

IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

INTERFOREST LTD.

- The Employer

-and-

I.W.A. - CANADA, LOCAL 500

- The Union

AND IN THE MATTER OF two group grievances of Mark Meyers, Charlene Craig, Michael Cotter, Howard Hodgson, James Krueger, Terri Veen, Julia Frechette and Randy Hibbs

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

A. P. Tarasuk	- Counsel
S. Krull	- Director, Human Resources
K. Falkingham	- Plant Manager
H. Grant	

On behalf of the Union:

Robert Navarretta	- Director, Arbitration & Resources
Eric Obermayer	- Chairperson
Dennis Byers	- Service Agent

Hearings held November 3, 2000, and January 15, 16 and 18, 2001 in Guelph, Ontario.

# AWARD

## I. INTRODUCTION

These grievances involve eight grievors who left work before the end of their scheduled shift Friday September 1, 2000. The Employer disciplined each of the grievors for leaving work without permission and did not pay the grievors statutory holiday pay for Labour Day, September 4, on the grounds that they did not complete their last shift before the holiday. The Union challenged the discipline and submitted that the grievors met the requirements of the collective agreement for statutory holiday pay.

## II. THE EVIDENCE

The Employer operates a wood processing facility near Durham, Ontario. The eight grievors work in the clipping area, cutting wood veneer to customer specifications. There are two clipping lines with nine employees each.

Friday September 1, 2000 was a hot and humid day. The Employer accepted that the heat was oppressive and that the conditions in the plant were difficult due to the heat and humidity. September 1 was also the last work day before the Labour Day holiday weekend.

The eight grievors were scheduled to work the 3:00 pm to 11:00 pm shift and each left prior to 11:00 pm. One grievor (Mark Meyers) left at 5:11 pm, six more grievors (Charlene Craig, Michael Cotter, Howard Hodgson, James Krueger, Terri Veen and Randy Hibbs) left at the break which started at 5:30 pm and the eighth grievor (Julia Frechette) left at 8:00 pm.

By way of background, I note that a ninth worker in the clipping department, Maxine Nuhn, was sick on the Friday afternoon. She was urged by her supervisor, Mr. Marshall, to go

home early and she left work at 5:30 pm.

Tuesday September 5 the Employer issued each of the eight grievors a written warning for leaving work early without the permission of their supervisor. None were paid holiday pay for Labour Day.

The parties disagreed about most of the other events of that Friday afternoon and led considerable evidence about those events. The eight grievors testified as well as their supervisor, Bruce Marshall. It initially appeared that the credibility of the nine witnesses would be crucial to a determination of the grievance. However, having now heard all the evidence and the submissions of the parties, in my view it is not necessary to resolve all the issues of credibility in order to resolve the grievances, making it unnecessary to reproduce all the evidence and all the differences in that evidence. Moreover, I see no benefit in my recording all the differences in the evidence and determining who I believe on what issue. Instead, I simply record the essential evidence and later address one dispute about the evidence.

Employees on the clipping line normally take short washroom breaks on an individual basis when needed. However, because of the heat that day Mr. Marshall shut down each of the clipping lines in turn (one line at about 4:20 and the other at about 4:35) and sent all the workers on each line on an extended (15 minute) washroom break.

Mr. Marshall testified that at about 4:15 pm Mark Meyers, one of the grievors, informed Mr. Marshall that he was feeling the heat and Mr. Marshall said he advised Mr. Meyers to take it easy. During his testimony, Mr. Meyers said he then informed Mr. Marshall about 5:15 that he could not work and was going home, at which point Mr. Marshall told him he would not be paid. Mr. Meyers testified that he was diabetic and that his diabetes was bothering

him that day. He said that he visited his doctor on the following Tuesday before coming to work but he did not obtain a doctor's note. The Employer's records show Mr. Meyers left work at 5:11 pm.

Six grievors (Charlene Craig, Michael Cotter, Howard Hodgson, James Krueger, Terri Veen and Randy Hibbs) who left work about 5:30 each testified that they independently and individually advised Mr. Marshall at various points between their washroom break and about 5:10 pm that they were leaving work. They each testified that they informed him they were leaving at 5:30. However, Mr. Marshall said none of the six advised him during that period that they were leaving at 5:30.

In any event, shortly before 5:30 the six grievors who left at 5:30 and Ms Nuhn, who had been advised to leave work, were near the punch clock ready to leave. Mr. Marshall called Mr. Falkingham, his boss, who told Mr. Marshall to warn those who left that they may not be paid for the holiday. Mr. Marshall then spoke to the assembled employees and informed them that 1) if they left they might not be paid for the holiday and 2) if they were leaving because they were sick, they had to bring a doctor's note.

Julia Frechette is the eighth grievor. She lives in Walkerton and the problems with the town water supply had created difficulties for her. Friday September 1 she had a meeting with town officials about compensation. She informed the Employer that she would be late for work and she arrived at work shortly before 5:00 pm. She said that additional clipping line employees left work about 7:10 pm and the Employer's records show that three (3) employees left about 7:10. Ms Frechette testified there were then too few remaining employees to run even one clipping line and they asked Mr. Marshall what they should do. She said Mr. Marshall advised them to clean up around the clipping lines and to leave at 8:00 pm. She said that is what she did. The Employer's records indicate that she and three

other employees in the clipping department left at 8:00 pm.

Mr. Marshall testified that he could not remember whether he gave Ms Frechette permission to leave. While he was confident he had not given any of the other seven grievors permission to leave, he was asked several times about Ms Frechette and each time he answered that he was unable to remember whether she left with permission.

### III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The following are the relevant provisions of the parties' 2000-2003 collective agreement:

#### ARTICLE 2 - RECOGNITION

...

2.02 Management Rights - ... the Company will ... discipline, suspend or discharge employees for cause with justice and due regard for the reasonable rights of the employees; ...

#### ARTICLE 15 - STATUTORY HOLIDAYS

...

15.02 To qualify for Statutory Holiday with pay, an employee must work during his/her last scheduled shift before and first scheduled shift after the holiday, unless absent through permission of his/her Supervisor or because of sickness or emergency in the employees' family. ...

...

(a) An employee with seniority shall receive eight (8) hours pay at his/her classification rate, provided he/she has completed his/her last regular scheduled shift preceding the holiday and his/her first regular scheduled shift following the holiday accordance with the shift schedule, and he/she has also completed any overtime commitment adjacent to the holiday for which he/she has been committed.

...

### IV. THE POSITION OF THE EMPLOYER

The Employer reviewed the evidence with care and asked me to accept the evidence of Mr. Marshall, the supervisor, where it conflicted with the evidence of the grievors. The Employer suggested I should conclude that the grievors had acted in concert in leaving work

although they testified that each independently arrived at the decision to leave at 5:30.

In any event, the Employer asked me to find that none of the grievors had permission to leave work; at best, the evidence suggested they told the supervisor they were leaving instead of seeking, or obtaining, permission to leave.

As for the provisions of Article 15.02 and the qualification for statutory holiday pay, the Employer submitted the purpose of the qualifying days was to ensure that employees did not stretch the long weekend by skipping the work day before or after the holiday. Those policy reasons regarding qualifying days were equally applicable to an employee who came to work, then left before the end of the shift. Working "during" the shift meant working throughout the shift. This interpretation was made clear by clause 15.02 (a) which stated that an employee must have "completed" the last shift. As these employees did not complete the last shift, they did not qualify for holiday pay.

As for Ms Frechette, the Employer similarly asked that I find she did not have permission to leave work at 8:00 pm. The Employer asked me to draw an adverse inference from the failure of the Union to call corroborative evidence to bolster Ms Frechette's testimony.

The Employer asked me to dismiss both grievances.

The Employer referred to the following awards: *United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) in re Ford Motor Company of Canada Limited (Windsor)* (1950), 2 L.A.C. 505 (Fuller); *Re Rheem Canada Ltd. and United Steelworkers, Local 6868* (1990), 15 L.A.C. (4th) 252 (Whitehead); and *Roberts Warehousing & Storage* [2000] O.O.H.S.A.D. No. 77 (OLRB, McLean).

## V. THE POSITION OF THE UNION

The Union submitted that the onus was on the Employer to demonstrate just cause for discipline. The Union said that, in the admitted oppressive heat that day, the grievors who advised their supervisor that they were leaving work early and gave the Employer time to respond should be held to have had permission as the supervisor at no time clearly advised them they were leaving without permission.

As for the statutory holiday pay, Article 15.02 speaks of being "absent" on the shift before the holiday and that means missing the entire shift. As each of the grievors worked part of the shift, they cannot be held to have been "absent" during that shift. That is why the parties used the word "during" instead of "throughout" or some similar word. They wished to signify that an employee must show up for the shift, not necessarily complete it. An employee who leaves work early might be disciplined but is still entitled to the holiday pay.

The Union asked me to declare that the Employer had violated the collective agreement in not paying the grievors for Labour Day and asked me to find that the discipline was imposed without cause.

The Union referred to the following additional awards: *Re Stran-Steel Division, Westeel-Rosco Ltd. and Teamsters Union, Local 847* (1980), 28 L.A.C. (2d) 153 (Betcherman) and *Re Toronto Printing Pressmen & Assistants' Union No. 10 and Photo Engravers & Electrotypers Ltd.* (1969), 21 L.A.C. 41 (Weatherill).

## VI. CONCLUSIONS

The grievors were each disciplined for leaving work early without permission. That issue

of permission is also central to a determination of the statutory holiday pay issue. Therefore I begin with the question of whether the grievors left work with their supervisor's permission.

I first consider the situation of the seven grievors (Mark Meyers, Charlene Craig, Michael Cotter, Howard Hodgson, James Krueger, Terri Veen and Randy Hibbs) who left at 5:11 and 5:30 pm. The Union submitted that because they advised the supervisor that they were leaving (assuming I accept the grievors' testimony) and thereby allowed the Employer time to replace them or otherwise deal with their departure, and because the supervisor did not expressly tell them they did not have his permission to leave, I should find that the grievors did have permission.

I have considered this submission carefully but, even if I were to accept the testimony of the seven grievors in its entirety in preference to that of their supervisor, I cannot find that these seven grievors had permission to leave work. Considering the evidence in its very best light for the Union position, the grievors simply told Mr. Marshall they were leaving; none of the seven grievors expressed any view that he or she had been seeking permission. Moreover, none of the seven grievors suggested that anything which the supervisor said or did, or even failed to say or do, indicated the supervisor gave permission. Finally Mr. Meyers testified that, as he was leaving work, his supervisor advised him that he would not be paid. Similarly as the six grievors were about to leave at 5:30, they were advised by their supervisor, after he spoke to Mr. Falkingham, that they might not get paid for the holiday if they left. This warning about not being paid for the holiday can only have been intended to convey that they were leaving without their supervisor's permission. While Mr. Marshall could have been clearer, given the situation I can find no fault in his failure to indicate more directly to the grievors that they were leaving work without permission. In summary, of these seven grievors,



1. No one sought permission; and,
2. Nothing the supervisor said or did, or failed to say or do, can reasonably be construed as granting permission to leave; on the contrary, his statements about the grievors not being paid can only be interpreted as meaning the seven grievors did not have permission to leave.

Taking the grievors' testimony on its most favourable terms for the Union and the seven grievors - that each grievor independently decided to leave work and each advised the supervisor they were leaving, and that the six who left at 5:30 gave him advance notice to that effect - I cannot find they had the permission of their supervisor to leave.

I turn now to the situation of Ms Frechette, the eighth grievor. She left at 8:00 pm and she testified that she did so with the permission of, or even on the instructions of, her supervisor. Mr. Marshall did not deny that he gave her permission - he simply testified that he could not remember. Did Ms Frechette have her supervisor's permission to leave work?

It was no doubt a difficult shift for Mr. Marshall and, with so many employees leaving work, he had many matters to consider. Eight employees left work at or about 5:30 necessitating the shutting down of one of the clipping lines. More employees left at about 7:10 pm. With the remaining employees it was then not possible to operate even one clipping line. The remaining employees in the clipping department, including Ms Frechette, left at 8:00 pm. While it is possible that Mr. Marshall sent the other employees home at 8:00 pm and intended that Ms Frechette stay until the end of the shift by herself with little or no work to do, I think that is highly unlikely. Instead, I find that the surrounding facts are consistent with Ms Frechette's testimony and I accept Ms Frechette's testimony. I conclude that she was advised to go home at 8:00 pm after cleaning up the workplace and that she left work with her supervisor's permission.

All eight grievors were given a written warning for "leaving work early on Friday September 1, 2000 without the permission of your Supervisor." As I have concluded that seven grievors (Mark Meyers, Charlene Craig, Michael Cotter, Howard Hodgson, James Krueger, Terri Veen and Randy Hibbs) did leave work without permission, I now consider whether their actions justify discipline in the form of a written warning.

Leaving work without permission in the middle of a shift is normally disruptive of the Employer's operations; it was in this instance. In the absence of some other acceptable reason, such as sickness, leaving work without permission is a matter of concern to an Employer and is a matter which can justify discipline. As there was no submission by the Union that there was any other acceptable reason (apart from permission) for the grievors having left work, I find that the seven grievors' actions were such as to justify some form of discipline. In this instance, the Employer chose as its form of discipline a written warning. A written warning is a comparatively mild form of discipline and I conclude that the written warning imposed here was reasonable in all the circumstances and does not warrant modification by me. The grievance as it relates to the discipline of the seven grievors (Mark Meyers, Charlene Craig, Michael Cotter, Howard Hodgson, James Krueger, Terri Veen and Randy Hibbs) is thus dismissed.

For clarity, I would note that the Union made no claim that Mr. Meyers - the grievor who has diabetes - had left work due to sickness. Although in some situations sickness could be a justification for leaving work before the end of the shift, the Union did not raise this argument in these circumstances.

I turn now to the discipline imposed on Ms Frechette. Having concluded that Ms Frechette had her supervisor's permission to leave work I find that the Employer's factual basis for imposing discipline was incorrect and I therefore conclude that the discipline was not for

just cause. I direct the Employer to rescind the September 5, 2000 warning letter given to Ms Frechette.

I turn now to the provisions of Article 15.02 and the failure to pay the grievors the statutory holiday pay for Labour Day. There is an element of ambiguity in the requirements of this Article for the receipt of statutory holiday pay. The requirement in the introductory wording of Article 15.02 that an employee be at work "during" the last shift, if read in isolation, could have the meaning urged by the Union. It is common to speak of arriving "during" the day, or of being awake "during" the night. The meaning in those situations is "at some point" and not "throughout". However, it is also common to use "during" to mean "throughout". What did these parties intend to convey here?

In my view the parties selected this language to deal with the common desire of employees to extend the long weekend by taking off the day immediately before or immediately after the holiday. When, as here, an employee leaves work early on the last work day before the holiday and thereby extends the long weekend, the problem for the Employer in trying to maintain production is similar to the problem created when an employee simply does not come to work at all. If I am correct that the parties included this language to address this concern about employees extending a holiday weekend, then the more likely meaning would be "throughout".

However, in this case, the parties made their intention clear in clause (a) of Article 15.02 which specifies that employees must have "completed" the last shift in order to qualify for the holiday pay. This clause clarifies what is meant by "an employee must work during his/her last scheduled shift". In response to my questions concerning the meaning of clause (a), the Union denied that the clause was intended to clarify the meaning of "during" and suggested that it was only intended to address the issue of overtime work. That suggestion

is not at all persuasive to me - if that had been the parties' intent then there was no reason to include any language regarding the last shift. But the parties did include the words about completing the last shift and those words have to be given meaning. I find that the grievors were required to work the entire shift on the Friday, that is to complete the shift, unless they fell within one of the exceptions.

The only exception upon which the Union relied was permission. The Union submitted that all eight grievors had their supervisor's permission to leave work early.

As I concluded above that the seven grievors (Mark Meyers, Charlene Craig, Michael Cotter, Howard Hodgson, James Krueger, Terri Veen and Randy Hibbs) who left at 5:11 and 5:30 did not have the permission of their supervisor to leave work, it follows that they did not fall within the exception for receiving holiday pay and that they did not qualify for holiday pay in this instance. The holiday pay grievance is dismissed with respect to these seven grievors.

Regarding Ms Frechette, I concluded above that she did leave work with her supervisor's permission. In terms of Article 15.02 I accept the Union submission that Ms Frechette was "absent through permission of" her supervisor. I find that Ms Frechette was thus entitled to statutory holiday pay. I direct the Employer to pay her the Labour Day, 2000 statutory holiday pay, together with interest.

Before concluding I will record a ruling made during the hearing which the Union asked that I note in this award. The Employer led its evidence first, calling the supervisor, Mr. Marshall. In anticipation of Union submissions related to the grievors having left work due to sickness and/or submissions that the Employer had a duty to accommodate the grievors due to the heat, the Employer led various evidence. In particular it led evidence that there

was an air conditioned cafeteria in the building. During the Employer's cross-examination of the grievors as to why they did not seek to cool off in the cafeteria, a "suggestion" was made to the effect that the air conditioning may not have been working. The Employer then sought to lead reply evidence on the state of the air conditioning in the cafeteria that day. The Union objected on the grounds that the Employer should have led that evidence initially. I ruled that the functioning of the cafeteria air conditioning was not an issue which the Employer should have been required to anticipate in its evidence-in-chief and that I would therefore allow the Employer to lead that reply evidence. As will be seen from the absence of any reference to that evidence, nothing ultimately turned on this issue.

In summary, I allow the two grievances with respect to Julia Frechette and I dismiss the two grievances with respect to the other seven grievors (Mark Meyers, Charlene Craig, Michael Cotter, Howard Hodgson, James Krueger, Terri Veen and Randy Hibbs). I will remain seised to deal with any difficulties which may arise in the implementation of this award.

Dated at London, Ontario this 16th day of February, 2001.

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Howard Snow, Arbitrator