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Fraser Lake Sawmills v. Industrial Wood and Allied Workers of Canada, Local 1-424

IN THE MATTER OF An Arbitration
Between
Fraser Lake Sawmills (the "Employer"), and
IWA - Canada, Local 1-424 (the "Union")

[1999] B.C.C.A.A.A. No. 298
Award no. A-189/99

British Columbia
Collective Agreement Arbitration
H.A. Hope, Q.C., Arbitrator

Heard: (Prince George, B.C.) April 19, 1999.
Award: June 22, 1999.
(35 paras.)

(Stat Holiday Graveyard Shift Schedule Arbitration)

Appearances:

Donald Jordan, Q.C., for the Employer.
Sandra Caffrey, for the Union.

AWARD

I- The Dispute

¶ 1 This dispute involves a policy grievance filed by the Union on May 29, 1997 on behalf of the crew on the graveyard shift in the planer mill. It relates to scheduling of the graveyard shift on Monday, May 19, 1997. The shift, which was first introduced on May 7, 1995, runs five nights per week commencing at midnight on Sunday. The Sunday midnight shift ends at 7 a.m. on Monday. It includes a one-half hour lunch break. In the result, employees earn eight hours pay for seven and one-half hours of work on the first shift of the week. On each of the four following nights, work commences at 1 a.m. and ends at 7 a.m. with a one-half hour lunch break. In the result employees earn eight hours pay for six and one-half hours of work.

¶ 2 In short, the disputed shift schedule calls for 7.5 hours of work and a half-hour lunch break for

eight hours pay the first night, followed by four shifts at 6.5 hours for eight hours pay for the remaining four shifts. The position of the Union was that it was a breach of the collective agreement for the Employer to incorporate into that four-day shift schedule a change in the start time on any of the four 6.5-hour shifts that results in an increase in the hours worked. The provision at issue reads as follows:

> VII(5) (a) The Employer shall have the right to operate his/her plant or any part thereof on a three (3) shift basis and all employees working under the arrangement shall receive eight (8) hours pay upon completion of the full hours established as their regular shift. Details of shifts shall be varied at the Employers' option. (emphasis added)

¶ 3 In presenting its case the Union called evidence from two witnesses, Maria Grey, the Union's shop steward on the shift, and Mike Bomberger, the Union's business agent assigned to the mill. The Union position was that the shift schedule had been "established" as to its "regular" hours and the Employer was not at liberty to change the hours of a particular shift. The Monday shift, said the Union, commenced at 1 a.m. and it was a breach of Article VII(5)(a).

¶ 4 The Employer elected to call no evidence. Its position, in effect, was that the parties had not "established" a "regular shift" with respect to statutory holidays and that it was entitled to commence the first shift following a statutory holiday at midnight. In terms of that fundamental interpretive issue, it took the same position with respect to the start time of the first shift following a mid-week statutory holiday. Its position was that "regular shift" refers to the schedule, not an individual shift within the schedule.

¶ 5 A secondary issue raised by the Union involved the assertion that the dispute had been settled and that the settlement was binding upon the Employer with respect to both the particular grievance and the underlying policy issue involving the interpretation and application of the collective agreement in work weeks that included a statutory holiday. The position of the Employer was that the facts did not support a conclusion that the parties had agreed to settle the grievance.

II - The Facts

¶ 6 The dispute first arose on approximately May 5, 1997 when Ms. Grey asked her shift foreman, Ramiro Santos, what the start time would be on the shift following the Victoria Day holiday on May 19. She wanted to confirm that it would commence at the usual time of 1 a.m. He confirmed that it would commence at 1 a.m. However, on Friday, May 16, 1997, Mr. Santos changed that instruction and advised the crew that the shift would start at midnight. That caused Ms. Grey to contact the business agent, Mr. Bomberger.

¶ 7 Mr. Bomberger said that his discussion with Ms. Grey caused him to contact Harold DeLong, the plant superintendent. Mr. Bomberger knew Mr. DeLong, having worked at the mill for 17 years commencing in 1979. In fact, he continued to be chairman of the plant committee at the material time, having been assigned as business agent on an acting basis in January of 1997. He continued in his dual role for approximately nine months in 1997 when his position as business agent was confirmed.

¶ 8 Mr. Bomberger said that he telephoned Mr. DeLong on Friday, May 16 and advised him, in effect, of his interpretation of the collective agreement. It was to the effect that the Employer could not schedule a seven and one-half hour shift on the second day of the shift schedule simply because the first day of the shift schedule was a statutory holiday. He quoted Mr. DeLong as having said that it was too late to change the shift start time at that late date but that he would pay the crew one hour of overtime

and would schedule six and one-half hours of work in future circumstances where the shift schedule included a statutory holiday.

¶ 9 Mr. Bomberger advised Ms. Grey of his discussion. She later recorded the following chronology in an internal Union document called a "grievance information form":

> Background Info: May 5 or 6 - I asked Ramiro what time [graveyard shift] was to start on Mon., May 19. His response was "1 A.M., regular Monday shift".
>
> Fri., May 16-97 - Ramiro tells crew we start at midnight on May 19-97.
>
> Fri., May 16-97 - I inform Mike Bomberger of this latest development. He says he'll call Harold [DeLong].
>
> Mon., May 19-97 - Mike [Bomberger] tells me Harold will pay o/t [overtime] for the extra [hour] worked.
>
> Mon., May 26-97 - I ask Harold [DeLong] about the [overtime hour]. He says that after talking to Jim Spinks [mill manager] we won't be paid the [overtime]. (emphasis added)

¶ 10 The decision of Mr. Spinks led Ms. Grey to file the May 29 grievance. She presented it at first step on that date to her foreman, Mr. Santos. In it she alleged that there had been a violation of the collective agreement in the form of an "improper shift scheduling". The second step of the grievance was presented to Mr. DeLong on June 6, 1997 but was not settled. Third step was conducted by Mr. Bomberger and Mr. Spinks, the mill manager. Arrangements for third stage were recorded by Mr. Bomberger in a standard form letter dated June 10, 1997 to Mr. Spinks.

¶ 11 In none of the grievance procedure exchanges did the Union take the position that the dispute had been settled. It was in these proceedings that the Union took the position for the first time that the telephone discussion on May 16 between Mr. DeLong and Mr. Bomberger constituted a settlement of the dispute binding upon the Employer, including the interpretation and application of the collective agreement to future circumstances involving work weeks that include a statutory holiday.

¶ 12 On the merits of the dispute, the Union also filed a copy of a grievance which had previously been settled between the parties. It was filed by Ms. Grey on January 3, 1997. It also alleged that there had been an improper scheduling of the graveyard shift on Thursday, January 2, 1997 when, once again, the first shift following a statutory holiday on January 1 was scheduled to commence at midnight rather than 1 a.m. The terms of the settlement endorsed on the grievance form and bearing what appeared to be the signature of Mr. DeLong is, "graveyard shift for Thursday, Jan. 2/97 will be paid one hour O/T".

¶ 13 Finally, with respect to the history of the shift schedule in dispute, both parties relied on Fraser Lake Sawmills and IWA, Local 1-424, March 18, 1997, unreported (Hope). That decision dealt with the introduction of the shift in May of 1995. In the context of that decision and the body of arbitral authority that has emerged with respect to provisions equivalent to the provision at issue in this dispute, I note that there was no conclusive evidence adduced in these proceedings which would establish a practice with respect to scheduling hours on shifts following statutory holidays.

¶ 14 The Union did not adduce evidence which would support the existence of such a practice over the period following the introduction of the shift in 1995. In the case of the Employer, it was put to Union witnesses in cross-examination that the practice was to schedule a seven and one-half hour shift for the first shift after a statutory holiday but the Union witnesses did not acknowledge that practice. As

stated, the Employer called no evidence. Hence, the issue must be resolved on the language of the collective agreement as interpreted in the context of the authorities that have emerged in this industry with respect to similar provisions.

III - Positions of the Parties

(i) - The Settlement Issue

¶ 15 As stated, the first occasion upon which the Union asserted that the matter had been settled was in a letter sent shortly before this hearing. The only fact relied on by the Union was the brief conversation between Mr. DeLong and Mr. Bomberger. In support of its position on the settlement the Union relied on Quest Wood Products Ltd. and IWA, Local 1-424, January 7, 1985, unreported (Ready); Molson Brewery and United Brewery Workers, Local 306, (1985) 15 L.A.C. (3d) 128 (Beck); and British Columbia Ferry Corporation and British Columbia Ferry & Marine Workers Union, [1980] 1 C.L.R.B.R. 409 (Munroe).

¶ 16 The Union argued that the discussion between Mr. Bomberger and Mr. DeLong met the criteria set out in that line of authority and should be seen as binding upon the Employer. It argued on the basis of the authorities that there was a strong public policy reason that required parties to honour settlements reached between them in the routine of their relationship. On the facts in this dispute, said the Union, Mr. DeLong committed the Employer to a resolution that should be seen as binding upon it.

¶ 17 The Employer's position was that it was clear on the facts that neither party viewed the dispute as having been settled. It pointed out that the conversation between Mr. DeLong and Mr. Bomberger preceded the filing of the grievance and all of the steps that followed. Those steps are set out in Article XIII. It reads as follows:

> Section 1:
>
> A Grievance Committee shall be elected to consist of two (2) to four (4) employees elected by the Union members employed in the operation covered by this Agreement. Members of this Grievance Committee shall have completed their probationary period with the Company and shall have at least one (1) year's experience in the type of operation.
>
> Wherever possible, members shall be selected on a departmental basis.
>
> Meetings of the Grievance Committee shall, except in cases of emergency, and wherever possible, be held outside of working hours. In the event that a grievance should arise it shall be dealt with in the following manner, without stoppage of work.
>
> Step 1: The individual employee involved with or without the Job Steward shall first take up the matter with the Foreman directly in charge of the work within fourteen (14) days from the occurrence of the event or events giving rise to the grievance or from the time when the employee has knowledge or may be reasonably presumed to have knowledge of such event or events.
>
> Step 2: If a satisfactory settlement is not then reached, it shall be reduced to writing by both parties when the same employee and the Committee shall take up the Grievance with the Plant Superintendent. If desired the Union

Business Agent shall accompany the Committee.

Step 3: If the grievance is not then satisfactorily solved, it shall be referred to the Local Union and the Management.

Step 4: If a satisfactory settlement is not then reached it shall be dealt with by arbitration as hereinafter provided.

¶ 18 The Employer pointed out that each step of the grievance procedure would have been rendered redundant if in fact the Union considered that the dispute had been settled even before the filing of the formal grievance. The Employer relied on Pacific Forest Products and PPWC, Local 7, (1984) 14 L.A.C. (3d) 151 (Munroe); City of Prince George and Prince George Fire Fighters Union, Local 1372, [1998] B.C.C.A.A.A. No. 296, May 6, 1998, (Kelleher); and City of London and CUPE Local 101, (1978) 13 L.A.C. (2d) 213 (Hinnegan). Its position was that those authorities require clear and unequivocal evidence of the terms of any settlement urged by a party and that the evidence relied on by the Union was deficient.

(ii) - The Interpretation Issue

¶ 19 The position of the Union was that the authorities that have evolved with respect to shift schedules make it clear that where the Employer fixes a "regular shift" under Article VII(5), it cannot unilaterally introduce a change to that shift. The Union relied in particular on the decision of Lysyk, J. in Various Forest Products Industries (Coast Region) Represented by Forest Industrial Relations Limited and International Woodworkers of America, A.F.L. - C.I.O. and C.L.C., September 16, 1985, unreported (Lysyk), as cited on pp. 4-5 of the Midnight Shift Arbitration between these parties as follows:

> Accordingly, the word "established" must mean established by practice. If 6 1/2 hours for the graveyard shift is an established practice, the first sentence of this paragraph entitles the employee to 8 hours pay. The "details" referred to in the second and concluding sentence of the paragraph must be taken to mean variance of matters other than shift duration established by practice; otherwise, the first sentence would be deprived of force. I assume, without finding it necessary to decide, that details of shifts would include such matters as the time of commencement, length of lunch breaks, and so forth. A change requiring an employee to work longer than before, without pay for the additional time worked, could not readily be characterized as a "detail" in any circumstances. The express safeguarding of established shift lengths by the first sentence of s. 8(a), in my view, rules out such characterization here. (emphasis added)

¶ 20 In support of its position on the interpretation issue the Union also relied on FIR and IWA, September 16, 1985, unreported (Lysyk) and FIR and IWA, June 19, 1975, unreported (Mackoff). The Union also relied on Pinette & Therrien Mills and IWA, Local 1-425, September 2, 1986, unreported (Munroe), an interpretive decision under the northern master agreement with respect to nine hour shifts and when a particular shift schedule is to be seen as "established as [a] regular shift". The Union urged that the decision of Mackoff J. in FIR and the IWA applied by analogy to the circumstances present in this dispute.

¶ 21 In that decision, Mackoff J. concluded that vacation hours are the contractual equivalent of hours worked for purposes of determining entitlement to a premium rate. The Union saw that reasoning as applying to the facts present in this dispute. Its view was that it supported the conclusion that scheduled hours not work due to a statutory holiday are to be treated as the equivalent of hours worked

for purposes of calculating whether a proposed change would require "an employee to work longer than before without pay for the additional time worked". The submission of the Union, in effect, was that the employees on the midnight shift who were entitled to claim the statutory holiday were to be seen as occupying a position equivalent to the position they would have occupied if they had worked. Hence, said the Union, advancing the start time on the Monday shift by one hour amounted to an increase in the hours without compensation.

¶ 22 The Employer relied on Fraser Lake Sawmills and IWA, Local 1-424, [1995] B.C.A.A.A. No. 337, October 23, 1995 (Taylor); Whonnock Industries Ltd. and IWA Local 1-367, April 5, 1984, unreported (McKee); Scott Cedar Products Ltd. and IWA, Local 1-3567, [1993] B.C.C.A.A.A. No. 170, May 12, 1993, (Munroe); and FIR and IWA, May 19, 1974, unreported (Hinckson). The Employer did an extensive review of all of the authorities submitted by both parties in support of its submission that none of the prior decisions dealing with the same or similar language supported the proposition that an employer was prohibited from assigning employees to work 7.5 hours on the first shift following a statutory holiday.

¶ 23 The Employer's position, in effect, was that a distinction in terms of the principles of interpretation must be made between "regular shift" and "regular hours". Its position was that the agreement does not bind it to particular hours on a particular day. Rather, it binds the parties to a shift schedule. On the authorities, said the Employer, it was necessary for the Union to establish that the "full hours established for [the] regular shift" included a schedule in which the Employer was prohibited from scheduling 7.5 hours for the first shift after a statutory holiday.

IV - Decision

(i) The Settlement Issue

¶ 24 The facts do not support the conclusion that the grievance was settled in the sense contemplated in the authorities. The decisions relied on by both parties contemplate, at the least, that the party asserting that a grievance has been settled will call evidence that supports the conclusion that officials who have the authority to make settlements binding upon the parties addressed the issues and agreed to clear terms of settlement. The application of that criteria will vary depending upon the particular facts.

¶ 25 Here, if the dispute related simply to a claim for overtime for the shift in question, being an issue of application, the evidence might support the claim that Mr. DeLong had the authority as plant superintendent to settle such a claim in terms binding upon the Employer. But this dispute involves an interpretation about which the parties disagree and which will bind the parties in future circumstances. In short, it is a dispute which will impact upon the manner in which the parties interpret and apply the terms of the agreement.

¶ 26 The requirement contemplated in the authorities is evidence of an agreement made that spoke directly to the interpretation issue by officials who were capable of binding the parties, not only with respect to the application of the agreement to the particular circumstances, but with respect to its interpretation as a general issue. Here the facts fell far short of meeting that criteria. Further, the conclusion must be that neither party viewed the dispute as having been settled because of their actions in the subsequent conduct of the grievance procedure. In the result, I conclude that the dispute was not settled.

(ii) The Interpretation Issue

¶ 27 I conclude that the interpretation advanced by the Union is correct in the context of the language used when it is read in conjunction with the interpretive authorities that have evolved with respect to the same or similar language. The primary authority in that regard is the decision of Lysyk, J. as cited in the Midnight Shift Arbitration. The interpretation advanced by the Employer can be tested against the reasoning in that decision. In particular, if the Employer's interpretation were to be accepted, it would require employees on the midnight shift "to work longer than before without pay for the additional time worked".

¶ 28 That conclusion is compelled by the fact that a statutory holiday entitles employees to time off with pay for the designated holiday and is the equivalent of time worked. In terms of a holiday coincidental with the first shift of the schedule, employees are entitled to receive eight hours pay for which they would normally be required to work seven and one-half hours. Requiring them to work an additional shift of seven and one-half hours in the same work week would require them to work an additional hour with no compensation.

¶ 29 Expressed in the context of a work week, the shift schedule in question requires employees in an ordinary week to work 33.5 hours for 40 hours pay. The interpretation of the Employer would require employees on the particular shift schedule to record 34.5 hours in that week to receive 40 hours pay. That is, accepting that a statutory holiday on which they would normally work 7.5 hours is credited as time worked for purposes of calculating their wage entitlement, the addition of one hour would either deny them full credit for their statutory holiday entitlement or, conversely, would add to the hours they were required to work on a shift that would normally be limited to 6.5 hours.

¶ 30 The same reasoning would apply to any statutory holiday occurring in a work week. A change in the starting time of a mid-week shift following a statutory holiday would require the employees affected to work an extra hour for the same compensation, being 40 hours pay for 34.5 hours of work and statutory holiday credits, as opposed to 40 hours pay for 33.5 hours of work. However the facts are viewed, advancing a shift by one hour is not offset by the fact that employees have been absent during the week on a statutory holiday.

¶ 31 The real issue in dispute is not whether the shift introduced in 1995 "established" a statutory holiday schedule. The existence of a consistent practice with respect to statutory holidays might very well bind the parties in the sense of amounting to a "shift" that has been "established" by the practice, thus becoming part of a "regular" shift. But I do not agree with the Employer that the absence of evidence of an express or implied agreement with respect to statutory holidays leaves it free to advance the normal start time without providing compensation for the additional hour worked.

¶ 32 The "regular shift" that the parties "established", as indicated in the March 1997 Midnight Shift Arbitration, is accurately described as follows:

> [C]ommences at midnight on Sunday and continues for five nights, ending at 7 a.m. on Friday. On the first shift, the crew works 7.5 hours and receives a one-half hour paid lunch break for a total of eight hours pay. On each of the following four shifts the crew works 6.5 hours and receives eight hours pay.

¶ 33 The coincidental occurrence of a statutory holiday within that "regular shift", in interpretative terms, does not alter its basic structure and the occurrence of routine factors affecting whether actual work is performed do not affect it unless the parties have incorporated expressly or by practice a variation in the regular shift to accommodate the particular exigency. An employer who establishes a regular shift is not free, to paraphrase the decision of Lysyk J., to change it in a manner that requires

employees to "work longer than before without pay for the additional time worked".

¶ 34 The only factor pointed to by the Employer to take the circumstances in this dispute outside of that restriction is the routine scheduling of a statutory holiday which is provided for under the provisions of the agreement. In order for that distinction to have effect, it is necessary to assume that employees who are absent on a statutory holiday are not entitled to include the hours they would normally work on that holiday in calculating the "time worked" for that five-day shift. There is no basis in the various decisions and the language used for excluding those hours.

¶ 35 In short, the question is whether adding one hour to a shift that follows a statutory holiday has the effect of requiring employees to "work longer than before without pay for the additional time worked". The answer to that question is, yes, and the Employer is therefore in breach of the collective agreement in seeking to schedule such a change without compensation. In the result, the grievance is granted. I will retain jurisdiction to assist the parties in calculating compensation for the employees affected if that becomes necessary.

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