Permanent Arbitration Tribunal

INTERPRETATION OF COLLECTIVE AGREEMENT

RN 793

In the matter of

Maritime Transport & Port Employees Union

And

Cargo Handling Corporation

BEFORE

R. Hossen	-	Acting President
B. Ramburn	-	Member
R. Sumputh	-	Member

Section 88 of the Industrial Relations Act, 1973 as amended makes provision for the interpretation of collective agreement:-

"*Interpretation of order, award and agreement*

(1) Where any question arises as to –

(a) the interpretation of any order or award made by the Tribunal;

(b) any order or award being inconsistent with any enactment; or

(c) the interpretation of any collective agreement,

any party to whom the order, award or agreement relates, or the Minister, may apply to the Tribunal for a declaration on the question, and thereupon the Tribunal shall make a declaration on the question after hearing the parties concerned.

(2) A declaration by the Tribunal under subsection (1) shall be notified to the parties and shall be deemed to form part of the order, award or collective agreement."

The Maritime Transport & Port Employers Union, hereinafter referred as "the Union" is seeking for an interpretation with respect to an agreement reached between itself as the Cargo Handling Corporation Ltd, hereinafter referred as "the Corporation.".

The specific request for interpretation is :
"***Whether under the agreement reached as per annex, ALL Plant Operators Superior Grade should draw the guaranteed overtime (additional shifts) once appointed in that grade".***

The Union's case is as follows:-

1. The dispute between the Cargo Handling Corporation and the Maritime Transport & Port Employers Union concerned a group of Plant and Equipment Operators Superior Grade who were NOT drawing the Five Additional Nights or the Five additional Shifts allowance.

   - The Five Additional Nights system caters for the replacement of workers on leave. The request of the Union was that this system be reinstated for those who had been promoted Plant and Equipment Operators Superior Grade and extended to

those employees who were already Plant and Equipment Operators Superior Grade .

- ❖ The claim was also that the FAN (Five Additional Nights) be paid exclusive of overtime performed on week days, as was the case for other CHCL employees.

2. An agreeement was reached – Para A -4 – to pay the FAN to these employees inclusive of overtime performed. The concession made by the Union on the FAN dispute was that the FAN would be paid inclusive of overtime effected and that those who were drawing the FAN exclusive of overtime would continue to do so, on a personal basis. Hence the agreement as per B – 1 which sets down that ALL Plant Operators will as per July 2002 draw the FAN.
3. Agreement as per B,. 4 stipulates that the replacement on shifts “to the other categories concerned (mainly the lashers)” would be referred to Price Water House Coopers who was then responsible of making recommendations on salaries and other conditions of employment. This has NOT been done.
4. ALL Plant Operators superior Grade posted on MCT were paid the FAN.
5. When came the time to promote the Plant and Equipment Grade I to Superior Grade, the FAN agreement was raised for its application to that group. Parties agreed on the method for effecting their promotion. Parties took note that as some were already performing the duties of Plant and Equipment Operators Superior Grade and were paid overtime and not the FAN. It was agreed that the overtime earned by those not earning additional shifts YET would eventually be absorbed in the same upon promotion to Superior Grade, meaning that they would continue to draw overtime but overtime paid to them would be deducted from their FAN when they would be appointed. Their appointments were to take effect as from the 1 December 2002.

6. At no time up to the January 2003 had Management given a different interpretation to the agreement reached between parties, to the effect that ALL Plant and Equipment Operators Superior Grade would draw the FAN.

The Corporation avers in its Statement of Case:-

With the implementation of the Salaries Restructuring Committee Report 1997 (The SRCR 1997") as from 1st June 1997. which coincided with major Port Labour Reforms, the employees' pay structure changed from a piece-rate basis to that of basic pay plus a performance related variable pay (productivity bonus). The said system, however, necessarily implied a shortfall in average take-home earnings for certain categories of employees in post on 1st June 1997. In order to curtail this difficulty and enable all incumbents to get a reasonable package, the SRCR 1997 recommended a system of additional shifts allowance payable only to these employees in post at the said time. This system was defined by SRCR 1997 as a "topping-up scheme".

1. The terms and modalities of the topping-up scheme were negotiated between the Applicant and the Respondent and the result of the negotiations appeared more advantageous to the workers than the recommendations of the SRCR 1997.

2. In accordance with the SRCR 1997 and the negotiations between the parties, the employees promoted to the post of Operators (Plant & Equipment) Superior Grade were not paid this additional shift allowance as from 01 June 1997/ On the other hand, Operators (Plant & Equipment Grade I became, through negotiations, entitled to 5 additional Shifts as from 1st June 1997.

3. The Respondent avers that Price Waterhouse Coopers did examine the question of replacements on shifts " to the other categories

concerned.mainly the lashers. Furthermore, the Respondent wishes to stress, first, that this question lies outside the ambit of the present terms of reference, and secondly, that the Applicant does not have negotiating rights for the category of lashers for instance.

4. Because the additional shifts system was not granted to all promotees to the grade of Operators (Plant & Equipment) Superior Grade and was instead replaced by a “personal allowance” system, a disparity in salaries crept up amongst the category of Operators (Plant & Equipment) in that the Grade I Operators (hierarchically lower than Superior Grade Operators) ended up being better remunerated than the Superior Grade Operators.

5. Moreover, the Respondent denies that it was ever agreed that the “overtime earned by those not earning additional shifts YET would eventually be absorbed in the same upon promotion to Operators (Plant & Equipment) Superior Grade.

6. In an attempt to eradicate this anomaly, a Conciliation/Mediation chaired by ex-judge Mr Jocelyn Forget was set up. The result of such conciliation was that the Respondent agreed to grant five additional nights to all Operators (Plant & Equipment) Superior Grade also called Plant Operators with effect from 1st July 2002, provided that the Heavy Equipment Allowance be removed or otherwise absorbed in their “Additional Shifts”.

7. The agreement, which was reached in the course of the conciliation by the Respondent in relation to the Operators (Plant & Equipment) Superior Grade (“The Agreement”), must not, be viewed in isolation but instead in the context in which it was reached.

8. The Respondent's case is that the Agreement was aimed exclusively at people in the employment of the Respondent at the time of the said agreement, that is, 15 November 2002, and not at those who would take up employment with the Respondent subsequently. The reason for this restriction was that the said agreement was intended to remedy a situation that had been created in the first place in the existing work force by reason of the coming into operation of the topping-up system recommended by the SRCR 1997, a system which itself was only intended to apply "to employees in post (as at 1st June 1997) and should not be detrimental to the interests of the Corporation"

9. Thus, in accordance with this interpretation, the Respondent is applying the said agreement only to Plant Operators who submitted their case to Mr Forget and not to those recruited as from 1st December 2002, as evidenced. In fact new recruits are now governed in any case by SRCR 2002, which came into operation on 1st July 2003.

10. Furthermore, the Respondent wishes to underline that it is presently facing additional staff costs of around 80 million Rupees on its annual budget, an increment triggered by the implementation of the recommendations of the SRCR 1997 regarding harmonized pensions schemes. In the circumstances, even if it is assumed that the Applicant's interpretation of the wording of Mr Forget's is the right one (which is strongly denied), the Respondent's humble submission is that it would not be able to give effect to the said interpretation without being forced into dire straits.

11. For all reasons highlighted in the present Statement of Case, the Respondent respectfully urges the Permanent Arbitration Tribunal to confirm that its interpretation of A-4 of Mr Forget's Ruling dated 15th November 2002 is to be the preferred one.

In its response to the Respondent's Statement of Case, the applicant further avers that:-

1. The Respondent, in para 1 of its Statement of Case, is referring to conditions which prevailed in the Port following SRC Report of 1997 and concerning employees represented by the Docks And Wharves Staff Employees Association (DAWSEA) and the Port Louis Harbour & Docks Workers Union (PH & DWU). It is in fact true to say that at that time the Additional Shift Allowance was paid to preserve the take home earnings of certain specific categories of employees as stated by the employer. The system adopted by the SRC 1997 was applied on a personal basis, i.e to those employees who were put in the 1997 new salary structure and who were drawing a gross salary which was less than what they were drawing prior to the application of the report. However the problem which cropped up between the CHC and the MTPEU was related to overtime work more specifically to "doubling" of shift and consequently for replacement of workers on leave and was related to conditions laid down as per Annex 1.

2. Contrary to what is stated in para 2 of the Repondent's Statement of Case, there has been NO NEGOTIATION on any topping-up scheme. What was however raised was the fact that paragraph 6.5

of the SRC had NOT been applied. Employees concerned represented by the DAWSEA and the PH & DWU were being paid the additional shift although when they decided NOT to work any additional shift and that when they worked additional shift, they were paid overtime over and above their additional shift allowance. Paragraph 6.5 of the SRC 1997 stipulated the following: *Employees should still be paid for those additional shifts even if their services are not required for specific reasons. However, an employee would not be remunerated for an additional shift if he chooses not to work for that shift.*

3. Referring to para 3 Respondent Statement of Case, both Plant Operators Grade I and Plant Operators Superior Grade were entitled to the Additional Shift Allowance as per SRC 1997 report as amended by the Board of the CHCL. At a first state the Plant Operators Grade I were NOT paid the additional shift allowance when they were promoted Superior Grade. That allowance was removed contrary to their contract of employment. Applicant maintains that negotiations between parties were held on issues raised in paragraph 1 of the statement of case of Applicant and had nothing to do with any topping-up scheme. Reference was however made to the contract of employment of the newly appointed Plant Operators Superior Grade. An agreement was finally reached to the effect that a guaranteed 5 nights/shift allowance would be paid with the difference that: 1). If an employee refuses to “double” any shift a deduction of 1 “night” is made from his guaranteed allowance and 2). The allowance is applicable only to Plant and Equipment Operators Superior Grade operating on all quays, mainly the Mauritius Container Terminal.

4. Concerning para 4 Respondent's statement of case, Respondent is thereby asked to provide to Applicant with excerpts of Price Water House Coopers Report setting down its recommendation on the issue of Additional shift allowance to the other categories concerned. The terms of reference of the Consultant was *Whether additional Shift Scheme should be adopted on Mauritius Container Terminal and/or the Multipurpose to cater for replacements on shift to the other categories concerned (namely) the lashers).* En passant it is worth to be noted that reference is made to additional shift and replacement on shift and NOT to any topping-up Scheme. The issue is of generalized nature (structured nature) and NOT limited to any personal allowance.

5. Reference was made to para B4 of Mr Forget Report to stress that there was a full agreement for Operators and no agreement for the other categories and the reason for the differentiation has rightly been explained by Respondent in Para 4 of its Statement of Case. It was because applicant did not have negotiating rights for the other categories. It is here to be underlined that what WPC had to determine was "Whether an additional shift scheme should be adopted on the MCT and /or Multipurpose Terminal to cater for replacement on shifts and NOT any "Topping-up" of salaries. At no time an agreement was reached for the payment of a personal allowance. The agreement concerned an allowance payable to cater for replacement of employees absent and in case of necessity to double shift.

6. Concerning para 6 of Respondent's Statement of Case, Applicant refers Respondent to the minutes of proceedings of meeting of 13 December 2002 para 3 (1) at page 2. Parties have indeed an AGREEMENT on that issue.

7. Referring to para 7 of the Respondent's Statement of Case, the removal of the heavy equipment allowance was in fact a concession made by the Employees concerned so as to enter into a new system applicable to ONE and ALL and based on guaranteed nights for doubling of shift. The agreement was reached between M. Lecordier for the CHC and Mr J. Bizlall for the Applicant, put in writing in its final form by them and submitted to J. Forget as his report of conciliation.

8. The content of paragraph 8 of the Respondnet's statement of case is agreed by the Applicant. This is what in fact the Applicant has applied for. Applicant maintains para 6 of its statement of case and maintains that at no time the Respondent had given a different interpretation to the agreement reached between parties. It was only when it had to pay the newly promoted Plant Operators Superior Grade that it has expressed a different interpretation. This is NOT acceptable in the light of the context and content of the agreement, the removal of the Heavy Equipment Allowance and the non payment of the Additional Shift Allowance to the Plant Operators Superior Grade NOT fit to work on the Mauritius Container Terminal and the cancellation of the Additional Shift Allowance to Plant Operators Grade 1.

9. Applicant denies para 9 of the Respondent's Statement of Case. Applicant considers content thereof as misleading and contrary to the letter and spirit of the conciliation over the Additional Shift Allowance.

10. Applicant denies para 10 of the Respondent's statement of case. It must be underlined that up to now there has not been any agreement appointing Mr Forget as Arbitrator. Mr Forget is not conducting presently any arbitration. Anyway we are dealing with an interpretation of matters related to Mr G. Forget Report dated 15 November 2002 and not any alleged 2004 Arbitration by G. Forget.

The Union's representative, Mr Jacques Bizlall deponed to the effect that the dispute between the Corporation and the Union concerns the Corporation Employees namely the Plant and Equipment Operators Superior Grade who were not drawing the 5 additional night shift allowances at the Corporation. There was a conciliation agreement which was submitted by Mr Forget on the 15th November 2000 in relation to that issue. According to the witness, there was a disparity in the salaries of Plant Equipment Operators Superior Grade between those appointed as grade (1) then promoted as Superior Grade. The disparity concerns those promoted in that grade, that is people who were promoted to the grade of Plant Equipment Operators Superior Grade. Instead of referring the matter to this Tribunal either jointly or through the Ministry of Labour, parties agreed to appoint a Conciliator and Mediator in the person of Mr Forget. The latter did not make any mediation and he only acted as Conciliator. Mr Lecordier who represented the General Manager of the Corporation entered into an agreement with the witness, which agreement was rectified by the executive committee of the union and by management of the Corporation. The document produced by Mr Forget reads inter alia -

"After several meetings between the General Manager of the Cargo Handling Corporation and Mr Jacques Bizlall, the negotiator of the Maritime Transport and Port Employees Union issues were narrowed down".

The witness stated that management agreed that because of the fact that additional shifts were not granted to all those promoted to the grade of Plant and Equipment Operators Superior Grade or otherwise, removed when they were promoted and eligible for a personal allowance, a disparity has occurred in salaries granted to Plant and Equipment Operators Superior Grade. The Cargo Handling Corporation Ltd has agreed at paragraph 4 to redress the situation by granting 5 additional nights to all Plant and Equipment Operators Superior Grade with effect from the 1st of July 2002. The witness stressed that this agreement clearly means that all those promoted will get that additional shift allowance. If they grouped up some of them do not get it, and the disparity between senior grade will be reinstated. In support of his contention the witness referred to the last paragraph of the agreement:

"Furthermore, it was agreed that the overtime earned by those not earning additional shift yet would eventually be absorbed in the same upon their promotion to superior grade as per paragraph 2.1 above".

This agreement therefore covers all those promoted.

The representative of the Corporation Mr R.Mohabeersing testified that the agreement to which Mr Bizlall referred to, concerns only those 75 Plant

Operators, not new employees as the system of topping up scheme recommended by the SRC 97. The topping up scheme and the additional shift is one and the same thing. The additional shift allowance was extended to only those 75 employees, Plant Operators, in the sense that no new employee would be eligible 2 days henceforth. New employees were not granted additional shift because they did not incur any loss in pay.

Miss Bunwaree for the Respondent was fair in her submission in conceding that there is a disparity between new recruits now in the Superior Grade and the ones drawing the additional shift and that the salaries of new recruits are now being considered under the Salary Restructuring Committee Report 2002. However, she stressed that it does not make much sense to import the Agreement which was in relation to a particular group of employees into the present situation which is now altogether different.

After considering the testimonial and documentary evidence adduced as well as Counsel submission, we find the interpretation of the Union to be the more plausible one. Indeed, Section B paragraph 1 at para 1 of the Conciliation Agreement reads: "*All Plant Operators will draw 5 additional shifts as from July 2002*". There has been no proviso, condition or qualifying provision attached to that decision. We are of the strong view that if such was the case, the Conciliator would have said so.

We need to stress that the witness representing the Respondent did not impress us in his explanation of the Respondent's interpretation. His vague answers and hesitant demeanour led us to

believe that he himself was not convinced of what he was saying. We only need to reproduce part of his cross-examination:-

"MR RAMANO: Now, may I refer you to page 2 of the minutes of proceedings, which was prepared faithfully by the employer. I read – " The Union proposed the payment of overtime to Operators (Plant and Equipment) Grade at the Mauritius Container Terminal and that they be placed in the roster with the Operators (Plant and Equipment) Superior Grade."

That's one part.

"Furthermore, it was agreed that the overtime earned by those not earning additional shifts yet would eventually be absorbed in same upon their promotion to Superior Grade as per paragraph 2.1".

So, your interpretation was along the line of that of the union. It is only when time comes to pay that you are having a different interpretation. Is that right, Mr Mohabeersing?

MR MOHABEERSING: Yes, because the situation changed afterwards.

MR RAMANO: Thank you, Mr President. I have finished with Mr Mohabeersing.

MISS BUNWAREE : I have no re-examination. I close my case."

The Tribunal therefore declares that the interpretation to be given to the issue *in lite* is that “All Plant Operators Superior Grade should draw the guaranteed overtime (additional skills) once appointed in that grade.”

R. Hossen
Acting President

B. Ramburn
Member

R. Sumputh
Member

Date: 7th September 2005