

IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE *LABOUR RELATIONS CODE* OF BRITISH COLUMBIA
R.S.B.C. 1996, c. 244

BETWEEN:

VICTORIA TIMES COLONIST, A DIVISION OF CANWEST
(the "Employer")

AND:

COMMUNICATIONS WORKERS OF AMERICA/CANADA
(the "Union")
(N. Boerma and B. Cox Grievance)

ARBITRATOR:	Christopher Sullivan
COUNSEL:	Michael Korbin for the Employer
	Sean FitzPatrick for the Union
DATE AND PLACE OF HEARING:	November 9, 2009 Victoria, BC
PUBLISHED:	January 4, 2010

The parties agree I have jurisdiction to hear and determine the matter in dispute. The case involves a grievance filed by the Union on March 31, 2009 essentially alleging the Company violated a longstanding Mailroom practice of employing substitutes to fill positions of Monday to Friday dayshift employees on vacation.

The Union cites Section 19(d) of the Collective Agreement in support of the grievance. That provision reads as follows:

Section 19. Manning

- d) The day shift shall consist of three (3) situations Monday to Friday and two (2) on other days as required.

The Company relies on Section 9(1), which provides:

Section 9. Vacations

- 1) It is agreed that the company shall not be obligated to fill the positions of employees on vacation but may do so at its own discretion, therefore regular employees on vacation shall not employ substitutes to fill their positions.

The circumstances surrounding the grievance are not seriously disputed and may be summarized as follows. The primary function of the Mailroom is to place inserts into newspapers. There has been a longstanding practice of at least thirty years whereby the Company has always employed a substitute to replace dayshift employees on vacation. On nine separate occasions during the spring and summer of 2009 the Company failed to hire substitutes and this gave rise to the grievance.

The evidence indicates that on each occasion the Union sent to the Company a substitute, who was then turned away by the Company. The Union paid approximately

\$3,200.00 to these substitute employees, and it seeks reimbursement as part of the remedy in the case.

The evidence discloses that Section 9(1) existed in an identical form as Section 10(1) in the 1984 Collective Agreement. During the 1989 round of collective bargaining there were no proposals regarding this language. The Union did, however, propose the manning provision at the time be amended to include the following proposal:

The day shift shall consist of three (3) situations. In the absence of any one of these situation holders they will be covered by a substitute.

The proposal was rejected by the Company and never included in the Collective Agreement.

Despite the Union's proposal and discussion of the topic at bargaining in 1989 the Company continued to always, without exception, replace dayshift employees on vacation until the 2009 incidents that gave rise to the present grievance. Based on an entitlement of five or six weeks of vacation for each of three senior Monday to Friday regular employees for a period of nineteen years dating back to 1989, there have been between approximately 1,400 and 1,800 consecutive occasions whereby the Company has always employed a substitute to replace an employee on vacation.

Evidence was also led regarding current economic conditions. Between the end of fiscal years 2007 and 2009 the Company experienced a fourteen percent decline in revenue for the newspaper generally, and a fifty-seven percent decline in the Mailroom. While labour costs and the number of flyers have remained relatively constant, there are fewer insert pieces. There were, however, occasions in 2009 where dayshift employees worked overtime.

SUMMARY OF PARTIES' POSITIONS

On behalf of the Union Mr. Fitzpatrick argues this is a classic case of estoppel, wherein it would be unfair and unjust to effectively turn a blind eye to the thirty year consistent past practice, which has existed through good, bad and all other economic times. Not once in the nineteen-year period since the matter was last discussed at collective bargaining in 1989 – a span of five successive Collective Agreements – did the Company indicate to the Union that it would not replace regular Monday to Friday dayshift situation holders on vacation. As at 2009, when the Company changed its practice, the Union had lost its opportunity to bargain express language supporting the grievance.

The Union seeks a declaration to the effect that the Company is estopped from relying on Section 9(1) and, further, that it continue to replace vacationing regular situation holders in accordance with the longstanding past practice until the commencement of a new Collective Agreement. The Union also seeks from the Company reimbursement in the amount of \$3,200.00 for the wages it paid to substitutes called to replace vacationing regular employees.

The Union cites the following authorities in support of its position: *Teamsters Joint Council No. 36 v. Canadian Office and Professional Employees' Union, Local 15 (Morrison Grievance)*, [2009] B.C.C.A.A.A. No. 34 (Lanyon); *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation (Failure to Post and Fill Grievances)*, November 24, 2008 (Sullivan); *British Columbia Maritime Employers Association v. International Longshore and Warehouse Union, Canada*, October 6, 2008 (Keras); *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*, July 28, 2008 (Kinzie); *TFL Forest Ltd. v. Communications, Energy and Paperworkers Union, Local 1123 (Estoppel Representation and Duration Grievance)*, [2008] B.C.C.A.A.A. No. 36 (Dorsey); *City of Vancouver and Canadian Union of Public Employees, Local 1004*, [2008] B.C.L.R.B.D. No. 12; *West*

Fraser Mills Ltd. and United Steelworkers of America, Local No. 1-425, [2006] B.C.L.R.B.D. No. 199; *Chemical Lime Company of Canada Inc. v. Cement Lime and Gypsum Workers Division of the International Brotherhood of Boilermakers, Local D486 (Pension Contributions Grievance)*, November 27, 2007 (Dorsey); *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*, December 3, 2007 (Kinzie); *TFL Forest Limited v. Communications, Energy and Paperworkers Union, Local 1123 (Probationary and Student Employees Grievance)*, March 31, 2006 (Dorsey); *100 Mile Lumber (A Division of West Fraser Mills Ltd.) v. United Steelworkers of America, Local 1-425 (Whistle Chasing Tradesman Overtime Grievance)*, February 6, 2006 (Steeves); *OK Ready Mix Ltd. v. Teamsters, Local Union No. 213 (Vacation Pay Grievance)*, [2005] B.C.C.A.A.A. No. 218 (McPhillips); *Riverside Forest Products Ltd. v. United Steelworkers of America, Local 1-423 (Calculation of Probationary Period Grievance)*, January 31, 2005 (Gordon); *Revell v. Litwin Construction (1973) Ltd.*, [1991] B.C.J. No. 3690 (BCCA); and *Versatile Pacific Shipyards Inc. and International Brotherhood of Electrical Workers, Local 213*, [1986] B.C.C.A.A.A. No 135 (Kelleher).

On behalf of the Company Mr. Korbin argues the Company has properly exercised its discretion, as expressly provided for under Section 9(1) of the Collective Agreement. The agreed-upon language clearly vests management with an unfettered discretion to fill the position of an employee on vacation, or not. An estoppel does not arise as the Company has never represented to the Union that it would always exercise its expressly reserved discretion in a particular manner. The Union is trying to achieve at this arbitration proceeding that which it could not negotiate in 1989 when it sought to ensure the replacement of absent regular situation holders. Counsel asserts that in the circumstances the Company has made a *bona fide* business decision in accordance with its express Collective Agreement rights to respond to prevailing negative economic conditions.

The Company cites the following authorities in support of its position: *British Columbia Ferry Corp. v. British Columbia Ferry and Marine Workers' Union*, [1996] B.C.C.A.A.A. No. 386 (Kelleher); *Bullmoose Operating Corp. v. Communications Energy and Paperworkers Union, Local 443 (Temporary Employees Grievance)*, [2002] B.C.C.A.A.A. No. 25 (Sullivan); *Fording Coal Ltd. v. United Steelworkers of America, Local 7884 (Vacation Pay Grievance)*, [2002] B.C.C.A.A.A. No. 205 (Lanyon); *Fording Coal Ltd. v. United Steelworkers of America, Local 7884*, [2003] B.C.L.R.B.D. No. 2; *British Columbia Nurses' Union v. Communications, Energy and Paperworkers' Union, Local 444 (Radley Grievance)*, [2005] B.C.C.A.A.A. No. 40 (Hope); *West Fraser Mills Ltd. and United Steelworkers of America, Local 1-425*, [2006] B.C.L.R.B.D. No. 199; and *University of British Columbia v. Association of University and College Employees, Local 1 et al*, [1984] B.C.C.A.A.A. No. 45 (McColl).

DECISION

Having carefully considered the parties' respective positions I determine the grievance cannot succeed. Section 9(1) of the Collective Agreement specifically addresses the precise issue that gives rise to the present grievance, and there is no basis upon which to alter what the parties have clearly expressed in that provision. Section 9(1) serves as a complete answer to the grievance as it expressly provides discretion for the Company to replace vacationing regular situation holders.

For ease of reference Section 9(1) warrants reproduction:

It is agreed that the company shall not be obligated to fill the positions of employees on vacation but may do so at its own discretion, therefore regular employees on vacation shall not employ substitutes to fill their positions.

The parties' intentions could hardly be expressed more clearly. They used the mandatory "shall" to confirm the Company "not be obligated" to replace employees on

vacation. To buttress their expression of intent, a second component of Section 9(1) goes on to confer upon the Company an express “discretion” to fill such positions. To remove any doubt a third component was added to the effect regular employees on vacation are not to employ substitutes.

The Union’s case rests on the doctrine of estoppel. The basic elements of this doctrine are well established, and include a representation by one party to another to the effect that it will not be relying on its strict legal rights, and detrimental reliance on this representation. It has been described that the underlying concept of the most modern version of this doctrine is “that of fairness or injustice” [*Litwin Construction (1973) Ltd., supra*] and the purpose of the doctrine is, “to prevent inequitable detriment” [*BC Rail Ltd. and UTU Locals 1778 and 1923 et al*, BCIRC Decision No. C152/92].

The law is clear that the requisite unequivocal representation for an estoppel may comprise of a written or verbal statement, or conduct in the form of past practice. As to whether a representation has been made in a particular situation is a matter of fact.

In the present case the longstanding practice cannot reasonably be construed as a representation that the Company would not be relying on its strict legal rights under Section 9(1). At best what can be observed is that the Company has for a long period of time consistently exercised its discretion a particular way. The fact it has done so cannot reasonably be regarded as a representation to the effect that it would not exercise its discretion differently in the future.

This is particularly so given bargaining history wherein the Union expressly sought to eliminate the Company’s discretion to replace absent regular situation holders, but was unsuccessful. The Union’s present grievance cannot in context be viewed as anything more than an attempt to achieve a significant manning guarantee, which it tried to attain through collective bargaining but could not.

Viewed objectively and bearing in mind the real life circumstances of a significant decline in Mailroom revenues, the Company's recent decisions to not replace vacationing Monday to Friday dayshift regular situation holders constitute reasonable exercises of its expressly reserved discretion pursuant to Section 9(1).

The grievance is therefore denied. It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 4th day of January, 2010.

A handwritten signature in black ink, appearing to read 'CS', written over a horizontal line.

Christopher Sullivan