6-3-1968

Re United Food Processors Union, Local 483 and Canada Starch Co (Buker)

Innis Christie
Dalhousie University Schulich School of Law

J L. McDougall

George Barron

3839

IN AN ARBITRATION

Between:

United Food Processors Union, Local No. 483

(The Union)

-and-

The Canada Starch Company Limited

(The Company)

Grievance filed December 14, 1967.

Hearing - April 16, 1968.

Before: Innis Christie, Chairman
J.L. McDougall, Company Nominee
George Barron, Union Nominee

Appearances:

For the Union:

J.H. Caldwell	Vice-President and Grievance Chairman Local 483
R.J. Patrick	President, Local 483
J. Stitt	Chief Stewart
L. Deschamps	Zone Stewart

For the Company:

A.J. Clark	Counsel
K.O. Weldon	Industrial Relations Manager
F. Trewartha	Plant Manager
J. Binks	Process Superintendant

Witnesses:

Called by the Union:

J. Stitt

Called by the Company:

J. Binks
E. Henry
K.O. Weldon
F. Trewartha

Employee grievance, pursuant to the Collective Agreement between the parties effective May 28, 1967, alleging improper assignment of work and requesting call-back pay of 4 hours at the regular rate of pay.

AWARD

The facts:

December 7, 1967 was an assigned day off for the grievor, K. Buker. The grievor works in the Dry Starch department. His "occupations", as indicated by his "Form 8" (or "Change in Job Title or Classification" notice or "Bulletin", as it is alterntively called), which was introduced in evidence, are "Operator-Packing, Palletizing and Bulk Loading" and "Spare Blend and Pack Specialties as Required". It is the latter of these "occupations" with which the Board is concerned. In section 1 of the Schedule "B", where pay rates are set out, "Blend and Pack Specialties" is listed as Class 4 job.

On December 7th, while the grievor was on his day off, the Company assigned J. McLean, whose "occupation" is "Operator-Packing, Palletizing and Bulk Loading", to the job of packing specialties for one and three quarter hours. "Operator-Packing, Palletizing and Bulk Loading" is shown in the rate schedule as a Class 3 job, but McLean was paid a class 4 rate during the time that he packed specialties because that is part of the job "Blend and Pack Specialties".

On the morning in question McLean was fifteen minutes late for work. Coincidentially, that same morning R. Merkley, who is also a class 3 operator in the Dry Starch division, mistakenly came to work on his assigned day off. In order to accommodate Merkley the foreman put him to work at the job which

McLean would have done had he come on time. When McLean arrived, in order to give him something to do, the foreman assigned him to pack specialties from a hopper which had been left partly full from a previous shift. After an hour and three quarters another work place became available and McLean was taken off specialties, although the hopper was still not empty.

The rate schedule in the Collective Agreement lists the occupation "Blend and Pack Specialties" but it nowhere mentions a job title "Blend and Pack Specialties as Required", which is the alternative occupation listed on the grievor's bulletin. The explanation of this "as required" usage is that the job of blending and packing specialties normally can be handled by one employee on the day shift, but the demand for specialties fluctuates widely and there are periods when a full three shifts of blending and packing specialties is required. The "As Required" operators then work on the other shifts, opposite the regular day man. All "As Required" operators like the grievor have an alternative "occupation" at which they work when the blending and packing of specialties is only a one shift operation.

When this grievance arose a new regular "Blend and Pack Specialties" operator was undergoing training on the three to eleven shift.

The grievor, it will be noted from his "occupation" title, was a "Spare Blend and Pack Specialties as Required" operator. It is therefore relevant that R. Villeneuve, who is the only regular "Blend and Pack Specialties as Required" operator on the grievor's shift, was absent during the week in question.

The issue:

The issue is whether, under these circumstances, the Company had the right to assign J. McLean to "Blend and Pack Specialties" without first giving the grievor an opportunity to earn over-time pay by calling him in to do any packing of specialties that was to be done on his shift. The answer, of course, depends on the particular provisions of the Collective Agreement before us, and, insofar as the agreement is ambiguous, on the common intention of the parties as demonstrated by their practice in the administration of the agreement.

Decision:

According to Appendix A, "definitions", a spare operator is,

> "an employee who replaces an operator ... during his temporary absence due to sickness, vacation, or other similar cause. ... Replacement of Regular Operators Class 4 and higher will be made from Spare and Second Relief Operators who have been assigned as a result of a bulletin. For the period, including Sundays, that a Spare Operator is taking the place of a regular operator, he shall enjoy the rights and privileges of the Operator he is replacing ... ."

The grievor is bulletined as a "Spare Blend and Pack Specialties As Required" operator, so, in accordance with Appendix A, he must be treated as having had all the rights and privileges of Villeneuve, the "as required" operator on his shift who was absent during the week in question. The problem then is, what are the rights and privileges of an "As Required" operator?

As the starting point, Article 3 provides:

> Subject to the provisions of this Agreement, the Union recognizes the right of the Company (1) to hire, promote and transfer, (2) to discipline any employee for justifiable cause, (3) to allocate work, describe, evaluate and classify jobs, and (4) to determine the number of employees in any classification.

Management's right "to allocate work" which is here in question, is modified by several provisons of the Collective Agreement.

Article 6(C) establishes certain conditions and priorities which govern the Company's right to procure a substitute where a worker, without notice, fails to report for his shift. Article 6(D) establishes somewhat different conditions and priorities which the Company must satisfy in procuring a replacement "for day jobs and for shift jobs where adequate notice was given that the employee would be absent for the following day only ...." Among other things, Articles 6(c) and (D) assign certain priorities to spare operators. Article 6(E) deals with work schedules and makes limited guarantees to employees scheduled to work on their regular jobs.

Articles 6(C), (D), and (E) must be read in conjunction with the definition of "Spare and Second Relief Operator" in Appendix A (quoted above), which gives a spare operator all the rights and priveleges of the man he is replacing. Moreover, when the Company is replacing regular operators class 4 and higher it is limited by this provision to choosing a spare or second relief operator who has been assigned as a result of a bulletin.

The grievance of W. Irving dated July 24, 1967, which the Company allowed, and upon which the Union placed some reliance before this Board, appears to be an instance of the misapplication of these provisions dealing with "replacements". A class 6 operator, who had been hospitalized, was replaced by an employee who did not have the job by bulletin, and the Company agreed that in failing to give the job to the grievor, who was bulletined for the job, they had misinterpreted the Collective Agreement. It was recognized that employees classified as "spare and

second relief operators," to the extent that they are entitled to work as "Replacements" under Articles 6(C) or (D), have a claim on the particular jobs for which, as a result of their training or other qualifications, they are bulletined.

The right to make this claim is limited by Article 7 (E), as follows;

> 1. Call back or Call in -
> The Company is not obligated to call in any employee for any job of approximately one half hour duration, that can be done by other hourly employees available in the department concerned, or the night superintendant's helpers.

7(E) obviously does not apply here, because the job in question lasted one hour and three quarters.

In my view Article 6(D) and Appendix A do not establish the grievor's claim to over-time pay. On December 7th he was not in the position of a Spare Operator claiming work as a "replacement". Rather, as pointed out above, he was in the position of an "as required" operator. The situation was not one of "replacement" in the terms of Article 6(D). On, facts, it was clearly not a case where "a replacement [was] required ... where adequate notice was given that the employee would be absent for the following day only ...." Even more clearly, Article 6(C) does not apply. This therefore, is quite different from the Irving grievance.

The only other relevant limitation on the Company's right to allocate work is that flowing from Article 11(A), which provides;

> (A) Each of the parties hereto recognizes that employees are entitled to an equitable measure of job security based on seniority, subject to the following provision:
> - (1) It is mutually recognized that seniority, skill, ability to perform the work required, efficiency,

responsibility and physical fitness are important considerations in selection of employees for job vacancies.

....

Seniority is thus a factor in determining whether an employee is entitled to a particular job. It follows that in granting the employee "an equitable measure of job security based on seniority" the Collective Agreement must give him some protection against loss of the job to which he has established entitlement.

The practice under the Collective Agreement is that at least some employees are assigned by "bulletin" to a regular job and also to an alternative job or jobs. These "bulletins" are referred to in Article 6(D) and Appendix A of the Collective Agreement. Article 11(A), in assuring an equitable measure of job security, must be held to afford some rights in connection with bulletined alternative jobs.

Article 5(D)-12 provides that an employee substituting on another job shall be paid at his own rate or the rate on the other job, whichever is greater. This clearly contemplates that employees will be moved into higher rated jobs on a temporary basis, and Mr. Weldon introduced convincing evidence that, in practice, this occurs very frequently. It was not clear on the evidence, however, that this kind of temporary advancement has been made as a matter of practice where the regular man on the job is off work and is willing to do the work on an over-time basis. Practice is therefore not helpful in determining the extent of protection afforded by Article 11(A).

The narrow question before the Board is whether the assurance of "an equitable measure of job security based on seniority" in Article 11(A) means that an "as required" operator is entitled to object where the Company has given some of the work for which he is bullentined "as required" to an unbulletined employee,

maintaining, at the same time, that the bulletined employee is not "required".

On the facts before us the Company could honestly assert that the grievor was not "required". Under the circumstances on the morning of December 7th the ad hoc adjustment in work assignments did not indicate that the Company required a "blend and pack specialties operator".

Alternatively, there is the broad question whether "an equitable measure of job security" gives a bulletined employee the right to demand that the Company call him in on over-time rather than assigning the work to an unqualified employee. It appears to this Board that under the general seniority provision the only limitation on the Company's right to allocate work is that it may not intentionally undercut rights gained through seniority. For example, if the Company gave the job of blending and packing specialties to an unbulletined employee while the bulletined "as required" operator was at work on a lower rated job there would clearly be a breach. There would also be a breach if the Company deliberately removed the opportunity for a bulletined "as required" operator to do his alternate work by giving it to an unbulletined man whenever the bulletined employee was on an assigned day off.

In the case before us there is no such deliberate undercutting of seniority.

If this Board were to hold that the Company was wrong in giving one and three quarter hours of specialties packing to the unbulletined employee, McLean, in the circumstances of this case we would be interfering unduly with the flexibility which, under this agreement, management is clearly intended to have.

Article 12, which deals with the operation of the labour pool, as well as Article 6(C) and (D) make it clear that the Company is to have considerable freedom in avoiding over-time.

The Company relied to some extent on an unreported decision, dated January 26, 1968, of a Board of Arbitration chaired by S.T. Garside dealing with a matter under this same Collective Agreement, and indeed, involving this same grievor. The Grievance there under consideration resulted from an alleged breach of Article 6(D) of the Collective Agreement, which, as has been pointed out, is not relevant here. Nevertheless, there are certain broad propositions in that award which may conflict with my reasoning. Where there is such a conflict I must respectfully disagree with the majority award in the previous case.

Summary:

The grievor is a "Spare blend and pack specialty as required" operator. The regular "blend and pack specialties as required" operator was absent during the week in question, and the grievor therefore stands in his shoes.

Under the management rights provision the Company has the right to allocate work, limited by Article 6(C) and (D), read in conjunction with the definition of "spare and second relief operator" in appendix A. Neither of these provisions is relevant here. The only other limitation on the Company's right to allocate work is the provision in Article 11(A) that "employees are entitled to an equitable measure of job security". Since entitlement to particular jobs is based in part on seniority, Article 11(A) affords some protection to qualified employees against the Company undercutting their seniority rights. The Company could not undercut an employee's job entitlement by giving the work normally

comprised in his job to another employee while the employee entitled worked on a lower rated job. Nor could the Company deliberately undermine his position by having the work done by other employees when the employee entitled was on assigned days off.

In the case before us the Company cannot conceivable be said to have deliberately undercut seniority rights. The grievor is an "as required" operator, and in the circumstances he can not be said to have been required. The grievance is therefore denied.

June 3, 1968.

Innis Christie, Chairman

I concur in the decision rendered. J. L. McDougall

I dissent Geo Bassow