7-6-1997

Re Strait Crossing Joint Venture and IUOE

Innis Christie

Re Strait Crossing Joint Venture and International Union of Operating Engineers/Iron Workers

[Indexed as: Strait Crossing Joint Venture and I.U.O.E. (Re)]

Nova Scotia
I. Christie

Heard: January 24, 1996 and January 30, 1997
Decision rendered: July 6, 1997

UNION GRIEVANCE concerning calculation of overtime pay. Grievance dismissed.

R.A. Pink, Q.C., and others, for the union.
E.P. Rossiter, Q.C., and others, for the employer.

AWARD

Union grievance alleging breach of Articles 17, 19, and Appendices "A", "B", "C", "D", and "E" the Collective Agreement between the Unions and the Employer dated September 17, 1993, which the parties agreed is the Collective Agreement that governs this matter, in that the Employer paid overtime improperly. The Unions requested that the Employer be ordered to pay overtime in full, with interest.

At the outset of the hearing the representatives of the parties agreed that I am properly seized of this grievance and that I should remain seized after the issue of this award to deal with any matters arising from its application.

This is a joint Union grievance, filed August 2, 1995, under the Collective Agreement, which is a project agreement covering all the trades party to this Grievance. The Grievance alleges that the Employer breached Articles 17.6 by paying overtime on the base rate rather than the total pay package. Article 17.6 provides that over time "shall be paid at the rate of time-and-one half (11/2) of the appropriate hourly rate". The issue is: "what is 'the appropriate hourly rate'?" As the parties agreed at the hearing, that phrase is nowhere defined in the Collective Agreement.

The Union's position is, of course, that based on the language of the Collective Agreement "the appropriate hourly rate" refers to the total hourly pay package. The Union's submission is that if the language is held to be ambiguous negotiating history makes it clear that

"the appropriate hourly rate" is the total hourly pay package, and further that the Employer is estopped from denying that that is the meaning given by the parties to the phrase "the appropriate hourly rate".

The Employer's position is, conversely, that on the language of the Collective Agreement "the appropriate hourly rate" refers to the base hourly pay rate. In the Employer's submission there is no relevant evidence of negotiating history, nor any basis upon which the Union can assert estoppel.

The relevant part of Article 17 is;

17.6 The Employer has the right to schedule shifts, including the variation of shift lengths.

Work performed in excess often (10) hours in any shift shall be paid at the rate of time and one-half (1 1/2) of the appropriate hourly rate. All work, except as indicated in Article 17.7, on Saturdays, Sundays and on a sixth and seventh shift, shall be paid at time and one-half (1 1/2) time and one-half (1 1/2).

The relevant parts of Article 19 are;

19.1 Wages and benefits shall be in accordance with the appropriate trade appendix.

19.2 One year after the date of signing and each year thereafter until the completion of the Project, the wage package will be adjusted in the following manner, using the Canada Consumer Price Index 1986 = 100, published by Statistics Canada.

The formula will be the year over year percentage increase in the Consumer Price Index times the hourly wage rate, rounded to the nearest cent.

The Union will advise the distribution of the increase. The increase will be implemented on the first pay period after notification from all of the respective Unions.

The Appendices set out the pay packages for each of the Unions. They differ in their complexity but the following is a good example for the purposes of the issue here:

WAGE APPENDIX "C"

for

INTERNATIONAL ASSOCIATION OF BRIDGE

STRUCTURAL &

ORNAMENTAL IRON WORKERS

1.1	Wage Rate	$ 19.04
1.2	Vacation Pay	$ .90

1.3	Benefit Plan	$ 1.00
1.4	Pension Plan	$ 3.00
1.5	Training Fund	$ .06
TOTAL PACKAGE		$ 24.00
1.6	Shift Premium	$ 1.00
1.7	Marine Premium	$ 1.00

1.8 A Foreman shall be paid a premium of two (2) dollars over the top rate being paid to Journeymen Ironworkers.

There is then a table for apprentices.

The Union called three witnesses. I allowed them to testify with respect to negotiation history over the objection of counsel for the Employer, having ruled that I would reserve on the question of whether there is ambiguity in the language of the Collective Agreement. The relevance and, in retrospect, the admissibility of such evidence is, of course, subject to the rather complex law with respect to latent as well as patent ambiguity.

The first Union witness was Edgar Doull, Canadian Director, I.U.O.E. Mr. Doull testified that in late 1989 he and officials from four of the other Unions met with officials of the Employer, which had not then yet been awarded the contract for what is now the Confederation Bridge. He was the chief union spokesperson and Paul Gianelli,"the top person at the site", was chief spokesperson for the Employer.

According to Mr. Doull collective bargaining commenced in February-March of 1993. While there was no deadline at the start, by June-July it became evident that the Employer needed the Collective Agreement as part of the package it was required to submit to the Government of Canada for approval of the project, and by September 17 there was great pressure to get the Collective Agreement signed that day.

Mr. Doull testified that the Employer's position was that they needed to know their costs; that they would pay a stated level of wages plus benefits and it was up to the Unions to decide how to allocate the available money between wages and benefits. "They'd give us something and we could do what we wanted with it", he testified. The Employer negotiated separately with each union, but Mr. Doull sat in on all negotiations. In the case of the O.E., for example, he said, the Union was told that the package was $25.50 per hour, with nothing above that except the negotiated inflation increase in

Article 19.2. This was confirmed by the other two Union witnesses and not disputed by the Employer.

In fact, Mr. Doull testified, the actual typescript version of the Collective Agreement which was signed on September 17, 1993, does not contain the breakdown of the "TOTAL PACKAGE" in Appendix "B" for the Labourers or in Appendix "C" for the Ironworkers (which is set out above, quoted from the printed booklet form of the Collective Agreement). A copy of the version of the Collective Agreement with these spaces blank is in evidence by agreement.

Consistent with this approach, Mr. Doull testified, the overtime clause in the Collective Agreement was agreed to before agreement on the wage rates was concluded. He stated, "I had made clear to the Employer that in all collective agreements in the area our [the O.E.'s] pension and health and other benefits are on hours earned, not worked. Therefore if overtime were paid on $25.50 we'd be getting the same thing; only I'd have to do the calculations, not them." He testified that he told the Employer's representative that "on several occasions when we were on the edge of breaking off" and "they never basically objected, because they said 'you've got $25.50; that's the package' ". In cross-examination Mr. Doull said, and reconfirmed, that he had raised this point fifteen or twenty times, and, when challenged by counsel, acknowledged that he could not understand why it was not made clear in the Collective Agreement.

Mr. Doull testified that throughout the negotiation of the Collective Agreement he kept "notes" which he retained, along with correspondence with the Employer, until negotiations finished. However, he acknowledged in cross-examination that he had no notes of any kind on this overtime issue. He said he had raised the issue in labour management meeting held in accord with Article 24.4 of the Collective Agreement and had written to Mr. Gianelli and John Forgeron, the Employer's Human Resources Manager on the subject, but did not have the documentation with him.

Counsel for the Employer requested an adjournment to get Mr. Doull's notes and letters on the negotiations, and with respect to post-signing meetings. After initially objecting to any such adjournment on the basis that the documentation in question had not been subpoenaed or even requested, counsel for the Unions agreed. After an adjournment of what turned out to be over a year Mr. Doull was

unable to produce any relevant minutes or correspondence with the Employer.

In cross-examination Mr. Doull said that for the O.E. $25.50 was the "appropriate hourly rate". It was also, he said, the "applicable rate", "the normal hourly rate" and "the wage rate" as those terms are used in this Collective Agreement, subject to the understanding that "any misunderstanding" would be cleared up after the signing. Any references to the "appropriate hourly rates" are to the rates for the various trades.

Mr. Doull testified that most trades, "the I.B.E.W. in particular, get benefits on hours paid not hours worked". In cross-examination he stated that, while this was not so for O.E. collective agreements on P.E.I., it was the case for other unions on P.E.I. and for his Union in New Brunswick, in project agreements. No such collective agreements were put in evidence, although counsel for the Employer called for them to be produced.

The Union's second witness was Raymond McBride, Business Agent for I.B.E.W. Local 1432, the P.E.I. Local. He attended all negotiations involving his Union as well as the general ones. Except for the legislative requirements for vacation pay and the like, Mr. McBride's perception was that any of the Unions could have kept their whole package for straight wages. Indeed, different locals of the I.B.E.W. had slightly different arrangements and received benefit payments from the Employer in different formats.

Most significantly, Mr. McBride testified that his Union was very late agreeing on what the breakdown of the wage package would be, and in the many discussions of overtime that was never regarded as relevant. He felt that if they had been thought that overtime was based only on the basic wage the members of his Union might have wanted a different breakdown, weighting the basic wage more heavily. He testified that for the Nova Scotia and New Brunswick locals of the I.B.E.W. basing overtime on the total package "was a given". He also testified that wage adjustments in 1994 and 1995 in accordance with Article 19.2 were made on the basis of the "wage rate" of $19.03, not the total package of $25.51 for his Union.

The Union's third witness was Roderick MacLennan, Business Agent for the Ironworkers Local 752, which serves both P.E.I. and Nova Scotia. He attended the negotiations involving his Union but

left before the negotiation of the general part of the Collective Agreement was concluded. He was not there when the overtime Article was actually agreed upon and his Union was not involved in any discussion of the application on the overtime rate to the basic wage rate or the total package.

Mr. MacLennan testified that his Union was asked to submit a letter stating the breakdown of the total package they wanted. Mr. MacLennan testified that at a meeting of his Union to decide upon the allocation he was asked about the incidence of the overtime rate in this context and told his membership that it did not matter how much was put toward benefits because overtime pay was based on the total package. In cross-examination he agreed that he had not been told that by the Employer, but had assumed it.

Mr. MacLennan testified that he first learned that the Employer was not paying overtime on the total package from several of his members who analysed their pension statements for 1994, which came out in 1995, and complained, some twenty-one months after the Collective Agreement had been signed. They, and he, had expected each element of the total package to be multiplied by one and one-half. He called Mr. Forgeron and "vented".

In cross-examination Mr. MacLennan acknowledged that Union members had been receiving their pay for that whole period of twenty-one months with no objection to the fact that the overtime rate was not reflected in any of the other benefits, including vacation pay and payments to the Union's training fund.

To avoid further delay the parties agreed in Mr. Gianelli's absence that he would testify that the Employer offered the Union a total wage package and left it to the Unions to decide how to break down that sum for their own purposes. He would testify, however that the Employer intended that overtime would be paid on the wage rate component of the broken down amount, and that was why the wording in Article 17.6 was used.

The Issues

As I stated at the outset, the obvious issue is "what is the meaning of 'the appropriate hourly rate' in Article 17.6". Does it refer to the simple or basic wage rate or to the total package? Is this phrase ambiguous in the context here, and, if so, does the evidence of negotiating history before me resolve the ambiguity? Further, if the wording of

the Collective Agreement is to be interpreted as the Employer says it should be, does the evidence disclose grounds for saying that the Employer is estopped from insisting on that interpretation of the Collective Agreement.

Decision

The Meaning of the Phrase "the appropriate hourly rate" in Article 17.6; Ambiguity

I am satisfied that the parties here signed the Collective Agreement with genuinely differing understandings of the meaning of the phrase "the appropriate hourly rate" in Article 17.6. Consideration of the various references to "wages" and related terms in the Collective Agreement to which counsel for the Unions directed me in argument is of no significant help in deciding which understanding is more logical. I do note, however, that in Article 19.2 there is reference to adjustment of the "wage package", which suggests that where the parties had the total package in mind they said so. Nevertheless, I think the phrase in issue is ambiguous, at least latently, in this context and for that reason that the evidence before me of negotiation history may appropriately be taken into account. I have done so, but that has not led me to the conclusion that the Union's interpretation is the most appropriate one.

The parties to collective bargaining must find their rights in the collective agreement, not in what is said during negotiations when "much is said and much can be misinterpreted" (see the quote from arbitrator George Adams in *Re Sudbury District Roman Catholic Separate School Board and O.E.C.T.A.* (1985), 15 L.A.C. (3d) 284, below), but this stricture is relaxed not only where the words of the collective agreement are patently ambiguous, but also where there is cogent evidence that apparently clear words were given a special meaning by *both* parties.

The authorities are clear that the extrinsic evidence properly admissible to show a latent ambiguity may include direct evidence of what the parties said in negotiations. Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., looseleaf (Aurora: Canada Law Book), state in para. 3:4400;

> ... the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing ...

. . . . .

> Although many arbitrators have accepted the common law principles and limited the introduction of extrinsic evidence accordingly, others have taken the view that the legislative provisions, such as s. 44(8) of the Ontario *Labour Relations Act*, permit the admission of parole evidence at the discretion of the arbitrator. ... Where an ambiguity is patent, that is, where it appears on the face of the agreement, an arbitrator may resort to extrinsic evidence as an aid to its interpretation. Where an ambiguity is latent, that is, where it is not apparent on its face, an arbitrator may rely upon extrinsic evidence not only as an aid to resolve the ambiguity once established but also to disclose the ambiguity.

The learned authors footnote the non-labour law case of *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co.* (1968), 3 D.L.R. (3d) 161 (Ont. H.C.J.), as support for the proposition quoted. They also cite many arbitration awards.

In para. 3:4420 Brown and Beatty state that, apart from past practice, the most significant form of extrinsic evidence is the history of negotiations. They state that documentary evidence forming part of the negotiations of a collective agreement may be introduced to assist in its construction and go on to say;

> Such documentary evidence may include a related agreement which was used as a point of reference, an interest arbitration award, as well as proposals made, discussions held and agreements reached during negotiations, although reservations have been expressed to admitting evidence as to the give and take of negotiation. Evidence of that kind, however, must address the issue of interpretation and ought to be relied upon only if it is unequivocal.

Most arbitrators dealing with issues of latent ambiguity have relied on and quoted from the reasons of Gale C.J.O. in *Leitch Gold Mines*, where his Lordship said, at p. 216:

> Where the language of the document and the incorporated manifestations of initial intention are clear on a consideration of the document alone and can be applied without difficulty to the facts of a case, it can be said that no patent ambiguity exists. In such a case, extrinsic evidence is not admissible to effect its interpretation. On the other hand, where the language is equivocal or if unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present. The term "latent ambiguity" seems now to be applied to all cases of doubtful meaning or application.
>
> .....
>
> Extrinsic evidence may be admitted to disclose a latent ambiguity, in either the language of the instrument or its application to the facts, and also to resolve it, but it is to be noted that the evidence allowed in to clear up the ambiguity may be more extensive than that which reveals it. Thus, evidence of relevant surrounding circumstances can be accepted to ascertain the meaning of the document and may clarify the meaning by indirectly disclosing the intention of the parties.

> If the surrounding circumstances, however, do not explain the latent ambiguity an equivocation is said to be established, in which event, in addition to evidence of circumstances, direct evidence of the parties' intentions may be received to resolve the equivocation.

There is room to suggest that this last sentence implies that direct evidence of the parties' intentions, such as the evidence here of what was said during negotiations, may *only* be used to "resolve the equivocation" and not to establish it. That may have been what Chief Justice Gale intended. Certainly such a rule would lend substance to his comment that "the evidence allowed in to clear up the ambiguity may be more extensive than that which reveals it". However, this suggestion was explicitly negatived by the Ontario Court of Appeal in *Noranda Metal Industries Ltd. v. I.B.E.W., Loc. 2345* (1983), 44 O.R. (2d) 529, a case in which the issue was whether the arbitrator had erred in relying on evidence that during negotiations the parties had agreed on a special meaning for words in the collective agreement.

At p. 536 of the *Noranda* decision, after quoting the last sentence from *Leitch Gold Mines* set out above, Dubin J.A. said;

> ... assuming that [the arbitrator] failed to make that finding [that the words in question were ambiguous] before admitting the extrinsic evidence, it was unnecessary for him to do so since he was entitled to entertain the extrinsic evidence with a view to determining whether that evidence disclosed the ambiguity in the words expressed.

The only extrinsic evidence under consideration there was evidence of what had been said during negotiations.

On this highly persuasive authority it is clear that evidence of what went on in negotiations is admissible to show that apparently clear language is in fact ambiguous, as well as to clear up a patent ambiguity or a latent ambiguity which has been revealed by other extrinsic evidence.

What is striking here, however, is that the only extrinsic evidence introduced by either side, either to show ambiguity or resolve it, is self-serving testimony of what they thought and their own subsequent actions. I do not doubt the veracity of that testimony and in the context I have concluded that the phrase "the appropriate hourly rate" in Article 17.6 is ambiguous, at least latently. My purpose in quoting so extensively from the authorities on this subject is to make it clear that, while evidence of negotiating history may be relied upon, including evidence of what was said during negotiations, both to show

that language is ambiguous and to resolve that ambiguity, such evidence must be clear and cogent. Evidence of what people thought, even when corroborated by evidence of their actions, does not easily meet that requirement. Such evidence does not alone provide a basis for concluding what the parties agreed upon, or appeared to have agreed upon. I note that Brown and Beatty in para. 3:4420 quoted above refer only to "documentary evidence" (which, on the authorities is, I think *too* narrow) and stress that the evidence "ought to be relied upon only if it is unequivocal".

While Mr. Doull, Mr. McBride and Mr. MacLennan all thought that the Employer had agreed to pay overtime based on the total package, that is not what the Collective Agreement says. The phrase used in Article 17.6 is "the appropriate hourly rate". Neither does the Collective Agreement say that overtime is to be based on the "wage rate" but, of the two phrases used in the appendices, "wage rate" has a closer semantic relationship to "the appropriate hourly rate" than does "total package". That somewhat more natural reading puts the onus on the Unions to show that that reference must have been understood to be to the "total package", and, of course, the Unions are the grievors here and so must make their case. Although this proposition hardly needs the support of arbitral precedent, counsel for the Employer cited *Re I.U.O.E., Loc. 686, & Cyanamid Ltd.* (1959), 9 L.A.C. 353 (Schwenger C.C.J., Chair) at p. 356, and *Re Canada Post Corp. and C.U.P.W. (Schlosser)* (1993), 39 L.A.C. (4th) 6 (Bird), at p. 13. The Unions have not made their case here through the evidence of negotiating history.

Counsel for the Unions stressed that when the Collective Agreement was negotiated it was left to the Unions to decide how much of the "total package" would go into the "wage rate" and how much into benefits, and even when the Collective Agreement was signed some of the Unions had not yet decided what the "wage rate" would be. His argument was that the Unions knew that the Employer needed to have the bottom line settled, so it was quite reasonable for them to have assumed that overtime was to be paid on the "total package", because otherwise a variable would have been introduced that was dependent on how much of the total package each Union would decide to allocate to the "wage rate". I see the point, but I am unconvinced that this was a basis for concluding, as the Unions apparently

did, that the Employer had agreed to pay overtime on the "total package". Overtime was bound to be a significant variable anyway.

None of the arbitration awards relied on by counsel for the Unions have provided a basis for allowing the Grievance. In so far as they involve terms like "hourly rates" and "regular rates" in other collective agreements, they do so in contexts so different from this one as to be of no assistance. Neither do I think that any of the general principles invoked by arbitrators in deciding the basis upon which benefits are to be calculated are helpful here. Clearly the benefits parts of the total package were "earned" in this setting, but it does not follow that the parties are to be taken to have agreed that overtime was to be calculated on the total package, when they used the phrase "the appropriate hourly rate". The same is true of the awards relied on by counsel for the Employer, including those dealing with the presumption against pyramiding.

The Grievors have failed to prove that "the appropriate hourly rate" in Article 17.6 refers to the total package. The phrase is ambiguous in the context here but the evidence of negotiating history before me does not resolve the ambiguity in the Unions' favour.

There was some suggestion in the evidence that basing overtime on the total package was standard industry practice for some trades in some provinces, but I am unable to conclude that a case for giving the phrase "the appropriate hourly rate" in Article 17.6 that interpretation has been made out on that basis either. The evidence was unclear and equivocal, probably because there is no uniform practice. Moreover, I am struck by the fact that no evidence was introduced on behalf of the Unions to demonstrate that where such is the practice it is done under substantially similar language. I suspect the collective agreement language in such situations more clearly bases overtime payment on the total package.

Estoppel

I am also satisfied that on the evidence the Employer did nothing to estop it from insisting on its rights under the Collective Agreement, interpreted in the most natural way. Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., looseleaf, state in para. 2:2210 that the essentials of the doctrine of equitable estoppel are;

> [1] a finding that there was a representation by words or conduct, which may include silence, [2] intended to be relied on by the party to which it was

> directed, [3] some reliance in the form of action or inaction, and [4] detriment resulting therefrom.

Where these requirements are met the party against whom the estoppel is set up will nor be allowed to enforce the rights it has represented itself as undertaking to forego, at least not until the party setting up the estoppel has had a fair opportunity to escape the effects of its detrimental reliance.

It is well established that equitable estoppel may arise from representations made in the course of collective bargaining (Brown and Beatty, *supra*, at footnote 12), but for good reason arbitrators have insisted that the evidence upon which an estoppel is to be based in this context be "clear and cogent". As arbitrator Adams said in *Sudbury District Roman Catholic Separate School Board* (1985), 15 L.A.C. (3d) 284 at pp. 286-7;

> I emphasize that evidence establishing an estoppel in the form of a representation made during negotiations and inconsistent with the clear wording of a collective agreement must be in the form of clear and cogent evidence. Labour relations statutes in all Canadian jurisdictions require that a collective agreement be in writing and it is simply too easy for parties in difficult negotiations, on the conclusion of the collective agreement, to allege that representations were made contrary to the document signed. Much is said in collective bargaining negotiations and because of the nature of that process, parties tend to hear what they wish to hear. Tactic and strategy underlie the communications between the parties as they attempt to persuade and cajole each other each other into agreement. But it is well understood that on the conclusion of a collective agreement, the parties' rights are to be found in the agreement and not in the *rationale* and arguments made during the negotiations preceding the document's execution.

In concluding that the case for estoppel had not been made out before him, arbitrator Adams drove his point home, at p. 293;

> ... collective bargaining negotiations are conducted under considerable pressure and often, as in this case, agreements are arrived at under physically trying circumstances. In collective bargaining negotiations much is said and much can be misunderstood or misinterpreted. But what should be clear to parties involved in the process is that the language they have achieved in their agreements is the language on which they must generally rely. More substantial and concrete evidence of an oral representation is required than was adduced before me in order to avoid the express terms of a collective agreement.

There is no evidence whatever before me here that satisfies the second of Brown and Beatty's requirements of equitable estoppel, and I have not been able to conclude that the first is satisfied either.

Mr. Doull's testimony, that he raised the question of whether overtime was to based on the total package "fifteen or twenty times", is the most relevant. But I did not understand him to suggest, and I do not find, that the Employer ever said positively that such was to be the case. At most the Employer left that implication open, by letting the Unions decide how to divide up the total package. At its best, from the Union's point of view, that might be construed as "a representation by ... silence", but it was certainly not a clear acquiescence in the assumption made by the Union negotiators. Indeed, the Employer's failure to include clear language in the Collective Agreement, or even make a definitively positive response on the question of the basis for the calculation of overtime, after so many requests, might be taken as an indication that it intended something different.

Conclusion and Order

Even taking into account the evidence of negotiating history before me, the Unions have failed to establish that the phrase "the appropriate hourly rate" in Article 17.6 refers to the total package and that overtime should therefore be paid on that basis. The evidence does not support a conclusion that the Employer is estopped from asserting its interpretation of the phrase as referring to the "wage rate" set out in the various appendices to the Collective Agreement. For these reasons the grievance is denied.