ARBITRATION TRIBUNAL

CANADA
PROVINCE OF QUEBEC

No. of submission: E-288-09

Date: April 16, 2010

CHAIRED BY: Me. Richard Marcheterre

The Communications Energy and Paperworkers Union, Local 8284
Hereafter called "the union"
And
Expertech Network Installation
Hereafter called "the employer"

Appellant: Union

Grievance(s): Union No. X82-010D (May 16, 2007)

Collective Agreement: May 2007 – November 2001

ARBITRATION AWARD
CANADIAN LABOUR CODE

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[1] The hearing for grievance X82-010D took place in Montreal on April 8, 2010. No jurisdictional or intra-jurisdictional measures were raised. The parties agreed to hold in abeyance all matters related to measures of monetary redress.

[2] The grievance filed under the classification mark S-2 reads as follows:

> Temporary transfer with promotion
>
> PROVISIONS OF THE COLLECTIVE AGREEMENT THAT ARE ALLEGED TO HAVE BEEN VIOLATED AND DESIRED SETTLEMENT:
>
> Article 22 and all other relevant articles and laws (sic)
>
> That the company cease violating the collective agreement immediately. That it grant temporary transfer to employees of the same classification and pay the expenses to which the employees are entitled, with full monetary compensation including any and all damages and interest.

[3] The Employer's response dated August 23, 2007, in the second stage of the grievance procedure, reads as follows (Exhibit S-3):

> In the interest of good labour relations, the grievances committee has studied the above-mentioned file.
>
> After investigating the facts, we can inform you that temporary transfer combined with a temporary promotion was, in the judgement of the manager, carried out in response to the urgent need for two Class II splicers at the Cornwall headquarters. The headquarters from which the transfer was carried out, based on the availability of employees, was Valleyfield. As no Class II splicer volunteered for transfer, instead of forcing someone to accept a temporary transfer, the company offered a temporary promotion to two volunteer Class III splicers to be transferred. We understand your position and want you to know that we are committed to finding alternative solutions to these types of cases and to respecting the collective agreement.

[4] The grievance is primarily based on a conflict arising from an addition to the end of the third section of Article 22 of the collective agreement in effect at the time of the events in question. The parts of Article 22 that are relevant to this litigation read as follows, with the change in bold letters added by the Tribunal:

ARTICLE 22

TRANSFERS AND REASSIGNMENTS

Definitions

> "Headquarters" means a locality and its contiguous territory in and from which an employee normally works as provided in Attachment B of this Agreement.
>
> "Reassignment" means an employee's assignment to another occupation and/or another work location within the employee's headquarters, or in the case of an

> employee in Toronto or Montreal, within his headquarters and within a 20 airline km radius from his reporting centre.
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> "Transfer" means the assignment of an employee on the basis that he will be required by the Company to begin or end his scheduled tour of duty in a headquarters other than his own or, in the case of employees in Toronto or Montreal, to another headquarters or to a different reporting centre other than his assigned reporting centre and more than 20 airline km. from his assigned reporting centre. **Transfers cannot be used to move employees between classes.**
>
> "Upgrade" means the reassignment of an employee to an occupation of a higher classification.
>
> […]

CONTEXT

[5] In order to better grasp the dispute, it is important to establish the context. It is important to understand this company's dynamic. It has only one customer, *Bell Canada*, for which it performs the work of installing telephone lines. The work sites in Ontario and Quebec are dependent upon *Bell Canada*'s service sales. Therefore, if there are a high number of sales in one location requiring the building of facilities on the telephone network, the Employer must determine whether, in the headquarters in question, there are enough workers in the class or classes needed to perform the work. If the headquarters does not have enough workers in one class, it moves employees from another headquarters to the one where the needs justify it.

[6] In this regard, it is important to point out immediately that, despite the claims of emergency in the Employer's response (S-3), the evidence does not find that there truly was an emergency. Indeed, it rather appears from the evidence that the transfers to another headquarters are common practice by the Employer as well; for it to be a true emergency in a given case, the evidence must show that the situation is different and requires different actions to be taken than the usual ones. A simple and normal surplus of work, as was the case here, is not an emergency situation.

[7] Furthermore, the Employer maintained in his response that there was no "*Class II splicer volunteering for transfer*". However, in the statement made by the human relations manager, Ms. Thérèse Doré, the evidence has shown that the Company did not look for volunteers.

[8] It also appears that with this Employer, there are two temporary personnel movements: transfer and promotion when an employee is reassigned. As these two notions are distinctly defined, it can therefore be assumed that they are two different movements that are not to be confused: they are not one and the same.

[9] In this instance, the Employer had a need for additional Class II splicers at the Cornwall headquarters in Ontario, so it drew from another headquarters, in Valleyfield.

The two employees who performed the work were Class III splicers and they lived in the immediate Cornwall area, although they reported to the Valleyfield centre. The two employees who claim that this was their work were also from the Valleyfield headquarters but were Class II splicers.

THE DISPUTE

[10] In order to better clarify the dispute, the undersigned asked Ms. Thérèse Doré, Human Relations Department head, to confirm whether her following understanding of the movement of manpower was correct, and she did so: A transfer of Class III employees to Cornwall along with a promotion to Class II in Cornwall in order to perform the required work.

[11] Ms. Doré stated that it was normal practice for a transfer to be followed by a promotion and that this was done in order to respect the last sentence of the third section of Article 22, to the effect that a transfer cannot be used to move employees between classes, so a transfer cannot be a promotion. The Union does not share this interpretation of this new stipulation and argues that the latter prohibits transferring a person and giving him a promotion, be it in one single movement of manpower or in successive movements during this same period in which additional employees are needed. This is at the heart of the dispute.

DISCUSSION

[12] This grievance requires interpretation and application of Article 22. As the parties have done so, we must return to certain precepts of the interpretive process.

Effect of a new Stipulation in the Collective Agreement

[13] The first principle looked at by the Tribunal is that of the consequences of a change to the collective agreement. The Tribunal considers that, when the parties add an element to the Agreement or to one of its provisions, it is because they want the future to be different from the past with regard to the work condition in question.

[14] In this regard, although Ms. Doré said that it has always been that way, the Tribunal cannot use the past or established practice as a basis for interpretation. It must instead consider that the parties wanted to eliminate the practice or add a determining nuance to it; otherwise, they would not have stipulated it as they did. In effect, they are not deemed to talk without wanting to say something.

[15] The parties added an element and, consequently, the latter must be perceived as significant to them. This element added to the third section of Article 22 reads as follows: **Transfers cannot be used to move employees between classes.**

[16] The parties did not set forth that, before the introduction of this element, the Employer was not forbidden by the Collective Agreement to act as he did, i.e. to transfer an employee and promote him to a higher class in the headquarters to which he is transferred. If the former Agreement had effectively prohibited this type of transfer, the

parties would not have had to stipulate it once again or clarify that the Employer could not act in that manner. By stipulating this last sentence of the third section of Article 22, they therefore were seeking to state the contrary to what was done before and, consequently, state that the Employer could no longer continue to act as he was doing.

[17] The Tribunal is of the opinion that when the parties introduced this text to Article 22, they effectively agreed to express their intention to limit the Employer's right to manage in cases of transfer to another headquarters. Obviously, by making this addition, they indicated that a transfer cannot be accompanied by promotion to a higher class.

[18] The matter is obvious in this case. Indeed, the evidence demonstrates overwhelmingly that Management was seeking to fill a need for employees in Cornwall to fill the positions of Class II splicer. That is how Mr. Levac, one of the two transferred employees, who held a Class III position when he was transferred to the Cornwall headquarters, was promoted to Class II. It is exactly the same situation for Mr. Leblanc, although his promotion to Class II was not simultaneous, but shortly after his arrival in Cornwall, with no changes to the situation at the source of his transfer. It is therefore demonstrated that the Employer, right from the outset and before even transferring either one of them, needed Class II employees and promoted them from Class III in Cornwall either when transferring them or after the transfer.

Interpretation in Favour of the Party for whom the Provision is Stipulated

[19] Another principle of interpretation that is constantly maintained is that a contractual provision is interpreted in favour of the party for which it was stipulated. Here, obviously, as the collective agreement constitutes all of the limits to the right of management, it must be considered that the addition of the third section to Article 22 was made in favour of the employees whose daily life is rife with transfers, given the needs of the regions in which the Employer operates.

[20] In view of these principles, therefore, the addition means that the parties demonstrated their common desire not to allow the Employer to grant a promotion when transferring, when at the time of the latter the personnel required is not in the lower class of the transferred employee.

[21] The Employer claims that he did not act in this manner, as he proceeded in two steps, by transferring the employee and thereafter giving him a promotion to the position and the class in which there were needs at the headquarters in question, i.e. Cornwall.

One cannot do indirectly what one is not allowed to do directly.

[22] Another principle of interpretation comes into play here: *one cannot do indirectly what one is not allowed to do directly*. Subject to all other conditions that the collective agreement may set out with regard to the Employer's right to promote an employee who is transferred from another headquarters, in the headquarters to which he was transferred, this means that unless a situation arose in Cornwall once the employee was transferred and working in the position to which he was transferred, the Employer could not execute

the transfer of an employee that would amount to or result in a promotion. This is what the Employer did in the cases of Mr. Levac and Mr. Leblanc.

Interpretation of the Collective Agreement as a single Entity

[23] The Employer also evoked another principle of interpretation, the fact that a collective agreement must be interpreted as a single entity, that a provision may not be isolated but must be taken in relation to all the others on the same subject. Although the Tribunal shares this principle, it has no bearing in this case as no other provision was brought forth on the very subject of the ban on promoting when transferring or, in other words, changing a transfer into a promotion. Consequently, the last sentence of the third section of Article 22 has meaning on its own, as it establishes the basic principle: a promotion cannot occur when transferring: **Transfers cannot be used to move employees between classes.**

[24] However if, on the other hand, this principle of interpretation were to be applied to this case, because this addition should be seen and understood in the context of other provisions of the collective agreement, as the Employer suggests, the conclusion would remain the same, in part because one would then have to take into account the fact that the parties are dealing differently with the question of temporary transfers in Sections 22.10 and the following Sections, as compared to temporary promotion in Section 24.02. The addition of this reference in the third section of Article 22 is therefore a clear indication of the intention of the parties to maintain and, indeed, increase the effect of making a distinction between these two notions.

[25] The Tribunal adds that this principle of interpretation would only be of practical importance in this case if it were not already concluded that the Employer violated Article 22 by carrying out a promotion when transferring. In fact, without taking this conclusion into account, the Employer argued, contrary to the arguments of the Union, that under Section 22.10, it did not have to look for volunteers. It is only with regard to the application of Section 22.10, which comprises the basis for temporary transfer, that the Tribunal has to look at this element ancillary to the dispute, but after it has been determined that a transfer cannot be accompanied by a promotion to a higher class, which we will consider further on.

RULING on the Meaning and Application of Article 22

[26] For the reasons stated above, the Tribunal is of the opinion that the last sentence of the third section prohibits the Employer from carrying out the transfer and the promotion of an employee in one and the same movement of manpower, be it simultaneously or subsequently, in the absence of a situation in terms of staffing needs that is different from the situation that had justified the transfer within the same class.

[27] The Tribunal is therefore of the opinion that the Employer violated the Collective Agreement by transferring Mr. Levac and Mr. Leblanc into a Class III position and granting them a promotion, simultaneously or subsequently, into Class II, a position that

was in fact the real need to be filled in Cornwall from the outset, at the time of the transfer.

[28] For all of the grounds discussed previously, Grievance X82-010-D is allowed.

DISCUSSION ON THE FOUR CLAIMS OF THE GRIEVANCE

[29] The fact that the grievance has been allowed does not necessarily mean that the employees suffered a prejudice due to erroneous application of Article 22 by the Employer. However, at the time of the Employer's submission, on May 16, 2007, the grievances included various claims that we will now look at in turn.

A. **"that it (the Company) grant temporary transfers to employees of the same class".**

[30] The preceding conclusion on the meaning of the third section of Article 22 has, as a consequence, that transfers must be carried out within the same class, barring which it is a promotion if it is done into a higher class, as transfers exclude promotions on the same occasion. In effect, under this provision, the Employer cannot transfer an employee and promote him into a higher class as part of the same movement of manpower or without the circumstances changing at the site of his transfer, thus justifying a promotion.

[31] The Tribunal must explain that the statement "*or without the circumstances changing at the site of the transfer, thus justifying a promotion*", is made with reservations and is but an *obiter dictum* concerning a potential right of the Employer, which it is neither useful nor relevant to determine in this instance, because this award does not have to determine it. In fact, the only objective of this award is to determine whether the Employer's decision to transfer and promote employees in the circumstances in question was in violation of the collective agreement, when in the said circumstances there was no new need of manpower in Cornwall after the employees Leblanc and Levac were transferred there. From the beginning to the end of the temporary transfers, the staffing needs were for Class II employees.

[32] There is no argument over the fact that the transfer was justified and that the transferred employees' place of origin was the Valleyfield headquarters. Because the reason for the transfer was Class II work in Cornwall, the Union nevertheless claims that the Employer had the obligation to first of all offer the transfer to voluntary Class II employees at that headquarters, including Mr. Philippe Lavallée and Mr. Benoît Dubois. It should be noted that these two employees testified to the effect that they would have volunteered for the transfer to Cornwall and that their statement to this effect has not been contradicted.

Volunteering

[33] When a collective agreement stipulates that a movement of manpower be carried out on a voluntary basis, the Employer must verify whether there are employees

who volunteer. Here, the Employer admitted that this was not done but considers that he did not have to do so.

[34] The movement in dispute in this case was a temporary transfer for less than 6 months. The evidence shows this and the parties agree upon it. We must therefore refer to the provisions relevant to temporary transfers of less than 6 months in Sections 22.10 and 22.11 of the collective agreement, which read as follows:

> [22.10] In the selection of an employee for temporary transfer, other than in the case of a temporary transfer to a plow train operation, where the employee is required by the Company to remain away from his home for a period which is expected by the Company to be in excess of two weeks, three weeks in the case of a two-man line crew normally sharing the same vehicle, the Company will give first consideration to the most senior employee who will volunteer from the functional group in the seniority unit at the reporting from which the transfer is to be made, and who has the necessary qualifications, providing the remaining employees at his report centre have the necessary qualifications to do the work remaining.
>
> [22.11] In the event that there is no volunteer, as provided in section 22.10, the employee of least seniority from the functional group in the seniority unit, at the reporting centre from which the transfer is to be made, and who has the necessary qualifications, shall be selected providing the remaining employees have the qualifications to complete the work remaining.

[35] In this case, the Employer assigned two employees under Section 22.11. However, as we have seen, he did not make sure that he determined beforehand whether there were one or more volunteers from the class of work that was needed in Cornwall (Class II) in the functional group of the seniority unit at the headquarters from which the transfer was carried out, Valleyfield in this case. As we have seen, the evidence shows that there were at least two employees from that group who would have volunteered, had they been provided the opportunity to do so.

The Criteria of Section 22.10

[36] The Employer assigned Mr. Leblanc and Mr. Levac for financial reasons, believing that, as the two employees from the Valleyfield headquarters live in the Cornwall area, it would be able to avoid some costs. It also claimed that by acting in this way, it was benefiting two parties: Mr. Leblanc and Mr. Levac, because they would be able to live at home, and the company, as it would avoid certain costs. Ms. Doré called this a "*win-win situation*". The Employer also maintained that the employees Lavallée and Dubois would have gained no real advantage in obtaining these transfers.

Place of Residence

[37] The Employer apparently considered the question of place of residence as a means of saving money. The place of residence, however, is not a criterion for selection

of employees in view of a temporary transfer. The criteria determined later in this decision are universal to all employees and are not categorised according to their place of residence.

The Financial Question or the Employee's Real Interest

[38] It flows from the above that the economic question is not a criterion, no more than the employee's interest in receiving a transfer. Section 22.10 of the collective agreement stipulates the 4 obligatory criteria that the Employer must respect when choosing an employee for a voluntary transfer, and neither the economic benefits nor the employee's interest, which is exclusive to each employee, are included. Based on the parties' wishes, the collective agreement grants the right to a temporary transfer without taking these notions into account.

[39] The place of residence referred to in Section 22.10 is therefore not a criterion but a reality flowing from application of the 4 selection criteria, in that the volunteer employee chosen may already have his place of residence close to the place of assignment, Cornwall in this instance. It is therefore true that this would offer some economic benefits to the Employer, but it does not entitle him to choose that employee without first meeting the 4 criteria for selection stipulated in Section 22.10 for a temporary transfer.

The Selection Sequence

[40] As the introduction to Section 22.11 is to the effect that it applies "*in the event that there is no volunteer* …", the Tribunal deems that the Employer must first of all ensure that there are no volunteers before determining which employee to temporarily transfer, subject to the criteria stipulated in this provision, such as seniority in the group, starting with the employee with the least seniority.

The 4 Criteria for Selecting an Employee to Transfer under Section 22.10

[41] The 4 criteria in Section 22.10 are as follows:

41.1.1. Having the qualifications required to do the work involved when transferred.

41.1.2. Being an employee in the same class as that needed for the transfer (Article 22 section 3), being part of the functional group at the reporting centre from which the transfer is carried out, i.e. Valleyfield, in this case.

41.1.3. Being the employee(s) with the most seniority in the group, according to the number of employees to be transferred.

41.1.4. These criteria apply between voluntary employees.

[42] It is only when at least one of these 4 conditions established by Section 22.10 is not fulfilled that the Employer, under Section 22.11, can assign an employee of his choice subject to the conditions that are therein stipulated.

[43] In this case, the evidence shows that the Employer did not attempt to find out whether there were volunteers, nor did he carry out this research among the employees of the functional group occupying a function of the classification for which a transfer was necessary, i.e. Class II in this case.

[44] In failing to respect in their entirety the 4 conditions of Section 22.10 which must be analyzed within the functional group of employees of the same class as that for which the transfer is needed, the Employer is in violation of the collective agreement and his decision to transfer Mr. Leblanc and Mr. Levac must be overruled from the start.

RULING on the Request to Transfer Class II Employees, i.e. Mr. Lavallée and Mr. Dubois

[45] The evidence overwhelmingly shows that if the Employer had respected Articles 22 and Section 22.10, it is Mr. Lavallée and Mr. Dubois who would have benefited from the transfers in question. Although, apparently, given the time that has passed, this can no longer become reality, the fact remains that if the employees Lavallée and Dubois had received the temporary transfer to Cornwall, they would potentially have enjoyed benefits for which reparatory compensation could be justified, which is the subject of the following chapters (B to D).

[46] For these reasons, the Tribunal grants the said transfers to Mr. Dubois and Mr. Lavallée.

B - ***That the Company "pay the expenses to which the employees are entitled"***

[47] This claim flows from the fact that the employees Lavallée and Dubois should have travelled to Cornwall and may have stayed there. This is not established with certainty by the evidence and, as the Tribunal was required to reserve its jurisdiction on the subject of damages, it will firstly leave it to the parties to determine whether these employees would, indeed, have been entitled to these "*expenses*" and, if so, to establish the compensation to be paid to them as such.

[48] If there is agreement in this regard, the Employer shall pay the said compensation within thirty (30) days from today. However, barring an agreement within thirty (30) days from today, the parties shall be convened once again to present their evidence and the arguments relevant to the determination of these damages, upon written request by one of the parties.

C - ***"with full monetary compensation"***

[49] It goes without saying that if the employees had received the transfers in accordance with the collective agreement, they may have received an advantage in terms of compensation. The evidence did not extend to this subject as the parties asked the

Tribunal to reserve its jurisdiction with regard to measures of monetary redress. The Tribunal therefore leaves it to the parties to determine if such an advantage truly did exist and, if so, what it was and what compensation is to be paid in consequence thereof.

[50] If there is agreement in this regard, the Employer shall pay the said compensation within thirty (30) days of today. In the absence of an agreement within thirty (30) days of today, they will be convened once again to present their evidence and the arguments relevant to the determination of this compensation, upon written request by one of the parties.

D - ***"and including any and all other damages and interest."***

[51] With regard to the compensation of all other damages, it shall be as it has been with other monetary claims. Therefore, the Tribunal leaves it to the parties to determine whether there were truly other damages and, if so, what this damage or these damages were, as well as the compensation to be paid in consequence thereof.

[52] If there is agreement in this regard, the Employer shall pay the said compensation within thirty (30) days of today. However, in the absence of an agreement within thirty (30) days of today, they shall be convened once again to present their evidence and the arguments relevant to the determination of this compensation, upon written request by one of the parties.

[53] With regard to interest, it will be added to the total amount of the compensation to be paid to Mr. Lavallée and Mr. Dubois, calculated from the date of submission of the grievance to the Employer on May 17, 2007 (S-2)

Sherbrooke, April 16, 2010

Richard Marcheterre, Arbitrator

For the Union: Maître Maxime Lazure-Bérubé (Rivest Schmidt, Lawyers)

For the Employer: Maître Aaron Makovka (Dunton Rainville, Lawyers)

Hearing Date(s): April 8, 2010

Date(s) of Judges' Consultation: April 14 and 15, 2010