IN THE MATTER OF AN ARBITRATION

BETWEEN

BELL TECHNICAL SOLUTIONS

("Company" or "BTS")

and

UNIFOR ("Union")

National Policy Grievance No. BTS-ON-18-01
(Island Days)

SOLE ARBITRATOR: James Hayes

APPEARANCES

For UNIFOR:

Micheil Russell, Counsel
Tyson Siddall, Telecommunications Director
Shawn Cowan, Local 43
Jim Fling, Local 34-O
Colum Lynn, Local 1996-O
Jeff Mark, Local 47

For BTS:

Maryse Tremblay, Counsel
Mireille Bergeron, Human Resources and Communications Director
John Kearney, Senior Manager, Field Operations
Mark Olmstead, Director, Field Operations: Ontario Central and Structured Cabling
Laura-Lee Hamilton, Senior Manager, Labour Relations
Also present in 2019:
Patrick Gendron, Director, Workforce Management and Logistics Delivery
Glen Belmore, Senior Manager, Workforce Management

Hearings: April 12, September 23, November 25, 2019; April 26, 28, 30, 2021

AWARD

Introduction

1. This decision addresses a policy grievance about whether *all* Regular Full-Time employees are entitled to have consecutive days of rest (CDORs) regardless of their schedules within each two-week period of work.

2. At issue is the interpretation of Article 16.02(d) of the Collective Agreement. This clause was amended in the most recent round of collective bargaining.

3. UNIFOR takes the position that the amendments were made, specifically, to reverse a 2012 arbitration award ("Herman Award") that interpreted the then-existing provision to allow the Company to schedule single days of rest (colloquially referred to as 'island days') without a guarantee of CDORs. *Bell Technical Solutions,* 2012 CarswellOnt 4012 (Herman).

4. The Union further takes the position that, if it is wrong in its interpretation of Article 16.02(d), BTS is estopped from relying on the strict language of the provision based on the bargaining history. UNIFOR submits that, because the Company remained silent in negotiations on the amendments to Article 16.02(d), the Union can rely upon that silence as signifying agreement to the Union's position.

5. BTS responds that a plain reading of the Collective Agreement and its context in the Collective Agreement indicates that CDORs are only guaranteed in the limited circumstances where a Full-Time employee's hours have been averaged over a two-week period. The Company says that its interpretation is reinforced when compared to the clarity of language used in granting Part-Time employees CDORs in Article 16.04(k). It further maintains that the Union has not made out the essential legal elements required to ground an estoppel.

Relevant Contract Language

6. Article 8.03 states:

"Regular Full-Time Employee" is defined as an employee who has Regular Full-Time status and who works forty (40) hours per week.

7. Article 16.01 reads in relevant part :

a) "Basic Hours of Work" means the number of hours worked per day and per week as established by this Article.

b) The arrangement of hours for all tours of duty shall be composed of consecutive hours and established by the Company. Such hours and tours will be posted on an eight (8) week schedule.

c) The hours of work may be assigned to a tour of duty on any day of the week according to the requirements of the job.

8. Article 16.02 reads in relevant part:

a) The basic hours of work for a Full-Time employee shall be eight (8) hours. However, when job requirements dictate, a Full-Time employee may work ten (10) hours per day when mutually agreed upon by the employee and their Operations Manager.

b) The basic hours of work for a Full-Time employee shall be forty (40) hours per week on the basis of five (5) days. However, the basic hours may be averaged over a two (2) week period on the basis of ten (10) days totaling eighty (80) hours. Whenever four (4) days of ten (10) hours are scheduled as per Article 16.02 (a), the basic hours may also be spread over a two (2) week period consisting of eight (8) days of ten (10) hours.

c) ***

d) i) **Where a Full-Time employee does their normal tour of duty spread over a two (2) week (80 hour) period, their rest days shall be consecutive to another rest day.**

ii) **It is understood that Sunday for an RFT-1 is still considered to be a day of rest (DOR).**

e) Regular Full-Time (RFT) employees as defined in Article 8.03 are divided in three (3) classifications:

i) RFT-1: This classification will constitute fifteen percent (15%) of the employees within the common locality that shall not be scheduled on Sundays or on two (2) consecutive Saturdays. **It is understood that Sunday for an RFT-1 is considered to be a rest day.**

ii) RFT-2 ….

ii) RFT-3….

9. Article 16.03(f) reads:

> **Where a Full-Time employee works four (4) days per week of nine (9) hours per day, the additional rest day shall be consecutive to another rest day.**

10. Article 16.04(k) reads:

> For each posted eight (8) week schedule, a Regular Part-Time employee will be allowed two (2) scheduled rest days per week. **Once per pay period, the two (2) scheduled rest days will be consecutive.** These scheduled rest days will be confirmed DD-7.

(emphasis above added throughout)

Facts

11. Given the accepted imperative that BTS offer customer service on weekends, scheduling is a significant issue for both parties. The Collective Agreement includes all manner of scheduling options and restrictions typically tailored to full-time and part-time classifications. For obvious reasons, the assignment of days of rest is important to employees.

12. As previously noted, UNIFOR arbitrated a grievance in 2012 that challenged the right of the Company to schedule a single day of rest for regular full-time employees.[1] The grievance was dismissed.

13. The key provision in dispute at that time was Article 16.15(a) which read:

> Where a regular full-time employee does his normal tour of duty spread over a two (2) week (80 hour) period, his rest day shall be consecutive to another rest day.

14. Shawn Cowan and Tyson Siddall gave the Union evidence concerning the 2018 negotiations. Mireille Bergeron, Mark Olmstead, and John Kearney did the same for BTS. Mr. Siddall and Ms. Bergeron were the chief spokespersons. They all testified

[1] Herman Award, para.1

with the benefit of contemporary notes taken by designated note-takers. While not *verbatim,* the parties' separate notes were intended to be comprehensive.

15. There is no dispute that the Union tabled. and highlighted in yellow, a proposed change to the existing Article 16.15(a) -- now Article 16.02(d) i) – on three occasions. The proposed change could not have been simpler. That is, the letter **'s'** was added to the first "day" in Article 16.15(a). The parties agreed to the current language of Article 16.02(d) on January 27 although the Company questioned the addition of clause (ii); it saw the addition as redundant given the second sentence of Article 16.02(e) i), a provision that remained unchanged.

16. The witnesses sharply differed however as to what was said by the Union when proposed amendments to Article 16.02(d) were discussed.

17. Both Union witnesses testified that, when the Article 16.02(d) proposal was introduced on January 12, Mr. Siddall explained that this was an important issue about CDOR for all full-time employees. Mr. Siddall testified that he emphasized by tone of voice the word 'days' on every date the issue came up and that he had been even more clear on January 25. The Union notes for that day record that Mr. Siddall said:

> Skip to 16.02 d) 2 is new language understood that Sunday for RFT 1 is still considered as a day of rest. Let me be very clear we did put the s back on to DAYS of rest to be consecutive to one another.

Mr. Siddall testified that this excerpt did not record the additional phrase "in a pay period" that he had added at the end of the last sentence. Both men said that the CDOR purpose of this proposal was also explicitly flagged by the Union on January 27th.

18. In cross-examination, the Union witnesses conceded that at no time had there been mention of the Herman Award or its intended reversal or any reference to "island days". Mr. Siddall agreed that he did not state, when speaking of CDORs, that

they would apply to all employees regardless of schedule. He agreed that the Union had never sought to eliminate the first part of the Article 16.02(d) i) sentence, explaining that "we didn't touch it because it says 'spread' not 'averaging'. Both witnesses accepted that the Union bargaining notes did not record all their present memories as to what had been said.

19. All the BTS witnesses recalled the negotiations on this point differently. They were adamant that the Union had not pointed out or provided any explanation as to why it was proposed to add another 's' to Article 16.02(d). Nor, they said, did they notice that this had been done. They did not recall any discussion of CDORs for full-time employees on January 12 or on any later date. They said that there had been no mention of the Herman Award, or, that the purpose of the proposed Article 16.02(d) amendment was to eliminate the single date of rest for full-time employees in all cases. Ms. Bergeron commented that, if Mr. Siddall had emphasized the word 'days', she would have made nothing of it as many things were emphasized. She agreed to what she saw as the redundant language of Article 16.02(d) ii) as an attempt to remove irritants on the Union side; it made no difference, "at some point you have to agree and move on". The Company witnesses all observed that the BTS bargaining notes contained no references anywhere to the CDOR issue for full-time employees. Neither did the occasional BTS-prepared summaries of what progress the parties had made to points in time; by way of contrast, CDORs for part-time employees were identified.

20. At the various ratification meetings, the Union stressed its achievement of CDORs for all full-time employees. The Collective Agreement was ratified by only 13 votes. The instant dispute materialized immediately. The Union alleges that, at the Labour Relations Committee meeting in May, the Company stated that "we know what was negotiated but we just can't make this work". Ms. Bergeron had quite a different recollection. She said that CDORs for full-time employees in all cases was never contemplated by her side. The Company did try to find a solution anyway but was not able to do so.

Submissions

21. UNIFOR submits that the Herman Award provides the essential context that should inform any analysis, referring to *City of Sault Ste. Marie,* 2014 CarswellOnt 17774 (Hayes) and *Halton Recycling Ltd.* (2019), 301 L.A.C. (4th) 67 (Price). It points to an e-mail sent by Mr. Siddall to Ms. Bergeron and Mr. Olmstead just prior to implementation of the renewed Collective Agreement, for a statement of its understanding and core legal position. This April 27, 2018 e-mail included the following:

> With respect to 'island DORs' and the uproar throughout the province. The change in 16.02 d) i) and addition of 16.02 d) ii) were done to reverse the decision in the 2013 arbitration.
> [16.02 d] i) was set out]
> Every employee is scheduled their normal tour over a two week period. That is how the employees are paid. Hence all RFTs shall have their rest days consecutive to one another. Going forward there will no longer be island rest days for RFTs.
> [16.02 d] ii) was set out]
> This further solidified that an RFT1 would have a rest day attached to a Sunday. We maintained throughout our 'road show' of the agreement that all employees in Ontario could be scheduled weekends by seniority, but consecutive days of rest were reinstated for Full=Time employees, and once a pay period for Part-Time employees. We did not negotiate a greater benefit for Part-Time employees.

Stated shortly, UNIFOR asserts that the first sentence of Article 16.02(d) i) captures *all* schedules assigned to full-time employees; whatever those scheduled shifts may be, they are "spread" over the two-week pay period.

22. The Union emphasizes that the relevant proposal(s) were presented in highlighted form on three occasions. The crucial point is that they were accepted without amendment. UNIFOR submits that its witness testimony was supported by specific recollections and more complete, if not perfect, bargaining notes. The Union CDOR proposal may have caused problems for BTS but was doable. It is inconceivable that these agreed-upon changes to the Collective Agreement amounted to nothing.

23. In the alternative, referring to *Re Hallmark Containers Ltd.,* (1983), 8 L.A.C. (3d) 4 (Burkett) and others[2], UNIFOR raises an estoppel. Agreement to a contract amendment is obviously intended to affect legal relations. It says that Union negotiators had said enough at the bargaining table to constitute a representation that required an articulated negative response -- if its characterization of the purpose of the proposal was not accepted. Detrimental reliance is established here because the Union lost its chance to protect its position when BTS remained silent at the bargaining table. In this situation, the Company may not now insist upon satisfaction of what BTS defines as the Article 16.02(d) i) precondition.

24. BTS defends with elementary principles of contract interpretation [3] and emphasizes the wording of Article 16.02(d) i) -- "where a Full-Time employee does their normal tour of duty spread over a two (2) week (80 hour) period…..".

25. BTS describes this language as setting a necessary precondition for CDOR entitlement. The Company maintains that the sub-Article has no application to full-time employees assigned basic hours of work, those working 5 days in a two-week period. Article 16.02(d) guarantees CDORs only to those employees whose hours are averaged, that is, spread over two weeks. BTS makes no distinction between "averaged" and "spread" and notes that neither did Arbitrator Luborsky in *Bell Technical Solutions* (Cowan) 2014 CarswellOnt 12868 at para. 10. It is only full-time employees -- such as those working 4X6 or 6X4 shifts over the two-week period -- who trigger CDOR entitlement under Article 16.02(d) i). Not those working basic hours on 5X5 shifts.

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[2] Re Cominco Ltd., (1996), 57 L.A.C. (4th) 36 (Larson); *Re TRW Canada Ltd.,* (2001), 95 L.A.C. (4th) 129 (Newman);

[3] *Board of School Trustees of School District No.75,* 2002 CarswellBC 4290 (Foley) at paras. 49-50; *Brock University,* (2014), 243 L.A.C. (4th) 240 (Knopf) at para. 46; *Park Lane Chevrolet Cadillac Limited,* 2017 CarswellOnt 12676 (Stout) at para. 84.

26. BTS submits that the provision is clear and that its meaning may be easily divined without recourse to extrinsic evidence. These parties know how to confer specific CDOR entitlement when they intend to do so. Counsel points to Article 16.03(f) and asks rhetorically: if full-time employees are entitled to CDORs regardless of schedule, why is this provision needed? The Company points as well to Article 16.04(k) for part-time employees.

27. The Company also suggests that the Union has misread the Herman Award. The reference to the singular 'day' is an ancillary observation. The main basis for the conclusion, at para. 18, was the recognition that, in contrast to RFTs, RPTs were plainly entitled to "two (2) consecutive days of rest each week". If the parties had intended that to be the case for all RFTs, they could have said so.

28. The Company further submits that the bargaining history evidence does not support a finding of estoppel. Citing numerous authorities, BTS says that the quality of such evidence is critical. The evidence must be such that the other party (BTS) is "fully aware" of the first party's (UNIFOR) position before it may be reasonably concluded that there was a shared assumption.[4] The witnesses all agree that no mention of the Herman Award was ever made by the Union. They also agree that the Union never stated that it intended to secure CDORs for all full-time employees no matter their schedules. There is no mention anywhere in the notes of "in a pay period", a concept imported by the Union to support its broad interpretation of Article 16.02(d) i). When the Company commented that Article 16.02(d) ii) was redundant and made no difference, the parties simply moved on. It is also notable that the BTS Bargaining Update about the Tentative Agreement, prepared for Manager Roadshows, made specific reference to CDORs for part-timers but not for full-time employees. BTS says that this omission, and its previous omission from

[4] *Victoria Times Colonist,* (2010), 203 L.A.C. (4th) 297 (Germaine); *Fort Garry Care Centre,* 2002 CarswellMan 630 at para. 89 (Hamilton) at paras.62-63; *Dare Foods Limited,* (2004), 128 L.A.C. (4th) 331 (Beck) at para. 53; *Re Sudbury District Roman Catholic Separate School Board,* (1984), 15 L.A.C. 284 (Adams) at para. 19; *Health Employers Assn. of British Columbia* [2018] B.C.A.A.A. No. 89 (Hall) at paras. 44, 49; *West Fraser Mills,* (2017), 286 L.A.C. (4th) 382 (McPhillips) at para. 79; *Acadia Toyota,* (2017), 281 L.A.C. (4th) 280 (Doucet) at paras. 39-42.

contemporaneous bargaining updates, demonstrates plainly that the Company never shared an understanding with UNIFOR as to the meaning of Article 16.02(d).

29. In reply, the Union asserts that Article 16.02(b) provides a guarantee of hours and is not about an ordering of shifts; that is, it should be seen as guaranteeing 80 hours of work that may be averaged over two weeks and no more than that. As such, the Union submits that it provides no assistance to the Company's position that Article 16.02(d) i) contains a precondition. Basic hours may be "spread" over two weeks whether or not the spread of shifts is unequal. Citing *Windsor Essex Community Care Access Centre* 1999 CarswellOnt 7405 (Levinson), UNIFOR also emphasizes that it bears no onus, as the grieving party, when interpretation of collective agreement language is required.

Discussion

30. Counsel do not contest the well-established principles of collective agreement interpretation.

31. Words should be given their plain meaning but read harmoniously within their collective agreement setting. Contextual evidence is admissible but should not be permitted to overwhelm the contract language adopted by the parties.

32. Turning first to the provision at issue.

33. I prefer the Company's straightforward approach to interpreting Article 16.02(d), an approach that is consistent with but not dependent upon the prior Herman Award.

34. There is no question that Article 16.02(a) and (b) provide basic hours of work for full-time employees, what Union counsel calls a guarantee. On the other hand, those same provisions also speak directly to the averaging/spreading of 80 hours over two-week periods whenever four days of 10 hours are scheduled. Both words, "averaged" and "spread", are used.

35. The clauses do more than set basic hours of 40 hours per week and 80 hours over two weeks. Article 16.02(b) explicitly authorizes the "spread" of such hours over a two-week period where 10-hour days are involved. It is in this clause that the word "spread" first appears. Article 16.02(d) follows immediately thereafter. I have no difficulty in concluding that the same word "spread" should be interpreted in that specific context. Accordingly, I read Article 16.02(d) i) as containing the precondition asserted by the Company. That is, to qualify for CDORs, a full-time employee must have performed a tour of duty that is not "normal" in the sense of 40 hours per week on the basis of 5 days.

36. Notwithstanding the creative Union submissions powerfully advanced, they require accepting the proposition that changing the word "day" to "days" in Article 16.02(d) i), married to the fresh addition of Article 16.02(d) ii), was sufficient to overturn the Herman Award. To some extent that submission may be arguable. But, with respect, it should not be that difficult to identify CDOR entitlement for full-time employees. If that had been the parties' mutual intention, all that would have been required was to confer a specific right to CDORs for all full-time employees no matter their schedules. No drafting artifice required. Done directly. The parties did so for Regular Part-Time employees in Article 16.04(k). Article 16.03(f) does likewise.

37. I turn now to the estoppel issue. UNIFOR argues that, even if its interpretation of Article 16.02(d) is incorrect, the Company should be precluded from denying the claim.

38. The requirements to establish an estoppel are equally well known. Where it is clearly established that negotiating parties shared an understanding of the interpretation or application of a particular provision, one may not resile therefrom to the detriment of the other. It is accepted that silence may give rise to the conclusion that agreement had been reached. However, such agreement should not be easily implied.

39. All witnesses in this case testified honestly to the best of their abilities in my opinion. And they were all tested in searching cross-examinations. Nevertheless. on the fundamental point at issue, there was no agreement. Union witnesses were resolute in their recollection that the CDOR purpose of amended Article 16.02(d), for all full-time employees, was stated plainly on more than one occasion at the bargaining table. Company witnesses testified otherwise.

40. One might think such a discrepancy to be highly improbable given the experience of the BTS and UNIFOR negotiators at the bargaining table. This is a long-standing, mature relationship and involved significant proposals for the renewal of a complex Collective Agreement. Detailed bargaining notes were taken by both parties. How could this happen?

41. The simple point is that it does. Ostensibly credible witnesses may be entirely mistaken particularly when ascribing the intentions of others. Misunderstandings do occur and collective bargaining, where parties are frequently negotiating many issues at once, makes for a fertile incubator. Arbitrator Kevin Burkett, long ago, expressed this useful caution:

> However, a board of arbitration must be mindful of the dynamics of the bargaining process in assessing evidence of this type tendered for this purpose. The difficulty lies in the fact that each party approached the bargaining table with its own agenda and its own expectations which may colour its understanding of what has transpired. If evidence of negotiating history is to establish and resolve a latent ambiguity it must establish that the parties were of a single mind as to the meaning and application of the language in dispute. Evidence of one side's expectation or of one side's understanding is not evidence of agreement and a board of arbitration must be sensitive to this essential distinction when relying on evidence of negotiating history as an aid to ascertaining the intention of the parties.
>
> *Re Hallmark Containers Ltd., supra,* at p.122

The same admonition is equally applicable to assertions of estoppel.

42. *Hallmark* provides another useful lesson that has been accepted by many arbitrators since. Silence may constitute assent to a particular interpretation, but that interpretation must have been clearly stated. There is no room for guesswork.

> ...company silence at the bargaining table, *after a full explanation as to the union's understanding of the language at issue has been made,* may constitute a company representation to the effect that it agrees with the union interpretation. Where, as in this case, the company silence is followed by a written acceptance, we have no doubt that a representation exists….
> The conduct of the company had the effect of denying the union the opportunity to clarify or rewrite the language to reflect its understanding of the meaning of the clause.
>
> (italics added)

43. I have considered the evidence very carefully but, in the final analysis, reach the same conclusion as did Arbitrator George Adams in another early decision in this area:

> Having regard to the nature of collective bargaining negotiations, I am unwilling to find that the representation has been made out, on the balance of probabilities, by sufficiently clear and unequivocal evidence to permit the grievance to succeed. As I pointed out above, collective bargaining negotiations are conducted under considerable pressure and often, as in this case, agreements are arrived at under physically trying circumstances. *In collective bargaining negotiations much is said and much can be misunderstood or misinterpreted. But what should be clear to parties involved in the process is that the language they have achieved in their agreements is the language on which they must generally rely. More substantial and concrete evidence of an oral representation is required than was adduced before me in order to avoid the express terms of an agreement.*
>
> (italics added)
>
> *Re Sudbury District Roman Catholic Separate School Board, supra.,* at para. 19.

44. Notwithstanding the genuine belief of both Union witnesses, I am unable to find on a balance of probabilities that their intended message was received by Ms. Bergeron and her team, let alone that it was accepted. While hindsight is easy, and no criticism is intended, it would be fair to describe the Union's approach to achieving CDORs for all full-time employees as opaque. It relied upon the addition of an 's' to

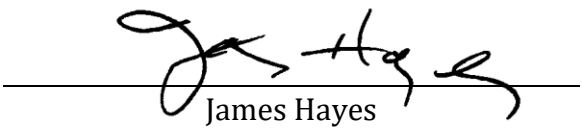
Article 16.02(d) i) accompanied by an arguably redundant ii). The amendment may well have been presented with verbal emphasis but no mention at all was made of the Herman Award or its intended reversal. While the Union bargaining notes for January 25th included the "let me be very clear" reference, the BTS notes did not. Nor did the Union notes record Mr. Siddall's recollection that he included a reference to "in a pay period", a phrase supportive of the UNIFOR interpretation of the Article. The Company witnesses flatly denied that they understood what the Union had intended to achieve by the proposed amendment. They rejected any suggestion that they had ever agreed to CDORs for all full-time employees regardless of schedule. There is no reasonable basis to disbelieve them. It is my further assessment that the statement attributed to Ms. Bergeron at the post-ratification Labour Relations Committee meeting must have been misunderstood if anything like that were stated.

45. In short, I am unable to find on the evidence that there was a shared understanding of the meaning of Article 16.02(d) and that the Company was estopped from taking the position that it has done. The Grievance must therefore be determined based on the contract language as written. I have earlier explained that, in my opinion, the language does not support the Union interpretation.

Disposition

46. The Grievance is dismissed.

Dated at Bracebridge, this 19th day of May, 2021.



James Hayes