

IN THE MATTER OF AN ARBITRATION

BETWEEN:

PRINCESS OF WALES THEATRE AND
ROYAL ALEXANDRA THEATRE

("the employer")

- AND -

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES AND MOVING PICTURE MACHINE
OPERATORS OF THE UNITED STATES AND CANADA
("IATSE"), LOCAL 800

("the union")

AND IN THE MATTER OF THE GRIEVANCE OF BEAUTY AND THE BEAST -
IMPROPER PAYMENT (TIME OF CALL).

BOARD OF ARBITRATION

Robert J. Herman
Arbitrator

APPEARANCES

FOR THE EMPLOYER

Stephen Bernofsky, Counsel
Laura Paglia
Lisa Petro

FOR THE UNION

Bernard Fishbein
Jillian Logan
Rhonda Collins

HEARINGS IN THIS MATTER WERE HELD IN TORONTO ON MAY 13, 1997
AND SEPTEMBER 18, 1997.

AWARD

1. This is a grievance over whether employees of the applicant, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada ("IATSE"), Local 800, received proper payment of wages with respect to the production of Beauty and the Beast, playing at the Princess of Wales Theatre in Toronto. The employer party to the collective agreement is "Princess of Wales Theatre and Royal Alexandra Theatre", but will be referred to as "Mirvish Productions", the company which operates both venues.

2. The particular dispute involves the interpretation and application of Article 4.01 of the collective agreement. That article, and other relevant articles of the collective agreement, read as follows:

ARTICLE FOUR - Hours of Work

- 4.01 Performances
Performances shall be a working period of four (4) hours, to be considered as from time of call to the final curtain. All time worked over and above this period shall be paid at the applicable rate as hereinafter set forth. A grace period of fifteen (15) minutes shall be allowed before extra time is charged.
- 4.02 Minimum Call
Minimum time for calls shall be four (4) hours.

...

9.03 ALL OTHERS

On signing	June 1, 1995	June 1, 1996	June 1, 1997
<u>-May 31, 1995</u>	<u>-May 31, 1996</u>	<u>-May 31, 1997</u>	<u>-May 31, 1998</u>
Performance			
Rate \$65.10	cost of living	cost of living	cost of living
Hourly			
Rate \$17.00	" " "	" " "	" " "

3. The dispute arises over the different views of the parties as to how to define "time of call" (referred to in Article 4.01), the point of time from which the performance rate begins to run. The parties agree that the performance rate is to be paid "from time of call to the final curtain", within the meaning of that phrase in Article 4.01, and that the performance rate is to comprise a period of up to four hours, to be at the rate reflected in Article 9.03. They disagree on the meaning of the phrase "time of call".

4. The union asserts that "time of call" has an industry meaning, referring to one-half hour before the curtain rises. Accordingly, submits the union, the performance rate is to be paid from one-half hour prior to the curtain rises until the final curtain falls. The employer asserts that "time of call" is determined by the employer, and can therefore be whenever the employer chooses, as long as the curtain falls no more than four hours later. From whenever the employer sets the "time of call", the next

four hours of work are all encompassed by the performance rate amount.

5. In 1994, Local 800 was certified with respect to a bargaining unit of hair and make-up employees for the Princess of Wales Theatre and the Royal Alexandra Theatre. This collective agreement is the first between the parties. It was signed in May, 1995.

6. When negotiations for the collective agreement began, Mirvish Productions was producing two on-going shows, Crazy For You and Miss Saigon, both of which employed members of Local 800. For these productions, there was no block performance rate, and employees were paid on an hourly basis. In negotiations, the parties agreed that the performance rate they were including in the new agreement would not apply to these two shows, and that the employer could continue to schedule and pay on these productions as it had been previously.

7. The union tabled a proposal that included the clause that became Article 4.01. The performance rate is a lump sum which covers the four hour period from "time of call to the final curtain". The lump sum amount is less than the total would be for four hours at the hourly rate. The rationale for this lesser amount is to create a situation or

an incentive where employers are able to obtain and retain the best employees for their shows. If an hourly rate were paid for the duration of the performance, then better employees would look to work only on the longer shows, since the greater number of hours of a longer show would yield higher remuneration. Shorter productions would lose employees whenever there was an opening on a longer show. A block fee performance rate solves this problem, as employees working on shows of different lengths receive the same amount for the period of the performance. The performance rate is set at less than the equivalent of a straight hourly rate in recognition that most performances will take less time than the number of hours covered by the performance rate. If the show is less than four hours (the performance rate period in this collective agreement), the employee will benefit. If the show is longer than four hours, the employer benefits.

8. There was discussion in negotiations about Article 4.01, but the parties dispute some of the statements made during these discussions. However, certain significant facts are not disputed. It was and is agreed that it is the employer's decision when to schedule employees to attend each night and begin work, and when to release them after the performance. It is also agreed, and the evidence establishes, that the phrase "time of call" has an industry accepted meaning: one half hour prior to the curtain rising.

This has been a general industry understanding and practice, reflected in the current practice of IATSE's sister locals, but in any event known to the employer as it began negotiations over this agreement. The parties never specifically discussed the meaning of the term "time of call" during their negotiations.

9. The collective agreement was signed, with Articles 4.01 and 9.03 as set out above. The first new show to be produced after it was signed and in effect was the Disney production of Beauty and the Beast. This dispute arose on this show, but not until it had been running for some considerable time.

10. The show began production in August, 1995. A member of Local 800, Fina Khan, was hired by Disney to be the department head of the Hair and Make-up Department for Beauty and the Beast. The show was managed by a production company out of New York City, Harris Production Services, which in turn hired a payroll company to perform all payroll functions. Mirvish Productions did not itself produce Beauty and the Beast, nor was it responsible for payroll matters.

11. In mid-August, 1995, Harris Production Services sent a memorandum to Ms. Khan, advising her that the performance would be from 6:30 p.m. to final curtain, and

stating that that period would be the "four hour performance call specified in ... the contract." Whether or not this memorandum was brought to the attention of the union (Ms. Khan was considered management on this production, as she was the department manager) prior to this dispute crystallizing, the practice on the show did not reflect the instructions given by Harris. From the beginning of the show, in August, 1995, until September, 1996, employees in the Hair and Make-up Department were called in to begin their shifts at 6:30 p.m. The curtain rose at 8:00 p.m. and fell at approximately 10:45 p.m. Employees were also asked to work for one hour after the curtain fell, a period referred to in the industry as "continuity". The employees were paid hourly from 6:30 p.m. to 7:30 p.m., and then received the lump sum performance rate from 7:30 p.m., one-half hour before the curtain rose, until the curtain fell, and then one additional hour's pay for the hour continuity after the show ended.

12. Time sheets were not filled out by individual employees, but were all done by one person, an employee in the bargaining unit who was also a union official. She then forwarded the time sheets to Fina Khan, for her approval, and once approved, copies went to both the on-site Production Manager for Disney and the Production Manager for Mirvish Productions. The employees were then paid by the payroll

company retained on Disney's behalf, and they were paid from August, 1995 until approximately September, 1996 in the manner that the union asserts they ought to have been, paid hourly from 6:30 p.m. to 7:30 p.m., and receiving the performance rate for the period from one-half hour before the curtain rose until it fell. Throughout this period, Disney and the employer were receiving and approving time sheets that reflected this practice.

13. In September, 1996, Disney became concerned about the higher costs of its Toronto production of Beauty and the Beast compared to productions playing elsewhere. Disney investigated, and concluded that the employees were not being paid as the collective agreement entitled the employer to pay them, and as the memorandum from its Production Manager in August, 1995 had indicated they ought to be paid. Disney's Production Manager contacted the Production Manager for Mirvish Productions, and advised her that he had read the collective agreement and was of the view that employees should receive the lump sum performance rate from when they came in until the curtain fell, provided this period was no longer than four hours.

14. As a result of Disney's request, employees were directed to come in at 6:45 p.m., instead of 6:30 p.m. as they had been previously, and the payroll company began to

pay them the block fee performance rate from 6:45 p.m. until the curtain fell, at approximately 10:45 p.m. Although the one hour continuity after the performance was also at that time terminated, it was restored shortly thereafter by Disney. There is no dispute over the payment of wages with respect to this one hour post-performance period.

15. The union grieved in response to this change in payment method and calculation. The union asserts that the collective agreement did not entitle the employer to determine that "time of call" started at other than one half hour prior to the curtain rising. Accordingly, it submits, the employer has not been paying the proper wages with respect to the period from 6:45 p.m. to 7:30 p.m., as it should have been paying straight time for this period, and not characterizing it as part of the period covered by the performance rate. The union agrees that the employer can decide at what time to call in employees and for what time to keep them on shift. The grievance is based only upon a challenge to the calculation and method of payment for the hours for which employees worked, not an objection to their scheduling.

16. The issue is what meaning to give to the phrase "time of call" in Article 4.01. Although the provisions of Article 4.02 have been set out above, the evidence from both

employer and union witnesses was that Article 4.02, dealing with Minimum Call, does not deal with the issue in dispute here, the time at which the performance rate is to begin.

17. Some brief comment on the negotiations is appropriate. I conclude that the understanding the employer took from the negotiations on Article 4.01 was that "time of call" could be whenever it chose, so long as the curtain would fall no more than four hours later. In negotiations, the employer did raise the issue of its authority to determine when employees would be called in to start working. It was agreed that this decision was within the employer's discretion. However, while the employer believed this meant it could also determine when "time of call" began, I conclude that the parties had not agreed to this. There was no shared understanding as to the method or calculation of payment that would flow from the exercise of the right of the employer to determine when employees were required to show up for work. As noted above, both parties were agreed that "time of call" was an industry term referring to one-half hour prior to the curtain rising, and both parties were aware of this understood and accepted meaning. There was no discussion in negotiations of the meaning or application of "time of call" in Article 4.01.

18. Since "time of call" has an accepted industry meaning, known by both parties during negotiations, since they used this term in Article 4.01, and since there was no discussion in negotiations about ascribing any other meaning to the term, I conclude that the phrase "time of call" in Article 4.01 means one-half hour prior to the curtain rising. It was likely the intention of the parties in utilizing this phrase to give it the generally accepted industry meaning.


19. While the employer is not restricted by Article 4.01 in scheduling, it cannot pay wages in a manner that depends on a different interpretation of this phrase. Whatever time it chooses to call employees in to begin their shifts, "time of call" remains a term meaning one-half hour prior to the rising of the curtain. As the performance rate is to be paid as Article 4.01 states, from the time of call to the final curtain, it follows that the rate for performances set out in Article 9.03 is to be paid for the period from 7:30 p.m. until the final curtain.

20. The employer paid the performance rate from 6:45 p.m. until the final curtain. It was not entitled to do so, and was in breach of the collective agreement by attributing the performance rate to the period from 6:45 p.m. to 7:30 p.m. For that period, it appears that straight time should have been paid to all employees at work.

21. For the reasons expressed above, the grievance is allowed and the Board declares that the company has breached the collective agreement.

22. As agreed, the Board will remain seized with respect to any remedial issue, and will also remain seized with respect to any matter arising from its decision herein.

DATED at Toronto, Ontario, this 5th day of November, 1997.



Robert J. Herman - Arbitrator