

BRITISH COLUMBIA LABOUR RELATIONS BOARD

GREATER VANCOUVER REGIONAL DISTRICT

(the "Employer")

-and-

GREATER VANCOUVER REGIONAL DISTRICT
EMPLOYEES UNION

("GVRDEU")

-and-

TEAMSTERS LOCAL UNION NO. 31

(the "Teamsters")

PANEL: Catherine R. McCreary, Vice-Chair

COUNSEL: Alan J. Hamilton, for the Employer
S. Michelle Blendell, for the GVRDEU
No one for Teamsters Local 31

CASE NO.: 43284

DATE OF DECISION: November 16, 2000

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The GVRDEU applies pursuant to Sections 49, 133(1), 139, and 143 of the
Labour Relations Code. The GVRDEU seeks a declaration that all persons performing
time keeping duties for the Employer at its Lake City Operations Center ("LCOC") are in
the bargaining unit it represents. In particular Sylvia Praught, ("Praught"), Tara Dong
("Dong") and Lana Moses ("Moses") all of whom perform timekeeping duties for the
Employer at LCOC should be in the GVRDEU bargaining unit.

2 The GVRDEU also alleges that the Employer breached the collective agreement
by failing to post a timekeeper position in accordance with the GVRDEU agreement. A
position involving timekeeping duties was posted under the Teamsters Local 31
("Teamsters") collective agreement and is currently occupied by Dong.

3 Finally, the GVRDEU seeks a declaration that Moses who is employed by
Adecco Canada Inc. ("Adecco") an employment agency, is really an employee of the
Employer.

4 Submissions have been received from the GVRDEU as well as from of the
Employer. Teamsters and Adecco were invited to but did not make submissions.

II. FACTS

5 The GVRDEU is certified to represent the employees of the Employer in a
bargaining unit described as:

"employees of the Greater Vancouver Regional District, except
office staff"

6 The GVRDEU Collective Agreement has provision for persons in the positions of
Timekeeper I, Timekeeper II and Timekeeper III.

7 The Teamsters are certified to represent the employees of the Employer in a
bargaining unit described as:

"clerical, technical, administrative and professional employees at
[various addresses in the Greater Vancouver Regional District],
except those now covered by the Certificate of the GVRDEU".

8 The Teamsters' bargaining unit includes Clerk Stenographer positions.

9 Praught was formerly employed by the Employer as an Assistant Area Operator
in the Operations and Maintenance-Waste Water Collection Division. That position is
within the GVRDEU bargaining unit. She was disabled from her position in 1997.

10 The Employer, the GVRDEU and the Teamsters agreed in January 1999 to accommodate Praught's return to work placing her in a clerk position at LCOC. The parties also agreed that Praught be permitted to remain within the GVRDEU bargaining unit and receive her pre-disability salary. Praught has been assigned time keeping duties in her new position. The Employer, the GVRDEU and the Teamsters also agreed that the position now occupied by Praught was properly within the jurisdiction of the Teamsters although the GVRDEU may have made the concession on a without prejudice basis.

11 Nancy Davis, an employee of the employer who worked as a timekeeper at LCOC under the GVRDEU collective agreement, was scheduled to retire in December 1999. The Employer gave the GVRDEU notice that it was posting a clerk position under the Teamsters' collective agreement as a replacement for Davis.

12 Soon after providing the GVRDEU with notice, the Employer posted a Clerk 3 position under the Teamster agreement. Dong was the successful applicant. Dong performs timekeeping duties.

13 The GVRDEU filed a grievance requesting that the Employer reverse its decision to post a clerk position and instead post a timekeeper position. The Employer denied the grievance and gave the GVRDEU notice that it reserved the right to argue that the matter was not appropriately addressed through the grievance procedure and was more properly within the jurisdiction of the Labour Relations Board.

14 The Employer has acquired the services of Moses to work as a Clerk 3 through Adecco. Moses works with and performs the same duties as Praught and Dong.

15 The Employer considers Moses to be an employee of Adecco and thus excluded from both the Teamsters and the GVRDEU bargaining units.

III. POSITIONS OF THE PARTIES

16 The GVRDEU seeks to have the Labour Relations Board determine all of the issues mentioned above. GVRDEU has made substantial submissions regarding the jurisdiction of the GVRDEU concerning time keeping duties. The GVRDEU also argued the Employer has contravened the collective agreement in not posting timekeeper positions. Extensive submissions have also been made on the issue of whether or not Moses is, in reality, an employee of the Employer.

17 The Employer takes the position that whether Praught, Dong, and Moses are within the Teamsters' or the GVRDEU bargaining unit raises an inter-jurisdictional issue requiring resolution by the Board. The Employer further takes the position that the Board should decline jurisdiction for the remaining matters that are more appropriately resolved in grievance arbitration.

IV. ANALYSIS AND DECISION

18 The issue I must determine is whether the Board should take jurisdiction over all
the matters raised by the GVRDEU in their application.

19 First, dealing with whether or not the persons performing timekeeping duties at
LCOC fall within the Teamsters' or the GVRDEU bargaining unit, it is clear that this is a
threshold matter which must be determined before anyone can deal with the remaining
two. There are some material differences in the facts alleged by the parties. It is
equally clear that the arbitration process will not resolve the representational issue as
there are two unions involved under two different collective agreements.

20 Accordingly, I have decided to hold a hearing to address the question of the
bargaining unit to which persons performing timekeeping duties belong.

21 Next, the issue of whether there has been a breach of the collective agreement
concerning the fact that Davis' position as timekeeper was not posted under the
GVRDEU agreement is a matter which is affected by the bargaining unit determination.
If I decide that the Teamsters collective agreement governs the timekeeping duties
assigned to Davis' successor, that is an end to the matter. If I decide that the GVRDEU
represents the time keeping employees, then the issue of improper posting is alive. I
have concluded that for the reasons which follow, I defer to arbitration the issues raised
in the grievance.

22 Both the GVRDEU and the Employer cited the Board's decision in *Repap
Carnaby Inc.*, BCLRB No. B31/94, (1994) 22 CLRBR (2d) 100. In that case, the issue
of deferral to arbitration was extensively considered. The Board reviewed the history of
the practice and held:

The Board has traditionally espoused a policy of deferring to
the private arbitration process for the resolution of disputes arising
under a collective agreement: *Rayonier Canada (B.C.) Ltd.*, BCLRB
No. 40/75, [1975] 2 Can LRBR 196. This approach was chosen
notwithstanding the existence of a conceivably open-ended
jurisdiction over arbitrable matters by virtue of Sections 96(1) and
65(1) of the Code. The Board stated that it would not finesse the
grievance and arbitration procedure established under a collective
agreement by enquiring indirectly into a contract dispute through
the vehicle of an alleged statutory violation. (p. 107)

23 The Board went on to summarize its position with respect to deferral to
arbitration. The Board held:

A summary of the general principles which emerge from
past decisions concerning the respective jurisdiction of the Board
and arbitrators under the Labour Relations Code is as follows:

- (a) There is a general policy in favour of deferring to the private grievance and arbitration process for the resolution of disputes concerning the interpretation, application, operation or alleged violation of a collective agreement between parties to a collective bargaining relationship: *Rayonier Canada*, supra; *Nanaimo Times Ltd.*, BCLRB No. 243/83, (1983), 3 CLRBR (NS) 205.
- (b) Arbitrators have the jurisdiction, and often the duty, to apply provisions of the statute when addressing matters arising under a collective agreement; however, they are reviewable on a "correctness" test: *British Columbia Hydro and Power Authority*, [BCLRB No. 289/84, 7 CLRBR (NS) 45]
- (c) The general policy has led arbitrators (in the course of adjudicating grievances) to deal with questions of employee status, whether a collective agreement is in force, whether certain conduct constitutes strike activity, and other matters which might be the subject of an application to the Labour Relations Board. The policy has even extended to a deferral to arbitration of allegations which might constitute an unfair labour practice complaint under the statute: *B.C. Ice and Cold Storage Limited*, BCLRB No. 377/83.
- (d) The policy of deferral to arbitration and the jurisdiction of arbitrators to interpret and apply the statute are not without limitation. Exceptions arise, and the Board will take jurisdiction where: the grievance and arbitration provisions will be incapable of affording an adequate remedy; the issue is unusual and not a matter normally subject to third party arbitration; the contract interpretation dispute is inextricably intertwined with the law and policy of the statute; or a collective agreement interpretation issue is necessarily incidental to the disposition of a matter properly before the Board: *Nanaimo Times*, supra, at pp. 206-208 and cases referred to therein.
- (e) An arbitrator does not have jurisdiction to hear a grievance which raises an inter-GVRDEU work jurisdiction dispute. As the arbitration process is not capable of binding a non-party without consent, an arbitrator is unable to provide a final and conclusive resolution of the dispute (i.e., there is the potential of conflicting arbitration awards): *B.C. Forest Products Limited, Crofton Pulp and Paper Division*, BCLRB No. 8/80, [1980] 2 Can LRBR 400, affirmed on reconsideration, BCLRB No. 36/80, [1980] 3 Can LRBR 11; BCLRB No. 75/80, [1981] 1 Can LRBR 95; *Victoria Machinery Depot Co. Ltd. et al* (1960), 22 D.L.R. (2d) 659 (BCCA); and *Health Labour Relations Association of B.C.*, BCLRB No. 34/85, (1985), 9 CLRBR (NS) 78 (affirmed on reconsideration, BCLRB No. 337/85).

- (f) While the arbitration process cannot bind non-parties in the absence of consent, not all third parties who may be affected by an arbitration award are entitled to standing and/or entitled to challenge the award on review. A settled example is third party contractors who may be affected by a grievance over the contracting out of bargaining unit work: *Craigmont Mines Limited*, supra.
- (g) Arbitration is the appropriate forum for dispute resolution where the employee status of an individual engaged directly by the employer is in issue and the remedies being sought in a grievance relate predominantly to the alleged violation of the collective agreement: *Government of British Columbia -and- British Columbia Government Employees' GVRDEU*, IRC No. C38/91, (1991), 12 CLRBR (2d) 255 (Reconsideration of IRC No. C135/90).

The leading decision respecting an arbitration board's authority to interpret and apply the Labour Code continues to be *British Columbia Hydro and Power Authority*, supra. The panel examined Section 34 (now Section 139), and concluded that the provision cannot be given a literal interpretation. The panel reasoned that an arbitrator's jurisdiction in Section 93(2) includes questions of arbitrability, such as whether a collective agreement is in effect or whether a grievor is an employee. The fact that such questions are within the jurisdiction of an arbitrator provides "cogent evidence" that the Legislature intended arbitrators to make interpretive judgments about matters referred to in Section 34 of the Code. This was also seen as consistent with the intention that arbitration be a relatively speedy method of providing a final and binding resolution of grievances. The ability of arbitrators to carry out this mandate would be severely impaired every time a question under the Code arose if the matter had to be adjourned while the Labour Relations Board considered the question. (pp. 108 - 110)

24 *Repap Carnaby Inc.*, supra, has since been extensively considered and it is clear that the policy of the Board has not changed. This case falls squarely within the enunciated principles in *Repap Carnaby Inc.*, supra. Accordingly, if I find that GVRDEU is the bargaining agent for time keeping employees, I defer to arbitration the matter of alleged improper posting.

25 I note that the Employer denied the grievance on the basis that the matter more properly belonged before the Board. The Employer does not continue that objection with respect to the arbitration of the grievance once the jurisdiction issue is determined.

26 Finally, there is the issue of whether Moses is an employee of the Employer or whether she is an employee of Adecco. At first blush, this appears to be an issue over which the Board might take jurisdiction. However, with closer scrutiny it is clear that this matter also falls within the jurisdiction of an arbitrator. The matter raises questions whether there has been violations of the collective agreement concerning contracting

out or contracting in, payment of correct wages and benefits, deduction and remittance of dues and other such issues. In the request for a remedy, the GVRDEU seeks wages and dues payable under their collective agreement. I also note that the GVRDEU has extensively quoted from arbitration cases to support the conclusion at which they wish me to arrive.

27 In *Repap Carnaby Inc., supra*, the question of an arbitrator's jurisdiction in "contracting in" cases was reviewed. The Board did an extensive analysis of the issue and made four main points.

28 First, arbitrators have long dealt with grievances claiming persons supplied by a contractor are working contrary to terms of a collective agreement between the union and the employer. Indeed, arbitration has been the primary forum for the resolution of such disputes without apparent difficulty.

29 Second, while there is a statutory basis for the inquiry the matter is primarily one of contract interpretation.

30 Next, the threshold issue in every contracting out dispute is whether there was a *bona fide* contracting out of work or whether bargaining unit work is being performed by persons who are not employees represented by the trade union, in alleged contravention of the collective agreement.

31 Finally, neither "contracting out" nor "contracting in" *per se* are dealt with in the Code. Whether a person is an employee in those contexts is more closely tied to provisions of the collective agreement (i.e., who can perform bargaining unit work) than whether the person is an employee for purposes of the Code. The former is a dispute over the interpretation and application of the collective agreement. A conclusion on the issue may require an examination of extrinsic evidence such as negotiating history and past practice. Thus the question of employee status in a contracting dispute is more appropriately resolved at arbitration.

32 I do not see any reason to depart from this line of reasoning. If it is determined that GVRDEU is the bargaining agent, the issue of Moses' employee status will be resolved in the grievance procedure under the GVRDEU collective agreement with the Employer.

V. CONCLUSION

33 1. A hearing will be held on the issue of under which collective agreement are the persons performing timekeeping duties for the Employer at LCOC. The Board's staff will be in contact with the parties to arrange the hearing, including any case management. The Board is aware that its decision on this issue is necessary before other matters can be resolved.

2. The Board defers to arbitration the issue of the grievance concerning the failure to post the position formerly performed by Davis.
3. The Board defers to arbitration the issues surrounding the contracting of work by the Employer to Adecco which is being performed by Moses.

LABOUR RELATIONS BOARD

"CATHERINE R. MCCREARY"

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VICE-CHAIR