Cited as:

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")

[1995] B.C.C.A.A.A. No. 337
Award no. A-323/95

British Columbia
Collective Agreement Arbitration
C. Taylor, Q.C., Arbitrator

Heard: (Prince George, B.C.) September 19, 1995.
Additional Submissions: October 6 & 10, 1995.
Award: October 23, 1995.
(52 paras.)

Appearances:

Donald J. Jordan, Q.C., for the Employer.
Sandra Banister, for the Union.

AWARD

I

¶ 1 The issue in this dispute arises from a grievance dated December 9, 1994 filed by four employees in the saw shop. The grievance reads:

> "The company is making all tradesmen work one hour longer than production workers. In past practice, all trades people worked the same hours as production on graveyard shift."

¶ 2 The position of the Employer is that the Collective Agreement permits it to require the employees affected to work 8 hours for 8 hours pay. The union joins issue with this relying on a body of arbitral authority emanating from the forest industry in British Columbia in which provisions identical to those

in issue in these proceedings have been interpreted as placing a restriction on the right of the employer to make unilateral changes in three-shift operations.

II

¶ 3 From the date of its establishment in or about 1979 until November, 1994, the Employer, with one exception, operated two production shifts and a graveyard maintenance shift. Production employees work 8 hours with a one-half hour lunch break and are paid for 8 hours. Since about 1986, graveyard maintenance employees have worked 8 hour shifts. Before that, they worked various shift durations -- 6 1/2, 7 or 7 1/2 hours.

¶ 4 From the Employer's inception in 1979 until November 1994, there was only one exception to the two shift operation. That occurred in mid-October 1981 when the Employer added a third production shift. It lasted for about 10 weeks, ending at Christmas 1981. On that occasion, production and maintenance employees including saw filers worked 6 1/2 hours from midnight to 7:00 a.m. and received 8 hours pay. When the Employer reverted to two production shifts, the saw filers went back to days and afternoons. Maintenance workers remained on graveyard.

¶ 5 In or about November 1994, the Employer, for the second time in its history,, scheduled a third production shift. Production employees worked midnight to 7:00 a.m. and were paid 8 hours. Saw filers as well as other maintenance employees were required to work 8 hours for 8 hours pay. The third production shift was discontinued in March 1995 when the saw filers returned to days and afternoons. Maintenance employees remained on graveyard.

¶ 6 The saw filers only work graveyard when there is a third production shift. The complaint is that the saw filers worked longer hours than their production counterparts yet both groups received a hours pay.

III

¶ 7 The Union relied on Articles III(1) and VII(5) of the Collective Agreement:

"Article III - Management

Section 1:

The management of the operation and the direction and promotion of the Employees are vested exclusively in the management, provided however that this will not be used for the purpose of discrimination against employees.

Article VII - HOURS OF WORK AND OVERTIME

Section 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 this arrangement shall receive eight (a) hours pay upon completion of the full hours established as their regular shift. Details of shifts shall be varied at the Employers' option.

b) It is agreed that Clause a) above shall only apply to those employees actually

working on a three (3) shift basis.

c) The Employers shall have the right to determine the number of shifts operated in any unit or department of the operation."

¶ 8 The Union submitted that Article VII(5) only applies when the Employer operates three production shifts. When this occurred in November 1994, the established relevant practice, it was argued, was the third production shift worked in 1981. On that occasion, both production and maintenance employees on graveyard worked 6 1/2 hours and received 8 hours pay. That, said the Union, was the established shift and the Employer may not unilaterally change that. As well, it was argued, it was discrimination for the Employer to require some employees to work 8 hours while others on the same shift worked fewer hours but both groups were paid for 8 hours.

¶ 9 Article VII(5) prescribes 8 hours pay for "the full hours established as their regular shift". The Union argued this was 6.5 hours, established in 1981 when the Employer operated the only other third production shift. The Employer said that 10 week occurrence 14 years ago could not be relied upon as establishing a "regular shift".

IV

¶ 10 In MacMillan Bloedel Limited Somass Division and International Woodworkers of America Local No. 1-85, unreported, 1978 (McKee), the employer changed the start time of the graveyard shift which had existed unchanged for 25 years. This would have resulted in increasing the number of hours worked without increasing the amount of pay.

¶ 11 Applying those facts to collective agreement language identical to Article VII(5) in the present case, the arbitrator held that the "full hours that have to be worked and the start up and quitting times of the shifts..." were established by negotiation and could not be unilaterally altered. That case dealt with the alteration of an established shift in existence for 25 years and does not assist in the interpretation of the words "regular shift" in Article VII(5). Moreover, the facts in that case are markedly different. There it was a 25 year shift. The present case deals with a 10 week shift which occurred some 14 years ago.

¶ 12 In 1984 Mr. McKee considered the issue once again: Whonnock Industries Limited (Lumber Division) and International Woodworkers of America, Local 1-367, unreported, 1984.

¶ 13 Referring to what is now Article VII(5), the arbitrator at pp.145-146 said:

> "...I find no ambiguity in this language: it is explicit. It is clear that the employer has the right to operate the plant on a three-shift basis. All employees are to receive eight hours of pay upon completion of the full hours established as their regular shift. I read this language to accommodate the fact that some employees will, and do, work a shift of less than eight hours.
>
> The sentence, "Details of shifts shall be varied at the company's option". I read to mean start and finish times, break periods, etc.
>
> Nowhere in this language can I find that it is a requirement of the collective agreement that an employer "negotiate" a shift pattern or the establishment of a shift. Quite clearly in Somass the establishment of a shift had been done by negotiation. The past practice in that relationship went back as far as 1952, if not further. I found, in effect, that while

> management had the right unilaterally to establish a shift pattern, it had given up this right by negotiating the length of the shift with Local 1-85."

¶ 14 In MacMillan Bloedel, supra, the employer unilaterally altered a regular graveyard shift which had existed for 25 years. That shift, said the arbitrator, had been established by mutual intention and could not be altered except by negotiation. The issue in the present case is whether a shift of 10 weeks duration worked 14 years ago is an established regular shift. That was not the issue in MacMillan Bloedel, supra, nor was it the issue in Whonnock, supra.

¶ 15 In the latter case, the employer sought to change the hours of work for a graveyard shift which had existed unchanged for "at least 12 years" (p.151). There was no issue that it was an established regular shift. The arbitrator held the employer could not unilaterally increase the hours of the shift without paying for it. He also concluded that such action was discriminatory within the meaning of Article III(1) since certain employees would be required to work more hours for the same pay.

¶ 16 The MacMillan Bloedel, supra, and Whonnock, supra, cases are distinguishable on their facts and there was no issue as to an established regular shift.

¶ 17 In 1985, the interpretation of article VII(5) became an "industry issue" and it was submitted to the Interpreter under the Master Agreement -- Mr. Justice K.M. Lysyk. He decided employers were not entitled to vary the number of hours worked by employees under Article VII(5) without changing the amount of compensation where such variation would alter the hours established as a regular shift. At pp.11-12, Lysyk, J. said:

> "...The first of the two sentences in s. 8(a) [now Article VII(5)] clearly entitles an employee to 8 hours pay upon completion of whatever number of hours is "established" as the regular shift. The duration of shifts worked in three-shift operations is not expressly dealt with else where in this Agreement. 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 practices 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."

¶ 18 It is therefore clear that in the present case if the 6 1/2 hours worked on the graveyard shift for 10 weeks in 1981 is an established regular shift then the Union must succeed. It has been authoritatively held that once the "full hours" of a third production shift are "established", the employer may not unilaterally increase the number of hours associated with the shift.

¶ 19 The reasoning of Lysyk, J. was applied by Arbitrator Munroe in British Columbia Forest Products Limited (Victoria Sawmill ,Division) and International Woodworkers of America, Local 1-118, unreported, 1986. In that case, the employer acknowledged the shift in issue had been "established" as the "full hours" for the graveyard maintenance crew in early 1981. Some one and a half years later,

operations were suspended. When they resumed one year after that, the employer argued that the "course of dealings" between the parties compelled a finding that there was an agreement that the employer's proposed work hours would be acceptable. The arbitrator declined to make that finding and held that the employer could not unilaterally alter the established regular shift. In that case, the duration of the practice was about 1 1/2 years and it was unnecessary for the arbitrator to deal with the issue of what constitutes a regular shift.

¶ 20 In 1986, this issue was considered by Arbitrator D.H. Vickers, as he then was, in British Columbia Forest Products Limited (Coast Sawmills Division) and International Woodworkers of America, Local 1-367, unreported, 1986.

¶ 21 After reviewing the authorities, the arbitrator said at p.3:

> "Thus the central question to be decided upon an application of section 8 of Article V is to determine what has been "established as a regular shift", whether by agreement, practice or otherwise."

¶ 22 The evidence indicated that three shifts occurred only sporadically. When worked, graveyard shift employees were paid 8 hours for 6 1/2 hours work. The union argued that the hours of work established by practice were 6 1/2 hours for 8 hours pay on graveyard when a graveyard shift was necessary. The employer said the graveyard shift was never "regular" and what is now Article VII(5) had no application.

¶ 23 Arbitrator Vickers concluded that the grievance was concerned with a graveyard maintenance shift when the plant was not in production: what is now Article VII(5) did not apply and he dismissed the grievance. He then went on to say this:

> "If I am wrong in the application of Mr. Justice Lysyk's interpretation, then I would also dismiss the grievance upon the basis that the graveyard maintenance shift cannot be characterized in any way as a regular shift. In the past, when the shift has been worked, the Company has paid 6 1/2 hours for 8 hours work. But in my opinion, the key to the application of Section 8 lies in the words "established as their regular shift". The graveyard shift has never been "regular" and therefore, I do not believe Section a of Article V would apply." (p.6)

¶ 24 The decisions of Lysyk, J., Mr. McKee and Mr. Munroe were followed in Canadian Forest Products Ltd., - Fort St. James Plant and International Woodworkers of America - Canada Local 1-424, unreported, 1988, (McPhillips). At p.8, the arbitrator said:

> "The case before this board is not one where there is a bilateral agreement as in the cases of MacMillan Bloedel. and B.C. Forest Products Limited, supra. Additionally, there is no lengthy, uninterrupted, past practice as in the cases of MacMillan Bloedel and Whonnock Industries, supra. However, the past practice of this employer, based on the uncontroverted evidence of the three union witnesses, is that the 966 Loader operator graveyard shift has always been 6 1/2 hours, whenever that shift has been in effect. Therefore, the "established" shift is one of 6 1/2 hours. In the result, this board concludes the employer was in breach of the Collective Agreement in January, 1987, when it scheduled an 8 hour shift for a hours pay for the 966 Loader Operator on the

graveyard shift."

¶ 25 The Union relied on that decision to say that the duration of the alleged practice or its recurrence is not the issue. Once the alleged practice is found to have occurred then, argued the Union, it is established. It is noteworthy, however, that Arbitrator McPhillips did not discuss the words which follow "established" in Article VII(5) -- "...established as their regular shift". The frequency of the shift in issue in that case is not easily discerned. The arbitrator accepted evidence "that, in past years when they worked as a 966 Operator on the third shift, they always had worked a 6 1/2 hour shift but were paid for 8 hours". (p.5)

¶ 26 In Northwood Pulp and Timber Limited and IWA - Canada Local 1-424, unreported, 1989, Arbitrator Hope followed the decisions of Lysyk, J., Mr. McKee and Mr. Munroe. He said those cases were followed by Mr. McPhillips who, he said:

> "...concluded that the language in question under the collective agreement in force between the parties prohibited the employer from unilaterally increasing the hours of work in a shift which had been "established" by practice in a three-shift operation."

¶ 27 I concur that was the finding of Arbitrator McPhillips.

¶ 28 The facts in Arbitrator Hopes case were quite different from the present case. There had been a year-round three-shift operation which reduced to two shifts between November and April. The evidence was clear that when the complex operated on a three-shift basis, the midnight shift ran from 12:00 a.m. to 7:00 a.m. with a half-hour paid lunch period for a total of 6 1/2 hours work for 8 hours pay. Historically, concluded Mr. Hope, "that was the clear practice". Mr. Hope was clearly dealing with an established regular shift.

V

¶ 29 Article VII(5) provides that employees are entitled to 8 hours pay for working the "full hours established as their regular shift". None of the cases deal directly with the interpretation of the words "regular shift".

¶ 30 MacMillan Bloedel, supra, was concerned with a shift established by mutual "negotiations and discussions" which remained unchanged for 25 years.

¶ 31 In Whonnock, supra, the employer unilaterally altered shift hours which had been in effect for 12 years.

¶ 32 Lysyk, J. said an employee is entitled to 8 hours pay for the number of hours established as the regular shift. He said the word "established" means established by practice.

¶ 33 The British Columbia Forest Products case, supra, dealt with an established regular shift of 1 1/2 years duration followed by a one year suspension of operations. In the present case, it is a one-time 10 week shift 14 years ago.

¶ 34 The Northwood Pulp case, supra, was a shift of some long standing and regularity.

¶ 35 While it is obiter, Mr. Vickers in British Columbia Forest Products, supra, made it clear that the

sporadic graveyard shift he was discussing would not qualify as an established regular shift. on the other hand, Canadian Forest Products, supra, seems to say that the regularity of the shifts does not matter. In any event, the case stops at the word "established" and does not consider the words which follow, "regular shift".

¶ 36 Given the facts in the present case, I am unable to rest the decision on the word "established". What is it that is established? It is a "regular shift".

¶ 37 The word "regular" must be considered in its setting and context and in relation to the subject matter of Article VII(5) as well as the specific circumstances of the case before me.

¶ 38 Article VII(5) is limited in its application to three-shift operations. The graveyard shift in the forest industry has historically been less than 8 hours. Article VII(5) provides that an employee working under this arrangement is entitled to 8 hours pay once the duration of that graveyard shift is established as a regular shift, it may not be unilaterally changed by the employer. It is the subject of change to an established regular shift which has been the focus of the arbitral authorities. But, one does not get to that point without first determining there is an established regular shift.

¶ 39 Is the Union correct in its assertion that prior to the implementation of the third production shift in November 1994, 6 1/2 hours had been "established" as the "full hours" of the "regular shift"? The authorities suggest that the "establishment" of the "full hours" of a regular shift can arise either by agreement of the parties, or, in the words of Lysyk, J., "by practice". There is here no suggestion of an agreement. The Union relies on what it described as a "practice", that being the ten week shift fourteen years ago.

¶ 40 This issue was addressed by Arbitrator Munroe in Scott Cedar Products Ltd./Green River Log Sales Ltd. and IWA - Canada, Local 1-3567, 1993, unreported.

¶ 41 In that case, the Employer implemented a graveyard shift "for a period of months" in 1992 and again "for a short while in 1993". The union submitted that the "full hours" of those shifts had been "established" by a graveyard shift which occurred in 1990. That was the first production graveyard shift in the long history of the employer's operation and it lasted some 2 1/2 months. The primary purpose of that 1990 shift was to train additional employees and the union agreed to a suspension of the seniority rules for that purpose. Mr. Munroe at p.8 said this:

> " Simply put, I am asked by the union to find that the facts surrounding the 1990 graveyard shift comprise a "practice" by which a pattern of six working hours was established as the "full hours" of a graveyard shift -- i.e., within the meaning and intent of Article V(8)(a) of the collective agreement. Having reviewed the prior awards cited to me by counsel, and having considered the matter fully, I am not able to make such a finding. Even leaving aside some of the historical ambiguities, and even assuming that the 1990 graveyard shift was as pristinely a six-hour shift as the union would have me accept, I simply cannot characterize the evidence as revealing a "practice" by which six hours has been "established" as the "full hours" of a graveyard shift. In my view, a "practice" of doing something in a particular way cannot reasonably be said to have been "established" simply by reason of it having been done in a particular way on a singular occasion in the past. Rather, in the ordinary parlance of industrial relations practitioners, for something to be considered "established" on grounds of "practice", it must be shown that the alleged practice has been sustained with reasonable consistency over a reasonable period of time in reasonably representative circumstances. The

> evidence in this case falls well short of meeting that basic test."

¶ 42 The Union sought to distinguish Scott Cedar Products on its facts. There, the 1990 shift was for the primary purpose of training and it was accompanied by a union agreement to suspend seniority rights. The 1992/1993 shifts were not of that type. In the present case, the disputed 1994 shift was scheduled by the Employer for the same purpose as the 1981 shift.

¶ 43 That factual distinction does not invalidate the general principle advanced in Scott Cedar Products. For something to be considered "established" on grounds of "practice", it must meet the test of "reasonable consistency over a reasonable period of time in reasonably representative circumstances".

¶ 44 Can it be said in the present case that there have been regular hours established for the graveyard maintenance shift?

¶ 45 In Re United Steelworkers, Local 5141 and Raybestos - Manhatten (Canada) Ltd., [1965] 16 L.A.C., 132 (Anderson), the collective agreement excluded from the bargaining unit persons regularly employed for 24 hours or less per week. The board said:

> "'Regular' has a meaning which in some circumstances means recurring uniformly according to a predictable time and manner, and 'regularly' in some circumstances means constant."

¶ 46 Collin's English Dictionary, 3rd Edition, 1991 defines regular:

> "(1) normal, customary or usual (2) according to a uniform principle, arrangement or order (3) occurring at fixed or prearranged intervals (4) following a set rule or normal practice, methodical or orderly."

¶ 47 The word "regular" in article VII(5) demands something more than an isolated occurrence or a special situation. The word compels a search for consistency or uniformity, the expected rather than the unusual or the anomalous.

¶ 48 No uniformity or consistency arises from a single occurring shift of 10 weeks duration 14 years ago. There is no recurrent theme. It is an isolated incident. That might be said to be established but it cannot reasonably be said to be an established regUlar shift. There is nothing regular about it.

¶ 49 It is not any established shift which secures the wage protection in Article VII(5). It is an established regular shift which attracts that provision. In these specific circumstances, a one-time, ten week shift which occurred 14 years ago is not an established regular shift and it is not a practice which meets the basic test in Scott Cedar Products.

¶ 50 The decision in Scott Cedar Products also deals with allegations of discrimination pursuant to Article III(1) of the collective agreement. As Arbitrator Munroe notes, the collective agreement contemplates distinctions in hours of work being drawn between employees or groups of employees working under the collective agreement. The only boundary is that set by the requirement that all employees receive 8 hours pay for the full hours established as their regular shift. In rejecting the allegation of discrimination, Mr. Munroe said at p.10:

" The second reason begins with an appreciation that we are dealing here with hours of work: in respect of which all manner of distinctions have long been drawn between employees or groups of employees working under the Master Agreement. I refer, as examples, to distinctions frequently encountered between maintenance employees (and even amongst maintenance employees) and production employees: and between employees on the day/afternoon shifts and those on the graveyard shift. As the parties to the Master Agreement have long understood, there is no requirement that all employees in a particular operation work the same number of hours. Rather; the requirement is that all employees receive eight hours' pay for the full hours (to a maximum of eight) established as their regular shift. Surely, so long as the hours of work assigned to an employee or group of employees are generally permissible within the frame of the collective agreement, a heavy burden of persuasion must be met by the union before a finding of "discrimination" would be justified. As I have indicated, I do not believe it would be justified in the case at hand."

¶ 51 That, it seems to me, is a complete answer to the allegation of discrimination in this case.

¶ 52 In the result, the grievance is denied.

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