Court of Queen's Bench of Alberta

Citation: Canadian Pacific Railway Company v Canadian Railway Office of Arbitration, 2016 ABQB 179

Date:
Docket: 1403 18059
Registry: Edmonton

Between:

Canadian Pacific Railway Company

Applicant

- and -

Christine Schmidt (Arbitrator for the Canadian Railway Office of Arbitration) and Teamsters Canada Rail Conference - Maintenance of Way Employees Division

Respondents

Reasons for Judgment
of the
Honourable Madam Justice D.A. Sulyma

I. Introduction

[1] The Employer, Canadian Pacific Railway Company (CPR) and the Union, Teamster Canada Rail Conference – Maintenance of Way Employees Division (the Union) are parties to a collective agreement (the collective agreement), with a term commencing January 1, 2013, that sets out terms and conditions of employment for the Union members working at CPR (Record of Proceedings, Tab 6). CPR is a federal undertaking and the Union is the exclusive bargaining agent for CPR employees who work on track repair, track maintenance, track rehabilitation, bridges, and track infrastructure (engineering employees). The parties are governed by the *Canada Labor Code*, RSC 1985, c L-2 (the *Code*) with respect to labour relations matters.

[2] The Union filed a grievance alleging that CPR is in breach of their collective agreement by interpreting and applying its terms so as to force employees to perform overtime work. CPR asserted it is within its rights to mandate employees to work overtime up to the 48 - hour maximum. In her decision issued June 27, 2014, the *Canadian Railway Office of Arbitration & Dispute Resolution, Case No. 4316* (the Decision), Arbitrator Christine Schmidt (the Arbitrator) agreed with the Union.

[3] CPR filed this application for judicial review with the Court of Queen's Bench of Alberta on December 18, 2014, contending that the Decision is unreasonable. The Union takes the view that the Decision is a reasonable interpretation of the collective agreement, is not amenable to judicial review, and that any concerns with the Decision ought properly to be remedied at the bargaining table.

II. Facts

[4] A dispute between the parties arose as to the interpretation and application of collective agreement terms governing overtime. CPR decided to treat overtime as mandatory after an admittedly long history of assigning overtime to employees on a voluntary basis through a seniority-based, roster process set out in the collective agreement. The Union grieved. The grievance process within the collective agreement, required by s 57(1) of the *Code*, did not resolve the dispute.

[5] A grievance that is not settled by the dispute resolution mechanism under the collective agreement "...may be referred by either party to the Canadian Railway Office of Arbitration and Dispute Resolution for final and binding settlement without stoppage of work" (Article 15.15, Record of Proceedings, Tab 6).

[6] The parties to this collective agreement, as well as other employers and unions in the railway industry, are parties to the Memorandum of Agreement Establishing the Canadian Railway Office of Arbitration (the Memorandum) which has been in force since 1965 (Record of Proceedings, Tab 5). The signatories to the Memorandum appoint a roster of arbitrators to the Canadian Railway Office of Arbitration (CROA) to resolve their labour disputes (Record of Proceedings, Tab 5, paras 3-6).

[7] The Union referred the dispute to this arbitration process that is designed specifically by employers and unions within the railway industry to achieve a final and binding resolution of work place disputes.

[8] The parties proceeded by filing written submissions and adducing evidence. Both the *Code* and the terms of the Memorandum contemplate an informal process, with wide latitude for receipt of evidence; an expeditious process where the decision must generally be rendered within 30 days; and the issuance of a final and binding decision.

III. Terms of the Collective Agreement and the *Code*

[9] The applicable terms of the Collective Agreement are found in Article 3:

SECTION 3

OVERTIME, CALLS AND WORK ON REST DAYS

3.1 Except as otherwise provided, when employees are required to work in excess of eight (8) hours per day or on regularly assigned rest days ... employees shall be paid for overtime on an actual minute basis at the rate of time and one half.

For overtime work, the senior employee regularly performing the work will be called.

...

(a) For overtime work on any particular track section the following order of call will be utilized:

First Employee — TMF on that section, if unavailable the ATMF, if unavailable the LTM, if unavailable the TM/TD (if qualified), if unavailable the Track Maintainer (if qualified). If there is no qualified employee available from the track section affected, a qualified employee from the mobile crew on that assigned territory will be called, in the same order as above. If unavailable from the mobile crew, then a qualified employee from the closest adjoining section to the work location or the suspected trouble area will be called, in the same order as above.

Second Employee — TM/TD on the track section affected.

Additional employees — will be called, based on Track Maintainer seniority from that track section. If further additional employees are required they shall be called in the same order as above from the following:

- mobile gangs on the assigned territory, if any
- employees from the closest adjoining section on that seniority territory
- other track employees from the seniority territory

Note: In cases of urgency (train delay) requiring track section forces, a qualified employee, who can respond to the service requirement at least ten (10) minutes sooner than the senior employee, will be called.

(b) For overtime work and call out procedures for Structures employees, the following order of call will be utilized:

First Employee

(i) If a callout problem is not known the senior Structures Forman working as such at the headquarter location on the territory where the problem occurs. If unavailable the next senior qualified employee from the Structures Foreman's list at the headquarter location on the territory where the problem occurs. If unavailable then proceed to Additional Employees callout procedures listed below.

(ii) If a callout problem is known, the senior qualified employee regularly performing the work will be called.

Additional Employees - will be called from the Bridgeman seniority list at the location if qualified in seniority order. If no qualified employees are available at the location, additional qualified employees will be called from the Seniority Territory as per Appendix D of Wage Agreement 41 where applicable...

3.5 An employee called in case of emergency or a temporary urgency outside of their regularly assigned hours, after having been relieved, shall be paid a minimum of three (3) hours at overtime rates for which three (3) hours of service may be required, but for such minimum shall not be required to perform work other than that of the emergency, and possibly another emergency which might arise subsequent to time of call. If, however, employees are called to commence work less than two (2) hours before regular starting time, the time will be computed continuously with the regular day's work, and the time before the regular starting time shall be paid for at the rate of time and one-half on the minute basis.

3.6 An employee who is called by the Company for overtime work pre- arranged or otherwise and accepts a call, will be paid one (1) hour at punitive rates if such a call is cancelled prior to their leaving home ...

After Hours and Weekend Response

3.12 Opportunity will be provided for two (2) or possibly three (3) qualified employees from designated mainline subdivisions to be placed on call on the following basis:

- positions will be awarded on a senior may basis
- Employees on call are only to be called if the Company is unable to secure adequate qualified staff after exhausting the callout procedures, currently specified within the Collective Agreement.
- On call employees cover entire subdivision or terminal.

[10] The relevant provisions of the *Code* are:

Hours of Work

Standard hours of work

169 (1) Except as otherwise provided by or under this Division

(a) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and

(b) no employer shall cause or permit an employee to work longer hours than eight hours in any day or forty hours in any week.

Averaging

(2) Where the nature of the work in an industrial establishment necessitates irregular distribution of the hours of work of an employee, the hours of work in a day and the hours of work in a week may be calculated, in such manner and in such circumstances as may be prescribed by the regulations, as an average for a period of two or more weeks.

...

Modified work schedule

170 (1) An employer may, in respect of employees subject to a collective agreement, establish, modify or cancel a work schedule under which the hours exceed the standard hours of work set out in paragraph 169(1)(a) if

(a) the average hours of work for a period of two or more weeks does not exceed forty hours a week; and

(b) the schedule, or its modification or cancellation, is agreed to in writing by the employer and the trade union.

...

Maximum hours of work

171 (1) An employee may be employed in excess of the standard hours of work but, subject to sections 172, 176 and 177, and to any regulations made pursuant to section 175, the total hours that may be worked by any employee in any week shall not exceed forty-eight hours in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in the industrial establishment in or in connection with the operation of which the employee is employed.

Averaging

(2) Subsection 169(2) applies in the computation of the maximum hours of work in a week prescribed under this section.

Maximum hours of work

172 (1) An employer may, in respect of employees subject to a collective agreement, establish, modify or cancel a work schedule under which the hours exceed the maximum set out in section 171 or in regulations made under section 175 if

(a) the average hours of work for a period of two or more weeks does not exceed forty-eight hours a week; and

(b) the schedule, or its modification or cancellation, is agreed to in writing by the employer and the trade union.

IV. Issue

[11] The issue is whether the Arbitrator arrived at a reasonable decision in finding that overtime is not mandatory under the collective agreement regime governing CPR and the Union.

V. Standard of Review

[12] The parties are agreed that the standard of reasonableness applies to the Court review of the Decision. However, it is useful to recall the seminal decisions bearing on this question.

[13] The reasonableness standard of review applies to an arbitrator's interpretation of the collective agreement: ***Alberta Health Services v Alberta Union of Provincial Employees***, 2013 ABCA 243 [***AHS v AUPE***] at para 10. The policy reasons for this standard of review are that labour arbitration boards have specialized expertise regarding labour relations, the resolution of employment-related disputes, and the interpretation of collective agreements, since they are "uniquely placed to respond to the exigencies of the employer-employee relationship" (***Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals***, 2011 SCC 59, at para 49; paras 42, 45-53). Further, the reasonableness standard maintains the integrity of the labour arbitration process and duly respects the legislative will and the parties' choice to

have labour arbitration boards resolve such disputes (***Dunsmuir v New Brunswick***, 2008 SCC 9, [***Dunsmuir***] at para 27 (TAB 5)).

[14] Union counsel offered extensive submissions on the standard of review applicable in this case, and I am grateful for her assistance. In the collective bargaining relationship between the Union and the Employer, there is a privative clause in the *Code*, and the parties have agreed to a privative clause in their Memorandum of Agreement Establishing the CROA & DR (Record of Proceedings, Tab 5). That Memorandum sets up an Office of Arbitration, a roster of arbitrators, and a process for resolution of disputes. At para 15, the parties have agreed that each "...decision of the arbitrator which is made under the authority of this agreement shall be final and binding upon the Railway, the bargaining agent and all the employees concerned."

[15] With respect to CROA decisions, and in particular, in respect of an arbitration decision involving these parties, this Court has applied a reasonableness standard of review: ***Teamsters Canada, Rail Conference Maintenance of Way Employees Division v Canadian Pacific Railway Co***, 2008 ABQB 769. The Court there noted, at para 18, that there are two privative clauses, the one in the Memorandum noted above and one in the *Code*. The purpose of the CROA arbitration process is "to encourage efficient resolution of disputes", and "[t]he CROA process ... incorporates significant expertise in labour policy and interpreting the collective agreement between the Union and CPR" (at para 18).

[16] The Supreme Court of Canada has articulated the approach to application of the reasonableness standard in ***Dunsmuir*** at para 47. The reasonableness standard involves asking whether there was justification, transparency and intelligibility in the decision-making process, and whether the decision falls within the range of outcomes that is defensible with respect to the facts and the law:

> Reasonableness is a deferential standard animated by the principle that ... certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[17] Later, in ***Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)***, 2011 SCC 62, [***Newfoundland Nurses***] the Supreme Court elaborated on the reasonableness standard when applied in reviewing an arbitration decision. The Court, at para 12, emphasized its earlier endorsement of the observation that "the notion of deference to administrative tribunal decision-making requires 'a respectful attention to the reasons offered or which could be offered in support of a decision'". Further, the Supreme Court held that an arbitrator's reasons need not include all of the "arguments, statutory provisions, jurisprudence or other details" or "an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). Rather, all that is required is that the court can "understand

why the tribunal made its decision and ... determine whether the conclusion is within the range of acceptable outcomes" (para 16).

[18] Courts have long held that the fact that there are two competing interpretations of a collective agreement does not change the standard of review. In ***Newfoundland Nurses***, the Court confirmed this principle, at para 17:

> The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay 'respectful attention' to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[19] There are two further established principles for judicial review on the standard of reasonableness in this context that bear repeating. First, the reviewing court should approach the decision "as an organic whole, without a line-by-line treasure hunt for error" and defer to the arbitrator's legal and factual findings: ***Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd***, 2013 SCC 34 [***Irving***] at paras 16, 54. Second, the reviewing Court is not permitted to substitute its "own views as to the proper legal framework" or to substitute its own "preferred" interpretation for that of an arbitrator: ***Irving*** at para 16; ***AHS v AUPE*** at para 16.

[20] The Alberta Court of Appeal weighed in with its views concerning the standard of review issue in the context of an arbitrator's interpretation of a collective agreement in ***United Nurses of Alberta, Local 301 v Capital Health Authority (University of Alberta)***, 2009 ABCA 202 [***United Nurses***]. At para 9, the Court reversed the chambers justice's decision to quash an arbitration decision. The Court held that the chambers justice erred in "analy[zing] the specific reasoning to determine whether there were sufficient defects to render the decision unreasonable" and in "review[ing] the reasons individually and in isolation to find defects that would render it unreasonable" (at para 8).

[21] As well, in ***United Nurses***, the Court explained that the proper approach is to ask "whether taken as a whole 'any of those reasons adequately support the decision'" in that there is a line of analysis that could reasonably lead to the arbitrator's conclusion (at para 8). The test is not "whether the reviewing judge agrees with the interpretation but whether the interpretation given was reasonable; that is, were the reasons intelligible and transparent and the result one of the possible legal outcomes available, not necessarily the most likely" (at para 9).

VI. Analysis

A. The Decision

[22] In the Decision, the Arbitrator commenced her examination of the dispute by setting out the Union's policy grievance, or statement of issue. The grievance was filed following upon a letter from CPR stating that it "...is well within its right to mandate employees to work overtime up to the 48 hour maximum..." as provided for by the *Code*; and information that two employees had been required to work overtime. The Union asserted that CPR's position was in violation of the collective agreement, past practice and the applicable law.

[23] She summarized the position of CPR to be that it asserts that it is "...within its rights to mandate employees to work overtime up to the 48-hour maximum hours as provided for in the Canada Labour Code ... and that the parties' current practice, the case law and arbitral jurisprudence support its position".

[24] The Arbitrator defined the issue as whether "... the Company can mandate bargaining unit employees to work overtime between 40 and 48 hours in a week. The company says it can. The union disagrees."

[25] During the hearing, the Arbitrator posed questions to determine the company practice in assigning overtime where it occurs in the field, in remote locations where it usually is necessary as opposed to where the day-to-day work is performed in the operation of the railway. In response to this question, CPR cited examples that the Arbitrator found "...essentially confirmed that the practice has been that overtime work has been voluntary."

[26] The Arbitrator considered the relevant sections of the *Code*. Section 169(1) states, except as otherwise provided, "(a) the standard hours of work of an employee shall not exceed eight hours in a day or forty hours in a week", and "(b) no employer shall cause or permit an employee to work longer hours than eight hours in a day or forty hours in any week."

[27] The Arbitrator then wrote that the standard hours are modified by exceptions: the averaging of hours under s 169(2) or modified work schedule as set out in s 170. She finds that s 171 provides for hours of work to be worked beyond the standard hours. That section states that an employee may be employed "...in excess of the standard hours of work..." but, subject to the exceptions (ss 172, 176, 177 and regulations under s 175) "...the total hours that may be worked by any employee in a week shall not exceed 48 hours..."

[28] The Arbitrator concluded that the application of s 174 (which provides that when an employee is permitted or required to work in excess of standard hours the employee shall be paid at an overtime rate) means that it is not a violation of the *Code* for an employer to require an employee to work overtime as is necessary, keeping in mind that the employer must maintain standard hours that do not exceed 40 hours in a work week.

[29] The Arbitrator considered the collective agreement provisions that she was referred to by the parties, and an "overtime availability list" implemented by CPR after it had asserted its right to mandate overtime.

[30] Finally, the Arbitrator referred to a letter dated August 18, 2006 sent from the then-Vice President of Labour relations of CPR to the President of the Union after a meeting with the Union (the Wilson Letter). Marked "Without Prejudice", the letter states:

> **Overtime Issues**
>
> With respect to the issue of overtime, CPR maintains the position that overtime is voluntary and thus it cannot force its workers to work overtime. The exception to this position is in the case of emergent situations. Here, CPR believes that it should be able to force employees to work overtime. Clear and effective processes will, however, be required to ensure that all parties have an understanding of when overtime will be required. We suggest that this matter warrants further discussion between CPA and TCRC at the bargaining table.

[31] She noted that two rounds of bargaining have taken place since the letter.

[32] The Arbitrator then reviewed the positions of the parties.

[33] The Union's position was founded on the premise that when it is necessary for employees to work overtime, section 3.1 of the Collective Agreement sets out the process for distribution of that work. If overtime was mandatory, there would be no need for a callout order – the first person called would have to work. Section 3.5 confirms this view since it speaks to an employee's choice of accepting a call. Section 3.12 provides for establishment of voluntary "on call" for overtime work – such employees can only be called once CPR has exhausted the call out procedures in section 3.1. It would be impossible to exhaust the callout procedures if overtime was mandatory, so therefore, it must be voluntary.

[34] The Union also argued that the "Overtime Call Availability List", circulated after this grievance arose, is evidence the front-line supervisors continued to operate on the basis that overtime was voluntary. Finally the Union relied on the Wilson Letter as confirmation of the parties' interpretation of the collective agreement that overtime was voluntary.

[35] CPR relied on arbitral jurisprudence to the effect that where legislative provisions do not determine the question of whether overtime is voluntary or mandatory and the collective agreement does not specifically address the issue, the employer has the right to schedule overtime as needed; in other words, it is mandatory. Unless the agreement provides otherwise, the scheduling of overtime falls within exclusive management rights.

[36] CPR takes a different view of the collective agreement terms. Article 3.1 provides a process to handle overtime calls based on seniority. CPR retains the right to force junior employees to work overtime should the senior employee decline. Article 3.6 does not derogate from that right. Article 3.12 ensures employees required for after-hours and weekend work are available if the calling procedures are exhausted.

[37] CPR concedes that the Company may have taken the position that overtime was voluntary at the time of the Wilson Letter in August 2006, but there was disagreement as to what amounts to an "emergency situation" so further discussions at the bargaining table were needed. CPR pointed out that the Wilson Letter is not part of the collective agreement. In addition, CPR says that its more recent letter has asserted its rights, and the reality in the field shows that overtime is required and is worked whenever necessary. CPR also points to the fact that it has applied for and obtained over 300 Ministerial permits issued pursuant to s 176(2) of the *Code* since 2006, whereby it has been authorized to "require" employees to work in excess of 48 hours per week, without Union objection.

[38] The Arbitrator referred to and relied on a decision of the same tribunal – CROA 1930 – that reiterates the parties, through past practice, may fashion an interpretation of the collective agreement, adopting that decision as follows (at page 13):

> But for the long-standing past practice of the Company, apparently unobjected to by the Brotherhood over many years, by which it treated seasonal employees other than extra gang labourers as reverting to extra gang labourer status if they do not claim permanent employment at the conclusion of their seasonal employment, thereby bringing them within the exception described in Article 10 of the Job Security Agreement, the Brotherhood's argument might have some appeal. **As is well established in the prior decisions of this Office, when a given interpretation of a collective agreement has been knowingly applied**

> **between the parties, without objection or grievance over a substantial number of years, spanning the renegotiation and renewal of the Collective Agreement in unchanged terms, the parties are taken to accept the established interpretation as part of their agreement, and the union which has acquiesced in the interpretation so applied cannot assert some different interpretation by means of a grievance.**
>
> [Emphasis by the Arbitrator]

[39] The Arbitrator then concluded (at page 13):

> Having regard to the relevant provisions of the collective agreement and to the past practice between the parties, I am persuaded that by their conduct and by their words, the parties have made clear their intent that overtime is voluntary.

[40] In addition, the Arbitrator observed (at page 13):

> The nature of the work performed by the bargaining unit employees has not recently changed. Overtime work in the field has gone on for years and I readily accept the Company's contention that its nature is such that it must be performed. Nevertheless, Company representatives, when asked directly, essentially agreed that when overtime "in the field" was required, it has not been compelled. As for the Company's contention that pursuant to articles 3.1 3.6 and 3.12 it reserves the right to require junior employees to work overtime in reverse order of seniority, the Company has never done so, nor does the collective agreement express such a right. According to those present at the hearing, when the call-procedures for required overtime are exhausted, which virtually never happens, no bargaining unit employee has been compelled to work.
>
> The practice of the parties in this case is evidence of their intent as it relates to the nature of required overtime in the collective agreement before me.

[41] The Arbitrator found that the Wilson Letter confirmed the understanding of CPR as to the overtime provisions, reflected in the application of the overtime provisions as voluntary, and had withstood two rounds of bargaining. She found that CPR "...could have been no clearer when it wrote 'CPR maintains the position that overtime is voluntary and thus it cannot force its workers to work overtime'".

[42] The Arbitrator agrees with Mr. Wilson's assertion that processes to ensure when overtime will be required are properly discussions to be held at the bargaining table.

[43] In conclusion, the Arbitrator found (at page 15):

> The collective bargaining implications flowing from the past practice of voluntary overtime pursuant to section 3, confirmed in writing most recently in 2006 by the Company, is that the Company must be taken to accept the interpretation that the Company cannot impose compulsory overtime on employees in the bargaining unit. Whether 300 Ministerial Permits have been issued since 2006 under section 176 of the Labour Code is irrelevant to the issue of whether the Company can impose mandatory overtime on an employee.
>
> For these reasons, the grievance is allowed. I declare that the imposition of mandatory overtime is a violation of the collective agreement.

B. Analysis of Parties' Arguments against applicable standard of Judicial Review

1. Was the Arbitrator's interpretation of the *Code* unreasonable?

[44] Section 174 of the *Code* provides: "...when an employee is required or permitted to work in excess of the standard hours of work, the employee shall, subject to any regulations ...be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages."

[45] CPR argues that section 174 of the *Code* grants the employer a *Code* right to impose mandatory overtime. The Union argues that this section means, as the Arbitrator found (Decision, p 6), that "...it is not a violation of the Code for an employer to require an employee to work overtime". CPR also argues that the other related provisions – ss 166,160(1), 170, 172, and 175 – support its view. CPR argues that the 300 Ministerial Permits obtained under s 176 of the *Code* since 2006 support its argument.

[46] The Union argues that s 174 does not impose an interpretation on the parties' collective agreement. Rather, while the parties cannot agree to lesser rights and benefits than outlined in the *Code*, they can contract to provide greater benefits. Counsel points to s 168(1) of the *Code* which provides:

> 168(1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

[47] The Union argues that section 174 does mandate the required rate of pay for overtime work, as confirmed by the decision of the Quebec Superior Court in ***Teamsters Canada Rail Conference v Schmidt***, 2015 QCCS 3552, [***Teamsters Canada***] at para 56:

> 56 Section 174 CLC has to apply to a weekly average threshold of 40 standard hours of work agreed to in writing by the Union and the Company for all employees, after which overtime at time and a half times their standard rates of pay is mandatory. No other interpretation of the texts is reasonably possible in the respectful opinion of the Court.

[48] In response to the argument concerning the Ministerial Permits obtained by CPR under s 176 of the *Code*, the Union points out that CPR required permits under this section for employees to work in excess of the maximum hours established by the *Code* whether they do so voluntary or mandatorily. Thus, as the Arbitrator found, the existence of the permits is irrelevant to the question of whether overtime is voluntary or mandatory pursuant to the collective agreement. Further, though CPR notes that ss 170 and 172 of the *Code* allow an employer to establish a work schedule exceeding 40 or 48 hours per week, it fails to point out that it cannot do so unilaterally and must instead have union agreement before doing so: ***Teamsters Canada*** at paras 45, 48.

[49] In my view and using a literal interpretation, s 174 allows an employer to require or permit overtime work and sets out the minimum rate of pay for such work. It does not purport to alter the contractual terms of the collective agreement as to assignment of overtime except to the extent that it provides a minimum standard that such overtime work must be paid at time and one-half. Section 168(1) of the *Code* specifically provides that nothing in the *Code* affects any

rights or benefits under contract that are more favourable to the employee than those found under that Part of the *Code*.

[50] The accompanying provisions that contemplate certain work schedules – ss 166, 160(1), 170, 172, and 175 – similarly permit specific schedule formulations and do not change the fundamental import of s 174. It remains necessary to turn to the provisions of the collective agreement to determine what rights and obligations the parties enjoy with respect to overtime.

[51] The Arbitrator's conclusion that s 174 means "...it is not a violation of the *Code* for an employer to require an employee to work overtime" is not unreasonable. Her interpretation of s 174 comports with s 168(1) of the *Code* which protects collective agreement terms that provide superior benefits, such as voluntary overtime. Indeed, if the *Code* were to enshrine the employer right to require overtime regardless of the terms of individual collective agreements, one would expect the use of clear language to do so.

2. Was the Arbitrator's admission and use of extrinsic evidence unreasonable?

[52] CPR argues that the right to require employees to perform overtime work is part of management's rights, and unless the terms of the contract provide that overtime is voluntary, employees are obliged to perform overtime work: Donald J M Brown & David M Beatty, *Canadian Labour Arbitration*, (Toronto: Canada Law Book, 2006) (LabourSource) at §4:2310, 5:3210; ***Sealy (Western) Ltd V Upholsters' International Union, Local 34, Re***, [1985] AGAA No 2, 20 LAC (3d) 45, at para 5. CPR argues that in the absence of express language to the contrary in a collective agreement, overtime work is compulsory. Further, CPR argues that the Arbitrator treated the absence of an express prohibition against mandatory overtime as a justification for the admission of extrinsic evidence, when CPR contends that the collective agreement expressly, clearly and unambiguously says CPR is entitled to require overtime.

[53] CPR emphasizes these words in Article 3.1: "... when employees <u>are required to work</u> in excess of eight (8) hours per day or on regularly assigned rest days ... employees shall be paid for overtime on an actual minute basis at the rate of time and one half" (emphasis added).

[54] CPR relies on ***Lantic Sugar Ltd v Bakery, Confectionary and Tobacco Workers International Union, Local 443, Re***, [1995] NBLAA No 44, 51 LAC (4th) 257 [***Lantic Sugar***].

[55] The Union emphasizes the balance of Article 3.1 which sets out that the CPR will call employees in the following order when the it needs (that is, "requires") someone to work overtime:

> Article 3.1
>
> - The senior employee regularly performing the work will be called;
> - For **work on a particular track section**, employees will be called in the following order:
>   - **First Employee**
>   - first the TMF on that section; if unavailable,
>   - the ATMF; if unavailable,
>   - the LTM; if unavailable,

- the TMJTD; if unavailable,
- the Track Maintainer; if unavailable,
- a qualified employee from the mobile crew in the same order as above:
  - first the TMF on that section; if unavailable,
  - the ATMF; if unavailable,
  - the LTM; if unavailable,
  - the TM/TD; if unavailable,
  - the Track Maintainer; if unavailable,
- a qualified employee from the closest adjoining section in the same order as above:
  - first the TMF on that section; if unavailable,
  - the ATMF; if unavailable,
  - the LTM; if unavailable,
  - the TM/TD; if unavailable,
  - the Track Maintainer

o **Second Employee**

- TMJTD on the track section affected.

o **Additional Employees** called based on Track Maintainer seniority from the track section.

o **Further Additional Employees** from mobile gangs in the following order:

- first the TMF on that section; if unavailable,
- the ATMF; if unavailable,
- the LTM; if unavailable,
- the TM/TD; if unavailable,
- the Track Maintainer.

o Then **Further Additional Employees** from the closest adjoining section in the following order:

- first the TMF on that section; if unavailable, the ATMF; if unavailable,
- a the LTM; if unavailable,
- the TM/TD; if unavailable,
- the Track Maintainer

- Then **Further Additional Employees** being other track employees from the seniority territory in the following order:
    - first the TMF on that section; if unavailable, a the ATMF; if unavailable,
    - the LTM; if unavailable,
    - the TM/TD; if unavailable,
    - the Track Maintainer.
    - In urgent cases, an employee who can respond at least ten minutes sooner than the senior employee will be called

- **Structures employees** will be called in the following order:
    - If a callout problem is not known,
        - the Senior Structures Forman; if unavailable,
        - The next senior qualified employee from the structures foreman's list; if unavailable,
        - Qualified employees from the Bridgeman seniority list will be called in seniority order; if unavailable,
        - Employees from the seniority territory.
    - If the callout problem is known, the senior qualified employee regularly performing the work will be called.

Article 3.6

- If the Employer calls an employee and the employee "accepts" the call, the employee will be paid for one hour's work if the Employer cancels the call.

Article 3.12

- Employees will be provided the "opportunity" to be placed on call but "are only to be called if the Company is unable to secure adequate qualified staff after exhausting the callout procedures"

[56] In the Union's view, these detailed provisions governing overtime require CPR to call employees in a particular order to determine if they are available to work. By setting out this detailed regime, the parties agreed that overtime is voluntary. Indeed, says the Union, these detailed steps would be unnecessary if overtime was mandatory, as CPR could compel the first person it called to work overtime. The Union argues that only once an employee accepts an overtime assignment is that employee "required" to report for the overtime shift; a failure to do so constitutes a failure to report for work. While there may be circumstances when CPR "requires" overtime work to be done, this does not equate with a right to mandate that a particular employee will take the overtime assignment. The word "required" can mean "needed', "compelled" or obliged": ***Sorbara Development Group Inc. and Labourers' International Union, Local 183, Re***, 2015 CarswellOnt 631.

[57] The Union argues that ***Lantic Sugar*** is distinguishable because in that case, the collective agreement did not contain an elaborate call out procedure premised on the right to accept or refuse overtime.

[58] CPR argues that the Arbitrator's use of extrinsic evidence was unreasonable in two ways: first, she did not identify an ambiguity in the collective agreement; and second, the Arbitrator did not link past practice with the collective agreement.

[59] The Arbitrator approached past practice on the basis of accepted arbitral authority between the parties, having regard to the relevant provisions of the collective agreement and to the past practice between the parties. She was persuaded that by their conduct and by their words, the parties made clear their intention that overtime be voluntary.

[60] At pages 13-14 of the Decision, the Arbitrator then observed:

> The nature of the work performed by the bargaining unit employees has not recently changed. Overtime work in the field has gone on for years and I readily accept the Company's contention that its nature is such that it must be performed. Nevertheless, Company representatives, when asked directly, essentially agreed that when overtime "in the field" was required, it has not been compelled. As for the Company's contention that pursuant to articles 3.1, 3.6 and 3.12 it reserves the right to require junior employees to work overtime in reverse order of seniority, the Company has never done so, nor does the collective agreement express such a right. According to those present at the hearing, when the call-procedures for required overtime have exhausted, which virtually never happens, no bargaining unit employee has been compelled to work.
>
> The practice of the parties in this case is evidence of their intent as it relates to respect to the nature of required overtime in the collective agreement before me.

[61] The Arbitrator found that the Wilson Letter confirmed the understanding of CPR as to the overtime provisions, reflected in the application of the overtime provisions as voluntary, had withstood two rounds of bargaining. She found that CPR "...could have been no clearer when it wrote 'CPR maintains the position that overtime is voluntary and thus it cannot force its workers to work overtime'".

[62] CPR made reference to standard authorities concerning the use of extrinsic evidence in labour arbitration. CPR referred to the use of past practice as an aid to interpretation as set out by Arbitrator Weiler in: ***John Bertram & Sons Co. v JAM, Local 1740***, (1967) 18 L.A.C. 362 at para 12):

> If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, which explicitly involves the interpretation of the agreement according to one meaning, and that this conduct (and, inferentially, this interpretation) be acquiesced in by the other party. If these facts obtain, the arbitrator is justified in attributing this particular meaning to the ambiguous provision. The principal reason for this is that the best evidence of the

> meaning most consistent with the agreement is that mutually accepted by the parties.
>
> [Emphasis added]

[63] CPR also referred to that decision at para 13, noting the four requirements for relying on past practice as an aid to interpretation:

> Hence it would seem preferable to place strict limitations on the use of past practice in our second sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection;(4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.

[64] In considering whether the Arbitrator's use of extrinsic evidence was unreasonable (by not identifying an ambiguity in the collective agreement or link past practice with the collective agreement), it is necessary to consider the context of her decision-making authority.

[65] First, s 224(6)(c) of the *Code* accords discretion to the Arbitrator to accept evidence as she sees fit:

> 224(6) In relation to any proceeding before an arbitrator under this section, the arbitrator may
>
> ...
>
> (c) receive and accept such evidence and information on oath, affidavit or otherwise as the arbitrator sees fit, whether or not the evidence is admissible in a court of law.

[66] Second, the parties have specifically agreed in the Memorandum, at para 13, that the "arbitrator may make such investigation as he/she deems proper" but shall not be "...shall not be bound by the rules of evidence and practice applicable to proceedings before courts of record but may receive, hear, request and consider any evidence which he/she may consider relevant." However, as set put at para 14, the decision of the Arbitrator "...shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement."

[67] Third, the parties have jurisprudence decided in the context of their relationship that touches on the use to be made of extrinsic evidence of past practice and the Wilson Letter. The previous authority the Arbitrator relied upon holds, in part:

> As is well established in the prior decisions of this Office, when a given interpretation of a collective agreement has been knowingly applied between the parties, without objection or grievance over a substantial number of years, spanning the renegotiation and renewal of the Collective Agreement in unchanged terms, the parties are taken to accept the established interpretation as part of their agreement, and the union which has acquiesced in the interpretation so applied cannot assert some different interpretation by means of a grievance.

[68] Fourth, the parties have also agreed that, absent agreement to the contrary, the decision of the Arbitrator must be rendered within 30 calendar days of the hearing (para 14). This Memorandum shows that the parties have agreed upon a tailor-made process - efficient, speedy, and binding - for resolution of their disputes under the collective agreement, consonant with the legislated and policy reasons for labour arbitration and for the deference to their decisions by the Courts upon judicial review.

[69] The Arbitrator applied an approach to past practice that has developed in the jurisprudence between the parties under a Memorandum that establishes a process where the parties give the Arbitrator wide latitude in conducting the hearing. In this case, she made "...such investigation as he/she deems proper" but was "...bound by the rules of evidence and practice applicable to proceedings before courts of record..." as she was entitled to "... receive, hear, request and consider any evidence which he/she may consider relevant."

[70] The parties specifically agreed that the Arbitrator could take into account evidence she considers relevant. She properly considered the evidence of the consistent past practice over years where overtime is voluntary at this workplace; and the admission of CPR in the Wilson Letter that overtime is voluntary at this workplace. She did not act unreasonably in adverting to such evidence in rendering an interpretation of the collective agreement.

[71] In any event, it appears that the four requirements for consideration of past practice as set out in the jurisprudence are met. In the phrase found in Article 3.1, "...when employees are required to work in excess of eight (8) hours per day or on regularly assigned rest days...", the word "required" could mean the work is required or it could mean the employees are required to do the work. The sections which follow clearly establish a system where employees may decline to work overtime, and then the next employees in line are offered the job.

[72] As to the first requirement, arguably, though the Arbitrator concluded otherwise, there is no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context.

[73] As to the second and third requirements, the conduct of the Union, one party to the agreement, is based on one meaning attributed to the relevant provision; the acquiescence of CPR can be seen in its conduct clearly expressed and can be inferred from the continuance of the practice for a long period without objection.

[74] As to the fourth requirement, there is evidence that members of the Union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.

[75] CPR has not shown that the Arbitrator's use of extrinsic evidence (past practice and the employer admission concerning voluntariness of overtime) as an aid to interpreting the collective agreement was unreasonable in this case.

C. Was the Arbitrator's decision unreasonable?

[76] The interpretation of collective agreement terms is an arbitral function deep within the Arbitrator's home territory: ***Dunsmuir*** at para 68; ***Newfoundland Nurses*** at para 23. Such decisions are protected from judicial review because dispute resolution systems within collective agreements are intended to provide speedy, efficient, and inexpensive solutions to problems so as not to interrupt the work to be done. Deference to arbitration board decisions is called for in this regime where there is a privative clause in the *Code*, a privative clause in the Memorandum that

establishes the process, and the parties have agreed that the arbitration decision will be final and binding.

[77] In ***Teamsters Canada Rail Conference v Picher***, 2014 QCCS 3010, the Court quoted the observation of the Quebec Court of Appeal: "[g]iven the specialized expertise of the arbitrator in railway labour relations and the privative clause enacted by Parliament under the *Canada Labour Code*, there can be little doubt that the decision of the arbitrator warrants deference" (para 65, quoting ***Canadien Pacfique ltée c Fraternité des préposés a l'entretien***, J.E. 2000-13-10, Quebec Court of Appeal).

[78] It may be that Article 3.1 and those related to it in the collective agreement are capable of two interpretations; it maybe that another arbitrator would have arrived at a different interpretation after her investigation and considering all the evidence. However, that is not the test. As the Supreme Court of Canada wrote in ***Dunsmuir***, at para 47:

> ... [C]ertain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness enquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes.

[79] I am satisfied in this case that the Arbitrator had a rational justification for her decision and that it was transparent and intelligible. The decision she made falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. As such, it is beyond the reach of judicial review.

[80] As Union counsel said, a manner of looking at this area of law includes the concept that the judiciary overlooks a number of sandboxes in a playground. And, that it ought to be rare that the judiciary oversees an actual sandbox fight. I like this analogy.

V. Conclusion

[81] In the result, I conclude that the Arbitrator's Decision was reasonable in finding that overtime is not mandatory under the collective agreement and *Code* regime governing CPR and the Union. The CPR application for judicial review of the Arbitrator's Decision is dismissed, with costs to the Union as the successful party. I reserve jurisdiction to decide the quantum of costs should the parties be unable to agree.

Heard on the 15th day of January, 2015.
Dated at the City of Edmonton, Alberta this 23rd day of March, 2016.

D.A. Sulyma
J.C.Q.B.A.

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