IN THE MATTER OF AN ARBITRATION pursuant to the provisions of the *Labour Relations Act, 1995* as amended

BETWEEN

The City of Timmins

("the Employer")

and

Public Service Alliance of Canada

("the Union")

Overtime Rates on Second Day of Rest

Before:
Larry Steinberg, Sole Arbitrator

For the Employer:
Michael Kennedy, Hicks Morley Hamilton Stewart Storie LLP
Lucy Wu, Hicks, Morley Hamilton Stewart Storie LLP
Rock Foy, Director of Corporate Services
David Dayment, Airport Manager

For the Union:
Michael Fisher, Raven, Cameron, Ballantyne and Yazbeck, LLP
Simcha Walfish, Articling Student
Martin Mika, Regional Vice-President, Ontario, Union of Canadian Transportation Employees, Public Service Alliance of Canada (PSAC)
Robert Charbonneau, Grievor & President of PSAC Local 0075

Hearing held by video conference on November 13, 2020

Overview

[1] The Union grieves on behalf of a number of its members that they were improperly paid for work performed on their second day of rest when they did not work on their first day of rest.

[2] The union asserts that these employees should have been paid at double time for each hour worked. The employer asserts that the employees are entitled to be paid at time and one half for each hour worked.

[3] Both parties argue that the clear language of the collective agreement supports their respective interpretation. In addition, and in the alternative, the union asserts that to the extent that the language is ambiguous, the long-standing practice of the employer to pay the employees for work performed at double time on their second day of rest should be used as an aid to the interpretation of the collective agreement.

[4] After careful review of the provisions of the collective agreement, the submissions of the parties, including the authorities filed, I have concluded that the grievances must be allowed.

Facts

[5] The parties proceeded by way of a Statement of Agreed Facts ("SAF"). No witnesses were called to testify. The SAF is as follows:

STATEMENT OF AGREED FACTS

Introduction

1. The City of Timmins owns and operates the Timmins Victor M. Power Airport ("Timmins Airport").

2. PSAC is the exclusive bargaining agent for all airfield maintenance, mechanical and building maintenance, and administrative staff employees of the City of Timmins employed at the Timmins Airport.

Background

3. An organizational chart of the staff at the Timmins Airport is attached at **Tab 1**. There are currently 8 full-time staff members and 5 seasonal staff

4. The winter schedule which sets the context for the grievances is attached as **Tab 2.**

The Grievances

5. The individual grievances in issue concern the overtime provisions of the collective agreement and allege a breach of Article 21.17 of the collective agreement. Copies of these grievances are attached as **Tab 3**.[1]

6. A copy of the applicable collective agreement, with an expiry date of December 31, 2021, is attached as **Tab 4**.

Overtime Grievances - Article 21.17

7. Article 21.17 reads in part:

> Overtime shall be compensated at the following rates:
>
> Time and one-half (1½), except as provided for in Clause 21.17 (b);
>
> Double (2) time for each hour of overtime worked after sixteen (16) hours' work in any twenty-four (24) hour period or after eight (8) hours' work on the employee's first day of rest, and for all hours worked on the second or subsequent day of rest. Second or subsequent day of rest means the second or subsequent day in an unbroken series of consecutive and contiguous calendar days of rest, which may, however, be separated by a designated paid holiday.

Last Round of Bargaining

8. The parties current collective agreement has a term of January 1, 2017 to December 31st, 2021.

9. During the last round of bargaining, on October 25, 2017, the employer proposed changes to the language in article 21.17. The employer took the position that this proposal would clarify that employees must work their first day of rest at a rate of time and one-half in order to receive double time for overtime on their second day of rest. A copy of the employer's proposal is attached as **Tab 5**. PSAC did not agree to the proposed changes. Thereafter, bargaining drifted for the next year and no collective agreement was concluded

10. On October 31, 2018, while the parties' were still in bargaining, the employer provided PSAC with a letter setting out its interpretation of article 21.17(b). A copy of this correspondence is attached as **Tab 6**. There was no response from PSAC

[1] Three grievances misidentify clause 21.03 of the collective agreement as the applicable provision. Clause 21.02 applies the Administrative Group, whereas the grievors are part of the Operations Unit to which clause 21.17 applies.

to this letter or at the bargaining table, as PSAC did not intend to bargain this provision.

11. On or about March 19, 2019, the parties concluded a Memorandum of Settlement to renew the collective agreement **(See Tab 7)**.

The Practice of The Parties

12. Prior to the last round of bargaining, the employer's practice was to pay employees who were required to work overtime on their second or subsequent day of rest compensation at double time, regardless of whether they worked overtime on their first day of rest. The employer would say that this has been its practice 's since the introduction of the "6 and 3" shift in 2011. The Union would say this practice has been in place since at least October 1999 when the Municipality took over the airport. There has been no substantive change to the collective agreement language in the overtime provisions since the Municipality took over the Airport in 1999.

13. After providing the Union its October 31, 2018, letter, the employer implemented its interpretation of clause 21.17, whereby, if employees worked overtime on a second or subsequent day of rest, without having worked on the first day of rest, the employer paid compensation at time and one-half.

14. In each of the grievances regarding this provision, the grievors worked overtime on a second (or subsequent) day of rest but not on the first. At issue is the applicable overtime rate.

Submissions of the Parties

Union

[6] The union argues that the proper approach to the interpretation of collective agreements is that the words used by the parties are to be given their ordinary and plain meaning. As well, the provision must be interpreted in the context of the collective agreement as a whole. (*DHL Express (Canada) Ltd. v. CAW-Canada, Local 4215*, 2004 CarswellNat 2975 (Hamilton) at paras. 51 and 54; *Ontario Finnish Resthome Assn. v. S.E.I.U., Local 268*, 2004 CarswellOnt 4541 (Luborsky) at paras. 13 and 15).

[7] The union argues that the clear language of Article 21.17 requires that double time be paid for all work on the second day of rest regardless of whether work was performed on the first day of rest. The union argues that this flows naturally from the language ", and for all hours worked on the second or subsequent day of rest" in that provision.

[8] The union also refers to Article 2 (Interpretation and Definitions), Article 20 (Hours of Work) and several other subsections of Article 21 (Overtime) in addition to Article 21.17.

[9] In the alternative, the union notes that there is a long-standing practice that employees are paid double time for work on the second day of rest when they have not worked the first day of rest (SAF at para. 12). The union urges that this past practice can be used as an aid to the interpretation of the language in Article 21.17 and refers to authorities on the proper use of past practice as an aid to interpretation. (*Drug Trading Co v. United Steelworkers of America, Local 3313*, [1989] OLAA No. 206 (Brown)("*Drug Trading*").

[10] The union requests that the grievances be allowed, that the grievors be appropriately compensated and that I remain seized.

Employer

[11] The employer argues that the proper interpretation of Article 21.17 requires an employee to work on their first day of rest to be eligible for double time on their second day of rest. The employer asserts that a correct interpretation indicates that the parties intended a continuum that flows from one day of rest to another.

[12] The employer argues that each case must turn on the specific and unique wording of the collective agreement and submits that explicit language is required to obtain double time on the second day of rest where the employee did not work on the first day of rest.

[13] The employer cites the following cases and acknowledges that the language in these cases was similar to but not identical to the language in Article 21.17. The employer notes that in those cases where employees received double time on the second day of rest without having worked on the first day of rest, the result was dictated by the specific wording of the collective agreement. *Treasury Board (Public Works Canada) v. Duguay, Re,* 1991 CarswellNat 1991 (Brown); *Earle v. Canada (Treasury Board-Transport Canada)*, 1991 CarswellNat 1733 (CPSSRB); *Treasury Board (Revenue Canada, Customs and Excise) v.Ruffell, Re,* 1989 CarswellNat 1444 (Loudon); *Treasury Board*

(Employment and Immigration Canada) v. Rockwood, Re, CarswellNat 1602 (D'Avignon) and *Treasury Board (Transport Canada) v.Dinney Re,* 1988 CarswellNat 1862 (Young).

[14] The employer requests that the grievances be dismissed since the language does not support the remedy requested by the union.

Decision

[15] For ease of reference, the relevant part of Article 21.17 provides as follows:

> Double (2) time for each hour of overtime worked after sixteen (16) hours work in any twenty-four hour period **or** after eight (8) hours work on the employee's first day of rest**, and** for all hours worked on the second or subsequent day of rest. Second or subsequent day of rest means the second or subsequent day in an unbroken series of consecutive and contiguous calendar days of rest, which may, however, be separated by a designated paid holiday. [emphasis added]

[16] As both parties acknowledge, the specific language of the collective agreement must be given its ordinary and plain meaning. In addition, both parties acknowledge that the parties could have expressed their intentions more clearly in any one of a number of ways.

[17] The word "and" is normally read conjunctively in the sense that it joins two or more conditions or concepts. As stated by Arbitrator Kaplan[2]:

> Normally, "and" is read conjunctively and will not be interpreted as meaning "or" except where the context requires it. Some arbitrators have observed that "and" will only be read as "or" so as to avoid an otherwise "repugnant" result. (See, for example, *Domgroup and RWDSU* 33 LAC (3d) 269 (Jollife)).

[18] The employer argues that "and" should be given its normal grammatical meaning. This approach results in an interpretation that work on the first day of rest is required before work on the second day of rest attracts double time. This is reinforced somewhat

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[2] *Greater Sudbury (City) v. CUPE, Local 4705,* 2008 CanLII 68881 (ON LA) ("*City of Sudbury*"); See also *Ontario Power Generation v. Society of Energy Professionals*, 2015 CanLII 94978)("*OPG*)(ON LA) Burkett).

by the second sentence in Article 21.17. This is a plausible interpretation of the language of the collective agreement.

[19] On the other hand, the union distinguishes the *City of Sudbury* and OPG cases on the basis that they involved lists of preconditions for bumping or inclusion in the bargaining unit respectively. In the union's submission, in this context, giving "and" its normal conjunctive meaning, made sense. On the other hand, the union argues that the context of this case does not require that result since this case concerns conditions that must be met for receiving double time and not a list of conditions.

[20] The union also points out that there is a comma before the word "and" and submits that it breaks the link between the requirements on the first day of rest and the second day of rest. The union asserts that the parties must have intended something by the use of the comma and the union argues that it is clear that this was to separate the two conditions for receiving double time on days of rest.

[21] In the same way that "and" must be given its ordinary grammatical meaning, so too must the use of a comma before "and". Although neither party referred to the vexing and complicated grammatical rules concerning the use of commas, the union's approach is also a very plausible interpretation of the collective agreement.

[22] I have carefully reviewed the other provisions of the collective agreement that were referred to by the parties and particularly Article 21.03(a) and (b). This is the analogous provision to Article 21.17 in respect of the Administrative Group. There is nothing in them that sheds light on which of the two interpretations urged on me by the parties makes the most sense and other than a cursory review, neither party made detailed submissions to suggest otherwise.

[23] In the result, after giving the words of Article 21.17 their plain meaning with the aid of the normal rules of grammatical usage and in the context of the collective agreement as a whole, I am left with two equally plausible interpretations of the collective agreement.

Past Practice

[24] This brings us then to the union's argument that the past practice between the parties should be used as an aid to interpretation of the collective agreement. Such extrinsic evidence may be relied on as an aid to interpretation where "there is no clear preponderance in favour of one meaning stemming from the words and structure of the collective agreement…".[3]

[25] I have found that applying the normal grammatical meaning to "and" and the comma before it and considering the language and structure of the collective agreement as a whole, there is no clear preponderance in favour of the meaning asserted by either party. Therefore, extrinsic evidence in the form of past practice can be resorted to in this case as an aid to interpretation.

[26] The SAF is clear that, since at least 2011, and possibly as far back as 1999, the employer paid double time for all hours worked on the second day of rest regardless of whether work was performed on the first day of rest. This shared common understanding formed the basis for the application of Article 21.17 for many years and through at least several collective agreements. In the absence of a clear preponderance in favour of one meaning stemming from the words and structure of the collective agreement, I accept and declare that this shared meaning is the proper interpretation of Article 21.17.

[27] For all of the above reasons, the grievances must be allowed and the employees are entitled to be compensated accordingly. As requested, I remain seized in the event that the parties encounter any difficulties in implementing this award.

Dated at Toronto Ontario this 27th day of November 2020.

Larry Steinberg

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[3] *John Bertram and Sons Co. Ltd. and International Association of Machinists, Local 1740* ("Weiler"), quoted at para. 21 of *Drug Trading*.