IN THE MATTER OF AN ARBITRATION PURSUANT TO THE *LABOUR RELATIONS ACT, 1995*

BETWEEN:

SMURFIT - M. B. I.

Employer

- and -

I. W. A. CANADA, LOCAL 500

Union

AND IN THE MATTER OF a group grievance (holiday pay rate for Sunday)

ARBITRATOR: Shari L. Novick

APPEARANCES:

FOR THE EMPLOYER: Thomas A. Stefanik, Counsel

FOR THE UNION: Robert Navaretta, Representative

A hearing into this matter was held in Oshawa, Ontario on March 2, 2001

AWARD

I

This group grievance concerns the amount of pay that certain employees at the Employer's Whitby plant are entitled to receive for December 24 and December 31, 2000. These days are designated holidays under the parties' collective agreement, during which the plant was closed.

Both of the above days fell on Sunday. The Employer's practice over the last few years has been to operate the Whitby plant on a "continuous run" or seven day basis. Certain groups of employees work three twelve-hour shifts per week, one of which is on Sunday. The collective agreement provides that any hours worked on Sunday will be paid at the rate of time and one half. As a result, these employees generally work thirty-six hours per week but get paid the equivalent of forty-two hours, as the Sunday shift yields the equivalent of eighteen hours of pay.

The grievors in this case worked two twelve-hour shifts during the weeks in question, and were then paid for an additional twelve hours for each of December 24 and December 31, days that the plant was closed and they did not work. They did not, however, receive the Sunday premium of time and one-half for either of those days. The Union claims that all employees who would have worked on December 24 and/or December 31 if the plant had not been closed are entitled to receive payment at the premium rate of time and one-half, or the equivalent of six hours of additional pay, for each of the days in question.

II

There are no facts in dispute and neither party called any witnesses. Each side outlined its view of the relevant facts and contractual provisions in its argument. The relevant facts are as follows:

The Employer manufactures corrugated paper products at its plant in Whitby. A "continuous run - 7 day operation" was instituted at the plant in mid - 1997. The collective agreement provides for a premium of time and one-half to be paid for hours worked on Sundays or holidays. The agreement also provides for twelve holidays, during which the plant is closed and for which employees are paid holiday pay. Both December 24 and December 31 are included in this list of holidays. In the year 2000, both of these days fell on Sunday. It is agreed that the plant was closed on both December 24 and December 31, and that none of the affected employees worked on that day.

The grievors received holiday pay equivalent to twelve hours of pay at their straight time rate for these days. None of the employees in question received the Sunday premium of time and one-half. The Union does not take issue with the Employer's right to close the plant on the days in question, but claims that the affected employees should be paid the Sunday premium rate for each of December 24 and 31.

The relevant collective agreement provisions are set out below:

ARTICLE 11 - HOLIDAYS

11.01 All regular employees will be granted holiday pay for eight (8) hours at the employee's basic rate on the following recognized holidays:

New Year's Day	Canada Day
December 24	January 2
Civic Holiday	Christmas Day
Good Friday	Labour Day
Boxing Day	Victoria Day
Thanksgiving Day	**December 31**

(emphasis added)

.....

11.02 If any of the above statutory holidays should occur on a scheduled working day during a period when the plant may be closed for a vacation period, or during vacation periods otherwise scheduled for employees, all employees who are eligible for statutory holiday pay as defined above shall receive such

pay provided they have worked the last shift prior to the vacation period and the first shift following the vacation period...

ARTICLE 16 - CONTINUOUS RUN - 7 DAY OPERATION

. . .

16.05 All scheduled hours worked will be paid at straight time rates with the exception of hours worked in excess of twelve (12) hours in a shift or a Sunday or holiday which will be paid at the rate of time and one half. An employee who voluntarily works on a Saturday or Sunday as a result of a replacement call-in will be paid overtime at the rates prescribed by the Collective Agreement (i.e. time and one-half for hours worked on Saturday and double time for hours worked on Sunday).

Under normal circumstances, the Company would not operate the plant on paid holidays. Employees working on the seven (7) day operation basis will be paid for twelve (12) hours at straight time rate for the holiday. Any work performed on a paid holiday would be voluntary and paid at the rate of time and one half.

The parties also filed a Memorandum of Settlement (Renewal Agreement) dated July 7, 2000 evidencing their agreement to renew the collective agreement previously in effect, subject to certain amendments and deletions. Nothing in this memorandum addresses the issue in dispute. A further Addendum dated May 5, 1997 regarding the implementation of the "continuous run" is appended to the memorandum. It addresses various details such as hours of work, job postings and meal allowances. The only provision that addresses holidays or holiday pay is as follows:

14. Holidays

In the event of a statutory holiday, employees who are not scheduled to work as a part of their regular schedule, will have the option of having an alternate day off as agreed to between the supervisor and the employee or pay in lieu of such holiday for twelve (12) hours at straight time rate.

III

The narrow issue to be determined in this case is the amount that employees who were scheduled to work on December 24 and December 31 should be paid for these days.

The Union argued that Article 16.05 of the collective agreement evidences the parties' agreement that employees who work on Sunday will be paid for the equivalent of eighteen hours of work, even though they only work twelve hours. Mr. Navaretta contended that employees should not lose wages because of the Employer's decision to close the plant on days that have been designated as holidays under the collective agreement. He claimed that the underlying rationale for providing for the holidays in question is to permit employees to enjoy time off during holiday periods with their families, and that this should not result in employees suffering a loss of wages.

The Union noted that the *Employment Standards Act* requires employers to pay wages to employees that they would have received if they had worked on a statutory holiday. It contended that the principle of maintaining an employee's level of earnings despite the fact that no work is done on a holiday should apply in this circumstance, despite the fact that the two days in question are not recognized as statutory holidays under the *Act*.

Mr. Navaretta relied on the decisions in *Re Municipality of Metropolitan Toronto and C.U.P.E., Local 43* (1984), 13 L.A.C. (3d) 356 (P.C. Picher), *Re Houle and Treasury Board (Dept. of Transport)* (1978), 21 L.A.C. (2d) 103 (Mitchell) and *Re Building Service Workers' Union, Local 220 and Sarnia General Hospital* (1972), 24 L.A.C. 181 (Shime) in support of his argument. While he allowed that the facts in these cases were not "on all fours" with the circumstances of the instant case, he asserted that the decisions indicate that the payment of premium pay to an employee for holiday hours does not constitute "pyramiding" of benefits. He also noted that the cases support his contention that an employee's "regular rate" is not always interpreted as meaning his or her straight-time rate.

The Employer pointed out that the cases relied on by the Union involve situations in which the employees worked the hours in question, whereas the grievors in this case did not. Counsel for the Employer contended that Article 16.05 is clear and specifies that employees are only entitled to receive the premium rate of time and one half if they actually work on Sundays. Mr. Stefanik noted that no provision in the collective agreement provides that an employee be paid at the premium rate for hours that are not worked, and contended that accepting the Union's argument would result in an alteration or amendment of the parties' agreement.

The Employer relied on the case of *Accurcast (Division of Meridian Operations Inc.) and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada), Local 351*, unreported, June 17, 1998, (Snow) in which the arbitrator declined to double the hourly rate typically earned by employees who worked on weekends when their shift fell on a holiday. Counsel contended that the union's argument in that case that the employees' "regular rate" encompassed the premium rate they received for weekend work was analogous to the argument raised in this case.

Both parties also referred to a recent unreported award of Arbitrator Saltman, that addresses a related issue that arose between them. In that case the Union contended that two employees who had been scheduled to work a Sunday shift but had taken bereavement leave on that day should have been paid the Sunday premium of time and one half. The Addendum of May 1997 regarding the implementation of the seven-day continuous operation provides that employees who work continuous 12 hour shifts are entitled to receive bereavement pay of 12 hours at their "basic rate" for each day on which they are eligible to receive bereavement leave.

Arbitrator Saltman did not accept the Union's contention that the grievors' bereavement pay should include the premium rate provided for Sunday work, and determined that an employee's "basic rate" is the rate established for the employee's classification, set out in the wage grid in the appendix to the collective agreement. The Union contended that this case was wrongly decided in light of the provision in Article 16.05 for premium pay for Sunday hours. The Union also submitted that this

award has no application to the instant case because the Addendum specifically addresses bereavement pay, but is silent on the issue in dispute in this case.

The Employer accepted that the issue of bereavement pay was distinct from the question before me, but contended that the Saltman award was nevertheless assistive, in that it addresses a similar question of whether an employee who qualifies for a negotiated benefit under the collective agreement but does not actually work on Sunday is entitled to be paid the premium provided for Sunday hours worked.

V

Having closely reviewed the Saltman award regarding the appropriate amount of pay that employees who take bereavement leave on a Sunday that they would have otherwise worked are entitled to receive, I find that the reasoning applied in that award is ultimately not applicable to the issue at hand. As is often the case, the question before me falls to be determined on the language of the applicable provision in the parties' collective agreement, which in this case is Article 16.05

Arbitrator Saltman considered the bereavement leave provisions in the collective agreement (Articles 19.10 and 19.11) which specify that employees are to receive a leave of absence with pay, in the appropriate circumstances, at "regular straight time basic rate". Section 6 of the Addendum regarding the implementation of the seven day operations also specifies that employees who work continuous 12 hour shifts are entitled to receive bereavement pay of 12 hours at their "basic rate" for each day of eligible leave. Arbitrator Saltman based her finding that the term "basic rate" refers to the wage rate established for the employee's classification that appears on the wage grid on the fact that the parties' agreement appears to distinguish between the terms "basic rate" and "regular rate". She found that in view of the wording of the bereavement leave provisions, "basic rate" refers to an employee's straight time hourly rate, whereas an employee's "regular rate" may encompass premium payments.

The contractual provisions that I am called upon to interpret in this case do not contain this terminology. While Article 11.01 does provide that employees are entitled to receive holiday pay for the twelve designated holidays at their "basic rate", I find that Article 16.05 is more germane to the issue to be determined. Article 11.01 provides for eight hours of holiday pay for the holidays specified. Prior to the implementation of the "continuous run" operations, employees used to work regular eight hour shifts, and this provision was clearly drafted in that context. Given that the parties' dispute in this case arises out of the "continuous run" operation that encompasses 12 hour shifts, it is more appropriate to turn to Article 16, the provision that addresses issues that arise in that context, for guidance on this question.

A close review of the language of both the first and second paragraphs of Article 16.05 leads me to the conclusion that employees who would regularly be scheduled to work on a Sunday but do not do so because it falls on a designated holiday under the collective agreement are not entitled to receive premium pay of time and one half for the day in question. The provision begins by specifying that all hours worked are to be paid at straight time rates, with certain exceptions. The language is clear that hours worked on Sunday are one of the exceptions, and will attract payment at the rate of time and one half. Although the Employer claims that the requirement in the first sentence that the hours be *worked* is enough to answer the Union's argument in this case, in my view it is the combination of that requirement and the language in the second paragraph of the article that determines the issue. The second paragraph provides that the employees working on the seven day operation or "continuous run" basis will be paid for twelve hours at *straight time* rate for the holiday. It then goes on to state that any work that is performed on one of the holidays would be voluntary and attract payment at the premium rate of time and one half.

The Union contended that the second paragraph of Article 16.05 is not meant to apply to holidays that fall on Sunday. I cannot agree with that position. While the previous paragraph provides for the payment of the time and one half premium for hours worked on Sunday, I am not persuaded that it goes as far as establishing that an employee who would have otherwise worked on a Sunday if it were not a holiday is entitled to payment at the premium rate for that day. In accordance with the

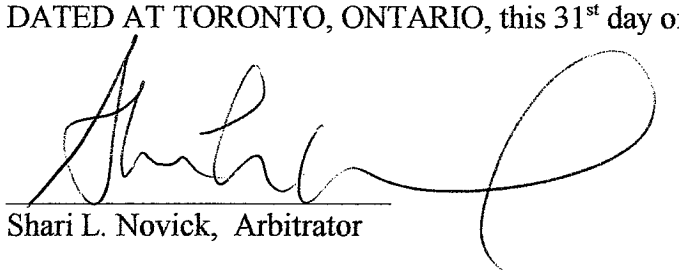
rules of contractual interpretation, and in the absence of any indication that the first part of Article 16.05 should override the second part, the two paragraphs must be read in tandem. The result, in my view, is that any hours worked on a Sunday attract the time and one half premium, but that holidays that are not worked and fall on a Sunday attract payment at an employee's straight time rate.

I note that the cases relied on by the Union in which a premium was ordered to be paid involve situations in which the employees worked the hours in question. The fact that the grievors in the instant case did not work on either of December 24 and December 31, 2000 renders these decisions of little use in the analysis.

I can appreciate the Union's point that from a common sense perspective it does not seem fair that an employee receive a lower wage for a week during which a recognized holiday falls. However, that fails to acknowledge the benefit of time off to an employee, as well as the fact that the Sunday premium is a benefit that the parties have negotiated that is only meant to accrue when actual work is performed on that day. In the face of the language appearing in Article 16.05, I cannot find otherwise. I note that this approach is also consistent with the general distinction in labour relations practice between benefits that employees earn by virtue of hours that are actually worked and those benefits that accrue as part and parcel of an employee's benefit package that are not dependent upon actual hours worked.

For the reasons expressed above, I find that the payment of holiday pay on the days in question at the grievors' straight time rate did not constitute a violation of the collective agreement. Accordingly, the grievance is dismissed.

DATED AT TORONTO, ONTARIO, this 31st day of March, 2001.



Shari L. Novick, Arbitrator