

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

(the “Employer”)

AND:

THE UNION OF NORTHERN WORKERS, A COMPONENT OF THE
PUBLIC SERVICES ALLIANCE OF CANADA

(the “Union”)

Failure to Consult Grievance

AWARD

ARBITRATOR: Randall J Noonan

APPEARANCES: Jeremy Walsh and Johs St. Louis, for the Employer
Michael Fisher, Kyra Nicolacopolous, Chris Parsons, for the Union

HEARING DATES: May 22, 2024

DATE OF AWARD: June 26. 2024

A. Introduction

1. This matter relates to a dispute between the parties as to whether the Employer was required to consult with and obtain the agreement of the Union prior to implementing a change in working hours for certain employees.
2. The Union's grievance arises out of the parties' 2021-23 Collective Agreement. The parties submitted an Agreed Statement of Facts ("ASOF") and several exhibits related to it. Neither side called witnesses. Both parties proceeded to argument based on the documents submitted.
3. The dispute relates to a shift schedule change for Museum Security Staff. The Union submits that Article 22.02(a) of the Collective Agreement required the Employer to consult and reach agreement with the Union before the change was established. The relevant parts of that Article are:

SHIFT WORK

22.02 Where the employees work is scheduled by the Employer to fall outside of the standard hours of work as defined in 22.01, the following process applies:

- (a) the Employer and the Union will agree before establishing new or revised shift hours for an operational unit. Such agreement will not be unreasonably withheld. The Employer will shall give employees at least 14 days notice of any change.
- (b) The daily shift hours will be no more than sixteen (16) hours.
- (c) The number of consecutive shift days of work will be no more than 7 days.
- (d) The number of consecutive days of rest between shifts shall be no less than two days.
- (e) The number of shift days in a year for which the employee is entitled to be paid is determined by dividing the standard yearly hours 1950 or 2080 by the daily shift hours.

4. I will set out the Agreed Statement of Facts in its entirety:
 1. At the time of these events, the Employer and the Union of Northern Workers (“UNW”) were subject to a Collective Agreement which was in force from 2021 to 2023.
 2. On December 2, 2021, the supervisor of the Museum Security Staff provided a proposed schedule for January 2022, to the museum security staff. The schedule had two security staff working separate shifts each day (one named “the morning shift” and the other named “the afternoon shift”). The morning shift was scheduled from 7:00 am to 3:30 pm and the afternoon shift was scheduled from 9:30 am to 6:00 pm on each weekday in January except Thursday when the afternoon shift ran from 1:00 pm to 9:30 pm. Attached as Exhibit “A” dated December 2, 2021, from Jordan Martin, Manager of Security and Maintenance to museum security staff which attaches the schedule for December and the proposed schedule for January.
 3. On December 8, 2021, a revised January schedule was sent by the Manager, Jordan Martin, to security staff. The revised schedule included new schedule times for the afternoon shift, which were 10 AM to 6:30 PM instead of 9:30 AM to 6 PM on Monday, Tuesday, Wednesday and Friday. The half hour later time difference was implemented to allow more time for cleaning staff to complete their work while security was there. The afternoon shift schedule on Thursdays remained at 1:00 PM to 9:30 PM. Attached as Exhibit “B” is the email from Jordan Martin, Manager of Security and Maintenance, to museum staff dated December 8, 2021. Attached as Exhibit “C” is an email exchange dated December 15, 2021, between Jordan Martin and Julie Ross, Assistant Director, Cultural and Heritage, and Sarah Carr-Locke, Director of Culture and Heritage.
 4. On the final schedule for January 2022, all shifts remained the same as the December 8 draft, but Thursday afternoons shifts were scheduled as 10 AM to 6:30 PM. Employees were still scheduled for the same number of hours. Attached as Exhibit “D” is the final implemented schedule.
 5. The Union became aware of the schedule change(s) on or around January 21, 2022, and wrote to the Employer at that time. Attached as Exhibit “E” is an email exchange dated January 28, 2022,

between Avery Parle, UNW service officer, and the employer representative.

6. The Union was not notified in advance of any of the changes to the scheduled shift times.
 7. The “Notice of Change of Work Schedule” form is usually provided to the Union when the Employer is seeking agreement from the Union regarding new/revised shift hours for an operational unit. For example, when a new season for a business unit or a new business unit altogether is formed, the Employer provides a copy of this completed form to the Union, accompanied by a draft copy of the proposed schedule and a letter introducing the circumstances of the new/revised schedule. A sample form for the 2020 Beach Attendance Schedule, together with the revised schedule and correspondence between the parties regarding same, is attached as Exhibit “F.” There are no records of a form respecting the shift hours of the Museum Security Staff.
 8. Further examples of proposed revisions are attached for home care staff at Thcho Community Services Agency as Exhibit “F-A” for Medical Device Processing Department staff as Exhibit “F-B,” and for instructors at Aurora College as Exhibit “F-C.”
 9. On February 4, 2022, the Union submitted a Second Level grievance which is attached as Exhibit “G.”
 10. On March 23, 2022, the Union referred the matter to arbitration. Attached as Exhibit “H” is the Referral to Arbitration.
 11. On March 24, 2022, the Employer provided a Final Level Response. Attached as Exhibit “I” is the Response and the covering email.
5. Article 22.02(a) is applicable when “employees’ work is scheduled by the Employer to fall outside of the standard hours of work as defined in 22.01.” Article 22.01 defines “standard hours” for employees working a 37.5-hour week and those working a 40-hour week.:
- 22.01 (a) Unless otherwise agreed upon by the Employer and the Union, the standard hours of work for employees who standard work week is 37.5 hours are:

- (i) The standard daily hours will be seven and one-half consecutive hours, between 08:30 and 17:00, each day from Monday to Friday.
 - (ii) The standard yearly hours will be 1950.
- (f) Unless otherwise agreed upon by the Employer and the Union, the standard hours of work for employees who standard work week is 40 hours are:
 - (i) the standard daily hours will be eight consecutive hours, between 08:00 and 17:00, each day from Monday to Friday.
 - (j) The standard yearly hours will be 2080.
- 6. It is common ground between the parties that the Museum Security Staff work a schedule that falls outside the standard hours of work and is covered by Article 22.02, Shift Work.
- 7. The exhibits attached to the ASOF show the schedules from December 2021 and January 2022 for Museum Security Staff. The email referred to as Exhibit "A" is from Jordan Martin to the Museum Security Staff. The first sentence of that email reads:

Please find attached a copy of the January hours for the afternoon shift. Please note the change in regular hours for the afternoon shift. This is to accommodate the cleaners, they have asked for more time in the evening to clean.

(emphasis added)
- 8. The impetus for the change was set out in an email from Julie Ross to Sarah Carr-Locke on December 8, 2021:

Hi Sarah.

Jordan has consulted with the cleaners and our HR CSM, Belinda, and is proposing we change the second guards shift hours from Monday to Friday from the current 9:30 AM to 6:00 PM to 10:00 AM to 6:30 PM. The weekend/holiday hours would remain the same. Once we open Thursday nights, I am unsure what the change would be or if the cleaners would clean while we are open to visitors (which could be problematic, but we have not crossed that bridge yet). Do you have any concerns with this schedule change?

9. Ms. Carr-Locke approved the change and it was subsequently implemented. It is apparent from the exchange that there had been some level of consultation with the cleaners but no apparent consultation with the security staff nor, as admitted in the ASOF, with the Union.

10. On January 21, 2022, Avery Perle, Service Officer for the Union, wrote to the Employer:

I have been advised the schedule was changed at the Museum without consulting the Union.

Could you please look into this?

11. John St. Louis responded on behalf of the Employer on January 28, 2022:

The start times of weekday afternoon shifts were adjusted (employees were provided two-weeks' notice of this), but the shift hours were not revised. This appears congruent with the Collective Agreement.

12. Mr. Perle indicated that the Union did not agree that the change was congruent with the Collective Agreement:

“Adjusting” the shift start and finish times permanently as the employer has is a revision. “Adjust” and Revise are synonymous and not antithetical.

In addition to the above the Collective Agreement specifically speaks to shift hours and not just shift schedule. As you know all words in the Collective Agreement have meaning. What the employer has done constitutes a revision of shift hours for an operational unit without consulting the union.

13. Mr. St. John then set out the Employer's view of the matter:

The union's interpretation of “shift hours” appears different from the employer's. I cannot find “shift schedules” in article 22.02. Please see definition of “shift hours” in 22.02 (e).

14. That exchange highlights the dispute between the parties and the issue that must be determined in this arbitration award. Does a change in the time that shift hours are performed constitute “establishing new or revised shift hours” for the purposes of Article 22.02?

B. The Union's Position

15. The Union acknowledges that the change in the shift times for the Museum Security Staff was a small change amounting to advancing the shift start and finish times by one-half hour for four days per week. However, the Union submits that the extent of the change is not relevant insofar as, in its view, Article 22.02 requires consultation and agreement to such changes regardless of the magnitude of the change.

16. The Union argues that a plain reading of the Article indicates that agreement is required for the establishment or revision of;

- daily work hours;
- start/end times;
- days of the week to be worked; and
- yearly hours, that is, 1950 or 2080 hours per year.

17. The Union argues that the Employer's interpretation of the Article requires a "reading in" of a discretion that is not in the Collective Agreement.

18. The Union submits that if the parties had intended to exempt start or finish times of shifts from the requirement for agreement under Article 22.02, it would have been easy to indicate that. The Union points to Appendix A7 of the Collective Agreement, and in particular, A7.03 which deals with hours of work for trades employees. In that Article, the Employer is specifically given the authority to vary hours of work upon providing notice:

A7.03 Hours of work shall be scheduled so that trades employees listed in Clause A7.01 above:

(a) on a weekly basis work forty (40) hours and five (5) days per week, Monday to Friday inclusive.

(b) On a daily basis, work eight (8) hours per day exclusive of not less than one-half (1/2) hour meal period. Normally the hours of work shall be between the hours of 0800 and 1700. These hours may be varied by the Employer for a classification or classifications of employees in a division or section, or for employees at a particular geographic location provided the employees receive adequate notice of the variation, and that the variation is not done on an individual employee basis for the purpose of avoiding payment of overtime to that particular employee...

(emphasis added)

19. Article A7.03 indicates that the parties clearly spelled out an Employer right to change start and finish times without Union agreement. There is no similar language in relation to shift work in Article 22.02. The Union submits that the logical conclusion is that there is no similar Employer right in relation to start and finish times for shift work.
20. The Union argues that the meaning of “shift hours” in Article 22.02(a) should be interpreted as broadly as “standard hours” in 22.01. Article 22.01 includes more than just the number of hours in a shift, but also the start and finish times, the maximum number of consecutive hours, and the yearly hours. Those same things should be included in any interpretation of “shift hours” under Article 22.02.
21. In summary of the Union’s position, a change in the start/finish times for a shift for employees who are scheduled outside of standard hours of work requires consultation and agreement of the Union before it can be implemented. The Employer did not consult or obtain agreement, therefore it has violated the Collective Agreement.
22. As a remedy, the Union seeks a declaration that the Employer has violated Article 22.02(a), and an order requiring the Employer to cease violating the Collective Agreement, and that this arbitration board remains seized in relation to the implementation of the award. The Union is not seeking damages but has indicated that it could seek damages for similar breaches in the future.
23. The Union cites the following authorities in support of its argument: *Pacific Press v. G.C.I.U., Local 25-C*, [1995] B.C.C.A.A.A. No. 637, at para 27; *Southern Railway of British Columbia v. C. U. P. E., Local 7000*, [2010] B.C.C.A.A.A. No. 138 (Germaine), at paras. 15, 16, 17, and 20; *DHL Express (Canada) Ltd. v. CAW-Canada, Local 4215* (2004), 124 L.A.C. (4th) 271 (Hamilton), at para 51; *Windsor Police Services Board and WPA (12-Hour Shift Change)* (2020), 322 L.A.C. (4th) 167 (Knopf); *Caressant Care (Rest Haven Nursing Home) and London and District Service Workers’ Union, Local 220*, 1988 CarswellOnt 5350 (Joliffe), at para. 20; *Government of the Northwest Territories and Public Service Alliance of Canada (Union of Northern Workers)*, (Holden) (unreported) (January 7, 2019); and *The Minister of Human Resources (Government of the Northwest Territories) and Union of Northern Workers*, (Joliffe) (unreported) (June 23, 2020).

C. The Employer’s Position

24. The Employer argues that the term “shift hours” in Article 22.02(a) should be understood to mean the number of hours in a shift as opposed to what the start and finish times of the shift are.
25. The Employer points out that “shift hours” appears six times in the Collective Agreement and that in each of those references it relates to the number of hours, except in Article

22.06 which deals with the Employer's obligation to provide transportation between home and the workplace for employees whose scheduled hours start or finish between midnight and 06:00. The Employer did not specify the other references.

26. The Employer indicates that it has some 5000 employees and it needs to be able to be flexible in its scheduling. It does not want to limit itself unnecessarily from changing shift times. The Employer admits that its discretion to do so is not unlimited.
27. The Employer submits that there is an inherent uncertainty in being a shift worker. It argues that, in this case, the number of hours worked has not changed, the days of the week to be worked has not changed, and the yearly number of hours worked has not been impacted.
28. In short, the Employer argues that the Collective Agreement does not indicate that agreement is required before a change of start or finish times of a shift can be implemented.
29. The Employer submits that if I should find that there has been a breach of the Collective Agreement, a declaration to that effect would be an appropriate remedy. The Employer also indicates that if I find there has been a breach, it will provide a shift change form to the Union for the museum security staff retroactively.
30. In reply to my question, the Employer indicated that shift start and finish time changes, such as the one in this case, are not common and that there hasn't been another since January 2022.
31. The Employer differentiated the situation with the Museum Security Staff from that of Beach Workers who had their work shifts changed. The Beach Workers had their rotation changed from 7 days on followed by 3 days off, to 7 days on followed by 4 days off. Thus, the Employer argues, it was appropriate to provide a shift change form to the Union in relation to the Beach Workers, but not to the Museum Security Staff who just had a change in the start and finish times of their shifts.
32. In support of its position, the Employer cites the eighth point set out in paragraph 27 of *Pacific Press (supra)*:
 8. Where an agreement uses different words one presumes that the parties intended different meanings.
33. The Employer also relied upon *Canadian Labour Arbitration*, Brown and Beatty, s. 5:3000:

Apart from directing individuals to work a particular classification or assigning different functions to various classifications, management

may also affect the work performed by its employees by the decisions it makes with respect to the hours and shifts to which they are assigned. In this regard, where management, pursuant to a broad mandate to “direct its working forces”, determines to alter its schedule of production and consequently the work hours, shifts and schedules of its employees, arbitrators have generally deferred to that prerogative, unless there is clear language in the agreement circumscribing it, unless, as a result of previous practice, it has induced the union to forbear from enforcing a contractual right, or unless there are legislative provisions bearing on the alteration. Again, however, it has been stipulated that this prerogative to alter working schedules must be exercised reasonably, in good faith, and without discrimination.

34. In reply, the Union argues that the Employer does not enjoy the prerogative suggested in the above citation when, as in this case, there is a specific provision in the Collective Agreement which limits employer discretion.

D. Analysis

35. Article 22.02(a) requires agreement of the Employer and Union before establishing or revising shift hours for an operational unit. There was no dispute between the parties that the Museum Security Staff constitutes “an operational unit.”
36. The issue is whether a change in the start and end times of a shift for an operational unit constitutes a revision of shift hours for that unit, or whether, as submitted by the Employer, it does not do so because it does not change the number of hours worked in the shift.
37. I agree with the Union that it is useful to examine the language of Article 22.01 in relation to “standard” hours of work to assist in determining the meaning of “shift hours” in 22.02(a). Both Articles relate to hours of work.
38. Article 22.01(a), set out above, specifies that the standard hours of work for employees on a 37.5-hour work week will be seven and one-half consecutive hours, between 08:30 and 17:00 each day from Monday to Friday. The parties have agreed in that article that hours of work relates not only to the number of hours worked, but also to the start and finish times of those hours.
39. Similarly, Article 22.01(b), which deals with employees working a 40-hour work week, specifies that the standard hours of work will be eight consecutive hours between 08:00 and 17:00 each day from Monday to Friday. Again, the referenced hours of work includes not only the number of hours, but also the start and finish times of the shifts.

40. In short, then, the parties have specifically agreed that, with respect to employees who work standard hours, their agreed-upon hours of work includes the number of hours and the start and finish times of their shifts.
41. Article 22.02 deals with Shift Work, that is, work where the employee's work schedule falls outside the hours set out in Article 22.01. Unlike Article 22.01, 22.02 does not specify start and end times for shift work. It does specify that daily shifts will be no longer than 16 hours, that the number of consecutive days of work will be no more than 7 days, that the number of consecutive days of rest between shifts shall be no less than 2 days, and that the number of shift days in a year for which an employee is entitled to be paid is the number of their yearly hours divide by "daily shift hours."
42. In my view, it makes sense that start and finish times for shift workers would not be specified in Article 22.02 because the employees in the shift work category could be assigned to a variety of start and finish times depending on the requirements of the particular job.
43. That does not mean, however, that the Employer is unrestrained in establishing or changing shift hours for shift employees. For each operational unit, the Union's agreement is required to either establish or revise shift hours.
44. Does the concept of shift hours as set out in Article 22.02 mean something different from the concept of standard hours used in Article 22.01? I have determined that it does not.
45. What Article 22.01 shows is that, through the collective bargaining process, not only are the daily number of hours, yearly hours, and number of consecutive hours to be worked matters subject to agreement, but so are the start and end times of shifts.
46. Although the start and finish times for shift work are not specified, I find that whatever those times are is, similarly, a matter for negotiation between the parties. Article 22.02(a) requires that shift hours must be agreed upon before they are established. In other words, as start and finish times are not specified for shift work as they are for standard shift work in Article 22.01, they are nonetheless subject to agreement when they are first set up. After that, there must be agreement between the parties before they are revised. I note that similarly to standard hours of work in Article 22.01, the yearly hours and the number of consecutive hours of work for shift work are also set out in the Collective Agreement and are thus matters for negotiation.
47. In *Southern Railway*, Arbitrator Germaine had this to say about how different interpretations of a collective agreement provision should be approached:
15. When the two approaches are examined closely, however, the differences between them assume a distinct esoteric quality. The award in *Imperial Oil* adopted this statement of the modern approach:

In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.

48. The contextual, harmonious reading of Articles 22.01 and 22.02 results in my determination that they both deal with the same subject matter which includes the start and end times of shifts. They just do so in relation to two different groups of employees.
49. A similar issue to that in the instant case was dealt with in *Windsor Police Services* in which there were two appendices of collective agreements dealing with hours of work for two different groups of employees. At paras. 30-34:

30. While there is somewhat different language in the Unit B Civilian contract, a similar conclusion must be reached. Unit B Article 05 – 05 mandates that Schedule ‘B’ sets out the hours for those working the compressed work week. Schedule ‘B’ in that contract creates 10-10-8 hour shifts. However, the contract also contains Appendix 12 that says: “the schedule contained herein shall apply to members of the Unit ‘B’ agreement working 12-hour shifts”. Again, those words signal the intent of the parties to apply the MOU’s shift schedule specifically to the members working the 12-hour shifts. The E-911 Dispatch personnel were working 12-hour shifts in concert with the Uniform Patrol units. Therefore, the only way to give effect to Appendix 12 is to respect the words that prescribe the schedule contained in the MOU “shall apply to members of the Unit ‘B’ agreement working 12-hour shifts”. Again, the finalized contract incorporated the 12-hour shift schedule for the affected members. This interpretation is consistent with the rules of interpretation that require that all words must be given meaning and that specific language must prevail over any general language.

31. To dispense any doubt about the interpretation of the application of appendices eight and 12 of the two collective agreements, there are further reasons for these conclusions. “Hours of Work” are contractual items for these parties. There is an “Hours of Work” article in both contracts. These provisions are complex and detailed. They reflect the reality that hours of work are important to both parties and are established through collective bargaining. Nothing in the Collective Agreements suggest that the Police Services Board has retained a broad or unfettered management right to unilaterally prescribe hours of work. Instead, the ‘hours of work’ articles in each contract codify what the parties have agreed upon. As Arbitrator Palmer decided in *U.S.W.A., Local 6958 v. Pedlar People Ltd., supra*, an hours of work provision

in a collective agreement creates “contractually settled” times for work to start and finish. When the language in a contract sets hours of work, it means that the hours can only be changed by mutual agreement. In the case at hand, the parties have replaced previous schedules with a 12-hour shift schedule. That amounts to a commitment that only can be terminated or changed “if both parties agree”.

32. Further, in the *Pedlar* situation, the collective agreement set out that the night shift hours would be “as mutually agreed”. Those shift hours were agreed upon and operated in accordance with that arrangement for years. When the company announced the change to the hours, the union objected. Arbitrator Palmer concluded, “The words ‘mutually agreed’ clearly mean that before any... shifts are scheduled by the company, their hours, at least, must be acceptable to the Union”....

33. Respected arbitrators have rejected the suggestion that mutually agreed-upon hours of work or schedules can be changed by an employer when it no longer wishes for them to continue. In *Alberni School District No. 70 v. C.U.P.E., Local 727, supra*, Arbitrator Christie held that hours of work established in a collective agreement preclude any changes without the union’s consent. He concluded that an employer’s right to alter a working schedule is conditional upon agreement being secured with the union and that a failure to obtain the union’s consent renders any unilateral alteration improper. To emphasize this point, he added: “Mutual agreement contemplates agreement before change occurs, not after...[p. 137].

34. Hours of work are important terms of employment for members of the bargaining unit and for employers. They are critical aspects of collective bargaining and often the subjects of intense discussion. It is possible for contractual language to retain hours of work as a matter of management rights. That has not been the case here, nor has it been asserted by the Police Services Board.

50. I agree with those comments and find them to be applicable in this case. The parties have made hours of work, including start and end times, a matter of negotiation requiring agreement. That required agreement was not sought or obtained by the Employer prior to implementing its changed schedule for Museum Security Staff. I agree with the Union that the fact that the schedule change was a relatively small one does not diminish the need for the Union’s agreement.

51. I am bolstered in this interpretation by the fact that the parties have, in Article A7.03 of Appendix “A” to their agreement, clearly indicated that the Employer does have the authority to change the start and finish times of trades employees. That article indicates

that where the parties have agreed that the Employer may unilaterally change the start and finish times of a shift, they specifically set that out in the Collective Agreement. They have not set out such a specific clause in relation to shift work. That lends support to the proposition that the Employer does not have the same flexibility in relation to changing the start and finish times for shift work as it does for trades work.

52. A key Employer argument is that when employers determine to alter the schedule of production and consequently the work hours, shifts and schedules of its employees, arbitrators have generally deferred to that prerogative, unless there is clear language in the agreement circumscribing it. That may be so, but I find that in this case there is clear language in the agreement circumscribing the right of the Employer to unilaterally make such changes.
53. For these reasons, I have determined and declare that the Employer has violated the Collective Agreement when it changed the afternoon start and end times for Museum Security Staff. The Union's grievance is upheld.
54. The Employer has also committed to providing a Notice of Change of Work Schedule form to the Union retroactively for the Museum Security Staff change. I order it to do so.
55. The Union has asked that I remain seized in relation to any implementation issues related to this award. Although I do not foresee any such issues arising, I find that request to be appropriate and I will retain jurisdiction in relation to the interpretation or implementation of this award.

DATED and effective on June 26, 2024.



RANDALL J. NOONAN
Arbitrator