In the Matter of an Arbitration

Between:

THE GOVERNMENT OF NUNAVUT -
THE MINISTER RESPONSIBLE FOR THE PUBLIC SERVICE ACT

(The Employer)

- and -

THE NUNAVUT EMPLOYEES UNION

(the Union)

Re: Banking of Overtime - Articles 26.02 (a) & (b); 28.01 (d)
Grievance Numbers 15-P-00697 & 15-P-00702

A W A R D

Paula Knopf – Arbitrator

APPEARANCES:

For the Employer:	Amanda Sarginson, Counsel Hilary Burns, Acting Director, Labour Relations
For the Union:	Douglas Hill, Grievance and Adjudication Officer Bill Fennell, NEU President Stephen Crane, NEU Service Officer Brian Boutilier, NEU Executive Director

The hearing of this matter was held in Iqaluit, Nunavut on October 19-20, 2016.

This case involves two policy grievances seeking clarification of the parties' rights with respect to the banking of hours worked as a result of a "Call Back" to work between scheduled shifts or if someone is required to report to work while on "Standby".

The relevant provisions of the Collective Agreement are as follows:

Definitions

(y) ***"Overtime"*** means work performed by an employee in excess of or outside of his/her regularly scheduled hours of work

(kk) ***"Standby"*** means any period of time during which, on the instruction of the deputy head, an employee is required to be available for recall to work

23.01 An employee who is required to work overtime shall be paid overtime compensation for each completed fifteen (15) minutes of overtime worked by him/her subject to a minimum payment of one (1) hour at the overtime rate when:

(a) the overtime work is authorized in advance by the Employer, except when employees are required to work in isolated communities, in which case the Employer must make arrangements for the authorization of overtime prior to the employee's dispatch to an isolated settlement;

(b) the employee does not control the duration of the overtime work.

23.04 (a) An employee who is requested to work overtime shall be entitled to a minimum of one hour's pay at the appropriate rate described below in (b).

(b) Overtime work shall be compensated as follows:

(i) at time and one-half (1 ½) for all hours except as provided in Clause 23.04(b)(ii);

(ii) at double time (2) for all hours of overtime worked after the first four (4) consecutive hours of overtime and double time (2) for all hours worked on the second or subsequent day of rest, provided the days of rest are consecutive.

(iii) in lieu of (i) and (ii) above the employee may request and the Employer shall grant equivalent leave with pay at the appropriate overtime rate to be taken at a time mutually agreeable to the Employer and the employee. An employee may accumulate up to 150 hours leave with pay each fiscal year in a non-refillable bank of leave. Any additional overtime hours over 150 shall be paid in accordance with (i) and (ii) above. Any amounts in the bank of leave may be carried forward from one fiscal year to the next, provided that at no time shall the bank of leave exceed 150 hours. All amounts carried over to a new fiscal year and not liquidated by August 31 shall be paid out in the first pay in October in the new fiscal year.

ARTICLE 26 – CALL BACK PAY

26.01 "Call Back" means calling of an employee to duty after he has reported off duty and before he/she is next scheduled for work. Employees designated for standby duty under Article 28 shall not be eligible for call back.

26.02 When an employee is recalled to a place of work for a specific duty, he/she shall be paid the greater of:

(a) compensation at the appropriate overtime rate; or

(b) compensation equivalent to four (4) hours pay at the straight-time rate.

26.03 (a) When an employee reports to work overtime for which he/she has been recalled under the conditions described in Clause 26.02 and is required to use transportation services other than normal public transportation service, he/she shall be paid the actual cost of commercial transportation each way, upon the production of receipt for payment of transportation in excess of eight dollars ($8.00).

ARTICLE 28 – STANDBY PAY

28.01 (d) During a period of standby of eight (8) consecutive hours or portion thereof, an employee on standby who is required to report for work for the first time shall be paid, in addition to the standby pay, either the appropriate overtime rate for all hours worked, or a minimum of four (4) hours pay at the straight time rate, whichever is greater. If the employee is required to report for work for a second or subsequent time during that standby period, the employee shall receive the

appropriate overtime rate for all hours worked on the second or subsequent reporting to work.

There is no disagreement about the relevant facts. There had been many inconsistent practices with regard to some aspects of Call Backs and Standby across this large bargaining unit. However, there was a consistent practice of allowing employees to bank the Standby or Call Back hours they worked outside of their regular shifts as part of their accumulation of 150 "bankable" hours that were then administered under the provisions in Article 23.04(b)(iii). The Employer raised several concerns about the administration of Articles 26.02 and 28.01(d) during the negotiations for the parties' renewal Collective Agreement on February 3 and 5, 2015. At those sessions, the parties discussed a number of scenarios concerning working while on Standby and Call Backs, agreeing on issues such as:

- when "Standby" or "overtime" rates apply if the employee who is to start a Standby period is kept at work longer than their regular shift
- whether there is "rounding up" of Standby pay for retuning to work after the initial threshold of 4 hours at straight time is met
- whether an employee who is not on Standby is eligible for Standby pay if called into work
- when one "Standby return to work payment" or "event" is generated, regardless of the reason for the call back or the number of patients that are served

As productive as these agreements were, there was no meeting of the minds about whether employees could bank hours worked while on Standby or when they are called back to work. On February 27, 2015, the Employer put the Union and bargaining unit on formal notice that employees would no longer be allowed to bank compensation for hours generated by Articles 26 (a) and (b) and Article 28.01(d). To be explicit, the Employer announced: "There is no ability to bank Standby or Call Back pay." It was to be "paid out". Almost immediately, and before the terms of the renewal Collective Agreement had been concluded, the Union put the Employer on notice that the Union disagreed with the Employer's announced change in practice. As a result, these two grievances were filed. The

Employer's response was to assert that Articles 26 and 28 do not provide for the ability to bank the hours in lieu of pay under Article 23.04(b)(iii). To date, the Collective Agreement has not been finalized. Neither party tabled language to amend any of the provisions that are relevant to this case. Each party asserts that the current language supports their respective, yet opposite, positions.

The Submissions of the Parties

The Submissions of the Union

The Union asserts that any hours of work that meet the definition of "overtime" must be compensated or treated in accordance with Article 23.04(b)(iii). Fundamental to the Union's position is the proposition that the Collective Agreement's definition of overtime encompasses hours where an employee is required to work during Standby or as a result of a Call Back because those hours are outside of the regular hours of work. It was said that Articles 26 and 28 specifically deal with the "rates", whereas Article 23.04(b)(iii) deals with how the overtime work is to be "compensated". The Union stressed that Article 23.04(b)(iii) is mandatory, requiring that the Employer "shall" grant leave with pay at the overtime rate at a time that is agreeable to both the Employer and the employee. Further, the Union pointed out that nothing in Article 23.04(b)(iii) precludes its application to Articles 26.02 or 28.01(d).[1]

Further, the Union stressed that the language of the first sentence in Article 23.04(b)(iii) has been in place since 2010. Prior to that, there was no "cap" or limit to the number of hours that could be banked. The cap and limits on carryover were introduced in 2010. Since 2010, the hours worked during Call Back or when required to report for work during a period on Standby, were

[1] The Union pointed to other ways in which overtime can be accumulated, such as Reporting Pay. However, since that is not in question in this case and no evidence was introduced by either party regarding the past practice or administration of that provision, I shall not be taking it into consideration.

allowed to be banked in the way prescribed in Article 23.04(b)(iii). The Union asserts that the Employer was "unreasonable" when it unilaterally imposed a blanket prohibition on the banking of hours under Articles 26.02 and 28.01(d). As a result, the Union asserts that the Employer has violated Article 23.04(b)(iii). In support of this, the Union relies upon *Government of Nunavut and Nunavut Employees Union (Casual Leave),* Decision of Richard Brown, November 9, 2014; *Government of Nunavut and Nunavut Employees Union (Casual Leave),* Decision of Richard Brown, November 29, 2014; *Power v. Canada (Treasury Board - Transport Canada),* 1988 CarswellNat 1559, [1988] C.P.S.S.R.B. No. 56 (Kwavnick).

In the alternative, the Union submitted that the Employer is estopped from altering its practice of allowing employees to bank overtime hours accumulated under Articles 26.02 and 28.01(d). It was stressed that the Union voiced its objections and then launched these grievances as soon as the Employer announced its intention to prohibit the banking of these hours. The Union stressed that it made its positions clear to the Employer that the Collective Agreement allowed Call Back and Standby hours to be banked. Therefore, it was said that if the Employer wanted to stop the practice, it ought to have negotiated a change to the appropriate language.

Further, and in the alternative, the Union pointed out that if the Employer is allowed to change its practice, it was obliged to give "reasonable notice" of the change and in any event could not implement the change until the new Collective Agreement come into effect, which has not happened to date.

The Union is seeking a declaration that the Employer violated Articles 23.04(b)(iii), 26.02 and 28.01(d). Further, the Union asked that the Employer be ordered to rescind the directive that prohibits the banking of Call Back hours and time worked during Standby so that employees are able to revert to the previous practice of being able to bank those hours. In the event that the Union does not

succeed on the merits of the case, the Union asked that the Employer be required to allow employees to resume banking those hours for the duration of the operation of this Collective Agreement on the basis of the estoppel arguments.

The Submissions of the Employer

The Employer asserted that since Articles 26 and 28 do not provide the ability to "bank" those hours of work, employees are only entitled to the prescribed amount of pay, not to any right to bank those hours as if they were overtime hours under Article 23.04(b)(iii). It was acknowledged that the Employer has allowed such hours to be banked for many years. This was said to have been an "indulgence" that was not required under the terms of the parties' contract. The Employer stressed that the Call Back and Standby provisions are separate from the overtime clause and that the definition of overtime does not include "any" work performed in excess of or outside of regularly scheduled hours. The Employer submitted that when hours worked fall outside of a regular shift or day, they are categorized separately as Standby or Call Back, and all are treated distinctly in specific clauses, without linking them to overtime, except in terms of their "rate of pay". This was said to be confirmed by the fact that the parties agree that Article 23.01 would not apply to Articles 26 and 28. It was suggested that if the parties had intended to allow for the banking of Call Back hours or work done while on Standby, they would have done so specifically. This Arbitrator was cautioned that there is no authority to alter or amend the provisions of the Collective Agreement. Therefore, it was submitted that there is no foundation for the Union's claim in the parties' contract.

In the alternative, the Employer argued that the Union is estopped from pursuing this claim. It was said that the existence of the practice that allowed for banking of these hours did not create an enforceable right. Further, it was stressed that estoppel is an equitable doctrine, requiring the party who asserts the claim to show that it relied to its detriment on the practice. As a consequence, the

Employer pointed out that the Union was put on clear notice of the intention to discontinue the practice during the negotiations, thereby giving the Union the chance to negotiate language that preserved the practice. Since the Union did not use that opportunity to bargain any changes to the Collective Agreement, the Employer argued that the Union has suffered no detriment. Further, in the alternative, the Employer asserted that it gave the Union sufficient notice of its intention to change the practice of banking these hours. Finally, the Employer responded to the Union's allegations regarding the unreasonability of the change in practice by arguing that this is a matter of contract interpretation that does not concern the application of employer discretion.

Accordingly, the Employer asked that these grievances be dismissed. In support of its submissions, the Employer relied upon *Eurocan Pulp & Paper Co. v. Canadian Paper Workers Union, Local 298,* [1990] 14 L.A.C. (4th) 105 (Hickling).

The Union's Reply Submissions

The Union asserts that Articles 26 and 28 do link to Article 23 because they provide for "pay" to be calculate at a minimum number of hours of straight time or at the "overtime rate", "whichever is greater." That overtime rate is spelled out in Article 23.04(b)(iii). This was said to be consistent with the agreements reached during negotiations where the parties worked out when and how the rates would be calculated for each situation, agreeing upon when the overtime rate was triggered. Therefore, the Union argued that Articles 26 and 28 must be read together with Article 23.04(b)(iii).

The Decision

This is a matter of contract interpretation. The result cannot be governed by abstract notions of fairness or by consideration of fiscal or operational objectives. The parties' bargain is what shall determine the result. The Employer is right in

asserting that the practice of allowing hours to be banked in the past does not necessarily form the basis of an enforceable right, see *Eurocan Pulp & Paper Co. v. Canadian Paper Workers Union, Local 298, supra,* at para. 44.

The parties have defined overtime as "work performed . . . in excess of or outside of his/her regularly scheduled hours of work." There is also a specific overtime provision, with Article 23 setting out, *inter alia,* how and when overtime will be allocated and the rates that are payable. Article 23.04(b) specifies how "overtime work shall be compensated". That compensation is described by equations in Articles 23.04(b)(i) and (ii), and is also made available to employees in an alternate way as "the equivalent leave with pay" under Article 23.04(b)(iii). The extent of the accumulation and rules governing its access are also spelled out in Article 23.04(b)(iii).

The question therefore becomes whether the hours worked under Articles 26.02 and 28.01(d) can also be administered or compensated under Article 23.04(b)(iii). Taking first the definition of overtime, it is true that it does not say "any" hours performed outside of an employee's regular schedule. However, that definition is not limited to only certain types of hours outside of a regular schedule. The definition of "Call Back" in Article 26.01 includes a call to duty between scheduled shifts. Therefore, those hours must be viewed as being "outside" of an employee's regular schedule. Article 26.02 provides that a Call Back entitles an employee to be paid the greater of "compensation at the overtime rate" or four hours at the straight-time rate." Article 26.03(a) then reads: "When an employee reports to work *overtime* for which he/she has been recalled..." [emphasis added]. All these references to "overtime" within Articles 26.02 and 26.03 link Article 26 to the definition of overtime. This means that those hours are overtime and one must read Article 23 to determine what is meant by "compensation at the overtime rate."

Similarly, under Article 28.01(d), when an employee on Standby is required to report to work, the Collective Agreement prescribes how the hours may be paid to an employee if s/he is required to work during their period of Standby. In those circumstances, the first time they are called in, they are to be paid either the "appropriate overtime rate for all hours worked, or a minimum of four (4) hours' pay at the straight time rate, whichever is greater." If there is a second or further call in, they are again entitled to "the appropriate overtime rate" for all hours worked. These "overtime" rates are payable in addition to their "standby pay".

Therefore, both Articles 26 and 28.01(d) use the word "overtime" repeatedly and refer to the payment at "the appropriate overtime rate". The only way to determine the "appropriate rate" that applies to overtime is to look at Article 23.04. It provides how overtime work is to be "compensated" and prescribes equations for calculating amounts and allows for the equivalent of up to 150 hours to be accumulated or "banked". To read the Collective Agreement as the Employer suggests would mean that overtime work under Articles 26 and 28 are to be compensated differently than under Article 23. The parties have specified different "rates" under Articles 26.02(b) and 28.01(d), depending on certain circumstances. However, there are the situations where there is the entitlement to the overtime rate, if it is greater. The only way to determine the "appropriate overtime rate" is to look to Article 23.04(b), including Article 23.04(b)(iii). The easiest way to illustrate this is to emphasize the operative words of Article 23.04 that apply to this case:

> (a) **An employee** who is **requested to work overtime** shall be **entitled to . . . . pay at the** appropriate rate **described below** in (b).
> (b) **Overtime** work **shall be compensated** as follows . . .
> (iii) In lieu of [time and a half of double time] **the employee may request and the Employer shall grant leave with pay at the** appropriate overtime rate to be taken at a time mutually agreeable to the Employer and the Employee. . . .

Nothing in that provision, or anywhere else in the Collective Agreement, excludes its application from the Standby or Call Back hours when the hours the employee is required to report for work outside of their regular shifts are worked as overtime.

Another simple way to approach and resolve this case is to point out that nothing in the Collective Agreement suggests that the terms "overtime" or "appropriate rate" should be given different meanings in different Articles. Contract interpretation demands that we give ordinary meaning to words. Therefore, they should be compensated in accordance with Article 23.04(b)(iii). There is no reason to treat Call Back hours or hours worked on Standby outside of regular shifts as anything other than overtime hours. Further, those hours meet the contract's definition of "overtime".

This conclusion means that the grievances must succeed on their merits. The Collective Agreement provides that the Employer must allow the employees to bank the overtime hours accumulated while being required to report to work while on Standby or when Called Back between scheduled shifts.

As a result, it is not accurate to say that the Employer allowed the banking of such hours in the past as an "indulgence". The previous accumulation of those hours complied with the Collective Agreement. Therefore, the estoppel issue is moot. However, it may be helpful to point out that if there had been an estoppel applicable against the Union, the doctrine of estoppel allows that it may be terminated by "reasonable notice." The amount of required notice depends on the circumstances of each case. However, where there is notice that there will be a change in contract administration and there is a question about whether one party may lose the opportunity to bargain a change of language, "reasonable notice" usually requires that the status quo will continue until the expiry of the existing collective agreement, see again *Eurocan Pulp & Paper Co. v. Canadian Paper Workers Union, Local 298, supra,* at para. 69 If that principle were to be

applied to this set of facts, that would mean that the Employer was required to give reasonable notice of its intention to change the application of Articles 23.04(b)(iii), 26 and 28. Since the Employer raised the issue in negotiations in early February 2015 and then implemented the change at the end of the month while the Collective Agreement was still in place, that could not be considered to be "reasonable notice" under these circumstances. It is true that there was still time for the parties to deal with the issue in bargaining. But neither side chose to do so, each insisting that their reading of the language would prevail. Be that as it may, the Employer was not entitled to make the change until the expiry of the Collective Agreement in operation at that time. Therefore, even if the Employer's estoppel argument had been applied against the Union, it would have been concluded that the Employer was not entitled to implement the change during the operation of the Collective Agreement.

Accordingly, since the operative language of the Collective Agreement remains unchanged and the Union's reading of Articles 23.04(b)(iii), 26 and 28 has been sustained, these grievances are upheld. I therefore Order and Declare:

1. The Employer violated Articles 23.04(b)(iii), 26 and 28 by failing to allow employees to accumulate overtime hours in accordance with the process set out in Article 23.04(b)(iii).

2. The Employer is required to advise employees immediately that they may resume the accumulation of Call Back hours under Article 26.02 and of Standby hours required to be worked under Article 28.01(d). Such accumulation shall be in accordance with the process set out in Article 23.04(b)(iii).

I remain seized with regard to implementation should further assistance be required.

Dated at Toronto this 7th day of November, 2016

Paula Knopf - Arbitrator