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Grievance Settlement Board

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GSB#2014-2260

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Professional Engineers Government of Ontario
(Policy) **Association**

- and -

The Crown in Right of Ontario
(Ministry of Transportation) **Employer**

BEFORE	Bram Herlich	**Vice-Chair**
FOR THE ASSOCIATION	Larry Robbins Labour Consultant	
FOR THE EMPLOYER	Robert Fredericks Treasury Board Secretariat Legal Services Branch Counsel	
HEARING	August 31, October 19, 22 and 30, 2015.	

Decision

Background

[1] Two grievances have been referred to this Board for determination. Both arise as a result of the Employer's decision to discontinue the Compressed Work Week schedules (hereinafter the "CWW") previously enjoyed by a large number of bargaining unit employees. The first is an Association grievance; the second is a group grievance filed on behalf of more than 100 named employees. While I am seized with both matters, the parties agreed to proceed initially with the Association grievance and to defer further consideration or litigation of the group grievance pending the instant award. This award is therefore confined to the Association grievance.

[2] The grievance arises out of the Provincial Highways Management Division ("PHM") of the Ministry of Transportation. Some 300 bargaining unit engineers are employed in PHM (this represents roughly half of the bargaining unit employees across the entire public service, the full bargaining unit). Approximately 40% of those 300 engineers in PHM were, until the events giving rise to the grievance, working under a CWW arrangement. While there may have been individual variations, the typical terms of these CWW arrangements involved extending the hours of the workday in conjunction with establishing a regular "flex day" off once every two weeks. In other words, employees on the CWW arrangement would work fewer days (i.e. nine rather than ten) over a two-week period, but would work more hours on the days they did work. Thus, there would be no alteration to the total number of hours worked. Those hours, however, would be distributed over a smaller number of days.

[3] This type of CWW had been in place for a substantial period of time. While no discrete point of inception was identified, the evidence establishes that such arrangements had been in place for at least 10 years and likely much longer.

[4] By letter dated February 18, 2014 the Employer advised the Association, in a "Confidential Disclosure", that it had taken a decision (which it would soon be communicating to bargaining unit members) to cancel all CWW arrangements across

the entire PHM division (subject to two minor exceptions – areas in which no employees in the instant bargaining unit work). The letter read, in part:

> The decision to cancel the compressed work week arrangements is a direct result of the division's changing business needs and service delivery expectations and requirements. Public expectations and business needs continue to be more demanding and delivery standards must be met to meet those needs. The availability of knowledgeable staff to handle detailed requests and meet critical business deadlines is essential. In order to ensure timely and effective service, PHM needs to align its hours of operation with both partner and client office hours to ensure effective support oversight. This change will maintain optimum staff levels throughout the entire business week.

[5] Approximately a month later, by memorandum dated March 24, 2014, all staff (including those in both the instant and other bargaining units) were advised of the pending demise of CWWs. The memo included the following:

> After a review of our requirements and to ensure we are able to provide the best services to the public, it was determined that the compressed work week was no longer feasible for the Division. Please note that effective September 2, 2014, Compressed Work Week (CWW) arrangements in the Division will no longer be available…

[6] As is evident, both the letter to the Association and the subsequent memo to staff announced a firm decision. There was no consultation with the Association either before or after the decision was taken (apart, of course, from what may have transpired subsequent to the filing of the grievances). (In fairness, no collective agreement provision requiring such consultation was referred to.) Similarly, (although this perhaps begins to tread on the ground of the second grievance) neither was there any Employer consideration (subject to a singular exception to which we shall come) of individual employee circumstances, needs, or abilities to continue a CWW, with or without modifications, in a fashion which might satisfy Employer concerns regarding operational requirements. The prohibition on CWW was, for all intents and purposes, full, complete and irrevocable within PHM. And, as indicated, CWWs ceased as of September 2, 2014 (employees were provided some five months advance notice of the change).

[7] The case turns on the interpretation and application of Article 9.2 of the collective agreement (in the Employer's view, one need not consider more than the last four words):

> Work arrangements including compressed work weeks, staggered hours, flexible hours, and employees working at home (telework) or at locations other than headquarters, may be entered into by mutual agreement in accordance with current practices. The Employer will make every effort to accommodate the employee's request, subject to operational requirements.

The evidence

[8] We heard the evidence of one Employer witness, Peter Verok, the Regional Director of the Central Region of the PHM Division. We also heard the evidence, tendered by the Association, of three bargaining unit engineers who have seen their CWWs eliminated.

[9] Before proceeding to consider it in the detail necessary for our purposes, it may be helpful to offer a general characterization of the evidence. While there can be little doubt (and there was no issue) as to the relevance of all of the evidence proffered, it stands in stark contrast, though not necessarily in contradiction. The focus of the evidence presented by each party was remarkably different, such that there was little, if any, clear overlap of subject matter, or at least focus, covered (and hence, little, if any, direct conflict). The broad description may well be something of a caricature, but the Employer's primary focus was on theory; the Association's on practice. The Employer focused its analysis at an organizational macro level; the Association's evidence was far more specific in its particularity.

[10] Mr. Verok provided an outline of the work performed within the PHM Division. It is responsible for 16,000 kilometres of roads, some 2700 bridges and the associated culverts, signage and other structures throughout the province. Those responsibilities include maintenance, repair, design and construction. PHM assesses the work to be performed and does the necessary engineering work to prepare contract

packages and set standards for the resulting projects. Those projects are then tendered externally to various contractors. Once the work is let to a contractor, PHM staff, including at least one engineer, oversee its progress. Engineers typically work as part of team, which may vary from project to project and include a variety of internal and external members.

[11] Not only is repair, maintenance and construction work performed by external contractors, so too is (about 95% of) the engineering design work associated with a given project. Thus, the chief responsibility of bargaining unit engineers in respect of various projects is comprised of preparation work leading to the tendering of a project. And once the project is tendered, the bargaining unit engineer responsible will continue to oversee the progress of the project. In addition, each engineer is assigned general responsibility for a number of bridges on an ongoing basis. The Division oversees some 350 projects, of varying degrees of size and complexity, annually. It should be noted that what might be described as a sea change in the manner in which engineering (and perhaps other) work is performed in the Division now dates back almost two decades. Mr. Verok explained that previous to that much more work was done in-house. Now most work is outsourced and most engineering work is performed by outside agencies.

[12] More recently, however, it appears that the division is facing different challenges which, curiously, might be described as an embarrassment of riches coupled with a poverty of staff. Significant public resources ($2.5 billion for 2014-2015) have been committed to highway rehabilitation and expansion projects across the province. There has, however, been no corresponding increase (perhaps even a reduction) in staff.

[13] I must comment, however, that, as in the bulk of his evidence, the brush Mr. Verok used to paint his evidentiary picture was impressively broad. Documents filed show that there has, indeed, been a trend of increases to the Ministry capital budgets (the vast majority of which are allotted to construction). They grew consistently from just over $1 billion in 2001-2002 to a peak of well over $3 billion in 2010-2011. From that

point on, they appear to have levelled off and declined somewhat – in 2013-2014 the capital budget was pegged at some $2.8 billion. It is not entirely clear precisely how the $2.5 billion figure above for highway rehabilitation and expansion projects in 2014-2015 fits within the historical progression. However, even with respect to the historical decline in staff or increase in the general quantum of project management, we were provided with little in the way of comparative empirical data to explain why or how or when matters progressed to the critical stage claimed to necessitate the elimination of CWWs.

[14] Mr. Verok explained that efficiency is critical in the Division's efforts to initiate and oversee an increasing volume of work with a decreased number of staff. And as engineers typically work as part of a team (or teams, which may vary depending on the project concerned), Mr. Verok expressed the view that CWWs can impede the ability of teams to function in an efficient manner. Put most simply, where one (or more) members of any given team are routinely unavailable for one day out of every ten, that will hamper the ability to efficiently schedule team meetings (and, of course, where multiple team members are on CWWs, the lack of available days may not correspond, thus exacerbating scheduling difficulties). In Mr. Verok's view, a culture of avoiding scheduling meetings on Mondays or Fridays (the most popular flex days) has therefore developed. This does not enhance efficient operations. Referring to portions of the PHM Strategic Plan and, in particular, the objective of delivering projects in the most efficient and flexible way through, among other things, developing and implementing process efficiencies in the procurement and management of efficiencies, Mr. Verok observed that having staff at work five days every week helps.

[15] Mr. Verok explained how CWWs pose further impediments to efficient operations. Each engineer has a personal roster of both bridges and projects (engineers would typically have responsibility for 6-10 projects at any given time) for which s/he bears primary responsibility. Should an issue arise on an urgent or time-sensitive basis, it is always best to involve the engineer who has the most extensive knowledge of the bridge/project in question. Such issues can arise at any time and while Mr. Verok conceded that other engineers are capable and have dealt with situations outside of their specific portfolios, it is, all the same, always preferable to enlist the participation of

the engineer with the most extensive knowledge. If engineers work only nine out of ten days, there is an increased likelihood that specific engineers will not be available on any given day.

[16] Similar concerns were expressed with respect to requests that PHM receives, with some regularity, for information from Queen's Park (perhaps spurred on by media requests or public issues or even infrequent spectacular events which may lead to major closures) to be provided with a quick turnaround. Again, while it is possible for staff available at the time of the request to respond competently, it is more desirable that the engineer with the most extensive knowledge be tapped for the response. And, once again, as these requests can come at any time, a fixed absence of one out of ten days for an engineer on CWW will not promote the best practice.

[17] In cross-examination, Mr. Verok allowed that employees work the same number of total hours whether or not on CWWs and that problems can arise at any time including, though not necessarily limited to, employees' working hours before or after the elimination of CWWs. He nonetheless asserted (consistent with what he had earlier described as an "all hands on deck" imperative) that he would prefer to have staff at work five days every week than work an extra hour each of nine out of ten days. Similarly, while he allowed that some, though certainly not all, employees exhibited "flexibility" in harmonizing their CWWs with workplace demands from time to time, he asserted that engineers making themselves available on their flex days was exceptional.

[18] However, when pressed, as he repeatedly was, to describe specific examples of operational difficulties resulting from CWWs, Mr. Verok again and again proved unequal to the task, falling back routinely to extremely generalized responses. He was unable to proffer a single specific instance where a CWW had posed an operational difficulty whether in respect of scheduling a meeting; providing coverage for an engineer on a flex day; providing answers to inquiries requiring short turnaround (he acknowledged that such responses could be adequately provided by others but that it was more desirable to have the response come from the person with the most extensive

knowledge of the project or structure); facilitating collaboration; or any problems whatsoever arising from a flex day absence.

[19] It was also clear from Mr. Verok's evidence that the Employer never considered the circumstances of any individual employee in determining to jettison long established CWWs. In response to a question on the point from his counsel, he pointed to the need for everyone to take equal part in the enterprise as a response to the question counsel had posed about whether individual employees' circumstances had been considered. There was one exception to this: we heard about an employee (presumably the only employee in the relevant group) who had been permitted to continue on a CWW. The precise reasons for this or the process that lead to it were not fully elucidated. We did hear later from one of the Association witnesses, Mr. Rhead, that he had made a specific request to continue his CWW and was simply advised that CWW was no longer available.

[20] The Association's evidence came from George Collins, a senior structural engineer who has worked in the Eastern Region of PHM (out of the Kingston office) since 2009; Lija Anne Whittaker, a project engineer employed in the Central Region of PHM and working out of the Downsview office with responsibility for the Intelligent Transportation System in one of two provincial regions (her territory includes everything west of Bayview as well as the entire Northeastern and Northwestern portions of the province). She has been in that position since 2005 (and in the OPS since 2000); and David Rhead, a concrete engineer working out of the Downsview office in the Material Engineering and Research Office of the Highway Standards Branch of PHM. Mr. Rhead joined the bargaining unit in 2010.

[21] For our current purposes, it is not necessary for me to review these witnesses' evidence either individually or in any great detail. It is, rather, sufficient to canvass but a few of the repeated and consistent themes they voiced.

[22] All testified about the difficulties or, more precisely, the lack of same, generated in their (over 20 years of combined) experience by working on CWWs. Each,

perhaps to varying degrees, exhibited a willingness to approach their established CWWs with some flexibility in the face of operational requirements. And while none had actually come to work on a scheduled flex day in the face of an emergent demand, they had all, from time to time, changed a scheduled flex day to meet an operational demand (such as scheduling a meeting). In their experience no significant problems or issues arose as a result of flex day absences – arrangements were made to minimize the number of staff absent on any given day and (like dealing with vacations, sick leave or other absences) arrangements were made to have remaining staff cover the portfolio of the staff member on a flex day. None of the witnesses could recall any difficulties emerging from the coverage of their portfolios or, indeed, their coverage of others.

[23] As far as requests for information on short turnaround time, first, it would appear that the total number of such requests, when filtered through the full staff complement (not all such requests land in the laps of a bargaining unit employee), results in events that are not likely to be measured as daily or even weekly in respect of any given bargaining unit employee. Second, the witnesses were of the view that such requests can and have been adequately dealt with, on the odd occasion which so requires (once or twice in six years for Mr. Collins) by other responsible staff.

[24] None of the witnesses attributed any difficulty in scheduling meetings to the operation of CWWs. Indeed, there was some evidence to suggest that the existence of CWWs is not the sole obstacle to the scheduling of meetings on Mondays or, more specifically, Fridays, at least during certain portions of the year (when the schedules of some outside collaborators may be subject to seasonal variations.) And further, it was even suggested that the elimination of CWWs has created new difficulties in scheduling. As most engineers now leave work earlier that they had under CWWs, this can sometimes pose some difficulty for the scheduling of afternoon meetings.

[25] And even if none of the witnesses actually reported to work on a flex day (unless it had been re-scheduled), that is not to say they were unavailable for consultation on those days. Mr. Rhead’s evidence was perhaps most on point. Mr. Verok had explained that advances in technology and communications have contributed

to the need for and expectation of prompt responses. Mr. Rhead demonstrated in his evidence (and his willingness to keep connected by cell phone or email or text) that it is perhaps these very same advances that permit and have allowed him to have work related input even on a flex day.

[26] In short, the Association witnesses denied ever having had any difficulties scheduling meetings due to CWW. Indeed, none was able to recall any specific difficulty of any particular type that emerged from the operation of CWWs or their impact on the Employer's operations. Nor were they able to recall any instance where any such difficulty had been brought to their attention by the Employer.

The positions of the parties

i. The Association

[27] The central provision is Article 9.2, which I set out again:

> Work arrangements including compressed work weeks, staggered hours, flexible hours, and employees working at home (telework) or at locations other than headquarters, may be entered into by mutual agreement in accordance with current practices. The Employer will make every effort to accommodate the employee's request, subject to operational requirements.

[28] There are a number of factors to be considered in the application of this article, including, the Association concedes: operational requirements. Employees do not have an absolute and unfettered right to CWWs. On the other hand, the maintenance and implementation of CWWs is not simply a matter of Employer discretion. The governing article must be read as a whole, including its references to "current practices" and the Employer's obligation to make every effort to accommodate requests for CWWs.

[29] More specifically, the Association points out that the article contemplates *individual* arrangements (it refers to the *employee's* request in the singular). Yet what the Employer has done is (subject to one exception) establish a blanket prohibition

across the entire division, a prohibition which serves to undo well over a hundred CWW arrangements which have been in place for (depending on individual hire dates) up to (and, in some cases more than) a decade. (Subject perhaps only to the singular example referred to earlier) there was never any consideration of individual employee's circumstances.

[30] And quite apart from that procedural dereliction, the Employer has, in any event, utterly failed to establish that operational requirements provide any justification for the wholesale elimination of CWWs. The lengthy history of CWWs within the division shifts an onus onto the Employer to explain why, suddenly after (at least) a decade in place, CWWs are no longer feasible. But not a single instance was identified where there was any significant interference in the Employer's ability to meet its operational requirements as a result of CWWs. Even if, for example, it is intuitively true that widely subscribed CWWs can effectively reduce the absolute number of days on which meetings might be scheduled, the three grievors who testified clearly indicated that, where necessary, they were prepared to and, on occasion, did subordinate their flex days to operational requirements – they would and did re-schedule flex days in the face of exigent meeting requirements. But again, there was simply no evidence of a single instance where a CWW interfered with the ability to schedule a meeting.

[31] In support of its position, the union referred to a number of cases, all the while acknowledging that none was directly on point. The cases dealt with collective agreement phrases such as "so far as possible"; "every reasonable effort"; "efficient operating requirements"; "best efforts"; and "reasonable efforts" found in the context of different language, (largely) different collective agreements, different issues and very different factual matrices. With one small exception, to which I shall return later, I have found the cases of little immediate value for our purposes.

ii. The Employer

[32] The Employer proceeds from a markedly different view of both the relevant facts and, perhaps more critically, the proper interpretation and application of the collective agreement.

[33] For the Employer, the proper analysis of Article 9.2 in our case begins and ends with the four concluding words: “subject to operational requirements”. The paramountcy of operational requirements can, it is submitted, effectively serve to negate all of the preceding words of the article. The Employer has negotiated something of a veto power. But the Employer goes even further in its consideration of “operational requirements”. Any determination as to what properly constitutes operational requirements is within the Employer’s purview. And, to the extent that determination is subject to any arbitral review whatsoever, such review must be extremely circumscribed. Indeed, asserts the Employer, the only operative standard is that of good faith. Thus, if I am satisfied that the Employer, in the present case, made a good faith assessment that its operational requirements make the continuation of any CWWs no longer feasible, that determination (even if it is wrong or unreasonable) must stand. And to complete the circle, that is precisely what happened here and the resulting good faith determination means that there is no need or obligation for the Employer to consider any other portions of 9.2, including references to current practices or making every effort to accommodate employee requests. No matter how compelling the case any individual employee might make for a CWW, the Employer, in view of its determination of operational requirements, need not even consider it.

[34] Even in the absence of “data”, i.e. any specific demonstrated instances where (at some point or points over their decade long history) the existence of CWWs has created any significant operational difficulties, the Employer asserts that it has demonstrated a good faith rational analysis to support their elimination.

[35] That conclusion proceeds from the evidence regarding the historical decline in staff coupled with the dramatic increase in projects to be initiated and

overseen. That combination requires (as various Employer documents, including the strategic plan, make plain) the development and implementation of “process efficiencies in procurement and management of consultants”. The Employer has concluded, as Mr. Verok put it, that having people at work five days every week helps. It need not await any clear, obvious and demonstrable correlation between having staff work nine out of ten days and workplace inefficiencies to make the impugned change. On its face, requiring staff to be at work five days every week is a reasonable operational consideration.

[36] And while it may be true that individual employees, as a general matter, do not all have to deal with information requests on short timelines on a frequent basis, it still makes operational sense to maximize the likelihood that the person with the most comprehensive knowledge of any particular project or structure is available to respond to such requests. The same would of course be true in relation to issues which may arise on an exigent basis in respect of ongoing projects or the day to day maintenance or repair of Ministry highways, bridges or related structures. Likewise, having staff available to make necessary decisions and provide required instructions will avoid instances of contractors billing for their standby time while awaiting such instructions.

[37] In short, maximizing efficiencies to avoid undesired and potentially costly contingencies is a rational approach to the Employer’s operational requirements.

[38] And, finally, while the Employer lauds the dedication and flexibility exhibited by the three Association witnesses, it is not satisfied that such flexibility is typical of all or even most engineers in the bargaining unit.

[39] In view of all of the above, the conclusion is inescapable that the Employer’s assessment of its operational requirements was made in good faith. It matters not that there could have been a better approach. I am to refrain from imposing what I might view as the best practice. So long as the Employer has acted in good faith its determination is not reviewable.

[40] The Employer reviewed a significant number of decisions in support of its position. These fell, broadly, within three categories. First, a number of cases were cited involving this Employer and CWWs. These cases, however, all involved a different bargaining unit, different collective agreement and very different collective agreement language. In each of these cases the union (OPSEU) was unsuccessful in mounting a challenge to Employer decisions regarding CWWs. In view of the different collective agreement language involved, these cases are of little assistance in the current exercise. The next set of cases involved challenges to the exercise of management discretion. In these cases, Employer considerations of operational requirements led the arbitrators to conclude that the impugned determinations were not in violation of collective agreement obligations.

[41] Finally, the Employer referred to cases which it described as ones in which management discretion was made subject to operational requirements. While the language in each of these cases differs from that currently under consideration, some of the provisions considered (or parts thereof) do bear some varying degrees of resemblance. For example, in *Renfrew County District School Board and Elementary Teachers' Federation of Ontario*, [2000] O.L.A.A. No. 967 (Goodfellow), the collective agreement contained the following provision:

> An employee is entitled to apply for Leave of Absence (without pay) for a specified period of time. Subject to operational requirements as determined by the Board, such leave shall not be unreasonably denied.

[42] The requested leave in the case was denied on the basis of operational requirements, viz. the immediate effect granting the leave would have had on the classroom. In determining that the Employer had properly denied the leave, the arbitrator offered the following interpretive analysis of the collective agreement (at paragraphs 8 and 9):

> The conditions under which leave may be granted are set out in the second sentence of article 23.01, which reads: "subject to operational requirements as determined by the Board, such leave shall not be unreasonably denied". In my view, this language affords management a very broad discretion in deciding

> whether to grant a leave. In particular, it appears to carve out from the usual form of arbitral review an area referred to as "operational requirements". It accomplishes this in two ways: first, by indicating that it is "subject to operational requirements" that leave shall not be unreasonably denied; second, by providing that the operational requirements are "as determined by the Board". Taken together, these two parts of the sentence provide a clear indication that the scope of arbitral review in the area of operational requirements is to be extremely limited. It will not be enough for an arbitrator to simply disagree with management's assessment of its operational needs: rather, provided there is some evidence to support the Board's decision, an arbitrator will need to be persuaded that the Board acted arbitrarily, discriminatorily, or in bad faith before its decision will be overturned.

[43] In *Calgary Airport Authority and Public Service Alliance of Canada* [2004] C.L.A.D. No. 405 (Jones) the agreement provided:

> The Employer shall, subject to operational requirements, make every reasonable effort to schedule vacation leave at a time in a manner suitable to the employee's wishes.

[44] After reviewing the evidence, the arbitrator concluded that the Employer's determination that operational requirements during the winter months supported the denial of the grievor's request and that the Employer's general policy (which contemplated possible exceptions) to deny vacation leaves during the winter for certain employees was reasonable.

[45] *Union of Northern Workers and The Minister Responsible for the Public Service* 2003 CarswellNat 6245 (T. Jolliffe) involved the denial of a request for a CWW. The grievor was a case manager in a Young Offender's facility. He had been working on a daily schedule of 7:30am to 4:00pm. When the Employer altered his schedule to 8:30am to 5:00pm, the grievor requested a CWW, working nine days out of ten from 7:30 to 5:00. The Employer denied the request and the grievance followed. The collective agreement contemplated CWWs, but included, inter alia, a requirement that there be no resulting decrease in productivity. Access to CWWs was "not to be unreasonably withheld". The arbitrator was presented with evidence that the early morning hour the grievor sought to resurrect was not an optimal time for holding case conferences – indeed, it was for that reason that the Employer had altered the start time

prior to the CWW request. Further, it was established that the grievor already had a significant backlog in uncompleted case conferences and case management reports. In that factual context, the arbitrator concluded that the Employer's denial of access to the CWW was reasonable and did not offend the collective agreement.

[46] Before concluding its submissions, the Employer also urged me to resist any temptation to characterize its discontinuation of CWWs as a blanket prohibition. The impugned decision is not one that applies across the bargaining unit. It is, rather, one that applies to one division within one Ministry. While almost all engineers employed in this Ministry do work in PHM, they represent only about 50% of the total number of bargaining unit employees across the OPS. I was also pointed to excerpts from a confidential "Q & A" document prepared for managers, a document which, on its face, appears to contemplate (at least the theoretical) possibility of continued or renewed participation in CWWs. It included the following instructions to mangers:

> - All inquiries from the employees with special circumstances require discussion with the manager and director for ultimate decision by PHMT. Managers should provide rationale to their director to bring to PHMT for discussion
>
> …
>
> - All decisions to allow participation in CWW require a discussion and decision by the manager and director before coming to PHMT. A business case is required that demonstrates cost savings and advantages to the business

[47] This demonstrates that the Employer's analysis of operational requirements did, effectively, consider each individual in the workplace. However, the Employer concluded that its concerns regarding operational requirements applied to every position without exception. The result (perhaps even regardless of individual circumstances) is that operational requirements were determined to "trump" all other considerations.

[48] In its most concise articulation, the Employer submits that a consideration of operational requirements is critical to the interpretation and application of article 9.2.

Any assessment of operational requirements is for the Employer to make. And as long as that assessment is made in good faith, as the evidence demonstrates occurred here, it must be allowed to stand. Thus, the Employer has demonstrated that operational requirements (in its assessment) make the continuation of CWWs no longer feasible and the instant grievance ought therefore to be dismissed.

Decision

[49] For the reasons which now follow, I have determined that the grievance must be allowed. In my view the Employer's case suffers significant legal and factual frailties.

[50] Leaving aside, for the moment, the important question of the standard of arbitral review of its determination, the Employer's assessment that operational requirements necessitated the elimination of CWWs is, on the evidence before me, suspect, at best. The basis for the determination was largely theoretical and, in fact, unrelated to any specific identified operational difficulties. The Employer referred us to the Q&A document for other purposes. But that document (e.g. in Q3 and Q7) makes it plain that the Employer's determination to eliminate long standing CWWs was made even though there had been no incidents or instances of abuse and even though the Employer expected its own managers (or at least some of them) to express the view that CWWs had been working well in their offices.

[51] Thus, the decision was based largely on the assertion that CWWs could or might create operational difficulties and that the Employer ought not to be required to await the proliferation of such difficulties. Rather, it ought to be permitted to assess its operational requirements in a proactive fashion to thereby avoid any instances of such anticipated issues.

[52] This approach might be more persuasive if the workplace were a tabula rasa and this was the first ever consideration of CWW. But, in a fashion which mirrors

the collective agreement provision to which I shall soon turn, there is far more context, far more history here. But self-imposed blinders have permitted the Employer to ignore that context and history in making its assessment of operational requirements.

[53] The broadly identified areas of concern are the manner in which CWWs can impede the scheduling of meetings and also prevent the person with the most comprehensive knowledge of a project, bridge or structure from responding to exigent operational demands or requests for information in a timely fashion. (The latter concern extends to possible liability for the standby costs of contractors awaiting instructions.)

[54] Even without considering the evidence which minimizes their cogency, the latter sets of concerns raise questions, at least to the extent that they relate to dealing with exigent or time-sensitive matters. The emergence of such individual matters is not synchronized with anyone's schedule. They can and do arise at any time. The only way to insure that the person with the most comprehensive knowledge of all given projects, bridges and structures is always available would be to have each bargaining unit member at work on a 24/7 basis. That is not a possibility. The most the Employer can therefore hope to achieve is to maximize the likelihood that the proper people are at work at the relevant times. But the CWWs the Employer chose to discontinue did not in any way alter the total number of hours worked by bargaining unit employees. In the absence of any empirical evidence to suggest, for example, that issues are more likely to arise on every second Friday rather than during the extended daily hours worked, it is difficult to see how the distribution of the same number of hours would make any statistically significant difference.

[55] The Association's evidence uniformly suggested that the difficulties, if any, posed by CWWs to the Employer's operational requirements were minimal and manageable. That evidence was not seriously challenged, except to suggest that the experience of the three Association witnesses may not be typical. But again, and at the risk of repetition, the Employer did not provide a single specific instance of a conflict (manageable or otherwise) between CWWs and operational requirements. There was no meeting pointed to that could not be scheduled; no response to urgent situations or

requests for information that could not be provided; and no instance identified where waiting time attributable to CWWs led to charges for contractors' standby time.

[56] In view of the foregoing, it is less than clear that the Employer has established that CWWs, as they previously existed, are no longer feasible. However, I agree with Employer counsel that whether or not I would have come to the same conclusion the Employer did regarding the feasibility of CWWs is not the issue in this case and, ultimately, is of no moment. I do not agree, however, that in order to dispose of and dismiss the grievance in this case, all I need do is satisfy myself that the Employer's assessment was made in good faith. The proper approach flows from the provision of the collective agreement, to which I now turn. Once again, I set out the article:

> Work arrangements including compressed work weeks, staggered hours, flexible hours, and employees working at home (telework) or at locations other than headquarters, may be entered into by mutual agreement in accordance with current practices. The Employer will make every effort to accommodate the employee's request, subject to operational requirements.

[57] For our purposes, the article may be considered as comprised of a number of components. First, it contemplates the implementation of various work arrangements by mutual agreement. If the article concluded at that point, the result might bring us closer to the kind of collective agreement provision the Employer says we have. There would arguably be no specific legal obligation on either party to agree and neither would there be any explicit limitation (whether with respect to operational requirements or otherwise) on the exercise of Employer discretion in that regard. There is, of course, much more to the provision. It refers to "current practices" and, at the time the CWWs were discontinued, the then current and very established practice was one which saw a very significant number of bargaining unit employees on CWWs. Further, the Employer is obliged to "make every effort to accommodate the employee's request [for an arrangement such as CWW]". And, finally, the availability of alternate work arrangements and the Employer's obligation to agree to any particular request is subject to operational requirements.

[58] The Employer asks me to interpret this article in much the same way arbitrator Goodfellow interpreted the provision before him in the *Renfrew* case above, more specifically to conclude that the scope of my review is extremely limited; it will not be enough for me to simply disagree with the Employer's assessment of operational requirements. Unless I am persuaded that the Employer acted arbitrarily, discriminatorily or in bad faith I ought not intervene.

[59] I do note, however, that the arbitrator, in formulating his view also pointed to and relied upon the fact that the collective agreement in that case (unlike ours) specifically provided that operational requirements were "as determined by the Board". More importantly, however, the arbitrator went on to qualify the articulated test as follows:

> Of course, this assumes that the Board has undertaken an actual assessment. … it must look at the circumstances of the individual request, consider what impact the leave would have on its operational requirements and determine whether that impact can be successfully ameliorated. For the Board to fail to undertake such an assessment would be to deprive the provision of any real meaning. Thus, while the discretion afforded the Board is indeed a broad one, it is one that must be exercised in the context of the given case.

[60] The Employer has also urged me not to conclude that its prohibition was a blanket one. Whether or not that description depends on OPS-wide application, the Employer's determination appears to have been applied uniformly across the PHM division, one which is significant in respect of numbers of bargaining unit engineers across the OPS and (at least virtually) all-encompassing within the present Ministry. I say "appears" because there was limited evidence to suggest that one PHM engineer has been permitted to work on a CWW even after its elimination for all others. It may be difficult to say whether this is an exception that proves or subverts the rule. But we also heard that Mr. Rhead's request for consideration was, effectively, rejected out of hand, with the bald reply that CWWs are "not available". This differential treatment remained unexplained. There does not appear to have been any process or consideration or weighing of individual circumstances which would comply with either the observations from the Renfrew case above or even the Employer's own Q&A document. And,

similarly, there was no evidence that the individual circumstances of any one of the over 100 signatories to the group grievance were ever canvassed or considered.

[61] When the Employer has permitted even a single exception to its "rule", it is difficult for it to then assert, as it effectively does, that operational requirements warrant a complete discontinuation of CWWs regardless of individual employee circumstances.

[62] In my view, this shortcoming, standing alone, might well be sufficient to lead to the conclusion that the Employer has failed to meet its collective agreement obligations. In my view, however, there are more fundamental failings in the Employer's approach. This returns me to the question of the propriety of the Employer's assessment of operational requirements.

[63] Referring to the decision of this Board in *OPSEU (Union Grievance) and Ontario Clean Water Agency* GSB File No. 263/98; 200o CanLII 20500 (Abramsky), (hereinafter "*OCWA"),* the Association proposed a different approach to the interpretation of the collective agreement.

[64] While the case involved a different issue, collective agreement and bargaining agent, the language bears some resemblance, at least in form and structure, to that under consideration. The operative portion of the agreement provided:

> An employee identified as surplus shall receive six (6) months notice of lay-off or, with mutual consent, an employee may resign and receive equivalent pay in lieu of notice. Pay in lieu of notice for the balance of the notice period shall only be granted where the Employer determines that operational requirements permit an employee's exit from the workplace prior to the expiration of six (6) months notice.

[65] Referring to a number of decisions of this and other boards (including Re *Young and the Crown in Right of Ontario (Ministry of Community and Social Services) (1979), 24 L.A.C. (2d)145 (Swinton))*, the Board adopted a reasonableness test in the reading of the collective agreement provision and, ultimately concluded that Employer had not been reasonable in respect of its determination of operational requirements.

[66] The reading and standard offered in the OCWA case may well be more apposite to the language here under consideration. But even if there is some conflict between the *Renfrew* and *OCWA* cases, it is not one I need resolve. In my view, the Employer has failed to meet either standard – its decision to eliminate CWWs, in particular, the process employed to arrive at that decision was both arbitrary and unreasonable.

[67] In the three decisions referred to earlier and relied upon by the Employer, there was ample evidence in each case to sustain the conclusion that a consideration of operational requirements supported the Employer's view. Apart from the Employer's expressed opinion in our case, there is little such evidence. While it would be inappropriate for me to simply impose what I might view as the "correct" approach, it is equally insufficient for the Employer to simply assert that it, in good faith, truly believes its own opinions and is thereby spared any further scrutiny of its administration of the collective agreement.

[68] While there may well be some question as to the correctness of the Employer's determination, I come to my conclusion not on the basis of what the Employer concluded. Rather, my focus is on *how* the Employer made its determination. There is much the Employer failed to consider. It formulated its "big picture" theoretical construct and then acted on what it viewed as an almost axiomatic general principle that "it is better to have all staff at work 10 out of every 10 days rather than the same number of hours distributed over nine days". The "all-hands on deck" imperative seems to have driven the exercise.

[69] And while viewed in pristine isolation, there may be some intuitive attraction to the driving proposition, that does not permit the Employer to ignore the history and context of CWWs and the governing collective agreement language and to then claim it has acted in a reasonable or even non-arbitrary fashion.

[70] Effectively, the Employer ignored:

- the substantial history of the “current practice” regarding CWWs at the time the decision was taken;

- the fact that it was unable to identify a single instance (in at least a decade of its history) where CWWs have collided with operational requirements; and

- the fact that at least some, even if not all, of its engineers are able to exhibit sufficient flexibility in their approach to CWWs to insure that operational requirements are not compromised

[71] This latter point clearly suggests that there might have been viable options apart from the retention of CWWs in their previous form or their complete elimination. There is no evidence that the Employer made any effort whatsoever to consider and assess any such options.

[72] And, finally, neither can I ignore the fact that (apart from a singular exception, less than fully explained) the Employer declined to consider and weigh the individual circumstances of any of its engineers formerly on CWWs, over 100 of whom are signatories to the group grievance in which they seek the maintenance of their CWWs. But the Employer failed to make any effort whatsoever to accommodate any of those individual employee requests.

[73] The Employer’s failure to weigh or even consider a host of factors clearly material to the issue but rather to cleave unflinchingly to a postulated principle was both arbitrary and unreasonable and, consequently, a breach of its collective agreement obligations.

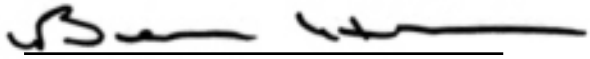
[74] The Association has requested a series of remedial responses, which I need not detail at this stage. Rather, I remit this matter to the parties and will remain seized in the event they are unable to resolve issues of remedy.

[75] I trust the parties will view this as the positive opportunity it provides. There is still the outstanding group grievance which might require an examination of the individual circumstances of over 100 engineers. Returning, however, to the concept of “mutual agreement” in Article 9.2, this may be an opportunity for the parties to come to

an agreement that may both provide for the continuation (even in a modified form) of CWWs while addressing the Employer's perceived concerns regarding operational requirements.

[76] The grievance is allowed.

Dated at Toronto, Ontario this 13th day of January 2016.



Bram Herlich, Vice-Chair