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Article abstract

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ARBITRATION JURISPRUDENCE

The arbitration awards studied in this issue are those rendered during the months of July, August, September, October and November, 1952. We are only reporting the awards containing comments which might be of particular interest to our readers.

1—ARBITRATION COUNCIL PROCEDURE

Because the representatives of parties appearing before an arbitration council have no rules of procedure to follow, problems often arise in regard to the conduct of the proceedings and the proof to be submitted. In the case of the *Construction Equipment Co. Ltd.*¹, the Union's representative presented as proof before the arbitration council, among other things, a document indicating wages paid in several enterprises comparable to the one in question. The company's representative doubted the genuineness of the information contained in this document.

Moreover, the companies referred to in this document had no obligation whatever to come themselves before the arbitration council and inform them of wages they were paying their own employees as they were in no way involved in this arbitration.

The members of the arbitration council then requested the Director of the conciliation and arbitration service of the Montreal district, Mr. Cyprien Miron, to have an inquiry made by one of the Department's officers at the employers mentioned in the said document. This inquiry to be carried out confidentially and to have as aim only to verify the information supplied by the Union in its document.

This procedure was successful, as when the conciliation service's officer presented his report to the council, and it was verified by the company's

representatives, the latter accepted the above-mentioned document.

In another case, that of the *Retail Merchants' Association, Furriers' Section, Montreal district*², we note a very particular method used by the arbitration council to bring about an agreement between the parties before rendering their award.

As a matter of fact, after the inquiry was finished and the deliberations were well advanced, at the President's suggestion, the arbitrators and the parties' representatives were brought together in a general meeting. The aim of this meeting was to try to get the parties to come to an agreement that would have carried a unanimous decision of the arbitration council. This method did not succeed.

In the same case³, the employer's representative called as witness, the assistant-inspector of the parity committee in the Montreal district. His testimony, according to the arbitration award, was that of an expert witness. At least on one point, that of the length of the normal work week, the arbitration council came to a decision, based entirely on this expert's testimony.

(2) Department of Labour, Document No. 655, page 2; date of award: October 30, 1952; dispute between the "Retail Merchants' Association, Furriers' Section", and the Union Nationale du Vêtement, Inc.; members of council: president: Roger Oulmet; employers representative: Francois Beaugard; employees' representative: Pierre Vadeboncoeur.

(3) *Ibidem*, Document No. 655, page 8.

(1) Department of Labour, Document No. 663, page 2; date of award: November 11, 1952; dispute between Construction Equipment Co. Ltd., and the International Union of Operating Engineers, local 793; members of council: president: Bernard Rose; employer's representative: D. A. Paterson; employees' representative: J. O. Renaud.

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In another case, that of the arbitration between the *Cie Electrique du Saguenay* and its employees' Union⁴, the council was obliged to make a decision on the following preliminary question: Should the arbitration

« cover all the points in the collective agreement, as the Union pretended. or only the point on which the parties did not come to an agreement during the conciliation, as the employer upheld? »

The members of this arbitration council decided, in majority, that the Union representative's claim should be granted and that the arbitration should proceed on all the points in the union's proposal for a collective agreement submitted to the Company at the negotiation or conciliation stages.

In the same arbitration award, the President of the arbitration council presents a few preliminary notes in regard to the proof supplied by the representatives of both parties and he concludes with the following terms:

« These short comments were necessary to explain why we are reluctant to change the texts that the parties drew up together, in 1951, when we have been given no reason, during the public sessions, explaining why these texts should be changed. »

2—SOCIAL CONSIDERATIONS

In the minority report the union representative presented as an appendix to the arbitration award concerning the *Retail Merchants' Association, Furriers' section, Montreal district*⁵, the union representative, in exposing his opinion on the hours of work, states as follows:

« This reduction, in thus spreading out the work year, would have the advantage of stabilizing labour and tying it more to the enterprise. It would be a step in raising up the

working class, and the union insists rightly on this progressive step which could mean more regular employment, as one of the bases of the workers' movement for social freedom. »

The author continues by indicating how, in his point of view, we should consider the example which comes to us from the United States in the sphere of Industrial Relations.

« The union has brought to the support of its claims on this subject, the example of the Americans, where working hours, in the industry concerned have been reduced to 35. It is wrong to reject « a priori » the American examples and precedents. »

We can admit, at a pinch, that wages in one country and the other cannot be compared well, the standard of living, the industrial concentration, etc., are too far apart; but when custom tends to sanction, on the other hand, a principle, a progressive view of things, or circumstances just as real here as there, there is no reason to push aside the example. »

Farther on in his report, the union representative notes what must be understood by social justice as applied to the questions of labour relations:

« It is a good thing to draw attention to such considerations; because what is involved here, is social justice. There are perhaps many who do not realize this: that social justice is exacting; but rightly so, it must be learned. Something always over-rules considerations of social justice; (abstract considerations, it is then said) in the eyes of arbitration councils: it is the panicky fear of touching the enterprise's profits. »

We may also read in the same report, while the author is still discussing the question of wages, the indication of one of the factors which, in his opinion, should lead the arbitration council to grant a substantial increase in wages:

« The style of living of the majority of furriers is an indication of their ability to pay. »

(4) Department of Labour, Document No. 654, page 1; date of award: October 25, 1952; dispute between the *Cie Electrique du Saguenay* and the "Syndicat National of the employees of the same Company"; members of council: president: Judge Joseph Marler; employer's representative: Arthur Matteau; employees' representative, Francois Jobin.

(5) *Ibidem*, Document No. 655, pages 16 and 17.

3—HOURS OF WORK

In the arbitration award rendered in the case of the *Canadian Industries Limited*⁶, the members of the arbitration council, in the majority, grant a reduction in working hours with full compensation in the workers' wages. The President justifies his decision in stating that he

« is of the opinion that this request of the Union must be accepted in view of the almost general tendency of the industry for the last few years to reduce the number of hours of work and to compensate for this reduction in such a way that the employee does not suffer any reduction in his pay envelope. »

In the report of the arbitration council entrusted in settling the dispute between the *Davie Shipbuilding & Repairing Co. Ltd.* and its employees' union⁷, the president of the council refuses to reduce the hours of work, in accordance with the union's demand, in pointing out that the Company had submitted

« proof that its present programme did not permit it to reduce the hours of work without prejudicing its general economy. »

4—WAGES AND RETROACTIVITY

In labour disputes, the questions of wages and retroactivity are very often the most important points to be decided. We note the criteria which have been used by the arbitrators in determining wage increases to be given in certain cases as well as the reasons generally given to grant retroactivity.

In the case already mentioned of *Canadian Industries Limited*⁸, here is

(6) Department of Labour, Document No. 647, page 6; date of award: October 1, 1952; dispute between "Canadian Industries Limited" and the "Syndicat des travailleurs de produits chimiques de McMasterville"; members of council: president: Judge René Lippe; employer's representative: A. Stewart McNichols; employees' representative: Marc Lapointe.

(7) Department of Labour, Document No. 619, pages 6 and 7; date of award: July 14, 1952; dispute between "Davie Shipbuilding & Repairing Co. Ltd." and the "Syndicat des Travailleurs des chantiers maritimes de Lauzon, Inc."; members of council: president: Lucien Lortie; employer's representative: Jacques Flynn; employees' representative: Maurice Lamontagne.

(8) *Ibidem*, Document No. 647, page 8.

how the president of the council expresses himself in discussing the question of wages:

« Your arbitration council has seriously studied the other reasons submitted by the Union to justify its demand. All this question of comparison with the average wages paid in industry in general and even in other plants of the same Company, in the Province or in the Country, must obviously be considered in the whole scheme of things, in taking into consideration the particular reasons which might have justified certain differentials in wages, without forgetting the consequences, not only possible, but almost certain, that too great an increase could have from the point of view of the increase in the cost of living. It must not be forgotten that every arbitration council must take into consideration, before deciding on an increase, the consequences of such an increase, in regard to:

- a) the Company concerned;*
- b) the welfare of the community;*
- c) the general public interest. »*

Still in Judge Lippe's notes, we may read some interesting comments on the estimating of retroactivity. It is noted that the employees who would be entitled to retroactivity are those who are still in the employment of the Company at the date of the signature of the agreement and have been at least from the date of the nomination of the arbitrators.

In another award, concerning the *Quebec Iron and Titanium Corp.*⁹, the president of the council, after expressing his regret that the representatives of the parties had not referred to the same standards to study the question of an increase in wages, suggests the following standards that he uses in the estimate of the proof presented: the cost of living; the standard of living; wages generally paid in the locality where the enterprise is situated; comparable wages in enterprises of a different type than the enterprise concerned; the policy of the Company.

(9) Department of Labour, Document No. 850, page 3; date of award: October 14, 1952; dispute between "Quebec Iron & Titanium Corp." (Havre St. Pierre) and "United Steelworkers of America", local 4466; members of council: president: H. D. Woods; employer's representative: Guy Farreau; employees' representative: R. J. Lamoureux.

In another award concerning the *Dominion Engineering Works Ltd.*, the president of the council makes the following statement on the question of retroactivity:

« The principle of full retroactivity is the only logical one, if our system of arbitration is to mean something. It is only in cases of a very exceptional nature that it should not be adhered to. »

The members of another arbitration council¹¹ have taken into consideration the proof presented on the question of wages in accordance with the following criteria: a) the precedent, or as it may be stated, the position of the employees from the point of view of wages paid by the Company, before the demand for an increase presented by the union; b) the reasons that might justify the arbitration council, and, because of this fact, the parties, to change the existing conditions.

These reasons, according to the members of this arbitration council, could be the following (and an analysis is made of each of them): decrease in production; competition and its influence on the determination of wages, this competition could be foreign and regional (provincial); the influence of wages on the industry in question, which refers to the capacity or the incapacity to pay of the industry concerned; the possible consequential effects on connected industries and, in this particular case, the building industry.

In another case¹² the arbitration award deals with proof by comparison on the question of wages. Here is how the president of the arbitration council expresses himself on this point:

(10) Department of Labour, Document No. 614, page 4; date of award: September 30, 1952; dispute between "Dominion Engineering Works Ltd." and the "International Association of Machinists", Lodge No. 1660; members of council: president: Jean Fillon; employer's representative: H. McDonald Sparks; employees' representative: Marc Lapointe.

(11) Department of Labour, Document No. 632, pages 2, 3 and 4; date of award: September 5, 1952; dispute between "Montreal Tile, Terrazzo & Marble employers' Association" and "Association des Ouvriers de l'Industrie du marbre, tuile et terrazzo"; members of council: president: L. Girard; employer's representative: Geo. Walsh; employees' representative: Marc Lapointe.

(12) Ibidem, Document No. 619, pages 11 and 15.

« The arbitration council, if it must give some importance to a certain proof by comparison, must also take into account that any comparison, no matter how good it may be, fails on one side or the other. It must not, moreover, lose sight of the fact that when this method of proof is chosen, that the two things compared operate under exactly the same conditions. »

The Union did not prove this and on the contrary the Company has demonstrated that it does not operate under the same conditions as those to whom it was compared; that the situation of the Lauzon shipyards was quite different. And it went into details and proved the difference. »

The union representative, in a minority report does not share the opinion of the president and the company representative on this point and he expresses himself as follows:

« On the question of wages, the union has been blamed for having presented proof by comparison. And yet, wages being an essentially relative notion, it is impossible to appraise or justify them without making comparisons either with the enterprise's profits, or with similar industries or trades, or with the strict necessities of human life: it has only made comparisons. It has even compared the wages of workers in England and in Japan with those of the workers in Lauzon. »

The author of this minority report then explains how the principles outlined above apply in the case under study.

In the arbitration award concerning the *James Robertson Co. Ltd.*¹³, the Company has pretended, at the inquiry, that it did not realize satisfactory profits. One of the reasons for which it could not improve its situation on this point was that it wished to keep as long as possible in its service its old employees in preference to others. In addition, it suggested that the employees who were not satisfied with the wages could look

(13) Department of Labour, Document No. 652, page 2; date of award: October 14, 1952; dispute between the "James Robertson Co. Ltd." and the United Steelworkers of America", local 3869; members of council: president: H. D. Woods; employer's representative: Paul E. Smith; employees' representative: Guy M. Desaulniers.

for work elsewhere where they could be better paid. We would like to note here the remarks of the president of the council on this point of view.

« *The desire on the part of Company officials to protect the older employees in their jobs is a laudable demonstration of humanitarian principle. Nevertheless in execution it represents a unilateral decision of management. In the circumstances, there seems to be no justification for passing part of the cost on to other potentially more efficient workers.*

The argument that the individual workers are at liberty to seek employment elsewhere has some validity but is not conclusive. Undoubtedly the failure of the employees to do so is in part a reflection of the excellent relations which exist in this plant.

But a well-known inertia of the labour market is also a factor. In any case, the employees have chosen to be represented by the Union, and through it to seek a wage scale equal to that found in similar occupations in the city. These demands cannot be met by the Company. The Council must confine itself to recommendations which recognize both the justice of the Union's claims for alterations and the difficulties of the Company.»

5—UNION SECURITY

A union had obtained, by direct negotiation with the employer, a clause of union shop in a collective agreement. As the parties could not agree to renew the said collective agreement, they were obliged to put their case before an arbitration council. The clause concerning the union status was included in the arbitrator's mandate. The union requested the arbitration council to improve still more the union status. Far from this, the arbitration council, with the union representative dissenting, decided to recommend that the said clause of union shop be taken out of the collective agreement and replaced by a clause of maintenance of union membership and adding to it the voluntary but irrevocable check-off of

union dues. This is the case of *Leveillee Ltee*¹⁴.

In another arbitration award¹⁵, the president and the union representative granted the imperfect union shop. The formula suggested has some special characteristics and for this reason, we would like to present it complete here. It is as follows:

« *The employer agrees to levy on the pay of all the employees who are members of the union, on the presentation of a list of these employees by the officers of the said union, a sum equal to the amount of the union fees demanded by the union from its members.*

Every employee who is a member of the union at the time of the signature of the present agreement is presumed to have accepted the levy mentioned above as a condition of maintenance of his employment, if he has not given his resignation as an employee of this company within 15 days from the signature of the present agreement.

All employees hired by the company after the date of signature of the present agreement, if they have never been in the company's employment before, must become members within 60 days from when they are hired, as a condition of their employment.

The present agreement will be posted in a conspicuous place at least one week before the expiration of the period of fifteen days provided for in paragraph 2.»

The Hon. Judge Georges H. Heon, in an arbitration award concerning the *Maryn Hosiery Mills Ltd.*¹⁶, expresses

(14) Department of Labour, Document No. 649, page 2; date of award: October 7, 1952; dispute between "Leveillee Ltee" and local 278 of the "Laundry Workers International Union"; members of council: president: Dollard Danseure; employer's representative: Jean Pilon; employees' representative: René Walsh.

(15) Department of Labour, Document No. 648, page 2; date of award: September 30, 1952; dispute between "Nierom Hosiery Ltd." and the "Syndicat Catholique des employés du bas-façonné de St. Jean"; members of council: president: Pierre Dansereau; employer's representative: P. Grenier; employees' representative: Pierre Vadeboncoeur.

(16) Department of Labour, Document No. 659, page 25; date of award: November 4, 1952; dispute between "Maryn Hosiery Mills Ltd." and the "Syndicat des employés du bas-façonné et circonfère de Montréal", section Maryn; members of council: president: Judge G. H. Heon; employer's representative: J. P. Sainte-Marie; employees' representative: Jacques Pêreault.

his opinion as follows when he refuses to grant the closed shop formula to the union.

«The president, because he believes that closed shop clauses where they are in existence, are not the result of arbitration awards, but are and should be, the result of free negotiations, and the employer's representative, recommend that article 20 of the last collective agreement in regard to the union check-off be incorporated in the same form in the new agreement.»

In another case, that of *S. & F. Clothing Co. Ltd.*¹⁷, the members of the arbitration council, the union representative dissenting, advise that they are refusing to grant a clause of union shop because the parties are working out their first collective labour agreement. In the case of *Grand'Mere Shoe Co. Ltd.*¹⁸, the Hon. Judge René Lippé on the subject of union security says:

«In view of the clauses of section 4 of the Labour Relations Act of the Province of Quebec, and in view of the refusal of the employers' association to accept a clause of perfect or imperfect union shop, it is the majority opinion of the members of your council, Mr. Eugene Magnan, union representative dissenting, that it cannot impose or even recommend to the employer such a clause in order to safeguard each worker's freedom of choice of union.»

Elsewhere, the union representative, in his minority report, gives his opinion on the same question. As these remarks have a certain originality, we wish to quote them here:

«It is obvious that in the shoe industry, and more particularly in the case of the Grand'Mere Shoe, a union

cannot live in a normal way because of the very high turnover of personnel and intermittent periods of unemployment; it must have a security that can only be granted by union security measures. Either the union is denied its legality and its legitimacy or else its legal existence is recognized and it is granted the means to live.»

From the juridical point of view, the question of union security not having yet been decided in a definite way, it appears to us abnormal that an arbitration council should decide a question of law. According to the law, the arbitration council is not necessarily made up of men of law but of men of great impartiality who would be particularly competent in questions of industrial relations; this does not necessarily exclude men of law; but when the latter are asked to take part in an arbitration council, it is not in their positions of men of law. Which means that an arbitration council, no matter of whom it consists, may not express an opinion on the legality of union security.»

On the other hand, the fact that there is no legislation authorizing union security formulas does not necessarily mean that these formulas are illegal. It is a principle of law that may be defined as follows: «Anything is permitted that is not prohibited.» Furthermore, everyone knows that in practice the law only sanctions an accomplished fact.»

Finally, an arbitration council which refuses a formula of union security chooses perhaps the only way of settling the question of law so that it never comes for a decision before a competent court i.e. a court with the required judicial authority.»

We also wish to mention two cases of arbitration awards rendered following disputes between hospitals and their employees' unions, in particular the *Hôpital du Sacré-Coeur de Cartierville*, the *Hôpital Général du Christ-Roi de Verdun* and the *Hôpital St-Jean de Dieu*¹⁹, these three hospitals being

(17) Department of Labour, Document No. 664, page 1; date of award: November 13, 1952; dispute between "S. & F. Clothing Co. Ltd." and the "Union Nationale du Vêtement Inc.;" members of council: president: Jean Fillion; employer's representative: J. W. Corber; employees' representative: Jerome Choquette.

(18) Department of Labour, Document No. 657, pages 3, 12 and 13; date of award: October 31, 1952; dispute between "Association patronale des Manufacturiers de Chaussures de Québec, for Grand'Mere Shoe Co. Ltd." and "Syndicat des travailleurs en chaussures de Grand-Mere, Inc.;" members of council: president: Judge René Lippé; employer's representative: Roger Deshaies; employees' representative, Eugene Magnan.

(19) Department of Labour, Document No. 656, pages 6 and 8; date of award: October 31, 1952; dispute between the hospitals mentioned and the "Alliance des infirmières de Montréal"; members of council: president: Claude Prevost; employer's representative: Guy Favreau; employees' representative: Pierre Vadeboncoeur.

united for arbitration purposes, the *Hôtel-Dieu* and *Sanatorium St-François de Sherbrooke* ²⁰, and its employees union, the said arbitration awards having granted clauses of union security.

In the case of the three first hospitals mentioned, the three arbitrators have unanimously granted a clause of maintenance of union membership for the employees in the service of the said enterprises at the date of the arbitration award, and a clause on the Rand formula for all the employees that the enterprises concerned may hire in the future.

In the second case mentioned, the members of the council, with the employer's representative dissenting, have granted a clause of imperfect union shop in emphasizing that such a clause

« would permit the union to maintain itself more effectively and furthermore, because of the rivalry which exists and which may exist between the different unions of the institution concerned, this formula would assure a better understanding and would avoid clashes among the personnel. »

In conclusion, we wish to report here a clause recommended in an arbitration award concerning the discrimination that may be made against some of the employees of a company because of union affiliation. This is the case of the *Dominion Sign & Window Cleaning Co.* ²¹. Here is the text of this clause:

« The Employer will not interfere with the right of an employee to become a member of the Union. There shall be no discrimination, interference or coercion by the Employer or any of its agents against any employee because of membership in the Union.

All employees will be hired through the Union. When the Employer is in need of help, the Union shall be entitled to twenty-four hours notice, that such help is desired; if the Union is unable to furnish the required number of men within twenty-four hours, the Employer shall have the right to hire help elsewhere.

The name of all new employees shall be reported to the Steward within seven days and the Company agrees to cooperate fully with the Union Committee. »

(20) Department of Labour, Document No. 639, page 9; date of award: September 22, 1952; dispute between "Hôtel Dieu and Sanatorium St-François de Sherbrooke" and "Association des employés du service hospitalier de Sherbrooke Inc."; members of council: president: Judge J. A. Gaudet; employer's representative: L. A. Trudeau, M.D.; employees' representative, Gerald McManus.

(21) Department of Labour, Document No. 613, page 3; date of award: June 27, 1952; dispute between "Dominion Sign & Window Cleaning Co." and the "International Union of its employees"; members of council: president: Victor Barré; employer's representative: F. Ross; employees' representative: Jeannine Théoret.