IN A MATTER OF AN ARBITRATION

BETWEEN

Insurance Corporation of British Columbia

(The Employer)

AND

Canadian Office and Professional Employees Union, Local 378

(The Union)

Article 12.07 (e) Policy Grievance

Arbitrator:	Ronald S. Keras
Counsel For The Employer:	Mr. Michael A. Vizsolyi
Counsel For The Union:	Mr. Leo McGrady, Q.C. Mr. Brian Nelson
Hearing:	Vancouver, B. C. May 3, 2007 August 1, 2007
Published:	August 30, 2007

I

The parties agreed that this Arbitration Board was properly constituted, pursuant to the terms of the Collective Agreement, to hear and decide the matter in dispute.

The Policy grievance concerned the interpretation of Article 12.07 "Scheduled Time Off Provisions". In a March 9, 2006 letter to Senior Union Representative Mr. Dave Park, ICBC Director of Labour Relations, Mr. David E. Cox outlined the Employer's intention as follows:

> Dear Mr. Park:
>
> **Re: Article 12.07 (e)**
>
> Please be advised that ICBC intends to apply the Collective Agreement respecting the above noted matter as it was intended. Previously, the Corporation has allowed employees to accrue more than ten (10) days in their TO bank. The purpose of this letter is to advise you that employees will only be allowed to accrue up to ten (10) days. Any days in excess of ten (10) days will be paid out in the period in which they are earned.

In a March 22, 2006 letter to Mr. Cox concerning a number of matters Mr. Park responded to the Employer's position on TO days as follows:

> **Article 12.07 (e) Banking of TO Days**
>
> Please be advised that the Union was unaware that ICBC was in violation of Article 12.07 (e) of the Collective Agreement by allowing employees to accrue more that ten (10) days in their TO Bank. Due to the notice of intent we require written

information from ICBC as to the names of all ICBC employees who have exceeded the ten (10) day limit and the current status of their TO banks.

Your notice also indicates that any days in excess of the ten (10) days will be paid out in the period in which they were earned. Please be advised that there is no provision in the Collective Agreement for TO days to be paid out to employees, to do so would initiate a grievance from the Union and/or its members. It is our position that ICBC management have allowed employees to exceed the TO banks by denying the time off entitlement to our members.

Therefore, the Union requests to meet with ICBC to discuss a process by which employees can take the excess time off from their TO banks in order to meet the limited requirement of Article 12.07 (e) of the Collective Agreement.

II

The Parties submitted an agreed statement of facts, portions of which follow:

(1) The Arbitration Board is properly constituted under the provisions of the Collective Agreement and the Labour Relations Code of British Columbia.

(2) There are no preliminary matters and Arbitrator Keras may proceed to adjudicate the grievance on its merits.

(3) The Canadian Office and Professional Employees Union, Local 378 and also formerly known as the Office and Technical Employees' Union, Local 378 and the Office and Professional Employees' Union, Local 378 ("the Union") and the Insurance Corporation of British Columbia ("the Employer") have been parties to a series of collective agreements since 1974. The

most recent collective agreement where the dispute arose will be in effect from 2006 to 2010.

(4) The Union is the certified bargaining agent. The Labour Relations Board under the Labour Code of British Columbia first granted the Union an Order of Certification on the 5 of November 1974. It described the unit as an all–inclusive unit comprised of employees in British Columbia, except those excluded by the Code. The Order of Certification has been varied three times. The first variance was issued on the 12 of April 1985, to reflect a change of address of the Employer. The second variance was issued on the 30 of April 1996, to reflect a change to the name of the Union from the Office and Technical Employees' Union, Local 378 to the Office and Professional Employees' International Union, Local 378. A third variance application was made in September 2004, to reflect a change to the name of the Union from the Office and Professional Employees' International Union, Local 378 to the Canadian Office and Professional Employees Union, Local 378.

(5) This Arbitration involves a policy dispute, where the Union challenges the position taken by the Employer in relation to its interpretation and application of Article 12.07(e) of the Collective Agreement. Article 12.07 of the 2006–2010 Collective Agreement is reproduced below in its entirety with emphasis added to Article 12.07(e):

> 12.07 Scheduled Time Off Provisions
>
> Full-time regular employees in positions covered under the hours of work provisions outlined in Articles 12.01(b), 12.03, 12.04, 12.05 and 12.06 will be entitled to the time off provisions as set out herein.
>
> (a) Employees will earn an entitlement of one (1) day off for time worked in each of the following periods:
>
> January 1 to January 23
> January 24 to February 15
> February 16 to March 10

March 11 to April 2
April 3 to April 26
April 27 to May 20
May 21 to June 11
June 12 to July 4
July 5 to July 27
July 28 to August 20
August 21 to September 11
September 12 to October 3
October 4 to October 25
October 26 to November 15
November 16 to December 8
December 9 to December 31

(b) Employees will request scheduled time off under this Article at least seven (7) working days in advance, and the scheduling of such time off will be subject to management approval.

(c) Scheduled time off will normally be taken in not less than full day increments. At the employee's option however, it may be taken in half-day increments.

(d) Scheduled time off will not take precedence over another employee's vacation leave.

(e) Scheduled time off will be taken in the period in which it is earned except that employees shall be allowed to accrue up to ten (10) days which can be taken in a continuous period. (emphasis added)

(f) Employees who take scheduled time off within any of the above shown periods and who fail to work the full period, will repay the Corporation the pro-rata portion of unearned entitlement for that period at the appropriate hourly rate.

(g) Employees who start work in positions which carry an entitlement to scheduled days off in accordance with this Article during one of the above shown

periods, or whose time worked in such a position is only a portion of any of the above periods, will earn the appropriate pro-rata portion of the day off to be paid at the appropriate hourly rate.

(h) Time worked will exclude maternity leave, long term disability, and any other leave without pay of more than ten (10) working days.

(i) Part-Time Regular Employees and all Temporary Employees

Employees will work the hours as described in this Article except that such employees will be paid at the appropriate hourly rate for all time worked in lieu of scheduled time off.

(6) The parties first bargained and introduced Article 12.07 into the 1978–1980 Collective Agreement.

Negotiation History

1978 Negotiations
1978–1980 Collective Agreement

(i) Derek Thomas, Labour Relations Manager, on the 1 of June 1978, issued a letter to Fred Trotter, Union President, giving notice of intention by the Employer to commence collective bargaining for a renewal of the Collective Agreement.

(ii) The first bargaining session for this round of negotiations occurred on the 13 of June 1978. The Union presented and explained their fifty–two demands. The Employer presented and explained their respective bargaining demands in three parts. The first part designated as CA demands were demands where substantive changes were being

sought but the intent of the proposal was only provided. The second part designated as CB demands were demands seeking clarification of existing language. The third were designated as CC demands that were supplementary in the sense the Employer considered these would clarify existing language that were being abused.

(iii) At the second negotiations meeting held on the 15 of June 1978. At this meeting the Union did a review of the demands made by the Employer. Attached to the minutes of this meeting is a summary document setting out the position category of each of the demands and the respective position of the parties.

(iv) The Hours of Work proposal presented by the Union (U–11) sought a universal nine day fortnight system with the exception of those working in Continuous Operations under Article 12.02 of the Collective Agreement. The Union also sought flexibility in the hours of work (U–43) for those working in Data Entry under Article 12.03.

(v) The Hours of Work proposal presented by the Employer was a statement of principle that they wished to negotiate changes as part of the renewal of the Collective Agreement under CA–23. They also had related Hours of Work demands in proposals CA–24 and CB–14.

(vi) The Employer made an overall settlement proposal to address eighteen areas of negotiations on the 19 of September 1978. The Employer went through each proposal and clarified any questions the Union had about any of the proposals. Under Appendix A, their proposal (previously made on the 8 of September 1978) sought as part of the modified work week to establish a system of working hours where employees would work an extra fifteen minutes daily (7.25 hours) would earn an extra eight days off

per year. These Hours of Work would apply to all employees other than those working in Claim Centers; Claims Branch Offices; Claims Resident Offices; Salvage Centers and the Computer Center.

(vii) The Union on the 21 of September 1978, presented their position in response to the Employer settlement proposals. Under Appendix A, they proposed to have the bargaining sub–committees discuss the Hours of Work (U–11, U–43, CA–23, CA–24 and CB–14) proposals instead of that offered by the Employer.

(viii) A revised Hours of Work proposal was made by the Employer on the 27 of September 1978. This proposal amended the one presented on the 19 of September 1978 by adding an accrual entitlement of five days and renumbering the sub–paragraphs.

(ix) A revised Hours of Work proposal was made on the 29 of September 1978 by the Union. This proposal provided, amongst other things: (1) the establishment of a 7.5 hour day under the modified work week provisions; (2) one day off in any pay period where a paid holiday does not occur (seventeen days); (3) accrual of fifteen time off days; (4) these time off provisions be available to those working Variable Hours under Article 12.06; and (5) Hours of Work sub–committee be struck to address particular hours of work issues.

(x) The Employer on the 4 of October 1978, presented a final offer to the Union. Its Hours of Work proposal was based upon their last position taken on the 27 of September 1978.

(xi) The Union Negotiating Committee on the 5 of October 1978, issued a negotiation summary to the Union membership outlining the state of negotiations.

It set out the major unresolved differences between the Employer and the Union.

(xii) On the 12 of October 1978, a Staff Memorandum was issued by the Employer outlining the state of negotiations.

(xiii) On the 19 of October 1978, another Staff Memorandum was issued by the Employer answering questions about the final offer and negotiations.

(xiv) On the 3 of November 1978, a joint application was made to the Department of Labour seeking the appointment of a Mediator. In the application the Employer and the Union outlined nine areas where a contractual dispute remained, which included the Hours of Work.

(xv) The Department of Labour appointed Mediator J.A. Chapelas on the 6 of November 1978.

(xvi) The first mediation meeting took place on the 17 of November 1978. The Mediator met with the parties about the major issues in dispute.

(xvii) The second mediation meeting took place on the 22 of November 1978. The Mediator continued to assist the parties in reaching a settlement. At this meeting, the Employer presented a proposal for settlement. The Union presented a counter–proposal that included a changed position on the Hours of Work.

(xviii) The Union gave the Employer strike notice at the Mediation meeting on the 22 of November 1978, pursuant to the Labour Code of British Columbia.

(xix) The third mediation meeting took place on the 28 of November 1978. The Mediator continued to assist the parties in reaching a settlement. At this

meeting, the Mediator outlined the concessions which the Union was prepared to make. The Employer and the Union sub–committee dealing with Hours of Work met with the Mediator to discuss Hours of Work details.

(xx) The fourth mediation meeting took place on the 1 of December 1978. The Employer explained their revised position with respect to the Hours of Work, amongst other issues, to Mediator Chapelas.

(xxi) Mediator J.A. Chapelas met with parties on the 6 of December 1978. This meeting resulted in a mediated settlement.

(xxii) The parties met on the 8 of December 1978, where they signed a Memorandum of Agreement reaching a tentative agreement. This Memorandum of Agreement, amongst other things, provided the earned time off days were to be implemented effective the 1 of January 1979.

(xxiii) The tentative agreement was later ratified by the Union membership and the Employer.

(xxiv) The bargaining materials, including the bargaining and mediation notes, do not establish the parties had any direct discussion with each other, or the Mediator about the payout of earned time.

(xxv) The Collective Agreement specifies a cash value equivalent to Scheduled Time Off in two circumstances. Under 12.07(f), where an employee has taken scheduled time off and failed to work the entire period, they are required to repay the Employer. Under 12.07(i) which specifies that part-time and temporary employees are paid at the appropriate hourly rate in lieu of Scheduled Time Off. The language of these two provisions has remained

unchanged since originally negotiated in the 1978–1980 Collective Agreement.

(7) No changes affecting the time off provisions under Article 12.07 occurred in any of the subsequent Collective Agreements until the negotiation of the 1991–1993 Collective Agreement.

1991 Negotiations
1991–1993 Collective Agreement

(8) Under the 1991–1993 Collective Agreement the only change made was in relation to Article 12.07(e). The parties agreed to increase the accrual entitlement from five days to eight days. This was a Union demand.

1993 Negotiations
1993–1996 Collective Agreement

(9) Under the 1993–1996 Collective Agreement the parties made four changes to Article 12.07 of the Collective Agreement. It incorporated those working under Article 12.02(b) to earn time off days. It also allowed for earned time to increase to sixteen days per year as a result of increasing the hours of work to seven and one–half hours per day. In addition, it increased the accrual entitlement under Article 12.07(e) from eight days to ten days. This was an Employer demand.

1996 Negotiations
1996–1999 Collective Agreement

(10) Under the 1996–1999 Collective Agreement the parties changed Article 12.07 of the Collective Agreement to allow earned time to be taken in one–half day increments at the election of the Employee. This required the term day off, to be changed to scheduled time off instead. These changes also resulted in some renumbering and repositioning of the applicable provisions. In addition, it provided those working

under 12.01(b) to earn time off days. This was an Employer demand.

(11) In reviewing the bargaining materials, including the bargaining and mediation notes (where applicable), the parties in the 1991–1993; 1993–1996; and 1996–1999 round of negotiations did not have any discussions about the payout of earned time under Article 12.07 of the Collective Agreement. The first time the parties discussed the payout of excess earned time was as a result of the change of practice notice received in the 2006 negotiations.

Past Practice

(12) With the introduction of Article 12.07 into the 1978–1980 Collective Agreement, Employees have been required to schedule any earned time or accrued earned time away from work; where this did not occur they were able to accrue earned time beyond that allowed and they were not subject to a payout until after the change of practice notice was issued in 2006 negotiations by the Employer.

(13) The payout of earned time off days under Article 12.07 only previously occurred where there existed extraordinary circumstances as described in administrative and interpretative documents issued by the Employer.

(14) The Union has received notification of policy and procedure documents involving the application of Article 12.07 of the Collective Agreement from the Employer.

> (i) A Human Resources Memo was issued on the 22 of March 1985, which provided policy guidance to Managers and Supervisors about vacation and time off schedules.
>
> (ii) An excerpt from the Management Guide issued in March 1990, provided policy guidance to Managers about the interpretation and application of scheduled

time off under Article 12.07 of the collective agreement.

(iii) Derek Thomas, Industrial Relations Manager, on the 10 of July 1996, sent a letter with a draft Corporate Policy Guide to Dave McPherson, Senior Union Representative, on policies which were intended to be issued to managers and staff.

(iv) Dave McPherson, Senior Union Representative, on the 23 of July 1996, responded to Derek Thomas, Industrial Relations Manager, advising the Union intended to seek improvements and correct errors contained in the Corporate Policy Guide.

(v) Derek Thomas, Industrial Relations Manager, on the 7 of October 1996, sent a letter to Dave McPherson, Senior Union Representative, seeking to have a meeting to discuss any issues involved with the Corporate Policy Guide.

(vi) The Employer introduced the Corporate Policy Guide on the 28 of October 1996 as a source of reference for managers and staff on policy issues. Included under heading E–7.4 Time Off (TO) Days was the administrative and the interpretative position taken by the Employer. The Corporate Policy Guide was a replacement for the Management Guide.

(vii) The Corporate Policy Guide was revised from time to time. Sample excerpts of the Time Off (TO) Days Policy for 1996; 1998; 1999; and 2005. The Corporate Policy Guide remains in existence at the time of the Arbitration and continues to provide reference to managers and staff on policy issues.

(viii) Mike Swanson, Labour Relations Manager, on the 17 of September 1997, sent an e–mail and an attached memo providing direction as to the

administration of Scheduled Time Off under Article 12.07 of the Collective Agreement to Managers, Human Resources and Labour Relations. This was sent to the Union under the requirements of Article 0.10.

2006 Negotiations
Change of Practice Notification and Implementation

(15) David Cox, Director of Labour Relations, issued a letter on the 9 of March 2006 to David Park, Senior Union Representative giving notice that the past practice involving Article 12.07(e) would be discontinued. This notice advised employees would only be able to accrue ten days under this provision. It also set out that any days in excess of the ten days would be paid out in the period earned.

(16) David Park, Senior Union Representative, sent a letter on the 22 of March 2006 to David Cox, Director of Labour Relations responding to the four past practice notices issued in negotiations. In respect to Article 12.07(e) notice, amongst other things, he advised that if the Employer was intending to payout the excess accrual entitlement a grievance would be submitted challenging this. He also requested to meeting to discuss a process whereby employees could take their excess time under Article 12.07(e) of the Collective Agreement.

(17) The Employer on the 22 of June 2006, issued details of the practice change involved with earned time off days under Article 12.07 of the Collective Agreement.

(18) Rita Mara, Manager of Payroll and Personnel Administration on the 22 of June 2006, in Management News issued details of how the practice changes under Article 12.07 would be implemented.

(19) Rita Mara, Manager of Payroll and Personnel Administration on the 5 of March 2007, in Management News

issued an update of how the practice changes under Article 12.07 would be implemented.

The Policy Grievance

(20) Brian Nelson, Arbitration Representative, submitted a policy grievance on the 16 of February 2007, to the attention of Michael Hancock, Director of Employee Relations. The covering letter and the attached grievance statement challenges the interpretation applied by the Employer to Article 12.07(e) and other relevant provisions of the Collective Agreement involving the payout of earned time and the refusal to allow scheduling at a future date.

(21) The primary contractual provisions relevant to the respective position of the parties involved with this policy dispute are set out in Article 12.07 of the 2006–2010 Collective Agreement. The other contractual provisions relevant to the dispute, amongst others, are Article(s) 0.10; 12.01(b); 12.03; 12.04; 12.05; 12.06; 14.09; 15.10 and 20.11(7).

(22) A grievance hearing was not held since the parties respective contractual positions had previously been communicated to one another in the 2006 negotiations; follow–up correspondence; and in joint consultation meetings.

(23) Mike Vizsolyi, Senior Employee Relations Advisor, issued a grievance reply on the 20 of February 2007. He denied the grievance. The interpretative position taken by the Employer is the Collective Agreement is silent allowing for the exercise of management rights to payout any excess earned time.

(24) Brian Nelson, Arbitration Representative, on the 20 of February 2007, sent a letter to Michael Hancock, Director of Employee Relations, giving notice the grievance reply was unsatisfactory and the Article 12.07(e) policy grievance was being referred to Arbitration.

(25) Arbitrator Keras was consensually appointed to adjudicate the issues in dispute under Section 86 of the Labour Relations Code of British Columbia.

General Terms of Agreement

(26) There are no Arbitral Awards that have interpreted Article 12.07(e) of the Collective Agreement. It is further agreed that there are no grievances that will be relied upon by the parties which touch upon the specific dispute involving the payout of earned time off days.

(27) The Arbitration hearing shall be bifurcated for the purposes of obtaining a decision on the interpretation of the issues in dispute. Any dispute relating to remedy shall be dealt with following the Arbitration Award on the interpretation of Article 12.07(e) being rendered, if necessary.

(28) It is agreed that based upon the parties mutual desire to expedite the Arbitration hearing, it is understood neither party will lead evidence requiring the presentation of viva voce evidence. The parties agree to limit their representation to the issues in dispute as described in this Agreed Statement of Facts; admitted documents; the collective agreement; and case authorities which they intend to rely upon.

(29) Arbitrator Keras shall remain seized of the matter for the purpose of adjudicating any unresolved issues involved with this Arbitration.

The Agreed Statement of Facts was dated May 3, 2007 and signed by Mr. Brian Nelson on behalf of the Union and Mr. Mike Vizsolyi on behalf of the Employer.

III

POSITION OF THE UNION

Mr. McGrady, on behalf of the Union, argued that the language of Article 12.07 (e) was clear, unequivocal and represents the mutual intention of the parties. Earned time was never intended to be paid out. The Article is an all inclusive provision covering every aspect of the operation of the provision.

The Union pointed to a number of ICBC memoranda which they argued confirmed their interpretation including a September 17, 1997 document to managers from Mr. Michael Swanson, Manager, Labour Relations, in which he commented:

> It is the intent that employees take their accrued TO days as opposed to requesting payouts.

The Union argued that determining the parties intent is "the fundamental object in constructing the terms of a collective agreement" (*Canadian Labour Arbitration,* Brown & Beatty, 3rd edition, paragraph 4:2100); that it is that bargain that the Arbitrator must respect (*Simon Fraser University and Association of University and College Employees, Local 2*, (1976) 2 CL.RBR 54 Weiler) and that the Employer cannot impose a rule or policy which is inconsistent with the language of the Collective Agreement (*Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.* 16 L.A.C. 73, J.B. Robinson, C.C.J., D. Wren, R.F. Hicks, Q.C.).

The Union argued that the particulars of the disputed Article identify it as mandatory language and as an all-inclusive provision resulting in a significant fetter to the management rights provision of the Collective Agreement. The exercise of the limited management rights is with respect to ensuring TO days off and that TO banks do not exceed ten (10) days. The Union described the TO days as an earned benefit and argued that the language ought not to be interpreted in a manner which would disentitle a party unless there is express language to support that view. By paying out employees the Employer has disentitled employees to a benefit they properly earned.

The Union contrasted provisions other than 12.07 (e) such as 12.07 (g) and 12.07 (i) which specifically allow a pay out citing the interpretive maxim *inclusio unius est exclusio alterius* – the inclusion of one excludes the other.

The Union's submission included reference to: *Regional Municipality of Hamilton-Wentworth Police Services Board and Hamilton-Wentworth Police Association,* 105 L.A.C. (4th) 139, H. Snow, January 14, 2002; *City of Toronto and Canadian Union of Public Employees, Local 79,* 149 L.A.C. (4th) 353, M.K.A. Nairn, April 3, 2006; *National Edible Oils, a Unit of Canada Packers Inc., and United Food and Commercial Workers International Union, Local 208,* 23 L.A.C. (3rd) 203, V. Solomatenko, April 18, 1986; *Canadian Broadcasting Corp. v. Communications, Energy and Paperworkers Union of Canada,* [2002] C.L.A.D. No. 449, P. Knopf, September 11, 2002; *Insurance Corp. of British Columbia v. Office and Professional Employees' Union, Local 378,* [2002] B.C.C.A.A.A. No. 389. R. Germaine, November 27, 2002; *Calgary Health Region v. Health Services Assoc. of Alberta,* [2005] A.G.A.A. No.25, D.G. Tettensor, M. Ezekiel, S. Palmer, January 18, 2004 and *Health Employers Assn. of British Columbia v. British Columbia*

Nurses' Union, [1994] B.C.C.A.A.A. No. 413, C. Taylor, H. Gray, D. Service-Brewster, November 21, 1994.

POSITION OF THE EMPLOYER

Mr. Vizsolyi, on behalf of the Employer advised that the parties never talked about excess bank days at the bargaining table and that this case was about unique facts to be decided on the plain language of Article 12.07. The words are not ambiguous therefore no extrinsic evidence is required. The practice was to allow excess days but the practice does not stand as an aid to interpretation. If the Employer was estopped from exercising its management right to pay out excess days the estoppel was resolved by notice.

The Employer argued that they were not depriving employees of an earned benefit, as in practice, employees were deferring a portion of their compensation into a bank which the Employer encouraged them to draw from, however if they did not, the Employer paid out the excess at the rate it was earned.

The Employer pointed out that Article 12.07 was silent with respect to time banks exceeding ten (10) days and that this arbitration cannot create language that does not exist. The Management Rights provision allows management remedial relief to "an uncontracted liability". The management rights provision at Article 0.10 reads:

> All management rights heretofore exercised by the Corporation, unless expressly limited by this Agreement, are reserved to and are vested exclusively in the Corporation.

The Employer argued that by providing notice to pay out excess days and the approach taken in paying out was not arbitrary, not discriminatory and not a bad faith approach. The Employer made clear that this was not a situation of a denial of time off and that the Employer agrees that their position comes with an obligation to offer time off. There was no evidence of a mutual intent on how to deal with excess days.

The Employer asserted that if the Union was right and that TO banks could not exceed ten (10) days, then any earned days of employees with a full bank would be forfeited.

The Employer's submission included reference to: *Int'l Ass'n of Machinists, Local 1740 and John Bertram & Sons Co. Ltd.,* 18 L.A.C. 362, P.C. Weiler, D. Wren, H.M. Payette, September 30, 1967; *City of Trail and International Association of Fire Fighters, Local 941,* 10 L.A.C. (3d) 25, D.R. Munroe, W.S. King, H. Abbott, February 25, 1983; *City of Kamloops and Canadian Union of Public Employees, Local 900,* [1994] B.C.L.R.B.D. No. 140, C.J. Bruce, M. Giardini and K. Oleksiuk, March 31, 1994; *Insurance Corp. of British Columbia v. Office and Professional Employees' Union, Local 378,* [2002] B.C.C.A.A.A. No. 389. R. Germaine, November 27, 2002; *British Columbia and BC Government and Service Employees' Union,* [1995] B.C.C.A.A.A. No 532, M.I. Chertkow, June 13, 1995 and *Wire Rope Industries Ltd. and United Steelworkers, Local 3910,* 4 L.A.C. (3d) 323, M.I. Chertkow, G. Edwards, D. Wilkins, April 28, 1982.

IV

The Employer described TO days as a practice in which employees defer a portion of their compensation to a time bank. Union counsel described TO days as an "earned" benefit. In *National Edible Oils* (supra) Arbitrator Solomatenko discussing the "earned" benefit of holiday pay commented as follows at page 8:

> It is part of the remuneration employees receive for performing services for the company, rather than a voluntary or gratuitously given. ... an employee prima facie has a right to be paid for a holiday because he has "earned" this right ...

It is likewise with the TO days. Employees "will earn" (Article 12.07) based on "time worked" (Article 12.07 (a)). As such I am of the view that the Union's interpretation does not result in the forfeiture of excess days. If the Union's grievance succeeds the parties will be required to meet and negotiate a solution based on a fair method of compensation (time off or wages or some other method of compensation) for employees who's current TO banks contain excess "earned" days. In such event this Board will retain jurisdiction in the event the parties require assistance in finding an equitable solution.

The crux of the current dispute centers around two Collective Agreement provisions; Article 12.07 (b);

> Employees will request scheduled time off under this Article at least seven (7) working days in advance, and the scheduling of such time off will be subject to management approval.

And Article 12.07 (e):

> Scheduled time off will be taken in the period in which it is earned except that employees shall be allowed to accrue up to ten (10) days which can be taken in a continuous period.

The Employer argued that it was not estopped from exercising its rights, in particular its management rights in paying out what it described as "an uncontracted liability". I am satisfied that the written notice of March 9, 2006 to Mr. Park from Mr. Cox was sufficient notice to end the estoppel, if in fact the Employer was previously estopped from exercising its management rights (See *Machinists*, supra). I am also satisfied that the Employer's decision was neither arbitrary, nor discriminatory. It was not a bad faith decision. There is simply a disagreement between the parties with respect to the interpretation and scope of Article 12.07.

The dispute arose from the last sentence of the March 9, 2006 notice letter: "Any days in excess of ten (10) days will be paid out in the period in which they are earned".

The essence of the Employer's submission is that the Article 12.07 language is silent with respect to the disputed pay out of excess days and therefore the Employer is free to pay out excess days pursuant to its management rights provision. In addition the Employer says that there is no requirement or provision for the Employer to force employees to take TO days off.

The essence of the Union's submission is that the Article 12.07 language is complete, all inclusive, and as such the Employer has failed in its duty to provide time off and to limit TO banks to ten (10) days; essentially that there is a Collective Agreement bar to paying out and a bar to exceeding ten (10) days in the TO Bank.

The statement of facts included a valuable history of the TO days provisions, including its genesis in the 1978 negotiations. Arbitrators must however proceed cautiously with respect to reliance on extrinsic evidence. In *City of Kamloops,* supra the panel commented on extrinsic evidence at page 4 as follows:

> An arbitrator is entitled to consider extrinsic evidence to determine the actual intent behind the words used by the parties in their collective agreement: U.B.C. and CUPE, supra, p. 18. If the language of the agreement is unambiguous, however, extrinsic evidence cannot be used to alter the meaning of its terms. It is the language itself that constitutes the primary resource for the arbitrator's inquiry and not the extrinsic evidence. In particular, it is clear that absent an ambiguity in the collective agreement, past practice cannot be used to create rights or impose obligations on a party that were not negotiated: B.C. Forests Products (Caycuse Logging), supra. Consequently, a remedy based solely upon a violation of the past practice of the parties, however longstanding, is inconsistent with the principles of the Code. Standing alone, past practice cannot be used to create rights that are not found in the collective agreement.

In the instant case much of the agreed history is helpful. The history informs the Board of the fact that prior to the March 9, 2006 "notice" letter the parties did not discuss excess days. Given Mr. Parks' March 22, 2006

response it is clear that there has never been a meeting of the minds with respect to excess days pay outs.

Both parties argued that the language of the Collective Agreement was clear and unambiguous. Both parties pointed to certain of Arbitrator Germaine's comments in *Insurance Corp.,* supra. The Employer referenced the "unless expressly limited by this Agreement" quote at paragraph 25 in distinguishing that case from the instant matter with an assertion that in the instant matter there is no Collective Agreement limitation to paying out excess days as the Agreement is silent. In isolation the Employer's assertion concerning the payment of excess days given the clear management rights clause of the Collective Agreement is correct. (See also Arbitrator Chertkow's comments in *British Columbia v. BCGEU,* supra). What is not answered by such assertion however, is how does an employee acquire excess days given the Article 12 provisions?

As clear as the management rights clause is, the Article 12.07 (e) provision is equally clear with respect to the maximum accrual of TO days; "up to ten (10) days". It appears that the Collective Agreement is silent with respect to the pay out of excess days because there is no provision for the accrual of excess days.

In *Canadian Labour Arbitration,* Brown & Beatty, 3rd edition, paragraph 4:2100 the authors discuss interpretation of collective agreement provisions:

> ... in determining the intention of the parties, the cardinal assumption is that the parties are assumed to have intended what

> they said, and that the meaning of the collective agreement is to be sought in its express provisions.

In carefully reading the Article 12.07 provisions in their entirety, all provisions read in concert with one another and in a manner consistent with the arbitral cannons of construction, the reasoned conclusion is that there is a bar to the accrual of "excess" TO days. (Re: the above *Canadian Labour Arbitration* reference and *Simon Fraser University* (supra)). That appears to be the clear intention of the parties from the plain reading of the provisions in particular Article 12.07 (e)'s unequivocal "up to ten (10) days".

I agree with the parties' submissions that there is no relevant ambiguity to be found in the language. The chronology and application of the language is clear. Certain employees (12.07), "earn" time off based on a time worked formula (12.07 (a)). Such employees can schedule time off subject to management approval (12.07 (b)). Such employees can accrue up to ten (10) days (12.07 (e)).

There is simply no provision to accrue more than ten (10) days in the TO Bank and the Employer did not argue a management right to payout any portion of the ten (10) day TO bank, ergo there is no payout, except as clearly specified or as mutually agreed. There are clearly specified exceptions which allow for payout. They are Article 12.07 (g) which reads:

> Employees who start work in positions which carry an entitlement to scheduled days off in accordance with this Article during one of the above shown periods, or whose time worked in such a position is only a portion of any of the above periods, will earn the appropriate pro-rata

> portion of the day off to be paid at the appropriate hourly rate.

and Article 12.07 (i) which reads:

> Part-Time Regular Employees and all Temporary Employees
>
> Employees will work the hours as described in this Article except that such employees will be paid at the appropriate hourly rate for all time worked in lieu of scheduled time off.

In the particular circumstances of the instant case the exceptions reinforce the proof of the rule or as Mr. McGrady put it "*inclusio unius est exclusio alterius* – the inclusion of one excludes the other".

From the evidence there is also an historical payout exception which the parties by their practice, including the Union's full knowledge, have essentially agreed to. It is best described by the following from the agreed statement of facts:

> The payout of earned time off days under Article 12.07 only previously occurred where there existed extraordinary circumstances as described in administrative and interpretative documents issued by the Employer.

I am satisfied from a careful review of the evidence, submissions of the parties and case law that the Union's grievance succeeds. Specifically, I find that Article 12.07 does not allow for the payout of any TO days to "Full-time regular employees in positions covered under the hours of work provisions outlined in Articles 12.01 (b), 12.03, 12.04, 12.05 and 12.06"

except as specified by Article 12.07 (g) and Article 12.07 (i) and except as pursuant to the "extraordinary circumstances" historical agreement between the parties as described above. I also find that Article 12.07 (e) includes a bar to the accrual of TO days beyond ten (10) days in an employee's TO bank.

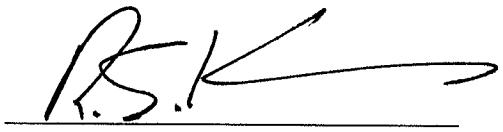
With respect to a revised administration of Article 12.07 given this finding and with respect to the grievance remedy concerning excess days, I refer the matter back to the parties for resolution.

This Board will retain jurisdiction in the unlikely event of any implementation and / or remedial difficulties.

All of which is so ordered.

I thank counsel for their helpful submissions.

Dated in Vancouver, British Columbia this 30th Day of August 2007.



Ronald S. Keras
Arbitrator

File 458