

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ROYAL ALEXANDRA THEATRE AND
PRINCESS OF WALES THEATRE
(the "Employer")

-and-

INTERNATIONAL ALLIANCE THEATRICAL STAGE EMPLOYEES,
THEATRICAL WARDROBE UNION, LOCAL 822
(the "Union")

UNION/POLICY GRIEVANCE

SOLE ARBITRATOR:

Margo R. Newman

APPEARING FOR THE UNION:

Susan Philpott, Counsel
Diane Reilly
Philip Clarke

APPEARING FOR THE EMPLOYER:

Stephen Bernofsky, Counsel
Lisa Petro
Brian Sewell

A hearing in this matter was held in Toronto, Ontario on February 1, 1995.

DECISION AND AWARD OF ARBITRATOR

The issue raised by this grievance is whether the Employer violated Articles 4.03 and 5.01 of the Collective Agreement by failing to pay the double time rate for time worked by employees at both theatres on Monday, December 19, 1994.

The resolution of this matter involves a determination of the whether the Fax sent by the Employer to the Union local on September 7, 1994 constitutes proper timely notice of a change of day off in compliance with Article 4.03 of the Collective Agreement, which reads:

DAY OFF

Unless otherwise notified, Sunday is deemed to be the day off. The day off is deemed to commence at 12:00 o'clock midnight of the day of and to terminate at 8:00 o'clock on the day following. It is agreed that time worked on the day off shall not be included as part of the forty (40) hour week.

Management reserves the right to change the day off with three (3) months written notice to the Local.

The parties agree that, if I find that no timely notice was given under this provision, the employees are entitled to double time for time worked on December 19, 1994 in accord with Article 5.01.

The uncontested evidence reveals that this provision was an entirely new article in the agreement, and was generated by the fact that the industry was discovering the trend of people to go to theatre on Sundays rather than Monday evenings. Since there was no day off provided for in prior agreements, and Sunday was designated a double time day,

employers were being penalized for having shows on Sunday. The parties adopted the above language to provide the employers with more flexibility in scheduling and the Union and employees sufficient notice of any anticipated schedule change. The Union introduced evidence of the bargaining history of this provision, including discussions surrounding its adoption and its understanding of the meaning of the notice language. Since the parties agree that the scope of the issue before me does not necessitate a broad interpretation of what constitutes proper notice under Article 4.03 or whether days off can or cannot be fluctuated during the three (3) month period, I need not recite all bargaining history evidence. Suffice it to say that there was no discussion of the form the written notice would take.

There is no question that, as of the time period in issue, the Union had received actual notice that the designated day off for the performances of Miss Saigon at the Princess of Wales Theatre and Crazy for You at the Royal Alexandra Theatre would be changed from Sunday to Monday. The manner and method by which such notice was received will be discussed later in this decision.

On September 7, 1994, the Union received a Fax from the Employer containing the following Christmas schedules:

1994 Miss Saigon Christmas Schedule
The Princess of Wales Theatre, Toronto

Monday, December 5		DARK
Tuesday, December 6		8:00
Wednesday, December 7	2:00	8:00
Thursday, December 8		8:00
Friday, December 9		8:00
Saturday, December 10	2:00	8:00
Sunday, December 11		2:00

Monday, December 12		DARK
Tuesday, December 13		8:00
Wednesday, December 14	2:00	8:00
Thursday, December 15	2:00	8:00
Friday, December 16		8:00
Saturday, December 17	2:00	8:00
Sunday, December 18		DARK
Monday, December 19		8:00
Tuesday, December 20		8:00
Wednesday, December 21		8:00
Thursday, December 22	2:00	8:00
Friday, December 23	2:00	8:00
Saturday, December 24	2:00	
Sunday, December 25		DARK (Christmas Day)
Monday, December 26		DARK
Tuesday, December 27		8:00
Wednesday, December 28	2:00	8:00
Thursday, December 29		8:00
Friday, December 30	2:00	8:00
Saturday, December 31	2:00	8:00
Sunday, January 1		DARK (New Year's Day)
Monday, January 2		DARK
Tuesday, January 3		DARK
Wednesday, January 4	2:00	8:00
Thursday, January 5	2:00	8:00
Friday, January 6		8:00
Saturday, January 7	2:00	8:00
Sunday, January 8	2:00	

1994 Crazy For You Christmas Schedule
 The Royal Alexandra Theatre, Toronto

Monday, December 5		DARK
Tuesday, December 6		DARK
Wednesday, December 7	2:00	8:00
Thursday, December 8	2:00	8:00
Friday, December 9		8:00
Saturday, December 10	2:00	8:00
Sunday, December 11		2:00
Monday, December 12		DARK
Tuesday, December 13		8:00
Wednesday, December 14	2:00	8:00
Thursday, December 15	2:00	8:00

Friday, December 16		8:00
Saturday, December 17	2:00	8:00
Sunday, December 18		DARK
Monday, December 19		8:00
Tuesday, December 20		8:00
Wednesday, December 21		8:00
Thursday, December 22	2:00	8:00
Friday, December 23	2:00	8:00
Saturday, December 24	2:00	
Sunday, December 25		DARK (Christmas Day)
Monday, December 26		DARK
Tuesday, December 27		8:00
Wednesday, December 28	2:00	8:00
Thursday, December 29		8:00
Friday, December 30	2:00	8:00
Saturday, December 31	2:00	8:00
Sunday, January 1		DARK (New Year's Day)
Monday, January 2		DARK
Tuesday, January 3		DARK
Wednesday, January 4	2:00	8:00
Thursday, January 5	2:00	8:00
Friday, January 6		8:00
Saturday, January 7	2:00	8:00
Sunday, January 8	2:00	

Diane Reilly, Local 822 Business Agent testified that, regardless of the theatre, employers normally schedule eight (8) shows per week and these schedules are known months ahead of time due to ticket sales. Reilly explained that it is customary for employers to change their schedules at Christmas time each year, since holidays when premium pay is required usually draw low customer turnout. She noted that she receives Christmas schedule changes from all theatres around the same time each year, as she did in 1994.

Reilly testified that the term "DARK" on a schedule indicates that there is no show that day. She reviewed these schedules, paying particular

attention to Christmas and New Year's Day. She stated that she thought it was odd that there was no Miss Saigon show scheduled for Sunday, December 18 because it was not a holiday period and the Employer normally scheduled a 2:00 show on Sundays. She also thought it unusual that Crazy For You added a show on Tuesday, December 13 and deleted the Sunday, December 18 show, since it was not a holiday week and they normally do not have a Tuesday show. Reilly testified that the Employer is free to make whatever schedule changes it wishes, and has occasionally scheduled shows on the designated day off.

Reilly thought nothing more of these notices of schedule changes until she received another FAX from the Employer on October 3, 1994 setting forth the pay rates it intended to pay over this holiday period. The notice for both theatres classified Monday, December 5 and January 9 as "Designated Day Off", Monday, December 12, 26 and January 2 as "No Performance", and Sunday, December 18, 25, and January 1 as "Designated Day Off" along with Tuesday, January 3. Since Monday, December 19 was not designated as a day off, the Employer noted that employees would receive straight time rate for work on that day.

Reilly testified that this October 3 Fax was her first clue that the Employer was attempting to change the designated day off and move it around. She stated that the prior schedule change told her nothing about a change in designated day off, since the term "DARK" is not synonymous with "day off" and only means that there is no scheduled performance on that day. She telephoned the Employer to express concern about the apparent attempt to change days off without notice and fluctuate them, and indicated the Union's position that double time was appropriate for Monday, December 19, 1994. The Union subsequently put this position in

writing on October 7; the Employer responded on October 18 that it felt that it had complied with the rules of the collective agreement by sending the revised Christmas schedules on September 7. The instant grievance was filed on November 2, 1994. Reilly testified that she does not believe that the October 3 Fax constitutes sufficient notice of a change in the designated day off. The parties agreed that, in any event, the October 3 correspondence would be untimely under the three (3) month notice provision in Article 4.03.

The Union introduced evidence of the manner in which the designated day off was changed from Sunday to Monday at each theatre. The correspondence relating to Miss Saigon in September, 1993 reveals that a document entitled "Performance Schedule Change Over To New Dark Day" was posted at the theatre, but not sent to the Union until September 20, 1993. Attached was a cover letter indicating that the change of performance schedule was to be effective November 1, 1993, acknowledging that the notice was untimely, and appealing for permission to make the change without penalty or overtime payments. Reilly testified that the Union membership agreed to overlook the lack of timely notice, and the Employer was so notified, along with the Union's position that posting of a new schedule backstage does not constitute sufficient notice under the terms of the contract. This correspondence concerning Miss Saigon does not refer to the term "day off."

On January 28, 1994, shortly after the opening of Crazy For You, the Union received written notice of a "New Playing Schedule", which specified that there would be no performances on Monday or Tuesday. The Employer's cover letter specifically designates Monday as the "official Day Off" with respect to the collective agreement, noting that any work on that

day would be paid at double time. Further correspondence clarifies that Monday is to be the official "Day Off" effective April 25, and that Sunday is to be paid at straight time rates. Reilly considered this sufficient timely notice under Article 4.03, stating that the Union was not concerned with a day or two lapse.

The Union argues that the notice provision of Article 4.03 requires, at a minimum, that particular type of information be transmitted in writing to the Union specifying that the Employer intends to change the designated day off effective at a time certain. The Union contends that the September 7 Fax does not meet that requirement, since it says nothing about a change of the day off, and the use of the term "Dark" day is not synonymous with "day off" and only informs the Union when there will be no performances. It notes that a comparison of the September 7 and October 3 Faxes reveals that the Employer is not using the term "Dark" day to mean "day off" but also to refer to days when there are "no performances." The Union refers to the two prior instances of agreement to change the day off at each theatre as evidence of a practice revealing the parties' understanding of what is required to be in the written notice. The Union concludes that it was not placed on reasonable notice, or even given a sufficient clue, on September 7 that the Employer intended to change the designated day off, and thus the double time provision applicable to work performed on a day off in Article 5.01 must apply to Monday, December 19, 1994, which remained a designated day off for pay purposes. It relies on *Re Newfoundland Farm Products Corp. and Newfoundland Association of Public Employees* (1988), 4 L.A.C. (4th) 343 (Easton) and *Re Carman Construction Ltd. & Fielding Construction Ltd. and United Steelworkers, Local 7727* (1973), 3 L.A.C. (2d) 157 (Ord) regarding the timeliness of notices given to avoid premium pay.

The Employer contends that the parties specifically set their mind to this provision, and the resultant language does not define what type of written notice is required or that certain magical words must be used. It argues that the September 7 Fax constitutes proper notice under Article 4.03, and that from it the Union knew, or ought to have reasonably known that the Employer was intending to change the day off. The Employer notes that in theatre reality, a schedule change is likely to mean a change in the designated day off, and the term "DARK" day has been used interchangeably with "day off." It states that the October 3 Fax merely sought to clarify the prior notice of a change in the day off. Finally, the Employer argues that past practice is not relevant since the language of Article 4.03 is clear, and, even if it were relevant, the Union has failed to establish a binding past practice based upon one or two incidents, relying on *Re Terra Nova/Cape Freels Integrated School Board and Newfoundland Association of Public Employees* (1993), 34 L.A.C. (4th) 337 (Cooper), *Re Children's Aid Society of Cape Breton and Canadian Union of Public Employees, Local 3010* (1992), 25 L.A.C. (4th) 83 (O'Connell), and *Re York University and Canadian Union of Public Employees, Local 1356* (1976), 12 L.A.C. (2d) 213 (Abbott).

Initially I must note that even were I to deem relevant the evidence of the conduct of the parties in changing the designated day off from Sunday to Monday at each theatre, the Union has not established a sufficient past practice which reveals mutual agreement of what exactly must be included in the written notice of intent to change the designated day off under Article 4.03. The correspondence concerning Miss Saigon, which was accepted by the Union as notice of a change in day off, albeit untimely, did not mention the term "day off", but merely referred to a schedule change. The correspondence concerning Crazy For You clearly set

out that Monday was to be the official "day off" referred to in the collective agreement. These two incidents do not reveal a clear understanding by each party that certain key words must be used to constitute adequate notice under Article 4.03, and will not be relied upon for the purpose of establishing what was intended by the parties in that regard.

Considering that the language of Article 4.03 does not address the form of the written notice which must be given to the Union, I am willing to assume for the sake of this case, that any writing from which the Union could reasonably glean that the Employer intended to change the designated day off would be sufficient under that provision. The question then becomes whether the Union should have reasonably been able to determine from the September 7, 1994 Fax that the Employer intended to change the designated day off during the Christmas Holiday schedule period.

A review of the evidence, with emphasis on a comparison of the September 7 and October 3 Faxes, convinces me that it was not reasonable for the Employer to conclude that the Union could discern from its revised Christmas Schedule alone that it intended to change the designated day off from Monday to another specific day or days. I am not convinced that the use of the term "DARK" on its Christmas Schedule, without the additional designation of "No Performance" or "Designated Day Off" which appears on its October 3 Fax, sufficiently informed the Union that the day off was being changed. As noted by Reilly, the term "DARK" means only that there is no show scheduled, and is not synonymous with designated day off. It may logically be assumed that when there is only one "DARK" day each week which remains constant on the schedule, such day is intended to constitute the designated day off, as was the case in the

September, 1993 Miss Saigon schedule change. However, where, as in the case of Crazy For You, there are normally two "DARK" days on the schedule in a given week, the meaning of the word is not obviously apparent. There is no dispute that the normal 1994 schedule for Crazy For You had both Monday and Tuesday designated as "DARK" days, but only Monday being agreed to as the designated day off under the agreement. This fact was clarified in the January, 1994 correspondence, because it was not readily apparent from the schedule itself.

Similarly, the Christmas Schedules faxed to the Union on September 7, 1994 contained the same ambiguity. Both schedules had "DARK" days indicated on other than the regularly scheduled Monday day off, and a majority of the weeks encompassed in the holiday period had two "DARK" days scheduled within a one week period. The fact that Monday, December 19 was not noted as a "DARK" day in a week when there was only one "DARK" day scheduled, does not clearly communicate an intention to change the designated day off from Monday back to Sunday for that period, especially since performances are occasionally scheduled on designated days off. There is no indication from the September 7 schedules themselves that the Employer intended to fluctuate the days off between Monday, Sunday and Tuesday, as noted on the October 3 Fax, and the Union could not reasonably have been expected to reach that conclusion when most Mondays continued to remain "DARK" days. Since it was reasonable for the Union to read the Christmas Schedule as an entire document, and not as expressing an intention to make different changes from week to week, I am unable to accept the Employer's argument that it gave the Union sufficient indication of its intention to make the changes noted on its October 3 Fax.

I therefore conclude that the September 7, 1994 Fax did not provide adequate notice of the Employer's intention to change the designated day off from Monday, December 19 to Sunday, December 25. Since it is admitted that the October 3, 1994 Fax was untimely under Article 4.03, I find that the Employer is obligated to pay double time for all work performed under the agreement on December 19, 1994 pursuant to the terms of Article 5.01. It is so ordered.

Accordingly, the grievance is allowed. I will remain seised with respect to any issues which may arise out of this award.

DATED at Toronto this 20th day of February, 1995

Margo R. Newman

Margo R. Newman, Arbitrator