IN THE MATTER OF AN ARBITRATION

BETWEEN:

U.S. STEEL CANADA INC.

("the Company")

AND:

UNITED STEELWORKERS OF AMERICA, LOCAL 1005

("the Union")

IN THE MATTER OF:

VACATION PAY ENTITLEMENT GRIEVANCE

SOLE ARBITRATOR:

Kevin M. Burkett

APPEARANCES FOR THE COMPANY:

Stephen Shamie - Counsel

APPEARANCES FOR THE UNION:

Tracey Henry - Counsel
Rolf Gerstenberger - President, Local 1005 USWA
Jake Lombardo - Plant Grievance Committee Chair

Hearings in this matter were held on November 18, 2009 in Burlington and January 20, 2010 in Hamilton, Ontario.

A W A R D

This grievance concerns a claim for vacation pay. There are two elements to the claim. The first is in respect of annual vacation pay for the 2009 vacation year. The second is in respect of the one-time 15-week pre-retirement vacation pay under article 11.01(b). There is no dispute with respect to my authority to hear and determine these matters. I will deal with each claim separately.

2009 ANNUAL VACATION

Turning firstly to the claim for vacation pay for the 2009 vacation year, the Union submits that the approximately 700 employees who were laid off in October 2008 and not recalled until after July 1, 2009 were not paid their full vacation pay for the 2009 vacation year to which they were entitled under the terms of the collective agreement. The Company takes the position that these employees were paid according to the terms of the collective agreement and, therefore, there has been no breach. The Company takes the alternative position that if I find the agreement not to be clear in this regard, the extrinsic evidence resolves any ambiguity in its favour. Finally, the Company asserts that even if I find in the Union's favour on the language, the Union is

nevertheless estopped from taking the position that it now does. There is no dispute with respect to my authority to hear and determine this matter.

The facts giving rise to this grievance are not in dispute. Whereas the employees who were laid off in October 2008 and recalled prior to July 1, 2009 were paid vacation pay in the amount of their hourly rate multiplied by 40 for each week of vacation entitlement, pursuant to article 11.03(a), the 700 employees who were laid off in October 2008 and not recalled until after July 1, 2009 were paid 2% of earnings since the previous July 1 for each week of vacation entitlement pursuant to article 11.06 of the collective agreement. Because the grievors had been laid off for a considerable portion of the vacation year, which under article 11.02 extends from July 1 to the following June 30, 2% of earnings from the previous July 1 results in a much lower payment than the hourly rate multiplied by 40 for each week of entitlement – hence the grievance.

It is useful, at the outset, to dispose of the ambiguity and estoppel issues that have been raised.

Even though the parties had entered into a series of letters of understanding dealing with the payment of vacation pay to employees subject to seasonal layoffs and even though these letters, including the one covering the seasonal layoff that occurred during the 2009 vacation year, addressed the eventuality of employees being recalled after June 30, there had only been one employee previously not recalled from seasonal layoff prior to July 1 with the requisite number of hours worked in the vacation year,

i.e. 1,040 hours at the time. This employee had been paid on the same basis as the grievors in this case. However, I am satisfied that the Union had no knowledge such that it cannot be argued on the basis of this single case that there exists a past practice as might usefully assist in ascertaining the shared intention of the parties if I were to find the language ambiguous. Nor can it be argued that the Union acquiesced in a practice such that its acquiescence constituted a representation for purposes of establishing an estoppel. Furthermore, the instances where employees not subject to seasonal layoff who otherwise terminated their employment prior to June 30 of the vacation year and were paid 2% of earnings from the prior July 1 does not give rise to a past practice that would assist in resolving an ambiguity in the language with respect to the vacation pay entitlement of someone on seasonal layoff who is recalled after July 1.

The only other factual matter that might be relevant should I find the language of the collective agreement to be ambiguous concerns the 2002 renegotiation of the collective agreement. In that round of bargaining, the Union tabled a demand on April 19, 2002 to "amend" Section 11.06 (which is identical to section 11.06 under consideration here) to provide that an employee who has been terminated shall be paid his/her full vacation pay. The Company rejected this proposal in a number of bargaining exchanges and, on June 20, 2002, the Union withdrew its proposal on a without prejudice basis. The Company tabled this documentary evidence in the form of negotiating notes for the purpose of establishing that the Union had conceded that

employees on seasonal layoff not recalled prior to July 1 would continue to receive 2% of earnings from the prior July 1 pursuant to article 11.06. The evidence of Mr. Tom Walker, a long-term Union official who was Chair of the Union's contract language subcommittee in 2002, is that the Union demand did not speak to the case of recall after July 1 from seasonal layoff, which had never occurred up to that point, but rather to the double penalty imposed upon an employee who is otherwise terminated and, in addition, has his/her vacation pay reduced pursuant to article 11.06. I am not prepared to find on this evidence that Mr. Walker, on behalf of the Union, made the concession that the Company relies on.

Having regard to the foregoing, there is no evidence before me that would resolve an ambiguity if I were to find that one exists or establish an estoppel. Accordingly, I am left to decide the issue before me on the language of the collective agreement.

The relevant provisions of the collective agreement are set out below.

SECTION 7 – SENIORITY

7.01 For the purpose of this agreement, "service" shall mean an employee's length of service with the Company at Hamilton Steel since the date of her/her last hiring or rehiring, but shall include service as provided in Clause 7.03 hereunder. Where two or more employees have the same service date the employee with the lowest permanent number assigned by the Company shall be considered to have the longest length of service.

7.02 Service and employment shall be terminated when an employee:

(a) Resigns;

(b) Is discharged;

(c) Is laid off for lack of work;

(d) Is absent due to a disability not compensable under the Workers' Safety and Insurance Board, for a period exceeding the limits set forth in Clause 7.03(a) relating to length of service and recall entitlement;

7.03

(a) When an employee, other than a probationary employee, has been laid off he/she shall be entitled to recall in inverse order of the layoff procedure as follows:

(i) Less than two (2) years of service at the date of layoff – for a period of twenty-four (24) months from the date of layoff.

(ii) Two (2) years but less than three (3) years of service at the date of layoff – for a period of thirty (30) months from the date of layoff.

(iii) Three (3) years of service but less than four (4) years of service at the date of layoff – for a period of thirty-six (36) months from the date of layoff.

(iv) Four (4) years but less than five (5) years of service at the date of layoff – for a period of forty-two 42) months from the date of layoff.

(b) If a former employee is recalled and rehired within the applicable period, his/her service shall include service prior to such layoff and further accumulation of service as follows:

(i) In the case of an employee with at least one (1) year of service at the date of layoff, the first nine (9) months of the layoff will be included with his/her prior service, or

(ii) In the case of an employee with three (3) years or more of service at the date of layoff, the first fifteen (15) months of the layoff will be included with his/her prior service.

SECTION 11 – VACATIONS

11.01

(a) An employee shall be entitled to an annual vacation with pay in accordance with the following schedule, on the basis of his/her service at July 1st in each year:

- One (1) year of service but less than Five (5) years – Two (2) weeks.
- Five (5) years of service but less than Nine (9) years – Three (3) weeks.
- Nine (9) years of service but less than Fifteen (15) years – Four (4) weeks.
- Fifteen (15) years of service but less than Twenty-two (22) years – Five (5) weeks.
- Twenty-two (22) years of service but less than Thirty (30) years – Six (6) weeks.
- Thirty (30) years of service or more – Seven (7) weeks.

(b) An employee with 30 or more years of service shall be entitled to fifteen (15) weeks of extended vacation with pay in addition to his/her regular vacation entitlement under Clause 11.01(a) immediately prior to his/her retirement date, less any vacation entitlement taken under this provision.

11.02 For the purposes of this Section, "vacation year" shall mean the year ending June 30th.

11.03

(a) Except as provided in (b) hereof vacation pay for each week of vacation shall be established by multiplying the employee's average hourly earnings during the calendar quarter year immediately preceding the vacation by forty (40).

(b) Vacation pay for each week of vacation shall be 2% of the employee's earnings during the vacation year, if the employee:

(i) has been on leave of absence for reasons other than disability or Union business directly related to the bargaining unit, for more than a combined total of 350 hours during the vacation year, or

(ii) has worked less than 520 hours during the vacation year for any reason, except that if an employee is required to take a vacation during the months of January and February, hours not worked between the previous July 1st and December 31st by reason of:

1. absence on a scheduled vacation, or

2. the celebration of a statutory holiday for which the employee was paid an allowance under Clauses 12.04 or Clause 12.02, shall be deemed to be hours worked for the purposes of this provision.

Hours not worked during the vacation year while on Union business directly related to the bargaining unit shall also be deemed to be hours worked for the purpose of this provision.

11.04

(a) An employee shall receive an additional payment equal to a percentage of the appropriate amount, as provided below, calculated under Clause 11.03 in respect to the length of vacation he/she is entitled to under Clause 11.01(a), whichever is applicable, depending upon the month when each such week of his/her vacation entitlement is taken:

(i) During the months of January, February, March, April, September, October and November – 30%
(ii) During the months of May, June, July, August and December – 20%.

(b) The appropriate payment as provided above for each such week of vacation entitlement will be determined on the basis of the month in which the first scheduled day of such week of vacation is taken.

(c) Such additional payment shall not apply to vacation pay for extended vacations provided in Clause 11.01(b).

(d) An employee may elect to schedule one week of his/her annual vacation entitlement in single days.

11.06 An employee whose employment is terminated shall be paid vacation pay in the amount of 2% of his/her earnings since the preceding July 1st in respect of each week of vacation to which he/she was entitled on such July 1st plus any payment to which he/she is entitled under Clause 11.04.

12.01 All employees covered by the Basic Agreement will receive a day's pay (computed under the provisions of Clause 12.03) for Christmas Day.

12.02 An employee having at least thirty (30) days of service will receive a day's pay (computed under the provisions of Clause 12.03) for New Year's Day, Heritage Day, Good Friday, Victoria Day, Canada Day, Civic Holiday, Labour Day, Thanksgiving Day and Boxing Day provided that such employee has worked one day in the month in which the Statutory Holiday is observed. Days of scheduled vacation shall be considered scheduled turns.

The November 17, 2008 letter of understanding between the Company and the Union, that pertains to the "2009 vacation payment for those employees whose service and employment is terminated as a result of temporary lay-off," reads as follows:

> This serves to confirm that the parties agree to the following with respect to 2009 vacation payment for those employees whose service and employment is terminated as a result of temporary lay-off.
>
> Vacation payment shall be made upon termination only if specifically requested by an employee.
>
> Vacation payment shall be made to a former employee who may be recalled to work at the time such employee takes vacation or, in the case

> of an employee recalled in accordance with the Basic Agreement, payment shall be made by July 1, 2009.
>
> Vacation payment shall be made by July 1, 2009 to any former employee not recalled to work as of that date.
>
> It is understood and agreed that this agreement relates specifically to the issue of vacation payment under the terms and conditions, as outlined herein, and is without prejudice to the provisions of the 2006 Basic Agreement.

There had been a series of such letters. The purpose of these letters was to assist those who were the subject of seasonal layoffs with claims for employment insurance by, at the employees' discretion, delaying the payment of vacation pay until the time of recall up to June 30. The 2008 letter expressly stipulated under paragraph 4 that vacation payment for the 2009 vacation year had to be made by July 1, 2009.

SUBMISSIONS

Without prejudice to its assertion that the Union bears the legal burden, the Company agreed to proceed first in argument. The Company describes the issue as whether those recalled from seasonal layoff after July 1, 2009 were paid vacation pay for the 2009 vacation year in accord with the collective agreement; that is, at 2% of earnings from July 1, 2008 for each week of vacation entitlement pursuant to article 11.06.

It is the primary position of the Company that the language of the collective agreement clearly and unambiguously supports its position. The Company relies on article 11.06 read in conjunction with article 7.02. Article 11.06 provides that, "An employee whose employment is terminated shall be paid vacation pay in the amount of 2% of his/her earnings since the preceding July 1st in respect of each week of vacation to which he/she was entitled on such July 1st ...." Article 7.02 provides that "service and employment shall be terminated when an employee ... is laid off work for lack of work." The Company submits that absent any dispute that these grievors were terminated within the meaning of article 7.02, they were no longer "employees" within the meaning of article 11.03 entitled to vacation pay in the amount of average hourly earnings times 40 for each week of entitlement but rather "former employees" within the meaning of the November 17, 2008 letter of understanding, entitled to 2% of earnings from the previous July 1 for each week of vacation entitlement. I am referred to the 1991 award of arbitrator Fisher between these parties (see *re:* <u>*Stelco Inc. Hilton Works and USWA, Local 1005*</u> *(July 1, 1991) unreported (Fisher)*) where, under essentially identical language, the arbitrator found that former employees on temporary layoff were not employees within the meaning of article 11.01 entitled to payment for Christmas Day. It is submitted that the central issue, i.e. whether the grievors were employees as of June 30, 2009 (the end of the vacation year, and the date as of which vacation pay for the 2009 vacation year had to be made), has already been decided in favour of the Company. The Company argues that if there is any

doubt in this regard, reference need only be had to the November 17, 2008 letter of understanding between the Company and the Union. The letter, it is submitted, confirms, firstly, that employees on "temporary layoff" are "former employees" who have been "terminated"; confirms, secondly, that if vacation payment is requested by the employee "upon termination," it shall be at 2%; and confirms, thirdly, that vacation payment is to be made no later than the end of the 2009 vacation year, i.e. by July 1, 2009. The Company submits that I can come to no other conclusion on the language but that these "former employees," whose employment had been "terminated," were correctly paid their vacation pay pursuant to article 11.06 of the collective agreement at the end of the 2009 vacation year, as of which time they were "former employee(s) not recalled to work as of that date" within the meaning of paragraph 4 of the November 17, 2008 letter of understanding between the parties.

The Union characterizes the issue differently. The Union asserts that the issue is more properly described as the vacation pay entitlement of those who have been recalled from seasonal layoff after July 1, 2009 who have had their service, including time on layoff, reinstated under article 7.03(b) of the collective agreement. I am reminded that under article 7.03(b), " If a former employee is recalled and rehired ... his/her service shall include service prior to such layoff and further accumulation of service ... (for the period of the layoff dependent upon years of service at the time of layoff.)" I am further reminded that there is no requirement under article 11 for an

employee to be actively at work on June 30/July 1 in order to qualify for the vacation pay to which an employee qualifies based on service.

The Union submits that article 11.06 does not apply to employees who have been recalled from seasonal layoff and had their service reinstated under article 7.03(b). Article 11.06, it is argued, has no application once past service has been reinstated. The effect of the reinstatement of service is to, in effect, reverse the termination such that article 11.03 then applies in the case of a seasonal layoff where, upon recall, service has been reinstated under article 7.03(b). To hold otherwise, it is submitted, would have the effect of truncating benefits earned over years of service and, as well, would produce the inequitable result of providing the enhanced vacation pay under article 11.03(a) to seasonally laid off employees who may have been recalled only a few days in advance of the July 1 date relied upon by the Company. Vacation accrues with service, it is argued, such that the reinstatement of service under article 7.03 must include service-related benefits, including vacation. The Union disagrees with the Company that vacation payment for those on seasonal layoff who are not recalled by July 1 is determined on the basis of "a point-in-time analysis" that ignores the reinstatement of service under article 7.03(b).

I am asked to find that seasonally laid off employees are treated differently than other terminated employees as evidenced by the November 17, 2008 letter of understanding in that the payment of vacation pay at 2% per week of entitlement is not paid at the time of termination. The subsequent reinstatement of service, it is

argued, results in an article 11.03(a) calculation of vacation pay for those recalled prior to July 1 and the recalculation of vacation pay under article 11.03(a) for those recalled after July 1 who had been paid vacation pay on July 1 under article 11.06. The Union reiterates that the article 11.06 calculation applies at the time of termination to employees terminated with recall rights but argues that it does not apply to those on seasonal layoff who are subsequently recalled (either before or after July 1) and who have their service reinstated under article 7.03. These employees, it is submitted, must be treated as if they had not been laid off and their vacation pay calculated under article 11.03(a). Because none of the grievors falls within the exceptions set out in article 11.03(b)(i) or (ii), they are entitled, it is argued, to vacation pay equal to their average hourly earnings in the calendar year immediately preceding, times 40, pursuant to article 11.03(a).

The Union relies upon *Stelco Inc. Hilton Works and United Steelworkers, Local 1005* *(1983) 11 LAC (3d) 388 (Adams)* in support of the proposition that even in respect of "former employees" who enjoy recall rights, the Company is obligated to exercise its management discretion reasonably. *Sola Basic Ltd. and International Association of Machinists, Local Lodge 1168* *(1976) 11 LAC (2d) 328 (Beck)* is cited in support of the proposition that vacation pay is a benefit earned through service and that such an earned benefit is not to be taken away or reduced except by express provision, such that a requirement for active service cannot be implied. It is submitted that there is no such express provision in this case. *Selkirk Metalbestos Household*

Manufacturing Canada (Inc.) and Sheet Metal Workers (1992) unreported (Kates) is cited in support of the proposition that an express provision is required to truncate a service-related benefit such that it cannot be implied that a laid off employee with recall rights is ineligible for vacation pay by reason of not being actively at work.

Finally, it is submitted that the 1991 award of arbitrator Fisher between these parties, as relied upon by the Company, is distinguishable. Whereas arbitrator Fisher ruled upon the entitlement of a laid off employee to statutory holiday pay (Christmas) while on layoff, the issue here concerns the vacation pay entitlement of an employee after recall and after reinstatement of service. Absent any consideration of the effect of the reinstatement of service under article 7.03(b), this award, it is submitted, is of no assistance.

The Company argues in reply that the Union argument that article 11.06 does not apply to employees who have been recalled after July 1 because their service has been reinstated cannot succeed. It is the submission of the Company, in reply, that the Union analysis falls down because the reinstatement of service under article 7.03(b) cannot be read as reinstating the vacation pay that would have been owed if the employee had been recalled prior to the end of the vacation year. Absent a provision under article 7.03 or elsewhere that provides for vacation pay as calculated under article 11.03(a) upon recall after July 1, it cannot be inferred, it is argued, that having service reinstated is to require that vacation pay be recalculated under article 11.03(a). The Company asserts that clear language, of which there is none, would be required.

The Company asserts further that when taken to its conclusion, the Union position lacks logic. If the effect of the reinstatement of service under article 7.03(b) is to cause the recalled employee to be treated as if he/she had never been laid off (which the Company disputes), thereby creating an entitlement to all service-related benefits then, it is argued, there would be an entitlement to not only vacation pay but also to holiday pay and health benefits, neither of which are provided while on layoff nor upon reinstatement of service upon recall. Further, it is submitted that the Union interpretation ignores the application of article 11.02 – the finite vacation year. It is submitted that the Union misses the interconnection between article 11.02 (the vacation year) and article 11.06 (the vacation payment to employees terminated during the vacation year). If there is any doubt in this regard, the Company points to the November 17, 2008 letter of understanding that expressly provides that seasonally laid off former employees who have not been recalled by July 1 are to be paid their vacation pay by that date. Just as a seasonally laid off employee is entitled to 2% per week of vacation entitlement at the commencement of the seasonal layoff, so too, it is argued, a seasonally laid off employee who has not been recalled prior to July 1 must be paid that amount at that time pursuant to paragraph 4 of the letter of understanding. In response to the Union's reliance upon article 11.03(a) and (b), the Company maintains that these clauses pertain to "employees," not to "former employees." It is submitted that "former employees" are dealt with under article 11.06. The Company argues that the <u>*Fisher award*</u> *(supra)*, contrary to the Union assertion, is helpful

because it rejects the distinction between permanently laid off employees and temporarily laid off employees drawn by the Union and because it accepts the existence of a finite vacation year. Finally, the Company argues that the awards relied upon by the Union that stand for the proposition that service-related benefits cannot be truncated without express language are of assistance to the Company because there is express language in this agreement that directed the Company to do what it did in calculating the vacation pay of the grievors.

DECISION

The Union is correct when it describes the issue as determining the vacation entitlement of those subject to seasonal layoff in October 2008 who were not recalled until after July 1, 2009 who then had their service reinstated under article 7.03(b). More precisely, the issue is whether the reinstatement of service under article 7.03(b) has retroactive, as well as prospective, effect. This is an unusual collective agreement in many respects not only because of the deemed termination provision, under which an employee subject to even temporary layoff for lack of work is deemed terminated and the two-track vacation pay calculation provisions, but also because of the provision that reinstates service upon recall within a stipulated period. It follows that in determining the intention of the parties with respect to the calculation of vacation

pay for those recalled from seasonal layoff after July 1 in any year, effect must be given to all the relevant provisions including both the letter of understanding and the reinstatement of service provision. I have applied the language of this collective agreement to the facts of this case and have determined that the Company was correct in calculating the annual vacation pay owing to those recalled from seasonal layoff after July 1, 2009 under article 11.06.

If it were not for the letter of understanding dated November 17, 2008 (that forms part of the collective agreement), that speaks directly to the issue of vacation payment for those subject to seasonal layoff in 2008, these grievors (apart from any question as to whether a recalculation of vacation pay would have been required at recall by reason of the reinstatement of service under article 7.03(b)) would have been entitled under article 11.06 to 2% of earnings from the preceding July 1 in respect of each week of vacation entitlement. This is so because under article 7.02, "Service and employment shall be terminated when an employee ... is laid off for lack of work" and under article 11.06, "An employee whose employment is terminated shall be paid vacation pay in the amount of 2% of his/her earnings since the preceding July 1st in respect of each week of vacation to which he/she was entitled on such July 1st." Absent the November 17, 2008 letter of understanding, a payment based on 2% of earnings would properly have been made to the grievors at the time of termination.

The November 17, 2008 letter (designed to assist laid off former employees with employment insurance claims) confirms the agreement of these parties with

respect to a number of points dealing with the 2009 vacation payment for those employees whose service and employment was terminated as a result of the October 2008 temporary layoff. The letter confirms that vacation payment shall be made upon termination (as it otherwise would) only if specifically requested by an employee (paragraph 2). (This would be the 2% per week of vacation pay entitlement under article 11.06.) Secondly, the letter confirms that in respect of a former employee recalled prior to July 1, "Vacation payment shall be made to a former employee who may be recalled to work at the time such employee takes vacation or, in the case of an employee recalled in accordance with the Basic Agreement, payment shall be made by July 1, 2009 (paragraph 3)." Because these former employees would have been recalled and, therefore, employees within the meaning of the collective agreement at the time vacation payment was to be made, they would have been entitled to payment under article 11.03, i.e. average hourly earnings during the preceding calendar quarter multiplied by 40. There is no dispute in this regard. Finally, the letter confirms, without specifying the amount, that vacation payment shall be made by July 1, 2009 to any former employee not recalled to work as of that date (paragraph 4). Having regard to the July 1 to June 30 vacation year, to the effect of article 11.06 and to the absence of any elaboration in the letter as to the amount of the vacation pay, the entitlement under paragraph 4 of the November 17, 2008 letter must be the same as that at the time of layoff under paragraph 2, i.e. 2% of earnings from the previous July 1 for each week of vacation entitlement. This is because under the terms of this

collective agreement, both those receiving vacation pay under paragraph 2 and those receiving vacation pay under paragraph 4 would have been "former employees" on layoff whose service and employment had been terminated at the time of payment. Absent a recalculation of the vacation pay entitlement following the reinstatement of service under article 7.03(b), therefore, payment would be on the basis of 2% of earnings under article 11.06.

The issue then, to reiterate, is whether, in addition to having prospective effect (which it clearly does), the reinstatement of service under article 7.03(b) has, as well, retroactive effect in the sense that it allows recalled employees to claim service-based entitlements that might have arisen during a layoff when, under the terms of the agreement, service and employment would have been terminated.

In the context of a collective agreement that expressly terminates service and employment during any layoff for lack of work, it can reasonably have been expected that if the reinstatement of service upon recall was intended to allow the terminated employees to reach back as if the termination had never occurred, there would be express words to this effect. However, article 7.03(b) says nothing about retroactive application. Its silence in this regard supports the inference that the reinstatement of service is not for the purpose of allowing the recalled employee to claim service-related entitlements that may have arisen during the period of the layoff when service and employment were terminated but rather is for the purpose of establishing claims to service-related entitlements going forwards from the time of recall. Indeed, the dual

prerequisites to the reinstatement of service under article 7.03(b) of being both "recalled and rehired" suggests a fresh point of departure. The reference to being not only "recalled" but also "rehired," consistent with there having been a termination of employment, underscores the hiatus in employment that exists during a layoff, thereby supporting the conclusion that express language, of which there is none, would be required to obviate the effects of this hiatus.

The hiatus in the employment relationship caused by the termination of service and employment occasioned by a layoff for lack of work was driven home to the parties by arbitrator Fisher in his 1991 award between these parties. The issue in that case, on essentially the same language as before me, was whether "former employees" on seasonal layoff were entitled to receive payment for Christmas Day pursuant to article 12.01 which provides that, "All employees covered by the Basic Agreement will receive a day's pay ... for Christmas Day." In ruling that these "former employees" were not entitled to pay for Christmas Day, arbitrator Fisher found that unlike many other collective agreements under which seniority and employment are only lost after a layoff of a specific length, there is no distinction in the deemed termination provision (at 7.02(c)) of this collective agreement between temporary and permanent layoff and that those on layoff (temporary or permanent) have their service and employment terminated. Arbitrator Fisher went on to draw a distinction between "employees" and "former employees." He describes the latter as seasonally laid off employees who are limited to recall rights, some access to the grievance procedure,

entitlement to SUB, limited entitlement to some medical benefits and the right to accrue some seniority during the period of layoff, i.e. reinstatement of service under article 7.03(b) as it was then and as it is now. In denying entitlement to pay for Christmas Day under article 12.02, arbitrator Fisher concluded:

> Insofar as the parties have negotiated a special status of "former employee" and assigned special rights to that status, it follows that where the Basic Collective Agreement speaks of "employees", it must be referring to people other than those designated as "former employees". Therefore, on the terms of this agreement "employees" do not include people on layoff.

The parties have not amended the relevant language since the release of the Fisher award in 1991.

Given the hiatus in employment that is occasioned by even a temporary layoff, given the agreement at paragraph 4 of the November 17, 2008 letter of understanding to make the 2009 vacation year payment to those seasonally laid off in October 2008 and not recalled prior to July 1, 2009, on July 1, 2009 (at which time the grievors would still have been "former employees" and not "employees" within the meaning of article 11.03(a) entitled to payment on the basis of average hourly earnings during the preceding calendar quarter multiplied by 40 for each week of vacation entitlement), one could reasonably have expected that, if there was to be a recalculation of vacation pay following recall triggered by the reinstatement of service under article 7.03(b), the letter would have spoken to such recalculation. There is no reference to a recalculation of vacation pay entitlement upon the reinstatement of service following recall. Indeed,

at a more fundamental level, if the parties had understood that the reinstatement of service would result in the recalculation of vacation pay under article 11.03(a) as if the "former employee" had been an "employee" at the time, there would have been no reason to distinguish between those recalled before July 1 and those recalled on or after July 1, as the vacation payment would be the same for both regardless of the date of recall.

The absence of any reference in the letter (a letter that deals specifically with the payment of vacation pay for those on seasonal layoff from October 2008 and specifically to those not recalled by July 1, 2009) to the recalculation of vacation pay for those recalled after July 1, 2009 supports the conclusion that the reinstatement of service under article 7.03(b) is not intended to have retroactive effect in the sense that service-related entitlements that might have arisen during the layoff to which a laid off former employee had no claim at the time may be claimed upon recall when service is reinstated.

The Union asks me to distinguish the award of arbitrator Fisher on the basis that while that award determined that an employee on seasonal layoff had no entitlement to Christmas pay, it did not address the issue of whether an employee on seasonal layoff, who has been recalled and who has had his/her service reinstated, is entitled to Christmas pay under article 12.02. The Union is correct on this point. However, the Fisher award is, as I have found, relevant in that it underscores the nature of the hiatus in employment caused by even a seasonal layoff. Furthermore, it

should be observed that even though article 7.03(b) in its present form was within the collective agreement before arbitrator Fisher, the issue of whether the payment for Christmas Day would trigger upon recall and rehire when service is reinstated was never raised. It can reasonably be assumed that if the Union was of the mind that the reinstatement of service under article 7.03(b) as it was and as it is now was intended to allow the laid off (terminated) employee to reach back and claim service-related benefits as if the layoff (termination) had never occurred, it would have raised the issue in pursuing its claim for payment for Christmas Day.

The Union argues that the result of not giving the reinstatement of service retroactive effect produces an unfair result in that those recalled immediately before July 1 receive significantly more vacation pay than those recalled shortly after July 1. As I have already observed, if the parties had intended to treat those recalled and rehired before July 1 the same as those recalled and rehired after, there would have been no reason to distinguish between the two.

Furthermore, while it would appear on its face that the July 1 cut-off date works an unfairness to those recalled after July 1, it must be remembered that were it not for the November 17, 2008 letter of understanding, the vacation pay entitlement for all seasonally laid off employees, whose service and employment are terminated under article 7.02(c), would be 2% of earnings from the previous July 1 under article 11.06, payable at the time of termination. The letter is designed to allow all laid off former employees to defer the taking of vacation pay to facilitate their individual

claims for employment insurance payments. In addition, under the letter, those recalled before the end of the vacation year are treated as "employees" within the meaning of article 11.03(a) when their vacation pay is calculated. While the decision of the parties to maintain the integrity of the vacation year, i.e. July 1 to June 30, by requiring that vacation pay be paid out for all those on seasonal layoff by July 1 draws a line that causes those recalled after the end of the vacation year to receive a lesser vacation pay, it cannot be found on balance that the letter as I have interpreted it works an unfairness. To the contrary, it operates to the benefit of all the seasonally laid off former employees, albeit some more than others.

The Union asserts that to find in the Company's favour would require the importation of a requirement that an employee be actively at work in order to qualify for vacation pay under article 11.03(a). The Union cites authority in support of the proposition that such a restriction cannot be inferred but rather express language is required to truncate service-related entitlements. None of the cases cited deals with language similar to that contained in this collective agreement. In making a finding that the grievors in this case are not entitled to vacation pay under article 11.03(a), I have relied upon the express language read as a coherent whole. To summarize, I have relied on the language at article 11.02 that expressly establishes a July 1 to June 30 vacation year; the language of article 7.02(c) that expressly deems a laid off employee to have been terminated; the language at article 11.06 that expressly provides that a terminated employee is entitled to 2% of earnings for the period back to the previous

July 1; the letter of understanding that expressly provides that those on seasonal layoff from October 2008 who have not been recalled by July 1, 2009 are to be paid the vacation pay owing at that time, i.e. at the end of the vacation year; and the language at article 7.03(b) and the letter that refer to the terminated employees on layoff as "former employees," as distinct from employees within the meaning of article 11.03(a). When this language is read as a coherent whole, it is clear that absent the application of article 7.03(b) (reinstatement of service upon recall), these former employees were entitled to vacation pay in the amount of 2% of earnings from the previous July 1 for each week of vacation entitlement pursuant to article 11.06 as of when, under paragraph 4 of the November 17, 2008 letter of understanding, vacation pay had to be paid to them.

To summarize further, the issue then, as I have stated, becomes whether the reinstatement of service under article 7.03(b) has retroactive effect in that it serves to negate the otherwise clear impact of the layoff, i.e. termination, and allow the employee to claim service-related entitlements that arose during the period of the termination. When reference is had to the language of this collective agreement that terminates service and employment when an employee is laid off, thereby creating a hiatus in employment during which those laid off are referred to under the collective agreement as "former employees" (the hiatus identified by arbitrator Fisher in 1991 on language that has remained unchanged), there would have to be clear and express language to allow article 7.03(b) to operate with retroactive effect. There is no such

language in article 7.03(b), elsewhere in the collective agreement or in the November 17, 2008 letter dealing with the seasonal layoff of these grievors. Indeed, the requirement under article 7.03(b) that the "former employee" be not only recalled but also "rehired" as a precondition to having his/her service reinstated suggests the opposite. So too does the distinction drawn in the November 17, 2008 letter of understanding between those recalled before July 1 and those recalled on July 1 or later. In the result, it must be found that the reinstatement of service under article 7.03(b) is intended to have prospective effect so that the payment of vacation pay to the grievors under article 11.06 on July 1, 2009 on the basis of 2% of earnings from the preceding July 1 was in accord with the collective agreement.

Having regard to all of the foregoing, that part of the grievance claiming vacation pay under article 11.03(a) for those laid off in October 2008 and not recalled until after July 1, 2009 is dismissed.

PRE-RETIREMENT VACATION

I come to a different conclusion with respect to pre-retirement vacation under article 11.01(b). Neither the November 17, 2008 letter of understanding, which specifically deals with the "2009 vacation payment," which I read as meaning the 2009 annual vacation payment, nor article 11.06 speaks to the 15-week pre-retirement vacation. Whereas, consistent with the July 1 to June 30 vacation year, the November 17, 2008 letter of understanding specified that those who had not been recalled by

July 1, 2009 were to be paid their 2009 vacation year vacation pay at that time and whereas they would have been terminated "former employees" at that time and, therefore, limited to annual vacation pay under article 11.06, article 11.06 does not apply to the one-time 15-week pre-retirement vacation earned over 30 years of service provided for under article 11.01(b).

Article 11.06 deals with the annual vacation pay for the July 1 to June 30 vacation year owing to an employee who is terminated during the vacation year. Article 11.06 provides for "vacation pay in the amount of 2% of his/her earnings since the preceding July 1st in respect of each week of vacation to which he/she was entitled on such July 1st ...." Given the July 1 to June 30 vacation year (article 11.02) and the annual vacation entitlement based on service as of July 1 of each year (article 11.01(a)), it could not be more clear that article 11.06 determines the annual (as distinct from pre-retirement) vacation pay owing to an employee who is terminated during the vacation year. If any further evidence of intention is required, article 11.06 goes on to include in the 2% calculation "any payment to which he/she is entitled under clause 11.04." Article 11.04 provides for bonus payments for annual vacation taken during specified months. Surely, if the parties thought it necessary to expressly include these bonus payments in the article 11.06 calculation, they would also have referenced the one-time 15-week pre-retirement vacation under article 11.01(b) if it had been their intention to have article 11.06 also apply to this entitlement. Their failure to have done so evidences an intention not to have article 11.06 apply to the

one-time 15-week pre-retirement vacation earned over 30 years of service. Accordingly, payment for pre-retirement vacation must be under article 11.03 and not just by default. Pre-retirement vacation entitlement under article 11.01(b) triggers "immediately prior to his/her retirement date." Because service does not accrue during a layoff when an individual is "terminated," the effective date of retirement must either precede or follow a layoff. It follows, therefore, that an individual would be an "employee" within the meaning of the collective agreement "immediately prior to his/her retirement date," entitled to pre-retirement vacation pay calculated under article 11.03.

Having regard to the foregoing, the grievance as it pertains to vacation pay owing in respect of pre-retirement vacation under article 11.01(b) succeeds. Affected employees are to be made whole.

I remain seized of any difficulty with respect to the implementation of this award.

Dated this 28th day of June 2010 in the City of Toronto.

Kevin Burkett

KEVIN BURKETT