

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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE CORPORATION OF THE CITY OF LONDON

- The Employer

-and-

THE LONDON CIVIC EMPLOYEES' LOCAL UNION NO. 107

- The Union

AND IN THE MATTER OF a policy grievance and a group grievance regarding winter control operations

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Geoffrey P. Belch

- Counsel

John Parsons

- Division Manager, Transportation and Roadside Operations

and others

On behalf of the Union:

Michael Klug

- Counsel

Alastair Bruff

- 2nd Vice President

and others

Hearing held October 10, 2007, in London, Ontario.

SUPPLEMENTARY AWARD

I. INTRODUCTION

The Union challenged the Employer's decision to implement a night shift for snow plow operators, filing both a group grievance and a policy grievance. In my award of March 12, 2007, I found that the Employer was estopped from implementing a night plow shift where the plow operators were paid only a shift differential. The issue in this award is the extent of the remedy, in particular whether the employees assigned to the night shift are entitled to standby pay and meal allowance.

II. THE EVIDENCE

This is a collective agreement between the Corporation of the City of London, the Employer, and the London Civic Employees' Local Union No. 107, the Union, which represents the outside workers. The employees involved in these grievances are mainly snow plow operators.

These parties refer to the process of clearing snow and ice from roads and sidewalks as winter control operations and their collective agreement contains special provisions regarding this work, found in a letter of understanding titled Winter Control Operations. For years these employees received extra overtime pay for plowing at night. However, in 2006 the Employer implemented a night plow shift and paid those employees only a shift differential.

In my earlier award I held that, for the remainder of this collective agreement, the Employer was estopped from paying winter control employees only a shift premium and had to continue to pay them in the same manner it had previously. I based that conclusion on findings that the Employer had said it would continue to pay the winter control employees

as it had in the past, that the Union had relied upon those assurances in agreeing to a grievance settlement, and that it would be unfair to allow the Employer to do what it had assured the Union it would not do.

In my March award I made the following order:

Order

Until the end of the period of operation of this collective agreement, the Employer is estopped from scheduling a plow shift and paying only the shift differential. The Employer is directed to pay those employees on the night plow shift using the special overtime rates established in paragraph 4 of the Letter of Understanding - that is, "a minimum of 8.0 hours work at the applicable overtime rate" - until the end of the period of operation of this agreement. Employees who were paid less than the overtime rates are to be fully compensated by the Employer in the amount of the difference between what they did receive and the amount that they should have received.

As is common practice, I leave to the parties the task of calculating the amounts owing. I will remain seized to deal with the issue of compensation or with any other issues which may arise in the implementation of this award.

An issue arose as to the extent of my order. Although the parties had agreed upon the overtime rates owed, they disagreed as to whether the Employer also had to pay the affected employees standby pay and meal allowance. It was the Union's position that the Employer was required to pay these additional amounts.

The original group grievance specifically sought monies for "standby, meal allowance" and the policy grievance specifically sought "meal allowances."

At the reconvened hearing, both parties agreed that in recent years in all circumstances in which a winter control employee worked at night, the employee received both standby pay and meal allowance, in addition to overtime pay. The parties further agreed that, notwithstanding the name, standby pay was only paid to a winter control employee if the employee actually worked. In particular, they agreed that standby pay was paid regardless of whether the employee had to standby or was advised well in advance of the need to work,

as long as the employee ultimately worked; and they agreed that if the employee was on standby ready to work if required, but was not then required to work, standby pay was not paid.

In addition to the above agreement at the hearing, Alastair Bruff, the Union's 2nd Vice President testified. He identified a 1999 document (an unsigned memo not part of any collective agreement) which he said set out the parties' understanding regarding standby pay and meal allowance. The document was consistent with the parties' oral agreement at the hearing as to their practice. In particular, the document noted that standby pay would be paid to all employees who plow at night, and it also provided that each storm was viewed as a call out and that meal allowance was therefore to be paid to all such employees. He said that whether called in or scheduled (e.g., the employee was advised Monday that he or she had to plow Thursday evening), every winter control operator had received both standby pay and meal allowance.

Mr. Bruff agreed that the Meal Allowance letter in the collective agreement dealing with the matter of meal allowance for winter control employees was negotiated after the 1999 document.

III. THE AGREEMENT

The key provisions of the parties' 2004-2005 collective agreement are as follows:

ARTICLE 11 - CALL-IN AND STANDBY

11.1 Any employee called in to work in an emergency must be paid for not less than (3) hours for such work at the applicable overtime rate. Call out time shall be calculated to allow the employee(s) a maximum of ½ hour travel to and ½ hour return inclusive of the minimum three (3) hours.

A meal allowance of . . . \$15.00 effective November 15, 2004 will be paid if the call out time exceeds four (4) hours.

- 11.2 Standby crews shall be made up . . . Each employee who is on standby crew shall be available to work upon being called by telephone. . . .
- 11.3 Each employee who is on standby shall be paid, while on standby, at his/her regular rate of pay for the following hours:
- 2 hours for each Saturday and Sunday
 - 4 hours for each of the holidays in Article 12
 - 1 hour for each evening other than a Saturday, a Sunday or a holiday evening

... .

ARTICLE 26 - RIGHTS AND PRIVILEGES

- 26.1 All the rights, benefits and privileges which the employees now enjoy, receive or possess shall, to the extent that the same do not conflict with this Agreement, continue to be enjoyed, possessed and held by the employees.

... .

Renewal Letter of Understanding Number: 2004-18
Original date Signed: January 17, 2001

SUBJECT: Meal Allowances for Road or Sidewalk Plough Employee's

- 1 Notwithstanding the terms of the Collective Agreement when a road or sidewalk plough employee is called in under Article 11 of the Collective Agreement, s(he) shall be paid meal allowance(s) at the applicable rate as follows:
- a) one (1) meal allowance after the first four (4) hours worked;
 - b) another meal allowance after the next four (4) hours worked; and
 - c) another meal allowances after the next four (4) hours worked.

... .

IV. UNION POSITION

The Union said the essence of my earlier award was that employees should receive the difference between what they were paid and what they would have been paid had the Employer followed the Winter Control letter of understanding.

As for the meal allowance, the Union said the allowance was dealt with in the Meal Allowances letter, above, which should be read in light of the 1999 understanding. Meal allowance was paid for all night plowing. In effect all such plowing was treated as an

emergency. Under the collective agreement employees received the allowance after four hours when “called in,” and the parties agreed that for years all night winter control employees received meal allowance as though they were always “called in” for work.

As the parties agreed that all employees who plowed at night had been receiving both meal allowance and standby pay, then the employees who had been assigned to work nights - an assignment I held the Employer was estopped from making without paying the employees under the Winter Control Operations letter - should also receive both allowances.

Finally, the Union said that under Article 26 of the collective agreement, above, the night plow employees enjoyed these payments and the Employer was required to continue making them.

The Union relied upon the following authority: *Re Corporation of the City of London and Canadian Union of Public Employees, Local 107* (1992), 31 L.A.C. (4th) 224 (Dissanayake).

V. EMPLOYER POSITION

In its opening statement the Employer suggested that I did not have jurisdiction to deal with the issue of standby pay and meal allowance. The Employer suggested that they were new issues and that it was too late in this proceeding for the Union to raise them. The Employer did not pursue this matter directly in its closing submissions, but relied upon the fact that my original award focussed on the overtime issue. Implicit in the Employer submission was the notion that since I had not considered standby pay and meal allowance earlier, it was now too late to do so.

The Employer submitted that although the Winter Control Operations letter of understanding

letter addressed overtime rates, it did not mention standby pay or meal allowance and to find an entitlement to standby pay and meal allowance one must look to other parts of the collective agreement. The Employer said that paying employees under the letter did not include paying either standby pay or meal allowance.

As for standby pay, it was generally viewed as being designed to compensate employees for the disruption in their personal lives caused by having to “standby” in case the Employer needed them at work. There was nothing in the collective agreement which suggested that employees who were assigned to work nights on a shift had any such disruption and nothing to suggest they ought to be compensated for any disruption. Under this collective agreement, employees on standby had to be ready to work if telephoned, so that these plow shift employees did not fit within the language of this collective agreement. When one combined the purpose of call ins and standby pay with the express language of this agreement, there was no way to stretch the standby pay language to cover the winter plow shift.

As for meal allowance, the Meal Allowances letter of understanding specified that it applied when the employee was called in under Article 11. The night shift employees were not called in, they were scheduled for that shift, and therefore they were not entitled to the meal allowance.

With respect to the 1999 document, the Employer said it should not be relied upon as the letters in the collective agreement contained the parties’ current agreement on these matters.

In summary, the Employer asked me to find that the Employer was not required to pay either standby pay or meal allowance.

The Employer relied upon the following: Call-in pay: purpose and entitlement, Section

8.3410 of Brown and Beatty, *Canadian Labour Arbitration*, 3rd edition; *Re Vancouver Hospital and Health Sciences Centre and Hospital Employees' Union, Local 180* (1996), 54 L.A.C. (4th) 35 (Morrison); and *Re International Molders & Allied Workers Union, Local 49, and Webster Manufacturing (London) Ltd.* (1971), 23 L.A.C. 37 (Weiler).

VI. CONCLUSIONS

Jurisdiction

As noted, the Employer initially suggested I did not have jurisdiction to deal with standby pay and meal allowance but did not pursue the issue.

I do have jurisdiction in this matter. The parties agreed that I would arbitrate these two grievances. Both standby pay and meal allowance were expressly raised as remedies in the group grievance and meal allowance was specified as a remedy in the policy grievance. As is common practice in labour arbitration, the earlier hearing was devoted primarily to the issue of whether there had been a violation of the collective agreement or whether there was an estoppel. The details of the remedy, including standby pay and meal allowance, which were only of concern if I found against the Employer, were not dealt with in that hearing.

I held that the Employer was estopped from paying these winter control employees a shift differential rather than the amounts previously paid winter control employees and I directed the Employer to compensate the employees “in the amount of the difference between what they did receive and the amount that they should have received.” (at page 37). I then retained jurisdiction “to deal with the issue of compensation or with any other issues which may arise in the implementation” of that award (at page 37). While I specifically mentioned overtime pay in that award, as overtime pay had been discussed at the earlier hearing, I did not

mention standby pay and meal allowance. Nevertheless, as I have jurisdiction to arbitrate the two grievances, and as the grievances specifically sought meal allowance and standby pay as remedies, and as I have retained jurisdiction over remedy, I conclude that I have jurisdiction to deal with these Union requests regarding remedy.

Standby pay and meal allowance

These parties agreed that they have had an unusual application of standby pay. They agreed that standby pay has long been paid to winter control employees plowing at night even in situations where they were scheduled in advance - that is, when there was no need for those employees to standby. For years the compensation in the collective agreement referred to as standby pay has been an integral part of the compensation for all winter control employees every time they performed winter control work under the Winter Control Operations letter.

Having found that:

1. The Employer was estopped from having a night plow shift where the employees were paid only a shift premium, rather than being paid pursuant to the Winter Control Operations letter contained in the collective agreement; and,
2. Standby pay has been an integral part of the compensation for employees doing this winter control work under that letter;

it follows that I conclude the affected employees are entitled to this normal aspect of employee compensation. I direct the Employer to pay the standby pay to these employees.

I turn now to the question of meal allowance. The parties agreed that for years all employees who worked nights on winter control work were paid the meal allowance. The meal allowance was paid although Article 11 speaks of paying meal allowance when employees are "called in to work in an emergency." In effect, the Employer has paid all such employees meal allowance as though those employees were all called in and as if each time they worked

it was an emergency. I conclude that the compensation in the collective agreement referred to as meal allowance has been an integral part of the compensation package for every winter control employee working under the Winter Control Operations letter of the collective agreement. Because meal allowance has been an integral part of winter control compensation, given my earlier award finding an estoppel, I conclude that these winter plow shift employees are entitled to this normal aspect of employee compensation. I direct the Employer to pay the meal allowance compensation to these employees.

In summary, I conclude that the employees who were assigned to work the night plow shift are to be compensated by the payment of both standby pay and meal allowance.

Once again, I leave to the parties the task of calculating the actual amounts owing. I continue to remain seised to deal with the issue of compensation or with any other issues which may arise in the implementation of either this or my earlier award.

Dated at London, Ontario this 12th day of December, 2007.

Howard Snow, Arbitrator