

IN THE MATTER OF AN ARBITRATION

BETWEEN

NORAMPAC INC.

AND

COMMUNICATIONS, ENERGY & PAPERWORKERS UNION
OF CANADA, LOCAL 1129

(Union Contractor Policy)

Industry Arbitrator	:	Donald R. Munroe, Q.C.
For the employer	:	Gary Catherwood
For the union	:	Daniel J. Rogers
Date and place of hearing	:	June 15, 2006 Vancouver, B.C.

I

I was constituted by the parties as an arbitration board under their collective agreement to hear and decide a grievance dated March 6, 2003 that was filed by the employer against the union.

The origin of the employer's grievance is a "union policy on relations between [union] members and outside contractors". The policy includes the following:

We do not work side-by-side with [contractors]. We do not have mixed crews. Contractors do their work, we do ours. Where there is a job which is divided between contractors and mill crews, there must be a sharp line between where their work stops, and where our work begins.

We don't help [contractors] by telling them where things are or how things are done. We don't bring them things or carry things away for them. We don't make it easy for them to do our work. Under no circumstances do we work as lead hands, overseeing or coordinating the work of contractors.

In the submission of the employer, the above-quoted extract from the union policy conflicts either directly or indirectly with the collective agreement, including the residual management right to manage the plant and direct the work force (as to the latter, see *Eurocan Pulp & Paper*, July 25, 1973 (Blair)). The employer argues that as the result of such conflict, the union policy must be declared unenforceable and of no effect.

For its part, the union denies that the policy runs counter to any express provision of the collective agreement. In the union's view, if this employer grievance were to succeed, it could only be on the basis that the policy conflicts

with the residual management right to direct and manage the work force. But such residual management right, says the union, must be exercised reasonably. And in the submission of the union, it is unreasonable for the employer to direct its work force to work with contractors in a manner inconsistent with the policy.

II

On paper, the union policy dates back to 1995. There is some confusion in the evidence about when the policy was formally adopted by the union by vote of the membership. The July/August/September 1995 edition of the union's newsletter ("The Pulper") reported that the policy had been adopted at the union meeting in June 1995. However, the minutes of that meeting contain nothing to that effect (nor do minutes of union meetings in the surrounding period). When that confusion was discovered in late 2002, the union took the policy to a union meeting where it was formally adopted by membership vote and recorded as such. That was in February 2003.

Throughout that period, the employer was generally aware of the existence of a union policy on contracting out, although not having been officially informed of it. I earlier used the term "on paper" in relation to the union policy, because it is clear that throughout the period 1995 to the date of this employer grievance (and subsequently), the union's enforcement of the policy (put differently, the union membership's adherence to the policy) was inconsistent. Not infrequently, union members did work side-by-side with contractor crews; and did work on mixed crews; and did bring things to contractor crews or take things away for them; and did assist in the coordination of contractor crews. There were instances where it was otherwise. In those latter instances, where the union or its members did act in a manner in apparent conformity with the policy, the employer attempted to "work around it" (as the witnesses put it) to avoid confrontation.

Matters came to a head, so to speak, in November 2002. In the week of November 14, 2002, a contractor was pulling cable through the mill. Two of the employer's electricians were working with two of the contractor's employees in the performance of the work. Things progressed without incident for the first couple of days. Then, on the third day, the union asserted that its members did not work with contractors, whereupon the employer's two electricians refused to continue with the job. After a brief work stoppage, the responsible supervisor issued a direct order to the two electricians to resume working as before. The order was obeyed by the two electricians; however, the head electrician (bargaining unit) departed the work place for a period citing stress.

The employer decided at that stage that the union policy had to be formally challenged. The course of action decided upon by the employer was to file the present grievance seeking arbitral disposition, rather than on-site confrontation between employees and supervisors. For a variety of understandable reasons, the grievance was some time getting to arbitration.

III

Article 3 of the collective agreement contains a number of provisions respecting contracting out:

ARTICLE 3 – CONTRACTING

- (a) The Company will notify the Union in writing as far in advance as possible of work to be performed by a contractor in the mill, and will, emergencies excepted, afford the Union the opportunity to review it with the Company prior to the contract being let.

To facilitate the review process, the Company will provide the Union with the information it uses in determining a contractor is necessary. The review process shall include the Union's ability to argue that bargaining unit employees should do all or part of the work.

- (b) The Company will not bring a contractor into the mill:
 - (i) which directly results in the layoff of employees, or
 - (ii) to do the job of employees on layoff, or
 - (iii) to do the job of a displaced employee working outside his/her job category.
- (c) Outside contractors may not be employed in the mill to do work normally done by members of the bargaining unit, unless necessary employees are unavailable. This shall not inhibit the Company's right to contract work on major installations, or other work that the Maintenance Department is unable to perform.
- (d) Machine washups shall be approached in the following manner:

A list of specific duties to be done by the contractor(s) shall be provided to the Union for review and discussion prior to the washup. It is understood that the contractor(s) will only perform functions on the list.
- (e) Temporary tradesmen will be used in accordance with Article 25, Section 11 to reduce the use of contractors.
- (f) It is not the intent of the Company to replace its regular work force through the use of contractors.

For clarity it is agreed that:

- a) The changes which provide that it is not the intent of the Company to replace its regular work force through the use of contractors will not set aside existing external work arrangements and practices.

- b) Working under the flexible work practice provisions does not mean that an employee has been displaced and is working outside his/her job category.
- (g) The Company will not send equipment out of the mill for repair which could be performed by tradesmen or apprentices on layoff or which directly results in the layoff of tradesmen or apprentices.

In addition to Article 3, the collective agreement includes a Letter of Intent and a Code of Ethics on contracting out. The Letter of Intent is in the following terms:

This is to confirm the agreement reached regarding the use of contractors during the current agreement:

- There shall be a meeting in January to review the known schedules and specific jobs involving contractors coming into the mill for the upcoming year. This information shall be reviewed with the Union in the same manner provided in Article 3 paragraph (a).
- If employees of contractors performing maintenance during washup are scheduled to work beyond a normal work day, then Paperboard employees in the same trade(s) and shift(s) will be offered the same opportunity.
- If equipment breaks down at night or on the weekends, tradesmen will be called before a contractor is used. Similarly, if we require additional operators (i.e., forklift operators), Paperboard employees will be called before a contractor is used.
- It is agreed that if there is a violation of the provisions of Article 3(a) in “non emergent” circumstances, then the Union may claim damages in the grievance and arbitration procedure depending on the specifics of the case.

The Code of Ethics, which is quite lengthy, comprises an agreement between the employer and the union respecting the conditions that will apply to non-union contractors "...coming onto the mill site to perform contractor work or perform maintenance and repair work of a nature normally performed by employees in the bargaining unit". (It is only rarely, if at all, that the employer engages the services of non-union contractors.) Those conditions have to do with minimum wages, contributions to the Pulp and Paper Industry Pension Plan, remittances to the Local Union, adherence to safety regulations, and the honouring of picket lines.

Although not directly pertinent to the issue at hand, it is worth noting that the above-cited provisions of the collective agreement are substantially drawn from the collective agreements covering the primary pulp and paper industry in the province. This employer is part of the secondary paper industry.

IV

Article 3 of the collective agreement imposes a number of procedural and substantive requirements/limitations on the employer's use of contractors. Likewise the Letter of Intent. And the Code of Ethics prescribes certain additional conditions where the contractor is non-union.

Those provisions clearly envisage the use of contractors in the employer's plant, including, at times, doing work that is normally done by employees in the bargaining unit. Together, those provisions are the negotiated terms and conditions surrounding and circumscribing the employer's engagement and utilization of contractors. As observed in *Alcan Smelters & Chemicals Ltd.* (1987) 28 L.A.C. (3d) 353 (Hope), "Where an employer agrees to restrict its right to contract out, it will be accountable for the full scope of limitations consistent with

the language to which it has agreed”. But so also the obverse. That is to say, where a union has agreed in collective bargaining that contracting out by the employer will to some extent be restricted or limited, then the union, too, will be accountable for that negotiated result, in the sense that the union will be precluded from adopting and seeking to enforce a policy which purports to enlarge upon the restrictions or limitations to which it has agreed.

In argument, the union sought to distinguish between the above-cited provisions of the collective agreement, on the one hand, and the union policy, on the other, by saying that the collective agreement deals with the decision-making by which a contractor may or may not be brought into the plant, while the disputed policy deals only with relations between employees and contractors once the latter are already in the plant. Thus, says the union, there is no conflict between the one and the other.

Considering some of the arbitral jurisprudence in the primary pulp and paper industry respecting Article 3(b), and looking as well at Articles 3(c) and (d) and parts of the Letter of Intent, I am not so sure that the distinction made by the union is easily drawn. But in all events, the question is not solely whether the union’s policy directly clashes with (i.e., negates) a provision of the collective agreement, but also (as I said above) whether the policy purports to enlarge upon the restrictions or limitations to which the union agreed in collective bargaining. In context, that as much runs afoul of the parties’ bargain, as revealed by their collective agreement, as would a union policy worded in a manner running directly counter to the bargain.

As I have already commented, the collective agreement clearly envisages that contractors may be present in the plant, including, at times, doing work that normally is done by the bargaining unit. Even where a contractor is present in the

plant in circumstances unobjectionable to the agreed restrictions or limitations contained in the collective agreement, the union policy effectively directs employees in the bargaining unit not to work alongside the contractor's employees; nor in a mixed crew with the contractor's employees; nor in any manner to give assistance to the contractor's employees or to help in the coordination of their work. None of that is mandated or envisaged by the collective agreement. It amounts to a unilateral attempt by the union to add constraints on the employer, as regards contractors working in the plant, beyond those contained in the collective agreement.

Clearly by the collective agreement, the parties turned their minds to the subject of contractors, and they adopted a fairly elaborate set of rules with respect thereto. In argument, the employer posed this question, rhetorically: "Against the backdrop of this collective agreement, can it be thought that it was open to the union to unilaterally promulgate its own additional set of restrictions?" I think there is considerable force to the rhetorical nature of that question.

This case is different from *Eurocan Pulp & Paper* (1998) 72 L.A.C. (4th) 38 (Hope) and *B.C. Transit* (1986) 27 L.A.C. (3d) 343 (McColl), a pair of awards cited by the union. The collective agreements in those cases provided that overtime was voluntary. The respective unions had by-laws limiting the amount of overtime an employee could work. As the matter was put by Arbitrator Hope in *Eurocan*:

It is true that the policy restricts bargaining unit members in the exercise of their individual right to accept or decline overtime assignments. However, in assessing the right of union members to act in concert with respect to matters affecting them as a group and as individuals, a distinction must be made between a by-law that compels employees to act in breach of their collective agreement obligations and a by-law that reflects an agreement between

employees with respect to some aspect of the application of the collective agreement that falls within their discretion as individuals and collectively.

The acceptance and distribution of overtime is voluntary under this agreement...[and] individual bargaining unit members, while they are bound by the agreement, are equally free to act as they please with respect to the exercise of matters within their discretion under the agreement.

As I have indicated, the issue in *B.C. Transit* was similar to the issue in *Eurocan*.

In the case before me, it is not a matter of employees individually or collectively through their union deciding how they will exercise a discretion possessed by them under the collective agreement. As a general statement, employees are required to obey instructions that are given to them by their supervisors, provided the instructions are not clearly precluded by the collective agreement, or are not otherwise unreasonable or unlawful. Here, the collective agreement does not preclude a supervisory direction to an employee to work alongside a contractor's employees; or to work in a mixed crew with a contractor's employees; or to give assistance to the contractor's employees or to help in the coordination of their work.

But while that is so, the union argues that it would be unreasonable for supervisors to give such directions; that is to say, that directions of that sort would be an unreasonable exercise of the employer's acknowledged management right to direct and manage the work force, and for that reason should not be countenanced.

I certainly cannot say that there could be no legitimate business purpose to the giving of such directions. And while the union may be correct that such directions will cause shop floor unrest, that cannot be a proper basis, in the

circumstances at hand, for declaring such directions to be unreasonable and therefore unenforceable. Effectively by its argument of unreasonableness, the union is seeking to incorporate its unilateral policy as an implicit term of the parties' collective agreement, thereby enlarging on the collective agreement's existing restrictions and limitations on the employer's utilization of contractors.

V

I find and declare that the union policy, as quoted at the outset of this award, is not binding on the employer; that the policy cannot be relied upon by the union or by the employees in the bargaining unit as a basis for declining directions given by the employer to the employees; and that in that sense, the policy is inoperative.

DATED THE 5th DAY OF JULY 2006.

"DONALD R. MUNROE"
Donald R. Munroe, Q.C.
Arbitrator