2-26-1970

Re United Steelworkers, Local 4820, and Haley Industries Ltd

Innis Christie

D M. Storey

D Churchhill-Smith

RE UNITED STEELWORKERS, LOCAL 4820, AND HALEY INDUSTRIES LTD.

I. Christie, D. M. Storey, D. Churchill-Smith. *February 26, 1970.*

EMPLOYEE GRIEVANCE alleging improper assignment of overtime.

H. Gargrave and others for the union.
S. E. Dinsdale, Q.C., and others for the company.

AWARD

Employee grievance alleging a breach of the collective agreement dated January 9, 1968, in that the company assigned overtime work taking inventory to an employee who did not normally perform such work rather than assigning it to the grievor who did normally perform such work. The grievor seeks compensation for twelve hours work at time and one-half.

The facts:

At the relevant time the grievor worked in the melting department, of which Mr. Shore was foreman, and held the highest rated classification in the department, that of permanent mould operator. When there is no moulding to be done a permanent mould operator may work in either of the two lower classifications, as a melter-pourer or as a melter-pourer-weigher.

On March 1st and 2, 1969, two employees were asked to work overtime taking inventory with the melting department foreman, Mr. Shore. The two were Curry, a melter-pourer lead hand (his lead hand status gave him a higher rate than a permanent mould operator) and Barr, a melter-pourer. Inventory taking consists of a detailed count of metal and other ingredients in the stores. Ingots stacked on pallets, scrap in bales and boxes and other ingredients must be picked up and moved by buggy, lift truck or hand cart to be weighed and then put back in their proper location. The foreman notes all weights of various metals, which are identified by a paint colour code.

According to Mr. Shore's testimony, during inventory taking Mr. Barr handled metal, bringing it to the scales and returning it to its place, and generally assisted in tidying up the stores. It was not work that Barr would normally perform since he

normally stays in the melt rooms, but he would use the same equipment, hand trucks and the like, in his normal work.

There was conflicting evidence on the important question of who has performed the task of inventory taking in the past. For the purposes of this case it is sufficiently accurate to say that until some four years ago Mr. Harry Irvine, who has been the metal stores keeper in the department for the last ten years, was in charge of inventory taking. He was usually assisted by the grievor, Curry or a Mr. Klutchy, who is not a member of the bargaining unit, or two of them. About four years ago there was a change in policy, after which the foreman or some other supervisor took charge of inventory.

Mr. Shore estimated that there may have been an inventory every three to six months in recent years. He denied that the grievor "consistently worked on inventory" but it is quite clear that Mr. Shore was usually assisted in inventory taking by some one or two employees from a small group consisting of the grievor, Irvine, Curry, and a couple of others drawn from the inspection department or outside the bargaining unit. Three melter-pourers, F. Bertrand, W. D. Guyea and I. Coules, each assisted Mr. Shore on inventory at least once within the last two years but only in the case of Bertrand was Mr. Shore able to say that the assistance had been given before the date of this grievance. It may well be that these facts are not of any real relevance. What is important, though, is that Barr, who assisted on March 1st and 2nd, had not previously worked on inventory.

Two grievances filed in July, 1968, were introduced in evidence. On July 4, 1968, F. La Porte, the present grievor, filed a grievance to the effect that he was not sharing overtime on a job that he normally performed as provided by the collective agreement because the work was being done by an employee who did not normally perform the work. On July 10, 1968, Mr. Irvine entered a similar grievance. Both grievances were settled at the third stage and at the hearing before us both the company and the union invoked the terminology of the settlement. The essence of those grievances was an objection to inventory taking being done by non-members of the bargaining union and the gist of the foreman's answer to both grievances was that "metal stores investigation is not part of the job melter-pourer-weigher".

The superintendant's answer at the second stage was, in both cases:

> On March 4th, 1968 a special inventory was called to ascertain the metal stores discrepancies. The foreman was to select a reliable

buggy driver with full knowledge of the metal stores but not normally receiving and issuing metal during the last three years as had Mr. Irvine and Mr. La Porte.

At stage 3 the assistant general manager's answer to Mr. La Porte's grievance was the following:

I agree with the Superintendent's finding in stage 2.

Opportunity will be given, when future inventories are taken, for all melter-pourers, capable of effectively handling the lift, to share in any overtime work required.

I am satisfied that so far as possible, Mr. La Porte is being given the opportunity to share in the overtime and must, therefore, refuse his claim.

The union relied on these statements as in some way requiring an employee to have an established knowledge of metal stores before he could legitimately be asked to work overtime taking inventory. The company, on the other hand, relied on the stage 3 answer to the La Porte grievance as indicating some obligation on their part to share inventory taking overtime work among all melter-pourers, like Mr. Barr.

One further document relevant to the earlier La Porte and Irvine grievances is a letter dated June 13, 1969 (which is of course well after the present grievance was launched) from R. E. McCarthy, the company's assistant general manager, to Mr. E. Briginshaw, United Steelworker's representative. The letter is signed by Mr. McCarthy and by Mr. Briginshaw and Mr. Curry for the union as well. The letter states:

Re: Grievances of H. Irvine and R. La Porte

This letter will serve to confirm that the above mentioned grievances have been settled and withdrawn from arbitration on the understanding that the Company will pay H. Irvine the equivalent of twelve hours pay at his regular hourly rate as of July 1, 1968.

This settlement is made without any admission of fault or liability and without prejudice to any position which either party may wish to take in regard to the same or similar issues in the future.

The company introduced evidence of overtime worked by employees in the melting department over the six months preceding March 1, 1969. In that period Mr. Curry had worked slightly less hours than Mr. La Porte and Mr. Barr had worked slightly more. To be more specific Mr. La Porte had a total of 32 overtime hours worked or offered and Mr. Barr had a total of 35 hours worked or offered. Over the two months preceding March 1st, Mr. La Porte had a total of 21 hours and Mr. Barr a total of 26 hours.

The issue:

Broadly stated, the issue is whether the company has acted in breach of art. 12:02 of the collective agreement, which provides:

12:02 — Overtime is on a voluntary basis and the opportunity to share overtime will be equally available to all those employees normally performing the work provided employees asked can take care of their own transportation.

On the facts, the issue is raised whether overtime was being made "equally available" to the grievor since Barr had worked slightly more hours in recent months. That issue only arises, however, if it is concluded that both Barr and the grievor were "normally performing the work" in question. The first question is, whether "the work" in question for the purposes of art. 12:02 is "inventory taking" as such or some lesser job component of inventory taking, like moving metal by hand cart. The next question is whether both the grievor and Mr. Barr normally performed "the work" in question and only if they did do we reach a consideration of the recorded hours of overtime for each.

Decision:

It should be made clear at the outset that we are not here concerned with the extent of the company's right to assign whomever it wishes to the task of inventory taking. There is no reference in the collective agreement specifically to inventory taking and this is not a case in which the union is arguing that non-bargaining unit employees may not do bargaining unit jobs in the course of taking inventory or that seniority provisions must be applied in determining who gets the work available on inventory taking. The question before us is whether the opportunity to share overtime was made equally available to "all those employees *normally performing the work*", where the work happened to be the taking of inventory. The arbitration decisions dealing with job and seniority rights on inventory taking may be of assistance, however, in determining whether "the work" for the purposes of art. 12:02 should be considered to be inventory taking as such or components thereof.

The weight of arbitral authority in Ontario is in favour of treating inventory taking as a separate and special classification of work to which members of the bargaining unit cannot claim a right of access in the absence of some explicit mention in the collective agreement. Where the issue is whether management has the right to contract out or to assign non-bargaining unit employees to inventory taking there appears to be virtual unanimity among arbitrators that, unless there is special mention of inventory taking as such, the work may be assigned by management at will. This line of cases was considered and followed in *Re U.S.W., Local 3129, and Moffatts Ltd.* (1966), 17 L.A.C. 102, (Reville, Co.Ct.J.).

There are three recent awards which cast some doubt on the correctness of the view that the company is entitled to disregard seniority in assigning inventory tasks to members of the bargaining unit; see *Re U.E.W. and Trane Co. of Canada Ltd.* (1964), 15 L.A.C. 167 (Lane, Co.Ct.J.); *Re U.S.W., Local 3789, and Beatty Bros. Ltd.* (1966), 17 L.A.C. 191 (Little, Co.Ct.J.) and *Re Federal Labour Union, Local 24762, and Sunbeam Corp. (Canada) Ltd.* (1966), 17 L.A.C. 311 (Weiler).

However, in none of these awards have questions of contracting out of or the application of seniority rights been settled by breaking inventory taking down into specific tasks. To do so would not be realistic.

In *Re U.S.W., Local 4444, and Stanley Steel Co. Ltd. (Hamilton Plant)* (1967), 19 L.A.C. 37 (Christie) the question was whether a provision of the collective agreement which precluded supervisors from doing "work ordinarily performed by a bargaining unit employees" was infringed by supervisors taking inventory. The point was disposed of in the following terms, which appear to be relevant here:

> The argument pressed by the union was that inventory taking must be regarded as a composite of tasks, some of which are ordinarily performed by layout men and which therefore may not be done by supervisors. I am unable to accept this argument. It amounts to saying that because a simple work activity is part of the "working procedure" in a bargaining unit job description no supervisor may engage in that activity. This could produce absurd results. For instance, a layout man's job description states under the heading "working procedure", that he "directs one or more labourers", but it could hardly be maintained that a foreman is thereby precluded from directing labourers in another aspect of the work of the plant. Similarly, although a layout man "prepares tags" and "checks steel for width and gauge and weighs on scale" in the course of his job of receiving steel, a foreman or other supervisor is not precluded from performing those same tasks in the course of inventory taking.
>
> This is not to say that a supervisor is entitled to do part of the work ordinarily performed by bargaining unit employees just because it is a small part. The point in the case before us is that "tagging", "checking" and "weighing" are not assigned functions. They are operations that arise in the course of the assigned function of a layout man and they are also incidental operations in inventory taking. This does not give the layout men any right in connection with inventory taking.

The same answer must be made to the question of what constitutes "the work" for the purposes of art. 12:02 in the collective agreement before us. The work in question is inventory taking. It follows that the company must assign

overtime work on inventory to "those employees normally performing the task of taking inventory".

As was pointed out above, there was some difference between the evidence of the grievor and Mr. Irvine on the one hand and that of Mr. Shore, the foreman, on the other, with regard to how consistently the grievor participated in inventory taking over the past number of years. However, it is clear that he had participated frequently and it is equally clear that Mr. Barr, to whom the work was assigned, had never before taken inventory. In light of these facts it is quite impossible to conclude that on March 1st and 2, 1969 the company assigned the overtime work in question to an employee "normally performing the work" in accordance with art. 12:02. That being so, it is unnecessary to consider the equality of overtime assignments between Mr. Barr and the grievor.

It will be recalled that at the third stage of Mr. La Porte's grievance of July 4, 1968, the company stated that in future inventory taking opportunity would be given for all melter-pourers capable of handling a lift truck to share in overtime work required. In my view this statement cannot affect our award in this matter. In the first place, it is a unilateral undertaking. There is no evidence that the union acceded to the arrangement and, indeed, the union witnesses denied any knowledge of it. Moreover, the letter of settlement dated June 13, 1969, relating to July, 1968, grievances of both Irvine and La Porte, which is signed by both parties to the collective agreement, states very specifically that the settlement of those grievances is made "without prejudice to any position which either party may wish to take in regard to the same or similar issues in the future".

I am unable to see how the union can be said to have given up its right to insist that overtime work, whether it be inventory work or any other kind of work, be made available equally to employees "normally performing the work". This, of course, in no way limits the company's right to assign whomever it wishes to inventory work that is done during regular working hours rather than on overtime.

Summary:

The narrow issue is whether Mr. Barr was an employee "normally performing the work" here in question. The answer depends on whether "the work" referred to in art. 12:02 is taken to be inventory taking as such or component tasks thereof. In other contexts arbitrators have uniformly treated inventory taking as a separate and identifiable sort of work and there is no good reason to treat it differently here. On

the evidence it is clear that Mr. La Porte normally performed the work of inventory taking and that Mr. Barr had never performed such work. It follows that Mr. La Porte was improperly denied an opportunity to work overtime on March 1st and 2nd and he must be compensated for twelve hours work at time and a half. This award in no way limits the company's right to assign inventory taking work during regular working hours.

[D. M. Storey concurred in the result; D. Churchill-Smith dissented.]