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Ontario Region

November 28, 2011

MEMO

To: **Telco Locals in Ontario**

Re: **Post Retirement Benefits Arbitration Decision**

Arbitrator Stephen Raymond issued his decision on November 28, 2011 in connection with the Post Retirement Benefits grievances filed by the Union. The Arbitrator dismissed the grievances. A copy of the decision is attached.

The Arbitrator based his decision upon Article 25 of the collective agreement. The Arbitrator determined that the actions of the company are subject to both Article 25.02 and 25.03 of the collective agreement.

The Arbitrator ruled that Article 25.02 permitted the Employer to announce changes to the benefit plans provided that it did so by giving the CEP at least 30 days' notice. This is qualified by the wording of Article 25.03, which permits that the consent of the Union, which may not be unreasonably withheld, is necessary for any changes that were to occur during the term of the collective agreement.

The Arbitrator ruled that 25.03 acts as a "freeze provision", that would prevent change to the benefit plans during the term of the collective agreement and would provide the Union with an opportunity to bargain to prevent the modification. The Arbitrator specifically noted that the elimination of post retirement benefits was not prevented by the CEP in the last round of negotiations.

On the basis of the decision of the Arbitrator, Bell's ability to phase out post retirement benefits as announced, was made effective by the ratification of the current collective agreement. The CEP entered bargaining with the knowledge that Bell intended to phase out post retirement benefits, and accordingly the CEP had an onus to change the collective agreement at negotiations in order to prevent the elimination of post retirement benefits.

The final offer presented by Bell did not provide for the continuation of post retirement benefits. This final offer was ratified by the employees in the bargaining unit, and according to the Arbitrator's interpretation of the collective agreement this was sufficient for post retirement benefits to be phased out as announced by Bell.

In solidarity,

Barbara M Dolan

Barb Dolan,
Administrative Vice President,
CEP Ontario Region.

BD:lmc/cope-343
cc: National Representatives Servicing Telco Locals

IN THE MATTER OF AN ARBITRATION

BETWEEN:

BELL CANADA

("Employer")

- and -

COMMUNICATION, ENERGY AND PAPERWORKERS UNION

("Union")

AND IN THE MATTER OF A GRIEVANCE IN RESPECT OF POST-RETIREMENT BENEFITS

Stephen Raymond	Arbitrator

Appearances for the Employer:

Maryse Tremblay	Counsel
Mireille Bergeron	Senior Counsel, Bell Canada
Amal Garzouzi	Senior Counsel, Bell Canada
Raynald Wilson	Director Human Resources

Appearances for the Union:

Micheil Russell	Counsel
Sean Howes	National Representative
Joel Carr	National Representative
Ray Mortimer	President, Local 26

A hearing in this matter was held in Toronto on September 10, 2010, March 10, 2011, April 21, 2011, May 31, 2011, and August 29 and 30, 2011.

AWARD

This arbitration is in respect of two grievances brought by the Union regarding the elimination of post-retirement benefits. The Employer announced on March 27, 2007, a phased-in elimination of post-retirement benefits. The first grievance dated April 5, 2007 is in respect of a Collective Agreement with a term of August 19, 2004 to November 30, 2007 ("Collective Agreement #1"). The second grievance dated September 10, 2010 is in respect of a Collective Agreement with a term of June 5, 2008 to November 30, 2012 ("Collective Agreement #2"). The issue before me is whether the elimination of the post-retirement benefits violates one or both of the Collective Agreements. The decision to eliminate the post-retirement benefits was made and communicated by the Employer to the Union during the term of Collective Agreement #1. The commencement of the implementation of the elimination of post-retirement benefits is during the term of Collective Agreement #2. There is no issue in respect of my jurisdiction.

The parties entered into an Agreed Statement of Facts which I set out below in its entirety. The parties also called extensive evidence in respect of bargaining history. I will set out some of that evidence when reviewing the arguments of the parties as well as in the decision.

Agreed Statement of Facts

The Agreed Statement of Facts agreed to by the parties is as follows:

1. The following Agreed Statement of Facts sets out facts that are agreed upon by the CEP and Bell Canada ("the Parties") in relation to the above-noted matter.

2. The CEP is the bargaining agent for the group of "Craft and Services Employees" employed by Bell Canada (often referred to as the "Technicians").

3. On April 5, 2007, the CEP filed a grievance challenging Bell Canada's decision to gradually eliminate post-retirement benefits for future retirees. A copy of the grievance is attached and entered as Exhibit 1.

4. The collective agreement in effect at the time the grievance was filed was the one in force for the period from August 19, 2004 until November 30, 2007. A copy of the 2004-2007 collective agreement is attached and entered as Exhibit 2.

5. A subsequent collective agreement was negotiated for the period from June 5, 2008 to November 30, 2012 and is currently binding on the Parties. A copy of the 2008-2012 collective agreement is attached and entered as Exhibit 3.

6. On March 26, 2007, Mr. Raynald Wilson, then Director, Labour Relations, informed Mr. Richard Chaumont, CEP National Representative (Quebec) and Mr. Sean Howes, CEP National Representative (Ontario) by way of conference call that Bell Canada would proceed to gradually change and eliminate the benefits provided to employees upon retirement over a ten year period.

7. On March 27, 2007, the Company sent a general communication to all its employees along with Questions and Answers, including the Craft and Services Employees represented by the CEP, notifying them of the gradual phasing in of changes to benefits at retirement over a ten year period. A copy of the said communication was sent to the Union on the same date. A copy of the March 27, 2007 communication to all employees with Questions and Answers is attached and entered as Exhibit 4.

8. Additional communication to all employees also included:

   - An additional email sent to all employees on March 30, 2007 which provides further details regarding the changes to benefits at retirement. A copy of the March 30, 2007 email to employees is attached and entered as Exhibit 5.

   - Additional detailed information on Bell intranet site ("Bellnet"), including:

     - Human Resources- News & Events
     - Concerns and Facts

- Additional Questions and Answers – April 5th update
- Information Toolkit

A copy of this additional information to employees on Bellnet is attached and entered as Exhibit 6.

9. The announced changes to post-retirement benefits can be summarized as follows:

   - No changes for employees retiring before January 1, 2012;
   - For employees retiring between January 1, 2012 and December 31, 2016, company-paid medical coverage, excluding vision, dental and life insurance are offered until employees reach the age of 65, at which time they will be covered under government programs;
   - Employees retiring on or after January 1, 2017 will not be eligible to receive company-paid post-retirement benefits.

10. Bell Canada is self insured for the various benefits offered to its employees and for all post-retirement benefits available to its retirees, except for the post-retirement life insurance.

11. The post-retirement benefits offered to the employees are described on a website available to Bell employees and retirees (the "Post-Retirement Benefits Website"). A copy of all pages contained on the Post-Retirement Benefits Website at the time of signature of the 2004-2007 collective agreement is attached and entered as Exhibit 7.

12. The Post-Retirement Benefits Website was modified shortly after the announcement of the phasing in of the changes to the post-retirement benefits. A copy of the Post-Retirement Benefits Website as modified in April, 2007 is attached and entered as Exhibit 8.

13. At the time of signature of the 2004-2007 collective agreement, the following administration contracts were in effect:

   - The Dental Plan (effective July 1, 2003), a copy of which is attached and entered as Exhibit 10;

- The Bell Canada Drug Plan (effective April 1, 2004), a copy of which is attached and entered as Exhibit 11;
- The Medical Plan (effective July 1, 2003), a copy of which is attached and entered as Exhibit 12.

14. At the time of signature of the 2004-2007 collective agreement, employees were eligible for post-retirement benefits as described in Exhibit 7. In July 2005, Bell Canada entered into a Life Insurance Policy for the first time, which is attached and entered as Exhibit 9.

15. The Parties signed a new collective agreement effective June 5, 2008 based on the changes found in the Proposed Settlement attached and entered as Exhibit 13. The new collective agreement was ratified by CEP membership, which ratification was completed on May 30, 2008. The text of Article 25 remained unchanged.

16. During the 2007-2008 negotiations that led to the new collective agreement, parties each tabled their respective demands in October 2007. A copy of the Union demands during the 2007-2008 collective bargaining is attached and entered as Exhibit 14. A copy of the Company demands during the 2007-2008 collective bargaining is attached and entered as Exhibit 15.

17. The Parties are free to call and introduce additional evidence to supplement the facts set out in this Agreed Statement of Facts.

<u>The Collective Agreement</u>

The Collective Agreement provision which the Union claims has been violated by the announced elimination of post-retirement benefits is Article 25, and, in particular, Article 25.03. The Article is unchanged from Collective Agreement #1 to Collective Agreement #2. Both Collective Agreements provide as follows:

Article 25 – Sickness Absence and Benefits

"25.01 The Company shall maintain for the duration of this Agreement, insofar as it applies to employees covered by this Agreement, the program of benefits provided under the following Plans:

- the Pension Plan
- the Income Protection Program
- the Transition Benefit Plan
- the Comprehensive Medical Expense Plan
- the Vision Care Plan
- the Dental Plan

It is understood that the Company's overall program of Benefits will change during the life of the Collective Agreement. As a result, insofar as they apply to the employees covered by this Agreement, the above undertaking applies to these Plans as they exist as of the date of signing of this agreement until such time as they are modified. From then on, this undertaking will apply to these plans as modified.

It is understood that any reference to any benefit, including sickness absence, in the Collective Agreement refers to the benefit then in force and should be read with the necessary modifications, including any reference to benefits in this Article.

25.02 At least 30 days prior to modifying any of the Plans listed in section 25.01 , the Company shall inform the Union of the changes to be implemented and request representation in that respect.

25.03 For the duration of this Collective Agreement and insofar as they apply to the employees covered by this Agreement, the Plans listed in section 25.01 shall not be modified, except with the consent of the Union, which shall not be unreasonably withheld."

The Union's Argument

The Union commenced its argument by noting that there is no disagreement that post-retirement benefits form part of the Collective Agreements. Post-retirement benefits are part of the Plans identified in Article 25.01.

The dispute between the parties is what steps need to be taken to eliminate these benefits. The Union took the position that the Employer has no right to unilaterally amend the Plans in Article 25 to remove the provision of post-retirement benefits. The Union stated that, although there were two grievances before me under two Collective Agreements, the second grievance was in many ways unnecessary. In any event, all of its submissions should be considered to be made in respect of both grievances. The Union stated that the Collective Agreements were clear; there was a prohibition against the unilateral removal of any benefit, including post-retirement benefits.

Alternatively, the Union relied on the bargaining history in support of its position. Its position was that the provisions of Article 25.01 are at least latently ambiguous and that I ought to rely on the bargaining history of the parties to interpret the Collective Agreements.

The Union commenced its detailed submissions with its alternative argument, and a review of the bargaining history evidence. It then made its primary argument that Article 25 prohibited the unilateral elimination of post-retirement benefits.

The Union's argument in respect of the bargaining history can be summarized as follows: In the round of bargaining following the announcement, the Employer did not seek to make any changes to Article 25 or the Collective Agreement in respect of its intention to eliminate post-retirement benefits. During the two previous rounds of collective bargaining, the Employer had acted differently when it wanted to make changes to benefits Plans. In both 1999 and 2004, the Employer sought to introduce a new benefit program. To do so, it made a presentation at bargaining detailing the new benefit program. In negotiations, Letters of Intent in respect of the changes were drafted and appended to the respective Collective Agreements. The Letters of Intent, although not part of the Collective Agreements, by agreement of the parties, were included in the Memoranda of Settlement that were ratified by the members of the bargaining unit.

It is this pattern which the Union said sets out the agreement of the parties such that changes to the benefits Plans are to be negotiated by the parties, and the Employer may not simply announce and implement a unilateral change. The changes described above, like the one before me, were company-wide announcements by the Employer to make changes to the

benefits Plans. The pattern had been established that when this occurs, there will be discussion at the bargaining table. The pattern is also that the Union has to consent to have an amendment to the Plans. In each case, Letters of Intent were signed by the Employer.

The Union then turned to the Collective Agreements and, in particular Article 25.03, which it says "freezes" the content of the benefit Plans. The only basis upon which those Plans may be modified is with the consent of the Union. Such consent may not be unreasonably withheld. There is no issue, in the matter before me, that consent was being unreasonably withheld because the consent of the Union to make the change was never sought by the Employer.

There was another issue that the Union addressed, which is what is meant by the Plans referred to in Article 25.01. The Employer took the position that the Plans were what it puts on its website. The Union took the position that the Plans were the actual plan documents. While not necessarily germane to the dispute between the parties, I address this issue in my decision below.

Returning to the crux of the Union's argument, the Union referred to the latest round of bargaining. The Union set out in its proposals that the post-retirement benefits should be maintained. To the Union, it was inexplicable that the Employer put nothing in its proposals in respect of the elimination. There was very little discussion at bargaining, even though the parties knew that the Union had filed a grievance claiming that the announcement of the elimination of the benefits was a violation of the Collective Agreement #1. Since there was so little discussion, there were no representations made at the bargaining table in respect of the post-retirement benefits. Similarly, there was no request by the Employer that the Union withdraw its grievance. The parties negotiated a Memorandum of Settlement. Article 25 was not amended. There was no Letter of Intent in respect of the proposed changes to the benefit Plans as there had been in previous rounds of collective bargaining.

The Union took the position that the Employer can make whatever announcements it wishes as long as it obtains the consent of the Union to make changes to the Plans. Since that consent was not received at the bargaining table or elsewhere, there is no right to make the change. Post-retirement benefits could not be eliminated without the Employer changing the wording of Article 25. No change was sought or achieved. Article 25.03 which prohibits the modification of the Plans means that post-retirement benefits could not be eliminated.

The Union relied upon the following authorities: Bell Canada, [2003] C.I.R.B. no. 212; Re Bell Canada and C.W.C. [1998] 11 C.L.A.S. 10; Bell Canada and C.E.P., Local 27, unreported decision dated January 15, 2010 (Burkett); Bisaillon v. Concordia University, [2006] 1 S.C.R. 666; Re Alcan

Canada Products Ltd. and Metal Foil Workers' Union, Local 1663 (1982) 5 L.A.C. (3d) 1 (Arthurs); Re Alcan Foils and Printing Specialties & Paper Products Union, Local 466 (1976) 11 L.A.C. (2d) 352 (Schiff); Re Corporation of the Township of Muskoka Lakes and Ontario Public Services Employees' Union, Local 326 (1981) 1 L.A.C. (3d) 125 (MacDowell); Re Mississauga Hydro Commission and International Brotherhood of Electrical Workers, Local 635 (1984) 17 L.A.C. (3d) 299 (P.C. Picher); Re Puretex Knitting Co. Ltd. and Canadian Textile & Chemical Union, Local 560 (1975) 8 L.A.C. (2d) 371 (Dunn); Re Hamilton Medical Laboratories and County Medical Laboratory and Ontario Public Service Employees' Union (1983) 10 L.A.C. (3d) 106 (Springate); Re Ontario Jockey Club and Mutuel Employees' Association, S.E.I.U., Local 528 (1980) 28 L.A.C. (2d) 14 (Carter); Re CN/CP Telecommunications and Canadian Association of Communications and Allied Workers (1985) 18 L.A.C. (3d) 78 (M.G. Picher).

The Employer's Argument

The Employer took the position that there was no requirement to negotiate the elimination of the post-retirement benefits. Simply put, once notice was given to the Union pursuant to the Collective Agreement, the onus was on the Union to negotiate to secure the benefits. When the Union failed to negotiate a change, the post-retirement benefits could be eliminated.

The Employer commenced its argument by reviewing the Collective Agreements. It took the position that there is no need to look at the bargaining history but, even if one does so, it is also clear that the Union did not, in bargaining, prevent the elimination of the post-retirement benefits.

In respect of the Collective Agreements, the Employer stated that Article 25.01 is clear. Benefit Plans are to be maintained for the duration of the Collective Agreement or until such time as they are modified pursuant to the Collective Agreement. Article 25.01 specifically states that the obligation is "for the duration of this Agreement". Articles 25.02 and 25.03 provide a process for modification of the Plans. Article 25.02 provides a specific notice provision in respect of modification. To make any modification, the Employer must provide the Union with thirty days advance notice. This notice must be read having regard as well to Article 25.03. This Article provides that there may not be any modification for the duration of the Collective Agreement without consent of the Union and that such consent may not be unreasonably withheld. The Employer agrees that the consent of the Union was not sought.

Reading all these Articles together, the Employer had the right to a unilateral modification provided it followed Articles 25.02 and 25.03. First, there must be at least thirty days advance

notice. Second, those modifications may not be implemented during the term of the Collective Agreement without the Union's consent. Those are the provisions to which the parties agreed, and to which the Employer complied. In fact, there was more than thirty days advance notice, and there was no implementation of the changes until after the parties had an opportunity to negotiate a renewal Collective Agreement, and thus no violation of either Article 25.02 or 25.03 occurred.

The Employer then turned to the negotiation history. The evidence of the negotiation of Collective Agreement #2 supported the Employer's position. The Union had a bargaining proposal to reintroduce the post-retirement benefits. No changes were made to the Collective Agreement. If there was no need for a proposal in order to maintain the post-retirement benefits, why did the Union have a proposal to maintain the benefits?

Further, it was argued, the subject of post-retirement benefits was hardly raised at negotiations. When it was raised during the last minute discussions that led to ratification of a Memorandum of Settlement, senior representatives of the Employer confirmed to Union representatives that the Employer intended to implement what it had announced. The Employer introduced internal Union correspondence (objected to by the Union but which I admitted) which demonstrated that the Union knew the Employer's announcement of changes would be implemented. The round of bargaining was long and contentious. When it came time to vote on the Employer's last offer a division occurred in the Union. On one side, one faction which was not supporting ratification claimed that in the Employer's proposed deal, the membership had lost its post-retirement benefits. On the other side, the leadership of the Union which supported ratification wrote in relation to the "facts" as presented by the other faction: "The removal of Post Retirement Benefits and the Employee Savings Plan aren't part of our contract, and never have been. Besides which, these are being removed from all BCE employees, not just the 5,000 technicians (although PRBs remain in place through 2011 and until 2016 at a reduced rate). If our fight is about getting these benefits included in our contract, when the rest of the company is losing them, we should prepare ourselves for a very long fight." The Employer asserted that the Union knew that the elimination of the post-retirement benefits would proceed.

In respect of the "pattern" from the previous rounds of bargaining, the Employer took the position that no past practice could be established. Simply put, what had been done previously when the Employer sought to make changes to benefits was not consistent and therefore, no practice could be established. In the first round of bargaining relied upon by the Union, there was no evidence that the Employer sought consent from the Union for the changes. In the second round of bargaining, the Employer made a presentation to provide the Union with an

opportunity for input. A Letter of Intent was drafted. It is not part of the Collective Agreement. It simply sets out the intention of the Employer.

The Employer also argued that the past practice, even if it exists, which it denied, does not advance the matter for the Union. The practice could end with notice. The Employer did so with notice of the elimination of post-retirement benefits. Any practice that included the drafting of a Letter of Intent to be included in the Memorandum of Settlement but did not form part of the Collective Agreement ended with the round of bargaining that achieved Collective Agreement #2.

The Employer relied upon the following authorities: Southern Railway of British Columbia Ltd. and C.U.P.E., Local 7000 (OPS 2-11-09), (2010) 198 L.A.C. (4th) 283; St. Mary's Cement (2010) 101 C.L.A.S. 240 (Hunter); Royal Ontario Museum [2011] O.L.A.A. No. 292 (Raymond); Bell Canada (Chawada Grievance), [2010] C.L.A.D. No. 70 (Burkett), aff'd CEP, Local 27 v. Bell Canada [2011] ONSC 2517; Bell Canada (2000), unreported decision dated September 7, 2000 (Hamelin), Bell Canada (2011), 106 C.L.A.S. 1 (Picher); Telus Communications Inc. [2010] B.C.J. No. 1990 (B.C.S.C.); Re Sudbury District Roman Catholic, (1984) 15 L.A.C. (3d) 284 (Adams); Toromont Industries Ltd. (2009) 192 L.A.C. (4th) 1 (Surdykowski); Siemens Automotive Ltd. (1995) 47 L.A.C. (4th) 380 (Williamson); Ontario (Ministry of Community Safety and Correctional Services), (2010), 197 L.A.C. (4th) 206 (Herlich); Explosive Technologies International (1996) 44 C.L.A.S. 446 (Keller); Markstay – Warren (Municipality) (2009) 98 C.L.A.S. 283 (Slotnick); Telus and TWU (Employee Share Purchase Plan) (2010) 201 L.A.C. (4th) 15 (Sims); Morben Inc. (2004) 124 L.A.C. (4th) 257 (Bendel); Smitty's Family Restaurant (1998) 72 L.A.C. (4th) 437 (Freedman); Jamesway Incubator Co. (2003) 119 L.A.C. (4th) 369 (Barrett); Mott's, a Division of Cadbury Beverages Canada Inc. (1997) 49 C.L.A.S. 265 (Whitehead); Ivaco Rolling Mills (Rod Mill) (1992) 28 L.A.C. (4th) 372 (Bendel); Manning Community Health Centre (1998) 52 C.L.A.S. 440 (Moreau); B.C. Rail (1197) 65 L.A.C. (4th) 443 (Hope); Re Longyear Canada Inc. (1981) 2 L.A.C. (3d) 72 (Picher); Manitoba Housing Authority (1994) 41 L.A.C. (4th) 225 (Teskey); Victoria Times Colonist (1984) 17 L.A.c. (3d) 284 (Hope); Eurocan Pulp & Paper Co. (1990) 14 L.A.C. (4th) 103 (Hickling); Fisher Gauge Ltd. (2001) 63 C.L.A.S. 306 (Starkman); Re CFTO-TV. Ltd. (1983) 10 L.A.C. (3d) 232 (Kennedy); Carleton University (1993) 37 L.A.C. (4th) 269 (Young); Bell Canada and C.E.P., unreported decision dated February 12, 2002 (Keller);Telus and T.W.U. (2009) 99 C.L.A.S. 46 (Kinzie); Noël v. Société d'énergie de la Baie James [2001] S.C.J. No. 41; Bell Canada, [2005] C.I.R.b. no. 311 and Canadian Air Line Flight Attendants' Association and Canadian Pacific Airlines Limited [1985] unreported decision of the Canada Labour Relations Board dated January 8, 1985.

The Union's reply

The Union raised a number of issues in reply. It stated that, in the first instance, there is no need to do anything other than interpret the Collective Agreements. In the Union's view, there is no window in which the Employer had the authority to eliminate the benefits without consent. It had Collective Agreement #1 in which it is obligated to maintain the benefits, and that is followed by Collective Agreement #2 in which also has the obligation to maintain the benefits. Normally, one Collective Agreement would follow the day after the expiry of the previous Collective Agreement. In this situation, Collective Agreement #1 expired on November 30, 2007, and the term of Collective Agreement #2 did not commence until June 5, 2008. The period between Collective Agreement #1 and Collective Agreement #2 is, however, covered by the statutory freeze period in which there is no power for the Employer to make unilateral changes. Accordingly, the Employer did not have any window in which it could enact the unilateral change. On each and every day during the period under consideration one Collective Agreement or the other governs and the Employer had to maintain the benefits. It had no right to eliminate any of the benefits unilaterally.

The Union further argued that if there is a need to review of bargaining history, those facts upon which the Employer seeks to rely are not actually helpful to the Employer. There should be no misunderstanding in respect of the position that the Union was taking. Within one week of the announcement of the future elimination of post-retirement benefits, a grievance was filed.

Finally, the Union took the position that if the Employer is correct, the Union would need to arrive at each set of collective bargaining and ask the question as to which Plans are continuing? The Union says that this is not what is required by the language. In a situation such as this, where there was no discussion with respect to changes to the Plans at the bargaining table, why would the Union need to raise it? It was unnecessary. Unless there is a change, there is no need for an alteration.

Decision

While I have read and reviewed the numerous cases cited by the parties, this decision turns strictly on my interpretation of Article 25 of the Collective Agreements in this matter.

A review of the timeline is helpful. Collective Agreement #1 has a term of August 24, 2004 to November 30, 2007. Near the end of the term of that Collective Agreement, on March 26, 2007, the Employer notified the Union that it would proceed to gradually change and eliminate post-retirement benefits over a ten year period. The parties went into collective bargaining, which lasted for several months. On May 5, 2008, the Employer made a proposal at bargaining which formed the basis for a Memorandum of Settlement which became Collective Agreement #2. The term of Collective Agreement #2 is June 5, 2008 to November 30, 2012. The first implementation date in respect of the elimination of post-retirement benefits is January 1, 2012.

The issue before me is whether Article 25 prohibits a change to the benefits Plans, such as the elimination of post-retirement benefits or permits it. The language of the Article permits the Employer to make the change in the way that it did. Article 25 does not create a complete prohibition of change. It permits it. Article 25.02 provides that any modification must have at least thirty days' notice. This obligation has been met by the Employer in this situation. The Employer has given over four years' of notice of the first change to post-retirement benefits. This far exceeds the Collective Agreement obligation to provide thirty days notice.

Article 25.03 is the more complicated section. It provides that the modification may not be implemented during the term of the Collective Agreement without the consent of the Union (and that such consent may not be unreasonably withheld). The Article is quite specific. It applies for the duration of the Collective Agreement. The purpose of this provision is to ensure that the members of the bargaining unit are not subjected to a change without having the opportunity to bargain in respect of the change. It is not that the change may not be implemented but rather, that the change may not be implemented until a new Collective Agreement has been bargained, and consequently an opportunity has been given in respect of bargaining in respect of the change. Article 25.03 in effect acts a freeze provision. The members of the bargaining unit are protected from change during the term of the Collective Agreement. There is an opportunity to bargain to prevent the modification. This is what the Union attempted to do in the bargaining after the announcement of the elimination of post-retirement benefits. It did not achieve its desired goal of maintaining the post-retirement benefits. The Collective Agreements are not violated where, as here, the Employer provides notice of the change and implements that change after the end of the Collective Agreement.

In deciding this, I specifically reject the Union's contention that the application of the two Collective Agreements taken together is that the change may not be made. At the time of the signing of the second Collective Agreement, the Union was aware that the Plans had been modified such that the post-retirement benefits would be phased out starting in January, 2012.

I also reject the Employer's contention as to what are the Plans. There was a dispute between the parties as to what exactly are the Plans referred to in Article 25.01. The Union is correct when it states that the Plans are the legal documents that the Employer negotiates with the insurer and not the postings the Employer makes to its own internal intranet in respect of benefit coverage.

Given my decision above, I need not consider the bargaining history. However, I do not find that the language of the Collective Agreement in respect of the entitlement to eliminate post-retirement benefits is either patently or latently ambiguous. The fact that there is a disagreement as to how the language operates is not enough.

Given, however, the significant amount of evidence called and arguments made, I think it is helpful to the parties to make the following comments. I also considered the recent decision between the parties in respect of the same provision of the same Collective Agreement by arbitrator Burkett dated January 15, 2010 which found that the provisions of Article 25 were at least latently ambiguous. He was determining a different matter, and that was the entitlement to arbitrate benefit entitlement disputes. In finding that he should refer to bargaining history when interpreting Article 25 of the Collective Agreement, he wrote, as follows, at page 20 of that Award:

> "Given the myriad of different arrangements that may be negotiated for the provision of benefits to employees, given the difficulty in determining intention with respect to incorporation and/or dispute resolution under the various types of arrangements and, indeed, given the contentious history between these parties in this regard, as evidenced by the prior awards, I have no hesitation in finding article 25 to be at least latently ambiguous. It is latently ambiguous both as to whether the details of the various plans are incorporated by reference and as to whether the intention of the parties is that individual claims to entitlement are to be arbitrated under the collective agreement, determined in some forum or left to the sole discretion of the agent or the Employer."

This decision was made between the commencement and conclusion of this hearing. I note that none of the latent ambiguities found by arbitrator Burkett are issues before me in respect of my interpretation of Article 25.

There were two main arguments based on the bargaining history. The first is the allegation by the Union that a pattern had emerged from the prior bargaining sessions in respect of changes to benefit Plans. The allegation is that, as a result of such pattern or practice, the Employer was not able to eliminate the post-retirement benefits without specifically bargaining the change.

Having reviewed the evidence, I reject this argument for two reasons. First, it is not evident that a practice was established. I do not find that there was a clear pattern of bargaining in respect of prior changes to the benefit Plans. Second, even if a pattern was established such that the Union could rely on a practice, that was brought to an end by the Employer's announcement of the phased-in elimination of post-retirement benefits.

The second main argument based on the bargaining history was in respect of the round of bargaining after the announcement of the elimination of post-retirement benefits that led to Collective Agreement #2. Both parties took the same fundamental position that once the announcement of the changes had been made, it was incumbent on the other party to make changes to the Collective Agreement to maintain its position. In this regard, the bargaining evidence was clear. The internal Union divisions in respect of whether to accept or reject the Employer's offer (it was accepted) clearly demonstrated that the Union knew that it had not achieved in bargaining the reintroduction (or the maintenance) of post-retirement benefits. From this I conclude that the Union accepted that it had the onus to change the Collective Agreement at bargaining in order to prevent the elimination of post-retirement benefits.

Finally, I think it is important to address the Union's argument as to what this means about bargaining. It is not, as stated by the Union, that it needs to arrive at bargaining and ask what is changed. The obligation rests on the Employer to state prior to bargaining, as it did here, what it intends to change so that the Union has a clear and unfettered opportunity to negotiate in respect of the proposed modifications.

For the reasons provided above, the grievances are dismissed.

Dated at Toronto, this 28th day of November, 2011.

Stephen Raymond