

ARBITRATION AWARD

BETWEEN:

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION
OF CANADA, LOCAL 96
(hereinafter called the "Union")

AND:

CORNER BROOK PULP AND PAPER LIMITED
(hereinafter called the "Employer")

GRIEVANCE - Policy grievance re work on statutory holidays

COUNSEL:

For the Union

Joël Michaud

For the Employer

Harold M. Smith, Q.C.

ARBITRATOR:

James C. Oakley

The Arbitration hearing was held at Corner Brook on July 4, 2008. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter in the event there was a question of interpretation arising from the Award, to be referred to the Arbitrator within thirty (30) days following publication of the Award.

The following exhibits were entered at the hearing:

- | | |
|------------|--|
| Consent 1 | Collective Agreement between Corner Brook Pulp and Paper Limited and Communications, Energy and Paperworkers Union of Canada, Local 96, effective June 1, 2004 to May 31, 2009 |
| Consent 2 | Grievance Form dated January 9, 2008 |
| Consent 3 | Reply to the grievance from Douglas J. Kendrick, Manager of Administration, Corner Brook Pulp and Paper Limited dated March 24, 2008 |
| Consent 4 | Letter dated December 13, 2007 from Jessica Couture, Human Resources Supervisor, Corner Brook Pulp and Paper Limited to Robert Aucoin, President, CEP Local 96 |
| Consent 5 | Seniority List dated January 12, 2007 |
| Consent 6 | Extract from Collective Agreement dated 1982 to 1984 |
| Consent 7 | Extract from Collective Agreement dated 1984 to 1988 |
| Consent 8 | Extract from Collective Agreement dated 1988 to 1990 |
| Consent 9 | Extract from Collective Agreement dated 1990 to 1993 |
| Consent 10 | Extract from Collective Agreement dated 1993 to 1998 |
| Consent 11 | Extract from Collective Agreement dated 1998 to 2004 |
| RA - 1 | Mill payroll entry submitted for September 3, 2006 |

- RA - 2 Mill payroll entry submitted for September 3, 2007
- RA - 3 Mill payroll entry submitted for September 3, 2007
- RA - 4 Essential Services Agreement dated August 18, 2005
- RA - 5 Memo dated November 21, 2007 from Peter Park giving notice he will not be available for work on Christmas/Boxing Day
- RA - 6 Memo dated November 15, 2007 from Paul Tiller giving notice he will not be available for work on Christmas/Boxing Day

Nature of the Grievance

The Union grieves the Employer's notice of intent to schedule employees to work on statutory holidays. The parties dispute whether work on statutory holidays is voluntary.

Collective Agreement

The relevant Sections of the Collective Agreement are as follows:

Section 6 - Contracting

6.01 The Company agrees that it will not contract out maintenance and repair work which is regularly performed by employees and for which the mill is equipped and the employees are willing, available, and capable of performing by reason of their skills. The Company will notify the Union concerned of any such work to be contracted out five (5) days before such contracts are entered into except in cases of emergency. (As an example, cases of emergency are defined as situations where the Company is confronted with an unforeseeable breakdown which requires immediate attention.)

...

Section 22 - Work on Sundays and Statutory Holidays

22.01 Employees will be allowed time and one-half for all time worked during Sundays and during the regular shutdown periods on Statutory Holidays. Employees required to work on a Sunday, or on a Statutory Holiday on a voluntary basis, shall be paid double their straight time rate for any time worked in excess of eight (8) hours for work done on the Sunday or on the day or days of the Statutory Holiday.

22.02 Any employee required to work on a voluntary basis the day of a Statutory Holiday established in Clause 26.01 may have an option:

a) The Statutory Holiday pay to which he is entitled under 26.01 plus time and one-half for all time worked on the Statutory Holiday and no alternative day off;

or

b) Time and one-half for all time worked on the Statutory Holiday plus, in lieu of the Statutory Holiday and Statutory Holiday pay established in Clause 26.01, an alternate day off to be taken on a date mutually agreed between the employee and his superintendent but no later than ninety (90) days following the Statutory Holiday, to be paid at the relevant Statutory Holiday pay to which he would have been entitled under Clause 26.01.

...

22.04 It is understood that in the scheduling of the work week in which a Statutory Holiday occurs, day employees will be scheduled so that they will be allowed four (4) days work plus pay for the Statutory Holiday. However, should the Christmas Statutory Holiday (25 and 26 of December) fall completely within the Monday to Friday period, the employees will be allowed three (3) days work.

22.05 After a Statutory Holiday shutdown established in Clause 26.01, the sheet shall be passed from the dryer section to the stack on the paper machines not more than five (5) minutes before the scheduled starting time; however, early start-ups may be agreed to by the parties to this Agreement.

...

Section 26 - Statutory Holidays

26.01 Statutory Holiday pay will be given to mill employees as follows:

1) New Year's Day (16 hours pay)

Shutdown period:

4:00 pm December 31 to 8:00 am January 2

2) Labour Day (8 hours pay)

Shutdown period:

8:00 am to 8:00 am

- 3) Christmas day (16 hours pay)

Shutdown period:

4:00 pm December 24 to 8:00 am December 26

- 4) Boxing Day (8 hours pay)

Shutdown period:

8:00 am December 26 to 8:00 am December 27

...

26.06 Start-Up - Shutdown - Statutory Holidays

It is the Company's intention to have paper machines start up at 8:00 am after a Statutory Holiday. Therefore, the Company will schedule employees within the jurisdiction of the trades Unions for pre start-up operations.

During total shutdown of the mill for Statutory Holidays, procedures for shutdown and start-up of the mill will be carried out during the hours of the shutdown (up to a maximum of two (2) hours for shutdown and two (2) hours for start-up).

- 26.07 It is agreed and understood that when work is to be done on any of the Statutory Holidays, the Union will be notified.

...

Section 32 - Welfare Plans

...

32.02 Insurance Benefits During a Legal Strike

In the event of a legal strike, insurance benefits excluding Short Term and Long Term Disability benefits will be maintained in as much as the employees or the Union will pay the total premium upon their return to work.

Short Term and Long Term Disability benefits in force at the beginning of the strike will continue to be paid if medical evidence is produced to support the claims when required.

With the implementation of that undertaking, both parties will meet at the earliest possible moment to discuss the means through which the total protection of the Mill property and its equipment is assured and that the essential services be maintained.

...

Appendix "F"

Memorandum of Agreement
Between
Corner Brook Pulp and Paper Limited
and
Communications, Energy and Paperworkers Union
of Canada, Local 96

Statutory Holiday Operation

1. Notwithstanding the provisions of the Collective Agreement and in particular those provided for in Section 22, the Company will have the right to operate the Mill during any of the Statutory Holidays provided for in Section 26.

However, on Christmas Day (starting at 8.00 pm on December 24, 1999), Boxing Day and Labour Day, this will be on a voluntary basis as per following procedure:

Regular employees scheduled to work and not wishing to do so, must inform their supervisor at least two (2) weeks in advance.

Should additional employees be needed to replace required scheduled employees not wishing to work, they will be selected from employees who were not scheduled that day or not required in their specific occupation and who have made themselves available by notifying the Company at least two (2) weeks in advance; in such a case preference for voluntary work will be given to qualified employees by departmental seniority, schedule permitting. If the Company is unable to obtain the sufficient number of volunteers, production will not be scheduled.

Crews will be kept to a minimum.

The Company will notify the Union should it decide not to operate on a Statutory Holiday.

2. When production continues during a statutory holiday, crews will be kept to a minimum as is done during regular operations on a Sunday.
3. An employee who works during the shutdown periods defined in 26.01 so that production may be maintained, will be paid in the following manner:

- a) The statutory holiday is paid according to 26.01;
 - b) double time is paid for all hours worked;
 - c) for each hour worked, an additional payment will be made of one (1) hour at the rate of pay of the job at which the employee worked;
 - d) an employee who works a complete shift during the statutory holiday, may take a compensatory day off (unpaid) before the following month of May, at a date agreed upon with immediate supervisor.
- 4. The employee who does not work during his statutory holiday is paid according to the provisions of the Collective Agreement;
 - 5. The weekly work schedule will be respected when the Mill operates on a Statutory Holiday with, however, the crews kept to a minimum as is done during regular operations on a Sunday.
 - 6. During total shutdown of the Mill for statutory holidays, procedures for shutdown and start-up of the Mill will be carried out during the hours of the shutdown (up to a maximum of two (2) hours for shutdown and two (2) hours for start-up).
 - 7. This agreement does not apply to employees whose regular work must take place during statutory holidays while the Mill is not in operation.

Legislation

The parties referred to the *Labour Standards Act*, RSNL 1990, c. L-2. The relevant sections are as follows:

- 4. Preferential conditions

Nothing in this *Act* prevents a contract of service from conferring upon an employee terms or conditions more favourable to the employee than the rights, benefits and privileges conferred upon the employee under this *Act*.

...
- 15. Public holidays
 - (1) An employer shall not require an employee to work under a contract of service on a public holiday.
 - (2) An employer shall pay to an employee the wages to which the employee would be entitled for work performed during a public

holiday notwithstanding that no work is performed by the employee during that public holiday.

- (3) The wages to which an employee is entitled under subsection (2) shall be calculated by multiplying the employee's hourly rate of pay by the average number of hours worked in a day by the employee in the 3 weeks immediately preceding the holiday.

...

Services in the public interest

18. (1) Notwithstanding section 15, an employer engaged in an undertaking that is responsible
- (a) for the operation of a public utility service;
 - (b) for the provision of a service the continuation of which, in the opinion of the minister, is necessary or essential in the public interest; or
 - (c) for a service traditionally carried on without regard to Sundays or public holidays, including industrial establishments in which operations once begun normally continue without cessation,

may require an employee to fulfil the terms of the contract of service during a public holiday.

- (2) Where an employee is required to work under this section during a public holiday and has so worked, the employer shall, notwithstanding the terms of a contract of service and at the option of the employee,
- (a) pay to the employee twice the wages properly earned by the employee for that day under the contract of service as if that day were a normal working day; or
 - (b) permit the employee to enjoy 1 full day's holiday within 30 days after the public holiday with pay to which the employee would be entitled if that day were a public holiday for that employee.

Evidence

The witness called by the Union was Robert Aucoin, Local 96 President. The witnesses called by the Employer were Gary Fiander, Electrical and Instrumentation Superintendent and Doug Kendrick, Manager of Administration.

The Union, CEP Local 96, represents a bargaining unit comprised of electricians and instrument technicians employed by Corner Brook Pulp and Paper Limited. Robert Aucoin, Local 96 President, testified that there are about 28 electricians and 8 instrument technicians in the bargaining unit. The work schedule for most of the electricians is a day shift from Mondays to Fridays. There are also electricians, known as tour electricians, having a 12 hour shift schedule of 4 days on and 4 days off. There is one tour electrician on duty at all times. The instrument technicians work a schedule of either day shifts from Mondays to Fridays, or evening shifts from 4:00 p.m. to 12:00 a.m. on a 7 day per week schedule. Gary Fiander, Electrical and Instrumentation Superintendent, testified that management employees in the department consist of the superintendent, two supervisors and two planners. Mr. Fiander and one of the planners are journeyman electricians.

Robert Aucoin testified that the practice of the Employer, since at least 1997 when he was first employed at the paper mill, has been to ask for volunteers to work on statutory holidays whether the mill is operating or shut down. Mr. Aucoin testified that it is the right of Union members to refuse to work on a holiday during a shutdown. He believed that if there is a shutdown, and there is no major capital project, then one electrician and one instrument technician would be sufficient. Doug Kendrick, Manager of Administration, testified that prior to 2005, the paper mill usually operated through Labour Day and Christmas Day/Boxing Day. He said the practice changed in 2006 as a result of market conditions, and the paper mill shut down on statutory holidays.

Gary Fiander testified about the need for electricians and instrument technicians when the paper mill is shut down. There is a need to continue operating the effluent treatment plant, which uses bacteria that require a constant temperature. It is also necessary to maintain the boilers and the transformers in the electrical substations. Mr. Fiander testified that the minimum requirement on a statutory holiday, when the plant is not operating, is to have 2 electricians per day to provide 24 hour coverage and one instrument technician per day to work an 8 hour shift. Mr. Fiander testified that the practice of the Employer has been to call for volunteers to work on statutory holidays, and if there are not

sufficient volunteers from the bargaining unit, then management employees with the required journeyman qualifications will provide the service. The practice developed where members of the bargaining unit would submit a written memo to management before each statutory holiday stating whether or not they wished to volunteer to work on the holiday. Mr. Fiander believed that the trend in recent years was that fewer members of the bargaining unit were volunteering to work on statutory holidays. This was believed to be related to the fact that about one half of the employees in the bargaining unit have young families and the employees prefer to be at home with their family on statutory holidays, in particular, the Christmas Day/Boxing Day holiday.

Gary Fiander testified that bargaining unit members volunteered to work during the Labour Day 2006 and Labour Day 2007 shutdowns. However, he became aware in early December, 2007, that there were no volunteers for the Christmas Day/Boxing Day holiday. On December 7, 2007, he told Mr. Aucoin that there were no volunteers and therefore he was planning to schedule shift electricians on those holidays. Mr. Aucoin told Mr. Fiander that it was voluntary for members to work on statutory holidays. When he heard about the proposal to schedule members to work on holidays, Mr. Aucoin requested a meeting with Doug Kendrick. He and the Local Vice President met with Mr. Kendrick and other Employer representatives. Mr. Aucoin testified that he told the Employer representatives that the Union was opposed to scheduling bargaining unit members to work on statutory holidays and the work was voluntary. Mr. Kendrick told him that the Employer was concerned about the need to secure the mill and to maintain certain equipment during a shutdown, in particular the effluent treatment plant and the steam plant. At the request of the Employer, Mr. Aucoin agreed to speak to the Union members and ask for volunteers. Mr. Aucoin testified that he met with available employees that same day. The result of the meeting was that no one volunteered to work on Christmas Day/Boxing Day.

Gary Fiander testified that the Employer offers volunteers a flexible work schedule on a statutory holiday, with options such as starting work late or going home for dinner. He said there was one employee, but he did not recall the name of the employee, who said he would volunteer but did not want to have his name placed on the schedule.

Doug Kendrick testified that the Employer decided not to schedule employees for Christmas Day/Boxing Day, 2007, recognizing that the past practice was to request volunteers. The work required to be performed by electricians and instrument technicians on those days was performed by management. The Employer decided to give notice to the Union that it would schedule

employees commencing with the next statutory holiday, on Labour Day 2008. By letter dated December 13, 2007, from Jessica Couture, Human Resources Supervisor, to Robert Aucoin, President of Local 96, the Employer advised the Union as follows:

Re: Essential Services on Statutory Holidays

Dear Robert:

At this time, we wish to formally advise you of our intent to abolish the practice of asking for volunteers for essential service work on statutory holidays.

During our recent discussion on Friday, December 7th, 2007, the Company raised the concern that, for the past number of years, we have been unsuccessful in obtaining volunteers and have been forced to maintain electrical/instrumentation coverage through the use of staff and/or contractors. We were advised at that time that you, as an Executive, would attempt to secure the coverage required through your membership. A little more than 30 minutes later, you informed us that your members were unwilling to work during the holiday. This quick response leads us to question the sincerity of the effort to secure coverage and whether there is a concerted effort within your union local to go against your employment obligations as outlined in the Collective Agreement and the *Labour Standards Act* of Newfoundland and Labrador. We advised you of our strong opinion that this is work of your union's jurisdiction every other day of the year, statutory holidays should be no exception. Responsibility for such work is entrusted to the members of CEP Local 96.

In order to provide you with ample notice, we will continue with our volunteerism practice for this upcoming holiday season. However in the New Year, the Company will be scheduling essential services employees during statutory holidays.

As you know, during statutory holidays or shutdowns many of our auxiliary systems must continue to operate. Those would include, but are not limited to, such major components as the boilers, HVAC systems and effluent treatment facilities. With critical pieces of equipment continuing operation, we have deemed it essential to maintain coverage in the electrical/instrumentation fields during these periods.

Scheduling for this work, as noted above, is in accordance with the Collective Agreement, and is specifically contemplated in the Tour and Compressed Work Week language.

I trust this advanced notice is satisfactory.

Regards,

Corner Brook Pulp and Paper Limited
Jessica Couture
Human Resources Supervisor

Doug Kendrick testified that the Employer could contract out work on statutory holidays, but it preferred to have Local 96 members doing the work. Robert Aucoin testified that the Local Union did not have a problem with the Employer contracting out work on statutory holidays if there were no volunteers from the bargaining unit and there were no management employees available to do the work.

On the New Year's Day 2007 holiday, the Employer scheduled bargaining unit employees according to the schedule for Sunday service and did not ask for volunteers. The Union did not dispute this procedure for the New Year's Day holiday.

The Employer referred to an Essential Services Agreement made between the Employer and four mill Union Locals, including Local 96, dated August 18, 2005. Doug Kendrick testified that the Essential Services Agreement resulted from a labour dispute between the Employer and the Loggers' Union, CEP Local 60N. He testified that Local 60N set up a picket line at the plant gate and wanted to control which employees entered the plant. Local 60N allowed persons identified as essential workers to cross the picket line. The Employer and the mill Union Locals agreed on the positions that would be essential. Mr. Kendrick testified that on previous occasions of labour disputes there were similar agreements made between the Employer and mill Unions. The 2005 Agreement was a modification of earlier documents. The Agreement did not have an expiry date and there was no discussion about termination of the Agreement after the strike was over. The Essential Services Agreement stated, in part, as follows:

Re: Essential Services Agreement

As per our agreement at our meeting on August 18, 2005, the following personnel are the maximum manning required to provide essential services:

...

Local 96:

1 Electrician per shift (12 hour shift)

1 Instrumentation per shift (12 hour shift)

...

In the event of an emergency, all employees as deemed essential by the Company will be considered Essential Service Workers.

The appropriate "Essential Service Worker" identification will be provided to help facilitate access into the Mill. The identification is available in the Human Resources Department.

Mr. Kendrick testified that negotiations for the Essential Services Agreement were not part of the negotiations for the Collective Agreement. The Essential Services Agreement was not subject to ratification by the members of the Union Locals. The Essential Services Agreement was signed on August 18, 2005. The Collective Agreement was signed at a later date in August or September, 2005 and backdated to April 25, 2005, to come into effect on that date.

Robert Aucoin testified that he signed the Essential Services Agreement on behalf of Local 96. The Loggers Local 60N had a picket line at the mill gate. Under the Essential Services Agreement, Local 96 agreed that if the Company chose to shut down production in the mill during a labour dispute, it would ensure that there was 1 electrician and 1 instrument technician per shift. Employees were given laminated cards to wear when they entered the mill during the labour dispute. The bold print on the card stated "Essential Service Worker". The Agreement would continue in effect for the duration of the labour dispute, but did not have an expiry date. Mr. Aucoin said the Union agreed not to set an expiry date because the length of the labour dispute was uncertain. Mr. Aucoin testified that there was no discussion about applying the Essential Services Agreement to anything other than the Loggers Local 60N strike. There were earlier drafts of the Essential Services Agreement setting out different numbers of employees before the number was agreed. Mr. Aucoin testified that the issue of essential services was not raised by the Employer during collective bargaining for the current Collective Agreement.

The parties referred to the language in prior collective agreements. The 1982 to 1984 collective agreement stated as follows:

Voluntary Repairs and Maintenance

27.07 It is generally agreed and understood that the above statutory holidays are days on which no work shall be done unless agreed by the Unions signatory to this Agreement.

Men required to work during a paid statutory holiday will receive time and one-half for all time worked on any such holiday in addition to the holiday pay referred to above. The only essential services provided will be that of No. 1 Sub-Station Operator.

The 1984 to 1998 collective agreement stated as follows:

Section XXII

Work on Sundays and Statutory Holidays

22.01 Employees will be allowed time and one-half for all time worked during Sundays and during the regular shutdown periods on Statutory Holidays. Employees required to work on a Sunday or on a Statutory Holiday shall be paid double their straight time rate for any time worked in excess of eight (8) hours for work done on the Sunday or on the day of the Statutory Holiday.

22.02 Any employee required to work on a voluntary basis the day of a Statutory Holiday established in Clause 26.01 may have an option: . . .

The 1988 to 1990 collective agreement stated as follows:

Section XXII

Work on Sundays and Statutory Holidays

22.01 Employees will be allowed time and one-half for all time worked during Sundays and during the regular shutdown periods on Statutory Holidays. Employees required to work on a Sunday or, on a Statutory Holiday on a voluntary basis, shall be paid double their straight time rate for any time worked in excess of eight (8) hours for work done on the Sunday or on the day of the Statutory Holiday.

22.02 Any employee required to work on a voluntary basis the day of a Statutory Holiday established in Clause 26.01 may have an option. . . .

The next 3 collective agreements (1990 to 1993, 1993 to 1998 and 1998 to 2004) contained similar wording in Articles 22.01 and 22.02.

Union Submission

The Union submitted that Article 22 limits the ability of the Employer to require employees to work on the public holidays listed in Article 26. Article 22 states that the work of an employee on a public holiday is on a voluntary basis. The premium rate paid to employees to work on a public holiday under Article 22 is not as great as the premium rate paid for work on a statutory holiday when the mill is operating under Appendix “F”. Appendix “F” applies only if the mill is operating on the 3 statutory holidays of Christmas Day, Boxing Day and Labour Day. Appendix “F” states that if the Company does not obtain sufficient volunteers, then there will be no production. Paragraph 7 of Appendix “F” states that Appendix “F” does not apply when there is no production, and that Appendix “F” does not apply to employees who are required to be present in the mill in any event, whether or not there is production. Although Article 22 applies to all the holidays listed in Article 26, the practice for New Year’s Day is that the Employer schedules employees, but the practice for the holidays of Christmas Day, Boxing Day and Labour Day is that the work is done by volunteers. The Union asked that declaratory relief be granted in respect of those 3 holidays. The reference to essential service on a holiday, when viewed within the context of the history of collective agreement language, is that reference to essential service was removed in the 1984 to 1988 Collective Agreement and replaced with reference to work on a voluntary basis. The same language was continued in every collective agreement up to the current Collective Agreement. The Essential Services Agreement does not apply. The Essential Services Agreement was made to facilitate access to the mill when there was picketing and to ensure the mill was maintained during a strike. There can be only one Collective Agreement in force at one time and the Essential Services Agreement ceased to have any effect upon the coming into force of the current Collective Agreement. The Employer had the opportunity to bring the issue to the bargaining table when the current Collective Agreement was negotiated, but it did not do so. To find that essential services applied, with the effect that work on a statutory holiday was mandatory, would amount to an amendment to the Collective Agreement. The Union referred to *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 222 and General Motors of Canada Limited*

(1953) 4 L.A.C. 1481 (Finkelman) (the “*General Motors*” case) which stated that an employee is only under an obligation to work on a holiday, as defined in the collective agreement, if the employee volunteers to work. The essential services provision in Article 32.02 does not apply in these circumstances where there was no labour dispute with Local 96. Section 4 of the *Labour Standards Act* provides that if the Union is able to negotiate a benefit that is more favourable than the benefits under the *Act*, then the negotiated benefit applies. The Union negotiated a more favourable benefit by negotiating that work on a holiday was on a voluntary basis. The Union submitted in the alternative, that if the language of the Collective Agreement was found to be ambiguous, then by reference to the past practice of the Employer asking for volunteers, the language should be interpreted to mean that work on a statutory holiday is on a voluntary basis. In the further alternative, the Union submitted that the Employer was estopped from changing the past practice that work on a holiday is voluntary, at least until the next round of collective bargaining. The Union recognized that certain work needed to be done on statutory holidays, and if there were no volunteers, the Employer could contract out the work under Article 6.01 of the Collective Agreement. The Union requested that the grievance be allowed.

Employer Submission

The Employer submitted that Appendix “F” applies in this situation and is not restricted to situations where the plant is operating on a statutory holiday. Paragraph 6 of Appendix “F” sets out procedures for shutdown and startup during the shutdown period. There would be no need for paragraph 6 if Appendix “F” applied only when the plant was operating. Under Appendix “F” crews were kept to a minimum number of employees. Appendix “F” recognized that some employees will be required to work in the mill when the plant is not in operation, notwithstanding the provisions of Article 22. A previous version of Appendix “F” was added to the 1993 Collective Agreement, which at that time provided for the Company’s right to operate on New Year’s Day, and set out a procedure distinct from Article 22. Under the Essential Services Agreement the Union recognized that certain work is essential. The Essential Services Agreement is not limited to situations where there is a labour dispute, but operates at other times as well. The Employer was not suggesting that 2 collective agreements were in operation at the same time, because the Essential Services Agreement was not a collective agreement. The Essential Services Agreement did not have an expiry date, and it continued to be operative. There is no absolute right to refuse work where some of the work is essential. There is no established past practice. The mill usually operated on holidays, prior to the Labour Day 2007 holiday. There were only 2 occasions, Labour Day and Christmas Day/Boxing

Day 2007, when employees were not available on a voluntary basis in sufficient numbers, and this did not establish a past practice. The work was not voluntary under the exceptions listed in Section 18 of the *Labour Standards Act*, namely, that it was in the public interest for the plant to operate, and there was a continuous operation of an industrial establishment. The Employer could require employees to work on a holiday. It is an obligation and not a benefit or a privilege to be required to work on a holiday. Therefore, Section 4 of the *Labour Standards Act* does not apply to allow the parties to contract out of the statute. The Collective Agreement should be interpreted so that it is not in contravention of the statute, which means that where the Employer is unable to obtain volunteers, it can schedule employees to work. The *General Motors* case, submitted by the Union, is outdated and not applicable. The Employer requested that the grievance be denied.

Considerations

The issue is whether work is voluntary on the statutory holidays of Labour Day, Christmas Day and Boxing Day, when the mill is not in operation, or whether the Employer may schedule employees to work. To date the Employer has not required employees to work on statutory holidays. However, the Employer gave notice to the Union that it would schedule employees to work commencing with Labour Day 2008. On statutory holidays when there is no production in the paper mill, there is a need for the Electrical and Instrumentation Department to maintain certain systems, such as the effluent treatment plant, the boilers, and the electrical substations. There is a need for at least 1 electrician and 1 instrument technician for this purpose. The required work may be performed by members of the bargaining unit, or the work may be performed by management or by outside contractors. The Union submits that work on statutory holidays is voluntary, and accepts that where there are no volunteers from the bargaining unit, the Employer may contract out the work pursuant to Article 6.01.

There are 4 statutory holidays listed in Article 26.01. The grievance concerns 3 of those statutory holidays, Labour Day, Christmas Day and Boxing Day. The grievance does not concern the Employer's practice of scheduling shift electricians or instrument technicians on New Year's Day, in accordance with the schedule for work on Sundays.

The Arbitrator refers to the principles of interpretation of collective agreement language discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, in particular, that the object of construction is to determine the intention of the parties from the express provisions of the collective

agreement (paragraph 4:2100), that the language should be viewed in its normal or ordinary sense (paragraph 4:2110), that preceding collective agreements may be used as an aid to determine the intention of the parties with respect to any changes made (4:2240), and that the language is to be interpreted within the context of the collective agreement as a whole (paragraph 4:2150).

The Collective Agreement addresses whether work on a statutory holiday is voluntary in Article 22. Article 22.01 states that “employees required to work on a Sunday or a statutory holiday on a voluntary basis should be paid double their straight time rate . . .”. Article 22.02 provides the option for an employee to receive pay or pay plus an alternate day off for “any employee required to work on a voluntary basis the day of a statutory holiday”. The ordinary meaning of “required to work on a voluntary basis”, is that the work is voluntary, and an employee is not required to work unless the employee volunteers to work. To find that work on a statutory holiday is compulsory, with the effect that the Employer may schedule employees to work on a statutory holiday, would be inconsistent with the language of Articles 22.01 and 22.02 which provides that work on a statutory holiday is “on a voluntary basis”. To find that such work is not voluntary would fail to give meaning to the language of Article 22.

I have reviewed the history of the collective agreement language, which may be considered as an aid to interpretation. In the 1982 to 1984 collective agreement, it is stated in Article 27.07 that no work shall be done on a statutory holiday unless agreed by the Union, and that men required to work will receive premium pay. In the 1984 to 1988 collective agreement, language similar to the current Article 22.02 first appears stating that “any employee required to work on a voluntary basis on the day of a statutory holiday” has certain options with respect to pay or time off. In the 1988 to 1990 collective agreement, Articles 22.01 and 22.02 refer to work on a statutory holiday “on a voluntary basis”. Similar language, with reference to “work on a voluntary basis”, is repeated in Articles 22.01 and 22.02 in subsequent collective agreements up to the current Collective Agreement. The history of the collective agreement language supports a finding that work on statutory holidays is voluntary.

The Employer relies on Appendix “F” in support of its submission that the parties have agreed that the Employer may schedule employees to work on a statutory holiday, when the mill is not in operation. Appendix “F” provides in paragraph 1 that, notwithstanding the provisions of Articles 22 or 26, the Company has the right to operate the mill during statutory holidays. Appendix “F” also states that operations on Christmas Day, Boxing Day and Labour Day will be on a voluntary basis and if the Company is unable to obtain a sufficient number of volunteers, production will not be

scheduled. Appendix “F” provides for payment for work on statutory holidays when the mill is in production, at a premium rate that is higher than the premium paid under Article 22. The Employer relies on paragraph 7 of Appendix “F” which states “this agreement does not apply to employees whose regular work must take place during statutory holidays while the mill is not in operation”. In the Employer’s submission, where the Collective Agreement provides that work “must” take place, the work is not voluntary. Paragraph 7 refers to employees who are working on the statutory holiday whether the mill is in operation or shut down. The “agreement” referred to in paragraph 7 is the agreement in respect of production in Appendix “F” which includes a higher premium pay rate than would otherwise be paid. The effect of paragraph 7 is to provide that Appendix “F” does not apply to certain employees. However, paragraph 7 does not have the effect of altering the voluntary nature of work on a statutory holiday when the mill is not in operation in Article 22. The Employer also referred to paragraph 6 of Appendix “F” which provides that during a total shutdown of the mill for statutory holidays, procedures for shutdown and startup will be carried out during the hours of the shutdown. Paragraph 6 of Appendix “F” is identical to the second paragraph of Article 26.06 which states the Company will schedule employees for pre-startup operations to ensure the paper machines may start up at 8:00 a.m. after the statutory holiday. By repeating this language in Appendix “F”, the parties have provided that Appendix “F” does not alter Article 26.06. However, paragraph 1 of Appendix “F” and the heading of Appendix “F” - “Statutory Holiday Operation” make it clear that the parties intended Appendix “F” to operate when there is production in the mill on statutory holidays. In conclusion, when Appendix “F” is read in its entirety, it does not alter the operation of Article 22 when the mill is not in production.

The Employer refers to Section 18 of the *Labour Standard Act*, which lists exceptions to the obligation of an employer regarding public holidays under Section 15 of the *Act*. Section 15 states that an employer shall not require an employee to work on a public holiday. One of the exceptions in Section 18 is that an employer may require an employee to work on a public holiday in an industrial establishment in which operations once begun normally continue without cessation. However, pursuant to Section 4 of the *Labour Standards Act*, a contract of service may provide for conditions more favourable to the employee. A contract of service includes a collective agreement. Section 4 allows the parties to contract out of an obligation under the *Act* where the contract provides a greater benefit to the employee. Therefore a collective agreement may provide that work on a public holiday is voluntary, which would be a term or condition more favourable to an employee otherwise required to work on a public holiday by reason of one of the exceptions listed in Section 18. It is unnecessary to decide whether or not one of the exceptions listed in Section 18 applies in

this case. Section 4 of the *Act* permits the parties to negotiate a Collective Agreement term that work on a statutory holiday is voluntary.

The Employer also refers to the Essential Services Agreement dated August 18, 2005. The Essential Services Agreement was signed at the time of a labour dispute between the Employer and the Loggers' Union, CEP Local 60N, and there was a picket line at the mill gate. There were discussions with the mill Unions about the numbers and classes of employees in each bargaining unit who would be designated as essential employees. The last paragraph of the Essential Services Agreement provides for identification tags to be issued to employees to allow them to cross the picket line and enter the Mill. While there is no expiry date stated in the Essential Services Agreement, it was signed within the context of a specific labour dispute. Therefore, the Essential Services Agreement is not applicable in the circumstances of the grievance before the Arbitrator.

In summary, Article 22 provides that work on a statutory holiday is voluntary. Article 22 operates on statutory holidays when the mill is not in production, and the operation of Article 22 is not altered by Appendix "F", the *Labour Standards Act* or the Essential Services Agreement. As a result of these findings, it is unnecessary to consider the alternative submissions made by the Union with respect to the use of past practice as an aid to the interpretation of the Collective Agreement, or the use of past practice to establish an estoppel against the Employer.

Decision

The grievance is allowed. Work on the statutory holidays of Christmas Day, Boxing Day and Labour Day when the mill is not in operation is voluntary.

DATED this 11th day of August, 2008.

James C. Oakley
Arbitrator