IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 357, KITCHENER
("the Union")

and

THE CENTRE IN THE SQUARE INC.
("the Employer)

Layoff Grievances and Performance of Bargaining Unit Work by Non-Members

BEFORE: Sole Arbitrator Larry Steinberg

APPEARANCES:

FOR THE UNION
Laurie Kent, Counsel
Larry Miller, IATSE Local 357

FOR THE EMPLOYER
Ian S. Campbell, Counsel
Bill Nuhn, Interim General Manager
Rob Sonoda, Director of Operations & Technical Service

Hearing held in Kitchener Ontario on November 21, 2011

AWARD

Overview

[1] The Union filed four grievances against the Employer. Two grievances are in respect of a temporary layoff for lack of work that took place during the summer of 2001. In those grievances ("the layoff grievances") employees were laid off in the middle of the work week. The Union claims that they should have been paid for 40 hours for the week in which they were laid off even though they did not work 40 hours. The Employer's position is that they should only be paid for the hours they actually worked that week.

[2] The other two grievances ("bargaining unit work grievances") are in respect of work performed by volunteers for two non-profit groups who borrowed equipment from the Employer. The volunteers loaded and/or unloaded the equipment from the loading dock at the Employer's premises onto trucks The Union claims that this work should have been performed by its members which is denied by the Employer. In addition, the Employer takes the position that even if the work is bargaining unit work, the work was so trivial that no remedy should be awarded.

[3] After considering the evidence and argument of the parties, I dismiss the layoff grievances. With respect to the bargaining unit work grievances, I allow the grievances to the extent of declaring that the work is bargaining unit work, however, I award no other remedies.

Facts

[4] The parties did not call any *viva voce* evidence. Rather, they agreed on a number of documents that were entered as Exhibits supplemented by the explanatory statements of counsel which were most helpful and efficient and for which I thank them.

(i) Layoff Grievances

[5] On June 24, 2011 the Employer issued notices of temporary layoff to its full time employees (Messrs. Constable, Hynes, McLean, Qualter, and Seip) due to lack of work. The layoffs were to be effective on July 11, 2011 until July 27, 2011 and from July 29, 2011 until August 26, 2011. One other full time employee, Luffman, received a notice of temporary layoff on that day however his period of layoff was to be effective on July 29, 2011 until August 26, 2011.

[6] Article 8.20 of the Collective Agreement states that the standard work week runs from 0001 Thursday to 2400 Wednesday. The work week encompassing July 11 therefore ran from Thursday July 7 to Wednesday July 13, 2011. Since July 11, 2011 was Monday, the employees were therefore laid off in the middle of the work week. The Union claims that Article 19.01 of the Collective Agreement, which provides that full time employees "shall be paid a minimum of forty (40) hours per week", is a guarantee that such employees are to be paid a minimum 40 hours per week regardless of how many hours they actually work. As a result, the Union claims that the employees laid off on July 11, 2011 are entitled to be paid the difference between what they were paid for the work week and 40 hours.

[7] A separate grievance was filed for Seip for the layoff that occurred on Friday, July 29, 2011. In that grievance the Union seeks pay for Seip for the difference between what he was paid and 40 hours for the work week of Thursday July 28 to Wednesday August 3, 2011 based on the provisions of Article 19.01 of the collective agreement.

[8] The parties also referred to the following extrinsic evidence. First, reference was made to two previous layoffs that occurred in 2007 and 2010. In each case the layoff took place during the work week as defined in the collective agreement and the employees were only paid for the hours they actually worked without any claim for 40 hours by the Union. However, in respect of the 2007 layoff the employee concerned did not have any lost time as a result of the layoff since he was reassigned to another job.

Second, reference was made to a proposal by the Union in collective bargaining in August 2011 seeking an amendment to Article 19.01 by adding to the existing language the words "for each of fifty two weeks (52) in a calendar year."

(ii) Bargaining Unit Work Grievances

[9] The Waterloo Uptown Jazz Festival ("Jazz Festival") and the Elora Festival are non-profit groups to whom the Employer lent or rented equipment, namely music stands and lights under the following circumstances.

[10] On July 15, Luffman, the only full time employee not on layoff, moved the music stands and lights to the loading dock. Volunteers from the Jazz Festival loaded the equipment onto a truck. When the equipment was returned (at an unknown date) the process was reversed; the volunteers took the equipment from the truck and placed it on the loading dock and Luffman then took the equipment from the loading dock to be put away. The Employer estimates that the work done by the volunteers took no more than 5 minutes; the Union says that if done by one person the work would take 20 minutes. The Union's position is that the work done by the volunteers (load in and load out) was bargaining unit work and should have been done by its members. Interestingly, one of the remedies requested by the Union in its grievance is that the Union be paid for 40 hours pursuant to Article 19.01 of the collective agreement.

[11] With respect to the Elora Festival grievance it claims that lights, risers and cables that were lent or rented to the Elora Festival were loaded in by volunteers and not by a member of the Union. The estimate of how much time such work took was the same as it was for the Jazz Festival grievance. Among the remedies requested in the grievance is a claim for 40 hours pay to the Union pursuant to Article 19.01 of the collective agreement.

Collective Agreement

[12] The provisions of the collective agreement referred to by the parties are as follows:

> **Article Three Management Rights**
>
> 3.02 The Centre shall have the right to make such rules and regulations as it may deem necessary for the conduct and management of the performances and working conditions; the right to the direction of its work force and to dismiss for proper cause subject to the Grievance Procedure. Further, the Union agrees that its members shall obey all rules and directions of any authorized representative of the Centre.
>
> **Article Six Jurisdiction**
>
> 6.01 Subject to provisions outlined in this Agreement, it is agreed that all construction, installation, alteration, operation and maintenance of stage equipment in The Centre In The Square premises including, but not limited to, scenery, drapes, picture sheets, lighting, sound, projection equipment and special effects created by whatever method shall be performed by members of the Union. The maintenance of all auditorium, lobby/foyer, dressing room and studio lighting shall be performed by members of the Union.
>
> 6.07 All properties, with the exception of personal hand properties, which are being moved to, from or within the theatre shall be moved by members of the Union. Properties shall include but not be limited to, furniture, decorations, floor covering, music stands, chairs, large musical instruments and their cases.
>
> **Article Seven Full-Time Employees**
>
> 7.01 Full time Heads of Department shall be: Head Carpenter, Head Electrician, Head Sound Person, and Head Prop Person. There shall be two (2) full-time assistants whose first responsibility shall be Assistant Carpenter/Fly Person, Assistant Electrician. The Crew Chief shall be selected

from the ranks of the full time employees by the General Manager, in consultation with the Business Agent.

Article Eight Hours of Work

8.01 Four (4) hours shall constitute the minimum work call for all personnel covered by this Agreement. Any call may be extended provided the appropriate meal and rest periods are observed.

In the event that full time employees work a recoverable call that provides five (5) hours of work in one day, the remaining three (3) hours for that day after the recoverable call is completed will be the minimum house maintenance call for that day provided that the two (2) calls are back to back with only one hour between. In all other circumstances, the minimum four (4) hour call shall apply to house maintenance calls.

8.02 Four (4) hours shall constitute the minimum call for extra people called to "Take In" and "Set Up" a production and four (4) hours shall constitute the minimum call for extra people who are called to "Take Down" and "Put Out" a production and who are not required to work the performance. Employees who work a performance and take-in and/or take-out shall be paid a minimum of two (2) hours on the take-in and/or take-out, subject to regular overtime provisions.

In the event that certain elements of a production have to be removed and such removal takes less than one (1) hour, then the time charged will be one (1) hour at the prevailing hourly rate.

For the purposes of this Collective Agreement, examples of certain elements shall include, but not limited to, musical instruments, wireless microphones, props etc.

8.05 Show calls shall be four (4) hours in duration, beginning one (1) hour before the advertised curtain time and ending when the performance ends.

8.06 Lectures and meetings that are down stage of the main drape on the apron shall be paid for at the prevailing hourly rate with a four (4) hour minimum call.

8.07 A dress rehearsal shall be considered the same as a performance; i.e. a Show Call, as to rates and minimum hours.

8.20 For full time Union employees, the standard work week will be five (5) days between 0001 Thursdays to 2400 Wednesday (excluding Sunday). However, if necessary the standard work week can be altered to include a sixth day (excluding Sundays). Full time employees may be scheduled to work within this work week with starting times to suit each day's activities.

All employees shall be paid one and one-half (1 ½) times the basic hourly rate when the hours of work exceed eight (8) hours per day (excluding Sunday) or forty (40) hours per week (excluding Sunday).

8.23 Twelve (12) hours shall be the minimum notice of cancellation of a scheduled performance for reasons other than Acts of God. In lieu of such minimum notice, each Union member called for the cancelled performance shall be paid for one (1) show call.

Notice will be deemed to have been given after the General Manager has contacted, verbally or otherwise:

(a) the Crew Chief when the Crew Chief is working on site at The Centre In The Square,

(b) the Business Agent in the absence of the Crew Chief.

Article Nineteen Rates of Pay

19.01 Full time employees shall be paid a minimum forty (40) hours per week.

Position of the Parties

Union

(i) Layoff Grievances

[13] The position of the Union is that Article 19.01 is clear and unambiguous on its face that full time employees are to be paid for a minimum of 40 hours per week. The Union submits that once a full time employee is scheduled to work within any work week as defined in Article 8.20 then that employee is entitled to be paid for 40 hours regardless of how many hours are actually worked.

[14] The Union pointed to the fact that in the 1980 collective agreement the 40 hour guarantee (for that is what in essence the Union argument is) only applied to Department Heads. The current language extending the guarantee to all full time employees first appeared in the 1991-93 collective agreement.

[15] Anticipating the Employer's argument that the events of 2007 and 2010 ought to be used as an aid to the interpretation of Article 19.01, counsel for the Union submitted that before those events can even be considered either a patent or latent ambiguity must exist. In counsel's submission, that is simply not possible in view of how clear and unambiguous Article 19.01 is. Moreover, even if an ambiguity exits, counsel submitted that the cases require, among other things, long-term silence on the part of a union as unspoken condonation of an employer's understanding of the collective agreement. (Counsel also addressed the matter from the point of view of estoppel however the Employer did not rely on estoppel in its argument. Therefore, I will omit that part of counsel's argument.) In her submission, isolated incidents do not amount to a practice and that is what the events of 2007 and 2010 amount to.

[16] Counsel asks that I make a declaration that the Employer violated the collective agreement and asks that I remain seized to deal with any issue arising from the implementation of this Award.

[17] In support of her argument counsel cited *Ontario Liquor Board's Employees' Union and Ontario (Liquor Control Board) (Palotta Grievance)* [2001] O.G.S.B.A. No. 57 ("*OLBEU*"); *International Alliance of Theatrical Stage Employees, Moving Picture Machine Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 58 and Exhibition Place (Malloy Grievance)* [2005] O.L.A.A. No. 535 (Howe); *Re Drug Trading Company Ltd. and United Steelworkers of America, Local 3313* (1998) 71 L.A.C.(4th) 231 (Brown) ("*Drug Trading Company*") and *Re Coca-Cola Bottling Co. and U.F.C.W., Locs. 175 and 633 (Boudreau)* (2006) 85 C.L.A.S. 279 (Hornung) ("*Coca-Cola*").

(ii) Bargaining Unit Work Grievances

[18] Counsel for the Union relied on the language of Article 6.01 and 6.07 which, in her submission, clearly state that the work done by the volunteers was the work of the bargaining unit. Counsel pointed out that the collective agreement covers part time employees as well as full time employees and that the work could have been done by them by means of a 4 hour call in pursuant to Article 8.03 of the collective agreement or it could have been rescheduled to take place on a day members of the union were at work.

[19] Counsel stated that to permit the work to be done by persons who are not members of the union would undermine the integrity of the bargaining unit.

Employer

(ii) Layoff Grievances

[20] Counsel for the Employer phrased the issue before me as whether Article 19.01, when read in the context of the entire collective agreement, gives a guarantee of a minimum of 40 hour per week of pay. In his submission, the answer to that is clearly in the negative for three reasons. First, Article 19.01 does not contain a clear and

unequivocal guarantee of 40 hours pay per week. Second, when Article 19.01 is read in the context of the collective agreement as a whole, it is clear it is not intended to be a weekly guarantee of 40 hours pay. Finally, the layoffs in 2007 and 2010 were made without the same claim for 40 hours pay as is made in this case.

[21] Counsel's starting point is the obvious observation that pursuant to the management rights clause, the Employer has the right to manage the business as it sees fit. In counsel's submission, this includes the fundamental right to layoff for lack of work and not to incur additional costs unless there is specific language that imposes that burden on the Employer. This includes not having to pay for hours where no work is performed as the Union is seeking in this case.

[22] The Employer argued that what the Union is seeking here is the imposition of a monetary obligation and that the case law is clear that very precise language which is clear and unambiguous is necessary to impose such a burden and submitted that the language of Article 19.01 lacks the necessary precision, clarity and lack of ambiguity in order to impose a monetary burden which so significantly departs from the Employer's typical rights under the management rights clause. For example, the parties did not use the word "guaranteed" to describe the payments referred to in Article 19.01. Rather, counsel suggested that the language in Article 19.01 when read with Article 8.20, means that full time employees are entitled to be scheduled for 40 hours per week if there is work to do.

[23] Counsel for the Employer asserted that, if accepted, the Union's interpretation would result in the absurd situation of someone who is called in from layoff to perform even a small amount of work being entitled to 40 hours of pay. In support of this Counsel pointed to the Bargaining Unit Work grievances where that very remedy was requested.

[24] Counsel asserted that the Union's claim is really for money for time not worked. Counsel submitted that where the parties intended that result they did so in clear

language. He cited as examples the provisions of Articles 13.04 (Vacation), Article 16.03 (Sick Leave), Article 17.01 (Bereavement Leave) and Article 8.23 (Hours of Work) as examples. He also cited in support of his position the decisions in *Re International Simultaneous Translation Service Ltd. and N.A.B.E.T.* (1993), 35 L.A.C. (4th) 55 (Taylor) and *Re Lewisporte Wholesalers Ltd. and U.F.C.W., Loc. 1252* (1988) 1 L.A.C. (4th) 114 (Bruce) to support his arguments that where other provisions in the collective agreement clearly indicate that in order to be paid an employee must work even in the face of an isolated clause that might indicate otherwise. He also referred to the decision in *The Skyline Ottawa Hotel and Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261*, unreported decision of Arbitrator Chaisson dated December 19, 1991 as indicating the type of language necessary to support an argument that language in a collective agreement amounts to a guarantee of pay even if all the hours necessary to earn such pay have not been worked.

[25] Finally, counsel submitted that past practice (the 2007 and 2010 layoffs) and negotiating history (the proposal made by the Union at bargaining in 2011) clearly indicate that even the Union doesn't believe that the interpretation asserted by the Union in this case is supported by the language of Article 19.01.

[26] Counsel summarized his argument as follows. First, the Union is seeking a monetary benefit and therefore the language must be clear and unambiguous in order for such a claim to be successful. Second, the type of benefit sought here is in the nature of a wage guarantee and the parties did not use the word "guarantee" or even words close to it. Third, if Article 19.01 was given the meaning asserted by the Union it would nullify or modify other provisions of the collective agreement. Fourth, if there is an ambiguity in the language of Article 19.01 then resort to the extrinsic evidence used as an aid to interpretation demonstrates that the language does not support the Union's argument.

[27] Counsel for the Employer, in addition to the cases noted above, relied on the following cases to support his arguments: *Re Wire Rope Industries Ltd. and United*

Steelworkers, Local 3910 (1982) 4 L.A.C.(3d) 323 (Chertkow); *Re Simcoe (County) and C.U.P.E., Local 5820.01* (2010) 195 L.A.C. (4th) 249 (Johnston); *Dynamic Closures (1995) Ltd. and United Steelworkers of America, Local 13292-03*, unreported decision of Arbitrator Dumoulin dated April 14, 1998 ("*Dynamic Closures*"); *Toronto (Metropolitan) Commissioners of Police v. Toronto (Metropolitan) Police Assn.* [1981] O.J. No. 651 (C.A.); 33 O.R. (2d) 476.

(ii) Bargaining Unit Work Grievances

[28] Counsel asserted that the work involved in these grievances does not fall squarely within the provisions of Article 6.07 of the collective agreement. Alternatively, even if it does, the collective agreement does not expressly prohibit this work from being done by persons who are not part of the bargaining unit and it did not undermine the bargaining unit. Finally, in the further alternative, the Employer asserts that the work is *de minimis* and therefore no breach of the collective agreement occurred.

[29] With respect to the scope of Article 6.07, counsel submitted that it covered work within the theatre and did not cover work performed on the loading dock. Moreover, the work was not performed for the benefit of the Employer or performed for anyone affiliated with the theatre.

[30] With respect to the second argument outlined above, counsel asserted that given the limited amount of work involved the integrity of the bargaining unit was not put in jeopardy and therefore there was no violation of the collective agreement.

[31] Finally, and related to the above argument, counsel asserted that the work was so minimal that, applying the *de minimis* principle, there has been no violation of the collective agreement or, if there has been such a violation, it has not been of sufficient magnitude as to warrant a remedy.

[32] In support of his arguments on these grievances counsel for the Employer cited *Atlantic Oil Workers Union, Local No. 1 and Ultramar Canada Inc.* unreported decision of Arbitrator Outhouse dated July 8, 1996 ("*Ultramar*"); *Re Canadian Blood Services and O.P.S.E.U.* (2001) 94 L.A.C. (4th) 429 (Chapman); *Re Carling O'Keefe Breweries of Canada Ltd. and Western Union of Brewery, Beverage, Winery & Distillery Workers, Local 287* (1987) 331 L.A.C.(3d) 69 (Beattie) ("*Carling O'Keefe*") and *Central Canada Potash and United Steelworkers of America, Local #7656* unreported decision of Arbitrator Norman dated March 31, 1988.

[33] In reply, Counsel for the Union vehemently disputed the position of the Employer that the work involved in the work of the bargaining unit grievances was not bargaining unit work and referred again to Article 6.07 of the collective agreement. She also urged me to at least issue a declaration of violation of the collective agreement even if I was of the opinion that this was not an appropriate case for damages.

[34] Counsel also disputed the limited scope attributed to Article 19.01 by Counsel for the Employer. She took particular aim at his analysis of the provisions of the collective agreement such as vacation, sick benefits and bereavement leave with pay that he said would be superfluous if Article 19.01 was given the meaning asserted by the Union. She pointed out that most of those provisions deal with situations where for whatever reason employees cannot attend at work. She emphasized that the Union is not asserting that employees ought to be paid 40 hours of pay if they cannot attend at work but only if they are scheduled to do so and there is not enough work for them in the week.

[35] She also distinguished some of the cases cited by Counsel for the Employer (*Wire Rope and County of Simcoe*) on the basis that the language in those cases clearly did not amount to a guarantee of the rights asserted by the Union in those cases unlike the language of Article 19.01 which clearly and unambiguously guarantees 40 hours pay for full time employees. She also distinguished *Simultaneous Translations* on

the basis that in that case the right asserted by the Union ran directly opposite to the Employer's right which is not the case here.

Decision

(i) Layoff Grievances

[36] Although the argument in this case took place on a number of levels, I am of the opinion that the real question is the limit of the application of Article 19.01. For ease of reference that provision provides that "Full time employees shall be paid a minimum forty (40) hours per week." In my view, this language unequivocally guarantees full time employees forty hours of pay per week in some circumstances.

[37] I therefore reject the position of counsel for Employer that the language of Article 19.01 is not sufficiently clear and explicit that it is a guarantee of wages because it does say that the pay is "guaranteed". I do not think that the absence of the word "guarantee" in Article 19.01 in any way undermines the clear meaning of the words that are used. In my view, the addition of that word to Article 19.01 would be superfluous to the language which was used and which clearly indicates that full time employees "shall" receive a minimum of 40 hours pay in a week. For example, in *Dynamic Closures*, Arbitrator DuMoulin stated as follows in connection with language which did not contain the word "guarantee" (at p. 15):

> An example of language which clearly and explicitly guarantees a certain level of wages is article 15.1 on reporting pay. It states 'Any employee reporting for work'.....without notice that no work is available 'shall receive a minimum of four (4) hours pay at the regular hourly rate...'.No such explicit language is found in Article 11..."

The language used in Article 19.01 is virtually identical to the language which Arbitrator DuMoulin commented on and, like him, I find that, on its face, it clearly and unambiguously provides for a guarantee of a minimum of 40 hours pay for full time employees.

[38] Moreover, counsel for the Employer acknowledged that Article 19.01 amounted in effect to a wage guarantee in some circumstances. He agreed that if the Employer was attempting to operate the theatre and there was less than 40 hours of work available for full time employees, then the Employer was obliged to pay its full time employees for 40 hours of pay in the week (this effectively disposes of the Employer's argument that Article 19.01 cannot amount to a guarantee of wages since it would render other provisions of the agreement superfluous). Therefore, the real issue between the parties is not whether Article 19.01 amounts to a guarantee of 40 hours pay but only whether it applies on the narrow fact of this case.

[39] Counsel for the Union acknowledges that, notwithstanding the language of Article 19.01, it is not a guarantee of 40 hours pay for 52 weeks a year. Rather, in attempting to place some limits on its otherwise seemingly limitless application, she asserts that it applies in any week in which full time employees are scheduled to work. Therefore, in this case, since the employees were scheduled to work part of the work week defined in the collective agreement prior to their layoff, they were entitled to be paid for the entire week notwithstanding that they did not work the entire week.

[40] In the Employer's view, however, on the facts of this case, the limit of the application of Article 19.01 is reached when the Employer exercises its broad management right to layoff employees for lack of work. In this case, since the layoffs were a *bona fide* exercise of that right, Article 19.01 cannot be applied in such a way as to limit that right including the timing of the layoffs.

[41] In my view, once the true dispute between the parties has been isolated, I have little hesitation in finding that the provision is latently ambiguous, that is to say, it is ambiguous in its application to the facts in this case since both interpretations urged on me are reasonably possible, thus permitting the admission of extrinsic evidence (*OLBEU, supra*, at paras. 8-10; *Coca-Cola, supra*). Each side provided some extrinsic evidence. The Union provided evidence of the evolution of the provision through successive collective agreements. The Employer provided extrinsic evidence of the fact

that a claim for 40 hours pay was not made in 2007 or 2010 when layoffs occurred mid-week.

[42] I have not found the extrinsic evidence to be particularly helpful in resolving the issue before me. The Union's evidence doesn't assist in determining the application of the provision in cases of layoff. The Employer sought to rely on the application of the article as an aid to interpretation. In order to be able to do so a number of requirements must be met including that the conduct of the Union is unambiguously based on the meaning attributed to Article 19.01 by the Employer and that the acquiescence of the Union can be inferred from the continuation of the practice over a long period of time (see *Re I.A.M., Loc. 1740, and John Bertram & Sons Co.* (1967), 18 L.A.C. 362 (Weiler) cited with approval and applied in *Drug Trading Company, supra* at pp. 236-237). However, in 2007 the employee in question was reassigned and suffered no lost time wages which is not the case here. The failure of the Union to object therefore cannot be said to be unambiguously based on the meaning of the provision asserted by the Employer. That only leaves the 2010 layoff. Even assuming that the layoffs that occurred in 2010 are identical in all respects to the layoffs in the current case, that is not a sufficiently long standing practice that the Employer can rely on it as an aid to interpretation.

[43] In determining the limits of the application of Article 19.03, my starting point must be Article 3, the Management Rights provision. Although this particular provision in this collective agreement is quite sparse, there is no doubt (and the Union did not argue to the contrary) that the Employer has the right to decide all matters pertaining to layoffs including the timing of such layoffs and the number of employees to be laid off subject only to specific restrictions in the collective agreement.

[44] The Union's argument at its core is that Article 19.01 amounts to a restriction on management's right to layoff when it sees fit. In my view, that is giving to Article 19.01 a more robust application than is warranted.

[45] As I noted earlier in this award, there is no doubt that Article 19.01 does amount to a guarantee of 40 hours pay for full time employees in a work week in some circumstances Such a guarantee, while not unheard of, is somewhat unusual. I was not provided with any information regarding the nature of the Employer's operation to explain why the parties felt the need to include such a provision in addition to the many call in clauses that are more typically found in collective agreements. Therefore I am left to try to discern why the provision is included in the collective agreement in order to try to determine the limits of the clause.

[46] It is apparent from a reading of the collective agreement that full time employees are the core group of employees necessary to permit the Employer to operate the theatre. Article 7 of the collective agreement is headed "Full-Time Employees". It lists who the full time employees are (Head Carpenter, Head Electrician, Head Sound Person, Head Prop Person and 2 full time assistants whose first responsibility is Assistant Carpenter/ Fly Person and Assistant Electrician). A Crew Chief is selected from among the full time employees by the Employer in consultation with the Union's Business Agent. (Article 7.01).

[47] In addition to the benefits of Article 19.01, a number of other benefits are applicable to full time employees. The Employer is required to endeavour to provide parking for full time employees at no charge (Article 7.05), to give them credits whenever possible in its programmes and to request crediting of Heads of Department in any radio, television or film production produced at the theatre (Article 7.04). Full time employees have the benefit of a sick leave plan and insurance benefits (Article 16.03-16.07) as well as bereavement leave and jury duty pay (Article 17).

[48] The available work in the theatre, as in most entertainment contexts, depends on what product is booked and when it is booked in addition to normal maintenance. There may be long periods of time between productions. Those who work in the theatre are therefore subject to significant peaks and valleys of available work on a regular basis. In those circumstances clauses such as Article 19.01 are negotiated for the core group of

employees in order to provide them with a predictable source of income and to insulate them somewhat from the typical ebb and flow of work in the live entertainment industry. For the Employer, this is an effective way to retain the services of its key employees who are familiar with the theatre and its systems thus avoiding having to continually train new employees.

[49] In my view, however, in situations where the Employer knows that for an extended period of time there will be no work at all to be done in the theatre and exercises its right to layoff its entire full time workforce, the same rationale does not apply. In these circumstances it does not seem reasonable that full time employees should reap the benefit of Article 19.01 where it would significantly interfere with the Employer's right to exercise its broad management right to decide the timing of the layoffs. At the point at which the available work is simply not sufficient for the Employer to maintain its workforce of full time employees, the rationale of smoothing out the peaks and valleys of available work (and pay) while the theatre stays open simply does not apply. In addition, employees will have recourse to other sources of income such as the use of vacation days, as occurred here, or access to EI where appropriate.

[50] For these reasons, I agree with the Employer's position that the limit of the application of Article 19.01 as a guarantee of 40 hours wages is reached when the Employer exercises its right to layoff its employees due to lack of work. If, in the exercise of that right, the Employer determines for *bona* fide reasons, that the layoff will occur mid-week, Article 19.01 does not apply and must yield to the right of the Employer to decide the timing of the layoffs. The layoff grievances are therefore dismissed.

(ii) Bargaining Unit Work Grievances

[51] These grievances involve the loading and unloading of music stands, lights, risers and cables by volunteers of either the Waterloo Uptown Jazz Festival or the Elora Festival. In one case the Union's claim is that the volunteers loaded the equipment from the loading dock to a truck and from the truck to the loading dock on the return of the

equipment. In the other case, the Union's claim is only about moving the equipment off the truck on the return. The parties estimated the work to be between 5 minutes if performed by more than one employee to not more that 20 minutes if performed by one employee.

[52] Notwithstanding the Employer's argument that the movement of music stands, lights, risers and cables is not covered by the collective agreement since they were being moved on the loading dock and not to, from or within the theatre, I have no doubt that Article 6.07 applies. For ease of reference that provision is as follows:

> 6.07 **All properties**, with the exception of personal hand properties, **which are being moved to, from or within the theatre shall be moved by members of the Union. Properties shall include but not be limited to**, furniture, decorations, floor covering, **music stands**, chairs, large musical instruments and their cases. (emphasis added)

[53] There is no doubt that the "theatre" as used in this collective agreement includes areas of the Employer's premises well beyond the physical boundaries of the area where performances occur and certainly includes the loading dock. "Properties" is a broad concept and can certainly cover lights and risers and specifically refers to music stands. Moreover, the Article is equally clear that the movement of properties shall be performed by members of the Union. Accordingly, the Employer violated the collective agreement by permitting the volunteers to perform the work.

[54] However, the amount of work involved was so minimal (5 minutes if more than one employee performed the work and 20 minutes if done by only one employee) that there is a serious question whether anything more than a declaration of violation of the collective agreement is warranted.

[55] At the relevant time the theatre was closed and the full time employees were laid off. There were no members of the Union at work to move the equipment. In response to the observation of Counsel for the Employer that if full time employees had

been called in to perform the work they would have been, on the argument of the Union, entitled to 40 hours pay for the week (which was a remedy requested in these grievances but not pursued at the hearing), Counsel for the Union suggested that part-time employees could have been called in to perform the work. That is true. It is also true that such employees would have been entitled to four hours pay by virtue of the minimum work call provisions of Article 8.01 of the collective agreement.

[56] Counsel for the Union observed that it was important for the Union to pursue these grievances and to obtain a monetary award for any breach of the collective agreement because the integrity of the bargaining unit could be threatened by such violations of the clear language of the collective agreement. That argument is not particularly persuasive on the facts of this case. The work is so minimal that it is impossible to see how the integrity of the bargaining unit is in any way threatened by a few volunteers loading and unloading some equipment particularly where all the members of the Union were on layoff at the time.

[57] Taking into account all the circumstances of this case I think this is an appropriate case to apply the *de minimus* principle as asserted by the Employer. In this regard I share the view of Arbitrator Beattie in *Carling O'Keefe*, *supra* at p. 81 where he had this to say:

> I am of the view, and I believe the view to be held generally by arbitrators, that in so interpreting and applying prescribed guidelines there must be some scope, albeit narrow, for common sense. Surely if a foreman provides momentary assistance to a bargaining unit employee no one should be heard to suggest that the integrity of the bargaining unit is being threatened. This common sense approach is the foundation for the principle in law of '*de minimus non curat lex*' (the law does not care for, or take notice of, very small or trifling matters)': Black's Law Dictionary, 4th ed., p. 482. The principle was applied by the board in the *Thompson General Hosp.* award, *supra*, where the article in the collective agreement prescribed specific exceptions of 'instruction and cases of an emergency nature'. In that case the supervisor had helped for about ten minutes to pass out food trays. The

> board was of the view that the work was normally done by bargaining unit employees but at the time the ward was very busy and the supervisor was trying to be helpful. The board found [at p. 148] that 'the evidence of any work done [by a supervisor] was so minimal and vague that the *de minimus* principle applied'; there was no consideration for the work done, no damages and no evidence of bad faith."

[58] Similarly, the views of Arbitrator Outhouse in *Ultramar* are instructive when, at p.15 he stated as follows:

> ....I am satisfied that the *de minimus* rule applies in this instance. In applying this rule regard must be had to the surrounding circumstances. Here, there were no bargaining unit employees on site and the amount of actual work was trifling. From a practical point of view, it simply would not make any sense to require the Employer to recall an employee from layoff to perform 15 minutes of work and I have no doubt that the parties never intended so absurd a result.

[59] If ever there was a case where the *de minimis* principle should be applied it is this case. The amount of bargaining unit work was trivial and no Union members were at work to do it since they were laid off. To require the Employer to recall a full time employee from layoff to perform this work makes no sense as is the suggestion that a part time employee be paid 4 hours of pay for 20 minutes of work.

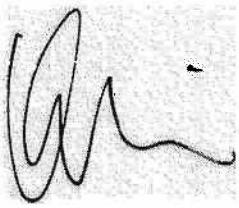
[60] Accordingly, since the Employer challenged whether the work was bargaining unit work, I am of the opinion that a declaration is appropriate to the effect that the work is bargaining unit work and that it ought to have been done by Union members. Beyond that, I think it is appropriate to apply the *de minimus* principle and I decline to award any other remedy.

Conclusion

[61] For the reasons stated above, I dismiss the layoff grievances and I declare that the work at issue in the bargaining unit grievances is bargaining unit work that should

have been performed by members of the Union but, on the facts of this case, I decline to award any other remedies based on the *de minimus* principle.

Dated at Toronto this 3rd day of January, 2012



Larry Steinberg, Arbitrator