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INTERIOR FOREST LABOUR RELATIONS ASSOCIATION

-AND-

INTERNATIONAL WOODWORKERS OF AMERICA
LOCALS 1-405, 1-417 and 1-423

INTERPRETATION OF B.C. SOUTHERN INTERIOR MASTER AGREEMENT

AWARD BY: THOMAS R. BERGER

FOR THE UNION: DAVID K. PIDGEON

FOR THE EMPLOYERS: THOMAS A. ROPER

DATES OF HEARING: February 4th and 5th, 1986

DATE OF AWARD: February 19th,1986

The parties have submitted seven questions for interpretation under Article XVII under the British Columbia Southern Interior Master Agreement (effective July 1, 1983 to June 30, 1986).

> Question 1: Is the seniority date for an employee who commenced his employment as a casual employee and subsequently was able, during a period when he was available for full-time employment, to complete the required 30 working days within 90 calendar days, the first day worked during the period such employee was available for full-time employment?

The answer to this question depends on the interpretation of Article X, Section 3:

> Section 3: Probationary Period
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> Notwithstanding anything to the contrary contained in this Agreement it shall be mutually agreed that all Employees are hired on probation; the probationary period to continue for thirty (30) days during which time they are to be considered temporary workers only and during this same period no seniority rights shall be recognized. Upon completion of thirty (30) working days, they shall be regarded as regular Employees, and shall then be entitled to seniority dating from the day on which they entered the Company's employ, provided however that the probationary period of thirty (30) working days shall only be cumulative within the three (3) calendar months following the date of entering employment. Days spent fire fighting will not be included as days of probation.

The language of Section 3 is unequivocal. It refers to "all Employees", and says that "[n]otwithstanding anything to the contrary contained in this agreement", they are hired on probation, the probation period to continue for 30 working days. After that, they are entitled to seniority

calculated "from the day on which they entered the Company's employ". Alex Barichello, manager, labour relations, Interior Forest Labour Relations Association (IFLRA), testified that the practice in the industry conforms to Section 3. In calculating seniority for casuals, the practice is to include any working day within the 90-day period.

Mr. Roper, for IFLRA, says that a day is a day is a day. Despite the plain language of Section 3, Mr. Pidgeon, for the union, cites Article VII, Section (1), Clause (d), and says that it contemplates two seniority lists, one for casuals and one for regular employees. Article VII, Section 1, Clause (d) says:

> (i) Casual labour employed on production work on Saturday and/or Sunday will receive rate and one-half for these days. Casual labour employed on Saturday for maintenance, repairs and preparatory work will be paid straight-time job rate. Casual labour employed on Sunday shall be paid rate and one-half for all hours worked.
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> (ii) Regular laid-off employees shall not be classified as casual employees and shall have reference for available work over the said casual employees.
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> (iii) The employer agrees to keep a separate seniority list of casual employees who have worked at least ten (10) working days, exclusively for recall purposes and subject to clause (ii), further agrees to recall casual employees in accordance with their seniority as set forth in this list.

Mr. Pidgeon says that a casual employee has seniority for casual, but not for regular employment, and that his seniority does not begin to run until he enters regular employment.

It is true, as Mr. Pidgeon points out, that casual employees do not get casual seniority rights until they have been employed for ten days. It may be, as he says, that there is a ten day probation period for casuals and a 30 day probation period for full-time employees. But this does not mean that, once casual employees achieve regular employment, they cannot claim the benefit of Article X, Section 3. Whatever their rights may have been while they were on probation, once they become regular employees, they are "then entitled to seniority dating from the day on which they entered the Company's employ. ..."

The interpretation advanced by the Company is supported by the cases. In Re City of Toronto and Canadian Union of Public Employees Local 43 (1979) 21 LAC (2d) 361, the grievor worked as a casual employee, resigned his employment, and worked for the employer subsequently as a regular full-time employee. It was held that because the grievor had terminated his employment before assuming regular full-time duties, the probation period would be calculated from the date of his rehire. However, the arbitrator held that the probation period defined as "six continuous months from the date of commencement of his employment with the City" would include time worked as a casual employee, i.e., "from the date of commencement of his employment." The plain language of the collective agreement was applied.

The same decision was reached on the same probation clause in Re Corporation of the City of Ottawa and Canadian Union of Public Employees, Local 503 (1984) 13 LAC (3d) 293. See also Re Gulf Canada Ltd. and Oil, Chemical and Atomic Workers, Local 9-593 (1981) 28 LAC (2d) 340, and Re Municipality of of Ottawa - Carlton and Canadian Union of Public Employees, Local 503 (1981) 4 LAC (3d) 77.

Article X, Section 3 makes no distinction between casual and regular employees. There is no requirement that casual employees, in order to gain the benefit of Article X, Section 3, must have been available for full-time work throughout. All that it requires is an accumulation of working days, "from the day on which they entered the Company's employ. ..."

The answer to the question is no.

Question 2: Under the agreement between Locals 1-405 and 1-417 of International Woodworkers of America and Weststar (B.C. Timber) Ltd. does Article XI, Section 2 have any application at all to instances of scheduled overtime?

The question has been referred to me as Interpreter by Mr. Donald R. Munroe, the Arbitrator. It concerns the meaning of Article XI, which reads:

Section 1: Call Time

An Employee reporting for work on the call of the Company, except school students reporting for work on school days, shall be paid his/her regular rate of pay for the entire period spent at the place of work in response to the call, with a minimum in any one day of:

(1) Two (2) hours' pay at the Employee's regular rate except when the Employee's condition is such that he/she is not competent to perform his/her duties or he/she has failed to comply with the accident prevention regulations of the Workers' Compensation Board; and

(2) If the Employee commences work, four hours' pay at his/her regular rate, except where his/her work is suspended because of inclement weather or other reasons completely beyond the control of the Company.

A school student reporting for work on school days on the call of the Company shall be paid his/her regular rate of pay for the entire period spent at the place of work in response to the call, with a minimum in any one day of two hours' pay at his/her regular rate.

Section 2: Call-In Time

Where an Employee is called in outside of his/her regular scheduled shift for emergency work he/she shall be paid a minimum of four (4) hours at time and one-half rate.

Where the emergency work for which the Employee was called in his been completed, he/she shall be released from duty. The minimum four (4) hours shall apply to each call in.

The answering of such call shall be at the option of the Employee.

In the case before the arbitrator, Steve Paszty, an electrician at B.C. Timber Ltd. at Castlegar, was engaged in repairing an automated sorting machine run by computer. This was on a Saturday. The foreman and the crew, including Mr. Paszty, agreed at 6.30 p.m. that they would all go home

and that they would return at 8.00 a.m. Mr. Paszty considered overnight the problem they were faced with and within twenty minutes of reporting for work the following morning was able to get the computer to work. All then went home.

I have recited the facts, as stated by the parties, to provide the context in which the question of interpretation of the collective agreement arose. The company says that in these circumstances Mr. Paszty was entitled simply to overtime on Sunday. The union says he was entitled to call-in time under Article XI, Section 2. The dispute is one for the Arbitrator to decide. What is before me, as Interpreter, is the meaning of Article XI, Section 2.

There is a distinction between what is described in Article XI, Section 2, as call time, which an employee is entitled to when he reports for work and there is no work to be done, and call-in time under Article XI, Section 2. Where an employee has to work outside of his regular scheduled shift for emergency work he is entitled to be paid a minimum of four hours at time and one-half rate. This is call-in time, and it is the same thing as "call-out time" or "call-back time".

Mr. Roper says that Article XI, Section 2 cannot apply to a case of scheduled overtime. He says that scheduled overtime is not at the option of the employee. Since the last sentence of Article XI, Section 2 says "the answering of such call shall be at the option of the employee", Article XI

Section 2 cannot encompass a case of scheduled overtime. The argument is circular. It is true that scheduled overtime is not at the option of the employee. That is the general rule. But a collective agreement may give an employee the right to refuse to agree to scheduled overtime. This collective agreement gives the employee that right wherever the employee is called in outside of his regular scheduled shift for emergency work.

Mr. Pidgeon says that the key is that overtime must be paid when the employee is called in to do work that is not contiguous to his regular scheduled shift. I think this is right. The fact that it was agreed Saturday that Mr. Paszty would come in on Sunday morning and that therefore no "call" had to be made on Sunday to bring him in is irrelevant. The vital thing is <u>when</u> did he come in, that is, was it outside of his regular shift?

This view is supported by E.E. Palmer in <u>Collective Agreement Arbitration in Canada</u>, 2nd ed., p. 647 - 656, and by previous cases, see, for instance, <u>Re Webster Manufacturing</u> 23 LAC 37 (Weiler, 1971). See also Brown and Beatty, <u>Canadian Labour Arbitration</u> 2nd ed. p. 472, para 8:3410.

The answer to the question is ~~no~~ YES

Question 3: Does a company violate Article XXX of the Southern Interior Master Agreement by selling equipment and entering into a logging contract with former employees who have purchased said equipment?

In the B.C. Southern Interior Master Agreement, there was from 1975 until 1983 a provision which read "the Company will not enter into any logging contract which would have the effect of discontinuing the employment of any regular logging Employee with the Company." (see Article XXXI(a) of the 1981 - 1983 collective agreement).

Mr. Hugh Ladner, Q.C., in B.C. Timber Ltd. and I.W.A., Local 1-417 (1983), decided that loggers laid off as a result of subcontracting could not require the company to provide them with jobs in the logging division. It was not obliged to do anything more than offer the loggers employment in the company's manufacturing division, as the company was prepared to do, and did do.

The union, during the 1983 negotiations, insisted on changes. The agreement now reads:

Article XXX - Logging Contracting & Sub-Contracting

(a) The Company will not enter into any logging contract or modify existing logging contracts of Sub-contractors which would have the effect of discontinuing the logging employment of any regular logging employee.

On the face of it, this overcomes the problem the union had as a result of the Ladner award, i.e., it protects an employee's right to continued employment in logging.

But the question that now arises goes beyond the entitlement of employees to continue to be employed in the logging division. It is this: if an employer sells equipment to a former employee in the logging division who left his employment so as to go into business, on the strength of a contract from the employer, does this violate Article XXX(a)?

At the outset, Mr. Roper objected to my jurisdiction. He said this is not a question for the Interpreter.

Drawing the line between the jurisdiction of the Interpreter and the Arbitrator is not always easy to do. The Interpreter has jurisdiction to determine the meaning of the provisions of the collective agreement. If it is simply a question of applying the collective agreement, then the Interpreter has no jurisdiction.

I am persuaded that I should answer the question posed here on the basis that what in truth has been asked is "does Article XXX(a) mean that the company is entitled to sell equipment to an employee and then enter into a sub-contract with him?" Or does Article XXX(a) mean that the company cannot enter into such a contract because its effect is to limit the number of employees in the logging division?

Mr. Pidgeon called evidence regarding what happened during the course of the negotiations. I ruled that U.B.C. and C.U.P.E., Local 116 (1977) 1 CLRBR 23 entitled Mr. Pidgeon to call evidence relating to the negotiations to determine the

meaning of Article XXX. Mr. Schumaker, president of Local 1-423, and Mr. Todman, president of IFLRA, gave evidence regarding what was said during the negotiations that led to this agreement. Both Mr. Schumaker and Mr. Todman agreed that they had the Ladner award in mind. Both Mr. Schumaker and Mr. Todman understood that the changes in the language would mean that if work were in the future to be sub-contracted it would not result in the transfer of any logging employee to the manufacturing division. In effect, any employee who wished to do so would retain his employment in the logging division. Both had in mind, to use Mr. Schumaker's words, that there "would be no further erosion of the logging division except by technical change or attrition."

But where an employee voluntarily resigns to go into business himself, though this may have the "effect" of discontinuing his logging employment, it is nevertheless a loss of employment by attrition. Both sides agree that attrition includes resignation. I am satisfied that neither Mr. Schumaker nor Mr. Todman had in mind the sale of equipment to a former employee, and the diminution of the logging division thereby.

There is no prohibition in Article XXX(a) on sub-contracting. What has been agreed is that employees in the logging division will not have to give up their employment in that division because of sub-contracts entered into by the

employer. But where an employee voluntarily resigns to go into business himself, though this may have the "effect" of discontinuing his logging employment, it is nevertheless a loss of employment by attrition.

The object of Article XXX(a) is to protect employees in the logging division, not simply to ensure that the number of persons employed in the logging division will remain constant. Article XXX(a) is not a manning clause.

The answer to the question is no.

Questions 4, 5 and 6

These have been settled by the parties

Question 7

(a) Is a casual employee who works on a statutory holiday entitled to rate and one-half?

(b) Is a casual employee working with tradesmen on Friday in circumstances in which Friday is a day on which a holiday has been agreed to be observed between the company and the shop committee pursuant to Article XIII, Section 1(c) or 1(d) entitled to rate and one-half for all hours worked on that day?

The parties have agreed that the answer to 7(a) is yes.

They are not, however, agreed on the answer to 7(b). The answer to this question depends on the wording of Article XIII. Article XIII, Section 2(c) says:

> An Employee working on a paid holiday shall be paid, in addition to his holiday pay, rate and one-half for any hours worked on a shift designated as the "holiday shift".

If therefore an employee actually works on a paid holiday he shall be paid rate and one-half. Under Article XIII, Section 2(h):

> Casual labour will not receive pay for Statutory Holidays.

But we are dealing here with pay for actually working on a paid holiday.

Article XIII, Section 1, designates Statutory holidays. It reads:

> Section 1: Designation of Days
>
> (a) All employees who work on New Year's Day Good Friday, Victoria Day, Dominion Day, British Columbia Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day, will be paid rate and one-half for all hours so worked.

Then follow provisions to ensure that whatever the day on which a Statutory holiday falls, employees will have a three day week-end. Article XIII, Section 1(b) reads:

> (b) In the event that one of the above Statutory Holidays falls on a Sunday the following Monday will be observed as the Statutory Holiday.

Then follow additional provisions for the Company and the Shop Committee, by agreement, to arrange for a holiday to be observed on some other day. These are the so-called "observation" sections.

(c) In the event of a Statutory Holiday falling on a Tuesday, Wednesday or Thursday and where the Company and Shop Committee mutually agree, the said holiday may be observed the preceding Monday or following Friday respectively.

(d) In the event that one of the within-named Statutory Holidays falls on Saturday it shall be observed on the preceding Friday or following Monday as agreed between the Company and the Shop Committee.

Finally, it is said:

(e) Notwithstanding (b),(c) and (d) above, for those employees who work on a Tuesday to Saturday work week as outlined in Article VII, Section 5, the following will apply.

(i) where a Statutory Holiday is observed on Friday by other employees, it shall be observed on Saturday.

(ii) where a Statutory Holiday falls on Saturday it will be observed on Saturday.

(iii) where a Statutory Holiday falls on their rest day (Sunday or Monday), the employee or employees shall observe the preceding Saturday or the following Tuesday as the Statutory Holiday as mutually agreed between the Company and the Shop Committee.

So casuals get paid <u>if they work</u> the statutory holiday, <u>and</u> they get paid at rate and one-half. This follows from Article XIII, Section 1(a). But, unlike other workers, they do <u>not</u> get paid for the statutory holiday if they do not <u>work</u> the statutory holiday (this is laid down by Section 2(h)). The question is, what happens where it has been agreed that the holiday shall be observed on a <u>Friday</u>?

The Union's position is that if it is agreed that the holiday is to be observed on a Friday, then that arrangement applies to all employees except those employed Tuesday to Saturday. Therefore, if a casual employee works on Friday he is entitled to rate and one-half for that day.

The Company argues that subsections (d) and (e) are designed to ensure that regular employees obtain a three-day break upon the occurrence of a statutory holiday. The "observation day" is intended to identify the day which an employee will be absent from work with pay. Casual employees do not receive statutory holiday pay. Accordingly, the concept of an "observation day" has no application to casual employees. I am not sure that this argument is sound. In any event it cannot apply here because it is conceded that some casual employees may be employed for a five-day week. So why shouldn't they have a three-day break? If so, does this mean that the remainder of casual employees should not? Nothing in the collective agreement countenances such an interpretation.

The Company also invokes the rule against adopting a construction that would lead to an absurdity. A casual employee, the company says, would receive time and one-half for hours worked on Friday while the tradesmen with whom he works are paid at straight time. But this overlooks the fact that the tradesmen are being paid for the statutory holiday, when they

do not work. Or, the company says, suppose the casual employee does not work on the Friday, or any other day in the week, but actually works on Saturday, say Christmas Day? If the union argument is that the statutory holiday is moved for all employees to Friday, and assuming that only those employees who work on the "observation" day would receive rate and one-half, then an absurdity arises. The result is that the casual employee who works on Christmas Day, in the example given, and works no other day in the week, would be paid at straight time rates. But this is not an absurdity; not every anomaly is an absurdity.

Finally, according to the Company, Section 2(c) must have been intended to exclude casuals; since casuals do not get holiday pay, they cannot receive rate and one-half "in addition ... to holiday pay". But I do not think this means that they are not covered by Section 2(c); it simply means that if they are not entitled to holiday pay, they do not get it, and those workers that are entitled to it do.

The collective agreement seems plain. I am not persuaded that, if I hold that it means what it says, any labour relations purpose is violated; neither do I see any absurdity.

The answer to the question is yes.

Thos R. Berger

THOMAS R. BERGER