HOURS OF WORK/OT
ALTERNATE SHIFT SCHED.

IN THE MATTER OF AN ARBITRATION

(CONIFER)

BETWEEN:

FINLAY FOREST INDUSTRIES LTD.

(hereinafter referred to as the "Employer")

AND:

IWA-CANADA, LOCAL 1-424

(hereinafter referred to as the "Union")

(Wednesday To Sunday Shift Arbitration)

Arbitrator:	H. Allan Hope, Q.C.
Counsel for the Employer:	Gary Catherwood
Counsel for the Union:	Sandra Banister
Place of Hearing:	Prince George, B.C.
Date of Hearing:	March 19, 1993
Written Submissions:	March 31 and May 18, 1993

A W A R D

I

This arbitration involves a dispute over the proper interpretation of the shift scheduling provisions of the collective agreement with respect to the entitlement of the Employer to initiate a Wednesday to Sunday maintenance shift for millwrights without the consent of the Union and the employees concerned. The dispute began on March 26, 1992 when the Employer unilaterally established a Wednesday through Sunday shift at Site 1, one of two lumber manufacturing plants it operates at Mackenzie, B.C. The submission of the Union was that scheduling that shift was a breach of Article VII(4) of the master agreement in force between the parties.

I note in passing that there are three master agreements in force in the industry in British Columbia. They can be described as the coast master, the southern interior master and the northern interior master. The collective agreement at issue in this dispute is included in the northern interior master. It is negotiated between the IWA and individual employers represented by the Council of Northern Interior Forest Employment Relations (CONIFER). Returning to the narrative, the provision at issue reads as follows:

> Section 4: Alternate Shift Scheduling
>
> a) Management, Plant or Camp Committees and Local Unions shall have the right under the terms of the Collective Agreement to agree upon and implement other schedules which, except for production shifts in manufacturing operations, may include Sundays, without overtime penalty, provided the principle of the forty (40) hour week is maintained over an averaging period. Rate and one-half shall be paid for hours worked on Sunday. (emphasis added)

b) Any variation(s) to Sections 1 and 2 above shall be implemented only upon completion of the following steps:

i) Negotiated agreement between the Local Union and Local Management.

ii) Majority approval by the employees involved in the proposed variations.

That provision, together with an addendum called Supplement No. 8, were introduced in collective bargaining for the current master collective agreements. Article VII(4)(c)(C) incorporates Supplement No. 8 in Article VII(4). According to the evidence of both parties, those negotiations followed the usual format in that the terms and conditions of the coast master agreement were settled first in negotiations between the IWA and Forest Industrial Relations Limited (FIR). The southern and northern interior industries were not represented in that bargaining. However, negotiators representing those two sectors, while not at the table, were present at the negotiations and conferred on a continuous basis with FIR negotiators with respect to matters having an industry-wide significance.

It was acknowledged, once again by both parties, that Article VII(4) and Supplement No. 8 did have industry-wide significance and represented a move by the industry to achieve flexibility with respect to the scheduling of production and maintenance shifts. The position of the Union was that it had agreed in all three master agreements to the introduction of the Article VII(4) and Supplement No. 8 language to give to local Unions the discretion to agree to shifts other than those set out in Article VII(1)(a) of the northern interior master agreement. I digress to note that there are differences in numbering in the three master agreements and some difference in content. I will note those differences as required. Section VII(1)(a) reads as follows:

Article VII - HOURS OF WORK AND OVERTIME

Section 1:

a) The regular hours of work shall be eight (8) hours per day and forty (40) hours per week, Monday to Friday inclusive.

The submission of the Union was that prior to the introduction of Article VII(4) and Supplement No. 8, employers in the industry, including the northern interior industry, had no unilateral right to introduce shift schedules that required employees to work on Sunday. The quid pro quo for agreeing to the introduction of shifts involving Sunday work was that agreement by a local Union and the employees affected was to be a necessary condition precedent to the introduction of any such shifts. The evidence of the Union was that prior to the current collective agreement, Sunday shifts were only scheduled for employees whose job duties required them to work on Sunday. The examples given were watchmen and steam plant employees such as engineers and firemen.

The Union evidence was that the standard shift schedule for many years had been Monday through Friday for production shifts and Tuesday through Saturday or Monday through Friday for maintenance shifts. Its submission was that the language of Article VII(4) was introduced in collective bargaining for the current agreement in response to a submission by the industry that the ability to schedule shifts outside of the normal routine was required to enable it to compete on world markets. The compromise, said the Union, was an agreement that "other schedules" could be implemented with the consent of the local Union and the employees affected. Initiating shift schedules outside of the regular pattern without that consent, said the Union, would be a breach of Article VII.

The position of the Employer was that the shift in question was authorized in express terms in another provision in Article VII.

In particular, the Employer submitted that the shift was authorized in Article VII(2) and that the reference to "other schedules" in Article VII(4) was a clear reference to schedules other than those provided for expressly in other provisions in Article VII. The Employer noted in that context that Article VII(1) provides for the basic schedule, being "eight hours per day and forty hours per week, Monday to Friday inclusive", and that Article VII(2) provides for Monday through Sunday shifts for certain employees, including millwrights. That provision was relied on by the Employer as its authority to schedule the Wednesday through Sunday maintenance shift at issue in this dispute. The provision reads as follows:

> Section 2: Engineers, Firemen, Millwrights, Maintenance, Repair, Construction Employees and Watchmen:
>
> a) The regular hours of work shall be five (5) eight-hour days, with two (2) days of rest each week Monday through Sunday. Such days of rest will be consecutive days unless mutually agreed to be otherwise between the employee and the Company. (emphasis added)
>
> b) Overtime shall be paid at rate and one-half for all hours worked in excess of eight (8) hours per day, on Sundays and upon the employee's two designated rest days, if worked, with the following exceptions:
>
> Double straight-time rates shall be paid for the following:
>
> i) Hours worked in excess of eleven (11) hours per day.
>
> ii) Hours worked on Sunday by employees who have worked five (5) shifts during the preceding six (6) days.
>
> iii) Item ii) above shall not apply to employees who work on Sunday as a regular scheduled day.

iv) For purposes of this provision, a Statutory Holiday shall be considered as a shift worked.

The position of the Employer was that Article VII(2)(a) amounts to express recognition of "five eight-hour days, with days of rest each week Monday through Sunday" for employees falling within the classifications governed by the provision, including millwrights. The Wednesday through Sunday shift at issue in this dispute falls within Article VII(2)(a), said the Employer, and, because it was a shift schedule provided for expressly in Article VII, it could not be seen as falling within the term, "other schedules", as it is used in Article VII(4). That is the provision relied on by the Union in this dispute. Article VII(2), unlike Article VII(4), was not introduced in the current collective agreement. It has been in successive agreements in varying forms in all three sectors of the industry for more than 20 years.

The Union's position was that there was no history in the industry of Article VII(2) having been invoked by employers as a basis for scheduling Sunday maintenance shifts and that the provision could not be relied on to found such a right in the current agreement, particularly in light of the introduction of Article VII(4) and Supplement No. 8. Those new provisions, said the Union, addressed that vary same right. If the right already existed under Article VII(2), said the Union, there would have been no necessity to introduce Article VII(4) and Supplement No. 8.

The Union said that Article VII(2) was intended to encompass two shift patterns, one being Tuesday through Saturday shifts for maintenance employees, with Sunday and Monday off; the other being five-day shifts including Sunday for those employees whose duties made Sunday work a necessity. That was the practice followed in the industry, said the Union. Its submission was that the practice with respect to Sunday shifts, coupled with the bargaining history with

respect to the introduction of Article VII(4) and Supplement No. 8, compelled the conclusion that the shift schedule initiated by the Employer in this dispute was a breach of the shift scheduling provisions of the collective agreement.

The Union evidence with respect to industry practice and the history of Article VII was given by Bob Blanchard, the former first vice-president of the IWA of Canada. He retired at the end of the year in 1988 but was present as a member of the Union bargaining committee during industry bargaining in 1988. Mr. Blanchard said that Article VII(4) had been introduced into the collective agreement in bargaining that year, along with Supplement No. 8. That supplement appears to have been intended to augment Article VII(4). The purpose of the supplement is set out in its introductory part. It reads as follows:

> A. FLEXIBILITY OF HOURS OF WORK
>
> The Parties recognize the need for flexibility of hours other than those outlined in Article VII - Hours of Work, Sections 1 and 2, for the express purpose of better utilization of manpower and capital such as:
>
> Balancing of production
>
> Maintenance
>
> Market requirements
>
> Even flow production
>
> Emergency or unexpected harvesting programs
>
> Continuous scheduling (e.g., Logging, Engineers, Firemen, Maintenance, Watchmen).
>
> . . . . . .

3. MAINTENANCE

(a) shifts of up to 10 hours per day, 40 hours per week, Monday to Sunday inclusive;

(b) three shifts per week, not exceeding 12 hours per day. (emphasis added)

Mr. Blanchard said, in effect, that there would have been no necessity to include "maintenance" in Section A of Supplement No. 8 if the Employer's interpretation was correct. He said that the dynamics in the negotiations for Article VII(4), (which is Article V(2) in the coast master agreement), and Supplement No. 8 involved recognition by both parties that Sunday shifts could not be scheduled under the existing language, including Article VII(2). His evidence was supported by Frank Everett, the president of the Union local. Both witnesses said that Wednesday through Sunday shifts had never been scheduled in the industry generally, including the industry in the northern interior. They said further that the negotiating history of Article VII(4) and Supplement No. 8 made it clear that such shifts could only be scheduled with the agreement of the local Union and the employees concerned.

The Union filed various documents relating to the negotiations giving rise to Article VII(4) and Supplement No. 8 in support of the recollection of Mr. Blanchard and Mr. Everett. In particular, the Union's notes of bargaining on June 16, 1988 between the Union's provincial negotiating committee and CONIFER were filed. The notes recorded David Gunderson, the executive director of CONIFER, as saying on its behalf that the northern interior industry wanted to "break away from [a] five day week, eight hour day". The evidence of Mr. Blanchard was that Mr. Gunderson had explained in bargaining that the industry required a better return on its capital investment in plant and equipment and that it wanted to move away from having to pay overtime for weekend work.

Both parties filed notes relating to negotiations that took place between the provincial negotiating committee and CONIFER on August 11, 1988 when the parties agreed to Article VII(4) and Supplement No. 8. The following are extracts taken from the notes of the Union of exchanges between Neil Menard and Jack Munro on behalf of the Union and Mr. Gunderson on behalf of CONIFER:

> Mr. Menard - [A]ny shift changes must be negotiated with the Local and must be approved by the crew before they are implemented.
>
> Mr. Gunderson - Yes, that's our understanding.
>
> Mr. Menard - What if a company went ahead if they couldn't get approval? Would you tell the employer they can't do that?
>
> Mr. Gunderson - That's a hard one. Think we can apply common sense. We understand clearly that if a crew is opposed, any benefit would be watered down. There have been instances where the Local Union has vetoed what the crew wanted to do.
>
> Mr. Munro - You're saying that there is no doubt that there has to be Local Union and crew approval before any changes are made.
>
> Mr. Gunderson - That is my understanding.
>
> Mr. Munro - [W]ith understanding that Supplement No. 8 has to be approved by the crew and the Local, we have an agreement.

In that exchange Mr. Gunderson confirmed that he was acting on behalf of various northern interior producers including this Employer. The Employer's notes of the meeting discloses the following exchanges:

> Mr. Menard - On Alternate Shifts and Supplement #8: Will you have the South's words "Must be agreed with Local Unions and must be approved with the crew"? Will you negotiate with Local

> Union and have approved by crew before flex. shifts are implemented?
>
> Mr. Gunderson - Yes.
>
> Mr. Menard - Will you, CONIFER, tell your member companies what the above means and what the collective agreement requires?
>
> Mr. Gunderson - Yes. The Supplement #8 is hypothetical but the whole basis of flex. is contingent on common sense and good faith. We are trying to be competitive. If a crew is opposed to a flex. shift, then any advantage of a flex. shift would be lost. What we are really concern with is a VETO by a Local Union. We have to come to an agreement with all the players at an operation.

There was a further discussion recorded between the parties with respect to good faith and acknowledgment that the consent of individual crews was necessary for the introduction of alternate shifts. The exchange recorded in CONIFER's notes is summarized as follows:

> Mr. Munro - I hear you say that Supplement #8 doesn't detract from the Collective Agreement. And that Local will negotiate a flex arrangement and that the crew will approve.

The position of the Union was that the extrinsic evidence made it clear that any shift schedule, whether production or maintenance, which incorporated Sunday as a straight-time day had to be implemented under Article VII(4) and Supplement No. 8. In summary, the Union position was that there had been no Wednesday through Sunday maintenance schedules established unilaterally in the northern industry in at least 25 years prior to the introduction of Article VII(4) and Supplement No. 8 and that no such shifts had been introduced without the consent of the Union and the employees affected after that date. In short, the Union said that the language, the bargaining history and the practice all supported its interpretation

that the Employer was not free to unilaterally institute the disputed shift.

The position of the Employer was that the language of the collective agreement was clear. In particular, its submission was that Article VII(4) and Supplement No. 8 only applied to shifts which fell outside the shift patterns the parties had agreed to in Article VII, including Article VII(2). In that context, the Employer said that the parties had specifically agreed in Article VII(2) that Wednesday through Sunday shifts could be imposed for various classifications, including millwrights. The Employer took issue with the evidence of Mr. Blanchard that such shifts were limited to employees who were required to work on Sunday because of the nature of their work, such as watchmen and steam plant employees such as engineers and firemen.

In that context, the Employer pointed out that the provision of the coast master equivalent to Article VII(2) in this agreement differed in significant terms. That provision is Article V(5) in the coast master agreement, and it reads as follows:

> Section 5: Saturday and Sunday Work
>
> (a) Those employees who of necessity regularly work on Saturday and Sunday shall take two (2) other days of the week off to be mutually agreed between the employee and the Company. In such event, Saturday and Sunday shall be considered working days and overtime rates shall not apply on Saturday. However, these employees shall be paid at rate and one-half for work performed on Sunday. It is agreed that overtime rates will apply when the regular daily or weekly work limit has been exceeded. It is further agreed that overtime rates will apply on the rest days of these employees if worked unless a change in rest days has been agreed upon between the employee and the Company. (emphasis added)

(b) For the purpose of this Section, employees shall be engineers, firemen, operating millwrights, maintenance workers, watchmen, cookhouse and bunkhouse employees.

It can be noted that the two provisions address similar categories of employee, but employ somewhat different language. The difference emphasized by the Employer was that the provision in the coast master agreement speaks in express terms of recognition of Sunday shifts by employees who are required to work "of necessity". That concept does not appear expressly in the language of the equivalent provision in the northern interior master agreement, said the Employer. But, the evidence of Mr. Blanchard was that the provisions were applied in the same fashion in both the coast master agreement and the southern and northern interior agreements. In particular, he said, the provision only applied to Sunday shifts for employees who were required to work on Sunday by reason of the nature of the work they performed.

In terms of the evidence of bargaining history, the Employer called evidence from Mr. Gunderson. His evidence was that CONIFER had never made the concession in bargaining that it did not have the right to schedule Wednesday through Sunday maintenance shifts under the existing language of the collective agreement. The Union witnesses did not disagree with his evidence. However, the answer of the Union in its evidence was that a right to schedule Sunday maintenance shifts had never been claimed by CONIFER in bargaining. Mr. Gunderson agreed with that evidence. On the issue of practice, the Employer called evidence that a Wednesday through Sunday maintenance shift schedule had been introduced at Site 2, its other production site in Mackenzie, as early as 1988 and that it stood as evidence of how the parties interpreted their agreement.

II

Turning to the particular facts, the dispute arose in January of 1992 when Ray Brougham, the maintenance superintendent at the Site 1 Plant in Mackenzie, scheduled a Wednesday through Sunday maintenance shift. The shift was initiated in the first instance without the knowledge and consent of the Union, but with the agreement of three of the four maintenance employees affected. Mr. Brougham said that he was advised by the Union plant committee at some point that the Wednesday to Sunday shift was "not a legal shift", but that the committee was not able to point to anything specific in the collective agreement to support its position.

The position of the Union, as stated, was that there was no prior practice in the industry generally and in the industry in the northern interior in particular whereby employers unilaterally introduced Wednesday through Sunday maintenance shifts. Mr. Everett agreed in cross-examination that there were operations in the northern interior industry where operations were conducted on a six day and seven day basis. But, said Mr. Everett, in those cases the "employer has talked to the union and there was no disagreement". He also agreed that kiln operations routinely ran seven days. But, said Mr. Everett, kiln employees "followed the change" in the sense that they come in on a call-in basis to push in or push out loads as required and that they get overtime and call-in time. He said that the discussion in collective bargaining with respect to alternate hours revolved around a desire on the part of the industry to obtain a six-day production week. He agreed that the industry was also seeking the right to schedule maintenance work on Sunday in order to achieve a six-day production week on the understanding that certain maintenance had to be done when operations were not in production.

It was put to Mr. Everett that any shift schedule involving five days at eight hours per day would fall within the terms of

Articles VII(1) and (2) of the master agreement. His position was that Monday to Friday shifts in production and Tuesday to Saturday shifts in maintenance fell within those provisions but that a shift schedule incorporating Sunday for maintenance workers fell under Article VII(4) and Supplement No. 8 and required the consent of the employees affected and the local Union.

Mr. Everett agreed that there was no express provision of the agreement providing that there would be no Sunday maintenance shifts but that the general understanding and application of Article VII(2) was that shift schedules incorporating Sunday could not be initiated unilaterally by an employer. He said the issue arose with another employer in 1979 and was challenged by grievance. He said the grievance was settled on the basis that the Sunday shift would not be scheduled in the future. He agreed that employers were entitled under the agreement to initiate a Tuesday through Saturday maintenance shift under Article VII(2) but that they could not schedule a Wednesday through Sunday shift under that provision. Finally, Mr. Everett said that he did not become aware of the Wednesday through Sunday shift the Employer had previously scheduled at Site 2 until the day prior to the hearing.

Mr. Brougham said the shift at Site 1 that gave rise to the dispute was initiated on January 20, 1992 and was not the subject of a grievance until March. The grievance filed in these proceedings is dated May 29, 1992. It became apparent that there was a history to the dispute which was not put before me and the Employer took no objections with respect to the timeliness of the grievance. Whatever may have been the evolution of the shift, it was clear that it was not initiated with the knowledge and consent of the Union. The further implication is that when the shift came to the attention of the Union, the grievance was filed and was advanced to arbitration.

In seeking to support its right to institute the shift, the Employer relied on the evidence of Mr. Gunderson who said in cross-examination that he had heard of circumstances in the northern interior industry where Sunday shifts had been worked. However, in his evidence in-chief Mr. Gunderson did not assert that there was a practice in the industry in the northern interior wherein employers had unilaterally instituted Sunday shifts. He gave an isolated example of a Wednesday through Sunday maintenance shift worked in the past in another plant serviced by another local Union, but did not say that it had been unilaterally imposed. In fact, Mr. Gunderson said specifically that he was not aware whether such shifts existed. His point was that Article VII(2) was not under discussion in collective bargaining because he did not understand it to be an issue.

I will return to Mr. Gunderson's evidence shortly. Here it is sufficient to say that the thrust of it was that he was not aware of any practice in the industry of unilaterally scheduling Wednesday through Sunday maintenance shifts, but neither was he aware that such shifts were seen as prohibited. He said that the issue of Wednesday to Sunday maintenance shifts did not arise in collective bargaining and that he was not aware of the industry ever having conceded that it was not entitled to schedule Wednesday through Sunday maintenance shifts under Article VII(2).

Returning to the narrative, the Employer, as stated, took the position that part of the practice in the industry included the Wednesday through Sunday maintenance shift it had initiated at various times in the past at its Site 2 Plant in Mackenzie. It was apparent in the evidence that the existence of that practice did not form part of the grievance procedure and that reference to it arose late in the proceedings. The evidence was that the existence of the practice was discovered belatedly by Mr. Brougham. Mr. Brougham was not aware of the practice when he initiated the disputed shift schedule in January of 1992. He said that when he heard about the shift, he went

to Site 2 and researched stored records in 1988, 1989 and 1990. Extracts from those records were produced. He had no personal knowledge of the shift or its scheduling and gave hearsay evidence of it based upon discussions with other persons.

The documents Mr. Brougham produced indicated that the shift had been scheduled intermittently over the period between October 23, 1988 and May 6, 1990. In cross-examination Mr. Brougham said that he understood that there had been some difficulties with the plant committee or someone else in the bargaining unit about the shift, but he was not certain if a formal grievance had been filed. The local Union, on the uncontradicted evidence of Mr. Everett, was not aware of the shift.

Before leaving the facts, it is necessary to return to the evidence adduced by the Employer from Mr. Gunderson with respect to collective bargaining and the general practice in the northern interior industry. The evidence of Mr. Gunderson was that the primary thrust of the industry in negotiations for the current collective agreement was to achieve what the parties described as "flexibility of shift scheduling". Filed in evidence was a copy of a proposal advanced by CONIFER on April 28, 1988. The proposal read as follows:

> EMPLOYER PROPOSALS
>
> We propose to negotiate amendments to the appropriate articles in the collective agreements in order to obtain more flexibility at manufacturing operations to create and improve our competitive edge in the world marketplace. During negotiations, specific proposals will be introduced which will provide for:
>
> > Cost effective utilization of plant facilities and flexibility of shift scheduling within broad guidelines.

The position of the Employer on the underlying issue of interpretation was that the focus of discussion in bargaining with respect to that proposal was flexibility of shift scheduling in the sense of a right to schedule shifts other than the eight hours per day, five days per week schedule which had been the standard in the industry for many years. The term, "other schedules", in Article VII(4) was intended, said the Employer, to embrace schedules other than the eight hours per day, five days per week schedules already included in Article VII. Those schedules included those under Article VII(1) for production shifts and schedules under Article VII(2) which included Sunday shifts for the classifications of employees named in the article.

The Employer noted in that context that Supplement No. 8 dealt with shift scheduling in logging, manufacturing, maintenance and other shifts in terms which made it clear that what was intended was the flexibility to negotiate shift schedules with employees and local Unions for patterns falling outside of eight hours per day, five days per week, including, for example, logging schedules consisting of 10 hours per day four days per week; schedules consisting of 10 days on and four days off; manufacturing shift schedules providing for two crews working four days at 10 hours per shift; up to three crews working Monday to Friday 10 hours per shift up to 40 hours per week; and continuous operations working different shift patterns than those set out in Article VII. Finally, under maintenance, the language, as set out previously, was seen by the Employer as providing for shifts other than eight hours per day, five days per week, being the only shift patterns available under Articles VII(1) and (2). The relevant part of Supplement No. 8 is repeated for convenience as follows:

> (a) Shifts of up to 10 hours per day, 40 hours per week, Monday to Sunday inclusive;

(b) Three shifts per week, not exceeding 12 hours per day.

The submission of the Employer was that flexibility was not intended to encompass schedules that already existed, including the right to initiate shift schedules involving eight hours per day, five days per week in any of the patterns authorized under Articles VII(1) and (2). The Employer relied in that regard on a decision made by Paul Fraser, Q.C. with respect to equivalent language in the southern interior master agreement. In the decision, Mr. Fraser concluded that a provision equivalent to Article VII(4) was limited in scope to shift schedules involving patterns other than those set out in the remainder of the hours of work provision. That decision did not deal with the issue raised here. I will refer to it and its citation later. However, it is convenient to record the fact that the flexibility sought by the northern interior industry included an ability to operate on a six-day schedule. In particular, the Union notes with respect to discussions between CONIFER and the Union's provincial negotiating committee on June 16, 1988 record the following exchange:

> FLEXIBILITY
>
> Mr. Munro - Is your position same as others?
>
> Mr. Gunderson - Our operations have to compete with U.S. Must break away from 5 day week, 8 hour day. Talking about same - have to have ability to operate plants on 6 days.
>
> Mr. Munro - Six days?
>
> Mr. Gunderson - Six days.
>
> Mr. Munro - Examples?
>
> Mr. Gunderson - Kilns - 7 day week, Saturday straight time.

As stated, Mr. Gunderson said that the discussions with respect to flexibility did not encompass any discussions about whether employers had the right to schedule Wednesday through Sunday maintenance shifts. In essence, Mr. Gunderson said that the topic simply did not arise. Mr. Blanchard and Mr. Everett did not disagree with that understanding. Their position on behalf of the Union was that Wednesday through Sunday maintenance shifts had not been scheduled in practice and that there was no suggestion from the industry during bargaining that the right to schedule those shifts existed and thus no occasion to discuss Article VII(2) or its equivalent in the other agreements.

It is in that context that the evidence of practice takes its significance. Mr. Gunderson was asked in cross-examination if he could recall any Wednesday through Sunday maintenance shift initiated by any employer serviced by this local Union other than those initiated by this Employer and he said that he could not recall any such shifts. I will deal with the arbitral authorities shortly. Here it is sufficient to say that there was no evidence led by the Employer directly or in cross-examination which would support a finding that Wednesday through Sunday maintenance shifts unilaterally imposed by employers reflected the practice of the parties in the application of the northern interior master agreement at any time material to the interpretation issue raised in this dispute.

III

Turning to the authorities relied on by the Union, I repeat that both parties relied on the decision of Mr. Fraser to which I made reference earlier, being the decision in Federated Co-Operatives Limited and International Woodworkers of America, Local 1-417, January 14, 1990, unreported. I will detail the Employer's position on the decision in the next part. The Union relied on an extract on p. 9 to support its submission with respect to the process an employer

must follow when initiating a shift schedule under the section equivalent in the southern interior master agreement to Article VII(4). The extract reads as follows:

> In these circumstances, the Employer's right to schedule is fettered to such an extent that it must fulfil three requirements: First, it must negotiate an Agreement with the local union and a majority of the employees affected; second, it must maintain the principle of the 40 hour work week over an averaging period and third, it must pay (except in manufacturing operations) rate and one-half for hours worked on Sunday.

The Union next relied on Canadian Forest Products Limited and Canadian Paperworkers' Union, January 7, 1991, unreported, (Owen), for the proposition that where a collective agreement requires the consent of the union and the employees involved to the introduction of a shift, the failure of the parties to reach agreement does not leave the employer in the position of imposing such a shift on the employees on the basis of its residual right to manage and direct the work force. That submission was made in response to allusions made by the Employer to the fact that the parties had not been able to reach agreement on the shift in dispute and an implication that it saw itself as free in those circumstances to exercise its inherent right to schedule any shift not prohibited in the agreement, including the shift in dispute.

That issue did not appear to survive the process. That is, it did not appear that the Employer was taking the position that a failure of the employees or the Union to agree to a proposed shift schedule would entitle it to proceed unilaterally for that reason only. The Employer's position in that regard was that a prudent manager could be expected to discuss a change in shift scheduling with the employees affected and seek to obtain their cooperation and consent, even in those circumstances where the Employer had a right to impose the schedule. Its position was that seeking the approval

of a crew did not constitute a waiver of any contractual right it had to impose a shift schedule without the consent of the employees or the Union and that the issue continued to be one of the proper interpretation of the language of the agreement.

The Union next relied on Re Hoover Co. Ltd. and United Electrical, Radio & Machine Workers of America, Local 520, 29 L.A.C. (2d) 162, March 23, 1981 (McLaren), for the interpretive proposition that where there is a general provision and a specific provision, the specific provision overrides the general. That decision was relied on to support the contention that Article VII(4) should be seen as determining the issue with respect to the scheduling of any alternate shift schedules which include Sunday as one of the days. The Union pointed in that context to the phrase, "may include Sundays", in Article VII(4)(a), as compared with the more general language contained in Article VII(2)(a), particularly when it is considered that Article VII(4) was introduced specifically to deal with the scheduling of weekend shifts.

The Union then cited the decision in Re Int'l Ass'n of Machinists, Local 1740, and John Bertram & Sons Co. Ltd. (1967), 18 L.A.C. 362 (Weiler), for the submission that the practice of the parties in the industry generally and, in particular, in the industry in the northern interior, compelled the interpretation urged by the Union. The Union relied in that same context on the decision in International Woodworkers of America, Locals 1-405, 1-417 and 1-423 and Interior Forest Labour Relations Association, April 25, 1991, unreported, (Berger). There the same issue was raised in the context of the southern interior master agreement. That is, the employer in that dispute unilaterally initiated a Wednesday through Sunday maintenance shift and the union took the position that the equivalent of Article VII(4) required the consent of the Union and the employees affected before such shifts could be initiated.

The southern interior master agreement contains a provision somewhat similar to Article VII(2), but it is structured differently with respect to the issue of Sunday work. In particular, the preamble provision makes reference to "employees who of necessity regularly work on Saturday and Sunday". The provision was expressed in that dispute as having application to a category of employees similar to those defined in Article VII(2). However, that provision did not contain any provision similar to Article VII(2)(a). In any event, Mr. Berger concluded that the language in that agreement did not support an entitlement in an employer "to schedule a Wednesday through Sunday shift without agreement of the Union".

The Union next relied on Re Pacific Forest Products Ltd., Nanaimo Division and Pulp, Paper and Woodworkers of Canada, Local 7, 14 L.A.C. 151 (Munroe), to support its contention that if the language of the collective agreement does not support the Union's interpretation, the facts support an application of the doctrine of estoppel so as to prevent the Employer from relying on its strict legal rights to schedule Wednesday through Sunday shifts until the issue has been addressed further in collective bargaining. In making that alternate submission, the Union relied on the evidence of practice as constituting a representation by the industry that employers do not have the right to introduce such a shift, and the fact that during collective bargaining, the Employer did not indicate in the exchanges that took place that it considered that it had the right to implement such a shift.

IV

The Employer relied on Palmer, Collective Agreement Arbitration in Canada, (1991) @ pp. 565-84 to support the proposition that management, generally speaking, has the right to manage and direct the work force, including the scheduling of shifts, unless the

collective agreement restricts that right. That same point was made by Mr. Fraser on p. 6 in Federated Co-Operatives where he wrote:

> It is well settled that an Employer has the unfettered right to direct the work force subject only to express restrictions contained in a Collective Agreement.

Those comments were made in the context of the right of an employer to impose shift schedules that are not inconsistent with the provisions of the agreement. The Employer relied in that same context on the decision in North Central Plywoods and Pulp, Paper and Woodworkers of Canada, Local 25, June 7, 1979, unreported, (Carrothers). There Professor Carrothers held that an employer retains the right to schedule shifts in accordance with its view of the needs of production unless the language of the agreement restricts that right by express reference.

The Employer then cited North Cariboo Forest Labour Relations Association and International Woodworkers of America, Local 1-424 and 1-425, April 26, 1982, unreported, to support the proposition that where a restriction is asserted against the right of an employer to schedule particular shifts, the restriction must be recorded in suitably direct language. The Employer also saw British Columbia Forest Products Limited and Pulp, Paper and Woodworkers of Canada, Local 18, June 15, 1983, unreported, (Cumming), as reinforcing that position. There Mr. Cumming, now Cumming, J.A. of the British Columbia Court of Appeal, was dealing with the interpretation of language similar but not identical to the language at issue in this dispute. He cited and relied on Board of Police Commissioners for the City of New Westminster and New Westminster Policemen's Association, Local No. 3, October 12, 1982, No. L293/82, unreported, (Foley), for the proposition that where an assertion is made that an employer has agreed to confer a financial benefit, it requires clear language to support the assertion. Mr. Cumming, as he then was, observed that the same

principles "apply equally to questions affecting fundamental management rights". The issue before him was the right of the employer to institute a particular schedule.

The Employer also relied on the decision of the former Labour Relations Board in British Columbia Forest Products Limited (Caycuse Logging) and Pulp, Paper and Woodworkers of Canada, Local 1-80, BCLRB Decision L#72/80 (May 16, 1980), for the proposition that extrinsic evidence cannot be used to create a right which is not secured in the collective agreement itself. The Employer later submitted a recent decision made by Bryan Williams, Q.C. in North Central Plywood and Pulp, Paper and Woodworkers of Canada, Local 25, March 11, 1993, unreported. That dispute involved an issue similar to the one raised in this dispute. In particular, it involved the right of the employer in that dispute, "to institute shifts from Wednesday to Sunday and Thursday to Monday, meaning that some millwrights would have to work on weekends - Saturday and Sunday".

Ultimately Mr. Williams concluded that the particular language under review contemplated a right in the employer to schedule such shifts. There, as here, there was no history of the employer having initiated a shift schedule that included Sunday. He concluded, however, that the practice did not defeat the clear language of the agreement which vested in the employer the express right to schedule such a shift. The response of the Union was that the language at issue in the decision differs substantially from that at issue in this dispute and that the decision was of no assistance.

Finally, the Employer relied on the decision of Mr. Fraser in Federated Co-Operatives Limited to support the submission that the equivalent in the southern interior master agreement to Article VII(4) was confined in application to shifts that fell outside the pattern of eight hours per shift, five days per week set out in Article

VII(1). The Employer relied in particular on the following passage on p. 9 of Mr. Fraser's reasons:

> It is clear from the language of [Article 7], when read alone and in the light of the whole Agreement, that [Article 7(4)] has application only in circumstances where the Employer wants to implement a shift that results in more or less than the 8 hours per shift, 40 hours a week, mandated by Section 1. (emphasis added)

The Employer, as I will set out in detail later, relied on that extract to support its submission that Article VII(4) only applies to shift schedules "that result in more or less than the eight hours per shift, 40 hours per week, mandated by Section 1". That dispute involved the right of the employer to swing an existing shift. It did not raise any question about the right of the employer to initiate a new shift schedule. In particular, it did not involve a right to schedule a Wednesday through Sunday maintenance shift.

V

On those facts and submissions, I turn to a resolution of the dispute. I am of the view that the interpretation advanced by the Union is the likely one. In reaching that conclusion, I accept the evidence of the Union that unilaterally scheduling a Wednesday through Sunday maintenance shift is contrary to the practice of the parties in the application of the collective agreement. I make that finding on the basis that the only evidence of a contrary practice, being the evidence of this Employer at Site 2, does not constitute evidence of past practice in the sense contemplated in the arbitral authorities, and, in any event, the evidence was vague with respect to how the shift was initiated and managed.

In particular, there was no indication that the Union was aware of the scheduling of the shift. In fact, Mr. Everett said that

he was unaware that the shift existed until the day prior to the hearing. In addition, on the question of the prevalence of the practice, it was apparent from the evidence of Mr. Brougham that he was unaware that the schedule existed when the dispute with respect to the scheduling of his shift first arose. Mr. Brougham said that before learning of that shift, he had made telephone inquiries of other plants and other employers in the region to determine whether it was open to him to schedule such a shift. He was informed in all of those inquiries that Wednesday to Sunday shifts were not the practice. A reasonable speculation is that the Site 2 shift was scheduled with the consent or acquiesence of the employees concerned, not on the basis of an assertion of a contractual right by the Employer.

The general principles governing the use of extrinsic evidence of practice were set out in the decision of the former Labour Relations Board in The Corporation of the District of Burnaby and Canadian Union of Public Employees, Local 23 [1978] 2 C.L.R.B.R. 99 (Weiler). It is made clear in that decision and in others that evidence of practice is only of assistance if it is established that it meets the following test set out on p. 103 of that decision:

> [I]n the final analysis, the objective of an arbitration board in resolving that doubt is to select the meaning which actually was intended by both of these parties in their concrete setting; not to make a judgment about which is the more obvious construction of the language when it is read in the abstract. (emphasis added)

However the practice evidence in this dispute is characterized, it does not support the conclusion that the practice of the parties was to schedule Wednesday through Sunday maintenance shifts in terms which would support the conclusion that they mutually intended Article VII(2) to authorize the scheduling of such shifts.

In District of Burnaby, extrinsic evidence of past practice is defined as facts that disclose the way in which parties have consistently applied disputed language. The general arbitral authorities make it clear that evidence of past practice must define a consistent practice which is sufficiently pervasive to support the inference that it reflects the mutual intentions of the parties. In Dominion Consolidated Truck Lines Limited and Teamsters Union Local 141 (1981), 28 L.A.C. (2d) 45 (Adams), the following comments appear on p. 49:

> Rather we would find that where parties in collective bargaining refer to a "practice" they are referring to the accepted "way of doing things"; their uniform and constant response to a recurring set of circumstances ... But regardless of how it is initiated, like all binding past practices, the course of conduct must occur with sufficient regularity, and continue long enough to be accepted by both parties as the normal way of operating presently and in the future ... The party asserting a practice bears the burden of proving it by clear and definite testimony.

The practice evidence relied on by the Employer does not meet that standard. I agree with the Employer's position that practice evidence cannot be used to found rights that are inconsistent with the language of the collective agreement. See North Central Plywoods and see Re Corporation of City of Victoria and Canadian Union of Public Employees, Local 50 (1975), 7 L.A.C. (2d) 239 (Weiler) @ p. 243. But I do not agree that language can be read in isolation on the basis of an assertion that its meaning is clear on its face. The leading decision with respect to the interpretation of collective agreement language in British Columbia is found in University of British Columbia and Canadian Union of Public Employees, Local 116 [1977] 1 C.L.R.B.R. 13 (Weiler). In that decision the Board made it clear that arbitrators should not rely on the plain meaning of language as considered independent from the facts giving rise to its introduction and application. On p. 16 the Board wrote:

> [I]t is important in industrial relations that the arbitrator decipher the actual intent of the parties lurking behind the language which they used and not rely on the assumption that the parties intended the "natural" or "plain" meaning of their language considered from an external point of view.

In short, in considering disputed language an arbitrator is required to approach it in the context of any available extrinsic evidence regardless of whether the language appears clear when read in isolation. On p. 18 the Board wrote:

> [T]he arbitrator, when he begins the task of interpretation, will be able to do so with a full appreciation of the relevant exchanges which eventually culminated in the formal document. With that material before him, the arbitrator can decide whether he entertains any doubt about the meaning intended for the provision in question and, if so, whether the negotiation history is helpful in resolving that doubt.

Applying those authorities to the language at issue in this dispute, I note first that Article VII(2)(a) is not clear in the sense urged by the Employer. When the language is read in conjunction with Article VII(4) and Supplement No. 8, a question arises as to the meaning intended for Article VII(2)(a) with respect to the scheduling of Sunday shifts. In particular, the reference in Article VII(4)(a) to "other schedules which, except for production shifts in manufacturing operations, may include Sundays" is inconsistent with the Employer's interpretation. The phrase can be read in the manner urged by the Employer, but it is not a likely meaning to attribute to the language when it is read in conjunction with the remainder of the provision and in the context of the prevailing practice.

The Employer relied on the decision in Federated Co-Operatives Limited and the language of the agreement to support the contention that "other schedules" in Article VII(4) meant schedules

other than those involving eight hours per day, five days per week. Certainly that comment was made by Mr. Fraser. However, he made it in the context of a dispute with respect to whether Article VII(4) could be read as requiring the consent of the affected employees and the union before the employer could swing shifts in a schedule already in existence. Mr. Fraser did not have to consider whether the term could be seen as encompassing "other schedules" in the sense of a pattern of schedules different from the patterns provided for in Articles VII(1) and (2).

Further, there was no indication that Mr. Fraser had any extrinsic evidence before him to assist in the interpretation of the language. Here the evidence of negotiating history makes it clear that what was under consideration in the negotiations giving rise to Article VII(4) and Supplement No. 8 included the desire of the industry to move to six-day production shifts as well as shift patterns outside of the eight hours per day, five days per week pattern. Six-day production, on the evidence, raises the issue of maintenance and the need for Sunday maintenance shifts. Considered in the context of the evidence, Article VII(4) is consistent with an agreement that production shifts could be scheduled Monday through Saturday and other shifts, including maintenance shifts, could be scheduled on Sundays when the criteria set out in the provision is met. Included in that language is a capacity to schedule shifts other than eight hour day - five day week shifts. But the language does not point exclusively to a right to schedule other than eight hour day - five day week schedules.

The broader interpretation is reinforced in a consideration of Supplement No. 8. In Part A, the intent of the provision acknowledges "the need for flexibility of hours", not simply hours other than the hours outlined in Article VII(1) and Article VII(2). Included specifically in the supplement are maintenance shifts. In Part B(3)(a), dealing specifically with maintenance, the language

contemplates in part, "shifts of up to 10 hours per day, 40 hours per week, Monday to Sunday inclusive". Giving those words their ordinary meaning, they cannot be said to exclude five eight hour shifts which include Sunday as one of the days. If it is accepted that five eight hour shifts including Sunday for maintenance workers is not a pattern included in Article VII(2), then the language in Part B(3)(a) and Article VII(4) gives to employers the right to schedule such shifts with the consent of the affected employees and the Union.

As indicated, Article VII(4) supports that assessment. If it is accepted that Article VII(2) contemplates two categories of employee, being those who are required to work on Sunday by reason of the nature of the work they perform, and maintenance employees for whom Article VII(2) is necessary in order to schedule Tuesday through Saturday shifts, then the Union is correct in its submission. The conclusion I reach on a consideration of the language is that it is not clear on its face, but when it is considered in conjunction with the extrinsic evidence, the interpretation advanced by the Union emerges as the probable one.

In reaching that conclusion, I did not disregard the interpretive principles summarized in the decision of Mr. Cumming in B.C. Forest Products with respect to the requirement for clear language to support an intention to restrict the right of an employer to institute shift schedules in accordance with the needs of production. But those principles must be applied here in a manner responsive to the language and structure of Article VII. That article represents an agreement by the Employer to restrict regular shift schedules to "eight hours per day and 40 hours per week, Monday to Friday inclusive". Thereafter the provision defines exceptions to that regular shift pattern. Nor did I overlook the reasoning of Mr. Williams in North Central Plywoods. That decision, when compared with the facts present in this dispute, underscores the first and most fundamental principle governing the interpretation of collective

agreements. That principle is that the interpretation must respond to the particular language and the particular circumstances. I agree with the principles of interpretation set out by Mr. Williams in that decision and his application of them to the facts and language before him. But the facts and language in this dispute differ and a different result is dictated.

Here there is clear language in the agreement defining a restriction on the right of the Employer to schedule shifts and the question is whether a shift pattern falling outside the restriction has been agreed to by the parties. The thrust of the evidence of bargaining history of Article VII was that a restriction on the scheduling of Sunday shifts existed and that the Employer wanted to negotiate a variation in the existing shift patterns. The evidence favours the Union submission that Wednesday through Sunday maintenance shifts were not an exception agreed to by the parties under Article VII(2) and that they were agreed to in the current agreement under Article VII(4) and Supplement No. 8. In the result, I conclude that the grievance must go in the Union's favour.

DATED at the City of Prince George, in the Province of British Columbia, this 16th day of June, 1993.

H. ALLAN HOPE, Q.C. - Arbitrator