

Subject - Arbitrability  
- Time Limits

**ARBITRATION AWARD**

BETWEEN:

INTERNATIONAL UNION OF OPERATING ENGINEERS  
LOCAL 904  
(hereinafter called the "Union")

AND:

TOROMONT CAT, a division of Toromont Industries Ltd.  
(hereinafter called the "Employer")

GRIEVANCES:

Retiree medical benefits plan  
No. 900 - Wallace Wiseman  
No. 901 - Ralph Curl

COUNSEL:

For the Union

V. Randell J. Earle, Q.C.

For the Employer

Gregory M. Anthony

ARBITRATOR:

James C. Oakley

The Arbitration hearing was held at St. John's on July 31 and September 12, 2007. The parties agreed as follows:

1. The Arbitrator was properly appointed to hear the grievance.
2. The Arbitrator would remain seized of the matter for 60 days following publication of the Award in the event there was a question of compensation or interpretation arising from the Award.
3. Witnesses were excluded from the hearing.
4. The Arbitrator would retain any tape recording of the hearing for 60 days following the publication of the Award.

The Employer raised a preliminary objection that the grievances were not arbitrable and were outside the jurisdiction of the Arbitrator. The Employer also raised a preliminary objection that the grievances were not filed within the mandatory time limit in the Collective Agreement. It was agreed that the Arbitrator would decide the preliminary issues before proceeding to hear the merits of the grievances.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between Toromont CAT, a division of Toromont Industries Ltd. and International Union of Operating Engineers, Local 904, effective August 1, 2004 to July 31, 2007
- Consent 2 - Grievance Form, Grievance No. 900 dated March 9, 2006 signed by Wallace Wiseman
- Consent 3 - Grievance Form, Grievance No. 901 dated March 9, 2006 signed by Ralph Curl
- Consent 4 - *Accident and Sickness Insurance Act*, RSNL 1990, c. A-2, s. 10
- BD - 1 Form letter dated November 2, 2004 to "Fellow Employees" from Ellen Speranza, Benefits and Compensation Analyst, Toromont CAT
- BD - 2 Letters dated December 14, 2004 to various employees from Bob Sleva, Manager, Employee & Industrial Relations
- BD - 3 Toromont CAT Newfoundland and Labrador power point presentation

- BD - 4 Letter dated July 30, 2007 from Great West Life Assurance Company to Ellen Speranza, Benefits and Compensation Analyst
- ME - 1 Employee Benefits - Newfoundland Tractor and Equipment Co. Ltd. booklet with attached letter from Managing Director dated December 1, 1982
- ME - 2 Collective Agreement Negotiations 2004 Management Proposals as at conclusion, July 27, 2004, Union's proposals as at conclusion, July 27, 2004

### **Nature of the Grievance**

The Union grieves that the Employer stopped paying 50% of premium costs for the retiree medical benefit plan with the effect that retirees had to pay 100% of the premiums. The Union seeks an order that the Employer reinstate payment of 50% of premium costs. The Employer has raised two objections to the arbitrability of the grievances, namely, that the dispute is outside the jurisdiction of the Arbitrator and that the grievances were not filed within the mandatory time limits in the Collective Agreement. The Union objected to the Employer raising the time limit objection on the grounds of lateness in raising the objection and waiver of the objection.

### **Collective Agreement**

The relevant articles of the Collective Agreement are as follows:

Article 4.00 - Management Rights

4.01 Management Rights - The Company possesses the unique and exclusive right to manage its operations and its employees in all aspects, except those specifically limited by this Agreement.

Article 14.00 - Grievance and Arbitration Procedure

14.01 Any matter relating to or involving:

- A. The interpretation, meaning, application, or administration of the Collective Agreement or any provisions of the Collective Agreement.
- B. A violation or an allegation of a violation of the Collective Agreement.

- C. A question whether a matter is arbitrable may be the subject of a grievance.

Procedure:

- A. Any such matter constituting a grievance must be filed in writing, identifying the Articles(s) allegedly violated, with the employer within seven (7) days, excluding Saturday, Sunday, and statutory holidays of the occurrence of the event given rise to the grievance. If such grievance is not filed within this period, it shall be considered settled.
  - B. The grievance must be filed and discussed with the employee's Foreman or Supervisor.
  - C. Failing settlement with the Supervisor, the grievance shall be submitted to the Branch Manager and/or his designated representative and a meeting held. At that time, the griever may have his Shop Steward and/or Business Manager or his designate in attendance.
  - D. Failing settlement with the Branch Manager or his designated representative, the grievance shall be settled in the manner provided by arbitration.
  - E. Both parties shall, failing the above, agree to a single arbitrator within seventy-two (72) hours or one of the parties or both may apply to the Minister of Employment and Labour Relations to appoint one as per the *Labour Relations Act*.
  - F. The parties may, by mutual consent, refer the matter to a three (3) person Arbitration Board or if mutually agreed, to a single Arbitrator of mutual agreement.
- 14.02 Arbitrator - The Arbitrator shall not have the power to alter, vary, modify, or amend any of the provisions of this Agreement or to substitute any provisions of this Agreement nor render a decision inconsistent therein. The decision of the Arbitrator is to be compiled with within fifteen (15) days of receipt by the parties.

Article 16.00 - Shop Steward

- 16.01 Steward Appointment - The Union may elect or appoint One Shop Steward and One Assistant Shop Steward to represent the employees at each branch. The Union shall notify the Company in writing as to the name or names of

such Shop Stewards or Assistant Shop Stewards. The Company agrees that no Shop Steward or Assistant Shop Stewart shall suffer discrimination by reason of holding such office.

....  
16.04 Steward-Allowed Time - The Shop Steward shall be allowed reasonable time during working hours, without loss of regular pay, to carry out his duties provided it does not interfere with his work. Any employee being reprimanded by the Company shall have the right to request that the Shop Steward be in attendance.

....  
Article 18.00 - Bulletin Board

18.01 Notice Board - A notice board shall be provided for the posting of all official Union notices exclusively, and will not be used for the purpose of disseminating political information. The right is reserved by the Company to request the removal of material offensive to the Company.

18.02 Board Location - The following information shall be kept in a central location, readily accessible to the Shop Steward:

- A. Seniority List,
- B. Copy of the Agreement, and
- C. Welfare Plan Provisions.

Any employee requiring such information shall contact the Shop Steward for same.

....  
Article 27.00 - Duration and Amendment of Agreement

....  
27.02 Agreement Complete - This Agreement is the complete and entire Agreement between the parties and supersedes or replaces all previous Agreements or practices both written and oral.

....  
Letter of Understanding #2  
Between  
Toromont CAT  
and  
International Union of Operating Engineers  
Local 904

The parties to the Collective Agreement here by agree that the subsequent articles listed below shall form part of their Collective Agreement.

- 1) Current Sick Leave - The company will continue its current sick leave benefit for the life of this Agreement. The Union agrees to cooperate with the Company in dealing with abuses in sick leave benefits.
- 2) Cost Share - The Company will continue to share in the cost of the premium for the Dental Plan up to a maximum increase of 3% per year.
- 3) Doctors Note - Toromont CAT does not normally require employees to provide a doctor's note in respect of the three (3) sick days that are unpaid under the Weekly Indemnity program provided by the insurance company, to qualify for payment from the Company.
- 4) Abuse - Where the Company believes there is abuse or questionable circumstances associated with an employee's absence, the employer may ask the employee to provide an explanation and/or require the employee to provide a doctor's note explaining the need for the absence for future occurrences.

Toromont CAT  
A Division of Toromont Industries Ltd.

International Union of Operating  
Engineers, Local 904

Letter of Understanding #4  
Between  
Toromont CAT  
and  
International Union of Operating Engineers  
Local 904

The parties to the Collective Agreement here by agree that the subsequent articles listed below shall form part of their Collective Agreement.

- 1) Weekly Indemnity - The Weekly Indemnity plan will replace your earnings during the first 26 weeks of absence due to illness or non work related injury.
- 2) Weekly Earnings - While you are under the care of a physician, the plan pays you 66 2/3% of your basic weekly earnings up to a maximum of \$475.00 per week.
- 3) Benefits First Thru Third Day - Benefits on the first day, up to and including the third day are at full pay on the fourth day of absence due to an illness or non work related injury the above insurance plan takes over.

- 4) Insurance - This is an insurance plan and is based on a seven (7) day week. The completion of the proper forms are the employees responsibilities, first payment is approximately two (2) weeks after the receipt of the forms by the insurance company.
- 5) Benefit changes - It should be noted that the only change to the long term benefit will be that it comes into play at the end of the twenty-six (26) weeks, instead of fifteen (15) weeks as previously the case.

Toromont CAT  
A Division of Toromont Industries

International Union of Operating  
Engineers, Local 904

### **Evidence**

The witness called by the Employer was Brian Doherty, Manager of Labour Relations. The witnesses called by the Union were Roy Hawco, Shop Steward, Lorna Clarke, Credit Representative, Ralph Curl, Mechanic (retired) and Michael Ezekiel, Business Manager, Local 904.

The two grievance forms are dated March 9, 2006. Grievance No. 900 was signed by Wallace Wiseman and Grievance No. 901 was signed by Ralph Curl. The description of the grievance on both grievance forms states "employer has not lived up to the commitments of the medical benefit plan to employees who were over the age of 50 years at the time of changing plans in 1997". The grievance forms state under the heading "settlement requested" that "employer to correct the problem immediately as per their commitment made in 1997 and pay the employees medical premium upon retirement in the amount of 50%". Under the heading "Employer's Reply to the Grievance" on the grievance forms, there is a handwritten response stating "no violation of the Collective Agreement".

Brian Doherty, Manager of Labour Relations, testified that he commenced his employment with the Employer on July 4, 2005. He is responsible for administration of the Collective Agreement. He did not participate in collective bargaining in 2004. He did not review the bargaining proposals made at that time and he was not aware of any representation by the Employer that there would be no change in the benefit plans. In preparation for the arbitration hearing, he reviewed the Employer's files regarding pensions and benefits located at the head office in Concord, Ontario. He referred to a form letter dated November 2, 2004 from Ellen Speranza, Benefits and Compensation Analyst, addressed to "fellow employees" that stated the audit group, as a result of examining the cost of the retiree

benefit program and determining that costs had more than doubled, determined that individual insurance could be purchased less expensively, and effective January 1, 2005 there would be no new entrants accepted into the company sponsored retiree benefit program. Mr. Doherty testified that he was not certain whether the letter was sent to all employees, and he was not certain whether the letter was placed in individual employee files. Mr. Doherty referred to letters dated December 14, 2004 from Bob Sleva, Mr. Doherty's predecessor in his position, addressed to nine individual employees. The letter advised the employees that they would be eligible to participate in the current post-retirement benefit program, and if they elected to participate they would be required to pay 50% of the cost of the benefit program and the company would pay the remaining 50%. The letters were placed in those nine individual employee's files. Wallace Wiseman and Ralph Curl were not recipients named on any of the nine letters entered as an exhibit. Mr. Doherty testified that prior to the change in payment of premium cost for the retiree benefit plan, benefits were provided to retirees on a 50/50 cost shared basis. He said that under the prior retiree benefit plan, there was no distinction made between retirees based upon whether they received a defined benefit pension or based upon their date of retirement.

Mr. Doherty referred to a power point presentation that he stated was presented at the St. John's branch in 2005, according to information he received from Carl Hanlon. He was told that both bargaining unit and nonbargaining unit employees attended the presentation. The presentation referred to the acquisition of Newfoundland Tractor by Toromont in 1997 and the conversion at that time of the employee benefit plan to the Toromont plan. The presentation stated that in 2004 Toromont committed that employees with guaranteed pension plans would be eligible for retiree medical benefits at a rate of 50% of premium costs. Active employees were advised in 2004 that effective December 31, 2004 they would no longer be eligible to participate in the retiree benefit plan. The presentation referred to a review by the Company of the retiree benefit plan in 2005. As a result of the review, the Company decided that active employees who retired prior to June 1, 2005 and reached the age of 55 years old, could participate in the benefit plan at the 50% premium level. The remaining active employees would be eligible for the retiree benefit plan when they retired, but they would pay 100% of the premium costs. Mr. Doherty did not have copies of any letters to employees informing them they would not be eligible for retiree benefits. According to Mr. Doherty, the change in the retiree benefit plan occurred in 2005 at the time of the presentation to employees. Mr. Doherty was asked about the contents of Letters of Understanding #2 and #4. He testified that casual sick days are paid by the Employer at 100% of wages for the first three days and that the weekly indemnity program applies after the third day. He was not aware of the contents of any employee

benefit plan booklet describing current benefits that was prepared by Great West Life or any other insurer. He was not aware of the statutory requirement to distribute to employees an outline of the benefits of the program. He reviewed a letter from Great West Life dated July 30, 2007 stating that retirees in Division 31, Class 3, under age 65, paid 100% of the retiree benefit costs and retirees in other categories (Division 31, Class 23, aged 65 and over, Division 17, both under and over age 65), paid 50% of retiree benefit costs.

Lorna Clarke testified that she was the administrator of the employee benefit plan from 1997 to 2000, and after that date the plan was administered from the corporate head office in Concord, Ontario. After Newfoundland Tractor was purchased by Toromont, information about the benefit plan was contained on sheets that were stapled together. The insurance carrier is currently Great West Life, but it had previously been Maritime Life and then Manulife. She attended an Employer presentation on group medical benefits, but was not certain if it was the same information as outlined on the power point presentation (exhibit BD-3).

Ralph Curl testified that he retired from his position as mechanic in Corner Brook on March 31, 2006. He was 65 years of age on March 19, 2006. He did not recall attending any meeting where the information outlined on the power point presentation was presented. He testified that he did not recall receiving any correspondence or other communication to advise him about any change in the retiree medical benefit plan. After he retired the amount he paid for premiums for the medical plan was doubled. He was also paying double the amount that other employees, such as John Park, were paying who retired before he did. He signed the grievance form on March 9, 2006 before he retired. He testified that he must have known at that time that the medical premium would increase when he retired.

Roy Hawco testified that he did not recall attending any presentation where the information in the power point presentation was presented. When he signed the Collective Agreement in 2004 he understood that the Collective Agreement said that the medical benefit plan would not change. Mr. Hawco did not personally receive any letter about retiree medical benefits. He had no personal knowledge of any changes to the retiree benefit plan. He was aware that under the management benefit plan, the employees pay a flat rate of \$9 per prescription, but the Union would not agree to have such a fee in the benefit plan for the Union members. During collective bargaining in 2004, the Employer representative, Bob Sleva, gave the Union copies of the Green Shield Plan to review. The

Employer wanted the bargaining unit employees to convert to the new plan. The Union would not agree to change the plan. The Employer's proposal was withdrawn from bargaining.

Michael Ezekiel testified that he was the Union's negotiator for the 2004 Collective Agreement. The negotiator for the Employer was Bob Sleva. Mr. Ezekiel testified that Mr. Sleva informed the Union that management was going to convert to a new benefit plan and the Employer wanted the Union members to be part of the new plan. The Union informed the Employer that it did not agree with the change. The written Employer proposals dated July 27, 2004 stated with respect to Letter of Understanding # 2 that sick leave issues were to be discussed as part of an overall benefits package, and stated with respect to Letter of Understanding # 4, that weekly indemnity was to be discussed as part of an overall benefits package. The written Union proposals dated July 27, 2004, at the conclusion of bargaining, stated that the Union's response to the Company's proposal on the benefit package was "they like it the way it is - present agreement". Mr. Ezekiel stated that the Union would not negotiate with the Employer any changes in the insurance carrier or the insurance benefits. The Union said at bargaining that it did not care about increases in premium payments, and it would keep the existing medical plan. Mr. Ezekiel testified that he was not informed that the Employer had unilaterally made changes to the benefit plan. He said the reference in Article 18 of the Collective Agreement to the welfare plan included the medical plan and pension benefits. He referred to the Newfoundland Tractor plan benefits as set out in exhibit ME-1.

### **Employer Submission**

The Employer submitted that the medical benefit plan is not covered under the Collective Agreement. The grievance does not allege violation of any specific article of the Collective Agreement. The grievance is outside the jurisdiction of the arbitrator. The Employer relied on the award between the same parties in *International Union of Operating Engineers, Local 904 v. Toromont CAT*, unreported, December 19, 2005 (Thistle) in which the Union grieved changes to the pension plan and the arbitrator found that there was no reference to the pension plan in the Collective Agreement and therefore changes to the plan were not arbitrable. Under Article 4.01, the Employer retained its management rights to manage subject to any specific provisions of the Collective Agreement. The medical benefit plan was not covered under Article 14.01. Under Article 14.02, the Arbitrator did not have the power to amend the Collective Agreement. Article 18.02 referred to the bulletin board and made no reference to the medical plan. The reference in Article 18 to providing information to the shop steward had the effect only that if an employee wanted information about the medical plan

they could request it from the shop steward. Article 18 did not have the effect of incorporating the terms of the medical plan into the Collective Agreement. Letter of Understanding # 2 applied only to current employees and not retirees and did not incorporate the medical plan into the Collective Agreement. Letter of Understanding # 4 did not incorporate the medical plan into the Collective Agreement. The Collective Agreement was the entire agreement between the parties unless an external document was incorporated by reference. The Employer referred to the four categories of insurance plan language discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> edition, at paragraph 4:1400. The language used in the Collective Agreement did not fit within the category that provided for payment of premiums for medical benefits. Payment by the Employer of premiums for retiree medical benefits was not a matter covered by the Collective Agreement. The discussion of the medical plan at the bargaining table did not mean that it was incorporated into the Collective Agreement. The Employer referred to arbitral authority stating that disputes concerning pensions or early retirement agreements were outside the jurisdiction of the arbitrator where there was no reference in the collective agreement. The principle of estoppel does not apply. There was no evidence of any agreement between the parties or any promise made by the Employer. There was no evidence that the Union relied to its detriment upon any statements made during collective bargaining. The benefit plan presented into evidence by the Union was a document that was 25 years old. The insurance carrier and the benefits had changed in the intervening years, but no grievances were filed with respect to the changes. The Union did not comply with the mandatory time limits in Article 14.01. The time limits were mandatory because Article 14.01 stated that the grievance was “considered settled” if the grievance was not filed within seven days of the occurrence of the event. The changes were made in early 2005 and the grievances were not filed until March, 2006. The Employer asked that the preliminary objections be allowed and the grievances dismissed.

### **Union Submission**

The Union submitted that the onus of proof was on the Employer with respect to both preliminary objections. The benefit plans have been the subject of collective bargaining and are an appropriate subject for the grievance and arbitration procedure. The parties negotiated the terms of the plan and incorporated parts of the plan in the Collective Agreement. The Employer and Union bargaining proposals make it clear that the whole benefit plan was the subject of collective bargaining. The Employer made proposals to change the benefit plans, however, the Union did not agree to pay a prescription drug charge or to make any changes to the existing plan. The parties intended the entire benefit plan to be part of the Collective Agreement. The benefit plan was set out in exhibit ME-1.

The Letters of Understanding incorporated the benefit plan. Letter of Understanding # 4 indicated that the only change to the long term disability plan was that benefits came into effect at the end of 26 weeks and not at the end of 15 weeks. Letter of Understanding #4 contained a series of statements showing the incorporation of the benefit plans by reference, and setting out a cap on the weekly indemnity payments. The Letters of Understanding required the Employer to maintain a benefit plan and incorporated the plan in to the Collective Agreement. The Employer was committed to cost sharing the dental plan. Article 18.02 stated that information about the welfare plan is to be readily accessible to the shop steward and information about the plan is to be obtained by employees from the shop steward. The importance of the shop steward is indicated by Article 16.01. The effect of Articles 16 and 18 is that if an employee has an issue with employee benefits, then he approaches the shop steward to represent him. The award between the same parties by Arbitrator Thistle dealt with the pension plan and is distinguishable from the present case. There is a significant difference in the collective agreement language with respect to the benefit plan compared to the pension plan. The Union submitted that the principles of estoppel apply based on the representation made by the Employer in collective bargaining. The Employer made a commitment that there would be no changes to the medical plan. The Employer made a representation that the complete benefit plan was subject to the collective bargaining process. The representation was relied upon by the Union to its detriment. The Employer is estopped from arguing that the benefit plan is outside the Collective Agreement. With respect to time limits, the Employer has not proven the facts required to establish the time limit objection. The Employer witness was not present at the meetings and was unable to answer questions with respect to the statements made at the meetings. The Employer has not proven that employees knew about the changes. The power point presentation did not state that the changes applied to bargaining unit employees. In the alternative, if the grievance was filed out of time, then the Employer's objection was untimely because it was not made at the first opportunity. The Employer did not give notice of the objection to the Union until the day before the arbitration hearing. The Employer took a fresh step in the grievance procedure by replying to the grievances and by proceeding to arbitration thereby waiving the timeliness objection. The Union requested that the preliminary objections by the Employer be dismissed and the Arbitrator proceed to hear the merits of the grievances.

### Considerations

The issues raised in the preliminary objections are (1) are the grievances within the jurisdiction of the Arbitrator? and (2) Are the grievances considered settled because they were filed outside the time limit in Article 14.01 of the Collective Agreement?

The grievances concern changes in the retiree medical benefits plan. The Employer decided in 2005 that active employees would continue to be eligible for the retiree medical benefit plan but would pay 100% of the premium costs. For that group of employees, the Employer would no longer pay 50% of premium costs. The Employer decided it would continue to pay 50% of the premium costs for current retirees and active employees with guaranteed pensions.

The Grievor, Ralph Curl, retired effective March 31, 2006. After he retired he paid 100% of the premium cost for the retiree medical benefit plan. He paid about double the amount for premium costs paid by other retirees and double the amount that he had been paying as an active employee.

The Union grieved that the elimination by the Employer of its payment of 50% of the premium costs for the retiree medical benefit plan violates the Collective Agreement. The Union argued that the commitment by the Employer to pay 50% of the premium costs for retiree medical benefits is enforceable at arbitration and within the jurisdiction of the Arbitrator. The Union referred to several articles of the Collective Agreement and the Letters of Understanding attached to the Collective Agreement in support of its position. The Union also argued estoppel against the Employer on the basis of representations made during collective bargaining.

The Employer submitted that the issue presented by these grievances is similar to the issue already decided in an arbitration award between the same parties in *International Union of Operating Engineers, Local 904 v. Toromont CAT*, December 19, 2005 (Thistle). That award concerned a grievance by the Union that the Company had violated the Collective Agreement by undertaking a pension conversion from a defined benefit plan to a defined contribution plan and entering into early retirement agreements with bargaining unit members without the consent of the Union. The arbitrator decided that the grievance was not filed within the time limit specified in the Collective Agreement. The arbitrator also commented on whether the issues related to the pension plan were within the jurisdiction of the arbitrator. In that regard the arbitrator stated as follows at page 8:

There is quite extensive arbitral authority on whether or not pension plans form part of the collective agreement, and the general conclusion is that this will depend on the specific language used in the collective agreement. In the instant case, there is nothing in the collective agreement dealing with the pension plan or the obligation of the Company in respect of the plan. The Union suggested that Article 9.02 dealing with a statement showing deductions from total wages has an impact on making the pension plan form part of the negotiations between the parties. Also, Article 18.00 - Bulletin Board - refers to having the Welfare Plan provisions kept in a central location and this, according to the Union, has an impact on how the parties had treated the pension plan and how changes could be made to the plan. With respect, these provisions do not make the pension plan subject to the bargaining process.

There are a number of arbitral awards dealing with the treatment of pension plans and whether they are subject to the collective bargaining process. When there is a dispute in respect of a pension plan the question is whether the dispute arises, either expressly or implicitly, from the interpretation, application, administration or contravention of the collective agreement. Where the pension plan itself is outside the ambit of the collective agreement, then the matter is not arbitral (*Dawn Foods Canada and U.F.C.W. Loc. 342 P-2* (108 L.A.C. (4<sup>th</sup>) 51 (2002))).

The Union submitted that the above arbitration award may be distinguished on the basis that there is collective agreement language that is applicable to the medical benefit plan. The Arbitrator finds that the above award is helpful with respect to the analysis to be applied by arbitrators, but the decision in this case will depend on a review of different collective agreement language, i.e. the language related to the benefit plans.

When considering the extent to which the parties have incorporated the retiree medical benefit plan in the Collective Agreement, the Arbitrator has considered the arbitral authorities dealing with incorporation of insurance and welfare plans. There is extensive arbitral authority in this regard and based on the principles, there are various options available to unions and employees when discussing the incorporation of such plans into collective agreements. The incorporation of insurance and welfare plans is discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> edition, paragraph 4:1400 as follows:

Pension, insurance and welfare plans are types of extrinsic documents or agreements which are commonly found physically separate from collective agreements. Whether they form part of the agreement or are otherwise relevant as aids to interpretation depends upon the surrounding circumstances, together with the specific language used in the collective agreement. Commonly, the relationship between such ancillary

documents and the collective agreement will fall into one of four categories. In one, the plan or policy is not mentioned in the agreement. In the second, the collective agreement specifically provides for certain benefits, while in the third it only provides for the payment of premiums. In the last, specific plans or policies are incorporated by reference into the agreement.

The Union submits that this is a case where the Employer has agreed to provide for payment of premiums for the retiree medical benefit plan, which would be a situation within the third category listed above. Where the type of language in the third category is used, an employer does not become an insurer, but any failure by the employer to pay the premiums, would be subject to the grievance and arbitration procedure.

The Arbitrator will review the Collective Agreement language to determine whether there is an express or implied obligation that the Employer pay 50% of the premium costs of a retiree medical benefit plan.

The Letters of Understanding address certain benefits of an insurance plan. Letter of Understanding # 2, paragraph 2, states that the Company will continue to share in the cost of the premium for the dental plan up to a maximum increase of 3% per year. This is a commitment that would fall within the third category discussed in the arbitral authorities, which is a commitment to pay premiums. However, the commitment to pay premiums in paragraph 2 of Letter of Understanding, # 2 applies only to the dental plan and not to any other benefit of an insurance plan. Letter of Understanding # 2 also refers to the weekly indemnity program provided by the insurance company which is stated to come into effect after the first three days of sickness, and implies that the Employer will provide to employees the benefits of the weekly indemnity program. Letter of Understanding # 4 refers to the weekly indemnity plan and states in paragraph 1 that the plan will replace earnings during the first 26 weeks of absence due to illness or non-work related injury, and in paragraph 2 that the plan pays 66 2/3% of basic weekly earnings up to a maximum of \$475 per week. Letter of Understanding # 4 also states in paragraph 5 that the only change to the long term benefit is that it comes into play at the end of 26 weeks instead of 15 weeks as previously the case. There is no reference in the Letters of Understanding to the retiree medical benefit plan. The Letters of Understanding refer to the benefits of the dental plan, the weekly indemnity plan and the long term benefit plan. Thus, the parties have given consideration to the issue of the benefits of insurance plans and have bargained in the Letters of Understanding for either the Employer to provide certain benefits or to pay premiums in respect

of certain benefits. However, the parties have made no express or implied reference to the retiree medical benefit plan in the Letters of Understanding.

The Arbitrator has considered whether Article 18.02 has the effect of providing that the Employer will pay premiums for a retiree medical benefit plan. Article 18 is headed "Bulletin Board". Article 18.01 is headed "Notice Board" and provides that there will be a notice board for the posting of official Union notices. Article 18.02 is headed "Board Location" and states that information, including the "welfare plan provisions", shall be kept in a central location accessible to the shop steward. Article 18.02 also provides that any employee requiring such information, including the welfare plan provisions, shall contact the shop steward for same. It is implied by Article 18.02 that there will be a welfare plan in order to have a provision that a copy of the welfare plan be made available to the shop steward and to employees by contacting the shop steward. However, there is nothing in Article 18.02 to indicate what benefits are included in the welfare plan. From the Letters of Understanding, it is evident that the welfare plan includes weekly indemnity, long term benefit and a dental plan. However, there is nothing in the Collective Agreement providing that the welfare plan includes a retiree medical benefit plan. Therefore there is no commitment in Article 18.02 that the Employer will pay premium costs for a retiree medical benefit plan.

Having considered Article 18.02, the Letters of Understanding and the Collective Agreement as a whole, there is no express or implied reference in the Collective Agreement to an obligation that the Employer pay premium costs for a retiree medical benefit plan.

The Union has argued estoppel against the Employer on the basis of representations made during collective bargaining. The Arbitrator has considered whether the principle of estoppel applies in these circumstances. Arbitrators have the authority to apply estoppel. The elements of estoppel are stated in *Brown & Beatty, Canadian Labour Arbitration*, 4<sup>th</sup> edition, at paragraph 2:2211 as follows:

Thus, the essentials of estoppel are: a clear and unequivocal representation, particularly where the representation occurs in the context of bargaining, which may be made by words or conduct; or in some circumstances it may result from silence or acquiescence; intended to be relied on by the party to whom it was directed; although that intention may be inferred from what reasonably should have been understood; some reliance in the form of some action or inaction; and detriment resulting therefrom.

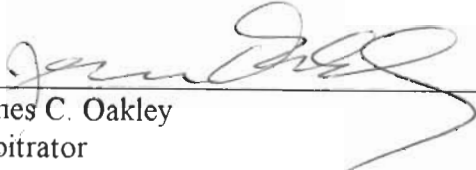
The Union alleges that the Employer represented that the welfare plans, including the retiree medical benefit plan, would continue, and in reliance on that representation, the Union did not negotiate that all benefits of the welfare plans be included in the Collective Agreement. The evidence of bargaining was set out in the written Company and Union proposals and the testimony of Union representatives at the bargaining table. The Employer proposed discussion of sick leave and weekly indemnity together with an overall benefits package, the Union responded that it did not agree to any changes to the Collective Agreement and the Employer withdrew its proposal. As noted above, the language in the Collective Agreement contained no express or implied promise by the Employer to pay premiums for the retiree medical benefit plan. The statements made in bargaining do not amount to a clear and unequivocal representation with respect to payment of premiums for the retiree medical benefit plan. Therefore this element of estoppel has not been proven and it is unnecessary to address the remaining elements that would need to be proven for the Union to succeed in its estoppel argument.

The Arbitrator has found that the grievance is not arbitrable and therefore it is unnecessary for the Arbitrator to make any finding with respect to the issue of time limits. The Arbitrator notes that the parties have agreed that the time limits under Article 14.01 are mandatory. Therefore in the event that the grievance was not filed within seven days of “the occurrence of the event giving rise to the grievance”, then the grievance would be “considered settled”. It is a question of fact in each case as to the date of the occurrence of the event giving rise to the grievance. However, as a result of the finding on arbitrability, it is unnecessary to review the evidence related to time limits.

### **Decision**

The preliminary objection by the Employer with respect to arbitrability is allowed. The grievances are outside the jurisdiction of the Arbitrator.

**DATED** this 30<sup>th</sup> day of October, 2007.

  
James C. Oakley  
Arbitrator