IN THE MATTER OF AN ARBITRATION UNDER SECTION 48 OF THE ONTARIO LABOUR RELATIONS ACT, 1995 (as amended)

BETWEEN

IATSE Local 58 ("the Union" or "IATSE")

AND

Ed Mirvish Enterprises Ltd. ("the Employer" or "Mirvish")

And in the matter of a claim that certain employees (the "claimants") have not been properly paid for the work that they did on the "Gilda's Club Event" that took place at the Princess of Wales Theatre on November 22, 2010

==========

BEFORE:	**R.O. MacDowell**	**(Sole Arbitrator)**

APPEARANCES:

For the Union:	**Ernest Schirru** **Jim Brett** **Ron Montgomery**	**(Counsel)**
For the Employer:	**Stephen Bernofsky** **Mark Lavaway** **Scot Whitam** **Chris Prideaux**	**(Counsel)**

A hearing in this matter was held in Toronto, Ontario on June 29, 2011.

AWARD

I - What this case is about

This arbitration proceeding arises from a dispute between the Union and the Employer over how to pay certain employees who worked on the "Gilda's Club Event" that was held at the Princess of Wales Theatre on November 22, 2010. The Gilda's Club Event was set up and performed and taken down on a single day - that is: there was a "Take-In", then a "Performance", and then a "Take-Out" after the performance. I am told that this does not happen very often. Normally, there is a "Take-in" at the beginning of the show, then the show runs for a number of weeks, and then there is a "Take-Out" when that series of performances is completed. Single day events are relatively uncommon.

*

The issue in this case is about how to pay certain individuals ("*the claimants*") who worked on the stage "Performance" and then stayed on to do work on the "Take-Out". In particular, the question is whether the claimants were entitled to the minimum *four hour pay guarantee* that was given to some *other* workers who were called in to work on the "Take-Out" (actually they were "called back", since they had worked earlier that day) .

*

I am told that the stage hands that came in and worked on the "Take-Out" (but did not work on the "Performance") got four hours' pay - even though, as it turned out, the "Take-Out" only took about two hours of actual work; so the question in this case is whether the group of stagehands who worked on the "Performance" first and then stayed on to work on the "Take-Out", ("holdovers", so to speak) were *also* entitled to the 4 hour guarantee that their coworkers

received for doing the "Take-Out". The holdovers assert that the four hour guarantee should have also have applied to them; and that they should not be in a worse position because their "previous" "work call" that day, happened to be contiguous with what they say is a "new call".

*

The Union asserts that the "Take-Out" constitutes a new and distinct work "*call*" for the claimants - a distinct bundle of work that is separate from the "*Performance Call*" that they had already done that day; and in the Union's submission, this "new" "work call" - being a *new* period of a *different kind of work* (the "Take-Out" work) - triggers the same kind of four hour pay guarantee for the stay-over workers, as it did for the other employees who came back to work only on the "Take-Out" (although that was not their "only" work that day).

*

The Employer replies that this claim is not supported by the language of the Collective Agreement and that the claimants were properly paid for the *work that they actually did* on the "Take-Out": two hours pay for two hours of extra work. As the Employer sees it, the claimants were not entitled to the kind of four hour guarantee that the other stage hands received.

II - Some Mechanics

A hearing in this matter was held, in Toronto, Ontario, on June 29, 2011. The parties were agreed that I have been properly appointed under the terms of the Collective Agreement and that I have jurisdiction to hear and determine the matters in dispute between them. The parties were further agreed that if I find that the Employer has breached its legal obligations in some way, I have jurisdiction to fashion an appropriate remedy. Finally, the parties

were agreed that if the Union is successful, I may remain seized in the event that there is any difficulty in calculating the amount that is payable to individual employees. (The claim is for an extra two hours pay for the approximately 11 employees who worked on the "Performance" and then on the subsequent "Take-Out").

*

In the course of the hearing, the Union adverted to some "past practice evidence" that, it said, would illuminate the meaning of any Collective Agreement language that was found to be *latently* or *patently* "*ambiguous*". The Union did not say that the language actually *was* ambiguous. On the contrary, the Union said that the Agreement was "clear", and that it supported the claim for extra pay; while, for its part, the Employer said that the Collective Agreement language was "clear" and that it did *not* support such claim. The parties also disagreed about what the "practice" was, and whether it consistently pointed one way or the other. The Union said that the practice was consistent and the Employer said that it wasn't.

*

However, in the end, the parties were content to confine the issue before me to a *purely interpretative exercise* - without prejudice to either party's right to refer to past practice in some *other* proceeding if such evidence would otherwise be admissible. Accordingly, I am asked to decide only which "reading" of the Collective Agreement is the "correct one" (i.e. the most probable one), having regard to the parties' representations and to the language of the Collective Agreement itself, standing alone - language that both parties concede is not a model of clarity. Neither party referred me to any arbitration decisions that might help with the interpretation, nor did they dwell upon how the Agreement was put together or the underlying rationale or purpose for any of the clauses to which I was referred.

I will refer to some of those provisions later. However, before looking at the Collective Agreement language itself (especially Article 5.8 on which the Union relies), I think that it might be useful to comment briefly on the context.

III - Some observations on the context

It seems to me that the interpretation problem that arises in this case, occurs, in part, because the term "*call*" is used in this industry in somewhat different senses: to describe the process by which casual workers are engaged by the Employer from time to time (Union members respond to a "call" from the employer for additional workers and the Union notionally refers people from its hiring-hall list to these casual work opportunities); and that same word - "call" - is also used as noun to describe the bundle, and the kind, and sometimes the period of work that the employees are expected to do when they have a "call". Casual stage hands respond to and work on "calls", in the same way that ordinary employees work "shifts" or have standard work days. Thus, for example, the Agreement speaks of a "PERFORMANCE CALL" (see Article 5.3), which is a period of hours when Union members are engaged to work on a stage performance, whether or not they work on anything else that day (see Article 5.7 which confirms that there may be more than one block of work in a single day).

These "calls" are of different types, but they are a routine and necessary part of the Theatre's operation, because the core group of regular employees comprising the "House Crew" (described as "Regular Weekly Employees" under Article 6 of the Agreement) has to be supplemented by additional stage hands who are required from time to time (and in varying

numbers), in order to meet the particular needs of the production being staged. Or to put the matter another way, these extra casual employees are additional to the House Crew, and they work on some kind of "call" basis: Performance, Rehearsal, Take-in, Take-Out, etc. - although Regular Employees may also be doing that work. [See Article 6.3(h) of the Agreement which confirms that the House Crew may also be required to work on the "Take-Out"].

*

It is not disputed that under the Collective Agreement the casual workers who do "calls" may be entitled to a guaranteed minimum number of work hours' pay when they work a "call", and that they get paid that amount, regardless of how many hours they actually work. For example, (and as noted) I am told that some individuals who worked earlier in the day on the November 22, 2010 and then came back to help with the "Take-Out", were paid a four hour minimum for that "Take out". The question in this case is whether the workers who had just worked on the Performance and who notionally "stayed-over" to do the "Take Out", should have been paid in the same way: four hours pay, even though they, too, only worked two hours.

*

These minimum guarantee clauses reverse the normal presumption that employees are only paid for the hours that they actually work; and there is no doubt that such clauses create a payment regime for casual workers that is different from that of the House Crew. Presumably, their purpose is to compensate casual employees for work that might otherwise be of uncertain duration and to induce casual employees to accept such work. Because these casual workers do not have the kind of continuous work pattern that the House Crew has (see Article 6); so the minimum call requirements can create a kind of standard shift, despite the vagaries and the uncertainties of the work flow.

It is also fair to say (and I think that this is common ground), that this particular Collective Agreement has a "stitched together" quality that makes it more difficult to relate the text of one clause to the text of another; and (with respect), it is not evident that the drafters of the document have always considered the congruence (or otherwise) of the language that they have used in the various clauses governing such (different) things as: the actual hours of work; the deemed hours worked for payment purposes because of "minimum guarantees"; and the rates of pay (straight time or premium pay) that are applied to those hours. Accordingly, while the Agreement should, of course, be read as a whole, that exercise is not necessarily as illuminating as it might be in some other settings.

*

Finally, it is a trite principle of interpretation that the fact that a result seems "unusual" (either generous or improvident depending on one's viewpoint) does not *necessarily* mean that this is not the required outcome under the Agreement. An apparent "oddity" may be an aid to interpretation, but it is not a reason, by itself, for rejecting what otherwise seems to be the better reading of the words that the parties have used. Moreover, (and despite the Employer's submission to the contrary), I do not think that the employees' *expectations*, or the Employer's *expectations*, or what the Employer *thinks* the *employees' expectations* are, will matter very much - at least where the only issue before the arbitrator is a pure question of interpretation and there is no evidence about "expectations". So, for example, if the claimants only stayed on after the Performance Call because they *expected* to get a four hour guarantee, then their expectations would be dashed if there were no contractual basis (or employer representation) to support that understanding. It is what the Agreement *says* that matters, not what a party thinks it says.

IV - Discussion

Since this case involves workers who are not the Regular Weekly Employees on the House Crew but rather casual workers who do individual "calls", it may be useful to begin by setting out what Article 5 says, in its entirety:

> **ARTICLE 5 – HOURS OF WORK AND MINIMUM CALLS**
>
> **5.1** REGULAR WORK CALLS: All regular work calls shall commence not earlier than 8:00 A.M.
>
> **5.2** PLAYING WEEK: For the purposes of this Agreement a week shall be deemed to be a playing bill of not more than (8) performances, not to exceed forty (40) hours.
>
> **5.3** PERFORMANCE CALL: A performance call shall be deemed to be a work period of three and one-half (3 ½) hours for all persons other than the House Crew and for the House Crew a performance call shall be deemed to be a working period of four (4) hours, time to be considered, in both cases, as from the time of the call to the final curtain.
>
> **5.4** REHEARSAL CALL: A rehearsal call shall be considered to be, for all purposes of this Agreement, the same as a performance call as defined in Article 5.3 hereof, when all elements of the performance are in place, in respect of rates of pay and maximum hours of work.
>
> **5.5** MINIMUM CALL FOR EXTRA MEN TO "TAKE-IN": Minimum call for extra stage employees called only for the "take-in" and "put-on" of a show shall be eight (8) hours.
>
> **5.6** MINIMUM CALL FOR EXTRA MEN TO "TAKE-OUT": Minimum call for extra stage employees called only for the "take-out" and "put-out" of a show shall be four (4) hours.
>
> **5.7** Subject to the foregoing, five (5) hours shall constitute the minimum call for a stage employee who is called by the Employer to work during a straight time period and who is not otherwise required to work for the Employer at the Employer's Theatres during the day on which he or she is called to work.
>
> **5.8** Four (4) hours shall constitute the minimum call for *all work other than that* referred to in this Article Five.

As will be seen, Article 5 of the Collective Agreement contemplates that from time to time the Theatre will require additional workers beyond the "House Crew" - literally extra workers - who may be needed for one kind of work or another, even though the House Crew may also be doing that work. For example: Article 5.3 deals with a "**Performance Call**" which carries a "*deemed*" ..."*work period of three and one half hours*"...for "*persons other than the House Crew*"; Article 5.4 says that "**Rehearsal Calls**" will be treated like a "**Performance Call**" ***if*** all of the elements of the Performance are in place; Article 5.5 deals with the **"Take-In"** work and mentions an 8 hour minimum work period; Article 5.6 deals with a **"Take-Out"** and mentions a four hour work period.; and so on. Article 5 indicates that the work that these casuals are asked to do is performed in bundles called a "call" and that there are various kinds of "calls".

There is no dispute that the claimants did a Performance Call on the Gilda's Club Event on November 22; and that under Article 5.3 that body of work is, for them, "***deemed*** *to be a* ***work period*** *of three and one half (3 1/2) hours... from the time of the call to the final curtain*". It follows, in my view (and as the Union contends) that the Performance Call was over when the "*deemed*" "*work period*" was complete. That "call" or body of work came to an end with the final curtain - which is not only the normal meaning of when a "performance" ends, but is also what the Collective Agreement actually says: that the Performance Call terminates when the *deemed* period of work is over at the final curtain.

*

Accordingly, anything done by the claimants after that point was not part of the "Performance Call". Such extra work was *not* an extension of the Performance Call (which had come to an end both contractually and in fact), but rather represents a new and different "call" (in

the sense of a new and different bundle of work). Moreover, what the claimants were actually doing was not only a new call, but is also (in my view) fairly and properly considered to be a "TAKE-OUT".

*

The nature of the work and the language of the Agreement both support the Union's assertion that the "Take-Out" is considered to be a separate body of work, which has been singled out and treated differently in Article 5 from other kinds of work: it is different both functionally and contractually from a "Performance Call". Moreover, that functional difference in not only recognized in Article 5.6, but is also recognised in Article 8.4, 8.5 and 22 where the "Taking-Out" is given special attention. Likewise in Article 6 - although this provision does not apply to casuals but rather to the House Crew who may also be asked to work on the "Take-Out".

*

Accordingly, (and not to further belabour the point) it is my view that the claimants were doing a **new** call and the kind of call that they were doing, was a "Take-Out" call: a bundle of work comprising a "Take-Out".

*

The question therefore is whether this new call fits (or doesn't) within Article 5 that regulates "MINIMUM CALLS"; and, in particular whether the claimants are entitled to the four hour minimum that their coworkers got for what was (or so the Employer apparently believed) a "new call" for them, as well. Or as the Union puts it rhetorically: why should the claimants be in any different position than their co-workers who returned to the theatre after an earlier call that day, since both groups were being asked to do an additional "call" on the same

day (which is why Article 5.7 has no application to *either* group of workers), and the kind of call they were both doing was a "Take-Out".

*

So do the holdovers "fit" within either Article 5.6 or Article 5.8, which provide for guaranteed minimums?

*

In my view, there is a quite plausible argument (looking only at the words in their dictionary meaning) that the claimants who had completed the Performance Call and who were asked to do this further "Take-Out" call, do indeed fit within Article 5.6. The "*only*" work to do at that point (this being a single performance) was the "Take-Out"; so it is perfectly plausible to say that the claimants were asked "*only*" for that work - "*for the Take-Out*" call; and further that they were "extra men" in the sense of being *extra* to House Crew. So it is perfectly plausible to say that the holdovers were extra workers needed to help with the "Take Out" and that this was the "*only*" work for them to do. The parties did not use the words "called ***in"*** or "called ***back***" (both phrases are found elsewhere in the Agreement, *but not here*) which might connote that it did not apply to someone who was *already there*. The word is "called", which can sensibly be read as called upon, not called *in*; and unlike in Article 5.7, the parties did not build in a limitation based upon a reference to work done earlier in the day. [If the "called-backs" had "*only*" done that single call, then under Article 5.7 they would have been entitled to a five hour guarantee, and the word "only" would be applied consistently in Article 5.6 and 5.7; however, it does not seem to be disputed that this was not the *only* "call" for the called-backs, so it is not entirely clear under what provision the called-backs were purportedly paid. As Counsel noted, it

has to do with the Employer's assessment of the employees' expectations, which, as I have suggested earlier, has little to do with their actual entitlements].

*

Be that as it may, assuming for the moment (and I actually think that this is the better reading of the clause) that the word "*extra*" in Article 5.6 excludes the claimants who were already in the theatre at the time that they commenced the new call, or that it cannot be said to apply to them because their "call" was not "*only*" to do the Take Out (because they were asked to and did do the "Performance Call" before hand), then Article 5.6, would not apply to the "stay-overs". [Note: I have no evidence about what the claimants were *told* when they first agreed to come to work - that is, whether they were told "up front" that they were going to be expected to work on the Take-Out as well as on the Performance, or whether that request was only made of them after they got there].

*

So what about Article 5.8 upon which the Union bases its claim? It seems to me that when the structure of the Article 5 is considered, as a whole, what one sees is that there are a number of designated kinds of work ("calls") that trigger specific treatment, in various ways, then there is the general "*catch-all provision*", found in Article 5.8, which is meant to capture any work not specifically dealt with already:

> **5.8** Four (4) hours shall constitute the minimum call for all work other than that referred to in this Article Five.

Article 5.8 applies to *any* kind of work - "**all work**" ***other than*** what has already been referred to in Article 5. So in my view, if the work in question, (being a separate call), is not

captured under Article 5.6, then it is captured by Article 5.8: the "catch-all" or "fall back" provision.

In other words, if it is said that Article 5.6 cannot apply because the "call" (noun) for which the claimants were "called" was not their *only* call that day (although it was the only work to be done at the time), because they were notionally (or actually - to repeat, I have no evidence) "called" to do both the Performance Call and the Take-Out too, of if they were not "extra" within the meaning of Article 5.6, then the claimants will still fit within the phrase "*all work*"... "*other than that referred to in this Article 5*". Accordingly, if the "Take Out" provision Article 5.6 does not apply to the claimants' circumstances, (because they did a Performance Call before hand), then, as I read it, Article 5.8 still requires a four hour "minimum call": their additional "call" must be a "call" with a minimum four hours. The casuals work in four hour blocks/guarantees, unless Article 5 prescribes something different; and here it doesn't, so the four hour minimum applies.

*

I have considered Article 8.8 and Article 8.16 to which I was referred by Counsel for the Employer, but I am not persuaded that either of those provisions is helpful to solve the present interpretation problem. Article 8.16 has no application to the current situation because it deals only with the "hourly rate" that applies to work done beyond a "minimum call" designated in Article 5. It deals with the **rate** that is to be applied to extra hours, not whether there must be a minimum call in the first place; or whether the "extension" is properly considered a "new call" - which on the facts of this case, I find it is.

Article 8.8, is unclear about what "overtime" means; but, again, it is a clause that talks about straight time rates versus overtime rates - not hours or guarantees; and, quite frankly, it raises some interpretation conundrums of its own: for example, if someone is "*only*" called in to do the "Take-Out" (per Article 5.6) how could *any* of those four hours be "overtime"? What does "overtime" mean here?" It is simply not clear; and in any event, I do not think it is much help when interpreting some other clause, dealing with some other subject matter.

*

In short, I am not persuaded that either of those provisions helps with the current interpretation problem: whether the stay-overs get a minimum guarantee of four hours work and four hours pay if they do another "call" after completing their designated Performance Call. Moreover, neither of these premium pay provisions persuades me that Article 5.8 should not be read in the "catch-all" manner described above.

*

I am reinforced in this view by looking at Article 22 of the Collective Agreement, which I think is useful not only because it gives the same special consideration to the "Take-Out work" that is found elsewhere in the Agreement, but also because it illustrates (1) the kind of fact situation presented here and (2) the very kind of language that could easily have been used more generally (but wasn't) to deal with the situation of "holdovers" who proceed from one kind of call to another. Articles 22.4 to 22.6 apply to "Concerts" and they read like this:

> **22.4** The minimum crew required for "Taking-Down" a Concert Attraction shall be the House Crew of four stage employees.
>
> **22.5** "Taking-Down" following the performance by those stage employees who worked it, shall be done on an hourly basis at the prevailing hourly rate.

22.6 Extra stage employees *called **in*** for the "Take-Down" shall be paid a minimum call of four (4) hours at the prevailing hourly rate.

*

There is no dispute that the Gilda's Club Event was not a "Concert"; nor is there any dispute that the parties have negotiated specific provisions for "Concerts" that oust whatever would otherwise apply to stage hands who work such events. The specific language pertaining to "Concerts" replaces any general language found elsewhere in the Agreement - at least to the extent of any incompatibility. The "specific" replaces the "general".

*

Nevertheless, in a setting which looks somewhat like the Gilda's Club Event, the parties have specifically addressed the very kind of fact pattern, and the very kind of problem, that we have in this case: some stage employees who are in the theatre to work the Performance, and then stay on "*following the performance*" to do the "Taking Down" - which Article 22 then says, will be done "*on an hourly basis*" at the "*prevailing hourly rate*". Then if some "*extra stage employees*" are "*called **in***" (i.e. they were not already there), those extra hands get the four hour guarantee. Thus, under Article 22.5 pertaining to "Concerts", there is no minimum guarantee for the holdovers who work "*on an hourly basis*", but there *is* such guarantee in the case of any extra stage employees, who are "called ***in***". The Agreement attaches significance to the "call *in*", and not just to the "call".

*

The clarity and precision of Article 22.5 incline me against reading Article 5 as if it said the same thing (moreover, if it did, it would have been unnecessary for the parties to spell it out so clearly in Article 22). Or put differently, if the Employer had wanted to accomplish the

(admittedly sensible) result that it urges upon me in this case, the model language to do that is in Article 22.5. But that is not the language that is used in Article 5, (or anywhere else that the parties pointed me to); and I do not think that I ought to read Article 5 so as to produce the same outcome, that is accomplished so clearly and so precisely by the *different language* in Article 22.5.

The better view, in my opinion, is the one proposed by the Union: that the "work" that the claimants were asked to do, is new "call", that is "caught" by the "catch all" language of Article 5.8; and that this "catch all" wording in Article 5.8 produces a four hour guarantee. It seems to me that this is the most probable reading of Article 5.8 in its application to the claimants' situation. What is not so easy is to read Article 5 *as if* it were written like Article 22.5.

*

In summary then, it is my view that the situation here falls within the provisions of Article 5.8, as proposed by the Union, and that the "Take-Out" in which the claimants were asked to participate did trigger a minimum 4 hour "call" pursuant to Article 5.8. It follows that those 11 workers should have been paid that minimum four hours, just like their coworkers who worked on that same "Take-Out". The fact that the claimants worked (and finished) a Performance Call immediately before their next "call" - the next period of work that they were asked to do - is no more significant for the claimants than it was for the returnees who worked earlier that day *and who, I am told, got the minimum guarantee*. In neither case does that earlier period of work affect payment for the "Take-Out" call - although it does take both sets of employees out of Article 5.7.

*

I recognize that this reading of Article 5.8 puts the "call-backs" and the "stay-overs" in the same economic position even though it might be argued that the former "deserve" the minimum guarantee more than the latter. Moreover a payment guarantee for the inconvenience of a "call IN" is the very kind of thing that one sees in other work settings and provides a "purpose" for the distinction that supports the Employer's view of things (i.e. there is a real distinction between those called in and those already there). I also think that the formula found in Articles 22.5-22.6 is clearer and makes a lot more operational sense.

Nevertheless, for the foregoing reasons, I am persuaded that Article 5.8 has been drafted as a "catch-all provision", and that it should be read as the Union proposes, and that in the circumstances of this case, the claimants did an extra "call", that under Article 5.8 commands a minimum four hour guarantee.

VI - Disposition

The forgoing reasons, the Union grievance succeeds. The Employer is directed to pay each of the 11 claimants two hours pay. In accordance with the agreement of the parties I will remain seized in the event that there is any difficulty in determining the amount to which each of the claimants is entitled.

Dated at Toronto this 14th day of July 2011

R.O. MacDowell, Sole Arbitrator