1987 CarswellBC 2120
British Columbia Arbitration

Quesnel Forest Products v. I.W.A., Local 1-424, Re

1987 CarswellBC 2120, 7 C.L.A.S. 50

BETWEEN: QUESNEL FOREST PRODUCTS (A DIVISION OF SLOCAN FOREST PRODUCTS LIMITED) (the "Company") AND: INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 1-424 (the "Union") (Pat Meehan Grievance)

Ready

Judgment: June 22, 1987

Counsel: Joe Coutts for the Company
Robert Blasina for the Union

Subject: Labour; Public

Headnote

Labour and employment law

Call-back pay was claimed under the collective agreement for a grievor who was called in to work before his shift and paid only for the hour actually worked at overtime rates. The Union argued that the fact that the grievor did not go home and thus incur an "extra trip" was not relevant. The Employer argued the provision was entitlement to compensation for the inconvenience of the "extra trip." Held, grievance allowed. The grievor was called back for a specific assignment which was not connected with his regular shift.

— See Headnote above. —

***Ready*:**

1 The parties agreed this board was properly constituted with jurisdiction to hear the matters in dispute. The issue in dispute centers around the application of Article VII, Section 10 - Call-Back Time which reads as follows:

> Employees called back to work after completion of their regular scheduled shift shall be paid a minimum of three (3) hours at rate and one-half.

THE FACTS

2 The grievor has been employed by the Company since July 14, 1982. He is an electrician and at the time the grievance arose in August, 1985 the grievor was working the day shift/night shift swing. The day shift hours were 7:00 a.m. to 3:30 p.m. and the night shift hours were 3:30 p.m. to 12 midnight. The shift swing was every 2 weeks.

3 The grievance arose as a result of events on August 8, 1985. On that date the grievor was working day shift and was scheduled to commence work at 7:00 a.m. At approximately 5:15 a.m. the grievor was called at home by Gordon Clark, the Maintenance Superintendent, and was advised that there was a problem with the chipper in that it wouldn't start. The chipper is a key piece of equipment and Mr. Clark obviously wanted to get the machinery up and running prior to

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the commencement of the day shift. The grievor arrived at the mill at approximately 5:50 a.m. It took him approximately 10 minutes to fix the chipper and then, according to his evidence, he made a couple of trial runs. In any event, at 6:30 a.m. he determined that the chipper was operating properly. He left the chipper, went to the lunchroom and waited for the commencement of his regular shift at 7:00 a.m. The grievor recorded the call-back and claimed the minimum 3 hours pay, per Article VII, Section 10 of the collective agreement. However, he only received I hours pay at overtime rates in addition to his regular rate of pay for that day. Therefore, he lodged this grievance.

4 Mr. Clark was questioned by his Counsel on his interpretation of Article VII, Section 10 (sout out above). He aswered "I interpret the clause that it doesn't apply at the end of a shift and prior to the shift start if it is an early start". He testified further that "on occasion when we bring someone in early and we pay such employees at overtime rates whether he is told before the shift or not. We pay under Article VII, Section 10 when an employee is called in and goes home". He testified further that "it happens more on weekends and that there is very little cause for it to happen during the week".

5 In a nutshell, Mr. Clark characterizes the circumstances of August 8, 1985 (the date this grievance arose) as an "early call-in to work" as opposed to a "call-back", as that term is used in Article VII, Section 10 in the collective agreement. When questioned about the grievor's claim for call-back pay, Mr. Clark said "I told him that is not the way it works - i.e. he was called in early on overtime and he would get paid that way".

6 Mr. Clark also testified about an earlier occasion some 2-3 months prior to August 8, 1985. On that occasion a similar incident occurred for which the grievor was only paid 1 hour at the overtime rate. As well, in January, 1985 the grievor claimed 3 hours call-back pay on a similar assignment and was only paid at overtime rates for the hours worked prior to his shift.

7 To summarize, the difference between Mr. Clark and the grievor -and the question before me - is the issue of whether or not an assignment of this nature represents an early call-in, (to use Mr. Clark's words), or a "call-back" which is provided for under the terms of Article VII, Section 10 the collective agreement.

8 It emerges from Mr. Clark's evidence that the only circumstance under which the Company would have paid the grievor "call-back" premium would be if the grievor had been called in and required to return home prior to the start of his regular shift - commonly known as the "extra trip" principle.

THE ISSUE

1 The issue to be determined is whether the grievor i entitled to 3 hours pay at rate and one-half under Article VII, Section 10 (set out above).

POSITION OF THE UNION

9 On behalf of the Union, Mr. Blasina argues that I ought to apply the clear and unambiguous meaning to Article VII, Section 10 and further that I ought to reject the "extra trip" principle. That is to say that the facts of this case support the proposition that there was a "call-back" in that the employee was called-in specifically to repair the chipper and when that work was completed the employee was not assigned further work until the start of his regular shift. Instead he returned to the lunchroom, had his breakfast and waited for his regular shift to start. As I understand Mr. Blasina's submission the grievor only lives 5-10 minutes from the plant and he could very well have returned home and come back to work for his regular shift that day. If he had done so, under the Company's interpretation, he would have received the "call-back" pay.

10 This, Fir. Blasina argues, should be rejected as an absurd application of the "extra trip" principle.

POSITION OF THE COMPANY

11 Mr. Coutts presented a very emotional argument on behalf of the Company. He claimed that the Union is guilty of bad faith in filing and pursuing this grievance. He asserted that I should apply the doctrine in Re University of British Columbia and Canadian Union of Public Employees, Local 116 (Weiler), C.L.R.B.R., Volume 1 in that I ought to look

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at what the practice of the parties has been over the years and rely on that practice as well as the bargaining history of the parties. The practice has been that employees called in early were only paid overtime rates up to the start of their regular shift. Further, "call-backs" are only, as Mr. Clark testified, paid when an employee is required to make an "extra trip".

12 In other words, Mr. Coutts asserts that the Union is now attempting to get, through arbitration, what it didn't get at the bargaining table in 1974 hen the parties inserted this provision in their collective agreement.

13 Mr. Coutts relies on the contents of Exhibit 5 which is a policy set out to member companies of CONIFER, formerly NCFLRA, which states as follows:

> HOURS OF WORK
>
> *RECOMMENDED POLICY*
>
> when an employee is called in to work earlier than his regular scheduled time it is recommended that he be paid time and one-half his regular rate for the hours between actual starting time and his regular starting time.
>
> For example:
>
> The employee's regular starting time is 8:00 a.m. He is asked to come in at 6:00 a.m. an a one-time basis, The recommended policy is to pay two (2)hours at time and one-half then straight time thereafter even though the employee does not work in excess of eight hours on that particular day.

14 Mr. Coutts also relied on the evidence of Mr. Gunderson, the Executive Director of CONIFER (the bargaining agent for the northern interior forest companies) formerly NCFLRA. Mr. Gunderson testified that the example given by the Union during negotiations in 1974 when it was arguing in support of the wording of Article VII, Section 10, was that the Union wanted the employees to be compensated for the inconvenience of having to make extra trips to work, and should be entitled to call-back premiums for such inconvenience.

CONSIDERATION OF EVIDENCE AND SUBMISSIONS

15 My task, as an arbitrator under the terms of the collective agreement between the parties, is not to interpret the collective agreement. The task of interpretation is provided for under Article XV, Section 1 - Interpretation. Rather my task, as an arbitrator, is to simply apply the facts to the provisions of the collective agreement as they appear before me. That is not to say that I shouldn't take into consideration negotiating history and past practice.

16 With regard to the past practice, there is no question that there has been a long practice of employees trading hifts and employees being called in early to relieve other employees who are required to attend doctor or dental appointments. Those employees, I am satisfied on the evidence, receive time and one-half overtime rates for those hours worked prior to their regular starting time shift. But it is also clear that on most occasions these arrangements are pre-arranged and pre-determined.

17 Both Counsel referred to numerous arbitral authorities to support their respective positions. As is the case with many legal questions, arbitral jurisprudence comes down squarely on both sides of this issue. one line of authority stands for the proposition that in order to trigger a call-in or call-back premium it is necessary to make an extra trip to and from work and then to return to work on a regular shift. In that regard see Re Webster Manufacturing (London) Ltd. and International Molders & Allied Workers Union, Local 49 (1971), 23 L.A.C. 37, (Weiler) and also see Re Shell Canada Ltd. and Oil, Chemical & Atomic Workers, 9-848 (1974), 6 L.A.C. (2d) 422 (O'Shea). That same line of authority was recently adopted in Re Lafarge Concrete, A Division of Canada Cement Lafarge Ltd. and United Cement, Lime, Gypsum and Allied Workers International union, Local 385, (Vickers), p. 16:

> The raison d'etre of call-out is the extra trip to work. Call-out is applicable when an employee is in a situation where it is necessary for him to make that extra trip to work.

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18 Counsel for the Union relied on the other line of authorities which Arbitrator McColl defined in Re Pacific Press Ltd. and Vancouver Typographical Union, Local 226 (1983), 13 L.A.C. (3d), p. 242 as

> the "literal approach" in which a literal interpretation of the language used determines whether or not the clause applies in certain circumstances. where the literal approach is used the "double trip" theory is not the basis for determining the right to the benefit of the clause.

19 In dealing with matters such as the one before this board there ar no absolutes. Each case must be decided on its merits. A starting point is the fact that the parties saw fit to address and provide for a premium payment for employees who were called back to work outside of their regular working hours.

20 With regard to the authorities on the subject which are clearly at odds, it is my view that the extra trip is only one factor of inconvenience. There are others. There is, for example, the inconvenience of being called out in the middle of the night to come to work to repair a piece of equipment. That is the basic purpose of call-back pay. That may or may not require an extra trip, depending on where an employee resides, and it may also depend on the time factor.

21 But what have we got in this case? In this case the facts reveal that the grievor was at home when called in to repair the chipper - and he was not assigned work up until his regular starting time. It was a specific assignment which was complete at 6:30 a.m. and he chose to wait in the Company lunchroom until the start of his regular shift at 7:00 a.m. rather than go home and return to work. The question now becomes whether or not that specific incident is a "call-back" under the circumstances.

22 Again I refer to the Pacific Press case cited above where Arbitrator McColl found at p. 246:

> I agree with Professor MacIntyre that all cases must be decided on their own peculiar facts whichever analysis is used. While it is easy to agree in the abstract with the comments made by Professor Weiler in the Webster Manufacturing case, it is quite apparent that the obiter observations made by him were unnecessary for a conclusion of the issue of the peculiar facts which were before that board. The adoption of those words to all instances shows the unreliability of taking observations from even learned arbitrators and applying them to factual situations which were not before the board when such comments or observations were made.
>
> I hesitate, having regard to the uniqueness of the issue wich is before me, to decide the correctness of one party's position over another on the basis of a single case. on the other hand, both counsel have agreed that there is clear inconsistency in the cases which were before me. As Professor MacIntyre's decision arises in this jurisdiction and on a factual basis distinguishes Professor Weiler's decision in Webster Manufacturing, I prefer to adopt Professor MacIntyre's reasoning. Apart from the fact that the decision is one which arises from an emminent arbitrator in this jurisdiction, it has the added advantage that it appears, on a factual basis, to parallel the instant case. A decision contrary to that of MacIntyre would only seem to me to throw the issue in British Columbia into the same quagmire of arbitral dispute that has occurred in other jurisdictions.

23 On the evidence and application of the facts I find the purpose and intention of Article VII, Section 10 has been met in this case. The grievance succeeds because the grievor was called back for a specific assignment which was not connected with his regular shift. The grievor is to be paid 3 hours pay at rate and one-half.

24 I make one final observation. This decision should not be interpreted by either party as interrupting that long-standing practice between the parties whereby shifts are exchanged for various reasons and employees are given one day advance notice that they are required to come in to work early. That practice should stand and should not be altered in any way by this decision as it is not my intention to do so. I make this ruling on the facts of this particular case.

25 It is so awarded.

26 Dated at Vancouver, British Columbia this 22nd day of June, 1987.

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2 "signed" Vincent L. Ready, Arbitrator

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