IN THE MATTER OF AN ARBITRATION UNDER

The Labour Relations Act

BETWEEN:

COMPASS MINERALS

("the Company")

-and-

UNIFOR, LOCAL 16-O

("the Union")

RE: TRADEMARK CONTRACTORS GRIEVANCE

Before: SOLE ARBITRATOR: M.G. Mitchnick

APPEARANCES:

For the Union:

Micheil Russell, Counsel
Gary Lynch, President
Glenn Sonier, National Representative
Ed Craig, Chief Steward
Lance Greer, Chief Steward

For the Company:

Dan J. Shields, Legal Counsel
Allan Knowlton, Sr. Engineer/ Project Manager
Neil Anstett, HR Manager

Hearings held in Stratford, Ontario on August 24th, 2017, May 3rd and 4th, 2018

AWARD

1. This matter arises from the demolition and replacement of the #3 surface bin at the company's salt mine in Goderich, Ontario. Given the specialized nature, scope and time-sensitivity of the project, the company determined to engage a construction contractor, Trademark, to carry out the job, which ultimately involved 19 employees of the contractor working 24 hours a day over 54 shifts. As it happens the company for two weeks of this period had 5 of its own Millwrights on lay-off due to low salt demand, and the Union grieves a violation of the parties' "Contracting out" clause both generally, and in respect of the two weeks' of wages it maintains were lost to the 5 members in question for not calling them in to assist with the project.

2. Mindful of the admonitions of the venerable *Russelsteel* line of cases, the Union has, over time, negotiated Article 2.07 of the collective agreement, dealing with contracting out at this facility, in great detail. Normally I would recite those provisions at the outset, but there are problems with the language which are better dealt with after a brief review of the facts. At this point, therefore, I will simply note that the Article contains the typical kind of language stipulating restrictions around work "normally performed" by the bargaining unit, as well as language dealing very specifically with the need for prior consultation with the Union.

3. The company's evidence was given by Mr. Allan Knowlton, who joined the company in June of 2013 as Senior Structural Engineer/Product Manager, and who was the individual given responsibility for the present project. Mr. Knowlton worked as an assistant project manager and Ironworker while getting his Engineering degree, and prior to joining Compass Minerals, Mr. Knowlton spent 16 years as a construction superintendent for a concrete and steel erection company. It is clear, based on Mr. Knowlton's background and experience, that he considers "structural steel" work to be that of an Ironworker, and not of an Industrial Millwright. It is equally apparent, and

Mr. Knowlton made no attempt to hide it, that this was very much a driving factor in the way Mr. Knowlton has dealt with this project.

4. Apart from the "skills" issue, the big driver on the time issue was that the #3 bin is integral to the operation of the mine, and it was critical for the company to have the work on replacing it done during the 4-week shutdown commencing on March 1st of the year in question (2016). To make that happen, it was also necessary that all of the "advance" work, the demolition and removal of the existing concrete and structural steel components as well as the delivery and staging of the new ones, be completed before the start of that shutdown. And in light of that time sensitivity, the commercial contract negotiated between Compass and the contractor contained a typical "Liquidated Damages" clause setting out a specific amount payable for each day the project was completed after its due date, as well as a "Bonus" clause for completion earlier than was called for. Trademark was also designated by Compass to act as the "constructor" on the job, for the purposes of the safe-practices requirements of the *Ontario Health and Safety Act*. Mr. Knowlton testified that in light of both these contractual and statutory considerations, he felt Compass could not assign any of the members of its own work force to the project without interfering with Trademark's obligations. These explanations were provided by Mr. Knowlton in emails to other senior managers in the course of preparing the responses to the grievances. Those emails stated in their summative parts:

> RE: Projects requiring contractors on site
>
> There is a plethora of reasons why we could not use our own forces but here are 2 simple ones:
>
> 1) The contractor was designated as "Constructor" for liability and control purposes
>   a) Section 1 of the Act (reg 213⁄91 – OHSH for Construction Projects) defines "constructor" as "a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer". The dictionary definition for "undertake" is "make oneself responsible for", which means a constructor is a person who is responsible for a project. The definition of

"employer" in section 1 of the Act includes contractors and subcontractors. "Project" is also defined in section 1 of the Act

b) When an owner of a project is an employer and uses his or her own workers to carry out that project, the owner is undertaking the project and is the constructor

2) The contract was written with liquidated damages if the contractor did not have the bin functional on or before the completion of shutdown. This resulted in shifts utilizing the entire 24 hour period and we did not have the resources to man or manage the workers to this extent. 5 millwrights would not have been adequate to fulfill this commitment and the shifts were non-negotiable.

And further, while setting out the "constructor" designation in the Ministry's Form, and the "Liquidated Damages" clause in the contract:

> In summary, our forces could not be used on the Bin Project due to the complexities involved in Scheduling, extremely tight deadlines, a 7 day work schedule which we did not have at the time, and personnel having to work any shift at no additional cost. If the schedule was not met financial hardship to Compass Minerals would be compensated via the liquidated damages, using our workers could provide undue hardship to the company.

The reference to shifts being "non-negotiable" is somewhat puzzling since, as will be seen, there was no discussion at all with the Union, and the collective agreement does in fact allow for special arrangements on scheduling to be mutually agreed upon. Apart from all that was set out in these emails, however, it became clear from Mr. Knowlton's testimony that, to his mind, the more fundamental reason why Compass was not in a position to either supply or supplement the labour on the project -- being his first response to employer counsel when asked the question -- was that "we do not have Ironworkers".

5. Given the language of Article 2.07, and the issues I find I have to ultimately decide in the case, it is sufficient that the scope and nature of the work involved be set out in general terms. As Mr. Knowlton explained, the existing bins were surrounded by precast concrete panels to protect them from the elements, and these were tied to structural steel

members. All of this, together with the structural steel components relating to the bins themselves, had to be dismantled and lifted out by a very heavy crane. The new bins were of modular design (i.e., in sections) and needed to be installed by way of structural steel connections. Such a system is classified as "dynamic" under the *Ontario Building Code*, and the structural steel connectors accordingly are required to be pre-tensioned. To do that, normal industry practice Mr. Knowlton indicates is to use what is referred to as the "turn of the nut" method. The bin as well must be tied into the existing head frame and shaft work with structural-steel beams and connections, which is performed using high-reach equipment 85feet in the air. Catwalks around the bin are tied into the existing stairwell, again using structural steel connectors, and were installed at the 40, 60 and 80-foot level. Asked on the basis of his own experience under which trade the work of the demolition fell, Mr. Knowlton responded "Ironworkers". The same for the installation of the new bins and enclosure, as well as the catwalks; in short, the whole project. As for the company's own tradesmen, Mr. Knowlton had had some experience with them on "ironwork" in the past, and was less than impressed. Reference was made to two incidents in particular, but only one had occurred and was present to the mind of Mr. Knowlton at the time the present project was being considered. On that occasion, involving, it would appear, the "shaft crew" rather than the Maintenance Millwrights, Mr. Knowlton had given instructions that the "turn of the nut" method was to be used for pre-tensioning the bolts; and instead the crew resorted to the use of a torque-wrench, which Mr. Knowlton had already indicated was not acceptable. His bottom-line on the Report he filed on the matter was:

> I have serious reservations regarding our shaft crews' ability to follow directions and how am I to know if other shortcuts were not made? Should we not consider giving this work to a more skilled trade which understands the proper methodology and can be held accountable for not following it?

5. As indicated, Mr. Knowlton was abundantly clear in his testimony that he never saw a role for any of the company's own forces in this highly-specialized and time-sensitive project, and no mention of it was ever made to the Union in the many months

that the work was being designed and planned. Asked again by company counsel why it was that Compass decided to contract out this work, Mr. Knowlton responded that "it was evident that we did not have the qualifications to perform this work – and it's 'Capital' work". In that latter regard Mr. Knowlton offered no definition of what constituted "Capital" versus what he termed "Expense" work, other than, he seemed to suggest, by way of the magnitude of the job, and the way that it was handled on the company's books. Mr. Knowlton acknowledged being aware that the company had used its own Millwrights to do structural-steel work in the past, but added that "these were small jobs, not 'Capital', involving a quick modification or repair". On this particular job, he testified as well, the certification required for the welding component was both "height" (fall-arrest) training and an "all-position" welding ticket. The company tendered documentation, and it is not disputed, that none of the 5 Millwrights on lay-off at the time were in possession of both of those qualifications. The evidence is that the "Heights" training is a one-day course, and the "all-position" welding certification a two-day.

6. Trademark was scheduled to start the demolition work on January 13th, and the first indication that anyone in the Union had of this Project was on January 11th in a "60 Second Talk" authored by Mr. Knowlton, announcing the anticipated presence of Trademark on site commencing the 13th. The announcement provided all employees with notice of the areas of the mill that would be affected by the Contractor's work, and the safety measures that would be put in place as a result. These "Talks" have wide distribution amongst the staff, and I accept that it would have reached a number of the members of the Union's executive as a result. The work did not in fact commence until January 14th, owing to a snowstorm, and on January 13th, Mr. Knowlton was asked by another manager if, apart from the "Talk" publication, he had sent the required Contract Notification Form to the Union. Mr. Knowlton was not familiar with that Form, but quickly forwarded one to the Union, in order that, as he testified, it could be discussed at the next weekly Contract Notification meeting that he was advised was scheduled for January 15th. Mr. Knowlton was not himself able to attend that meeting, and the first he

heard of the Union's reaction to the Contract in question was when he saw the grievance that had been filed on that same day.

7. Mr. Gary Lynch and Mr. Ed Craig were called to give evidence on the Union side. Mr. Lynch has been with the company for 17 years, as an underground production miner, and is currently the Union President. He testified that the company uses contractors frequently, to the point where meetings are held once a week to allow the Union to hear from the company what the projected work is, and give the Union a chance "to put its two cents worth in"; i.e., whether there is any way in which at least some of the work could be performed by members of the company's own workforce. Mr. Lynch testified that that was exactly what the Union would have done had it been given advance notice of the present job -- particularly in light of the fact that a significant number of its members, including 5 Millwrights, had just been put on lay-off. While not part of the Maintenance department himself, Mr. Lynch testified that he is aware that the company's own Millwrights do work with structural steel, either on their own, or under the supervision of an on-site contractor like Trademark. Mr. Lynch was a straightforward witness, and did not hesitate to agree with company counsel that the project in question amounted to "capital work", and that it clearly required the engagement of an outside contractor to complete it. On the other hand, Mr. Lynch noted, the contractor was "throwing a lot of people at the job", and he wasn't satisfied that there was not in there some amount of work that could have been done by the company's own staff, particularly at the preparatory stage. Mr. Lynch was in fact able to point to another capital project, called the "Continuous Miner", which has been ongoing at the mill for the past four years, and which was being performed by a combination of contractors' forces and the company's own Millwrights.

8. More detailed evidence of the kind of structural-steel work done by the company's own Millwrights was able to be given by Mr. Craig, being himself a Millwright who has now been with the company for some five and a half years. Mr. Craig is now the Chief Steward for Maintenance, and more recently has been the department's Union

representative in the Contracting-out meetings. As Mr. Lynch had indicated, at these meetings the company would explain the work and how many contractor employees were being brought in, and a discussion would ensue as to the possibility of more of the company's own employees being used on the job. As for the Continuous Mining project, that one involved work on the three head towers, as well as the Bell storage unit and the conveyor lines, and there was structural steel work performed by Mr. Craig and other company Millwrights, under the supervision of Trademark and other contractors, on both the towers and in attaching the steel stringers to the conveyor line. Going over the breakdown of the tasks set out in the job documents provided by the company, it was Mr. Craig's evidence that there was really nothing in that package that differed substantially, apart from some of the heights involved and the need for fall-arrest training, from work that the company's Millwrights had performed on the towers and conveyor line of the Continuous Mining project, or from other work that the Millwright group has performed in the plant from time to time. Mr. Knowlton, it might be noted here, when asked about these specific instances of the company's Millwrights doing "Ironworker" type jobs, simply responded:

> "Those were under Expense; that's the main difference."

And again that, "when these are done by our own people, it's in the realm of Expense, not Capital".

9. Beyond those examples, it was the evidence of Mr. Craig that there is at least some degree of overlap between the duties of a Millwright at the plant and those of an Ironworker, noting specifically the reinforcement of the floor in the transfer-tower surface, where he and the other Millwrights installed the floor and the guard-rails, and completed the tensioning of the bolts. In that latter regard (as noted, a particular concern on the part of Mr. Knowlton), Mr. Craig testified that the Trademark supervisor simply indicated to the Millwright crew the method that he wanted them to use for the tightening, and left them to do the job -- which they did, without complaint.

10. With that as the backdrop, I turn now to the language that the parties have negotiated into their collective agreement. The Union filed with me the language contained in the collective agreement that immediately preceded the present one, and it is useful to begin with what was in place at the time of that prior agreement. In its full terms Article 2.07 at that point read:

> So far as practicable with the work force available, normal maintenance, repair and production work which has been done regularly by the Company's own employees will continue to be done by such employees.
>
> New construction, installation or modification of equipment, major repairs, major maintenance, major overhaul work, warranty work or other work not regularly done by the Company's own employees may be done by outside contractors.
>
> This Clause is not intended to restrict the Company to let contracts when it feels it necessary, economical, or expedient to do so, such as not having the necessary equipment, supervision or employees immediately available with the necessary skills or when peaks of work would require a temporary increase of the Company's forces with subsequent layoff of such forces.
>
> If it becomes necessary to contract out work as provided for above, the Company agrees to give a written notification of the reasons for such contracting out to a designated representative of the Union, prior to the work being performed. The Company will normally provide three (3) days notice for major contracts involving more than ten (10) outside workers. If time does not permit, the Company shall notify a Union official and follow with a written notice. In the notification, the Company will give the name of the contractor, the approximate number of personnel involved, the approximate duration and the job to be performed.
>
> The Company will not cause an employee to be laid off, demoted, terminated or transferred by bringing in outside contractors to perform normal maintenance repair or production work on the plant premises.
>
> <u>Maintenance Contracting Out Clarification</u>:
>
> If it becomes necessary to contract out work and in order to obtain maintenance crew involvement for the identification and planning of work that will assist in the minimization of contracting out the Company will discuss with the Union all work that has the potential to be contracted out, prior to the work being performed. The

Company agrees to give a written notification of the reasons for such contracting out to a designated representative of the Union.

Under currently agreed to Overtime Guidelines the Company is committed to the use of qualified Sifto employees, from the volunteers on all Departmental overtime sign up lists ahead of having contractors carry out the required work.

Modification of equipment, major repairs, major maintenance and major overhaul work will be first offered to the Company's own employees as per Clauses 6.05 k) and 6.09 b). Both parties understand that normal service levels must be maintained.

Jobs requiring four (4) days or less (that can include modification of equipment, major repairs, major maintenance and major overhaul work) will first be offered to available Sifto Journeymen. Shift assignments will be assigned in the following order:

- Regular posted shift Journeyman's normal duties.
- Assignment of prioritized work
- Job continuity
- Backfilling other unplanned work

Supervisors will consider Journeyman's specific job interest (as per Clause 2.08) prior to contracting out work. Contractors can be utilized so that normal service levels can be maintained.

The Company agrees to no open ended contracts.

Notification of a Maintenance Contract:

If it becomes necessary to outsource work the Union will be notified.

An e-mail will be sent to the "contracting out" distribution list. The notification will classify into two categories:

1. Pre-note – 3 days or more advance notice
2. Urgent – Less than 3 days notice.

The purpose of the notification of a contract is to ensure that the workplace parties are aware of what work is being contracted. In the case of the "pre-note" the Union will be allowed to suggest alternative solutions to out-sourcing.

11. The first impression that one gets in reading that Article through is that it appears to have evolved in pieces, over time. The latter portion, headed "Maintenance Contracting Out Clarification", for example, could virtually stand on its own. However,

"maintenance" work, whether "normal" or "major", is also dealt with in paragraphs one and two, which again, in themselves, could well stand alone as a typical form of "contracting out" clause: what has been done "regularly" by the company's own employees in the past will continue to be so done; what has not, may be done by outside contractors. However, those clauses appear to be effectively over-ridden by the next following paragraph, recognizing a much broader discretion in the company to contract out, and, as can be seen, setting out an entirely different set of tests for doing so.

12. Article 2.07 as re-written currently picks up "some" of that previous version. It now provides [with numbering of the paragraphs added here for easier reference]:

> 2.07 [1] With the work force available, normal maintenance, mining, hoisting, and shipping work which has been done regularly by the Company's own employees will continue to be done by such employees.
>
> [2] New construction, installation, warranty work, capital project work (See Note Below) as agreed to by the parties, modification of equipment, major repairs, major maintenance, and major overhaul work which has been done regularly by the Company's own employees will continue to be done by such employees.
>
> [3] The Company agrees that all work will be offered to bargaining unit members unless it is capital project work (See Note Below) as agreed to by the parties. The Company is committed to providing training to its own employees to reduce the use of outside contractors.
>
> [4] The Company will not cause any of its own employees to suffer any loss of hours of work or pay including overtime and mine holiday work (as described in applicable procedures and guidelines), to be laid off, demoted, terminated or transferred by bringing in outside contractors. The Company will also ensure that the use of outside contractors does not hinder any existing and/or the creation of any future posted job positions by bringing in outside contractors.
>
> [5] To ensure bargaining unit growth is not restricted, the Company is committed to ensure the hiring of additional full time bargaining unit employees to maintain adequate manpower levels appropriate to the mine to reduce the use of outside contractors.
>
> [6] Under currently agreed to Overtime/Mine Holiday Procedures & Guidelines, the Company is committed to the use of its own qualified employees, including

other volunteers on all departmental weekly overtime/mine holiday sign-up lists ahead of bringing in outside contractors.

[7]The Company agrees to no open ended contracts and, the Company further agrees that no outside contractor employee will be utilized to the extent of being established as a permanent residential contractor.

[8]The parties understand that contractor use is restricted to supplementing the existing work force under temporary conditions when extra work is required or the expertise is not available and all internal avenues have been exhausted. If it becomes necessary to contract out work, the Company will discuss with the Union all work that has the potential to be contracted out and alternative solutions to out-sourcing prior to the work being performed.

[9] The Company will normally provide three (3) days written notification of the reasons for such contracting out to a designated representative of the Union prior to the work being performed. If time does not permit, the Company shall notify a Union official and follow with the written notification. In the written notification, the Company will give the name of the contractor, the approximate number of personnel involved, the approximate duration, the job to be performed, the shift schedule, and the hours of work to be performed.

[10] An e-mail will be sent to the "contracting out" distribution list. The purpose of the notification of a contract is to ensure that the workplace parties are aware of what work is being contracted.

NOTE: With regard to "Capital Project Work"; in the event of the parties not reaching an agreement as stipulated above, the Company may proceed in contracting out such work, the Union may further pursue such matters through the grievance/arbitration process.

The words “so far as practicable” have been deleted from the start of paragraph one, leaving the phrase “With the work force available” more or less floating by itself; but more substantially, paragraph two has been converted from the negative “*not*” been done regularly by the company’s own employees, to the positive “has been done regularly”, lining up with the format of paragraph one. In that way the two paragraphs really merge into one, with a single test, effectively stating that normal maintenance, mining, hoisting, and shipping work, new construction, installation, warranty work, capital project work [as determined], modification of equipment, major repairs, major maintenance, and major overhaul work which has been done regularly by the Company’s own employees will

continue to be done by such employees. The important point to note for present purposes is that, under paragraph two, "capital project work" is *not* identified as an exception to the kind of work that the company would be expected to perform with its own forces. That, I have to say, appears to me to be inconsistent with the tenor of the evidence coming from both sides, and, although the present version, unlike the prior version, provides no insight over which paragraphs of the Article are to be read subordinate to others, I get the sense that paragraph three more closely reflects the understanding of the parties as to what the impact of a finding of a "capital project" would be (although not, as the Union witnesses noted, and as the actual experience of the past bears out, on an "all or nothing" basis). In that regard I find the "Note" itself to be of critical assistance in trying to divine the overall intentions of the parties, stating as it does that in the event the parties are *not* able to agree on whether a particular project is "capital" as the company may claim, the company "may proceed in contracting out such work". Equally clearly, however, the project is not definitively determined to be a "capital" one simply because the company says it is -- whether or not, as Mr. Russell submits, it chooses to characterize it that way for accounting purposes. Rather, on a straightforward reading of the clause, the Union's recourse in the event of such lack of agreement is to have an arbitrator decide the point. And if it is not found through adjudication to in fact be a "capital" one, I agree with Mr. Russell in so far as he argues that the "exclusion" provided to the company under paragraph three has no application.

13. Having said all of that, I would note that, in the absence of extrinsic evidence to assist, it is not obvious how an arbitrator is to come to the conclusion that a particular project is or is not a "Capital" one. There is nothing to support Mr. Shields' suggestion that the arbitrator can simply apply the Labour Board's test for "construction work" to resolve that, and indeed the parties treatment here of "new construction" and "major repair" in the same way as "normal maintenance" speaks loudly against that. Fortunately, it may be said, in the present case I do not have to deal with that dilemma: the Union in its own evidence has acknowledged that the nature and magnitude of the

current project made it a "Capital" one, and one for which the company was justified in looking to a contractor for help. But again, that acknowledgement did not extend so far as to say that the company was thereby entitled to give no consideration whatsoever to the possibility of the company's employees being able to assist with the work -- particularly at the demolition and prepping stage, and when there were at that very point a number of Millwrights on lay-off.

14. Which takes us to paragraph number 8: the "consultation" section. That section, as written, stands apart from any conclusion as to whether a project is a "Capital" one, thus justifying the engagement of a Contractor in the first place. And the history at this mill of the *joint* use of Contractor and own forces on occasion provides a ready illustration as to why. While Mr. Knowlton proceeded on the basis that there was simply *no* work that was appropriate on this specialized job for the company's own workforce to do, the "bi-jurisdictional" nature of some of the tasks that even Mr. Knowlton conceded to, and the history of what has been done by the company's Millwrights in the past, make the results of any meaningful and open-minded dialogue on the issue much less than a foregone conclusion in a case such as this. It is simply no answer to that history and area of overlap to say, as Mr. Knowlton does: "Those earlier instances were Expense; this one was Capital". Those terms, at best, describe a result; not a rationale. The new paragraph "8" in fact represents a much stronger version for the Union than the old paragraph three that it appears to replace, and, once again, now reads:

> [8] The parties understand that contractor use is restricted to supplementing the existing work force under temporary conditions when extra work is required or the expertise is not available *and all internal avenues have been exhausted*. If it becomes necessary to contract out work, the Company will discuss with the Union all work that has the potential to be contracted out *and alternative solutions to out-sourcing prior to the work being performed.*
>
> (emphasis fairly made by Mr. Russell)

It is difficult to imagine a scenario of notice and discussion being farther from meeting the undertakings and requirements of this section than what occurred (or more to the point, did not occur) in the present case. And there must be consequences.

15. There are, as we all know, a vast number of cases dealing with the issue of contracting out and, in particular here, the question of remedy. The Union led off with:

> *BC Rail and UA, Local 170 (Air Brake Rebuild), Re*, 2004 Carswell BC 3837 (Munroe)
>
> *Re Burrard Yarrows Corp. and Brotherhood of Painters*, (1981), 30 L.A.C. (2d) 331 (Christie)
>
> *Re Via Rail Canada Inc. and I.A.M.*, (1993), 35 L.A.C. (4th) 267 (Franklin)
>
> *Exchanger Industries and BBF, Local 146 (Contracting Out), Re*, (2014), 245 L.A.C. (4th) 42 (Kanee)

And the employer responded with:

> *Valco Furniture Ltd. and U.S.W.A., Local 9315 (2000), 86 L.A.C. (4th) 309* (Roach)
>
> *Re Vaughan Hydro-Electric Commission and Canadian Union of Public Employees, Local 2246 (1995), 51 L.A.C. (4th) 129* (Beattie)
>
> *Re Canadian Waste Services Inc. and United Steelwokers of America, Local 343-6* (1999), 84 L.A.C. (4th) 50 (H.D. Brown)
>
> *Re Cameco Fuel Manufacturing Inc. and USW, Local 14193 (US Ecology)*, 2013 CarswellOnt 9217, 115 C.L.A.S. 179 (Chauvin)
>
> *Re British Columbia Ferry Corp. and B.C.F.M.W.U. (Collins)* (2002), 115 L.A.C. (4th) 367 (Gordon)
>
> *Ivaco Rolling Mills and United Steelworkers of America, Local 8794*, 1997 CarswellOnt 5651, 49 C.L.A.S. 385 (Adell)
>
> *Re Iron Ore Co. of Canada and United Steelworkers, Local 5795*, 1976 CarswellNfld 173, 13 L.A.C. (2d) 131 (L. Harris)

Essar Steel Algoma Inc. v. U.S.W., Local 2251, 2009 CarswellOnt 8534, [2009] O.L.A.A. No. 377 (Stout)

15930 Fraser Highway Ltd. and UFCW, Local 1518 (Roastery), 2014 CarswellBC 3393, [2014] B.C.W.L.D. 8078 (Nichols)

Iron Ore Co. of Canada and USWA, Local 5795 (15409), 2016 CarswellNfld 109, 126 C.L.A.S. 206 (Buffett)

16. Before dealing with Remedy, however, a couple of other points in argument need to be dealt with. Designation by an owner of a contractor coming on site to carry out a construction project as the "constructor" is of course normal and appropriate. It does not follow from that, however, that the owner is thereby precluded from doing any of the work on its own, either independently or by way of assistance to the contractor. It is not unusual for a constructor in the capacity of a "general" or overall project manager to direct employees from a number of sources, including of both the owner and subcontractors, and it remains the responsibility of the contractor/constructor under s.23 of the Act to ensure that

> b) every employer and every worker performing work on the project complies with this Act and the regulations…

That right and responsibility to direct *all* forces engaged in the project can be reinforced in the commercial agreement with the contractor as well, as Compass has done in the present case, for example in stipulating in 6(a) of its contract:

> Contractor shall have complete control of the Services and shall direct and supervise the Services [sic]its highest and best management practice, skill and attention.

Again, the evidence indicates that this is how "contracted" work has been able to be done in the past, with Compass's own employees performing the tasks assigned to them under the supervision of the Contractor (including Trademark, amongst others). Further, I agree with Mr. Russell that the employer cannot purport to over-ride its obligations under the collective agreement by way of terms that it negotiates with an outside party (and the

only case cited by the employer suggesting the contrary, *Cameco*, appears to be one in which there was an unchallenged commitment to outside contractors that preceded the events in question, and that existing contract posed difficulties with changing the manner in which the work could be re-assigned).

17. The "causation" argument made by Compass under paragraph 4 also merits brief comment, if only as a caution to the company about relying on the fact that the 5 Millwrights were *already* on lay-off, for other reasons, as a complete defence to the exposure that that paragraph creates. In the *Vaughan* case, for example, the arbitrator noted at page 135f that, apart from the lay-offs having occurred due to the overall lack of work rather than the contracting-out, the amount of contracting actually *declined* after the lay-offs had gone into effect. In *British Columbia Ferry*, Arbitrator Gordon notes, at page 384:

> "A union which has agreed to language such as that found in Article 14(a) may be able to establish in a particular case that the provision has been breached even where the sequence of events is not consistent with a contemporaneous or closely proximate causal connection between contracting out and the lay-off."

And in the *Valco* case, the arbitrator summed up by noting, at page 328:

> "…they all had been recalled to work from lay-off by the time the unloading of the furniture took place to fill Sears' orders … Very simply, the Employer's actions of February 22, 1999 did not lead to the lay-off of January 1999, nor did it prevent the employees…from being recalled to work from the said lay-offs."

And here there is more for the employer to consider: the language of the corresponding paragraph in the prior version of 2.07 has, as Mr. Russell notes, been expanded to include, in addition to lay-off, "*any* loss of hours of work". To demonstrate the point, one only has to consider what the company's legal position would be if it had employees on lay off, and instead of recalling them to offer a period of the employees' normal work

that subsequently became continuously available, chose to do it instead by engaging a contractor.

18. That said, however, I agree with Mr. Shields that the evidence here falls short of establishing that the work performed by the contractor in the present case was work that could and should have generated the recall of the 5 Millwrights that were on lay-off. The work at high levels complicates the matter here, and it is not disputed that none of the five were qualified as of that point of time to step into the role of the personnel being utilized by the Contractor. Mr. Russell's suggestion that there may have been other Millwrights at work whose assignments the 5 could have taken over in order to free them to work on the Bin project instead, however creative, is nonetheless speculative on the evidence, and insufficient to establish a claim for special damages on behalf of the 5. The claim for two weeks' pay on behalf of these 5 employees is accordingly denied.

19. What Mr. Russell's submission on the point really does is to once again underscore the potential value of the Union having at least the opportunity for full discussion on the matter. As Arbitrator Christie fairly comments in the *Burrard Yarrows* case, at page 339:

> "The requirements of the second sentence of art. XV – s. 14 are not onerous. It only applies if time permits and the company is not obliged to get the union's assent; it need only contact them and "see if they can come up with a better arrangement or solution."

Damages for a loss of opportunity of this type do not admit of normal quantification, and arbitrators appear to take care to set them at a level (at least in the absence of repeated violations) that strikes a balance between not being excessively "punitive", yet substantial enough to get the employer's attention. In the cases cited I see that the damages as awarded range from a low of a few dollars to a high of $7,000, depending on the reason for the omission, and, as the arbitrators have stated in some cases, whether the need to contract out was a foregone conclusion. The latter is not the issue here; as noted, the Union in its evidence concedes that the project in question required the assistance of a

Contractor; but the evidence is equally clear that there have been occasions in the past where the company's own forces could be usefully employed in working along with the employees of the contractor. Once again, I am not prepared to speculate on what might have come out of the required meeting: the Union was entitled to the opportunity to take its best shot; and the language of paragraph 8 sets a particularly high bar that the company has to demonstrate it has met. In the present case no advance dialogue took place with the Union whatever, let alone in a way that would have been timely for such a project, and I have nothing before me to assess as to whether the company showed a good-faith willingness to consider the Union's views. Damages, once again, must flow.

20. In resolving what that level of damages should be, there is, as Mr. Shields suggests, a relative degree of convergence between the principles put forward by both parties on the issue, and I note the endorsement of Mr. Russell's *B.C. Rail* case in the *Essar Algoma* decision cited by Mr. Shields. As Arbitrator Stout there sets out at paragraph 37:

> "A collective agreement is different from most other contracts. In a collective agreement, the Union contracts to obtain benefits for both itself and its members. Not every breach of a collective agreement can be easily quantified. As a result, arbitrators must look beyond common law principles and take into consideration labour relations principles in crafting appropriate remedial responses."

And then, more specifically at paragraph 39:

> "It is not uncommon for situations to arise where a party may have lost an opportunity that can no longer be made available to them. Such is the situation when an employer has failed to provide a union with proper notice of contracting out. The approach to assessing damages where a company has failed to comply with notice provisions is set out in an extract from *Re B.C. Rail and United Association, Local 170, Metal Trades Division, Supra,* at paragraph 34:
>
> > "In my view, the approach to the assessment of damages where employers fail to comply with notice provisions is set out in the following extract on p. 14 of the decision of

> Arbitrator Kelleher, as he then was, in Re Weyerhauser Canada Ltd. and P.P.W.C., Loc. 10:
>
> > The issue of damages for a lost opportunity to persuade an employer in a contracting dispute is discussed in *Burrard Yarrows Corporation and International Brotherhood of Painters, Local 138*, (1982) 30 L.A.C. (2d) 331 (Christie) and *Eurocan Pulp & Paper Company and Canadian Paperworkers' Union, Local 298*, unreported, February 5, 1990 (Hope). I accept the principles which emerge from those cases: that the amount of damages awarded should be more than nominal; and that damages should be sufficient to give the employer a "meaningful incentive to comply with the notice provisions in the future" (See Eurocan, supra, at 30). "

The Union, after a brief caucus, put forward the number of $10,500 as an amount suitable to make the company pay attention to its obligations in the future. This, however, is the first time the parties have had to really engage on the new language as substantially re-written in the 2015-18 collective agreement; and there have been no other instances of a breach that the Union can point to that would suggest an overall unwillingness by the company to respect its obligations regarding contracting-out. Indeed, the meetings between these parties for the purpose of the sharing of information on contracting-out take place weekly. On the other side, the present omission took place at a time when there were Millwrights on lay-off, and it is troubling that Mr. Knowlton, being given the assignment of this major project, does not appear to have been apprised in advance of the requirements generated by the collective agreement with respect to contracting-out. While the level of damages called for here does not lie at the low end of the scale, therefore, the appropriate amount of damages levied in the *BC Rail* case itself, Mr. Shields fairly points out, was considered to be $4500. I believe on all the principles that that is an appropriate guide for the present case, although with some measure of indexing in light of the fact that that award was issued in the year 2004.

21. By way of appropriate remedy, therefore, I hereby make the obvious declaration that in the instance at hand the company has wholly failed to meet its contractual obligation to provide the Union a meaningful opportunity to explore whether any internal possibilities existed as well for this "Capital" project, and I order payment to the Union of general damages in the amount of $5,500 as a consequence. Such amount shall be payable to the Union, for such allocation or use as it considers appropriate, within thirty days of this award.

22. I will remain seized in the usual way.

Dated at Toronto this 15th day of June, 2018

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Arbitrator