IN THE MATTER OF AN ARBITRATION UNDER
SECTION 104 OF THE *LABOUR RELATIONS CODE*, RSBC 1996 c.244

Between

RIO TINTO ALCAN INC.

(the "Company" or the "Employer")

- and -

UNIFOR, LOCAL 2301

(the "Union")

(Vacation Scheduling)

ARBITRATOR:	Kate Young
APPEARANCES:	Peter Shklanka, for the Union Charles Harrison, for the Employer
DATES OF HEARING:	June 6, 7 and September 22, 2016
PLACE OF HEARING:	Kitimat, British Columbia
DATE OF AWARD:	October 17, 2016

I. Introduction

Rio Tinto has expanded and modernized its smelter in Kitimat. The change over to the new equipment occurred while the old equipment continued to operate, and the Employer faced significant challenges ensuring the work force was trained to start up and operate the new smelter. In late 2015, three Departments of the smelter changed the manner in which vacations were scheduled for 2016.

The Union grieves the change, saying the Employer has violated both the Collective Agreement and a Settlement Agreement negotiated in 2014. The Employer says it has a management right to make the change, it has imposed similar restrictions in the past, and there was a valid business purpose for its actions.

II. The Collective Agreement

> Article 5 Rights Reserved to Management
> 5.01 The Union understands and agrees to recognize that the Company has the right to manage and operate its Plants. …
> 5.02 The Company understands and agrees that the exercise of its rights in this Article does not relieve the Company of its obligations arising out of any provision of this Agreement, or limit the rights of the Union or employees arising out of any other provision of this Agreement.
>
> Article 13 Vacations with Pay
> 13.01 (a) All vacations must be taken at a time satisfactory to the Company and will be arranged when possible, in accordance with the expressed preference of the employee and in accordance with the rotational plan provided in Section 13.02. Vacations shall normally be scheduled in unbroken periods, except as provided for in Section 13.01 (g) (deferred vacation), 13.02 (vacation rotational program) and 13.08 (broken vacation days). However, the employee may express their preference to schedule their vacation in periods of seven (7) consecutive days each.
> …
> 13.02 (a) The Company will continue to operate a rotational program for vacations which provides the maximum opportunity for each employee to select a vacation time during the preferred period. Should they elect to take their vacation in the preferred period, they will be allowed a maximum of twenty one (21) days in one unbroken block which will be taken in accordance with the particular circumstance and conditions of the Plant and the vacation group in which the employee belongs. An employee in selecting their vacation time will be allowed only one choice. Therefore, the employee who wishes to take their vacations in several blocks will be allowed to select only one block and the remainder will be taken according to Company seniority and Company requirement. The preferred period commences with the summer closing of elementary schools and extends for as many weeks as

> is required to schedule three consecutive twenty one day vacation blocks for shift workers.

III. The Facts

Rick Belmont, the past president of the Union, and Darrell Stelmaschuk, the Labour Relations Coordinator for the Kitimat smelter, testified as to the past practice. There has been a common understanding for many years as to how vacations will be scheduled. That practice has been set out in a joint bulletin and in annual bulletins published and broadly distributed by the Union. In 2012 the parties signed a 5 year agreement to cover the anticipated start up of the new smelter. The Employer obtained changes such as the right to hire transitional employees to cover this period. The Employer did not seek any changes to vacation scheduling. The start up of the new smelter was delayed until 2015 and the change over to the new operation was to be completed in early to mid 2016.

Vacations are scheduled in November and December for the following year. Each Department determines how many employees can be absent from work each day over the following year. Employees are permitted to take their vacations in increments of seven work days (exceptions to this are not relevant here).

All employees have an opportunity to schedule their vacations during the "preferred period", the nine weeks in the summer when children are out of school. Employees are permitted to take a maximum of three weeks of vacation during this period. If employees are unable to schedule their requested vacation during the preferred period in any given year, they have a "credit". Employees with credits have the first opportunity to select a block of vacation days the following year.

Once employees with credits have made their selections, vacations are scheduled in order of seniority. Selections are done in rounds. An employee can only book one continuous block of time in each round. If an employee does not choose to book his/her entire vacation as a block, the employee makes a first choice for a vacation period, then makes his/her second choice during the next round of selection on the basis of seniority, and the third and final choice(s) during subsequent round(s).

In the past, employees were entitled to book all their vacation entitlements in one block in the first round of vacation selection. For some senior employees this might be over nine weeks of vacation per year (and more if they have deferred vacation from a prior year). The only restriction placed upon all employees is that they are entitled to book a maximum of three weeks in the preferred period. They were able to book time at either the beginning or the end of the preferred period, and have a longer continuous vacation period.

Union Bulletins in 2006 to 2011, included the following:

> Question #9 – Can an hourly paid employee as their first choice book vacation time for the last three (3) weeks in preferred period and the first two weeks

> right after preferred period in one block? (this covers at the start of preferred period as well.)
> Answer – All the hourly paid employees with credits must first be offered their vacation in preferred period before anyone can combine weeks in preferred period and weeks outside preferred period into one (1) block or choice.

In late 2013, the Employer introduced a new policy for the scheduling of vacations in 2014. Only selections of vacation time in the preferred period could be made in the first round. Employees who wanted to take their vacation outside the preferred period would have to wait for the second round to select their first vacation block. This restricted all employees, regardless of seniority and total vacation entitlements, to a maximum block of three weeks in the preferred period in the first round of vacation selection.

The Union grieved this change in vacation scheduling and the parties settled in a Letter of Resolve dated October 2014 (the "Settlement Agreement"). Jose Pires, the Chief Shop Steward, represented the Union in these negotiations. He made it clear the Union sought a return to the status quo. Mr. Stelmaschuk testified that he understood this was the Union's goal and the parties agreed that senior employees could book weeks of vacation contiguous to the preferred periods; that is longer blocks of vacation which included either the three weeks at the end or the beginning of the preferred period. There was no discussion during these negotiations about the Employer imposing a maximum length to a continuous block of vacation.

The negotiators agree there was a discussion of the right of the Employer to impose vacation black outs, when no vacation could be booked. This occurred in 2014 and was not grieved by the Union. Mr. Stelmaschuk made it clear that, for a number of business reasons associated with the start up, there may be periods when no employee would be permitted to take vacations.

Mr. Stelmaschuk said he wanted a reference to management rights in the introduction because he anticipated issues with the start up of the new smelter. He testified he told Mr. Pires that certain vacation times might be unavailable because of the need to train employees. In cross-examination, he acknowledged he may not have mentioned training in these discussions. Mr. Pires testified there was no mention of training or shortage of skills. I need not resolve this disagreement, as I find the context of the discussions was regarding the imposition of black out periods, which is not before me in this grievance.

The Settlement Agreement states: "Nothing in this letter of grievance resolve supercede[s] the company's rights found in Article 5 or 13 of the CLA".

The Settlement Agreement reads, in part:

> First Round: …
> 3. When all vacation credits have been scheduled, the employee with the highest company seniority will be given the first opportunity to book their

> first choice of vacation in unbroken blocks of seven (7) days within any open blocks of time in the pay roll year.
> 4. Open blocks of vacation time in the preferred period are limited to a maximum of twenty one (21) days in one unbroken block. This does no preclude an employee from booking a twenty one day block of time at the beginning or end of the preferred vacation period and extending their vacation by adding further seven (7) day blocks of time outside the preferred vacation period as long as the time is available.

In October 2014, a Union Bulletin was issued stating that the "2015 vacation scheduling will go back to the old system". This Bulletin was signed by Mr. Stelmaschuk and Tanya Meyer, Human Resources Director.

In November 2015, the Carbon, Casting and Reduction Departments, changed the way employees could schedule their 2016 vacations.

In the Casting Department a decision was made that employees could book a maximum vacation block of three weeks in each of the first two rounds of vacation selection, whether they booked in the preferred period or not. Manny Arruda, the Coordinator of the Casting Department, had been there for only one year in June 2016. He perceived that junior employees would not get a fair opportunity to book their vacations in a manner which enabled them to get a regular break from work in 2016, and was concerned that less senior employees would burn out, as they were working substantial overtime with the start up of the new smelter.

The last four to five months of 2015 had been very challenging. The Department was changing from one type of production equipment to another. The equipment was not functioning as anticipated. A lot of employees worked involuntary overtime and many of them were junior. All employees had to be trained and cross trained in operating new equipment. Mr. Arruda feared that less senior employees would be unable to take their vacations until October or November 2016, if senior employees were able to book their full vacation entitlement in the first round. An employee told him he was tired.

The change was announced in a bulletin issued October 28, 2015. It read in part "Casting management understand that this may be different from previous years, but feel this [is] the fairest way to ensure everyone gets an opportunity to book throughout the year."

Human Resources asked Mr. Arruda for an explanation for the change. He wrote:

> Last year we had a black out period and the allowed vacation time was compressed and many people have taken a lot of time off on their first picks (which prevents other people from taking time off). With the limited amount of trained people due to new employees coming into the department, trained and competent employees have been working extra days to cover shifts in some cases having to work mandatory overtime to sustain operations and have gone long periods without time off. In an effort to ensure that all

> employees have a chance to take some vacation time and manage their fatigue for the safety of themselves and others we have limited the amount of time off on the first and 2nd round. If we did not do this and we allowed employees to take as much time off on their first round (in some cases employees have 8 weeks off in a row) it will prevent the lower seniority employees from potentially not having the ability to take a well deserved break and the ability to reenergize.

A table entered in evidence shows that more employees in the Department were able to take vacation weeks between June and mid-October in 2016. Mr. Arruda considered it important that junior employees have access to vacations during the prime time.

In cross-examination Mr. Arruda acknowledged that, at the time of this hearing in early June 2016, there were still vacation dates available in 2016. There were also times, not yet selected by any employee, which could have been booked in the period January to March 2016. He testified there was a potential problem and he took a conservative approach.

The parties agree that four employees in Casting were affected by this change. Antonio Almeida was denied a request to take a seven week block of vacation time. He was able to book three weeks in the first round and three weeks in the second round but not the dates he sought. Theo Maag wanted to take a six week vacation from October 10 to November 30. He was limited to three weeks in the first round. He was able to book off two additional weeks after the first round and booked an unbroken 5 week vacation. John Ferreira requested a four week block and was denied his request. He did not book an alternate time. Vitorino Abreau was told he must limit his first choice to three weeks. He took three weeks in the middle of the preferred period rather than six weeks of uninterrupted vacation.

David Alexandre Tremblay is the manager of the Reduction Department. He had held the position for one year in September 2016, and had been in the Kitimat smelter for 3 years. In his Department he introduced a change in the way vacations could be scheduled in 2016 and put a cap of four consecutive weeks of vacation, whether the vacation was within the preferred period or not.

Mr. Tremblay describes Reduction as the heart of the smelter, with 200 hourly employees and 40 staff. The smelter rebuild was substantial and the processes for the new pots were completely different. He compared the old smelter to a tank, and the new one to a Ferrari. The employees had to be retrained to operate all the new equipment and this was made more difficult because of the overlap in the operation of the two smelters.

Training was divided into four phases. The first phase, completed in 2015, required full time training for approximately 25% of the employees to start up the first new pots. Phase two was to train employees on a single task. There are 10 to 12 tasks for the operation and 24 to 84 hours of training is required per task. The third phase was to allow employees to take their summer vacations in 2016. Students and contractors were trained on one task to provide relief for employees on vacation. The fourth phase to cross train all employees on all tasks commenced in August 2016.

There were limited windows to train employees and if there were problems, such as a power outage or instability with the equipment, that window was lost. In the fall of 2015 there were ten power outages, the demand for product was high and the Department was barely keeping up. Employees from the Quebec operation were brought in, but their numbers were limited because only volunteers came to Kitimat. No other skilled and fully trained people were available to train others. Also, as more pots came on line there was limited equipment available for training. The Employer was short of both time and personnel for training. During 2016, new employees were transferred in from other Departments and their pre-arranged vacation periods had to be accommodated.

On November 30, 2015, Mr. Tremblay sent a notice to the hourly employees explaining the reasons for the limit of 4 consecutive weeks of vacation (unless he approved an exception): "[To] Allow more flexibility with training and cross-training; minimize impacts when key people go on vacations; maximize retention of the recently acquired skills; limit the impact on employees of all the HSE, technical and organizational changes". The memo concluded "Other operational areas also have similar restriction to be able to deal with another challenging year where people are still learning their job in a constantly evolving environment."

The Reduction Department brought in 20 more employees and more trainers to ensure there would be an opportunity for everyone to take a summer vacation. The impact of the 4 week limitation on blocks of vacation meant that more employees were able to schedule their vacations in the preferred period. Some employees were initially unable to schedule all their vacations in 2016 and more slots were opened up in the spring and fall of 2016. Extra resources were brought in. Mr. Tremblay anticipates there will be no similar limitations placed on vacation scheduling in 2017.

One employee in the Reduction Department was unable to book his desired vacation. Mario Lagana wanted April 30 to June 3 off. He was able to book May 14 to June 3 in the first round. On the second round he booked April 30 to May 6. He had to work a few days in the middle of his vacation.

Joe Bellows is the Carbon ABF Coordinator. There are new processes in his Department also and extensive training is required for all employees. The Carbon Department creates anodes to be used in Reduction and must keep up with the schedule set by the Reduction Department. In late 2015 when considering vacation scheduling for 2016, the Carbon Department manager, the other coordinator and Mr. Bellows decided that vacations should be limited to blocks of a maximum length of four weeks. Tom Bolton and Joe Lourenco were two employees in the Department who sought longer vacations.

Tom Bolton wanted to book five straight weeks. This request was denied. He was told to book four weeks and a longer vacation would be considered later in the year. He later withdrew his request for five weeks.

Joe Lourenco sought an eight week vacation to visit his family in Portugal. He was told he would have to split his vacation into two 4 week segments, but that his request would be

reviewed in June 2016. Taking into account his success at being trained, his competence and his ability to retain information, he was given the 8 weeks off in a row when his request was reconsidered in the summer of 2016.

IV. Positions of the Parties

1. The Union

The Union says that the Collective Agreement addresses the question of the length of a continuous vacation. The parties agreed that there would be a limit placed only upon vacations booked within the preferred period. No limit is placed upon requests outside the preferred period. The Employer unilaterally altered the Collective Agreement, and effectively placed the entire year in the same category as the preferred period when it limited vacation blocks to 3 or 4 continuous weeks. The Employer is only permitted to restrict the length of vacations during the preferred period. If there is a discretion, it must be reasonably exercised. The effect of the change is to give priority for available vacation slots to less senior employees.

The Collective Agreement specifies that vacations "will be arranged when possible in accordance with the expressed preference of the employee" and this language should carry weight. If the Employer is concerned that senior employees will not be available to train others, the Employer can hire more trainers or train more employees internally. If the Employer is concerned that employees will forget their training, employees can have their training refreshed upon their return or they could be trained longer in one area to ensure the retention of the knowledge. The training schedule could be altered to accommodate vacations. The Employer can consider other options to ensure that employees get the benefit of the Collective Agreement. The Employer is not entitled to restrict the length of vacations for business reasons.

The Settlement Agreement confirmed the agreed to process of vacation selection which did not "preclude" vacations that extended before or beyond the preferred period. This was violated. The settlement does not restrict the length of vacation blocks.

The Union relies upon past practice. Access to long unbroken blocks of vacation is one of the benefits of seniority. The Employer has an obligation to provide employees with earned vacation time and, if there is a concern about fairness, the Employer should seek an alteration to the Collective Agreement. The Employer must organize its operations so as to provide employees their earned vacations, or ensure adequate manning.

The Union seeks a declaration that the Employer violated the Collective Agreement and/or the Settlement Agreement and that the Employer cease and desist. The Union seeks an Order requiring compliance with the Settlement Agreement and compensatory damages of $25,000.

2. The Employer

This is an extraordinary time at the mill and an extraordinary change to vacation scheduling was required to ensure the safety of the installation of the new production line.

The right to restrict the length of an employee's vacation is consistent with the existing and recognized rights of the Employer to determine how many employees can be off at any one time, and to black out certain periods from any vacation time. The Employer has a clear reserved management right to act as it did, the only limitation is that it must act reasonably, and it did so here. The Settlement Agreement did not vary the Collective Agreement and there has been no violation. No guarantee was ever given that employees could schedule their vacations in a block.

Each Department had a different approach. Casting Department employees could have continuous vacations, but could do so only if the time they wanted was available in a subsequent rounds of vacation selection. This was to ensure fairness. In Carbon and Reduction the four week limit was imposed to ensure knowledge and skill retention. This was not a blanket, arbitrary rule and exceptions were permitted. The Employer need not hire other employees or take extraordinary measures to allow employees to schedule vacations as they wish. Even if it did hire more employees, they would have to be trained and the equipment is not available to train new employees. The Employer hired everyone it could who was already trained.

Employee preference for vacations must take second place to production needs. Article 13.02 specifies that employees "will be allowed a maximum of twenty one (21) days in one unbroken block [within the preferred period] which will be taken in accordance with the particular circumstance and conditions of the Plant and the vacation group in which the employee belongs".

V. Analysis

I start with a consideration of the Settlement Agreement which was reached in response to a grievance arising from the introduction of a rule that an employee's choice in the first round of vacation selection for 2014 was limited to a three week period within the preferred period. The Union argues the Settlement Agreement prohibits the Employer from placing restrictions upon the entitlement of employees to book an unbroken block of vacation time in the first round of vacation selection, (except when the employee selects the 21 day block in the middle of the three vacation blocks in the preferred period).

Under the terms of the Settlement Agreement, employees in the first round were to be given their "<u>first choice of vacation</u> in unbroken blocks of seven days within <u>any</u> open blocks of time" (by seniority after the vacation credits had been scheduled). These words evidence an agreement that employees should be given their choice of vacation in the first round with no limits as to length, as long as an existing vacation slot is still unclaimed.

The Settlement Agreement goes on to say that although blocks of vacation time in the preferred period are limited to a maximum of 21 days, this did "not preclude an employee from booking a twenty-one (21) day block of time at the beginning or end of the preferred vacation period and extending their vacation by adding further seven (7) day blocks of time outside the preferred vacation period as long as the time is available." That is, the restriction on booking only three weeks within the preferred period did not diminish an employee's entitlement to book a longer unbroken period of vacation by adding on vacation entitlements to the beginning or end of the preferred period. It is reasonable to imply from this term that the limitation of 21 days in the preferred period also does not preclude an employee from booking an unbroken period of vacation completely outside the preferred period which is longer than 21 days by adding further 7 day blocks.

The Employer argues that the term "as long as the time is available" means that management retained its right to restrict the booking of vacations outside the preferred period so as to maintain the Employer's control over the total length of a block of vacation. I disagree and find that the term reflects the Employer's right to determine how many employees may be absent from work at any one time, and its right in extraordinary circumstances to block out periods of vacation entitlement. It also refers to the reality that when an employee has his/her opportunity to make a vacation selection, an employee with greater seniority or a credit may have already claimed that slot. This language does not entitle the Employer to impose restrictions on the length of a continuous block of vacation.

The unbroken pattern of at least 34 years of placing no restrictions on the length of earned vacations booked in the first round of selection, indicates a mutual understanding that the Employer has no such entitlement under this language.

The Employer argues this is an extraordinary time and, with the new smelter and new technology, past practice can no longer provide guidance to the parties, that is, how the Collective Agreement worked in the past is not informative as to how it should work in the future. I again disagree. If the Employer finds that the language of the Collective Agreement is not suited to its current challenges, it must seek an amendment to the language or the express agreement of the Union to relieve it of its obligations. The negotiations in 2012 indicate the parties were capable of reaching such agreements when the transition to the new smelter was first contemplated.

I find that the Union and its members very legitimately assumed that there would be no change to the practice while the Collective Agreement language remained the same. The Settlement Agreement must be interpreted in the context of the statements made during negotiations and reiterated in the Union Bulletin, dated October 2015 and signed by the Employer representatives, that "For 2015 vacation scheduling it will go back to the old system". The "old system" placed no restriction on the length of unbroken vacations (subject to the special rules about the preferred period).

The decisions made by the three Departments at the end of 2015 for the 2016 vacation year are inconsistent with the expectations of the parties emerging from the grievance resolve of October 2, 2014. The three Departments unilaterally limited the number of seven day blocks

which could be booked in the first round of vacation selection, either to three, as in Casting, or four, as in Reduction and Carbon. This was not the status quo.

The Casting Department's 21 day limit during the first round of vacation selection precludes an employee from "extending their vacation by adding further seven (7) day blocks of time outside the preferred vacation period". The Casting Department not only precluded additions to the preferred vacation period, it placed the same limits on every other periods of the year as in the preferred period. It has changed the entire year to be a "preferred period". This is clearly contrary to the express words of the Settlement Agreement.

The actions of the Reduction and Carbon Departments, in restricting vacations to a 4 week maximum, is inconsistent with the mutual understanding of the parties following the grievance resolve, and the express and implied terms of the Settlement Agreement. This is a case where the extrinsic evidence, of what was said during negotiations and past practice, aids in interpretation. While the language does not clearly state that no limitation will be placed on the length of vacation blocks selected in the first round, it is stated by implication, and confirmed by the evidence that the parties expected a return to the status quo.

The Settlement Agreement does not supersede the Employer's rights under Article 5 or 13 of the Collective Agreement. Does Article 5 is the Management Rights clause entitle the Employer to place restrictions on the length of vacation time which can be booked in any round of selection?

It is common ground that an employer must act reasonably and fairly in exercising its management right to administer the vacation entitlement of employees. My role is not to second guess the Employer's judgment, and substitute my judgment for that of the Employer in management areas. However, I am entitled to ascertain the operational needs of the Employer on the basis of the evidence, and to assess whether the action taken is a reasonable response to these needs.

In considering the limitations placed upon management's right respecting vacation scheduling, I rely upon the judgment of Allan Hope respecting the same collective agreement in *Alcan Smelters and Chemicals Ltd. and Canadian Auto Workers, Local 2301 (Da Costa Arbitration)*, [1995] 39 CLAS 455. The case arose from a request to book banked Compensation for Time Worked. The Employer denied the employee request for specific days. The case involved almost identical language to that before me:

> CFTW's must be taken at a time satisfactory to the company. When possible these will be arranged with the expressed preference of the employee.

The Employer denied the request on the basis that it could not be assured of having a properly trained replacement available on the dates selected by the grievor. Arbitrator Hope held that the Employer had provided a reasonable explanation and was entitled to make the needs of production a priority, and dismissed the grievance. He adopted the reasoning in *Re Metro Transit Operating Co. and Independent Canadian Transit Union* (1984) 14 L.A.C.(3d) 358 (Dorsey):

> a party who has a discretion must exercise it 'reasonably' so as not to defeat the legitimate rights and expectations of the other party to the collective agreement…

Arbitrator Hope concluded:

> It is trite to say that such exercise of the Employer's discretion must be reviewed on the particular facts and a determination made on the balancing of interests test …

The Employer must have a good reason related to its production or business needs to alter a lengthy past practice which has continued with the clear agreement of the parties. The legitimate rights and expectations of the Union and its members will be defeated if the Employer fails to provide a reasonable explanation for changing its historic practice.

The situation of the Employer going into 2016 is a very important consideration in balancing the interests of the parties. There is no question that the Employer was going through a challenging period. As very well described by Mr. Tremblay, the start up of the smelter was an unusual process and it was unique that one smelter would open, while the old smelter continued to operate. The last start up of any smelter was 15 years ago and there were many unknowns. The new operation is more fragile and less forgiving. During other start ups, pots and production have been lost, costing millions of dollars. The new smelter has 384 pots in Reduction. Each processes 3000 tons of metal. Each pot costs $800,000 and each day a pot is not operating costs $3,000. There is no question that the Employer had significant production issues to address in late 2015.

Balanced against this is the right of employees to schedule their earned vacation in accordance with their expressed preference. The actions of the three Departments in 2016 had an impact on those employees who are entitled to more than three or four weeks of vacation a year. This limit was felt by more senior employees. The benefits of seniority are of primary importance to any union. An employee's seniority, under the terms of a collective agreement gives rise to important rights such as relief from layoff, right of recall to employment, promotions, transfers, vacations and vacation pay, to mention only a few. As noted by counsel for the Union, more junior employees will not get the best selection for vacation blocks (although the preferred period offers significant protection for them) knowing that their turn will come. Seniority is an earned benefit, not only by longevity in the workplace, but in recognition of the sacrifices and struggles which senior members have made for the bargaining unit as a whole, through contract negotiation and administration, and industrial unrest. Rights derived from seniority should only be diminished or abridged in exceptional circumstances.

This is not a situation where a neutral rule has had an unintended impact upon a particular group of employees. This is a situation where the intent of the Employer is to restrict the length of unbroken vacation for those employees who have earned the longest vacations.
The changes made by all three managers had the effect of singling out more senior employees to different treatment, treatment which is contrary to an extensive past practice.

This fact imposes a greater onus upon the Employer to establish a real and legitimate business reason related to ensuring productivity in the work place.

In balancing the interests of the Employer and the Union, I take into account the context. The reasons given for the decision differ in the three Departments and I will address each in turn.

The Casting Coordinator decided to limit the length of a vacation block for the first two rounds of selection to a maximum of three weeks each in order to provide more opportunities for junior employees to get needed vacations early in the year. He said he was concerned that junior employees would not have time off until October or November 2016, after the senior employees had booked their vacations. Mr. Arruda defended his decision saying he did not want some of the employees in his Department having to go 8 or 9 months before getting a vacation. He was concerned that these employees would suffer burnout as many had been working significant overtime. His stated reason was that everyone needed a break, and he saw a potential for junior employees waiting too long for their vacation.

As it turned out there were many opportunities for employees to take breaks in the beginning of the year up until spring break. Mr. Arruda admitted he had very little knowledge of the history of booking vacations in the Casting Department, having come to the Department only one year before. He had no reasonable basis for assuming that vacations could not be booked until the fall of 2016 for junior employees. I find that Mr. Arruda changed the historical practice with little consideration of the Collective Agreement or the fairness which the parties had built into its practice. The preferred period gives a fair opportunity for all employees to take a break in the summer months. The parties have considered the fairest way to address this and concluded that a credit system is the best way to redress this problem. Mr. Arruda placed his own personal view of what is fair and equitable over the agreement of the parties.

More significantly, Mr. Arruda did not provide a reasonable business or production rationale for his action. Mr. Arruda was speculating that junior employees, who may be required to work overtime, might find that they were burned out. He had no evidence to support this conclusion. Although there was significant overtime worked in 2015, only one employee reported he was tired. In conclusion, I do not find a valid business reason for the change in the Casting Department.

The Manager of Reduction and a Coordinator in Carbon imposed a limit of four consecutive weeks for each block of vacation. The two Departments underwent significant changes with the new smelter installation and extensive training was required.

Key employees were trained to be trainers in the Reduction Department. Training had to be organized around the availability of equipment and competent knowledgeable trainers. Mr. Tremblay's evidence that four of the five modern smelters which have started up have failed, from lack of proper training of employees, was unchallenged. Very little of the old knowledge was useful and there were many new employees. Bringing everyone's skill level up was necessary and complex.

Mr. Tremblay testified there were several problems with long vacations. Key employees trained to train other employees would not be at the work place. Senior employees not yet fully trained, or not fully familiar with the equipment, would lose out on training opportunities and be left behind in terms of their needed skills. The training required is very complex and the newly acquired skill and knowledge may be lost and the employee would have to be retrained if they were off on a long vacation.

A new type of furnace was introduced in the Carbon Department to prepare to produce the anodes used in Reduction. Extensive training was required for all 43 employees in the Department. The production of anodes had to coordinate with the new pots coming on stream. Mr. Bellows was a party to the decision to reduce the time off, with the understanding there would be exceptions allowed.

Several reasons related to training were given to limit the vacation entitlement in the two Departments. The success of the change-over and the start up of the new smelter depends upon the employees who operate the equipment. There could be a failure without training and the skills to operate the equipment.

One reason given for the decision to limit blocks of vacation was to ensure that qualified trainers were available to train other employees. The Employer selected key employees to train early and to provide training to others. In making this selection the Employer could take into account that senior employees are entitled to long periods of vacation during which they could not train. The Employer could schedule training in 2016 around the longer vacations which would have been booked but for the change in practice. The Employer had other trainers available from its Quebec operations and they could be used during the periods when training was essential and the equipment was available, but a trainer was off on vacation. I am not convinced that training opportunities would be compromised more because an employee is off for 6 or 7 weeks in a row rather than in two periods totaling 6 or 7 weeks.

A related reason given is that employees who are absent for long vacations may miss out on training and cross training opportunities. Again, I am not satisfied that these obstacles could not be overcome by planning in advance when employees will be trained and cross trained taking into account their vacation schedules. Employees are entitled to take time off and this will interfere with their training. It is not clear that having shorter, more numerous vacations would be easier to accommodate.

The Employer is concerned that employees will miss out on some steps in the development of the production process if they are away for a long period of time. Again, breaking up a vacation will not necessarily address this problem. Employees who are away for 4 or 7 weeks will perhaps need to be brought up to speed on how many pots or furnaces are operating and what changes have occurred during their absence.

In my view the Employer was using a very blunt instrument to accomplish a goal which could be reached by other means.

The Employer's most persuasive argument in support of limiting the length of vacation blocks, is that an employee who has recently acquired a skill may lose the benefit of the training if shortly after learning the skill they are absent for a prolonged period. Once trained, an employee will need significant operating experience before the task is learned and remembered.

While there is merit to the argument, I note several flaws. The first is that it is very speculative that an employee who is absent for 7 or 8 weeks is going to lose their memory of a skill, more than an employee who is away for 4 weeks. Being absent for two lengthy periods may result in a greater loss of knowledge, not less. Second, the Employer will know well in advance when an employee will be away for a lengthy vacation and can take the vacation schedule into account in deciding what training should occur and when. The training could be scheduled so as to provide an employee sufficient time to really learn a new skill before going on vacation. If the Employer is concerned that an employee has forgotten some skill after 4, 6 or 8 weeks, a short refresher might need to be built into the training schedule.

A review of the facts from the Carbon and Reduction Departments indicates that the fears were not well founded. Mr. Lourenco was given the opportunity to take a lengthy vacation. The problems anticipated from an unbroken vacation were not avoided when Mr. Lagana had to separate his vacation in the Reduction Department by a period of only a few days. I am mindful of the dangers of taking advantage of subsequent events when analyzing an earlier decision, but I think the evidence of what occurred during 2016 underscores that the Employer was not thinking through the issue before changing a lengthy past practice.

In my view, this comes down to a lack of respect for the seniority rights of the affected employees. The Employer built in many protections so that employees, including junior employees, had an opportunity to take vacations during the summer months. Students and casual employees were brought on during the summer and trained to complete one task so as to maximize vacations during that period. The rights of junior employees to get vacation during the preferred period should be given no more weight than the right of senior employees to take their earned vacations at a time which suits them. The value of keeping trained, skilled and qualified employees in the long term should not be underestimated, and one of the perks of a long term commitment to this Employer is longer and preferred vacation times.

Adhering to one's obligations under a collective agreement is critical to the labour relations regime established by the *Labour Relations Code*, and this is recognized in the purposes of the *Code* set out under Section 2. A collective bargaining relationship is ongoing and expected to continue indefinitely. The success of the relationship is based upon mutual trust and cooperation. Part of the trust is that an agreement between the parties will be administered and applied in accordance with the legitimate and reasonable expectations of the parties.

The explanations provided by the Employer for the restrictions placed upon unbroken blocks of vacations are not reasonable, and cannot be justified by business demands. The directions

from these three Departments regarding vacation booking in 2016 are not authorized under the Management Rights Article of the Collective Agreement.

Further, I find Article 13 of the Collective Agreement consistent with the Settlement Agreement.

The parties have agreed to a limitation on the length of an employee's vacation time. This limitation is only during the preferred summer months. This agreement indicates the Employer does not have an unrestricted entitlement to place limits upon the maximum vacation which could be booked in one unbroken block.

Past practice aids in the interpretation of the phrase "All vacations must be taken at a time satisfactory to the Company and will be arranged when possible, in accordance with the expressed preference of the employee". Over a significant period of time and numerous collective agreements no restriction has been placed on the length of vacations. A mutual understanding has been established that the broad authority of the Employer does not extend to enable it to limit vacations in this manner. The Union and its members very legitimately assumed that there would be no change to the practice while the Collective Agreement language remained the same.

In conclusion, I find that the Employer breached the Settlement Agreement and the Collective Agreement by limiting the length of earned vacations blocks during the first round of vacation selection in 2016.

VI. Relief

The Union seeks an award of general damages as it cannot prove any direct economic loss suffered by any single employee. The Union relies upon *West Park Healthcare Centre and SEIU, Local 1,* 138 L.A.C. (4th) (Charney, Sack, Filion) where the arbitration board awarded damages of $10,000 to the union and $1,000 to each employee laid off in a restructuring. The employer acknowledged it breached the collective agreement as it did not contact the union as required. The Award concluded:

> While the monetary loss is not specific, the union and the employees are entitled to damages: the employees were entitled to damages for denial of the benefit of union representation, and the union for denial of its right to represent the employees pursuant to [the collective agreement], as well as for the injury to its reputation as an effective bargaining agent in administering the terms of the collective agreement. The union was not only marginalized; to all intents and purposes, it was ignored. The rights of the union and the employees have intrinsic value and compensation is warranted for their deprivation. (para. 11)

The Union also relies upon the decision in *The City of Calgary v. Calgary Fire Fighters Assn.,* [2009] AGAA (Polock, Laird, Landry). The Arbitration board found that there was

no entitlement to compensatory damages but, as an existing right of the union had been violated, there was an entitlement to general damages assessed at $5,000.

The Employer responds that no employee testified they had suffered a loss because of the change of practice. All employees were able to take their vacation and there was no real or significant hardship. This was an extraordinary year, a "one-off event" and the decisions made respecting vacation booking will likely not be repeated.

I have broad authority under Sections 84(2) and 89(a) of the *Labour Relations Code* to make orders setting the monetary value of an injury or loss suffered by a trade union or other person as a result of a contravention of a collective agreement, and to provide a final and conclusive settlement of a dispute without a stoppage of work. The awarding of non-compensatory damages for breach of a collective agreement can play a role in an arbitrator's exercise of remedial jurisdiction in exceptional circumstances. For instance, where it can be established that it is reasonably necessary to ensure future compliance with the collective agreement or in circumstances when an employer has profited from the violation. Damages may be assessed where there is an ongoing pattern of collective agreement breaches, or a clear need to deter further violations.

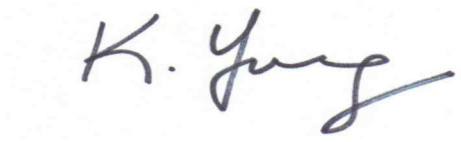
The evidence here does not establish that the Employer has engaged in an ongoing pattern of unreasonably administering its authority to schedule vacations. The long history of consistent application of the Collective Agreement, the Settlement Agreement, and the issuance of joint Bulletins, indicates a respectful relationship, at least on this subject. The changes made in late 2015 are an anomaly and are explained by the unique challenges faced by relatively new managers.

On the evidence as a whole, I find that a case for an award of damages has not been made.

VII. Conclusion

I declare that the Employer breached the Settlement Agreement when it altered its past practice respecting the scheduling of vacations in 2016. In addition, the Employer exercised its management's rights unreasonably, and violated Article 13 of the Collective Agreement.

Dated at the City of Victoria, British Columbia this 17th day of October 2016.



Kate Young, Arbitrator