Case Name:

Scott Cedar Products Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-3567

IN THE MATTER OF An Arbitration
Between
Scott Cedar Products Ltd./Green River Log Sales Ltd., and
IWA - Canada, Local 1-3567

[1993] B.C.C.A.A.A. No. 170
Award no. A-167/93

British Columbia
Collective Agreement Arbitration
D.R. Munroe, Arbitrator

Heard: (Vancouver, B.C.) April 29, 1993.
Award: May 12, 1993.
(25 paras.)

(Graveyard Shift Arbitration)

Appearances:

Gary Catherwood, for the Employer.
Sandra Banister, for the Union.

AWARD

¶ 1 I was constituted by the parties as an arbitration board under their collective agreement to hear and decide a grievance filed by the union in relation to the company's implementation of a graveyard shift. The graveyard shift was in operation for a period of months in the spring of 1992, and again for a short while in March, 1993.

¶ 2 In the view of the union, there are two issues to be arbitrated:

1. The length of the graveyard shift. For the hourly employees, the length of the shift was eight hours for which the employees received eight hours' pay. For the piece workers, the length of the shift was six hours for which the workers also received eight hours' pay. The union submits that upon a proper application of Article V(8)(a) of the collective agreement, both the hourly employees and the piece workers ought to have been required to work only six hours in return for the eight hours' pay. In the alternative, the union submits that by distinguishing as aforesaid between the hourly employees and the piece workers, the employer was in violation of Article II(1) of the collective agreement. By that provision, the management and operation of the employer's enterprise, including the

direction of the work, forces, is vested exclusively in management; provided, however, that "...this will not be used for purposes of discrimination against employees".

2. Payment for piece workers. During the graveyard shifts in question, the employer paid the piece workers on the basis of eight hours' pay at the guarantee rate, or six hours' pay at the piece rate and two hours' pay at the guarantee rate, whichever was the greater. Put another way, for the seventh and eighth hours of the graveyard shift (during which the piece workers did not actually work), the piece workers were limited in all events to the guarantee rate. In the submission of the union, that comprises a violation of Article V(8)(a) of the collective agreement. The proper course, says the union, was for the employer to pay the piece workers, for the seventh and eighth hours of the shift, the greater of the averaged piece rate for the preceding six hours or the guarantee rate.

¶ 3 The employer submits that only the first of the above issues is properly before me. It takes that position because the written grievance, while clearly articulating the first issue, makes no mention of the second issue. I am of the view that the employer's preliminary objection should not succeed. I reach that conclusion for these reasons. First, I find as a fact that both issues were mentioned by the union to the company within a few days of the implementation of the graveyard shift in 1992. Second, I find as a fact that both issues were raised by the union at the step four grievance meeting. Third, on September 22, 1992, counsel for the union wrote to counsel for the employer confirming the existence of both issues. Fourth, I believe that the second issue is part and parcel of the true substance of the dispute between the parties which I would characterize generally as the manner in which employees will be paid on graveyard shift. Lastly, I am unable to discern any prejudice flowing to the company by allowing the second issue to form part of this grievance. Thus, whether by extending the time limits or by allowing a formal amendment to the grievance (assuming that the second issue was not included in the grievance in the first place), I conclude that both of the issues (as I have summarized them above) are arbitrable in the present proceeding.

¶ 4 I turn now to the merits of the first issue. Article V(8)(a) of the collective agreement (which is headed "Three-Shift Operations") provides as follows:

> The company shall have the right to operate the plant or any part thereof on a three-shift basis and all employees working under this 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 company's option.

¶ 5 The collective agreement governing these parties is a "me too" replica of the Master Agreement between Forest Industrial Relations (representing coastal forest industry employers) and various locals of the IWA-Canada. By virtue of the above provision, one finds throughout the industry a variety of circumstances in which employees on a graveyard shift work fewer than eight hours while receiving eight hours' pay.

¶ 6 It has been authoritatively held that once the "full hours" of a graveyard shift are "established", the employer may not unilaterally increase the number of hours associated with the shift: Various Forest Products Industries September 16, 1985 (Lysyk, J.). In the just-cited case, the Interpreter under the Master Agreement was asked this question:

> Is the company entitled to vary the number of hours worked by employees under Article V, Hours of Work, to a total not exceeding 8 hours per shift without changing the amount of compensation it must pay the employees in question, i.e., 8 hours per

shift?

¶ 7 In response to that question, the Interpreter, upon a consideration of Article V(8)(a) of the Master Agreement, said this:

> The context within which the question is presented, briefly stated, is this. A common situation in the industry where three shift operations are involved is that the "graveyard" shift runs from 1:00 a.m. to 8:00 a.m., representing 6 1/2 hours work and 1/2 hour for lunch. By virtue of s. 8(a) of Article V, an employee working under this arrangement is entitled to receive 8 hours pay. The circumstances I am required to consider involve extension of the graveyard shift on Monday morning one additional hour, commencing at midnight and running to 8:00 a.m. Under the terms of s. 8(a), the employee would receive no extra remuneration for working the additional hour.
> As stated, the employers take the position that a change in duration of shift of this nature is a "detail" within the meaning of the last sentence of s. 8(a). The Union says that the first sentence of s. 8(a) entitles the employee to 8 hours pay upon completion of the full hours established as their regular shift, and where 6 1/2 hours have been so established, substitution of a longer period cannot properly be characterized as a mere "detail" within the meaning of that word in the next sentence.
> Counsel referred me to two awards made by Mr. Clive McKee, as single arbitrator, dealing with this issue: MacMillan Bloedel Limited Somass Division -and-International Woodworkers of America. Local 1-85 (June 19th, 1978) and Whonnock Industries Limited (Lumber Division) -and- International Woodworkers of America. Local 1-367 (April 5th, 1984). In both, the arbitrator held that the Company was not entitled to make such a change unilaterally.
> I find myself in agreement with that result for reasons which can be shortly stated. The first of the two sentences in s. 8(a) 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 elsewhere in the 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 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" 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.

¶ 8 The essence of the dispute before me is whether the union is correct in its assertion that prior to the implementation of the graveyard shift in 1992, six hours had been "established" as the "full hours" associated with a graveyard shift at this employer's operation. Based on the authorities, the "establishment" of the "full hours" of a shift can arise either by agreement between the parties, or, in the words of the Interpreter, "by practice". There is no suggestion here of an agreement between the parties. Rather, the union relies on what it describes as a "practice".

¶ 9 For present purposes, the employer's operation can be described as comprising two divisions: the Scott division and the Green River division. The Scott division has been operating for about 12 years; the Green River division has been operating for about 25 years. Until 1990, neither division had ever

had a production graveyard shift. The graveyard shift in 1990 (about which more is said below) lasted only some two and one-half months. Thus, in 1992, when the contentious graveyard shift was implemented, it would have been hard to describe the employer's operation as having had any sort of substantial history of production work being done on graveyard shift.

¶ 10 At the same time, it has not been uncommon for a clean-up employee to work the graveyard shift. As well, from time to time over the years, a few of the maintenance employees have worked the graveyard shift. In those instances, the employees have worked and been paid for eight hours.

¶ 11 For its assertion of a 6-hour "practice", the union relies exclusively on the graveyard shift in 1990. As I have stated, that was the first production graveyard shift in the history of the employer's operation; and it lasted some two and one-half months. On the evidence, its primary purpose was to train five additional cubermen so that greater relief in that position would be available on the day and afternoon shifts. To achieve that purpose, the employer sought the agreement of the union to suspend the seniority rules -- so as to prevent the already-qualified cubermen from bidding onto the graveyard shift (an occurrence which would have negated the primary purpose of the shift). The union agreed that for a period of one month, the seniority rules would be suspended. At the end of the month, two of the already-qualified cubermen bid onto the graveyard shift, but three of the trainees continued with their training. After a further approximately six weeks, the graveyard shift was discontinued.

¶ 12 It is worth noting that at the time the above-described graveyard shift was implemented (October, 1990), it was known and understood to be for a limited duration: not beyond the upcoming Christmas shutdown. And that is precisely what occurred. It is also worth noting that at the time of the temporary graveyard shift in 1990, it was not within anyone's contemplation that there might be a production graveyard shift in the future.

¶ 13 For the most part, the production work done on the 1990 graveyard shift was confined to the Scott division. However, one of the production employees, the chipper operator, worked in the Green River division (which houses the chipper used by both divisions). The production employees who worked in the Scott division (both the hourly employees and the piece workers) were paid for eight hours but were required to work only six. However, the one production employee who worked in the Green River division worked and was paid for eight hours. For six of the eight hours he operated the chipper. For the other two hours he performed clean-up duties. The one production employee at the Green River division filed a grievance to the effect that he, too, should have been required to work only six hours while being paid for eight. The grievance was later dropped.

¶ 14 Thus, I am confronted with the following bare facts:

1. An employer whose enterprise has existed, in one of its divisions for 12 years; in another of its divisions for 25 years.
2. An absence in both divisions of any substantial history of production graveyard shifts; however, the existence in both divisions of a history of clean-up and maintenance employees working a graveyard shift -- and of such employees working and being paid for eight hours.
3. The implementation in 1990 of a temporary (two and one-half months) graveyard shift for the primary purpose of training additional cubermen (for which, I might add, the company hired a trainer). For the two and one-half months that the shift was in existence, the production employees at the Scott division worked six hours while being paid for eight, while the one production employee at the Green River division worked and was paid for eight hours.

¶ 15 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 fording. 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.

¶ 16 On the first issue, the union made an alternative argument: that by distinguishing in 1992 and 1993 between the hourly employees and the piece workers (that is, by requiring eight hours' work of the former but only six hours' work of the latter), the employer ran afoul of the no-discrimination proviso found in Article II(1) of the collective agreement.

¶ 17 Assuming (as is the case) that the piece workers on the day and afternoon shifts are working the full eight hours (on top of the usual meal breaks), it really isn't feasible to require the piece workers on a graveyard shift to likewise work eight hours -- at least not without requiring them to perform duties which are outside their usual range of duties. As one of the union's witnesses acknowledged in cross examination, were it otherwise, this employer undoubtedly would have demanded more work of the graveyard piece workers than just the six hours.

¶ 18 But this same lack of feasibility does not apply to the graveyard hourly employees -- whose work is more easily capable of being overlapped with their counterparts on the day and afternoon shifts.

¶ 19 Thus, counsel for the employer is correct in his submission that the distinction drawn between the hourly employees and the piece workers was not "...for the purposes of discrimination against employees": Article II(1) of the collective agreement.

¶ 20 Counsel for the union asked me to construe Article II(1) in a manner consistent with the general law's modern trend toward remedying the effects of discrimination, despite what the purpose of the challenged conduct might have been. But that argument assumes that what occurred on the graveyard shifts in 1992 and 1993 amounted effectively to discrimination against employees of a sort envisaged by Article H(1). I am of the view that it did not. I have reached that view upon two main considerations. The first is that as between the hourly employees and the piece workers, many differences of treatment exist. Some of these are structural -- i.e., mandated by the collective agreement (the main one being differences of earning opportunities). Others are found in the everyday conventions of the workplace (most notably, the ability of piece workers to take extra breaks and to leave work early so long as their production is at an acceptable level).

¶ 21 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.

¶ 22 The second issue before me has to do with the basis of payment of the piece workers on the graveyard shift. As I have indicated, the practice adopted by the company in 1992 and 1993 was to pay the piece workers in the usual manner for the six hours that they were on the job (that is, the guarantee rate or the piece rate, whichever was the greater) but to pay only the guarantee rate for the seventh and eighth hours for which they were entitled to compensation by virtue of Article V(8)(a).

¶ 23 Under Article V(8)(a), the company was required to pay the piece workers "...eight (8) hours' pay upon completion of the full hours established as their regular shift". In the present context, I believe the phrase "eight (8) hours' pay" must be taken to mean eight (8) hours' pay calculated in the usual manner for the employees in question. For these workers, the usual manner of calculation includes a consideration of piece rates.

¶ 24 That does not necessarily mean that the actual method of calculation proposed by the union is the only or even the most appropriate in the circumstances. In argument, counsel for the employer commented that by looking solely at a rolling six-hour period, so to speak, the end result might be artificially high: because it may be easier to achieve a higher hourly production over six hours than over eight hours. I note as well that subsequent to the hearing, counsel for the employer wrote to the undersigned (with a copy to counsel for the union) suggesting that were I to find in favour of the union on this aspect of the case, I should "...reserve jurisdiction and invite submissions from the parties with respect to...[the] method of calculation". I accept that suggestion as reasonable.

¶ 25 In the result: (1) the union's grievance is denied insofar as it pertains to the duration of the graveyard shift implemented by the employer in 1992 and again in 1993; but (2) the union's grievance is allowed insofar as it pertains to the payment of the piece workers on those graveyard shifts. Within the frame of this award, the precise calculation of the payments to the piece workers is referred back to the parties for discussion and, hopefully, resolution. Failing resolution, the matter may be referred back to me for final disposition.

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