9-25-1984

Re Island Telephone Co Ltd and International Brotherhood of Electrical Workers, Local 1030

Innis Christie

RE ISLAND TELEPHONE CO. LTD. AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1030

I. Christie. (Prince Edward Island) September 25, 1984.

UNION GRIEVANCE relating to safety footwear. Grievance allowed in part.

P. J. D. Mullin and others, for the union.
L. St. Jean and others, for the employer.

AWARD

Article 18.3 of the collective agreement between the parties deals with "safety" generally and in that context deals rather awkwardly with the specific matter before me; the company's obligation to provide safety footwear:

> 18.3 Safety — The Company and the Union agree as follows:
>
> (a) To integrate safety with production and operation.
>
> (b) To provide safe working conditions, proper and adequate tools, equipment and protective devices.
>
> (c) To maintain safe, clean, adequately heated, ventilated and lighted places of work in all Company buildings.
>
> (d) To keep Plant Craft Employees at all times familiar with safe working practices.
>
> (e) The Company's safety Manual as amended, will be used as a general safety guide.
>
> (f) The Union shall have representation on the Company's main Safety Committee. Such appointees shall be granted sufficient time to attend meetings of this committee.

(g) The Company agrees to discuss with the Union any particular matter with respect to safety if and when requested by the Union.

(h) No Union Member shall do or be required to do any work that is considered unsafe; he shall strictly observe all safety rules and regulations.

Paragraph (b) and, to a much lesser extent, para. (e) are the directly relevant parts of art. 18.3.

Safety footwear did not become an issue between the parties until 1983. Prior to that, according to the union, safety footwear was not mandatory for the company's employees. However, according to the evidence of Donald Livingstone, the company's vice-president and general manager, and of Phil Acorn, the company's supervisor, administration and planning, safety footwear was mandatory prior to 1983 in a broad range of company jobs, although top management became aware in the late spring of 1983 that enforcement varied enormously with the attitudes of particular foremen.

I accept the evidence on behalf of the company as descriptive of the situation that applied. Section 207 of the Regulations under the *Construction Safety Act*, R.S.P.E.I. 1974, c. C-16.2, provides:

> 207. Every Employer shall require to be worn such personal protective clothing and equipment as is necessary for the protection of his workmen from any particular hazard to which they are exposed.

In light of such legislation it would be surprising if the company's official policy, at least, were not to require safety footwear in a broad range of jobs. In fact the relevant page of the company's safety manual outlining its "Safety Footwear Policy" provided, under date of 1980:

1.02 *Definition of Safety Footwear*: . . .

For Clarification purposes and uniformity of operation, laced boots, (6" or higher) should be worn under the following conditions:

(A) When using climbers.

(B) When climbing poles or extension ladders.

(C) When working with molten material.

(D) When opening, closing or working over rough terrain.

1.03 *Where Safety Footwear is required*:

Safety footwear should be worn by all Company employees whose job content requires them to work on or visit job sites involving:

1. Construction, alteration repair, demolition or moving of buildings or other structures.
2. Outside Plant Construction and Maintenance.
3. Station Installation or Maintenance.

4. Special Services Installation or Maintenance.
5. Buildings Mechanical Equipment Installation and Maintenance.
6. Use of power lawn mowers.
7. Elevator mechanical maintenance.
8. Building heating, ventilation, air conditioning and plumbing work.
9. Handling of tool or material in warehouses, storerooms, loading docks, transport vans, Apparatus Repair Shop and Print Shop.
10. Vehicle Mechanical maintenance.
11. Central Office Equipment Installation and Maintenance.

Counsel for the union laid considerable emphasis on the fact that in May of 1984 this page was replaced by a new "Safety Footwear Policy" which differed in that the word "should", both where it appears in the definition of safety footwear and under the head "Where Safety Footwear is Required", was replaced by the word "must". The union's position is that with that change in wording the company moved from a non-mandatory to a mandatory safety footwear policy. There is no objection by the union to that change. The contention, simply, is that it is relevant to the issue of whether or not the company is obliged to provide such safety footwear.

My finding on the evidence is that, notwithstanding the change of wording in the company's written "Safety Footwear Policy", it did not move from a non-mandatory to a mandatory safety footwear policy. Rather, the company's official policy always was one of mandatory safety footwear, and the word "should" in the earlier written version of its policy was interpreted that way by the company's management. As a matter of fact, however, the company's policy was not uniformly enforced until the autumn of 1983, and the changed wording in its written policies reflects a new emphasis on enforcement and eliminates any ambiguity. To reiterate: I find that official company policy throughout has been that safety footwear is mandatory in the circumstances spelled out in the written policy, but that until the autumn of 1983 enforcement was lax and the practice of requiring safety footwear was unclear.

Although Mr. Livingstone and Carl Simpson, the union's business agent, had somewhat different versions of their exchanges on this matter from the autumn of 1983 through to the first of June, 1984, I need not dwell on the differences between them. It suffices to say that in the context of the company's renewed interest in safety the union raised the matter of the company's payment for safety boots and shoes. The 1980 written statement of the company's "Safety Footwear Policy" provided:

1.04 Reimbursement for Safety Footwear

The Company will contribute up to a maximum of $25.00 per pair towards the cost of *Safety Boots* (They must be the *laced type (6" or higher), limited to* the purchase of two pair per year.

The Company will contribute up to a maximum of $15.00 per pair towards the cost of *Safety Shoes*, for those employees who do not need the boot type of Safety footwear in their job. This would be limited to the purchase of two pair per year.

When an employee presents receipt as proof of purchase, the immediate supervisor shall reimburse him using Form A5, provided the safety footwear is still required in his assignment.

NOTE: Normal repairs to safety footwear are the responsibility of the employee.

Discussion between Mr. Simpson and Mr. Livingstone focused on the amounts of the company's contribution and no agreement was reached. Under date of November 22, 1983, the union filed a grievance which stated:

Island Tel. demands Employees to wear Safety Footwear. Island Tel. refuses to reimburse in full for Safety Footwear in question, as per Collective Agreement.

Settlement Requested: Full Redress

Just around that time, effective January 1, 1984, Maritime Tel. & Tel., which has a collective agreement with this same union, announced that it would henceforth provide safety shoes and boots to its employees. In light of this, at one point in the discussions, which continued to take place between them in the new year, Mr. Livingstone told Mr. Simpson that Island Tel. would be adopting a similar policy. It was understood, however, that Mr. Livingstone was at the same time conducting an informal survey of the policies of other telephone companies and of local utility companies with respect to the provision of safety footwear. The upshot of this was that under date of March 1, 1984, Mr. Livingstone wrote to Mr. Simpson as follows:

Further to our meeting of November 2, 1983, regarding the policy on Safety Footwear. As indicated to you, I said we would carry out a study with regard to policy on Safety Footwear.

I am pleased to say that this has been completed and a policy change will be made whereby employees who require safety shoes or boots will be provided with one pair per year.

We plan to introduce this new policy and provide details to all employees by April 30, 1984.

That policy was never in fact introduced. Mr. Livingstone testified that after writing this letter he became concerned about the bad experience that Maritime Tel. & Tel. was having with the actual provision of safety footwear to its employees. He decided, he

testified, that it would not be a good idea for a company "in the telephone business to get into the boot business". The result was that under date of May 29th Mr. Livingstone wrote to Mr. Simpson stating, simply, that a copy of the company's policy on safety footwear was enclosed. The new statement of "Safety Footwear Policy" not only replaced the word "should" with the word "must", as discussed above, but it also contained a new s. 1.04, as follows:

> 1.04 *Reimbursement for Safety Footwear*
>
> The Company will contribute up to a maximum of $55 a year towards the costs of *Safety Boots*. (They must be the laced or zippered type — 6" or higher). This $55 can be a *one-time* contribution or a *two-time* contribution of $27.50 each.
>
> The Company will contribute up to a maximum of $35 a year towards the cost of Safety Shoes, for those employees who do not need the boot type of Safety Footwear in their job. This $35 can be a *one-time* contribution or a *two-time* contribution of $17.50 each.
>
> When an employee presents a receipt as proof of purchase, the immediate supervisor shall reimburse him using Form A5, provided the safety footwear is still required in his assignment.
>
> NOTE: *Normal repairs to safety footwear are the responsibility of the employee.*

The union's response to this was the following letter from Mr. Simpson to Mr. Livingstone, which constitutes the grievance before me:

> This letter will confirm our telephone conversation of June 1, 1984, with respect to your letter dated May 29, 1984.
>
> As you are aware, a grievance was filed on the 22nd of November, 1983 concerning safety footwear re: cost etc. We withdrew this grievance on March 16, 1984 because of your letter of the 1st of March, 1984 and due to your statement to me prior to your letter (March 1, 1984) at which time you said "We will do what Maritime does" with respect to safety footwear.
>
> Please consider this letter a formal grievance requesting The Island Telephone Company provide footwear for employees whom the Company are asking to wear same and for full redress to those employees who were forced to purchase safety footwear at Company request.

While it was not clearly delineated, there appeared to be some disagreement between the parties as to whether this, or the grievance filed in November, constituted the grievance before me. If, as I have suggested, this letter constituted the grievance then there might appear to be some difficulty as to whether the steps of the grievance procedure set out in art. 19 of the collective agreement have been satisfied. However, I heard no formal objection on procedural grounds and, in any event, all aspects of the grievance were fully discussed between the parties. I

therefore rule that the grievance as set out in Mr. Simpson's letter of June 1, 1984, is properly before me and that any possible procedural objections were effectively waived, before this matter came on for hearing before me.

The issues

In my view the broad issue of whether the company is required by the collective agreement to provide safety footwear for the employees who are required to wear such footwear can be broken down into three specific issues:

(1) Does art. 18.3 of the collective agreement before me impose an obligation "To provide safe working conditions, proper and adequate tools, equipment and protective devices" on the company?

(2) Are safety shoes and boots "protective devices" as that phrase is used in art. 18.3? If so,

(3) What obligations does the word "provide" in this context impose on the company, and does the company's written "Safety Footwear Policy" fulfil those obligations?

A fourth issue which arises if these questions are decided in favour of the union is as to the appropriate remedy in the circumstances of this agreement.

Decisions

(1) Article 18.3, which is set out above, is awkwardly worded in that it does not simply state that the company agrees or undertakes to do certain things with respect to safety. Rather it states that "The Company and the Union agree as follows . . . ". Of the eight paragraphs that follow some, that is (a), (e) and (h), might be read as imposing obligations on employees and some, that is (a), (d), (e) and (f), might be regarded as imposing obligations on the union, but all eight clearly impose obligations on the company. Specifically, para. 8.3(b), which is the subject-matter of this grievance, clearly imposes an obligation on the company "To provide safe working conditions, proper and adequate tools, equipment and protective devices". It is simply not a sensible reading of that paragraph to suggest that it imposes an obligation on the union, or some joint obligation on the union and the company, "to provide . . . proper and adequate . . . protective devices", any more than it would be sensible to read para. (c) as imposing an obligation on the union, or the union and the company jointly, "To maintain safe, clean, adequately heated, ventilated and lighted places of work in all Company buildings".

It is perfectly clear to me that the meaning of, and obvious intent behind, art. 18.3(b) is that the company has undertaken an obligation "to provide . . . proper and adequate . . . protective devices". In reaching that conclusion I am interpreting, not altering or changing any provision or substituting any new provision in, the collective agreement.

(2) Are safety shoes and safety boots protective devices? That specific question has been considered, more or less directly, in four reported arbitration decisions. The general thrust of those decisions is that safety shoes and boots are to be included within the collective agreement term "protective devices". Counsel for the employer submitted that those awards are to be distinguished because in each case the collective agreement clearly imposed an obligation on the employer to provide protective devices. However, having reached the conclusion I have in respect of issue (1), that this collective agreement does impose an obligation to provide protective devices on the company, that distinction no longer serves. Of course each collective agreement must be considered in its own right, and the meaning attached to a term like "protective devices" in one collective agreement need not necessarily be adopted in relation to another. Nevertheless, a clear line of arbitral decisions suggests, in the absence of indications to the contrary, that there is an accepted meaning which was intended by the parties when they entered this collective agreement.

In *Re U.A.W., Local 456 and Mueller Ltd.* (1964), 15 L.A.C. 208, arbitrator Palmer held that the word "devices", in the phrase "protective devices and other equipment necessary to protect the employees from injury . . . will be provided by the Company", covered safety shoes. I note in passing that in that case the company had never paid for safety shoes up until the time of the grievance, but that past practice was treated as irrelevant by the arbitrator because up until that time the rule requiring that safety shoes be worn had never been enforced by the company.

In *Re U.S.W. and Diebold of Canada Ltd.* (1966), 16 L.A.C. 412 (Little), the majority of a board of arbitration chaired by Judge Little concluded that safety shoes were "equipment necessary to safeguard employees" and under the collective agreement before them had to be provided by the company. That decision does not assist the union here because in the course of its award the majority noted [at pp. 415-6] that "in making their submissions in the present arbitration neither counsel agreed with Professor Palmer that 'safety shoes' can be classified as a

'device' ", and the board agreed with counsel. However, that specific point of interpretation arose directly in *Re U.E.W., Local 512 and Delamere and Williams Co. Ltd.* (1971), 23 L.A.C. 56 (Johnston). In that case a board chaired by D. L. Johnston considered a collective agreement provision which made no mention of other equipment but simply required the company to "provide . . . protective devices". There, the board considered earlier Ontario awards, including the two cited above, some American awards and the Ontario *Industrial Safety Act* and reached the conclusion that the word "devices" included safety shoes. The board's reasoning was, in my opinion, perfectly sensible [p. 61]:

> In this agreement, the parties have been more cryptic and employed a general phrase "whatever protective devices". We conclude it was the parties' intention to employ a cryptic and general phrase because they did not anticipate it would be necessary to parse specific words such as device or equipment, knowing the company had a measure of discretion albeit delimited by the enforcement of the *Industrial Safety Act*.

The fourth reported arbitration award cited to me, *Re Hydro-Electric Com'n of Township of Nepean and C.U.P.E., Local 983* (1972), 1 L.A.C. (2d) 264 (Brown), was less helpful because the collective agreement there under consideration required the company to provide "approved safety devices and clothing", and the arbitration board found it unnecessary to consider whether safety shoes and boots could be considered "devices" since they were obviously "clothing".

My conclusion is that art. 18.3(b) unambiguously requires the company to make provision for safety shoes and boots. Indeed, there is no question that during the entire period covered by the evidence the company has made provision for safety shoes and boots by paying an annual allowance. Nothing in the collective agreement other than art. 18.3(b) would require them to do that, so the company's practice appears to buttress my conclusion, at least in so far as it indicates that the company itself considered that it had some obligation in the provision of safety shoes and boots.

(3) The real issue between the parties is how far the company's obligation "to provide" safety shoes and boots goes. Must the company literally "provide" shoes and boots to its employees or must it simply pay for them, and if so how much and how frequently?

In my view the word "provide" need not be read so literally as to require the company "to go into the boot business". If the

company is paying for its employees' safety shoes and boots it is certainly, in one sense of the word, "providing" them. In this respect, at least, the word "provide" can be said to be ambiguous, making it entirely proper for me to take into account in determining its meaning the fact that it has been used in one collective agreement after another in the context of the company's longstanding practice of making an allowance to its employees towards the purchase of their safety shoes and boots. Read in that context there is no question in my mind that the company's obligation to "provide" safety shoes and boots can be fulfilled by paying for them, rather than by actually carrying a stock of safety shoes and boots for its employees.

The next question is how much the company is required to pay for any given pair of shoes or boots and how frequently it must replace them for any particular employee. In both respects the parties must be taken to have intended that there be a limit of "reasonableness" on the company's obligation. Clearly, the company can only be said to be required to pay a reasonable price for safety shoes or boots and can only be required to replace them when reasonably required. Initially the company must decide what constitutes the reasonable provision of safety shoes and boots, and, considering the number of employees in this company, the parties must be taken to have intended the company would establish rules or guidelines for its supervisors and staff, with respect to the price that would be paid for a pair of shoes or boots and the frequency with which such payment would be made. That, of course, is what the company has done in s. 1.04 of its safety footwear policy, set out above. It has said, in effect, that up to the amounts there set out, it will not question either the cost or the frequency of purchase of safety footwear. No one would challenge that, but the company has also said, in effect, that it will never pay more than the amounts set out in s. 1.04 of the "Safety Footwear Policy". The question is whether in setting such limits the company has gone beyond its powers under the collective agreement. My conclusion is that, while the company must obviously make the initial decision, ultimately the determination of what it reasonably must provide under the collective agreement is a matter for determination through the grievance procedure and arbitration.

Another way of putting it is to say that the company may exercise its rule-making power to set up a workable system of providing safety shoes and boots to its employees. Brown and Beatty, *Canadian Labour Arbitration*, 2nd ed. (1984), para. 4:1500, pp. 178-80, state:

> Even where such rules do not form part of the agreement, it is now generally conceded that in the absence of specific language to the contrary in the collective agreement, the making of such rules lies within the prerogative or initiative of management, and arbitrators have held this to be so whether or not an express management's rights clause exists reserving the right of management to direct the work force. However, this rule-making power is neither absolute nor without limitation. Rather, as summarized in *KVP Co. Ltd.* [(1965), 16 L.A.C. 73 (Robinson)], a number of principles relating to this power have now become universally accepted among arbitrators . . .
>
> . . . . .
>
> Reformulated, these criteria may be said to require that any plant rules which are unilaterally promulgated must not be inconsistent with the terms of the collective agreement, that their enforcement not be unreasonable, and that they must be brought to the attention of those intended to be regulated by them.

Here, just as in the context of discipline, the ultimate question is whether the employer has breached the collective agreement, but the employer may seek both fairness and efficiency through the promulgation of rules that meet these criteria, because the parties must be taken to have intended that the collective agreement be workable.

The parties must be taken to have expected that the company would provide rules or guidelines which, if set in good faith, would be treated with considerable deference by arbitrators. Although the company's obligation is "to provide", that is to pay for, employees' safety shoes and boots, not in part but fully within the limits of reasonableness, the parties cannot be taken to have intended that the time-consuming and expensive grievance and arbitration procedure be used to niggle over a dollar here or a dollar there for safety shoes and boots. If in any particular case the union can establish that the company has breached its obligation it should be ordered to comply, but in my opinion there will be a heavy onus on the union to show that the amounts paid by the company were not set in good faith or did not represent a reasonable price for "proper and adequate" safety shoes or boots for a particular employee.

In conclusion, this grievance is allowed in so far as I have concluded that art. 18.3(b) does require the company "to provide . . . proper and adequate . . . protective devices" and that such devices include safety footwear. It is denied, however, in that there is no basis in the evidence before me for awarding any "redress" to any individual employee. In other words, there is nothing to suggest that the safety footwear allowance paid by the

company in accordance with its safety footwear policy did not constitute the reasonable provision of those particular protective devices.