

IN THE MATTER OF AN ARBITRATION
(Under the *Canada Labour Code*)

BETWEEN:

EXPERTECH NETWORK INSTALLATION

("Expertech")

-AND-

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

(the "Union")

AND IN THE MATTER OF an arbitration of two Union collective agreement interpretation grievances under the "Craft and Services Employees" and "Clerical and Associated Employees" collective agreements between the parties

BEFORE: G. T. SURDYKOWSKI – Sole Arbitrator

APPEARANCES:

For the Company: David M. Chondon, Counsel; Karen G. Hunt, V.P. Human Resources; Erin Chedd, Manager – Industrial Relations.

For the Union: Micheil Russell, Counsel; Janice McClelland, National Representative.

HEARING HELD IN ETOBICOKE, ONTARIO ON JUNE 20, 2007.

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SUPPLEMENTARY AWARD #2

I. INTRODUCTION

1. This Award concerns the implementation of the remedy I awarded in this matter.
2. I issued a December 6, 2006 Final Award on the merits and a January 8, 2007 Supplementary Award dealing with an earlier implementation issue.
3. In my Final Award, I declared that Expertech violated the Craft Agreement between the parties effective May 9, 2003 by refusing to extend the pension plan components of the Bell Canada 2004 VER to the employees covered by that collective agreement. (I dismissed a companion grievance that raised the same issue under the Clerical Agreement between the parties.) I ordered Expertech to make the same pension plan components contained in the Bell Canada 2004 VER available to employees covered by the Craft Agreement on the same basis and for the equivalent period of time. I remitted the implementation of the remedy ordered to the parties, and I remained seized for the purposes of rectification, and to deal with any dispute between the parties concerning the implementation or application of the Final Award, including any issues concerning the scope of the pension plan obligations or any calculations in that respect.
4. Subsequently, issues arose concerning the VER eligibility timeframe for Craft Agreement employees and the effective dates for base pension and enhancement purposes under the VER which I had ordered be made available to Craft Agreement bargaining unit employees. I held, in paragraphs 4-6 of the Supplementary Award, that:
 4. The relief ordered was intended to put the aggrieved employees in the position that they would have been in if the Bell Canada 2004 VER had been offered to Craft employees at the time, as I determined it should have been.
 5. The intent of the Final Award was that eligibility therefore be determined on that same basis. That is, the Craft Agreement employees who are eligible for the 2004 VER are those employees who met the eligibility criteria as at December 31, 2004 (see, paragraph 16 of the Final Award).

6. As for the second question, eligible employees who elect to take the 2004 VER will have worked during the interim period (i.e. until I determined the matter) and their basic pension entitlement may be greater now than it was as at December 31, 2004. They neither should nor can be penalized for this. Accordingly, the basic pension entitlement for Craft employees who elect to take the 2004 VER in accordance with my Final Award must be calculated as at their retirement date. However, for the same reasons as in the case of the eligibility time frame, December 31, 2004 is the effective date for purposes of the enhancements that are part of the 2004 VER.

5. Two further implementation issues have arisen. The first issue concerns the interplay between the December 6, 2006 and January 8, 2007 Awards and two earlier agreements between the parties: a Workforce Adjustment Agreement and a Severance Agreement, both dated April 17, 2006.

6. The Workforce Adjustment Severance Agreements were entered into by the parties before the hearing in this matter began. In the Workforce Adjustment Agreement the parties agreed that:

WHEREAS the Company gave notice under Article 11 of the Craft and Services Collective Agreement (the "Collective Agreement") on March 10, 2006;

AND WHEREAS as contemplated by Article 11 of the Collective Agreement, the parties have met to explore options in addressing the situation of surplus employees and work opportunities;

AND WHEREAS the parties have reached an agreement as to a plan to address the necessary workforce adjustment;

THEREFORE the parties agree to the following:

...

2. By April 24, 2006, the Company shall provide employees who will be of the age 55 or more as of May 5, 2006 (the "eligible employees") with their individual pension statements. On the condition that not less than forty (40) of the eligible employees volunteer to retire and so notify the Company by not later than May 5, 2006, up to a maximum number of forty-five (45) eligible employees as determined by net credited service with the Company, shall be entitled to a force adjustment allowance as follows:

a) A lump sum payment of twenty seven thousand dollars (\$27,000.00), less necessary statutory deductions. The Company agrees to make this lump sum

payment directly into the RRSP accounts of employees upon the receipt of the necessary account information;

...

4. In recognition of the pending arbitration and Canada Industrial Relations Board proceedings, in the event that an arbitrator or the Board orders or otherwise directs Expertech to offer to Expertech employees a VER/ERIP similar to that previously provided by Bell Canada to its employees, Expertech agrees that all those voluntarily retiring pursuant to paragraph 2 above shall have the same opportunity for the VER/ERIP to be offered by Expertech to employees, less any payment received as contemplated in paragraph 2 a) above.

...

(Emphasis added.)

In the Severance Agreement the parties agreed as follows:

WHEREAS the parties have reached an agreement as to a plan to address the necessary workforce adjustment on April 17, 2006 (the “workforce adjustment agreement”);

AND WHEREAS the agreement contemplated the voluntary retirement of some eligible employees;

AND WHEREAS the parties wish to confirm the respective obligations, rights and entitlements in respect of those voluntarily retiring;

THEREFORE the parties agree to the following:

1. This agreement is intended to supplement the workforce adjustment agreement in order to fully communicate the entitlements of employees volunteering to retire. In this regard, the parties agree that nothing in this agreement is intended to amend or otherwise modify the terms of the workforce adjustment agreement between the parties.
2. In addition to the allowance and entitlements contemplated by the workforce adjustment agreement, eligible employees retiring pursuant to paragraph 2 of the workforce adjustment agreement shall be entitled to the following:
 - a) The lump sum allowance shall be characterized as a “retirement allowance” for tax treatment purposes, whether or not the employee requests that this lump sum payment be made directly into a RRSP account;

...

3. In recognition of the pending arbitration and Canada Industrial Relations Board proceedings, any rights of the employees volunteering to retire are preserved in the event that an arbitrator or the Board orders or otherwise directs Expertech to offer to

Expertech employees a VER/ERIP similar to that previously provided by Bell Canada to its employees, less any lump sum allowance received by the employee as contemplated in paragraph 2 a) above.

...

(Emphasis added.)

7. At the parties' joint request, I convened a telephone conference call on April 24, 2006 (still before the hearing in this matter began) with respect to the Workforce Adjustment Agreement and the Severance Agreement. After that call, I wrote to the parties on April 25, 2006, in part, as follows:

... paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement simply provide that any employee who takes advantage of the Agreements does so without prejudice to any rights in the event that a greater benefit is obtained in either the CIRB or arbitration proceedings...

II. THE DISPUTE

8. Some 44 bargaining unit employees volunteered to retire under the Workforce Adjustment and Severance Agreements before I issued my Final Award. A dispute has arisen concerning the \$27,000.00 lump sum payable under paragraph 2(a) of the Workforce Adjustment Agreement, and more specifically whether this sum must be returned by employees who volunteered to retire early under the Workforce Adjustment and Severance Agreements and now wish to avail themselves of the VER equivalent that must be offered to employees in accordance with my Final and Supplementary Awards.

9. Expertech has taken the position that paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement require any employee who voluntarily retired under those agreements to return the \$27,000.00 lump sum they received under paragraph 2(a) of the Workforce Adjustment Agreement if they now wish to accept the VER that must be offered in accordance with my Final and Supplementary Awards.

10. The parties' positions are quite straightforward. The Union asserts that when the parties referred to "a VER/ERIP similar to that previously provided by Bell Canada to its employees", in paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement they intended the comparison to be to the entire VER package, including both the pension and non-pension components. The Union submits that the \$27,000.00 lump sum was a non-pension severance payment in addition to the pension entitlement under the Workforce Adjustment Agreement, and that paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement were intended to offset any cash allowance portion of any remedy obtained in the arbitration or CIRB proceedings, so as to ensure that no retiring employee received two severance payments for the same retirement. The Union points out that the Bell Canada 2004 VER consisted of a pension and non-pension components, and that the "Special Cash Allowance" and other non-pension components of the Bell Canada 2004 VER were neither sought nor awarded as part of the remedy for Expertech's breach of the Craft Agreement in this case. Counsel submits that the lump sum payable under the Workforce Adjustment and Severance Agreements is the equivalent of the non-pension component "Special Cash Allowance" of 8-12 months base salary. The Union says that if the "full" Bell Canada 2004 VER had been awarded the lump sum would have to be deducted from any "Special Cash Allowance", but that since only the pension component has been awarded there is nothing to deduct the lump sum payment from. The Union submits that Expertech's interpretation would have the effect of reducing their pension entitlement by a cash amount that has nothing to do with the pension, and that that was envisioned by the parties. The Union says that the Company's interpretation of the Workforce Adjustment and Severance Agreements is illogical and administratively unfeasible, and that its interpretation is the better one in any event.

11. Expertech submits that the Union's interpretation is absurd and inconsistent with the language of the Workforce Adjustment and Severance Agreements. Counsel says that I got it right when I wrote in my April 25, 2007 letter that the purpose of paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement was to ensure that any employee who voluntarily retired pursuant to the agreements did

so without prejudice to the right to claim a greater benefit if one was obtained in litigation. Counsel submits that the intention was that the \$27,000.00 lump sum payment would have to be repaid if any greater benefit was obtained in either the CIRB or the arbitration proceedings. Expertech has obtained an actuarial calculation (which the Union has not had an opportunity to verify) of the additional value of the VER being offered in accordance with my Final and Supplementary Awards compared to that received under the Workforce Adjustment and Severance Agreements. This calculation purports to show an additional VER value that ranges from \$569.00 to \$115,000.00 (the median being \$61,500.00) for the 44 employees in issue. (These figures include an amount for Additional Guaranteed Temporary Pension (“AGTP”) payable as a bridge to regular pension at age 65.)

12. Expertech observes that these are sophisticated parties and that if they had intended that the paragraph 4 Workforce Adjustment Agreement and paragraph 3 Severance Agreement deduction be made only from a cash payment component they would have said so. Counsel reminds me of my observation in paragraph 30 of my Final Award that “A party cannot be excused from the bargain it has made merely because it turns out to be expensive or difficult to comply with it.” He submits that the fact that the result may be complex or administratively difficult is irrelevant in this case, and that if I accept the Union’s interpretation the 44 employees will in fact enjoy a windfall of \$27,000.00. Counsel also reminds me that any of the 44 employees who accept the VER offered in accordance with my Final Award will also have the benefit of up to an additional 14 months service and salary as a result of my Supplementary Award. Expertech submits that its interpretation of the Workforce Adjustment and Severance Agreements is the only possible one.

13. Expertech also argues that if the VER it has offered is similar to the Bell Canada 2004 VER and benefit under that plan is greater than under the Workforce Adjustment and Severance Agreements, as it submitted the actuarial calculations demonstrate it is, then the \$27,000.00 lump sum payment must be deducted, and if it is not similar it does not have to be offered to these 44 employees.

III. DECISION

14. I agree with the Union for the following reasons.

15. I begin by summarily disposing of Expertech's last three points. First, notwithstanding the often pejorative use of the term, the issue is not whether the 44 employees who volunteered to retire early under the Workforce Adjustment Agreement will receive a windfall unless they are required to return the \$27,000.00 lump sum payment that they received under that agreement. Windfall or not, the question is whether they are entitled to keep that payment if they accept the equivalent to Bell 2004 VER offer that the Company is required to make to them.

16. Second, the benefit of the additional service and salary that these employees received is irrelevant. The employees have earned that benefit, and it has nothing to do with the lump sum payment in issue.

17. Third, I have ordered Expertech to make the same pension plan components contained in the Bell Canada 2004 VER available to employees covered by the Craft Agreement on the same basis and for the equivalent period of time. Accordingly, Expertech has no choice but to make that offer to eligible employees who have previously accepted the voluntary retirement invitation reflected in the Workforce Adjustment Agreement and Severance Agreements. There is no issue of "similarity" in that respect.

18. On the other hand, and subject to consideration of the principle of Ockham's razor (i.e. that when more than one explanation or interpretation is offered the preferred one is the one that explains the most or raises the fewest questions), I agree with Expertech that the fact that the result may be complex or administratively difficult is irrelevant.

19. The question is this: what did the parties agree to in paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement? Of course they

now disagree, but they did agree to something, and the question that may still be asked is: “What would the parties have said if they had been asked that question at the time?”

20. The starting point is the words used by the parties. First, the parties did not use the term “greater benefit” in either the Workforce Adjustment Agreement or the Severance Agreement. I used that term in my April 25, 2006 letter, perhaps too generally in retrospect, assuming before the hearing began that that would be the only instance in which the provisions would be of any value to employees. Second, I note that the parties did not use the same words in paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement. In paragraph 4 of the Workforce Adjustment Agreement the parties agreed that if:

... an arbitrator or the Board orders or otherwise directs Expertech to offer to Expertech employees a VER/ERIP similar to that previously provided by Bell Canada to its employees, Expertech agrees that all those voluntarily retiring pursuant to paragraph 2 above shall have the same opportunity for the VER/ERIP to be offered by Expertech to employees, less any payment received as contemplated in paragraph 2 a) above.

(Emphasis added.)

But in paragraph 3 of the Severance Agreement, they agreed that if:

... an arbitrator or the Board orders or otherwise directs Expertech to offer to Expertech employees a VER/ERIP similar to that previously provided by Bell Canada to its employees, less any lump sum allowance received by the employee as contemplated in paragraph 2 a) above.

(Emphasis added.)

21. A general rule of contract interpretation is that different words should be given different meanings unless it is apparent that the parties meant the same thing. In this case, the “different words” are also in different documents. But it is clear that the Workforce Adjustment and Severance Agreements are companion documents that are intended to operate and be read together, and that each therefore informs the interpretation of the other. This is apparent from the general preamble of the Severance Agreement which specifies that “the parties wish to confirm the respective obligations, rights and entitlements in respect of those retiring” under the Workforce Adjustment

Agreement. It then specifically references the Workforce Adjustment Agreement, and specifically states (in paragraph 1) that it “is intended to supplement the workforce adjustment agreement in order to fully communicate the entitlements of employees volunteering to retire.” Further, the preamble portion of paragraph 2 of the Severance Agreement specifically refers to paragraph 2 of the Workforce Adjustment Agreement, and in paragraph 2 a) refers to the lump sum payment of \$27,000.00 under paragraph 2 a) of the Workforce Adjustment Agreement as a “lump sum allowance” that is to be characterized as a retirement allowance, which is the way cash severance payments are often characterized. Even in the preamble of paragraph 2 of the Workforce Adjustment Agreement the lump sum payment is referred to as a “force adjustment allowance”. It is therefore apparent that “lump sum payment” in paragraph 2 a) of the Workforce Adjustment Agreement and “lump sum allowance” under paragraph 2 a) of the Severance Agreement are intended to mean the same thing.

22. Although the parties have focused on whether what I have ordered Expertech to offer to employees is “similar” to the Bell Canada 2004 VER such that the lump sum payment received under the Workforce Adjustment Agreement must be returned, there are really two parts to the issue. First, is what I have ordered Expertech to offer to Craft Agreement employees “similar” to the Bell Canada 2004 VER such that paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement are engaged? Second, what do the words “less any payment received” in paragraph 4 of the Workforce Adjustment Agreement and “less any lump sum allowance received” in paragraph 3 of the Severance Agreement mean or require?

23. In the absence of any suggestion to the contrary (and there is none), I must assume that the parties intended the plain and ordinary meaning of the words they chose. Unfortunately, the plain and ordinary meaning of the word “similar” is imprecise. “Similar” means “related in appearance or nature; alike though not identical”. It is a virtual synonym for “resembling”, and does not mean “the same as”, except when “same” is used loosely. Sometimes parties purposely use words loosely in order to achieve an agreement. Is that what these parties did in the Workforce Adjustment and Severance

Agreements? I don't know. But I consider it likely that a practical approach more closely mirrors the parties' approach at the time they entered into the Workforce Adjustment and Severance Agreements than a technical approach does.

24. There is undoubtedly some similarity between what I have ordered Expertech to offer to Craft Agreement employees, including the 44 who accepted the offer in the Workforce Adjustment and Severance Agreements as aforesaid, and the Bell Canada 2004 VER. But the similarity is only partial. I did not order Expertech to offer Craft employees "a VER/ERIP similar to that previously provided by Bell Canada to its employees". I ordered only that pension plan components the same as those in the Bell Canada 2004 VER package be made available. That is, I only ordered that an equivalent to the pension plan part of the Bell Canada 2004 VER be offered to the Craft employees.

25. Although the pension component was undoubtedly of primary importance in the Bell Canada 2004 VER, the non-pension components were also significant. That is also the case for the Workforce Adjustment and Severance Agreements between these parties. It is not enough to compare part of the Bell Canada 2004 VER to what I awarded in my Final and Supplementary Awards in order to determine whether they are "similar" for purposes of the Workforce Adjustment and Severance Agreements. For "similarity" purposes I consider it appropriate to compare the two voluntary retirement "packages" as a whole, because I consider it more probable than not that that is what the parties would have said they intended if that had been asked that question when they entered into the Workforce Adjustment and Severance Agreements before the hearing in this matter began.

26. The parties entered into the Workforce Adjustment and Severance Agreements well before the hearing in this proceeding began. There is no indication that the Company was then aware of precisely what remedy the Union was seeking, and more specifically that the Union was not asking that I award any of the non-pension plan components, including any equivalent to the "Special Cash Allowance" non-pension component of the Bell Canada 2004 VER. The remedy that the Union obtained for Craft

Agreement employees is limited to what it asked for; namely, an equivalent to the pension component of the Bell Canada 2004 VER. Assuming that Expertech's calculations are accurate, the VER pension that I have ordered has a greater value to employees than pension component of the Workforce Adjustment and Severance Agreements package. As such it is a "greater benefit" for the 44 employees. However, the greater benefit available to them as a result of my Final and Supplementary Awards is limited to that better pension arrangement or component. But that is not the issue. The issue is whether the VER remedy that I have ordered is similar to the Bell Canada 2004 VER.

27. The pension plan component of the remedy that the Union has obtained in this proceeding is "similar" to the pension plan component of the Workforce Adjustment and Severance Agreements. Indeed, it is the same. But the pension plan component is the entire remedial package in this case. I am satisfied that the VER remedy that the Union has obtained in this case is more dissimilar than it is "similar" to the Bell Canada 2004 VER package because the latter consisted of both pension and non-pension components. By itself, this causes me to me to seriously doubt that the parties intended that this degree of similarity would be sufficient to engage paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement. The answer to the second question confirms that that was not their intention.

28. The parties agreed that any employee who volunteered to retire under the Workforce Adjustment and Severance Agreements would remain eligible for any "similar" VER or ERIP ordered by an arbitrator or the CIRB less any payment or lump sum allowance received "as contemplated in paragraph 2 a)". Why did the parties put it that way? And what does the different wording, albeit with the same meaning, suggest? Their intention must be gleaned from the plain and ordinary meaning of their words.

29. First of all, the paragraph 2 a) lump sum payment/allowance referred to is not a variable amount. It is a specific and fixed amount of \$27,000.00 to be paid to every employee who volunteered to retire under the Workforce Adjustment and Severance

Agreements. As counsel for Expertech points out, these are sophisticated parties who must be taken say what they mean and mean what they say. If they intended that the lump sum payment would have to be returned if any VER subsequently became available as a result of the arbitration or CIRB proceedings the word “similar” would be unnecessary and even misleading. Whether or not the remedy I have ordered is sufficiently “similar” to the Bell Canada 2004 VER to engage the operation of paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement the requirement of similarity informs the interpretation of the “less any payment/lump sum allowance” provisions.

30. The parties did not agree in either the Workforce Adjustment Agreement or the Severance Agreement that eligible employees would have access to any ordered VER “less the lump sum payment of \$27,000.00 received pursuant to paragraph 2 a) above.” If they had agreed to those or other words to that effect, Expertech could have a point. But they did not. The parties agreed that employees who voluntarily retired under the Workforce Adjustment and Severance Agreements did so without prejudice to a right to participate in any VER remedy obtained at arbitration or from the CIRB, but that any offer required to be made in that respect would be less any payment/lump sum allowance received “as contemplated in paragraph 2 a)” (emphasis added) in both agreements. What did the parties contemplate?

31. I am satisfied that when they arrived at the April 17, 2006 Workforce Adjustment and Severance Agreements before the hearing in this matter began the Union’s litigation strategy was not yet fully formed (indeed there is no indication that Mr. Russell was involved in the process that led to them), and that what the parties contemplated was the possibility that a lump sum payment “similar” to the \$27,000.00, and to the “Special Cash Allowance” that was part of the Bell Canada 2004 VER package, might be awarded as part of a remedy ordered by an arbitrator or the CIRB. It is apparent from the structure of the Bell Canada 2004 VER that the non-pension “Special Cash Allowance” was intended as provide an added inducement to employees to apply for that VER. It is apparent from the phrasing of the Severance Agreement that the purpose of the lump sum

payable under the Workforce Adjustment Agreement was the same; namely, to provide an additional non-pension inducement to eligible employees to volunteer to retire and make it more likely that a sufficient number of employees would be enticed to volunteer to retire to meet the Expertech's workforce reduction objective. That is what the provisions of the Workforce Adjustment and Severance Agreements clearly indicate, and that is the non-pension payments' only connection to the pension component. The \$27,000.00 lump sum payable under the Workforce Adjustment Agreement is "similar" to the "Special Cash Allowance" offered as part of the Bell Canada 2004 VER. There is nothing "similar" to this in the VER remedy that I have awarded.

32. In the result, I am satisfied that the parties meant and intended that "less any payment received" in paragraph 4 of the Workforce Adjustment Agreement have the same meaning as "less any lump sum allowance received" in paragraph 3 of the Severance Agreement, and that the parties intended only that any "similar" lump sum payment awarded as part of any VER remedy obtained by the Union from an arbitrator or the CIRB would be deducted from the \$27,000.00 already received so as to preclude any duplication of the inducement in that respect.

33. **I THEREFORE DECLARE THAT** Craft Agreement employees who volunteered to retire in accordance with the Workforce Adjustment and Severance Agreements are not required to return the \$27,000.00 lump sum payment that they received in that respect if they accept the equivalent to Bell Canada 2004 VER pension plan offer that I have ordered Expertech to make.

34. There is a second implementation issue between the parties concerns the status for remedial purposes of persons who were actively employed in the Craft Agreement bargaining unit during the eligibility period, but who subsequently left employment (other than under the Workforce Adjustment and Severance Agreements) before my Final Award was issued? There are five such employees. Four of them retired, and one was discharged. That latter employee has both grieved the discharge and filed an individual VER grievance.

35. The parties were not in a position to deal with that issue at the hearing on June 20, 2007, and I therefore remitted it to them for further investigation and discussion. I remain seized with that issue.

DATED AT TORONTO THIS 31ST DAY OF JULY 2007.

George T. Surdykowski – Sole Arbitrator