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")

DISSENT

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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DISSENT

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1.00 Overview

The core issue in this case involves the interpretation of Article 24 of the Collective Bargaining Agreement dated February 20, 2010 to February 19, 2013, (the "Current Collective Agreement").

Additionally, it is argued by Telecommunications Employees Association of Manitoba (TEAM) (hereinafter referred to as "TEAM" or the "Union"), that the within grievance is brought pursuant to predecessor versions of the Collective Bargaining Agreement.

Specifically, TEAM argues that the applicable provisions of the predecessor Collective Agreements apply in the same manner as the wording of the Current Collective Agreement in force as of the date of the Arbitration. Relief is sought by TEAM, on a retroactive basis, to the date that the two-tier system of payment was implemented by MTS Allstream Inc. (hereinafter, "the Company" or "MTS"). This has been stated to have occurred sometime in 2005.

2.00 The Collective Agreements

For clarity, the prior versions of the Collective Agreements are included as part of Exhibit No. 1 in this proceeding. Those versions are as follows:

1. The February 19, 2004 to February 19, 2007 Collective Agreement;

2. The February 19, 2007 to February 19, 2010 Collective Agreement; and

3. The Current Collective Agreement – February 20, 2010 to February 19, 2013.

Article 24 of the Current Collective Agreement is identical to Article 23 of the February 19, 2004 Collective Agreement and Article 24 of the February 19, 2007 Collective Agreement.

Unless otherwise specifically stated, reference to "the Collective Agreement" shall be a reference to all 3 versions of the Collective Agreement, collectively.

I do not find it necessary to repeat the facts as recorded by the Chair, Mr. Wood, however I will where necessary refer to the facts in reference to these reasons.

The key section of Article 24 is Article 24.02.2. This is the section which requires interpretation.

Importantly it should be noted that "call out overtime" as found in Article 24.02.2 is not a defined term under the Collective Agreement. Similarly, "call out for immediate reporting to the workplace" as found in Article 24.02.1 is not a defined term under the Collective Agreement.

3.00 Summary of the Most Useful Interpretation Principles

Counsel provided numerous authorities to the Board to provide guidance in interpreting the Collective Agreement.

By no means is the following list intended to be an exhaustive list of interpretation principles, however, I find these principles to be the most helpful in this case.

1. The fundamental object in construing the terms of the collective agreement is to discover the intention of the parties who agreed to it. As stated in **Halsbury's Laws of England**:

> "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.
>
> ...

> But the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention."

Brown & Beatty, **Canadian Labour Arbitration**, 4th ed., 4:2100

2. Accordingly, in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions.

Brown & Beatty, **Canadian Labour Arbitration** 4:2100

3. When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the purpose of the particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies.

Brown & Beatty, **Canadian Labour Arbitration** 4:2100

4. In searching for the parties' intention with respect to particular provisions in the agreement, arbitrators have generally assumed that the language before them should be viewed in its normal and ordinary sense unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense.

Brown & Beatty, **Canadian Labour Arbitration** 4:2110

5. There is to be a presumption that all words have meaning. It is further to be a presumption that the words to be construed were not intended to be in conflict. Where

> the same word is used twice it is presumed to have the same meaning, where two different words are used, they are intended to have different meanings.
>
> Brown & Beatty, **Canadian Labour Arbitration** 4:2120

Thus, I take it from these principles that the first step in interpreting a written instrument is to look at the wording of the instrument and only the wording of the instrument.

4.00 Extrinsic Evidence

Although there are numerous exceptions, the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing. If the written agreement is ambiguous, however, such evidence is admissible as an aid to interpretation of the agreement to explain the ambiguity but not to vary the terms of the agreement.

Thus in considering the meaning of Article 24 of the Collective Agreement, it is not appropriate to consider extrinsic evidence. Accordingly, in this first step of the analysis, what follows is my analysis of the written provision found in Article 24 of the Collective Agreement.

5.00 Analysis of Article 24

The question and the ultimate issue in this arbitration, is to determine the meaning of the words "call out overtime". As stated, these words are not defined in the Collective Agreement.

The position of TEAM is that work performed by an employee at home by ITSM Duty Managers constitutes call out overtime and is subject to the 2 hour minimum stipulated by Article 24.02.2.

The position of MTS is the opposite, that work done at home by the ITSM Duty Managers does not constitute call out overtime; it is not subject to the 2 hour minimum stipulated.

Article 24 is the section of the Collective Agreement intended to apply to Duty Managers. It specifically applies to payment to Duty Managers for work outside of normal working hours. It is in addition to what is found elsewhere in the Collective Agreement under Article 21 which specifically deals with overtime.

Article 24 establishes three separate methods for paying Duty Managers:

24.01

Article 24.01 stipulates that the Company may direct an employee to be available for work outside of normal working hours and that he or she shall receive Duty Manager pay at the rate of two (2) hours per day for each day he or she is required to be available.

Article 24.01 does not contain a requirement of returning to the office or the workplace for this pay to be received. It is given automatically whether or not any work is actually performed by the employee. Obviously therefore, it is paid to Duty Managers when they are not required to attend at the workplace.

24.02.1

Article 24.02.1 stipulates that for a call out for immediate reporting to the workplace, the employee 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 is reasonably necessary to travel home.

Article 24.02.1 does require the employee to "report" to the workplace.

However, it is not Article 24.02.1 which is to be interpreted under this grievance. It is Article 24.02.2.

24.02.2

Article 24.02.2 stipulates that a minimum of 2 hours shall be paid for call out overtime.

6.00 Conclusions Regarding Article 24.02.2

Regarding these three sections of Article 24 (Article 24.03 is not relevant to this analysis), I draw the following conclusions:

1. Article 24.01 is intended to compensate Duty Managers without a requirement of reporting to the workplace.

2. Article 24.02.1 does require an employee to report to the workplace.

3. Article 24.02.2 does not require reporting to the workplace.

4. I conclude that by using the term "call out for immediate reporting to the workplace" in Article 24.02.1 as distinct from using the term "call out overtime" in Article 24.02.2, there was an intention by using this different language to refer to two different types of call out work. Where two different words are used, they are intended to have different meanings.

5. In interpreting Article 24, and specifically Article 24.02.1 and Article 24.02.2, I conclude that:

    a) "Call out overtime" is something different, and forms a larger or broader category of work than "call out for immediate reporting to the workplace".

    b) In the case of a "call out for immediate reporting to the workplace, Article 24.02.1 sets a maximum payment for that work, which is to include travel time.

c) I further interpret Article 24.02.2 as to require a minimum of 2 hours to be paid for call out overtime. As 24.02.2 does not stipulate a requirement for reporting to the workplace, I conclude that this is not a requirement of the section.

I therefore conclude that based upon the plain wording of Article 24.02.2, "call out overtime" does not require an employee to return to the workplace, and accordingly, applies to work conducted at home.

I am aided in this interpretation by the following:

1. The relevant case law submitted by counsel, related to call out overtime; and

2. The evidence of Mr. Rooney, of the Company's interpretation of Article 24.02.2.

7.00 Summary of Legal Principles from Case Law Related to Call Out Overtime

Both counsel for TEAM and counsel for MTS provided ample case law to support their respective positions regarding the interpretation of Article 24. However, one must be cautious when considering case law considering other contractual provisions as the cardinal rule in interpreting contractual provisions is to first consider the wording of the provision under consideration and to give effect to the words given.

However, it can be helpful to look to case law to extrapolate principles where possible, with the caveat that one must be cautious in doing so to give effect to the written instrument being considered.

In ***The Queen in Right of Manitoba and M.G.E.A.*** 28 L.A.C. (3d) 241 Arbitrator Freedman Q.C., (as he then was), considered a similar provision regarding the payment for call out overtime.

In that case, Arbitrator Freedman was considering a provision which stipulated as follows:

> "An employee, if called out or scheduled to work overtime shall receive for the work, compensation for a minimum of three (3) hours at the applicable overtime rate provided that the period of overtime worked by the employee is not contiguous to his scheduled working hours…"
>
> ***The Queen in Right of Manitoba and M.G.E.A.*** 28 L.A.C. (3d) 241, p. 243

The collective agreement in ***The Queen in Right of Manitoba and M.G.E.A.*** 28 L.A.C. (3d) 241, as well as collective agreements considered in certain other awards are similar, in that the wording of those collective agreements stipulate for call out pay as follows:

a) "shall receive for the work" ***The Queen in Right of Manitoba and Manitoba Government Employees Association*** 28 L.A.C. (3d) 241;

b) returns to work as in ***Canada (Treasury Board – Transport) and Health***, RE 43 L.A.C. 346; or

c) reports to duty and "called back to work" as in ***Re Health Employers Assn. of British Columbia and B.C.N.U.***, 43 L.A.C. (4^{th}) 25.

I agree with Mr. Wood that these provisions allow by their wording for the interpretation that call out work can include working at home without return to the workplace.

I also agree with Mr. Wood that such decisions do not call for the collective agreements' express wording to be disregarded. These cases, where call out provisions are found to apply to work at home, do not contain wording that specifically requires or stipulates a return to the workplace. However, when considering Article 24.02.2, it is clear that this section does not require a return to the workplace.

Article 24.02.2 has specific, different wording than that which is found in Article 24.02.1. I do not find that the wording of Article 24.02.1 modifies or provides a definition for the clear wording of Article 24.02.2.

If it was the intention to provide a definition of "call out overtime" in Article 24.02.2, so as to require a return to the workplace, that is something that would have had to have been set out in the terms of the Collective Agreement. This has not been done.

8.00 Evidence of Don Rooney

Significantly, Mr. Rooney was cross-examined by counsel for TEAM with respect to the application of Article 24.02.2. Mr. Rooney was specifically asked whether work done at home by ITSM Duty Managers constituted "call out overtime". To this question Mr. Rooney responded in the affirmative. He did so twice.

I cannot accept that an individual in Mr. Rooney's position could have given such an answer in an arbitration, principally established to determine the meaning of call out overtime, and not to have that answer binding upon the Company.

I must point out that I found Mr. Rooney, as I did all of the witnesses in this case, to be professional, knowledgeable of their respective fields, and credible.

This is not a case of an out of arbitration statement being attributed to Mr. Rooney in the course of the arbitration, in an attempt by TEAM to assert an advantage or an admission. This is an answer given by Mr. Rooney in the context of an arbitration, which given the solemnity of the proceedings, ought to be given significant weight.

As a matter of construction and interpretation I consider this answer given by Mr. Rooney to be an admission, the effect of which is to demonstrate that in interpreting Article 24.02.2, there is no ambiguity. "Call out overtime" applies to work done from home.

9.00 Conclusion Re: Interpretation of Article 24.02.2

In this case, the governing and dominant principle for construing this written instrument is that where two different words are used, they are intended to have different meanings.

I find nothing in the wording of Article 24.02.2 as to require a return to the workplace, as is specifically required to receive payment pursuant to Article 24.02.1.

I therefore conclude that, based upon the first step of the analysis to be applied in the construction of a written instrument, Article 24 of the Collective Agreement is clear and unambiguous.

I find that Article 24.02.2 is intended by its express wording to include work performed by Duty Managers without returning to the workplace. I further find that the principles enunciated in the case law which support this conclusion to be applicable and specifically, because Article 24.02.2 does not require a return to the workplace, that those cases which have found call out provisions to apply to work done from home to be persuasive and determinative authorities.

In coming to this interpretation, I am of the view that this does not amount to "an absurdity" or an unintended windfall to the grievors. With a 2 hour minimum payment system in place, I find that employees are properly and fairly compensated for having personal time interrupted, and being required to remain available for work outside of normal working hours. This, I find, was the intention of the Collective Agreement.

This is not a situation where employees receive a 2 hour minimum payment for every call received. Under the Collective Agreement, employees are paid a 2 hour minimum for all work performed during a particular 2 hour period, whether they receive one call, or ten. I find this to be reasonable compensation for the work performed.

10.00 Extrinsic Evidence

As I have found the wording of the Collective Agreement to be clear and unambiguous, it is not necessary to delve into the extrinsic evidence, which was presented during the hearing. However, if I had found it necessary to consider the extrinsic evidence I would have found that the extrinsic evidence supported TEAM's position and would have found that the call out provision of Article 24.02.2 applied to work done by Duty Managers at home. Because significant time was spent during the hearing to lead extrinsic evidence, I shall record my findings.

As I have previously stated, extrinsic evidence is inadmissible unless there is an ambiguity. Extrinsic evidence that might be of assistance in interpreting such an agreement as the one in this arbitration consists of either:

a) the negotiating history between the parties; or

b) past practice.

11.00 Negotiating History

I agree with the following passage regarding the sparing use which can be made of past negotiating history as an interpretive tool.

> "It is doubtful whether any inferences can properly be drawn about the meaning of an expiring collective agreement from exchanges that occurred at the bargaining table in respect of a replacement agreement.
>
> ...

> Evidence of negotiating history is generally less helpful than evidence of past practice, since it is often merely evidence of the positions taken by the parties, or of what the negotiators thought, which is of little assistance."
>
> Snyder, **Collective Agreement Arbitration in Canada**, Fourth Ed., LexisNexis, p. 43

Details of the negotiating history have been set out, in the reasons of the Chair. I find that such evidence of negotiating history to be of little use in interpreting the Collective Agreement.

12.00 Past Practice

Accordingly, I view the evidence of past practice to be of most assistance in the analysis of extrinsic evidence.

The past practices of the parties can succinctly be found in the Agreed Statement of Facts filed in this proceeding as Exhibit No. 1, specifically at paras. 13, 14, and 15.

To summarize those facts, the practice which has evolved is that the ITSM Duty Manager is paid 1 hour pay at double time for each day they are on-call whether or not he or she receives a call requiring attention. This I interpret as being consistent with Article 24.01.

However, what is telling is that between 11:00 p.m. and 6:15 a.m., MTS pays to ITSM Duty Managers a minimum payment of 2 hours of total time worked on a call. This minimum 2 hour rate of pay is paid Monday to Friday 11:00 p.m. to 6:15 a.m. as well as weekends or holidays, 11:00 p.m. to 6:15 a.m.

It was clear from the evidence that this practice of paying ITSM Duty Managers a 2 hour minimum for calls received between the hours of 11:00 p.m. and 6:15 a.m., was known to the Company.

There is no provision of the Collective Agreement which governs this conduct, or which suggests a different rate of pay between the hours of 11:00 p.m. and 6:15 a.m. for ITSM Duty Managers.

I can only interpret this conduct by the Company to pay the minimum 2 hours of pay for calls received between 11:00 p.m. and 6:15 a.m. as to be an acknowledgement of the application of Article 24.02.2 to work done by ITSM Duty Managers at home.

I find that this practice has arisen out of a recognition by the Company that Article 24.02.2 applies to work done at home by ITSM Duty Managers.

13.00 Determining the Appropriate Relief

In considering the appropriate relief, the issue for the Board is to determine how far back in time the grievance reaches. There are several time periods to consider. They are the following:

1. To limit the relief in the award to amounts not paid to 20 days prior to the filing of the grievance;

2. To extend benefits to February 20, 2010, the start date of the current Collective Agreement;

3. To extend benefits to February 19, 2008, the start date of the prior Collective Agreement; and

4. To extend benefits to 2005 which occurred during the currency of the February 19, 2004 to February 19, 2007 Collective Agreement. The Agreed Statement of Facts, para. 18 states, "The method of paying the ITSM Duty Managers outlined above has been in place since 2005".

14.00 Analysis

The Collective Agreement stipulates that the grievance must be filed within 20 days from the date that the employee has been made aware of the alleged violation (Article 5.04.2).

This question to be decided arises in the context of timeliness. Where the grievance has been characterized as a continuing breach, the power to relieve against the limits under the Act can be used by an arbitrator to fashion a remedy to reflect the continuing nature of the breach. The decision of the Manitoba Court of Appeal in ***Canadian Paper Workers Union Local 830 v. MacMillan Bathurst Inc.*** (1987) 49 ManR. (2d) 82, confirmed that arbitrators in Manitoba may relieve against breaches of time limits, notwithstanding the existence of mandatory language in the collective agreement.

Re Province of Manitoba and Manitoba Government and General Employees' Union
180 L.A.C. (4th) 150 p. 174 and
Re Province of Manitoba and Manitoba Government and General Employees' Union
(Debra Fredborg Grievance), [2005] MGAD No. 13 ad No. 13, at para. 70

In ***Re Province of Manitoba and Manitoba Government and General Employees' Union***, 180 L.A.C. (4th) 150, Arbitrator Peltz granted relief from the time limits on the following basis:

> "In the *Mileage Grievance, supra*, it was also confirmed that the statutory authority to relieve extends to awarding retroactive compensation (at para. 24).
>
> I accept the Union's argument that this is an appropriate case to grant relief from time limits. The Union was unaware of the Employer's failure to credit muster time and no negligence on the Union's part was suggested. The Union acted promptly once the error was revealed. No prejudice of any kind was claimed by the Employer. Finally, while the delay was substantial, the Employer's exposure will not likely be large. The negotiated rights of employees can be upheld without imposing an unreasonable burden on the Employer and its operations. In these circumstances, it would be fair and equitable to exercise my discretion in favour of granting the requested relief.

> Based on the foregoing, as an arbitrator with threshold jurisdiction over a continuing grievance, I have concluded that I can and should award redress on a retroactive basis as claimed."
>
> ***Re Province of Manitoba and Manitoba Government and General Employees' Union***, 180 L.A.C. (4th) 150, p. 174

15.00 Analysis Re: Timelines

On the facts of this arbitration, I find that the grievance is properly characterized as a continuing one. This in fact was a matter agreed to by counsel for MTS, i.e., that the grievance was of a continuing nature.

Applying the criteria set out by Arbitrator Peltz, I further find as follows:

1. The Union was unaware of the Company policy set out in paras. 13 and 15 of the Agreed Statement of Facts to partly implement the 2 hour minimum overtime rate for work done at home by ITSM Duty Managers.

2. While in the Agreed Statement of Facts it is acknowledged that the employees were aware of this practice, this does not equate to knowledge of the Union. I further find that the grievors were unaware that the two-tier payment system was a breach of the Collective Agreement until sometime after December, 2010, when Mr. raised the issue with a labour relations analyst with the Union.

3. Additionally, efforts were made by the Union to obtain from the Company information related to the method of payment for all employees within the TEAM bargaining unit. This information was not provided by the Company.

Exhibit 4 is a February 13, 2000 letter to Mr. Don Rooney seeking information. On the second page, under point no. 6 information is requested as follows:

"Information on the compensation paid to all employees within the TEAM bargaining unit. This information to include:

- Employee number, first name, initial, and last name
- Job title
- Job number and corresponding SAP number as appears in bi-weekly Dues List
- Status e.g. RFT, RPT, Term, Acting, Special Assignment
- Salary group and annual/increment step
- Base salary
- Bonus Plan eligibility
- Bonuses paid
- Other forms of compensation e.g. President's Club, ad hoc payments etc.
- VP group, department & sub-group."

In response to this letter, no information was provided by the Company related to the compensation paid to all employees within the TEAM bargaining unit.

I find that the request for information by TEAM required a response from the Company, which would have alerted the Union to the existence of the method of paying employees call out overtime when working away from the physical location of the workplace. This information was not provided.

In considering the prejudice to the Company, it was argued that the Company has been prejudiced because it has lost the ability to create another shift which could have alleviated and avoided the Company's potential liability. I am simply not persuaded that there is real prejudice to the Company. No evidence was led as to:

a) The potential total costs to the Company if the grievance is successful; or

b) The cost to the Company of creating a second shift or a shift to cover call out work, or whether the creation of such a shift would actually result in a cost savings to the Company.

Based on the foregoing, I would conclude that jurisdiction is found over this matter as a continuing grievance. I would further conclude that to be fair and equitable, redress should be available on a retroactive basis as claimed. On the facts of this grievance:

a) Any alleged prejudice by the Company has not been proven or shown to exist by reference to actual costs to the Company; and

b) It would be unfair to the grievors to limit the ability to grieve and to seek redress on a retroactive basis, when in the face of an express request for information from the Company, that information, known to the Company was not provided to the Union.

16.00 Length of Remedy – Application of Prior Collective Agreements

Having found a continuing grievance and equitable grounds to exist to award redress on a retroactive basis, the question turns to how far to provide benefits retroactively. Specifically, is it available to provide redress under previous collective agreements.

As set out, *supra*, this grievance purports to cover a period of time beyond the start date of the current Collective Agreement.

The second last paragraph of page 2 of the grievance sets out the timeframe for the grievance:

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

However, in the opening statements of TEAM counsel, and in the Agreed Statements of Facts, TEAM is advancing a claim for relief dating to 2005, and no earlier.

I therefore must consider whether on equitable grounds the grievance ought to extend benefits and provide redress to January 1, 2005 (at the earliest), during the Collective Agreement dated February 19, 2004 to February 19, 2007, or to some other period.

17.00 Accrued Rights

Whether or not an arbitrator under an existing collective agreement has jurisdiction to consider granting relief under prior collective agreements is driven by the determination as to whether the grievance involves vested or accrued rights.

In ***Dayco (Canada) Ltd. v. CAW-Canada***, [1993] 2 S.C.R. 230, the Supreme Court of Canada enunciated the principles to be considered in considering such a grievance. At p. 49, the Court stated as follows:

> "A collective agreement is rather like a contract for a fixed term. At the end of the term, the contract or agreement is said to "expire" by mutual agreement. But the contract is not thereby rendered a nullity. It ceases to have prospective application, but the rights that have accrued under it continue to subsist."
>
> ***Dayco (Canada) Ltd. v. CAW-Canada***, [1993] 2 S.C.R. 230

And further, in considering the implication of a subsequent collective agreement upon a prior collective agreement, the Court at p. 50 stated as follows:

> "The new agreement "displaces" the old one, which is no longer in force. But this is with respect to the current employment relationship, and says nothing about the previously accrued rights of the parties; see also *Re United Steelworkers, Local 5951 and Medland Enterprises Ltd.* (1963), 14 L.A.C. 55."

Notably, and still at p. 50 of the reasons, the Supreme Court of Canada offers guidance as to the types of rights which may be considered as accrued rights for the purpose of this analysis. The Supreme Court stated as follows:

> "Other cases on this point are reviewed below, and I have found no case that suggests that accrued rights are expunged once a new collective agreement is negotiated. **Moreover, I see nothing differentiating the promise to pay retirement health benefits from promises to pay regular wages or vacation pay." [Emphasis added]**

Notably, at p. 57, in further analysis, the Supreme Court offered further guidance as to the principles to apply in determining whether rights are vested or accrued.

> "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.
>
> ...
>
> 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."

Dayco (Canada) Ltd. v. CAW-Canada, [1993] 2 S.C.R. 230, p. 57

Subsequently, in ***Re Huntsville District Nursing Home and Ontario Nurses' Association*** (Chipperfield) 106 L.A.C. (4th) 312, Arbitrator Lynk considered the Supreme Court's decision in ***Dayco*** at para. 324, Arbitrator Lynk stated as follows:

> "Since the Supreme Court of Canada's ruling in ***Dayco***, arbitrators have routinely found that employment rights and entitlements accrued under a prior collective agreement have survived the end of the agreement. Accordingly, they can be grieved and remedies can be sought before an arbitration board appointed under a subsequent collective agreement."

It must be noted, however, that in so finding, Arbitrator Lynk found that an arbitration board has the jurisdiction to hear, decide, and remedy a claim respecting an employment right that has crystallized, accrued, or vested under a prior collective agreement, notwithstanding the rule in ***Goodyear***.

18.00 The Rule in *Goodyear*

At paras. 320 – 321 of Arbitrator Lynk's reason, he refers to the rule in ***Goodyear***. The rule in ***Goodyear*** is generally that an arbitration panel can have no jurisdiction beyond the collective

agreement under which it is constituted. In ***Re Goodyear Inc.***, the Board of Arbitration concluded as follows:

> "There are numerous cases where boards of arbitration have found that they have jurisdiction to hear a grievance under a given collective agreement where the breach of the current agreement originated as a breach of identical terms of an earlier expired agreement or as a breach of the current agreement which began outside the mandatory time-limits of the grievance procedure. In those cases where the action complained of can be characterized as a continuing breach of the current agreement, as distinguished from a single and spent breach of either the expired collective agreement or the current agreement, the board of arbitration can assert jurisdiction, but only in so far as the grievance relates to ongoing breaches of the current agreement. Its remedial authority does not extend retroactively beyond the period of the collective agreement under which it is constituted (see, *e.g., Re Parking Authority of Toronto and C.U.P.E., Local 43* (1974), 5 L.A.C. (2d) 150 (Adell) [application for judicial review dismissed 5 L.A.C. (2D) 336 *n* , 47 D.L.R. (3d) 40, 4 O.R. (2d) 45]), and redress generally excludes any collective agreement: *Re U.S.W., Local 7105, and Automatic Screw Machine Products Ltd.* (1972), 23 L.A.C. 396 (Johnston)."

This I accept as did Arbitrator Lynk in ***Re Huntsville District Nursing***, to be a general principle. However, Arbitrator Lynk noted that since ***Re Goodyear Inc.***, several significant variances to the rule have emerged. The reason for these variances principally being that if the general rule applied literally in all cases, a result could ensue which was a consequence not intended by the parties to the contract and one which was unjustified in the scope of contemporary industrial relations.

Huntsville District Nursing Home and Ontario Nurses' Association,
[2001], 106 L.A.C. (4th) p. 322

Arbitrator Lynk concluded that two variances were to be extracted from the case law. He noted that these are not necessarily exhaustive, however, but these two variances did capture the prevailing exceptions that arbitration boards over the past two decades have regularly adopted.

The first variance noted by Arbitrator Lynk is that the parties themselves can agree to charge the arbitration board with the necessary jurisdiction to grant a remedy for a breach of another collective agreement aside from the one under which it was appointed.

Huntsville District Nursing Home and Ontario Nurses' Association,
[2001], 106 L.A.C. (4th) p. 322

The second variance to the ***Re Goodyear*** rule goes to the question of accrued or vested employment rights and in this regard, Arbitrator Lynk noted the clearest example of this variance was to be found in the Supreme Court's decision ***Dayco***, *supra.*

Huntsville District Nursing Home and Ontario Nurses' Association,
[2001], 106 L.A.C. (4th) p. 322

Considering then the application of the second variance to the rule in ***Goodyear***, Arbitrator Lynk at p. 325 of his reasons in ***Re Huntsville*** set out a test to be applied. That test is set out as follows:

> "I am satisfied that the accumulated weight of judicial and arbitral case law has established that an arbitration board may have the jurisdiction to hear, decide and remedy a claim respecting an employment right or entitlement that had crystallized or accrued or vested under a prior collective agreement, notwithstanding the rule in *Re Goodyear*. However, for jurisdiction to be acquired under this second variance, each of the following three pre-conditions must be met.
>
> First, the employment right or entitlement that is being claimed must have accrued or vested under the prior collective agreement(s). To put it another way, an employment right found in a collective agreement expires with the termination of the collective agreement, unless the right or entitlement can be said to have crystallized or vested or accrued prior to the end of the agreement. Having crystallized, these rights remain grievable and are capable of arbitral remedy, unless the parties have extinguished these rights by some subsequent agreement. Mr. Justice La Forest, at p. 641 of the *Dayco* ruling, stated that:
>
> > '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...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.'

Whether a right or entitlement can be said to have vested or accrued prior to the expiry of a collective agreement is to be judged on the circumstances of each case. However, it appears clear from *Dayco* that crystallization or accrual would have an ordinary contractual meaning (vesting would appear to have a more specific, pension-related meaning), such that the fulfillment of a promise, or the satisfaction by one party of its side of a mutual obligation, would be ordinarily sufficient to acquire that status.

Second, the arbitration board must determine whether the grievance before it has been filed under the previous collective agreement or agreements where the claim in question has been said to have crystallized. This is ordinarily determined by examining whether the grievance has made any specific references in its language to an earlier date when the claim in question could be said to have accrued: *Re Air Canada, supra*; *Re Canadian Broadcasting Corp., supra*. For example, in *Re Beachville Lime Ltd., supra*, the grievance was filed in December 1999, and specifically referred to incidents that occurred in 1994 and 1995. These references were sufficient to imply:

> '...that the grievance is filed under the collective agreements in effect at those times. Accordingly, it must be found that the arbitrator has jurisdiction to hear and consider this grievance as it relates to rights that may have accrued to the grievor under the collective agreements in place in 1994 and 1995. [At p. 359.]

And third, the grievance must satisfy any procedural or timeliness provisions in the collective agreement, subject to their modification by statute: *Re Beachville Lime Ltd., supra.*"

Huntsville District Nursing Home and Ontario Nurses' Association,
[2001], 106 L.A.C. (4th) pgs. 325 and 326

19.00 Analysis and Application of the Exception to the *Goodyear* Principle

I find that the test set out by Arbitrator Lynk is appropriate and in applying the test to the facts of this arbitration, that the rights asserted by the grievance are vested, accrued, or crystallized rights as contemplated by the Supreme Court's decision in ***Dayco***.

Regarding the first criteria, I find that the employment right or entitlement (the minimum 2 hour pay under the call out provision of Article 24.02.2 of the Collective Agreement), must have accrued or vested under the prior collective agreements. Once an employee has performed his or her duties, and thereby met their contractual obligations to be paid, their rights have crystalized, or accrued.

Second, I conclude that the grievance filed has been filed under the previous collective agreement or agreements, as well as the current Collective Agreement. This is obvious from the plain wording of the grievance. On p. 2 thereof, specific reference is made to the language of the collective agreement changing in 2004 and indicating that since that date, the grievors have been improperly denied overtime pay since that provision was introduced.

I therefore find the second criteria to have been met.

Third, the grievance must satisfy any procedural or timeliness provisions in the Collective Agreement subject to their modifications by statute.

I have noted that it is agreed for the purpose of this arbitration that the breach of the Collective Agreement has been a continuous breach. I have found that the grievance was filed on a timely basis, as out, *supra*. I have also found that redress on a retroactive basis

20.00 Conclusion Regarding Retroactive Relief

I therefore conclude that relief ought to be granted to the grievors retroactively, to the point in time when the two-tier system of payment was introduced by MTS. This occurred sometime in 2005, no earlier, obviously, than January 1, 2005.

I see no basis upon which to limit the right to relief to the start date of the current Collective Agreement. The right to be paid unpaid wages, calculated as call out pay, or otherwise, becomes an accrued right, once the work has been completed. I further see no basis to limit the right to relief to any other date.

In my view, the most important factor in this analysis is the level of knowledge of the parties. The Company was aware of the practice. The Union was not aware of the practice, and the grievors were not aware that this was a breach of the Collective Agreement, until this matter was brought to the Union's attention.

21.00 Arguments Made by MTS

In reaching this conclusion, I have considered the arguments made by MTS. Notably, MTS relies upon ***Re Manitoba and M.G.E.U.*** (Fredborg) 81 C.L.A.S. 169 a decision of Arbitrator Hamilton. In this decision, Arbitrator Hamilton invoked the ***Goodyear*** principle, and found that any remedial relief ought to be limited to the term of the agreement.

> ***Manitoba and M.G.E.U.*** (Fredborg) (Re) (2005), 81 C.L.A.S. 169, para. 59

What I view as driving Arbitrator Hamilton's decision on this point is the knowledge of the grievor in the spring of 2002 that she was not being paid at the appropriate level of "XO3". Thus, I conclude that on an equitable basis, Arbitrator Hamilton was unwilling to provide redress to the grievor outside of the current collective agreement.

> ***Manitoba and M.G.E.U.*** (Fredborg) (Re) (2005), 81 C.L.A.S. 169, paras. 59 and 62

Ultimately, if the decision of Arbitrator Hamilton in ***Re Manitoba and M.G.E.U.*** is to the effect that "promises to pay regular wages or vacation pay" as set out in ***Dayco*** are somehow not vested rights, I would view Arbitrator Hamilton's decision as being in conflict with the Supreme Court of Canada's decision in ***Dayco***. This is so because in ***Dayco***, in referencing promises to pay regular wages or vacation pay, the Supreme Court stated:

> "All of these can be enforced after the termination of the agreement. Any other conclusion would render meaningless a wide range of promises to employees that might extend beyond the expiration of a collective agreement."

> ***Dayco (Canada) Ltd. v. CAW-Canada***, [1993] 2 S.C.R. 230, p. 51

Furthermore, MTS relies upon ***Re Manitoba and M.G.E.U.*** (Anderson), 158 L.A.C. (4th) 225, a decision of Arbitrator Graham, Q.C. I do not view this case as being an authoritative or persuasive authority regarding the within arbitration. This case involved an overpayment by the Company, not a failure to pay by the Company. It was the Province, not the employees that was seeking an order to recover all of the overpayments including those made prior to March 22, 2003, the effective date of the current collective agreement.

Arbitrator Graham found that he would have been without jurisdiction to order recovery of the payments made prior to March 22, 2003 on the basis that those overpayments did not constitute "vested rights".

Re Manitoba and M.G.E.U. (Anderson), 158 L.A.C. (4th) 225, pgs. 241 and 242

Ultimately, Arbitrator Graham allowed the grievance brought by the employee and declared that the Province was limited to recovery of that portion of the total overpayments of $6,796.14 which were made to the grievor from or after March 22, 2003.

The distinction between the case considered by Arbitrator Graham and a case such as the within arbitration was noted by Arbitrator Graham himself, as follows:

> "The three step sequential process utilized by Arbitrator Hamilton was logical in the *Fredborg* case, in which the grievor was an employee seeking payment of additional wages as a result of having "Acting Status" in a particular employment position. However, in the present case, the Grievor is an employee attempting to limit the Province's ability to recover wages paid to her by mistake."

Re Manitoba and M.G.E.U. (Anderson), 158 L.A.C. (4th) 225, p. 7, p. 233

Lastly, it was argued by counsel for MTS that the ***Goodyear*** decision is still good law and the principle has not been overruled or questioned in ***Dayco***. It was further submitted that if the rights sought to be enforced in the within arbitration constitute vested, crystallized, or accrued rights, what rights would not constitute vested, crystallized, or accrued rights? In other words, what meaning is left in the ***Goodyear*** principle to be applied?

It is not for this Board to "imagine" circumstances in which the principle in ***Goodyear*** would still apply to a particular matter under arbitration.

What is clear is that the decision in ***Dayco***, being a decision of the Supreme Court of Canada is binding. That decision clearly states that unpaid wages are vested rights and it is impossible in considering the facts of this arbitration, to draw any meaningful distinction between the unpaid wages contemplated by the Supreme Court of Canada in ***Dayco*** and the right to 2 hours minimum pay under Article 24.02.2.

22.00 Conclusion and Remedy

I would therefore conclude that the grievance ought to be allowed. I would further conclude that redress ought to be available retroactively to the date when the two-tier payment practice was introduced by MTS, no earlier than January 1, 2005.

Dated this 23 day of January, 2013

Faron J. Trippier
Nominee for TEAM