

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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SIEMENS CANADA LIMITED

- The Employer

-and-

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION
AND GENERAL WORKERS UNION OF CANADA (CAW - CANADA)
and its LOCAL 127

- The Union

AND IN THE MATTER OF a grievance of Gary Phelps (grievance #18279)

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Helen Van Dyke	- Labour Relations Advisor
Frank Whitmarsh	- Manufacturing Coordinator
Sherry Anderson	- Administrative Assistant

On behalf of the Union:

Robert Jenner	- CAW National Representative
Robert McCready	- Union Plant Chairperson
Gary Phelps	- Grievor

Hearing held April 8, 1998 in Chatham, Ontario.

AWARD

I. INTRODUCTION

This grievance alleges that Gary Phelps, the grievor, should have been awarded the job of "back-up" for the position of "Stock Controller (Lot Control) - Shift B rotating shift", as he was the senior applicant.

In selecting a back-up, the Employer followed its practice under which only those employees who held a position on the same shift were considered for a back-up position. As the grievor did not have a job on this shift, the Employer did not consider him for the back-up position. The issue before me is one of interpretation of the agreement:

In order to be considered for a back-up position does an employee have to be working on the same shift as the employee requiring a back-up?

II. THE EVIDENCE

The Employer operates its automotive parts business in Chatham and is the successor of Bendix Electronics. It has two primary shifts - referred to as A shift and B shift. The A and B shifts alternate between days and afternoons every two weeks. In addition, in some jobs employees work only the day shift. The Employer previously operated a third shift, referred to as C shift, which was a midnight shift. However, there has been no C shift in 1998 and there are no plans to reinstate it.

The grievor's last permanent job posting was as an operator on C shift. When C shift was discontinued the grievor moved into the pool of available workers. He was then assigned to work as needed on the A or B shifts. As a matter of administrative convenience the grievor was said to be assigned to the A shift, but he has worked approximately 40% to 45% of his

time on the B shift. The grievor once temporarily replaced the Stock Controller (Lot Control) - Shift B rotating shift, the position for which he applied to be back-up.

The collective agreement provides that there be a designated back-up for all jobs requiring on-the-job training. The back-up's role is to replace the regular employee when he or she is absent. The selection process for back-ups is specified in the collective agreement and Article IX.2.2.(i) describes those persons who are "eligible to fill" the back-up role. The grievor met those requirements.

Frank Whitmarsh, the manufacturing coordinator, selected the back-ups and he explained the basis on which he made his decisions. Mr. Whitmarsh testified that he relied upon seniority and whether the employee was "bid to the shift", that is an employee had to have successfully bid on a job on that same shift in order to be considered as a back-up. Mr. Whitmarsh indicated that he had used this bid to the shift requirement during the five years that he had made the selections and that it was based in part on Article IX 2.2.(iii) which referred to classification and shift.

In this instance the grievor was the senior applicant. However, Mr. Whitmarsh stated that the grievor was not eligible for consideration as a back-up as the grievor's current bid position was on the C shift. In addition, given the grievor's bid position on C shift, the grievor was not eligible for consideration for any other back-up position on either the A shift or the B shift.

Mr. Whitmarsh also said he had followed the practice of disqualifying as a back-up any employee who successfully bid on a job on another shift. Under this approach, those employees who were successful in obtaining a position on another shift automatically lost their back-up positions.

As a practical matter, most employees were only interested in serving as a back-up for another employee on their own shift. Most employees preferred to work the day shift rather than the afternoon shift and they thus ordinarily took their vacations during the weeks they were scheduled to work the afternoon shift. If an employee was a back-up for another employee on the opposite shift, it might mean that an employee would work his normal two weeks of afternoons, then work two weeks of afternoons filling in as a back-up for a vacationing employee, and then work two more weeks on his own afternoon shift.

The workforce assignments were made each week for the following week and were provided to the Union for review before they were made available to the workforce generally. Those workforce assignments included the names of the back-ups. While the information on back-ups was provided each week to the Union, the Union did not realize that Mr. Whitmarsh had followed the approach described above in choosing employees for back-up positions.

III. PROVISIONS OF THE AGREEMENT

The following are the relevant provisions of the parties' collective agreement:

ARTICLE IX - SUBSECTION 1 - JOB POSTINGS

1. Job Posting Procedure

...

- (c) The most senior employee will be declared the successful applicant . . . provided he has the ability to do the job.

...

ARTICLE IX - SUBSECTION 2 - TRANSFERS

...

2. Back-up Procedure

In all classifications requiring on the job training, the Company will select employees based on their seniority, availability and ability to assume back-up positions. These employees will be used when the posted employees are absent due to illness, vacation, etc. Employees reduced from the classification currently assigned within the plant and shift, will be temporarily recalled to the

classification prior to the use of back-up personnel.

Notification of these openings and the selected employee's name shall appear on the employees' bulletin board.

- (i) Direct labour employees posted to the specific plant and employees without a posted job presently working in the specific plant will be the only employees eligible to fill the back-up role.
- (ii) An employee shall hold only one back-up role at any one time. In the case of emergency, and by mutual agreement between the Company and the Union, an employee presently listed as one back-up may be assigned to back-up another employee.
- (iii) Back-up roles will be identified by the classification and shift. If additional manpower is required, the next senior employee on the back-up list per shift will be used. (subject to the provision of Article XI - Overtime). When back-ups have been exhausted as identified by the current shift, back-ups from the opposite shift presently at work will be used in accordance with their seniority.
- (iv) Employees once identified as back-up's will be removed from the lists should they :
 - (a) be placed on another back-up list.
 - (b) be the successful incumbent to a job posting in another plant or to an indirect labour classification or to a leadhand classification or to a lift truck driver classification.
 - (c) be placed on layoff or reduced from the plant to which he was assigned for a period of longer than fifteen (15) working days.

IV. POSITION OF THE UNION

The Union submitted that the Employer's approach in filling back-up positions violated Article IX.2. Article IX.2.2(i) indicated which employees were eligible to fill a back-up role. The grievor met those criteria. Article IX.2.2.(iv) provided how an employee lost a back-up role. It did not indicate that an employee lost a back-up role when he had a shift change, or worked on another shift.

The grievor was not bid to the A shift; he had been assigned to it as a matter of administrative convenience. He actually worked where needed and had worked with the B shift nearly half time.

Employees on the A and B shifts who were back-ups for those employees who only worked the day shift, nevertheless worked half their time on the afternoon shift. When these employees were scheduled for afternoons but needed as back-up on the day shift, they moved from their scheduled shift.

The Union referred me to the following award: *Bendix Electronics and National Automobile, Aerospace and Agricultural Implement Workers of Canada (C.A.W.) and its Local 127* (August 2, 1988) unreported (Palmer). The Union submitted that the award dealt with this precise issue under an earlier collective agreement when the business had been operated by the Employer's predecessor.

In summary the Union said the grievor was the senior applicant, met the criteria, was available for the work, had done the work in the past, and should be awarded the position.

V. POSITION OF THE EMPLOYER

The Employer submitted that the language of the collective agreement supported its view that to be successful in bidding for a back-up position an employee had to hold a bid position on the same shift. The Employer acknowledged that under Article IX.2.2.(i) the grievor was eligible to apply. However, Article IX.2.2.(iii) mentioned classification and shift and thus associated the back-up role with the shift. It also indicated how those in back-up positions were selected when needed - the Employer was to take the next senior employee "per shift". The Employer submitted that it made sense from an operational basis to have the back-up

employee from the same shift as the employee requiring a back-up.

The Employer contrasted the selection criteria for back-up positions with the selection criteria for normal job postings. Seniority governed in normal job postings provided the employee had the ability to do the job (see Article IX, Subsection 1). However, in the selection of back-ups, the inclusion of "availability" meant that the applicants should be bid to the same shift. In this instance if the C shift were re-implemented and the grievor returned to working nights, the Employer would be without a back-up.

Finally, if I found the language to be ambiguous, the Employer submitted that I should resolve the matter in the Employer's favour on the basis of the past practice.

The Employer referred me to the following awards: *Bendix Electronics (supra)*; *Ascoelectric Limited and Communications and Electrical Workers of Canada and its Local 553-CLC* (July 31, 1990) unreported (Devlin); and *Butler Metal Products and C.A.W. Local 1986 (Grievance #159)* (April 5, 1990) unreported (Brent).

VI. CONCLUSIONS

The question before me is this:

Are back-up employees required to hold a bid position and thus work regularly on the same shift as the person for whom they act as back-up?

In a case such as this where the resolution of the parties' difference depends on the interpretation of their agreement, I would normally examine the language of the agreement with care in order to determine the parties' intention. However, in this case the Union has submitted that their intention has already been determined in a prior award (*Bendix*

Electronics, supra, Palmer) and that the interpretation is binding on the parties. If the issue of interpretation before me has been previously resolved, then that earlier award would govern and the matter would be ended. However the parties disagreed as to whether this earlier award actually dealt with the matter at issue now.

I begin with a review of the relevant provisions of the agreement in order to highlight the nature of the question of interpretation in this case. I then review the earlier award to determine whether the same issue of interpretation was addressed in that case.

As the issue before me has not been addressed directly in the agreement, the parties' intention has to be derived from various related provisions. The parties did express their intention in the section on eligibility for back-up. While the criteria for eligibility for consideration are specified in the agreement, they do not include being bid to the shift (Article IX.2.2.(i)). In addition, the parties have turned their minds to the issue of the loss of a back-up position. While they specified several ways that a back-up position would be lost, they did not include bidding to and/or working on a different shift (Article IX.2.2.(iv)). Thus the language of the agreement in those two areas suggests that the answer to the question before me - whether back-up employees are required to hold a bid position and thus work regularly on the same shift as the person for whom they act as back-up - is no.

The Employer, however, submitted the parties have acknowledged this concept of being bid to the shift by the inclusion of several phrases in the agreement, and said that as a matter of operational efficiency it made sense. I acknowledge the merit of the Employer's submissions regarding operational concerns, and thus turn to the phrases which the Employer suggested support its view.

In Article IX.2.2.(iii) there is a reference to back-up roles being identified by "classification

and shift". However, it would seem that the reference to "classification and shift" does not describe the person who is selected as back-up, but rather refers to the job being backed-up. In this grievance the job is described as "Stock Controller (Lot Control) - Shift B rotating shift".

Similarly the parties used the word "availability" in Article IX.2.2. as one of the criteria for selection. But this is a very general word. If the parties had meant that the employee must have a bid position on the same shift, they could have said so much more clearly.

It appears from the above review that the parties did not include this concept of being bid to the shift when they addressed the issue most directly. This preliminary review supports the Union position whereas the Employer's interpretation of the language requires conclusions to be drawn by implication from the wording. It would still be necessary, however, to consider the two positions more fully if the earlier award did not resolve this issue.

Turning to Arbitrator Palmer's award in *Bendix Electronics, supra*, interpreting an earlier agreement between this Union and the Employer's predecessor, the provisions are similar to those in the current agreement. For comparison purposes I reproduce below the relevant sections of the agreement at that time. In some places the old collective agreement included additional or alternative wording; in other places there is additional wording in the current agreement. For ease in later reviewing those differences, I have numbered them.

ARTICLE IX - SUBSECTION 2 - TRANSFERS

...

2. Back-Up Procedure

In all classifications requiring on the job training, the Company will select employees based on their seniority, availability and ability to assume back-up positions. These employees will be used when the posted employees are absent due to illness, vacation, etc. Laid off employees ^[1], currently assigned within the plant and shift, will be temporarily recalled to the classification prior to the use

of back-up personnel.

Notification of these openings and the selected employee's name shall appear on the employees' bulletin board.

- (i) Direct labour employees from the specific plant ^[2] will be the only employees eligible to fill the back-up role.
- (ii) An employee shall hold only one back-up role including supplemental employees as identified in the skilled trades group ^[3], at any one time. In the case of emergency, and by mutual agreement between the Company and the Union, an employee presently listed as one back-up may be assigned to back-up another employee.
- (iii) Back-up roles will be identified by the classification and shift. If additional manpower is required, the next senior employee on the back-up list per shift will be used. (subject to the provision of Article XI - Overtime). ^[4]
- (iv) Employees once identified as back-up's will be removed from the lists should they :
 - (a) Be placed on another back-up list.
 - (b) be the successful incumbent to a job posting in another plant or an indirect labour classification. ^[5]
 - (c) ^[6]placed on layoff ^[7] from the plant to which he was assigned for a period of longer than fifteen (15) working days.

As noted, there are 7 differences between the language in 1988 and the current language.

1. In describing who should be recalled prior to using back-ups, the agreement once read "laid off employees". It now reads "Employees reduced from the classification". This has no impact on the issue before me.
2. In describing the employees eligible for consideration as a back-up, the old language of "employees from the specific plant" now reads "employees posted to the specific plant and employees without a posted job presently working in the specific plant". I would read this as a clarification which has no impact on the issue before me. However, if the new language has any impact it supports the Union view as it now contemplates a person without a posted job being able to bid on a back-up position.

3. The deletion of "including supplemental employees as identified in the skilled trades group" does not change the meaning of the agreement, and thus the change has no impact on the question in this grievance.
4. The parties did add the third sentence in the current Article IX.2.2.(iii) to deal with the process for finding a back-up when one is needed. But these employees have already been selected as back-ups and thus this change does not affect the selection process for a back-up position.
5. The parties added two further ways that an employee loses a back-up position. While the parties turned their minds to the loss of a back-up position at some point after the Palmer award, those additional ways by which back-up positions are lost and which are now included in Article IX.2.2.(iv) do not include anything that supports the Employer's current view. In any event, the change does not affect the issue before me.
6. The parties added the word "be" at the start of clause (c) in order, I assume, to make the three clauses of (iv) grammatically consistent. In any event, it is not a change in meaning.
7. Finally, the parties have now added "or reduced" after the word layoff in clause (c). This has no effect on the issue in this case.

Thus the changes from one agreement to the other do not affect the issue before me and I conclude that the language in the two agreements is, for current purposes, identical.

An arbitration award is final and binding on the parties to that agreement and, of relevance in this instance, binding on a successor Employer. Thus to the extent that the Palmer award interpreted these provisions it provided a final and binding interpretation. If the interpretation answers the question before me then it is to be followed in this instance.

Now I consider the interpretation provided by Arbitrator Palmer in his award. The issue in that case was similar - the Union had grieved that any employee who worked only the day

shift should have a back-up from both the A shift and the B shift so that there would always be a back-up scheduled to work the day shift. The Employer took the position that it was not necessary to have a back-up employee scheduled for the same shift. The Employer was successful. The position advanced by the Employer in this grievance is essentially the position advanced unsuccessfully by the Union before Arbitrator Palmer. On the other hand, the Union now supports, and adopts as its position, the Employer position which was upheld by Arbitrator Palmer.

Arbitrator Palmer's conclusions were as follows:

The Union argument . . . depended upon clause (iii) set out above. Specifically, they emphasised the word "shift". In their opinion, by inserting this word, in essence the Company was obligated to provide a "back-up" for every permanent day job, or "presently steady day job" from each of the A and B shifts in order that any time there was someone scheduled to work during the day shift that is a "back-up" under Article IX.2.2. Thus, their grievance should succeed.

The language of the collective agreement, however, does not support such a conclusion. Thus, if one looks at the first sentence of clause (iii) it states that "back-up roles" will be shown by classification and "shift". What, then, is the role so identified? It is the position that the "back-up" man will take if there is an absence by the incumbent; it is not his normal classification. Thus, on the clear grammatical reading of clause (iii), the word "shift" only relates to the job to be "backed-up"; it cannot relate to the "back-up" employees normal shift as the Union argues. Similarly, the second sentence of (iii) cannot provide assistance to the Union, clearly this relates to the selection of persons in addition to the "back-up" employees. Thus, there seems no way, on this language, to support the Union's case. (at page 5-6)

No specific mention was made of the word "available" in Article IX.2.2. but the language was the same then as it is now.

The Palmer award dealt with the issue before me. Arbitrator Palmer decided that a back-up employee was not required to be working the same shift as the person being backed-up. The reasoning in that award was not challenged before me. The parties are bound by that award. In view of Arbitrator Palmer's conclusion that a back-up need not work the same shift as the

person being backed-up, it follows that the Employer violated the agreement when it read into the agreement a requirement that, in order to be considered for a back-up role, an employee had to be bid to the same shift.

While I heard evidence of the Employer's recent practice, the Employer made no suggestion that the Union was estopped from asserting its interpretation of the agreement. I note, in any event, that the Union had not been aware of the Employer's approach in filling back-up positions.

The Employer suggested that I look to past practice. Past practice may be used to determine the intention of the parties when a provision is ambiguous. As this issue had been previously resolved in the Palmer award, the Employer's submission on past practice does not need to be addressed.

I turn now to a remedy for the grievor. The only reason for denying the grievor the back-up position was the Employer's view that a back-up had to be bid to a job on the same shift. I concluded above that the Employer was incorrect in that view. In these circumstances, it is clear the grievor should have received the appointment initially. I thus direct the Employer to award the grievor the position of back-up Stock Controller (Lot Control) - Shift B rotating shift.

Finally, I remain seized to deal with any difficulties which may arise in the implementation of this award.

Dated at London, Ontario this 6th day of May, 1998.

Howard Snow, Arbitrator