Case Name:

Corp. of Massey Hall and Roy Thomson Hall v. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada Local 58 (Work Scheduling Grievance)

IN THE MATTER OF an arbitration under section 48 of the Labour Relations Act, 1995 (as amended)
AND IN THE MATTER OF a grievance concerning work scheduling, premium pay, and the supply of union members from the union hiring hall

Between
The Corporation of Massey Hall and Roy Thomson Hall ("the employer" or "the corporation"), and
IATSE Local 58 ("IATSE" or "the union")

[2003] O.L.A.A. No. 413
File No. MPA/Y300994

Ontario
Labour Arbitration
R.O. MacDowell, Arbitrator

Heard: Toronto, Ontario, June 23, 2003
Award: July 7, 2003
(50 paras.)

Appearances:

Bernard Fishbein, counsel, Gordon Graham, Bill Hamilton, Gordon Henderson and Bill Nalepka, for the union.
Charles Humphrey, counsel, Jeffrey Lieberman, Brett Randall and Sandy Castonguay, for the employer.

AWARD

I - What this case is about, in general

¶ 1 This arbitration proceeding arises from an employer grievance concerning the interplay between: the employer's right to schedule its employees' hours of work (Article 14.11); the payment of premium pay (Article 8.5); and the union's right/obligation to refer workers from the hiring hall, when the employer identifies a need for extra staff (Article 3).

¶ 2 The employer claims that the union has improperly manipulated the hiring Mall mechanism, in order to generate premium pay for the "permanent employees" who regularly work for the employer on what is known as the employer's "house crew".

¶ 3 The employer submits that, in October 2002, in response to a call to the union hiring hall for additional workers, the union purportedly dispatched out the corporation's own permanent employees - individuals who had already put in a number of work hours in accordance with their regular work schedule. If the permanent employees had been scheduled by the employer to work these additional hours, they would be entitled to premium pay; but on the days in question, such work assignments were neither required, nor desired, by the employer. On the contrary, it was the union, not the employer, which demanded that members of the house crew work during these time slots.

¶ 4 The employer submits that the union is not entitled to "dispatch out" the corporations own permanent employees in this way - treating them like "out of work" union members; and that this "manipulation" (as the employer sees it), of the hiring hall, is inconsistent with the scheduling regime provided in the collective agreement.

¶ 5 The union denies that it has acted inappropriately or contrary to the terms of the collective agreement. The union maintains that when the employer signals that it needs additional forces, the union, has the unfettered right to send whomever it wishes including members of the employer's "permanent" staff / "house crew", who have already worked for the employer for a number of hours, that day or that week. And if that dispatch triggers overtime or other premiums, then that is a cost which the employer must bear.

¶ 6 In the union's submission, the employer has no right to choose or veto the individuals whom the union sends to a job, nor can the employer demand the cheapest staffing alternative. The employer's right to reject persons sent from the hiring hall, is limited to the concerns mentioned in Article 3.3 and 18.1 (intoxication, incompetence) of the agreement, and none of those circumstances apply in the instant case.

¶ 7 The union further submits that if there is work available of the kind that the "permanent employees" on the house crew (the so-called "department heads": "head electrician"; "head soundman"; "property manager"; and "head carpenter") normally do, then these department heads should be the first ones assigned (or dispatched) to do such work - assuming that they are willing to take on the assignment.

¶ 8 In the union's submission, the 4 individuals comprising the "house crew", have a "right of first refusal" with respect to any work in their respective "departments" including work that attracts overtime and premium pay; and, in addition, they must be present when any such work is being done. The union asks, rhetorically; how can there be a "department" if the "department head" isn't there?.

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¶ 9 A hearing in this matter was held, in Toronto, on June 23, 2003. 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 I should answer the interpretation question posed by this grievance first; then if I find that the union's actions are inconsistent with the collective agreement, I should remain seized with respect to the remedy, if any, to which the employer may be entitled.

¶ 10 The provisions of the collective agreement immediately relevant to this case, read as follows:

> 3.1 The Manager agrees to employ only stage employees supplied by the Union and who are members in a good standing by the Union.
>
> 3.2 The Union agrees to supply the number of competent persons required by the Manager to perform work under the provisions in this Agreement.
>
> 3.3 The employer may refuse to employ or may demand replacement for any stage employee in an intoxicated condition.
>
> ...
>
> 14.11 Crew scheduling shall be the responsibility of the Manager, in consultation with the Shop Steward and shall not be carried out contrary to the terms of this agreement.
>
> ...
>
> 8.5 Except in the case of extreme emergency, a break of a minimum of nine (9) hours shall be given after the conclusion of a days work and before work is resumed on the following day. Should an employee not receive the nine (9) our minimum break, double time shall prevail for all time worked until the nine (9) our minimum break period is given. [emphasis added].

For completeness, I might also note Article 17 of the collective agreement, which confirms some of the employer's "Management Rights":

> 17.1 The Manager shall have the right: to make such rules and regulations as may be deemed necessary for the conduct and management of performances and working conditions; to marine the operation and undertakings of the Manager, and to select, install and require the operation of any equipment, plant and machinery which the Manager in its discretion deems necessary for the efficient and economical carrying out of the operations and undertakings of the Manager.
>
> 17.2 Provided that these actions are not inconsistent with the terms of this Agreement, and the union further agrees that its member shall obey all directives given by the authorized representatives of the Manager provided that they are not inconsistent with terms of this Agreement or with the rules and regulations of [the union]. [emphasis added]

II - Some background.

¶ 11 The employer is a publicly funded corporation that operates two well known concert facilities in the City of Toronto. The union represents the "stage employees" who work at these facilities. The current collective agreement runs from August 2001 to August 2003.

¶ 12 The collective agreement applies to the "permanent employees" at the concert facilities [see Article 5], and also to the casual employees who are hired from time to time,'to meet the requirements of the particular client that is using the hall. The "permanent employees" consist of the four "department heads" mentioned above (head electrician, head soundman, property manager, and head

carpenter). These "permanent employees" are also referred to as the "house crew" - both colloquially, and in parts of the collective agreement.

¶ 13 When the labour requirements for a particular production are not met by members of the house crew, the employer can resort to the union "hiring hall" for additional workers, whom the union then supplies. These casual call-ins give the employer the flexibility to augment its workforce in accordance with the needs of whatever program is being mounted in its facilities.

¶ 14 The collective agreement clearly distinguishes between the "permanent employees" [per Article 5], on the "house crew", and the other individuals who are hired from time to time, on an as-needed basis.

¶ 15 The corporation's "permanent employees" are regular employees, who have a guaranteed of minimum of 40 hours pay per week for a minimum of 40 weeks per year, as well as a number of benefits that are not applicable to the casual employees, referred from the union hiring hall. For example, only "permanent employees" on the "house crew" have "just cause protection" (see Article 15), free parking, bereavement leave, leave for jury duty, and so on. By contrast, the extra persons who are hired on a casual basis, have different rights that are applicable only when they are actually working.

¶ 16 The collective agreement reflects this different treatment in a number of ways. I will not record all of them here. But, for example, Article 14 includes the following stipulations:

ARTICLE 14 - HOURS OF WORK AND MINIMUM CALLS

> 14.1 In the case of a permanent employee as herein defined, a performance call shall be deemed to be a working period of not more than four (4) hours, commencing one hour before the start of the performance and ending at the time of the final curtain.
>
> 14.2 In the case of extra employees called to work the performance, a performance call shall be deemed to be a working, of not more than three and one half (3 1/2) hours commencing one half (1/2) hour before the start of the performance and ending at the time of the final curtain.
>
> 14.5 Permanent employees herein defined shall be paid for one half (1/2) a week if they work for three (3) days or fewer in a week, they shall be paid a full week if they work for four (4) days or more in a week.
>
> ...
>
> 14.11 Crew scheduling shall be the responsibility of the Manager, in consultation with the Shop Steward and shall not be carried out contrary to the terms of this agreement

¶ 17 As will be seen, the agreement distinguishes between permanent employees and extra employees in a number of different ways. But the key legal difference is that "permanent employees" are employees all the time, with whatever rights or benefits accrue to their permanent status; while the extras, who are called in to work as needed, are only "employees" when they have actually been hired and are working for the employer.

¶ 18 I am told that Article 14.11 is a new provision of the collective agreement added during the last round of bargaining. Prior to the introduction of this clause, the union steward did the scheduling under the supervision of the production manager.

III - The events giving rise to this grievance.

¶ 19 The events giving rise to the grievance occurred in the first week of October 2002 (Monday, September 30 - Sunday, October 6).

¶ 20 In accordance with its scheduling power, spelled out in Article 14.11, the employer prepared a schedule of work assignments for each of the four members of its "house crew": Stephen McDonald, the electrician; Jim Thibeault, the sound man; Gord Henderson, the prop man; and Rod Karpel, the carpenter. For the blanks in the schedule (i.e. when one or more members of the house crew was not required to work) the employer stipulated that it would need someone from the hiring hall to provide whatever skills were required for the event that was occurring in that time slot. Thus, by looking at the schedule, each member of the house crew could see when he was required to work ("scheduled on"), and when an event would be covered by someone else, sent from the hiring hall.

¶ 21 The work schedule was posted in the usual way. But the union steward objected, claiming that house crew members were entitled to work some of the shifts that they had been " scheduled off, and for which the employer had requested the union to provide employees from the union's hiring hall. The employer responded that it wanted persons from the hiring hall during these time slots, and that it was not prepared to schedule the department heads on the "house crew" to work the shifts in question.

¶ 22 On October 1, 2002, the employer wrote to the union, setting out its position as follows:

> I am writing regarding what we understand to be the Union's position relating to the supply of members under Article 3.2 of the collective agreement. The Hall has requested that the union supply members to work Toronto Symphony Orchestra concerts on October 2 & 3 2002, and Call to the Bar convocations on October 3 & 4 2002. We understand that the union has refused to supply the requested members but instead is directing permanent Hall employees who have not been scheduled to work these hours to report to work and perform the work in question. Such employees would be entitled to overtime payments if they were scheduled to work such hours.
>
> The Hall is not obliged under the terms of the collective agreement to schedule employees in such a way as to attract overtime entitlement if there are alternative scheduling arrangements available which do not result in overtime payment. The Hall has asked the union, pursuant to Article 3.2 to supply competent persons to perform the work. By refusing to supply such persons, the union is violating the collective agreement and the Ontario Labour Relations Act.
>
> Please treat this letter as formal notice that the Hall is grieving the union's violation of the collective agreement and will be referring this in matter to arbitration unless we immediately receive written confirmation from the union that it will cease such conduct and supply competent persons in accordance with its obligations under the collective agreement.
>
> As a result of the union's violation of the collective agreement, the Hall may be obliged to pay employees overtime payment which would not have been necessary but for the union's breach of the collective agreement. In this regard we wish to advise the union of the following:
>
> 1. The payment of any overtime to permanent employees working during the

period referred to above, who were not scheduled to work is without prejudice to the Hall's position in this matter;

2. The Hall will as part of the grievance request that the arbitrator direct the union to compensate that (sic) Hall for the overtime costs incurred by the Hall as result of the union's breach of the collective agreement

We trust this makes our position clear

¶ 23 The union replied that it would not provide persons from the hiring hall for the periods in question, and that the department heads were the only ones entitled to work. So having no other alternative, the employer accepted the union's ultimatum "under protest" and filed this grievance. In the result, on the dates in question, the department heads did work the disputed shifts, and were paid premiums in accordance with Article 8.5 of the agreement.

¶ 24 I do not think that it is necessary to reproduce the schedules for all four department heads. It suffices to look at the situation of Steve McDonald, the electrician.

¶ 25 In my view Mr. McDonald's experience appropriately illustrates the situation giving rise to this grievance. The other members of the house crew are similarly situated.

¶ 26 On October 3, Mr. McDonald was scheduled to work the "call to the bar ceremony", beginning at 7.00 AM. He was not scheduled to work the TSO concert that night, beginning at 6.00 PM. For this later time slot, the employer notified the union that it would require an electrician from the hiring hall. Mr. McDonald was also scheduled by the employer to come in to work again, on the following day, (October 4) for another "call to the bar" ceremony, beginning at 7.00 AM.

¶ 27 But that is not what happened. In addition to the "call to the bar" event, beginning at 7.00 AM on October 3, the union insisted that Mr. McDonald work the TSO event beginning at 6.00 PM and stretching into the evening. As a result, when Mr. McDonald came back in to work the following morning, October 4, at 7.00 AM, there had not been (and could not be) an 11 hour break between work assignments, as contemplated by Article 8.5.

¶ 28 Because the union insisted that Mr. McDonald work both the 6.00 PM TSO slot on October 3, and the 7.00 AM "call to the bar event" on October 4, it was impossible for the employer to comply with the break period prescribed by Article 8.5. So Mr. McDonald claimed premium pay for the hours worked on October 4.

¶ 29 There was no "emergency" necessitating that Mr. McDonald work without an 11 hour break between the completion of one day's work (October 3) and the resumption of work the following day (October 4). Nor was there anything in the collective agreement or the union's local bylaws that compelled such back to back assignments. On the contrary. That situation arose because the union unilaterally demanded that Mr. McDonald work in this pattern. He was not required to do so, nor is that what the employer wanted.

IV - Discussion and Disposition

¶ 30 I might begin by observing that that, as in any other collective bargaining relationship, the employer retains the right to run its business, as it sees fit, unless it is specifically restricted by the terms of the collective agreement. That is a general principle of collective agreement interpretation, which, in

this case, it is confirmed by Article 17 of the current agreement; and it is the starting point for any discussion of the parties' respective rights and responsibilities. (Note that under Article 20, it is the agreement that governs the parties' relationship, and that ny collateral promises or rights are expressly disclaimed).

¶ 31 The IATSE collective agreement is pretty sparse, as these documents go. However, the parties have carefully distinguished between the "permanent employees" who are members of the "house crew", and the extra employees called in to work a particular performance; and in the case of the "house crew", the parties have carefully delineated the permanent employees' rights, guarantees and entitlements (like the 40 hour x 40 week pay guarantee, found in Article 5).

¶ 32 However, with that in mind, I am unable to find anything in the collective agreement which gives the individual house crew members a "right of first refusal" with respect to any work or work assignments, within their area of specialization (electrical, carpentry, etc.); nor is there anything requiring them to be on the employer's premises when such work is being performed. In my view, neither of these propositions flows from the fact that they are called "department heads".

¶ 33 The department heads do not have a pre-emptive right to claim such work although, of course, it will normally make operational sense to direct the lion's share of such work to the house crew. But ultimately, it is the employer that decides how many hours that the permanent employee will work, and on what schedule. And when there are gaps to be filled, the union is obliged to send "persons" (Article 3.2 to fill in the "holes" that the employer has determined need filling ("persons" because until they are hired they are not yet "employees").

¶ 34 Work assignment guarantees and work distribution rights are not uncommon in collective agreements. Nor is it uncommon to find rules respecting the distribution of premium pay opportunities. However, this collective agreement does not contain that kind of language; and, the fact that it does contain other kinds of guarantees and entitlements, suggests that if the union wants such additional guarantees, it must be specifically negotiated. Absent such specification, the permanent employees are not entitled to any particular number of hours or assignments (although they are, entitled to the pay guarantee in Article 5, whether they work or not).

¶ 35 On the other hand, Article 14.11 clearly and specifically gives the employer the responsibility for "crew scheduling" - which must, perforce, include the scheduling of its own "permanent employees", on the "house crew". And in my view, it would make nonsense of this a specific management right, if the union , through manipulation of the hiring hall, could compel an alternative scheduling arrangements for persons who are clearly permanent employees of the employer - for example, could require the employer to continue the permanent crew members on what would, for them, be overtime, or, as here, work in a pattern where there would be an insufficient break between successive shifts.

¶ 36 In my view, there is an operating incompatibility between Articles 17 and Article 14.11 of the agreement, and what the union says is its "right" under the hiring hall provision to determine who will work during any particular time slot; and in my opinion, it is the express management right that must prevail here. Whatever may have been the case under prior contract language, I do not think that it is now open to the union to demand, that, say, Mr. McDonald must be engaged to work for the evening time slot on October 3, in addition to the early morning time slot that the employer scheduled for him that day.

¶ 37 Let me look at the problem here from another perspective.

¶ 38 Article 14.11 makes "crew scheduling" the responsibility of the Manager, and obliges the employer to schedule in accordance with the terms of the collective agreement. But Article 8.5 compels the employer to provide a nine-hour break: "a break of a minimum all of nine hours SHALL be given after the conclusion of eight days work and before work is resumed the following day". Yet on the union's theory, the employer would be required to prepare (or accept) a schedule which specifically contradicts the clear intention of Article 8.5: permanent employees would work without the required break, and without there being an emergency either.

¶ 39 Article 8.5 envisages that employees will have a break between successive workdays (and so does the Employment Standards Act), unless there is some sort of "emergency" which prevents it. That is what the employer provided for in its work schedule. But the union wants to engineer a situation in which permanent employees work without the anticipated break, and without their being any "emergency" at all. And in my view, such proposition is inconsistent with both Article 14.11 and Article 8.5.

¶ 40 The union's position rests, among other things, on the assumption that the employers' "permanent employees" can be treated for hiring hall purposes, just as if they were out of work union members, notionally sitting on the bench, waiting for work assignments - that is, non-employees, hoping to be hired ("employed" per Article 3.1) for casual employment, from time to time. The union's theory rests on its purported ability to supply" someone who is, legally, already there, on the employer's permanent staff.

¶ 41 I have some considerable doubt whether that assumption applies to the individuals who are already "permanent employees" of the Corporation, with, among other things, the guaranteed pay provisions mentioned above. For as I have already indicated: the collective agreement routinely distinguishes between the permanent employees on the "house crew", and the "extra" employees taken on, from time to time, is needed.

¶ 42 I do not think the collective agreement supports the union's view that the house crew members can be treated like these "non-employee extras" - at least with respect to purported dispatches to their own regular employer. In agreeing to take on "persons" sent from the union hiring hall I do not think that the employer has given up its night to schedule permanent employees or order their work assignments. And no one suggests, for example, that there were no other qualified workers available for the job call, so that the union was "forced" to (notionally) "send back" members of the "house crew".

¶ 43 Be that as it may, I am satisfied that the purported exercise of union discretion under Article 3, was inconsistent with the employer's power to make work assignments, and schedule its permanent employees, under Article 14.11.

¶ 44 Or to put the matter another way: the employer is entitled to determine the work schedule for its permanent employees, and it can require the union to supply competent members for those periods when the permanent employees are not so scheduled. Conversely, the union is not entitled to force the employer to schedule its permanent employees for some other time periods. It is the employer, not the union, that determines work hours and work assignments. That is what Article 14.11 means.

¶ 45 Finally, I find that what happened here should not have happened. The permanent employees should have followed the employer's directive and worked only when they were scheduled (article 17.2), then filed a grievance if they believed that the schedule was in some way improper.

¶ 46 Disputes about how the collective agreement should be applied, must be dealt with at arbitration

(see Article 4.1) - not by the kind of "self-help" and "fait accompli" that the employer was presented with here.

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¶ 47 For the foregoing reasons, I'm satisfied that the schedule fashioned for the house crew was a legitimate exercise of the employer's scheduling authority, sanctioned by Article 14.11; and that the union's attempt to force the employer to schedule additional hours for these employees, was inconsistent with the union's obligations, under the collective agreement.

¶ 48 Moreover, in accordance with the well-known "work now grieve later" principle, (reinforced by Articles 4.1 and 17.2 of the collective agreement), the union should have supplied the extras, as requested, then filed a grievance if it was thought that the employer's position was somehow in breach of its collective agreement obligations.

¶ 49 The employer's grievance therefore a succeeds.

¶ 50 In accordance with the agreement of the parties, I will remain seized in the event that there is any difficulty in the determining what remedy should flow from this declaration.

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