SUPREME COURT OF NOVA SCOTIA

Citation: Bowater Mersey Paper Company Ltd. v. Communications, Energy & Paperworkers Union of Canada, Local 141, 2009 NSSC 193

Date: 20090618
Docket: Hfx No. 303131
Registry: Halifax

IN THE MATTER OF

The *Trade Union Act*, R.S.N.S. 1989, c.475, s.1 and the *Arbitration Act*, R.S.N.S. 1989, c.19

- and -

A Grievance by the Communications, Energy & Paperworkers Union of Canada, Local 141 concerning signs being made by an outside contractor

- and -

An Application by Bower Mersey Paper Company Limited for an order to quash and set aside the Award of Bruce Archibald, Q.C. date September 8, 2008

BETWEEN:

Bowater Mersey Paper Company Limited

Applicant

- and -

Communications, Energy & Paperworkers Union of Canada, Local 141

Respondent

Judge: The Honourable Justice Walter R.E. Goodfellow

Heard: March 25, 2009 in Halifax, Nova Scotia (in Chambers)

Counsel: Richard G. Petrie, for the Applicant
Raymond F. Larkin, Q.C. and Meredith Wain, for the Respondents

By the Court:

BACKGROUND:

[1] This application for judicial review arises out of an arbitration award dated September 8, 2008 (the "decision"). The decision deals with three grievances by the respondent, Communications, Energy & Paperworkers Union of Canada, Local 141 ("the Union") against the applicant, Bowater Mersey Paper Company Limited ("Bowater"), involving what the arbitrator described as "a somewhat quirky grievance concerning the contracting out of sign making in a paper mill."

[2] More specifically, the grievances provided:

(a) Grievance 13-141-2007: Company violated s.35, para.2485 (and others), having signs made by outside contractor;

(b) Grievance 28-141-2007: Company contracted out making of six small signs. Work contracted out the making of six small signs. Work always done in-house: (Pleasantville signs);

(c) Grievance 55-141-2007: Contracting Out: Section 35, para.2485 and others. Company contracted out two - restricted area signs from Veinot's Print: 2' x 1' signs, P.O. #124569.

[3] The arbitration was heard April 9th and May 29th of 2008. In his decision, the arbitrator stated:

> ..Making and sticking durable lettering (or painting lettering) on walls, doors or beams on the one hand, or placing lettering on coreplast or some other durable background plaque which can be hung up or affixed to other structures or surfaces on the other, must surely constitute "minor installation". It is only work protected by Section 35, however, if it meets the conditions laid out in the last phrase of the first sentence of paragraph one.
>
> Has the "durable sign making" described above, been regularly performed by employees in the bargaining unit? The answer to this question, on the evidence, must be "Yes". Mr. Wolfe's descriptions of which signs either he or Mr. Benvie made (whether lettering was affixed to beams or put on coreplast, wood or metal), was essentially uncontradicted. This work of minor installation of durable signs has been done by bargaining unit employees, whether called "mill artist", "carpenter" or whatever,

for many years. Is the mill equipped to make such durable signs? Yes, must be the reply. The computer with the "Corel Draw" programme which allows for the production of adhesive lettering to go on walls, beams or coreplast is appropriate equipment for the making of durable signs which constitute a minor installation. The final question in relation to the mandatory conditions attached to work protected from contracting out is "Are the Employees capable of doing this work?" In relation to the lettering/coreplast processes the answer is "Yes". Mr. Wolfe, among others, can work the equipment even if, unlike Mr. Benvie, he is not adept at free-hand lettering. I conclude, therefore, that durable signs of the type produced on coreplast by Pleasantville Signs are bargaining unit work protected as minor installations by Section 35, and that the Employer's contracting out of this work was in contravention of the collective Agreement.

What about the Veinot's Print signs concerning "Authorized Personnel Only"? These signs were not off-the-shelf "purchasable" items. They were purpose made to the Employer's particular specifications prior to final installation. This was the contracting out of a minor installation. However, I am not sure from the evidence that these signs are of the straightforward type which the mill forces are capable of making. They have an attractive border, varying fonts and differing type styles which may be beyond the capacity of the equipment and the training level of mill employees. The Union has not proved its case in relation to these conditions. However, because these signs are of a durable sort and "custom" or "purpose-built" rather than purchasable, ready-made commercial items, surely they are presumptively "minor installation" being considered for contracting out. As such, they fall within the category work which might not be contracted out if they did meet three conditions, and are thus items about which the Union should be given notice in paragraph two. I therefore conclude that the Employer was in breach of its obligations under Section 35 paragraph two for not giving notice to the Union about letting the contracting for these minor installations.

THE COLLECTIVE AGREEMENT:

[4] The key provision of the Collective Agreement relating to contracting out provides:

[1] The Company agrees not to contract out repair or maintenance work or minor installation and modification work (as distinguished from new construction or major modification), which is regularly performed by employees, for which the mill is equipped and which the employees are capable of doing. The Company will provide a list of planned capital work at the beginning of each year (January). This does not preclude the Company's ability to introduce new capital work or special repair work throughout the year.

[2] When considering contracting out, the Company will advise the appropriate Unions at the time before the contract is let. Notification will either be in writing and/or at a meeting as is deemed appropriate by the parties. In addition, the Company will give

written notice at the beginning of any month outlining the nature and extent of any work which is to be started by the contractors during that month.

[3] It is understood that the time provisions of the above two paragraphs may not apply to breakdowns of essential equipment. However, in such cases, the Company undertakes to keep the Unions fully informed.

[4] The Company states further that for several years it has maintained practically stable numbers of maintenance men, and that this has occasioned some contracting out. The Company agrees to increase crews when necessary to take care of work normally done by the maintenance crews and when the work diminishes, the Company will have to reduce the crews. If new employees are so taken on the work force, they may be eligible for layoff at the end of the project without recourse to seniority provisions of the Collective Agreement.

[5] During the life of this Agreement, Company policy shall not be to contract out the present production processes in the mill, although this shall not be taken to prevent things as purchase of chips, the use of ready-mix cement, the buying of prefabricated piping or similar purchases of semi-processed materials, etc.

[5] The arbitrator notes that there are five central aspects to s.35:

(1) Five types of protected work "bargaining unit work" which are protected against contracting out (i) repair work; (ii) maintenance work; (iii) minor installation work; (iv) minor modification work; and (v) present production processes in the mill.

(2) The Collective Agreement has four protected areas of bargaining unit and at work: (a) repair; (b) maintenance; (c) minor installation; and (d) minor modification.

[6] There are three additional conditions which must apply in order to prevent contracting out and to require the Employer to use its own mill forces.

The first condition is that each of the four types of work is "regularly performed" by bargaining unit employees. As will be seen, this is a phrase which has been considered in the arbitral jurisprudence and in relation to which there was evidence from both parties to the current situation. The second condition is that the mill must be "equipped" to do each of the four types of work in question. Here again, there is considerable evidence as to which kinds of signs the mill is "equipped" to make. The third condition necessary to prevent contracting out of the four protected "maintenance department"

functions is that the work is of a type which mill forces within the bargaining unit are "capable of doing". On this point as well, there is considerable evidence concerning the kinds of signs which maintenance personnel within the bargaining unit are capable of making.

***TRADE UNION ACT*, Chapter 475, R.S.N.S. 1989 as amended:**

An Act Respecting the Right of Employees to Organize and Providing for Mediation, Conciliation and Arbitration of Industrial Disputes

42(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.

(2) Where a collective agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:

> Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator, the appointment shall be made by the Minister of Labour for Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it.

(3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement. *R.S., c.475, s.42.*

43(1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement

(a) shall determine his or its own procedure, but shall give full opportunity to the parties to the proceedings to present evidence and make submissions to him or it;

***ARBITRATION ACT*, Chapter 19, Revised Statutes of Nova Scotia, 1989 as amended:**

Removal of arbitrator or umpire

15(1) Where an arbitrator or umpire has misconducted himself the court may remove him.

Setting aside an arbitration

(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set aside the award. *R.S., c.19, s.15*.

***TRADE UNION ACT*, Chapter 475, Revised Statutes of Nova Scotia, 1989 as amended:**

Powers and duty of arbitrator or arbitration board

43 (1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement

(a) shall determine his or its own procedure, but shall give full opportunity to the parties to the proceedings to present evidence and make submissions to him or it;

(b) has, in relation to any proceedings before him or it, the powers conferred on the Board, in relation to any proceedings before the Board by subsections (7) and (8) of Section 16;

(c) has power to determine any question as to whether a matter referred to him or it is arbitrable;

(d) where

(i) he or it determines that an employee has been discharged or disciplined by an employer for cause, and

(ii) the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration,

> has power to substitute for the discharge or discipline any other penalty that to the arbitrator or arbitration board seems just and reasonable in the circumstances; and
>
> (e) has power to treat as part of the collective agreement the provisions of any statute of the Province governing relations between the parties to the collective agreement.

[7] The parties each state the issues in a somewhat different fashion but do not appear to disagree as to the issues to be addressed.

ISSUES:

1.) **Standard of Review?**

> **Issue No. 1 – What is the applicable Standard of Review When Reviewing a Decision on the Grounds of Procedural Fairness?**
>
> **Issue No. 2 – What is the Appropriate Standard of Review of the Arbitrator's Interpretation of the Collective Agreement?**
>
> **Issue No. 3 – Did the Arbitrator Commit a Reviewable Error When He Found the Employer Contravened Section 35 of the Collective Agreement?**
>
> **Issue No. 4 – Did the Arbitrator Violate the Employer's Right to Procedural Fairness?**

DETERMINATIONS:

Issue No. 1 – What is the applicable Standard of Review When Reviewing a Decision on the Grounds of Procedural Fairness?

[8] Both counsel recite the same authorities and, in particular, the Supreme Court of Canada decision in **Dunsmuir** v. **New Brunswick**, 2008 SCC 9 (CanLII). I conclude there is no disagreement on this issue that the appropriate standard of review is correctness.

Issue No. 2 – What is the Appropriate Standard of Review of the Arbitrator's Interpretation of the Collective Agreement?

[9] Again, I do not see there is any level of disagreement between the parties and conclude on this issue that the standard of review is one of reasonableness.

Issue No. 4 – Did the Arbitrator Violate the Employer's Right to Procedural Fairness?

[10] In argument the Union advanced that the Arbitrator was entitled to set boundaries of the process and procedure except that wide latitude must be given to an Arbitrator in the area of how an arbitration proceeding is to be conducted. Support of its position, the Union made reference to Section 43(1)(a) of the *Trade Union Act*:

> **43(1)** An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement
>
> > **(a)** **shall** determine his or its own procedure, but **shall** give full opportunity to the parties to the proceedings to present evidence and make submissions to him or it; [emphasis added to emphasize mandatory direction]

[11] The Court was referred to section 43(1)(a) by Union counsel advancing the argument that what the arbitrator did was to proceed as he was entitled to by virtue of the first part of section 43(1)(a). I did not recall either counsel addressing the latter provision in section 43(1)(a). Subsequent to hearing oral argument and reserving my decision I reflected on the terminology in section 43(1) which both parties acknowledge placed a mandatory duty upon the arbitrator. I posed to counsel the question:

> Can it be said that where the Arbitrator addresses the issue in these circumstances in his decision and makes it the foundation and rationale for his determination that he has met the duty upon him under the Trade Union Act to, "shall give full opportunity to the parties to the proceeding is to present evidence and make submissions to him"?

[12] What transpired is captured in the following comment by the arbitrator in his decision:

> ¶ 33 .... Almost as an afterthought, in rebuttal, however, Counsel for the Union suggested that sign making and their subsequent installation could be just that: "minor

> installation" in the words of Section 35, paragraph one. Here is the germ of the solution to this case. Making and sticking durable lettering (or painting lettering) on walls, doors or beams on the one hand, or placing lettering on coreplast or some other durable background plaque which can be hung up or affixed to other structures or surfaces on the other, must surely constitute "minor installation". It is only work protected by Section 35, however, if it meets the conditions laid out in the last phrase of the first sentence of paragraph one.

[13] I felt compelled to put this question to counsel and present an opportunity for each of them to address it which they did so in further written submissions.

[14] An opportunity was given to both counsel to make further submissions which were received. The question I posed could fits under Issue No. 4, however, I concluded it was essential counsel have an opportunity to address the question as it relates to the latter part of section 43(1)(a) that I raised which was not specifically addressed in oral argument or their written submissions.

INTERPRETATION OF THE *TRADE UNION ACT*:

[15] The interpretation of this *Act* is to be dealt with in accordance with the interpretation of statutes. Guidance is provided by Driedger on the Construction of Statutes, Third Edition, by Ruth Sullivan as follows:

> ***Modern purposive approach.*** Modern courts do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. As Matthews J.A. recently wrote in *R. v. Moore:*
>
> > From a study of the relevant case law up to date, the words of an Act are always to be read in light of the object of that Act. Consideration must be given to both the spirit and the letter of the legislation.
>
> ***
>
> In the Supreme Court of Canada purposive analysis is a staple of statutory interpretation. In *Clarke v. Clarke*, Wilson J. wrote:
>
> > In interpreting the provisions of the Act the purpose of the legislation must be kept in mind and the Act given a broad and liberal construction which will give effect to that purpose.

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.. *Thomson v. Canada (Minister of Agriculture)*, L'Heureux-Dubé J. wrote:

> [A] judge's fundamental consideration in statutory interpretation is the purpose of legislation.
>
> REASONS FOR MODERN ADOPTION OF PURPOSIVE APPROACH
>
> ***Overview***. A number of factors have contributed to the emphasis put on purposive analysis in modern statutory interpretation. First, there is the remedial construction rule found in the Interpretation Acts of all Canadian jurisdictions. Starting with the first statute on interpretation enacted by the Parliament of Canada in 1849, Canadian Interpretation Acts have contained a provision that directs courts to give every enactment "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[16] The parties start from a foundation that they have a statutory entitlement to "full opportunity to present evidence and make submissions." The procedure to achieve this foundation is to be determined by the arbitrator.

[17] Whether or not an arbitrator has complied with the statutory obligation to give full opportunity to the parties to present evidence and make submissions is determined by the factual circumstances of each arbitration.

[18] As was recently noted by the Supreme Court of Canada in **Dunsmuir** v. **New Brunswick**, *supra,* at para. 79:

> As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case".

[19] I agree with the Union's submission that the arbitrator has the entitlement to determine his or her own procedure and that this is essential to the conduct of an arbitration in a fair, impartial and within a wide boundary, the limit of which is to be determined by the arbitrator scheduling the procedure, the manner and limitations of the arbitration hearing. This does constitute a deferential standard of review when dealing with the issue of procedural fairness. It is merely a recognition of the statutory direction scope given to an arbitrator.

[20] **Overwaitea Food Group** v. **Bates**, 2006 B.C.S.C. 1201, at para. 55, Bates, J. operating under the former "patently unreasonable" standard, found that:

> It is the manner of arriving at the Deferral Decision which causes the Decision itself to be both unfair and patently unreasonable. If the Tribunal had heard relevant evidence and submissions from the Petitioner, and arrived at the same Decision, after due consideration, then both the unfairness and the patent unreasonableness would disappear.

[21] The Court concluded at para. 54 the decision should be set aside in part because:

> ...the Petitioner did not have an opportunity to present argument on the factors which formed the basis of the Decision;
>
> ...the two factors that form the basis of the Deferral Decision are not merely significant; they are the only two factors that form the basis for the Decision.

[22] See also **Nova Scotia Government and General Employees Union** v. **Capital District Health Authority**, 2008 N.S.S.C. 7, per Moir, J. at para. 22;

> With great respect, the learned arbitrator deprived the union of the opportunity to be heard by straying into an issue on which the union had no reason to believe it needed to call evidence or present arguments.

[23] The Union acknowledges in its submission in response to the question I posed post-argument, Bowater had not made any submissions on the issue of "minor installation". To make or not make representations does not constitute an element of procedural unfairness. It is the failure to give the statutory mandated opportunity that results in procedural unfairness.

[24] As noted by Justice Fichaud in **Creager** v. **Provincial Dental Board of Nova Scotia**, 2005 N.S.C.A. 9, at paras 24 and 25:

> 24 Issues of procedural fairness do not involve any deferential standard of review: Moreau-Bérubé v. New Brunswick (Judicial Council), [2002] 1 S.C.R. 249, at para. 74 per Arbour, J.; C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the majority and at para. 5 per Bastarache, J. dissenting. As stated by Justice Binnie in C.U.P.E, at para. 102:

> The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.

This point is also clear from Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé (paras. 55-62) considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but (para. 43) considered procedural fairness without analyzing the standard of review.

25 Procedural fairness analysis may involve a review of the statutory intent and the tribunal's functions assigned by that statute: e.g. Bell Canada v. Canadian Telephone Employees Association, [2003] 1 S.C.R. 884 at paras. 21-31; Imperial Oil Ltd. v. Quebec (Minister of the Environment), [2003] 2 S.C.R. 624 at paras. 31-32. But, once the court has determined that a requirement of procedural fairness applies, the court decides whether there was a violation without deference.

[25] A determination of procedural fairness also takes into account the responsibility and conduct of counsel / parties. Quite probably in a situation where counsel chooses to conduct her/his case in a particular manner will rarely, if ever, give rise to a finding by itself of non-compliance by the arbitrator of the statutory duty. For example, the determination to cross-examine is solely a decision for counsel. Our Court, if we have a self-represented party the preference, but not a prerequisite, is to explain to the self-represented party the differences between direct, cross-examination and re-direct and the parties entitlement, however, the ultimate decision rests with the party. Procedural fairness is achieved if a party is accorded an opportunity for the party to exercise entitlement. An arbitrator does not have to provide an opportunity in any specific manner, it is not the arbitrator's duty to draw to the attention of an opposing party(s) issues that have not been addressed by the party. An arbitrator is entitled to rely upon counsel to exercise her/his judgement to determine what counsel feel should or should not be addressed whether in evidence directly, through cross-examination, in rebuttal or in issues in argument.

[26] What transpired here is that the parties defined the issues based on the grievances and proceeded to conduct themselves in evidence and argument on the issues defined and placed before the arbitrator. There was no mention of what turned out to be the **deciding issue**, namely, the question of whether what transpired constituted "minor installation" until as the arbitrator stated, in the nature of an afterthought.

[27] Not every issue or comment made by counsel in argument must be addressed by the arbitrator; **however**, whenever the arbitrator intended to give serious consideration to the afterthought then the duty to provide full opportunity to address an issue that heretofore was not on the plate but is now being considered by the arbitrator as the deciding issue arises. The statutory requirement of full opportunity to address it by way of evidence and argument arose.

[28] In these circumstances, procedural fairness was not accorded to Bowater. The arbitrator's award must be quashed.

Issue No. 3 – Did the Arbitrator Commit a Reviewable Error When He Found the Employer Contravened Section 35 of the Collective Agreement?

[29] Normally I would address this issue as fully as possible; however, in the circumstances where neither the Union nor Bowater presented any evidence nor advanced any argument, the determination by the arbitrator is without the benefit of a proper hearing on the deciding issue. It follows that his analysis and determination is based upon a foundation absent any real input by the Union no direct evidence was called on the issue of what constitutes a "minor installation", no written submission related to it as an issue and no argument was advanced, merely an afterthought. Bowater did not have any awareness that this was going to be an issue let alone the deciding issue, and was not afforded any opportunity to call evidence on what constitutes a "minor installation" to consider cross-examination and calling into question whatever evidence the Union might have called. Bowater made no written submission on the deciding issue, nor was it provided an opportunity to address the issue orally. This rendered the arbitrator's determination one that I have difficulty, if not an impossibility of determining its reasonableness.

RESULT:

[30] The arbitrator's award is quashed and I would recommend to the parties that the matter be treated as at an end. If, however, either of the parties wishes the order to contain a provision directing a re-hearing before a new arbitrator, then I am inclined of the view that that is their entitlement.

Justice Walter R.E. Goodfellow