IN THE MATTER OF AN ARBITRATION

BETWEEN

The Board of Governors of Exhibition Place

(the "Employer")

-and-

The International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local #58, Toronto

("IATSE" or the "Union")

Re: Canadian National Exhibition –Scheduling grievance

SOLE ARBITRATOR: Marilyn Silverman

APPEARANCES

For the Employer:

Sharmila Clark, Counsel
Victoria Lee, Senior Labour Relations Consultant
Ron Mills, Director Facility Services
Jeff Mann, Senior Production Coordinator

For IATSE Local 58:

Ernie A. Schirru, Counsel
Jim Brett, IATSE Local 58 President
Justin Anteunis, IATSE Local 58 Vice President
Gerry Penic, IATSE Local 58 member
Mark Goldenberg, IATSE Local 58 member

Hearing held on February 27, 2014

Award issued on March 31, 2014.

AWARD

1. This grievance concerns a new scheduling practice implemented in 2013 by the Employer at the Canadian National Exhibition (the "CNE").

2. The Employer operates various venues for more than three hundred different events, including shows that take place at the CNE (such as a dog show, Ricoh Ice show). The CNE runs for an 18 day period each year, beginning in August and leading up to, and including, Labour Day. Local 58 members, the stage local of the Union, work at the CNE on these shows, including some shows that are videotaped.

3. The Employer and the Company are party to a collective agreement effective from January 1, to 2012 to December 31, 2015 (the "Collective Agreement"). The scheduling change of which the Union complains occurred for the first time for the 2013 CNE year. The Union filed its grievance on August 29, 2013.

4. Until the 2013 change, some employees assigned to shows at the CNE worked from 18 to 25 days without a day off during that period. Although the CNE is on for 18 days, some employees worked up to 25 days in a row including for the set ups and tear downs of the shows. In 2013 the Employer changed the schedule to provide breaks (days off work) in that 18 to 25 straight day schedule.

5. The Employer says it did so to comply with the requirements of Section 18. (4) of the *Employment Standards Act, 2000 (the* "ESA*")* which provides for 24 and 48 hour breaks in every week and two weeks respectively. The Union responds that the previous scheduling practice did not breach the ESA. The Union asserts that the scheduling practice is longstanding and unchanged and, as a result, the Employer must continue it at the CNE until the expiry of the Collective Agreement. The Union emphasizes that its members work on a "feast or famine" basis during the CNE and that they want the work when it is available.

6. In addition to the argument on the interpretation of Section 18.(4) of the ESA, the Union advances two alternative arguments: one is that these employees are excluded under a regulation to the ESA either because shows are video recorded (although it is agreed that not all shows are video recorded) or because the employees are managerial and/or supervisory. The Employer disputes the application of the relevant regulation to these facts.

7. The parties provided a copy of an approval from the Ministry of Labour for excess weekly hours of work during the CNE (the "Permit"). It does not address the main issue to be determined in this case, although the Union says that the employees do not exceed the weekly maximums provided for in the Permit.

8. The ESA provision relied upon by the Employer is found in Sections 18. (4) of Part VII of the ESA. However I reproduce the entirety of Section 18 as that section relates to the analysis of this case:

> **Hours free from work**
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> 18. (1) An employer shall give an employee a period of at least 11 consecutive hours free from performing work in each day. 2000, c. 41, s. 18 (1); 2002, c. 18, Sched. J, s. 3 (10).
>
> **Exception**
>
> (2) Subsection (1) does not apply to an employee who is on call and called in during a period in which the employee would not otherwise be expected to perform work for his or her employer. 2000, c. 41, s. 18 (2).
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> **Free from work between shifts**
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> (3) An employer shall give an employee a period of at least eight hours free from the performance of work between shifts unless the total time worked on successive shifts does not exceed 13 hours or unless the employer and the employee agree otherwise. 2000, c. 41, s. 18 (3).
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> **Weekly or biweekly free time requirements**
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> (4) An employer shall give an employee a period free from the performance of work equal to,
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> (a) at least 24 consecutive hours in every work week; or
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> (b) at least 48 consecutive hours in every period of two consecutive work weeks. 2000, c. 41, s. 18 (4).

9. In addition the parties referred to other portions of Part VII (Hours of work and eating periods) of the ESA:

> **Limit on hours of work**
> 17. (1) Subject to subsections (2) and (3), no employer shall require or permit an employee to work more than,
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> (a) eight hours in a day or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day:
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> (b) 48 hours in a work week.
>
> …
>
> **Hours free from work**
> 18.(1) An employer shall give an employee a period of at least 11 consecutive hours free from performing work in each day.
>
> **Exception**
>
> (2) Subsection (1) does not apply to an employee who is on call and called in during a period in which the employee would not otherwise be expected to perform work for his or her employer.
>
> …
>
> **Exceptional Circumstances**
> 19. An employer may require an employee to work more than the maximum number of hours permitted under section 17 or to work during a period that is required to be free from performing work under section 18 only as follows, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations:
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> 1. To deal with an emergency.
> 2. If something unforeseen occurs, to ensure the continued delivery of public services, regardless of who delivers those services.
> 3. If something unforeseen occurs, to ensure that continuous processes or seasonal operations are not interrupted.
> 4. To carry out urgent repair work to the employer's plant or equipment.
>
> …

10. The Union's main argument is that the proper statutory interpretation to be given to Section 18. (4) is found in the use of the words "an employer shall give". The Union says this phrase is not an ESA mandate but instead allows an employee to work that continuous period

without the one or two day break, if the employee chooses. The choice to work without those breaks, in the Union's view, is voluntary; at the employees' option.

11. The Union contrasts the language in Section 18. (4) with that found in Section 17.(1) which reads "no employer shall require or permit…". It asserts that the difference in wording must be given meaning.

12. Local 58 contends that when it refers members to the CNE those members are voluntarily agreeing to work every day of the time period when the CNE is open. If a member does not want to do that, he or she will be given the one or two day breaks.

13. The Union relies on the decision in *Indalex Aluminum Solutions v. United Steelworkers, Local 9042 (Voluntary Overtime Grievance),* [2008] O.L.A.A. No. 782 (Burkett) in support of its position. That case analyzed Section 18. (1) of the ESA in the context of whether the language contained in that section was voluntary at an employee's option. The parties sought clarification as to whether allowing such overtime violated Section 18. (1) of the ESA. The employees were not required to work, but were asked if they wanted to.

14. In finding that the overtime worked did not give rise to a violation of the ESA, the Board of Arbitration in *Indalex* relied on both the greater right or benefit provision found in Section 5. (2) of the ESA, and, more notably for the purpose of the instant case, on the interpretation of the different language found in Sections 17 and 18 of the ESA. Paragraphs 7 and 8 of *Indalex* provide the analysis:

> 7 Secondly, when Section 18.(1) and Section 17.(1) are read together, it is clear that the working of voluntary overtime cannot give rise to a breach of Section 18.(1). Section 17. (1) stipulates that "no employer shall require or permit an employee to work more than eight hours in a day ... and 48 hours in a week." The obvious intention of the legislature, as buttressed by the Section 5.(2) exemption contained in Section 17.(2) of the Employment Standards Act, is to create an absolute prohibition against working more than eight hours in a day and 48 hours in a week. The legislature has done this by prohibiting an employer from both requiring an employee to work beyond the prescribed limit or permitting an employee

> who might be agreeable to work beyond the prescribed limit and by exempting Section 17.(1) from the greater benefit provisions of Section 5.(2). In contrast, Section 18. (1) is not framed as an absolute prohibition. Under Section 18. (1), to which Section 5. (2) applies, an employer "shall give an employee a period of at least 11 consecutive hours free from performing work each day." Given the distinction drawn by the legislature in Section 17. (1) between hours that an employee is required to work and hours that an employee might be permitted to work, it must be found that the duty upon an employer under Section 18.(1) to "give" the required daily time off work refers to scheduled or otherwise mandatory hours as distinct from hours that an employee might volunteer to work. In other words, so long as an employer does not schedule or otherwise require an employee to work with less than 11 consecutive hours off work, it is giving the employee the required time off work within the meaning of Section 18.(1). The language of Sections 17. (1) and 18.(1), read together, supports a distinction between scheduled or mandatory hours and voluntary hours; a distinction that, as in this case, can be rationalized on the basis of not only the employer's operational needs but also on the basis of the remuneration and convenience needs of an employee who might volunteer to work such overtime.
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> 8 Accordingly, so long as an employee has a contractual right to at least 11 hours free from work daily, as in this case, that employee can volunteer to work overtime hours that may reduce the time free from work to less than 11 hours daily as prescribed under Section 18.(1) of the Employment Standards Act.

15. The Union highlights that the weekly maximums under the Permit are not exceeded when the weekly or bi-weekly free time is not scheduled.

16. The Union addresses the estoppel argument. It says that the scheduling practice has existed for a long time and if the Employer wants to change it, the Employer must do so at bargaining. Employees working at the CNE expected to be able to work every day in the three week period and the Employer has unilaterally deprived employees of that extra time without notice. The Employer has not before exercised its management rights to schedule in the way it now suggests. The Union therefore had no opportunity to address this issue in bargaining. IATSE acknowledges that the estoppel, if granted, only survives for the duration of the Collective Agreement.

17. The Employer relies on the weekly and biweekly free time language in Section 18 and on its management right to “schedule its activities” found in Article 2.1 of the Collective Agreement. The Employer asserts that the change in schedule was motivated by safe practices.

The Employer says that there is no Collective Agreement provision prohibiting this change and that it has an exclusive right to make the change.

18. The Employer distinguishes *Indalex* in that it does not deal with section 18. (4) of the ESA but rather with Section 18. (1) and the requirement that an employee have 11 hours free from work in a day. The Employer says that the weekly and biweekly free time requirements found in Section 18. (4) are distinct from the break requirements of Section 18. (1) and each are subject to certain exceptions. The exceptions to Section 18. (4) are found in Section 19 of the ESA; and none of those apply. It also says that Section 18. (1), unlike Section 18. (4), has a specific exception found in Section 18. (2) of the ESA.

19. The Employer asserts that the weekly and biweekly rest periods are not voluntary; ie at the Union or employee's option. It contends that *Indalex* addresses the issue of voluntary overtime and the impact of the ESA requirement to have 11 hours free from work in a day. This case is not about voluntary overtime but about weekly and biweekly rest periods.

20. The Employer relies on the decisions in *Re Cargill Foods and United Food and Commercial Workers' International Union, Local 633* (2006), 151 L.A.C. (4th) (Shime) and *Smucker Foods of Canada Co. and U.F.C.W., Local 175 (Re)*, [2007] 91 C.L.A.S. 116 (Dissanayake) for the proposition that scheduling must be in compliance with the ESA. Both cases also affirm an employer's right to schedule and to change shift schedules in compliance with the ESA.

21. The Employer concludes that it has a right to schedule, that it does so in this instance to comply with the ESA, to protect health and safety and to provide balance for employees between work and personal life. The Employer also notes that there are no damages accruing to the Union as more people have been given more training and hours in the revised scheduling.

22. The Union replies that there is no real distinction between the statutory analysis in *Indalex* in respect of Section 18.(1) and the analysis that should be given to this case in respect of Section 18.(4). The Union responds to the Employer's reference Section 18. (2) by noting that there was no consideration given to Section 18. (2) in the *Indalex* analysis of Section 18.(1).

23. The Union responds to the proposition that there need be an actual provision of a collective agreement that is breached in order to found an estoppel. It argues that is not a necessary pre-condition to an estoppel and relies on the decision in *Re Greater Sudbury Hydro Plus Inc. and Canadian Union of Public Employees, Local 4705* (2003), 115 L.A.C.(4th) (Marcotte).

Decision

24. I have carefully considered the submissions and the ESA provisions as well as the case law provided. I am persuaded by both the language of the relevant provisions of the ESA and the analysis in *Indalex* that the scheduling practice prior to the 2013 change did not give rise to a violation of Section 18. (4) of the ESA.

25. As explained in *Indalex*, the legislature used different words in Section 18 (both in Section 18. (1) and 18. (4)) as distinct from the words used in Section 17.

26. An employer cannot "require or permit" an employee to work more than 8 hours in a day or 48 in a week. There is no room for any volunteer assignment in these words. However, by contrast, the directive that an employer "shall give" means that an employer cannot mandate those hours (ie they are voluntary) but that an employee is permitted to work them.

27. As to the Employer argument that Section 18. (1) is different than Section 18. (4), I do not accept that the different subject matter in those two sections changes the statutory interpretation described in *Indalex.* If the words in Section 17, not to "require or permit", are compared with the words in Section 18(4), "shall give", the analysis is precisely the same as between Section 18. (1) and Section 18. (4). The enabling words used are the same. Just as

differences in language in statutes (as between Section 17.(1) and both Sections 18.(1) and 18.(4)) intend different interpretations, so the same language (as in Sections 18.(1) and 18.(4)) intends the same interpretation.

28. The exceptions in Section 19 do not support the Employer's argument because those exceptions come into play only when an employer is entitled to "require" an employee to work.

29. In light of the conclusion reached on the Union's main argument it is not necessary for me to decide the issue on either of the Union's second or third arguments relying on the Regulation.

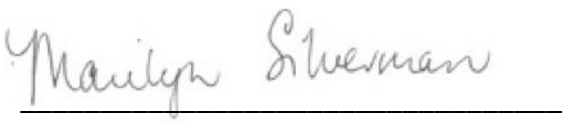
30. It is important to note that this case arises out of a unique fact situation involving an 18-25 day period, once a year, in a specialized and unique industry. There may well be other considerations, notably health and safety ones or other ESA provisions, that arise in the event that a scheduling practice extends beyond such a short and dedicated period of time. Here the Employer has consistently, for many years, given these employees the opportunity to work a substantial number of hours per week (the Permit extends hours for this period, over this short concentrated period). Also, as the Union points out, the Permit is not exceeded by the employees working without the weekly or biweekly free time.

31. All the elements of an estoppel are present, given the longstanding and consistent practice of scheduling in this way during the CNE. If the Employer proposes to change it, it must do so with notice at bargaining.

32. Accordingly the grievance is allowed. The Employer is required to revert to the pre-2013 scheduling practice with respect to the opportunity to work during the CNE period. Employees who volunteer to work the hours of this schedule, in accordance with the terms of the practice, shall be entitled to do so. Nothing in this decision requires any employee, who chooses not to work without the weekly or bi weekly break, to do so nor does it alter the terms of the Permit.

33. The issues of remedy, if any, beyond this order is referred to the parties for resolution, failing which I remain seized.

Dated at Toronto this 31st day of March, 2014



Marilyn Silverman

Arbitrator