

ARBITRATION AWARD

BETWEEN:

FISH, FOOD AND ALLIED WORKERS UNION (FFAW/CAW)
(hereinafter called the "Union")

AND:

OCEAN CHOICE INTERNATIONAL LP
(hereinafter called the "Company" or the "Employer")

GRIEVANCE: Group Grievance - Watchmen

COUNSEL: For the Union

Greg Pretty

For the Employer

Twila E. Reid

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on June 17 and July 13, 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 applicable time limits for filing the Award were waived.
5. The Arbitrator would remain seized of the matter for ninety (90) days, 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 Ocean Choice International LP and Fish, Food and Allied Workers Union (FFAW/CAW) dated January 1, 2010 to December 31, 2011
- Consent 2 - Grievance Form dated January 7, 2011, Grievance No. 14547, Group Grievance - Wilmore Stockley, Morley Gover and Terrence Stacey
- Consent 3 - Memo dated January 11, 2011 from Hughie Crewe, Plant Manager - Marystown to Allan Moulton, Local President, FFAW
- Consent 4 - Letter dated January 13, 2011 from Allan Moulton to Hughie Crewe
- Consent 5 - Letter dated January 28, 2011 from Hughie Crewe, Operations Manager - Marystown to Wilmore Stockley
- Consent 6 - Letter dated January 28, 2011 from Hughie Crewe, Operations Manager- Marystown to Terrence Stacey
- Consent 7 - Letter dated January 28, 2011 from Hughie Crewe, Operations Manager, Marystown to Morley Gover
- Consent 8 - Memorandum dated February 4, 2011 from Hughie Crewe to Morley Gover, Wilmore Stockley and Terrence Stacey, Subject: Security Schedule
- Consent 9 - Collective Agreement for Plants between Fishery Products International Limited and FFAW/ CAW dated April 1, 2006 to December 31, 2009

Consent 10 - Memorandum dated February 9, 2008 from Gregg Hardy to Terrence Stacey, Wilmore Stockley and Morley Gover, Subject: Security of Plant Premises

AM - 1 First page of the memorandum entered as Consent 10

AR - 1 Memorandum dated January 27, 2008 from Gregg Hardy to Terrence Stacey and Wilmore Stockley, Subject: Security of Plant Premises

Nature of the Grievance

The Union alleges that the elimination of watchmen positions at the Marystown plant violated the Collective Agreement and violated an agreement between the parties to continue the positions. The Union relies on estoppel against the Employer. The Employer submits that the positions were eliminated as a result of technological change. The Employer also denies that there was an agreement to continue the watchmen positions, and denies that the requirements of estoppel have been met.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 1 Recognition

...

1:02 Persons in positions outside the bargaining unit shall not perform work done by classifications for which the working conditions are covered by this Agreement except for the purpose of demonstrating or instruction or in the event of a job no member of the bargaining unit is capable of performing, or in cases of emergency.

Article 3 Management Rights

3:01 It is expressly understood and declared that except as modified by the terms of this Agreement, it is the exclusive right of the Company to manage the affairs in which it is engaged and to direct its working forces. Without any limitation of the foregoing such rights include but are not limited to:

1. The introduction of technical improvements, changes in the method of operation, installation of systems which would

improve working conditions and provide additional income for the individual worker, and the right to engage, lay-off, promote, transfer, and for just cause reprimand, suspend, or discharge.

- 2. The Company retains the sole and exclusive right to specify the work to be performed and services to be rendered by any employee or employees, or class of employees. The Union will not attempt to compel the Company to subdivide the work allocated to such employees in order to create additional classifications when, in the opinion of the Company, such new classifications are unnecessary.
- 3. Management rights are subject to the provisions of this Agreement and should be exercised in a manner that is fair, reasonable, and consistent with the terms of this Agreement.

...

Article 10 Hours of Work

10:01 The regular hours of work for employees shall be as follows:

...

- 5. The regular hours of work for watchmen will be eight (8) hours per day to an average of forty-eight (48) hours per week.

10:02 In any department or classification where it becomes necessary to work out a long-term or permanent change in the regular daily working schedules different from those outlined in Schedule "C", such change in the schedule must be agreed upon between the Company and the Union and thereafter become part of this Agreement. Should the parties fail to reach an agreement on a schedule, the matter may be referred to arbitration for final settlement. Failing agreement, no change shall be implemented by the Company until the arbitrator has ruled on the issue.

...

Article 15 Seniority

...

15:03:02 Vacancies and new positions of a permanent nature within the bargaining unit shall be posted on the plant bulletin board for five (5) working days, with all members of the bargaining unit having the right to apply.

...

Article 22 General

22:01 It is understood and agreed that if, in any department, circumstances arise for which no provision is made herein, the parties shall use their best endeavors to adjust the matter, but work shall proceed under the existing practice of the Company pending settlement between the parties.

...

Article 26 Technological Change

26:01 In keeping with the Company's policy of having employees informed, the Company agrees to communicate with the Union on technological change. This shall be done through the vehicle of the Labour Management Committees referred to in Article 20. Unless the circumstances do not reasonably permit, the Company will provide at least thirty (30) days notice prior to implementing technological change that will cause any job classification to be declared redundant.

Evidence

The witness called by the Union was Allan Moulton, Local Union President. The witnesses called by the Employer were Blaine Sullivan, Chief Operating Officer and Alvin Roff, Director of Groundfish Operations.

Ocean Choice International Inc. ("OCI") purchased fish plant operations of Fishery Products International ("FPI"), including the Marystown Plant, effective December 23, 2007. At that time, a Collective Agreement was in effect between the Union and FPI, with an expiry date of December 31, 2009. OCI attended collective bargaining sessions between FPI and the Union prior to its purchase of FPI plants. The Union and OCI negotiated the current Collective Agreement, effective January 1, 2010 to December 31, 2011.

Terrence Stacey, Wilmore Stockley and Morley Gover were employed in the classification of Watchman at the Marystown plant. They each received a letter dated January 28, 2011 from Hughie Crewe, Operations Manager, Marystown, which stated, in part, as follows:

The purpose of this letter is to notify you that your current classification (Watchman) has become redundant. Please note that under Article 15:03:03 of the Collective

Agreement, you have the right to exercise your seniority to move into another job classification, on a permanent move, to which your seniority and ability entitles you.

The three Watchmen exercised their seniority to move into the positions of Receiving Shed Room Workers at the plant. These positions had the same pay level, at Job Grade II, as the Watchmen positions. The Union claims that the former Watchmen have suffered a loss of income because the new positions have fewer regular hours of work and less opportunity to work overtime.

The Union filed a group grievance on behalf of the three Watchmen on January 7, 2011. The grievance was filed following notice to the Union in December, 2010 that the jobs would be made redundant. The grievance stated, in part, as follows:

Nature of the grievance - Company in violation of Article 3 Management Rights Article 22, as well as an understanding reached between the parties, Schedule A and any other pertaining Article in the Collective Agreement.

The parties dispute whether or not the Company had previously agreed to retain the Watchmen positions. The Union alleged that an oral agreement to that effect was made between Allan Moulton, Union representative and Gregg Hardy, the former Marystown Plant Manager, in January, 2008.

Allan Moulton has held the position of Vice President of the industrial sector with the Union in Marystown since 2000. He has worked at the Marystown plant since 1972. He has participated in every collective bargaining session since the 1980's, including collective bargaining for the current Collective Agreement with OCI. He is a full time Union representative with an office at the Marystown plant.

Allan Moulton testified that he had discussions about the Watchmen positions with the former Plant Manager, Gregg Hardy in January, 2008. Mr. Moulton said that Hughie Crewe was present at the time. One of the four Watchmen retired on December 27, 2007. Mr. Moulton testified that he knew another employee who was interested in the vacant Watchman position. Mr. Moulton told Mr. Hardy that the Company was required by the Collective Agreement to post a job vacancy for the Watchman position. Mr. Moulton said that he agreed not to file a grievance about the failure to post the vacancy and to allow the Company to operate with three Watchmen, because Mr. Hardy told him that he would try to find a way to retain the current number of Watchmen. Mr. Moulton said that

he told the employee interested in the vacant job that it would not be posted, and that allowing the Company to operate with three Watchmen was the only way to keep the jobs for the remaining Watchmen. Mr. Moulton said that the Company implemented a new schedule for three Watchmen in place of the schedule for four Watchmen. The effect was to change the schedule from 24 hours per day, seven days per week to six days per week on Mondays to Saturdays. The new schedule was a key issue in his arrangement with Mr. Hardy. Mr. Moulton understood the agreement was that the Watchmen would be retained until they left their employment by attrition, or by retirement, or reached age 65, whichever occurred first.

In January, 2008, based on the ages of the remaining Watchmen, it could take up to 7 years for all Watchmen to reach age 65. Mr. Moulton said his agreement with Mr. Hardy was made under the Management Rights Article of the Collective Agreement, which he believed required the Company to act in a manner that was fair and reasonable.

Mr. Moulton said that memorandums issued by Gregg Hardy about the new schedule, dated January 27, 2008 and February 9, 2008, were the application of the agreement. Both memorandums were copied to Hughie Crewe, Plant Operations Manager and to other managers in Marystown. The subject of both memorandums was "Security of Plant Premises". The first memorandum, dated January 27, 2008, was from Gregg Hardy to Terrence Stacey and Wilmore Stockley, two of the Watchmen. At that time, one of the Watchmen, Morley Gover, was temporarily absent from the workplace to pursue work opportunities outside the Province. The first memorandum set out a two (2) man system and stated, in part, as follows:

As you have already been advised, there are some changes to the plant security schedule being followed by the Marystown Operation and this communication will hopefully clarify any questions that you may have as it relates to this function. Until further notice the security schedule for the Marystown Operation (Ocean Choice International L.P) will be a two (2) man system as outlined in the attached document; there will be no plant security on duty during the day shift, except for Saturday and there will be no security on shift at all on Sunday; this is a change that management has decided is necessary going forward and any further changes to this will be promptly communicated.

...

We will be further reviewing our policies and procedures on a ongoing basis with respect to the security of the plant and its property, and will advise of any changes/developments as they become available.

...

After the first memorandum, Morley Gover returned from his temporary absence to resume his Watchman position. The second memorandum, dated February 9, 2008, set out a three (3) man system and stated, in part, as follows:

Please be advised that the Plant Security schedule has been changed to accommodate the three (3) man system and this communication will hopefully clarify any questions that you may have as it relates to this function; the Security schedule will run 6 days a week 24 hours a day, there will be no scheduled security on Sunday. (See attached schedule).

...

We will be further reviewing our policies and procedures on a ongoing basis with respect to the security of the plant and its property, and will advise of any changes/developments as they become available.

Mr. Moulton testified that he did not see the need to have his agreement with Mr. Hardy set out in writing. He did not have any correspondence regarding the agreement or any notes of his discussions with Mr. Hardy. He said that other agreements were made with the Company that were not in writing. He gave the example of an arrangement where the Company permitted cleanup workers to leave work early and get paid for the full shift, provided the cleanup job was finished.

Mr. Moulton understood that Gregg Hardy represented the Company and had authority to make decisions about the Collective Agreement. Mr. Moulton had no knowledge of any limit on Mr. Hardy's spending authority. When the plant was operated by FPI, Mr. Moulton had dealt with both Sadie Popovitch, the Human Resources and Labour Relations Supervisor, and with Gregg Hardy, the Plant Manager, with respect to labour relations issues at the Marystown plant. He dealt with Sadie Popovitch on issues of grievances and arbitrations. After the plant was operated by OCI management, there was no labour relations supervisor, and he dealt with the Plant Manager or with Blaine Sullivan, the Chief Operating Officer, on labour relations issues.

Allan Moulton testified that, about one week before Christmas 2010, he was informed by Alvin Roff, Director of Groundfish Operations and by Hughie Crewe, Plant Manager, that the Watchmen positions would be eliminated. They told him that the Company would be installing an automatic gate and security cameras, and that, as a result of these changes, the Watchmen positions would become redundant effective the end of January, 2011. They told him that the security cameras were necessary to ensure product being shipped to the United States would not be delayed at the border.

Mr. Moulton said that, in December, 2010, he told Alvin Roff about the agreement that he had made with Gregg Hardy. At that time, Mr. Hardy was no longer employed by the Company. On December 24, 2010, Mr. Moulton telephoned Blaine Sullivan. Mr. Sullivan told him that Gregg Hardy did not have authority to make the agreement alleged. Mr. Sullivan also told him that no one besides Mr. Moulton understood there was such an agreement. Mr. Moulton said he received an email from Gregg Hardy in December, 2010, and he spoke to Hughie Crewe about it on December 28, 2010. The email was not entered as an exhibit. Mr. Moulton said Hughie Crewe told him that he recalled a discussion in 2008 about attrition or retirement, but did not recall any discussion about Watchmen staying to age 65.

Mr. Moulton said that there was no structured labour management committee at the Marystown plant. With reference to the 30 days notice of technological change in Article 26, Mr. Moulton testified that he was told to consider the discussion in December, 2010 to be notice under Article 26. He did not receive any written notice of technological change.

Mr. Moulton testified that the duties of the Watchmen included controlling vehicles and persons entering and leaving the property from the watchhouse, signing for packages and ensuring they were delivered, tying lines for trawlers, taking emergency phone calls for workers, ensuring the road was salted in the winter, and other duties that were listed on a directive. He said the duties of the Watchmen are now being done by persons outside the bargaining unit.

Mr. Moulton said that the decision to eliminate the Watchmen positions was not fair and reasonable, and was inconsistent with the understanding he had with Mr. Hardy.

Blaine Sullivan, Chief Operating Officer for OCI, testified that OCI operates 14 plants, with 10 plants subject to collective agreements. He testified that he told Mr. Moulton that OCI would have a leaner structure than FPI and there would no longer be a Labour Relations Supervisor at the Marystown plant. He told Mr. Moulton that he would deal with major labour relations issues. Mr. Sullivan said that from December, 2007 to December, 2010, Mr. Moulton had periodically raised the issue of Watchmen as an issue the Company needed to address.

Mr. Sullivan testified that the Watchmen positions were made redundant as a result of technological change. The changes included installation of surveillance cameras, and the installation of an automatic gate. The surveillance cameras were installed to meet the requirements of the Customs

Trade Partnership Against Terrorism (CTPAT). If those requirements were met, then the Company would have priority access to ship product across the border into the United States. It was important to be an approved shipper in order to avoid delay at the border with fresh product. The requirements included surveillance cameras and perimeter fencing. There was no requirement under CTPAT to have Watchmen. The cost to install the equipment was about \$50,000. He said the video cameras are monitored from time to time by the Plant Manager and other Managers when necessary. A video recording was stored on a hard drive in Marystown.

Mr. Sullivan testified that the automatic gate would permit entrance to the property by an entry card that would open a lever. An intercom was installed at the gate for use by persons entering the property who did not have an entry card. The intercom would be answered at the plant office, and if entry was authorized by management, then the lever would be operated remotely from the office. The automatic gate and intercom system and the surveillance cameras were installed in January, 2011.

Mr. Sullivan testified that he had discussions with Marystown plant management in the Fall, 2010 about having the Watchmen in a productive role. He said that Marystown was the only plant that had Watchmen. He said with the introduction of technology the Watchmen positions were not necessary. The core duty of the Watchman was to open and close the gate for persons entering the plant. Mr. Sullivan said that he did not know the details of all the Watchmens' duties, and could not say whether those duties included arranging for snow clearing or advising the power company if there was a power failure on a vessel. He said that tying lines for the trawlers was a duty of Watchmen and also a duty of other employees. He said that when the Company said the positions were redundant, it meant that the positions were no longer required because the core duties were eliminated.

Mr. Sullivan said that Mr. Moulton told him in December, 2010 that he had a verbal agreement with Gregg Hardy that the Watchmen would be eliminated through attrition and would not be replaced when they left. Mr. Sullivan had no knowledge of any promise that there would be work for the Watchmen until they left the Company or reached age 65. He said that the alleged agreement came as a complete surprise to him. He said Gregg Hardy did not have authority as Plant Manager to make such an agreement. The total cost of a commitment to keep the Watchmen to age 65 could amount to \$700,000, based on \$100,000 per year for up to 7 years. The Plant Manager had authority to spend up to \$10,000. A Business Unit Manager, such as Mr. Roff, had authority to spend up to

\$25,000. Spending any additional amounts required approval from the head office. Mr. Sullivan understood that Mr. Hardy made an agreement with Mr. Moulton that the Watchmen who remained would get additional hours of work and there would be scheduling changes so that the Watchmen did not have to work on Sundays. He said that if there had been any agreement to guarantee work for Watchmen for up to seven years, then it would have been made in writing and he would have had to approve it. He said that no mention was made of any such agreement during collective bargaining in 2010. He said that an agreement on a minor issue, such as the cleanup crew leaving work early, could be made without his approval because such an agreement did not involve any additional cost to the Company.

Alvin Roff has held the position of Director of Groundfish Operations since October, 2010. For the previous 10 years he was the Plant Manager at the Grand Bank plant for Clearwater Seafoods. As Director of Groundfish Operations, he was responsible for two active groundfish plants in 2010, at Marystown and Fortune. He was the immediate supervisor of the Plant Managers in those plants.

Mr. Roff said that the Company had to be CTPAT compliant because a large amount of its product was shipped to the United States about twice per week. Access at the United States border was important because the Company was trucking fresh product. He said that the Fortune Plant did not need to be CTPAT compliant because almost none of its fresh product was shipped to the United States. He said that the Watchmens' core duties were to operate the watchhouse at the entrance, to obtain authority from the office for persons to enter the property and to operate the gates and control the entry of persons and traffic to the property. The Watchmen also did security patrols around the premises, which included making rounds at night. Mr. Roff said the Watchmens' duties were made redundant as a result of technological change. The positions were deemed no longer necessary in their entirety. He said the Company installed 32 cameras to monitor the property 24 hours per day, 7 days per week. An automatic lever was installed at the gate to be opened by an entry card. If a person did not have a card they would call the office on the intercom. A manager at the office approves entry and remotely operates the lever. Mr. Roff said the function of management to operate the lever was similar to the former function of management to authorize the Watchmen to permit a person to enter the plant. When asked if the work of the Watchmen was being done by management after the changes were implemented, Mr. Roff said that operating the lever was about 0.1% of the Watchmens' duties. Mr. Roff said he was not aware of any agreement with the Union not to eliminate the Watchmen positions.

Mr. Roff said that in October or November, 2010, he and Blaine Sullivan discussed eliminating the Watchmen positions. There was a need to reduce overhead at the Marystown plant. The decision would save about \$100,000 per year. On December 13, 2010, he and Hughie Crewe informed Allan Moulton about the decision to eliminate the Watchmen positions. He said that Article 26, Technological Change, was discussed briefly. He said they told Mr. Moulton that the installation of security cameras was connected to the elimination of the Watchmen positions.

Prior to the arbitration hearing, Mr. Roff checked the Company records and determined that the last labour management committee meeting was on September 5, 2005, when the plant was operated by FPI. He said that there had been no labour management committee meeting since OCI took over operations and the Union had not requested any committee meeting. He said there is regular dialogue with the full time Union representative, Mr. Moulton.

Mr. Roff said that the Watchmen were transferred to the job of Receiving Shed Room Workers, a position having the same job grade level as Watchmen. He said it was possible that the former Watchmen could receive less income as Receiving Shed Room Workers because those positions could have fewer hours per week.

Union Submission

The Union submitted that the Employer's former Plant Manager made an agreement with Union representative Allan Moulton about how the Watchmen positions would be eliminated. As the Watchmen left the workplace through attrition, they would not be replaced, and their positions would not be posted. The agreement was confirmed by the fact that the Union did not file any grievance about the failure to post a vacancy following the retirement of a Watchman in 2008. The effect of the agreement was that the number of Watchmen was reduced from four to three. The Union relied to its detriment on the agreement because it did not file a grievance about the Company's failure to post a vacancy under Article 15.03.02. There were two rounds of collective bargaining after the agreement was made. There was no legal requirement that an agreement be made in writing. Gregg Hardy, the former Plant Manager, was a person with authority to make the agreement. Since OCI took over operations from FPI, there was no longer a Human Resources Manager at the plant. The local Plant Manager made decisions and had authority in labour relations matters. The Union had proven all the ingredients of estoppel, as discussed in prior arbitration awards. The Watchmen

suffered a loss of income as a result of being made redundant and placed in other positions. The Union also submitted that it was a breach of the Collective Agreement to arbitrarily transfer the duties of the bargaining unit position of Watchman to management. The Watchman position was not redundant because the Watchmen's duties were now being performed by management, in particular, viewing the recordings made by the video cameras, and remotely raising the lever to permit persons to enter the property. The duties of the Watchmen were established by the testimony of Allan Moulton. The Employer's witnesses were not familiar with some of the duties, such as tying lines for the vessels and monitoring the amount of ammonia and fuel on the site. Viewing the video recordings replaced the physical patrols of the property by the Watchmen. The Employer had acted simply to save money, but had disregarded the integrity of the bargaining unit. With respect to management performing work of the bargaining unit, the Union referred to the arbitration awards in *Axis Logistics Inc. and UFCW, Local 175* (2001) 64 C.L.A.S. 83 (Wilson) and *General Chemicals Ltd. v. CAW, Local 89* (1993) 38 L.A.C. (4th) 24 (Brandt). Although there had not been a recent labour management committee meeting, the local Union representative was available and had addressed the issue. The Union requested that the grievance be upheld and the Watchmen's positions be restored.

Employer Submission

The Employer submitted that the Union had failed to prove all three elements of the test for estoppel, namely, (1) a representation with an intent to affect legal relations, (2) reliance on the representation, and (3) detriment to the party relying. The only evidence of a representation was Allan Moulton's testimony about an oral agreement. There was no evidence of documents or notes. Gregg Hardy was not called as a witness. It was not clear whether the representation alleged by the Union was to keep the Watchmen employed until they retired at age 65 or to keep the Watchmen until the positions were eliminated by attrition. Allan Moulton alleged that there was an agreement to retain the Watchmen until age 65. There was no clear and unequivocal representation with an intent to affect legal relations. The requirement for a clear and unequivocal representation to establish an estoppel was discussed in the arbitral authorities, including *Benlan Inc. and U.F.C.W., Local 175* (2011) 105 C.L.A.S. 52 (Kennedy), *Parisco Ltd. and U.F.C.W., Local 175* (2003) 73 C.L.A.S. 52 (M. Newman), and *Ontario Paper Co. Ltd. and Canadian Paperworkers Union, Local 84* (1983) 10 L.A.C. (3d) 369 (Rayner). The doctrine of estoppel should be applied with caution, as stated in the Court decision in *Her Majesty the Queen in Right of Newfoundland and Labrador and Newfoundland and Labrador Association of Public and Private Employees*, 2010 NLCA. 37. The Plant Manager, Gregg Hardy,

did not have authority to make the alleged representation. When the plant was operated by FPI, there was a Labour Relations Manager with authority in labour relations matters, as indicated by her signature on letters attached to the Collective Agreement. Blaine Sullivan told Allan Moulton that he would exercise the role of the Labour Relations Manager for OCI. Plant Managers do not have authority for expenditures over \$10,000. The cost of continuing the Watchmen positions was about \$100,000 per year, which was beyond the Plant Manager's authority. The Employer referred to the arbitration award in *Hydro Ottawa Ltd. and I.B.E.W., Local 636* (2009) 189 L.A.C. (4th) 33 (Weatherill) where it was found that supervisors did not have authority to make a representation binding on the company. There was no reliance by the Union on any representation. The fact that the Union did not grieve the failure to post the vacancy does not establish detrimental reliance. There was no detriment to the Union as the Watchmen had no proven financial loss. The Watchmen continued to receive the same wage rate in their new positions as Receiving Shed Room Workers. There was a potential for overtime in the new positions. The elimination of the Watchmen positions was authorized by the technological change provision of Article 26. The Watchmen positions were made redundant by the automatic gate and by the security cameras. There was no onus on the Employer to establish the Watchmen's duties. It was not proven that certain duties were exclusive to the Watchmen, such as receiving courier packages, tying up the lines to the vessels, and securing power to the vessels. The Employer's witness, Alvin Roff, testified that only 0.1% of the former Watchmen's duties were now being done by management. With respect to opening the gate, it was previously a management duty to approve entry. The only change in procedure was that now management remotely operated the lever. The viewing of video recordings was done by management only if there was an event that required review. Management was not performing the full bundle of work that amounted to a position. In that regard, the Employer referred to *Standard Radio Inc. and CEP* (2005) 84 C.L.A.S. 28 (Keller). There was compliance with Article 26. Although the labour management committee had not met, the Company met with the Local Union representative in December, 2010. In the event there was a technical noncompliance with the requirement for a meeting under Article 26, then the Union had waived any such requirement by accepting oral notice to Union representative Allan Moulton. The form of notice did not cause any prejudice to the Union as there was ample opportunity for discussion of the proposed technological change. The Employer requested that the grievance be denied.

Considerations

The issues before the Arbitrator are (1) is the Employer estopped from eliminating the Watchmen positions, (2) were the Watchmen positions made redundant pursuant to the technological change provisions of Article 26 of the Collective Agreement, and (3) was there any violation of the integrity of the bargaining unit by management doing the work of the former Watchmen positions.

Arbitrators have authority to apply the doctrine of estoppel. The application of estoppel in labour relation disputes was recently approved by the Supreme Court of Newfoundland and Labrador Court of Appeal in *Her Majesty the Queen in right of Newfoundland and Labrador v. Newfoundland and Labrador Association of Public and Private Employees*, 2010 NLCA 37. The Court stated, in part, as follows:

[54] This commentary demonstrates that the doctrine of estoppel has a rather fluid application in labour arbitration as compared to the consideration of past practice. The doctrine of estoppel arises in a number of different ways such as by conduct, convention or representation (see discussion of estoppel by convention and representation in *Ryan v. Moore*, [2005] 2 S.C.R. 53). However, care must be taken in the field of labour relations to ensure that undisciplined applications of this doctrine do not undermine the integrity of the collective bargaining process and in particular the language of a collective agreements negotiated in good faith by the parties at a bargaining table. In *Ryan*, the Supreme Court at para. 50 affirmed the admonition that:

. . . it has long been accepted that estoppels are to be received with caution and applied with care (citation omitted)

The Union has alleged that the Employer is estopped from eliminating the Watchmen positions as a result of an agreement made between the former Marystown Plant Manager, Gregg Hardy and the local Union representative, Allan Moulton in January, 2008. When considering whether estoppel applies, I will consider the elements of estoppel as set out in the arbitral authorities, which are (1) a representation, either by words or conduct, including silence or acquiescence, (2) intention that the representation be acted on by the other party, which may be inferred from the circumstances and (3) reliance on the representation to the detriment or prejudice of the other party (Brown & Beatty, *Canadian Labour Arbitration* 4th edition, paragraph 2:2211).

The Employer denies that any of the elements of estoppel have been proven by the Union. In particular, the Employer denies that the Plant Manager made the representation alleged by the Union. The Employer also submits that, even if the representation was made by the Plant Manager, he did not have authority to make such a representation on behalf of the Company, because the cost of the representation exceeded the limit of his spending authority.

I will first consider the facts relevant to the issue of estoppel. The Marystown fish plant was operated by Fishery Products International until it was taken over by Ocean Choice International in December, 2007. The Marystown plant was the only OCI plant with Watchmen. Unlike other fish plants, the Marystown plant is located outside the local community, and its location raises security issues that other plants do not have. In December, 2007, one of the four Watchmen retired. Also at that time, another Watchman, Morley Gover, was absent on a temporary leave of absence to obtain employment out of the Province. The other two Watchmen were Terrence Stacey and Wilmore Stockley. The Company did not post a notice of vacancy for the position of the Watchman who had retired. The Company implemented a revised work schedule for the remaining Watchmen. When there were four Watchmen, the schedule was 24 hours per day, seven days per week. The revised work schedule was set out in two memorandums from Gregg Hardy, Plant Manager. In the first memorandum, the revised schedule was for two Watchmen, as Mr. Gover was temporarily absent. Under the two Watchmen system there would be no plant security during the day shift, except for Saturday, and no security on Sunday. Mr. Hardy issued a second memorandum dated February 9, 2008, following the return to work of Mr. Gover, which set out a revised schedule for a three Watchmen system. The revised schedule operated six days per week, 24 hours per day, with no security on Sunday.

Allan Moulton, local Union representative, testified that he knew that another employee was interested in the Watchman position that became vacant when one of the Watchmen retired. Mr. Moulton said that he spoke to Mr. Hardy in early January, 2008, about the vacant position. Mr. Moulton testified that he agreed not to grieve the Company's failure to post the vacancy, because he had an agreement with Mr. Hardy that the remaining Watchmen's positions would continue until they were eliminated by attrition or by retirement or the Watchmen reached age 65. Following the meeting, the schedule for the reduced number of Watchmen was implemented. Mr. Moulton said the new schedule was a key part of his agreement with Mr. Hardy. The Union alleges that, when the Employer eliminated the Watchmen positions in 2011, it violated the agreement made between Mr. Hardy and Mr. Moulton and therefore estoppel applies against the Employer.

The first element of estoppel is that a representation be made. In this regard, there is an issue of whether Mr. Hardy made the representation alleged. There is also an issue of whether Mr. Hardy had authority on behalf of the Company to make the representation.

The Employer submits that any agreement made between Mr. Hardy and Mr. Moulton was made with respect to the scheduling of the remaining Watchmen. The Employer denies there was any commitment to retain the Watchmen until they left by attrition or reached age 65. Having regard to the age of the Watchmen in 2008, it could take up to seven years until all Watchmen reached age 65. The Employer maintained that it was highly unlikely that the Plant Manager would make such a commitment, and even if he did, he did not have authority to do so. The former Plant Manager did not testify at the hearing. The evidence with respect to the alleged agreement is the testimony of Allan Moulton, and the evidence of the surrounding circumstances, including the memorandums issued by the Plant Manager on January 27 and February 9, 2008. To establish a representation for the purpose of estoppel, the evidence needs to be clear and unequivocal as to the content of the representation. Allan Moulton understood that the agreement to retain the Watchmen would remain in effect until the positions were eliminated by attrition or retirement or the employees reached age 65. However, it was not clear from Mr. Moulton's testimony that Mr. Hardy expressly committed the Company to retain the Watchmen as alleged.

There was no evidence of any letter, email or any other document confirming the alleged representation. Mr. Moulton did not produce any notes of any conversation he had with Mr. Hardy about the representation. Although written documentation is not necessary to prove a representation, the absence of documentation makes it more difficult to establish the content of the representation with sufficient clarity. It is important that the content of the representation be established with clarity, particularly where it is alleged that the Company made a commitment that would continue in effect for several years, with a significant financial obligation to the Company. Clarity is also important in a situation such as the present, where the Union alleges that, as a result of the representation, the Company could not eliminate the Watchmen positions even though it made technological changes. The alleged agreement would have significant long term financial and organizational consequences to the Company. Also, the memorandums from the Plant Manager dated January 27, 2008 and February 9, 2008 are not consistent with the alleged agreement. The first memorandum states there will be changes to the plant security schedule and a two man system would be implemented. It states "further changes to this will be promptly communicated". The second memorandum implements a three man system and another revised security schedule. Both

memorandums state that the Employer will be “further reviewing our policies and procedures on an ongoing basis with respect to the security of the plant” and that the Watchmen would be advised of any changes. The statements in the memorandums do not suggest any restriction on the Company’s future actions, and are not consistent with the representation alleged by Mr. Moulton. The Arbitrator finds that the Union has not established the representation alleged. Therefore, the Arbitrator finds that estoppel is not proven.

The Company also alleges that Mr. Hardy did not have authority to make the alleged agreement and bind the Company. However, it is unnecessary to decide the issue of the Plant Manager’s authority.

The Arbitrator has also considered the element of the doctrine of estoppel that requires reliance on the representation to the detriment of the party alleging the estoppel. In this case the Union alleges that Mr. Moulton relied on the representation to the Union’s detriment by failing to file a grievance in January, 2008 about the job posting. However, it is unnecessary to decide whether or not detrimental reliance is proven, having regard to the Arbitrator’s finding that the representation alleged is not proven.

The Company submits that it complied with Article 26, the technological change article of the Collective Agreement. Although the grievance form did not refer to Article 26, both parties addressed this issue at the arbitration hearing. The changes that were implemented by the Employer included the installation of an automatic lever at the entrance and the installation of security cameras inside and outside the plant. The Employer’s witnesses testified that the security cameras were necessary under the CTPAT requirements to maintain priority access across the United States border for fresh product. The Employer also submitted that the elimination of the Watchmen positions would result in a cost savings. The entry of persons to the property is controlled by an entry card for authorized persons. Any person without an entry card uses the intercom located at the gate to contact the plant office. A management person may grant access and then remotely operate the lever from the office. Alvin Roff, Director of Groundfish Operations of the Company, testified that the task of remotely raising the lever from the office, which was comparable to the task of the Watchmen opening the gate, comprises 0.1% of the duties of a Watchman. The evidence establishes that the core duties of the Watchmen comprised the operation of the watchhouse and the plant patrols, and that those duties were substantially no longer required as a result of the technological changes introduced by the Employer. In that respect, the Employer complied with Article 26. There is a requirement for notice to the Union under Article 26. Notice to the Union was given by meeting

with the local Union representative. The Union did not object to the form of notice. I find that the Company complied with Article 26.

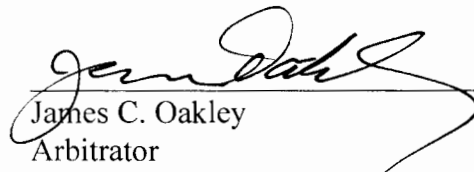
The Union has alleged a violation of the integrity of the bargaining unit by management performing work of the former Watchmen. Having regard to the evidence, I find that the core duties of Watchmen, the operation of the watchhouse and the plant patrols, were eliminated as a result of technological change. The positions were made redundant by technological change. In *Standard Radio Inc. and CEP* (2005) 84 C.L.A.S. 28 (Keller) (“*Standard Radio*”), the positions were made redundant under a technological change article, and the continued performance by management of 20% to 30% of the duties of one of the eliminated positions did not violate the collective agreement, as it did not constitute a job. In the present case, the work done by management is an insignificant percentage of the former duties of Watchmen, and is considerably less than the percentage performed by management in the *Standard Radio* case. As noted above, the Watchmen positions were no longer required as a result of technological change. Therefore there is no violation of the integrity of the bargaining unit.

In summary, the Union has not proven that the Employer made a representation to continue the Watchmen positions until the Watchmen left the positions by attrition, retirement or reached age 65. The Employer is not estopped from eliminating the Watchmen positions. The Watchmen positions were made redundant by the Employer pursuant to implementing technological changes under Article 26. The actions of the Employer do not impair the integrity of the bargaining unit. For these reasons the grievance will be denied.

Decision

The grievance is denied.

DATED this 12th day of October, 2011.


James C. Oakley
Arbitrator