IN THE MATTER OF AN ARBITRATION PURSUANT TO SECTION 104 OF THE LABOUR RELATIONS CODE OF BRITISH COLUMBIA

BETWEEN

B & R DRUGS (SHOPPERS DRUG MART STORE # 273)
(The Employer)

AND

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1518
(The Union)

CAAB Case No. 66524/14R

Policy Grievance – Employer using 4 hour parallel shifts rather than maximizing hours of work by daily seniority to 8 hour shifts

Arbitrator:	Ronald S. Keras
Counsel for the Employer:	Mr. Peter M. Archibald, Q.C.
Counsel for the Union:	Mr. Chris Buchanan
Hearing:	April 29, 30 & May 20, 2014
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I

The arbitration board was constituted by appointment from the Director of the Collective Agreement Arbitration Bureau pursuant to Section 104 of the *BC Labour Relations Code*.

The policy grievance was brought by the Union and read in part:

> The Employer is using four (4) hour parallel shifts rather than maximizing hours of work by daily seniority to eight (8) hour shifts.
>
> We are grieving that this is a violation of the seniority provision contained in section 13 of the Collective Agreement (CBA) and the CBA as a whole.
>
> In addition, it is our view that the Employer is exercising their management rights in bad faith which is a violation of section 17 of the CBA.
>
> As remedy, we are seeking:
>
> 1. The Employer cease and desist in improperly scheduling four (4) hour parallel shifts and properly maximize hours of work by daily seniority to eight (8) hour shifts.
> 2. Those senior employees who did not receive full eight (8) hour shifts are compensated retroactively, with full redress.
> 3. Any other remedy the Union would seek at arbitration which a board of arbitration would deem just and appropriate.

The Employer assertion was that there was no violation of the Collective Agreement and that the Employer has the right, pursuant to the terms of the Collective Agreement, to set schedules to meet the needs of the business.

The Collective Agreement's seniority provision in part reads:

Section 13 – SENIORITY

....

(e) Reduction and Increase of Hours

Preference in available hours of work in a store shall be given to senior employees, providing the employee has the ability to perform the work.

...

(g) Reduction of Hours

The Employer shall not reduce the weekly hours of work of an employee for the purpose of replacing such hours with another employee at a lower rate of pay.

The management rights provision of the Collective Agreement is found at Section 17 and reads as follows:

Section 17 – UNION'S RECGNITION OF MANAGMENTS RIGHTS

The union agrees that the Employer has the sole right to plan, direct and control store operations, direct the working force, discharge employees for just cause and control any other matter requiring judgment as to the competency of employees.

The Parties agree that the foregoing enumeration of management's rights shall not be deemed to exclude other recognized functions of management not specifically covered by this Agreement. The Employer, therefore, retains all rights not otherwise covered in this Agreement.

The exercise of the foregoing rights shall in no way alter any of the provisions of this Agreement.

II

Union witness Mr. Dave Archibald, Union Servicing Representative since 1998, testified that the Union had about 20,000 members in retail and that Store 273 had forty (40) employees in the Bargaining unit in classifications of Clerks, Cosmetics and Pharmacy.

Mr. Archibald testified that the store changed scheduling from some eight (8) hour shifts to two (2) four (4) hour shifts, which he described as parallel shifts that the Union viewed as contrary to Section 13 of the Collective Agreement as it had the effect of reducing hours for senior employees.

In cross-examination, Mr. Archibald agreed that employees may receive additional hours beyond the schedule and that such hours are offered by seniority. He confirmed that the minimum shift hours are four (4) hours. Mr. Archibald testified to a January 20, 2014 meeting with management concerning hours assigned out of seniority, which resulted in compensation for one employee. He also advised that certain grievances were withdrawn. Mr. Archibald agreed that the Employer has the right to schedule total store hours, for example 500 hours for the week.

Union witness and Shop Steward, Ms. Ruth Ralston, has worked at the White Rock store for thirty-four (34) years and has worked in all departments of the store. She testified that the store owner, Mr. Wong, has been at the store about eight (8) years. Ms. Ralston described the Wednesday / Friday truck delivery in some detail. She said that there is always something for Merchandizers to do on an eight (8) hour shift and that there is lots of stock left over the day after delivery. Ms. Ralston

advised that as Shop Steward she is always looking at hours, as people are always asking about hours. Ms. Ralston testified that there was at least one discussion with Jas Mahal, Front Store Manager, in which he advised he felt sorry for junior employee and single Mom Julie and wanted to give her more hours. Ms. Ralston testified that stock does not get out faster as a result of parallel shifts.

In cross-examination, Ms. Ralston advised that most of her time was spent doing postal work but that she still does merchandizing. She agreed that Thursdays and Saturdays are big shopping days in the store. When asked about the shifts she said "I know what I see – four (4) hour shifts don't make any difference".

Union witness, Ms. Lori Rushton, has worked for fifteen (15) years at the White Rock store and has worked for ten (10) years as a Merchandizer. Ms. Rushton testified that she believes four (4) hour shifts are no good, that they can't do what they are supposed to do and that eight (8) hour shifts are better. Ms. Rushton works every Saturday.

In cross-examination, Ms. Rushton described the work she does on Saturdays. She advised that Merchandizers help to sort products. She testified that she did not agree that there are less "holes" as a result of four (4) hour shifts. She said there is no improvement.

In redirect, Ms. Rushton testified that the ends (of the aisles) are not better with the four (4) hour shifts and that her observations are based on the whole week.

Employer witness, Mr. Billie Wong, franchise owner since 2006 testified that the store moved in January to a store with greater square footage. He said he could not describe the store better than Ruth. He advised that each department does its own scheduling. Mr. Wong advised that Mahal developed a new schedule in January and that he reviewed it and said 'let's try it' as he didn't see anything wrong with the schedule. Mr. Wong testified that four people working 5pm to 9pm on Wednesday putting out stock was better than two people putting out stock. He said he walks the store every day to see if it looks good for customers. He advised that the store is improving under the new schedule. He advised that four (4) hour employees sometimes stay longer or come in early, agreeing with Lori. Mr. Wong testified that Ruth and Lori were wrong, as he did see improvement.

In cross-examination, Mr. Wong testified that he understood the issue and that he had the right to decide total hours and that he decides the hours in each department. Mr. Wong advised that, of the twenty-three (23) front end employees, six (6) to eight (8) are full time and the part-timers hours fluctuate up and down. Mr. Wong testified that the stores busy time is late October through to the first or second week of January and that more than one quarter of the business is in November and December. Mr. Wong agreed that management cannot schedule junior staff more hours than a senior person. Mr. Wong did not agree that employee Sierra going from 32 hours to 20 hours was a significant change. In redirect, Mr. Wong testified that there are Merchandizers on shift before the 5pm to 9pm shift.

Employer witness, Mr. Jas Mahal, Front Store Manager since May 1, 2013, had worked at the Langley store and at Walmart for nine (9) years, testified that he had discussed scheduling with Mr. Wong throughout 2013. He said that there were

significant "holes" (empty shelving) during the old schedule. Mr. Mahal testified that with the new schedule totes were 100% complete by Wednesday night and therefore fully accessible on Thursday (Senior's Day), which also reduced customer complaints.

Mr. Mahal advised that fourteen (14) to twenty-two (22) skids of product come in on Wednesday and that often Merchandizers are asked to help sort. Mr. Mahal testified that prior to the schedule change there were up to 750 holes of between 9,000 to 12,000 products and that since the change the holes are as low as 350.

In cross-examination, Mr. Mahal testified that he knows where all employees are, that he has a good understanding of the business, that he is responsible for all store functions and that he is involved in all aspects of the business. He advised that prior to the schedule change processes were not as productive as they should have been in a competitive environment. Mr. Mahal did not agree that junior employees get more hours under the new schedule and that the decision to go to a new schedule was based solely on the needs of the business. Mr. Mahal confirmed that under the previous schedule three Merchandizers worked eight (8) hour shifts with shifts beginning at 1:30 and at 3:30.

III

The Union argued that by parallel shifting the Employer has undermined the seniority rights of employees to obtain hours of work by seniority and that it impairs the ability of employees to progress through the wage scale as progression

is based on hours worked. The Union described Section 13(e) and other provisions as fettering management rights of the Employer.

The Union set out the basic principles of the interpretive exercise by citing *College of New Caledonia* [2012] B.C.C.A.A.A. No. 22 in which Arbitrator Mark Brown cited Arbitrator Bird's decision in *Pacific Press v. Graphic Communications International Union, Local 25-C*, [1995] B.C.C.A.A.A. No. 637, Award n. X-187/95, (R. B. Bird, Q.C.) November 14, 1995, in which Arbitrator Bird set out what he described as "rules of interpretation which is the task at hand". Arbitrator Bird's rules of interpretation are as follows:

> The first major issue I address is one of interpretation. I reaffirm my adherence to the rules of interpretation which I set out in White Spot. I summarize as follows:
>
> 1. The object of interpretation is to discover the mutual intention of the parties.
> 2. The primary resource for an interpretation is the collective agreement.
> 3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
> 4. Extrinsic evidence may clarify but not contradict a collective agreement.
> 5. A very important promise is likely to be clearly and unequivocally expressed.
> 6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
> 7. All clauses and words in a collective agreement should be given meaning, if possible.
> 8. Where an agreement uses different words one presumes that the parties intended different meanings.
> 9. Ordinarily words in a collective agreement should be given their plain meaning.

10. Parties are presumed to know about relevant jurisprudence.

The Union assertion was that changes in common law over the last two decades have changed the applicability of certain presumptions, in particular, point 5, which the Union says has been eliminated. The Union's point was that neither Party has an onus of proof and that the meaning of the provisions must be discerned from the language itself. In support the Union cited *Catalyst Paper v. C.E.P. Local 1123,* (John B. Hall), (May3, 2012) (unreported).

In support of its argument concerning the importance of seniority rights such as Section 13(e) and 13(g) the Union cited *United Electrical Workers, Local 512, and Tung-Sol of Canada Ltd.,* 15 L.A.C. 161 (R.W. Reville, C.C.J., P.Siren, T.S. Scott), (July 7, 1964) . At page 162 the panel commented as follows:

> Seniority is one of the most important and far reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process.

The Union argued that under Section 13 the Employer is afforded no discretion in assigning hours and that the purpose of Section 13 is to ensure employees are able to maximize hours and be able to work full time hours (more than thirty-two (32) hours a week). The Union described what the Employer's scheduling is doing is taking full time hours from some employees and transferring hours to junior employees, who are undoubtedly working at a lower wage rate.

The Union's alternate argument is that the Employer would have to establish that its actions were reasonable and in good faith and that the dramatic shift change resulted in more efficiency and that the Employer had an evidentiary onus to

establish that the change had an actual impact. The Union argued that its witnesses were compelling in their testimony that the shift change did not produce any improvements in the stores operation.

The Union sought a cease and desist order with respect to parallel shifts and that they be declared illegal.

The Unions case included reference to the following additional case law:

Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43, [1987] 28 L.A.C. (3d) 230, (G.G. Brent, M. Tate and H. Beresford, Q.C.), May 29, 1987

Beachcomber Hot Tubs Inc. and Teamsters Local 31 (Asghar), [2008] 176 L.A.C. (4th) 1, (J.E. Dorsey, Q.C.) August 5, 2008

United Electrical Workers, Local 512 and Tung-sol of Canada Ltd., [1964] 21-15 L.A.C. 161, (R.W. Reville, C.C.J., P.Siren, (T.S. Scott) July 7, 1964

Construction & General Workers' Union, Local 92 v. Voice Construction Ltd. [2004] Court File No. 29547, 238 D.L.R. (4th) 217; (McLachlin C.J.C., Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish J.J.), April 8, 2004

IKEA Canada Limited Partnership v. Teamsters Local Union No. 213 (Part-time Co-Workers Grievance), [2012] B.C.C.A.A.A. No. 118, Award N. A-089/12 (J. Kinzie), July 30, 2012

Simon Fraser University v. Association of University and College Employees, Local 2 (Borzillo Grievance), [1988] B.C.C.A.A.A. No. 402, Award No. A-215/88, (Allan E. Black), July 21, 1988

Intercon Security Ltd. v. Hospital Employees' Union (Kailly Grievance), [2011] B.C.C.A.A.A. No. 24, No. X-007/11, (J. Steeves), January 8, 2011

Simon Fraser University v. Association of University and College Employees, Local 6, Teaching Support Staff Union, [1983] B.C.L.R.B.D. No: 169, No. 169/83 (Appeal of No. L88/82), (Allen E. Black, Vice-Chair, H.L. Fritz, Doris Hanson), July 21, 1988.

The Employer began its argument by acknowledging that the Union had abandoned its bad faith argument. The Employer described the Union's two lay witnesses; one is a Shop Steward, as having an interest and argued that Mr. Mahal's evidence should be preferred. Mr. Mahal's job was to try and improve mechanizing, he concluded that four (4) hour shifts allowed better organizing of the back room and that talkers were out, which was not achieved under the previous schedule, the ends were better, there were less holes and Mr. Mahal was not contradicted. The Employer suggested a review of Mahal's evidence to the *Faryna Chorny* standard, that 'things were better' would be born out.

In terms of onus the Employer argued that he who asserts has the onus of proving his assertion, which in this case is the Union. With respect to management rights, the direction of the work force is the prerogative of management unless expressly taken away and the policy grievance is a narrow issue – does the Agreement

require the Employer to schedule eight (8) hour shifts? The Employer commented that Merchandizers are all doing the same kind of work and that Section 13(e) does not oblige the Employer to schedule eight (8) hour shifts.

The Employer's review of evidence was that the schedule change intended to address stocking of shelves, Senior's Day, talkers for Saturday, sales, and stock room cleanup. Both Mr. Mahal and Mr. Wong testified that there were improvements to the ends and to the number of holes and that evidence was not contradicted. The Employer said that management has the right to schedule and make business decisions and that Dave Archibald agreed that a four (4) hour shift was not a violation of the Collective Agreement. The Employer cited *Voice Construction Ltd. v Construction & General Workers' Union, Local 92*, [2004] 2004 SCC 23, (McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBal, Deschamps, and Fish J.J.), April 8, 2004. The Court, at paragraph 32, commented as follows:

> Generally management has the residual right to do as it sees fit in the conduct of its business. This right is subject to any express term of a collective agreement or human rights and other employment-related statutes providing otherwise: ...

The Employers case also included reference to the following case law:

U.F.C.W., Local 175 v. Pinty's Delicious Foods Inc. [2012] 219 L.A.C. (4th) 197, (Nimal Dissanayake), April 30, 2012.

Canada Tungsten Mining Corp. v. United Steelworkers of America, Local 953 (Scott Grievance) [1985] C.L.A.D. No. 17, (H.A. Hope), March 14, 1985.

Wire Rope Industries Ltd. and United Steelworkers, Local 3910, [1982] 4 L.A.C. (3d) 323, (M. I. Chertkow, J. Edwards, D. Wilkins), April 28, 1982.

British Columbia Railway Co. v. Canadian Union of Transportation Employees, Local #6 (Kampe Grievance) [1984] B.C.C.A.A.A. No. 407, (H.A. Hope), April 11, 1984.

Kimco Pharmacy Ltd. and U.F.C.W., Local 1518, [1997] 1997 CLB 12619, (R.K. McDonald), July 23, 1997.

Jiwa Drugs Ltd. v United Food and Commercial Workers International Union Local 1518, (Ali Grievance), [2000] B.C.C.A.A.A. No. 169, (S. Lanyon), March 3, 2000.

Kimco Pharmacy Ltd. and U.F.C.W., Local 1518, [1997] 1997 CLB 12619, (R.K. McDonald), July 23, 1997, on appeal to the BC Labour Relations Board, decided under BCLRB No. B319/98, John B. Hall, Vice-Chair, writing for the Board, August 4, 1998.

Hamilton Public Library and CUPE, Local 932 [2011-12], 238 L.A.C. (4th) 116, (George T. Surdykowski), November 4, 2013.

Surrey School District No. 35 v. Canadian Union of Public Employees Local 728 (Chahal Grievances) [2002] 109 L.A.C. (4th) 345, (M. Jackson) August 9, 2002.

IV

Section 17 of the Collective Agreement is a significant management rights clause as it gives the Employer the "sole right" to many aspects of the decision making with respect to the business, including "all rights not otherwise covered in this Agreement". The exercise of such rights however shall "in no way alter any of the provisions of this Agreement".

The Union argued essentially that the parallel shifts altered the employees' seniority rights as described in Section 13(e) and 13(g) and that Section 13 was a clear fettering of Management's Section 17 rights.

In terms of onus, the Employer stated he who asserts has the onus to prove his assertion. In *Wire Rope* (supra) the panel commented at paragraph 20 as follows:

> ... We ought not to impose upon an employer any restrictions on its right to organize and reorganize its work-force unless it clearly and unequivocally bargained so to do. ...

In Re: *Catalyst Paper* (supra) beginning at page 14, Arbitrator Hall quoted a passage from *Noranda Mines*:

...

> Of course the fact that the employer did not intend the result alleged by the union does not defeat the union interpretation if the language agreed upon dictates that result. I simply observe that, in my preliminary consideration of the language, I find it inherently unlikely that the employer would express an intention to confer substantial monetary benefits on employees

> in language from which that intention emerges obliquely or by inference.
>
> Whether I take a plain and ordinary meaning approach or a purposive approach to the interpretation of the Collective Agreement, I am not persuaded by the Union's argument.

At page 16 Arbitrator Hall commented:

> The notion that a party has a special onus or burden to establish its interpretation of a collective agreement has been overtaken by subsequent authorities in this Province. Most (and perhaps all) of the leading arbitrators who once espoused that approach have expressly charted a different course. See, for instance, *Pope and Talbot -and-CEP, Local 1092*, [2006] BCCAAA No. 224 (Hope), at paragraph 92. The current state of the law is exemplified by *The Board of Education of School District No. 36 (Surrey)/BCPSEA -and-BCTF/Surrey Teachers' Association* (March 6, 2009), unreported (Korbin):
>
> > With respect to the Employer's reliance on the *Wire Rope and Noranda* line of cases, arbitrators have not, in recent history, strictly adhered to the notion that the Union bears any additional onus or burden in cases such as this. It is my view that as this is a matter of interpretation, my role is to find the mutual intention of the parties within the competing interpretations put forward by the parties. In such an analysis, neither party bears any special onus of proof. (p. 13)

With respect to *Catalyst Paper* (supra), the Employer pointed out that the case was about severance pay and retained its assertion that he who asserts must prove their assertion. The Union took the position that *Catalyst Paper* stands for the proposition that once the facts are proven no party has an onus on interpretation. In the instant case the facts concerning the change in scheduled hours are not in

dispute. The dispute is whether the parallel shifts violate Section 13(e) or are they an appropriate exercise of management rights as outlined in Section 17. As Arbitrator Bird stated "The object of interpretation is to discover the mutual intention of the parties". That is the interpretive exercise for this Board.

The Employer's response to *Catalyst Paper* included reference to *Wire Rope* (supra) and the argument that *Catalyst Paper,* in B.C. law, provides some limitation, however argued that such is not the case here as the Employer has the right to manage the work force. *Wire Rope* (supra) beginning at para19 reads:

> 19 We are of the view that the union carries the same kind of burden as it would have when it attempts to assert a right to a monetary benefit and to impose an obligation on an employer to pay the same. When a union asserts that a provision in the collective agreement has taken away a fundamental management right to organize and reorganize its work-force for bona fide business reasons, the same kind of precise language must be found as arbitrators have held is necessary when a union attempts to impose an obligation on an employer to pay a benefit.
>
> 20 We are of the view that arbitrators ought not to impose a monetary obligation on an employer that he clearly did not bargain to pay. We believe that same principle is applicable in the kind of situation we are faced with in this dispute. We ought not to impose upon an employer any restrictions on its right to organize and reorganize its work-force unless it clearly and unequivocally bargained so to do. It is obvious in the case before us that the ramifications of the position taken by the union go further than this particular grievance. If it were to succeed, it would, for all intents and purposes, restrict the company from reorganizing its work-force by barring temporary transfers to meet its production needs. Such a far-reaching proposition requires, in our view, the same kind of clear and unequivocal language as one would expect to find in a collective agreement where a monetary obligation is imposed upon an employer.

> We do not find that art. 5.13 of this collective agreement contains such clear, expressed and unequivocal language which would support the union's position in this case. Because of the ambiguity in the language of art. 5.13 the union, in our judgment, has failed to satisfy us on a preponderance of evidence that the company was in breach of that section when it transferred the grievor to the labour pool on the day in question.

In addition the Employer pointed to a number of cases, arguing that for the Union to succeed it would "need clear language" (*Pinty, Voice Construction*) supra.

In the instant case the question is whether the provisions of Section 13 fetter Section 17 management rights provision and if so to what extent. With respect to the interpretive exercise I adopt the tenet as described by Arbitrator Korbin in the School District 36 case (*Catalyst Paper,* supra) as follows:

> It is my view that as this is a matter of interpretation, my role is to find the mutual intention of the parties within the competing interpretations put forward by the parties. In such an analysis, neither party bears any special onus of proof.

In *Re: Canada Tungsten Mining Corp.,* supra Arbitrator Hope discussed the Employer's right to manage:

> 16 The argument of the union has an initial logic but it is contrary to established arbitral principles governing the interpretation of collective agreements. The right of an employer to structure the work so as to achieve the highest degree of productivity is a right fundamental to the management role. Limiting that right is an intention that should appear in clear language where it is made express or arises by necessary implication.

17 Disputes with respect to the application of that fundamental principle are impelled by the fact that a sense of proprietorship with respect to a particular job or particular work is a common reaction in the work place. References to "our work" abound in work jurisdiction disputes and it is common for employees and unions to resist moves by an employer to make unilateral dispositions of work contrary to the wishes of the employees who customarily perform it.

18 But that reaction, understandable as it may be, does not reflect the realities of a collective bargaining relationship. The right to assign work belongs to management and an employee seeking to enforce a claim of proprietorship against particular work must relate that claim to clear language appearing in the collective agreement. More particularly, employees are not aided in that endeavor by a presumption that they are entitled to lay claim to the particular work they have been performing.

19 The principles governing a work jurisdiction claim were addressed in *Re Windsor Public Utilities Commission and International Brotherhood of Electrical Workers, Local 911*, [1975] 7 L.A.A. (2d) 380 (Adams). In that decision Prof. Adams first set out the principle whereby management is seen to have a presumptive right to manage the enterprise. He then commented on that principle on pp. 381-82 as follows:

> The principle has been applied to all cases of managerial initiative whereby it has come to mean that no one has a proprietary interest in the specific set of job functions he is or has been performing. [authorities cited] Thus there can be no implied obligation inferred from the "climate of collective bargaining", to maintain, in whole or in part, the status quo as far as the assignment of work tasks is concerned. Management has a presumptive right to make changes in the organization of its work force.

In my view with respect to onus, Arbitrator Hope accurately describes the arbitral consensus of the time (1980s). In B.C. the current arbitral consensus is captured by Arbitrators Hall and Korbin (*Catalyst Paper*). I agree with the "management

has a presumptive right" line of authorities. The interpretive exercise in the instant case is to decide the impact on the management rights provisions as a result of Section 13 of the Collective Agreement and to do so based on a "Korbin" interpretive review, including a review of the facts and the submissions of counsel.

The Employer assertion was that there was nothing in the Collective Agreement that requires the Employer to schedule eight (8) hour shifts. The Union said that it did not take the position that there was such a requirement but that there was a requirement to give preference in available hours to senior employees.

The Employer relied on *Kimco Pharmacy* (supra) for the propositions that the Collective Agreement does not talk about maximizing hours and that scheduling is done by department. The *Kimco* decision was with respect to days off but it also concluded that scheduling was by department. Arbitrator McDonald concluded his consideration of the *Kimco* case as follows:

> In the end analysis, I am required to determine the meaning of the collective agreement and in particular Section 13(e). **The language plus the uncontroverted practice identified by the parties satisfies me that senior part time employees are entitled to have their seniority considered and applied in receiving priority selection for available hours of work.** This is in the nature of an obligation that must be satisfied on a weekly and daily basis. I am not convinced that the meaning extends to the consideration of relative days off for the further maximization of hours. Within the meaning of this collective agreement, there is not then an unrestricted right to be chosen for work. In addition, the priority selection is subject to the Employer's obligation to make a genuine effort to schedule eligible part time employees to two consecutive days off every second week. (emphasis added)

In Re: *Jiwa Drugs* (supra) Arbitrator Lanyon arrived at the following Analysis and Decision:

> 19 The primary provision in the Collective Agreement that is in dispute, (Section 13(e) Reduction in Increase of Hours) was considered in a recent arbitration between the parties: Re Kimco Pharmacy Ltd. -and-United Food and Commercial Workers Union, Local 1518, [1997] B.C.A.A.A. No. 454, July 23, 1997 (R.K. McDonald). This decision dealt with the interrelationship between Section 13(e) and Section 5(i) (Consecutive Days Off). Section 13(e)
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> ....
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> 20 In respect of the interrelationship between Sections 13(e) and 5(i), Arbitrator McDonald found that the Employer retained the right to schedule employees to particular days off - as opposed to employees having a right to claim particular days off. Secondly, Arbitrator McDonald found that under Section 13(e) of the Collective Agreement senior employees are entitled to a maximum number of hours on both a weekly and daily basis. Thirdly, however, he found that this entitlement of senior employees to the maximum number of hours of work was based on departmental seniority, not storewide seniority. The Union appealed this decision to the Labour Relations Board. Its appeal was denied: Re Kimco Pharmacy Ltd., [1998] B.C.L. R.B.D. No. 319, [1998] B.C.L.R.B. Decision No. 319/98.
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> 21 In summary, the Union argues that the maximization of hours principle contained in Section 13(e), provides senior employees the right to be scheduled on a store-wide basis in the following circumstances: first, the greatest number of hours daily store-wide given an employees ability to perform the work; second, the greatest number of hours weekly store-wide given an employees ability to perform the work; third, the ability to self-schedule days of work with the longest shifts; and finally an entitlement to be scheduled for shifts, other than their scheduled days off, on those days in which junior employees have been scheduled in preference to them and for which they are capable of performing the work.

...

23 In summary, the Employer argues first that Kimco, supra, Award is conclusive of the issues of departmental seniority and self-scheduling. Senior employees cannot, for example, claim hours of work by junior employees in a different department nor can they demand that scheduled days off be switched in order to claim shifts worked by junior employees. Second, the Employer argues that so long as senior employees have greater overall hours (whether on a particular day or over a week), it has no further obligation to schedule those senior employees to the hours of work assigned to junior part-time employees. Thirdly, the Employer argues that it is essential in the retail industry to keep a pool of part-time workers who can be called into work during peak periods or during vacation periods or sickness of other employees. This is the underlying purpose of what may termed the Employer's 12 to 20 hour rule: the ability of a manager to ensure that part-time employees are given at least 12 to 20 hours of work per week so that it is able to retain these part-time workers.

....

27 I consider myself bound by Arbitrator McDonald's decision in Kimco, supra; specifically, his interpretation of the interrelationship between Section 5(i) and 13(e) stating that the Employer had maintained the right to schedule an employees' days off. Thus, this claim of the grievors is denied.

28 The third example involves the grievor having been scheduled in accordance with Section 5(i) for two days off: Tuesday, November 3, 1998 and Wednesday, November 4, 1998. However on Friday, November 6, 1998, the Employer also scheduled the grievor to be off while Surindra Sugrim, junior to the grievor was scheduled to work 7.5 hours on till 1. Sugrim performed the same work in the same department as the grievor. The weekly totals worked were 20 1/4 hours for the grievor and 15 1/2 hours for Sugrim.

29 It appears at first sight that the Kimco, supra, Award addresses the issues of "switching days". However, Kimco deals, as stated, with the interrelationship of Sections 5(i) and 13(e). Section 5(i) deals with

the scheduling of an employees "days off" - two consecutive days off each week for full-time employees and two consecutive days off every two weeks for part-time employees. Kimco, supra, states that the Employer retains the right to schedule these days off; employees have no right to demand that their days off be switched with those of junior employees in order to obtain those junior employees shifts; in effect, they have no right to self-schedule.

30 However, in the week of November 1 to 7, 1998, the Employer had scheduled the grievor, in accordance with Section 5(i), her two days off on Tuesday, November 3 and Wednesday, November 4, 1998. The Employer then scheduled the grievor another day off on Friday, November 6, 1998; and at the same time it scheduled a junior employee (Sugrim) to perform the same work in the same department as the grievor was capable of performing - cashier.

31 This may well be an example of the Employer's view of its right to schedule its junior part-time employees so long as the senior employee had a greater number of hours. In the week of November 1 to 7, 1998 the grievor had 20 1/4 hours, and Sugrim 15 1/2 hours. Thus on Friday, November 6, 1998, the Employer felt it had the right, and that it made good business sense, to apply the 12-20 hour rule, to its pool of junior part-time employees and thus scheduled Sugrim to an additional 7.5 hours.

32 It is clear that Section 13(e) contains no 12 to 20 hour rule. The Employer is not entitled to assign these hours of work to other part-time employees simply because the weekly total of the senior employee is greater than those of other junior part-time employees. The grievor states that she was available for work on that day and was entitled to be assigned to that work. No other scheduling restrictions applied to the grievor. She was therefore entitled to that work.

33 In terms of scheduling this will mean that senior employees will be assigned more work in the future and junior part-time employees less work. However, under this interpretation, the Employer is still able to schedule the number of employees it requires. For instance, if the Employer finds it necessary to schedule one employee in the morning, two in the afternoon and one in the evening this interpretation does not restrict the Employer's ability to schedule such

employees. Under the Collective Agreement part-time employees must work at least a minimum of four hours. Senior employees working back to back schedules with these junior employees, or on the same day as these employees, cannot claim any additional hours that would impinge upon those four-hour minimums.

34 However, the importance of senior employees obtaining these additional incremental hours involve, not just the hours themselves, but their link to wages and benefits.

35 Under this Collective Agreement both **an employee's wage and their benefits are tied to the total number of hours that they work - the greater number of total hours worked, the greater is that employees' actual wage and benefits.** (Emphasis added)

36 Finally, there is the issue of departmental seniority versus wall-to-wall seniority. It is true, as the Union states, that the Collective Agreement makes no mention of departmental seniority. However, all Shoppers Drug Mart stores, whether union or non-union, are organized along departmental lines. Further, all scheduling forms drawn up by the Employer are based upon its four departments. Moreover, and most important, Arbitrator McDonald in Kimco, supra, based his interpretation of Section 13(e) on departmental seniority:

- Counsel for the parties were ad idem and the evidence confirmed that as a matter of practice, a senior part time employee within a department could expect, from the available work, the most hours of work on a weekly and a daily basis.

37 Therefore I find that seniority operates on a departmental basis within the Shoppers Drug Mart stores.

38 In conclusion, scheduling is clearly a difficult task under this collective agreement. In this case the Union and the Employer have had two arbitrations in a short period of time, concerning the interpretation of Article 13(e). I find the Employer administered the scheduling in good faith, and clearly acted on the advice of the Human Resources Department of Shoppers Drug Mart, and what he considered to be good business practice.

> 39 The parties will attempt to fashion a remedy for the grievor. If they are unable to agree upon a remedy I retain jurisdiction. However in respect to all other matters, other than the grievor, my award operates prospectively. As stated, this is a difficult interpretive issue. The Employer in this case acted in good faith.
>
> 40 Therefore the grievance is allowed in part.

Arbitrator Lanyon summarized the history of the Parties differences with respect to scheduling, days off, departmental seniority and therefore, with respect to Section 13(e), the only currently undecided matter before this Board is whether parallel shifts violate Section 13(e) of the Collective Agreement and, if so, in what manner and to what extent.

The earlier decisions are helpful. In *Kimco Pharmacy* (supra) Arbitrator McDonald states "senior part time employees are entitled to have their seniority considered and applied in receiving priority selection for available hours of work".

In *Jiwa Drugs* (supra) Arbitrator Lanyon states "I consider myself bound by Arbitrator McDonald's decision in *Kimco*".

Acknowledged in *Jiwa Drugs* and *Kimco Pharmacy* is "that senior part time employees are entitled to have their seniority considered and applied in receiving priority selection for available hours of work" and "an employee's wage and their benefits are tied to the total number of hours that they work".

I agree with Mr. Wong that management has the right to set the number of hours of available work for the store and for each department. That is clear from the plain

reading of Section 17 of the Collective Agreement. It is also clear that management has the right to decide what additional hours may be required. For example, it likely makes good business sense to schedule additional hours in the evening of a delivery so that the stocking of shelves is complete for the next morning. It is not necessary for this Board to prefer the testimony of Union witnesses vis a vis Employer witnesses as to whether the schedule change produced improvements or not, as that is not the question before this Board. As well, the bad faith assertion was dropped as an issue in these proceedings. In addition, basic aspects of the business scheduling requirements are self-evident.

In this case the relevant Arbitrator Bird rules of interpretation are as follows:

> 5. A very important promise is likely to be clearly and unequivocally expressed.
> 6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
> 7. All clauses and words in a collective agreement should be given meaning, if possible.
> 8. Where an agreement uses different words one presumes that the parties intended different meanings.
> 9. Ordinarily words in a collective agreement should be given their plain meaning.

Notwithstanding the Union's position concerning point 5 of the Arbitrator Bird rules, Sections 13(e) and 13(g), in my opinion, are "clearly and unequivocally expressed".

We begin the interpretive exercise by acknowledging the management rights Section 17 provision. The Employer retains "all rights" subject to "any of the provisions of this Agreements" i.e. Section 13(e) and 13(g).

Section 13(e) obligates the Employer to give "Preference in available hours of work ... to senior employees ...". Section 13(g) requires that "The Employer shall not reduce the weekly hours of work of an employee for the purpose of replacing such hours with another employee at a lower rate of pay".

Parallel shifting within the new schedule reduced the number of eight (8) hour shifts, increased the number of four (4) hour shifts and limited the ability of senior employees to acquire such four (4) hour shifts as they were parallel to other four (4) hour shifts. The impact of reduced hours was articulated by Arbitrator Lanyon: "the greater number of total hours worked, the greater is that employees' actual wage and benefits". The reasoned conclusion is that Section 13(e) and 13(g) constitute "a very important promise" (Arbitrator Bird rules of interpretation).

It is clear from a review of the schedules that the new schedule had a negative impact from an Employee perspective on those very important promises of Section 13. Given the Section 13 provisions, parallel shifting must be based on a very important *bona fide* operational (business) requirement.

On a careful review of the evidence, submissions and, in particular, the details of the new schedule, I find it contains two categories of shifts. I am satisfied that certain changes are as a result of appropriate important business decisions. I am also satisfied that some schedule changes are not required for the stores operation and as such violate the very important promise contained in Section 13(e).

As Arbitrator Lanyon observed, "scheduling is clearly a difficult task under this collective agreement", therefore this Board will not conclude with an exhaustive list of each shift and whether it constitutes a violation of Section 13(e) or not. Rather, I will use two examples which demonstrate the threshold requirements for the scheduling of parallel shifting.

1) In my view, an example of a bona fide requirement for the implementation of parallel shifts is the Wednesday afternoon delivery in which management's goal is to unload the delivery and stock the shelves in time for Senior's Day the next morning. The compelling feature for parallel shifts in this example is that a seven (7) or eight (8) hour shift that begins well before the delivery doesn't assist in getting the shelves stocked prior to the Thursday morning requirement. In this example there is the option of a mix of seven (7) or eight (8) hour shifts with two (2) four (4) hour shifts of 5pm to 9pm. This is intentionally a fairly high threshold for the implementation of parallel shifts which I believe is required in recognition of the very important promises of Section 13(e) and 13(g).

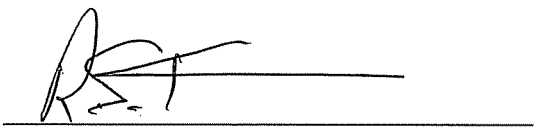
2) In my view, there are a number of parallel shifts in the schedule that do not reach the threshold of a bona fide business reason to the extent that it supersedes the provisions of the Section 13's promises. For example, where stocking of shelves occurs throughout the day there is no reason for two parallel shifts to cover eight (8) hours of work. Such parallel shifts constitute a violation of Section 13(e). Another example is the talkers, which, in my view, can be placed on an eight (8) hour shift as effectively as on two (2) four (4) hour shifts.

In the result, on a careful review of the evidence and submissions of the Parties, the Union's grievance is allowed to the extent described above.

I shall retain jurisdiction in the unlikely event of implementation difficulties.

I thank counsel for their helpful submissions.

Dated at Vancouver, BC this 9th day of June 2014.



Ronald S. Keras
Arbitrator

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