IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

NATIONAL STEEL CAR LIMITED
- the Employer

-and-

UNITED STEELWORKERS OF AMERICA, LOCAL 7135
- the Union

AND IN THE MATTER of a group grievance regarding pay periods

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Larry G. Culver	- Counsel
Hal Bruckner	- Vice President, Human Resources

On behalf of the Union:

Chris Winterburn	- Acting President
Ken Laurence	- Grievance Chairman

Hearing held October 19, 2001 in Hamilton, Ontario.

AWARD

I. INTRODUCTION

For many years this Employer paid its employees every week. The Employer now pays employees every second week.

The collective agreement does not explicitly regulate the pay period. However, the Union said the requirement for the Employer to pay employees weekly was implicit in the language of the agreement.

II. THE EVIDENCE

The Employer has been in business in Hamilton since 1912. Until recently, the Employer had employed its own payroll staff and it had always paid its employees weekly.

The Employer's computer program used to generate the weekly payroll was developed about 1963 by the Employer's staff using a programming language (Cobol) which is no longer in common use. As its senior computer staff retired, the Employer found that it no longer had the skills required to maintain and up-date its payroll system. It was difficult to hire new staff with those skills. The Employer became concerned about the integrity and accuracy of the payroll records produced using that program.

During the past year the Employer considered changing the way it prepares payroll. One option was to use an external payroll firm. The Employer decided that an external payroll provider was the best option available.

In June 2001, soon after the Employer reached this conclusion, Hal Bruckner, the Employer's Vice President of Human Resources, discussed this issue in a meeting with the Union. Mr.

Bruckner advised the Union that the Employer was considering an external payroll provider and that such a change would involve a move from the traditional weekly pay to a bi-weekly pay. The Employer asked the Union for its comments on the proposed change.

A few days after that meeting the then President of the Union Local, Maurice Rozon, informed Mr. Bruckner that the Union and its members did not like the proposed change but the Union acknowledged the Employer had the right under the collective agreement to implement that change. Mr. Rozon included a similar comment in his "President's Report" column in the Union's newsletter. He wrote ". . . there is no language in the Collective Agreement regarding the restructure of pay periods."

Mr. Bruckner testified that Mr. Rozon and he commonly discussed and reached agreement on issues of concern to the parties. While Mr. Rozon never claimed to be able to bind the Union, nevertheless Mr. Bruckner said that the Employer had relied upon the agreements reached through those discussions.

After Mr. Bruckner obtained Mr. Rozon's advice, the Employer contracted with an external payroll service to handle the payroll. If the Union had challenged the Employer's right to implement this change, Mr. Bruckner said that the Employer would not have proceeded with the change until the challenge had been resolved through the grievance procedure.

The Employer and the Union discussed the implementation of the payroll change during the summer. In response to a suggestion made by the Union, the Employer arranged for each employee to receive one week of vacation pay during the changeover to a bi-weekly pay as a means of assisting the employees' budgeting. The change to a bi-weekly pay began with a two week pay October 19, 2001.

Ken Laurence is the Grievance Chairman for the Union. He testified about various aspects

of the collective agreement and the employment relationship which he felt supported the Union position that weekly payment was part of the collective agreement. He said that the form signed by employees at the beginning of their employment authorizes the Employer to deduct "weekly Union Dues". In addition, at the time of hiring employees commonly sign an authorization form for a weekly deduction for the "Employees' Charitable Donation Fund". Mr. Laurence felt that both deductions suggested a system of weekly pay.

Mr. Laurence also noted that the agreement had a "weekly indemnity plan" (Article 17) which provided income support for sick or injured employees. He felt a weekly indemnity implied a weekly pay system.

In his testimony Mr. Laurence stated that an employee who had been laid off or terminated could pick up the final pay on the "regular pay day" or it would be mailed (Article 7.09). He noted that there will now be many fewer regular pay days. However, Mr. Laurence agreed that these employees do not often receive their final pay on the next pay day. In some cases - such as terminations - the final pay is expedited and may be available before the next pay day. In most cases the final pay is delayed two or three weeks.

Mr. Laurence also noted that under the grievance procedure (Article 5.12) the limit on the recovery of wages lost was four working days before the day the grievance was filed. In practice this limit on recovery has been used infrequently. It might be used, for example, if an employee who was laid off delayed his or her grievance for many months and then claimed an improper layoff and sought full back pay for the duration of that layoff. However, the Employer only infrequently relied on the four day wage recovery limit and routinely made all corrections necessary to ensure that employees were paid the wages specified in the agreement, regardless of the limit on recovery.

III. COLLECTIVE AGREEMENT PROVISIONS

The following are the relevant provisions of the parties' 1999-2003 collective agreement.

ARTICLE V - GRIEVANCE PROCEDURE

. . .

5.12 When an employee's grievance is settled by the parties or determined by a Board of Arbitration on the basis that the employee is entitled to be reimbursed for wages lost as a result of action on the part of the Company in violation of this agreement, such reimbursement shall be retroactive to the date four (4) working days prior to the presentation of the grievance to the Company in writing at Step 2. . . .

. . .

ARTICLE VI - MANAGEMENT RIGHTS

6.01 Except as, and to the extent specifically modified by this agreement, all rights and prerogatives which the Company had prior to the execution of this agreement are retained by the Company and remain exclusively and without limitation within the rights of the Company and its management. Without limiting the generality of the foregoing, the Company's rights shall include:

. . .

(c) . . . And generally the right to manage the enterprise and its business without interference are solely and exclusively the right of the Company.

(d) The Company will provide the Union with at least seven (7) working days notification of the establishment of any new rule(s), regulation(s), which will apply to all employees of the bargaining unit.

6.02 In administering this Collective Agreement, the Company agrees to act reasonably, in a non-discriminatory fashion and in a manner consistent with the Agreement as a whole.

ARTICLE VII - SENIORITY

. . .

7.09 General Provisions Respecting Lay-off

. . .

(3) Employee Payoffs

The following will be the procedure with regard to the paying off of terminated employees. Employees who are laid off . . . Wages due an employee can be picked up on their regular pay day or will be forwarded to the employee by mail . . . An employee terminated . . . Wages and vacation pay due an employee can be picked up on the regular pay day or will be forwarded to the employee by mail . . .

. . .

ARTICLE XVII - INSURANCE PLANS

17.01 . . .

(c) If the employee's eligibility under legislation is for less than $343.00 per week, the weekly indemnity plan hereunder would pay the difference between the amount for which the employee is eligible and $343.00 per week. In other words, an employee eligible for weekly indemnity hereunder would not receive less than $343.00 per week. . .

(d) The weekly indemnity plan hereunder shall continue to provide up to fifty-two (52) weeks of payment, . . .

ARTICLE XIX - CHECK OFF OF UNION DUES

19.01 All employees, on the first day of their employment in the bargaining unit, will be required, as a condition of continuing employment, to sign an "Authorization to Deduct Union Dues" form provided in Article 19.07 hereof.

. . .

19.04 The Company agrees that it will deduct from the earnings of each employee . . . on their first day of employment in the bargaining unit, pursuant to such authorization, in each month, regular weekly Union Dues in the amount certified by the Union to the Company to be currently in effect according to the Union's Constitution.

. . .

19.07 . . .

Section 19.07 contains the form authorizing the Employer to "deduct regular weekly union dues . . . in the amount currently in effect according to the union's constitution . . ."

IV. UNION POSITION

The Union noted that the agreement used "regular pay day" and submitted that a regular pay day and a regular pay period were similar concepts. Regular meant recurring, or at a fixed time or interval. The Union submitted that the use of regular pay day was done to ensure that the employees would not have the receipt of their pay delayed. The employees will now have to wait one additional week for one-half of their pay.

The Union said the weekly dues deduction and the weekly charitable deduction were based on a system of weekly pay. The Union submitted the provision for a weekly indemnity, the arrangements for paying an employee who had been laid off or terminated, and the limit on

wage recovery contained in the grievance procedure article all pointed to a weekly pay period. In addition, the Union noted that until the mid-1980's the collective agreement had called for the deduction of regular monthly dues but that it had been changed to weekly dues. All these factors, the Union said, indicated that the parties based their agreement on a system of weekly payroll.

If the agreement was ambiguous, the Union submitted that past practice should be used to resolve the ambiguity. The lengthy past practice had been to pay employees weekly.

The Union referred to the following authority: *Re General Electric Canada Inc. and United Steelworkers of America, Local 8912* (1988), 3 L.A.C. (4th) 217 (Solomatenko).

V. EMPLOYER POSITION

The Employer submitted that nothing in this agreement explicitly or implicitly provided for a weekly pay system.

The Employer said that the only language which dealt with the pay period was the management rights article. The Employer submitted that the pay period was a matter left to management under that article. The Employer acknowledged that there were restrictions on the exercise of management rights, but the Employer submitted it had dealt with this change in a proper manner in accordance with the collective agreement. The Employer had first decided that business reasons supported making this change. The Employer had then advised the Union well in advance of the possible change and it had received from the Union its opinion that the change was permissible.

The Employer replied to each of the provisions in the agreement and indicated why it believed none implied a weekly payroll.

The dues check-off and the charitable donation forms did not imply a weekly pay. They simply expressed an amount to be deducted on a weekly basis. Two times the weekly amounts could be deducted and shown on each bi-weekly payroll.

Nothing in the parties' weekly indemnity plan suggested a weekly pay period. The agreement specified a weekly benefit for sick or injured employees but that did not mean employees who were neither sick nor injured must be paid weekly.

Although employees who were laid off or terminated could pick up the pay on "their" or "the" regular pay day, the agreement did not indicate when the regular pay days occurred, nor did it require that the pay be available on the "next" pay day. In practice the pay was not normally ready for the "next" regular pay day. This provision did not imply a weekly pay.

The language of the grievance procedure cannot be relied upon as indicating a weekly pay system. Under both a weekly and a bi-weekly pay system an employee cannot recover any money owing from an earlier pay period, once the pay for that period has been received. As there was no difference in outcome following the introduction of a bi-weekly payroll, this provision did not imply a weekly pay.

In the alternative, if I were to decide that the Union was correct in its interpretation of the agreement, the Employer submitted the Union was estopped from asserting that interpretation until the end of the collective agreement. The Employer had sought the Union's view regarding this change, the Employer had been advised by the Local Union President that it could make this change, and the Employer had relied upon that advice. It would now be inequitable to allow the Union to retreat from that view.

The Employer referred to the following: *Re United Steelworkers and Uddeholm Steels Ltd.* (1971), 22 L.A.C. 419 (P. C. Weiler) and *Re De Havilland Aircraft of Canada Ltd. and*

Canadian Automobile Workers, Local 112 (1987), 27 L.A.C. (3d) 97 (Foisy).

VI. CONCLUSIONS

As both parties acknowledged, this agreement does not explicitly provide for weekly pay - that is, a requirement for weekly pay is not expressly stated. The primary issue is whether the requirement for weekly pay is implicit in the agreement - that is, is it implied although it is not plainly stated. Whether something is explicit or implicit, an arbitrator's task is to determine the parties' intention. The question is this:

> Did the parties intend to require the Employer to pay each employee each week?

The Union relied on a variety of provisions which it said conveyed that intention.

The collective agreement calls for the Employer to deduct the Union's weekly dues. However, Article 19.04 states "The Company agrees that it will deduct . . . in each month, regular weekly Union Dues in the amount certified by the Union to the Company to be currently in effect according to the Union's Constitution" (Article 19.04). In my view, the agreement makes clear that the Employer deducts weekly dues because the Union's Constitution specifies the dues as a weekly amount. The agreement does not tie the deduction of weekly dues to a weekly pay system.

Similarly the authorization to make a weekly deduction for charity does not depend on a weekly pay system. It is simply an expression of the amount to be deducted per week and does not require that the employees actually be paid every week. The form permits the Employer to deduct double from each bi-weekly pay period, that is two times the weekly amount for the two weeks.

Neither of the two deductions provide any information about how often the employees are

paid.

The parties have provided for a weekly indemnity plan. But weekly indemnity plans for sick or injured employees are common in many workplaces including, for example, employers that pay bi-weekly (26 times per year) and those that pay two times a month (24 times per year). I cannot read into the mere fact that the agreement provides for a "weekly indemnity plan" a requirement that the Employer must provide weekly pay to those employees who are at work. A weekly indemnity plan no more implies a weekly pay than a long term disability plan would imply, for example, a monthly pay.

The provision for a final payment to those employees who have been laid off or terminated calls for payment on "their" or "the" "regular pay day". I cannot read into that anything beyond a requirement that there be a regular pay day. Under both a weekly pay system and a bi-weekly pay system there is still a "regular pay day" for employees. The requirement to have the pay available for pick up on a regular pay day is met when a regular pay day occurs only every second Friday. I also note that the parties acknowledged that the pay was often not ready for the next pay day and, conversely, in special circumstances the Employer had expedited the pay and had made it available before the next regular pay day. As these provisions for employee pay-offs make equal sense if the pay period is weekly or bi-weekly, I cannot find implicit in these provisions a requirement to pay weekly. I conclude that this provision does not require employees to be paid every week.

The grievance procedure limits the recovery of pay to four days before the day on which the grievance is presented. The four days plus the day on which the grievance is presented does make a week, but that alone is insufficient to imply a weekly pay period. In addition, the recovery of wages is the same whether employees are paid weekly or bi-weekly. I am unable to find implicit in this provision a requirement to pay employees every week.

In summary, no provision in this agreement implies that employees are to be paid weekly. Moreover, considering all the provisions together I cannot find anything to indicate an agreement between the parties that the Employer must pay it employees every week.

Instead I find that the pay period is one of the items left to management under the Management Rights article. There are two relevant limits in this agreement on the exercise of management rights - the requirement to provide notice to the Union (6.01(d)) and the requirement to act reasonably (6.02).

The Employer provided the Union with more than enough notice to meet the requirement of Article 6.01(d).

The Union did not suggest that the Employer's payroll change was unreasonable. In any event, I find that the Employer had valid business reasons for making the change to an external payroll provider and to a bi-weekly payroll. The Employer's decision was reasonable and meets the requirements of Article 6.02.

As there is no implicit requirement in the agreement to pay weekly, as the Employer provided notice to the Union of the change, and as the Employer had valid business reasons for making the change, I conclude that the Employer did not violate this agreement by instituting its new bi-weekly pay system.

It is unnecessary to deal with the Employer's alternative submission.

The grievance is dismissed.

Dated in London, Ontario this 16th day of November, 2001.

Howard Snow, Arbitrator