

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GREATER VANCOUVER REGIONAL DISTRICT

(the "Employer")

AND:

GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES' UNION

(the "Union")

ARBITRATION BOARD:

Stephen Kelleher, Q.C.
Chair

John Collison
Nominee of the Employer

Ray Haynes
Nominee of the Union

COUNSEL:

Alan J. Hamilton, Q.C. and
Judith Macfarlane
for the Employer

John Hodgins
for the Union

DATE OF HEARING:

April 26 and December 5, 2001

PLACE OF HEARING:

Vancouver, B.C.

DATE OF AWARD:

March 8, 2002

I

These proceedings arise from a grievance launched by the Union on behalf of Fred Beattie. The Union's complaint raises the issue of whether an employee who is being paid for "stand-by" time is entitled to overtime when he or she spends time on the telephone engaged in the Employer's business.

The Union's letter of April 30, 1999 sets out the grievance:

Mr. Fred Beattie has recently notified us that when he performs standby duties in his role as Chlorine Mechanic II he is often not credited with the appropriate number of overtime hours. This shortfall in overtime payment stems from the Employers refusal to pay overtime premiums for the time that Mr. Beattie spends resolving business issues over the telephone. Some of these conversations require in-depth discussion with other staff, including those in attendance in the Control Room. The conversations may last for a considerable time and may even involve follow-up telephone calls to resolve the issue at hand. It is the Union's view that if an employee on standby is asked to do anything beyond being asked to report to a certain workplace at a certain time, then that employee is "on the clock" for the purposes of recording time worked. The Union requires, as a resolution to this grievance, that the Employer recognize and pay Mr. Beattie for time worked when attempting to resolve the corporation's business over the telephone while he is on standby.

II

The Employer operates the water distribution system in the Greater Vancouver Regional District. Employees ensure that water is properly chlorinated and disinfected. They mainly work eight-hour shifts during the day Monday to Friday. Some employees work Sunday through Thursday and some work Tuesday through Saturday.

Problems can arise at any time. For that reason there is always an employee on stand-by, who is available. When an alarm occurs, it is noted in the Control Room at Lake City Operations. The employee on stand-by is then contacted.

Articles 3.06 and 3.07 of the Collective Agreement address call out and stand by respectively:

3.06 Call Out

(a) Work Outside of Regular Shifts:

Employees for whom stand-by time has not been arranged and who are called out to work separate from their regular shift will receive two hours pay at prevailing overtime rates if they are sent home without working.

(b) Employees for whom stand-by time has not been arranged and who are called out to work separate from their regular shifts will receive two hours pay at straight time rates plus pay for the time worked at the prevailing overtime rates.

Employees for whom stand-by time has been arranged and who are called out to work separate from their regular shifts will receive pay at the prevailing overtime rates.

(c) Employees who start work prior to a normal shift and continue to work during the normal shift or employees who continue to work beyond the normal shift will be paid the applicable rates for such time worked. As per Clause 3.05, an employee who has been notified of a requirement to work overtime immediately preceding the regular shift and who is entitled to a meal allowance shall not be paid callout. Any grievance with regard to time shall be adjusted by following the procedures laid out in Clause 7.02.

3.07 Stand-By

- (a) The sharing of the stand-by time between the District Operator and the assistant District Operator will be determined by the Superintendent.
- (b) Where operations of the system require regularly scheduled stand-by time, remuneration will be made as follows:
 - (i) Where stand-by time is shared by treatment plant operators or other regular groups at an operation or installation then stand-by time will be paid for at the rate of one hour's pay for each eight (8) hours of stand-by. (1981)
 - (ii) Where stand-by of less than eight (8) hours is required for Forestry operations then stand-by compensation will be at the rate of one hour's pay or one hour's time off as mutually agreed, for each eight (8) hours of accumulated stand-by time. (1980)

An employee on stand-by receives two hours' pay for each day from Monday to Friday and three hours' stand-by pay for each of Saturday and Sunday.

Mr. Beattie described the normal procedure for receiving telephone calls from the Employer while on Stand-by. The Control Room receives a variety of alarms from the primary and secondary plants in the system or a telephone call from a crew member indicating a water leak or some other water distribution system problem has occurred. It calls the employee on stand-by. That employee must be available by telephone or pager. The employee cannot consume alcohol when on stand-by. The employee must be within the Greater Vancouver Regional District. The employee on stand-by then asks a number of questions and if required may direct that a pump be stopped or started or that a crew be sent out. The employee ensures there is proper disinfection. If disinfection is compromised in any way the employee on stand-by physically proceeds to work.

Mr. Beattie estimated that he received two calls per week. Over the ten years of the 1990's the need for physically reporting to a worksite dropped considerably. That is

because of a sophisticated computerized monitoring program which came online in 1994. Eventually all the secondary plants came on line with SCADA: Supervisory Control and Data Acquisition. The result was that many operations and problems could be handled without leaving home.

The grievance arose from three incidents which occurred in April, 1999. The first was a bleach leak in Newton. Mr. Beattie was able to give instructions over the telephone. He determined what was leaking; the amount of bleach that had spilled; what equipment, including safety gear, was on site; and that no personal injuries had occurred. He considered the situation, gave instructions and then later ensured by telephone that the leak had been contained.

The second incident concerned low residuals at a secondary plant. Mr. Beattie remedied the problem by discussions with the Control Room and by going through the computer screens with the control room operator. There were two 15 minute telephone calls.

The third was a telephone call from an employee in Newton. The sodium hypochloride pump was not operating. Mr. Beattie was able to give telephone instructions on getting rid of an air lock. Mr. Beattie recalled there were two phone calls. The first was at least 20 minutes and the second was shorter.

Mr. Beattie claimed overtime for these calls and was refused. He was informed that there was no overtime for calls at home.

This did not surprise Mr. Beattie. He was aware that employees in this department did not receive pay. In the past there had been telephone calls where he did not have to report for work and was not paid overtime.

The practice in Mr. Beattie's department differs from that in Sewage and Drainage. Employees in that department who are on stand-by claim and are paid overtime for telephone calls received from the Employer at their home. However, neither the

Employer nor the Union relies on past practice to advance its interpretation of the Collective Agreement.

The issue, then, is whether the Collective Agreement entitles an employee to be paid for services rendered by telephone to the Employer. The Union points to the purposes of stand-by. It is to compensate an employee for the inconvenience of being constantly ready to report for work. It is not intended to compensate for work performed while on stand-by. In the absence of compelling language, stand-by language cannot cover both “standing by” and performing actual work.

The Employer points out that “stand-by” is not defined in the Collective Agreement. Counsel argues a distinction must be made between “work” and providing service to the Employer. Article 3.06(b) addresses call out pay. It distinguishes between those employees on stand-by and those who are not. Employees on stand-by receive overtime for being called out to work. Employees who are not on stand-by receive two hours pay in addition to overtime rates for the time “worked”.

Thus the Employer invites us to distinguish between time “worked” and time spent traveling to work.

Several arbitration awards discuss similar issues. In *Leco Industries Ltd. and Oil Chemical and Atomic Workers International Union, Local 9-819* (1980) 26 L.A.C. (2d) 80 (iBrunner), the company required maintenance employees to carry a pager. When they received a page, they were required to telephone the supervisor and give advice on how a problem should be rectified. Sometimes several calls were necessary. Sometimes the employee would be required to attend at the plant. When that occurred, the employee received a minimum of four hours at time and one half. The Union’s grievance was over the fact that no pay was received for carrying the pager or giving telephone advice.

The arbitrator found that when an employee made a telephone call in response to the pager he was performing overtime within the meaning of Article 21.04 of that Collective Agreement:

An employee shall be paid at the rate of time and one half for all work performed in excess of the normal weekly hours of work.

Arbitrator Brunner reasoned:

In my view an employee who is called by such a device to telephone the plant and then gives emergency maintenance advice with respect to malfunctioning equipment or machinery is from that moment on performing work for the employer. If such activity takes place outside his normal working hours, and if the time spent by him is in excess of his "normal weekly hours of work", then he is entitled to be compensated for such time at the rate prescribed by art. 21.04. No other reasonable meaning can in my view be given to the plain words "work performed". For the purpose of clarity I would state that I consider all time spent from the moment the "bell boy" device is activated until the termination of the last telephone call wherein advice is given, to be "work performed" under the said article.

Similar circumstances were considered in *Weyerhaeuser Canada Lcd. and Pulp, Paper and Woodworkers of Canada Local 10* (1983) 9 L.A.C. (3d) 308 (Bird). The facts of that case were set out by the arbitrator:

A superintendent called the grievor at home to get information about a production error. The grievor gave the information on the telephone and then claimed pay for half an hour for providing it, plus two hours' call time. The employer refused the claim. The employer's position is that the grievor is a production worker who is paid for work performed in the mill. Providing information on the telephone is not "work" performed by the grievor and there was no call into the place of employment to perform work so a call-time payment is not owed to the grievor, according to the employer.

Arbitrator Bird decided that the employee was performing "work":

It related to Lyons' duties as a first assistant brown stock operator. The employer argued that answering serious questions on the telephone at home about operations performed

in the mill is not in his job description therefore it cannot be work that earns pay. In my opinion if he did not answer he would be in breach of his duty and acting contrary to art. 1, s. 1, which states that the employer and employees have the duty to co-operate fully for the advancement of conditions. Among the desired conditions are “economy of operation, quality and quantity of output”. Precisely these conditions were being investigated by Gadsden while he was speaking to Lyons on the telephone. Lyons did what he was bound to do. He cooperated. In doing so he was fulfilling an employment responsibility.

Arbitrator Bird decided that the grievor was entitled to be paid overtime for the time actually spent on the telephone. He decided that call-in pay was not payable under the circumstances.

Health Employers Association of B.C and British Columbia Nurses Union (1994) 43 L.A.C. 4th 25 (Taylor) arose at the Tumbler Ridge Health Centre. When the Emergency Department was closed (late at night and most of the weekend), the public was directed to call the on duty nurse at her or his home.

The on-call nurse received a premium of one dollar per hour. The Union argued that when calls were received the nurse was called back within the meaning of Article 29.01(b):

- (b) Call-back means the period during which an employee is scheduled off-duty and is either:
 - (1) on-call and reports to duty at the Employer’s request, or
 - (2) is not on-call and returns to duty, at the Employer’s request, after the completion of her shift.

As such the Union argued, the employee was entitled to be compensated as per Article 29.04 (a):

- (a) Compensation

Employees called back to work after the completion of their shift, or called back to work on a scheduled day off while being paid the on-call premium shall be paid a minimum of two (2) hours pay at the appropriate overtime rates provided in Article 27.05 for each separate callback.

Arbitrator Taylor agreed. In doing so he adopted the reasoning of Arbitrator Freedman, the former Chief Justice of Manitoba, in *The Queen in right of Manitoba and Manitoba Government Employees Association* (1987) 28 L.A.C. (3d) 241. In that case a health and social development worker made and received calls from his home after regular work hours. The employee claimed for “call outs” if he provided “significant” service. He did not claim for minor telephone calls.

Arbitrator Taylor adopted the reasoning of Mr. Freedman:

We adopt arbitrator Freedman’s reasoning in the Manitoba Government case and conclude that, in the presence of this definition and the facts before us, it would be interpreting the collective agreement too narrowly to say that art. 29.04(a) only applies if the on-call nurse actually left her home in the middle of the night to provide service from the health centre.

The purpose of the callback provision is to recognize the personal inconvenience and significant disruption in being called to duty in the middle of the night. That disruption and social dislocation occurs whether the on-call duty nurse leaves her home and goes to the workplace or whether she performs her duties without leaving home. There is no substantive difference. Either way she encounters significant disruption and, since we have found that she performs the same duties and provides the same service from home as at work, either way she goes to work.

Arbitrator Taylor concluded that this did not include “non-medical” calls fielded by the nurses.

A similar issue came before Arbitrator Larson in *HEABC on behalf of Pacific Rehabilitation Society and British Columbia Nurses Union* (1996) B.C.C.A.A.A. In September 1993, the Employer eliminated supervisory positions and assigned Unit

Coordinators to rotate on call for blocks of one-week periods. When the grievors were called at home and had to deal with issues that had formerly been dealt with by nursing supervisors, they claimed to be entitled to call back pay for each call, again relying on Article 29.04. The Employer's position was that they had already been paid the on-call premium and that the calls did not constitute a "call back" within the meaning of the Collective Agreement. The Employer also argued that the *Tumbler Ridge* Award of Arbitrator Taylor was wrong and should not be followed.

Arbitrator Larson considered the authorities. He upheld the conclusion in *Tumbler Ridge* and in fact went further:

From my point of view, the problem is that even accepting that those arguments are cogent, I am not persuaded that the Tumbler Ridge arbitration board arrived at a wrong conclusion, either on the clear conviction test or the patently wrong test, except I think that the board was obviously wrong where it said that a distinction was to be made for non-medical assistance calls. There is absolutely no basis in the collective agreement for that distinction. Article 29.0 1(a) defines a call back simply as an employee reporting for duty at the employer's request. Nowhere does the agreement require that the call back be for any particular purpose either to deal with emergencies or an activity of some other nature. The only condition is that the work must be required to be done by the Employer.

What one can say, however, is that since the compensation payable to an employee on a call back is stated to be a minimum of two hours at overtime rates, it follows that the entitlement to receive it is subject to Article 27.05, In fact that is stated as an express exception under Article 29.04(a) which requires a minimum of two hours pay at the "appropriate" overtime rates "provided in Article 27.05". That means that, as with all overtime, an employee who works less than 15 extra minutes may not claim overtime pay. In that manner, while the collective agreement does not contemplate that the significance of a telephone call or other work be measured on any kind of a qualitative scale, an employee who takes a telephone call or calls at home that, in total, amount to Less than fifteen minutes per shift, is not entitled to call back pay under Article 29.04(a). Only if the work amounts to fifteen minutes or more is the employee entitled to the minimum of two overtime hours.

IV

In our view, what emerges from the authorities is the principle that when an employee, whether on call or not, is required to perform work for the Employer without leaving home, he or she is *prima facie* entitled to be compensated.

How does that principle apply here? The issue must turn on the interpretation or application of Article 3.06(b). Was Mr. Beattie “called out to work” when he was telephoned at home and he remedied a problem by giving telephone instructions?

We agree with Mr. Hodgins that the nonnal meaning of “stand-by” does not encompass both being ready to work for the Employer and actually performing work. Does the language of Article 3.06(b) dictate a different result? We think not. In one sense an employee who handles the problem by telephone is not called “out” to work. That is, the employee does not need to leave the home and go outdoors. But the employee is performing work. He or she is called away from whatever the employee was otherwise doing. We adopt in this regard the analysis of Arbitrator Freedman in the *Manitoba case, supra*. Article 3.06 of that agreement used the same term, “called out”:

An employee, if called out or scheduled to work overtime shall receive for the work, compensation for a minimum of three (3) hours at the applicable overtime rate provided that the period of overtime worked by the employee is not contiguous to his scheduled working hours

Arbitrator Freedman reasoned:

It is construing and interpreting the Agreement too narrowly to say that art. 3.06 only applies if Mr. Buller actually leaves his home in the middle of the night, to provide a service from premises other than his home

If he is providing a service to the client, which in many cases is best provided over the telephone, and is doing so outside his regular working hours, ten in the context of his particular job it seems to me that he has been “caned out” in essentially the same way as if he attended at the office. Presumably Mr. Buller

could, if he were so inclined, tell a caller at 1:00 a.m. in the morning that he would not take the call at his home but would rather go to the office and receive the call there. That approach might more closely fit the present wording of art. 3.06, but, in my view, would be no more consistent with the apparent intention of the article than the interpretation which I give to the article.

Accordingly, I find that the telephone services which Mr. Buller provided on the days in question constitute his being “called out” for the purposes of an. 3.06.

(at 244)

This reasoning is persuasive. Mr. Beattie was providing service to his employer outside his regular working hours. He was “called out” in essentially the same way that employees in other contexts physically attend at work. In both cases the employee is taken away from non-work activities and performs work for the Employer.

For these reasons we conclude that the grievance succeeds. We retain jurisdiction to resolve any issue arising from the implementation of the award.

Dated at the City of Vancouver in the Province of British Columbia this 8th day of March, 2002.

STEPHEN KELLEHER, Q.C.

“RAY HAYNES”

Nominee of the Union

“JOHN COLLISON”

Nominee of the Employer