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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GKN WALTERSCHEID CANADA INC.

- The Employer

-and-

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
Local Lodge No. 1703

- The Union

AND IN THE MATTER OF the grievance of Steven Ferguson

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Frank Reeb	- Manufacturing Manager
Elisa Henley	- Human Resources Manager

On behalf of the Union:

Mark Wright	- Counsel
Carl Sibley	- Directing Business Representative, District Lodge 184
Frank Thibert	- Plant Committee Chair, IAM, Local Lodge 1703
Steven Ferguson	- Grievor

Hearing held December 11, 1998 in London, Ontario.

AWARD

I. INTRODUCTION

The parties' collective agreement provides for a bonus for employees "with perfect attendance" in any month. Steven Ferguson, the grievor, was denied the bonus for a month during which the parties agreed he had been at work at all times. He had, however, forgotten to "swipe" his time card on one occasion and the Employer relied on this fact to deny the bonus. The primary issue was the interpretation of "perfect attendance".

II. THE FACTS

The Employer runs a facility in Rodney, Ontario. The collective agreement includes a one half day holiday bonus - "earned extra holiday" - for each month in which an employee has "perfect attendance", to a maximum bonus of nine half days per calendar year. This was the provision involved in this grievance. The collective agreement also includes another bonus, a weekly cash bonus for "perfect attendance (no excuse)".

The Employer recently began a system of tracking employee attendance using computer cards which are "swiped". The employee attendance information is then transmitted electronically to the Employer's office in Chicago, and the payroll and attendance bonuses are administered from Chicago on the basis of that information. On one occasion in late 1997 the grievor forgot to swipe his card in a timely fashion, although the parties agreed that he was at work on time. He was denied the earned extra holiday bonus for that month. In this December, 1997 grievance he sought the holiday bonus for himself and for anyone else who had been denied the bonus in similar circumstances.

Regarding the history of the administration of this provision, the Employer has for several

years produced and circulated memos indicating how it will administer the two bonuses. The Employer refers to these memos as its "policy". In 1995 the memo regarding the earned extra holiday bonus indicated that it was a "no excuse policy". The memo indicated the types of absences which would permit an employee to receive the bonus (e.g. holidays, vacation, approved union business, etc.) and also listed types of absences which would disqualify an employee (e.g. sickness, personal leave, pregnancy leave, etc.). The memo said that the Employer would rely on its payroll records to determine perfect attendance.

At the time of the grievance the Employer's most recent memo on the earned extra holiday bonus was dated January 1996. It was similar in all relevant respects to the 1995 memo.

In comparison with the earned extra holiday memo, the January 1996 memo regarding the weekly cash bonus noted that "Failure to punch in or out will disqualify the employee from the bonus for that week." No similar language was included in the January 1996 memo on the earned extra holiday time, the matter which was involved in this grievance.

In September, 1997 this grievor had filed a grievance about a denial of the earned holiday bonus in similar circumstances when he had forgotten to punch in, or swipe his card, on time. That grievance was settled by paying the grievor the bonus. Following the settlement the Employer posted a notice in November, 1997 indicating that the monthly earned extra holiday bonus worked on a "no excuse" basis.

After this current grievance was filed, the Employer issued another memo dated January 1, 1998 describing how it would administer the earned extra holiday bonus provision. The new memo included the following: "Failure to punch in or out without a clock misfunction, will disqualify the employee from the extra holiday for that month."

There were two disputed factual issues at the hearing. The first involved the Employer's response to the grievor's September, 1997 grievance. In its opening statement the Employer said that its response to that grievance had been the same as its current position and that the Union had accepted the Employer position when they agreed to the settlement of that grievance. The Union disagreed.

Elisa Henley is the Employer's Human Resources Manager and works in the Chicago office. She testified that she had prepared a response to the grievor's September grievance and faxed it to Kerry Drew, who was then the manager at the Rodney facility. That response indicates that the Employer views this bonus as operating as a no excuse policy and that if an employee "is tardy or does not punch in on time or at all, for whatever reason, they should not be paid" the bonus. Ms. Henley testified that after she faxed that response to Mr. Drew he had advised her that he had provided a copy of her response to the grievor.

Both the grievor and the Union's Plant Committee Chair testified on this issue. They both stated that they had not seen Ms Henley's response prior to the hearing.

During the October, 1997 negotiations for this collective agreement the parties had increased the earned extra holiday benefit from a maximum of eight half days in a year to nine. The second factual issue was whether the Union had relied upon the Employer's memos in order to secure that increase in the benefit (a fact which might have suggested some measure of agreement with the Employer's policy or have led to an argument of estoppel). While the Employer in its opening statement had asserted that the Union had relied upon this "policy", Ms Henley testified on this issue and she agreed with the Union that the Union had not referred to the Employer's memo nor used the Employer's memo during the negotiations.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The following are the relevant provisions of the agreement:

ARTICLE IV - RESERVATION OF MANAGEMENT RIGHTS

The Union acknowledges that it is the exclusive function of the Company to:

. . .

4.04 - Rules and Regulations. Formulate and revise personnel policies, make, alter and enforce rules and regulations to be observed by the employees provided such rules and regulations shall not be inconsistent with the terms of this agreement.

ARTICLE A-VI - PLANT HOLIDAYS

A6.01 - Number of Holidays.

. . .

An additional one half (1/2) day can be earned each month with perfect attendance to a maximum of nine (9) one half (1/2) days each calendar year. A voucher will be provided which can be used as paid time off or cash at the end of the year.

. . .

PAY GRADES AND JOB CLASSIFICATIONS

. . .

Incentives.

A. Attendance

1. Weekly perfect attendance (no excuse) $.50/hour

. . .

In addition, appended to the agreement are the Plant Rules made under Section 4.04 of the agreement, the violation of which is said to be "sufficient grounds for disciplinary action". The Rules are said to be "provided for information purposes and are not considered a contractual term". Among the rules is "failure to clock in on your time card when reporting to work . . ."

IV. POSITION OF THE UNION

The Union submitted that the bonus was for "perfect attendance" and, as the parties agreed that the grievor had been at work the entire month, he was entitled to the bonus. The Union submitted that it would require clear language in the agreement to remove an earned benefit such as this. The Union referred to the following award: *CAW, Canada, Local 4401 Canadian Maritime Union and Upper Lakes Shipping Corporation (Wheaton grievance)* (unreported), November 29, 1996 (Randall).

The Union submitted that the Employer's policies in the various memos did not give the Employer any additional rights. In any event, the operative policy dated January 1, 1996 did not refer to punching in or out. To the extent that the collective agreement provision on the weekly bonus is relevant, it refers to "no excuse" but that phrase is directed to the types of absences which affect the right to the bonus, not to the issue of timely punching in or out. The Employer's late inclusion of the language on punching in and out in its January 1998 memo cannot affect the result in this grievance as it came after the grievance was filed.

As for the settlement of this grievor's earlier grievance, Ms Henley's memo had not been provided to the grievor or the Union. The substance of the settlement was simply that the grievor received his bonus in very similar circumstances, a fact which supported the Union position.

The Union asked that the grievor be made whole, that other employees in similar circumstances be made whole, and that I remain seised to deal with any difficulties which may arise.

V. POSITION OF THE EMPLOYER

The Employer noted that it had long included the "no excuse" language in its various policies on the earned extra holiday bonus. It was not feasible for the Union to suggest that the extra half day earned holiday bonus negotiated in 1997 was unrelated to the Employer's policy. The Employer's policy regarding punching in and out was essential to the administration of the benefit.

The Employer's interpretation had been consistently expressed in its various memos. The requirement to punch in had always been implicit in its references to "no excuse" and had merely been made explicit in the January 1998 memo.

The Employer asked that the grievance be dismissed. If I directed that other employees be made whole, the Employer requested that the order be clear as to the period of time during which that direction would operate.

VI. CONCLUSIONS

There were two factual issues in dispute. I begin with them.

The first issue dealt with the Employer's response to the grievor's September 1997 grievance on this issue. Ms Henley said that she had been advised by Mr. Drew, the previous manager, that he had provided Ms Henley's faxed response to the grievor. Mr. Drew did not testify. Both the grievor and the Union's Plant Committee Chair testified that the first time they had seen the memo was on the day of the arbitration hearing. I conclude that the memo was not provided to the Union or the grievor, nor seen by the Union or the grievor, until the day of the hearing and, more importantly, that the Union had not agreed with the terms of the memo

in settling the earlier grievance. It follows that the Union did not accept that interpretation of the collective agreement.

Secondly, the Employer had suggested that the Union had used the Employer's policies to negotiate the extra half day. However, I heard no evidence that the Union had relied in any way on the Employer's policy in negotiating the extra one half day of earned holiday. Ms Henley agreed that the Union had not produced the policy, and that the Union had not referred to the policy when negotiating the increase. I conclude the Union did not use and did not rely upon the memos in negotiating an increase in this benefit.

I now turn to the collective agreement.

This bonus is based on "perfect attendance". The parties agreed that the grievor had been at work at all times during the month in question, but that he had on one occasion forgotten to swipe his card in a timely manner. The principal issue is thus whether he had perfect attendance as that term is used in the Article. One might ordinarily think the term "perfect attendance" simply required an employee to be at work for all scheduled hours - and the grievor was.

However, the Employer submitted that in addition to being at work, an employee had to have properly swiped his card. The Employer has expressed this interpretation in the past. It appeared from the Employer's comments at the hearing that the Employer views its memos as having some measure of contractual force. They do not. They simply set out the Employer's interpretation as of the time they were written.

In any event, prior to the January 1, 1998 memo, the Employer's position on this issue of timely swiping of the card had not been clear in its memos. The old language, such as that

in the 1996 memo, clearly specified various types of absences and described how the Employer intended to treat them in determining the bonus, but did not clearly deal with late punching in, or late swiping of the computer card.

Moreover the Employer has not consistently applied its interpretation. The September, 1997 grievance involved a similar situation in which this grievor had forgotten to swipe his card in a timely manner. Notwithstanding the views expressed in the memo from Ms Henley to Mr. Drew, the Employer paid the grievor the perfect attendance bonus.

In most instances, I would expect parties who used the words "perfect attendance" to intend being at work for all scheduled hours. None of the evidence or arguments persuades me that the parties intended otherwise when they agreed on this language in the agreement. In the absence of any compelling argument to the contrary, I conclude that the term perfect attendance, in the context of this case, means being at work for all scheduled hours.

As the parties agreed that the grievor was at work throughout the month, I find that he had perfect attendance, and I direct the Employer to compensate him with an additional one half day of earned extra holiday under Article A6.01.

The Employer expressed a concern about the difficulty of administering this provision if it could not rely solely on the attendance records from the swiping of employee cards. While the timely swiping of the cards will indicate that an employee is at work on time, this bonus is dependent on perfect attendance at work, not dependent on perfect swiping of the card. If the Employer wishes to add timely swiping as a requirement for receiving the bonus then it will need to amend the collective agreement or otherwise secure the Union's agreement, not simply indicate by way of memo that it will follow that approach. I appreciate the Employer's concern that issues of fact over whether an employee was at work are difficult

to resolve weeks or months after the day in question. If the holiday bonus was dependent on the timely swiping of the cards it would be administratively much easier, but the agreement does not base the bonus on timely swiping of the cards; the collective agreement bases the bonus on attendance and in this case there was no dispute as to the grievor's attendance.

The grievance is expressed as a "policy grievance" and asks that both the grievor and "anyone else that has lost bonuses should be totally reimbursed for losses due to punching in late." I was advised that no grievances have been filed on this issue since December 1997 when this grievance was filed. It appears that the parties were awaiting a resolution of this grievance. The issue has been resolved in the Union's favour and I thus direct that those employees who, as was the case with the grievor, were at work and who were denied the bonus solely due to their failure to swipe their cards in a timely manner during the period from December 1, 1997 through the end of December 1998 (the last full month prior to this award) be similarly made whole through the award of an extra one half day earned extra holiday time.

I retain jurisdiction to deal with any issues which may arise in the implementation of this award.

Dated at London, Ontario this 8th day of January, 1999.

Howard Snow, Arbitrator