# PART 2

# CONSIDERATIONS AND DECISION

The foregoing evidence and arguments have been set out in sufficient detail to familiarize the reader with the issues. A further summary is unnecessary.

Issue # 1: The Employer's assertion that the original arbitration award must be interpreted in order to determine when the collective agreement ceased to apply.

In the arbitrator's view, it is appropriate for the parties to refer to the original award for guidance on relevant matters. Whether and how long a collective agreement applies are certainly relevant matters where compensation is to be determined. In this case, both the Employer and the Union have made references to the arbitrator's original award by expressing their own differing interpretations of the wording used to describe the reason for finding that the CLRA collective agreement applied in the first place.

Where there is a lot of money at stake, it is to be expected that counsel would perform their advocacy roles to the best of their abilities within the law to serve their clients' interests. The Employer's interest is to minimize its payout, the Union's interest is to maximize it. The arbitrator has the responsibility of

determining the most correct and appropriate payout possible based on the facts and the information available.

On balance, this arbitrator does not consider the exercise of interpreting his arbitration award to be an appeal by the Employer to reopen or reconsider his July 2014 findings. Rather it is a necessary exercise in these particular circumstances because operational changes occurred at the mine site in 2015, which evidence was understandably not available in the 2014 hearings. At that time, the end of December 2014 was the expected completion date for the construction phase of the project. The Employer's conviction is that, once commercial mining operations became the predominant activity on site as of April 1, 2015, Sodexo employees were working in the production industry, to which the construction collective agreement does not apply.

The Employer is entitled to pursue its case on that point.

Issue #2: Whether the collective agreement applied after April 1, 2015

The Employer's essential position is that the arbitrator's award on the merits found that the CLRA collective agreement applied in 2014 because construction, not mining, was the predominant activity on the project site at that time. Therefore, since mining operations, not construction, became the predominant activity on site as of April 1, 2015, that constituted a fundamental shift of activity on the DSO

project. Construction activity was no longer the *raison d'être* for the collective agreement and, therefore, the agreement ceased to apply as of that date. The Employer spared no effort to support this position.

Mr. Choubey provided the arbitrator with an excellent review and explanation of the history and development of this mine: the trial mining, the reasons for testing the ore, the processes used for producing standard or premium grades of ore depending on the market price, the various segments of the railway transportation system and legal arrangements with the owners, and the features of and arrangements with shipping/port facilities enabling production to reach its markets. Another important feature of Mr. Choubey's testimony was an economics lesson on how market forces affect mine operations, planning and decisions.

In response, the Union's position is simply that the arbitrator's award established that the collective agreement would apply until the construction phase ended. Since the evidence shows that the construction phase continued into December 2015, the collective agreement applied throughout and, therefore, the compensation hearings should proceed with the accounting exercise.

It is clear that the Employer has placed significant emphasis on the predominance of activity factor on the site of the DSO project. Several references in the July 21, 2014 award were made to "predominant activity" or "primary

activity" or "Sodexo's predominant purpose" as they applied to providing service for construction people on site. The Employer distinguished passages from the award from the situation caused by the switch to predominantly operations activity on April 1, 2015. They bear repeating here:

First, on page 68, the arbitrator lists seven (7) areas of common ground, particularly Items 2, 3, and 5:

> ....
> 2. that the nature of the development work at the site in and around the Dome is *predominately construction work*, with some trial mining work occurring seasonally;
> 3. that *the construction phase is anticipated to be completed by December 2014, after which the predominant activity is expected to be mining operations*;
> ....
> 5. that the nature and scope of the work performed at the camp to date is accommodation and catering, *mostly for contractors' construction employees*;
>
> [Emphasis added.]
> ....

Next on page 73:

> ... I am satisfied that the evidence unequivocally established that, from the date of certification order on December 18, 2013, *construction activity was the predominant activity* on that project and that *the clientele at the camp were predominantly, but not exclusively, construction industry employees*....
> [Emphasis added.]

Continuing to page 74:

> *Whatever the ultimate intention may have been for the camp, its raison d'être during the construction phase of the development project was mainly to accommodate construction industry employees. Whether by*

*design or circumstance, this was the situation that existed for Sodexo at the time of certification and continues to exist until the construction phase is completed....*
[Emphasis added]

Indeed, counsel took this issue even farther by claiming that even if construction was occurring during commercial operations, it would not constitute a "construction phase". Counsel stated that the only construction that was going on as of April 1, 2015 was the "non-essential wet process in the Dome", and that the Sodexo camp was the primary accommodation facility for the project for all people on the site. Furthermore, counsel submitted that it would seem unusual to find that the predominant activity on the site was construction if government determined otherwise by reducing tax credits, etc. For those reasons and more, counsel argued that the context in which Sodexo performed its work on April 1, 2015 changed to supporting the production phase of the project. Therefore, the CLRA collective agreement ceased to apply at that point.

With the greatest of respect, the arbitrator disagrees with the Employer's conclusion that the collective agreement ceased to apply on April 1, 2015.

In determining whether there was a valid CLRA/HRW Local 779 collective agreement in place which bound Sodexo to its terms and conditions in the particular circumstances that existed after the Labour Relations Board certified the Union on December 18, 2013 as the bargaining agent for a unit of employees of

Sodexo Canada Ltd., the unequivocal evidence was precisely as stated at page 68 of the arbitrator's award, particularly in Items 2, 3 and 5 as the Employer has referenced. Yes, the nature and scope of the development work at the site was predominately construction work. To describe it as "predominately construction work" was to state the obvious. In his recent testimony, John Tobin responded to the arbitrator's question how he reached the conclusion that, during his tenure, it was mostly construction workers who Sodexo served at the site Camp. Mr. Tobin testified that the camp was originally to accommodate the growing numbers of construction workers, like Sunny Corner, that the night shift was opened for Sodexo in 2013, and he felt the same way about the presence of construction workers during 2015. On the basis of all the evidence provided on this subject, the arbitrator considered it to be a simple, unequivocal, finding of fact as to the status of construction activity on the project at the time. In terms of what that meant for the application of the CLRA collective agreement to Sodexo's employees, it was the equivalent of a slam dunk, a *fait accompli.* The basic fact that Sodexo was providing services for construction employees within the construction industry on the project site justified the application of the collective agreement.

A finding that there was construction activity taking place on the project site that was squarely within the scope of services for the bargaining unit members to provide for a reasonably lengthy period of time would be ample reason to apply the

CLRA collective agreement. That the evidence indicated there was so much construction activity happening that it could justify affixing the adverb "predominantly" simply meant that there was more than sufficient bargaining work available to justify the application of the collective agreement. This finding of fact more than answered the question whether there was enough construction industry work to occupy the bargaining unit for a reasonable length of time, it made the decision to apply the collective agreement an absolute no brainer, a decision beyond all reasonable challenge.

However, what the unequivocal evidence did not do, and what the arbitrator's finding did not require was to establish "predominately construction activity" as the necessary condition for the application of the CLRA collective agreement. "Predominantly construction activity" was simply a reflection of the reality of the situation that existed on the project site at the time. As the arbitrator said at pages 73-74 of his award – commenting on counsel for the Employer's assertion that the Sodexo camp was intended to be and was in fact an operations camp:

> Whatever the ultimate intention may have been for the camp, its *raison d'être* during the construction phase of the development project was mainly to accommodate construction industry employees. Whether by design or circumstance, this was the situation that existed for Sodexo at the time of certification and continues to exist until the construction phase is completed. In my view, Sodexo has found itself to be an employer squarely engaged in the construction industry on the project at the Tata Steel site.

The evidence in the 2014 hearings suggested the expectation that the TSMC construction project would proceed in the same manner as most other large remote projects in the province had done. It is probably a safe observation that such projects underwent a construction phase through to completion before operations were able to commence. That was the direction the evidence suggested in the Sodexo arbitration case on the merits. In Item 3 on page 68, it was clear that predominantly operations activity was expected in 2015, but only after the construction phase was anticipated to be completed by December 2014. And the arbitrator's comment on page 74, that "this was the situation that existed for Sodexo at the time of certification and continues to exist until the construction phase is completed" was made in the context of Jean Marc Blake's evidence at the time of hearings (April 30th, 2014) at page 41, that there were 280 total people on the site, 168 were in the Sodexo camp, 112 were housed in Schefferville, construction and mining numbers would ramp up in the summer, and $550 -$700 million had been earmarked for the anticipated completion of construction at the end of December 2014.

While "predominantly construction activity" – even to the point of becoming Sodexo's *raison d'être* at the time – was an accurate assessment of the situation Sodexo found itself in, it was not the threshold condition that had to exist in order to decide that the CLRA collective agreement applied. In the arbitrator's view, that

decision could be justified if the evidence described a more modest level of construction activity, but one nonetheless capable of sufficiently encompassing a viable working construction industry collective bargaining relationship.

Yes, the construction phase was anticipated to be completed by December 2014, after which the predominant activity was expected to be mining operations – actually the evidence of Mr. Jean Marc Blake, Vice President HR with Tata Steel Minerals Canada at page 40 was that "construction activity should end on December 19, 2014, at which time it will be turned over to operations". Yes, the scope of work of Sodexo's employees at the camp was mostly for contractors' construction employees at that time. And yes, the arbitrator was satisfied at page 77 that:

> ...in the particular circumstances Sodexo Canada Ltd. found itself as a contractor running the Tata Steel Timmins Labrador Camp, it was effectively an employer in the industrial and commercial sector of the construction industry....

At pages 80-81, the arbitrator found that:

> ...Sodexo's bargaining rights belonged to the CLRA as of December 18, 2013, when Local 779 was certified for the unit of Sodexo employees. That agreement became the sole collective agreement in effect between the Employer and the Union.

Finally, at pages 81-82, the arbitrator ordered

> ...the Employer to comply with the terms and conditions of the collective agreement retroactive to the date of December 18, 2013 and to *continue compliance for the duration of the construction phase of the Tata Steel Project site.* [Emphasis added]

It should be noted that the arbitrator did not order the Employer "to continue compliance for the duration of the construction phase … *as long as it continues to be the predominant or primary activity phase of the site*". No such meaning was expressed and no such meaning was intended.

This arbitrator is not a stranger to major construction projects and knows full well that intended completion dates are often not met on time for one reason or another and that extensions may occur, some longer than others. As such they may be considered objectives, or expectations, but rarely guarantees. In the face of evidence indicating that construction at the Tata Steel site was expected to be completed by December 19, 2014, or by the end of December 2014, the arbitrator recognized it would be irresponsible for him to declare that compliance with the CLRA collective agreement would cease precisely on either of those dates. That would unreasonably restrict the application of the collective agreement should construction actually continue beyond the intended completion date. Therefore, the wording the arbitrator chose was deliberate, and the effect of those words was that the Employer's responsibility was to comply with the CLRA agreement until the construction phase came to an end, whenever that occurred.

However, it is important to stress that the length of the construction phase must be considered in the context of Sodexo's particular provision of services to individuals involved in construction activity on the project site. To the extent that

some construction employees on the site may not have received services from the bargaining unit at Sodexo, the Local 779 collective agreement would not have applied to their circumstances. If there were construction workers on site at the completion of the construction phase in 2015 who Sodexo was not providing services for (e.g., mention has been made that Sodexo did not provide service to Sunny Corner employees, some of whom were on site until December 10, 2015), the CLRA collective agreement would not have applied. In effect, the collective agreement would have applied only while Sodexo was providing services to the particular construction worker clients it chose to accommodate and service at its camp on site. It is possible that the end of such services might have occurred at some point prior to the completion of the construction phase. But the evidence does not make it clear when that point occurred.

The arbitrator rejects the notion that the collective agreement ceased to apply on April 1, 2015 when the Employer said the predominant activity on site became operations. That notion is tantamount to declaring that attainment of predominant operations activity made the application of the collective agreement null and void. It did not do so. The Employer's position effectively invites the conclusion that the TSMC project could not have more than one phase ongoing at the same time. I respectfully disagree. The construction phase and the operations phase of a project need not be temporally mutually exclusive. In its own right each one is a

contributing feature of a project's development and there is no reason why each one may not contribute concurrently with the other. Although such phases often occur in sequence on many construction projects because of the particular nature of those particular projects, they are perfectly capable of existing simultaneously on other projects. For example, if a currently producing company should decide to undertake a large construction project to achieve greater capacity, or productivity, or establish a new process for another product line, and that construction project is of sufficient scope and character to bring it within the commercial and industrial sector subject to construction industry collective bargaining, this arbitrator knows of no impediment to the application of CLRA collective agreements to that project where the company has the ability to operate while construction is ongoing.

The TSMC project was a project on which commercial production operation was capable of occurring (with the Dry process) while its construction phase continued.

Mr. Choubey testified that no mining actually occurred in 2014 because enough ore had been stockpiled. He also explained that TSMC decided to construct the additional Wet process to have the option of using it when premium ore prices became high enough. His evidence was that the Wet processing system was constructed from 2012 to 2014 and was completed in 2014, but TSMC decided not to operate it at that time for economic reasons. Similarly, in 2015

TSMC made the same decision for the same reason – the unprecedented low price of ore at $45/tonne. Low prices continued in 2015, 2016 and 2017.

The only part of Mr. Choubey's testimony regarding the Wet process the arbitrator has a concern with is his evidence that construction on the Wet process was completed in 2014. With the greatest of respect, that does not jibe with the preponderance of evidence on that subject. Mr. Bill Schenkles of Sunny Corner and Mr. Peter Smith of JSM both provided convincing evidence that the value of their contracts with TSMC significantly increased to cover continuing construction work during 2015 on the ore production processes in the Dome. Most if not all of that work was in or around the Dome where the Wet process was located. It is well established that the mine operated in 2015 with the Dry process only. That left the Wet process the only process that could have required construction work during 2015. Indeed, counsel for the Employer made that point quite clearly in his submissions when he said that the only construction that was going on as of April 1, 2015 was the non-essential Wet process in the Dome.

In the arbitrator's view, the fact that construction activity may occur on a mine production process that is unnecessary to use at the time does not change the nature of the construction activity itself. The Wet process was intended to be used when economic conditions became favourable. As such, its construction was a prudent addition to the mine's production facilities, and it fortunately occurred at a

time when it did not interfere with operations. While it may have been a non-essential operating process at that time, it was not non-essential construction activity that erected it and prepared for its use when it became economically viable.

The Union's evidence leaves no doubt that JSM's construction employees were on site until November 23, 2015 and some of Sunny Corner's employees were on site up to December 10, 2015, at which time (according to Mr. Schenkles) production had ceased. Other than the work on the Wet process, there has been no other explanation why construction activity occurred throughout the 2015 year. Also, a read through the various purchase orders in the DSO Timmins Project Contract (BS#1) provides more than enough evidence of Sunny Corner's Mechanical and Piping Contract to demonstrate the nature of the construction activity that his company, including sub-contractors, worked on in the Dome during 2015. On balance, the arbitrator fully accepts that construction work on the Wet process did not end in 2014 and neither did it end on April 1, 2015. It is the arbitrator's finding that construction work on the Wet process continued throughout the 2015 year until the construction phase on site was fully completed in December.

It is abundantly clear that the two phases occurred simultaneously in 2015. The operations phase did not alter, cancel, or otherwise affect the construction

phase; it merely switched which phase was predominant relative to the other. At best, that meant at some point during 2015, operations became the major activity on site and construction became the minor activity. For the purpose of determining whether tax and other credits would cease, that switch may have been significant from Government's perspective. However, for the purpose of establishing whether the collective agreement applied, the switch was not determinative. The emergence of predominant operations activity did not reduce the amount of construction activity that existed. Involved in that activity were construction industry contractors' workers who were clients of Sodexo.

**Since construction activity continued throughout 2015 until the end of the construction phase in December, and since the bargaining unit members at Sodexo were assigned work supporting that activity, the collective agreement applied past April 1, 2015 until such assignments ceased later in the year.**

Issue #3: Whether construction activity support work should be the sole basis for determining compensation owing

At Mr. Éric Azran's request, Mr. Przybylowski undertook an analytical exercise to demonstrate when construction activity ceased predominance on site and a switch occurred to production/operations activity. Mr. Przybylowski's spreadsheet AP#2 indicates his methodology of comparing the number of

construction meals at the Sodexo Camp during 2014 and 2015 to the number of non-construction meals at that Camp and calculating the percentage of construction meals for the date of each entry. Of course, it was not only the Kitchen staff who provided service for construction activity on site. Housekeepers, Cleaners (Janitors) and Snow Shovellers performed their respective duties associated with those people who were accommodated at the camp. And Drivers also transported people accommodated elsewhere to and from the Sodexo Camp. All those classifications, and any others that may have been relevant would also be entitled to the provisions of the collective agreement. Other than meals served by Kitchen staff, no analysis was provided by the Employer on the extent of services provided by any other classifications of Sodexo employees. Nevertheless, on the logical assumption that those accommodated at the Camp would be among those who were served meals, an examination of site activity based upon meals served appears to be the only available evidence indicating the level and proportion of some of Sodexo's work assignments in support of construction activity, as well as non-construction activity.

The arbitrator is aware that Mr. Przybylowski's analysis of meals served in AP#2 is not a perfectly accurate measure of construction activity support provided by Sodexo's employees under the collective agreement. For example, AP#2 shows 244 construction meals for all of January 2014, 504 construction meals for all of

February, and no meals at all for March and April 2014. Yet Ms. Lisa White in LW#3 specified 14,999.4 straight time hours for Sodexo employees for the period December 18, 2013 to March 28, 2014. This information derives from the evidence provided in the original arbitration hearings in April 2014 and the arbitrator's award of damages for that period for all classifications of bargaining unit employees. Also, LW#3 indicates 5766.5 total hours worked in April 2014, which does not jibe with Mr. Przybylowski's numbers at all. It is difficult to conceive how it would take 15,000 hours over a three (3) month period for Sodexo's employees to serve only 748 construction meals (plus perhaps a few others for part of December 2013). Even for the 1208 total meals served, it is obvious that Mr. Przybylowski's analysis does not provide the whole picture of Sodexo's work assignments to the bargaining unit. The arbitrator also notes that in AP#3, the snapshot of lodging on August 4, 2015, 33 Sunny Corner construction workers are listed as being accommodated at the Sodexo Camp that day. That is indeed strange given the other evidence at these hearings that none of Sunny Corner's workers were accommodated at the Sodexo camp in 2015, rather they were all accommodated and fed at the LIM camp. In the arbitrator's view, it is unlikely that 33 Sunny Corner employees were accommodated for only one day in 2015. Therefore, a degree of caution is clearly advised when considering Mr.

Pyzybylowski's analyses for the purpose of establishing the level of Sodexo's support for construction activity on site in 2015.

Since it is logical to conclude that the various classifications of Sodexo's employees were involved in much more than the provision of meals, it means that AP#2 did not analyze the full extent of construction activity support provided by all classifications of employees in Sodexo's bargaining unit. Therefore, the arbitrator accepts AP#2 with a degree of reservation based on the discrepancy described above, and the *caveat* that it shows the performance of only one of Sodexo's services indicating construction activity. It does not show all of Sodexo's services which might indicate support for construction activity on site.

Mr. Przybylowski's calculations show that the first time the construction meals percentage dipped to 49% was on May 13, 2015 and it held that percentage until May 19, 2015 when it returned to 50%. This contradicts the Employer's assertion that predominately production activity occurred on April 1, 2015. The only significance of the date of April 1, 2015 is that full commercial production occurred on that date. Predominantly operations activity occurred almost a month and a half later on May 13th, 2015. After that date, it went to 48%, hovered in the low to mid-40s until August when it peaked again at 49% on August 28th and 31st and generally held in the mid-to-high 40s (even at 50%, 53% and 52%) in September, dropped to the low 40s until the last three days of October/first of

November when it was 51%, 51%, 51% and 50%, held again in the high 40s until mid-November and then gradually declined to 18-20% late in December. Of course, none of this affects the arbitrator's decision that the collective agreement continued to apply throughout 2015. However, Mr. Przybylowski's numbers do offer the best "available" indication of the amount of construction activity that Sodexo employees serviced, albeit by meals served, in both 2014 and 2015. Those numbers are helpful in demonstrating a measure of how much work there was for the bargaining unit to perform while the collective agreement applied during 2015.

Although Mr. Pyzybylowski was challenged why he did not include the meals for Sodexo employees in the construction meals category, the arbitrator does not consider that issue to be of major import in this particular exercise. Its relevance had more to do with the main purpose of Mr. Przybylowski's analysis, namely, to demonstrate when the switch in predominant activity occurred, a matter that the arbitrator has found to be of no assistance in determining whether the collective agreement applied. There is more than sufficient other information in Mr. Przybylowski's numbers to indicate one measure of Sodexo's work supporting construction activity on site. By that measure alone, AP#2 establishes that Sodexo serviced much more construction activity in 2015 than it serviced in 2014.

For ease of reference, the arbitrator has combined Mr. Przybylowski's daily numbers to provide a single page monthly comparison of 2014 and 2015. With the

caveat that the arbitrator's eyesight may not be what it used to be for extracting information from Excel spreadsheets, the following table may not be absolutely precise, but it is nevertheless sufficiently accurate to reasonably capture the essence and proportion of Sodexo's meal preparation activity for construction and non-construction clients.

Table 1. 2014 2015

| Month | Construction Meals | % | Non-Constriction Meals | % | Construction Meals | % | Non-Construction Meals | % |
|---|---|---|---|---|---|---|---|---|
| January | 244 | 62 | 150 | 38 | 3177 | 59 | 2230 | 41 |
| February | 504 | 62 | 310 | 38 | 3705 | 59 | 2598 | 41 |
| March | Nil | -- | Nil | -- | 6165 | 59 | 4373 | 41 |
| April | Nil | -- | Nil | -- | 7719 | 57 | 5753 | 43 |
| May | 1678 | 61 | 1072 | 39 | 7586 | 48 | 8147 | 52 |
| June | 3204 | 64 | 1767 | 36 | 5061 | 46 | 5946 | 54 |
| July | 5699 | 64 | 3222 | 36 | 5356 | 41 | 7829 | 59 |
| August | 3234 | 62 | 1952 | 38 | 5987 | 46 | 7076 | 54 |
| September | 6938 | 60 | 4705 | 40 | 4421 | 41 | 6319 | 59 |
| October | 7909 | 57 | 5984 | 43 | 3270 | 43 | 4356 | 57 |
| November | 6770 | 55 | 5514 | 45 | 4198 | 44 | 5280 | 56 |
| December | 3345 | 50 | 3330 | 50 | 566 | 20 | 2236 | 80 |
| Totals | 39,525 | 59 | 28,006 | 41 | 57,211 | 47 | 62,143 | 53 |

The foregoing indicates that Sodexo served 1.45 times more construction meals in 2015 than in 2014. This establishes that there was more construction activity in 2015 than in 2014. The wide variation for the months January, February, March and April account for most of that difference, but Sodexo employees still performed a significant amount of work in support of construction activity from mid-May until at least mid-November 2015. That is sufficient evidence to establish that the construction industry bargaining unit at Sodexo was viable until the later months of 2015.

The number of construction meals in 2015 was only 15% less than ALL meals served by Sodexo in 2014. Clearly, this demonstrates how much heavier construction activity was in 2015 than in 2014, despite the switch in predominance that occurred in mid-May after commercial operations began for the first time on April 1, 2015.

It should be noted that the Employer did not distinguish between construction and non-construction clients in Lisa White's calculations of wages and benefits owing. No attempt was made in the 2014 hearings to claim that the bargaining unit's scope of work and remuneration for it under the collective agreement should be considered solely on the basis of the construction clients Sodexo serviced. Indeed, the arbitrator's July 21, 2014 award of wages was based on both activities being assigned to Sodexo's bargaining unit employees. Nothing changed in 2015 in that respect.

Also, in the arbitrator's opinion, a claim that a different compensation regime should apply for service provided to non-construction clients would require contemporaneous records to identify that separate group of Sodexo employees whose work was performed solely and exclusively for non-construction clients. Similar records would also be required for the separate group of Sodexo employees, whose work was performed solely and exclusively for construction workers on site. Without such evidence, there would be no way to know the

names of the employees who would be eligible for compensation owing on the basis of services performed solely for construction activity. No such evidence is available because the Employer did not at any time assign work to its employees that way.

Clearly, the evidence Ms. White provided was derived from the payroll accounting information that was available to her, which did not distinguish between work performed for construction and non-construction clients. Throughout the compensation hearings, there was no issue raised about restricting compensation owing for the bargaining unit solely to work performed for Sodexo's construction clients. By all indications, the parties were in agreement that the bargaining unit at Sodexo consisted of all its employees who were assigned work supporting construction activity as well as non-construction activity.

*Arbitrator asked the parties to attempt settlement on a proportional basis, recognizing the extent of construction activity and commercial production activity in 2015*

However, the issue of restricting compensation owing to work performed in support of construction activity did arise post-hearings when the arbitrator asked both counsel to consider the prospect of settlement on a mutually agreed proportional basis, which would obviously recognize the greater extent of operations activity that Sodexo serviced in 2015. The parties did try, but ultimately reported that they could not settle. For different reasons, (see pages

102-107 of PART 1 of this award) both had problems with a proportional approach.

The Employer's main position was that the percentage should be applied strictly to construction activity support work from April 2014 to December 2015, which, it argued, would reflect the declining amount of construction activity over that period and would fairly pay the bargaining unit for work they performed in support of construction activity. In the alternative, should the arbitrator consider the percentage process applicable only from April 1, 2015 to December 31, 2015, the Employer proposed a higher amount owing to the Union and Sodexo employees.

The Union disputed Mr. Przybylowski's analysis of construction meals served, claiming it was flawed because it did not reflect the work of Housekeeping, Janitors, Snow Shovelers, and Bus Drivers, etc. It was also the Union accountant's view that applying some percentage to the last nine months of 2015 would be unreasonable because it would be a "nightmare" to try to attribute the damages to individual workers. Therefore, in an attempt to conclude litigation, yet be fair to its members, the Union proposed that the collective agreement be applied 100% for all work performed to the end date of September 30, 2015. The Union calculated a damage amount somewhat higher than either of the Employer's proposals exclusive of shift premium and interest.

A reading of the parties' post hearing submissions reveals that the parties potentially narrowed the financial gap between them but would not commit to a settlement. It appears that the focus of the proportional settlement suggested by the arbitrator was interpreted to be an analysis of the work the bargaining unit performed for construction activity only. That is unfortunate because that is not what the arbitrator meant the parties to do. Logically, that restriction would not make sense because the July 21, 2014 arbitration decision had already awarded wages from December 18, 2013 to March 28, 2014 on the basis of all the work assigned to the bargaining unit, which included work in support of non-construction activity as well. Clearly, what was different in 2015 was only the extent of operations activity that occurred. The arbitrator's hope was that the parties might fashion a settlement that would recognize the proportional difference between construction activity and the non-construction activity that was expanded by commercial operations in 2015. To the extent that this was not clear to the parties, the arbitrator must assume responsibility for any confusion. There being no opportunity to clarify matters during settlement talks, the arbitrator's up-front suggestion had to be abundantly clear. Obviously it was not, and an opportunity may have been lost. In the result, since the parties were still unable to reach their own resolution of compensation owing, the arbitrator was obliged to further continue his own deliberations on compensation owing.

*Absent agreement to settle, arbitrator examines issue of restricting compensation solely to work performed in support of construction activity.*

In continuing to explore approaches to determine whether there might be merit during some portion of 2015 to restrict compensation owing for the bargaining unit and the Union to work performed solely in support of construction activity, the arbitrator notes that Table 1 above demonstrates a slow start for construction activity early in 2014 until July, after which there was a peak in September, October and November. Even December (a time when a slowdown might be expected) showed as much activity as June and August clearly because construction activity continued into 2015. Start-up in January and February 2015 began at the same general level as December 2014. Heavy construction activity occurred in March, April and May. The months of June and July had average construction activity. There was a small upsurge in August. September, October and November showed a gradual decline. Then in December construction activity plummeted.

*Collective agreement applies to bargaining unit work on behalf of construction activity on site*

The CLRA collective agreement certainly applies to work that Sodexo's bargaining unit performs for construction activity on site. Construction activity on the Project Site, which Sodexo employees serviced was the *sine qua non* for the

application of the CLRA/Local 779 collective agreement. In the absence of that construction activity, the assignment of work solely for non-construction activity would not have collective agreement implications. Of course, where there is ongoing construction activity, the parties would be free to mutually agree to an arrangement for the bargaining unit to perform work in support of non-construction activity as well. However, the arbitrator submits that the likelihood of such an arrangement would be zero if the Employer were to propose two different pay scales for essentially the same type of work. In the result, if the Employer wanted to assign non-construction work to the bargaining unit, there would be an expectation that payment would be the same as provided in the collective agreement for construction activity bargaining unit work.

In the arbitrator's opinion, the CLRA collective agreement applied to Sodexo as long as there was sufficient construction activity support work for a validly operating bargaining unit to perform. The evidence is that Sodexo did not supply services to all construction workers on site. For example, the Employer claimed that Sodexo did not provide services to Sunny Corner employees in 2015. Therefore, what needs to be clarified is whether support services by Sodexo continued, for example, until all construction employees left the site on December 10, 2015 when productions operations had shut down, or whether the servicing of construction workers on site by Sodexo ceased sometime earlier. If the latter was

the case, the collective agreement possibly could have ceased to apply before the actual construction phase ended in December 2015. In determining appropriate compensation, part of the difficulty lies in determining exactly when Sodexo ceased such service to construction workers on site.

The arbitrator sought the parties' assistance in clarifying the above matters on February 29, 2018 because they were important to a reasonably accurate determination of compensation owing. The Employer responded first on March 13, 2018 (see PART 1), taking the position essentially that the hearings were finished and it would be improper to consider further evidence or submissions. The Union responded later on April 13, 2018, essentially taking the position that there was little assistance of any significance it could add at this juncture. In the result, the arbitrator concluded that the parties were unable to provide any further clarity on how large a bargaining unit was needed to be assigned to construction industry support work during 2015, or when bargaining unit employees ceased to perform support work on behalf of construction activity on the project site.

On balance, the arbitrator is satisfied that there are relatively few difficulties involved in determining compensation owed between December 18, 2013 and December 31, 2014. The primary reason for that is because there is no longer any dispute that the collective agreement applied during that period and that the

bargaining unit performed the accommodation/service work for all of Sodexo's clients at the camp site, a situation that continued throughout 2014.

There is absolutely no doubt that the collective agreement continued past December 31, 2014 and continued throughout 2015 even when the "switch" to predominant production activity occurred in mid-May. Therefore, the most contentious period for determination of compensation in 2015 is after the mid-May "switch". After that point, there is evidence of gradually declining construction activity into November, but it is clear that the monthly totals in Table 1 still indicate a substantial amount of construction activity work for the Sodexo bargaining unit to service. However, in attempting to calculate the appropriate compensation for Sodexo's bargaining unit employees on the basis of construction activity only, the fact that there was a substantially greater proportion of non-construction (operations) employees serviced by Sodexo employees from May onwards in 2015, gives cause to consider whether or to what extent the collective agreement should apply to Sodexo's work on behalf of those non-construction activities.

Issue #4: Should the collective agreement be deemed to apply to work performed on behalf of non-construction employees?

Since this compensation exercise is taking place long after the period in question has occurred, an effort to determine appropriate compensation makes it

necessary to look back in time to determine what effect the collective agreement would have had if it had been applied as it should have been applied in the first place. Essentially, that would require a hypothetical step into the Employer's shoes from the very beginning on December 18, 2013, and to walk the Employer's journey until the collective agreement ceased to apply – whenever that point is determined to be.

There is no question that the agreement would apply to the bargaining unit employees to whom Sodexo would thereafter assign work in support of construction activity on the project site throughout that entire period. To ensure that appropriate compensation would apply solely for construction client support work, the Employer would need only to restrict its work assignments to that category, and that would effectively define who was in the bargaining unit. Obviously, that would preclude the assignment of non-construction support work to the bargaining unit at all times. A separate group of employees would have to perform non-construction support work. Then when the collective agreement no longer applied because Sodexo's work in support of construction activity ceased, it would seem logical that the total compensation owing would flow complication-free from the payroll records. However, the arbitrator submits that that approach would be purely hypothetical and unrealistic for these compensation hearings.

To establish compensation owing, a return to reality in 2017 would ultimately be necessary. A look into the past to hypothesize a clean slate of things in order to establish what the Employer would do if the collective agreement applied would ignore what actually did happen. Almost all the evidence submitted in support of the Employer's position in this case revolves around how Sodexo actually assigned work to its employees on the project site. Indeed, Sodexo's actual payroll information is based on payments it made to its employees as if there was no collective agreement. If that were to be ignored because a clean slate is to be contemplated in order to determine compensation, there would be no deduction for wages already paid from compensation amounts determined on the basis of the collective agreement. Obviously, that cannot be the case. Information from 2014 and 2015 is relevant in determining compensation owing. Therefore, all evidence of how bargaining unit employees were actually assigned and paid is relevant for consideration.

Establishing the size and composition of the bargaining unit which was assigned work solely in support of construction activity, would be the Employer's responsibility at arbitration. To accomplish that would require accurate records of the extent of particular construction activity support work it assigned to all the various classifications of Sodexo employees, and the clear end date of Sodexo's construction activity support work on site.

In the arbitrator's view, such an approach would be impractical, unrealistic, unreliable and invalid in this case because the Employer cannot retroactively establish the size and composition of the bargaining unit needed to perform work solely on behalf of construction activity. The number of employees of that hypothetical bargaining unit would have to be determined and they would have to be distinguished from those to whom only non-construction support work was assigned. Since they were never distinguished, the Employer is unable to supply such evidence now.

The fact of the matter is that Sodexo assigned all of its 2015 work to its general work force. No group of employees was singled out to perform work solely on behalf of construction activity and no group of employees was singled out to perform work solely on behalf of non-construction activity.

The collective agreement applies to the members of the bargaining unit who performed work in support of construction activity. But for the purpose of determining appropriate compensation at this juncture, we would need to know the composition of that bargaining unit and how long the collective agreement applied to it in 2015. It has been suggested that those employees who performed work solely on behalf of construction activity, i.e., the bargaining unit, should now be compensated in accordance with the CLRA/Local 779 collective agreement, yet the evidence is that those same employees were also assigned all the non-

construction activity work. With the greatest respect, this evidence cannot be ignored.

Any claim that compensation owing for either 2014 or 2015 should be restricted to work performed solely in support of construction activity would be tantamount to claiming that the relevant bargaining unit would have had to consist of those employees who performed that work exclusively. Of course, the corollary is that work performed in support of non-construction activity would have to be performed by employees who were not in the bargaining unit. That would describe a much smaller bargaining unit than one to which both construction and non-construction support work has been assigned.

At best, it would be a hypothetical exercise to contemplate the size and composition of the bargaining unit that would be required for Sodexo to service only the amount of construction activity involved on site in 2015. If the Employer were to attempt such an assessment, it would require a retroactive examination of what Sodexo's determination would have been at the beginning of 2015 if it had to establish the initial size and composition of the bargaining unit needed to provide support work solely for construction activity on the project site during that year. As part of that exercise, the Employer would have to demonstrate how or whether the size and composition of bargaining unit would have been affected by changes in construction activity throughout the remainder of the year. It would be difficult

to imagine how such an exercise in 2017 could avoid being influenced by the fact that Sodexo chose not to apply the collective agreement to any of the work its employees performed. To accurately calculate compensation owing, the number, identity, classifications and tenure of all Sodexo's bargaining unit members required to perform bargaining unit services for construction activity on site throughout 2015 would have to be established. The arbitrator is not convinced of the likelihood this information can be retroactively determined by the Employer.

The Employer never put its mind to this exercise in the first place. Sodexo conducted its annual 2015 accommodation/services activity based upon an implementation plan made for the wrong reason. It simply chose to proceed as if no collective agreement applied to any portion of its work after April 1st. To anticipate what a hypothetical Sodexo decision would have been on the size of the bargaining unit if it had to apply the CLRA collective agreement to only one segment of its employees in 2015, would require retroactive corporate thinking influenced by the Employer's contrary practice, which faced no adverse consequences in the past, but would now be subject to the very consequences it has always sought to avoid. In such circumstances, the arbitrator is doubtful that the Employer's determination at this stage would be devoid of a self-serving element. Therefore, the arbitrator is not satisfied that a reasonable retroactive assessment of the size of the bargaining unit in 2015 can now be made. Essentially it would be

tantamount to asking the Employer to re-write its collective bargaining history reflecting its own current self-interest, long after its contrary practice of assigning its employees had been established.

For the arbitrator to conduct this examination of what the Employer would have done if it had to apply the collective agreement to only one part of its operation in 2015 would surely be an exercise in hypothetical futility twice removed. If no other reasonable avenue for determining compensation owing can be determined, the arbitrator may have no other choice than to issue a less than satisfactory compensation award. However, every effort will be made to avoid having to do so.

An associated matter further complicating an assessment of the size of Sodexo's bargaining unit in 2015 is that most construction phases in the industry feature a decline in personnel as the amount of work on a project winds down towards completion. That usually means a reduction in the number of construction employees as that date approaches. Construction projects usually do not reach final completion with a full crew compliment at work on a single final day. Crew numbers normally decrease gradually as work diminishes, and the size of a bargaining unit reduces commensurately until there is nobody left in the unit. At that point the relevant collective agreement would certainly cease to apply. Also, there is usually an inevitable commissioning stage, on which the parties often

disagree whether work is construction work for a CLRA bargaining unit or is third party work. Of course, for Sodexo that issue would be moot because servicing many of the construction employees working on the construction site was its responsibility (a point acknowledged by Mr. Przybylowski who appropriately included commissioning as construction activity in his calculations). It is also worthy of note that page 25 of BS#1 describes a Purchase Order for Sunny Corner for "Commissioning Support Service" (Delivery date July 14, 2015), thereby establishing such work as construction activity on the site. Unfortunately, aside from Sunny Corner employees who performed "some" commissioning, and JSM employees who performed more commissioning throughout 2015, especially in the summer and early fall, it is not clear whether all construction industry contractors who were accommodated at the Sodexo Camp were involved in commissioning and how long that activity lasted for them. All the foregoing adds to the complexity of determining the size of the Sodexo bargaining unit as a means of determining appropriate compensation owing for 2015.

In the process of further considering whether the basis for determining compensation owing should be restricted to construction activity, it seems reasonable to assume that the Sodexo bargaining unit, which the Employer cannot accurately determine as being independent of employees engaged solely in non-construction activity support work, likely would have been subject to some

reduction of personnel as the need for its services to construction workers declined. Table 1 does indicate a decrease of construction meals served after May 2015, as well as a decrease in non-construction meals served after September 2015. Therefore, one might expect those situations to have had some effect on Sodexo's overall staffing numbers. However, determining how much of a decline would have occurred and when it would have occurred is not an exact science, for it is not obvious how to ascertain how much of a decrease in construction activity would actually translate into the reduction of one Sodexo bargaining unit employee. As the matter stands, no analysis has been advanced on this subject. To the extent employee reductions did occur in 2015, they appear to have been based on the reduction of overall activity on the project site. Overall activity was clearly the basis for the assignment of work to Sodexo's employees in the first place without regard to it being for construction or production activity.

If the point is reached when there are insufficient employees engaged in the construction industry to support a viable bargaining unit, a collective agreement would cease to apply. However, evidence of any decline in the size of Sodexo's bargaining unit matching a decline in construction activity up to completion of the TSMC construction phase is entirely missing in this case because at no time did Sodexo consider its workforce subject to the CLRA/Local 779 collective agreement. It did not consider how many bargaining unit employees it required, or

all the classifications involved, or the periods of employment involved. The only analysis was of meals served and that was undertaken in 2017; no analysis was done on any other Camp accommodation services. In other words, there is no evidence that Sodexo exercised due diligence in 2015 by keeping records to ensure such information would be available at these compensation hearings should the Courts decide against the company in the original award. Although the evidence shows the total amount of compensation for work performed by Sodexo employees in 2015, it does not show the size of the bargaining unit at any time. Such due diligence would have been helpful to the determination of compensation owing based on service to construction activity only.

In the arbitrator's view, a claim that compensation owing should be restricted to a bargaining unit of employees identified solely on the basis of construction industry support work they performed could conceivably invite the conclusion that the size of the bargaining unit should have been much smaller in both 2014 and 2015 than the group of employees who were actually assigned to perform work on behalf of both construction activity and non-construction activity. Indeed, it is equally conceivable that this approach could lead to the conclusion that some of the employees named in the Employer's payroll records would not now be considered bargaining unit employees eligible for compensation. First and most importantly, that would be at odds with the compensation order for wages in the

July 21, 2014 award. Second, the evidence does not indicate who those employees would be. The evidence also does not establish how many employees would have composed that bargaining unit, or who are the individual employees in that bargaining unit who should now be entitled to compensation owed. Third, it would also be conceivable that there would have been no bargaining unit at all in the later months of 2015, if only non-construction activity on site was left for Sodexo to service.

Obviously, the picture of the bargaining unit that meets the foregoing restrictions required to determine compensation owing, would bear no resemblance to the group of employees who actually performed the work assigned by the Employer. More to the point, the payroll evidence provided to this arbitration is not reasonably comparable to the bargaining unit contemplated by the Employer's position as the basis for determining compensation owing. A bargaining unit supporting construction activity only, which is created hypothetically and retroactively, cannot be supported by the information describing a completely different management practice in 2014 and 2015. If the Employer had exercised due diligence in those years to later assist this compensation arbitration to arrive at an accurate amount owing by keeping an alternate record of the number, names and hours of employees who should or should not be considered for compensation owing, the Employer's position might be more supportable, and those entitled to

compensation owing and the appropriate amounts might be able to be determined much more accurately and comprehensively. Since no due diligence was considered, an accurate, complete and precise determination of compensation owing at this point is unlikely to be attained. In the arbitrator's opinion, that is unfortunate because it renders this particular approach to determining compensation owing a much less useful alternative than it might have been.

To reiterate an earlier point, the arbitrator is left with scant and imperfect information on which to determine appropriate compensation for bargaining unit employees during 2015 relying on the Employer's retroactive determination of the size of the bargaining unit as the basis of doing so.

As indicated earlier in these deliberations, to exhaust all possible sources of evidence on the matter, the arbitrator invited the parties to contribute as much information and assistance as they may have been able to share on this issue. The arbitrator contacted counsel for this particular purpose on February 28, 2018, and also to advise them of the status of the award to date. In addition, clarification was requested 1) whether Sodexo Drivers drove Sunny Corner employees from the LIM camp to the construction site and back during 2015, and 2) in light of Mr. Przybylowski's spreadsheet AP#2 showing that Sunny Corner's employees received no meals from the LIM camp after October 28, 2015, who fed them?

The arbitrator's hope for the parties' assistance on these matters was to enable him to achieve the most accurate and appropriate determination of compensation owed. In other words, as long as the path to that end remained inadequate, it would be more desirable for the parties to reach their own settlement than for the arbitrator to fashion a less-than-perfect outcome. With the greatest of respect to counsel, the arbitrator expected more from them than they were able to provide. Their frustration is understandable. There is nothing further to be gained from post-hearing communications. In the arbitrator's view, even though he believes he is entitled by the *The Labour Relations Act* and the *Public Enquiries Act* to seek relevant evidence from the parties at any time as long as both parties have the opportunity to respond to it, and he is entitled to ask counsel as officers of the court to obtain relevant information, there is no profit to be gained by arguing that issue at this point. Since the parties clearly have no stomach for a settlement, the arbitrator has decided to consider the content of counsels' most recent correspondence to be of minimal assistance.

For the preceding reasons, the arbitrator finds that pursuing reasonably accurate information on the size of the bargaining unit, which performed work solely in support of construction activity in 2015, is not a satisfactory or reliable approach for determining appropriate compensation owing.

*Proposing an alternate perspective to consider for determining reasonably appropriate compensation owing.*

The arbitrator understands the Union's frustration that it would be a nightmare to apply a proportional approach to damages for individual employees. The arbitrator also understands the Employer's frustration in responding to requests for additional information after the arbitrator has already advised that he has rejected the Employer's main argument on the application of the collective agreement past April 1, 2015. Therefore, at this particular point, it might be useful to look at determining compensation owing from another perspective. Rather than trying to figure out what the appropriate size of the bargaining unit should have been in 2014 and 2015, perhaps consideration should be given instead to focussing on the effect that the Employer's assignments of work actually had on the employees in the bargaining unit.

The starting point for this approach is the finding that the collective agreement continued to apply after December 31, 2014. It is common ground that the SCC decision had the effect of confirming that the collective agreement applied to Sodexo since December 18, 2013. This also confirms the arbitrator's July 21, 2014 award ordering a wage payment $314,118.56 for the period December 18, 2013 to March 28, 2014, and his order that payment be determined for benefits for that period and on an ongoing basis. Having already determined above that the basis for compensation owing was work performed by the bargaining unit

supporting construction and non-construction activity, the arbitrator would require very convincing evidence and argument that he should depart from that reasoning in determining compensation owing for the remainder of 2014 and 2015.

Since the Employer willingly, without reservation or condition of any kind assigned more than construction activity related work to the bargaining unit employees throughout 2014 and 2015, the arbitrator is satisfied that it established a practice of doing so, which practice it was entitled to cease at any time with appropriate notice to the bargaining unit. However, the fact of the matter is that the Employer did not at any time cease that practice during the construction phase of the project. The Employer's proposal that assignments to support non-construction activity should not now be considered by the arbitrator for the purpose of determining compensation is a little like closing the barn door after the cows have already gone. The Employer's practice and its payroll evidence in these compensation hearings demonstrate its presumption and acceptance that remuneration in accordance with the provisions of the collective agreement also applied to the bargaining unit employees who performed all Sodexo's servicing for construction activity as well as non-construction activity.

This situation is not a certification matter as it was in *Re USWA v. Diepdaume Mines Limited.* There is no build-up principle involved here for all the Mine employees on the DSO Site. And there is no issue of assigning bargaining rights to

the appropriate stage of development of the project. A union of all TSMC employees on the Mining operation was not certified. HERE Local 779 was certified solely for Sodexo's employees. The appropriate bargaining unit is still the same as it was on December 18, 2013. The sole issue to be determined is compensation owing to the employees of that bargaining unit until the collective agreement ceased to apply. There was no other bargaining unit at the Sodexo Camp, and no other group of employees has been identified as having serviced non-construction activity exclusively. Therefore, the members of the bargaining unit, who were the only ones the collective agreement could have applied to 100 per cent were the only ones who performed all the work Sodexo assigned to its employees since December 18, 2013. Sodexo did not consider distinguishing work for non-construction from construction clients in its assignments at the time. And it did not distinguish between them in the calculations of compensation owing introduced by Ms. Lisa White. Consequently, all the work assigned to Sodexo's bargaining unit employees included all the work for non-construction activity and, as long as this practice existed, it was subject to the same payment and conditions under the collective agreement that applied to work in support of construction activity. Despite the fact that the Union's construction industry evidence in 2014 hearings made it clear that it was not unusual for work supporting non-construction clients to be absorbed by the Local 779 bargaining unit, Sodexo did not attempt to

avoid that situation at any time. Despite knowledge of the foregoing, Sodexo continued without any change in the way it assigned work to its employees. The effect of those assignments to members of the bargaining is that work performed for non-construction clients fell under the very same payment scheme that applied to work for construction clients. The payment scheme is the one prescribed by the collective agreement.

Sodexo could have assigned its employees altogether differently. The Employer had the ability to accommodate all construction employees somewhere else and arrange for them to be fed by other agencies, as has been suggested was done for Sunny Corner employees at the LIM camp. It also could have considered separating a group of employees at the Sodexo Camp for exclusive assignment to non-construction employees. And it could have ceased its practice of assigning everything to the bargaining unit at any time. It did none of those things. The Employer ignored the potential consequences, yet in an obvious demonstration of acknowledging those consequences, it made no suggestion during the compensation hearings that payment owing to the bargaining unit should be restricted to work performed solely for construction clients. That position was not taken until counsel for the Employer did so in post-hearing correspondence. In essence, Sodexo's practice was to assign all its work in 2014 and 2015 to bargaining unit members to whom the collective agreement applied, and it is that

evidence which should be fully considered for the purpose of determining compensation owing.

Table 1 shows that the proportion of non-construction clients served meals by the bargaining unit in 2014 ranged from a low of 36% to a high of 50%, with most months in the high 30s to low 40s. In the arbitrator's view, those non-construction proportions seem higher than would be expected, and construction proportions seem lower than would be expected, especially in light of the evidence in 2014 that construction activity was expected to result in predominately more construction accommodations than non-construction accommodations at the Sodexo Camp. It is surprising that this distribution of work did not appear to raise any concern on the Employer's part for the potential of future compensation hearings, especially since it had the ability to minimize its construction activity exposure by arranging accommodation and meals for construction clients elsewhere (as was the case for Sunny Corner employees in 2015). Also, with a view to a possible hearing at some point on compensation owing, the Employer could have ceased its practice of assigning non-construction support work to bargaining unit employees.

On the one hand, one might attribute this indiscriminate distribution of work to the Employer's unfamiliarity with the situation during the first four months of 2014 and its reluctance to change its practice, expecting that construction would be

completed by the end of 2014, as was the evidence in the original hearings. Yet that would indicate that the Employer was content with the bargaining unit performing all of Sodexo's work during 2014 generally in the proportions noted in Table 1 for construction and non-construction activity. In other words, Sodexo accepted those proportions for its own convenience during 2014 knowing that it could do so with impunity at the time. Now that the collective agreement has been deemed to have applied, the Employer asserts that it would not have assigned non-construction activity support work to bargaining unit employees if the collective agreement had applied at the time. This argument is not convincing because it suggests that the reason for the Employer saying it would not now assign non-construction support work to the bargaining unit is to avoid having to pay collective agreement rates for it. It would not be logical to avoid such assignments if the Employer believed there would be no financial consequence. The fact of the matter is that the Employer's practice in 2014 and 2015 has established the consequence, and that practice cannot now be ceased retroactively. Therefore, the arbitrator finds that the bargaining unit is entitled to be paid for all work assigned to it at CLRA/Local 779 rates, and that the other terms and conditions of the agreement also apply to all bargaining unit employees while the Employer's practice persisted.

On the other hand, one might wonder if this distribution of work was an attempt by Sodexo to actually minimize its construction activity exposure in 2014 from the onset while at the same time ensure that a necessary balance of construction and non-construction employees were housed at the Camp and were readily available on site at all times. There is no evidence that such was the case, but in any event that scenario would also mean that the assignment of all work solely to the bargaining unit was deliberate and that Sodexo was content with the proportions for construction and non-construction. As indicated in the preceding paragraph, again it would mean that Sodexo accepted those proportions during 2014 knowing that if the collective agreement were to be applied (as is now happening) the bargaining unit would be entitled to be paid for all work assigned to it at CLRA/Local 779 rates, and that the other terms and conditions of the agreement would also apply. It was open to the Employer to change the assignment of all work to the bargaining unit in 2015 if it wished. It did not do so. Payment for all such work has already been ordered in the July 21, 2014 award. None of the evidence and submissions at compensation hearings warrants changing the basis for determining such compensation.

There appears to have been little concern on the Employer's part throughout 2015 for how it assigned its work as it continued to use the bargaining unit solely to service both construction and non-construction employees regardless of their

respective proportions. The arbitrator is satisfied that the Employer was quite aware, as it was in 2014, that should the collective agreement be deemed to apply to the members of the bargaining unit at Sodexo, its employees would be entitled to be paid in accordance with the provisions of the collective agreement.

In the final analysis, the fact of the matter is that Sodexo conducted its business on site since December 2013 as it wished and for its own convenience with total disregard for a potential finding that the collective agreement might in future be deemed by the arbitrator and/or the courts to apply retroactively to the date of certification. In essence, the Employer chose to ignore all consequences until it had no other choice but try to minimize them at compensation hearings. The Employer's current position is essentially that it should now be considered fair to compensate the Union and the bargaining unit only for work employees performed in support of construction activity.

This is not an issue of the Employer deciding what it would do if the collective agreement had been applied in the past. It no longer has that luxury. The collective agreement has been deemed to have applied from the date of certification. Therefore, the Employer does not have the right to change the decisions it made regarding assignments to the bargaining unit in the past. Rather, it is now responsible for any decisions it did make that were in violation of the collective agreement.

In the arbitrator's view, if that position were to be accepted, there first would have to be a finding that absolutely none of the work in support of non-construction activity would be payable to bargaining unit members who did such work for Sodexo in 2014 and 2015 as was the case for other Local 779 bargaining units on other construction projects in the province (e.g., at the IOC expansion project) as indicated in the original award. The arbitrator considers it all too convenient for the Employer to suggest now that it would have paid only for construction activity support work if the collective agreement had applied at the time. The fact is that the collective agreement did apply, albeit retroactively, from December 2013 until December 31, 2015. What the Employer proposes is that the arbitrator totally ignore the Employer's persistent assignment of non-construction activity work to the bargaining unit throughout the Mine project when it suited its own purposes. The Employer was fully aware since original hearings on the merits in April 2014 that it was common practice on other construction projects for Local 779 to perform work on behalf of non-construction clients staying at camps on site. The reason for that is more likely than not that those Employers found the practice more convenient than having to find alternate accommodation, meals, transportation, etc., elsewhere for those people. Therefore, on balance, the arbitrator does not accept that the same arrangement would definitely not have occurred in Sodexo's circumstances. Such an arrangement should not be dismissed

from consideration. The best evidence of what the Employer's wishes were in this regard is its own practice.

On balance, the arbitrator finds that the bargaining unit should be paid at collective agreement rates for a portion of non-construction support work as well as for all the construction activity support work it performed. Again, an obvious difficulty is determining the additional percentage that would be reasonable for such work. At the moment, all the arbitrator has to assist him in that determination is Mr. Przybylowski's analysis of meals served.

It is also important to note that if the arbitrator's decision above was the opposite, to adequately deal with compensation owing would require accurate records demonstrating what work was performed in support of construction activity, when, how much, and for how long it was performed, and what classifications were involved. In other words, it would be necessary to return to the exercise of determining the size and composition of the bargaining unit at all times. Also, the precise point at which Sodexo's involvement with construction activity ended in 2015 would need to be established, as well as the extent and timing of bargaining unit reductions associated with the decline in construction activity. The evidence currently available to the arbitrator is of very little assistance in this regard, and there is considerable doubt that it can be provided. Clearly the reason there is no evidence of the size of the bargaining unit required in 2015 is because

Sodexo did not consider keeping alternate records for 2015. While Mr. Przybylowski was asked in 2017 to calculate some numbers to support the Employer's position that a "predominant activity" switch occurred on April 1, 2015, Sodexo did not at any time attempt to distinguish between the accommodation and catering work performed for construction workers on site and similar work performed for non-construction employees on site.

In the arbitrator's view, the only remaining method to approach appropriate compensation is to recognize the fact that all work assigned by Sodexo in 2014 and 2015 was to members of the bargaining unit, that the collective agreement applied to construction activity support work assigned to the unit by the Employer, and the practice of assigning non-construction activity support work to the bargaining unit establishes the payment of collective agreement wages and benefits for such work. This would still require a decision on the percentage of non-construction activity support work that would be reasonable to add to the construction activity support work it did. However, the arbitrator is satisfied that this method would permit a more reasonable approximation of compensation owing compared with attempting to determine the size of the bargaining unit in order to determine such compensation.

At the moment, the arbitrator is aware from the original award that 47 Sodexo employees were identified as bargaining unit members entitled to compensation up to March 28, 2014 (before construction numbers ramped up in summer). Mr. Przybylowski identified the figure of 18 Sodexo employees who were lodged at the Sodexo camp on August 4, 2015. That clearly represented a single work day for a group of employees during their in-camp schedule. There would have been a similar group of employees who were on their off-schedule at the time. This seems to suggest that the number of Sodexo employees required to serve a full camp in 2015 may have been less than the number required in 2014. But that seems hardly logical given the significant increase in both construction and non-construction activity on site throughout 2015. In any event, whatever the actual numbers may be for 2015, the salient fact is that the bargaining unit was assigned all that work.

*Sodexo entitled to accommodate other than construction workers at the camp site.*

In 2015, TSMC was aware that there would be a need to accommodate mine employees as close as possible to production operations on site to enable them to tend to their duties promptly. Since the Sodexo camp was the only camp on site, it made sense that operations workers would be accommodated there. Similarly, it also made sense for some construction workers to be accommodated there. Obviously, Sodexo was able to accommodate workers from both groups during

2015. If it couldn't do so, there would have been no room for somebody and that somebody would have had to be accommodated elsewhere despite the inefficiencies it would have caused. To the extent that Sodexo was able to accommodate significant numbers from both groups at the same time, it clearly reflected the wishes of senior project management. However, with both groups being serviced by Sodexo employees, but using the Employer's argument that only those servicing construction activity on site should be considered bargaining unit employees subject to the CLRA collective agreement, there would have been a need to separate the bargaining unit employees from the other Sodexo employees who serviced the operations people. If separating Sodexo's employees in this manner proved to be impractical, as the arbitrator submits would have been quickly realized if the collective agreement had been followed, the issue would surely have attracted attention from the bargaining agent who would have attempted to ensure the best interests of the bargaining unit. Even if the Union were to propose that the bargaining unit service both groups, contingent upon adherence to CLRA agreement monetary and other provisions, a proposal Sodexo could reject if it wished to do so, at least the issue would be out in the open and the Employer would realize it would have to separate its workforce at the camp, or re-think accommodating both groups on site. Of course, since the Employer never did apply the collective agreement at any time, it never turned its mind to such a

situation. Rather it conducted its business as if the collective agreement did not apply, thereby lumping construction activity and operations activity together for its own convenience. Now that the collective agreement has been found to apply from December 18, 2013 until the end of the construction project activity serviced by Sodexo in 2015, the Employer must turn its mind to the impact its decision to service both groups in 2015 has had on the application of the collective agreement for the purpose of determining compensation. The blunt question is whether the Employer has effectively made itself responsible for the bargaining unit servicing both groups of people?

The evidence in 2014 was that some non-construction personnel were accommodated at the Sodexo camp while construction employees constituted the largest number of clients. The 2014 hearing also heard evidence that it was not unusual for non-construction personnel to be accommodated at such camps on other project sites, without affecting the application of the collective agreement to employees. The Employer was made aware of this when hearings occurred in April 2014. The evidence is that there were non-construction people accommodated at the Sodexo camp throughout 2014 and certainly more during 2015. The arbitrator has heard no evidence that Sodexo separated out those extra people in 2014, assigned a special group of employees to service them, and identified a lesser compensation regime for accommodating them. Indeed, there

has been no evidence at these compensation hearings that the Employer's calculations for wages and benefits for the 47 bargaining unit employees for the period December 18, 2013 to March 28, 2014 were based on anything other than the total amount of work performed on behalf of all people accommodated at the Sodexo camp, as well as catering for other construction employees on site who were accommodated elsewhere. And there has been no evidence or suggestion that Sodexo's compensation calculations to the end of 2014 have factored out accommodation and other services for non-construction clients at the camp. Clearly Sodexo's work included everybody at the camp, regardless what activity they represented, and the Employer's own payroll calculations for 2014 demonstrate that Sodexo accepted that situation. This does not support counsel's post hearing position that Sodexo should not be required to pay CLRA agreement wages for accommodating operations people.

Since Sodexo has demonstrated its acceptance that all clients of its camp were serviced by the bargaining unit and, since the arbitrator has found (for reasons already explained) that Sodexo employees are to be paid wages and benefits for that service in accordance with the collective agreement until December 31, 2004, the arbitrator reject's counsel's recent submission that Sodexo should not pay wages and benefits for servicing any non-construction clients at any time. **Under the circumstances, the arbitrator is satisfied that payment for services to**

**construction workers is due and payable to the bargaining unit for 2015 and that the same proportion of work for non-construction workers as in 2014 also should be due and payable during 2015 while Sodexo was servicing construction workers on the site.**

On balance, the arbitrator is aware that, at no time since the Union was certified on December 18, 2013, and even after the arbitration award was rendered in July 2014, has Sodexo seen fit to apply the CLRA/Local 779 collective agreement provisions to any of its employees in the camp on the TSMC site. In effect, Sodexo has treated all work performed by its employees on behalf of construction and non-construction workers alike as if there was no bargaining unit and no collective agreement. The obvious consequence of choosing not to participate in a collective bargaining relationship with Local 779, prevented discussion with the bargaining agent on grievances and issues concerning the application of the collective agreement's provisions and also of management's decisions affecting bargaining unit employees. The list of items not discussed is as long as the collective agreement itself. Therefore, there was no opportunity for an information exchange to occur on contentious issues as they arose, such as work schedule hours, how overtime should be calculated, when shift differentials should apply, how many employees were performing bargaining unit work, what classifications to employ, vacations, holidays, entitlement to other benefits, and

increases and reductions in personnel, etc. Such discourse would have shed light on all matters affecting the bargaining unit and the Union, and may well have prevented the disagreements these compensation hearings have heard about hours of work schedules, overtime calculations and whether shifts and shift differentials should apply.

However, Sodexo's bargaining unit members should not be disadvantaged by the Employer's failure to participate in a normal bargaining relationship with the Union, or because of the Employer's lack of due diligence in keeping alternate records of bargaining unit issues, which might potentially be beneficial for establishing accuracy and completeness of compensation owing in future hearings.

This is not a matter of penalizing the Employer for refusing to participate in a bargaining relationship with the Union, or failing to apply the collective agreement when it should have done so, or failing to keep alternate records based on the collective agreement, which might assist a more accurate and complete determination of compensation owing at this stage.

Since the employees and the Union are entitled to be made whole in this compensation exercise, it is important that the Employer's past decisions do not unfairly disadvantage their entitlement. Throughout this exercise, the arbitrator has attempted to determine compensation owing as closely and as appropriately as possible in these most undesirable and wanting circumstances of insufficient

available information. Although the parties have never agreed to the arbitrator participating as a mediator in this matter, he has requested that the parties consider settlement on their own and has made suggestions in that regard. A reading of this award reveals how inadequately the evidence contributes to an accurate, comprehensive and reliable determination of compensation owing.

*Determining compensation owing for 2015 for work in support of non-construction activity as well as construction activity*

In considering compensation owing for 2015 on the basis of the available evidence, the arbitrator again references Table 1, noting that the total meals served during the last four months of 2014 are roughly in the same range as meals served during the first four months of 2015, viz:

| | | | |
|---|---|---|---|
| September 2014 | (60) 11,643 | January 2015 | (59) 5,347 |
| October 2014 | (57) 13,893 | February 2015 | (59) 6,303 |
| November 2014 | (55) 12,284 | March 2015 | (59) 10,538 |
| December 2014 | (50) 6,675 | April 2015 | (57) 13,472 |

Percent of construction meals served in brackets ( ).

As can be seen, the totals for January and February 2015 indicate a slow start in 2015, which is generally reflective of the reduced site activity in December 2014. However, the most significant aspect of this eight (8) month comparison is that the percentage of construction meals exceeded the percentage of non-construction meals in every month (excepting December, when it was 50%). **Interestingly, according to Mr. Przybylowski's assessment (AP#2), construction meals in**

**April 2015 were greater than non-construction meals. Indeed, the "switch" to predominately operations activity, which the Employer asserted occurred on April 1st, 2015 did not actually take place until May 13, 2015.**

**On balance, it is the arbitrator's finding that, from January through April 2015, Sodexo's practice of assigning support work to the bargaining unit for both construction activity and non-construction activity, continued to the same general extent as it did during 2014. In essence, the Employer continued its normal practice of assigning on average 41% non-construction activity support work to the bargaining unit. Therefore, for the period of January 1, 2015 to April 30, 2015, all the members of the bargaining unit are entitled to be compensated fully in accordance with the collective agreement in the same manner as from March 29th, 2014 to December 31, 2014. As a matter of compensation owing, only actual wages paid by Sodexo shall be deducted from that entitlement.**

**In the arbitrator's view, however, the situation was not normal from May to December 2015. After May, construction meals started to decline in real terms, but the proportion of non-construction meals climbed from a low of 52% in May to a high of 80% in December. Although the Employer continued its practice of assigning all of the construction and non-construction**

**support work to the bargaining unit, the proportion of non-construction meals increased substantially.**

**In the arbitrator's view, the objective of this compensation exercise is to determine as reasonably and as fairly as possible what compensation owing should be to the bargaining unit and the Union. No part of that compensation owing should be intended to penalize the Employer beyond the consequences flowing from the Employer's failure to apply the collective agreement. In these circumstances, the Employer had established a practice of assigning a certain level of non-construction support work to the bargaining unit from March 28, 2014 to April 30, 2015, which may reasonably be determined to be around a 41% average. From May 2015 onward, such assignments exceeded that level. In other words, the Employer's assignments in support of non-construction activity were significantly above the norm of its established practice. Therefore, in the spirit of establishing reasonably appropriate compensation owing on this two-year one-off situation long after the collective agreement ceased to apply, the arbitrator is satisfied that the Employer should not have to pay for the proportions supporting non-construction activity in 2015 assigned each month in excess of the normal average of 41%.**

The arbitrator has examined the Union's evidence from Mr. Schenkles and Mr. Smith with a view to determining the extent of construction activity on site in

late 2015, for which Sodexo provided service. It appears that Sunny Corner workers did have a presence on site until December 10th. However, the evidence is that Sodexo did not provide services to Sunny Corner (except the unexplained 33 employees on August 4, 2015). From page 10 of Mr. Przybylowski's document AR#2, if one presumes that three meals per day translates into one Sodexo Camp resident, the numbers indicate that those accommodated for construction activity declined from a high of 8 on December 1st to a low of 2 from mid-month onwards. The only other meals provided were for First Nations at 10 per day. It is not known whether the First Nations construction activity was performed for construction employees accommodated at the Sodexo Camp. **In light of the foregoing, the arbitrator is satisfied that there was not sufficient work performed in support of construction activity in December 2015 to sustain a bargaining unit. Therefore, the month of December 2015 is eliminated for the purpose of determining compensation owing.**

For November 2015, AP#2 shows 4198 construction meals (44%) and 5280 non-construction meals (56%), which was higher than the 3270 (43%) and 4356 (57%) meals in October 2015. This indicates an increase in both construction and non-construction activity in November (9,478 meals). In contrast, October's activity (7,626) was the least active month in the period May to November. These numbers suggest that there was sufficient construction activity in November to

sustain a valid bargaining unit of reasonable size. To support that conclusion, the arbitrator's review of PS#2 indicates that the end dates of JSM employees on the construction site show one person leaving on Nov. 2nd, three leaving on Nov. 9th, nine leaving on Nov. 16th, one leaving on Nov. 23rd and 24th respectively. Therefore, most of JSM's employees were still active on the site at least until November 16th, thereby making the collective agreement applicable to the accommodation and other services performed on their behalf by Sodexo's bargaining unit during that month.

Although October was less active, PS#2 shows a substantial number of JSM employees on site throughout that month. The collective agreement applied to Sodexo's work performed on their behalf as well.

As for the months of May, June, July, August and September, there is no question that the collective agreement applied to the work Sodexo's bargaining unit performed in support of the numerous construction employees who were on site. Table #1 indicates the following percentages for non-construction meals from May to November 2015:

| | | | |
|---|---|---|---|
| May | 52% | September | 59% |
| June | 54% | October | 57% |
| July | 59% | November | 56% |
| August | 54% | | |

During those seven (7) months, the average percentage of non-construction meals is calculated at just under 56%. That equates to an average of 15% more than the 41% calculated for the period January 2014 through April 2015.

**Therefore, as a matter of compensation owing, a deduction of an average 15% shall be made from the collective agreement wage and benefit calculations for all the bargaining unit employees for each of the months of May, June, July, August, September, October and November 2015.**

**The arbitrator proposes that the parties provide a revised spreadsheet calculation for 2015 showing the amounts paid by Sodexo, the amounts payable under the collective agreement, and new columns indicating 1) 15% deduction from collective agreement calculations for each of the 8 months May-November, and 2) final amount compensation owing. This would allow calculations as the parties have already made them, but then adjust for the 15% deductions from the collective agreement amount calculations for the months May through November 2015. Hopefully, the application of a monthly 15% deduction will resolve the "nightmare" of trying to calculate percentage damages for each individual employee.**

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# Penultimate Decision on Compensation Owing

*Wage payment due for the period December 18, 2013 to March 28, 2014*

$314,118.56 is payable as ordered in the original arbitration award.

Since the objective of determining compensation owing is to make the employees whole from the point the collective agreement was deemed to have been violated, the arbitrator orders interest to be paid on the amount above for the period December 18, 2013 to March 28, 2014. The interest amount shall be apportioned among the bargaining unit employees who were employed by Sodexo during that period.

(See the section on interest below for the details how interest shall be calculated.)

*Benefit payments due for the period December 18, 2013 to March 28, 2014*

In the arbitrator's view, since wages in the amount of $314,118.56 was awarded for the above period in the original arbitration award in accordance with the Union's calculation under Option #2, and since many benefit calculations are based on wages, it would be inconsistent to calculate benefits on a different wage calculation for the above period.

The method of calculating overtime for this period has been disputed. One aspect of overtime involves an employee's scheduled hours of work. Since the collective agreement should have applied since December 18, 2013, the arbitrator is satisfied that for those employees who worked twelve (12) hour shifts, the weekly schedule in Article 7.01 should have been considered to be the "compacted work schedule of Monday through Thursday inclusive, consisting of four (4) ten (10) hour days". In the arbitrator's view, if a normal bargaining relationship had been in place, all the provisions of the collective agreement would have applied, among them the various hours of work shift schedules, and judging from the testimony of Union witness who described that a 12 hour shift was not at all uncommon at Sodexo, it is the 10 hour/4 days/week compacted schedule that must be applied to employees on 12 hour shifts for the calculation of overtime in the overall determination of compensation owing.

The second aspect of overtime is how it should be calculated. Article 7.01 states: "All hours worked in excess of ten (10) hours per day shall be paid at double time the regular rate of pay." To avoid the pyramiding of overtime prohibited by Article 7.03, the arbitrator's interpretation of the relevant collective agreement wording in the context of the whole of Article 7 (including Article 7.02) is that overtime for employees who worked 12 hours/day should be calculated in the following manner:

| | | |
|---|---|---|
| Monday | 10 hours straight time | 2 hours double time |
| Tuesday | 10 hours straight time | 2 hours double time |
| Wednesday | 10 hours straight time | 2 hours double time |
| Thursday | 10 hours straight time | 2 hours double time |
| Friday | All hours at double time (i.e., after 40 hours straight time per week) | |
| Saturday | All hours at double time | |
| Sunday | All hours at double time | |

It is noted that the type of seven (7) twelve (12) hour shifts schedule in a two (2) week period, which Mr. McCormick testified is common in the construction industry, is only contemplated for security personnel under Article 7.04A of the CLRA/ Local 779 collective agreement. The agreement does not allow for other classifications working such a schedule. For a schedule to apply like the one described by Mr. McCormick, it would have to be agreed upon by both parties. The arbitrator does not presume that such a schedule would have been agreed.

**The parties are ordered to recalculate the amount of overtime and other benefits owing from December 18, 2013 to March 28, 2014 on the basis of the foregoing findings. After exchanging calculations, the parties shall provide the arbitrator with a final document indicating the final calculations within five (5) business days from the date of this award.**

Interest shall apply from December 18, 2013 to March 28, 2014 and apportioned among the bargaining unit employees who were entitled to benefits during that period. Interest for the various industrial funds shall apply for the

Union. (See the section on interest below for the details how interest is to be calculated).

*Compensation payable from March 29, 2014 to November 30, 2015.*

**Wages, overtime and other benefits for this period shall be calculated on the basis of the CLRA/Local 779 collective agreement Industrial Wage Rates Effective May 1, 2013, May 1, 2014, and May 1, 2015. Overtime calculations for those working 10 or more hours shifts shall be in accordance with the arbitrator's interpretation of Article 7 above. Compensation calculations for the above period must consider all time worked by the bargaining unit members in support of construction activity as well as non-construction activity. For the period May through November 2015, a deduction of 15% from collective agreement calculations shall be made for each of those seven (7) months. Within five (5) business days from the date of this award, the parties shall revise their spreadsheet calculations to reflect this finding, exchange them with each other, agree on a joint document denoting compensation owing, and send a copy to the arbitrator.**

Again, interest is payable on the amount determined in accordance with the section on interest below. Calculations shall apply for the full period March 29, 2014 to November 30, 2015.

*Shift Differential Pay*

The Union does not bear the onus of proving that shift work actually took place and identifying each employee involved. The only way the Union could provide such proof would be through the Employer's own records. Since the Employer did not establish shifts in 2014 and 2015, its payroll records do not show payments for such time worked. The Union's responsibility is to demonstrate that the collective agreement provides for shift differential premium, and that there were instances observed where the implementation of shifts should have occurred. Since the Union was not on site or otherwise in a position to monitor all individual situations where shifts should have been instituted in accordance with the collective agreement, it should not be required to provide every instance where a shift should have occurred. The arbitrator finds that, had the collective agreement been applied as it should have been applied from the very beginning, all the provisions of the agreement, including shift work and payment thereof would have prevailed.

This situation for shift differential is no different than other provisions of the collective agreement that should have been followed by the Employer, but for which the Union has not specifically requested as matters of compensation owing because their circumstances are too difficult or cumbersome to determine. For example: Article 6:01 -- Check-off, especially the Employer's obligation to hold

any monies in trust that have not been transmitted to the Union; Uniforms in accordance with Articles 18.01 and 18.02; Articles 9.02, 9.03, 9.04 and 9.06 -- split shifts (permitted only for Kitchen staff); Article 10.01 – Reporting Time; Article 14.02 – transfer or temporary assignment to classifications with a higher rate of pay; Article 15.01 – Manpower Requirements; Article 16 – Business Agent; Article 17 Shop Stewards; Article 22 Safety; Article 23 – Funeral Leave; Article 26 -- Transportation, Board and Lodging. There are potential financial aspects involved in some of those Articles, which the Union clearly has chosen to forego because of the impracticality of trying to ferret out sufficient information from its membership to pursue timely claims for this arbitration.

To the extent any of the foregoing issues were violated by the Employer's practices, the Employer would be the sole beneficiary. As far as the claim for shift differential is concerned, the arbitrator is satisfied that the testimonies of John Tobin (who testified that it was because the camp was originally to accommodate the growing numbers of construction workers, like Sunny Corner, that the night shift was opened for Sodexo in 2013, and he felt the same way about the presence of construction workers during 2015), and Martine Cyr (who testified that Cleaners sometimes stayed after their shifts to clean rooms later) provide convincing indication that some shift work scheduling would have been appropriate to

establish under the collective agreement for Housekeepers, Cleaners, and likely some Kitchen staff such as Sandwich Makers and Dishwashers.

Still, **a global amount is the most appropriate determination for this particular item because of the all-but-impossible task of determining the identity of each employee who should have been assigned to other shifts instead of reporting to work early or staying after their regular shifts to perform work at a later time. The only reasonable way to apply this global amount would be to distribute it among all the employees in the bargaining unit. In the arbitrator's opinion, this is especially reasonable given the fact that the Union has not insisted on redress for several other provisions containing financial implications, which, if pursued, would have further complicated and prolonged these proceedings.**

**The parties shall reflect this distribution in their calculations for 2014 and 2015.**

In the absence of any Employer payroll records, showing individual payments for shift differential, the arbitrator has only the Union's estimate of $102,000 to consider as a global amount owing. That estimate is accepted and it shall be apportioned among the bargaining unit employees.

Interest shall apply on that global amount calculated until November 30, 2015. See below how interest is to be calculated.

*Interest*

The parties have provided their positions on the issue of interest.

The Employer's initial position was to question the arbitrator's authority to award interest in this jurisdiction. In counsel's experience, arbitrators have not awarded interest.

Counsel for the Union begged to differ with opposing counsel's experience, saying that his own experience in this jurisdiction is that arbitrators have issued awards of interest. The Union requested the payment of interest to the various amounts of compensation owing, citing *Irving Pulp & Paper, Resource Development Trades Council of Newfoundland and Labrador, Nova Scotia Public Service Commission* and *Cargo Link Transport Ltd.* The Union requested that interest be awarded on all amounts owing, calculated quarterly from December 18, 2014 to March 28, 2014 (6% or 7% accrued) and from March 29, 2014 to December 31, 2015 at a minimum of 4% (~ $300,000) in accordance with the *Judgement Interest Act.*

In his e-mail of November 3, 2017, counsel for the Employer took the position that, since the arbitrator stated to counsel that he was going to award interest, it was the Employer's view

> ...that interest for the period December 18, 2013 to July 21, 2014 should be calculated from the date of the first arbitration award (July 21, 2014) to the date of this current award. Interest should then be calculated for

each month after that to the date of your current award. (ie. calculated from the end of each month that the money became owing, to the date of your award). For example, money owing for the month of October 2014 should accumulate interest for the period October 31, 2014 to the date of your award in the within matter. Finally, interest should be calculated pursuant to the Judgement Interest Act.

On the issue of the authority of arbitrators to award interest, the Union's jurisprudence lends credible and sufficient support for its position. To that jurisprudence, the arbitrator would add *Re Air Canada and Canadian Air Line Employees' Assn* (1981), 29 L.A.C. (2d) 142, (Picher), which is referred to as "what is usually considered the seminal case" by the authors of Lancaster House in *Leading Cases on Labour Arbitration Online*, Chapter 7, Remedial Powers of the Arbitrator, 7.4.6 Interest. (See Internet Link: Interest Lancaster House 191ece21-e31b-4d90-a6f5-5e2qbf66d173.pdf). This case ruled as far back as 1981 that arbitrators have the authority to award interest as part of the principle of making an injured party whole. The authors above further state:

> ...An overview of the arbitral practice is provided in *Fort James Canada Inc. and G.C.I.U., Local 100-M* (2002), 103 L.A.C. (4th) 425, where Arbitrator Elaine Newman concluded that an award of interest normally follows an award of damages as a matter of course. Only where the aggrieved wrongfully delayed the process, thereby extending the interest claim, is there an exception to this principle. Furthermore, while the parties are free in their collective agreement to relieve against liability for interest in the event of a breach, clear language must be used to accomplish this result.
>
> ....
>
> In *Canadian Broadcasting Corp and N.R.P.A.* (1995), 45 L.A.C. (4th) 444, Arbitrator Burkett ruled that the principle of compensating an individual for his or her actual loss called for an award of *compound*

> interest, unless there was some compelling circumstance warranting the denial of such relief.
> . . . .

Bringing the practice forward to 2016, in *Re Toronto Transit Commission and A.T.U., Local 113,* (2016), CanLll 17316 (Slotnick), a Supplementary Award, the evidence was that the grievance was filed nearly nine (9) years previously, had a long history including a decision by another arbitrator, which was judicially reviewed, and arbitrator Slotnick ruled on a matter of Holiday Pay entitlement in his July 25, 2013 award. On page 2 of the Supplementary Award, the arbitrator wrote:

> As of the date of this hearing (February 10, 2016) more than 2 1/2 years after my award was issued, no money had been paid to the affected employees. However, the parties agreed that there was no bad faith involved in this delay.

The Union asked for an award of interest on all monies owed, compounded on an annual basis, not as an extra remedy or punishment, but as an integral part of making the grievors whole resulting from the violation of the collective agreement. Since the employees had been denied the use of money for years, the Union argued that interest is part of the proper compensation payable. The Employer argued that an award of interest is discretionary, and since the Union had been aware since 1997 that inactive employees received no holiday pay, interest would provide a new benefit. There were changes to the Employment Standards Act in 2001,

which along with the wording of the collective agreement required holiday pay for the employees. The Employer also argued that interest would be a windfall because the employees would likely receive Workers Compensation benefits for the same days they are receiving holiday pay for.

At page 6 of the award, the arbitrator's decision stated in part:

> I agree with the TTC that interest is a discretionary remedy. But it is also a normal part of the remedy where a violation of the collective agreement has been found. In one of the decisions cited above between these two parties *(TTC-ATU, grievances of Hicks, Sweet and Robbins)*, the arbitrator put it this way (at page 5):
>
> > A Board of Arbitration of course has always a discretion whether interest should be disallowed if this is just and reasonable in the circumstances. However, as we have indicated, such a course is an exception to the general rule which must be justified on the facts.
>
> Here I do not see any compelling reason to depart from the general rule that interest be paid. In the *Canada Post* case cited above, the arbitrator quotes from *Re CBC and National Radio Producers' Assn.* (1995) 45 L.A.C. ($4^{th}$) 444 (Burkett) as follows:
>
> > The difficulties posed in interpreting the collective agreement, while giving rise to the issues in dispute, do not in some way lessen the effect of a finding of a breach nor should the interpretative difficulties cause an arbitrator to do other than attempt to make the aggrieved party whole. It is not open to the party that has breached the collective agreement to argue that even though it has been found to have violated the collective agreement the grievors should not be made whole because the collective agreement was difficult to interpret or apply.

> In my view, that sentiment applies equally to the situation here, where the language of the collective agreement did not change but the statutory environment did, giving the affected employees a benefit under the unchanged collective agreement language that they previously did not have. A violation of the collective agreement was established; therefore, interest should be paid on the money owed.
>
> . . . .
>
> There remains the issue of whether the interest should be compounded. The case law is mixed, and the various rationales are discussed in the *Canada Post* case, cited above. The arbitrator in that case decided that compound interest was the fair result, and was influenced by a factor that applies here, namely the long period of time when the grievance was filed and the final award, including a judicial review application. He also notes that the bank rate used to fix interest does not reflect the reality in the marketplace. I am persuaded by the analysis in that case that compound interest is warranted here.

On the issue of compound interest, in *Cargo Link Transport, supra*, at page 7, arbitrator Larson commented on the Union's request for interest:

> Although the Union asked that interest be awarded, it did not make any argument on the amount of interest or how it should be determined. As may be appreciated, with the award going back almost five years, the interest rates over that period have varied considerably and often. To calculate the amounts owed as they accrued would be quite complicated.
>
> What I have elected to do is to use the *Court Order Interest Act RSBC 1996 c.79* as a model even though it does not deal directly to labour arbitrations. Firstly, it treats the entitlement and calculation of interest depending on whether it is calculated on damages prior to the decision of the court or after it. In this case, we are dealing primarily with prejudgement interest since all damages are in the form of back pay. Section 5 requires that interest be added to an order of payment for enforcement purposes. It also prohibits an award of interest on interest or on costs. In other words, compound interest is not permitted by the *Act*....Under the *Act,* the rate is the prime lending rate of the banker of the government and is set in six month segments as at January 1 and July 1 in each year that the damages have accrued.

> Using that model, I order that interest be calculated in six month segments of each year in which the damages accrued for each driver back to August 1, 2006 to the date that the damages are paid to the Union under the terms of this award both before and after the award except that no interest shall accrue after the award is registered in the Supreme Court Registry under section 102 of the Labour Relations Act or is referred to the Director of Employment Standards for enforcement under the *Employment Standards Act,* as the case may be. The rate for each six month period shall be set on January 1 and July 1, in each year based on the prime lending rate of a chartered bank at that time, which I set as the Royal Bank of Canada. The interest shall not be compounded.
>
> The Union shall calculate the interest based on the prescribed formula and send the calculations and amounts to the Employer for verification. The interest in each case shall be added to the damage award for each driver. If the parties are unable to agree on either the calculations or any amounts of interest to be paid within 5 business days from the date they are referred by the Union to the Employer, they shall be referred to me for a final and binding decision.

We have, therefore, two fairly recent cases of interest being awarded, the first *TTC* case requiring compound interest without reference to a Provincial Interest Act for the Courts, and the second *Cargo Link* case requiring simple interest using the *Court Order Interest Act* as a model.

In the instant collective agreement, an arbitrator's powers are stated in Article 20.04, viz:

> Article 20:04
> The arbitrator appointed under this Article shall have all the powers conferred upon an arbitrator under the Labour Relations Act, Section 88, and without restricting their power and authority, their decision shall be an order and may require:
> - Compliance with the agreement in a stipulated manner.
> - Reinstatement of an employee in the case of dismissal or suspension in lieu of dismissal with or without compensation.

Section 88.1(5) of the *Labour Relations Act* stipulates further that "an arbitration board appointed under this Act or under a collective agreement has the powers that are or may be conferred on commissioners under the *Public Enquiries Act.*

There is nothing in the collective agreement or the Labour Relations Act that prohibits this arbitrator from finding a breach of the collective agreement, ordering compliance with the collective agreement, and establishing an appropriate remedy for such breach, which, in the event of loss of income resulting from that breach, as is the situation here, permits the arbitrator to use his discretion to include an award of interest as part of that remedy.

The jurisprudence and authorities referenced in this case are more than sufficient to establish the right of an arbitrator in this jurisdiction and others throughout Canada to exercise discretion to award interest where it is appropriate to do so for the purpose of making the aggrieved employees and/or party whole.

In the arbitrator's opinion, such discretion would be appropriate to apply especially in the instant case where there has been a loss of income and a long delay has ensued, through no fault of the grieving employees, including an application for judicial review, appeal of the judicial review decision, and final decision of the SCC not to hear an appeal of the Appeal Court decision quashing the Judicial review decision, during which and up to the present the grievors and the Union have been denied the use of the monies which the collective agreement entitled them to receive, due to the Employer's breach of the agreement.

The arbitrator is satisfied that, in the particular circumstances of this breach and the long delay that has ensued preventing the grievors from being made whole again, a strong argument can be made for an award of compound interest on compensation owing. However, from the very beginning, the Union has suggested interest rates and amounts should be determined in accordance with the *Judgement Interest Act,* and in its post hearing correspondence, the Employer has also argued in favour of following the *Judgement Interest Act* in determining interest. The arbitrator is satisfied that counsel are aware that the *Judgement Interest Act* prohibits interest on interest, i.e., compound interest.

The *Judgement Interest Act* does not establish the authority of an arbitrator to award interest. That right is reserved to the Provincial Court of Newfoundland and Labrador and the Supreme Court of Newfoundland and Labrador. However, as is noted in the 2010 case *Cargo Link Transport, supra* at page 7, the arbitrator used the *Court Order Interest Act* RSBC 1996 c.79 as a model in determining that compound interest should not be awarded, how and when interest should be calculated. The 2016 case *Toronto Transit Commission, supra,* made no reference to the equivalent legislation in that province.

On balance, the arbitrator in the instant case defers to the Union's wish (and the Employer's concurrence) to determine interest based on using the *Judgement Interest Act* as a model. In doing so, however, the arbitrator does not consider

himself bound to strict adherence of every aspect of the *Act*. In consideration of the lengthy history of this case, which has delayed the appropriate payment of compensation owing, including interest, **it is ordered that interest be calculated quarterly in each year in which compensation owing has been determined from:**

1. December 18, 2013 to March 28, 2014 for the amount of $314,118.56 ordered on July 21, 2014, based on the quarterly prime rate established on January 1, 2014 by the Royal Bank of Canada. The employees entitled to share the amount of $314,118.56, shall also be apportioned interest on their individual amounts in accordance with the quarterly prime rate as determined above.

2. December 18, 2013 to March 28, 2014 for the amount of benefit compensation owing (newly recalculated by the parties in accordance with this award) based on the quarterly prime rate established on January 1, 2014 by the Royal Bank of Canada. The employees and the Union entitled to the benefit amounts recalculated by the parties, shall also be apportioned interest on the individual employee amounts and Union amounts in accordance with the quarterly prime rate as determined above.

3. March 29, 2014 to March 31, 2014 for compensation owing to employees and the Union, based on the quarterly prime rate established on January 1, 2014 by the Royal Bank of Canada.

4. April 1, 2014 to November 30, 2015 for compensation owing (newly calculated by the parties in accordance with this award), based on the quarterly prime rates established by the Royal Bank of Canada on April 1, 2014, July 1, 2014, October 1, 2014, January 1, 2015, April 1, 2015, July 1, 2015, October 1, 2015.

Interest shall not be compounded.

The Union is ordered to calculate interest in accordance with the above instructions and deliver its calculation to the Employer for verification within five (5) business days from the date of this penultimate award. The parties are free to use any

professional services they may deem necessary for the purpose of calculating interest. A copy of the final calculation shall be e-mailed to the arbitrator, and will become part of the final award.

In the event that the parties disagree on the final amount calculated, or on the method of calculation, the arbitrator will remain seized of jurisdiction to render a final and binding decision on the matter.

Interest will be due and payable to the employees and the Union upon the date the final decision is declared by the arbitrator. The arbitrator will remain seized.

*Other matters*

Should the parties find that five (5) business days will not be enough time to accomplish the various calculations required by this penultimate award, the arbitrator will be prepared to consider their joint request for an extension.

While the arbitrator might not have anticipated every possible nuance involved in the final calculations of compensation owing, the core reasoning and direction to follow for such calculations should be sufficient for the parties to make any joint adjustments that may be necessary. The arbitrator will remain seized just in case.

Once the parties have submitted the final calculations required, the arbitrator will immediately declare and date such calculations as the final decision in this matter. All payments for compensation owing shall be due and payable as of the date of the final decision. The arbitrator will remain seized.

Respectfully submitted as the penultimate decision of the arbitrator.

Dated at Mount Pearl, Newfoundland and Labrador this 16th day of April, 2018.

David L. Alcock
Sole Arbitrator