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Re United Brewery Workers, Local 800, and Loblaw Groceterias Co Ltd

Innis Christie

RE UNITED BREWERY WORKERS, LOCAL 800, AND LOBLAW GROCETERIAS CO. LTD.

I. Christie. *May 12, 1967.*

UNION GRIEVANCE seeking interpretation of seniority provisions of collective agreement.

S. Nosanchuk and others for the union.

W. G. Gray, Q.C., and others for the company.

AWARD

The facts:

Except on the matter of past practice the facts are not in dispute. In January, 1967, the company placed George McKinnon in the position of receiver in the grocery department of their store at 720 Ouellette Avenue, Windsor, Ontario. Mr. McKinnon was first employed by the company in the Autumn of 1932. From 1932 until 1938 he held various jobs which would now be performed by members of the bargaining unit for which the union is bargaining agent. This fact was not disputed by counsel for the union. In 1938 Mr. McKinnon was promoted to manager and held that position with the company until January 1967 when, for health reasons, he was demoted to the position of receiver. Receivers are within the bargaining unit as defined in art. 1.01 of the collective agreement.

The incumbent union was certified on August 8, 1956, so, until January, 1967, George McKinnon was never within the bargaining unit defined in the collective agreement before me. Moreover, he was never a member of a union certified or recognized as bargaining agent pursuant to collective bargaining legislation, nor has he held a job within a bargaining unit established under such legislation. As pointed out above, how-

ever, his first jobs with the company were of a type that would now fall within a bargaining unit.

There was considerable evidence introduced relevant to the past practice of the company in demoting managers to jobs within the bargaining unit. It suffices to say in this connection that past practice is not relevant because I find the agreement clear on its face. Even if the agreement were ambiguous, the evidence did not satisfy me that a practice was established in this connection.

There are two matters of practice which I do take to have been established by the evidence. It is clear that the seniority of an employee who has been in the bargaining unit since certification in 1956 is considered by the parties to have accumulated from his date of original hiring, even though that date anteceded the establishment of collective bargaining with the company. This was not doubted by Mr. Brown, the union's Chief Steward, in his testimony. Mr. Brown also agreed with the company's witnesses that it is accepted that one who *returns* to the bargaining unit is credited with full seniority. That is, when a manager, who at one time held a job in the bargaining unit defined in the collective agreement between the Union and the Company, is demoted back into the bargaining unit he is to be credited with seniority dating from the date of his original hiring by the company. There can be no doubt of this, in light of art. 8.07 of the collective agreement, which is considered below.

The issue:

The issue is, with what seniority does George McKinnon reenter the bargaining unit. The answer lies in the interpretation of the following provisions of the collective agreement:

> "8.01 Seniority means the relative ranking of employees as determined by their respective lengths of accumulated service with the company.
>
> "8.02 Seniority is the principle of granting preference to employees in matters of promotion, demotions, lay-offs, re-hiring after lay-offs, transfers, and all other matters, but only when all other qualifications necessary to fill the normal requirements of the job are relatively equal.
>
> "8.03 There shall be a probationary work period for new employees of sixty working days and if the company

retains a new employee after his probationary period, his seniority shall date and be computed from the first day of his probationary work period."

These provisions must, of course, be read in the light of the agreement as a whole, and specifically, in connection with the provisions referred to below.

Decision:

On the plain words fo art. 8.01 it would appear that George McKinnon is an employee, that he has been in the service of the company since 1932, that he started accumulating service at the time and therefore that his seniority dates from his original hiring. It can hardly be argued that "accumulated service with the company" means "accumulated service *in the bargaining unit* with the company" when the meaning of the clause hitherto accepted by the parties is considered. For one thing, service with the company prior to the establishment of a bargaining unit has always been credited to the seniority of employees who were in the unit when the agreement was first made. This, of course, would obviously have been intended by the parties and it may be overly legalistic to rely on this usage in the present context. Much more persuasive is the common acceptance of the fact that managers promoted out of the bargaining unit and demoted back to it are credited with seniority from the date of original hiring. Clearly the parties do not take "a cumulated service with the company" to mean "accumulated service *in the bargaining unit* with the company".

It was argued that the word "employees" in art. 8.01 must be resticted to mean "employees in the bargaining unit". The word is not defined and there is no basis in the rest of the collective agreement for this. Indeed, except for art. 8.07, the wording of the rest of the agreement inclines me away from this restricted interpretation. For example, art. 1.01 provides that the union shall be sole bargaining agent for all employees of the company, *exclusive* of various persons including store managers. Obviously in that article if the word "employees" had the restricted meaning contended for the exclusion would be unnecessary. Throughout the agreement there is reference to "employees within the bargaining unit". I am not persuaded that the word "employees" should be read so as to render the words "within the bargaining unit" superfluous. The wording of art. 8.07 is somewhat inconsistent in that it refers to "*persons*

outside the bargaining unit." This might be thought to indicate that the word "employee" is not a suitable word when referring to people outside the unit, but it is not sufficient to persuade me that the word "employees" in art. 8.01 should be given other than its ordinary meaning.

It was argued that the words "new employees" in art. 8.03 should be read to mean "employees *new to the bargaining unit*". If Mr. McKinnon were considered a "new employee" for the purposes of the art. 8.03 he would then be governed by the provision that "his seniority shall date and be computed from the first day of his probationary work period". The mind boggles at calling Mr. McKinnon a "new employee" and subjecting him to a period of probation.

At this point we must leave the realm of verbal niceties. The real argument is that in concluding the collective agreement the union cannot be taken to have been acting in the interests of persons not in the bargaining unit. This is the best basis for arguing that "employees" referred to in the agreement are only employees in the bargaining unit.

In this connection it is important that the parties to the agreement accept that managers who were at one time members of the bargaining unit under this agreement continue to accumulate seniority rights under it. I realize that such persons may be distinguished from Mr. McKinnon in that they are not "new to the bargaining unit" and therefore would not fall within art. 8.03 as interpreted by union counsel. Nevertheless, the fact that such former members of the bargaining unit continue to accumulate seniority under art. 8.01 indicates to me that the purpose of the seniority provisions of this agreement is to set up some clear standard from promotion, etc. and not to grant seniority right as a reward for long standing in the bargaining unit. The words "new employee" must be given their plain meaning. No distinction can be made, on the basis of either art. 8.03 or art. 8.01, between a demoted manager who was originally in the bargaining unit and one who did a bargaining type of work at a time before there was a union.

Art. 8.07 provides:

> "8.07 In the event of a return of persons outside the bargaining unit to the bargaining unit, resulting in the demotion of employees within the bargaining unit, such demoted employees will have their former rate maintained for a period of six weeks."

I realize that this wording indicates that the parties did not contemplate the entry into the bargaining unit with seniority of one who had not previously belonged to it. The article does not, of course, either grant or deny the right to enter the bargaining unit with seniority to anyone, returnee or not. Its limitations can be explained by the fact that it was inserted in the collective agreement following a dispute which, according to the evidence at the hearing, resulted in the "return" of two managers to the bargaining unit.

In the alternative, counsel for the union submitted that Mr. McKinnon should be given seniority only for the period from 1932 to 1938 when he was employed in bargaining unit type work. Such a result might follow if the seniority provisions of the agreement were quite different. The suggestion is clearly at odds with the accepted practice of crediting managers returning to the bargaining unit with seniority to the date of original hiring.

The words of the collective agreement dictate that upon his return to the bargaining unit George McKinnon be credited with seniority to the date of his original hiring. This is consistent with the decisions of other arbitrators who have considered the matter in this province. See *Re Int'l Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 222, and Duplate (Canada) Ltd.* (1954), 5 L.A.C. 1622; *Re Textile Workers Union of America, Local 742, and Guelph Yarns* (1954), 5 L.A.C. 1657; *Re Int'l Ass'n of Machinists and Lucas – Rotax Ltd.* (1955), 6 L.A.C. 169; *Re United Electrical, Radio and Machine Workers, Local 512, and Square D Co. Ltd.* (1957), 7 L.A.C. 261. In all these cases it is accepted that an employee promoted out of a bargaining unit and demoted back to it comes in with seniority back to the date of original hiring.

The principal authority to the contrary, *Re District 50, United Mine Workers of America, Local 13135, and Canadian Industries Ltd.* (1954), 5 L.A.C. 1703, must be distinguished on the basis that there seniority was to accrue only to "employees", who were defined as being persons "paid at an hourly rate".

In three cases arbitrators have gone beyond the *Duplate* case and those following it to hold, as I hold here, that on demotion into the bargaining unit an employee who has never been in the bargaining unit, but who has at one time done bargaining unit type work for the employer, brings with him seniority to the date of his original hiring. See *Re Int'l Chemical Workers, Local 506, and Toronto Elevators Ltd.* (1956), 6 L.A.C. 183;

Re United Automobile Workers and Robbins & Myers Co. Ltd. (1958), 9 L.A.C. 197; *Re Int'l Ass'n of Machinists, Local 1674, and Lucas-Rotax Ltd.* (1959), 10 L.A.C. 84. The only difference in those cases was that there was specific provision in the collective agreements for the accumulation of seniority by an employee promoted out of the bargaining unit. This is not a distinguishing factor because both parties to the agreement before me accept the right of such an employee to accumulate seniority, although the right is less explicit here.

Some arbitrators have gone even further and held that an employee enters the bargaining unit with seniority back to the date of original hiring even where he has never done bargaining unit type work for the employer. See *Re Northern Electric Employees Ass'n, and Northern Electric Co. Ltd.* (1963), 14 L.A.C. 303; *Re United Electrical Workers, Local 523, and Page-Hersey Tubes Ltd.* (1960), 11 L.A.C. 181. This further extension is not accepted by the board in *Re General Truck Drivers' Union, Local 879, and Wood Alexander Ltd.* (1961), 11 L.A.C. 368. The employee in that case had never done bargaining unit type work, as the arbitrator is at pains to point out. The Chairman, however, rather pointedly refrains from approving in principle decisions such as the one in this case.

The only other voice dissenting from the result reached here is that of the chairman in *Re Mine, Mill & Smelter Workers, Local 903, and Loblaw Groceterias Ltd.* (1961), 11 L.A.C. 319. In that case his Honour Judge Little, after considering seniority provisions indistinguishable from those before me, stated that the right to enter the bargaining unit with seniority to the date of original hiring was dependent upon the fact that the employee had at one time been a member of the bargaining unit. This remark is unsupported and was totally *obiter*, since the employee in question had, in fact, been a member of the bargaining unit.

In summary:

The clear words of art. 8.01 indicate that seniority is to be measured from the date of original hiring. In principle I am unable to distinguish between the accepted case of an employee who is promoted out of the bargaining unit and returns to it with seniority to the date of original hiring and the case of one who did bargaining unit type work before there was a bargaining

unit established. The great majority of arbitrators in Ontario who have considered the problem have reached the same conclusion. Moreover, I am satisfied that this result is equitable and desirable for sound industrial relations. I therefore hold that upon being placed in a job in the bargaining unit George McKinnon is to be credited with seniority dating from his original hiring in 1932.