

RECEIVED JUL 29 2005

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN FOREST PRODUCTS LTD.
(NORTHWOOD PULP MILL)

("Employer")

AND:

COMMUNICATIONS, ENERGY AND PAPERWORKERS'
UNION OF CANADA
BILL HICKEY LOCAL 603

("Union")

RE:

CONTRACTING OUT

COUNSEL:

FOR THE EMPLOYER:

Peter F. Parsons

FOR THE UNION:

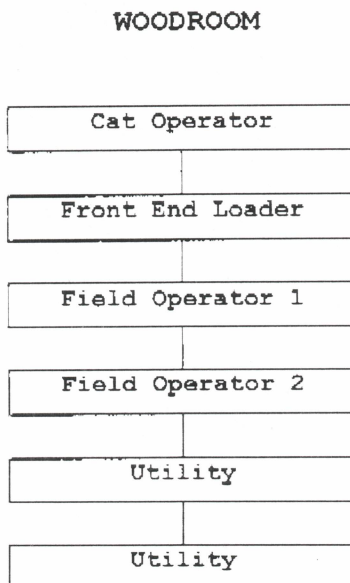
John Rogers

DATE OF HEARING:

May 25, 26, 27, 2005
Prince George, BC

COLIN TAYLOR, Q.C.
Arbitrator

Figure 2



[2] The Chip Dump Operator and Truck Dump Operator jobs no longer exist. Many of their duties were transferred to the new Field Operator 1 and 2 positions. The Chip Screens Operator job was moved to the Pulping Group line. These changes did not result in layoffs. The affected employees found positions elsewhere in the mill. The net result, however, is a reduction of the regular workforce in the Woodroom.

[3] The Employer's pulping operation requires a continuous supply of wood chips. The delivery of the chips is partly by rail and partly by truck.

[4] Certain of the duties performed by the Truck Dump Operator and Chip Screens Operator were assumed by

truck drivers who deliver wood chips to the mill. The drivers are not employees of the Employer. They are employees or contractors of the chip suppliers. The Union grieves that this action by the Employer is a violation of the contracting provisions of the collective agreement. While acknowledging that certain duties formerly performed by the Truck Dump Operator and Chip Screens Operator have been assumed by truck drivers, the Employer submits that such duties are so minor as to attract the de minimis principle and there is no violation of the collective agreement.

[5] The relevant provision of the collective agreement is Article XXV. The Union relies specifically on clause (c) thereof:

ARTICLE XXV - CONTRACTING

(a) The Company will notify the Union of their intention to have work performed by contractors in the mill and will, emergencies excepted, afford the Union the opportunity to review it with the Company prior to a final decision being made. For this purpose, a Joint Contracting committee will be established and it will be used as a forum to discuss the Company's contracting decisions.

In keeping with a joint commitment of the Company and the Union to provide as much maintenance and repair work as possible to the regular maintenance workforce, the Committee will also meet quarterly to make recommendations regarding the utilization of the mill maintenance workforce to minimize the use of

contractors, both inside and outside of the mill.

(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 employee working outside of his job category.

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

For greater clarity it is agreed that:

i) The changes which provide that it is not the intent of the company to replace its regular workforce through the use of contract firms will not set aside existing external work arrangements and practices.

(ii) Working under the flexible work practice provisions does not mean that an employee has been displaced and is working outside of his job category.

II

[6] The interpretation of Article XXV is informed by a number of earlier awards issued by Arbitrator Munroe. Beginning with *MacMillan Bloedel Limited (Powell River Division) -and- Canadian Paperworkers' Union, Local 76* unreported, 1989, ("Contracting" arbitration), he reviewed the history of Article XXV and addressed the meaning of clause (c) which then referred only to maintenance employees whereas, in its present form, the protection is extended to the "regular work force". At p.20, Arbitrator Munroe said:

... while I agree that Article XXV(c) represents a commitment by the companies to directly employ maintenance tradesmen in viable numbers, I simply cannot read into the language an absolute prohibition against the contracting of any particular type of maintenance work.

[7] In *Norske Canada Ltd. (Elk Falls) (Formerly Fletcher Challenge Canada Limited, Elk Falls) -and- Communications, Energy & Paperworkers Local 1123*, unreported, 2001, ("Core Cutters" arbitration), Arbitrator Munroe traced the evolution of Article XXV(c) into its present form and, at p.23, concluded:

Clearly, Article XXV(c) ... does not comprise an absolute prohibition against the contracting out of any particular type of work ... On the language of Article XXV(c), it reaches only those situations where the

use of a contract firm is intended to replace the regular work force.

[8] That comment was made in the context of a decision by the employer to eliminate a core department with the equipment and employees necessary to cut the 3-inch diameter cores and to contract out the employer's entire core cutting requirements. The Arbitrator found that the implementation of that decision was intended to include the permanent elimination of the core cutter jobs and a corresponding reduction of the regular work force.

[9] At p.31 of *Norske - "Core Cutter"* arbitration, Arbitrator Munroe said the word "replace" in Article XXV(c) means "permanently replace", or at least "replace for the foreseeable future". He went on to say that Article XXV(c) means more than cause and unintended effect:

... the limitation set up by Article XXV(c) is against the use of contract firms where the use of such firms is intended by the company to replace its regular work force.
(p.32)

[10] In *Norske Canada (Crofton Division) -and- Pulp, Paper and Woodworkers of Canada, Local 2*, unreported, 2002, Munroe, ("*Town Truck*" arbitration), the union relied on the "*Core Cutter*" arbitration in grieving certain changes to a truck driver position occasioned

by the decision of the employer to discontinue the daily routine of picking up supplies from a nearby town. Local suppliers were required to arrange their own deliveries to the mill which the union said was the replacement of the town truck driver by contractors and a breach of Article XXV(c). The changes, however, did not result in any staff reduction and the grievance was denied. At pp. 7-8, Arbitrator Munroe said:

Article XXIII(c) ... is not an absolute prohibition against the contracting out of any particular type of work. At the threshold, the union must demonstrate that the intended consequence of the employer's use of a contract firm (if such it was) was the replacement of regular work force. If there is serious ambiguity in that regard, the union does not satisfy the normal burden of proof by invoking 'common sense' to fill the evidentiary void or deficiency.

[11] In response to the union's argument in the "Town Truck" arbitration case that it was not strictly necessary to show that a replacement of the regular work force had, in fact, occurred and that it was sufficient to show that was the employers' intention, Arbitrator Munroe said:

One can imagine a fact pattern where that argument may have to be fully addressed and decided (which I do not do here). But if actual employment loss cannot presently be shown by the use of contract firms, the least expectation must be a showing by clear evidence that a reduction of the regular work

force was (is) nevertheless the true intention. (pp.8-9)

[12] In *Norske Canada (Elk Falls Division) - and - Communications, Energy and Paperworkers Union of Canada, Local 1123*, unreported, 2003, ("Waste Hogger" arbitration), Arbitrator Munroe relied on his decision in the "Town Truck" arbitration in denying the grievance because the union could not identify any employee who lost employment after the employer discontinued the use of the waste hogger. The waste that formerly went through the waste hogger was added to the list of things picked up and taken away by a contractor. The elimination of the waste hogger, and the additional pick-up work assigned to the contractor, did not result in any layoffs and the union did not establish any intention on the part of the employer to replace an employee with the waste removal contractor.

[13] The purpose of Article XXV(c) is not to prevent contracting but to provide job security by protecting the regular work force from contracting which threatens job security. Thus, the "Core Cutter" grievance was upheld while the "Town Truck" and "Waste Hogger" grievances were denied.

III

[14] The job description for the Truck Dump Operator contains the following list of general duties:

1. Operates (2) truck dumpers and chip samplers. Responsible for quick turnaround of trucks (shared with Chip Screen operator 50%).
2. Controls #3 chip belt to storage (shared: Chip Screen Operator).
3. Controls chains from truck dumpers (shared).
4. Performs chip tests for moisture, classification and bark count on all chip trucks and/or cars as required and enters into computer.
5. Assists Chip Dump Operator as required, i.e. truck dumps down.
6. Maintains daily log (jointly with Chip Screen Operator).
7. Assists Chip Screen Operator as required (chip flingers, etc.).
8. Maintains radio contact with mobile equipment operators.
9. Regular check and clean up of chips at truck dumps and screens building.

[15] The nature of the job was described by Mr. Rob Braaten who has occupied that position for 12 years. He

testified that duties 1 and 3 were "three quarters of my day."

[16] With respect to the delivery of chips by truck, Mr. Braaten described the following procedure:

- i. The truck backed on to the dumper.
- ii. The driver pressed a button alerting Mr. Braaten in his Chip Screens control room positioned above the dumper, that the truck was ready to be unloaded.
- iii. Mr. Braaten activated the hydraulic lifting of the truck. When the load was emptied, Mr. Braaten activated the lowering of the truck.
- iv. If a chip sample was required, the driver gathered the sample and delivered it to Mr. Braaten in the control room.

[17] Under the new system, which the Union says is in breach of Article XXV(c), the truck driver has total control over the unloading of the chips. The driver presses buttons to initiate the dump and lower the truck and otherwise has complete control over the dumping process. At any time during the raising or lowering of the truck, the stop button can be selected and the truck will hold in its present position. The

truck can then be raised or lowered. Previously, such control was exercised by the Truck Dump Operator (or Chip Screens Operator). A new booth has been constructed from which the truck driver can observe the truck dumping operation. As well, the truck driver activates the chip sampler.

[18] In cross-examination, Mr. Braaten was asked:

The initiating of the dump process and the initiating of the sampler have been transferred to the drivers?

A: Yes

In fact, the driver is engaged in more than initiating. The driver has complete control over the raising and lowering of the truck, functions formerly performed by the Operators. If asked, the drivers have always collected and delivered samples. Now they initiate the sampling process.

[19] Mr. Martin Pudlas is the Acting General Manager of the mill. He previously occupied the position of Process and Process Control Superintendent responsible for implementing technological and organizational process improvements including a \$25 million conversion of panel controls to DCS/PLC. Mr. Pudlas observed, "He could now actually operate the mill by remote control." This and other initiatives resulted in changes to the

lines of progression including the elimination of positions but no layoffs out of the mill.

[20] Mr. Pudlas agreed in cross-examination that the continuous delivery of wood chips is essential to the operation of the mill.

[21] As to the truck dumping operation, Mr. Pudlas described the "old" and "new" procedures this way:

Old Way: The driver alerted the control room - a buzzer would sound and the Chip Screens Operator or Truck Dump Operator would activate the lift. Now, the driver does this. If asked, the driver would collect a sample and take it to the sample room. The Chip Screens or Truck Dump Operator would hit the down button to lower the truck.

New Way: The driver no longer alerts the control room that he is ready to dump. Now, the driver hits the button to initiate the lift and the dump and he walks up to the new booth and observes. Hit the down button and the truck goes down. The driver has the ability to stop the truck half way.

[22] As to sampling, Mr. Pudlas testified that formerly the Operators "would hit the button to initiate the sample. Now, the driver hits sample button and the arm goes in and retrieves a sample. The driver takes the sample to the control room."

[23] The Chip Screens and Truck Dump Operators shared the duty of dumping and sampling. One of the two

operators was always present to perform those duties and would observe the dumping through windows in the control room or by way of a computer screen. Even during mill shutdowns, an Operator would be on duty to process the dumping of chips. Now, the operation of the two dumpers and the sampler are conducted by the drivers. The drivers press the "up" and "down" buttons to raise and lower the trucks and press the sampler button to retrieve a sample. In addition, the drivers control the raising and lowering in that, at any time, they can stop, lower or resume raising or lowering the truck. This might be necessary to ensure the loads are fully emptied.

[24] Formerly, the drivers pressed a button to alert the Operator that the truck was ready to dump. The Operators initiated the dump. Now, the driver presses a button at truck level and sends a direct signal to the hydraulic lift to activate the dump. Thus, the "old" button alerted the operator to initiate the dump. The "new" button (relocated for driver safety and convenience) activates the dump. Formerly, the Operator lowered the truck. Now, the driver performs that function.

[25] In order to implement the new driver-controlled process, the activation buttons are manual whereas, under Operator control, they were DCS, the reverse of automation.

[26] To accommodate the new driver-controlled system, a new booth has been constructed from which the drivers can observe the dumping process. The sample booth has not changed.

[27] General duty number 1 found in the job description of the Truck Dump Operator is:

*Operates (2) truck dumpers and chip samplers.
Responsible for quick turnaround of trucks
(shared with Chip Screen operator 50%)*

Mr. Pudlas agreed that a continuous supply of chips is essential to the operation of the mill and a Truck Dump Operator or Chip Screens Operator was (save for rare occasions) on duty at all times, even during mill shutdowns.

[28] The operators were not only in charge of chip truck dumping but, as well, they monitored the dumping.

[29] The Employer submits that the changes amount to no more than a different finger on the button. It is argued that whereas the Operator used to press the button, now it is the driver who does so, a change characterized by the Employer as *de minimis* and therefore not in breach of the collective agreement.

[30] The Union submits that the duties assumed by the drivers go far beyond the mere pushing of a button. It argues that the changes are:

... structural ... not due to automation but to the transfer of functions to the drivers.

[31] The Union argues that the Employer deliberately omitted the sampling function from the new control operation because of its intention to transfer the function to the drivers.

[32] The Union points to the new booth for drivers which is unnecessary for just weather protection since that purpose is served by the existing sample shack. The purpose, it is asserted, is to allow the drivers to safely and correctly perform and observe the dumps, previously the function of the Operators. The Union argues that the new booth is not a technological advancement but a means of allowing the drivers to perform the same functions previously performed by the Operators.

[33] A similar argument is advanced by the Union with respect to the relocation of the controls by which the drivers activate the dumps. Those changes, the Union contends, do not amount to automation but are made to insure safe dumping by the drivers and to transfer the dumping function to them.

[34] The Employer characterizes the assumption of duties by the drivers as part of "multi-faceted sweeping change in the mill" and said that common sense must prevail. It argued that this case "amounts to two buttons - one initiates unloading - one initiates the sampler" and says the Truck Dump Operator job was not eliminated by "two button pushes".

IV

[35] In *Harmac Pacific Inc. -and- Pulp, Paper and Woodworkers of Canada, Local 8*, [1999] B.C.C.A.A.A. No. 265, (Munroe), a new Truck Dump facility resulted in the elimination of the Truck Dump Operator job. The union relied on Article XXV(b) of the collective agreement (substantially the same as the current clause (b)) contending that the Truck Dump Operator duties had been transferred to the truck drivers. In terms of Article XXV(b), the union asserted that contractors were doing "the job" of the Truck Dump Operator. The employer argued that due to extensive automation of the Truck Dump, there was no job left for the Truck Dump Operator. Arbitrator Munroe found that the new facility represented a substantial technological change. It automated procedures previously done manually. The result was that off-loading procedures were performed by the truck drivers.

[36] In dismissing the grievance, Arbitrator Munroe concluded:

Apart from the clicking of the computer mouse ... the truck drivers are doing no more in functional terms than they have been doing for many years. That fact lends credence to the view that the true underlying cause of the job elimination (then and now) was the extensive automation of the Truck Dump facility; but as well, it makes it difficult for the union to argue that what occurred was the "... bring(ing) into the mill" of contractors with resulting layoffs, etc. And if, as counsel for the union put it, the "... entire function of the position of Truck Dump Operator has been taken over", the "taking over" has been almost entirely by the introduction of technological change, and not by any substantial assignment of new duties or responsibilities to the truck drivers. That, in turn, is a serious impediment to the union's argument that contractors are now doing "the job" (as distinct from one or two tasks requiring just a few seconds to perform) of the Truck Dump Operators. (para.38)

[37] In characterizing the case before me as one which "amounts to two buttons - one initiates unloading - one initiates the sampler", the Employer sought to place this case on all fours with Harmac and argues for a similar result.

[38] The Harmac case is distinguishable on these grounds:

First, it was decided on different collective agreement language. Here, the Union relies on Article XXV(c). Harmac was concerned with the predecessor language to Article XXV(b) and whether the truck drivers were doing "the job" of the Truck Dump Operators or merely performing "one or two tasks requiring just a few seconds to perform" of the Truck Dump Operators.

Second, the "extensive automation" of the Truck Dump Facility in Harmac did not occur here.

Third, it was held in Harmac that, apart from "the clicking of the computer mouse ... to raise the dumping platform and ... the later clicking of the computer mouse ... to lower the dumping platform (plus occasional use of the backstop vibrator)", the truck drivers did no more than they did before the construction of the new facility. The case before me involves much more than two mouse clicks.

[39] Harmac must be understood in the light of its particular facts and in the light of different collective agreement language. The job eliminated in Harmac occurred because of "extensive automation" rather than contractors. Harmac was, in the words of the Employer, a "two button push case". Can that be said of the case at hand?

First, the continuous supply of wood chips is essential to the mill.

Second, the operation of the truck dump was the first duty on the Truck Dump Operator job description which, said Mr. Braaten, with sampling, occupied three quarters of his time.

Third, an Operator was required to be at the mill at all times unless the Truck Dump was completely down or there was an emergency more important than the delivery of chips.

Fourth, the Operators were not merely present for the unloading of chips but also to monitor the safe and correct procedure.

Fifth, previously the Operators initiated the sampling process. This function was not included in the new control operation because of the Employer's intention to transfer this function to the truck drivers. The safety box for local control purposes for maintenance became the control for sampling by the drivers. Is this any different than assigning drivers to go upstairs and perform the sampling?

Sixth, the Truck Dump was not automated but a new booth was built for the drivers to observe the dumping. The suggestion that the new booth was for weather protection is thin given the presence of the sample shack. The purpose of the new booth is to allow drivers to perform and observe the dumps, previously the

function of the Operators. The new booth is not a technological advancement.

Seventh, the manual controls for raising and lowering the trucks were relocated for safe operation by the drivers.

Eighth, the described changes can not be said to arise from automation as in *Harmac*. They are changes to facilitate the transfer of duties from the Operators to the drivers.

Ninth, in the aggregate, these changes can not reasonably be described as a "two button push". They are functional changes. The functions of truck dumping and sampling have been transferred from the Operators to the drivers. To facilitate this transfer, the control buttons have been relocated to allow the drivers to operate them safely. When the Operators were doing the work, it was performed by DCS control. This was changed to manual controls. A new booth was built for the drivers. A sampler function was not built into the DCS system, the reasonable inference being that it was the Employer's intention to have the drivers perform this function.

[40] While it is correct to say that the drivers have not assumed all of the duties of the Operators, the transfer of the duties which have occurred are essential to the Employer's intention to eliminate the

Truck Dump Operator job. On the whole of the evidence, it is apparent that the Employer intended to replace the Truck Dump Operator by the transfer of the duties so described to the truck drivers.

[41] Would there have been work for the Truck Dump Operators if the duties, so described, had not been transferred to the drivers? In my view, that question is answered in the affirmative.

[42] The purpose and intent of Article XXV(c) is to protect the jobs of employees. What occurred here is that the Employer intended to replace the Truck Dump Operators by the transfer of the truck dumping and sampler functions to the drivers. In the words of Arbitrator Munroe in Norske "Core Cutter" arbitration:

... it was a significant structural change by which a contract firm would be used to replace regular work force. That is what was intended and happened.

[43] In the result, the grievance is allowed. I leave the remedy to the parties to work out and remain seized in the event of any difficulty in this regard.

DATED at Vancouver, British Columbia, this 29th day of July, 2005.


Colin Taylor, Q.C.