IN THE MATTER OF AN ARBITRATION

BETWEEN:

FLETCHER CHALLENGE CANADA LTD.

(the "Employer")

AND:

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL UNIONS 630, 1092, 1123 AND 1132

PULP, PAPER AND WOODWORKERS OF CANADA, LOCAL 2

(the "Union" or "Unions")

(Sunday Letter Carry Over Interpretation Grievance)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Adam S. Albright for the Employer
	David Schaub for the Union
HEARING:	October 4, 2000 Vancouver, BC
PUBLISHED:	October 23, 2000

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The parties agreed I was properly constituted as an arbitrator with jurisdiction to hear and determine the matter in dispute.

The issue before me is the correct interpretation of the clause in the Collective Agreements at the Employer's three mills governing Sunday Letter and Statutory Holiday carry over.

BACKGROUND

The Communications, Energy and Paperworkers Union of Canada ("CEP") and Pulp, Paper and Woodworkers of Canada ("PPWC") commenced joint negotiations for the pulp and paper industry in British Columbia in early 1997. The Employer, Fletcher Challenge, was selected as the target for pattern bargaining.

The Employer indicated a desire to negotiate mill-by-mill, so the Unions presented their agenda at each of the three Fletcher Challenge mills - Crofton, Elk Falls and Mackenzie. The following language on Sunday letter and statutory holiday carry over appeared in the Union agenda presented at all three operations as item 6 (h) (i):

> The Company agrees that employees may carry over Sunday Letter and statutory holiday time earned when sufficient straight-time hours are unavailable that week. The hours may be carried over after the week in which they are earned provided a regular work schedule is being followed.

Subsequently, the parties held some main table discussions and in June, 1997 the Unions commenced a strike lasting nine months. The issues in dispute were referred to an Industrial Inquiry Commission, which issued a report forming the basis of settlement for the 1997-2003 Collective Agreements. The strike concluded in April, 1998.

The issue of Sunday letter carry over was submitted to the Industrial Inquiry Commission and the language proposed by the Union was included in the Commission's report.

The Sunday letter is unique to the B.C. pulp and paper industry. It provides for additional payment for employees who work on Sunday or a statutory holiday by reduction of the work week and subsequent accrual of overtime rates after having worked a lesser number of hours in the week.

POSITION OF THE UNION

The Union called three witnesses to establish the intent behind its proposal and provide evidence of the presentations made at each of the three mills and at the main table during negotiations on the subject of Sunday letter application.

The Union witnesses, in particular Brian Payne who was Vice-President and head spokesperson for the CEP at the time, gave evidence that the Employer's response to the proposal on Sunday letter carry over was "no" and that they wanted to delete it. The Union's evidence is that it was their intent to realize the negotiated benefit for their members which already existed at a number of pulp mills in the province. The Union witnesses further testified that the intent was to carry the benefit forward or back where there were not enough hours available in the week to realize the application of the Sunday letter.

Mr. Schaub characterizes the issue as whether there is any restriction placed on the language in the agreements to limit it to a one-week carry forward as asserted by the Employer. He argues that the intent of the language is clear - to provide an opportunity to extend the Sunday letter application into the weeks preceding and following until the employee realizes the benefit.

The Union further submits that the evidence of its witnesses is equally clear as to the intent of the language, which was subsequently accepted as a result of the Industrial Inquiry Commission with little or no negotiation between the parties. The Union argues that there is no clear understanding between the parties other than the Union's proposal and explanation of such.

Mr. Schaub asks that I uphold the Union's interpretation of the article and award payment to those employees who have not received the benefit of the Sunday letter since the signing of the Collective Agreement.

POSITION OF THE EMPLOYER

The Employer adduced evidence from two witnesses, both of whom testified that their understanding of the Union proposal was that the Sunday letter application could be carried forward for only one week. The Employer intended to call a third witness, however, it was agreed that his evidence would be similar to that of the other two witnesses for the Employer.

The Employer's evidence is that, while the Union talked of the benefit existing at other mills, the specifics of its application were not discussed. The Employer's position at bargaining was to delete the Sunday letter application.

On behalf of the Employer, Mr. Albright submits that the intent of the clause is to carry the application of the Sunday letter forward only and that such carry over is limited to one week. He argues that the Employer developed that understanding as a result of the presentations of the Union at collective bargaining.

While the Employer submits that the language in the Collective Agreements may well be ambiguous, Mr. Albright argues that the only evidence

that is relevant is what the parties said to each other in bargaining. The question before me, in the submission of the Employer, is what actual representations were made by the Union on the Sunday letter application, not what was in their minds at the time.

The Employer relies on a series of cases that support that the arbitrator must search for the mutual intention of the parties, using both the language and extrinsic evidence of bargaining history. The Employer asserts that I must make a finding of fact based on the evidence as a whole, not simply rely on the Collective Agreement language. The Employer submits the following cases in this respect: *Government of the Province of British Columbia and British Columbia Government & Service Employees' Union* [1997] B.C.C.A.A. No. 550, Award No. 294/97 (Ready); *LSG Sky Chefs and Independent Canadian Transit Union, Local 10* [1996] B.C.C.A.A.A. No. 393, Award No. X-140/96 (Moore); *Re British Columbia Rapid Transit Co. and Office Technical Employees Union, Local 378* [1988] 1 L.A.C. (4th) 328 (McPhillips); *Re Andres Wines (B.C.) Ltd. and United Brewery and Distillery Workers, Local 300*, November 15, 1977, 16 L.A.C. (2d) 422 (Weiler); and *Re City of Winnipeg and Amalgamated Transit Union, Local 1505*, 58 C.L.A.S. 21 (Sept. 14, 1999).

The Employer takes the alternate position that an estoppel exists. In other words, the Union made certain representations to the Employer at bargaining, which were understood and relied upon by the Employer, and is

now barred from pursuing a different application of the language. The Employer submits the following cases in support of its estoppel argument: *Kuehne & Nagel Distribution and Teamsters Local Union No. 31* [1996] B.C.C.A.A.A. No. 272, Award No. A-162/96 (Taylor); and *Re Hallmark Containers Ltd. and Canadian Paperworkers Union, Local 303* [1983] 8 L.A.C. (3d) 117 (Burkett).

Finally, the Employer submits that the operation of the Sunday letter application in other mills is irrelevant to this case, as those situations are specific to bargaining with those companies, the Employer was unaware of the practice or interpretation at these mills and there is no arbitration award or interpretation of the language as it exists elsewhere.

In the submission of the Employer, whether through interpretation or estoppel, it is wrong for the Union to put a proposal forward at bargaining and now put forward an interpretation of the language that goes beyond that proposal. Therefore, the Employer asks that I find the Sunday letter application be limited to a one-week carry over.

DECISION

As one of the Industrial Inquiry Commissioners involved in the settlement of the dispute leading to the current Collective Agreements between

the Unions and Employer at its three mills, including recommending the language in question, I am in an unique position as arbitrator in this case.

I start by noting, as did the Union in its argument, that the language that was included in the final Commission report was exactly the language proposed by the Unions in their initial bargaining agenda. Having said that, I agree with the Employer in that, on its face, the language may well be ambiguous. In any event, it is well established that ambiguity is not a precondition to an arbitrator looking at relevant evidence of bargaining history as well as the language of the Collective Agreement in order to determine its true intent.

In *LSG Sky Chefs, supra*, the arbitrator quotes a passage from the Labour Relations Board decision in *Nanaimo Times Ltd.* BCLRB No. B40/96, which discusses how an arbitrator may use both the language and extrinsic evidence in his or her deliberations. Pages 6-7 of the award states:

> On the other hand, if an arbitrator concludes that when the language of the collective agreement is considered with the extrinsic evidence, there is some doubt about the meaning of the provision in dispute, the arbitrator is entitled to use extrinsic evidence to resolve the ambiguity or doubt, even in the face of collective agreement language that appeared clear when read in isolation: Finlay Forest Industries Ltd. BCLRB No. B137/94. However, even in these circumstances an arbitrator is not bound to base his or her decision on the extrinsic evidence simply because the language is somewhat equivocal. The

> arbitrator is trying to decipher the meaning which the parties mutually intended for the disputed contract language, and should not forget the actual language in concentrating on a mass of extrinsic material.

In that case, Arbitrator Moore goes on to conclude at page 8:

> I recognize that the test to be applied in determining the mutual intent of the parties is an objective, not a subjective one. It is not one of determining the actual intention of either side but rather what a reasonable person would interpret as the result of what was said or done in bargaining.

Similarly, in *British Columbia Rapid Transit Co., supra*, arbitrator McPhillips addresses the legal framework for interpreting contract language, at page 9:

> In interpreting contract language, an arbitration board must ascertain the intention of the parties. As this arbitrator notes in British Columbia Packers Ltd., May 12, 1998, at pp. 13-4:
>
> > An arbitration board has the responsibility to "divine what the parties intended to mean when they reached their agreement" *Consumer Glass Co.*, B.C.L.R.B. NO. 46/79 at p.11; see also *Andres Wines (B.C.) Ltd. and Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Loc. 300*, [1978] 1 Can. L.R.B.R. 251 (Weiler). As the labour board noted in *Board of School Trustees, School District No. 57, Prince George*, B.C.L.R.B. No. 41/76, at p. 9, "the intent of one party

> is only significant when the extrinsic evidence allows an arbitration board to attribute it to the other party".
>
> An arbitration board does not have a mandate to impose what it thinks would be fair and reasonable terms in the circumstances. The obligation is to determine what a reasonable person would have concluded was the intention of the parties. Further, it is the mutual intention of the parties which must be established. *Noranda Mines, supra* (Hope); *Highmont Operating Corp.*, October 31, 1985 (Kelleher); *Consolidated Aviation Fueling & Services (Pacific) Ltd.*, June 30, 1987 (Greyell); *Board of School Trustees, School District No. 57, Prince George, supra.*

I accept this as the arbitral jurisprudence that must guide me in the interpretation of Collective Agreement language, however, these and the other cases referred to me differ from this case in one important and material way. In the case at hand there was no mutual intent reached by the parties. Put another way, the only conclusion a reasonable person could draw from the bargaining history is that little or no negotiation took place on the Sunday letter and, as a result, the parties did not establish any mutual intention on the issue.

During negotiations, the Unions presented their proposal on Sunday letter application as part of their bargaining agenda and the Employer simply refused the Union's request. Furthermore, the evidence of what did transpire

at the few meetings where the parties did discuss this issue is of little assistance to me in interpreting the language. In other words, having not reached an agreement on the issue, neither party is able to rely on any mutual intent of the disputed language.

The only intention or purpose that can be ascertained in this case is that of the Unions in proposing this language, as it was expressed to the Commission and throughout this hearing. The language was effectively imposed by the Industrial Inquiry Commission, existing as the Unions initially proposed it and, as such, the intent was to provide to the Unions the benefit which it sought for its members. To underscore that point, it will be recalled that the Commission had the difficult task of striking balance to bring an end to a nine-month strike.

Therefore, I accept that the purpose of the carry over is to allow employees to realize the benefit of the Sunday letter in a week where there are not enough straight-time hours to do so. The evidence before me is clear that with a one-week carry over the benefit would not necessarily be realized in all cases, especially in the week of Christmas-New Year's. This result would be contrary to the purpose of the carry over.

For all of the above reasons, I find that the language in question is not limited to one week as suggested by the Employer, but I do not accept that the

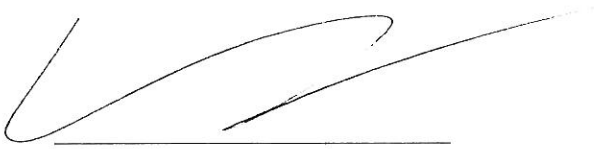
carry over should precede the event as suggested by the Unions in this hearing. While this may be the practice in other mills in the province, there is no clear evidence before me in this case to support that interpretation. The words "carried over after the week in which they are earned" are clear and, on its face, the language is consistent with carrying forward the Sunday letter application as argued by the Employer.

I now turn to the Employer's argument of estoppel. I cannot find any clear evidence of representation or reliance on which to sustain such an argument. An estoppel arises when one party makes a representation to the other and agreement is reached on that basis and then the other side resiles from the representation. While the Employer representatives at bargaining may well have come away with the understanding that the carry over would be limited to one week, it is not their understanding or reliance which led to this language being included in the Collective Agreements. The issue of Sunday letter application carry over was outstanding and was submitted to the Commissioners, who in turn included the language, as proposed by the Unions, in their report. As I have already found, the intent of the language is consistent with the result sought by the Unions – to allow a carry over, without limitation, so that the employees could realize the benefit of the Sunday letter application.

In the result, the grievance succeeds in part.

I will retain jurisdiction to resolve any dispute as to the implementation of this Award.

Dated at the City of Vancouver in the Province of British Columbia this 23rd day of October, 2000.



Vincent L. Ready