

Cited as:

**Tolko Industries Ltd. (Quesnel) v. Industrial, Wood and Allied
Workers, Local 1-424 (Jacobsen Grievance)**

IN THE MATTER OF An Arbitration
Between
Tolko Industries Ltd. (Quesnel), and
IWA - Canada, Local 1-424

[1999] B.C.C.A.A.A. No. 397
Award no. A-255/99

**British Columbia
Collective Agreement Arbitration
D.R. Munroe, Q.C., Arbitrator**

Heard: (Prince George, B.C.) July 28, 1999.
Award: August 9, 1999.
(22 paras.)

(Grievance of Brian Jacobsen et al)

Appearances:

Thomas A. Roper, Q.C., for the Employer.
Sandra Caffrey, for the Union.

AWARD

I

¶ 1 I was constituted by the parties as an arbitrator under their collective agreement with jurisdiction to hear and decide a grievance filed by the union on behalf of Bryan Jacobsen (the grievor). The arbitration hearing was conducted on July 28, 1999, at Prince George, B.C.

¶ 2 The argument made by the union, on behalf of the grievor (and the other "whistle chasers" in the sawmill) is that the company is in violation of the management rights provision of the collective agreement; that is to say, Article III(1) of the agreement which reads as follows:

Management

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 the employees.

¶ 3 Briefly, the union says that the company is discriminating against certain graveyard-shift maintenance employees because, in the circumstances hereafter described, the company is requiring them to work 8 hours for 8 hours' pay, while at the same time requiring the graveyard-shift production

employees to work only 6.5 hours for 8 hours' pay.

II

¶ 4 It is important to understand the industry-wide history and implications of this dispute. For many years, the forest industry collective agreements throughout the province (including this one) have contained a provision headed "Three Shift Operations" reading (in part) as follows:

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 (8) hours pay upon completion of the full hours established as their regular shift. Details of shifts shall be varied at the Employer's option.

¶ 5 There being only 24 hours in a day, a three-shift operation can result in one or more groups of employees on one or more shifts working less than eight hours. The main point of the above provision is that if a forest industry employer goes to a three-shift operation, in whole or in part, anyone working less than 8 hours will nevertheless be entitled to 8 hours' pay. (See also Article VII(1) of this collective agreement which says that, "The regular hours of work shall be eight (8) hours per day....") But while the embodiment of that broad principle in the above-quoted provision has not produced mid-contract controversy, there has been no shortage of grievances and arbitrations about the meaning or application of the phrase "full hours of work established as their regular shift". See, for example, MacMillan Bloedel (Somass), June 19, 1978 (McKee), Whonnock Industries, April 5, 1984 (McKee), Various Forest Products Employers, September 16, 1985 (Lysyk, J.), B.C. Forest Products (Victoria Sawmill), January 22, 1986 (Munroe), B.C. Forest Products (Coast Sawmills), April 16, 1986 (Vickers), Canadian Forest Products (Ft. St. James), November 3, 1988 (McPhillips), Scott Cedar Products, [1993] B.C.C.A.A.A. No. 170, May 12, 1993 (Munroe), Fraser Lake Sawmills, [1995] B.C.C.A.A.A. No. 337, October 23, 1995 (Taylor) and Fraser Lake Sawmills, [1997] B.C.C.A.A.A. No. 275, March 18, 1997 (Hope).

¶ 6 For present purposes, the cases cited above can be summarized as follows. The employer has the right to operate the plant, or any part thereof, on a three-shift basis, either permanently or intermittently. The employer also has the right to "establish" the "full hours" comprising the "regular shifts" of the employees working the three-shift operation (to a maximum of 8 hours worked). But once the full hours comprising the regular shifts are established, either by agreement with the union or by practice, the employer loses the unilateral right to alter them. And for working the full hours established as their regular shift, the employees are entitled to receive 8 hours' pay, even where the shift is less than eight hours' duration.

III

¶ 7 In consequence of the collective agreement, as interpreted and applied in decisions like the ones cited above, there are various shift patterns in three-shift forest industry operations, all of them attracting eight hours' pay for each shift worked. One common pattern for production workers is an 8.5-hour day and afternoon shift (including a one-half hour unpaid meal break) and a 7-hour (or less) graveyard shift (including a paid meal break). A common pattern for maintenance workers is three shifts of equal duration - i.e., eight hours including a paid meal break. The shift patterns as thus described are certainly not the only ones found in three-shift operations. But they are quite common.

¶ 8 In the 1995 Fraser Lake Sawmills case, the employer scheduled a third production shift for only the second time in its history. There had long been a graveyard maintenance shift which, since 1986,

had been 8 hours' duration for 8 hours' pay. When the third production shift was implemented, the production employees were scheduled to work midnight to 7:00 a.m. and were paid 8 hours. However, the saw filers and other maintenance workers were required to work 8 hours for 8 hours' pay.

¶ 9 On behalf of the graveyard shift maintenance workers, the union filed a grievance in the following terms: "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." The company's reply to the grievance, in summary, was to say that the collective agreement allowed it to require the affected employees to work 8 hours for 8 hours' pay. In response to the company's general reply, the union argued: (1) that based on the arbitral jurisprudence, the company did not have the right to make unilateral changes to the shift pattern in three-shift operations, which the union claimed had occurred in that case; or (2) that the company had violated Article III(1) of the collective agreement by discriminating against the maintenance workers by requiring them to work longer hours than the production workers for 8 hours' pay.

¶ 10 The union's first argument was based on one earlier instance of a three-shift operation, which was for a 10-week period in 1981. On that occasion, the maintenance workers on the graveyard shift, in common with the production workers on that shift, worked 6.5 hours and received 8 hours' pay. When the company reverted to two production shifts, the maintenance workers who remained on the graveyard shift went back to longer hours. The union's argument, in sum, was that by the singular occurrence in 1981, 6.5 hours had been "established" as the "full hours" of the "regular shift" of the graveyard maintenance workers whenever the company exercised its right to operate the plant on a three-shift basis. That argument was rejected by arbitrator Taylor whose reasoning included a reference to the above-cited award in Scott Cedar Products. There, the union had made a similar argument as the one made to arbitrator Taylor, based on similar facts. At page 8 of Scott Cedar Products, one finds the following passage:

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 text.

¶ 11 The award in Scott Cedar Products also dealt with an allegation of discrimination, based on the same language as in Article III(1) of the present collective agreement. There, the argument was advanced by the union on behalf of the hourly employees who were required to work 8 hours on the graveyard shift for 8 hours' pay, while the piece workers on that shift worked only 6 hours for which they received 8 hours' pay (being a combination of the piece rate and the guarantee rate). The union's allegation that the company had exercised its management rights "for purposes of discrimination against" the hourly employees was rejected for the following reasons (in part):

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.

¶ 12 Returning to the 1995 Fraser Lake Sawmills award, arbitrator Taylor commented at page 21 that the just-quoted extract from Scott Cedar Products "...is a complete answer to the allegation of discrimination in this case". As will be recalled, the allegation of discrimination in Fraser Lake Sawmills was one by maintenance workers on the graveyard shift who were required to work 8 hours for 8 hours' pay while the production workers on the same shift worked midnight to 7:00 a.m. for 8 hours' pay.

IV

¶ 13 That takes me to the facts of the case now before me. The company's plant at Quesnel, B.C., includes a planer mill and a sawmill. For something greater than 10 years, the planer mill has operated on a three-shift basis. Throughout, the production workers in the planer mill have worked an 8-hour shift on days and afternoons, but a 6.5-hour shift on graveyard; however, the maintenance workers in the planer mill have always worked 8-hour shifts (all three shifts) for 8 hours' pay. That has been true of all maintenance workers in the planer mill - i.e., the "whistle chasers" as well as those who do the scheduled maintenance work. I might add that the electricians based in the sawmill also do "whistle chasing" in the planer mill.

¶ 14 The different shift schedules as between the production and maintenance workers in the planer mill have never been the subject of a grievance alleging discrimination by the company against the maintenance workers.

¶ 15 Until January, 1996, sawmill production was on a two-shift basis. The production workers on the day and afternoon shifts worked 8 hours for 8 hours' pay, and so did the "whistle chasers" on those shifts. There was also a graveyard maintenance shift on which scheduled maintenance was performed: which was 8 hours' work for 8 hours' pay. There was not a perfect overlap between the production workers and the "whistle chasers" on the day and afternoon shifts. The result was that for the last hour of the afternoon shift, the "whistle chasing" was done by the graveyard maintenance personnel.

¶ 16 In January, 1996, the company put on a third production shift in the sawmill. The third production shift continues to this day. The sawmill production workers on the graveyard shift, like their counterparts in the planer mill, are scheduled to work 6.5 hours for which they receive 8 hours' pay. The sawmill maintenance workers on the graveyard shift who serve as "whistle chasers", like their counterparts in the planer mill, are required to work 8 hours for 8 hours' pay.

¶ 17 When the company put on the third production shift in the sawmill, and scheduled the employees as aforesaid, the union filed a grievance at the request of the sawmill graveyard "whistle chasers". The object of the grievance was to secure a 6.5-hour graveyard shift for the grieving employees. The grievance was denied by the company, and was dropped by the union after the third step of the grievance procedure.

¶ 18 The issue was later brought up by the union in the collective bargaining leading to the current collective agreement. The union's demand was resisted by the company, and was not pursued by the union to the point of impasse. Approximately four months after the conclusion of the collective bargaining, the present grievance was filed by Bryan Jacobsen, a sawmill "whistle chaser" (electrician), on his own behalf and on behalf of the other sawmill maintenance workers required to work an 8-hour graveyard shift for 8 hours' pay. The remedy sought is that the sawmill "whistle chasers" on the graveyard shift be required to work only 6.5 hours for 8 hours' pay - i.e., just like the sawmill production workers on the graveyard shift.

V

¶ 19 The union does not allege either an agreement or established practice that graveyard maintenance workers shall be required to work only 6.5 hours for 8 hours' pay - i.e., such as would require (like in the earlier-cited cases) an interpretation or application of the phrase "full hours established as their regular shift". Nor could any such allegation be credibly made. In plain fact, maintenance workers have never worked a 6.5 graveyard shift at this operation. Quite to the contrary, maintenance workers have always worked 8-hour shifts for 8 hours' pay.

¶ 20 Instead, the union's sole argument in the present case is to say that the company is in violation of the management rights clause, Article III(1), which includes the proviso that management will not exercise its rights "...for the purpose of discrimination against...employees". In making that argument, the union, far from asserting an established practice of 6.5-hour graveyard shifts for maintenance employees, expressly acknowledges that such is not the case; and indeed says that that is the very underpinning of its allegation of discrimination. As counsel for the union put it in argument: "We agree that there was no established graveyard shift for 'whistle chasers' in the sawmill, but when the company decided to establish one, they were not permitted to discriminate."

¶ 21 Even if one accepts (as the union would have me do) that for present purposes, "whistle chasers" should be viewed as different from the maintenance employees doing the scheduled maintenance work, it is not correct to suggest that the shift scheduling which is here in contention was something new to the company's Quesnel operation. As earlier noted, the maintenance workers performing "whistle chasing" functions for the planer mill have always been required to work 8 hours for 8 hours' pay; and it will be recalled that the maintenance workers on the pre-1996 sawmill graveyard shift always served as "whistle chasers" for one hour of their 8-hour shift. In short, and reiterating something said above, all maintenance workers on the graveyard shift at the company's Quesnel operation have always been required to work 8 hours for 8 hours' pay. In that sense, the sawmill graveyard scheduling commencing in January, 1996, was simply an application of the longstanding status quo.

¶ 22 In my view, the 1995 Fraser Lake Sawmills case, in its disposition of the discrimination issue, is indistinguishable in principle from the case at hand. Likewise the award in Scott Cedar Products. I adopt those awards as a full response to the union's grievance. It cannot be said that the company has violated Article III(1) of the collective agreement by exercising a management right "...for the purpose of discrimination against...employees". The union's grievance is therefore dismissed.

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