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Re Int'l Moulders Union and Jamaica MFG (Canada) Ltd

Innis Christie

D Wren

S H. Hartt

RE INT'L MOULDERS UNION AND JAMAICA MFG. (CANADA) LTD.

I. Christie, D. Wren, S.H. Hartt. *December, 1966.*

EMPLOYEE GRIEVANCE claiming improper change of incentive standard.

E.C. Witthames and *D.A. Crawford* for the union.
M.L. Rothman and *P. Cape* for the company.

AWARD

The facts

The facts essential to the settlement of this grievance do not appear to be in dispute. Employees of the company are paid an hourly base rate, as set out in the schedule to the collective agreement, plus incentive pay. The incentive system operates wholly outside the agreement except for references in art. 10(c), which is quoted below, and upon which this grievance is based. There are several indirect references to the incentive scheme in the "Wage Schedule and Classifications" appended to the

agreement. The references in the schedule do no more than testify to the existence of the incentive system. The system in use is a standard allowed time method of calculating bonus payments.

Prior to February, 1965, the standard rate under the incentive system for machining deck faucets 210 and 215 was 33 per hour. In February or March, 1965, the Gisholt lathe, which had been used for machining deck faucets, was replaced by a Warner-Swasey No. 2 lathe. The grievor had produced deck faucets 210 and 215 on the Gisholt machine and continued, after March, 1965, to produce them on the Warner-Swasey lathe. From the time of the change-over in February or March, 1965, until August, 1966, a period of 17 or 18 months, the grievor's incentive pay for machining deck faucets 210 and 215 on the Warner-Swasey lathe was based on a job standard of 33 per hour. The current collective agreement became effective on May 5, 1966. In August, 1966, after time and motion studies conducted by the company, the job standard for deck faucets 210 and 215 on the Warner-Swasey machine was changed to 43 per hour.

Mr. Cape, managing director of the company, gave evidence of the bonus hours which, according to company records, the grievor had earned in the production of deck faucets 210 and 215. Bonus hours are expressed in percentages of actual hours worked:

Gisholt machine, at 33 pieces per hour: 37-40%
Warner-Swasey lathe, at 33 pieces per hour: 90%
Warner-Swasey lathe, at 43 pieces per hour: 46%

Mr. Cape testified that job standards were, in general, established so that an average qualified employee could earn bonus hours amounting to about 40% of time worked. He testified that no other employee earned bonus hours which averaged 90% of hours worked, but there was no evidence to indicate that other employees did not earn higher than the normal bonus of about 40%.

Mr. Cape's evidence relating to bonus earnings was not contradicted. Mr. Tuinstra, the grievor, testified that the change in the job standard from 33 to 43 pieces per hour reduced his average weekly earnings by $13 or $14 per week from that which he had earned over the previous year. Since it is not clear what part of any week he spent machining deck faucets 210 and 215 on the Warner-Swasey lathe there is no apparent contradiction between this testimony and that of Mr. Cape. I think it is fair to

say that there could be no dispute that the change in job standard cost Mr. Tuinstra at least $7 or $8 per week.

The only direct reference in the collective agreement to the incentive system is in art. 19(c):

> "Job Standards, once established, shall not be changed, unless due to changes in methods, process, materials, conditions or mathematical errors; and then only if such changes amount to five (5) per cent or more of the total time values assigned to the standard. Only such elements as are affected by the change shall be revised and the new standards shall yield the same earnings opportunity as previously enjoyed."

It was conceded (or, if not, I find as a fact) that changes in method amounting to more than 5% of the total time values assigned did take place with the introduction of the Warner-Swasey lathe in February or March of 1965. At that time, the company could, in keeping with art. 10(c), have changed the job standard applicable to machining deck faucets 210 and 215.

The current incentive system was adopted by the company in 1963 after negotiations with the union, and on the basis of time and motion studies. Job standards were then posted. It is my understanding that since 1963 there have been no changes in methods, process, materials or conditions, other than the introduction of the Warner-Swasey lathe, which would warrant a change in job standards. Completely new processes, however, have been introduced. In each case where a new process was introduced Mr. Cape established a temporary job standard by negotiation with the individual machine operator, which was subsequently verified by time and motion studies and posted.

The other relevant sections of the agreement are art. 1.01, which provides that the purpose of the agreement is in part to accomplish the fair and peaceful adjustments of all disputes: Art. 4.01, the management rights clause, in which the union acknowledges that it is the exclusive function of the employer to, among other things, maintain efficiency and generally to manage the industrial enterprise, and art. 4.02 by which the company agrees that its functions shall be exercised in a manner consistent with this agreement and the bargaining rights of the union.

The issues

The issue is whether the company had the right in August, 1966, to change the job standard in question on the basis of the

change in methods when the Warner-Swasey machine was introduced early in 1965. Given that in March, 1965, the company could have changed the job standard, there are two questions raised by the facts:

(1) Did the signing of the current collective agreement preclude the company from any change in job standards unless there was a change in methods, materials, etc., *subsequent* to May 5, 1966, the effective date of the current agreement?

(2) By paying the grievor bonus based on a standard of 33 deck faucets per hour for nearly 18 months did the company *establish* that as the rate applicable to the job on the Warner-Swasey lathe? To put this question in a different way; by paying the grievor on a standard of 33 per hour for 18 months did the company estop itself from denying that it had extablished this as the rate for work on the Warner-Swasey lathe? The grievor's case was not argued on this ground, but I cannot escape the conclusion that this is the real question, and therefore must deal with it.

Decision

In his argument for the union Mr. Witthames relied on art. 13.01 of the agreement, which provides that "should the company expand its operation in Prescott" new wage classifications and rates will not be put into effect until "agreed to by mutual consent". This argument was not pressed, and it is sufficient to say that the replacement of the Gishold lathe by the Warner-Swasey lathe does not constitute an expansion of the company's operation in Prescott.

(1) The union argued mainly that if the introduction of the Warner-Swasey lathe, in early 1965, gave the company a right, under the collective agreement then in force, to change the job standard in question that right was lost upon the signing of the current collective agreement, effective May 5, 1966.

The company could not, it was argued, rely upon rights gained under the previous agreement. In this connection the decision in *Re U.E.W., Local 524, and Canadian General Electric Co. Ltd. (Peterborough)* (1951), 2 L.A.C. 710, was cited.

In the *United Electrical Workers* case the board held that the company had no right to change piece-work prices on the basis of a change in method made prior to the signing of the current agreement. That decision must be distinguished because the

relevant clause of the collective agreement there in question provided as follows:

> "The standard 'piece work prices' and 'standard time rates' presently in effect, and any established hereafter, will remain in effect for one year from the date of signing this agreement except for adjustments due to [changes in methods, obvious error establishing the rates, etc.] . . .".

In the agreement before us the corresponding words are "job standards, once established, shall not be changed, unless due to changes in method [etc.] . . .". Thus, the agreement in the *United Electrical Workers* case had the effect of itself establishing the piece rates then being paid, but it cannot be said that the agreement before us *expressly* fixes job standards as of the effective date of the agreement. It might be argued that such an intent is to be inferred from the words of art. 10(c) but I cannot so hold. The whole system of incentive rates here in question is quite outside the purview of the collective agreement, except for the employee protection provided by art. 10(c). The effect of the plain words of art. 10(c) is that once a job standard has been established it may not be changed unless there is a change in methods, materials, etc., *subsequent to the establishment of the standard*. It does not appear to have been the intention of the parties that if, for instance, a new machine had been introduced only a few weeks before the signing of the agreement, the signing itself would preclude any subsequent change in the applicable incentive standard.

The union appeared to rely on a ground broader than an implied intention that the signing of the agreement should freeze incentive rates then being paid. The union argued that the company could not reach back into the term of a prior collective agreement for the right to change standards during the currency of the present agreement. This broad ground can not be supported by authority or reason.

The prior agreement was introduced in evidence and contained a clause identical to cl. 10(c) in the current agreement. It is therefore clear that in March, 1965, the company had a right to change the job standard applicable to the production of deck faucets 210 and 215, and that right could be brought to an end only by consent of the parties, judgment of a competent Court or by lapse of time (see *Re U.E.W., Local 524, and Canadian General Electric Co. Ltd. (Peterborough)* (1951), 2 L.A.C. 710 at p. 714, *per* Lang, C.C.J., and see also *Re U.S.W., Local*

2900, and John Inglis Co. Ltd. (1961), 12 L.A.C. 44). The signing of the collective agreement, unless it can be interpreted as cancelling the right by consent, does not, in itself, prevent the company from subsequently changing the job standard. The collective bargaining relationship is a continuing one.

(2) The crucial question is whether the job standard of 33 deck faucets per hour was established *subsequent to the change-over* to the Warner-Swasey machine.

By paying the grievor on the old standard of 33 deck faucets per hour over a period of 18 months for his work on the new machine did the company "establish" 33 deck faucets per hour as the new job standard? Nothing is said in the agreement and there is no conclusive practice to settle what may constitute "establishing" a job standard. Clearly it is the unilateral right of the company, although, when the current incentive system was adopted in 1963, all the job standards were negotiated with the union. Similarly, there was a practice of negotiation when new processes were established. Temporary rates were established by agreement with the operator concerned, and, by agreement therefore, they could never become binding and offer no guidance in the case before us. Once these standards were confirmed by time study they were posted along with the standards originally established. However, this is not sufficient basis for saying that job standards could be established only by posting.

Mr. Cape testified that the failure to retime the grievor's job until August, 1966, was the result of an honest mistake or oversight on his part, and I accept his evidence. He had no intention of establishing a job standard of 33 deck faucets per hour for the Warner-Swasey lathe. However, the question of whether or not the standard is to be treated as established must depend, not upon the subjective intention of the responsible officer of the company but rather upon his acts. I am impelled to the conclusion that the only reasonable inference to be drawn by the union, or by the grievor, or by any reasonable onlooker, from the fact that the grievor was paid on a standard of 33 per hour for 18 months would be that the company had established that to be the standard for the Warner-Swasey lathe.

> "To say as the company says, that it had a different intention which it did not manifest because of a mistake which officials made, affords no ground for refusing to give credence to the objective facts . . . the company position is clearly repugnant to well accepted principles of contract law"

quoting from the case of *Re U.E.W., Local 524 and Canadian General Electric Co. Ltd. (Peterborough)* (1953), 4 L.A.C. 1346, *per* Professor Bora Laskin (as he then was), at p. 1351. In August, 1966, the company was estopped from denying that it had established a job standard of 33 deck faucets per hour for the Warner-Swasey machine.

Counsel for the company argued that the company's clear right to change the job standard in question, derived from the combined effect of art. 10(c) and the managements rights clause, could not be lost by practice or "acquiesence". In this connection he cited the case of *Re Int'l Operating Engineers, Local 796, and Wellesley Hospital* (1963), 14 L.A.C. 81. In that case the employer was entitled to compute wages on a monthly basis, but was paying his employees every two weeks. An erroneous formula for computing bi-weekly pay had been used for some 15 years, during which the collective agreement was renewed several times. The grievance arose when the formula was corrected and employees' pay reduced slightly in consequence. The board held that even such long practice would not avail the grievor in the face of the clear words of the collective agreement.

I cannot agree that the same principle is involved in the case before us. We are not concerned to interpret a clause of the collective agreement granting a right to the company; we are concerned with the question of whether, in August, 1966, the company must be held to have already exercised the right which it clearly gained in March, 1965. The company's argument correctly states the principle of interpretation, that the *clear* words of an agreement cannot be otherwise interpreted upon proof of divergent practice. But the doctrine of estoppel, which is a rule of commonsense and justice, clearly applicable to rights under a collective agreement (*Re Oil, Chemical & Atomic Workers, Local 16-633, and United Gas Ltd.* (1962), 13 L.A.C. 80, *per* Reville, C.C.J., at p. 82), does not deny the existence of rights; it fetters their exercise. Where one party by his words or acts leads another to act in reasonable reliance and to his detriment on a representation of fact the first party cannot afterwards deny the truth of the representation. Here, management, by its acts, led the grievor to believe that a standard of 33 deck faucets per hour had been established for the Warner-Swasey machine. Since that was clearly management's right nothing in the agreement would lead the grievor to think otherwise.

It is no doubt true that a reasonable person in the position of the grievor would suspect, from the fact that he was receiving

the highest bonus in the factory, that there had been some mistake in leaving his job standard at 33 per hour, and would therefore not be immediately misled into detrimental reliance. However, we do not know how much higher his bonus was than that of the next best paid man. In any case, his high pay must be balanced against the continuing passage of time. No matter how far out of line he is, at some point, the man on the factory floor must conclude that 33 deck faucets per hour is indeed the job standard established for the Warner-Swasey lathe. The determination of the job standard is, after all, a management function. It is not necessary to decide at exactly what point in time the standard for the new machine was established in this case. The company must have a reasonable time to ascertain a proper job standard but clearly nothing like 18 months is required. The fact that a collective agreement was signed in about the 14th month does not, of itself, "establish" a job standard, but it does increase the likelihood that an ordinary person would conclude that management had by that time established the rate. The following quote from an American decision is relevant:

> "The employees are entitled to assume that management is living up to its agreement. When a piece work price has been paid for an extended period of time under normal conditions of operation, they have every right to consider that it is the established price and that it will not be changed except in accordance with the provision of section 7.
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> "This is not a holding that management is not entitled to a reasonable time within which to discover and correct errors in the application of piece work prices such as apparently occurred in this case. But it is definitely a holding that two years is far more than a reasonable time": *Re United Farm Equipment & Metal Workers Council, Local 108, and Int'l Harvester Co., McCormack Works* (1950), 14 L.A. 1010.

I realize that in this case the grievor has benefited already from management's honest mistake and that as a result of this award he will continue to so benefit until the end of the term of the current collective agreement. However, management, through its carelessness, led him to rely on the fact that his weekly pay was at least $7 or $8 higher than it is on the basis of the new job standard. The grievor almost certainly made commitments which would constitute a detrimental reliance in the sense relevant to estoppel. His interest in the security of incentive wages

which he has become accustomed to earning is precisely the interest that art. 10(c) is intended to protect.

Summary

The issue is whether the company had the right, in August, 1966, to change the job standard in question, on the basis of the change in methods when the Warner-Swasey lathe was introduced early in 1965. Given that in March, 1965, the company could have changed the job standard, did it lose that right either by entering the current collective agreement, or by paying the grievor on the old standard for a period of nearly 18 months? My decision is that the signing of the new collective agreement could not, of itself, prevent the company from changing the job standard; but by paying the grievor on the old standard for such a long period the company estopped itself from denying that in August, 1966, 33 deck faucets per hour was the "established" job standard for the new machine. The grievance is therefore allowed.

The company is precluded under the current collective agreement from changing the job standard in question unless there is a further change in methods, etc., in accordance with art. 10(c). Bonus paid since August, 1966, when the standard of 43 per hour was introduced, will be adjusted to the standard of 33 per hour.

DISSENT (Hartt)

At the hearing in this matter which was held on October 27, 1966, the undersigned board member questioned Mr. Cape and Mr. Edward C. Witthames, the union representative, as to how bonus rates came to be set in the first place and whose responsibility it was to set them. As a result of these questions, it became clear that the company had initiated the conversion from straight time rates to the present combination of time and piece rates, and, after the time and motion studies made by its industrial engineer had been completed, the question of this conversion was discussed at a meeting or meetings with the union. Mr. Witthames, in particular, was quite forceful in his assertion that the union had taken part in such discussions and had ultimately given its blessing to the new system. It was also revealed, during the course of the evidence, that whenever, since the introduction of the incentive rate system, a new machine or new job was introduced at the plant, the question of the standard rate to be applied to the new machine or the new job was discussed with the employee or employees involved, and an

interim rate arrived at on an amicable basis in all cases. Subsequently, the company's industrial engineer visited the plant and timed the jobs on which interim rates had been established. In no case was the rate which he would have established sufficiently different from the interim rate to warrant a change being made, and, as a result, the interim rate was confirmed and became the rate for the new machine or job.

In the case which has given rise to the grievance before this board, no such discussions were had with the grievor at the time of the change-over in machines, for the obvious reason that the company, by error, neglected to consider the problem of the new rate to be attached to the machining of deck faucets 210 and 215 on the Warner-Swasey turret lathe. In August, 1966, when the company, in the course of scheduling an unusually heavy load of production, realized that nothing had been done to fix an appropriate incentive rate for this operation, Mr. Tuinstra was absent in San Francisco on union business. Accordingly, no discussions were held with him, as would have been the usual procedure, concerning the rate to be applicable. Instead, Mr. Tuinstra's production records on the new machine were examined and a rate of 43 pieces per hour decided upon, on the basis that this would permit Mr. Tuinstra to earn at least the usual proportion of bonus hours. (As it turned out, it would appear from the evidence that Mr. Tuinstra has done somewhat better than the usual 35% to 40%, earning, at a standard rate of 43 pieces per hour on the new machine, 46% bonus on the average.)

All of the foregoing is recited at length in order to underline the undersigned board member's inability to accept the view that the company, having done nothing to alter the applicable incentive rate in February or March, 1965, when the change-over of machines admittedly occurred, was precluded from doing so in August, 1966, because of the lapse of time. The relevant clause in the collective agreement provides that job standards, once established, shall not be changed except under certain circumstances. The question before this board is what constitutes the "establishment" of a job standard. Can mere silence or the failure to do anything when the same is based on an error or oversight, even if such silence or failure to act continues for a period of 18 months, be sufficient to "establish" a job standard? With the greatest respect to those who hold the contrary view, I am unable to subscribe to the theory that, by failing to address itself to the question of the appropriate incentive rate

on the new machine, the company had "established" the old rate as the standard.

Among the several definitions of the word "establish" which are found in Webster's New World Dictionary, published by the World Publishing Company (1953), are found the following: "1. to make stable; make firm; settle. 2. to order, ordain, or appoint (officials, laws, etc.) permanently. 3. to set up (a government, nation, business, etc.); found; institute". I find great merit in the argument made at the hearing by company's counsel that the ordinary meaning of the word is such as to require a positive act of some sort. It is a principle of law common to most jurisdictions that mere silence or failure to act, when based on an error, cannot be said to imply acquiescence or consent unless the party who has kept silent has done or said things which might reasonably induce in those with whom he was dealing the belief that he meant to acquiesce or consent. Now, in the circumstances before the board, it is clear that the usual procedures which the union itself might have expected would have been followed in February or March, 1965, or thereafter, had the company intended to "establish" 33 pieces per hour as the new rate on the Warner-Swasey turret lathe for the job in question, were not in fact followed. No approach was made to Mr. Tuinstra to discuss the setting up of an interim rate, none of the normal discussions were held, in fact nothing at all was done. The result was that Mr. Tuinstra continued for some time to be remunerated, at least as far as the incentive aspect of his remuneration was concerned, on an incentive rate of 33 pieces per hour, which in fact produced the effect that he was able to earn, on a fairly regular basis, 90% bonus hours. The union was well aware that no other employee in the plant earned anything close to 90% bonus hours. Nor can they be said to have had any reasonable cause to think that the company intended to single out Mr. Tuinstra for this kind of unusual benefit. Rather, they too said nothing, and did nothing to "establish" the new rate, preferring not to raise the matter and not to call the matter to the company's attention.

I find great significance, also, in the fact that at the hearing the union representative stated, in reply to a question by the chairman, that the union was not basing its argument on the lapse of time between February or March, 1965, and August, 1966. Rather, it was relying on the more technical ground, that the signature in the interval of a collective agreement ended forever the company's opportunity to avail itself of the change

in machines for the purpose of changing incentive rates on the job in question. If I am not incorrect, the matter was stated thus: If the machines had been changed on October 27th (date of the hearing) and nothing done to alter the incentive rates until the following year, and the grievances were being argued in October, 1967, then the union would base its case solely on the question of whether or not the change had been significant enough (in excess of 5% of the total time values assigned to the standard) to warrant a change (although the union representative expressly stated at the same time that he was making no argument on the question of the extent of the change in the time values for purposes of this arbitration). The undersigned board member pursued this question with the union representative at some length in order to make clear in my mind just what the union's position was. The reason is that, although the board is certainly not precluded from resolving any matter brought before it for a reason not urged by the party concerned, but which nevertheless appears to the board to be valid, the very fact that the union representative stated clearly and expressly to the board that he was not relying on the question of the lapse of time does carry importance from the point of view of determining whether the union or the grievor really were induced into the belief that it was the company's intention that the rate of 33 pieces per hour be "established" on the Warner-Swasey machine as the result of the company's failure to change the rate for some time after the machine had been introduced. The significance which I find in the statement by Mr. Witthames to which I have referred above is that he is unwilling to say that in the mind of the union the rate of 33 pieces per hour had been established by the efflux of time. This is a very frank indication of the fact that the company's conduct was not such as to induce in the union the belief that it was entitled to regard the rate of 33 pieces per hour as "established", and, on this basis, I would think that the board cannot properly find that the company had so conducted itself, even in silence and in error, to induce in the grievor or in the union a reasonable belief that the rate of 33 pieces per hour had been "established" some time after February or March, 1965, but before August of 1966.

I must emphasize that I was very much impressed with the fact that no evidence was led by the union to rebut the company's position to the effect that its failure to act was due to simple, common, human error. There was no shred of doubt raised as to the veracity of Mr. Cape's version to the effect that, as the result of the departure of the plant manager or foreman

who had previously concerned himself with such matters, management had overlooked this question. No attempt whatsoever was made by the union to suggest that the company had in fact "established" the rate for the Warner-Swasey machine at 33 pieces per hour and had changed it as an afterthought or for ulterior motives. No vestige of evidence was led to establish a detrimental reliance sufficient to estop the company from denying it had varied the rate before August, 1966.

The company, at the hearing, cited the case of *Re Int'l Operating Engineers, Local 796, and Wellesley Hospital* (1963), 14 L.A.C. 81. In that case, the collective agreement provided that employees were to be paid every two weeks, but wages were to be computed on a monthly basis as theretofore. Prior to 1948, the agreement had provided for the payment of wages twice a month. It was only in 1963 that the hospital authorities discovered that in paying wages every two weeks instead of twice a month, there had resulted an overpayment to employees of one day's wages per year. The hospital proceeded to correct its formula for the calculation of bi-weekly pay. It was argued for the union before the board in that case that 15 years' practice should be sufficient to ascertain the intention of the parties. It was held by the majority of the board that what the union had alleged as a past practice was nothing more than a mere bookkeeping error, which the hospital authorities were not prevented from correcting by a lapse of time, even one as long as 15 years. I think that the principle which can be extracted from that award where the collective agreement contains a clear provision, no lapse of time, however long, or even the signature of successive collective agreements in the interval, is sufficient to vary the clear terms of the collective agreement. Nor is the company's failure to act pursuant to a clear provision in the agreement sufficient, even if such failure lasts for 15 years, to constitute such an action a waiver of the company's right to act. The other case cited by the company, *Re U.E.W., Local 523, and Page-Hersey Tubes Ltd.* (1960), 11 L.A.C. 143, stands for the same principle. In that case it was stated that "there must be an actual agreement shown between the company and the union to waive a particular term of the agreement".

Now, it may be argued that, although the lapse of time cannot be sufficient to constitute a waiver of the rights of one party or the other when those rights are set forth clearly in the collective agreement, the fact of allowing 18 months to elapse without moving to alter the old rate of 33 pieces per hour which applied to the Gisholt machine, might be sufficient to "establish" that

rate for the Warner-Swasey machine, by being proof of the company's acquiescence in an acceptance of that rate. With great respect, I would submit that the board cannot here differentiate between the waiver of the right provided in art. 10(c) of the collective agreement (to vary job standards when certain conditions were fulfilled) and the "establishment" of the old rate of 33 pieces per hour as the new rate. The two are inextricably intertwined. The company could not "establish" the old rate as the new rate without at the same time waiving its right to vary that rate. Since no one disputes that in February or March, 1965, when the machines were changed, the opportunity arose to vary the job standard, any "establishment" of the old rate as the new rate would necessarily involve the waiver of the right to change the applicable job standard. In this case, if we admit that mere silence, induced by error, and the lapse of 18 months is not sufficient to amount to a waiver of the clear provision of a collective agreement (and it is submitted that in the light of previous awards one must so admit) it must follow that the same factors cannot amount to the "establishment" of a new rate when such "establishment" would necessarily involve the waiver of the right to make a change.