

In The Matter Of An Arbitration

Between:

Northstar Aerospace - Milton

("the employer")

- and -

**National Automobile, Aerospace, Transportation and General
Workers Union of Canada (UNIFOR-Canada) and its Local 112**

("the union")

And In The Matter Of A Union/Policy Grievance [Grv. Ref # 2016-08]

Owen V. Gray - Sole Arbitrator

Appearances:

For the Union:

Graham Davies, Plant Chairperson
Dave Vukovic, Skilled Trades Rep Bargaining Committee
Harmik Ghalustians, Production Rep Bargaining Committee
Scott McIlmoyle, Local Union President
Ram Persaud, past member of Bargaining Committee

For the Employer:

David L. W. Francis, Counsel
Victor Kim, Student-At-Law
Krista Bunn, Human Resource Manager
Brian Stone, Director of Operations

Hearing conducted in Milton, Ontario on
June 8, 2016.

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AWARD

1 This award is the result of referral to arbitration of the following union grievance:

The Union protests the action of the company for replacing the normal hours of work with the alternate work schedule. We claim this to be a violation of the collective agreement. We ask that the company honor the normal hours of work schedule.

For the reasons that follow, I am not persuaded that the employer violated the parties' collective agreement by doing what it did.

2 The "normal hours of work" are defined in Article 1 of Schedule "B" to the parties' collective agreement as being 8 hours per day, 5 days per week, Monday through Friday, inclusive, on a "day," "afternoon" or "night" shift. Schedule "B" defines the start and stop times for those morning, afternoon and night shifts. For ease of reference these will be referred to as "5x8" shifts.

3 The "alternate work schedule" is defined in Schedule "G" to the collective agreement. It provides that the employer can establish work schedules under which an employee will work either four 10 hour shifts, Monday through Thursday, inclusive, on a "morning" or "afternoon" shift, or three 12 hour shifts, Friday through Sunday, inclusive, on a "day" or "night" shift. The schedule defines the start and stop times for these morning, afternoon, day and night shifts. For ease of reference these will be referred to as "4x10" shifts and "3x12" shifts, respectively.

4 The union says its grievance is a response to the employer's having implemented changes it announced on August 21, 2015 and October 20, 2015. The August 21st announcement was that commencing September 21, 2015, all Gear Machinists and General Machinists in Grinding and Gear Grinding would work 4x10 shifts, rotating between morning and afternoon hours. The October 20th announcement was that commencing on a date between November 23 and

December 7, 2015, employees in each of several listed classifications would work 4x10 shifts, rotating between morning and afternoon hours.

5 While some employees remained on 5x8 schedules after those changes were made, the union says that all employees in most classifications were thereafter on 4x10 schedules. None were on 3x12 schedules. As a result of their discussions, the union understands the employer's position to be that it could, if it wished, place all bargaining unit employees on 4x10 schedules without having any employees on either 5x8 or 3x12 schedules.

6 The union's position is that the employer cannot have all bargaining unit employees on alternate work schedules, and cannot have employees on 4x10 schedules without also having employees on 3x12 schedules. The employer denies that its right to use alternate work schedules is subject to either limitation.

7 Schedule G was first added to the parties' collective agreement as a result of collective bargaining in 2011. The first collective agreement in which it appeared later expired in 2014, and was replaced by the current collective agreement, without any pertinent change to Schedule "G." The union says that its position is supported by what took place during bargaining in 2011. The employer denies this, and says that its interpretation is consistent with how it used alternate work schedules during the term of the 2011-2014 collective agreement.

8 During their opening statements each party made an effort to fully identify the allegations of fact on which it relied, and the parties were able to come to an agreement about those facts that made witness testimony unnecessary. They agreed, among other things, that:

- During bargaining in 2011 the employer made and later withdrew a proposal to add the following to the definition of normal hours of work in Schedule "B":

The Company may revise the normal hours of work as set out herein for legitimate business reasons by providing fourteen (14) days advance notice to the Union unless the revision is a temporary one of two (2) weeks or less in which case the required notice to the Union shall be three (3) days.

- The employer also made a proposal about the Alternate Work Schedule provisions in what eventually became Schedule "G." The proposal was modified several times in the course of bargaining. Documents put before me reflect all or a portion of each of the versions of that proposal that the employer presented on September 19, 22, 28 and 29. A further document dated November 9, 2011, reflects the final language of all the changes on which the parties agreed. The Alternate Work Schedule language in that document reflects a proposal that was made by the employer after September 29th and accepted by the union prior to a strike that was subsequently settled by the November 9th agreement and a subsequent return to work protocol.
- During the term of the resulting collective agreement some employees in some classifications volunteered for or were assigned to 4x10 and 3x12 work schedules. The numbers working on each of those types of schedule changed from time to time. In late 2012 all 4x10 schedules were eliminated, leaving some employees still on 3x12 schedules and all others on 5x8 schedules. That situation continued for a couple of years.
- The current collective agreement came into effect in October 2014, based on an agreement reached in June 2014.
- Production requirements increased later in 2014. Effective on various dates in August, September and November of 2014, 4x10 schedules were reintroduced for some employees and additional employees were placed on 3x12 schedules. Effective February 8, 2015, all 4x10 and 3x12 schedules were eliminated. All employees were then on 5x8 schedules until the employer implemented the changes to which the union objects in this grievance.

- 9 The parts of Schedule "G" that are relevant to this dispute read as follows:

ALTERNATE WORK SCHEDULE

...

Management will provide one month notice to the union prior to initiating or cancelling the following hours of work/schedule. This notice period can be shortened if mutually agreed. The notice may be for all areas of the plant or specific classifications within the plant. The parties agree to the following regarding the hours of work as defined in Schedule B, Item 1 of the collective agreement:

At least one months [sic] notice, 30 calendar days, will be given to the employee by the company of any shift change regarding joining or leaving the alternate work schedule.

1. Hours of Work:

Monday through Thursday – two – 4x10 hour shifts (40 hours per week)

- 6:00am to 4:00pm (Day Shift)
- 4:00pm to 2:00am (Afternoon Shift)

...

Friday, Saturday and Sunday – two – 3x12 hour shifts (36 hour work week)

- 6:00am to 6:00pm (Day Shift)
- 6:00pm to 6:00am (Night shift)

Note: Employees working the 3x 12hr./36 hr. work week, will be paid the equivalent of 40 hours worked. ...

2. Available Positions:

The Company shall post for schedules for the number of positions needed by schedule. Volunteer employees from the respective classifications shall apply. The positions shall be filled by seniority to those qualified who have volunteered up to the staffing levels/ classifications and/or skilled groups required by the Company in its' [sic] sole discretion. The parties recognize that cross training may be necessary. The Union will endeavour to provide its best efforts to assist the Company in finding and securing sufficient volunteers for this shift schedule. Should the Company be unable to fill the positions with qualified volunteers from within the respective classifications, then the opportunity shall be assigned to the least senior employee in the required classification and/or skill group. Once an employee has volunteered on these schedules, they shall be considered to have committed to remain on the schedule for a minimum of three (3) months.

Newly hired employees in the same classification and/or skill group as those on the above schedule, may be assigned by the Company (once qualified) to positions on the above shift schedules, and shall not have the option of leaving the shift schedule without the approval of the Company.

...

10 At one point in the hearing the union's representative said that the language of the collective agreement permits what is complained of in this grievance, and that what took place during bargaining in 2011 was what precluded the employer from relying on rights that that language otherwise gave it. In the course of his closing argument, however, the union's representative also took the position that what the employer had done was not permitted by the language of the collective agreement. Employer counsel expressed some concern about the inconsistency in these positions, but responded to all of the union's arguments. I have treated them as arguments made in the alternative.

11 The union's representative argued that before the current collective agreement was concluded the employer had only used the Alternate Work Schedule provisions to maintain a seven day a week operation. He submitted that those provisions did not permit the use of 4x10 schedules unless 3x12 schedules were also used.

12 Nothing in the language of Schedule "G" itself expressly provides that it will be used only to maintain a seven day a week operation. The employer's having used 4x10 schedules only in conjunction with 3x12 schedules during the term of the earlier collective agreement did not oblige it to do so thereafter. Nothing in Schedule "G" expressly requires that 4x10 schedules be used only in conjunction with 3x12 schedules. The language of the provision certainly does not impose any numeric relationship between the number of employees on 4x10 schedules and the number on 3x12 schedules. The union's representative conceded that having one employee on a 3x12 schedule would be enough to satisfy the implied limitation for which he was arguing. This limitation cannot sensibly be implied from the language on which the parties agreed in 2011 and renewed in 2014.

13 During the term of the previous agreement the union tolerated the employer's use of 3x12 schedules without there being any employees on 4x10 schedules. The union's representative said that that was acceptable because other employees were on 5x8 schedules, and so that use of 3x12 shifts without

also having 4x10 shifts was consistent with the union's view that the Alternate Work Schedule provisions could only be used to maintain a seven day a week operation.

14 Schedule "G" does not expressly state that an alternate work schedule can only be used to maintain a seven day operation, nor is that a necessary implication of the language of Schedule "G."

15 The other limitation for which the union's representative contended was that the employer could not put all of the employees in a classification, or all of the employees in the bargaining unit, on an alternate work schedule. He argued that this was the implication of the language that appears in Schedule "G" under the heading "Available Positions," which provides that any alternate work schedule positions will be posted and filled first by qualified volunteer applicants in accordance with seniority and, if there are insufficient qualified volunteers, by assignment of qualified non-volunteer employees in reverse order of seniority. The union's argument seems to be that if all production positions were placed on alternate work schedules to fill the position this process would somehow become meaningless, and that the parties' having agreed on that process implied an intention that alternate work schedules could be used only when that process would be meaningful.

16 I disagree. Schedule "G" says that notice of transition to or from an alternate work schedule "may be for all areas of the plant or specific classifications within the plant." There is no express limit on the number of positions in a classification, or in the plant, that can be transitioned to an alternate work schedule.

17 It is not apparent to me that the posting, application and assignment process contemplated by Schedule "G" cannot be meaningful when a scheduling change results in all positions in a classification or in the plant being on 4x10 schedules. The positions that are not already on such a schedule would still have to be posted. It seems possible that a senior employee in a 5x8 position in one

classification could chose to apply for, and become entitled to a new 4x10 position in, another classification for which he or she is qualified, in preference to more junior applicant who is presently working in that other classification. In any event, even assuming (without finding) that there can be circumstances in which a transition to having all employees in a specific classification or all employees in the plant on 4x10 schedules would make the outcome of the posting, application and assignment process a foregone conclusion, that does not have the necessary implication that the provision was not intended to be available to the employer in those circumstances.

18 I note that the announcement of August 21, 2015, said "Since this affects the entire area volunteers for this shift are not necessary at this time." The union did not argue that the employer had breached the collective agreement by failing to post the new 4x10 positions on that occasion. I am not called upon to determine, and have made no finding, whether compliance with the posting, application and assignment process contemplated by Schedule "G" was unnecessary on that occasion.

19 The union's representative argued in the alternative that an estoppel prevents the company from altering the work week to a 4 day week from a 5 day one. He said the estoppel arose from the employer's conduct during the 2011 negotiations – in particular, the withdrawal of the proposal to modify the normal work hours provision in Schedule "B" and the revisions made to its proposal in the course of negotiations for the addition of what became the Alternate Work Week provision in Schedule "G".

20 Labour arbitrators have adapted to rights arbitration the concept of promissory estoppel described by Lord Denning in *Combe v. Combe*, [1951] 1 All E.R. 767 (C.A.), at p. 770:

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by

him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

Courts have accepted that arbitrators may do this, allowing representations that do not appear in a collective agreement to affect the outcome of disputes about its interpretation, application, administration or alleged violation, even though arbitrators function in a statutory framework that defines "collective agreement" as an agreement in writing. The authors of Brown and Beatty, *Canadian Labour Arbitration* (4th edition, Canada Law Book) describe the elements necessary to establish an estoppel as follows at §2:2211 (citations omitted, formatted for clarity):

a clear and unequivocal representation, particularly where the representation occurs in the context of bargaining; which may be made by words or conduct; or in some circumstances it may result from silence or acquiescence;

intended to be relied on by the party to whom it was directed; although that intention may be inferred from what reasonably should have been understood;

some reliance in the form of some action or inaction; and
detriment resulting therefrom.

21 I am not persuaded that any of the bargaining conduct relied upon by the union amounted to a representation about the meaning or possible use of alternate work schedules.

22 As a matter of logic, the complete withdrawal of a proposal in bargaining is not, by itself, a representation about the meaning, effect or intended use of some other proposal. Sometimes a party may say something about why it is withdrawing a proposal. Depending on its content and the circumstances in which it is made, such a statement might amount to a representation on which an estoppel could later be founded if the other prerequisites for an estoppel are present. In this case, however, there is no suggestion that the employer made any such statement when it withdrew the proposal referred to in the first bullet point in paragraph 8 above.

23 Similarly, in the absence of some accompanying explanation or rationale for a proposal of collective agreement language, the meaning or use intended by its proponent can only be assessed from the proposed language itself, considered in the context of the other provisions of the collective agreement in which the proposed language would appear if accepted. Proposals and responses to them are sometimes accompanied by oral or written statements of a party's rationale for its position. In some cases, elements of such an exchange may constitute representations on which an estoppel might subsequently be founded. But the documents in which the proposals in question here were delivered did not themselves contain any statements of rationale or of what the employer was seeking to achieve or of what the employer thought the language meant or could permit. No part of any accompanying oral statement or discussion is relied upon by the union. It does not rely on anything other than the language of proposals themselves. Each was different from the previous one in one or more respects, but none of the differences is anything more than a change in the language on which the employer was seeking agreement.

24 It is difficult to imagine how differences in the language of a series of proposals for a particular provision could ever, without more, amount to a representation that the apparent meaning of the version on which the parties ultimately agree would not be relied upon or enforced in some way by either party. Certainly there is nothing in the series of proposals on which the union relies here that could amount to a representation that the employer would not rely on the plain meaning of the language on which the parties eventually settled.

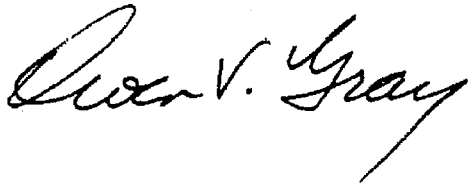
25 It was not entirely clear what it was about the successive proposals in question that the union regards as amounting to a representation from which an estoppel arose. The union representative's succinct submissions on this point did draw attention to the growth in successive proposals of the provision's posting, application and assignment language. The fact that that occurred does not logically affect the interpretation or application of the language on which the

parties ultimately agreed in that regard. It does not change my analysis in paragraphs 15 and 16, nor my conclusion that that language does not create an implied limitation on putting all of the positions in a classification or in the plant on 4x10 schedules. Important as the inclusion of those provisions no doubt was to the union, they do not have the implications for which it contends here.

26 The language of Schedule "G" permitted what the employer did. It was not precluded from doing so by what happened in bargaining in 2011.

27 For these reasons the grievance is dismissed.

June 13, 2016

A handwritten signature in cursive script, reading "Dean V. Gray". The signature is written in dark ink and is positioned below the date.