In the Matter of An Arbitration Between

Northwood Pulp and Timber (the "Employer")

and

Canadian Paperworkers' Union Local 603 (the "Union")

Heard: (Vancouver, B.C.) November 24, 25, 1990
Award: February 7, 1991

(Policy Grievance Concerning Article XXI, Section 2 [Probationary Period] and Article XXV [Contracting] of the Standard Labour Agreement)

Arbitrator: Donald R. Munroe, Q.C.

Counsel: Thomas Roper for the Company
John Rogers for the CPU

I

The parties agreed that I was properly constituted as an arbitration board under their collective agreement with jurisdiction to resolve the issues in dispute.

The company is a member of the Pulp and Paper Industrial Relations Bureau (the PPIRB) which negotiates collective agreements on behalf of the employers in the B.C. primary pulp and paper industry. The union is a local of the Canadian Paperworkers Union (the CPU) which is one of two labour organizations representing employees in that industry. The collective agreements negotiated from time to time between the PPIRB and the CPU are known as the Standard Labour Agreement.

This is a policy grievance which brings into question the interpretation of, and relationship between, two provisions of the 1988-91 Standard Labour Agreement. The two provisions are Article XXV which deals with contracting, and Article XXI, Section 2 which deals with the probationary period for new hires.

Article XXV (contracting) reads as follows:

a) The Company will notify the Union of work to be performed by contractors in the mill, and will, emergencies excepted, afford the Union the opportunity to review it with the Company prior 'to work being commenced.

b) The Company will not bring a contractor into the mill:
   i) which directly results in the layoff of employees, or
   ii) to do the Job of employees on layoff, or
   iii) to do the Job of a displaced tradesman or apprentice working in a category outside his trade.

c) It is not the intent of the Company to replace its regular maintenance work force through the use of contract maintenance firms in the mill.

Article XXI, Section 2 (probationary period) provides that:

> Until an employee has been on the payroll of the Company for thirty (30) calendar days, or until he has accumulated thirty (30) working days in a ninety (90)-calendar day period, he shall be considered a probationary employee and shall have no rights under Article XXI with respect to seniority.

Both of those provisions have quite modern origins. Prior to 1988, Article XXV (contracting) was comprised solely of what is now paragraph (a). The whole of paragraph (b) was crafted between the parties during the negotiations leading to the 1988-91 Standard Labour Agreement (including a separate letter of intent which prohibits the employers from "...send(ing) equipment out of the mill for repair which directly results in the layoff of tradesmen or apprentices.")

Until 1986, the Standard Labour Agreement was silent on the matter of a probationary period for new hires. The companion Statements of Policy did contain the observation that, "During the recognized probationary period, new employees have all rights under this Agreement, except those relating to Standing Committee grievance procedure concerning discharge". However, as I have said, there was nothing explicit in the contract itself about the duration, implications, etc. of the probationary period. That was corrected in two stages: partly in 1986 and partly in 1988. In 1986, the parties included in the Standard Labour Agreement, as Article XXI, Section 2, a provision that, "Until an employee has been on the payroll of the company for thirty (30) calendar days he shall be considered a probationary employee and shall have no rights under Article XXI with respect to seniority". In 1988, the parties inserted the phrase "or until he has accumulated thirty (30) working days in a ninety (90) calendar day period" -- so that Article XXI, Section 2 now reads as I earlier reproduced it.

As will be seen, the first issue to be determined is the relationship between Article XXV (contracting), on the one hand, and Article XXI, Section 2 (probationary period), on the other. More particularly, I am asked to determine whether the limitations or protections established by sub- paragraph (b) of the former provision (whatever may be the substantive content of those limitations or protections) were intended even to be applicable where the person or persons allegedly detrimentally affected by the company's use of a contractor are still in their probationary period.

The second issue requiring adjudication is the true span of the probationary period -- i.e., what precisely is the meaning of the words and phrases found in Article XXI, Section 2 which delineate the period during which someone shall be considered a probationary employee? While that issue may appear, on its face, to be one purely internal to Article XXI, Section 2, the circumstances disclosed in evidence reveal an important practical link with the first issue summarized above. That linkage, which is well understood by the parties, will be discussed in greater detail at the appropriate point in this award.

A final set of questions mooted during the hearing has to do with what might be described as the case-by-case operation of the words found in sub-paragraph (b) of Article XXV: "...which *directly results* in the layoff of employees"; "...to do *the job of* employees on layoff"; and "...to do *the job of* a *displaced* tradesman or apprentice working in a category outside his trade". A number of hypothetical scenarios were discussed and debated, both between the witnesses and between counsel, with the underlined words and phrases being the central pivot.

However, no concrete fact patterns were explored in any detail; nor were any specific instances of contracting put in issue. And as I commented to counsel during the hearing, I believe that on this one

aspect of the parties' dispute, a fairly detailed appreciation of real-life disputed circumstances is necessary for anything more than the most elementary arbitral declarations.

That is not to say that the whole case was argued without any factual underpinnings whatsoever. On the contrary, while the parties deliberately and by agreement kept clear of discussing specific situations and specific individuals, they certainly did sketch the general foundation for their respective concerns. But prior to recording what was said in that regard, and prior to any further examination of the issues, it is useful to make these broad observations about the manner in which I have approached the provisions of the collective agreement here in dispute.

II

One of the disputed provisions deals with contracting out. In that connection, I was told more than once during the hearing that the president of the PPIRB, speaking at the negotiations for the 1988-91 collective agreement, had repeatedly and vigorously told the CPU that the employers he represented were enormously reluctant to agree to restrictive language on the subject. More especially, the president of the PPIRB stated that the employers certainly could not agree to anything that would extend shutdowns; or that would prevent the employers from taking advantage of new technologies, methods or materials; or that would limit the use of contractors to do specialized work; or that would altar practices respecting warranty work; or that would require a mill to man up for peak periods.

In context and tenor, the suggestion arising from that testimony was that the judgments an arbitrator reaches about the interpretation or application of those parts of Article XXV which came into being during the 1988 negotiations ought properly to be shaped or at least tempered by the admonitions given across the bargaining table by the PPIRB to the CPU. However, the plain truth is that at the conclusion of the negotiations, quite extensive language on the subject of contracting had been agreed upon and included in the collective agreement. No doubt, it was much less limiting than the CPU had originally demanded. However, it did give to the union's membership new and significant protections; and, as the president of the PPIRB acknowledged in cross examination, "...it went further than [the employers] wanted to go ...."

Nor was the eventual consensus easily reached. The contracting issue was at the very heart of the 1988 collective bargaining. If the employers were reluctant to open up the subject, the CPU (and the PPWC locals with which it was jointly bargaining) was absolutely insistent that the collective agreement contain new protections or limitations. Part way through the negotiations, the CPU (together with the PPWC) announced that contracting was the make-or-break issue. Nothing else would be discussed until that issue was settled. If the issue was not promptly resolved, the talks would be broken off and there would be an ensuing labour dispute. The gauntlet thus having been dropped, the negotiators got down to serious business -- including the careful drafting and examination of oral and written proposals on the matter in contention.

A review of the flow and content of the proposals and counter-proposals on the subject of contracting truly does reveal a classic episode of collective bargaining: where intense and tough negotiations finally result in a compromise settlement being hammered out. Without question, the language upon which the

parties eventually agreed was in respect of a subject which they both regarded as engaging important interests; which they both treated with caution and concern; and to which they both contributed.

From all the foregoing, it follows that while the legal burden of proof undoubtedly lies with the union, my initial approach to the content of Article XXV (contracting) must be characterized by astute even-handedness. Counsel for the union drew my attention to the award in *Alcan Smelters* (1987) 28 L.A.C. (3d) 353 (Hope) from which the following passages (at pp.359-64) might aptly be reproduced:

> ...it is convenient to consider the authorities relied on by the employer in support of the strict interpretation approach it urged. The employer submitted that current arbitral authority in British Columbia requires that restrictions on contracting out be set out in express language. The employer saw that approach as emanating from decisions of the Labour Relations Board of British Columbia...
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> Here the question of what approach an arbitrator should take to the interpretation of contracting out provisions is one involving "a general principle of the collective agreement or doctrines which have emerged in the arbitration jurisprudence", rather than a "legal principle created by labour legislation". Hence, the (labour relations) board should not be seen in the decisions relied on by the employer having enunciated an industrial relations principle of the Code binding on arbitrators with respect to the interpretation of contracting out language. Rather, the decision approaches that issue in a different jurisdictional context where the observations with respect to the interpretation of contracting out provisions appear as an acknowledgement of the prevailing arbitral consensus...
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> One can say that the times are very different in the economic and industrial relations milieu of 1987 than when the decisions with respect to contracting out relied on by the employer were written. The right of employers to contract out work is coming under increasing challenge in both collective bargaining and in the exercise of the grievance and arbitration process. One can say that the issue of contracting out has become one of the most controversial aspects of the collective bargaining relationship as employers are driven by economic pressures to reduce benefits and trim operating costs to achieve or retain a competitive position in increasingly competitive domestic and world markets and unions are pressed to preserve the status quo…
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> In the contemporary context, one can say that unions must continue to accept the reality that they must negotiate any limitation on contracting out in collective bargaining and have the limitation set out in specific terms in the collective agreement. But the backlash of union response to the contracting out of work is a factor to consider in interpreting any language in which an employer has in fact agreed to limit its right to contract out. The result is that neither side can expect to have their intentions arise by implication as opposed to expressing those intentions in clear language.
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> Where an employer agrees to restrict its right to contract out, it will be accountable for the full scope of limitation consistent with the language to which it has agreed. That is, while unions must bargain to achieve limitations on contracting out, employers must ensure that where they have agreed to limitations in clear language, any exceptions upon which the employer intends to rely must be expressed in language that accurately defines the exception. Where the parties have expressed a general restriction on contracting out in clear language, an employer cannot expect that an arbitrator will invoke a strict approach to the interpretation of the language to favour any exceptions relied on by the employer.

Both parties relied on an earlier decision of this arbitrator, *Petro Canada Explorations and Energy & Chemical Workers' Union, Local 686* (March 15, 1983), unreported, in support of their positions. The employer relied in particular on the following extract from p.20:

> The rule of strict construction with respect to issues of contracting out requires that the union establish that the disputed work fell within its job jurisdiction as defined in the agreement.

On p.31 of the decision the following statement appears: "The reality with respect to vagueness or generality in a contracting out provision is that it favours the employer."

That reality arises from the domain in which the parties exist and bargain. That is, a union has no inherent right to claim jurisdiction over work and, conversely, an employer has a residual right to have work performed in any manner it pleases provided it is not in breach of some provision of its collective agreement with the union. Hence, when a union wants to rely on some restriction on the exercise of a residual right by an employer, it must be able to bring itself within the language of a restriction it has negotiated.

Because the employer retains that which it has not bargained away, vagueness in the language afflicts the party who must rely on it in asserting a right. But, particularly in light of prevailing attitudes, an arbitrator must presume that an employer will husband its right to contract out in suitable language and that a union will be entitled to the full measure of any language of limitation that has been agreed to by the parties.

A somewhat narrower expression of essentially the same thought is found *in Canadian Fishing Company Limited*, February 6, 1985 (Munroe) at p.12-13:

> We turn now to an examination of Article 5.06, and its application to the facts at hand. As counsel for the company observed, Article 5.06 deals with a type of contracting out. From that premise, it was submitted that our deliberations should be influenced by the so-called presumptive framework summarized in *Dillingham Corporation* (Canada) Ltd. (1982) 7 L.A.C. (3d) 1 (Dorsey) at 12:
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> > Guided by direction from the Labour Relations Board, current arbitral consensus in British Columbia is that it requires an "express prohibition" in a collective agreement to prohibit an employer contracting out and that in its absence, the union has "a steep uphill battle" and would "be bucking a strong tide of arbitral consensus": *Federated Co-operatives Ltd. and Retail, Wholesale & Department Store Union, Local 580*, [1980] 1 Can. L.R.B.R. 372 (Germaine) (B.C.) at p.379; Re *Burrard Yarrows Corp., Vancouver Division and Int'l Brotherhood of Painters, Local 138* (1981), 30 L.A.C. (2d) 331 (Christie) at p.336, and Re *Nabob Foods Ltd. and Canadian Allied Manufaturers Wholesale & Retail Union, Local 1600*, (1982) 5 L.A.C. (3d) (Munroe); *also B.C. Systems- Corp. and B.C. Government Employee's Union*, and Re *Robin Hood Multifoods Ltd. And Miscellaneous Workers, Wholesale & Retail Delivery Drivers & Helpers, Local 351* (1980), 26 L.A.C. (2d) 371 (Ladner).
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> However, as the chairman of this board observed in *Rivtow Straights Limited*, May 31, 1984, at pp.10-11:
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> > In the *Nabo*b decision, to which reference is made in the above extract, there was a cautionary note expressed concerning arbitral reliance on the so-called presumptive

> framework (see pp.257-59). But here, I need not add to the growing jurisprudence on the validity or otherwise of such reliance. That is because I am not faced with a "silent contract". There simply is no doubt that the collective agreement at hand does contain restrictions on what might otherwise be a management prerogative to enter into whatever contracts appeared advantageous. That being so, the difference between the parties is reduced to an ordinary issue of interpretation. There is no need, nor any justification, for resort to the "silent contract" cases, or to cases where the trade union was seeking to show the existence of restrictions by oblique implication.
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> That is not to say that the clear existence of some restriction has the result of shifting the onus to the company to prove that the restriction does not apply in the circumstances. The onus remains with the (union) to prove its case. But the case cannot be defeated simply by reference to a general presumptive climate.

In a similar vein, let me comment briefly on the thrust of the union's evidence as it relates to the second issue in the case -- i.e., the true meaning and implications of the contract language defining the probationary period. In 1986, another local of the CPU was party to a dispute which arose at another mill, and which concerned an employer's use of probationary employees as temporary staff. The dispute arose at a time when the Standard Labour Agreement was silent on the subject. Although the 1986 language on the probationary period had come into being prior to the arbitration hearing, the arbitrator declined to interpret it. Rather, the award was published based on the pre-1986 situation of a silent collective agreement coupled with a statement of policy. See *Cariboo Pulp and Paper Company*, June 8, 1987 (Larson).

As explained in evidence, the union was happy with parts of the *Cariboo* award but not so happy about other parts. Concurring with the union, the arbitrator held that under the terms of the Standard Labour Agreement, an employer could not terminate an employee except for just or proper cause; that an insufficiency of work does not comprise just or proper cause for termination; accordingly, that a probationary employee was entitled to continue working so long as work was available (subject to misconduct giving rise to just or proper cause); and finally, that the appropriate step in the event of an insufficiency of work was not to terminate the probationary employee but to lay him off.

While holding that a probationary employee could not be terminated (as distinct from laid off) for redundancy, the arbitrator acknowledged that a probationary employee who was laid off due to lack of work had no mechanism available to him under the collective agreement to be recalled to active service if other work later became available. As the arbitrator put it (at p.11): "The Employer could then hire some other person to do that work such that the laid off probationary employee might never even be given the opportunity to accumulate seniority in more than one period, even if that were a possibility. Further, there may be nothing to prevent the Employer from acting to terminate the laid off employee after a reasonable period of lay off."

The CPU's first concern arising from the *Cariboo* award was the notion of an employer "...acting to terminate the laid off employee after a reasonable period of lay off"; in particular, the lack of definition of what might constitute a "reasonable period of lay off". The CPU's second concern was the arbitrator's stated view that probationary service could not be accumulated over two or more periods of work; that the probationary period had to be completed, if at all, in a single period of work (see pp.12 et seq.).

The union's 1988 proposal to change Article XXI, Section 2 was because of those concerns. And just as the PPIRB would have me shape my interpretive judgments about Article XXV so as to be in harmony with its bargaining agenda, so would the CPU have me do likewise with respect to Article XXI, Section 2. That, notwithstanding that the "solution" proposed in.1988 by the CPU was not accepted by the PPIRB; that the end result, once again, was a compromise.

The time I have spent on these broad preliminary observations is roughly proportionate, in my view, to the time spent by both sides adducing evidence which ultimately demonstrated, at best, a unilateral intent. Yet, as I have sought to convey, the 1988 negotiations between these parties was a showing of collective bargaining at its best. The two sides were evenly matched, in terms not only of negotiating skills but of bargaining power. The opposing teams of negotiators came together with clear and conflicting mandates on difficult and important issues. Neither side was willing to have disregarded, or to have seriously threatened, what it regarded as its essential economic imperatives. However, nor was anyone being reckless: there was common ground that a labour dispute should be avoided if reasonably possible. In the end, the parties came up with contract language which clearly was the best deal available short of economic warfare, and which struggles with considerable success to be responsive to the legitimate and pressing interests of both the employees and the employers covered by the Standard Labour Agreement. It is with a like set of mind that I have approached my deliberations on the precise issues in dispute.

III

Through the eyes of the union, the facts which triggered this grievance were quite simple and can be succinctly recorded. Notwithstanding the award in *Cariboo*, seven employees were terminated by the company upon the completion of what the company considered to be a temporary assignment. The seven employees were labourers which is a classification found in the wage schedule to the Standard Labour Agreement. At the time, there was a contractor engaged at the mill who was using labourers (among others) in the performance of its contract.

Apparently, and again solely from the perspective of the union, this sort of thing was happening from time to time but not always in the same form. As the witness for the union described it, "The employer was not in all cases terminating the employees upon completion of a temporary assignment; in some cases the employer was laying them off -- it was a mixed bag".

When the union lodged a grievance, the company brought back four of the seven labourers. The only distinction between the four who were brought back, and the three who were not, was that the former were regular employees while the latter were probationary employees. In the stated view of the company, Article XXV (contracting) simply has no application to employees who have not completed their probationary period and acquired regular status.

In the submission of the union, that is just plain wrong. But in addition, the union says this: If the employer has hired and then lays off a probationary employee, but does not "...act to terminate the laid off employee after a reasonable period of lay off" (*Cariboo* at p.11), then the employee ceases to be a probationary employee, and instead becomes a regular employee, upon the passage of 30 days "on the payroll" (see Article XXI, Section 2). The phrase "on the payroll", says the union, includes periods of layoff. Hence, in the submission of the union, the three labourers who were not brought back by the

company were not still in their probationary periods -- even though they had worked for the company for only a few days prior to being "laid off". (Recall that under the *Cariboo* award, they could not be "terminated" on account of an insufficiency of work; rather, they had to be "laid off".).

In the submission of the company, that is absurd. It is absurd because it could mean the existence of literally hundreds of individuals having the protection of Article XXV (contracting) who may have worked a week or two for the company some years ago, but who have not since set foot in the mill. In the view of the company, it also places a premium on form over substance: It distinguishes for no real substantive reason. between those who the company may have "...act(ed) to terminate...after a reasonable period of lay off", and those who simply have been gone for a long time without either them or the company believing to be in existence even the slightest residue of the prior employment relationship.

I was informed by the company that the maintenance crew (which was the primary focus of the hearing) is now some 218 strong; that that is as high as it has ever been. During the spring and fall maintenance shutdowns, the company adds to the work force by approximately 850 individuals -- mostly for quite brief periods; certainly for less than 30 days. The figure 850 is made up both of direct hires and of the employees in the employ of contractors. The number of direct hires is limited to about 50. That is not because there is a cost advantage to using contractors during the annual maintenance shutdowns. As a matter of fact, the cost of using a contractor is often higher for the company than using its own forces. Rather, it is because there are practical limitations on the number of direct hires which the company is able to handle -- especially having in mind the brief period for which they are required. These practical limitations include the point at which the company's supervisory resources get spread too thin, and the mill infrastructure generally: the fixed number of shops, employee facilities, etc.

Upon the completion of the maintenance work for which the direct hires were engaged, they typically have been let go by the employer (to use a neutral formulation) -- even though, on some occasions, the contractors who likewise have been engaged for purposes of the maintenance shutdown (or who may have been engaged prior to the shutdown in other permissible circumstances), and who are using employees in the same work classifications as the direct hires, may not as yet have finished up and departed.

The company says that quite apart from whether Article XXV (contracting) even applies to probationary employees, and quite apart from the true computation and implications of the probationary period, it is entitled to rely on the plain language of sub-paragraph (b) of Article XXV which clearly conveys that for that sub-paragraph to be operative, there must be a demonstrable causal connection between the use or continuing use of a contractor and the event or circumstance being grieved. In that regard, the company relies on the phrase "directly results" in sub-paragraph (b) (i); the phrase "to do the job of" in pub-paragraphs (b) (ii) and (iii); and the word "displaced" in sub-paragraph (b) (iii).

For a variety of reasons, the company says that in virtually all instances where the work force has temporarily ballooned to accommodate the intense but short-lived work requirements associated with a maintenance shutdown, there is no causal connection of a kind contemplated by Article XXV, sub-paragraph (b) between the use or retention of contractors and the points at which the direct hires are either engaged or let go.

IV

But at the threshold, the company submits that Article XXV (contracting) is simply inapplicable to probationary employees. In sum, the submission made by the company is that the word “employee”, as it appears in that provision, must be defined to mean an employee who has acquired seniority rights, and therefore must be taken to exclude persons who have not as yet completed their probationary period.

The theory that “employee” in Article XXV (contracting) does not include a probationary employee is grounded largely in the company's assertion that to hold otherwise would be inconsistent with the parties' reasonable expectations. To the extent necessary, I was invited by the company to engage in an analysis similar to the one mandated by *Andres Wines (B.C.) Ltd.* [1978] I CLRBR 251 (B.C.L.R.B.). The invocation of that decision is on the premise that because neither side directly addressed this question during the 1988 negotiations, there exists a “gap” in the agreement which I am entitled to close by “reconstructing some kind of hypothetical intent” based upon the nature and purpose of the contract benefit in question; the language and structure of the agreement; the parties' behaviour as it may shed light on the problem; and finally, an assessment of what reasonable labour negotiators would recognize “...as a sensible judgment about who should enjoy the benefit in this unusual situation” (see *Andres* at pp.252-53).

However, this is not an “unusual situation” such that one can comfortably adopt a “gap” analysis. Some clauses of the collective agreement specifically state that a probationary employee will not enjoy a particular benefit. One example is the probationary language itself. It says that a probationary employee “...shall have no rights under Article XXI with respect to seniority”. Two other examples can be found in the jury duty (Article XII) and bereavement leave (Article XIII) provisions. The application of those two benefits is limited to “...regular full-time employees” which very clearly excludes probationary employees.

But while examples can be found in this collective agreement of the explicit exclusion of probationary employees from a particular benefit, the reverse is not also the case. One cannot find examples of the explicit inclusion of probationary employees within the ambit of a particular benefit. Yet probationary employees are routinely considered covered by all manner of clauses in which the word “employee” is the only qualifier.

Let me be clearly understood. I do not preclude the possibility of the word “employee”, as it appears in this or that provision of the Standard Labour Agreement, being taken to exclude a probationary employee. However, if that is the proper result in a given case, it surely must be upon the usual tools of interpretation being brought to bear on the dispute. Given the structure of the Standard Labour Agreement, it would not be legitimate to say that a “gap” exists, giving rise to a kind of quasi-interest arbitral jurisdiction, simply because the use of the word “employee” in a particular clause was not specifically discussed between the parties in terms of whether it did, or did not, include a probationary employee.

The case for the union on this aspect of the dispute is quite strong. The word “employee” is by no means uncommonly taken in collective agreements to include a probationary employee. Moreover, there is, as I have indicated, a structural tendency in this bargaining relationship to specifically exclude probationary employees from the ambit of a particular benefit where that is the parties' true intent, but otherwise to treat probationary employees as falling within the general designation “employee”. Nor is there anything

absolutely inherent in the contract benefit here in question which plainly suggests that “employee” was intended to mean only regular and not probationary employees.

One other feature of the evidence can now usefully be recorded. In some of its counter-proposals to the union on the subject of contracting, the PPIRB sought to limit the scope of any new language to tradesmen. The union rejected that limitation, and was adamant that new sub-paragraph (b) be cast in terms of “all employees”. I do not mean to imply that the phrase “all employees” was voiced by anyone during the 1988 negotiations in relation to the question of probationary versus regular employees. Rather, its use was in relation to the debate about tradesmen versus all classifications. However, the point to be made is that there was hard bargaining not only about what the protection against contracting would be, but also about who would be the beneficiaries of that protection; and further, that that hard bargaining occurred between experienced negotiators who were intimately familiar with the structure and content of the collective agreement as it then stood.

Be that as it may, the reply by the company is that the parties could not possibly have intended Article XXV (contracting) to be applicable to situations involving probationary employees. The purpose of that provision, says the company, is to provide a measure of job security. If that is so, probationary employees must be found to be outside its scope. Job security is a function of seniority rights. As Article XXI, Section 2 instructs us, probationary employees do not possess such rights. All of that being the case, how can the union conscientiously claim that the word “employee”, as found in Article XXV, includes a probationary employee? So the argument goes.

Another argument to a similar effect was made by the company based on the phrase “...the job of” as it twice appears in sub-paragraph (b) of Article XXV. Reduced to its essentials, the argument is that a person without seniority rights (e.g., a probationary employee) is not able to claim a job incumbency; hence, that in respect of such a person the phrase “...the job of” does not provide a reference point; and finally, that such a person must therefore be found not to be an “employee” within the meaning of Article XXV.

The phrase “...the job of”, coupled with the lack of recall rights in a probationary employee who has been laid off, also led the company to make an alternative submission: that if a probationary employee might conceivably claim the benefit of sub-paragraph (b)(i) of Article XXV, he could not possibly do likewise with respect to sub-paragraph (b)(ii).

In my view, the company's alternative argument fails to take account of the same phrase -- “...the job of” -- appearing as well in sub-paragraph (b)(iii): which contemplates displacement from a classification short of layoff. If I may say so, the Company's alternative submission also asks me to credit the negotiators on both sides of the table with a subtlety of expression which I believe even they would find astonishing. Certainly, there is no support in the evidence for the company's alternative argument. I do not think I can give it credence.

Thus, the issue remains as I earlier stated it: whether Article XXV (contracting) is applicable in circumstances where the only employees who might potentially claim the benefit of that provision are probationary employees? I have concluded that the answer to that question is in the affirmative. In his closing argument, counsel for the company did construct a legal framework within which one might have justified the opposite conclusion. However, I do not believe it would have had much to do with the

parties' words and behaviour at the bargaining table. On the evidence, I consider the company's argument to be just too legalistic to reflect what the parties truly were about at the time they reached their bargain. I am of the opinion that the arguments on behalf of the union represent a much more probable expression of the parties' true intent on this first interpretive issue. I therefore find and declare that probationary employees are not automatically excluded, by virtue of their probationary status, from the operation of all or any of the provisions of Article XXV (contracting).

V

To set the stage for a resolution of the second issue, consider the following scenario. The company hires, let us say, a pipefitter, to help out during a regular maintenance shutdown. The pipefitter has never before been employed by the company, and his active employment in this instance is brought to an end, say, after 10 days -- i.e., upon the completion of the maintenance project which triggered his hiring in the first place.

A year or so goes by without anything happening to remind one of our hypothetical pipefitter's brief period of employment with the company. Then, the company engages the services of a contractor to perform a job which requires the performance of work within the pipefitter trade. The contractor proceeds to do the work, using its own forces. The union, recalling our hypothetical pipefitter, lodges a complaint based on Article XXV (contracting). In brief, the union's grievance is that the contractor is doing the job of an employee on layoff (Article XXV, Section (b)(ii)). The company replies that our hypothetical pipefitter long ago ceased to have any claim to employee status. To that, the union retorts that not only does the individual have employee status, his status is actually that of a regular employee and not merely a probationary employee. Thus the issue is joined.

The union points out that under *Cariboo*, the company would have been free to "...act to terminate the laid off [probationary] employee after a reasonable period of lay off". If it has not done so, then after the passage of 30 days "on the payroll", which includes any periods of layoff, the employee acquires regular status with all that that entails. In sum and substance, that is the position taken by the union.

As I earlier sought to indicate, the scenario I have just painted is by no means an isolated possibility. And the company is frankly horrified at the implications of the union's position. As a practical matter, it could have the effect of blocking the company's use of <u>any</u> contractors -- notwithstanding, as everyone knows, that the company could not possibly satisfy all of its maintenance shutdown requirements by directly adding to its own employee complement.

In the submission of the company, the proper interpretation and application of Article XXI, Section 2 (probationary period) of the Standard Labour Agreement is as follows. When an employee is hired, he goes into a regular schedule of shifts which may be any one of the schedules then in existence at the mill. At the conclusion of 30 calendar days (and presuming satisfactory performance), the employee is considered to have passed his probationary period and acquired regular status. If something happens to interrupt the employee's participation in the work schedule (the clearest example being a layoff), the employee still has a chance to complete his probationary period and acquire regular status, but in order to do so he must accumulate 30 working days in the 90 calendar day period calculated from the date of hire. The 30 working days need not be in a single period of active employment. However, they must be

accumulated within the 90 calendar days aforesaid. If the employee does not complete his probationary period in either one of those two alternative fashions, then not only has he failed to acquire regular status, he is not in a position to claim the existence of an employment relationship at all. To fit the matter into the global context of this proceeding (and in the alternative to the company's first position on the application of the contracting provisions to probationary employees), such an individual is no longer to be considered an employee within the meaning or contemplation of Article XXV (contracting).

I am of the view that the company's proposed interpretation and application of Article XXI, Section 2 (probationary period) is correct. In arriving at that conclusion, I have considered what might be called the "contract background" which commences with the Statements of Policy and ranges through the *Cariboo* award and the 1986 and 1988 contract amendments. I have considered as well the flow and content of the 1988 proposals and counter proposals. Lastly, I have considered the matter within the structure of the Standard Labour Agreement as a whole.

There is no doubt that the 1988 adjustment to Article XXI, Section 2 was to correct what the CPU perceived to be a problem arising from the *Cariboo* award: the arbitral finding that probationary service could not be accumulated over two or more periods of work. To correct that problem, the CPU suggested that Article XXI, Section 2 be completely recast to provide that, "An employee will be considered probationary until he has accumulated twenty (20) working days or one hundred and sixty (160) hours, whichever comes first, in any one year period". The PPIRB was not willing to go along with that proposal, and instead suggested the insertion of the phrase "or until he has accumulated thirty (30) working days in a ninety (90) calendar day period -- i.e., the existing formulation. When that suggestion was accepted by the CPU, the parties went on to other issues.

Quite clearly, the insertion of the new phrase in Article XXI, Section 2 was intended by both sides to enhance the position of new hires. That is, it was intended to liberalize the predecessor language on the subject. But if the union is correct in what it now contends, such liberalization was completely unnecessary. So long as a new hire had a few days here and there of active employment in the first few weeks following the date of hire and prior to being laid off (or for that matter even a single day of active employment), all he had to do to acquire regular status, on the union's view of things, was to await the expiry of the 30 day period. What, then, was the point or necessity of the 1988 contract amendment?

How does this fit within the other parts of Article XXI of the Standard Labour Agreement? Article XXI, Section 3 directs that, "Any employee, other than a probationary employee, whose employment ceases through no fault of his own, shall retain seniority and shall be recalled on the following bases..." (there follows stipulated formulae for seniority retention and recall rights based on length of continuous service). Clearly, then, a probationary employee who is laid off is not intended to have seniority retention and consequential recall rights. Equally clearly, one result of an acceptance of the union's argument on this aspect of the case would be to effectively negate that explicitly stated mutual understanding. In my view, 'the whole thing is simply incongruous.

I have not overlooked the union's observation that at least some of the surprising consequences flowing from an acceptance of its argument might be cured by the company "...acting to terminate the laid off [probationary] employee after a reasonable period of layoff", as contemplated by the *Cariboo* award. However, the arbitrator in *Cariboo* did not purport to interpret even the 1986 version of Article XXI, Section 2, let alone the 1988 version (which had not as yet been bargained). To all intents and purposes,

the arbitrator in *Cariboo* was dealing with a collective agreement which was silent on the point now being discussed. As regards that point, the *Cariboo* award has been overtaken by subsequent collective bargaining. Arbitral gloss in that regard is no longer required.

For the reasons stated, I have extremely serious reservations about the union's proposed interpretation of Article XXI, Section 2 (probationary period). On the other side of the coin, I consider the company's proposed interpretation of that provision to be a sensible and natural reading thereof. As I earlier stated, the company's position on this part of the case must be accepted. I so find and declare.

VI

At page 4 of this award, and again at pages 17-18, I referred to a set of questions mooted during the hearing and arising from certain phrases contained in Article XXV (contracting) of the Standard Labour Agreement: "directly results"; "the job of"; and "displaced". I alluded as well to the virtual impossibility of comprehensively interpreting or applying those phrases in a purely declaratory proceeding -- i.e., without the benefit of real-life disputed situations to sharpen one's focus.

That said, I can comfortably agree with the company that the language employed by the parties certainly does involve considerations of causation. And I can safely record my agreement with the union that "new construction" or "capital works" are not automatically excluded from the ambit of Article XXV; further, that the word "job" as contained in that provision is not necessarily the same thing as "regular job". In the 1988 negotiations, the PPIRB sought but failed to have the new contracting language expressed in terms of "regular job". Nor are the parties strangers to the distinction: see, for example, Article XVIII, Section 2 and Article XXII, Section 5(b).

Apart from those general declaratory observations, I believe the operation of Article XXV (contracting) must await case-by-case analysis.

VII

Let me attempt a brief summary. I agree with the union that the notion of "employee" as found in Article XXV (contracting) does not automatically exclude a probationary employee. At the same time, I accept as correct the company's interpretation of Article XXI, Section 2 (probationary period). Lastly, I have provided very limited declaratory assistance on a few of the issues raised by the general language of Article XXV (contracting).

In the circumstances proven in evidence, and in the exercise of my discretion in this regard, I am of the view that this award should not provide the basis for any retrospective relief. Relief sought by any existing grievances should be prospective only.

Dated At Vancouver, B.C., This 7th Day of February 1991.

Donald R. Munroe, Q.C.
Arbitrator