

ARBITRATION AWARD

(Preliminary Award)

BETWEEN:

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 1252
(hereinafter called the "Union")

AND:

GULF SHRIMP LIMITED
(hereinafter called the "Employer")

GRIEVANCE: Policy Grievance

COUNSEL: For the Union

David P. Goodland

For the Employer

Anna M. Cook

ARBITRATOR: James C. Oakley

The arbitration hearing on a preliminary objection raised by the Employer was held at St. John's on April 9, 2008. The parties agreed that the Arbitrator was acceptable and the Arbitrator would remain seized of the matter for sixty (60) days following publication of the Award in the event there is a question of interpretation or compensation arising from the Award. The Employer raised a preliminary objection that the grievance was not filed within the time limits in the Collective Agreement and therefore the grievance was not arbitrable. The Arbitrator heard evidence and submissions with respect to the preliminary objection.

The exhibits entered at the hearing were as follows:

- Consent - 1 Collective Agreement between Gulf Shrimp Limited and UFCW Canada, Local 1252 effective January 1, 2007 to December 31, 2009
- Consent - 2 UFCW Grievance Form 2240 filed January 31, 2008
- Consent - 3 Letter from David Earle of the Employer to David Hann of the Union dated February 4, 2008
- DE - 1 UFCW Grievance Form 1382 filed September 5, 2007, name of Grievor - Laura Dredge and the Union
- DE - 2 Letter dated February 1, 2008 from Linda Chafe, President of the Union to David Earle of the Employer
- DE - 3 Fax cover sheet dated September 5, 2007 from David Hann of the Union to Fred Billard of the Employer
- DE - 4 Letter dated September 6, 2007 from Fred Billard to David Hann
- DE - 5 Letter dated September 10, 2007 from Fred Billard to David Hann
- DE - 6 Letter dated September 27, 2007 from Fred Billard to David Hann

- DE - 7 Fax cover sheet dated October 16, 2007 with attached policy from Fred Billard to David Hann
- DE - 8 Fax cover sheet dated October 22, 2007 with attached policy from Fred Billard to David Hann
- DE - 9 Letter dated October 19, 2007 from Dave Hann to Fred Billard

Nature of the Grievance

The Union filed a grievance on January 31, 2008 stating that the Union challenged the validity/lawfulness of a Company policy/rule posted October 27, 2007. The Employer raised a preliminary objection that the grievance procedure in the Collective Agreement was not followed, the grievance was filed out of time and was not arbitrable. The Union submitted that the time limits were discretionary, the Union had a valid explanation for the delay in the filing of the grievance and there was no prejudice caused to the Employer by the delay.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 3 - Management

- 3.01 The Company reserves and retains solely and exclusively all of its inherent rights and authority to manage the business, as such rights existed prior to the execution of this Agreement with the Union. The enumeration of its rights and authority shall not be considered to exclude those not stated in this Article.

3.02 The sole and exclusive rights of Management which are not abridged by this Agreement shall include, but are not limited to:

- Its right to establish or continue policies, practices and procedures for the conduct of the business, and from time to time, to change or abolish such policies, practices or procedures;
- . . .
- To make and enforce reasonable rules for the maintenance of discipline and protection of life and property;
- . . .
- To establish, from time to time, rules and regulations governing employment covered by this Agreement, provided such rules are not inconsistent with the provisions of this Agreement;

. . .
Article 6 - Discipline

6.01 The Company shall not discharge, dismiss, suspend or otherwise discipline an employee except for just cause.

. . .
Article 18 - Grievance Procedure and Arbitration

18.01 A grievance is defined as an alleged violation of one or more specific article(s) or section(s) of this Agreement.

18.02 If any such grievance arises, there shall be no stoppage or suspension of work because of such grievance, but such grievance shall be submitted to the following grievance and arbitration procedures:

STEP ONE: The employee, alone or with assistance of a Shop Steward, may present the grievance to his foreman or supervisor which grievance must be submitted within three (3) working days of the incident giving rise to the grievance. Within two (2) working days after presentation of the grievance, the foreman or supervisor shall give his answer orally to the employee and/or Union Steward involved.

Any Grievance which cannot be adjusted at Step One, shall be referred to the Chief Steward and/or his alternate and committee in writing for adjustment at the next step.

18.03 STEP TWO: If the grievance is not resolved at Step One, the Chief Steward may, within three (3) working days of receipt of the foreman's or supervisor's answer, submit to the Plant Manager a signed, written statement of grievance. The statement of grievance shall name the employee involved, shall state the

nature of the grievance, shall identify all the articles of this Agreement alleged to be violated and shall indicate the relief requested.

- ...
- 18.07 Time limits fixed by this Article shall be extended only by mutual agreement between the Company and the Union, subject to the right of either party to provide reasonable grounds for its delay which shall be an arbitrable issue failing agreement.

Evidence

The witnesses called at the preliminary hearing were David Earle, financial officer, on behalf of the Employer and David Hann, national representative, on behalf of the Union.

Gulf Shrimp Limited operates a shrimp plant at Black Duck Cove. The plant manager is Fred Billard. The plant processes shrimp during the season which runs from April to October. Employees are laid off during the winter shutdown, except for employees engaged in maintenance or startup activities. In 2007, the plant shut down for the season on October 6, 2007.

The Employer prepared a policy regarding doctors notes that was posted on the bulletin board at the plant, as follows:

NOTICE

All employees bringing in doctor's notes for time off due to medical reasons will be required to provide Gulf Shrimp Ltd. with a second doctor's note declaring them fit to return to work. Employees not having this clearance will not be permitted to return to work.

The notice was posted on August 27, 2007. The notice was attached as Schedule "A" to the grievance filed January 31, 2008 challenging the policy.

The issue of providing a doctor's note declaring an employee fit to return to work, came to the attention of the Union following the application of the policy to employee Laura Dredge. Ms. Dredge was off sick and when she returned to work on September 3, 2007, she was sent home by the Employer because she did not have a doctor's note declaring her fit to return to work, as required by the policy. Ms. Dredge was not paid for the time she missed from work. David Hann, national representative for the Union, testified that he was contacted by the shop steward at the Black Duck Cove plant. He prepared and filed a grievance on September 5, 2007. He testified that the reason he filed the grievance was that Laura Dredge was being disciplined because she was sent home.

The grievance form for Grievance 1382 (the "Dredge grievance") was filed September 5, 2007. The grievance stated the name of the Grievor was "Laura Dredge and the Union", and the date of the occurrence was September 3, 2007. The grievance form stated the nature of the grievance was "employee sent home and the Company refusing to let employee work her shift". The grievance referred to "Article 6, 6.01, Article 8 - Seniority and the Collective Agreement". The remedy sought was "full redress for all hours lost due to Company refusing to let employee work". David Hann testified that he was informed by the shop steward that the policy was posted on the bulletin board, but he did not have a copy of the policy at the time the grievance was filed.

There was an exchange of correspondence by fax between David Hann and Fred Billard following the filing of the Dredge grievance. By fax dated September 5, 2007, Mr. Hann, requested a response to the issue of the Company refusing to let an employee work. By letter dated September 6, 2007, Mr. Billard responded to the fax and raised an issue about compliance with Step 1 of the grievance procedure. By further letter dated September 10, 2007 from Mr. Billard to Mr. Hann, Mr. Billard stated “a notice informing employees to have a doctor’s note before returning to work is posted on the bulletin board in the lunch room so everyone is aware of it”. By further letter dated September 27, 2007, Mr. Billard stated that management has a right to establish policies under Article 3.02 and referred again to the policy posted on the bulletin board. Mr. Hann requested a copy of the policy and by fax dated October 6, 2007 Mr. Billard sent a copy of the policy related to the present grievance. The document that was faxed on that date to Mr. Hann did not have the same wording as the policy posted on the bulletin board, as Mr. Hann determined from discussions he had with the shop steward. Mr. Hann requested a copy of the original policy that was posted. By letter dated October 19, 2007, Mr. Billard provided a copy of the notice posted on the bulletin board.

The Dredge grievance was referred to arbitration and I was appointed as Arbitrator to hear the grievance. At the hearing of the Dredge grievance on January 29, 2008, the Employer raised a preliminary objection with respect to whether the grievance was an individual grievance or a policy grievance. The Employer submitted that the Dredge grievance was an individual grievance, and not a policy grievance, and the redress available to be awarded by the Arbitrator was limited to whether the Grievor, Laura Dredge, was entitled to payment for lost wages. The Employer submitted that because the grievance was not a policy grievance, the validity of the policy posted on the notice

board was not at issue, and the policy could not be declared invalid by the Arbitrator. The Union submitted that the Dredge grievance was both an individual and a policy grievance. Following submissions on the issue, I decided in a decision issued orally at the hearing on January 29, 2008, that the Dredge grievance was an individual grievance and not a policy grievance. I based the decision on the wording of the grievance form, in particular, the redress claimed, the description of the nature of the grievance and the Collective Agreement articles alleged to be violated. I also reviewed the correspondence between the parties subsequent to the filing of the grievance and found that the Union did not state in the correspondence that it was grieving the validity of the policy.

Following the ruling on the Dredge grievance on January 29, 2008, the parties agreed to defer further proceedings until the parties reviewed the matter. The Union then filed grievance 2240, the current grievance, on January 31, 2008. By letter dated February 4, 2008, from David Earle to David Hann, the Employer advised the Union that it was denying the grievance, maintaining that the policy was reasonable and lawful in accordance with its management rights, and that the Employer was raising a preliminary objection that the matter was not arbitrable because it was not filed on a timely basis.

David Hann testified that he did not file a separate policy grievance prior to January 31, 2008 because he believed that the Dredge grievance filed September 5, 2007 challenged the policy. He testified that he believed in order to prove that Laura Dredge was entitled to recover lost wages, the Union would have to prove that the policy was wrong and should be struck down. He testified that this position was submitted by the Union to the Arbitrator, but the Arbitrator ruled otherwise on

January 29, 2008. Mr. Hann testified that the Union continues to object to the policy, because the Employer indicates it will continue to enforce the policy.

David Earle testified that the Employer was not informed that the Union was challenging the validity of the policy in the Dredge grievance, and asking that the policy be struck down until the issue was raised at the hearing on January 29, 2008. Mr. Earle testified that there has been no change or revision to the policy. Mr. Earle testified that there has been no prejudice to the Employer's ability to respond to the grievance. The Employer has not lost any evidence and there are no witnesses who are unavailable to the Employer as a result of the delay in the filing of the grievance.

Employer Submission

The Employer submitted that the grievance was not filed within the time limits in Article 18. There was no mutual agreement between the Employer and the Union to extend the time limit pursuant to Article 18.07. The Union was required to provide reasonable grounds for the delay. The Union had not provided any reasonable explanation for its failure to file a policy grievance within the time limits. The Dredge grievance filed September 5, 2007 made no reference to the Employer's policy. There was no evidence to support the Union's claim that it was challenging the validity of the policy in the Dredge grievance. The Union did not amend the Dredge grievance before the hearing. The Union could have filed a policy grievance at the time the policy was posted but chose not to. The Dredge grievance was about the treatment of Laura Dredge under the policy. It would have been possible for the Dredge grievance to be upheld for various reasons other than the invalidity of the

policy, for example, if it was found the policy was not applied correctly. There was no requirement for the Employer to prove that prejudice resulted from the delay. The grievance was not a continuing grievance. If any breach occurred it was when the policy was posted. The posting of the policy was a single event. It was not a continuing event. There could be continuing consequences each time an employee is required to provide a doctor's note. The grievance was filed well past the time limit and it was not arbitrable.

Union Submission

The Union submitted that the time limits in Article 18 are discretionary, and may be extended where there are reasonable grounds. The explanation offered by the Union was reasonable and sensible. The Dredge grievance was the first grievance filed on behalf of this bargaining unit. The Union representative believed that in order for Laura Dredge to recover her lost wages it was necessary to prove that the policy was wrong. The Union representative believed that the Dredge grievance challenged the policy. The correspondence between the parties after the filing of the Dredge grievance made extensive reference to the policy. The Employer was informed that the policy was at issue. The length of the delay was not significant. The plant was closed for most of the period of the delay, and was in operation for only about 5 weeks after the Dredge grievance was filed. There was no evidence that the Employer suffered any prejudice, such as a witness not being available or evidence being lost. The Employer was not exposed to any additional damages as a result of the delay. There was no impairment of the Employer's ability to present its case. There was a continuing violation of the Collective Agreement because the issue arose every time an

employee was not allowed to return to work from sickness without a doctor's note. To find the grievance to be arbitrable was in the best interests of labour relations between the parties. The Union requested that the Employer's preliminary objection as to arbitrability be denied.

Considerations

The issue is whether the grievance was filed out of time and not arbitrable. The Collective Agreement sets out time limits for the filing of a grievance. Under Article 18.02, at Step 1, the grievance must be submitted within 3 working days of the incident giving rise to the grievance. The grievance is dated January 31, 2008. The grievance challenges the validity of the Company policy posted on August 27, 2007. The Union's national representative, David Hann, became aware of the policy after the Employer sent an employee home from work on September 3, 2007 because she did not have a doctor's note declaring her fit to return to work. Assuming that the incident giving rise to the grievance was the posting of the notice on August 27, 2007, or the application of the policy to the employee on September 3, 2007, then the grievance was not filed within 3 working days of the incident, and was filed outside the time limit in Step 1 of the grievance procedure under Article 18.02.

The Union submits that the time limit may be extended because the Union has provided reasonable grounds for the delay and the grievance is arbitrable under Article 18.07. The Union also submits that the grievance is one of a continuing nature and therefore the incident giving rise to the grievance is ongoing and the grievance was not filed out of time.

I will first address the issue of whether to extend the time limit for the filing of the grievance under Article 18.07, and then, if necessary, address the issue of whether the grievance is one of a continuing nature. For the purpose of considering Article 18.07 and the extension of time, I will assume that the incident giving rise to the grievance occurred on either August 27, 2007 or September 3, 2007.

Article 18.07 states that there may be agreement by the parties to extend the time limits, but where the parties do not agree, the issue may be referred to an arbitrator. Article 18.07 states that extension of the time limit shall be an arbitrable issue where a party has provided reasonable grounds for the delay. The effect of Article 18.07 is that the Arbitrator has discretion to extend the time limit where the requirements of Article 18.07 are met.

The grounds upon which arbitrators have been permitted to extend time limits for the filing of a grievance have been considered in the arbitral authorities. In *Brown & Beatty, Canadian Labour Arbitration*, 4th edition, the authors state as follows:

In determining whether reasonable grounds exist for extending a time-limit, arbitrators have said that no one factor is necessarily governing. Rather, the general approach is to take into account a number of factors, including the nature of the grievance, the length of the delay, and the reasons for the delay, including whether the grievor was responsible for the delay.

The time limit under Article 18.07 may be extended where the party requesting the extension provides reasonable grounds for the delay. The factors outlined in the above text authority may be

considered under Article 18.07. The reason for the delay in filing the grievance was explained by David Hann in his testimony at the hearing. Mr. Hann testified that he believed that the Dredge grievance, that he filed on September 5, 2007, included a challenge to the policy. He believed that in order for Laura Dredge to be awarded her lost wages, it would be necessary to prove that the policy relied upon by the Employer was invalid. The question of whether the Dredge grievance was a policy grievance or an individual grievance became an issue in dispute between the parties. Submissions on the issue were made at the prior arbitration hearing on January 29, 2008. A decision was made by the Arbitrator at that time that the Dredge grievance was an individual grievance and not a policy grievance. Although Mr. Hann's opinion, that the Dredge grievance included a policy grievance, was not accepted by the Arbitrator in the ruling made on January 29, 2008, I am satisfied that Mr. Hann gave a reasonable explanation for the failure by the Union to file a policy grievance on an earlier date.

The total length of the delay was not significant. There was a period of about 5 months between the posting of the policy and the filing of the grievance. The plant was closed for about 4 of those months. Also, the policy grievance was filed within two days of the ruling by the Arbitrator, on January 29, 2008, that the Dredge grievance was not a policy grievance.

The discretion to extend the time limits under Article 18.07 is not stated to be subject to proof of lack of prejudice to the Employer. However, in the exercise of the Arbitrator's discretion, it would be appropriate to consider any prejudicial effect on the Employer. In this case, there is no evidence of prejudice caused to the Employer, such as the absence of a witness or the loss of evidence. In that

regard I refer to the discussion of the factors to consider on the issue of prejudice in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 2:3214.

I find that the Union has provided reasonable grounds for the delay within the meaning of Article 18.07. It is appropriate to extend the time limit to the date of the filing of the grievance. Therefore the grievance is arbitrable. Having exercised discretion to extend the time limit under Article 18.07, it is unnecessary to consider whether the nature of the grievance is a continuing grievance.

Decision

The Arbitrator finds it appropriate to extend the time limit for the filing of the grievance under Article 18.07, having regard to the reasonable grounds for the delay provided by the Union. The grievance is arbitrable.

DATED at St. John's this 8th day of May, 2008.

James C. Oakley
Arbitrator