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Re United Electrical Workers, Local 523, and Welland Forge Ltd

Innis Christie

S Bullock

E J. Orsini

RE UNITED ELECTRICAL WORKERS, LOCAL 523, AND WELLAND FORGE LTD.

I. Christie, S. Bullock, E. J. Orsini. *February 18, 1970.*

EMPLOYEE GRIEVANCES alleging failure to pay full pay for certain statutory holidays.

J. McIntyre and *I. Turner* for the union.
A. L. Learn and *F. J. Karner* for the company.

AWARD

The facts

There was no real dispute between the parties about the facts. I should perhaps note at the outset that in its written statement of facts submitted to the board the union treats both grievances as relating to the July 1st holiday. The company's statement of facts, on the other hand, treats McHarg's grievance as relating to the August 4th holiday. McHarg's grievance form itself does not indicate to which holiday it relates. He was sick for both of them and it is a reasonable inference that his grievance, which is expressed in terms of a grievance against failure to pay for one holiday only, relates to the more recent of them. In any case, nothing turns on this discrepancy between the submission of the union and the submission of the company.

The grievor William McHarg was ill for a period of some weeks extending over the August Civic holiday, during which time he received weekly sick benefit payments in accordance with art. 19 of the collective agreement. The grievor Larry Honsinger was receiving compensation under the Ontario *Workmen's Compensation Act*, R.S.O. 1960, c. 437, for a period of some weeks extending over the July 1st holiday. In both cases because of sickness the employees had written permission from the company to be absent from work on their

regularly scheduled working days immediately preceding and following the holiday in question. In both cases the company paid the grievors only the difference between straight time pay for the holiday and compensation payments in one case and sick benefit payments in the other. The relevant provisions of the collective agreement are the following:

> 11:02 It is the intent of the Company to protect employees against loss of straight time pay on holidays enumerated in Article 11:01. For this purpose, the Company agrees to pay on each of such holidays for the hours the employee would have worked, had there been no holiday, subject to the following conditions:
>
> 11:03 Provided the employee is available for work on his regularly scheduled work day immediately preceding the holiday and his regularly scheduled working day immediately following this holiday, unless he has obtained written permission from the Company to be absent or is absent because of being sick or injured.

The company introduced some evidence to establish a past practice under these provisions. The company has been in operation since June, 1966. The current collective agreement is the first between the union and this company, and was effective October 1, 1968. Mr. Karner, the company's comptroller, testified that the company's policy both before and after the collective agreement has been to pay the difference between straight time pay and compensation or sick benefits, as was done in the case of these grievors. While insisting that the cases set out in its written statement were only examples, the company specified five instances in which the matter has been dealt with in accordance with the alleged practice. One of these, the instance of A. Finlayson, relates to the Labour Day holiday in 1969 and thus occurred after the union had indicated its disagreement with the company's interpretation of the collective agreement by filing the grievance before us. The fact that Finlayson did not grieve does not, therefore, establish the kind of acquiescence in the company's practice that is necessary if that practice is to be used in the interpretation of the terms of the collective agreement. The same is true in the case of D. Jeffries who was paid in this way for the August Civic holiday and shortly thereafter left the company.

Of the three remaining instances put forward by the company two relate to the grievor, McHarg. One of them is the very instance here under consideration. Thus the only incidents of payment in accordance with the alleged practice established before the board are that of McHarg's payment for the Dominion Day holiday, July 1, 1969, and payment to J. Bolduc for the Good Friday holiday, April 4, 1969.

The company made it clear that the practice has been to make full payment to any employee who was sick on a statutory holiday and the two qualifying days but was not receiving compensation or sick benefit. This might occur where the three-day waiting period under art. 19 of the collective agreement had not elapsed.

The issues

The issue is whether art. 11:02 of the collective agreement obligates the company to pay the grievors a full day's straight time pay for the holidays in question. The company argues that the grievors are already partially compensated by sick benefit and Workmen's Compensation for those days and, therefore, to make full payment would be to give an unjustified bonus. The company did not at any time suggest that it was not obligated to pay the grievors at least the difference between one day's holiday pay and the compensation or sick benefits payments they were receiving.

Decision

As a starting point, in my opinion, art. 11:02 of the collective agreement entitles an employee who would regularly be scheduled work on a holiday named in art. 11:01 to a day's pay. Under rather similar provisions one or two arbitrators have taken the position that if an employee is ill on a holiday it cannot then be said that he "would have worked" on that day and therefore that he is not entitled to holiday pay. But art. 11:02 of this collective agreement should not be read in that way, in light of the express provision in art. 11:03 preserving the right to holiday pay for an employee who is ill on the two qualifying days, that is on the working days preceding and following. It is, of course, possible for an employee to be ill on the two qualifying days and still able to work on the holiday itself, but in my view the clear intention of the parties was to provide that an employee who is sick for a period that includes the statutory holiday is entitled to pay for that day. It is unnecessary to dwell upon the point because it has not been disputed. The company has, in the past, paid employees who were ill on the holiday in question as well as on the qualifying days. The only question before us is how much holiday pay an employee who is receiving compensation or sick benefit is to receive.

In my view the plain and obvious meaning of art. 11:02 is that where an employee is entitled to holiday pay he is entitled to be paid the equivalent of the pay he would have received for a full shift. The relevant words are: ". . . the company agrees to pay on each of such holidays *for the hours the*

employee would have worked had there been no holiday." Not only does this provision establish that the company is obliged to pay, it appears to set the amount the company is obliged to pay. The company, however, relies on the preceding sentence which states: "It is the intent of the Company to protect employees against loss of straight time pay on holidays". It is "for this purpose" that the company agrees to pay on the holidays.

I am unable to accept the argument that the statement of purpose in art. 11:02 alters the meaning to be given to the substantive part of the article. Generally speaking statements of purpose, while they may be of the greatest use in interpreting ambiguous provisions in documents of all kinds, cannot override the plain words of substantive provisions. Moreover, in my view, the statement of purpose in art. 11:02 is not directed to the alleged problem of interpretation before us.

The statement of purpose is, I suggest, included for a purpose quite different from that for which the company seeks to use it. Arbitration boards in Ontario have been frequently called upon to decide whether employees are entitled to be compensated for statutory holidays which fall on week-ends and other non-working days. To resolve that question holiday pay provisions are commonly categorized either as providing a fringe benefit over and above the regular negotiated pay or as ensuring that there be no loss of regular pay as a result of holidays. In my view the statement of purpose in art. 11:02 is clearly there to establish beyond any doubt that this provision is in the second category. In my view, therefore, the statement of purpose does not relate to the question before us. It might be objected that this is unduly confining the words of the statement of purpose but, on the other hand, if the words of purpose are given the meaning contended for by the company there is then a conflict between the most obvious meaning of the substantive part of art. 11:02 and the statement of purpose. If the statement of purpose means what I have said it means there is no conflict at all within the section, and it is only common sense, as well as good law, to interpret any provision in such a way that it is internally consistent. In summary, the clear words of art. 11:02 require the company to pay the grievors for what would have been their regularly scheduled hours had there been no holiday. The statement of purpose at the first of art. 11:02 does not lead me to any different interpretation on the article.

The company has objected throughout that to pay the employees their full pay for the holidays in question is to give

them a "bonus" because they are already receiving, in one case, sick benefits and in the other, Workmen's Compensation. In my view no "bonus" is being given. Like all the company's employees the grievors gain extra benefit from the fact that there is a statutory holiday. Employees who are on the job get a day off with pay. The grievors get an extra day's pay and, being excused by art. 11:03, that is exactly what they are entitled to. They are not being doubly "paid". Workmen's Compensation and sick benefit are not wages; they are compensation in the nature of insurance payments, flowing from injury or sickness as the case may be. The purpose of such payments is to make up for loss of wages to some extent, but they are not themselves wages. It cannot be said that the grievors have already been "paid" in part for the days in question.

In its argument the company relied on past practice. My view of the effect of past practice in this context is very close to that expressed by the chairman in *Re Int'l Ass'n of Machinists, Local 1740, and John Bertram & Sons Co. Ltd.* (1967), 18 L.A.C. 362 (Weiler, chairman) at pp. 367-8:

> If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, which explicitly involves the interpretation of the agreement according to one meaning, and that this conduct (and, inferentially, this interpretation) be acquiesced in by the other party. If these facts obtain, the arbitrator is justified in attributing this particular meaning to the ambiguous provision. The principal reason for this is that the best evidence of the meaning most consistent with the agreement is that *mutually accepted* by the parties. Such a doctrine, while useful, should be quite carefully employed. Hence it would seem preferable to place strict limitations on the use of past practice in [this] our second sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) Acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.

(Italics added.)

On the basis of the evidence presented I am unable to say that any past practice was established within the terms just quoted. Clearly the union expressed no acquiescence nor was the practice in question continued for a "long period" without

objection. Obviously, company policy before the collective agreement became effective is of no value in determining the intentions of the parties in art. 11 in the collective agreement. In any event, in my view art. 11:02 is not ambiguous with regard to whether or not the employees should receive holiday pay equivalent to a full shift or merely part of it. They are to receive pay for "the hours the employees would have worked". However defensible and fair the company's policy may be it is not provided for by the terms of the collective agreement.

The grievance is allowed. The company is directed to pay to the grievors, McHarg and Honsinger, an amount necessary to make up the difference between holiday pay already given them for August Civic holiday and Dominion Day respectively and payment for a full shift.

DISSENT (Orsini)

I have read the award of the majority of the board and with respect must dissent on the following grounds:

Article 10 — hours of work and overtime —

Article 10:04 reads as follows:

> Overtime payments shall be made on the basis of either daily or weekly overtime hours worked, but an employee shall not be paid both daily or weekly overtime hours worked.

Article 10:05(a) reads as follows:

> The standard work week shall be one of forty (40) hours made up of five consecutive days of eight (8) hours per day commencing at 7:30 a.m. on Monday of each week. The normal work week will be Monday to Friday inclusive. The shifts will be 7:30 a.m. to 4:00 p.m. and 4:00 p.m. to 12:30 a.m.

On this basis overtime is paid on either a daily or weekly basis. Article 11:02 reads as follows:

> It is the intent of the Company to protect employees against loss of straight time pay on holidays enumerated in Article 11:01. For this purpose, the Company agrees to pay on each of such holidays for the hours the employee would have worked had there been no holiday, subject to the following conditions.

This section then refers to the hours an employee works preceding and following a holiday to determine the hours to be paid for the holiday — *e.g.*, assuming a statutory holiday falls on a Wednesday — hours worked on the preceding Monday — 10, employee off work due to illness on Tuesday, Wednesday and Thursday, returns to work on Friday and works 10 hours. In this example the straight time pay for this employee will be 10 hours times his job hourly rate. Overtime

rates would not be paid for since reference is made to "loss of straight time pay" however the employee would receive ten hours pay at his job hourly rate.

Workmen's Compensation and weekly sickness indemnity benefits are fringe benefits *paid for entirely by this company. They are designed to protect and provide payment to an employee who loses time due to sickness or injury whether it be within or outside the company premises.*

Remuneration from whatever source (paid for and provided by the company) at no cost to its employees is providing protection to the employee against "loss of straight time pay" as defined in art. 11:02. The company in these two grievances and in all past cases since it was formed in 1966 have followed this practice which is outlined in art. 11:02 of this agreement.

To provide Workmen's Compensation or sick benefits over and above the normal payment for a statutory holiday is a "bonus" or a premium payment. An employee off on sick leave has a "take home pay for that day" which is higher than the pay of a regular full-time employee and as much as 75% higher than that received if he had worked (Workmen's Compensation based on 75% of four weeks earnings before the accident).

With all due respect, in my opinion, any payment beyond payment for the hours the employees would have worked had there been no holiday and if he were not ill or injured is not just, nor equitable, nor provided for in this agreement.