Case Name:

Lehigh Inland Cement Ltd. v. United Cement, Lime, Gypsum and Allied Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Union, Local D359

IN THE MATTER OF a Grievance Arbitration
Between
Lehigh Inland Cement Limited, employer/respondent,
and
The United Cement, Lime, Gypsum and Allied Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Union, Local D359, union/grievor

[2005] A.G.A.A. No. 14

LAX/2005-346

File No. Alta. G.A.A. 2005-013

File No. HCI-10064

Alberta
Grievance Arbitration

D.M. Howes (Chair), P.M. Kirkwood and G.M. Johanson

Heard: (Edmonton, Alberta) November 15, 2004.
Award: January 28, 2005.

(50 paras.)

Appearances:

For the Employer: Sean Day, Counsel, Kent Stuehmer, Kiln Superintendent and Witness, Scott Emerson, Manager Human Resources, and Darwin Hill, Production Supervisor.

For the Union: Vern Bartee, Consultant/Representative, Stuart Bilodeau, Acting President and Witness, Don Maes, International Representative and Witness, Vivienne Bartee, Assistant, Richard Lawson, Witness, and Guy Desharnais, Witness.

INTRODUCTION

1 The parties agreed to arbitrate this grievance under the collective agreement and agreed this arbitration panel was properly constituted and had the jurisdiction to hear and decide the case. There were no preliminary matters.

Union's Argument

ARGUMENTS OF THE PARTIES

2 The Union alleges the Employer contracted out refractory or kiln brick work in 2003 while bargaining unit members, who could perform the work, were on lay-off. This resulted in either employees being laid off or the lay off being extended.

3 Eight employees were identified by the Union as persons who would have been able to operate company owned equipment to do the work done by the contractor, had the Employer transported the equipment from Cadomin to Edmonton. If these eight employees had been able to do this work, other employees would not have been laid off or would have been recalled earlier.

4 The Union argues the work done by the contractor is bargaining unit work. If the Employer is going to take away work done by the bargaining unit for 25 years, it better substantiate the change by something like a safety hazard. Here, the Employer cannot justify the contracting out by relying on safety reasons, because there was no safety issue present, no emergency and no hazard assessment performed.

5 The Union says the Employer's actions are contrary to sections 1.04 and 13.08 of the collective agreement. It relies on an excerpt from Brown and Beatty, Canadian Labour Arbitration (3d edition) at 5:13 10 to support its argument.

6 It asks the panel to declare the Employer in breach and then to reserve our jurisdiction on damages until the parties have had a chance to negotiate damages.

Employer's Argument

7 The Employer says the layoffs were caused by an inventory shutdown. The work done by the contractor in the kiln involved descaling and removing bricks, work the contractor had been doing for sometime before the layoff. The Employer denies any contravention of the collective agreement.

8 Responding to the Union's argument on article 1.04, the Employer says the agreement allows it to subcontract part of its operation but restricts it from transferring any of "its work" for the purpose of eliminating job classifications or "which results in an employee being laid off". The Employer believes the Union wants article 1.04 of the collective agreement to say "layoff and recall", which it does not say. As a result, there is no obligation to transfer working employees to the work the contractor would do so that laid off employees can be recalled. It argues the Union must prove the causal connection between the subcontracting and the layoff, which it cannot. If the panel concludes the layoff resulted from the inventory shutdown, rather than the contractor's work, then the article cannot apply as "resulting from a transfer of work" and the Union cannot succeed. In addition, the Employer asserts the "work" done in this case was not "the Employer's" work but the contractor's work, as had been established by previous contracting out practices.

9 The Employer says the collective agreement does not define bargaining unit work, nor does it provide a guarantee of work. Therefore, there can be no guarantee of bargaining unit work being done by bargaining unit employees.

10 Referring to article 13, the Employer says the collective agreement does not oblige the Employer to recall employees before using a contractor. Article 1.03 Management Rights in the collective agreement enables management to retain all rights not "specifically" abridged, delegated, granted or modified by the agreement. There is no such restriction present in the agreement dealing with this situation.

11 In support of its case, the Employer advances two decisions: Re Vaughan Hydro-Electric Com'n and CUPE 51 L.A.C. (4th) 129 and Re Pacific Forest Products and I.W.A.-Canada, Local 1-80 54 L.A.C. (4th) 126.

12 The Employer agreed the panel should reserve its jurisdiction on damages until the parties have had a chance to negotiate damages.

THE QUESTIONS FOR DECISION

13 The questions the panel must decide are:

1 Did the Employer transfer any of its work to any other concerns which resulted in an employee being laid off contrary to article

1.04?

2 Is the Employer required to recall or reassign employees under 13.08 before contracting out work which bargaining unit employees could perform?

14 For the reasons set out below, the panel finds that there has been no violation of article 1.04 or 13.08. We dismiss the grievance.

THE EVIDENCE

15 The parties agreed the applicable collective agreement is dated December 1, 2002 to November 30, 2005.

16 On April 17, 2003, the Employer notified the employees in writing of an inventory shutdown. The letter said, in part:

> Based on current forecasts, we expect to have all cement and clinker storage full to capacity by the end of April, if not before. In discussions with the Superintendents and Supervisors regarding maintenance, refractory requirements and Plant housekeeping, we have estimated a potential fours weeks Inventory Shutdown commencing no later than May 1, 2003.
>
> To this end, there will be layoffs for some employees commencing May 12 to May 16, 2003. A skeleton Production crew will be required to man Central Control, Quality Control, Shipping and Finish Mill operations. All Maintenance and Stores classifications will be retained for the duration of the shutdown unless vacation requests have been approved.

In the attachments to the letter the Employer identified 30 positions that it would require employees to fill during the estimated reduced operating period of May 16 - 30, 2003.

17 This inventory shutdown affected all production employees and meant the kiln would not operate. From April 23, 2003 to May 31, 2003, the kiln did not operate. This was the first inventory shutdown in ten years.

18 The Employer and the Union had some discussions about the layoffs and shutdown. For about two weeks, employees performed a variety of work including cleanup and man watch. By early May, some employees worked on maintenance, some were assigned other work and some were able to exercise their bumping rights under the collective agreement. All eighteen repairmen and seven to eight electricians remained working. Most production employees worked until May 8th or 9th.

19 On April 30, 2003 the Employer sent a notice to at least one employee about the layoff. Brian Achtymichuk's letter read, in part:

> We have completed a review of our manning requirements for the Reduced Operating Period commencing approximately May 12, 2003 to approximately May 30, 2003.

You have not been assigned a position for this period and as such you will be laid off at the end of your shift May 8, 2003.

20 According to the layoff and recall summary sheet, one employee, Mike Brewer, was laid off on Monday, May 5, 2003 and did not return until May 30, 2003. The remaining employees, who did not bump into other roles, were laid off on Thursday, May 8 or Friday, May 9, with two laid off on Thursday, May 15, 2003. Some of the laid off employees were called to return to work as early as May 14. Several refused for various reasons and several others did report back as early as May 15th.

21 The kiln is 190 feet long by 30 feet wide with a single entrance. Heat and materials in the kiln require the bricks be descaled and replaced periodically. Over the years, the process of descaling, removing and replacing bricks in the kiln occurred on a regular basis. At one point, bargaining unit employees used hand tools or hand held power tools to descale the brick, break out the brick and remove it with a bobcat. Employees then installed new brick. Several years ago, the Employer purchased a Kaboto loader with a long arm, which bargaining unit employees used to assist with breaking out the brick. In 2002 the Employer moved the Kaboto to its Cadomin quarry site. Since then the Employer has used the Kaboto in Edmonton only three times, but not for the work in dispute here.

22 In 2002 the Employer began contracting Quadra Industrial Services ("Quadra") to descale and remove brick from the kiln. It began the subcontracting for safety reasons because Quadra had more powerful equipment that also enabled remote operation by the operator. Quadra regularly performed this type of work throughout North America. Since then the Employer has consistently contracted out this work. Bargaining unit employees take the old bricks out of the kiln after they have been broken away from the kiln walls and then install the new bricks.

23 On May 5, 2003 Quadra was hired to do work in the kiln and came in to set up its equipment. For eight hours on Tuesday, May 6, 2003, the contractor descaled ten feet of brick in the kiln using a Brokk skid steer loader. The next day it removed its equipment from the kiln.

24 Two bargaining unit employees, Guy Desharnais and Gordon Norrie measured the brick to determine the need to remove any and if so, how much to remove. Mr. Desharnais worked throughout the layoff; Mr. Norrie was laid off on May 8th and returned on May 15th.

25 On May 13, 2003 the Kiln Superintendent gave the Union written notice of the intent to use Quadra for the "brick tearout in the kiln".

26 The acting Union President said he was not given and did not see the notice that that Employer intended to use a contractor, as required by a Letter of Understanding in the collective agreement. He did agree that there had been a series of discussions about the shutdown between the Employer and the Union before he became acting President. (The parties agreed that any dispute about the proper notice was not before this panel to decide.)

27 Mr. Desharnais identified himself and seven others who were capable of operating

the Kaboto to descale and remove the bricks. (The Kaboto was in Cadomin at the time.) Only one of these eight employees, Brian Achtymichuk did not work during the layoff. Mr. Achtymichuk was laid off at the end of his shift on May 8, 2003. The Employer called him to return, on May 15, 2003, for labourer work in the kiln but he did not return the call. He returned to work on May 30, 2003.

28 On May 13, 2003 Quadra again set up its equipment and on May 15, 2003 worked for eight hours to remove the ten feet of brick on the kiln wall. As usual, employees in the bargaining unit later removed the bricks from the kiln floor and cleaned up and then placed the new bricks in the kiln. The Employer recalled five employees around May 15th to do refractory work - clean up the torn out brick and install new brick.

29 Quadra had been on the site doing other work before the layoff but it had not been an issue for the Union because no employees were laid off. Similarly, the Employer had contracted Quadra to descale the brick in the kiln previously, but again all bargaining unit employees had been working during Quadra's contracts.

30 Union witnesses said a hazard assessment had not been done on the Kabotu or on the Quadra work so any Employer rationale for using a contractor that related to safety could not be substantiated. The Employer witness testified that a hazard assessment was done several years earlier, before contracting Quadra the first time.

ANALYSIS AND REASONS

1 Article 1.04

31 Article 1.04 of the collective agreement states:

> The Company reserves the right to subcontract any part of its operation, but agrees not to transfer any of its work to any other concerns for the purpose of eliminating the job classifications listed in Appendix "A" or "B" or which results in any employee being laid off.

32 Article 1.04 prohibits the employer from transferring any of its work to any other concern ... which results in an employee being laid off. The parties do not dispute that subcontracting in this case would be a transfer.

33 This article refers to the Employer's work through the use of the words "The Company" and "its". There is no reference in article 1.0 4 or elsewhere in the collective agreement that prohibits contracting out of "bargaining unit work". We agree with the Employer that the term 'bargaining unit work' is not defined in the agreement. As a result, the Union cannot succeed in its more general argument that this work is bargaining unit work and must be assigned to bargaining unit employees where they are available to do the work. This collective agreement does not provide such a guarantee.

34 In Canadian Labour Arbitration (at 5:1310) the authors identify that even though certain tasks may fall within the class of work normally performed by bargaining unit employees this categorization does not imply employees have the right to do the work. In the absence of specific language in the collective agreement providing otherwise, the

authors state it is universally accepted that the employer, acting in good faith, may subcontract the work to others. In order to prohibit or restrict contracting out, the collective agreement must have express language saying so.

35 Relying on the plain words used in article 1.04, in order to succeed in its grievance, the Union must establish the subcontracted work was the Employer's ("its") work. It must also show the subcontracting resulted in or caused at least one employee being laid off. (See: Brown & Beatty 5:1310 at note 11; Pacific Forest Products (supra) at page 128; Vaughan Hydro-Electric Com'n at page 135- 137.) This means the layoff must be connected in both time and purpose to the subcontracting.

The work

36 We approach this part of the analysis by examining the work that Quadra was actually doing on each of the days it billed. On May 5 Quadra was not performing any of the Employer's work but was performing work for itself; it was setting up equipment to do the descaling.

37 On May 6, Quadra was descaling the bricks in the kiln. All the evidence before us indicates that the Employer has not had bargaining unit employees descale the bricks since 2002, even though it was work done by bargaining unit employees before then. From this the panel concludes that, on May 6, 2003, the work of descaling the bricks was not "The Company's" or "its" work as required in article 1.04; it was and is Quadra's work.

38 Similarly, on May 8 and 13 Quadra was not performing any work for the Employer; it was taking down and setting up its equipment again and it billed for that time. As a result, on May 8 or 13 Quadra could not have been and was not performing any of the Employer's ("its") work caught by article 1.04.

39 Finally, on May 15th, Quadra removed the bricks from the kiln walls. This was also work that it had been contracted by the Employer to do since 2002 and was work that the Employer no long performed. As a result, it was not "The Company's" or "its" work under article 1.04. This was work that would have been and had previously been performed by Quadra under contract while employees continued to do their normal jobs. On this basis alone, the breach of article 1.04 fails, however we move on to examine the causal connection.

The causal connection

40 In April the Employer decided to shutdown production in an inventory shutdown. It provided notice to employees which included identification the number of employees required to do work that could be done during the shutdown. This enabled employees to evaluate their layoff and bumping rights under the collective agreement. The notice is clear and contemplates a layoff for approximately the same period as in evidence. The layoff intention becomes even clearer by April 30, 2004 in Mr. Achtimychuk's letter. We find the layoffs were because of the inventory shutdown, which affected all production employees, not because of the subcontracting of two days of work to Quadra. The causal link to any employee being laid off is to the inventory shutdown. Had the inventory shutdown not occurred, we infer employees would have continued to work while Quadra

was on site doing the descaling and brick removal, just as they had done on the occasions before this.

41 Did Quadra's work on any of the dates it billed result in any employees being laid off? We must say no. There was no work done by Quadra on the standby days (those where it set up or took down its equipment) so we cannot attribute any employee being laid off to the fact that a contractor was on stand by.

42 On May 6th, there was only one employee on layoff, Mike Brewer. The Union has not provided any specifics about his layoff and in the absence of any specific information about his notice of layoff and the timing of the layoff notice, we infer that he was in the similar situation as Mr. Achtimychuk, except that he was not one of the eight employees qualified to operate the Kaboto. We infer that Mr. Brewer was laid off because of the inventory shutdown, not because Quadra was hired to descale the brick.

43 On May 15th all employees who were being laid off were already on layoff. The cause of their layoff was the inventory shutdown as identified in the notice of April 17, 2003. No employee was laid off because Quadra was contracted on May 13th to work on May 15th. The evidence also shows that the opposite of a continued or ongoing layoff was occurring - employees were returning to work about this time. Two employees returned to work that day. Three others returned on May 16th. Ten others were called but did not return to work. Two employees returned on May 20th.

Summary on Article 1.04

44 As a result of this analysis, the panel concludes that the Employer did not breach article 1.04 of the collective agreement. The Union's evidence has not established the conditions in article 1.04 necessary to prove a breach. The Employer did not transfer any of its work to another concern which resulted in at least one employee being laid off. The work which was contracted had, as part of the Employer's normal business practice, been previously contracted to the same contractor and, therefore became the contractor's work, not the Employer's work. There was no causal connection between the contracted work and the layoffs. The layoffs were contemplated and triggered by the inventory shutdown in April. There is no evidence of bad faith surrounding the inventory shutdown and resultant layoffs. We dismiss this part of the grievance.

1 Article 13

45 Relevant parts of Article 13 state:

13.06 Further Rules of Seniority

In all cases of ... reduction of work force and recall after layoff, the following factors will be considered:

1 Seniority

2 Ability to perform the work. ...
3 Physical fitness to perform the job in question.
4 Where several persons are being considered ... seniority shall govern.
5 Qualifications as established by the Company for any job must be reasonable, necessary and relevant to the performance of such job.
6 The qualifications for new entrants to the position of Laboratory Analyst or Control Analyst ...
7 The minimum educational requirements for both CCO and PRO shall be Grade 12 or equivalent. ...

13.08 Discontinuance of Jobs & Layoff Provisions

1 Definitions

When used in this Agreement:

a) The term "temporary discontinuance" means the cessation of a job for a period of time and the reassignment or layoff on a temporary basis of the employee who normally performs the job. A temporary discontinuance of a job due to a planned or unplanned curtailment of plant or quarry operations may result in a reduction in the working force for a projected period of time of up to 12 months.

...

13.09 Temporary Discontinuance and Temporary Layoff

1 In the event the Company announces the temporary discontinuance of a job or operation or a temporary layoff, the employees in the classifications affected will have their jobs discontinued or be laid off according to their seniority with the junior employees' jobs being discontinued first.

...

1 An employee who does not elect to bump a less senior employee or whose seniority is not sufficient to bump another employer shall be laid off and recalled pursuant to the provisions of Section 13, 06 and Section 13.11.

13.11 Recall

Recall from temporary layoff, including those laid off as a result of temporary job discontinuance and indefinite layoff, including employees laid off due to permanent discontinuance of jobs shall be in accordance with the following principles.

1 Recall from layoff shall be carried out according to their seniority standing, that is the most senior employee shall be recalled first, provided however, that he meets the requirements of ability and fitness defined in Section 13.06. ...

This article 13.11 goes on to refer to the choices made by the employee at time of lay off (recall to any job where qualified or recall only to the last permanently recorded classification) as another guiding factor for the Employer to use on recall.

46 The Union raises two other questions. First, was there an obligation under the collective agreement to recall laid off employees to do the work before Quadra was contracted to do it? Second, was there an obligation for the Employer to reassign qualified employees, who were still working, to do the Quadra work so that other employees could be recalled from layoff to do other work? These are questions arising from article 13. We answer no to both.

47 The recall provisions operate on a combined basis of seniority and ability to perform the work as qualified in the collective agreement. There is an express provision in article 13.07 that the Employer will not hire new employees if an employee on layoff is capable of performing the work. There is no express obligation in the collective agreement to recall any employee, or reassign any work to an employee who is already working so a laid off employee can be recalled, before a part of the operation can be subcontracted. In order to use the recall provisions to restrict or limit the Employer's specified reservation of rights, to subcontract any part of its operation as set out in article 1.04, the recall provisions of the collective agreement would require clear and specific words. These specific words are not present, nor are any other words which would infer the obligation exists. We must therefore find that, contrary to the Union's argument, article 13 does not restrict or qualify the Employer's additional rights in article 1.04.

48 Using the recall provisions to limit the Employer's ability to subcontract work is merely another way of saying the Employer cannot contract out. Relying on the excerpt from Canadian Labour Law at 5:1310 (supra), a restriction on the employer's right to contract out must be specific or express. Article 13 contains no such specific or express limitation.

49 In summary, there was no requirement that the Employer recall any laid off

employee to perform the work done by Quadra. Nor was there any obligation to reassign work to any qualified (for the Quadra work) but working employee so that another employee could be recalled from layoff. There has been no breach of article 13.

DECISION AND DIRECTIONS

50 For the reasons stated earlier, the majority of the arbitration panel dismisses the grievance.

cp/e/qlpha