IN THE MATTER OF AN ARBITRATION

BETWEEN:

United Steelworkers, Local 2010
(The "Union")

-and-

Queen's University
(The "Employer")

Central Heating Plant Vacation Scheduling Grievances

Award

Ian Anderson, Sole Arbitrator

For the Union:

John Goldthorp, Staff Representative
Kelly Orser, Local President
Briana Broderick, Local Vice President
Karl Schonwandt, Grievor
Gord Crawley, Grievor
Joe Hulton, Grievor
Laird Monahan, Grievor

For the Employer:

Jeremy Hann, Counsel
Heather Shields, Director and Counsel, Employee and Labour Relations
Lisa Colby, Senior Labour Relations Advisor
Gillian Shields, Employee/Labour Relations Advisor
John Korince, Chief Operating Engineer

Hearing held on April 28, 2017.

Award issued May 5, 2017.

1. These grievances all concern the reasonableness of a rule which the Employer unilaterally adopted with respect to the scheduling of vacations.

2. As is my practice, I offered a pre-hearing teleconference with the representatives of the parties. The parties accepted this offer. The result was an agreement as to expedited procedure. More particularly, the hearing was conducted on the basis of the following statement of Agreed Facts:

AGREED STATEMENT OF FACTS

Background

1) The Employer and the Union are parties to a collective agreement which is effective as between January 1, 2015 and December 31, 2018 (the **"Collective Agreement"**).

2) The Union represents Class 2 Engineers at the University's Central Heating Plant (**"CHP"**). Class 3 Engineers are represented by CUPE and governed by another collective agreement.

3) Currently the Employer employs six full-time Class 2 Engineers. Prior to the ratification of the current Collective Agreement there were only five Class 2 Engineers on rotation.

4) Class 2 Engineers now work the following fixed six week schedule in accordance with a letter of understanding located at page 72 of the Collective Agreement:

   - Seven 12-hour night shifts over 2 weeks;
   - Seven 12-hour day shifts over 2 weeks; then
   - Ten 8-hour day shifts on Maintenance over 2 weeks (**"Maintenance Weeks"**).

5) The schedule is fixed and it is possible for an employee to determine what shift an employee will be working for the entire vacation year.

6) Class 2 Engineers have, for many years, been permitted to "switch" certain shifts with another Class 2 Engineer's agreement/consent, further approved/denied by the Chief Engineer/Manager.

7) Prior to January 28, 2016, employees were not prohibited from taking vacation during the four 12 hour shift weeks.

8) On January 28, 2016 the Employer adopted a rule that Class 2 Engineers must take vacation during Maintenance Weeks. The new rule was introduced by way of written notice on January 28, 2016 and subsequent clarification to the Union. The parties do not dispute the meaning of the rule. They do dispute whether or not the Employer had the authority to enact the rule itself.

9) The Employer has taken the position with the Union (which the Union does not necessarily agree with) that the rationale for the new rule is:

   i) Cost: The Employer is not required to replace an employee who is on their maintenance week and therefore there are no replacement costs associated with an employee taking vacation on their maintenance week. There is a need to replace an employee who takes vacation on any of their 12-hour shifts. This generally results in overtime or lieu time costs;

   ii) Impact on Employees: It is not reasonable to ask employees who have already worked 2 to 4 weeks of 12 hour shifts to cover an additional week of two of twelve hour shifts and

   iii) Safety: The Technical Standards and Safety Authority (TSSA) has signalled that allowing the CHP to utilize 3rd Class Engineers to cover the vacation of 2nd Class Engineers will be monitored more closely and may be restricted due to regulatory requirements from the TSSA.

10) The effect of the new rule is that Class 2 Engineers are now only eligible to take their vacation for 1/3 of the shifts that they work. They remain eligible, however, to switch 12 hour shifts in order to be able to take a specific week off; subject to point 6 above. This allows them to have 12 hours shifts off, without having to draw down their vacation banks.

The Specific Grievances

11) Four grievances are before the arbitrator and the parties have agreed to consolidate them. At their essence they all deal with whether the Employer is permitted to black out the ability for employees to take vacation during the two, two week periods where employees are scheduled to work 12 hour shifts. Put differently, is it permissible to restrict approval of vacation time to the employee's Maintenance Shifts?

12) **Grievance 2016-009:** On April 10, 2016, the Grievor, Mr. Monahan requested vacation for October 31 to November 14, 2016. On April 14, 2016, he submitted a vacation request for September 19-30, 2016. These requests were all for periods of time that he was scheduled to work twelve hour shifts. John Korince, the Grievor's Supervisor, denied the requests. He suggested that Mr. Monahan consult with other Class 2 Engineers to see if any of them would be willing to switch shifts with him to facilitate the time off he sought.

13) **Grievance 2016-010:** the Grievor Joe Hulton submitted a request for vacation for the period of July 3-17, 2016. This was during a period of time that he was scheduled to work twelve hour shifts. He was denied the request based on the Employer's new rule. He subsequently requested vacation for July 20-29 (which was during his Maintenance Week) and was approved.

14) **Grievance 2016-013 (group):** on February 10, 2016 the Union contacted John Korince regarding potential concerns about the new operational requirement that vacation be booked only on Maintenance Weeks. Mr. Korince agreed that the Employer would hold a meeting to discuss the new requirement along with other possible options. In the interim Mr. Korince approved certain vacation requests. When the parties were unable to reach such a resolution the Employer cancelled the employees' vacation requests. The Grievors in this group grievance are Gordon Crawley, Joe Hulton, Laird Monahan and Karl Schonwandt. None of the employees suffered any financial loss from the cancellation of their vacation, as the affected employees were able to recover their individual deposits.

15) **Grievance 2016-006 (policy):** the Union brought a policy grievance which alleges that the Employer's new rule may contain unreasonable restrictions by not allowing CHP members access to their vacation entitlement throughout the year.

16) There is no evidence or allegation that any individual Grievor, or the Union, suffered any financial loss from the above set of circumstances.

3. During argument, the parties sometimes referred to the four weeks of 12 hour shifts as “Plant Weeks” in contra distinction to the Maintenance Weeks of 8 hour shifts. I shall adopt the same terminology, and will also refer to “Plant shifts” and “Maintenance shifts”. The parties also filed as evidence sample schedules. In a given two week period, there are always four 2nd Class Engineers scheduled to work a total of fourteen 12 hour Plant shifts, with the result that there is a 2nd Class Engineer on duty 24 hours a day. In the same two week period, two 2nd Class Engineers will be scheduled to work 8 hour Maintenance shifts on days from Monday to Friday. The weekly schedules of the Engineers are staggered so that in any given week one will be working his/her first Maintenance Week and another will be working his/her second Maintenance Week.[1]

4. The relevant provisions of the collective agreement are set out in Appendix A to this award.

5. The Union argues paragraph 7 of the Letter of Understanding (“LOU”) is clear that the vacation period is not restricted to Maintenance Weeks. Rather, pursuant to Article 22, vacations are to be granted at the times requested, subject to operational requirements. The Union acknowledges Article 5.1 permits the Employer to establish reasonable policies. However, it argues both Article 5.2 and the well known principles stated in *Lumber & Sawmill Workers’ Union, Local 2537 v. KVP*, (1965) 16 LAC 73 (Wren) require such policies are not inconsistent with the collective agreement. The Union argues the new rule is inconsistent with the collective agreement. Further, the Union argues the new rule is inconsistent with the reasonable expectations of the employees, who previously could book vacation in Plant Weeks, but are now restricted to booking vacations in the one third of the year during which they are scheduled to work Maintenance Weeks. The Union

[1] This is based on the current staffing level of six 2nd Class Engineers.

notes the last sentence of paragraph 1(a) of the LOU: “The employee schedule[d] on her/his second week of Maintenance would be available for vacation coverage within the USW Group.” This sentence it, argues, contemplates vacations being scheduled in Plant Weeks, by giving the Employer the necessary flexibility to schedule vacations during those weeks. The Employer is afforded additional flexibility in that Paragraph 5 of the LOU permits it to use 3rd Class Engineers to replace 2nd Class Engineers if necessary. The 3rd Class Engineers are in a separate bargaining unit but the collective agreement applicable to them permits them to perform the duties of 2nd Class Engineers, and to be paid accordingly.

6. The Employer argues it exercised its management rights reasonably in barring vacations by employees during their Plant Weeks.

7. The Employer notes it is agreed the rule is clear. There is no allegation the rule is discriminatory, arbitrary or enacted in bad faith and no facts which could support such allegations. Further, there is no allegation of an estoppel, and no facts which could support such an allegation. The sole issue, therefore, is whether the rule is prohibited or in violation of the collective agreement.

8. The Employer notes the schedule for the 2nd Class Engineers is established by the LOU. The fixed schedule created is important in terms of ensuring stability and minimal disruption to sleep cycles. During Plant Weeks, employees work either three or four 12 hour shifts. On average, these employees work 42 hours per week during the four Plant Weeks. Paragraph 1(e) provides for lieu time in the form of one Earned Day Off (“EDO”) for each set of four Plant Weeks to “smooth” out the hours worked to 40 hours per Plant Week. (Paragraph 1(e) also provides that the EDO is taken in the first Maintenance Week.) Paragraph 1(b) of the LOU adjusts the salaries otherwise payable under the collective agreement to reflect that these employees are working 40 hours per week, not 35. The Employer notes that Paragraph 1(h) of the LOU recognizes that the work of the employees in the CHP is not operationally suitable for flex time.

9. The Employer notes the overtime provisions contained in Paragraph 4 of the LOU. It argues the prospect of having to pay overtime to employees moved from a Maintenance shift to cover a vacationing employee who had been scheduled to work a Plant shift constitutes a significant operational concern justifying the new rule.

10. With respect to the last sentence of paragraph 1(a), the Employer argues this does not give employees a right to take Plant shifts off as vacation, rather it is a permissive tool which permits the Employer to shift employees from a Maintenance shift to a Plant shift. The Employer argues that it has exercised its management rights under the collective agreement in establishing the rule limiting vacations to weeks on which the requesting employee is scheduled to be on a Maintenance Week, and that its decision is subject to review only to determine if it acted reasonably or in good faith. Reference is made to *Brown & Beatty, Canadian Labour Arbitration*, 8:3240, Scheduling Vacations and *CUPW v. Canada Post Corp.*, (2014) 242 LAC (4th) 304 (Peltz).

11. The Employer argues the reasons it has given for its decision, cost, impact on employees (including a stated concern about health) and safety, more than meet the standard of reasonableness. Its decision is not subject to review for correctness.

12. In reply, the Union argues the last sentence of paragraph 1(a) permits the Employer to reschedule an employee working his/her second Maintenance Week to cover the shifts of an employee taking vacation during a Plant Week. There are, accordingly, no overtime costs associated with doing so. The Union also argues that there is no evidence of any impact on the health of employees from being required to work five weeks out of six on 12 hour shifts rather than four weeks out of six.

Analysis and Decision

13. I do not agree with the Employer the rule may only be struck down if it is in "violation" of or "prohibited" by the collective agreement. Rather the question is whether it is "inconsistent" with the collective agreement: see *KVP* at para. 34.

14. The Employer cites the *Canada Post Corp.* decision as authority for the proposition that where a collective agreement does not provide an unencumbered right of employees to choose the timing of their vacations, an employer has an inherent right to schedule vacations at times which best serve its interests, subject to review only on the basis of whether the employer acted reasonably, in good faith and in pursuit of legitimate business reasons. I do not agree that *Canada Post Corp.* stands as authority for this proposition. In that case, Arbitrator Peltz distinguished another case on the basis that the collective agreement at issue in it provided for an unrestricted right of employees to schedule vacations: see para. 31. He did not suggest that unless a collective agreement provides such an unrestricted right, an employer's decision is only subject to the limited review argued by the Employer in this case. The question, in every case, is what does the collective agreement state.

15. In *Canada Post Corp.*, the collective agreement expressly afforded the employer the right to establish vacation schedules, subject only to a duty to consult with the union. There was no question the employer had consulted with the union, and thus its right to establish a vacation schedule was subject only to review for reasonableness as stated by Arbitrator Peltz. Unlike that case, and the cases referenced in Brown & Beatty in the portion cited by the Employer, this collective agreement does not leave management with the unfettered right to schedule vacations. Rather, Article 22.05 provides: "The Employer will endeavour to grant vacations at times requested by the employee." This right of employees is, however, not unrestricted. Article 22.05 goes on to state the Employer is not required to grant a vacation at a time that would adversely affect operational requirements. Paragraph 7 of the LOU provides that vacation requests will not be unreasonably denied by the Chief Engineer. The LOU states in the event of a

conflict, it takes precedence over the provisions of the collective agreement. The Chief Engineer's discretion to decline vacation requests is not, therefore, limited to operational requirements, but extends to any reasonable basis contemplated by the collective agreement.

16. This brings us to the last sentence of Paragraph 1(a), which I set out again for convenience: "The employee schedule[d] on her/his second week of Maintenance would be available for vacation coverage within the USW Group." The meaning of this sentence is not entirely clear on its face. I note that paragraph 1(f) already gives the Employer the right to reschedule employees on a temporary basis for "operational requirements" with no overtime consequences, provided sufficient notice is given. It is arguable the last sentence of Paragraph 1(a) affords the Employer a similar right with respect to the scheduling of vacations. I note the Union expressly adopts this position, and states that an employee on his/her second Maintenance Week unilaterally scheduled to cover the shifts of a vacationing employee who had been scheduled to work Plant shifts has no claim to overtime. The Employer takes a similar position, stating the last sentence of Paragraph 1(a) permits it to reschedule employees in this manner. In view of the positions of the parties, I conclude this is the proper interpretation of the last sentence of Paragraph 1(a): i.e. the collective agreement provides the Employer with the right to reschedule an employee normally scheduled to work his/her second Maintenance Week to cover the Plant Week of an employee absent on vacation.

17. I agree with the Employer that this does not give rise to a right on the part of employees to take vacation during their Plant Weeks. Rather such requests continue to be subject to the approval of the Chief Engineer, which approval shall not be unreasonably denied.

18. Cost is a factor which might reasonably be considered by the Chief Engineer in denying a vacation request. But if there is another employee normally scheduled to work his/her second Maintenance Week available to be substituted, then there is no

cost of overtime to consider in deciding whether or not it is reasonable to grant vacation to an employee during his/her Plant week. As noted, for any given week there is always one employee scheduled to work his/her second Maintenance Week. However, it will not always be the case that this employee will be available to be substituted. This would not be the case, for example, if the employee had him or herself been granted vacation for that week. To give another example, it would also not be the case if that employee had already been rescheduled to work the Plant Week of another vacationing employee. There may, or may not, be other examples.

19. The Employer cites the impact on the morale and health of other employees if they are required to work an additional 12 hour shift. The simple answer to this argument is that it is precisely what the employees, through their bargaining agent, have agreed to do by the inclusion of the last sentence of Paragraph 1(a). Further, I agree with the Union that there is no evidence to support any health concern.

20. The Employer cites safety concerns and the scrutiny of the TSSA which would arise from the use of 3rd Class Engineers to cover vacationing 2nd Class Engineers. However, this concern does not arise to the extent that a vacationing 2nd Class Engineer is replaced by another 2nd Class Engineer who would otherwise be scheduled for a second Maintenance Week.

21. In summary, the collective agreement contemplates that vacation may in some circumstances be taken by 2nd Class Engineers during weeks they are scheduled to work Plant Weeks. A blanket rule which limits vacations to weeks on which an employee is scheduled to work Maintenance Weeks is, therefore, inconsistent with the collective agreement.

22. For all of the foregoing reasons, the rule adopted by the Employer is overly broad and therefore struck down. The grievances are allowed to that extent. No other remedy is sought or appropriate.

23. I remain seized with respect to the interpretation or implementation of this award.

Dated at Toronto this 5th day of May, 2017.

"Ian Anderson"
Ian Anderson
Arbitrator

Appendix A

ARTICLE 5 - MANAGEMENT RIGHTS

5.01 The Union recognizes that the management of Queen's University is fixed exclusively in the University and without restricting the generality of the foregoing, the Union acknowledges that, subject to the provisions of this Agreement, it is the exclusive function of the University to:

….

(f) establish, alter and enforce reasonable policies, guidelines, rules and regulations governing the operation of the University.

5.02 The University agrees that it will not exercise its rights set out in this Article in a manner that is inconsistent with the provisions of this Agreement and confirms its commitment to administer this Agreement such that it will not act in a manner that is arbitrary, discriminatory, or in bad faith. The Union agrees that the fact of the University exercising its rights under this Article shall not constitute harassment.

ARTICLE 22 - VACATIONS

22.05 The Employer will endeavour to grant vacations at times requested by the employee. Where all requests cannot be granted, preference will be given in order of seniority. However, the Employer shall not be required to grant a vacation at a time which would adversely affect the operational requirements. Vacation requests must be submitted before the time designated by the appropriate Department Head/designate.

LETTER OF UNDERSTANDING: CENTRAL HEATING PLANT

The Parties agree that the provisions of the Collective Agreement are subject to this Letter of Understanding for 2nd Class Engineers in the Central Heating Plant ("employees"). To the extent that a matter addressed in the Collective Agreement conflicts with this Letter of Understanding, the provisions of this Letter of Understanding on that matter will prevail.

1. Hours of Work and Scheduling

(a) Employees are paid based on a 40-hour work week but normally work fourteen 12-hour shifts over a 4-week period; employees are normally scheduled for either three 12-hour shifts or four 12-hour shifts in a week. At least 2 employees are normally scheduled on 8-hour maintenance shifts. The employee schedule[d] on her/his second week of Maintenance would be available for vacation coverage within the USW Group.

(b) The Salary Grid referenced in the Collective Agreement represents full-time equivalent salaries for a regular 35-hour work week. Employees' full-time equivalent salary will be adjusted proportionately to reflect a regular work week of 40 hours.

(c) Effective the date of ratification by both parties the normal work schedule is a 6-week rotation of:

Seven 12-hour night shifts over 2 weeks;
Seven 12-hour day shifts over 2 weeks; and
Ten 8-hour day shifts on maintenance over 2 weeks

(d) It is understood that the normal work schedule above is based on 6 employees normally working in the rotation.

(e) Employees who work fourteen 12-hour shifts over a 4-week period earn 8 hours of lieu time ("Earned Day Off") in that period, which will be taken during the employee's next scheduled maintenance week, normally on the first day of that week.

(f) When operational requirements deem it necessary to designate a temporary shift change that will last 1 month or less, the employee whose shift schedule is to be changed shall be given 5 days' notice of the change in shift. Failure to give the required 5 days' notice of the change in shift shall result in payment to the employee at 1.5 times his regular hourly rate for the first full shift so affected.

(g) Due to the requirements of the job, it is understood that the eating period for employees shall be a paid period of time. During all break times employees are required to remain in the control room and be available for emergency work. Break times cannot be accumulated and taken as time off.

(h) It is understood and agreed that the work of employees is not operationally suitable for Flexible Hours of Work arrangements, as set out in Article 20.08 of the Collective Agreement.

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4. Overtime

(a) For employees working 12-hour shifts, overtime will be averaged over a 4-week period. Overtime will be paid to the employee at the rate of 1.5 times the employee's regular hourly rate, calculated by dividing the employee's annual full-time equivalent salary by 2080, for all hours worked in excess of 168 hours during the 4-week averaging period.

(b) An employee who works overtime on a scheduled day off will be paid at the rate of 1.5 times his regular hourly rate for each hour of overtime worked, except in the case where the employee works overtime on two consecutive scheduled days off; in that case the employee will be paid at the rate of 2 times his regular hourly rate for all hours worked on his second scheduled day off.

5.Call-In

(a) The University will attempt to distribute call-ins among those employees who would normally perform the work. However, if no one is available, then 3rd class engineers may be called in.

(b) The University is not required to call-in an employee if a qualified person is at work and is able to cover the required work.

(c) An employee who is required by the Employer to return to work outside her/his scheduled shift, other than for hours immediately after her/his scheduled shift will be paid at 1.5 times her/his regular hourly rate for actual hours worked or will be paid for 4 hours at her/his regular hourly rate, whichever is greater. If the call-in occurs such that the majority of hours are on a Paid Holiday or a Sunday, the employee will be paid at 2 times her/his regular hourly rate.

….

7. Vacations

(a) Vacations will be scheduled in blocks of one week or two weeks. In special circumstances and subject to operational efficiencies, vacation time may be requested in blocks of time that are less than 1 week. The Chief Engineer will consider and respond to such requests, which will not be unreasonably denied.

(b) An employee shall submit her/his vacation request(s) in writing and shall receive a written response at least 8 weeks before the requested vacation date(s), provided that the vacation request was submitted with sufficient time to do so.

(c) A summer vacation schedule shall be posted by June 1st each year, showing each employee’s approved vacation time until the end of August.

(d) While every effort will be made to honour approved vacation requests, the parties recognize that circumstances might arise subsequent to the approval that require vacation schedules to be adjusted, after discussion with the affected employee(s).

…..