ref.# Annual Vacation leave

FINDINGS AND DECISION

IN A DISPUTE
between

Molson Canada, St. John's
("the Company")
and

Fish, Food and Allied workers Union FFAW/CAW
("the Union")

Grievor: Mr. Steve Lawlor

APPEARANCES:
For the Employer:
  Presenter: Mr. Harold Smith, Q.C.,
  Advisor: Mr. John Buckley, Brewery Manager

For the Union
  Presenter: Mr. Greg Kirby, LL.B
  Advisor: Mr. Steve Lawlor, Local Chairperson

Witnesses:
  For Union: Mr. Steve Lawlor

The Arbitrator: Dr. John A. Scott, Chair

The Grievance was heard on June 23, 2009 in St. John's.

The Statement of Grievance reads: Violation of the Collective Agreement. Articles # 3 & 20 and other pertinent articles. Forced Steve Lawlor off Workers Compensation and on Annual Vacation Leave.

The Requested Adjustment reads "Full Redress."

THE PARTIES AGREED THAT:
- the Arbitrator was properly appointed and had authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were properly observed or are waived;
- there are no points to be raised as to arbitrability or other preliminary objections;
- issues of quantum, if any, would be considered separately, and if the parties do not reach agreement within thirty (30) calendar days they will be referred, by notice given within the same thirty (30) calendar days, to the Arbitrator for resolution;
- the Arbitrator will remain seised of the matter for thirty (30) calendar days after publication of the award to deal with matters of interpretation, should they arise.

DOCUMENTS TAKEN INTO EVIDENCE:
Consent #1 Collective Agreement 2006-2012
Consent #2 Grievance # 01801
Consent #3 Letter: April 7, 2009, Ms. Denise Sullivan to Ms. Smith re Grievor
Consent #4 E-mail: April 13, 2009 Mr. Lawlor to Ms. Karen Brake
Consent #5 E-mail: April 14, 2009 (pm) Mr. Buckley to Mr. Lawlor
Consent #6 E-mail: April 14, 2009 (am) Mr. Lawlor to Mr. Buckley
Consent #7 Letter: April 27, 2009 Mr. Armstrong to Mr. Hynes
Consent #8 Letter: April 28, 2009 Mr. Lawlor to Mr. Armstrong
Consent #9 Letter: May 4, 2009 Mr. Buckley to Mr Lawlor
Consent #10 Letter: May 5, 2009 Mr. Lawlor to Mr. Buckley

ARTICLES OF THE COLLECTIVE AGREEMENT CONSIDERED
ARTICLE 3 – MANAGEMENTS RIGHTS

3:01 The Union acknowledges that it is the exclusive function of the Company to:
(a) maintain order, discipline and efficiency;
(b) hire, discharge, transfer, promote, demote or discipline employees, provided that a claim that an employee has been discharged, transferred, demoted or disciplined without just cause may be dealt with as hereinafter provided;
(c) generally to manage the industrial enterprise in which the Company is engaged and without restricting the generality of the foregoing to determine the products and by-products to be

manufactured, processed, packaged, shipped and distributed; the methods of manufacturing, processing, packaging, shipping and distribution; the sources, quantities and kinds of ingredients, supplies and other materials used in the manufacturing, processing and packaging of the Company's products and by-products; the schedules of manufacturing, processing, packaging, shipping and distribution and the kinds and locations of machinery, equipment and tools used throughout the Company's operations.

It is understood that in exercising these functions, the Company must conform to all other clauses of this Agreement and if the exercise of these functions and powers come (*sic*) in conflict with the terms of the Agreement, the case may be dealt with under the grievance procedure.

ARTICLE 7 – ARBITRATION

7.04 The Arbitrator shall not have any authority to make any decision inconsistent with the provisions of this Agreement and/or its memoranda; nor to alter, modify, add to or amend any part of this Agreement; however, in discipline cases the Arbitrator may sustain, modify or set aside a penalty.

ARTICLE 20 – VACATIONS

20.01 Vacation leave – As of May 1st in each year and based on seniority attained up to that day, employees will be entitled to paid vacations as follows: ....

20.02 Summer vacation schedules shall be posted by February 15th of each year. Employees shall be required to indicate their preference of vacation prior to March 1st. Employees will be notified by the Company of their approved vacation schedule by April 1st.

Any employee who fails to indicate his preference of summer vacation prior to March 1st shall forfeit his right to displace employees with less seniority who have indicated their preference prior to March 1st. Subsequent to March 1st, the available vacation slots will be filled on the basis of seniority.

Summer vacations shall be limited to two (2) weeks for employees with less than eight (8) years seniority and three (3) weeks for employees with more than eight (8) years seniority and shall be scheduled between ***June 1st (effective January 1st, 2007)*** and the third week of September inclusive. Where practical, vacation may be taken outside this period if mutually satisfactory to an employee and the Company.

Additional weeks of vacation for employees with three (3) years or more of service shall be taken outside the regular summer vacation period. Vacation requests shall be decided on a seniority basis and the Company will not refuse vacation requests for the purpose of preserving vacation weeks for the annual maintenance shutdown and Christmas shutdown. It is further understood that, subject to the provisions of the seniority clause, unused vacation weeks may be scheduled during the annual maintenance shutdown and Christmas shutdown.

20.07 Near the conclusion of the vacation year, an employee with unused vacation entitlement who is then in receipt of Weekly Indemnity or Long Term Disability benefits and who has not been continuously absent from work in excess of 104 weeks shall:

(i) Cease to receive such benefits and be placed on vacation leave until his unused vacation entitlement is exhausted; and,
(ii) Resume receipt of disability benefits, if still qualified, once his vacation credits are exhausted.

An employee whose disability benefits are interrupted as described above shall have his eligible benefit period extended by the number of weeks for which he has been placed on vacation leave by the Company pursuant to this clause.

ARTICLE 24 – MISCELLANEOUS CLAUSE

(a) Amendments to this Agreement may be made only by mutual consent of both parties. Proposed amendments shall be submitted in writing by the party desiring a change, and negotiations thereon shall start within thirty (30) days of such notice. During negotiations, and thereafter if no agreement is reached, the provision of this Agreement shall remain in effect.

(b) The Company and the Union agree that there will be no discrimination against any employee because of race, creed, colour, gender, national origin, or membership in the Union.

SCHEDULE "B"
INSURANCE AND BENEFIT PLAN

The Company is not the insurer of the following benefits, and the terms and conditions set out below shall be governed by the contract with the insurers. To be eligible for benefits, the employee must be classified as a

regular employee and be continuously employed for a minimum of six (6) months.

An employee shall not receive wages or other allowances such as holiday pay, vacation pay, weekly indemnity, LTD, Workers' Compensation, or other similar benefits from more than one source for the same day or part day.

The employee's share of any Unemployment Insurance Premium Rebate will be retained by the Company to offset a portion of the cost of the benefit improvements contained in this Agreement. ....

4. Weekly Indemnity

(a) Each eligible employee shall be entitled to weekly indemnity benefits as specified below during periods of non-occupational disability, providing that:

(1) he is actively at work when the disability commenced and was not absent without leave, or on lay-off, and

(2) he submits medical evidence of sickness or accident satisfactory to the Company and the insurer.....

5. Long Term Disability

_____Should the disability, described above, continue beyond the end of the 26th week, the insured Long Term Disability Plan will commence at the 27th week and will continue until recovery or age 65, whichever occurs first...

LETTER OF UNDERSTANDING
RE: WEEKLY INDEMNITY DURING VACATION

This letter, which shall not form part of the collective agreement, will confirm our discussions during recent negotiations and the Company's intent to continue its present practice with respect to entitlement to Weekly Indemnity benefits during vacation.

An employee who becomes ill or who is injured after having commenced his vacation and, as a result, is hospitalized or is forced to cancel his vacation and return home may, if qualified for Weekly Indemnity coverage, apply to postpone any remaining full week(s) of vacation and enrol in the Weekly Indemnity Plan ...

EVIDENCE

THE FIRST UNION WITNESS was the Grievor, Mr. Lawlor, a Molson employee for 30 years, currently as a Brewer, who has served for three years as the

Local's Chairperson and, prior to that, as Recording Secretary and as a Shop Steward. Mr. Lawlor is on Easy and Safe Return to Work with the *Workplace Health, Safety and Compensation Commission* (WHSCC). His WHSCC claim commenced on August 4, 2008, and he will "return to full time next week if all works out well" at which time the WHSCC claim will terminate.

Mr. Lawlor testified he was familiar with the instant grievance which arose "because the Company took me off WHSCC benefits and made me use annual vacation leave." He confirmed Consent #6 was an e-mail he sent Mr. Buckley at 9:28 pm on April 14, 2009, asking "... if I'd been put on vacation. Until then it was only verbal in conversation with Mr. Buckley." Consent #5 is Mr. Buckley's confirmation that Mr. Lawlor is "on vacation as per our discussion from April13 to May 5." Mr. Lawlor testified that the April 13 - May 5 period fell during the time he was receiving WHSCC benefits:

> "To my knowledge, the WHSCC benefits had been suspended temporarily from the 13th to the 5th... It was not right. It was not a ... part of the Collective Agreement. It was a violation."

The Grievor filed the grievance on April 15, 2009. Mr. Lawlor does not know whether his benefits were extended as a result of his having been placed on vacation, but did receive vacation pay, "deposited directly into my account." He did not receive any notice from WHSCC that his benefits were temporarily suspended between April 13th and May 5th.

He also confirmed that the instant grievance claims the Company has violated Articles 3 and 20 since, under the Collective Agreement, he "should not have to take vacation while on WHSCC benefits."

On Cross Examination Mr. Lawlor confirmed that, as a "Brewer", his actual classification under the Collective Agreement is "Brewhouse Operator." He

also confirmed that the WHSCC claim initiated in August of 2008 was the result of a recurrence of a previous injury. He described the vacation arrangements in place prior to the April '09 events giving rise to the instant grievance.

> "As I read the Collective Agreement, the schedule for summer vacation is set in January and February each year. I had three weeks scheduled. I was entitled to seven weeks. Three weeks were scheduled in February month for the summer period from June 1st to the 3rd week in September."

The Grievor confirmed his belief that he did take the three scheduled summer weeks prior to August 2008, and this left him with approximately four weeks, but he had taken a few days of this outside the summer vacation period. He agreed that between April 13 and May 5, 2009 there were "17 days... or 3 weeks and 2 days." He also testified he had 2 hours vacation entitlement left from 2008, which he understands he was eligible to use until May 1, 2009.

Under Article 20.02, he had seven weeks annual vacation entitlement for the period from May 1, 2008 until April 30, 2009; a new seven week vacation entitlement began on May 1, 2009. The three week summer portions of each year's vacation had to be scheduled by February 15, of each year.

Mr. Lawlor confirmed that as of April 2009 the 2008-2009 summer period vacation entitlement he had available to him was 3 weeks and 2 days ... "and 2 hours," and that he had exhausted his summer vacation period prior to going off on WHSCC in August, 2008. While on WHSCC he had not taken any vacation until the Company put him on vacation in April 2009. He confirmed that he did not return to work from the WHSCC during the period from August 4, 2008 until May 5, 2009, and that the Collective Agreement permits him to have more than the three weeks summer vacation leave if there is mutual agreement.

The Grievor confirmed as well that, while on WHSCC benefits, his drugs and medical appointments are covered by the Commission. He received no

communication from WHSCC indicating that his case was closed during the April 13 - May 5 period, and did not have to reapply for WHSCC at the end of that period. He understood from Consent # 3 that WHSCC had suspended his

> "... claim for that period, and that I'd be receiving pay from Molson for that 17 days... They were cautioning WHSCC about overpaying me. They did not want WHSCC to pay me as well."

Mr. Lawlor said he is aware that, had the WHSCC paid him, his actual pay would have exceeded the limit allowed.

On Redirect Examination, the Grievor confirmed he had not received WHSCC benefits for the period in question. He also confirmed that the 17 days vacation entitlement are now gone, and that this is the reason for the grievance.

ARGUMENT

At this point the Union rested its case. The Employer indicated it was satisfied, on the basis of the evidence adduced in direct and cross examination, to proceed directly to argument.

FOR THE UNION, Mr. Kirby invited the Arbitrator to review Article 7:04 which expressly denies the Arbitrator "authority to make any decision inconsistent with the provisions of this Agreement..." or "to alter, modify, add to or amend any part of this Agreement."

He also directed the Arbitrator's attention to the clear and unambiguous wording of Article 20.07 as applying to "... an employee with unused vacation entitlement who is then in receipt of Weekly Indemnity or Long Term Disability benefits...." He called attention to the fact that the Collective Agreement does not refer to WHSCC benefits. The WHSCC organization and its procedures are separate and distinct from "Weekly Indemnity" and "Long Term Disability". Mr. Kirby argued that the *Letter of understanding Re: Weekly Indemnity During*

Vacation supports the Union's position, as does Schedule "B" which defines "Weekly Indemnity" (at # 4) and talks about "Long Term Disability" (at # 5).

The Union submits that if the Grievor had been in receipt of "Weekly Indemnity or Long Term Disability benefits", there would have been no grievance. But the fact is that the Grievor was receiving WHSCC benefits, which are not specified in the Collective Agreement. Therefore, Article 20.07 does not apply in his circumstances. In the Union's view, this is the crux of the matter.

The Employer has forced the Grievor to take vacation while in receipt of WHSCC benefits. The question of double dipping is irrelevant. Article 20.07 is very specific. The Arbitrator has no authority to alter the language by reading it as though it referred to those on WHSCC benefits. This is an interpretive issue and the Arbitrator should ignore the Employer's attempts to draw in irrelevant information and considerations.

The Union directed the Arbitrator's attention to the following cases drawn from the arbitral jurisprudence: *DHL Express (Canada) Ltd. v. CAW-Canada, Locals 4215, 144 & 4278, 124 L.A.C.* (4th) 271ff, 2004; *Re PCL Construction Ltd. and Cascade Construction Ltd. and Construction and General Workers' Local Union 1111, 1982 8 L.A.C*. (3d) p 49 ff.; *Albert Linegar, & United Brotherhood of Carpenters and Joiners of America, Local 579, Don Buckle Ltd., 2007, 135 C.L.R.B.R. (2d)* 13 ff*.*

The Union stressed the importance of the "implied exclusion argument" set out in *Albert Linegar* (para. 27), where it is described as the "maxim of statutory interpretation *'expressio unius est exclusio alterius'.*" The fact that Article 20.07 actually lists those on Weekly Indemnity and LTD benefits as required to take vacation leave in certain circumstances, must be interpreted as without application to those on WHSCC benefits since those on WHSCC

benefits are not listed. Therefore those on WHSCC benefits are excluded by this principle.

Article 24 requires that there be a mutual agreement reached for any change to the Collective Agreement. There has been no such no mutual agreement in the instant matter.

The Employer does not dispute or contest the facts, but simply seeks impunity to move the Grievor to vacation leave. If he were on LTD or Weekly Indemnity, the Union would not be here. But the Union is here, and with good reason.

The Union urges the Arbitrator to find for the Union and to order full redress, which, in this case, includes:

(i) issuing an order finding that the Employer's action was a violation of the Collective Agreement; and
(ii) awarding a monetary amount equal to what he would have received from WHSCC for the 17 days in question; and
(iii) requiring his lost vacation days be restored to him.

For the Employer, Mr. Smith offered observations on the arbitral jurisprudence provided by the Union, pointing out that while he agrees with the principles as expressed in *Re PCL Construction Ltd.* and in *Albert Linegar*, the agreements in each case are distinct, and the Arbitrator must interpret this Agreement. None of the arbitral jurisprudence, in the Employer's view, stands for the position that the Employer is prevented from placing the Grievor on vacation leave during a period of WHSCC benefits. The grievance specifies that the Employer has violated Articles #s 3 & 20.

The Union asserts that the Agreement restricts the Employer's management rights, and in some cases it does so. But what does the Collective Agreement require the Employer to do?

Article 20.10 speaks not of "entitlement" but of "eligibility" for seven weeks annual vacation effective May 1st each year; and Article 20.02 speaks of a two week period from February 15 to March 1 for employees to indicate their preferences regarding summer vacation schedules. It speaks of "preference", not of a "right", and there are limitations specified on the securing of those preferences.

The Company retains the right to schedule the vacations. Restrictions are on BOTH parties in this Agreement. It asserts Management's right to schedule, and requires the Employer to operate within a seniority framework. The Parties agree to the May 1 to April 30 vacation year, with no carryover.

In raising the "implied exclusion argument" the Union seeks to impose a statutory regime of interpretation, rather than a agreement-based view, on Article 20.07. But the Collective Agreement requires the Employer to schedule vacations, and to do this without carryover. The 7 weeks vacation must be taken within the one vacation May 1 - April 30 year. Article 20.07 says this.

Schedule "B" creates the Weekly Indemnity and LTD plans, but Article 20.07 sets out the Employer's right and duty to schedule vacations, and it says that the Employer can do so whether the employee is able to enjoy it or not.

The Parties have agreed not to pyramid benefits; no double dipping. So in Schedule "B" the Parties have negotiated a way to come off the insurance plans within the Collective Agreement. The Collective Agreement precludes pyramiding, and Article 20.07 gives recognition to that superior principle. Ability to enjoy vacation leave is not an issue. The Parties turned their minds to the question of how to prevent double dipping and how to ensure no loss of benefit under the plans that are contracted with private parties.

The WHSCC was not asked to do anything in this case. All the letter

(Consent # 3) says is that the Grievor will be on full salary. WHSCC acted under the appropriate Section of the *Act.* WHSCC decided to interrupt benefits.

The Arbitrator can not circumvent the contract. The Grievor was on WHSCC benefits from August 4, 2008 until after May 1, 2009. If he was not scheduled for his outstanding unused vacation leave by May 1, 2009, what happens to it? No payment or carryover is available, and the Employer is under a contractual requirement to schedule outside the summer vacation period. So it must schedule the leave prior to May 1st. The Employer acknowledges that this time it did run over to May 5 in order to get it all in, but that was the result of circumstances.

The key here is the integrity of the Collective Agreement. The Employer's right to schedule and the absence of any payout or carryover are crucial. The Union is seeking to legitimate double dipping, which the Collective Agreement prohibits. The Employer and the Union have agreed to prevent pyramiding. The Employer is required to inform WHSCC of any salary changes.

The Arbitrator must ask whether the Employer's interpretation of the Agreement is reasonable; it does not even have to be the preferred interpretation, since the Union carries the onus in this matter.

The Employer was required to schedule the Grievor's unused vacation time within the year. It makes no sense to seek the extra benefit, since that is not available under WHSCC legislation. It is not a situation that lies completely within the purview of Article 20.07. The reason WHSCC is not explicitly named in Article 20.07 is that the Parties themselves control the Weekly Indemnity and LTD plans, but do not determine WHSCC policy or practice.

The Employer is not restrained by the Collective Agreement from acting as it has done in this matter. The Grievor has lost nothing. The Arbitrator must,

therefore, deny the grievance. Employer Counsel invited the Arbitrator to consider *Re Guelph Engineering & United Steelworkers* Local 4474 16 L.A.C. (3d) 377 October 1984 O.B.Shime.

In Rebuttal Argument for the Union, Mr. Kirby invited the Arbitrator to focus on the real issue in this matter. Employer Counsel claims that no carryover is permitted, but then admits that the Employer did, in fact, carry over 5 days vacation leave by placing the Grievor on leave until May 5. Carryover is, clearly, available. The Employer's actions prove it. Article 20.02 speaks (in the last sentence of the 3rd paragraph) not of an absolute bar to carryover, but in more permissive terms: "Where practical, vacation may be taken outside this period if mutually satisfactory to an employee and the Company." There is no express requirement that vacation must be completed within the entitlement year. Evidence shows the Employer itself acted as though carryover is allowed. Article 20 does not impose a one year time frame as Employer counsel argues.

Employer Counsel asserts that the Employer controls LTD and Weekly Indemnity plans, while the WHSCC is beyond its reach. But this claim is without foundation. The LTD and Weekly Indemnity plans are contracted with insurance companies that do not answer to individual Employers in the way suggested.

The Union is not seeking to double dip. There is no pyramiding at issue here. It was the Employer who decided to place the Grievor on vacation leave, not the WHSCC. It was the Employer who violated the Collective Agreement. The simple and inescapable fact is that the WHSCC is not referenced in 20.07. The Employer acted without contractual authority.

The Union urged the Arbitrator to keep in mind the "implied exclusion argument" set out in *Albert Linegar* (para. 27) based on the principle "*expressio unius est exclusio alterius*". The fact that Article 20.07 actually lists those on

Weekly Indemnity and LTD benefits must be seen as excluding those on WHSCC benefits. The Arbitrator must not to get caught up in irrelevancies.

CONSIDERATIONS

At issue between the Parties is a) the interpretation of the Collective Agreement, in particular Article 20.00; and (b) its bearing on the Employer's action as grieved.

Article 20.07 reads, in part:

> "Near the conclusion of the vacation year, an employee with unused vacation entitlement who is then in receipt of Weekly Indemnity or Long Term Disability benefits and who has not been continuously absent from work in excess of 104 weeks shall:
>
> (i) Cease to receive such benefits and be placed on vacation leave ..."

The Union acknowledges that the transfer to vacation leave occurred near "the conclusion of the vacation year", and that the Grievor was, at the relevant time, "an employee with unused vacation entitlement ... not ... continuously absent from work in excess of 104 weeks." But the Grievor was not "... then in receipt of Weekly Indemnity or Long Term Disability benefits...", but of WHSCC benefits. Therefore the Union claims that, since the Article does not list WHSCC benefits among the benefits specified, the Grievor is not subject to 20.07.

In the Employer's view, the Agreement confirms scheduling as a Management right. The Agreement does not require the Employer to schedule vacations at times convenient to employees. The Employer argues the Grievor is not exempted by the language of 20.07 from having to take vacation. In the Employer's view, its interpretation of the Collective Agreement was reasonable given the Grievor's circumstances. The Employer acted within its rights and responsibilities under the Collective Agreement. In the Employer's view, Article 20.07 requires the Employer to schedule vacation leave so it is taken within

each May 1 - April 30 "vacation year" (Article 20.07). There is no carryover. Contractually, the Employer had no option but to act as it did.

Carryover? The Employer asserts that Article 20.07 requires of the Parties that vacation leave must be taken within what that article calls "the vacation year". Since Article 20.01 provides that, "as of May 1st in each year and based on seniority attained up to that day, employees will be entitled to paid vacations as" therein set out, the vacation year ends on April 30 of the next year, with no carryover allowed. Counsel for the Employer argued that the logic of Article 20 constrains the Employer, leaving it no option but to ensure that it schedule all unused vacation leave within that May 1 - April 30 period.

With respect, I am not persuaded by the Employer's argument. Article 20, when read as a whole, does not expressly require that all vacation leave be scheduled and/or taken within the specified one year period starting on May 1 of each year. Article 20.01 says that "As of May 1st in each year... employees will be *entitled* to paid vacations as follows:..." (emphasis added). The annual entitlement is established as of May 1 each year. The Agreement addresses scheduling and use of that entilement elsewhere in that Article.

Article 20.02, for instance, limits use of vacation entitlement in respect of that portion of vacation leave that may be used during the summer, between June 1st and the 3rd week of September, and then goes on, (in the concluding sentence of the 3rd paragraph): "Where practical, vacation may be taken outside this period if mutually satisfactory to an employee and the Company."

I note that Article 20.02 does not expressly require that such leave taken "outside this period" (if mutually agreed) can only be taken within "the vacation year" as Article 20.07 uses that phrase. It simply says "outside this period" (referring to the period June 1 to the 3rd week in September).

The final paragraph of 20.02 provides that: "Additional weeks of vacation for employees with three (3) years or more of service shall be taken outside the regular summer vacation period." Again, the Agreement uses a general phrase, "outside the regular summer vacation period" without the further specification that the "outside" timeframe must itself fall within the May 1 - April 30 year referred to as the "vacation year" in 20.07.

I note, on the other hand, that the Grievor himself testified he had 2 hours vacation entitlement left from 2008, which he understands he was eligible to use until May 1, 2009. This suggests that the Griever, who is also the Local Union Chairperson, may share the Employer's understanding of a one year contractual constraint on the use of vacation leave entitlements. However, this point was not explored on cross or redirect examination, and I do not find it definitive of the interpretive matter before me.

The view is clearly not shared by Union Counsel. Union Counsel pointed out that the Employer had itself repudiated this limited single year interpretation since it scheduled the Grievor's vacation leave to end on May 5, thus allowing his unused vacation leave to be used after the commencement of the Grievor's vacation entitlement for the next year.

I find nothing in Articles 20.03, 04, 05, or 06 that bear on the scheduling either of the summer vacation leave period or of the unused vacation leave.

Thus, I find that Articles 20.01 through 20.06 do not contain the express language that would sustain the Employer's argument that the Employer is contractually bound to schedule "unused vacation entitlement" so that it is used within each current "vacation year". But this leaves the question whether such express language is to be found, as Employer counsel claims, in Article 20.07.

Article 20.07 clearly speaks of a "vacation year" as a single period with a

"conclusion". It also speaks twice of an employee's "vacation entitlement" or "vacation credits" being "exhausted." 20.07 provides that, in certain specified circumstances, "an employee with unused vacation entitlement ... shall... (c)ease to receive such benefits and be placed on vacation leave until his unused vacation entitlement is exhausted; and ... (r)esume receipt of disability benefits, if still qualified, once his vacation credits are exhausted."

I note that Article 20.07 is the only provision in Article 20 that speaks of unused vacation entitlements of certain specified employees being "exhausted". The Agreement clearly speaks of vacation entitlements commencing each year on May 1st, and of vacation entitlements unused after the summer leave period being scheduled "outside the regular summer vacation period", providing there is mutual agreement; but it is only with reference to those "in receipt of Weekly Indemnity or Long Term Disability benefits" that Article 20 speaks of Employees' vacation entitlement / credits being "exhausted" in a "vacation year".

Thus, the only article that eliminates carryover is 20.07, and that Article addreses a specific subgroup of employees. That is, it applies to "an employee with unused vacation entitlement who is then in receipt of Weekly Indemnity or Long Term Disability benefits and who has not been continuously absent from work in excess of 104..."

In view of the facts: a) that elsewhere in the Article 20 the Agreement contemplates vacation entitlements unused after the summer leave period being taken "outside the regular summer vacation period", if mutualy agreed; and b) that there are special circumstances specified where vacation leave is described as being "exhausted" within one year, I find that the language of the Collective Agreement does not sustain the Employer's general claim that there is no carryover. Much stronger Collective Agreement language would be

required, therefore, to sustain the Employer's view that it was required by the Collective Agreement to schedule the Grievor's "unused" vacation so that it was used prior to the commencement of the 2009 entitlement.

Implied inclusion of WHSCC benefits?

The Employer acknowledged that Aricle 20.07 does not expressly address an employee "who is then in receipt of" WHSCC benefits.The Employer argued, however, that inclusion of such an employee as the Grievor is implied, since the only reason an employee on WHSCC benefits was not referenced was that the WHSCC is not subject to the Employer's direction in the way that insurers who manage the "Weekly Indemnity or Long Term Disability benefits" can be induced to accommodate the Employer's needs.

The Union argued insistently that the Employer's implied inclusion argument was unreasonable on two grounds. First, factually, because the Employer's ability to secure insurers' cooperation had not been shown to be any greater than its ability to influence WHSCC policy and practice.

Second, the Arbitrator's interpretation must respect the "implied exclusion argument" set out in *Albert Linegar*. Since Article 20.07 actually lists those required to take vacation leave as those on Weekly Indemnity and LTD benefits it must be held that the Agreement excludes those on WHSCC benefits. Listing who is to be included as covered by a provision must be taken as proof that those framing the provision intended to exclude those not explicitly listed .... ("*expressio unius est exclusio alterius*").

Employer Counsel suggested that, by invoking this "implied exclusion argument", the Union was drawing on principles more appropriate to the interpretation of statutes, but not specifically applicable to the interpretation of collective agreements. With respect, I am not persuaded that this distinction is

relevant to the matter before me. It is core to the arbitral process, as reflected in jurisprudence that, in interpreting collective agreements arbitrators must be guided by the words used in the Collective Agreement as it is written. (See *Re PCL Construction Ltd.* @ p 53 and *DHL Express (Canada) Ltd.*@ para. 51.)

Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para 4:2100

The Object of Construction: Intention of the Parties read as follows:

It has often been stated that the fundamental object in construing the terms of a collective agreement is to discover the intention of the parties who agreed to it. As one arbitrator, quoting from *Halsbury's Laws of England*, stated in an early award:

> The object of all interpretation of a written instrument is to discover the intention of the author, the written declaration of whose mind it is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit.

And further:

> ***But the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention....***

The implication of terms into a collective agreement may be necessary on occasion, to give effect to the collective agreement. One board has held that two conditions are necessary in this regard: (1) if it is necessary to imply a term in order to give "business or collective agreement efficacy" to the contract, in other words, in order to make the collective agreement work; and (2) if, having been made aware of the omission of the term, both parties to the agreement would have agreed without hesiation to its insertion...." (emphasis added)

I also note that Article 7.04 expressly denies the Arbitrator authority "to alter, modify, add to or amend any part of this Agreement." Brown and Beatty comment on such a provision as follows, in part:

2:1202 Express prohibition against amending or adding to the agreement
Many collective agreements expressly provide that the arbitrator shall not "alter, amend, add to or vary" the collective agreement. The effect of including such a provision in the agreement is, however, not free from doubt. Some arbitrators have said that this provision adds nothing to the limitation that the arbitrator is confined to determining disputes arising from the interpretation, administration, application or alleged violation of the collective agreement...

Others have asserted that such a clause prevents the imposition of the arbitrator's personal views of the equities of a dispute and affirms that his or her jurisdiction is confined to interpreting and applying the collective agreement in the adjudication of disputes which arise thereunder.

One court has offered support for the latter view in holding that a clause of this type precludes an arbitrator from implying terms in the collective agreement as to how management's discretion may be exercised..... As one arbitrator has stated:

> ... Where the parties to a Labour Agreement fail to make provision in their Agreement for a contingency which happens, the Arbitrator cannot supply it, even if he might have some idea in his mind as to what the parties would put in their writing to take care of that contingency if it had occurred to them before the Agreement was written.

I am unaware of any circumstances in the instant matter which might prompt or permit me to imply the phrase "or WHSCC benefits" in Article 20.07.

I find nothing in the evidence or argument presented to prompt me to conclude that "implication of terms into the collective agreement is "necessary... to give effect to" it. (see above Brown and Beatty at 4:2100)

Similarly, I do not find it "necessary to imply a term in order to ... make the collective agreement work".

Obviously, as the instant grievance shows, it is not the case that "both parties to the agreement would have agreed without hesitation to its insertion..."

I also recognise that my authority is expressly limited by Article 7.04.

Reasonable? Counsel for the Employer argued the Arbitrator should sustain the Employer's interpretation of the Collective Agreement even if it were not actually the preferred one, so long as it was "reasonable". In the instant case, I find the Employer's interpretation not to be "reasonable", since it entails treating the Grievor as member of a group to which he does not contractually belong.

DECISION

In light of the foregoing considerations I find that

THE GRIEVANCE IS UPHELD.
I find the Employer's action was a violation of the Collective Agreement. The Grievor's 17 vacation days are to be restored.

Respectfully submitted as the decision of the Arbitrator.

John a Scott, Ph.D., Arbitrator

July 29, 2009