be restricted to the period of Monday through Friday inclusive with no split shifts permitted.

(f) "Operational employees" means employees whose normal responsibilities include plant operations or functions.

22.02 When because of the operational requirements of the service, hours of work are scheduled for employees on a rotating or irregular basis:

(a) they shall be scheduled so that employees:

(i) on a weekly basis work an average of forty (40) hours and five (5) days per week, and;

(ii) on a daily basis, work eight (8) hours per day from 8 am to 5 pm exclusive of a lunch period.

(b) The work schedule for the purpose of averaging the regular hours of work per week pursuant to subsection (a)(i) and (ii) shall be established at four (4) week intervals over the course of the year.

(c) Notwithstanding Articles 22.02(a) and 22.02(b), at the request of the employee, the Employer may allow employees to determine their own hours of work subject to operational requirements that due to the ongoing nature of their work cannot be met by working the standard hours.

When this occurs, employees must schedule their work such that they work an average of 40 hours per week of work over a four week period. Employees who are required by the Employer to work outside the approved regularly scheduled employee determined hours shall be paid in accordance with the overtime provisions of this Collective Agreement. Employees who are required by the Employer to work on designated paid holidays shall be compensated in accordance with Article 16.

(d) The arrangements made in Article 22.02(c) may be terminated at any time by either the employee or the Employer with a minimum of 14 calendar days notice.

(e) Such modifications as identified in (c) and (d) above shall not permit split shifts.

(f) The Employer agrees that employees will not be coerced into working a varied work schedule in accordance with Article 22.01(c) or Article 22.02(c).

22.03 The Employer shall make every reasonable effort:

(a) (i) not to schedule the commencement of a shift within sixteen (16) hours of completion of the employee's previous shift; and

(ii) to avoid excessive fluctuations in hours of work; and

(iii) an employee shall be paid two (2) times his/her straight time rate for all regularly scheduled hours of work when the employee has been confined to the work site, at the direction of the Employer, due to operational requirements and the employee has completed sixteen (16) consecutive hours of work immediately following completion of his/her previous regularly scheduled shift.

This Clause shall be applicable until such time as the employee has been authorized to leave the work site.

(b) An employee who is called out to work overtime within the period beginning eight (8) hours before the start of his/her scheduled shift, shall be entitled to one (1) hour off for each hour actually worked in this period, to a maximum of four (4)hours, except when called out within the two (2) hour period prior to the start of his/her scheduled shift. Such time off shall be scheduled to begin at the commencement of his/her scheduled shift and there will be no loss of pay for this time off. However, an employee who is requested to continue work or is called back during this time off, will be paid double time for each regular shift hour worked to a maximum of four (4) hours.

22.04 (a) The Employer agrees that before a schedule of working hours is changed, the change will be discussed with the appropriate Steward of the Union if the change will affect a majority of the employees governed by the Union.

(b) Shift schedules shall be posted in the work area at least twenty-eight (28) calendar days in advance of the starting date of the new schedule. Shift schedules shall indicate the work requirements for each employee in the plant for a minimum period of twenty-eight (28) days.

(c) When an employee's work schedule is revised without four (4) calendar days notice, the employee shall be compensated at the rate of double (2) time for the first full shift worked on the new schedule. Subsequent shifts worked on the new schedule shall be paid for at the straight time rate.

(d) When an employee's work schedule is revised at his/her request the employee shall be compensated at the straight time rate for the first full shift worked on the new schedule.

22.05 Provided advance notice is given and with the approval of the Employer, employees may exchange shifts if there is no increased cost to the Employer. Employees requesting changes must do so in writing. Time sheets will reflect the regularly scheduled employees.

22.06 Overtime

In this Article:

(a) "overtime" means authorized work performed by an employee in excess or outside of his/her scheduled hours of work;

(b) "straight time rate" means the hourly rate of remuneration as defined in this Agreement;

(c) "time and one-half" means one and one-half (1½) times the straight time rate; and

(d) "double time" means two (2) times the straight time rate.

22.07 Assignment of Overtime Work

Subject to operational requirements, the Employer shall make every reasonable effort:

(a) to avoid scheduling employees to work excessive overtime. Where operational requirements permit, employees may be relieved, for personal reasons, from working overtime. In cases of emergency employees will be required to work overtime;

(b) to allocate overtime work on an equitable basis among readily available qualified employees; and

(c) to give employees who are required to work overtime adequate advance notice of this requirement.

22.08 An employee shall not be required to work overtime on duties which are not covered by his/her classification except in a situation in which the Employer has determined that an employee of the appropriate classification is not available to perform such duties.

22.09 An employee who is required to work during his/her scheduled time off shall not be required to remain off duty during a scheduled work period, or part thereof, to prevent him/her from working overtime.

22.10 The Union is entitled to consult the President of the Northwest Territories Power Corporation or his/her representative, whenever it is alleged that employees are required to work unreasonable amounts of overtime.

22.11 (a) Subject to Clause 22.12, an employee is entitled to time and one-half (1½) compensation for each hour of overtime worked by him/her.

(b) Subject to Clause 22.12, an employee is entitled to double (2) time for each hour of overtime worked by him/her:

(i) after four (4) hours of overtime on a scheduled working day;

(ii) on his/her first or subsequent days of rest, provided the days of rest are consecutive.

(c) In lieu of (a) and (b) the employee may request and the Employer shall grant equivalent leave with pay at the appropriate overtime rate to be taken at a time mutually agreeable to the Employer and the employee. An employee may accumulate up to a ceiling of ten (10) days leave with pay in a non-refillable bank of leave. Any additional overtime shall be compensated with cash.

22.12 An employee shall be paid overtime compensation for each completed fifteen (15) minute period of overtime worked by him/her.

22.13 An employee who works three (3) or more hours of overtime immediately before or following his/her scheduled hours of work shall receive a meal or a meal allowance equivalent to the Duty Travel Dinner Meal rate. An employee who works three (3) hours of overtime in excess of eight (8) hours of work on his/her day of rest shall receive a meal or meal allowance equivalent to the Duty Travel Dinner Meal rate. In addition, an employee shall receive an additional dinner meal or dinner meal allowance for every four(4) additional hours of overtime worked. Where possible the Employer shall have these meals transported to the worksite, and shall pay the transportation cost. Reasonable time with pay shall be allowed for the employee to take a meal break at or adjacent to his/her place of work. An employee who receives meals or meal allowances under this Article shall not be entitled to the equivalent meals or meal allowances under the Duty Travel Policy.

22.14 (a) An employee attending a training course on the instructions of the Employer shall receive pay at the straight time rate, except in the following circumstances:

(i) the employee will receive pay at the applicable overtime rate for all hours in attendance at a training course on a day of rest, or all hours in excess of an employee's scheduled hours of work;

(ii) an employee who works and attends a training course on a day other than a day of rest, will be paid at the applicable overtime rate for all hours worked or in training in excess of the employee's scheduled hours of work.

(b) Notwithstanding (a) and except for the provisions of Article 24, an employee who is away from his/her headquarters area for the purpose of training is not eligible for pay on a scheduled day of rest unless he/she is in attendance at training sessions.

22.15 (a) The Employer shall give twenty-four (24) hours notice to an employee who is required to work in a non-emergency situation at a satellite station. Where the Employer fails to provide twenty-four (24) hours notice, the employee shall be compensated at a rate of double (2) time for any part of all of the first shift worked at the satellite station. Subsequent shifts worked at the satellite stations shall be paid at the straight time rate.

(b) The provisions of 22.15(a) above shall not apply in those situations where an employee departs from his/her headquarters and returns from a satellite station on the same day within the time designated as his/her regularly scheduled shift.

22.16 Twelve (12) Hour Shift

The Employer and the Union agree that notwithstanding the provision of Article 22 - Hours of Work and Overtime - the parties agree to examine and implement a twelve (12) hour work schedule on a trial basis if the employees at the selected plant location so request and providing:

(a) The implementation of a twelve (12) hour work schedule and any said variation in hours shall not result in any additional expenditure or cost to the Employer by reason only of such variation.

(b) A trial period shall be established for a period of six (6) consecutive months.

(c) The above trial period may be extended by mutual agreement between the parties for further period not exceeding six (6) consecutive months.

(d) An evaluation by both parties shall be conducted within the last month of the trial period.

(e) On written notice from the authorized representative of the respective Union Local, the parties shall commence discussions to establish a twelve (12) hour work schedule at the applicable plant location(s) and if mutually agreeable the parties shall implement such a work schedule.

General Terms

1. At the agreed upon selected plant location, the Parent Plant Management and duly authorized representative(s) of the Union may jointly devise and decide on a mutually acceptable twelve (12) hour work schedule which shall include a specified number of consecutive calendar days of work followed by a specified number of earned days of rest. The scheduled hours of work on any day as set forth in such a work schedule may exceed eight (8) hours per day; starting and quitting times shall be determined according to operational requirements, and the normal daily hours of work shall be consecutive.

2. The twelve (12) hour work schedule must incorporate an "availability list" and ensure that an employee's normal week shall not exceed an average of forty (40)hours per week over the life of the work schedule.

3. For the purpose of the twelve (12) hour work schedule trial period;

   (a) "day" means a twenty-four (24) hour period commencing at 0001 hours;

   (b) "week" means a period of seven (7) consecutive days beginning at 0001hours Sunday morning and ending at 2400 hours the following Saturday night;

   (c) the Employer shall endeavour, where practicable, to schedule days of rest consecutively, but consecutive days may occur in separate weeks.

4. All work performed:

   (a) in excess of the scheduled hours of work on a scheduled work day;

   (b) on any of the employee's scheduled days of rest;

   shall be compensated at the normal rate of pay.

5. Leave – General

   Employees shall have their accrued days of vacation, and sick leave credits converted to hours of credits by multiplying the number of days by eight (8) or seven and one-half (7½) hours per day, whichever is applicable, in accordance with their evaluation. When an employee ceases to be subject to this provision his/her credits will be converted to days by dividing the number of hours by eight(8) hours or seven and one-half (7½) hours, whichever is applicable, per day and adjusting it upwards to the nearest half day.

6. Vacation Leave

   Employees shall earn vacation leave credits at the rates prescribed for their years of service, as set forth in Article 15 of the Agreement, but shall be converted to hours on the basis of one (1) day equals eight (8) hours, and one (1) week equals forty (40) hours or one day equals seven and one-half (7½) hours and one week equals thirty-seven and one-half (37½) hours, whichever is applicable. Leave will be granted on an hourly basis with the hours debited for each day of vacation leave being the same as the hours the employee would have normally been scheduled to work on that day.

7. Designated Paid Holidays

   An employee who works on a designated paid holiday shall be compensated, in addition to the eight (8) hours or seven and one-half (7½) hours holiday pay he/she would have been granted had he/she not worked, for all hours worked on the holiday.

8. Special Leave

Special leave shall be converted to hours on the basis of one (1) day equals eight (8) hours, and one (1) week equals forty (40) hours or one day equals seven and one-half (7½) hours and one week equals thirty-seven and one-half (371/2)hours, whichever is applicable. Leave will be granted on an hourly basis with the hours debited for each day of special leave being the same as the hours the employee would have normally been scheduled to work on that day.

9. Sick Leave

Employees shall earn sick leave credits at the rate prescribed in Article 19 of the Agreement but shall be converted to hours by multiplying the number of days by eight (8) hours, and one (1) week equals forty (40) hours or one day equals seven and one-half (7½) hours and one week equals thirty-seven and one-half (37½)hours, whichever is applicable. Leave will be granted on a hourly basis with the hours debited for each day of sick leave being the same as the hours the employees would normally have been scheduled to work on that day.

10. Shift Premium

A shift premium shall be paid in accordance with Article 27 of the Agreement.

11. Due to operational requirements, the Employer may reschedule the swing shift operator without penalty to facilitate the twelve (12) hour work schedule.

12. Employees on the "availability list" shall not receive "standby pay" and shall be available for at least one (1) hour prior to the start of the designated shift and for at least one (1) hour following the commencement of the shift the employee is designated to be available for.

13. Either party may terminate the provisions of Article 22.17 following thirty (30)days written notice from either party to the other providing that prior discussions on termination have been held or at an earlier date if mutually agreed upon by both parties.

22.17 Where the parties have agreed to implement a twelve (12) hour shift schedule they will negotiate a Letter of Understanding for that specific plant and that letter will become part of the Collective Agreement.

ARTICLE 22A
HOURS OF WORK AND OVERTIME
OFFICE EMPLOYEES

22A.01 (a) All provisions of this Collective Agreement, except as amended by its article, shall apply to office employees covered by this Agreement.

(b) For the purpose of this Article, a week shall consist of seven (7)consecutive days beginning at 0001 hours Sunday morning and ending at2400 hours Saturday. This day is a twenty-four (24) hour period commencing at 0001 hours.

(c) Office employees means employees who normally perform their duties in an office setting and whose responsibilities are not normally related to plant operations or functions, and includes engineers, engineering technologists, maintenance technologists and CADD technologists/project officers.

22A.02 The scheduled work week shall be thirty-seven and one-half (37½) hours from Monday to Friday inclusive, and the scheduled work day shall be seven and one half (7 ½) consecutive hours, exclusive of a lunch period, between the hours of 7 am and 6 pm.

The parties agree to review the matter of flexible hours through joint consultation.

ARTICLE 28
PAY ADMINISTRATION

28.01 An employee is entitled to be paid for services rendered in accordance with the hourly rates of pay specified in Appendix A for the evaluation of the position to which the appointment is made. The hourly rates of pay specified in Appendix A shall be the official rates of pay.

28.02 Employees shall be paid bi-weekly with pay days being alternate Fridays in accordance with the pay system of the Employer.

28.03 Pay supplements such as overtime and shift premiums shall be issued to employees on regular pay dates with the details of pay supplement outlined on the employee's pay stub. Except in conditions beyond the Employer's control, the Employer shall issue these pay supplements within three (3) weeks of the end of the pay period in which they were earned.

28.04 When an employee is appointed to a position, the maximum rate of pay of which exceeds that of his/her former position the employee shall receive:

(a) the minimum rate for the new position where the employee presently earns less than the minimum salary established for the new position; or

(b) one increment where the employee presently earns the same as or more than the minimum but less than the maximum salary for the new position.

28.05 When an employee is appointed to a position having the same maximum rate of pay as his/her former position, his/her salary shall remain unchanged.

28.06 When an employee accepts a position having a lower maximum rate of pay than that of his/her former position, the rate of pay on appointment to that position shall be not less than the minimum salary nor more than the maximum salary for that position and shall be equal to or nearest to the rate he/she was paid in the former position.

28.07 (a) Where an employee occupies a position which is reevaluated because of a change of duties, resulting in its inclusion in a class having a higher maximum salary, the employee shall receive:

(i) the minimum rate for the new class where his/her present salary is less than the minimum salary established for the class; or

(ii) one increment where his/her salary is the same as or more than the minimum but less than the maximum salary for the new class.

(b) Where an employee occupies a position which is reevaluated resulting in its inclusion in a class having a maximum salary the same as that previously applicable to the position, the salary payable to the employee shall remain unchanged.

(c) Notwithstanding Clause 28.01:

(i) If an employee is reevaluated to a level with a lower maximum hourly rate of pay, the employee's hourly rate of pay shall not change. The Employee shall receive his/her negotiated economic increase for the employee's level as negotiated economic supplement (NES). The NES shall be calculated by multiplying the negotiated economic increase for the employee's level by the employee's currently hourly rate of pay. The NES will be paid biweekly on all hours worked by the employee.

(ii) The employee shall continue to receive the NES until such time as the maximum hourly rate for the employee's level equals or exceeds the employee's hourly rate of pay or until the employee accepts another position, whichever comes first.

(d) The effective date of a re-evaluation that results in an increase in pay shall be the date upon which the employee began to substantially perform the new or changed duties, but in any event no retroactivity shall be paid for any re-evaluation adjustment that extends beyond sixty (60) days prior to the filing of a job evaluation appeal.

28.08 Regrading

(a) When a class is regraded by the assignment of a higher pay grade, the salary of each employee in a position in that class shall be at the same step of the new salary range as it was in the old salary range, except at no time will the new salary exceed the maximum of the new range.

(b) Notwithstanding the provisions of (a) where an employee is hired at any step in the range other than the minimum due to labour market pressures and the pay range is subsequently revised upward, the employee will not receive an increase in proportion with the increase applicable to the class provided the employee has been so advised in writing at the time of the appointment.

28.09 Salary Payable to an Acting Incumbent

(a) Where an employee is required by the Employer to perform the duties of a position having a higher maximum salary than the maximum salary applicable to his/her present position and where the duties are to be performed on a continuous basis for a period of one (1) day or more, the employee shall:

(i) receive the minimum salary for the acting position where his/her present salary is less than the minimum for that position; but in no case shall receive less than one hundred and five percent (105%) of his/her present salary or

(ii) receive a salary at a rate one (1) increment higher than where his/her present salary is the same or higher than the minimum but less than the maximum for the acting position; but in no case shall receive less than one hundred and five percent (105%) of his/her present salary

(iii) subject to Clause 28.10, be entitled to a salary increment in the acting position if he/she remains in that position in excess of the normal probationary period for that position;

(iv) on return to his/her regular position be paid at the rate to which he/she would be entitled (including increments) had he/she remained in the regular position.

28.10 Employee Performance Review

(a) An employee shall have his/her job performance evaluated annually on or before his/her anniversary date.

(b) Subject to (c) below, the salary of the employee may be increased annually on his/her anniversary date by one increment within the pay grade applicable to the class to which his/her position is allocated provided the employee is not at the maximum step of the applicable pay grade to which his/her position is allocated;

(c) An employee shall be granted a salary increment when the performance of his/her duties has been satisfactory.

(d) Where a salary increment provided for under this section is withheld, the salary increment may be granted on any subsequent first day of the month up to six (6)months after the date upon which the increment has been withheld.

(e) When as a result of a formal review of an employee's job performance, a written document is placed on his/her personal file, the employee concerned shall be given an opportunity to sign the review form or document in question and to indicate that its contents have been read and explained. Upon request, the employee shall receive a copy of his/her performance evaluation review.

(f) A department head who intends to recommend withholding a pay increment from an employee, shall, at least two (2) weeks and not more than six (6) weeks before the due date of the pay increment to the employee, give the employee notice in writing

of the intention to do so. If such notice of denial is not given, the pay increment shall be implemented on the due date and shall be paid to the employee within two (2) pay periods.

28.11 Application of Anniversary Date

(a) The anniversary date of an employee who commences service or is promoted, or reevaluated, resulting in a salary increase shall be:

(i) the first day of the month if the transaction occurred prior to the sixteenth(16) day of the month; or

(ii) the first day of the month following if the transaction occurred on or after the sixteenth (16) day of the month.

(iii) the pay increase shall be effective at the beginning of the pay period that includes the anniversary date.

(b) The anniversary date of an employee who is appointed to a position or whose position is reevaluated not resulting in a salary increase shall remain unchanged.

(c) The anniversary date of an employee who has been on leave of absence without pay in excess of six (6) continuous months shall be moved to a date which provides for a total of twelve (12) months of paid employment between anniversary dates.

28.12 Retroactive Regrading or Reevaluation

Where the reevaluation of a position or the regrading of a class is to take effect retroactively, only employees on strength on the date of implementation of such change shall be entitled to receive any retroactive benefits that might accrue.

28.13 New or Revised Classes of Employment

(a) Subject to (b) below, during the term of this Agreement, the Employer shall have the right to establish and introduce new classes of employment, modify or revise the kind and level of work inherent in an existing class or regrade an existing class and establish applicable rates of pay for such classes.

(b) The Union shall receive immediate notification from the Employer of the establishment of new classes of employment and the applicable rates of pay, of the modification or revision to the kind and level of work inherent in an existing class or regrading of an existing class. Where the Union is in disagreement with the rates of pay for such classes, the Union will notify the Employer within thirty (30)days

from the date of the receipt of notification from the Employer. Should no mutual agreement be reached, the matter may be referred to an arbitrator in accordance with the Public Service Act.

28.14 Pay Transaction Priorities

Where a salary increment and any other transaction such as reevaluation, promotion, regrading, or salary revision are effective on the same date, the salary increment shall be processed first followed by the other transactions.

28.15 Where an employee has received more than his/her proper entitlement to wages and benefits or where retroactive membership dues deductions are necessary, no continuing employee shall be subject to such deductions in excess of fifteen percent (15%) of the employee's net earnings per pay period. This will not apply to recoveries for suspensions or unauthorized leaves of absence.