IN THE MATTER OF:

An Arbitration Between:

CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 731
(hereinafter referred to as "the Union")

and

SEVEN OAKS SCHOOL DIVISION NO. 10
(hereinafter referred to as "the Division")

and

DALE ROBINSON

(hereinafter referred to as "the Grievor")

ARBITRATION AWARD

BOARD:

GAVIN M. WOOD - Chairperson
BRUCE BUCKLEY - Nominee for the Union
GERALD PARKINSON - Nominee of the Division

COUNSEL

ROB SIMPSON - Counsel for the Division
BILL SUMERLUS - Counsel for the Union

AWARD

On August 26 and 27, 1998, an arbitration hearing was held into the grievance of Dale Robinson. The Arbitration Board consisted of Gavin Wood as chairperson, Bruce Buckley as nominee for Canadian Union of Public Employees Local 731 and Gerald Parkinson as nominee for Seven Oaks School Division No. 10. Robert Simpson appeared as Counsel for the Division and William Sumerlus appeared as Counsel for the Union. At the outset, the parties confirmed the jurisdiction of the Board of Arbitration and that the Board was properly constituted.

The grievance arose from a posting for a "weekend utility" position. On June 27, 1997, after being interviewed, Dale Robinson was denied the position. On July 4, 1997, he grieved that denial on the following terms:

> I claim there is a difference between myself and the Seven Oaks School Division (hereinafter referred to as the "School Division"). The School Division has misinterpreted and/or misapplied and/or violated Articles 1,4,8,12 and other relevant Articles of the Collective Agreement and the Labour Relations Act, Section 80(2). The School Division has denied me the Job Bulletin No. 12/97 Weekend Utility Position (Temp. Position) on June 27, 1997. I was unfairly denied the position. I was the senior qualified applicant. My rights under the

collective agreement have been violated"

The grievance requested several remedies. The Board at the outset was asked only to consider whether the Division should be required to award the Grievor the weekend utility position. Jurisdiction was to be maintained with regards to the balance of the remedies sought.

EVIDENCE

Evidence was received from six witnesses. The Union called the Grievor; Mike Anderson and Dave Inkster, both weekend utility employees with the Division; Brian Peters, a Division employee who had filled in the weekend utility position; and Steve Edwards, a union representative. The Division called Cliff Meder, the Director of Maintenance for the Division.

Several exhibits were filed by agreement, including a Collective Agreement (exhibit 1) for the period from January 1, 1995 to December 31, 1997 ("the Collective Agreement").

Additional exhibits were filed during the course of the hearing. Certain facts were also stipulated to the Board.

FACTUAL CIRCUMSTANCES

Not surprisingly, much of the testimony was uncontroversial. The factual circumstances are set out drawing from the totality of the evidence heard. When there is dispute amongst the witnesses, the evidence of each is considered.

The Seven Oaks School Division serves approximately 9,000 students. It has a teaching complement of approximately 550 fulltime equivalent positions, and 450 nonteaching staff. There are 29 buildings, including 25 schools, operated by the Division.

The 1970's were a period of expansion for the Division. By 1978 it was recognized that the weekend custodial positions which were then classified as "Utility Class 2" positions, involved increasing duties and responsibilities. As a result, in 1978 the weekend utility positions were reclassified as "Utility Class 3". The salary for the positions was increased by $25.00 a week. These changes occurred in recognition of the increasing duties of weekend utility employees, together with them being required to work weekends and being on emergency call outs.

In the period of 1986 to 1992, job descriptions were prepared for the nonteaching positions in the Division. The descriptions were developed by representatives of the Union and the Division. As a result, a job description was prepared for "Utility Class 3" (Exhibit "5").

The description provided by way of "position summary":

> "Under the direction of the Director of Maintenance, the Assistant Director of Maintenance and the Director of Custodial Services, maintain security of buildings on weekends, move equipment from building to building and perform grounds maintenance duties."

In terms of duties, the description provided in part:

> (1.) Perform security duties throughout the schools during off hours including checking schools for damage on weekends, responding to security alarms, and

opening and closing schools for community groups.

(2.) Monitor heating equipment several times a day on weekends throughout the winter months (October to May) and maintain a log book on weekends.

(3.) Substitute for the Courier and the Custodians on an oncall basis and assist trades people as requested. (Exhibit "5")

There are two weekend utility positions with the Division. The positions require attendance outside of shift hours at any one of the buildings operated by the Division on a prearranged basis (for use of the building by some group) or on an emergency basis. An emergency can arise as a result of one of several different types of alarms in the buildings being activated (as monitored by Triple A Security), a resident in the vicinity of a building noticing something taking place on the Division's property, or the police or fire department requiring access.

The weekend utility positions require response to such call outs. Usually the call is made by Triple A Security to Mr. Meder or one of the supervisors (designated to take such calls on a rotation basis), who then in turn contact one of the two weekend utility employees. The weekend utility personnel are provided with both a pager and a cellular telephone in order to assist the supervisors for the Division in contacting them.

The weekend utility employees have keys and access codes to all of the buildings. If one of those employees is away, he leaves his keys and codes for his replacement.

If called out after his usual work day, the weekend utility employee is paid time and a half from 4:40 p.m. to 12:00 a.m. and double time after 12:00 a.m., with a minimum of two hours per callout. If an employee is called out on a dayoff, then he is paid double time regardless of whether the callout is before or after midnight (again a minimum of two hours per callout is paid).

The hours of work for a weekend utility employee are different for two periods of the year. During the school year, one employee (Mike Anderson, except when he was injured) works Wednesday to Sunday, 7:30 a.m. until 4:40 p.m., with Mondays and Tuesdays off. The second employee (Dave Inkster) works Saturday to Wednesday and is off on Thursday and Friday. That is, during the school year both weekend utility employees work Saturday and Sunday, as well as Wednesday. On Monday and Tuesday, when the one employee is on his daysoff, the other employee is called to respond to callouts, and on Thursday and Friday days off, the other employee is called. On Saturday' Sunday and Wednesday, when both weekend utility employees are working, the callouts are made on a rotation basis. On Monday, Tuesday, Wednesday and Thursday, if the one employee is unavailable or if on the Wednesday, Saturday and Sunday, the employee called on is unavailable, the other one will be called. On occasion, if neither is available, one of the Supervisors will respond to a callout.

The second time period is during the summer recess, that is, roughly the months of July and August. The one employee (Mike Anderson) works 7:30 a.m. to 4:00 p.m. on Sunday to Thursday, with Friday and Saturday off . The other employee (Dave Inkster) works from Monday to Friday, with Saturday and Sunday off. The two employees are free to rotate this schedule to allow each of them alternate weekends off if they wish. On Friday and Sunday, the employee working responds to all callouts. When both are working, or neither working, then they respond to the callout on rotation. Also during the summer months, the weekend utility workers take their holidays. When one is away, the other is responsible for all call-outs. On the days when neither is working, then another Division employee (normally a Utility Class 2 worker) is brought in to deal with the day work and the callouts. There are also occasions when, if only one weekend utility employee is working, he may make arrangements with the Supervisor to be away.

Until the grievance was brought, there had been no dispute between the Division and the Union over the weekend utility positions. There was an occurrence of Mr. Inkster being unavailable for callouts because his answering machine at his home was on and messages were being recorded. Mr. Meder spoke to Mr. Inkster, requesting that he turn off his machine so that he could be reached and thereby available to respond to callouts. Mr. Inkster was told by Mr. Meder that he must be available to respond (as the job demands) or would be subject to discipline.

During the hearing there was considerable controversy over whether there was, or was not, a mandatory requirement that the weekend utility employees respond to callouts on their days off. In that regard, witnesses were in sharp disagreement concerning the requirements of the weekend utility positions.

The Grievor said that he understood that the position required callout work, but that this had always been handled on the basis that the callouts occurred only on the day that the employee was otherwise working.

Mike Anderson, one of the weekend utility workers, said that he had never been told that callouts were compulsory on days off. He said he had never been "ordered" over the years to take a callout, rather he had been asked. At the same time, he said that the only time he had refused a callout was once when, in his opinion, he had consumed too much alcohol to drive safely. He acknowledged that he regularly accepted callouts on his days off, explaining that he needed the money. He also said that he would at times advise that he was unavailable for callouts when he was away (for example, at the lake). In summary, he maintained that it was his understanding that the weekend utility positions required call-outs to be performed on the evenings and overnight of the five work days each week. If available on a day off, "you could go if you wished". The job did not require one to be available twentyfour hours a day, seven days a week.

Dave Inkster said that he had never been advised that as a weekend utility worker, he must be available for callouts on his days off. He said there was no written policy at the Division that weekend utility employees had to be available on days off. He did not believe that the job description required such availability. He said that callouts were a form of overtime and that the Union had always taken the position that overtime was at the discretion of the individual employee. It was the employee's choice to take overtime if he or she wished. When faced with the demand that his answering machine be turned off, Mr. Inkster maintained that he did not understand that demand to mean that he could be forced to accept overtime. He understood overtime was always at his discretion. At the same time, he acknowledged that weekend utility employees had been responsible for callouts for over twenty years.

Brian Peters was called as a witness by the Grievor. He had been employed with the Division since 1982 in a series of custodial jobs. He had filled in as a utility worker on weekends. He was currently employed as a floating daycustodian. He said that he did fill in as a weekend utility worker for one week and that he answered all callouts.

Mr. Meder conceded that regular overtime was voluntary. While Mr. Meder considered callouts to be a form of overtime, he maintained that the nature of the job rendered such callouts a compulsory job requirement. He agreed that if only one weekend employee was working on a given day, it was that employee who was called first to respond to the callout. However, if that person for whatever reason was unavailable, then the other employee, even though on his day off, was called upon to take the call-out. The employee on his days off was paid automatically at a double time rate (regardless of the hour of the day), but was required to respond to the callout.

Having said that, Mr. Meder conceded that he had never disciplined Mr. Inkster for not being available as a result of his answering machine being on; nor had he disciplined Mr. Anderson for being

unavailable due to having consumed too much alcohol; nor had he ever told Mr. Anderson that he could not book off from callouts in order to go to the lake.

However, he also maintained that since the classification for the weekend utility position was changed in 1978, both Utility Class 3 employees were required to be available to take calls, even if on their days off.

The Grievor has been employed with the Division for fourteen years. In that time he had held a number of different custodial jobs. In June, 1997, he was the day custodian at Forest Park School, working Monday to Friday. He was aware of the position of "weekend utility" with the Division. It was also sometimes referred to as the "Utility 3" or "Utility Class 3" position due to its distinct class 3 classification. Mr. Robinson had applied once before for one of the weekend utility positions (in 1989), but had withdrawn his application. He said he was aware of what the position involved.

In June, 1997, the Grievor had an additional parttime job driving a limousine. It was primarily a "summertime position" with flexible hours.

Mike Anderson, one of the weekend utility employees, was seriously injured in a car accident on June 15, 1997. It was apparent that he would not be returning to work for an extended period of time. A replacement position for him was posted by a job bulletin on June 25, 1997. The bulletin noted: *"This is a Temporary Position Indefinite"* (exhibit 4) The bulletin set forth the qualifications for the position and provided:

SHIFT	Days 7:30 A.M. 4:30 P.M., May include some evenings shifts. Days of work will be Wednesday to Sunday, with Monday and Tuesdays off.
PLEASE NOTE	The successful applicant must have a valid 5th class power engineer's certificate and a current Manitoba driver's license. (exhibit 4)

Due to the incapacity of Mr. Anderson, the application deadline was set quickly for June 27, 1997.

The Grievor did apply for the position. It was stipulated in evidence that he was the senior person who applied for the position and that he was qualified in terms of physical capability, in knowledge, and in having the necessary certificates and licenses.

The Grievor was interviewed for the position on June 27 by Mr. Meder and two other individuals with the Division.

The interview initially went "well" according to both sides. Mr. Robinson and Mr. Meder both knew that the Grievor was the senior employee applying for the position. There was first a general discussion about the weekend utility position and that it was a temporary position of an indefinite duration given the uncertainty over how long Mr. Anderson would be disabled.

The Grievor said that Mr. Meder basically Gave me the position., and asked if the Grievor could start on Saturday that week. The Grievor explained that he could not as he was driving in his parttime job. At that point, the conversation turned to the requirement of availability for callouts.

Mr. Robinson said he was not available over the weekend. Mr. Meder indicated that arrangements could be made to cover Saturday, June 28, 1997, but that thereafter he would have to be available on Fridays and Saturdays. Mr. Robinson said that the job did not require him to be available on his days off. Mr.

Robinson explained that he wasn't available for callouts Friday or Saturday (until at least "close to midnight") because of his job driving the limousine. Mr. Meder explained the nature of the job as requiring one to respond to callouts on days off when necessary. The Grievor responded that the weekend utility position must still allow one to have two uninterrupted days off each week; that is, days off without callouts.

Mr. Meder explained to the Grievor that if he was not in a position to respond to emergency callouts on Fridays and Saturdays, that he would have to pass over him and go on to the next senior applicant. Mr. Meder maintained that when he said that, the Grievor did not indicate a willingness to give up his part-time job. The Grievor said that Mr. Meder told him that the job required him to be on call "twentyfour hours a day seven days a week", at which time he responded that the position had to allow for two days off work each week.

Both agreed that the interview concluded with Mr. Meder advising the Grievor that he would not be given the job because he was unable to do the job as required. The next senior applicant was offered and accepted the position. That person carried out all of the emergency calls he was asked to perform until Mr. Anderson returned to the position (approximately one year later).

On exiting the interview, Mr. Meder was reported to have said that the Grievor wouldn't work "Saturdays or Sundays" and that he therefore didn't "deserve" the job. Mr. Meder could not recall making any such comment but said that it was possible that he may have said something about Mr. Robinson being unavailable to work weekends.

After being denied the position, Mr. Robinson filed a grievance on July 4, 1997. Subsequently the grievance was rejected by the Board of Trustees at its meeting on October 20, 1997. In a letter the Superintendent of the Division wrote to the Union explaining the rejection as follows:

> "The job requirements of the position are such that the employee is required to respond to emergency calls after hours and on days off. The grievor, Mr. Robinson, indicated he had another job outside the Division and thus unable to respond to emergency call outs." (Exhibit "3")

In response, Steven Edwards, a Union representative, attempted to clarify the Grievor's position in a letter in the following terms:

> "The Union is clarifying its position in that Mr. Robinson stated in the interview that he was only unavailable for calls out on his days off to respond to emergency calls but this was not a problem for him during his regular scheduled days. (Exhibit "6")

The Division, despite this clarification, reconfirmed its position of rejection of the grievance by letter dated November 10, 1997 (Exhibit "7").

SUBMISSIONS

For Mr. Sumerlus, the issue of this grievance was whether the qualifications for the weekend utility position posted in the job bulletin (exhibit 4) were in violation of the Collective Agreement. Specifically, he maintained that the Division had set a qualification of requiring

availability for callouts "24 hours a day, 7 days a week". He summarized the position of the Grievor that such a requirement was unreasonable and contrary to the Collective Agreement.

Mr. Sumerlus recognized the right of management to set qualifications for positions and to set policies for the workplace. But he maintained that such qualifications and policies could not be unreasonable and could not be in contradiction to a collective agreement. He conceded that the Division had not acted with mala fides in setting the disputed qualifications. However, in setting the disputed qualifications, the Employer improperly disqualified the Grievor.

Mr. Sumerlus referred to Re: Fletcher Challenge Canada Ltd. and Communications Energy and Paperworkers Union Local 1123 (1997), 62 L.A C (4th), 358 in which the employer's authority to set qualifications was commented upon as follows:

> "...that, subject to the terms of the particular agreement, an employer has the power and the responsibility to fix the qualifications it deems necessary to perform the requirements of the job. Those qualifications must be reasonable and related to the functions to be performed: Re: Inglis Ltd. and U.S.W.. Local 4487, supra at p. 229..." Per, Re: Corporation of District of Mapleridge and CUPE, (1979) 23 L.A.C. (2d) 86
>
> ……
>
> The Employer has the right to determine initially what qualifications an applicant must have for a particular job. The issue is to what extent, if any, this management right is circumscribed by the Collective Agreement? Were the qualifications set by the Employer in this case correct in the arbitral sense that is to say, were they contemplated by the Collective Agreement?(p. 362)"

Having offered that summary, Mr. Sumerlus turned to a review of the Collective Agreement

(exhibit 1). Article 12.01 provided:

> "The work week shall consist of five (5) consecutive days of eight (8) hours each with two (2) consecutive days off. No eight (8) hour shift shall be spread over a period of longer than ten (10) hours with a minimum work period of not less than two (2) hours."

Mr. Sumerlus stressed that the requirement of "two consecutive days off" was mandatory.

Article 8.08 provided:

> "Method of making appointments: Seniority as determined in Article 7.02 (Probation Period &: Calculation of Seniority) shall be the determining factor, provided the employee has the necessary qualifications to meet the requirements of the job..."

Emphasis was placed on the "necessary qualifications" condition. He urged that it was improper to disqualify an applicant who was unable to meet a requirement set in contravention of the Collective Agreement.

Article 13.02(3) provided:

13.02(3.) All overtime worked on Saturdays and Sundays shall be paid for at double time (2 x). Where an employee is required to consider Saturday or Sunday as part of that employee's regular work week the two (2) consecutive days off shall be considered that employee's Saturday and Sunday for overtime purposes.

This Article recognized that the Division can schedule an employee to work on Saturdays and Sundays. However, this provision, according to Mr. Sumerlus, did not contradict the mandatory requirement of Article 12.01. If a weekend utility employee was required to be on standby on his days off, then it follows that there was no dayoff and the provision for two consecutive days off set in Article 12.01 was contravened. In that regard, Counsel for the Union reminded the Board of the general rule of interpretation of collective agreements: the normal usual and ordinary meaning of words should be used.

Mr. Sumerlus recognized that the Division might argue that the requirement of being on call is found in the job description (in the reference to the availability to respond to security alarms and such). But he maintained that such reference to availability could not circumvent the clear requirements of the Collective Agreement for a mandatory "two consecutive days off". Turning specifically to the job description, he considered the various "duties", but suggested that phrases such as "during off hours" could not justify "the big jump" to find that such employees must be on stand by 24 hours a day, 7 days a week. He questioned why the job description did not specifically provide for the spelling out of such an onerous job requirement quite specifically.

He maintained that the denial of the application of the Grievor was based on this requirement, which was in clear contradiction to the Collective Agreement. He went on to challenge one to find where, in the wording of the Collective Agreement, it provides that a weekend utility employee must be on call on his days off and on call 24 hours a day, 7 days a week.

Further, Mr. Sumerlus turned to the job posting (exhibit 4). He reviewed the qualifications set out in that posting, maintaining that there was no reference to be on standby on one's days off.

Mr. Sumerlus referenced a series of authorities to support his submission. In Re: Board of School Trustees, Delta School District and Canadian Union of Public Employees, Local 1091 (1994), 46 LA.C. (4th) 216, the Arbitrator was faced with the issue of whether the employer violated the collective agreement when it set the qualifications for a job posting.

The Arbitrator wrote:

> "The issue to be determined in this award is whether the employer violated the collective agreement when it set the qualifications for the posting for a laborer.
>
> Let me start by confirming that I accept that, absent language in the collective agreement which provides otherwise, management has the responsibility and right to specify the necessary qualifications for a particular job and determine what relative weight should be given to each of the chosen qualifications. I also accept that management's determinations will not be honored if the employer in bad faith manipulated the job qualifications to subvert the just claim of employees under the terms of the collective agreement or the qualifications are not reasonable in relation to the work to be done" (at page 228)

In Re: Ontario Educational Communications Authority and National Assoc. of Broadcast Employees & Technicians (1976), 11 L.A.C. (2d) 30, the Arbitrator considered a provision dealing with scheduling. Relying upon other articles to assist in reading that provision in context, Arbitrator Linden found that the scheduling of work had been carried out in violation of the collective agreement.

Counsel emphasized the test employed in grievances involving nonpromotion. In Re: Saskatchewan Health Care Association and Saskatchewan Union of Nurses (1996), 52 L.A.C. (4th) 157, the stated test was:

> "The employer obviously has the right, in the first instance, to make a decision with respect to matters of ability, performance and qualifications. The duty of the arbitration board is to determine whether in making that decision the employer complied with the terms of the collective bargaining agreement. That obviously involves more than merely determining whether the employer acted in good faith, without arbitrariness or discrimination. It also involves more than determining whether the decision of the employer was reasonable, although in the words of Mr. Justice Cory that may go a long way to determine the issue submitted to the board. If the Grievor grieves the decision of the employer, the Grievor has the right to have the arbitration board who hears the case determine, for example, the issue of whether or not, in the board's opinion, the Grievor was or was not possessed of the required ability, performance and qualifications for the position". (at page 165)

Counsel asked that the test laid out in Re: Lever Brothers Ltd. and Teamsters Union Local 132 (1994), 39 L.A.C. (4th) 299 be considered. Arbitrator Knopf wrote:

> "The standards of review which arbitration boards should adopt have been ably canvassed and analyzed in the many cases cited above by counsel. Suffice to say for purposes of this case, the cases establish that arbitrators should look to see if there has been compliance with the collective agreement, look for honesty and lack of mala fides, look for reasonableness and can only consider management rights to be unfettered if the collective agreement specifically so provides as set out in the University Hospital, case, supra, at pp. 139-40:
>
> …..It is now reasonably well established the scope of arbitral review of a management decision of this type is somewhat broader than it used to be. Prior to the decision of the Ontario Divisional Court [in A & P] there had been a line of cases which had suggested that the basis for arbitral review of employers' decisions in matters of this kind ought to be limited to a consideration of whether or not the decision was made reasonably, without discrimination and in food faith. However, the A & P case and subsequent cases have indicated that, in the absence of some express provision in the collective agreement providing that the assessment of an employee's ability is to be based on management's opinion, a board of arbitration reviewing a management assessment is obliged to consider whether or not the decision is correct ... Putting it another way the board of arbitration must determine whether or not management complied with the terms of the collective agreement in reaching its decision and, following the A & P case, there is no longer room for any "presumption" that management's evaluation is to be respected or shown any particular deference save in cases of demonstrable bad faith or unreasonableness."

(at pages 315316)

Mr. Sumerlus pointed out the requirements that a employer must satisfy in introducing a rule unilaterally as set in: Re: Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd. (1965), Vol. 16 11 16 LA.C. 73 at pages 8586.

Mr. Sumerlus also referenced the following awards as illustrative of the standard of review:

(1) Re: Toronto Hospital (General Division) and Ontario Nurses' Association (1994), 41 L.A.C. (4th) 196;

(2) Re: Rosewood Manor and Hospital Employees' Union, Local 180 (1990), 15 L.A.C. (4th), at pages 407408;

(3) Re: Michael's Extended Care Centre and Canadian Health Care Guild (1994), 40 L.A.C. (4th) at pages 116117;

Mr. Sumerlus pointed out awards dealing with circumstances whereby it was appropriate to consider the past history between an employer and employee in the analysis of a grievance. In Re: The City of Brandon and The Canadian Union of Public Employees, Local No. 69 (1997), Arbitrator Freedman wrote:

> "We start our analysis of this situation by examining the Agreement. If the Agreement is clear and there is no legal ambiguity, then issues relating to past practice do not arise." (at page 18)

In Re: Corporation of City of Victoria and Canadian Union of Public Employees, Local 50 (1974), 7 L.A.C. (2d) 239, the rejection of extrinsic evidence was explained in the following terms:

> "Apparently, the City has administered the collective agreement and in particular this language under s. 21:10 for a considerable number of years on the assumption that only three hours' pay at the normal rates was guaranteed on an emergency call. It argued that this past practice implied that that was the correct interpretation. However, I believe that the language of the agreement on its face is sufficiently clear that extrinsic evidence may not be used to alter its meaning, and that is certainly true of the character of the evidence advanced here. (at page 243)

The Board was also referred to Re: Douglas Memorial Hospital and Canadian Union of Public Employees, Local 153 (1991), 19 L.A.C. (4th), 14 and Re: Government of the Northwest Territories and Union of Northern Workers (1997), 65 L.A.C. (4th), 211.

Mr. Sumerlus then turned to consideration of the testimony. He challenged whether there had been a consistent practice of requiring weekend utility employees to respond to callouts on their days off. For example, Mr. Andersen had refused a callout and had also at times advised that he would be away. Mr. Sumerlus pointed out that there were a number of qualified people who could respond to callouts without necessitating the weekend utility workers to be available on their days off. He challenged how this requirement then could be seen as reasonable. All of the witnesses called by the Grievor testified that none of them had ever been ordered to be available for callouts, but rather had responded to calls on request. Even Mr. Meder, called on behalf of the Division, said that he had never ordered anyone to take

a call. He emphasized the evidence of Mr. Inkster, who had been on the negotiating committee for the Union and who maintained that all overtime was voluntary.

It was pointed out that the Collective Agreement did not provide for payment while on standby. By the provisions of the Collective Agreement, one was only paid for an actual callout.

Finally, in summary, Mr. Sumerlus challenged how it could be that such a stringent requirement of being available for calls 24 hours a day, 7 days a week would not have to be detailed in writing. He maintained that the reason this policy was not set out was that it was unreasonable and clearly inconsistent with the Collective Agreement.

In his response, Mr. Simpson began by saying that the Grievor was denied the temporary Utility Class 3 position was that he was found to be unqualified, specifically that he was unavailable to perform the job as required. Mr. Simpson stressed that the Division had the right to set qualifications as long as those qualifications were not set in contradiction of the Collective Agreement, arbitrarily, in bad faith, or in a discriminatory manner. Such qualifications must also pass a test of reasonableness.

He went on to emphasize that the onus of showing that the Division had acted improperly in setting the qualifications was on the Grievor. In summary, Counsel for the Division argued that the Division had not acted improperly in setting the qualifications and that the Grievor had demonstrated to the selection committee that he was unable to meet those qualifications (by being unavailable for the job as required).

Mr. Simpson then turned to a review of the weekend utility position, detailing its various aspects as set out in the evidence. After that review, Mr. Simpson reemphasized that the job carried with it a commitment to respond to emergency callouts.

Mr. Simpson next reviewed the job description for "Utility Class 3", (exhibit 5), and the job bulletin (exhibit 4). The job description referred to off hours checking and responding to alarms, to monitoring on weekends and to the maintaining of security of buildings on weekends. He suggested that someone considering the job bulletin would have naturally referenced the job description.

He reminded that the Grievor had said that he was familiar with the weekend utility position. Mr. Simpson surmised that the Grievor must have known of callouts being required on off hours. Specifically, the Grievor must have known how the job requirements were met in offhours, on days off, during the summer months, and during holidays.

Concerning to the interview on June 27, 1997, the Grievor had told the interviewers that he could not work on Friday evenings or Saturdays. How, Mr. Simpson challenged, could such a requirement, given the nature of the weekend utility position, be seen as unreasonable?

For Mr. Simpson, it was on the basis of the Grievor advising that he was unavailable that he was passed over for the position. He did not say, Mr. Simpson emphasized, that he was only unavailable for the summer months. Nor did he say that he would make himself available on Friday evenings or Saturdays in the fall. Nor did he say that he would give up his parttime job.

Mr. Simpson referenced the following authorities with regards to the requirement of availability of the employee to qualify for a position: Re: York County Hospital and Ontario Nurses' Assoc. (1987), 30 L.A.C. (3d), 314; (at pages 325328); Re: Denison Mines Ltd. and United Steelworkers (1983), 10 L.A.C. (3d), 209, at pages 217 218; Re: Seaway/Midwest Ltd. and Teamsters Union, Local 419 (1982), 6 L.A.C. (2d), 295, in which it was stated: "To a large extent availability is a relative term which must be determined based on the job requirements and the facts of the particular case." (at page 303).

For Counsel, the refusal to be available must be looked at in the context of the weekend utility job, which for over 20 years had required response to callouts. Mr. Meder had emphasized the commitment required to be available and to accept callouts.

Mr. Simpson reviewed the various aspects of the weekend utility position during the course of a year with the requirement for availability on Fridays and Saturdays. With that review in mind, Mr. Simpson pointed out that it was not a matter as the Grievor now attempted to present in the grievance that he was unprepared to work on his days off. Rather he was unavailable to work on Friday evenings and Saturdays. That was what the interviewers had been advised. The employee placed in that position had to be available for callouts on Fridays and Saturdays both in the summer months and during the school year.

Mr. Simpson recognized that the Board must consider the Collective Agreement. But the Division was not in breach of Article 8.08 in that, while the Grievor was the senior applicant for the position, he was not qualified for the appointment.

Mr. Simpson denied the claim made by Counsel for the Union that Article 12.01 "guaranteed" two consecutive days off for employees. He referenced Articles 12.02, 12.03 and 12.04, which provided:

> 12.02 Maintenance staff work days where possible. Custodial staff shall work days whenever possible providing prior authorization has been granted by the school principal and the Director of Custodial Services.
>
> 12.03 Working Schedule: Working Schedule is defined as hours of work which the Board agrees to set forth for each employee, as may be required by conditions throughout the school division.
>
> 12.04 An employee who works three (3) or more hours in a day shall be entitled to a fifteen (15) minute paid rest break during each complete three (3) hour period. (exhibit 1)

He said that given these other subparts of Article 12, one could not rationalize Article 12.01 as guaranteeing two consecutive days off. Rather Article 12.01 set the normal hours of work to allow for the calculating of overtime. In that regard, Article 13.01 provided:

> 13.01 All time worked in excess of those hours and conditions as set out in Article 12.01 of this Agreement shall be regarded as overtime payable at the rate of time and onehalf provided that, under normal circumstances, the schedule of work as set out in Article 12.03 has been completed and is not considered for overtime purposes. In any case, the employee will be guaranteed two (2) hours at overtime rates for each call out. If an employee is called out for a second call out within a two hour call out, the employee shall be paid overtime for the additional time which is in excess of the initial two hour call out. (exhibit 1)

He pointed out that actual scheduling of work is within the authority of the Board as provided for in Article 12.03.

Further, Article 13.02 provided in part:

> 13.02 All overtime worked before and after an employee's regular work shift

> which is eight (8) hours shall be considered overtime and will be paid at the following overtime rates:
>
> 1) Time and one half (1 1/2) will be paid for the first eight (8) hours worked over the regular working shift in any one day and double time (2 x) shall be paid thereafter.
>
> 2) Any employee, having returned home from the employee's regular work shift, called back by reason of an emergency shall be paid time and one half (1 1/2) for all overtime before midnight and double time (2 x) for all overtime worked after midnight. Custodians shall be given the preference for overtime worked in their own schools.
>
> 3) All overtime worked on Saturdays and Sundays shall be paid for at double time (2 x). Where an employee is required to consider Saturday or Sunday as part of that employee's regular work week the two (2) consecutive days off shall be considered that employee's Saturday and Sunday for overtime purposes.

Mr. Simpson argued that based on these provisions, the Collective Agreement specifically contemplated overtime including overtime by way of call back due to an emergency.

Turning to authorities concerning compulsory overtime, Counsel referenced the following from Brown and Beatty, Canadian Labour Arbitration (32) (at page 7156):

> "Compulsory overtime. When overtime assignments are compulsory, arbitrators have approached the question differently, although even her a threshold issue may arise as to whether an employee has refused an overtime assignment in a way which warrants discipline. For example, it has been held that a prospective statement by an employee that she will not be available for overtime work in future does not justify the imposition of a disciplinary sanction prior to an actual refusal to work."

He referred to Re: Lantic Sugar Ltd. and Bakery Confectionary & Tobacco Workers International Union, Local 443 (1995), 51 L.A.C. (4th), 257 as illustrative of what may constitute a compulsory overtime provision in a collective agreement (pages 265266).

He maintained that in the present circumstance, the callout provision was a compulsory overtime requirement for the Utility Class 3 employee. For Article 13.01 specifically contemplates overtime beyond the work schedule provided for by Article 12.03. The following authorities were cited as dealing with compulsory overtime in emergency situations pursuant to collective agreements:

(1.) Re: Adams Mine Cliffs of Canada Ltd. and United Steelworkers (1975), 8 L.A.C. (2d); 204;

(2.) Re: Corporation of the City of Nanaimo and Canadian Union of Public Employees Local 401 (1981), 30 L.A.C. (2d), 304; and

(3.) Re: Government of Saskatchewan and Saskatchewan Government Employees Union (Wisminity & Peterson) (1990), 15 L A C. (4th), 1.

For Counsel, these authorities show that overtime, particularly in the context of emergency situations, can be a compulsory requirement pursuant to collective agreements.

He went on to review "the history" of the weekend utility position. The requirement of responding to callout emergencies was consistent with that history as well as consistent with the Collective Agreement, according to counsel.

Mr. Simpson denied that there was a policy of the Division to require weekend utility employees to be available 24 hours a day, 7 days a week. Rather, the position required emergency attendance, in recognition of which there was a salary differential and a paid premium if required to respond. The requirement of emergency attendance did not constitute a unilaterally imposed rule.

While denying that the qualifications set by the Division for the weekend utility position were in conflict with the Collective Agreement, Mr. Simpson also argued that, even if there was a conflict, the Union is estopped given the longterm acceptance of the criteria for the weekend utility positions. Specifically, the Union and Grievor were estopped from advancing the alleged conflict between the job qualifications and the Collective Agreement until the next opportunity in which to deal with that conflict through the bargaining process.

The following explanation of the concept of equitable estoppel from Brown and Beatty, Canadian Labour Arbitration (3d) was quoted:

> "The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.
>
> …..
>
> It is apparent that there are two aspects of the doctrine as thus stated. There must be a course of conduct in which both parties act or both consent and in which the party who later seeks to set up the estoppel is led to suppose that the strict rights will not be enforced. It follows that the party against whom the estoppel is set up will not be allowed to enforce his strict rights if it would be inequitable to do so. The main situation where it would be inequitable for strict rights to be upheld would be where the party now setting up the estoppel has relied to his detriments" (at pages 260 261)

Mr. Simpson was mindful of the distinction between the use of evidence of past practice in the context of interpretation of a collective agreement from its use to create an estoppel.

In that regard, he quoted again from Brown and Beatty, Canadian Labour Arbitration (3d):

> "In considering past practice in this regard, however, a distinction must be made between creating an estoppel and using it as an aid to the interpretation of the collective agreement. In the latter context, evidence of a past practice is admitted to assist the arbitrator in selecting the correct interpretation of a term in a collective agreement which permits more than one possible interpretation. Such evidence is available, however, only if the agreement is ambiguous or capable of more than one meaning. That restriction, however, has no application to the

> admittance of such evidence for the purpose of establishing the requirements of the doctrine of estoppel. Nevertheless, arbitrators have been cautious in applying the doctrine of estoppel where the basis of the representation has been an established work practiced (page 268)

Mr. Simpson asked the Board of Arbitration to consider as well the following awards:

(1) Re: Ferraro's Ltd. and United Food & Commercial Workers, Local 1518 (1989), 7 L.A.C. (4th), 228;

(2) Re: Transcona Springfield School Division No. 12 and Canadian Union of Public Employees, Local 3465 (l993), 34 L.A.C. (4th), 225 wherein Arbitrator Chapman concluded:

> "Under the circumstances we are of the view that we should consider the past practice of the parties. As mentioned earlier, it is beyond dispute that the members of the bargaining unit and/or the union had acquiesced in the manner in which the employer interpreted the collective agreement. The only evidence we had was of one isolated incident some four or five years ago and there was no formal complaint made. At best the reference to that incident was "vague". Considering the jurisprudence we have quoted with respect to estoppel we feel that it would only be appropriate to hold that the union, even if it is correct in its interpretation of the collective agreement, is estopped from proceeding with these grievances.
>
> We must then determine for how long the estoppel is to be effective. We have already commented that the parties have chosen not to provide us with any of the collective agreements entered into between the parties subsequent to ex. 1. We do not know when the current collective agreement (if any) expires but, in our view, the estoppel would be effective until the termination of whatever current agreement is presently in force between the parties. In the interim and, at the very least during negotiations, we are of the view that the parties should direct serious efforts to resolving the conflict between articles 11(b) and 16.02. They might be well served by achieving some degree of consistency between collective agreements relating to both bargaining united" (at pages 124125)

(3) Re: Corporation of City of London and Canadian Union of Public Employees, Local 101 (1990), 11 L.A.C. (4^{th}), 319; and

(4) Re: The Agassiz Teachers' Association of the Manitoba Teachers' Society and The Agassiz School Division No. 13 (1997), in which Arbitrator Graham considered a number of authorities on estoppel in the context of breach of a collective agreement.

It was the Division's position that if the Board should conclude that a breach of the Collective Agreement had occurred, then an opportunity should be given by the doctrine of estoppel for the parties to deal with the situation by way of bargaining.

In concluding, Mr. Simpson out that the Union itself had been involved in preparing the job description (exhibit 5). In summary, Mr. Simpson argued that the Division had acted reasonably and in accordance with the Collective Agreement in rejecting the Grievor's application for the job in question.

Mr. Sumerlus, in rebuttal, again reiterated the Grievor's position that he had been prepared to respond to callouts on his days of work he was only unprepared for such callouts on his days off. Counsel referred again to the testimony of Messrs. Anderson and Inkster as consistent with the position taken by the

Grievor in the job interview that callouts on days off were not compulsory. He also referred again to the job bulletin (exhibit 4) which he insisted did not call for "a guarantee" of being on call 7 days a week.

While Mr. Sumerlus was prepared to concede that there were cases in which compulsory overtime was found to be provided for in various collective agreements, the key was the wording of those individual agreements. The Board of Arbitration must consider such cases as Adams Mine, infra and Nanaimo, infra. in the context of the specific wording of those collective agreements.

Concerning the application of the doctrine of estoppel, Counsel pointed out that the first notification to the Union of a disagreement over the requirements for the weekend utility position was during the interview for the position with the Grievor. Furthermore, Mr. Sumerlus argued that there was no consistent past practice.

Finally, Mr. Sumerlus asked the Board to consider the following additional awards on the doctrine of estoppel:

(1.) Re: Carefree Lodge and Ontario Nurses' Association (1980), 28 L.A.C. (2d), 129 in which the Board of Arbitration found:

> "In the result, there is no tangible evidence before this board which would permit us to interfere with what appears on its face to be a clear and unambiguous term of the agreement. There is no evidence of a practice which was so strong as to overcome the otherwise clear intention of the parties as expressed in there agreement. Construed reasonably, and giving effect to all of its language, art. 18.01 requires the employer to recognize the second Monday in February as a paid holiday until Heritage Day is proclaimed at which time it will be replaced by the latter." (page 132)

(2.) Re: City of Portage la Prairie and The Canadian Union of Public Employees, Local 1002 (1993), 16;

(3.) Re: Health Sciences Centre and Canadian Union of Public Employees, Local 1550 (1998), (at pages 911)

(4.) Lakeshore District Health System and Canadian Union of Public Employees, Local 2358 (1986), (at pages 11-13), in which the requirement of detrimental reliance was referenced.

At the conclusion of Mr. Sumerlus' rebuttal, Mr. Simpson challenged the suggestion that the doctrine of estoppel required proof of detrimental reliance. He urged the Board to consider the awards he had prescribed.

CONSIDERATION

The parties in their submissions were largely in agreement on the legal principles applicable to the factual circumstances of this grievance. It is appropriate first to consider those legal principles. After that consideration, this section turns to the essential points of disagreement arising from Counsel's submissions. Finally, after review of those areas of disagreement, the issues of the grievance are analyzed.

As pointed out by counsel, Article 8.08 of the Collective Agreement provides that seniority be the determining factor in appointments, "provided the employee has the necessary qualifications to meet the requirements of the job". From the Division's perspective, the Grievor simply did not have the necessary

qualifications. For the Union, the qualifications set by the Division breached the provisions of the Collective Agreement, and were therefore invalidly imposed.

Certainly, Counsel for the Grievor was prepared to recognize management's right to set qualifications for a position. That is, in the ordinary exercise of management functions, the Employer may determine what specific qualifications are necessary for a particular job, and the weight to be given to each of those chosen qualifications. That managerial function is recognized in the case law subject to certain exceptions. Counsel referred to Brown and Beatty, Canadian Labour Arbitration, (3d) at pages 6 -43 6-45. Mr. Sumerlus also referred to the award in Re: Fletcher Challenge, infra, which is quoted above.

In the context of this grievance, the key consideration is whether the qualifications were consistent with the provisions of the Collective Agreement. In Re: Fletcher Challenge, infra, that issue was defined as follows: "The issue is to what extent, if any, this management right is circumscribed by the Collective Agreement? Were the qualifications set by the Employer in this case correct in the arbitral sense that is to say, were they contemplated by the Collective Agreement?" (at page 362). In Re: Board of School Trustees Delta School District, infra, it was stated: "The issue to be determined in this award is whether the employer violated the collective agreement when it set the qualifications for the posting for a laborer" (page 228). And in Re: Saskatchewan Health Care Association, infra,: "The duty of the Arbitration Board is to determine whether in making that decision the Employer complied with the terms of the Collective Bargaining Agreements (p. 165).

The meeting of "the necessary qualifications" includes the availability of the applicant. As noted in the award in Re: Dennison Mines, infra, availability is a relative term that must be determined based on the job requirements (p. 217). And as noted in Re: Seaway Midwest, infra, the "ability to do the job" includes availability to perform the work (page 302).

In considering the Awards cited by both Counsel on the arbitral test applicable to the review management's decision as to an appointment, there does seem to be distinction between the various tests. Several of those tests are quoted above. It is helpful to consider the summary concerning the arbitral test contained in Brown and Beatty, Canadian Labour Arbitration (3d), in which it is stated:

> "From the earliest awards it was said that the primary function of the arbitral review in these circumstances is to ensure that:
>
> ... the judgment of the company must be honest, and unbiased, and not actuated by any malice or ill will directed at the particular employee, and second, the managerial decision must be reasonable, one which a reasonable employer could have reached in the light of the facts available. The underlying purpose of this interpretation is to prevent the arbitration board taking over the function of management, a position which it is said they are manifestly incapable of filling.
>
> Even on this view it is apparent that, except when the agreement leaves the employer's discretion completely unfettered, arbitrators have not restricted their inquiry to an analysis of the *bona fides* of the employer's motives. In additions, as the extract confirms, arbitrators have examined the merits of such decisions, at the time they were made, against a standard of reasonableness." (p. 6-43 to 6-44)

Counsel in their submissions differed on the extent that the arbitral review includes a standard of reasonableness. In that regard, in the Brown and Beatty text, the authors comment:

> "A standard of reasonableness has been invoked in virtually all cases in which an arbitrator must asses the employer's judgment with respect to the skills and

> abilities of its employees. Even though it is often outside the scope of seniority provisions, the employer's decision to demote, in a non disciplinary sense, is also commonly tested in the same manner and against the same standards that prevail in the promotion, layoff, bumping and transfer cases." (at pages 6 44)

From these arbitral principles, two broad issues emerged from the submissions of Counsel. One centered on the Collective Agreement. The other on what took place during the interview process. Turning to the contentions concerning the Collective Agreement, much analysis dealt with whether the Collective Agreement prohibits callouts on days off. Both Counsel carried out reviews of the Collective Agreement as to whether or not its provisions provide for, or prohibit, such callouts. Those reviews have been detailed above.

On consideration of those reviews, it does seem that the problem of interpreting the Collective Agreement on this issue is that neither party to the Collective Agreement turned its mind to the eventuality of "stand by".

Also in contention was the job description for "Utility Class 3" (exhibit 5). Counsel for the Division emphasized the duties set out in the description clearly contemplated callouts on days off. And reminded that the job description was developed by representatives of both the Union and the Division. Counsel for the Grievor argued that the job description was of little importance, for whatever the details of the job description, those details could not circumvent what he maintained to be the clear requirements of the Collective Agreement for the mandatory "days off". Ultimately then he argued, any consideration of the job description must refer back to the provisions of the Collective Agreement.

Controversy also arose from a series of awards referenced by Mr. Simpson as illustrative that arbitral law recognizes that overtime assignments may be compulsory. Mr. Sumerlus, did not "argue against" the awards; instead he pointed out that the key in each of the awards in which overtime assignments were found to be compulsory, was the interpretation by the board of arbitration of the particular collective agreement. The question remained whether the Collective Agreement specifically prohibited such compulsory overtime.

A further contention arose over the testimony of the past "history" concerning the weekend utility positions. In part that contention was over the factual circumstances. For Mr. Simpson, a detailed review of the "history" of the positions demonstrated management's right to callout weekend utility employees on days off. Mr. Sumerlus disputed that description of what the past practice revealed. He pointed to the testimony of the weekend utility employee they did not consider themselves under compulsion to answer callouts. And he pointed to the evidence of Mr. Meder that he had never actually ordered any employee to attend to callouts, but rather had always asked.

On reflection of the evidence in its totality, the difficulty with the past practice stems from the co-operation that existed between management and the weekend utility employees until this grievance. That cooperation lead management ne ver To order. a callout and for the employees to "work with" management to provide the necessary emergency attendance at all hours of the day and night and on all days of the year. Given that cooperation, it seems that neither management or the Union ever turned their minds to the issue of whether such emergency attendance on days off were compulsory.

As well, in part the contention over past history involved the parole evidence rule specifically as to whether the evidence of such past practice could be considered in the analysis of this grievance. Appropriately, Counsel agreed that all evidence would be received by the Board of Arbitration with the acknowledgment that the evidence on past practice might ultimately be excluded by application of that rule. Several authorities were referenced by Mr. Sumerlus in support of excluding any consideration of

past practice. As recognized by both Counsel, however, all of those cases provide that for the rule to be applicable, the agreement must be "clear and without legal ambiguity".

The second broad issue which emerged from Counsels' submissions is what was said by the Grievor and Mr. Meder during the job interview. To resolve this issue requires a factual finding. The evidence received concerning the interview is set out above. To a point, Mr. Robinson and Mr. Meder agreed on what was said. The Grievor was known to be the senior applicant, and the interview appears to have initially proceeded on the basis that he would "get the job". Both also agreed that the discussion during the interview turned to Mr. Robinson's availability over the first weekend. Mr. Robinson said that he was not available. Mr. Meder responded that he could arrange a replacement for this first weekend. That unavailability over the weekend lead to a discussion about the job requirements, which in turn caused Mr. Robinson to maintain that he was entitled to two consecutive and uninterrupted days off each week. A broader discussion of the job requirements followed. At this point the evidence of the two diverged as to what was said.

Given the established arbitral principles, it is not surprising that Counsel appeared in broad agreement on the issues facing the Board of Arbitration. It was in the application of those principles to the factual circumstances that Counsel differed. Yet the submissions of Mr. Sumerlus and Mr. Simpson differed significantly in their overall thrust. For Mr. Simpson, this grievance was narrow in focus, dealing with whether the Grievor had proven to be unavailable to meet the basic job requirements for the position (and therefore did not have the "necessary qualifications" pursuant to Article 8.08 of the Collective Agreement). Mr. Sumerlus maintained throughout his argument that the grievance centered on the requirement of the Division that weekend utility employees be available for callouts on their days off.

One must be mindful that strategy of Counsel may well have lead to these different approaches. However, the difference does seem to have arose in part over a different view as to what was said in the job interview. In analyzing this grievance, it is appropriate first to consider what was said during that interview.

As noted, Mr. Robinson and Mr. Meder agreed on what took place during the interview until the topic arose as to availability on Fridays and Saturdays for callouts. The Grievor explained that his parttime position required him to drive on Friday and Saturday evenings, at least until close to midnight. In the summer months, one weekend utility position (Mike Anderson's) involved working from Sunday to Thursday with Friday and Saturday off. However, during the school year, that same position required the employee to work from Wednesday to Sunday.

Mr. Robinson maintained in the interview that he was entitled to his days off without being required to respond to callouts. He did not say that he was prepared to give up the job of driving the limousine, although he did indicate that it was a parttime position. Mr. Meder said that he realized that the driving job was parttime. He also confirmed that Mr. Robinson had said that he could be available on Fridays and Saturdays "close to midnight". Mr. Meder said, however, that there was no indication that he was prepared to give up the limousine job or that it was only for the summer months. Mr. Meder insisted that it followed that the Grievor was not available on Friday or Saturday evenings to take callouts. He understood that he had "another job" or "another parttime job" on those evenings.

In crossexamination, Mr. Meder maintained that Mr. Robinson did not say that the part-time job was only during the summer period. He admitted, however, that he did not ask whether Mr. Robinson could work on Friday and Saturday evenings "during the heating season". In reexamination, Mr. Robinson confirmed that he said that he could not work on Friday or Saturday evenings because of his parttime work. He told Mr. Meder that he could not be asked to work then because those were his days off. When asked in reexamination as to what was said concerning the period of the school year, the Grievor did not

answer directly, but instead replied that he thought that he would have been most likely available on Fridays and Saturdays.

In considering the testimony of Mr. Robinson and Mr. Meder, one is struck that the interview took an unfortunate turn. Mr. Robinson had explained that he had a parttime job which prevented him from working on Friday and Saturday evenings. Mr. Meder said that he had to be available on those evenings. The Grievor responded by maintaining that he could not be subject to such a demand on his days off. Given the cooperation that had existed up to that point between the weekend utility employees and management, the parties might well have worked out a compromise to "bridge the gap" of the Friday and Saturday evenings over the summer. Granted Mr. Robinson had not been involved in that cooperation, but both the utility employees and management had demonstrated flexibility in dealing with the callouts until this interview.

Instead the interview took its negative turn with Mr. Robinson maintaining that he could not be asked to work on his days off and with Mr. Meder determining that he was unavailable on Friday and Saturday evenings.

On consideration of the evidence, I conclude the Mr. Meder understood from Mr. Robinson that his part-time job prevented him from being available on Friday and Saturday evenings not just during the summer, but as well during the school year. Mr. Robinson did not indicate that the job was temporary or that it was just for the summer. On reexamination he did indicate that he would have most likely been available on Friday and Saturday evenings. Despite the understandable attempt by Mr. Sumerlus in re-examination to have him say more, Mr. Robinson talked in terms of what "might have been". He did not say that he had told Mr. Meder that he would be available on Friday and Saturday evenings during the school year. Mr. Meder therefore was left with the understanding from the Grievor that he was unavailable on the Friday and Saturday evenings during the school year. The position to be filled involved shifts on Fridays and Saturdays during the school year together with availability for callouts on those Friday and Saturday evenings.

The position was being filled on a temporary basis during the summer months. However, it was for an indefinite duration. It seems reasonable for management to have required the applicant to be available to work on callouts on Fridays and Saturdays during the school year.

One can appreciate the way in which Mr. Sumerlus characterized the central issue of the grievance. From the Grievor's perspective, he saw the issue as a requirement to work on call on his days off. However, one need not determine the issue developed by Counsel for the Union. In determining the grievance, I find that in the interview Mr. Meder was provided with answers by Mr. Robinson that lead him to understand that the Grievor was unavailable for callouts on Fridays and Saturdays during the school year.

It follows then that management appropriately reached the conclusion that the Grievor did not meet the qualifications for the weekend utility position in that he was unavailable on Friday and Saturday evenings during the school year, Fridays and Saturdays then being regular work days. Such qualifications complied with the Collective Agreement.

It follows that Article 8.08 of Collective Agreement was not breached by the Grievor being denied the position.

Certainly from the submissions of Counsel, there is an issue involving the callout requirements of the weekend utility positions under the provisions of the Collective Agreement. It is unnecessary in this grievance to determine that broader issue of interpretation of those provisions. But certainly the parties are now alerted to the issue and hopeful it can be clarified through the bargaining process.

DECISION

It follows that the Grievor was not unfairly denied the position as alleged in the grievance. Therefore the grievance is denied.

Thanks is extended to both Counsel for their presentation of this grievance and in particular, as to their clarity in setting the issues through their submissions.

The chair also thanks the Nominees for their attention to this matter during deliberation.

Each of the parties are responsible for the costs of their Nominee and will jointly share the costs of the chairperson.

Dated this 26th day of October, 1998.
GAVIN M. WOOD, CHAIRPERSON

I DISSENT IN THE ABOVE AWARD.
Dated this 21st day of October, 1998.
Bruce Buckley, Nominee for the Union

I CONCUR IN THE ABOVE AWARD.
Dated this 20th day of October, 1998.
Gerald Parkinson, Nominee for the Division