

Case Name:

**Canadian Office and Professional Employees'
Union, Local 378 v. Terasen Gas
Inc. (Policy Grievance)**

**Labour Relations Code
(Section 84 Appointment)**

Between

**Canadian Office and Professional Employees'
Union, Local 378, Union, and
Terasen Gas Inc., Employer
(Re: Bargaining Unit Work -- Pre-hearing Disclosure)**

[2010] B.C.C.A.A.A. No. 59

**British Columbia
Collective Agreement Arbitration**

Panel: James E. Dorsey, Q.C. (Arbitrator)

Heard: Submissions: April 15, 20 and 22, 2010.

Award: April 23, 2010.

(33 paras.)

Labour Arbitration -- Process and procedure -- Arbitration -- Production.

The union grieved that former bargaining unit employees were engaged by the employer as employees or dependent contractors to perform bargaining unit work but were not recognized or included by the employer within the bargaining unit and covered by the collective agreement. The union sought production of certain documents.

HELD: The union claims were within the scope of the grievance and documents related to these claims were relevant. The documents and particulars requested by the union were relevant or potentially relevant to the matters at issue in this arbitration. Subject to any claim of privilege that might come to the attention of the employer, the arbitrator granted the union's application and ordered that the employer disclose to the union the documents and particulars listed in the submission of union counsel.

Statutes, Regulations and Rules Cited:

Labour Relations Code, s. 84

Appearances:

Representing the Union: Allan E. Black, Q.C. and Stephanie T. Mayor.

Representing the Employer: Keith J. Murray and Louisa Poskitt.

ARBITRATION AWARD

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1. Grievance and Union Request for Particulars and Documents

1 A union policy grievance on October 22, 2009 consolidates three previous grievances dated August 1, 2007 and May 16, 2008 alleging a violation of "Article 1 and all other applicable provisions" of the collective agreement. The policy grievance was an employer suggestion to the union by email on September 30, 2008: "Perhaps you just want to replace all three of these grievances with one Policy Grievance -- as the names change with time, and as you know, there are others." The union adopted the suggestion when the employer agreed "timeliness will not be an issue as a result of this."

2 The union grieves former bargaining unit employees were engaged by the employer as employees or dependent contractors to perform bargaining unit work but were not recognized or included by the employer within the bargaining unit and covered by the collective agreement. The union seeks retroactive redress for itself, each individual and members of the bargaining unit. The redress stated in the grievance encompasses wages, benefits, union dues, income tax liabilities and interest. The union also seeks damages.

3 The grievances states: "The Union requests that prior to meeting for the grievance procedure the Employer provide the Union with a list of any contractors doing bargaining unit work." A similar request had been made in the August 1, 2007 grievance involving William Moffat and the May 16, 2008 grievances involving Margaret Pitts and Alfred Head.

4 I was notified of my appointment as arbitrator on December 14, 2009. Notice was given on January 5, 2010 for a hearing on April 13 and 14, 2010.

5 The union wrote the employer on January 22nd requesting particulars of the employer's position and disclosure of all potentially relevant and reliant documents, including electronic communications. The affected individuals were eight named employees and "any other similarly situated in-

dividual, following their retirement." The union offered to exchange particulars and documents on February 22nd. The letter concluded: "We request that you advise us as soon as possible whether you object to the disclosure of any of the requested information or documents so that we may seek an order from Arbitrator Dorsey for their disclosure."

6 On February 22nd, the union sent the employer a statement of particulars describing affected "Former Employees" and listing eleven persons, but expressly stating the grievance applied to all re-engaged former employees who are retired and receiving pension benefits, whether known or not by the union. The union wrote:

To date, the Employer has failed to recognize the Union as the exclusive bargaining agent of the Former Employees, failed to remit union dues, assessments and employee information with respect to the Former Employees, failed to provide Employer contributions to the pension fund with respect to the Former Employees, and failed to post any job vacancies for the positions filled by the Former Employees.

As a result, the Union asserts that the Employer has violated, and continues to violate, Article 1.01, Article 1.02, Article 6 and all other relevant articles of the Collective Agreement.

Alternatively, if the Former Employees are not considered members of the bargaining unit, it is the Union's position that the Employer has violated Article 1.09 of the collective agreement in that the Former Employees are non-bargaining unit members performing bargaining unit work.

7 The union forwarded relevant or potentially relevant documents and requested employer disclosure, including:

In addition to our request for particulars and documents contained in our letter of January 22, 2010, and without limiting the generality of our previous request, we request that the Employer provide us with a list of every former bargaining unit employee who: a) previously performed bargaining unit work, b) left the employ of the Employer, c) received and/or receives pension benefits, and d) performed and/or performs services/work/tasks for the Employer in some capacity subsequent to leaving the employ of the Employer and receiving pension benefits without becoming and/or maintaining membership in the Union as part of the bargaining unit for the period between January 1, 2007 to the present date.

The employer was asked to disclose particulars and documents previously requested and additional particulars and documents no later than March 1st.

2. Jurisdiction, Pre-hearing Disclosure Order and Partial Compliance

8 On March 3rd, the union applied for an order that the employer make pre-hearing disclosure of particulars and documents. The application was heard by conference call on March 10th. The union and employer agreed I am properly constituted as an arbitrator under their collective agreement and the *Labour Relations Code* to finally decide the merits of the grievance.

9 The order issued March 10, 2010 concludes as follows:

The employer does not object to providing pre-hearing disclosure of the particulars and documents requested by the union in its correspondence of January 22, 2010; February 22, 2010; and March 3, 2010. I order the employer to deliver these particulars and documents to counsel for the union no later than 5:00 p.m. on Wednesday, March 24, 2010.

In fact, there were no additional particulars or documents requested or itemized in the March 3rd letter from union counsel.

10 The employer provided particulars and documents on March 25th. The employer states the day delay was by agreement with the union and that:

On March 25, 2010, the Employer provided the particulars and documents that had been ordered. We also noted there were a small number of documents the Employer had not been able to locate, and that we would provide them if and when they were located. These additional documents were subsequently provided (to the extent they were located). Accordingly, the Order was complied with ...

11 In its particulars and disclosure on March 25th, the employer identified fourteen persons and wrote:

It is Terasen's position that the contracting for the services provided by the foregoing individuals did not violate the Collective Agreement.

To the extent the foregoing individuals (or Gasificient) performed work normally performed by bargaining unit employees, the contracting out of such work did not violate Article 1.10 of the Collective Agreement. The contracting out assignments did not result in the termination or downgrading of any employee, and the contracting out arrangements were otherwise bona fide.

12 The union submits: "On March 26, 2010, the Union requested outstanding and further particulars and relevant documents, and advised the Employer to inform the Union as soon as possible whether they objected to the disclosure of any of the requested particulars and documents." The employer replies it was:

... a new request for particulars and documents, which they described as arising from the documents that had been provided. Union Counsel's correspondence was essentially divided into two sections, one of which contained five bullet point requests, with the other section containing twelve bullet point requests.

On April 8, 2010, we responded with particulars and documents. With respect to the first five bullet point requests, we provided particulars relating to each of those items.

Our April 8, 2010 correspondence and document disclosure also responded to each of the other twelve bullet points, providing documents where appropriate.

Our April 8, 2010 correspondence did assert the database information sought by the Union was not relevant. We maintain that position.

In response to the Union's March 26, 2010 request for invoices, we provided summaries that indicated the amounts billed under each contract. We indicated that we hoped this would eliminate the need for invoices, which the Employer was having some challenges securing. Union Counsel has now indicated the summaries are not sufficient (in his April 15, 2010 correspondence). Therefore, the Employer will make further efforts to obtain relevant invoices.

13 On March 30th and 31st, the union requested disclosure of time sheets submitted by former employees and correspondence between the employer and former employees.

14 The employer responded to the March 26th request on April 8th. It stated: "The Labour Relations Department is unaware of any further former bargaining unit members who have provided services to Terasen that would fall within the scope of the policy grievance." Among its responses to requests for information and documents, the employer stated:

There is an electronic database as generally described in your correspondence. However, the database indicates the date the job went into the system and a closing date. My understanding is that it does not provide the dates that the job was actually worked on. Further, the assignment of a job to a particular employee's "job queue number" does not mean the job was actually performed by that individual. Therefore, we understand, the database does not provide the relevant information.

15 The union replied on April 10th that it considered the employer had not fully disclosed all relevant and potentially relevant documents. It states:

While all of the above documents are at least potentially relevant the invoices, the electronic data base, the contracts, scope of work document, time sheets and job postings all of which are in the Employer's exclusive possession are especially relevant based on the evidence we have gathered.

Nothing further was disclosed by the employer.

3. Mediation Unsuccessful and Arbitration Adjourned

16 The union and employer agreed to use the first scheduled day of hearing to seek a resolution of the grievance. It was not achieved. The union was unable to proceed the second day without further employer disclosure. The hearing was adjourned.

17 The union seeks an order for disclosure by April 30th of any documents and particulars previously requested but not disclosed and additional documents and particulars that have been identified through the documents and particulars that were disclosed.

18 The union has identified another person. The employer's submission states:

Our March 25, 2010 correspondence made no representation whatsoever regarding the existence of other former Terasen employees providing services to Terasen, post-retirement. Our April 8, 2010 correspondence stated the Labour Relations Department was not aware of further former bargaining unit members providing services that fell within the scope of the policy grievance. That representation was accurate.

The Union has now raised a further individual, of whom the Labour Relations Department was not aware - and, in any event, may not be within the scope of the grievance. The Employer will provide documents relating to this individual.

19 In response to the union's application, the employer submits:

6. Current Disclosure Requests

Union Counsel's April 15, 2010 correspondence contains a hodgepodge of requests scattered throughout the letter, many of which are new requests, and some of which are irrelevant. Some requests are overly broad and/or vague and unclear. There is no basis for making any Order based on Union Counsel's April 15, 2010 correspondence.

We further note we did not receive the March 30, 2010 email referred to in Union Counsel's April 15, 2010 correspondence. As far as I can determine, we have not previously received a request for timesheets.

Additionally, some of the documents sought fall outside the timeframe of the grievance. The policy grievance was filed October 22, 2008. Prior to that date, individual grievances existed for Mr. Moffat, Mr. Head and Ms. Pitts. While the Employer stated it would encompass those individual grievances within the policy grievance, the policy grievance cannot retroactively apply to other individuals who may have been providing services prior to its filing. Accordingly, documents from prior to October, 2008 are largely irrelevant, other than as they relate to Mr. Moffat, Mr. Head and Ms. Pitts.

7. Procedure for Moving Forward

Given the scope of the Union's request for further documents and particulars, the lack of clarity around a number of the requests, and the number of new and irrelevant items requested, it may be necessary to hold an oral hearing to deal with these requests.

We also need to deal with the scope of the grievance (which does not include job posting issues) and the timeframe of the grievance.

In order to expedite matters, we are prepared to provide a list of the items we have no objection to providing, subject to their existence and our ability to locate them. As a prelude to that, we suggest that Union Counsel provide a single comprehensible list of the items requested.

4. Nature and Scope of Grievance and Relevance of Certain Requests

20 The nature of the original individual and subsequent policy grievances was an alleged failure to include certain persons within the scope of the bargaining unit contrary to Article 1 and all other applicable collective agreement provisions. The grievances and correspondence in 2008 and after the referral to arbitration are clear that the grievance encompassed those persons who provided post-retirement services, whether they were known or not yet known to the union. Fourteen persons were identified by the employer in its disclosure on March 25th. A fifteenth identified by the union is being investigated by the employer.

21 One goal of pre-hearing disclosure is to identify all affected persons so any person who might be entitled to notice of the arbitration is given timely notice. All documents relating to each person are relevant to this policy grievance and subject to being disclosed.

22 The timeframe within which particulars and documents are relevant is from January 1, 2007. The initial August 1, 2007 grievance, the subsequent grievances and the consolidated policy grievance address an ongoing situation involving an undisclosed and undetermined number of persons "on a fully retroactive basis." Documents relating to each of the identified persons since and prior to October 22, 2008 are relevant. The extent to which any remedy with respect to an individual should be retroactive to January 1, 2007 or any date prior to October 22, 2008 is a matter that can be addressed if and when it arises after the merits of the grievance have been heard and determined.

23 The union's particulars of February 22nd specifically identify Articles 1.01, 1.02, 1.09 and 6. On March 25th, the employer identified reliance on Article 1.10. In its April 20th submission, the employer submits:

The grievances do not allege any violation of Article 6 of the Collective Agreement - the job posting provisions. It appears that an alleged violation of Article 6 was first raised subsequent to the matter being referred to arbitration. We do not consider any claim with respect to Article 6 to be within the scope of the grievances, and therefore documents related to that claim are irrelevant.

24 The March 10th order encompassed job postings requested by the union in its letter of January 22nd. This extends to any bargaining unit work performed by the persons identified by the union at the time and subsequently identified by either the employer or union. It might be there are no job postings encompassing work performed by persons providing post-retirement service. Or it might be that there were job postings for vacant positions encompassing the work performed before or subsequent to the services provided. Job postings are relevant to the central issue of persons performing bargaining unit work.

25 Whether the employer was required by the collective agreement to post temporary or other job vacancies because the work to be performed is bargaining unit work covered by the collective agreement is a matter inextricably included in the real substance of the matter in dispute. If the employer was required under the collective agreement to have the work performed by members of the bargaining unit, then any failure to meet a requirement to post a job vacancy could support the union's remedial claim listed in its February 22nd letter: "An order for any resulting damage to the Union and its bargaining unit members." As the union submits:

Further, if individuals are found "employees", then job posting provisions also relate to a remedy for those members of the bargaining unit who were not given a fair opportunity to apply for the position vacated and filled by the returning individual. The grievances always sought "make whole" remedies for "any person adversely affected" (see Employer's attachments).

26 This is a dispute about bargaining unit work. The union says the work is to be performed by bargaining unit employees and the provisions in the collective agreement for the allocation of available work apply. The employer submits the work, to the extent it was work normally performed by bargaining unit employees, could be contracted out under the provisions of the collective agreement. Job posting requirements in the collective agreement are necessarily incidental to the obligations the union asserts the employer had under the collective agreement with respect to the work and an integral aspect of the real substance of the matter in dispute.

27 I find that union claims with respect to Article 6 are within the scope of the grievance and documents related to these claims are relevant.

28 On March 26th, the union wrote:

We are aware of an electronic database that tracks employees' job queue number, assigned jobs, job descriptions and relevant dates. Please provide us these records for all relevant Former Employees, which cover the months preceding their retirement and subsequent to it. Our witnesses indicate that at least a few Former Employees had access to and utilized this system when they returned to work following their retirement.

29 The union asserts this database is relevant and was utilized by some former employees. The employer asserts an understanding about the nature of the data and concludes, based on that understanding, that it is not relevant. As refined in the request in the current application -- "Electronic records from the Employer's database with respect to the Former Employees subsequent to their retirement, described more fully in the April 15, 2010 letter" -- are potentially relevant records of the work performed, when it was performed and who performed it and are to be disclosed to the union for its examination.

30 I acknowledge some confusion about the nature of the following elaboration on the electronic data in the union's letter of April 22nd, which may be clear to both the union and the employer:

Not only does the Union request records for the Former Employees' "job que numbers" subsequent to their retirement, but also records for other employees' "job que numbers" that the Former Employees entered projects/ jobs under subsequent to retirement, which include, but are not limited to, Ms. Darlene Freeman, Mr. Sean Reynolds, and Ms. Robin Northey.

5. Order for Disclosure of Documents and Particulars

31 The focus of this decision is to look forward to ensure there is disclosure that will enable a reasonable estimate of the time required for hearing and to schedule mutually convenient dates.

32 I have carefully reviewed the various requests from January 22nd to date and the documents and particulars disclosed by the employer. It is not necessary to convene an oral hearing or have further written submissions for an orderly, constructive and expeditious resolution of the pre-hearing disclosure issues.

33 I have determined the documents and particulars requested by the union are relevant or potentially relevant to the matters at issue in this arbitration. Subject to any claim of privilege that might come to the attention of the employer, I grant the union's application and order that, no later than April 30, 2010, the employer disclose to the union the documents and particulars listed in numbers 1 to 12, inclusive, in the submission of union counsel dated April 22, 2010. If the employer has specific issues about the scope or clarity of a matter within the list, such as the electronic database, it can be resolved between now and April 30th by expedited written application or telephone conference.

APRIL 23, 2010, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

qp/e/qllas