

BRITISH COLUMBIA LABOUR RELATIONS BOARD

NANAIMO TIMES LTD.

(the "Employer")

-and-

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION,
LOCAL 525-M

(the "Union")

PANEL: John B. Hall, Associate Chair (Adjudication)
Joan Gordon, Vice-Chair
Brent Mullin, Vice-Chair

COUNSEL: Theodore C. Arsenault, for the Union
Michael Coady, for the Employer

CASE NO.: 23190

DATE OF DECISION: January 4, 1996

DATE OF REASONS: February 12, 1996

REASONS FOR THE BOARD'S DECISION

I. NATURE OF THE APPLICATION

1 This is an application by the Union under Section 99 of the *Labour Relations Code* for review of an arbitration award issued by J.M. MacIntyre, Q.C. on July 24, 1995 (Ministry No. A240/95). The Union grieved the Employer's transfer of bargaining unit work to Nanaimo Collating Incorporated ("NCI"), also known as Mid-Island Distribution Service ("MIDS") as being, among other things, a contracting out in violation of Article 1.02 of the Collective Agreement. Central to this application, the Arbitrator held that Article 1.02 of the Collective Agreement did not prohibit the Employer's contracting out.

2 The Union raises two grounds of appeal:

1. The Arbitrator violated the principles expressed or implied in the Code by his use of extrinsic evidence in interpreting Article 1.02; and

2. The Award is not based on a reasoned analysis of the issues before the Arbitrator and is incongruous in light of the relevant provisions of the Collective Agreement.

3 In the portion of its submission dealing with "Relief Sought", among eight categories of relief, the Union requests "[s]uch further and other relief as counsel may request at the hearing of this application". From this we assume that the Union is requesting an oral hearing. However, we are satisfied that this matter can be adjudicated without a hearing. The arguments to the Board in this application are clearly articulated in the parties' submissions and no oral hearing is necessary to elucidate those arguments. Further, there are no material factual disputes. As for the Union's submission that it may request relief other than that set out in its submissions, the Board's consistent policy has been that parties must outline their arguments and request relief fully in their respective submissions. In any event, given our decision to dismiss the Union's application, we do not need to hear the Union's submissions on remedy.

4 We dismissed the Union's application under Section 99 by letter to the parties dated January 4, 1996. In that decision, we found that neither of the grounds advanced by the Union establish a basis for review under Section 99 of the Code. These are our reasons for that decision.

II. BACKGROUND

5 The Union seeks review of the Arbitrator's conclusion that the contracting out of bargaining unit work by Nanaimo Times to NCI was not a violation of Article 1.02 of the Collective Agreement. That clause provides:

Article 1 - Union Recognition

1.02 The Company agrees it shall not sign or make any other agreement, written or verbal relating to any work covered under the terms of this agreement.

6 During the course of the proceedings before the Arbitrator, the Employer introduced and relied on numerous collective agreements from various Vancouver Island Thomson newspapers and various unions. The Employer advanced these agreements to support its argument that Article 1.02 was modeled on a special work jurisdiction clause commonly used in the printing industry to clearly establish the lines of jurisdiction between various craft unions working for the same employer. Those collective agreements were admitted into evidence by consent.

III. THE ARBITRATOR'S FINDINGS

7 The Arbitrator commenced his analysis by acknowledging that while at first sight Article 1.02 could be argued to prohibit any contracting out, that provision had to be read in context. The Arbitrator then reviewed several collective agreements introduced by the Employer. The Arbitrator referred to the Union's arguments that he should not consider these agreements which involved other unions and other employers, and that Article 1.02 was clear on its face such that extrinsic and collateral evidence should not be admitted to try to make it ambiguous. The Union further argued that in those collective agreements there were several unions at one location, and in those cases the unions needed to define their work and protect it within the "jurisdiction" portion of their agreements. In the present case, the Union argued Article 1.02 was placed under "union recognition" and there were no competing unions. The Arbitrator held:

If there is anything that is clear in the construction of collective agreements, it is that ambiguity lurks within even apparently clear clauses. It is for that reason that arbitrators generally agree that it is not necessary to determine that a clause, standing alone, is ambiguous as a precondition to considering other parts of the agreement or the practice or understandings of the parties. In the present case, counsel for the employer argues that other agreements between closely related employers and unions contain language too similar for coincidence, and these raise at least an ambiguity. (pp. 27-28)

8 The Arbitrator noted that the phrase "employer shall sign no other agreement" in the other collective agreements appeared to address the concern that agreements with

other unions might trench on one union's work or work jurisdiction: a "no-contracting-in" clause (p.28). However, the Arbitrator noted that the novel feature in the parties' Collective Agreement was that, as the Union argued, the disputed provision was found in the union recognition clause, and was "not in the usual location as part of the work description in the Jurisdictional Article where it is located in other agreements." (p.28)

9 The Arbitrator concluded:

The evidence available to me to interpret Art. 1.02 is not extensive; there is no bargaining history; there are no awards before me dealing with that clause within a union recognition article...; no past practice or discussions were put before me. I have to make the best reasonable assumption based on the language and the minimal background taken from the other agreements and arbitrator Munroe's comments [in *Re Times Colonist Division, Canadian Newspapers Co. Ltd. and Victoria Mailers' Union, Local 121*, (1982) 7 L.A.C. (3d) 204]. It is not self-evident to me that the words of Art. 2.01 [sic], standing alone, create a general no-contracting-out clause. If the Article was returned to the end of the jurisdiction article from which it may have wandered--i.e. Art. 4.01-- it would prohibit agreements which trenched upon that Article, but I read that article as a union security clause and not a job security clause.... [T]here appears to be general agreement that no-contracting-out clauses have to be clear, and I do not find Art. 1.02 to be a clear no-contracting-out clause, even if combined with Art. 4.01. (pp. 30-31).

10 For these reasons, the Arbitrator dismissed the Union's grievance.

IV. ARGUMENT

1. Use of Extrinsic Evidence

11 The Union submits that the Arbitrator erred by considering the impugned extrinsic evidence, by then using it to create an ambiguity in Article 1.02, and by concluding that it was not self-evident that the words of Article 1.02, standing alone, created a "no-contracting-out" clause. The Union argues that Article 1.02 of the Collective Agreement is clear on its face and prohibits any contracting out of any work covered under the terms of the Collective Agreement by any form of agreement, either written or verbal. The Union relies on *Federated Co-operatives Ltd.*, BCLRB No. B39/94, for the propositions that where the language of the collective agreement is clear, extrinsic evidence cannot be used to alter its meaning or the scope of its application, and that where a provision clearly applies, an arbitrator cannot choose to apply it in a manner contrary to its meaning.

12 The Union argues that the Arbitrator strayed from the cardinal principle implicit in the Code that it is the language of the collective agreement which is paramount. The

Union says Article 1.02 clearly applies to this contracting out and the Arbitrator erred by finding to the contrary. Through “arbitral gloss” the Union says that the Arbitrator has effectively created an exception to the scope of Article 1.02 and altered that provision to exclude from its coverage any agreements made by the Employer that relate to bargaining unit work in the form of contracting out. This error had the result that the Arbitrator failed to have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties.

13 The Union further submits that the Arbitrator misapplied the extrinsic evidence. The various collective agreements that the Arbitrator considered did not have any real life connection to Article 1.02 of the parties’ Collective Agreement. The Union says that the impugned evidence was not the type of extrinsic evidence which an arbitration board can properly rely upon to determine the actual intent behind the words used by the parties to the Collective Agreement.

14 The Employer argues that the Union did not object to the impugned evidence at the time the evidence was admitted and should not now be entitled to launch an appeal raising that objection. In any case, the Employer argues that the impugned extrinsic evidence was properly admitted because there was a *bona fide* doubt as to the meaning of Article 1.02 in respect of which the evidence was admitted and considered.

15 The Employer relies on *University of British Columbia*, BCLRB No. 42/76, [1977] 1 Can LRBR 13 (“*U.B.C.*”), as setting the test for when an arbitrator may consider extrinsic evidence: “in any case in which there is a *bona fide* doubt about the meaning of the language in the agreement” (p. 9). From this passage, the Employer argues that the requirement was not for ambiguity, but for *bona fide* doubt. The Employer submits that there was a *bona fide* doubt about the meaning of Article 1.02 and the clause is also ambiguous both on the face of the Collective Agreement and in context of the impugned extrinsic evidence.

16 The Employer argues that the Union’s argument based on *Federated Cooperatives, supra*, mischaracterizes what the Arbitrator did in the Award. The Employer asserts that what the Arbitrator did was to determine whether the Union was incorrect in its assertion that Article 1.02 clearly applied to the circumstances at hand. The Arbitrator was entitled to, and did, make this determination based upon an examination of the language of Article 1.02 and the context in which it appears in the Collective Agreement. The Arbitrator then reviewed the other collective agreements and the Munroe award (in *Re Times Colonist Division, supra*) which the Arbitrator characterized as “minimal background”.

17 The Employer argues that even if the extrinsic evidence had played a significant part in the Arbitrator’s decision, this would have been proper. Citing *Federated Cooperatives, supra*, the Employer argues that even where language seems clear, an arbitrator may consider extrinsic evidence to determine whether it is, nonetheless, ambiguous.

18 The Employer submits that the Arbitrator's primary focus was on the language of the Collective Agreement, especially Articles 1.02 and 4.01 and their context. The Arbitrator did not alter the meaning of Article 1.02 but recognized that it is capable of several possible meanings and concluded that the Union had not shown to his satisfaction that its interpretation reflected the intent of the parties. The Arbitrator did not ignore the language of the provision as did the arbitrator in *Federated Co-operatives*. The Employer argues that the Arbitrator noted that there was no explicit reference in the Collective Agreement to contracting out, applied a plain meaning approach, remarked on the very wide possible interpretations of Article 1.02, correctly recognized the importance of context, and noted that ambiguity "lurks within even apparently clear clauses". The Arbitrator simply did not agree with the Union's argument.

19 The Union replies that it is not appealing on the basis that the Arbitrator improperly admitted the impugned evidence, but on the basis of his use of the evidence. This improper use had the result that the Arbitrator failed to give meaning to the clear language and altered the clear meaning of the language and the scope of its application. The Union argues that after admitting the extrinsic evidence an arbitrator is free to conclude that in light of the clear and unambiguous language of the collective agreement and principles applicable to interpreting collective agreements, that the extrinsic evidence cannot be properly used. The Arbitrator failed to make this distinction and in failing to do so, he erred in law. The Union further argues that the Arbitrator erred, through his use of the extrinsic evidence, by inferring that the parties intended the provision to apply to union recognition and not to contracting out.

2. Reasoned Analysis

20 The Union argues that the Award lacks any reasoned analysis of the language contained in Article 1.02 and, specifically, why the clear and unambiguous language of Article 1.02 does not cover a contracting out: *Drifter Motor Hotel (Rupert Management Ltd.)*, BCLRB No. 29/78.

21 The Union submits that the only analysis of Article 1.02 is with reference to the other collective agreements and that Article 1.02 may have "wandered" from the end of Article 4.01. The Union submits that by reading Articles 1.02 and 4.01 together, the Arbitrator concluded that Article 1.02 was a union security clause. In doing so, the Arbitrator erred by commenting that "[i]f the Article was returned to the end of the jurisdiction article from which it may have wandered - i.e. Art. 4.01 - it would prohibit agreements which trespassed upon that Article..." (p.31). The Union argues that the Arbitrator had no evidence before him that Article 1.02 had ever been connected to Article 4.01. The Union argues that the Arbitrator's analysis is clearly wrong, inconsistent, and illogical. The Arbitrator either failed to grasp or chose to disregard the clear language of Article 1.02 in the context of the Collective Agreement as a whole.

22 The Union further argues that the Arbitrator failed to read Article 1.02 in the context of other provisions of the Collective Agreement, in particular Article 52.02 which

the Union says restricts the Employer from signing any contract of any kind with any other union relating to any jobs or work covered by the Agreement. The Union submits that the Arbitrator should have considered all relevant provisions in the Collective Agreement as a whole and that if a plain reading of a clause suggests that it may have application to the matter before him, it should have been considered: *Inland Natural Gas Co. Ltd.*, BCLRB No. 136/86.

23 The Employer extensively reviews the elements in the Arbitrator's analysis and submits that the Arbitrator gave a thoughtful and reasoned analysis based on the evidence properly before him. The Arbitrator did not find that Article 1.02 *had* wandered from Article 4.01, but speculated that if the Article had done so, it would have a certain effect. These remarks were made in the context of strengthening the Union's argument.

24 The Employer further argues that the Union's Article 52.02 argument was not raised before the Arbitrator. However, the entire Collective Agreement was in evidence and there was no basis for assuming the Arbitrator did not consider all its parts; he was not required to refer in his Award to every clause in the Collective Agreement that he considered. In any case, the Employer argues that Article 52.02 is intended to protect the bridge period after the expiry of the Collective Agreement and therefore offers no assistance to the Union.

V. ANALYSIS

25 It is a long established principle that the legislature did not intend the Board to be a full-fledged avenue of appeal from arbitration decisions: *Simon Fraser University*, BCLRB No. 16/76, [1976] 2 Can LRBR 54. The standard the Board applies under Section 99 in reviewing arbitration awards dealing with contract interpretation is set out in *Lornex Mining Corporation Ltd.*, BCLRB No. 96/76, [1977] 1 Can LRBR 377:

...does the material before the Board indicate that the arbitrator was making a *genuine* effort to reach his conclusions on the basis of the relevant provisions of the bargain struck by the parties? If so, his interpretation of those provisions (an interpretation made by a person selected by the parties themselves to assist in the self-government of their relationship) will be beyond review by us. (p. 381; emphasis in original)

1. Use of Extrinsic Evidence

26 The Union submits that the Arbitrator improperly considered and used extrinsic evidence to alter the meaning and scope of Article 1.02 of the Collective Agreement. The correct approach to an arbitrator's use of extrinsic evidence in this jurisdiction was long ago set out in *U.B.C., supra*. Those principles have subsequently been applied in numerous cases under Section 99 (formerly Section 108) of the Code. Some of those decisions have at times been advanced as representing a departure from the *U.B.C.* principles. In order to provide clear guidance to the community, we are taking this opportunity to confirm the Board's approach when reviewing an arbitrator's use of extrinsic evidence.

27 We begin by quoting a key passage in *U.B.C.*:

...in any case in which there is a *bona fide* doubt about the proper meaning of the language of the agreement... arbitrators must have available to them a broad range of evidence about the meaning which was mutually intended by the negotiators.... [T]he party [seeking to adduce the extrinsic evidence] does not have to clear a preliminary barrier before that evidence can be utilized, of securing an initial ruling from the arbitrator that the agreement is legally ambiguous on its face. Instead the arbitrator, when he begins the task of interpretation, will be able to do so with a full appreciation of the relevant exchanges which eventually culminated in the formal document. With that material before him, the arbitrator can decide whether he entertains any doubt about the meaning for the provision in question and, if so, whether the negotiation history is helpful in resolving that doubt... We have been articulating the principles upon which arbitrators may properly *use* evidence of negotiation history. That should not be taken to imply that arbitrators are *bound* to base their decisions on such evidence simply whenever the wording of the agreement is somewhat equivocal. The arbitrator is trying to decipher the proper meaning which the parties may reasonably be said to have intended for their contract language. (p. 18)

28 It follows that there is no requirement or pre-condition that a party seeking to adduce extrinsic evidence must first establish a *bona fide* doubt or an ambiguity on the face of the collective agreement prior to the arbitrator admitting the evidence. An arbitrator will accept the evidence when it is proffered (subject, of course, to the usual rules about relevancy and so on). The arbitrator is then able to consider both the language of the disputed provision and the extrinsic evidence when determining whether there is any *bona fide* doubt or ambiguity about the language of the agreement.

29 If the arbitrator decides, after considering both the collective agreement language and the extrinsic evidence, that there is *no* doubt about the proper meaning of the clause in question, the arbitrator then reaches an interpretive judgment without

regard to the extrinsic evidence. See *Pacific Press Ltd.*, BCLRB No. B97/94 (upheld on reconsideration BCLRB No. B427/94) where the Board concluded that after considering the extrinsic evidence and finding the language of the collective agreement to be clear, the arbitrator did not need to (and would not be entitled to) resort to extrinsic evidence as an aid to interpretation. This amounts to the arbitrator effectively concluding: "I have considered all of the evidence, both the collective agreement and that which is extrinsic to the agreement, and conclude that what the language means is what it appears to mean to me on first reading."

30 On the other hand, if an arbitrator concludes that when the language of the collective agreement is considered with the extrinsic evidence, there is some doubt about the meaning of the provision in dispute, the arbitrator is entitled to use extrinsic evidence to resolve the ambiguity or doubt, even in the face of collective agreement language that appeared clear when read in isolation: *Finlay Forest Industries Ltd.*, BCLRB No. B137/94. However, even in these circumstances, an arbitrator is not bound to base his or her decision on the extrinsic evidence simply because the language is somewhat equivocal. The arbitrator is trying to decipher the meaning which the parties *mutually* intended for the disputed contract language, and should not forget the actual language in concentrating on a mass of extrinsic material: *U.B.C.* Subject to the considerations in *Board of School Trustees, School District No. 57 (Prince George)*, BCLRB No. 41/76, with respect to the relative value of various types of extrinsic evidence as disclosing mutuality, an arbitrator's assessment of the weight attached to extrinsic evidence is not properly the subject of review under Section 99: *Board of School Trustees of School District No. 39 (Vancouver)*, BCLRB No. B386/95.

31 In our view, the use of "*bona fide* doubt" as opposed to "ambiguity" in *U.B.C.* is of no consequence; one term is not a more stringent standard than the other. Neither are required prior to admitting extrinsic evidence, and both express the notion that an arbitrator must find some doubt arising from the language of the collective agreement in the context of any extrinsic evidence.

32 The fundamental point, as we have emphasized, is that arbitrators approach their interpretive task with a full appreciation of the circumstances relevant to the disputed contract language. The arbitrator may then determine how, if at all, the extrinsic evidence is of assistance. For example, the collective agreement language may not admit of ambiguity, such that the extrinsic evidence is properly disregarded; alternatively, where ambiguity is found, the evidence may be used as an aid to interpretation. These aspects of an arbitrator's reasoning should be evident on the face of the award (although there is no need for a rote analysis of the *U. B. C.* concepts). Beyond this, it is not the Board's role to second guess the arbitrator's assessment of ambiguity, the weight attached to the extrinsic evidence, or the interpretation of the collective agreement in light of the extrinsic evidence.

33 In this case, the Arbitrator did not err in his use of extrinsic evidence. First, he properly admitted the extrinsic evidence. Then, the Arbitrator noted that "ambiguity lurks within even apparently clear clauses" and went on to consider the extrinsic evidence when interpreting Article 1.02. He specifically stated that the evidence

available was not extensive and that “I have to make the best reasonable assumption based on the language and the minimal background taken from the other agreements and arbitrator Munroe’s comments [in *Re Times Colonist Division, supra*].”

34 However, it is apparent on the face of the Award that when the Arbitrator engaged in his interpretive task, he did not lose sight of Article 1.02. He found that it was not self-evident that the language of Article 1.02, “standing alone” created a “no contracting-out” clause. From this statement, we conclude that the Arbitrator simply did not agree with the Union that Article 1.02, even without the context of the extrinsic evidence, clearly and unambiguously applied to the contracting out at issue. The Arbitrator committed no reviewable error in reaching that conclusion.

35 Finally, the Arbitrator did not unqualifiedly accept the extrinsic evidence as directly applicable to the case before him. Rather, he referred to the Union’s argument that the impugned agreements were between different employers and different unions and acknowledged the Union’s argument that Article 1.02 was found in the union recognition clause, unlike the clauses in the other collective agreements which were located in the jurisdiction article. To the extent that he did consider the extrinsic evidence, the Arbitrator characterized it (and the Munroe award in *Re Times Colonist Division*) as “minimal background”. The Union’s argument that the Arbitrator used extrinsic evidence to alter the meaning and scope of a clear and unambiguous provision simply cannot be supported on the face of the Award.

2. Reasoned Analysis

35 The Union next argues that the Award is not based on a reasoned analysis of the issues before the Arbitrator and is incongruous in light of the relevant provisions of the Collective Agreement. We find that the Award in this case in no way comes close to the extreme circumstances that existed in *Drifter Motor Hotel, supra*. In that case, the majority’s award in a discharge arbitration was three paragraphs long, failed to accurately state the issues before the board, and did not contain the recital of any facts, relevant or otherwise. In this context, the Board held that:

Parties to an arbitration are entitled to expect a reasoned analysis of the issues before the arbitration board. If an account of that analysis is missing in the award and if the result of the award appears incongruous in light of the governing collective agreement, it may be that the arbitration board has not discharged its statutory mandate. (p. 9)

36 There is no question here that the Arbitrator fulfilled his statutory mandate. In addressing the Union’s argument that the Employer illegally contracted out a portion of the bargaining work, the Arbitrator analyzed the relevant provision of the Collective Agreement in the context of the extrinsic evidence, thereby addressing the relevant issue: whether Article 1.02 was intended to apply to contracting-out situations. He thoroughly reviewed the facts (as set out at pages 2 - 11 of the Award). Further, the facts relevant to his analysis of Article 1.02 were considered and assessed to provide

“minimal background”. Unlike *Drifter Motor Hotel*, it is clear on the face of the Award that the Arbitrator considered the facts and applied them to the issues that he was obliged to adjudicate. Moreover, the Award clearly reveals the reasoning process that led to the Arbitrator’s conclusions and thereby provides the parties with a reasoned analysis of the issues: *H.L.R.A. Health and Benefit Plan (Kelowna General Hospital)*, IRC No. C72/89.

37 The Union’s argument that there was no reasoned basis for the Arbitrator to conclude that Article 1.02 had “wandered” from Article 4.01 also fails. First, the Arbitrator did not definitively make that conclusion. He merely said that *if* that had occurred, it would prohibit agreements that trenched upon Article 4.01. However, the Arbitrator found that Article 4.01 was a union security clause and not a job security clause, so that analysis did not help the Union’s case. Second, that statement appears to be a reference to the Union’s argument set out at page 28 of the Award that Article 1.02 was found in the union recognition clause as opposed to its “usual location” in the other collective agreements as part of the work description in the jurisdiction article clause.

38 Finally, the Union’s argument that the Arbitrator failed to consider the whole Collective Agreement, and Article 52.02 in particular, when engaging in his interpretive task also fails. First, arbitrators need not recite all of the facts, arguments, or provisions of the collective agreement that they considered in reaching their decision: *Lornex Mining Corporation Ltd., supra*, pp. 380-81. Second, the Union did not make this argument before the Arbitrator and we are therefore not prepared to consider it as a valid ground for review: *Empire Iron Works (B. C.) Ltd.*, BCLRB No. B254/95. Further, Article 52.02 was not central to the real substance of the matter in dispute as were the impugned provisions to the promotions issue in *Inland Natural Gas Co. Ltd., supra*.

39 Ultimately, this is a case in which the Arbitrator simply disagreed with the arguments advanced by the Union. In so disagreeing and in providing a reasoned analysis for his determination, the Arbitrator committed no reviewable error.

VI. CONCLUSION

40 The Panel has decided to use this opportunity to confirm the Board’s approach to an arbitrator’s use of extrinsic evidence. We conclude that the Arbitrator properly applied the impugned extrinsic evidence, that the Award provides a reasoned analysis

of the issues, and that the decision properly considers the relevant provisions of the Collective Agreement. Therefore, the Union's application is dismissed.

LABOUR RELATIONS BOARD

JOHN B. HALL
ASSOCIATE CHAIR (ADJUDICATION)

JOAN GORDON
VICE-CHAIR

BRENT MULLIN
VICE-CHAIR