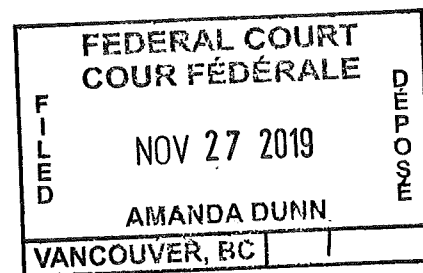IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE *CANADA LABOUR CODE*, R.S.C. 1985, c. L-2

BETWEEN:

VITERRA INC.
(Cascadia and Pacific)

AND:

GRAIN WORKERS' UNION, LOCAL 333

(Overtime Grievance)

ARBITRATOR:	Christopher Sullivan
COUNSEL:	Peter A. Csiszar for Employer
	Charles Gordon, Q.C. for Union
DATE AND PLACE OF HEARING:	July 29, 2019
PUBLISHED:	October 28, 2019

17121.3

This case involves two policy grievance filed by the Union, one at each of Viterra's Pacific and Cascadia terminals. The grievances, both dated July 14, 2017, are identical in substance. They are both policy grievances expressly alleging violation of the Collective Agreement's management rights provision contained in Article 3.01, and also violation the *Canada Labour Code*. Both grievances assert: "Company is in violation of overtime provisions of the *Canada Labour Code*." The remedy sought is: "Restrict immediately all overtime to 8 hours per week per employee."

In an award dated December 28, 2017, I denied a preliminary objection made by the Employer to the effect that this board has no jurisdiction to hear the grievances. I also determined the grievances are arbitrable as policy grievances. The December 28, 2017 award was challenged in court and the jurisdiction of this board to hear and determine the grievances was confirmed.

The parties are covered by a Collective Agreement between the Union and the Vancouver Terminal Elevators' Association, which is comprised of five terminals, including the two Viterra terminals that are covered by the grievances. The Collective Agreement does not contain provisions regarding overtime and the provisions of the *Canada Labour Code* apply in relation to this topic.

The relevant *Code* overtime sections are as follows:

PART III – Standard Hours, Wages, Vacations and Holidays

DIVISION I – HOURS OF WORK

Standard hours of work

169(1) Except as otherwise provided by or under this Division

    (a)   the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and

(b) no employer shall cause or permit an employee to work longer hours in any day or forty hours in any week.

Averaging

(2) Where the nature of the work in an industrial establishment necessitates irregular distribution of the hours of work of an employee, the hours of work in a day and the hours of work in a week may be calculated, in such manner and in such circumstances as may be prescribed by the regulations, as an average for a period of two or more weeks.

Duration of averaging

(2.1) The averaged hours of work calculated pursuant to subsection (2) remain in effect

(a) where the averaging of hours of work is agreed to in writing by an employer and a trade union, for the duration of that agreement or for such shorter period as is agreed to by the parties; or

(b) where the averaging of hours of work is not agreed to in writing by an employer and a trade union, for no longer than three years....

Maximum hours of work

171(1) An employee may be employed in excess of the standard hours of work but subject to sections 172, 176 and 177, and to any regulations made pursuant to section 175, the total hours that may be worked by any employee in any week shall not exceed forty-eight hours in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in the industrial establishment in or in connection with the operation of which the employee is employed.

Averaging

(2) Subsection 169(2) applies in the computation of the maximum hours of work in a week prescribed under this section.

Maximum hours of work

172(1) An employer may, in respect of employees subject to a collective agreement, establish or modify or cancel a work schedule under which the

hours exceed the maximum set out in section 171 or in regulations made under section 175 if

    (a)   the average hours of work for a period of two or more weeks does not exceed forty-eight hours a week; and

    (b)   the schedule, or its modification or cancellation, is agreed to in writing by the employer and the trade union.

The evidence before me discloses there is no agreed upon averaging agreement between the parties. Further, the working of overtime at the terminals in question is strictly voluntary, and the Collective Agreement contemplates employees working in excess of 48-hours in a week.

The evidence reveals a number of employees have worked in excess of the prescribed 48-hours in a week. This has occurred regularly and often, particularly when the Employer was running only two shifts at both the Cascadia and Pacific terminals, as opposed to three. For example, due to accommodating rail service many employees were almost always asked to work late on overtime. The information before me discloses that as of January 28, 2019, the Employer implemented a third shift at both terminals, and this has greatly reduced the excessive weekly hours of work performed by a number of employees.

The data relied upon by the Union for the period prior to the grievances supports a determination that the Employer was in contravention of the statutory overtime hours of work per week.

The Union has requested that I issue a cease and desist order. I have considered the payroll data relied on by the Union for the period prior to the filing of the two grievances on July 14, 2017. Based on that data and the stipulations agreed by the parties in their May 10, 2018 correspondence, I have found that the *Canada Labour Code* has

been violated and order the Employer cease and desist from violating the *Code*. Going forward, I leave it to the parties to meet and determine what form of averaging arrangement can be agreed upon in the context of a 6-on/3-off continuous operation schedule that does not operate on a week-to-week basis.

I remain seized with jurisdiction to resolve any dispute that may arise out of the implementation of this decision.

It is so awarded.

Christopher Sullivan