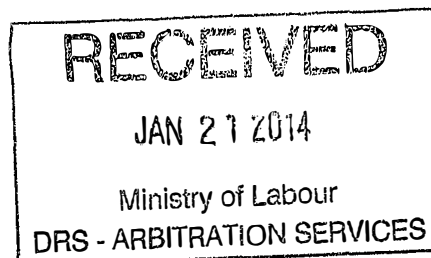


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10448-XR-13



IN THE MATTER OF AN ARBITRATION

BETWEEN:

CERTAINTED INSULATION CANADA

AND

UNIFOR LOCAL 80-0

AND IN THE MATTER OF A UNION GRIEVANCE RELATING TO A FREEZE ON
VACATION REQUESTS

ARBITRATOR:

J.F.W. Weatherill

Hearings in this matter were held at Ottawa on December 13, 2013 and January 14, 2014.

P. Hunt and T. Finlay, for the union.

R. Bell, for the company.

AWARD

In this grievance, dated October 24, 2013, the union alleges that the company improperly imposed a freeze on vacation requests. The issue is whether or not it was open to the company to do this, having regard to the provisions of the collective agreement and to the circumstances.

On October 21, 2013, the company posted a notice to employees the text of which is as follows:

Please be advised that there will be a freeze on all vacation and Banked Stat requests from October 27, 2013 to November 30, 2013. This freeze on vacation requests will greatly improve our ability to maintain increased

production levels and train new employees during this period of time.

Vacation requests that have already been approved during this time frame will remain approved.

I would like to take the opportunity to thank the Union members for their co-operation and understanding of this vacation freeze. The flexibility of our work force reflects favorably to our logistics team and the rest of the CertainTeed/Saint-Gobain family.

Sincerely,

*Gerald Amann
Plant Manager*

It is agreed that the company had need of a full, or almost full workforce ("all hands on deck" as counsel put it), since it had recently shut down production from late August until late October, while the glass melter was rebuilt. There was no production during this period. The company manufactures fibreglass insulation for industrial and commercial construction and has a regular workforce of some 100 employees, working four shifts on a twenty-four hour, seven-day basis. There was thus an urgent need to resume production, and production at a high volume, to fill orders.

There is no evidence as to how many employees had scheduled vacations during the period mentioned, nor as to how many had planned to request vacations then. There have been no individual grievances with respect to the vacation freeze. This is a union grievance relating essentially to the interpretation and application of the collective agreement. I shall deal first with the scheme established by these provisions, and then with certain evidence relating to past practice and to bargaining, and to the effect these may have on the application

of those provisions.

It is useful to set out the management rights clause of the collective agreement, the material portions of which are as follows:

2.04 Management Rights

The union acknowledges that it is the right of the company to:

2.04(A) Maintain order, discipline and efficiency.

2.04(D) Operate and manage its business in all respects, except where this is in contradiction with the terms of this agreement.

2.04(E) Make and alter from time to time rules and regulations to be observed by employees provided such rules and regulations are reasonable and not inconsistent with this agreement.

The question is whether or not the provisions of article 10 of the collective agreement, which deals with vacations, have been contradicted by or are inconsistent with the action of the company in imposing a vacation freeze. The material provisions of article 10 are as follows:

ARTICLE 10 - VACATIONS

Vacation to be earned and taken in a calendar year. Effective January 1, 2011 everyone will receive a full vacation entitlement. Vacation pay at 2% gross earnings

or card rate whichever is greater per week.

[Counsel for the union emphasised the use of the term "entitlement", and it may be noted that this term appears on three occasions in the provisions relating to vacation for the ON-call classification, as well as appearing in the provisions hereafter cited.]

10.02(A) Notwithstanding Article 10.01 ["Eligibility"] an employee may carry over up to 42 hours of vacation in any calendar year, however, an employee must take a minimum of 84 hours in any vacation year. Any unused entitlement in excess of 42 hours shall be paid.

10.03(A) Vacations and Conflicting Requests

Employees shall indicate their first (1st) and second (2nd) preferences for their summer/fall vacation period prior to May 1st in any year, and prior to November 1st for the remaining vacation period prior to May 1st in any year, and prior to November 1st for the remaining vacation period, on the forms provided. Where there is a conflict, vacation periods shall be assigned on the basis of seniority, based on the length of service in a given department. Employees shall be advised as soon as possible in advance and their vacation period will not be changed without consulting with the employee.

10.03(B) The Company and the Union agree that the principle of seniority in Article 10.04 (A) above should also be subject to an equal opportunity for employees wishing to take their vacation during the period between June 15th and Labour Day.

Employees are encouraged to come to a mutually satisfactory arrangement with their co-workers during the period noted above. In the event that conflict

cannot be resolved between a group of employees the Company may limit the number of weeks of vacation to a maximum of two (2) weeks for employees with more than two (2) weeks vacation entitlement in order to resolve the conflicting group of employees' requests for vacation.

10.03 (C) All vacation requests require a minimum of two (2) weeks notice, except outside summer peak periods and December holiday period where only one week notice of request is required.

10.03 (D) A maximum of four (4) employees are allowed off for vacation and holidays per shift except in July where a maximum of three (3) employees per shift for shifts one (1) and three (3) will be allowed; and a maximum of three (3) employees per shift in August for shifts two (2) and four (4). Restrictions on vacations/personal leave/sick days request will apply to the first three (3) working days of absence due to sickness or bereavement leaves.

The above provisions do not support the conclusion that, as counsel for the company put it, the company has the "right to implement a vacation request freeze in extraordinary circumstances". It is true of course that article 2.04(D) gives the company the right to "operate and manage its business in all respects", but this right is subject to the critically important exception that such operation and management not be in contradiction with the terms of the collective agreement. I shall refer below to specific terms which, in my view, have been contradicted in this case.

It is also true, as counsel for the company indicated, that there are no provisions in the collective agreement which prohibit a vacation request freeze. Neither, indeed, are there any provisions which prohibit a unilateral reduction in wage rates. That is, there are no specific provisions to such effect. On reflection, however, it should be clear that the exception provided for in Article 2.04(D) has precisely this effect: there are provisions in the

collective agreement relating to vacation entitlements just as there are relating to wage entitlements. It is simply not open to the company in the exercise of its management rights to contradict these provisions.

Article 10 provides for the entitlement of employees to take the vacation they have earned. Employees are not entitled, however, to take such vacation at their own pleasure. Article 10 sets out limitations on the number of employees who can take vacation during any given period, and provides a mechanism for resolving conflicts (partly on the basis of seniority, and partly by a limitation on lengths of vacation at certain times) as between employees. Where there are, as in Article 10 (D) express limitations on the numbers of employees on certain shifts or in certain work groups (as delimited by the company in guidelines issued from time to time and which the union has not said were unreasonable) then it is, I consider, contradictory to say that a company has "the right to schedule vacation based on operational needs".

In bargaining for a renewal agreement, the company did indeed put forward just such a proposition, which it subsequently withdrew, saying that it had simply been put forward to "clarify" the existing language. In my view, however, it is clear that such a provision would have been a substantial change to what the collective agreement before me provides and which entitles employees to request vacation subject only to the limitations expressed in the collective agreement and referred to above.

Although the case turns on a different point than that in issue here, I note the statements of arbitrator Luborsky in *Tembec Inc.*, (2002) 111 L.A.C. (4th) 313 at paragraphs 13 and 14 that,

I accept as the appropriate starting point to my analysis the Employer's submission that in the absence of a provision in the collective agreement to the contrary, the Employer has the presumptive right to schedule employees on

vacation in a manner that will maximize efficiencies [cases cited] - - -

However, the distinguishing factor in all of the cases referred to by employer counsel is that the practice the employer sought to discontinue, no matter how longstanding, was a practice founded upon its general management privilege to operate its enterprise, rather than in connection with the application of a specific substantive provision in the collective agreement. That is unlike the situation in the instant case, where there are provisions in the collective agreement dealing specifically with the topic of vacation allotment.

In the instant case as well there are, as set out above, provisions dealing specifically with vacation entitlement, and with the limitations which may affect the exercise of such entitlements. The *Tembec* case may be contrasted with the *Royal City Bingo* case, (1999) B.C. file No. A-228/99, referred to by counsel for the employer, where arbitrator McPhillips noted at p. 243 that,

First of all, there is nothing in this language which can be interpreted as creating an absolute right to a vacation at whatever time an employee chooses. Indeed, the opening phrase of Article 18.03 is that "the Employer will determine how many employees in each classification may take vacation at any particular time". Presumably, that number could be zero.

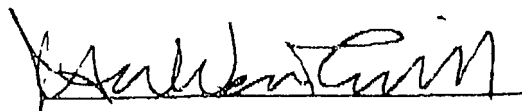
In the instant case, the union does not assert that sort of "absolute right", and the collective agreement sets out specific limitations on the number of employees in various classifications who may take vacations at certain times. This collective agreement does not contemplate that that number might be zero.

Finally, it is to be noted that there is some conflict in the evidence as to whether or

not the company sought the union's consent to the vacation freeze. There have been such freezes in the past, and on the two other occasions of which there is evidence, the union either had no objection or appears actually to have voted in favour of the freeze. There is no suggestion of any "representation intended to affect legal relations" in the evidence before me and while, as noted, some of the evidence is in conflict, I do not consider that any of the witnesses sought in any way to mislead. The two parties are sincere in their beliefs as to their rights. The relationship between the parties is a good one, and in my view in the previous incidents referred to as well as in the present case, the union has recognized the employer's needs and has sought to cooperate, while the company, seeking to continue the harmonious relationship, has sought the cooperation of the union. These mutual courtesies have no effect on the actual terms of the collective agreement by which the parties are bound. In the instant case, those terms do not contemplate the unilateral imposition of a freeze on vacation requests.

For all of the foregoing reasons, the grievance is allowed. It is my award that the notice (Exhibit 1) posted on October 21, 2013 relating to a freeze on vacation requests, and the company's subsequent unilateral implementation of such a freeze, was in violation of the collective agreement, and it is so declared.

DATED AT OTTAWA, this 21st day of January, 2014,

A handwritten signature in black ink, appearing to read "Arbitrator", written over a horizontal line.

Arbitrator