RE UNITED PACKINGHOUSE, FOOD & ALLIED WORKERS UNION, LOCAL 459, AND H. J. HEINZ CO. OF CANADA LTD. (LEAMINGTON PLANT)

D. C. Thomas, C.C.J., M. L. Levinson, S. E. Dinsdale, Q.C.
August 28, 1967.

Wages — Error in calculation — Overpayment — Recovery of overpayment — Mistake.

A pay office clerk misunderstood her instructions with the result that a group of employees were consistently overpaid during a considerable length of time. On discovery of the error and overpayment, the company began withholding a specified amount from pay of each of the employees concerned intending to recover the overpayment over a period of time. The employees concerned grieved. *Held*, M. L. Levinson dissenting, the company was entitled to recover the overpayment by withholding a portion of each employee's pay. The overpayment did not occur through misinterpretation of the collective agreement but through the failure of the clerk to follow instructions. The overpayments were therefore made under a mistake of fact, and not a mistake of law, and money paid under a mistake of fact can be recovered in the absence of neglect, misconduct or breach of duty on the part of the payer. No evidence of neglect, misconduct or breach of duty by the company was found and no evidence was given to show a change of circumstances on the part of the employees concerned. The company simply asserted its common law right of set-off. M. L. Levinson would have allowed the grievance, finding evidence of neglectful conduct by the company and change of circumstances by the grievors.

T. E. Armstrong, H. Bertenbach and *A. Brown* for the union.
B. H. Stewart, E. E. Litt and others for the company.

[Full award 14 pages]

RE INT'L ASS'N OF MACHINISTS, LOCAL 1740, AND JOHN BERTRAM & SONS CO. LTD.

P. C. Weiler, D. Wren, H. M. Payette. *September 20, 1967.*

Classification — Change in job content — Unilateral change in wage rate — Whether proper.

Evidence — Past practice — Admissibility.

Rates of wages — Change in job content — Whether unilateral change in rate proper.

EMPLOYEE GRIEVANCE alleging improper payment of wages.

A. Walker and *M. Stewart* for the union.
J. P. Hunt and *K. Johnson* for the company.

AWARD

This arbitration hearing was held in Dundas on September 12, 1967, and all preliminary and jurisdictional objects were waived. The subject of the grievance was a claim by Miss Mary Greenwood that she had been paid at a rate ($245 per month) which was lower than the minimum rate specified in the collective agreement for the job of switchboard operator ($285) into which she was transferred on March 29, 1967. It was agreed by the parties that such was in fact the case and thus, unless the company offered a valid defence, the grievor would be entitled to this agreement's "effective monthly rate" from March 29, 1967, up to the date of the award and thereafter.

The company suggested two defences. In the first place they contended they had a general power to adjust wage rates for different jobs in accord with changing evaluation of the job's content. In effect, they contended that the rates specified in appendix B, "Classifications and Rate Ranges", were for "job duties and responsibilities" and not for "job titles". It pointed to arts. 1.01 and 4.01 of the agreement as conferring such a power.

> "1.01. The purpose of this Agreement is to provide a harmonious collective bargaining relationship between the parties and to provide machinery for the prompt and equitable disposition of grievances, and to establish and maintain mutually satisfactory working conditions, hours and wages for all employees who are subject to the provision of this Agreement . . .
>
> "4.01. The management of the offices and the direction of the working forces is vested exclusively in the Company and includes, but is not limited to, the right to hire, transfer, promote, demote, suspend or discharge for proper cause and to relieve employees from duty because of lack of work or for other legitimate reasons. It is agreed that these functions shall be exercised in a fair and just manner."

It is obvious that neither of these clauses specifically gives the company a right to change the terms of the agreement (indeed the most important term of the agreement, the wage bargain). What the company is really contending for is an implied power to adjust the agreement to changing working conditions, a power which the arbitrator should read into the agreement as a matter of "business necessity". Such a contention is quite comparable to that made by unions when they seek in arbitration implied limitations on the right to subcontract, etc.

However interesting the argument might be in theory, two considerations preclude its acceptance here. First, by reason of appendix A, the company has specifically reserved to itself the right to make adjustments upwards in salary. The negative implication is that they cannot make adjustments downwards. Secondly, the company did not prove in this case the facts necessarily incident to the exercise of such a power, namely, the occurrence of substantial changes in the job duties and responsibilities of a switchboard operator. Indeed, the only evidence regarding this matter, that of Miss Earla Jack, the previous incumbent in the job, was that there had been no significant changes in her duties for the eight years she was the operator. Although a new switchboard allowed direct dialling for outgoing calls, she still performed substantially the same operations at the board. For these two reasons the first company defence must fail.

However, they chiefly relied on a second defence which stemmed from the fact that they had made known their decision to downgrade the content of the job of switchboard operator and to lower its salary rate more than a year previously. The actual events at the basis of this argument were largely agreed to, although their interpretation was disputed. Hence it is necessary to describe precisely what happened.

The company personnel manager, Mr. Hunt, addressed the following letter to Miss Earla Jack:

"February 8, 1966.

"Miss E. Jack,
Bertram Machine & Tool Company,
15 Hatt Street,
Dundas, Ontario.

Dear Miss Jack:

The duties and responsibilities required to satisfactorily perform the function of Switchboard Operator have been considerably reduced since the installation of the new switchboard.

The requirements have accordingly been re-evaluated. The attached outlines the major changes.

The position of Switchboard Operator now appears to fall into the same salary group as Junior Stenographer. Effective February 7, 1966, the salary range – Minimum $240.00 – Maximum $274.00 per month, is the proposed salary range for Switchboard Operator.

Your monthly salary will, however, remain at the present level $323.00 per month until such time as a vacancy becomes available to which you have transferable skills, and such vacancy carries a salary higher than the proposed salary to be established for Switchboard Operator. When such a vacancy is available, you will be given the opportunity to transfer; however, should you decline the transfer, your salary would then be adjusted to the then current salary for Switchboard Operator.

Your supervisor, Mr. A. Goss, will be prepared to discuss this situation with you at any time.

Yours very truly,
BERTRAM MACHINE & TOOL CO.

(Sgd) J. P. Hunt

J. P. HUNT,
Personnel Manager."

At the time Miss Jack was both the switchboard operator and the president of Office Workers Union, Local 1997, of the I.A.M. (which local was then signatory to the office employees agreement, although soon thereafter merged into the Shop Wor-

kers, Local 1770). Miss Jack immediately protested to her supervisor Mr. Goss and, getting no satisfaction from him, spoke to Mr. Hunt (by telephone, according to her). She was told that she would not have her rate changed unless she was offered a transfer to a vacancy which she refused (in which case she would drop to the new, lower rate). According to her uncontradicted evidence she informed Mr. Hunt that if her rate was lowered she would grieve, and that she was then told that the company would be "reasonable" about any transfer she might not like. She also spoke to her fellow office employees, including some of the office shop committee members, and it was agreed that no immediate grievance was possible since no immediate harm had been caused to anyone. Miss Jack continued at the same rate at the switchboard until March 29, 1967, when she was transferred (at her request) and was replaced by Miss Greenwood. When the latter learned of the rate offered her on this job she immediately grieved.

A problem of interpretation which was much disputed at the hearing concerned the capacity in which Miss Jack received the letter and discussed the company decision. The union (and Miss Jack) contended she was speaking merely as the employee concerned with the decision, while the company said they were speaking to her as the union representative who admittedly was in charge of the administration of the agreement. The board does not feel this is an important problem and finds as a matter of fact that the union had notice, through the actual knowledge (in whatever capacity it was acquired) of the official concerned. Moreover, there was no doubt that the union did not take any official steps through the grievance procedure concerning the company decision for over a year from which they acquired their knowledge. On the other hand there is no doubt that the union did not accept the company position, since Miss Jack did protest to Mr. Hunt, and threatened to grieve if her rate was in fact lowered. In addition, the company's position was in no way prejudiced by any "injurious reliance" on the union's passive position. The union is not grieving about Miss Jack but rather about Miss Greenwood, and as to the latter they did so immediately. Finally, there was no intervening re-negotiation of the agreement when the company might have relied on union silence as constituting acceptance of this decision and thus eliminating the need for negotiation about it.

The question we must ask then is as follows: if a company decision to change working conditions in breach of the agree-

ment is communicated to the union, and the union, while protesting, takes no official action because its application in the first instance has no harmful effect on any employee, is the union then precluded from grieving when the application of the new policy in the second instance does in fact harm an employee in the bargaining unit?

This question comes within the larger issue of the scope to be given to "past practice" in the interpretation and application of collective agreements. In effect the company has argued that the events described above constituted a precedent wherein the agreement was applied according to the meaning contended for by the company. Thus the arbitration board is bound to adopt the same meaning here. In order to evaluate this argument we must consider the reasons for, or purposes of, the use of "past practice".

There are two main bases for their relevance. The earlier situation may involve a representation, by one party (express or tacit), which is relied on by the other. The latter may change his position in such a way that it would not be harmed if the other were to change its position about the meaning of the agreement. The effect of such conduct is variously described as "promissory estoppel" or "waiver", and precludes repudiation of the representation if, and to the extent that, the party which has relied on it would suffer harm from steps taken prior to repudiation. The fairness of such a general doctrine is obvious but, as we have seen earlier, it is not applicable here. First, the union made no representation to the effect it agreed with the company's decision and, on the contrary, explicitly rejected it. Second, the company's position has not been changed to its detriment since any monetary award would relate only to Miss Greenwood about whose claim the company was given timely notice.

A second use of "past practice" is quite different and occurs even where there is no detrimental reliance. If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, which explicitly involves the interpretation of the agreement according to one meaning, and that this conduct (and, inferentially, this interpretation) be acquiesced in by the other party. If these facts

obtain, the arbitrator is justified in attributing this particular meaning to the ambiguous provision. The principal reason for this is that the best evidence of the meaning most consistent with the agreement is that mutually accepted by the parties. Such a doctrine, while useful, should be quite carefully employed. Indiscriminate recourse to past practice has been said to rigidify industrial relations at the plant level, or in the lower reaches of the grievance process. It does so by forcing higher management or union officials to prohibit (without their clearance) the settling of grievances in a sensible fashion, and a spirit of mutual accommodation, for fear of setting precedents which may plague either side in unforeseen ways in future arbitration decisions. A party should not be forced unnecessarily to run the risk of losing by its conduct its opportunity to have a neutral interpretation of the terms of the agreement which it bargained for.

Hence it would seem preferable to place strict limitations on the use of past practice in our second sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.

In our case the only one of these conditions satisfied is the last. Certainly the precedent at issue was only one isolated occurrence and, in any event, the union explicitly rejected the validity of the interpretation of the agreement relied on by the company as justifying its action. The union failure to grieve over Miss Jack's position was, from its point of view, a sensible decision to save the time and effort needed in processing a grievance through to arbitration until there was some real, concrete gain to be achieved. Indeed it might well be that a policy grievance by the union would have been rejected in arbitration as an attempt to gain a declaratory judgment where no specific relief is possible. In any event, they cannot be taken to have lost their right to obtain a fair interpretation of the agreement on the merits. As such the grievance must be upheld and

Miss Greenwood to be entitled to the minimum rate of $285 per month from the date she began work as a switchboard operator. Hence she is awarded the difference between this minimum rate of $285 and her actual monthly salary from March 29, 1967, until the date her salary rate is changed in accordance with this award.

In accordance with art. 7.15 of the agreement, the chairman alone has made the decision concerning this grievance.

RE UNITED AUTOMOBILE WORKERS, LOCAL 222, AND COULTER MANUFACTURING LTD.

J. F. W. Weatherill. September 12, 1967.

Bargaining unit — Work performed by foreman — Whether proper.

Management rights — Elimination of inspector on night shift — Performance of work by foreman.

UNION GRIEVANCE alleging performance by foreman of bargaining unit work.

H. F. Benson, D. Heasman and others for the union.
A. Fortier, J. Wyatt and others for the company.

AWARD

The grievance, dated May 31, 1967, is a policy grievance, claiming that the company has violated the collective agreement by having a foreman perform the work of an inspector, contrary to s. 55 of the collective agreement. In particular, it is alleged that, on the second shift at the "North Plant" of the company, the work formerly done by an inspector (a classification within the bargaining unit) is now performed by a foreman.

Prior to May, 1966, both die cast and stamping work was performed at the "North Plant" of the company at Oshawa. After that time, the die cast work was moved to the "South Plant" which then commenced operations. Before this move,