

ARBITRATION AWARD

BETWEEN:

UNITED BROTHERHOOD OF CARPENTERS, LOCAL 579
(hereinafter called the "Union")

AND:

SILVERBIRCH NO. 30 OPERATIONS LIMITED PARTNERSHIP
(TRAVELLERS INN ST. JOHN'S)
(hereinafter called the "Employer")

GRIEVANCE: Termination of Employment

COUNSEL: For the Union
Robert Dornan

For the Employer
Lisa M. Gallivan

ARBITRATOR: James C. Oakley

The arbitration hearing was held at Paradise, Newfoundland and Labrador on November 3, 2011.
The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between SilverBirch No. 30 Operations Limited Partnership (Travellers Inn St. John's) and United Brotherhood of Carpenters, Local Union 579, signed April 19, 2010
- Consent 2 - Page from SilverBirchhotels.com website
- Consent 3 - Travellers Inn, St. John's, seniority list as of June, 2011
- Consent 4 - Letter dated May 19, 2011 to employees from Trevor Morgan, Regional Vice President, Operations, Eastern Canada, SilverBirch Hotels & Resorts
- Consent 5 - Letter of grievance dated May 31, 2011 from the Union to the Employer
- Consent 6 - Letter dated June 3, 2011 from Rod White, General Manager, Travellers Inn, St. John's to Neville Smith, Business Representative of the Union
- Consent 7 - Email dated June 7, 2011 from Rod White to Neville Smith
- Consent 8 - Letter dated June 8, 2011 from Neville Smith to Rod White
- Consent 9 - Letter dated June 16, 2011 from Neville Smith to Rod White
- Consent 10 - Letter dated June 17, 2011 from Rod White to Neville Smith
- Consent 11 - Email dated May 19, 2011 from Darrell Melvin of the Union to Rod White
- Consent 12 - Email dated May 26, 2011 from Rod White to Darrell Melvin

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 4 Management Rights

4:01 The Union agrees it is the exclusive right of the Company to manage its business in which it is engaged and without limiting the generally of the foregoing, the Company shall have the right to:

...

(d) determine the qualifications, select, hire, transfer, promote, demote, classify, layoff, suspend and discharge or otherwise discipline any employee for just cause and to increase or decrease working forces;

...

(f) all matters concerning the operations of the Company's business not specifically dealt with herein shall be reserved to be the management's sole responsibility;

...

Article 10 Seniority

10:01 Where an employee permanently moves from one classification to another the employee shall not carry his/her classification seniority from their previous classification into the new classification. Employees who have permanently moved shall accrue seniority in the new classification and will be subject to layoff in the new classification. An employee will maintain his/her seniority in the previous classification for a period of one year and where laid off from their new classification shall be entitled to displace the most junior employee in their former classification where there is a more junior employee. There will be no right of recall to the new classification where the employee exercises their right to displace a worker in their former classification.

...

10:03 Seniority shall be recognized in matters of layoffs and filling of vacancies. In all cases, employees must have the qualifications, skill and ability (and be suitable in the case of Food and Beverage Department) to perform the work.

...

10:05 An employee's classification and company seniority will be forfeited and employment severed for any of the following reasons:

- (a) if he/she voluntarily resigns;
- (b) if he/she is discharged for just cause;

- (c) if he/she has been absent for any reason for a period of three (3) days without written leave of absence, unless such absence is due to proven sickness or accident;
- (d) if he/she is laid off continuously for a period of twelve (12) months;
- (e) if a laid off employee does not return to work within five (5) days following a recall by registered mail to the address on file with the Company.

...

Article 18 Arbitration

...

18:05 The arbitrator shall have authority to make such order as he considers fair and reasonable in the circumstances, including an order to reinstate any employee who has been unjustly dismissed, or to modify any disciplinary action taken by the Company, provided that the arbitrator shall not have authority to make any decision inconsistent with the stipulation of this Agreement or to delete, alter, or modify any part thereof. The fees and expenses of the arbitrator shall be borne equally by the Company and the Union.

...

Article 21 Term of Agreement

21:01 The Collective Agreement shall come into full force and effect January 1, 2010 for a period of thirty six (36) months from that date, following which it shall automatically renew itself year to year unless notice is given by one party to the other within sixty (60) days next preceding December 31, 2013 or anniversary date thereof, of a desire to amend or terminate this Agreement.

Evidence

The witness called by the Union was Neville Smith, Union business representative. The Employer did not call any witnesses.

The Travellers Inn is a hotel in St. John's, Newfoundland and Labrador, operated by the Employer. The hotel closed for extensive renovations on September 6, 2011. The Employer anticipates that the hotel will reopen after the renovations, and that the work required to complete the renovations will take more than 12 months.

Neville Smith testified that bargaining unit employees at the hotel were informed at a meeting on May 19, 2011 that the hotel would close for renovations and their employment would be terminated. The seniority list dated June 20, 2011 lists 28 employees in the bargaining unit. There are three

employees on the list with more than 30 years service and 12 employees with more than 10 years service. Mr. Smith said that employees at the hotel view their employment as permanent and not temporary.

The Employer sent each employee a letter dated May 19, 2011, which stated as follows:

This letter confirms our conversation today wherein we advised you that your employment with SilverBirch No. 30 Operations Limited Partnership (“SilverBirch”) will terminate effective September 6, 2011 (the “Termination Date”) as a result of the cessation of operations of the Travellers Inn due to property renovations.

Working notice of termination

As stated above, your employment will cease on the Termination Date. During this working notice period (commencing the date of this letter and ending on the Termination Date), you will continue to receive your current compensation and benefits, and you will be expected to perform your duties at a level appropriate to an employee in your position. This prior notice of termination of employment is inclusive of any notice of termination of employment that may be required pursuant to applicable law and the provisions of the *Employment Standards Act* in respect of collective dismissals and of any notice required in accordance with the provisions of the Collective Agreement between SilverBirch and United Brotherhood of Carpenters and Joiners of America Local 579.

Vacation Entitlements

Your accrued and unused vacation days up to the Termination Date, or the date that you resign or are terminated for cause, will be paid to you, as a lump sum, less all applicable deductions.

Group Insurance

Your current insured benefits will continue until the Termination Date, provided you remain employed during the working notice period. All your benefits will cease as of that date.

We take this opportunity to thank you for the services provided to SilverBirch and wish you great success in your future endeavours.

Yours truly,
Trevor Morgan
Regional Vice President, Operations
Eastern Canada

Mr. Smith testified that the Union sent an email to the Employer asking questions about severance pay and about employees who choose to return to work once renovations are completed. Rod White replied for the Employer by email dated May 26, 2011 which stated as follows:

1. What formula will be used to determine severance pay that will be paid to our members?

Our communication to our Associates clearly stated that we have elected to provide a working notice that exceeds our obligations. As such, no additional severance is being offered. We remain committed to taking advantage of the lengthy notice to provide assistance to our Associates with a focus on minimizing the impact of the upcoming closure. We would welcome an opportunity to work with the union collaboratively on this.

2. What is in place for employees who choose not to take a severance package but return to their position once renovations are completed?

Employees have been provided with a formal notification of their pending termination. This constitutes a working notice. Should they choose not to stay with us until the end of our operations, they would have to tender their resignation. When we are ready to re-open, we invite our Associates to apply for available roles.

The Union filed a grievance by letter dated May 31, 2011 which stated as follows:

This notice of grievance is filed in accordance with Article 17 - Grievance Procedure of our Collective Agreement.

We maintain that Silverbirch No. 30 Operations is in violation of the entire Collective Agreement, including Articles 10, 11 and 21.

We find it unconscionable and somewhat cold hearted that you would advise your valued Associates, many of whom have given years of service and dedication to the success of your operation, that ‘when we are ready to re-open we invite our Associates to apply for available roles.’ Furthermore your suggestion that should these employees, who you have refused to indicate that they will be retained after the renovations and who are now being forced to prematurely seek employment elsewhere, be unable to “stay with us until the end of the operations” they will be terminated, with the subsequent lost of collective agreement benefits and rights.

We also point out that it is our opinion that you have not adequately or effectively provide the employees or Local 579 with written notification of the renovations or information outlining the assistance the Employer has offered “to our Associates with a focus on minimizing the impact of the upcoming renovations.”

Finally, we advise that Local 579 will continue to represent the best interest of our members throughout this process and after the re-opening, where we will continue to represent your valued Associates who you will have no reason not to expect recall upon reopening.

We are seeking full compliance with the provisions of the collective agreement and all lost wages and collective agreement benefits and rights as a result of the failure of the Employer to comply with our Collective Agreement.

If this issue is not resolved or if you fail to make a reply we will be asking that this matter be immediately refereed to arbitration and ask that you consider recommending one of the arbitrators provided in Article 18:08.

Yours truly,
Neville Smith
Business Representative

Neville Smith testified that the Employer offered a transition plan to help employees find other employment. The plan included resume writing, job interview skills and training. Mr. Smith testified that Union and Employer representatives met on June 9, 2011. Employer representatives informed the Union that if the grievance proceeded, then the Employer’s cost to respond to the grievance would be taken out of the transition funds available to assist employees. Mr. Smith referred to the Employer’s offer, prior to the arbitration hearing, to stipulate that the employees would not be terminated on the date the hotel closed for renovations, but would be laid off and subject to recall if the hotel reopened within 12 months. He said the Employer’s offer was moot and did not resolve the grievance, because the Employer knew the hotel would not reopen within that time frame. Mr. Smith testified that the Employer’s unwillingness to commit to rehire the employees after the renovations was an attempt to “clean house” of the unionized workforce, and to save the Employer the cost of paying higher benefits to more senior employees. He said it was not fair to the employees to expect them to return to service without the benefit of their accumulated seniority for the purpose of vacation and other benefits. Mr. Smith testified that Article 10:05 (d), which provided for loss of seniority after 12 months layoff, was not intended to be a tool for the Employer to have a mass layoff or termination of employees. Mr. Smith also testified that severance pay is a

common practice after termination, and that employees who are terminated are entitled to severance pay.

Union Submission

The Union submitted that the letter of May 19, 2011 informed employees that their employment would be terminated. The letter referred to September 6, 2011 as a termination date and not a layoff date. The burden of proof is on the Employer to justify termination of employment. There was no proof of just cause for termination. The severing of the employment relationship entitles employees to severance pay in excess of the minimum statutory amount under the *Labour Standards Act*, RSNL 1990, c. L-2. The employees were entitled to severance pay calculated on the basis of approximately one month's pay per year of service, subject to taking into account various factors. The Employer did not comply with the common law requirement for reasonable notice of termination or pay in lieu of notice. The Union acknowledged that employees who are paid an appropriate amount of severance pay would not have a right of recall under the Collective Agreement. It was disingenuous and self serving of the Employer to later take the position that employees were laid off and not terminated. The Employer anticipates that the extensive renovations will take more than 12 months. The Employer also expects that employees will lose their right of recall and have their employment severed after the layoff continues for 12 months under Article 10:05 (d). Layoff for an indefinite period with no reasonable expectation of recall is a termination of employment and warrants the payment of severance pay. Having layoff status with the right of recall is of no benefit to the employees if they lose their employment status after 12 months because the hotel has not reopened. Seniority is one of the most far reaching benefits of union representation. Collective agreements should be interpreted strictly to preserve seniority rights. The intent of Article 10:05 is to establish the seniority of employees in relation to other employees. The Employer is not permitted to use Article 10:05 (d) to unfairly extinguish seniority rights. The Employer is attempting to remove the older employees with more seniority by not extending the right of recall beyond 12 months, and to thereby avoid an allegation of discrimination. The Employer's intent is that employees who return to work would lose their accumulated seniority benefits. The Union submitted that employees who are not paid severance pay will continue to have recall rights that may be exercised whenever the hotel reopens. The Union referred to arbitral text authority in support of its submissions. The case authorities referred to by the Employer could be distinguished based on their facts. The Union requested that the grievance be allowed.

Employer Submission

The Employer submitted that, although the letter to employees dated May 19, 2011 referred to termination of employment, in fact the employees were laid off, with a right of recall for 12 months. Employees were laid off as a result of the hotel being closed for renovations. The Employer will recall employees if the hotel reopens within 12 months. Under Article 10:05 (d), employees will lose seniority after 12 months of layoff. The parties had freely bargained the terms of the Collective Agreement, including a right of recall for a period of 12 months. Both the Employer and the Union may rely on the terms of the Collective Agreement. The Collective Agreement requires the Employer to have just cause to discharge an employee. Under common law there is a right to discharge an employee without cause upon giving proper notice. There was no provision in the Collective Agreement that required the Employer to give notice or pay in lieu of notice upon layoff or termination of employment. Such a provision cannot be implied into the Collective Agreement. The common law principle of reasonable notice was not preserved under the Collective Agreement (*Motorways (1980) Ltd. v. Teamsters Union, Locals 979, 990, 395 and 362* (1998) 70 L.A.C. (4th) 165 (Sorow) (“*Motorways*”). An employer is entitled to place employees on layoff in response to a shortage of work (*F. Archibald Brokerage Ltd. v. Teamsters Local 213* [1987] B.C.A.A. No. 238 (Hope)). In the case of *Bowater Maritimes Inc. v. Communications, Energy and Paperworkers Union, Local 117 et al.*, December 15, 2008 (Bruce) (upheld in *Bowater Maritimes Inc. v. CEP, Local 117 et al.* (2010) 193 L.A.C. (4th) 169 (N.B.Q.B.) and *Bowater Maritimes Inc. v. C.E.P., Local 117 et al.* 2011 N.B.C.A. 22 (Can LII) (“*Bowater*”), the arbitrator dealt with the situation of closure of a paper mill. The arbitrator ruled that the employees were laid off and continued to have status as employees and to accumulate pension benefits for a period of three years, based on the seniority article in the collective agreement, and the possibility of recall. The case authorities relied on by the Employer contained similar collective agreement language to the current Collective Agreement. The Employer also pointed out that it had given the employees almost four months notice of layoff, which was considerably longer than the notice that was required under the *Labour Standards Act*. The Employer requested that the grievance be denied.

Considerations

The Employer closed the Travellers Inn for renovations on September 6, 2011. The employees in the bargaining unit were sent a letter dated May 19, 2011 stating that their employment with the Employer would terminate effective September 6, 2011 as a result of the cessation of operations due

to property renovations. The employees were advised that when the hotel reopens, they may apply for available positions.

The issues to be considered by the Arbitrator are as follows: (1) what is the employment status of the employees after September 6, 2011, (2) are employees entitled to severance pay under the Collective Agreement or by common law, upon layoff or termination of employment due to closure of the hotel, and (3) in the event that the employees have layoff status effective September 6, 2011, do those employees have a right of recall when the hotel reopens?

Article 4:01 of the Collective Agreement states that the Employer's management rights include the right to lay off employees, and the right to discharge an employee for just cause. Article 10 is headed "Seniority". Article 10:03 states that seniority shall be recognized in matters of layoff and filling of vacancies. In this case, there is no issue with respect to the order of layoff, for the reason that all employees were laid off at the same time. Article 10:05 states that seniority will be forfeited and employment severed in various circumstances, including resignation and discharge for just cause. One of those circumstances, according to Article 10:05 (d), occurs when an employee "is laid off continuously for a period of 12 months".

The employment status of an employee when there is a shortage of work has been considered by arbitrators. Whether an employee is laid off or terminated from employment has been considered in relation to an employee's entitlement to severance pay, pension credits, and other benefits. The arbitral authorities indicate that, where an employer does not have the right to terminate employment except for just cause, an employer may lay off employees for shortage of work, subject to a right of recall, and in accordance with the layoff, recall, seniority and other articles of the collective agreement.

In *Motorways (1980) Ltd. v. Teamsters Union, Locals 979, 990, 395 and 362* (1998) 70 L.A.C. (4th) 165 (Sorow) ("*Motorways*"), the closure of a business was found to result in a layoff of employees, and not a termination of employment. The arbitrator stated the following, at page 186:

Simply put, this Collective Agreement neither creates nor purports to preserve the common law right to discharge without just (or proper) cause. In the absence of a right to discharge without just or proper cause, there cannot logically be implied a common law notion of reasonable notice.

One of the cases cited by the Union, during the course of its argument, was *Re Canadian Broadcasting Corp. and N.R.P.A.* (1991), 22 L.A.C. (4th) 40. At page 48 Arbitrator Burkett said:

More importantly for our purposes, it is universally accepted that the requirement for just cause as a prerequisite to the termination of an employee under a collective agreement relates to individual conduct. Management business decisions, unrelated to the conduct of the individual, that result in the termination of an employee do not satisfy the requirement of just cause. *Terminations resulting from these types of decisions are dealt with under the layoff provisions of a collective agreement* [emphasis added].

The comments of Arbitrator Burkett are applicable to the Collective Agreement before us. In reality, the Employer's action at the time of closure was not a termination under the Collective Agreement, but rather a layoff. Admittedly, at the time of such layoff, the layoff was likely to be permanent in character, unless the Employer thereafter chose to restart its operations. This Collective Agreement recognizes the right of the Employer to layoff employees, although such right is conditioned by considerations of seniority. No issue has been raised that the layoff was out of order of seniority.

The finding in the *Motorways* case, with respect to employment status after a business closure, was followed in *Bowater Maritimes Inc. v. Communications, Energy and Paperworkers Union, Local 117 et al.*, December 15, 2008 (Bruce) (upheld in *Bowater Maritimes Inc. v. CEP, Local 117 et al.* (2010) 193 L.A.C. (4th) 169 (N.B.Q.B.) and *Bowater Maritimes Inc. v. C.E.P., Local 117 et al.* 2011 N.B.C.A. 22 (Can LII) ("*Bowater*"). The arbitrator found that, upon closure of a paper mill, the employees were laid off and were not terminated. The arbitrator stated as follows, at paragraphs 23 and 24:

The Employer's position, as stated in their letter to employees advising of the closure of the Mill, is that the permanent and definitive closure results in the termination of their employment as of the last day of their work. Given the Employer's acknowledgement that employees, following their last day of work, were placed on layoff under the provisions of the applicable Collective Agreement, it follows that the Employer's letter to employees, advising that their employment was terminated, was incorrect unless it was intended to refer to the termination of their scheduled work as opposed to the termination of employee status. A somewhat similar situation regarding a termination notice was addressed in the arbitration case of *Re Motorways (1980) Ltd. and Teamsters Union, Locals 979, 990, 395 and 362* (1998), 70 L.A.C.

(4th) 165 (Soronow) where there was a closure of the whole of the operations of the employer.

...

As stated in the *Motorways* case (*supra*, at page 178), employees under a collective agreement are protected from dismissal unless the dismissal meets the requirements of proper cause. Proper cause must be seen as referable only to cause arising from wrongful or inappropriate conduct of the employee. If there is a lack of work, employees are placed on layoff for a period of time. On the expiry of that time period on layoff, mill service (and, therefore, employee status) is lost. The reference in paragraph (iii) of Subarticle 5.02(c) confirms that Mill service continues while an employee remains on layoff.

Having regard to the arbitral authorities and the relevant Articles of the Collective Agreement, the employees at Travellers Inn were laid off as a result of the closure of the hotel, effective September 6, 2011. Their employment was not terminated as of that date. The employees were laid off and continue to have status as employees with a right of recall.

With respect to severance pay, there is no entitlement to severance pay stated in the Collective Agreement. The Union submits that severance pay is payable on the basis of the common law principle that employees are entitled to reasonable notice of termination of employment or pay in lieu of notice. The Union submits that the length of notice, or the amount of severance pay, is calculated based on various factors, such as length of service. However, according to arbitral authorities, the common law principle that an employer is required to give reasonable notice of termination of employment or pay severance pay in lieu of notice, when there is no just cause for termination, cannot be incorporated into a collective agreement, where that collective agreement does not permit the employer to discharge without just cause. The reason for this conclusion is that it is inconsistent with an employee's right not to be dismissed except for just cause, for an employer to have the right to dismiss without cause upon payment of severance pay.

In the *Motorways* case, the employees were found to be laid off following closure of the business and were not entitled to severance pay. The same finding was applied when there was closure of a business in *International Association of Machinists and Aerospace Workers, Local Lodge 1579 v. L-3 Communications Spar Aerospace Limited* (2010) 201 L.A.C. (4th) 85 (Wakeling), where the arbitrator stated the following at paragraph 11:

If Spar Aerospace does not have the right to dismiss an employee without cause, an employee is not entitled to reasonable advance notice of the date Spar Aerospace intends to terminate his or her employment or pay in lieu of notice, as assessed by the common law. The two rights are interdependent. One does not exist without the other. *Isidore Garon Ltée v. Tremblay*, [2006] 1 S.C.R. 27, 52; *Graphic Communications Union, Local 255-C v. Quebecor Jasper Printing Ltd.*, 333 A.R. 204, 208 (Q.B. 2002); *Quebecor Jasper Printing Ltd. v. Graphic Communications Union, Local 2550*, [2002] A.G.A.A. No. 37, 1161 (Sims); *Motorways (1980) Ltd. v. Teamsters Union, Locals 979, 990, 395 & 362*, 70 L.A.C. (4th) 165, 186 (Sorow 1998) & *Penrose Rehabilitation Hospital v. Canadian Health Care Guild*, 10 Alta. G.A.A. 95-099, p. 10 (Smith 1995).

The principles discussed in the above arbitral authorities apply in this case, with the effect that the Employer is not required to pay severance pay. A common law right to severance pay cannot be implied into a collective agreement, where it would be inconsistent with the agreement's express terms. In this Collective Agreement the Employer may not discharge an employee except for just cause. The Employer may lay off employees, subject to the right of recall. It is inconsistent with these terms to imply into the Collective Agreement an obligation to give reasonable notice of termination or to pay severance pay in lieu of notice, when an employee is laid off or employment is terminated without cause. On the basis of the arbitral authorities, and upon review of the Collective Agreement, the employees do not have an implied right to notice of termination or payment of severance pay in lieu of notice. Therefore, the employees are not entitled to severance pay.

The Union also grieves the Employer's statement in its letter to employees that they will not be recalled to work when the hotel reopens, but may apply for available roles. It is premature to decide this issue at this time. The status of employees after September 6, 2011 has been decided by this Award. Also, it is possible that the hotel will reopen within one year after closure, in which event the issue of loss of seniority under Article 10:05 (d) will not arise. For those reasons, the Arbitrator will retain jurisdiction over the issue of the right of recall to work. The authority of an arbitrator to retain jurisdiction to complete an award is discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 1:5600. The parties may request the Arbitrator to reconvene the hearing to address the issue of recall to work at the appropriate time, if necessary.

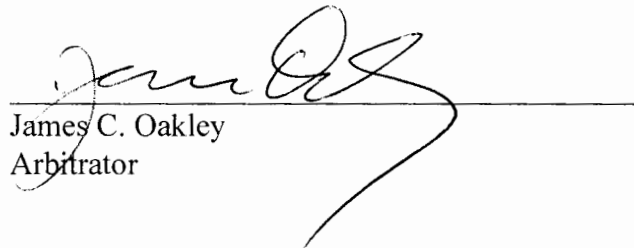
In summary, (1) the employment status of the employees after September 6, 2011 is that they are laid off with a right of recall; (2) employees are not entitled to severance pay under the Collective

Agreement, or by common law, upon layoff or termination of employment; and (3) it is premature to decide the issue of the right of employees to be recalled to work when the hotel reopens, and the Arbitrator retains jurisdiction to decide the issue at the appropriate time, upon consideration of further submissions.

Decision

The grievance is allowed in part and denied in part. The Employer violated the Collective Agreement by its letter to employees stating their employment was terminated, when in fact, the employees were laid off with a right of recall. The Union's claim for severance pay is denied. The Arbitrator retains jurisdiction over the issue of the right of recall to work after the hotel reopens.

DATED this 29th day of November, 2011.



James C. Oakley
Arbitrator