6-12-1981

Re Utah Mines Ltd and International Union of Operating Engineers, Local 115

Innis Christie

RE UTAH MINES LTD. AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 115

I. Christie. (British Columbia) June 12, 1981.

EMPLOYEE GRIEVANCE relating to holiday pay.

D. B. Stevenson and others, for the union.
J. Weiler and *J. DiMarco*, for the employer.

AWARD

The parties agreed that at all relevant times the grievor, Daniel Richard, was a warehouseman — first aid man, working in the warehouse operation. His birthday fell on September 2, 1980. He started work on August 9, 1979. In that year Labour Day fell on September 2nd and he worked on Labour Day so that in accordance with the collective agreement the following day, September 3rd, was considered to be his birthday holiday. He worked that day as well. On September 3, 1979, the grievor was scheduled to work and did work on the afternoon shift whereas on the first day of September, 1980, he worked on the day shift and was scheduled to work on the day shift on his birthday, September 2nd. On August 27, 1980, six days prior to his birthday, the grievor was notified by his supervisor, a Mr. Tate, not to work on his birthday. Accordingly, he did not work on September 2, 1980, and was paid the basic straight-time rate of pay for that holiday.

On September 4th, the grievor, who was the shop steward in the warehouse, filed the grievance in this matter. It should perhaps be made clear at this point that the grievor at no time brought to Mr. Tate's attention the fact that his birthday was September 2nd and maintained throughout that he wished to work on that day. Mr. Tate knew that September 2nd was the grievor's birthday because it was marked as such, along with the birthdays of other employees in the warehouse, on a calendar in Tate's office. The practice in the warehouse, since the provision for birthday holidays first came into the collective agreement in 1978, has been for employees on day shift not to work on their birthdays. The calendar in Mr. Tate's office was marked to enable him to keep track of these matters. Since this grievance was filed three others have been filed in similar circumstances.

The afternoon and graveyard shifts in the warehouse are treated somewhat differently because, whereas eight storekeepers, six warehousemen and a couple of first aid people work on the day shift, on the afternoon shift there is only one first aid person, one storekeeper and one warehouseman and on the graveyard shift only one first aid person and one warehouseman. For this reason the company feels that it can get along without one member of its full complement on day shift but not on the afternoon or graveyard shift.

The provision of the collective agreement here in issue is art. 15 and, in particular, art. 15.01(1):

ARTICLE 15

General Holidays

15.01 Employees shall receive eight (8) hours pay at basic straight time rate of pay for each of the following holidays, subject to the provisions set out below:

New Year's Day	Labour Day
Heritage Day	Thanksgiving Day
Good Friday	Armistice Day
Victoria Day	Christmas Day
Dominion Day	Boxing Day
First Monday in August	

1) Effective May 8, 1978 the employee's birthday shall be a holiday. To be eligible for his birthday holiday an employee must notify the Company seven (7) working days prior to his birthday to permit proper arrangements for his absence. If an employee fails to provide such advance notice he shall not be entitled to time off work but shall be paid as per 15.02. If an employee's birthday falls on any of the other paid general holidays listed in 15.01, the day following the general holiday shall be considered the birthday holiday.

15.02 For work performed on a general holiday, an employee shall be paid at two (2) times the employee's straight time rate of pay in addition to the amount payable under 15.01 above.

. . . . .

15.05 An employee who is scheduled to work on a general holiday and does not work, shall receive no pay.

In the collective agreement between the parties, effective April 13, 1976 to April 12, 1978, art. 15.01(1) provided for a floating holiday to be "taken at a time which is acceptable to both the company and the employee", the date to "be confirmed in writing normally one (1) week before occurrence". This "floater" caused problems. A large number of employees did not take their holiday within the year in which it was allotted. As a result, in the negotiations for the 1978-80 collective agreement the union proposed that a "birthday" holiday take the place of the "floater". The evidence of Mr. DiMarco, the company's industrial relations manager, and Mr. Robinson, the union's business agent with responsibility as "Mining Coordinator", who were involved in the negotiations, did not appear to me to differ materially in any respect with regard to the discussion that preceded the adoption of the birthday holiday. The parties were anxious to escape the confusion that resulted from having a "floater". The company's concern with the union proposal of a birthday holiday was the difficulty of administering it. Discussion centred around the requirement that the employee trigger his entitlement to the holiday by giving notice of the occurrence of his birthday, and the length of the notice to be required. The wording of art. 15.01(1), quoted above, was the outcome of this discussion.

Nothing in the testimony of Mr. DiMarco or Mr. Robinson suggested to me that the parties addressed their minds directly to the issue here: whether an employee can refuse to take his birthday holiday and claim the premium pay under art. 15.02 where the company directs that he take the day off as a holiday on straight-time pay. I include in this generalization the testimony of Mr. Robinson when he was recalled, over Mr. Weiler's objection, to testify with regard to his conversations with Keith Matthews held in the course of attempting to settle this grievance. Mr. Matthews had been the company's chief negotiator in the 1978 negotiations. I found Mr. Robinson particularly candid in his evidence with respect to his conversation with Mr. Matthews. He testified that they agreed that their intention was that, while the birthday holiday was to appear in the collective agreement as part of the general holiday provisions, it was to be a special holiday,

with special circumstances surrounding the granting of it to meet some particular concerns of the company; one being that the company did not intend to give the holiday if it would have to keep track of everyone's birthday. This was not to say that there was any mutuality of intent, or indeed any thought given to the question before me here, as I have already stated it.

The birthday holiday provision first negotiated in 1978 was not changed in the 1980-82 collective agreement although the context was changed slightly by the fact that "Heritage Day" was added to the list of holidays in art. 15.01 and the premium pay under art. 15.02 was increased from time and one-half to double time.

Both Mr. DiMarco and Mr. Robinson as well as Wilf LaPierre, who is currently the union's business agent at the site, testified with regard to past practice with respect to the birthday holiday. Again, I found no real conflicts in the evidence. Rather, as would be expected, different aspects or contexts of practice in the company's operations were stressed.

Practice in the pit and the mill, which are continuous production operations, has been to allow any employee to work on his holiday if he wishes to do so, with no questions asked. Since some 500 people, the vast majority of the work-force, work in the pit and the mill this might be thought to have established the practice for the whole operation, but counsel for the company stressed that there are good economic reasons for the practice in the pit and the mill which do not apply in the warehouse. The nature of the job functions in those operations is such that if an employee were to stay home from his scheduled shift because it was his birthday he would have to be replaced, and his replacement would be working overtime and therefore entitled to premium pay. Thus, it costs the company very little more to allow such an employee to work on his birthday and claim double time under art. 15.02. Indeed, during the 1978-80 collective agreement, the first two years of the life of the birthday holiday pay provision, the premium for working on a holiday was time and a half so the company lost nothing at all by allowing a "birthday boy" to work rather than calling in a replacement in the pit or the mill.

The company's submission that this has been the underlying consideration is substantiated by the fact that in the warehouse, where the grievor works, employees are allowed to work on their birthdays when they are scheduled for the afternoon or graveyard shifts, where they would have to be replaced. It has already been mentioned that this was the case with the grievor on his birthday in 1979. Mr. DiMarco also testified to a case in which a pit

employee who did not have to be replaced because he was a trainee was directed not to report to work on his birthday. No grievance was filed in that case.

Thus, while the union argues that the pit and mill have established a general practice of allowing, if not encouraging, employees to work on their birthday holiday the company argues that, properly defined, the practice is to allow or encourage employees who would have to be replaced by someone else on premium pay to work on their birthdays.

The evidence with regard to the gas shop, where some 37 employees work, does not appear to me to be of great assistance. Apparently for a number of months, if not a year or two, the superintendent in that operation followed a practice of allowing employees to work on their birthdays and take another day off in lieu. There is no justification whatever for that practice in the collective agreement and Mr. DiMarco testified that as soon as he became aware of it the practice was stopped. Moreover, as I understand it, what went on in the gas shop is not what the grievor here is claiming to be entitled to do. He asks to be allowed to work on his birthday and be paid the premium pay, not to have a day off in lieu.

In the warehouse the superintendent has, apparently, always kept track of his peoples' birthdays. The evidence did not establish that he has always directed them to take their birthdays off, but it appears that they have, in fact, on their own initiative or his, done so, at least where they were working on the day shift. Most important, there was no evidence of people in the warehouse working on their birthdays contrary to the direction of the superintendent. Since what the union is seeking to establish is not merely that the company has allowed people to work on their birthdays but that employees have a right to work on their birthdays and be paid the premium, notwithstanding the fact that the company directs them not to work, it does not appear to me that the general evidence of practice in the warehouse assists the union's case at all.

Beyond that, there was one instance prior to the one that gave rise to this grievance of a refusal by the warehouse superintendent to let an employee work on her birthday and be paid the premium. In that case, which arose on June 1, 1980, Mary Doubinin wanted to take a Friday off and work the following Tuesday, which was her birthday. It is not absolutely clear whether she wanted the kind of arrangement that had been improperly made in the gas shop or simply to be paid premium

pay on her birthday holiday. In any event, she was not allowed to work on her birthday. She filed a grievance, the shop steward on which was the present grievor, claiming premium pay under art. 15.02 on the grounds, as here, that the company had wrongly precluded her from working on her birthday. At the second stage of the grievance procedure the company's written response, signed by R. J. DeGrace, material superintendent, addressed to Mrs. Doubinin, with a copy to D. W. Richard, the grievor here, was:

> After considering the position put forth at the second step meeting on June 12th, 1980, I find that the Company must reserve the right to determine if employees are required to work on statutory holidays.
>
> There is no violation of the Collective Agreement. Your grievance must therefore be denied.

The Doubinin grievance was not carried further by the union. I have set it out here as if it were merely an instance of past practice in the warehouse. Counsel for the company relied on it in that way but also argued that it should, in effect, foreclose the issue before me. Article 12.07 of the collective agreement is particularly pertinent to the latter argument:

> 12.07 If the difference is not submitted by an employee or the Union within the time limits set out in the Grievance and Arbitration Procedures, the difference shall be deemed settled on the basis of the Company's last disposition, and all further reference to the Grievance Procedure shall be at an end...

The company also relied on past practice on a rather different plane. On any holiday other than an employee's birthday it is clearly management that decides whether anyone will work, and if so, who. For example, several days before a holiday, if the pit was falling behind the mill, if maintenance work were required or if the warehouse needed extra work management would, as a matter of course, announce which crews would be working on the holiday. Those people would then get premium pay under art. 15.02, and it has never been suggested that the decision to work on the holiday is entirely for the employee to make. Article 15.05 provides: "An employee who is scheduled to work on a general holiday and does not work, shall receive no pay." In the company's submission, the same principle, that the company decides who works or not, should apply with respect to the birthday holiday, except to the extent that the principal is expressly limited by art. 15.01(1), in so far as it "entitles" an employee to his birthday holiday. It is in this context, of course, that the union most vigorously asserts the special character of the birthday holiday.

The issues

The issue, as has already been stated, is whether the effect of art. 15.01(1) of the collective agreement is that where an employee does not give the seven working days' notice, which he must give to be eligible for or entitled to time off on his birthday, the company can require that he not work. In other words, by failing to give the notice necessary to entitle himself to time off can an employee oblige the company to let him work an otherwise scheduled shift on his birthday and pay him double time in accordance with art. 15.02?

Decision

I have concluded that the grievance must fail, and I have reached this conclusion without considering the estoppel, precedential or binding effect of the resolution of the Doubinin grievance. For the purposes of my decision, I have considered it simply as an instance of past practice.

I am satisfied that the evidence of negotiating history is of no real assistance to either the union or the company. I am also satisfied that the practice in the pit and the mill does not assist the union, that the practice in the gas shop is irrelevant and that the practice in the warehouse demonstrates that the intent of the company has always been that the collective agreement be interpreted as they now contend I should interpret it. I am not necessarily satisfied that that intent was shared by the union but past practice certainly does not lead to a finding of mutual intent that the collective agreement be interpreted favourably to the union's position here.

The argument for the union's position is, therefore, one of barest literalism. It boils down to saying that because "to be eligible" for his birthday holiday an employee must give seven days' notice, if he fails to do so he does not become "eligible" for the holiday, and "eligibility" is not something the company can bestow upon him.

Alternatively, the union calls into play art. 8.03, a paragraph of which provides: "An employee's posted schedule shall not be changed during the week for the purpose of avoiding the payment of weekly overtime." The union also relies on art. 11.07 which requires 72 hours' notice of "any planned layoff", and says that the company's power to require anybody not to work on his scheduled days is limited by the twin constraints of the requirement of just cause for discipline and the seniority and notice requirements of lay-off.

I am unable to accept these submissions. An employee on a holiday is neither terminated nor in the half-way state of an employee on lay-off or suspension where, while he maintains his employee status not only does he not work, the employer is relieved of its primary obligation, that of paying him. An employee on holiday continues to be paid and he is in every other respect owed the obligations of an employee under the collective agreement. He is simply not required to work on what would otherwise be a scheduled work day. Thus, art. 11.07 is of no assistance to the union and the quoted part of art. 8.03 does not help either. Perhaps the best way to look at it is to say that art. 8.03 must be read subject to art. 15.01, so that holidays are inherently an aspect of any posted work schedule.

What does it mean under this collective agreement that a day is a "holiday"? With respect to the holidays listed in the first part of art. 15.01 it cannot mean that the employee is entitled to the day off, because no one questions that employees may be required to work on their holidays. It simply means that unless otherwise directed the employee will not work but will be paid, and if he is directed to work he will be paid premium pay.

The first sentence of art. 15.01(1) states simply that ". . . the employee's birthday shall be a holiday". But, because his birthday is individual to him it is not a "general" holiday in the normal sense and it is to that extent "special". In what other respects is "special" must depend on the collective agreement, as interpreted in light of any other evidence of a mutual intent of the parties. According to the collective agreement the only thing special about the birthday holiday is that there must be seven days' notice by the employee if he is to be "eligible", and if he is "fails to provide such advance notice he shall not be entitled to time off work but shall be paid as per 15.02". This is not a direct statement that an employee is entitled to time off on his birthday, unlike other holidays upon which he must work if directed to do so by the company, on pain of losing his holiday pay at least, but the inference is that if he does give the required notice he then is entitled to the time off. In that respect then the birthday holiday is "special".

More important, the only reading of "eligible" earlier in art. 15.01(1) that is consistent with the apparent intent of the parties and their practice is to equate "eligible" with "entitled". In other words, notice is something the employee must give in order to ensure that he can get the day off. The only other possible interpretation of the word "eligible" is that if the employee fails to give

the seven days' notice he does not get the holiday in the sense that he does not have normal holiday rights in respect of it. That is if he does not give the notice he does not have the right to either have the day off or be paid a premium. That meaning is precluded by the next sentence which specifically says that where he does not give the notice he "shall be paid as per 15.02". Thus, "eligible" means the same as "entitled". It refers to a pre-condition of an employee right, not to a status. It is a limit on the employee, not the company.

Conclusion

There is nothing in the collective agreement, interpreted in the light of negotiating history and past practice, that leads me to conclude in favour of the grievor. I find nothing to suggest that a birthday holiday is special in the sense contended for by the union; that it alone is a holiday upon which the employee can insist on working. The grievance is therefore dismissed.