IN THE MATTER OF AN ARBITRATION

BETWEEN:

MTS ALLSTREAM INC.
(hereinafter referred to as "MTS" or the "Company")

-and-

TELECOMMUNICATIONS EMPLOYEES ASSOCIATION OF MANITOBA (TEAM-IFPTE Local 161)
(hereinafter referred to as "TEAM" or the "Union")

ARBITRATION AWARD

BOARD OF ARBITRATION:	Gavin Wood, Faron Trippier, and Robert Simpson
DATES OF HEARING:	November 26 and 27, 2012
DATE OF AWARD:	January 18, 2013
LOCATION OF HEARING:	Winnipeg, Manitoba
APPEARANCES:	Kristin Gibson and Paul McDonald, Counsel for the Employer Shawn Scarcello, Counsel for the Union

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MTS INC.
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(hereinafter referred to as "TEAM" or the "Union")

AWARD

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1.00 INTRODUCTION

At the outset the parties confirmed the Arbitration Panel (the "Panel") was properly constituted and had the requisite jurisdiction to hear this arbitration. (The parties reserved the right to make submission pertaining to the Panel's jurisdiction with respect to the scope of remedy, should the Panel find it appropriate to award a remedy.)

This arbitration arises from a grievance brought by a group of employees of the Company alleging breach of the governing collective agreement as a result of the Company policy to pay only a specified minimum overtime to on-call ITSM department employees, taking work-related telephone calls.

2.00 EVIDENCE

The parties proceeded by way of an extensive "Agreed Statement of Facts", which attached the collective agreement for the period from February 20, 2012 to February 19, 2013 (the "Collective Agreement") and a number of other documents. During the course of testimony, a number of additional documents were filed.

The Union called two witnesses: Mr. Larry Trach, formerly the business manager of the Union; and Mr. Dean Smith, a duty manager with the ITSM department of MTS (and one of the group of grievors). The Company called Mr. Don Rooney, MTS's director of labour relations.

The parties agreed to a splitting of the case, with the Panel being requested initially to decide the following questions:

a) has the Company breached the collective agreement as alleged in the Grievance;

b) if the Company has breached the collective agreement as alleged in the Grievance, is it appropriate to award a remedy;

c) if it is appropriate to award a remedy, does the Panel have jurisdiction to award a remedy to compensate for any breaches that occurred before the date the current collective agreement came into force (February 20, 2010);

d) if it is appropriate to award a remedy, should the remedy be limited to a certain time period due to the timing of the filing of the Grievance;

e) if it is appropriate to limit the remedy to a certain time period, what is the appropriate time period; and

f) any other issue either party may raise at the hearing of this matter, other than quantum of damages, that falls within the scope of the Panel's jurisdiction.

The parties advised that after receiving the Panel's response to these questions, they intended to attempt to resolve any outstanding issues between themselves. The parties further asked that the Panel remain seized in the event they require further assistance from the Panel.

In their opening statements the parties took the position that article 24 of the Collective Agreement was unambiguous. However, they both intended to present extrinsic evidence on the negotiating history of the present article 24 and with respect to the Company's policy on overtime to on-call employees of the ITSM department, with the understanding that should the Panel determine that article 24 in fact was unambiguous that

all of the extrinsic evidence received should be disregarded.

3.00 BACKGROUND

Given the extensive Agreed Statement of Facts, it is not surprising that there is little controversy between the parties with respect to the factual circumstances of this grievance. Those circumstances are set out here, with reference to particular witnesses on any factual issue.

(i) The ITSM Duty Managers

The group of eight grievors (collectively the grievors in the group policy grievance) work as client support specialists at the Company's ITSM service desk in the ITSM department located at 191 Pioneer Avenue, Winnipeg. The ITSM service desk provides technical support to other MTS and Allstream employees working for the Company nationally. ITSM employees are also responsible for answering telephone calls and email inquiries from employees having technical difficulties with Company-supplied computers, phones or other technical devices and otherwise provide advice either over the phone or in person where needed.

The ITSM service desk provides these services to employees 24 hours a day, 7 days a week, 365 days a year. Its business hours are 6:30 a.m. to 5:00 p.m., Monday to Friday. The client-support specialists work at the service desk on 7½ hour shifts, with staggered start times to cover these normal business hours. Outside the normal business hours, the service desk is staffed by employees on-call. The client support specialists take

turns to staff this call function, each acting as the ITSM duty manager one day per week and every eighth weekend (subject to the exigencies of staff absences due to illness or vacation).

The ITSM duty manager is responsible, then, to be on-call outside of the service desk's normal business hours in order to field calls from MTS and Allstream employees having technical difficulties. In order to perform his or her duties from home, each ITS duty manager is provided by the Company with all necessary equipment, including a Blackberry, laptop, VPN access and pager. When outside normal working hours, MTS and Allstream employees calling the service desk for assistance are routed to the ITSM duty manager's Blackberry. A recorded message advises such employees as to the issues that the duty manager will support and requesting that other issues, of a non-critical nature, be dealt with by contacting the service desk during regular business hours.

There are, then, two types of calls that an ITSM duty manager may receive outside of regular business hours: supported calls which are "any applications-infrastructure calls" deemed critical by MTS and Allstream; and unsupported calls which are calls that are not critical to the business. The duty manager is to attempt to address the problems identified as supported calls, but to defer the non-supported calls to be dealt with by the ITSM service desk during regular working hours.

The ITSM duty manager is responsible for tracking information when calls come in, such as the nature of the call, what he or she did to try and solve the issue, and

how long the call took to address. All of that information is recorded on a time-stamped electronic ticket, which is saved in the Company's computer network for access by other employees. The ITSM duty manager is also to record the greater of: (i) the time actually spent on the call or (ii) what minimum amount of time he or she is entitled to receive pursuant to the payment schedule set under the Company policy as described below (so that the duty manager will receive payment for tending to the calls). These entries of actual time spent or minimum time set by Company policy are reviewed on a daily basis and, once approved, represent the hours the duty manager will be paid for on his or her next bi-weekly pay. That is, the hours spent tending to calls as an ITSM duty manager appear on that employee's electronic pay stub every two weeks.

The duty manager is expected to respond to any message within 15 minutes if possible.

The compensation for duty manager with the Company is dealt with under the Collective Agreement. In the collective agreement effective from February, 2001 to February, 2004, article 23 provides:

> "**23.01** Due to the nature of its operation, the Company may direct an employee to be available for work outside normal working hours, and he/she shall receive Duty Manager pay at the rate of two (2) hours pay per day for each day he/she is required to be available.
>
> **23.02** In addition to the monies paid in Article 23.01 above, if the employee is authorized to leave his/her residence and report to work, the employee shall be paid at the overtime rate for the time worked.
>
> **23.03** Every effort shall be made to equitably distribute the standby requirements amongst all qualified employees."

The wording of article 23 with respect to duty manager was then changed through bargaining. Article 23 reads (for the collective agreement from February 19, 2004 to February 19, 2007):

> "**23.01** Due to the nature of its operation, the Company may direct an employee to be available for work outside normal working hours, and he/she shall receive Duty Manager pay at the rate of two (2) hours pay per day for each day he/she is required to be available.
>
> **23.02.1** In addition to the monies paid in Article 23.01 above, a call-out for immediate reporting to the workplace will be paid at the applicable overtime rate from the time the employee is called and shall continue after completion of the job for such period as reasonably necessary to travel home.
>
> **23.02.2** A minimum of two (2) hours shall be paid for call-out overtime.
>
> **23.03** Every effort shall be made to equitably distribute the standby requirements among all qualified employees."

The wording of article 23, now article 24, has remained unchanged in the collective agreement for the period February 19, 2007 to February 19, 2010 and for the present Collective Agreement (February 20, 2010 to February 19, 2013).

With respect to overtime, article 21 of the Collective Agreement provides:

> "**21.01** When an employee is authorized to work beyond the normal work day, such additional hours shall be considered as overtime and will be compensated for at the applicable overtime rate.
>
> **21.02** Effective February 19, 2011, employees working overtime shall be compensated at a rate of time and one-half for the first four (4) hours overtime in a week. Overtime beyond four (4) hours in a week shall be compensated at a rate of double time.

21.03.1 A call-out for immediate reporting to the workplace will be paid at the applicable overtime rate from the time the employee is called and shall continue after completion of the job for such period as reasonably necessary to travel home.

21.03.2 A minimum of two (2) hours shall be paid for call-out overtime."

The method of paying the ITSM duty managers has been in place since 2005, with employees rotating through that position knowing of that method of payment since that time.

The ITSM duty manager since 2005 is paid two hours pay for each day he or she is on-call. This is paid whether the person receives a call requiring attention or not. In addition, the Company pays the ITSM duty manager at the applicable overtime rate for every supported call that he or she responds to outside of the normal business hours, but without attending to the workplace, according to the following schedule:

Day of Week	**Time of Call**	**Payment**
Mon-Fri	5:00pm-11:00pm	Time worked, minimum payment of 15 minutes or total time worked on a call
Mon-Fri	11:00pm-6:15am	Time worked, minimum payment of 2 hours or total time worked on a call (no overlapping claims in a 2 hour period)
Weekend/Holiday	6:15am-11:00pm	Time worked, minimum payment of 15 minutes or total time worked on a call

Weekend/Holiday	11:00pm-6:15am	Time worked, minimum payment of 2 hours or total time worked on a call (no overlapping claims in a 2 hour period)

If the duty manager has to report to the physical location of the MTS office in order to deal with a supported call after regular business hours, the person is paid the greater of the time worked or two hours (at the applicable overtime rate). The ITSM duty manager only reports to the workplace if VPN access is down and the network cannot be accessed from home. Typically, then, a call outside normal business hours is serviced remotely via the Blackberry or laptop computer.

In the Agreed Statement of Facts, the parties also referenced the matter of compensation to ITSM duty managers for dealing with unsupported calls. Specifically, it set out:

> "The parties agree that the ITSM Duty Manager is also compensated for fielding unsupported calls, although they do not agree what the Company's practice is in that regard. The parties agree that this distinction only affects the quantum of any damages and it is an issue they will attempt to resolve if the Board concludes there has been a breach of the collective agreement and a remedy is owing to the Grievors."

For the majority of the time, the duration of calls that can be handled remotely is less than 15 minutes. A spreadsheet was produced detailing calls fielded by ITSM duty managers (between February 20, 2010 and March 25, 2011). It shows a wide variety of such calls when the service desk is closed, with such calls occurring both during the

evening and overnight and in the early morning.

MTS recognizes that acting as the ITSM duty manager is disruptive to the client support specialist. Because of the nature of the work, the duty manager on-call is generally required to stay at home to field calls (in order to have a quiet place to be able to concentrate). After being on-call, he or she may be required to work the next day on the service desk (for its normal business hours). MTS believes it recognizes this disruptive effect by paying two hours pay for each day that the duty manager is on-call and by paying overtime for each supported call that he or she responds to.

There are employees in departments other than ITSM who work on-call as duty managers for their respective departments. The amount of minimum payment, or when a minimum payment is made, to other duty managers is not consistent throughout MTS. However, some duty managers in other departments do receive a minimum payment of two hours for work performed at home at all times while on-call, including such work before 11:00 p.m..

(ii) Recent History

In 2004, during the course of collective bargaining, the Union presented a proposal to change the wording of then article 23 dealing with duty managers. This was because technology was increasingly allowing employees when on-call to work from home, without the need to attend the workplace. The Union proposed during bargaining the

following changes to article 23:

> "**23.01** Due to the nature of its operation, the Company may direct an employee to be available for work outside normal working hours, and he/she shall receive Duty Manager pay at the rate of **two (2) hours pay per day for each day he/she is required to be available**.
>
> **Delete:** - Strike through stale dating.
>
> **Remove:** - Bold Highlighting of words in this provisions.
>
> **23.02** In addition to the monies paid in Article 23.01 above, if the employee is authorized to leave his/her residence and report to work, the employee shall be paid at the overtime rate **for a minimum of 2 hours or** for the time worked **if in excess of 2 hours**.
>
> **Delete:** - The strike through words.
>
> **Add:** - Bold words."

Ultimately (save for the minor change of deleting the stale dating in article 23.01) the parties settled on the wording for article 23 (signed off on December 22, 2004) which has remained unchanged for the collective agreement for: the February 19, 2004 to February 19, 2007, the February 19, 2007 to February 19, 2010, and February 20, 2010 to February 19, 2013 (now as article 24).

The two-tier schedule or method of paying the ITSM duty managers (based on whether a supported call is received before or after 11:00 p.m.) that has been in place since 2005 is not provided for in the present wording of article 24.

Mr. Trach, then the business manager of TEAM, became aware of certain issues of concern to the ITSM duty managers "late in 2004 or early in 2005". In particular,

he was advised by these employees that they were receiving an excessive number of calls when on-call. They complained of calls throughout the night and then being required to work throughout the next day on the ITSM service desk. Mr. Trach explained that the Union saw this as a safety issue, with the duty manager on-call the previous night then having to drive to and from the workplace the next day with minimal sleep. Also, through discussion with the duty managers, he determined that there were a large number of nuisance calls occurring, arising at least in part because of the then recent acquisition of Allstream by MTS. The ITSM service desk personnel also raised concern about changes to their hours of work that were then being implemented by MTS.

Mr. Trach wrote Mr. Don Rooney, the labour relations manager of MTS, on January 27, 2005, raising these concerns. In the letter he commented, in particular, on the new hours of work being implemented by the Company and then wrote:

> "Having put you on notice of our concerns, we are prepared to take a "wait and see" approach at this time to give the Company a chance to continue its planning and discussions with managers and employees in order to arrive at a mutually satisfactory plan for new hours of work for the Service Desk employees. However we wish to be very clear that TEAM is not in any way waiving any of its rights to enforce the provisions of our collective agreement, and we reserve the right to do so in the event we receive any complaints from our members or if we determine that the Company is in a violation of Article 18 or any other article of the collective agreement."

In a letter dated February 7, 2005, a labour relations consultant on behalf of Mr. Rooney responded to those concerns, stating in part:

> "As discussed, as the result of the ITSM Service Desk now providing support for MTS/Allstream nationally, shift schedules will be adjusted effective February 10, 2005.

> For the month of February, call volumes will be monitored and the shift start and end times adjusted accordingly. The shifts will be assigned on a rotational basis, and once the start and end times have been finalized, employees will be able to trade shifts."

Mr. Trach and Mr. Rooney described that the Company and the Union adopted a "wait and see" approach to the scheduling and payment changes for the ITSM service desk employees. Some time in 2005 (the date was undetermined), Mr. Trach had a further meeting with certain of these affected employees. This led to him meeting with Mr. Rooney on September 23, 2005. He said that the meeting involved several issues. There was still concern for the ITSM duty managers over an excessive number of calls to the on-call service. There was also concern over the type of calls, the belief being that a significant number of these were in the nature of unsupported calls. There was also an issue raised about the change of the start time of the ITSM service desk shift (to 6:30 a.m. from 7:00 a.m.). Thirdly, Mr. Trach advised that the Union was taking the position that the duty managers were not being paid for supported calls within the terms of the collective agreement. Specifically, the Union took the position that each of these calls warranted payment of two hours.

Mr. Rooney also recalled these issues being raised. (Mr. Trach, according to Mr. Rooney, attended the meeting with Mr. Don Machray, a TEAM labour relations officer.) Mr. Rooney specifically recalled the discussion concerning the minimum overtime pay issue for each supported call. He advised that MTS disagreed with the position that

such calls, when serviced while the duty manager remained at home, entitled him or her to two hours pay, whether the call itself lasted in fact for 30 seconds or 30 minutes.

Mr. Rooney indicated that he would follow up on attempting to have employees defer on non-essential calls to the business hours of the ITSM service desk. Mr. Trach in response said that after this attempt to reduce the number of incoming calls to the ITSM duty manager had been pursued, he would talk to the ITSM employees again concerning these various issues.

Mr. Rooney testified that there was recognition at the meeting that for the present the "status quo" with respect to the operation of the ITSM service desk and the on-call service would remain in place. In Mr. Rooney's handwritten notes, the meeting is shown to have concluded as follows:

> "- LT to talk to ITSM people to see if there is an issue.
>
> - DR - tf issue revised - status quo practice until issue resolved."

Mr. Rooney said that further to that understanding he prepared a letter form of agreement dated September 29, 2005. That letter reads:

> "This is further to our meeting on September 23, 2005.
>
> The Company and TEAM acknowledge that payment for call-out overtime practices vary greatly throughout TEAM's jurisdiction."
>
> Further it is recognized that the parties have a significant difference of opinion regarding the interpretation of the Collective Agreement with respect to the call-out overtime provisions.

> That having been said, the parties agree, on a without prejudice or precedent basis, to set this issue aside and allow the current practices with respect to the payment of call-out overtime to continue.
>
> Either party reserves its right to raise this issue in the future and challenge the status quo. Should this occur, the Company agrees to allow the current practices with respect to the payment of call-out overtime to continue until the issue is resolved.
>
> To be clear, this agreement is without prejudice or precedent to the rights of, or positions taken by TEAM or the Company in the future."

The letter contained two signature spots for signing by Mr. Rooney and Mr. Trach. Mr. Rooney testified to being sure that he sent this document to Mr. Trach. (Mr. Rooney thought the document was executed by both of them, but in preparation for the grievance he had been unable to locate a signed copy of it.)

Mr. Trach maintained in testimony that he had never seen this document and denied that he would have agreed on behalf of the Union and the ITSM duty managers as set out in that document.

A follow-up meeting was held between Mr. Trach and Mr. Rooney on October 21st. The various issues raised at the September 23rd meeting were again canvassed. There was further discussion over the plan of MTS to implement a program to defer non-essential, unsupported calls to normal business hours of the service desk.

By then, Mr. Rooney had canvassed how duty managers were paid for the service calls outside of business hours in various departments of MTS. He recognized that

there was a wide range of practices as to how they were paid, sometimes even within the same department. This realization was discussed. By the time of that meeting, Mr. Rooney had prepared a detailed document setting out the results of the survey on the various practices for payment of duty managers throughout the various departments with TEAM members. (While that document was reviewed during the course of the October 21st meeting, a copy of it was not provided to Mr. Trach.) Mr. Rooney reviewed this document and the results of the survey during his testimony. It confirms a wide range of practices with respect to payment for on-call duty managers. For example, in network services in the engineering department, the document notes:

> "**Network Services**
>
> **Engineering**
> - Mixed bag
> - Call out overtime is claimed under one of the following scenarios:
>
> 1. When an employee reports to the workplace, the overtime rules within the TEAM contract are followed with a minimum of two hours (this is consistent in all groups).
> 2. If the person deals with the issue from home, the time worked is claimed.
> 3. If the person deals with the issue from home, then the two hour minimum is claimed."

By the October 21st meeting, Mr. Trach acknowledged, MTS was in the process of implementing a program for the deferral of non-essential calls to regular business hours for the ITSM service desk personnel. The Union was already seeing the results, with a lessening of non-essential calls to ITSM duty managers. At the meeting, there was a discussion with regards to the changes in the shift time for the ITSM service desk.

Concerning the payment of those duty managers, there was disagreement. At the meeting, Mr. Trach explained that TEAM's position was that the duty managers should be paid two hours as a minimum, pursuant to the collective agreement, for each call-in even when the duty manager was not required to leave his or her home. Mr. Rooney, on behalf of MTS, maintained that the present system of payment was within the terms of the collective agreement and that the status quo with regards to payment of the ITSM duty managers should be maintained. He pointed out that the ITSM duty managers were only called upon to be on-call once during a seven or eight day rotation, which was much less onerous than duty managers in other departments of MTS. MTS' position was that the two hour minimum referenced in the collective agreement only applied in the case of a duty manager being required to leave home for the workplace.

Ultimately, the parties at that meeting "agreed to disagree". Mr. Trach recalled advising Mr. Rooney that the Union would give the Company one month to reconsider its position with respect to its method of payment. (There was also some "hard talk" with the Union representative threatening that the ITSM duty managers could start to attend to the workplace for every call-in and the Company representative commenting that it could begin to take a hard position on when it would pay at all for call-ins.)

In Mr. Rooney's notes of the meeting there is reference to this dispute. The notes read in part:

> "Going forward to any calls - 2 hours for every call (Give MTS a month to fix).

...

- In one month they will start booking two hours."

Subsequently Mr. Trach wrote an email dated November 21, 2005 to a number of the ITSM duty managers concerning the MTS program to reduce the number of call-ins. He concludes the email as follows:

> "Given the questions raised in paragraph 2, do we need a meeting to discuss the whole matter; progress made, non-supported calls, supported calls, 2 hour minimum call out for reporting to the workplace (in this case the home), and anything else that may have come up in the last month on this matter? If so, let me know ASAP and I will schedule a mtg. For 16:30 on a suitable day."

He heard nothing further to that e-mail.

Mr. Trach had a further email sent on December 21, 2005, to the same duty managers, which reads:

> "Larry called wanting to know of any updates concerning overtime issues or what problems we are still running into. Let me know of any issues or if you prefer email/contact him with specifics. If needed, he may want to set up another meeting with us in January 2006."

Again, Mr. Trach heard nothing further. He explained that the Union thought that the issues raised by the ITSM duty managers had been resolved, and in particular, that the Union assumed the duty managers were now being paid a minimum of two hours for each supported call outside of the regular business hours of the service desk. In fact, the method of payment set out that had been implemented during 2005 and as set out above, was being maintained by MTS.

Mr. Trach maintained in testimony that a grievance would have been brought then if the Union had been aware then that there had been no change to the applicable overtime rate for supported calls outside of the normal business hours of the ITSM service desk. Mr. Rooney maintained that if MTS had known that the Union was not satisfied with this method of payment it might have considered creating a night shift on the ITSM service desk or have acted otherwise in a manner to minimize its costs for the call-in service on the ITSM service desk.

Further contacts between the Union and the Company on the issue thereafter ceased. But there were some efforts in the subsequent years during bargaining to change the wording of the collective agreement article with regards to duty managers. In February 2007, in preparation for collective bargaining, TEAM requested a copy of "all current MTS policies applicable to the TEAM bargaining unit" and "information on the compensation paid to all employees within the TEAM bargaining unit". These requests were responded to by MTS. During the course of testimony, the Union took the position that MTS failed to comply fully with these requests in that there was no policy revealed concerning the payment schedule for supported calls made to ITSM duty managers outside of the normal business hours and no information specifically as to their payment for that service. The Company maintained that there was no policy concerning that payment schedule and that it had provided the information sought with regards to compensation paid to employees. Mr. Trach maintained that if this information had been known to the Union at the time of collective bargaining in 2007 that the Union "probably would have grieved" for what it believed to be a breach of the collective agreement. Mr. Rooney denied that there was any attempt on the part of MTS to hide the two-tier system of payment of ITSM duty

managers (that is, the payment schedule that had been in place since 2005 with respect to calls before and after 11:00 p.m.).

For the 2010 collective bargaining process, TEAM initially produced a "high level" proposal for amendments to the collective agreement. The following proposal with regards to articles 21 and 24 reads:

> "**Article 21 - Overtime & Article 24 - Duty Manager**
> - TEAM wants to clarify the collective bargaining agreement to prevent undue pressures on TEAM members to work overtime hours without compensation.
> - TEAM also seeks to update the wording of sub-clauses to reflect modern methods of communication and remote working."

Mr. Rooney testified that he responded to this proposal. Then, in the actual bargaining, the Union drafted the following amendments to the wording of articles 21 and 24:

> "**Amend Article 21 - Overtime**
> **21.02.1** A call-out to resolve a problem or issue, with or without reporting to the workplace, will be paid at the applicable overtime rate from the time the employee is called upon and shall continue until completion of the job, or where the employee must report to the workplace for such period as reasonably necessary to travel home.
>
> **Amend Article 24 - Duty Manager**
> **24.02.1** In addition to the monies paid in Article 24.01 above, a call-out to resolve a problem or issue, with or without reporting to the workplace, will be paid at the applicable overtime rate from the time the employee is called upon and shall continue until completion of the job, or where the employee must report to the workplace for such period as reasonably necessary to travel home."

Mr. Rooney took the position that this wording would result in "four hours pay

for a five-minute call," which MTS found excessive. In response, according to Mr. Rooney, the Union threatened to have duty managers attend at the workplace for each call.

MTS then made a counter-proposal on the wording of articles 21 and 24 as follows:

> "**21.02.1** A call-out to resolve a problem or issue, with or without reporting to the workplace, will be paid at the applicable overtime rate from the time the employee is called upon and shall continue until completion of the job, or where the employee must report to the workplace for such period as reasonably necessary to travel home.
>
> **.2** A minimum of one (1) hour shall be paid for call-out overtime.
>
> **24.02.1** In addition to the monies paid in Article 24.01 above, a call-out to resolve a problem or issue, with or without reporting to the workplace, will be paid at the applicable overtime rate from the time the employee is called upon and shall continue until completion of the job or where the employee must report to the workplace for such period as reasonably necessary to travel home."
>
> **.2** A minimum of one (1) hour shall be paid for call-out overtime.

Mr. Rooney explained that he disagreed with the company bargaining committee, who felt it was necessary to make a counter-proposal. He felt the present wording of those articles covered the two-tier status quo with regards to payment of duty managers.

The Union did not accept the counter-proposal but rather further proposed the following wording:

> "**<u>Amend Article 21 - Overtime</u>**
> **21.02.1** A call-out to resolve a problem or issue, with or without

reporting to the workplace, will be paid at the applicable overtime rate from the time the employee is called upon and shall continue until completion of the job, or where the employee must report to the workplace for such period as reasonably necessary to travel home.

.2 A minimum of one (1) hour shall be paid for call-out overtime, except between midnight and 6:00 when the minimum of two (2) hours shall be paid for call-out overtime.

Amend Article 24 - Duty Manager

24.02.1 In addition to the monies paid in Article 24.01 above, a call-out to resolve a problem or issue, with or without reporting to the workplace, will be paid at the applicable overtime rate from the time the employee is called upon and shall continue until completion of the job, or where the employee must report to the workplace for such period as reasonably necessary to travel home."

.2 A minimum of one (1) hour shall be paid for call-out overtime, except between midnight and 6:00 when the minimum of two (2) hours shall be paid for call-out overtime."

MTS rejected this TEAM counter-proposal. Mr. Rooney in responding had a written document prepared, which he read into the record during a bargaining meeting. (The document was not provided to the TEAM bargaining committee, however.) That document reads in part:

> "TEAM also seeks to update the wording of sub-clauses to reflect modern methods of communication and remote working.
>
> Response to TEAM - May 11, 2010
>
> - TEAM tabled a proposal on April 27th to update Articles 21 and 24 to reflect the fact that employees are not always required to leave their homes to respond to after hours call-outs and in fact the majority of time they do not.
>
> - We questioned whether or not the two hour minimum would apply to situations where employees do not have to leave their homes and you responded that you had not given that issue any thought when drafting the proposal.

- We had a good discussion on whether or not it would be reasonable for employees to claim two hours at double time rates (based on the current overtime premium) for a five minute call from home. We do not think the current collective agreement language supports this.

...

- I have to admit we are a little uncomfortable with this issue. Even when tabling our proposal of April 28th we had some reservations because:

  1. We do not want to raise the profile of the call-out overtime issue which may result in increased operating costs and
  2. At no time do we want to open the door to paying two hours at overtime rates for a short duration call from home.

- We talked about why the two hour minimum is in place and that is because back in the day employees had to physically leave their homes and the two hours included travel time to and from the office or work location, warming up a vehicle in the winter etc. When employees respond from home none of this applies.

- You did comment that part of TEAM's motivation for maintaining the two hour minimum was to keep the cost of call-out high to entice the Company to fix systems rather than continue to call out employees to perform a duct tape fix.

- We do not accept this as sound rationale. Yes, employees fixing the situation from home are inconvenienced, potentially woken up in the middle of the night etc. but to suggest the two hour minimum would apply in these situations is something we cannot agree to under any circumstances.

...

- We reject your proposal of April 28th and will live with the status quo. We are prepared to live with whatever is happening out in the workplace today because we do not think there are too many employees claiming the two hour maximum for a short call at home and we think a reasonable understanding is in place in most situations.

- We must go on record however and advise that if the question is raised by a manager as to whether or not the two hour minimum applies to employees responding from home, our response would be no. If this resulted in a grievance we would have to deal with the issue then."

TEAM then made yet a further proposal to the Company with respect to a revised wording for article 21. It reads:

> "**Article 21 - Overtime**
> **21.03** A call-out to resolve a problem or issue without reporting to the workplace will be paid at the applicable overtime rate from the time the employee is called upon and shall continue until completion of the job. A minimum of one hour shall be paid for said call-out overtime.
>
> Note: If this language is accepted, also revise Article 24 - Duty Manager to affect a similar distinction between a call-out to the workplace and a call-out without reporting to the workplace."

The Company rejected this further counter-proposal.

The wording of articles 21 and 24 ultimately remained unchanged from the wording in the 2007-2010 agreement, and the 2004-2007 agreement.

(iii) the Grievance

In December, 2010, Mr. raised with a labour relations analyst with the Union, that as an ITSM duty manager he was not being paid in accordance with article 24.02.2 of the Collective Agreement. Ultimately, this led to a grievance being filed on March 25, 2011. The grievance reads in part:

"This Grievance concerns MTS Allstream Inc.'s (the Company or

> MTS) ongoing policy to deny minimum call-out overtime to on-call employees of the ITSM department taking work related telephone calls and entering electronic data into the MTS system from home between 5:00 pm - 11:00 pm Monday to Friday and 6:30 am - 11:00 pm Saturday and Sundays.
>
> Without excluding any other statute or regulation or any other applicable Article or Provision of the Telecommunications Employees Association of Manitoba (TEAM) Collective Agreement (CA), TEAM asserts that the Company's administration of overtime in the ITSM department is a breach of Article 24.04.2 of the CA."
>
> ...
>
> "An earlier incarnation of Article 24 in the same CA was considerably different and did not include a separate requirement for a minimum of 2 hours for call-out overtime.
>
> The Company's policy for the administration of overtime in the ITSM department for employees on-call...was unilaterally imposed on the grievors by MTS. TEAM and/or the individual grievors did not agree to the policy or waive their rights to overtime under the CA. TEAM only recently became aware of the policy and that the minimum call-out overtime was not being booked in accordance with the MTS policy. The grievors were not aware the policy was a breach of the CA until they consulted with TEAM and its counsel in March of 2011."

The grievance goes on to assert:

> "In summary, TEAM asserts that Article 24.02.2 applies to work that does not require a physical return to the Company's offices, regardless of the time it is performed. Therefore, the grievors have been improperly denied overtime pay since the provision was introduced into the CA in 2004."

The grievance claims with regard to relief:

> "TEAM, in conjunction with the grievors, has calculated that each of the ITSM on-call employees has been unfairly denied minimum call-out overtime amounting to lost overtime wages of approximately $8,000.00 per year. MTS records kept in compliance with Section 24(2) of the Canada Labour Standards Regulations on its time recording system will be able to provide a precise calculation of the overtime owing to each individual grievant. In this regard, TEAM

> intends to rely on and hereby requests production and particulars of all documents and records that deal with the above stated facts and allegations related to the denial of overtime and the ITSM overtime policy, and in particular, records of the time worked by each of the grievors for every day they were on-call."

And in terms of the actual relief sought:

> "1. An order directing the Company to pay all outstanding call-out overtime due to the grievants going forward and on a retroactive basis;
> 2. A declaration that Article 24.02.2 applies to authorized call-out work performed at home and does not require a physical return to the Company's offices;
> 3. A declaration the Company has violated the provisions of the CA and the applicable statutes, practices or policies, as stated above;
> 4. An order directing the Company to compensate and make whole each greivant for lost overtime and any other damages and any incidental financial loss incurred as a result of the Company's breaches as stated above;
> 5. Any other remedy, which is just and equitable under the circumstances."

4.00 SUBMISSIONS

Counsel for the Union, Mr. Scarcello, began his submission by summarizing its position:

the language of a collective agreement is determinative if unambiguous; and given that the wording of article 24 is clear, it follows that ITSM duty managers must be paid for authorized call-out work performed at home as set by 24.02.2.

He then turned to a review of the wording of article 24. In that review he stressed the phrase "call-out overtime", reminding that Mr. Rooney in his testimony had confirmed that work performed at home constituted call-out overtime. It followed for the

Union that by 24.02.2 the decision to this grievance was simple on its face: the parties have agreed that the overtime referenced in that article includes work at home.

He recognized that the Company will argue the reference to "workplace" and "travel" set out in 24.02.1. But he reminded that article 24, being the only article dealing with the position of duty manager, governs how duty managers are paid. He referred to the scheme of payment of ITSM duty managers. For the Union, the 11:00 p.m. aspect of that scheme was clearly outside the wording of the agreement, with 24.02.2 providing no distinction between before and after that point in time. That is, the two-tier scheme was outside the wording of article 24.

He maintained that consistent with established arbitral law, the phrase "reporting to the workplace" includes a duty manager working at home. In support of that interpretation, he referenced the following authorities:

(a) ***Re The Queen in Right of Manitoba and Manitoba Government Employees' Association*** (Buller) [1987], 28 L.A.C. (3d) 241 (Freedman), in which the phrase "called-out or scheduled to work overtime" was interpreted as follows:

> "I am of the view that the provision of the services by Mr. Buller over the telephone is an integral part of his job function. It is construing and interpreting the Agreement too narrowly to say that art. 3.06 only applies if Mr. Buller actually leaves his home in the middle of the night, to provide a service from premises other than his home. If he is providing a service to the client, which in many cases is best provided over the telephone, and is doing so outside his regular working hours, then in the context of his particular job it seems to me that he has been

> "called out" in essentially the same way as if he attended at the office. Presumably Mr. Buller could, if he were so inclined, tell a caller at 1:00 a.m. in the morning that he would not take the call at his home but would rather go to the office and receive the call there. That approach might more closely fit the present wording of art. 3.06, but, in my view, would be no more consistent with the apparent intention of the article than the interpretation which I give to the article." (p.244);

(b) ***Canada (Treasury Board – Transport) and Heath*** [1994], 43 L.A.C. (4th) 346 (Turner), (at p.353); and

(c) ***Health Employers Assn. of British Columbia and B.C.N.U.*** [1994], 43 L.A.C. (4th) 25 (Taylor), (at p.34).

Mr. Scarcello reminded that the Company specifically provides all necessary equipment to allow for the ITSM duty manager on-call to work at home. It followed that these cited line of cases established that article 24.02 should be interpreted on its plain meaning.

He then turned to consideration of basic principles of interpretation of a collective agreement. He stressed that the extrinsic evidence, such as evidence of the negotiating history of a provision and concerning past practice in interpreting of a provision, should only be utilized if a provision is found to be ambiguous. That is, "if the written agreement is ambiguous, however, extrinsic evidence is admissible as an aid to the interpretation of the agreement to explain the ambiguity but not to vary the terms of the

agreement" (Brown and Beatty, **Canadian Labour Arbitration** (4 ed.) 3:4400).

Mr. Scarcello also referenced:

(a) Snyder, **Collective Agreement Arbitration in Canada**, p.43; and

(b) Brown and Beatty, supra 3:4430.

Turning to the testimony on extrinsic evidence, Counsel first reviewed the evidence on the negotiating history. He concluded that no clear intent arises from the conduct of the parties in the negotiation of the present article 24. Certainly, he pointed to there being no negotiating history with respect to the two-tier payment scheme that was presently in effect. With regards to evidence on past practice, he pointed out that there was, and are, a variety of payment schemes for duty managers with MTS. In the case of the ITSM duty managers, the two-tier payment scheme, he argued, is outside of the wording of article 24. That is, a 15-minute minimum and the before and after 11:00 p.m. stipulation ignore article 24. Having said that, he stressed by its past payment practices that the Company was prepared to recognize and pay for work performed at home; that is, recognize the workplace as including home.

With regards to the appropriate remedy, the Union maintained that there had been an ongoing, continuing breach of the collective agreement since 2005. To Counsel's mind, the issue raised by this grievance was "how far back in this continuing breach situation should the remedy be set". He acknowledged that the basic rule by arbitral

principles was that an arbitrator's jurisdiction was confined to granting a remedy under the governing collective agreement. He, though, maintained that established jurisprudence varied or extended this principle in the case of vested rights. He referenced ***Dayco (Canada) Ltd. V. CAW-Canada,*** [1993] 2 S.C.R. 230, which provides:

> "As a simple principle of contract law, the enforcement of a contract can take place well after the contract itself has expired. What is at issue in these cases is exactly that – the enforcement of the collective agreement to rectify damage appearing after the expiration of the agreement. Accepting the thrust of the law established in *Genstar,* I can deal quickly with the company's arguments on this point. In its written submissions it argues that "under Canadian law, the parties to a collective agreement may not provide in the collective agreement for any rights or benefits to endure beyond the term of the collective agreement." This, of course, is contrary to the position taken in *Genstar.* The company's other key argument is that "the Union has cited no Canadian case in which a term of a collective agreement was found to survive the expiry of the agreement." This is true enough, but I think it is a mischaracterization of the union's position. It is not the survival of the term *per se* that allows for arbitrability – no one disputes that the term is extinguished in the sense that it has no prospective application. Rather it is that the rights created by that term vest or accrue. This rather fundamental distinction was simply not addressed by the company."

Counsel referenced the following applications of the ***Dayco*** decision in terms of distinguishing vested rights:

(a) ***Huntsville District Nursing Home and O.N.A. (Chipperfield) (Re)*** [2001], 106 L.A.C. (4th) 312 (Lynk), (at pp.324-325), in which arbitrator Lynk in applying the ***Dayco*** principle noted three pre-conditions which must be met (i) that the employment right or entitlement that is being claimed has accrued or vested under prior collective agreement (s); (ii) the grievance has been filed under the previous collective agreement or agreements; and (iii) the

grievance must satisfy any procedural or timeliness provisions in the collective agreement; and

(b) ***Manitoba and M.G.E.U. (219-014-2006) (Re)*** [2008], 180 L.A.C. (4th) 150 (Peltz), (at p.172).

In applying ***Dayco,*** Counsel for the Union urged the recognition that the overtime wages owed were long accrued, vested rights, with it following that the remedy should apply from the time that the two-tier payment scheme was implemented in 2005 in breach of article 23 (and now article 24). He pointed out that in the grievance the allegation is that "grievors have been improperly denied overtime pay since the provision was introduced into the CA in 2004".

Mr. Scarcello recognized a timeliness issue would be raised by the Company. He maintained that there was no issue with respect to timeliness, given the continuing nature of the breach. The principle in ***Dayco***, as explained in the ***Huntsville District Nursing Home*** award, with its three-part test, allowed for the remedy to extend back to the commencement of the vested rights.

Counsel also recognized that the Company would raise the Union's knowledge of the two-tier system of payment of ITSM duty managers. On this point, he first reviewed the evidence, pointing out that Mr. Trach on behalf of the Union understood in late 2005 that the Company had ended this method of payment. (This was because he

heard nothing further from the duty managers, despite inquiry by him.) He noted that Mr. Rooney had testified that the Company, if it had become aware in 2005 of opposition to the two-tier payment system, might have introduced a night shift. However, he pointed out that in the letter of agreement that Mr. Rooney prepared (dated September 29, 2005) the Company was prepared to accept the difference of opinion regarding the call-out overtime provisions of the collective agreement.

The Company then was aware of this disagreement in the fall of 2005, and took no steps. It followed, for the Union, that MTS had "rolled the dice" in maintaining the scheme for payment of ITSM duty managers when on-call since 2005. He pointed out that TEAM, then, had no knowledge of MTS continuing with the two-tier scheme thereafter. In that regard, from the Union's perspective, it had not received the necessary information in the process of negotiating in 2007, to have learned that the two-tier system remained in place.

In reply, Counsel for MTS Mr. McDonald, first took exception to the Union's interpretation of article 24. He maintained it was "a stretch" to argue that Mr. Rooney's reference to "call-out overtime" was verification of the Union's position, that working at home fell within article 24.02. He reminded that Mr. Rooney had also testified that the call–out provision in article 24.02 did not include working at home. He referenced that Mr. Trach in his email of October 21, 2005 to a number of the ITSM duty managers, had noted that Mr. Rooney "was still hung up" that article 23.02 required "that you must report to work (your work building)". (He also referenced the May 11, 2010 note in which Mr. Rooney maintained that article 24.02 did not apply to employees "responding from home".)

Counsel also challenged the Union's overall position that only article 24 applied to ITSM duty managers. He reminded, of course, there were numerous other provisions of the collective agreement (such as those dealing with layoffs, holidays and such) that were also applicable to duty managers as employees of MTS. In particular, he reminded of the application of article 21, the overtime provision, stressing that article 24 did not set the overtime rate. It was article 21 whereby overtime is provided for in the case of employees "authorized to work beyond the normal work days", in which case that employee is "compensated for at the applicable overtime rate".

He also took exception to the overall thrust of the Union's submission that somehow MTS by accepting the status quo in the fall of 2005 (as the Union did), was also conceding the grievance could be brought six years later. He maintained that the evidence, in contradiction, was clear that MTS would have taken other steps (possibly a night shift) if the present grievance had been brought in a timely manner.

Mr. McDonald then turned to a review of the Agreed Statement of Facts, stressing: the distinction between supported and unsupported calls; the split nature of the grievance; the call log that was maintained by the ITSM duty managers; the ticket number system of each actual call for identification purposes; and the pay code system that was found on the electronic pay stub of a duty manager. For him, the pay stub recording of the overtime pay provided that each individual duty manager was aware, each time he or she was paid "since at least 2005", that the two-tier payment system of overtime was in operation.

Mr. McDonald turned to the issue of interpretation of article 24. He began by reviewing the interpretative principle of the plain and ordinary meaning rule. He referenced section 4:2100 and 2110 of *Brown and Beatty*, supra. He also noted the additional interpretive provisions: if two different words are used, they are intended to have different meanings; that all words viewed are intended to have meaning; that the language of the collective agreement shouldn't be interpreted to result in an absurdity; and that intention within the wording of the collective agreement must be clear particularly for a financial benefit to be conferred.

With those principles in mind, Mr. McDonald reviewed the actual wording of article 24. For him, it was clear that 24.01 was intended to make Company employees available outside normal work hours. To make them available, the Company is required to pay them (two hours pay per day). In addition, according to the Company, 24.02.1 provides for a call-out when a duty manager is required to attend the workplace. He denied the Union's interpretation of this provision, maintaining that it specifically and unequivocally provides for attendance at the workplace. He referenced the words and phrases,"to the workplace", "home" in contrast to "the workplace", "to travel" and, "as reasonably necessary," as all confirming on a plain reading that the article dealt with the specific circumstance of an employee leaving home to attend at the workplace. Said another way, the Company maintained that 24.02.1 required attendance at the workplace to trigger payment as specified under 24.02.2. He urged the finding that, on the plain and ordinary meaning of 24.02, the Union's position that it applied to working at home, was wrong.

He acknowledged that the two-tier scheme for payment of overtime to ITSM duty managers (with a 15-minute minimum and the two hour pay after 11:00 p.m.) was not set by article 24. But he pointed out that there was nothing within the Collective Agreement that says that duty managers could not be paid on that basis: rather the two-tier scheme is not addressed. In that regard, he referenced article 21, as requiring when overtime must be paid. Article 21, he acknowledged, suggests that the actual time spent is to be compensated for at the applicable overtime rate. It was MTS that had put in the minimum of 15 minutes and after 11:00 p.m. minimum. There was nothing under the Collective Agreement, Mr. McDonald maintained, that prevented the Company from setting the two-tier payment practice.

In summary, as with the Union's position, the Company maintained that the plain meaning rule of interpretation governed. Should the Panel conclude, however, that article 24 was ambiguous, Mr. McDonald agreed with the Union's position that extrinsic evidence could be relied upon as an aid to interpretation of the ambiguous provision. He referenced in that regard section 3:4400 (extrinsic evidence), 3:4420 (negotiating history), and 3:440 (past practice) of ***Brown and Beatty***, *supra*.

He began by reviewing the negotiating history of article 23/24 of the various collective agreements. He stressed that from that history it was clear that the parties had on occasion, in bargaining, turned their minds to the situation of duty managers working

at home and had then determined to leave the present wording in place. He also stressed that the history supported the Employer's position that the two hour minimum was, as worded, intended to only apply to circumstances of the duty manager attending at the workplace. He acknowledged that in 2004 the reference in article 23 to "residence" was removed, but stressed that the reference to "travel home" remained.

He also disagreed with the position of the Union that arbitral authorities supported an interpretation of the word "workplace" as including working at home. He referenced a *Brown and Beatty* section dealing with call-in and call-out pay (section 8:3410). He noted in particular the recognition in *Brown and Beatty* that the language of the particular collective agreement determined the compensation of employees when on-call and when called in to work. He cited the following authorities in support of the Company's position that article 24.02 should be interpreted as applicable only when an employee leaves home and attends at the workplace:

(a) ***Assiniboine Regional Health Authority and Manitoba Nurses' Union (Chut)*** [2003], 115 L.A.C. (4th) 183 (Jamieson), in which arbitrator Jamieson writes:

> "Unfortunately, it is readily apparent from the cases cited that there is really no consensus among arbitrators as to whether taking work-related calls at home entitles employees to call-in or call-back minimum guaranteed hours at overtime rates. Obviously, the cases presented to us are split one way or the other and it goes without saying that much depends on the circumstances before the arbitrator and the particular language of the collective agreements in question."

(b) ***University of Alberta Hospital and U.N.A., Loc. 301 (Re)*** [2000], 90 L.A.C. (4th) 328 (Ponak) (at pp.338-339);

(c) ***Ontario (Ministry of Government Services) and O.P.S.E.U. (Couture) (Re)*** [2011], 105 C.L.A.S. 274 (Dissanayake) (at paragraphs 319-320); and

(d) ***Re Leco Industries Ltd. and Oil, Chemical and Atomic Workers International Union, Local 9-819*** [1980], 26 L.A.C. (2d) 80 (Brunner) (at p. 84).

Counsel urged careful consideration of the cases cited by both the Union and the Company as a whole, maintaining that the Union cases were distinguishable by the particular wording of the call-out compensation provisions in each of the collective agreements.

Mr. McDonald also reminded of the interpretative principle that "a clear expression of intention is required to confer financial benefit". He referred to:

(a) ***Brown and Beatty,*** *supra*, 4:2120; and

(b) ***Brandon General Hospital and Manitoba Nurses Union, Loc. 4, Re*** [1996], 56 L.A.C. (4th) 174 (Chapman) (at p.184).

In that regard, he referenced examples from the log-sheets of the ITSM duty managers, calculating that sometimes - and without "cherry picking" - in a single on-call period the two-hour minimum per call interpretation of the Union would result in as much as 20 hours of overtime. Such a result, he maintained, could not have been intended by the Company.

With respect to the matter of past practice, the background as to the two-tier payment of ITSM duty managers in 2005 was reviewed. He also reviewed the various schemes of pay for duty managers in other departments. He stressed that certainly most of those departments did not pay a two-hour minimum per call when the employee did not leave home. He maintained that on the testimony received it was clear that the Union could not establish its claimed interpretation of article 23/24 from past practice. He further stressed that it was clear that the Union had knowledge of the two-tier payment system in 2005. If Mr. Trach thought the two-tier payment had ended, that was an assumption on his part. From the Company's perspective, the Union, if it did not know that the two-tier system continued after 2005, then it "should have known." Mr. McDonald further asserted it was clear from the Union's proposed changes to article 23 (24) during collective bargaining that the Union had knowledge of the two-tier system. (He also denied the suggestion that somehow the Company had withheld requested information on the two-tier compensation scheme, urging careful reading of what the Union requested to be produced in its letter of February 13, 2007.)

Turning again to the bargaining history, Counsel maintained that the series of proposals made during collective bargaining in 2010 showed the Union recognized that article 24.02 dealt with a specific circumstance of the duty managers returning to the workplace in a call-out situation. Those attempts were rejected by the Employer. For Counsel, then, it was apparent that the Union was attempting by the grievance process to obtain a benefit of overtime being paid at a two-hour minimum when the duty manager does not leave the home, despite that benefit being unobtainable through the course of negotiations.

Mr. McDonald referenced the following cases in which a party attempted through the grievance process to obtain what it could not by bargaining:

(a) ***Re Weyerhaeuser Canada, Ltd. and Pulp, Paper and Woodworkers of Canada, Local 10*** [1982], 9 L.A.C. (3d) 308 (Bird) (at pp.321-322); and

(b) ***Re Palm Dairies Ltd. and Retail, Wholesale and Department Store Union, Local 580*** [1980], 26 L.A.C. (2d) 414 (Hope).

Turning to the topic of remedies, Mr. McDonald first referenced articles 5.04 and 6.01 of the Collective Agreement which provide:

> "**5.04.1** In the event an employee chooses to grieve on a discharge, suspension or promotion, he/she must file his/her grievance within five (5) working days of receipt of a notice on the discharge, suspension or promotion. In such cases the grievance procedure will

commence at Step 2.

> **.2** For grievances pertaining to other matters, the grievance must be filed within **twenty (20)** working days from the time the employee has been made aware of the alleged violation.

...

> **6.01** Unless the provisions of Article 5 have been complied with, a grievance shall not proceed to Arbitration."

He maintained that these provisions were mandatory and not directive in nature, citing in support: ***The Manitoba Telephone System and Telecommunications Employees Association of Manitoba*** (unreported, May 12, 1993) (Suche).

While Mr. McDonald conceded that the Panel did have jurisdiction to extend the time limit and procedural requirements set under the Collective Agreement, he maintained that such discretion must be "used sparingly". He referred in that regard to ***Nelson & District Credit Union and I.W.A. – Canada, Loc. 1-405 (Simpson)*** [1998], 71 L.A.C. (4th) 333 (Greyell), in which this principle of judicious sparing use is noted by arbitrator Hope in ***Nuranda Mines Ltd. (Boss Mountain Division) and U.S.W., Loc. 7852*** [1977], 1 W.L.A.C. 143 in the following terms:

> "The exercise of the discretion in s. 98(e) to compel payment of a monetary benefit on a retroactive basis could only be just and reasonable in the most unusual of circumstances. This discretion should be exercised judicially and sparingly and should not benefit an employee who sits on his rights."

The factors to be considered in relaxing the timeline of a collective agreement

are set out, he noted, in ***Re London Tavern and International Beverage Dispensers' and Bartenders' Union, Local 280*** [1981], 2 L.A.C. (3d) 411 (MacDowell) (at pp.425-426). He maintained that those factors overwhelmingly supported the position of MTS that there should be no relaxing of the timeline of article 5.04 of the Collective Agreement.

Mr. McDonald also referenced ***FPC Flexible Packaging Corp. and G.C.I.U., Loc. 500-M (Annette) (Re)*** [1998], 77 L.A.C. (4th) 198 (Bendel), in setting the requirement that Unions must be "zealous in asserting rights of employees." In that award this requirement is stressed by arbitrator Laskin in ***Re Canadian General Electric Company (Davenport Works and U.E.*** [1952], 3 L.A.C. 980) in the following terms:

> "Absent bad faith on the part of the employer, a Union which misconceives its rights or those of employees and thereby fails to press them, should not be permitted to make a retroactive claim to re-open, after the lapse of a reasonable time, transactions which have been completed, as, for example, cases of piece-work jobs for which payment has been made and accepted without expression of dissatisfaction."

Counsel for the Company also commented on the Union reliance on the ***Dayco*** vested rights exception. He began by referencing the following governing principle set out in ***Re Goodyear Canada Inc. and United Rubber Workers, Local 232*** [1980], 28 L.A.C. (2d) 196 (Picher): "A Board of Arbitration can have no jurisdiction beyond the collective agreement under which it is constituted" (p.202). He noted that the key consideration is whether a grievance involves a vested right. There has been considerable arbitral jurisprudence, he pointed out, subsequent to the ***Dayco*** decision concerning this

consideration. He referenced ***The Province of Manitoba and General Employees' Union (Fredborg)*** (2005), 81 C.L.A.S. 169 (Hamilton), in which it is noted:

> "There has been considerable arbitral jurisprudence subsequent to the *Dayco* decision. Not surprisingly, the results vary because whether a right or entitlement can be found to have vested or accrued prior to the expiry of a collective agreement must be judged "...on circumstances of each case" (p.325 of *Huntsville*).

Mr. McDonald also pointed out that in the above award, arbitrator Hamilton noted that the ***Dayco*** decision did not involve any question regarding the arbitrator's jurisdiction to consider a grievance arising under a collective agreement which preceeded the agreement under which he had actually been appointed. Mr. Hamilton concludes:

> "In my view, the issue before me differs from disputes involving health and welfare benefits, vacation entitlement and retirement benefits. Such benefits accrue and vest over a period of time through succeeding agreements. Given the knowledge of the Grievor in the spring of 2002, it is my view this case is of a different character. The obligation to pay the Grievor at the proper step on the XO3 pay grade arose each time she was paid on a bi-weekly basis after she was appointed to that position. When the regular, recurring breaches and the "continuing" nature of the Grievance are assessed in the context of the wording of the Agreement, I have determined that the *Goodyear* principle ought to be applied, meaning that any remedial relief will be limited to the term of the Agreement."

Mr. McDonald also cited to similar effect: ***Manitoba and M.G.E.U. (Anderson) (Re)*** [2006], 158 L.A.C. (4th) 225 (Graham).

In summary, Mr. McDonald maintained that cases such as ***Huntsville*** must be carefully applied, and limited in their effect. Here he maintained that the circumstances

were the same as in ***The Province of Manitoba and M.G.E.U. (Fredborg),*** with the ***Goodyear*** principle governing.

In reply, Counsel for the Union first referenced the cross-examination of Mr. Rooney. He stressed that Mr. Rooney had said during his cross-examination that the phrase "call-out overtime" does include work at home.

Mr. Scarcello went on to clarify the position of the Union with regards to how article 24.02 should be interpreted in calculating overtime pay. He turned, as an example, to the log-call record of Mr. Doug Gerlaca, an ITSM duty manager, during the on-call of January 10, 2010. From 6:59 a.m. to 6:33 p.m. there had been 10 calls. The Union takes the position, Mr. Scarcello explained, that any of those calls within a two-hour period entitles that duty manager to the two hour minimum, but only one two hour minimum. This would be applicable, according to the Union, whether these calls were received before or after 11:00 p.m.. He denied the suggestion of Company Counsel that the Union was maintaining that each of those calls should be paid on the basis of a two-hour minimum. Rather all calls within two hours should be paid one two hour minimum. He pointed out, as well, that under the two-tier payment scheme in place since 2005, all calls within a two hour period after 11:00 p.m. are paid as two hours. He pointed as well to the workplace schedule. There are "no overlapping calls in a two-hour period" according to that schedule.

He also denied the claim of the Company that the Union was interpreting the

word "workplace" and "work" in article 24 as interchangeable. Rather, the Union's position was that, given the case law, workplace includes the home, or if you will, the home becomes the workplace.

Mr. Scarcello also denied the underlining argument of the Company that somehow TEAM had agreed to the two-tier payment schedule. He reminded that there was no agreement, written or verbal, from the testimony to support that claim.

With respect to the matter of remedy, he maintained that the two-hour minimum set out in 24.02.2 was a vested right, with the Employer unable to take that right away. It was not, he argued, a prospective right, but rather once an employee takes calls during an on-call shift there was a vested right. That is, a vested right was created because the employee had performed his or her half of the bargain.

He acknowledged that the ***Goodyear*** principle was still "good law" but maintained that the ***Dayco*** line of authorities was applicable to the present circumstances.

5.00 ANALYSIS

Counsel in their submissions presented a logical breakdown of the grievance into several sub-issues. In the analysis, the Panel will adopt their approach, first by considering the interpretation of the Collective Agreement, and in particular articles 21 and 24.

(i) Legal Principles

The parties, by their stated positions, have defined the initial issue as that of interpretation. The Union says that article 24 is clear in its meaning and intent. The Company also interprets article 24 as unambiguous. So both submitters presented on the basis that article 24, taken in the context of the whole of the provisions of the collective agreement, has a plain meaning. That plain meaning, they each argued, is consistent with the respective positions on the grievance, advanced by their respective clients.

The fundamental object in construing a provision of a collective agreement is to discover the intention of the contracting parties. As explained in ***Brown and Beatty,*** *supra* (4:2100):

> "It has often been stated that the fundamental object in construing the terms of a collective agreement is to discover the intention of the parties who agreed to it. As one arbitrator, quoting from *Halsbury's Laws of England,* stated in an early award:
>
> > "The object of all interpretation of a written instrument is to discover the intention of the author, the written declaration of whose mind it is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit."

The presumption underlying this fundamental object is that contracting parties intend what is stated in a collective agreement; that is, the meaning can be found in its express words. Hence, the plain meaning rule is the cornerstone. As frequently noted, arbitrators are directed by longstanding precedent to ascertain intention from the

words of the agreement itself. Again from ***Brown and Beatty,*** *supra*:

> "Accordingly, in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they said, and that the meaning of the collective agreement is to be sought in its express provisions. Thus, where, for example, the parties had detailed in the collective agreement specific elements of management rights, without limitation as to the manner in which they would have applied, the arbitrator was held to have erred in employing that those rights were to be exercised fairly and without discrimination. When faced with a choice between two linguistically permissible interpretations however, arbitrators have been guided by the reasonableness of each possible interpretation, administrative feasibility, and which interpretation would give rise to anomalies." (ch. 4:2100)

Arbitrator Freedman, in ***University of Manitoba and Canadian Union of Educational Workers, Local 9*** (1990), 11 L.A.C. (4th) 353 writes concerning the construing of provisions of a collective agreement:

> "The prescribed task to me is to construe and interpret the Agreement according to the intention of the parties, which intention is derived from the words they have used, unless there is an ambiguity of the nature and to the extent that would warrant the admissibility of extrinsic evidence to aid in the interpretation of the Agreement." (p. 358)

In a decision of arbitrator Hamilton in the case of ***Transcontinental Printing Inc. and Media Union of Manitoba, No. 191,*** [1995] M.G.A.D. No. 43 (QL), he writes:

> "The predominant reference point for an arbitrator must be the language used by the parties in the Agreement because it is from the written word that the common intention of the parties is to be ascertained. Language is to be construed in accordance with its ordinary and plain meaning unless adopting this approach would lead to an absurdity or a repugnancy. In these latter situations, arbitrators will interpret the words used in a manner so as to avoid such results.

> But, these are principles of interpretation to be used in the context of the written agreement itself. A counter balancing principle is that anomalies or ill-considered results are not sufficient to cause the alteration of the plain meaning of words. Neither is the fact that one interpretation of the collective agreement may result in a (perceived) hardship to one party. In the seminal case of Massey-Harris (1953) 4 L.A.C. 1579 (Gale) at p. 1580:
>
> > "...we must ascertain the meaning of what is written into a clause and to give effect to the intention of the signatories to the Agreement as so expressed. If, on its face, the clause is logical and is unambiguous, we are required to apply its language in the apparent sense in which it is used notwithstanding that the result may be obnoxious to one side or the other. In those circumstances it would be wrong for us to guess that some effect other than indicated by the language therein contained was contemplated or add words to accomplish a different result."

If the language used in a collective agreement is clear and unambiguous, interpretation should be confined to that actual language. If a provision of a collective agreement is ambiguous then extrinsic evidence, as well as the agreement, may be utilized to aid in interpretation. In Palmer, ***Collective Agreement Arbitration in Canada***, (3rd ed) it is noted concerning the effect of ambiguity:

> "...where the terms of a collective agreement are clear and unambiguous, arbitrators cannot base their decisions concerning interpretation on extrinsic evidence. On the other hand, extrinsic evidence is admissible once there is an ambiguity." (p. 136)

In ***Canadian Union of Public Employees v. Assiniboine Regional Health Authority***, [2008] M.G.A.D. No. 5 evidence was presented to arbitrator Graham as to the negotiating history to resolve any ambiguities. He writes concerning this evidence:

> "However, the commonly accepted arbitral and judicial authorities with

> respect to the admissibility of parol or extrinsic evidence, place clear and sensible limits on the admissibility and use of extrinsic evidence. In CAW Canada and Bristol Aerospace Limited (2006), 197 Man. R. (2d) 20 (Man. Q.B.), Mr. Justice Scurfield emphasized, that the first step in any analysis relating to admitting and relying on parol evidence " is to determine if the language of the collective agreement is clear. Only if it is not should extrinsic evidence be relied upon".
>
> Numerous other authorities have expressed the same principle by stating that extrinsic evidence in a labour arbitration case is only admissible if the relevant provisions in the collective agreement are ambiguous.
>
> The provisions which I must interpret are not models of clarity, but that is not to say they are "ambiguous" as that term has been used in the authorities considering the use of parol evidence.
>
> I am satisfied that it is possible, although not easy, to interpret the relevant provisions in the Collective Agreement using standard rules of construction, and interpretation. It is not necessary to resort to evidence of particular statements used by the representative of one of the parties over the course of lengthy and complex negotiations to interpret provisions which later prove controversial." (para. 93)

As already noted above in ***University of Manitoba and Canadian Union of Educational Workers*** language is to be construed in accordance with its plain and ordinary meaning unless adopting this approach would lead to an absurdity. And, as commented upon by arbitrator Hamilton in ***Parkland Regional Health Authority*** [2001] M.G.A.D. No. 60 (at para. 212), the plain meaning rule must be applied in the context of the collective agreement as a whole. Further, "anomalies or ill considered results" are not sufficient to allow for the alteration of the plain meaning of the words. And as a corollary, alteration of a plain meaning is not allowed simply because it results in a hardship to one party.

Arbitrator Hamilton in ***Parkland Regional Health Authority***, references the following quotes from "seminal cases" to reinforce these underlying principles of the plain meaning rule:

(a) ***Massey-Harris*** (1953), 4 L.A.C. 1579 (Gale):

> "...we must ascertain the meaning of what is written into a clause and to give effect to the intention of the signatories to the agreement as so expressed. If, on its face, the clause is logical and is unambiguous, we are required to apply its language in the apparent sense in which it is used notwithstanding that the result may be obnoxious to one side or the other. In those circumstances it would be wrong for us to guess that some effect other than that indicated by the language therein contained was contemplated or add words to accomplish a different result." (p. 1580)

(b) ***International Nickel Co. Of Canada and U.S.W.*** (1974) 5 L.A.C. (2d) 331 (Weatherill):

> "It may be that the provisions of the collective agreement here in issue pose a problem of construction, so that they may be said to be of 'doubtful meaning' in that very general sense. In our view, however, the adoption of the notion of 'latent ambiguity' to include generally 'all cases of doubtful meaning or application'... should not be and was not intended to be taken so far as to open the door to the admission of extrinsic evidence wherever a disagreement as to the construction of a document arises. If that were allowed, the strength of a document such as a collective agreement would be greatly reduced and the well established rules respecting the admission of extrinsic evidence would be meaningless." (pp. 333-334)

(c) ***Canadian National Railway Company and Canadian Telecommunications Union*** (1975), 8 L.A.C. (2d) 256 (Brown:

> "...it is unquestionable that unless an ambiguity either latent or patent is found, extrinsic evidence even though admitted cannot be used to

> interpret the contract. While there may be differences of opinion on the application to be given to the terms of the collective agreement that is a matter for argument and if the words used, as we have found here, are clear in themselves then arguability as to construction does not involve ambiguity." (p. 259)

Arbitrators also comment that the rule of confining to actual language is justified as preserving the integrity of a contract that the parties have taken care to reduce to writing. As explained in ***Puretex Knitting Co. and C.T.C.U., Local 560*** (1975), 8 L.A.C. (2d) 371 (Dunn): "The intention of the parties must be construed objectively" (p.259).

(ii) Application

The plain meaning rule, then, calls for language of a collective agreement to be construed in accordance with its ordinary, plain meaning. What is the result of the application of the rule in the present context?

A starting point for its application is article 21. Article 21.01 provides for overtime when an employee is authorized to work beyond the normal work day "at the applicable overtime rate." That overtime rate is set in article 21.02, based on the actual overtime worked in a week. The rate prescribed is time and one-half for the first four hours of overtime in a week and double time for overtime beyond four hours in a week. However, there is an exception to this overtime rate based on time actually worked by article 21.03: if called-out to the workplace, the employee is paid at the applicable overtime rate (of 21.02) calculated from the time of call-out to the time reasonably necessary to travel home

(21.03.1), with a minimum payment of two hours for "call-out overtime" (21.03.2).

Article 21, then, in plain language sets out the overtime provisions for employees under the Collective Agreement. Article 24 goes on to provide for additional provisions concerning overtime in the case of duty managers. "Due to the nature of its operations", the Company is entitled as set out in 24.01 to require a duty manager to be available to work outside normal working hours, with that duty manager receiving two hours pay for each day he/she is required to be available. Further, article 24.02, then, provides for additional overtime pay for a duty manager in addition to the two hours paid by article 24.01. It states that if a duty manager is called-out to the workplace, he/she is paid at the applicable overtime rate from the time of call-out to the time reasonably necessary to travel home (24.02.1), with a minimum payment of two hours for "call-out overtime" (24.02.2).

Articles 21 and 24 constitute the extent of the overtime provisions in the Collective Agreement, with 24 directed to specific terms for duty managers working overtime.

In my opinion, applying the plain meaning rule to these express words - as directed by arbitral authorities seems at first blush to support the position of the Company. Specifically, the Company argues that article 24.01 deals with a duty manager being required to be available for work outside normal working hours, that is, overtime work, with two hours pay per day for being available. Article 24.02, according to the Company on a

plain meaning, deals with the particular circumstances of a duty manager being called-out "for immediate reporting to the workplace." That does seem to be the plain reading of 24.01 and 24.02.

Implicitly the Union in its submission acknowledges this first impression on a plain reading of 24.02. For the Union says that the phrases "reporting to the workplace" and "as reasonably necessary to travel home", while not uncertain on a plain reading, must be interpreted by a line of authorities dealing with the meaning in a collective agreement of such words as "workplace" in the circumstance of call-out.

The Union, in particular, relies on the interpretative approach taken in ***The Queen in Right of Manitoba and M.G.E.A. (Buller)***, *supra,* to call-out payment when the employee does not leave his/her home. Therein the arbitrator finds that it is too narrow to interpret the agreement to say that overtime only applies if the grievor leaves his home and that, rather, he should be found to have been called-out when he provides service over the telephone. Both sides in their submissions rely on lines of authorities either supporting or rejecting that interpretative approach. As already quoted above, arbitrator Jamieson in ***Assiniboine Regional Health Authority (Chut)***, *supra*, comments on the lack of consensus and the split amongst arbitrators in dealing with pay for call-out taken at home. And in ***Brown and Beatty***, *supra*, the differences in approach to interpretation of collective agreements on this issue is commented on with reference to the numerous divergent decisions.

Brown and Beatty, goes on to summarize: "in most cases, however, it is the language of the agreement, not differences of opinion among arbitrators, which determines the outcome of a case." It must be said, reading the cited cases as a whole, that they are not all reconcilable. But the following interpretative principles emerge overall:

(a) not surprisingly, the applicable terms of the collective agreement are consistently said to be the key. If those terms clearly provide what is to occur in terms of overtime payment when a call-out does not require the employee to leave home, then those terms are to govern;

(b) in many circumstances the agreement may be less than clear, with different interpretations possible. In that case, some arbitrators favour recognizing that the return to work includes the employee working at home. Thus, for example, in ***Canada (Treasury Board - Transport) and Health***, *supra*, the arbitrator found that "during the time Mr. Heath was performing the (call-out) work requested, his home became his place of work (p. 353)." He goes on to note:

> "I also agree with Mr. Smith that if the parties wanted the collective agreement to be interpreted as requiring a return to the normal workplace or work site, they would have indicated that since other clauses within art. 13, Overtime, clearly refer to "place of work". As Brown and Beatty, supra, have written [at para. 4:2100] the language before me "should be viewed in its normal or ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the collective agreement". While cl. 13.02 could and someday may be free from doubt, I do not find that within the overall context of art. 13 that it is difficult to interpret and, therefore, it does not lead to some absurdity or inconsistency."

(c) even if the employee, by the collective agreement terms, is entitled to claim that he has been recalled to work when working at home, there is generally recognized to be some limit to this interpretation. So in the ***Queen in Right of Manitoba and M.G.E.A.***, Mr. Freedman notes:

> "One can envision an employee in Mr. Buller's position having a 24-hour or 48-hour period off work being constantly disrupted every four hours by telephone calls or visits. If the disruptions are material, or "significant", the provisions of art. 3.06 should apply. On the other hand, to treat one five-minute telephone call every four hours as an entitlement to three hours of overtime at time and one-half would, I think, be beyond the intention of the parties, had they directed their minds to that particular situation. While it would admittedly be disruptive, I do not think the Agreement should be read as requiring it to be compensated, under art. 3.06" (p.245)

Ultimately, it is the wording of the agreement which governs. So in the common circumstance of the on-call employee servicing calls from home, the wording of the call-out provisions are interpreted to determine if the parties to the collective agreement intended that the employee must actually leave home in order to be paid at the prescribed rate.

This is well illustrated by ***Ontario (Ministry of Government Services) and O.P.S.E.U. (Couture)***, *supra*. Arbitrator Dissauayake considers the stand-by provisions of the agreement. He reviews a series of awards, including ***Re Markham Stouville Hospital*** (2007) 167 L.A.C. (4th) 425 (Albertyn), in which the arbitrator found that when the grievors performed the work required "remotely", they met the terms of the collective agreement

(which provided for call-back pay "where employees are called back to work"). In Markham, arbitrator Albertyn goes on to quote the following from ***Re Northeast Mental Health Centre*** (2004) O.L.A.A. No. 673 (Whittaker):

> "Having reviewed the authorities, we find that in the absence of language which indicates something else, call back entitlement should turn on whether an employee is obliged to perform "work" for the employer where she would otherwise be entitles to private pursuits. In the absence of language in the collective agreement that would require attendance at work, call back pay should be understood as compensation for the disruption to one's own time and nothing else.
>
> Arbitrator Albertyn then formulates the test to be applied as follows at para. 28:
>
> > the question then is whether there is language in the collective agreement which indicates that the call-back entitlement requires the conclusion that it is payable only upon physically returning to the workplace to perform the work as, on the language, was the case in Northeast Mental Health Centre
>
> While those cases had to do with the entitlement to call-back pay, the same reasoning and test is appropriate in the present case. Applying that test, the conclusion is inescapable that the language in Article UN10.1 contemplates a physical return to the work place. Just as the reference to "leave" and "leaving" was held to make sense only if employees were returning to the workplace in ***Re University of Alberta***, the reference to "required to return" has the same result. In the language before me, the language is even more suggestive of such an intention because there is explicit reference to "the work place". In my view, it is an unreasonable stretch to interpret those words as including circumstances where the employee remains available immediately to work using the computer at home or other off site location. That would be to totally ignore the parties' reference to the workplace. It is clear that when regularly scheduled, the grievors performed their work at their workplace, i.e. their office. The definition of stand-by time in article UN10 envisages availability to immediately return to that workplace. There is nothing in the union's particulars that asserts that when on the rotation during after hours, the grievors are required to remain available to immediately return to the workplace."

In summary, taking these authorities and the principles set by them into

account, I have reached the conclusion that the ITSM duty managers are not entitled to the call-out overtime sought by the Union in this grievance. I do so for several reasons.

Most important is the wording of article 24. It provides (in 24.01) for two hours pay for each day that a duty manager is on-call outside normal working hours. In addition, in the circumstance of "a call-out for immediate reporting to the workplace" the duty manager is paid at the applicable overtime rate for the time "after completion of the job" for the "period as reasonably necessary to travel home", with a two-hour minimum for that overtime period.

On a plain meaning of this wording, I am satisfied that the framers' intention is that the two hour minimum is to attach when the employee is called-out from home (24.02.1). That is, I am satisfied that the unequivocal language in article 24 provides that the call-back entitlement is payable only upon the physical return to the workplace to perform the work. As found in ***Ontario (Ministry of Government Services)***, it is "an unreasonable stretch to interpret 24.02.1 as including circumstances where the duty manager provides call-out services while at home. Such a stretch requires one to ignore the obvious meaning of several words and phrases in 24.02.1.

Further, this interpretation does not require one to ignore or reject the reasoning behind such decisions as ***The Queen in Right of Manitoba and M.G.E.A. (Buller)***. The wording of the applicable collective agreement call-out provisions in certain awards - referring to "shall receive for the work" ***(The Queen in Right)*** or to "returns to

work" ***(Canada Treasury Board- Transport and Health)*** or to "reports to duty" and "called back to work" ***(Health Employers Assn. Of British Columbia and B.C.N.U.)*** - allow by their wordage for the interpretation that call-out to work can include working at home, without return to the workplace. Such decisions, that is, do not call for disregarding the express wording of the collective agreement found in such awards as ***Assiniboine Regional Health Authority*** and ***Ontario (Ministry of Government Services) and O.P.S.E.U.***, in which there are explicit references to return to the workplace. The present circumstances, in my view, fall within this second category of awards.

Equally as important, this interpretation does not cause one to ignore the fact that duty managers presently conduct supported calls from home. In those circumstances, article 21.01 provides for authorized overtime. The rate of overtime is then set by 21.02. A duty manager directed to be available for work outside normal working hours (by 24.01) receives two hours pay per day of required availability plus overtime (by 21.02). It is only, as contemplated in the wording of 24.02.1, when the duty manager is physically called-out that the two hour minimum of 24.02.2 applies.

Arbitrator Freedman in ***The Queen in Right of Manitoba and M.G.E.A*** and other arbitrators have recognized that with modern equipment an out-of-work-hours service provider can provide such services at times without leaving home. Essentially the same service is provided without attendance at the workplace. In such awards recognizing this reality, the arbitrators are seeking to find that the governing collective agreements

compensate the service provider as intended by the agreement framers. Here the scheme of the Collective Agreement provides, by articles 21 and 24, for compensation for all overtime services of the ITSM duty mangers, whether by the regular overtime provision in 21.01, by the two hour availability pay in 24.01, and by the two hour minimum if the duty manager is required to return to the workplace. It is not necessary, in other words, to broaden the ambit of 24.02.1 from its plain meaning for duty managers to be compensated for supported calls handled without leaving their homes.

Also, the interpretation of article 24.02 - that the duty manager must go to the workplace to be paid at least the two hour minimum - is supported by the principle that arbitrators "ought not to impose a monetary obligation on an employer that he clearly did not bargain to pay" (***Re Wire Rope Industries Ltd. and U.S.W., Loc. 3910*** (1982), 4. L.A.C. (3d) 323 (Chertkow) - as applied in ***Brandon General Hospital and Manitoba Nurses Union***. The wording, on a plain reading of 24.02, does not support an interpretation that in-home supported calls by duty managers are to be compensated on a two hour minimum basis. The wording necessary for such an interpretation to create such a monetary obligation simply isn't present.

In reaching this conclusion, I should also note other aspects of Counsels' submissions. Both submissions recognized that the present two-tier compensation scheme for on-call duty managers is outside the wording of the Collective Agreement. I accept the parties' common position, however, that there is nothing under the provisions of the Collective Agreement that prevents the two-tier payment practice for on-call duty managers

that was implemented in 2005, and that continues today. Its existence does not impact, in my view, on the interpretation exercise called for, and which is set out above.

Union Counsel also stressed in his submission that Mr. Rooney had answered during cross examination that the phrase "call-out overtime" in 24.02.1 included work performed at home. Company Counsel responded that Mr. Rooney had also in testifying denied that it did. In that regard, I believe it is necessary to consider his evidence in its totality. Effective cross examination may have "extracted" a contrary answer, or two, from the Company representative, but taken as a whole I do not believe that his position on the meaning of the phrase "call-out overtime" in 24.02 was other than that advanced by the Company.

Returning to the overall anaylsis of the grievance, given the finding reached that article 24 is clear and unequivocal, and given its interpretation set out above, it is not necessary, and it would be inappropriate, to consider the extrinsic evidence presented during the grievance hearing. Such extrinsic evidence is only to be relied upon if the language of the Collective Agreement is unclear. Here that language has been found clear on its plain meaning.

6.00 DECISION

In view of all the above, the grievance is dismissed.

I wish to compliment Counsel for their thoughtful presentation of this grievance.

Dated this 25th day of January, 2013

Gavin M. Wood
Chairperson

I CONCUR/~~DISSENT~~ IN THE ABOVE AWARD.
Dated this 23rd day of January, 2013

Robert A. Simpson
Nominee for MTS

I ~~CONCUR~~/DISSENT IN THE ABOVE AWARD.
Dated this 23rd day of January, 2013

Faron Trippier
Nominee for TEAM