

ARBITRATION AWARD

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 1615
(hereinafter called the "Union")

AND:

NEWFOUNDLAND AND LABRADOR HYDRO
(hereinafter called the "Employer" or the "Company")

GRIEVANCE: Schedule "A" - Wages - Pay groups 8 and below

COUNSEL: For the Union

V. Randell J. Earle, Q.C.

For the Employer

Denis Mahoney

ARBITRATION BOARD: James C. Oakley, Chairperson
David Curtis
William Alcock

The arbitration hearing was held at St. John's on September 22 and 23, November 20 and 21, and December 10, 2008. The parties agreed as follows:

1. The Arbitration Board was acceptable.
2. There was a dispute regarding the arbitrability of a Letter of Intent dated February 17, 2007. The parties agreed that the Arbitration Board would decide the issue of arbitrability and also decide the merits of the grievance, regardless of its decision on arbitrability.
3. The grievance procedure was properly followed or any requirements waived.
4. Any applicable time limits for the filing of the Award were waived.
5. The Arbitration Board would remain seized of the matter for sixty (60) days following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.
6. Witnesses were not excluded from the hearing.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between Newfoundland and Labrador Hydro and Local 1615 of the International Brotherhood of Electrical Workers, Operations Unit, effective April 1, 2006 to March 31, 2010
- Consent 2 - Grievance Form dated June 25, 2008
- Consent 3 - Letter dated June 1, 2008 from Bob Clarke, Business Manager of the Union to Gerard McDonald, Vice President Human Resources and Organizational Effectiveness of the Company
- Consent 4 - Letter dated June 13, 2008 from Gerard McDonald to Bob Clarke
- Consent 5 - Email dated June 16, 2008 from Gerard McDonald to Bob Clarke
- Consent 6 - Letter dated June 16, 2008 from Bob Clarke to Gerard McDonald
- Consent 7 - Letter dated July 8, 2008 from Debbie Molloy, Manager Labour Relations of the Company to Bob Clarke of the Union

- Consent 8 - Letter of Intent dated February 17, 2007
- Consent 9 - Letter dated May 2, 2008 from Bob Clarke to Gerard McDonald
- Consent 10 - Email dated February 20, 2007 from Joanne Dunne, Labour Relations Specialist of the Company to Jody Whittle of the Union with attached changes to Operations Collective Agreement
- Consent 11 - Power point presentation for meeting with employees in pay groups 8 and below, Gerard McDonald, Bay D'Espoir, April 20, 2007
- Consent 12 - Committee Report - Job Evaluation Review of Group 8 and below
- Consent 13 - Union proposed cents per hour increase and proposed Letter of Intent, February, 2007
- Consent 14 - Proposed Letter of Intent
- Consent 15 - Proposed Letter of Intent
- Consent 16 - Email dated February 5, 2007 from Gerard McDonald to Bob Clarke
- Consent 17 - Power point presentation, Kick-off: Job Evaluation Reviews, IBEW, Local 1615, Office Workers Unit, Operations Unit Pay Groups 8 and below, Gerard McDonald, May 22, 2007
- Consent 18 - Memo dated May 28, 2007 from Michael Roberts, Manager, Human Resources to Joint Evaluation Committee members re Summary - Job Evaluation Meetings & Next Steps
- Consent 19 - Memo dated June 4, 2007 from Gerard McDonald and Bob Clarke to employees in the Operations bargaining unit (pay group 8 and under) and Office Workers bargaining unit - re Update Job Evaluation Reviews
- Consent 20 - Email dated October 26, 2007 from Michael Roberts, Manager Human Resources to Operations Unit, Office Workers Unit with attached memo dated June 4, 2007
- Consent 21 - Memo dated December 19, 2007 from Gerard McDonald and Bob Clarke to employees in the Operations bargaining unit (pay groups 8 and under) and Office Workers bargaining unit, re Update - Job Evaluation Reviews
- Consent 22 - Email dated January 23, 2008 from Gerard McDonald to Hughie Ireland re Final Job Evaluation Groups 8 and Below - Summary Document

- Consent 23 - Email dated February 11, 2008 from Gerard McDonald to Michael Roberts with attached memo dated February 11, 2008 from Gerard McDonald and Bob Clarke to employees in the Operations bargaining unit (pay groups 8 and under) and Office Workers bargaining unit
- Consent 24 - Report of the IBEW, Local 1615 Job Evaluation Committee - Job Evaluation Review - Pay Groups 8 and Below
- Consent 25 - Additional comments from management side of the Job Evaluation Committee dated January 22, 2008
- Consent 26 - Email dated February 5, 2008 from Gerard McDonald to Jody Whittle with attached analysis on the Job Evaluation Project
- Consent 27 - Letter dated February 8, 2008 from Gerard McDonald to Bob Clarke re Job Evaluation Reviews
- Consent 28 - Email dated February 13, 2008 from Gerard McDonald to Jody Whittle and Bob Clarke
- Consent 29 - Job Evaluation Report Presentation dated April 9, 2008
- Consent 30 - Email dated April 14, 2008 from Bob Clarke to Gerard McDonald
- Consent 31 - Email dated April 16, 2008 from Gerard McDonald to Bob Clarke
- Consent 32 - Letter dated April 17, 2008 from Bob Clarke to Gerard McDonald
- Consent 33 - Email dated April 26, 2008 from Bob Clarke to Gerard McDonald
- Consent 34 - Email dated April 24, 2008 from Gerard McDonald to Bob Clarke
- Consent 35 - Letter dated May 1, 2008 from Gerard McDonald to Bob Clarke
- Consent 36 - Letter dated May 26, 2008 from Gerard McDonald to Bob Clarke
- Consent 37 - Email dated September 9, 2008 from Gerard McDonald to Bob Clarke
- Consent 38 - Power point presentation - Update Session - Job Evaluation Review of Pay Grades 8 and below Operations Unit, IBEW, Local 1615, Gerard McDonald, Bay D'Espoir, June 5, 2008

Consent 39 - Article 10.04 - Office Workers Collective Agreement

Consent 40 - Schedule "F" - Office Workers Collective Agreement re Job Evaluation Committee

Consent 41 - Proposed Letter of Intent dated February 16, 2007

TB - 1 Book of Documents re Hay Group Job Evaluation

U - 1 Union Proposal

U - 2 Excerpt from text, Wallace and Faye, *Compensation, Theory and Practice*, 2nd edition

U - 3 Excerpt from text, Armstrong et al. *Job Evaluation*

Nature of the Grievance

The Union grieves that the Employer did not fulfill its obligation to complete and implement the job evaluation process in the Operations Unit for pay groups 8 and below, as per a Letter of Intent dated February 17, 2007. The Letter of Intent was signed by the parties during the last round of collective bargaining. The Employer submits that the Letter of Intent is not part of the Collective Agreement and any dispute about the Letter of Intent is not arbitrable. The parties also dispute the interpretation of the Letter of Intent. The parties agreed that the Board would make a ruling on the merits of the grievance, regardless of the Board's ruling on arbitrability.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 1 Recognition

1.01 The Corporation recognizes the Union as the sole bargaining agent for those employees of the Corporation, who form part of the Bargaining Unit as defined by Order-in-Council, Number 479-71 and subsequent amendments.

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Article 6 Management Rights

6.01 The Union acknowledges and agrees that the Corporation has the exclusive right to operate and manage the affairs in which it is engaged and to direct its working forces. Such rights, without limiting the foregoing, include, but are not limited to: the right to hire, determine the job qualifications of employees, promote, transfer, test, to suspend, demote, lay off, discipline or discharge for just cause; to determine the number of employees to perform the work; to control and regulate the use of all equipment and to schedule the work; to determine the products, machinery and tools to be used; the right to make and alter from time to time, reasonable rules and regulations to be observed by the employees. It is understood that in the exercise of the foregoing Management Rights, the Corporation shall be consistent with the provisions of this Agreement.

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Article 11 Grievance

11.01 An employee (or group of employees) who believes he/she has a grievance concerning the meaning, interpretation, application or alleged violation of this Agreement, shall first approach his/her immediate Supervisor and an earnest effort shall be made by both parties to resolve it verbally. The employee, may if he/she so desires, have his/her shop steward present.

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Article 12 Arbitration

12.01 If any grievance arising out of this Agreement shall remain unresolved having exhausted the provisions of Article 11, the matter in dispute shall be submitted to a board of three (3) arbitrators. By mutual agreement between the Parties a Board of Arbitration may be replaced by a single arbitrator. Such requests for a single arbitrator shall not be unreasonably denied.

...

12.02 An Arbitration Board shall not have power to amend, cancel, or add to the terms of this Agreement and in rendering a decision shall be bound by the terms of this Agreement. A Board, however, has the right to make monetary awards consistent with that which was lost by the grieved party. Such decision shall not have retroactive effect prior to the date the grievance occurred.

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Article 36 Abrogation

36.01 This Document and those referred to herein constitute the sole Agreement between the Parties hereto and all communications not herein referred to are hereby abrogated.

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Article 37 Subjugation

37.01 This Agreement shall be the subject to Newfoundland Law, and without restricting the generality of the foregoing, shall be expressly subject to *The Labour Relations Act*, Chapter L-1, RSN 1990.

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Schedule "A"
Hourly Wage Rates

Classifications
By Pay Group

	Apr. 1/06	Apr. 1/07	Apr. 1/08	Apr. 1/09
<u>GROUP 12</u>	\$28.89	\$30.27	\$31.85	\$33.32
Lead Thermal Plant Operator Lead Customer Services Technologist				
<u>GROUP 11</u>	\$27.50	\$28.84	\$30.37	\$31.80
Thermal Plant Operator Technologist System Operator Lead Hydro Plant Operator Hydro Plant Operator (Remote)				
<u>GROUP 10</u>	\$26.16	\$27.46	\$28.95	\$30.33
Electrician/Operator Mechanic/Operator Hydro Plant Operator System Operator (Trainee)				

<u>GROUP 9</u>	\$24.88	\$26.14	\$27.59	\$28.94
Electrical Maintenance "A"				
Mechanical Maintenance "A"				
Line Worker "A"				
Stores Repair Worker				
Sr. Line Inspector				
Distribution Field Representative				
Building Custodian				
<u>GROUP 8</u>	\$23.44	\$24.14	\$24.86	\$25.61
<u>GROUP 7</u>	\$22.16	\$22.82	\$23.51	\$24.21
Electrical Maintenance "B"				
Mechanical Maintenance "B"				
Line Worker "B"				
General Maintenance "A"				
Terminal Maintenance "A"				
Diesel System Representative				
Heavy Equipment Operator				
<u>GROUP 6</u>	\$21.05	\$21.68	\$22.33	\$23.00
General Maintenance "B"				
Terminal Maintenance "B"				
Diesel Plant Operator (Standby Plant)				
Driver Groundworker				
Materials Control Clerk				
<u>GROUP 5</u>	\$19.98	\$20.57	\$21.19	\$21.83
Electrical Maintenance Helper				
Mechanical Maintenance Helper				
Diesel Plant Operator				
Line Inspector				
Stores Worker				

<u>GROUP 4</u>	\$18.98	\$19.55	\$20.14	\$20.74
Water System Attendant				
Utility Worker				
Security Guard				
Cook				
<u>GROUP 3</u>	\$18.05	\$18.59	\$19.15	\$19.72
<u>GROUP 2</u>	\$17.12	\$17.64	\$18.17	\$18.71
<u>GROUP 1</u>	\$16.29	\$16.78	\$17.28	\$17.80
Labourer				

The above schedule of wages includes special adjustment for Pay Groups 9, 10, 11 and 12 as follows:

\$0.50/hour effective April 1, 2007
 \$0.65/hour effective April 1, 2008
 \$0.50/hour effective April 1, 2009

Evidence

The witnesses called by the Union were Bob Clarke and Terry Bouzane. The witness called by the Company was Gerard McDonald.

Negotiations for the current Collective Agreement commenced in May, 2006 and concluded in February, 2007. The parties signed the Collective Agreement on March 23, 2007. The Letter of Intent dated February 17, 2007 was signed by Gerard McDonald, Vice President Human Resources and Organizational Effectiveness, for the Company and by Bob Clarke, Business Manager, for the Union. The printed text of the Collective Agreement did not include the Letter of Intent. Bob Clarke testified that he and members of the Union negotiating committee reviewed the Collective Agreement prior to signing. He said that by mistake the Union did not to ensure that the Letter of Intent was included in the printed text. Gerard McDonald testified that the Company had never intended the Letter of Intent to form part of the Collective Agreement, and therefore it was not a mistake to have omitted the Letter of Intent from the printed text.

The Letter of Intent dated February 17, 2007, stated as follows:

PROPOSED LETTER OF INTENT

TO: Bob Clarke, Business Manager, IBEW Local 1615

RE: Internal Review of Pay Grade Assignments, Operations Unit
Pay Grades 8 and Below

This will confirm our understanding that, immediately following the signing of a new collective agreement, an ad hoc committee will be formed to conduct a job evaluation review of all classifications below Pay Group 9 in the operations bargaining unit. The purpose of this review will be to determine if any changes in pay group assignments are required in order to ensure that classifications below pay group 9 are paid equitably relative to each other. The process to be used will be as follows:

1. The committee will be comprised of two representatives of IBEW Local 1615 and two representatives of Hydro;
2. The Hay Group will be engaged to advise the committee on the use of an acceptable process for establishing point ratings for all classifications in pay groups 1 to 8 and to facilitate the work done by the committee in completing these evaluations;
3. The classifications of Electrical Maintenance "A" on pay group 9 and Labourer on pay group 1 will be evaluated first and used as benchmarks for the committee's evaluation of all other classifications in pay groups 1 to 8. It is understood that, as benchmarks, the pay levels assigned to these classifications are not subject to change.
4. Point ratings and appropriate pay group assignments will then be determined for all other classifications relative to these benchmarks using the tool and process recommended by the Hay Group.
5. Any proposed adjustments to existing pay group assignments will be communicated to the company's Labour Relations Specialist and the Business Manager, IBEW Local 1615 for their approval.

The parties agree and understand that the rates and pay grades in Schedule "A" of the collective agreement are not subject to review or change as part of this process. However, it is recognized that the committee may recommend a change in the pay grade assigned to a classification below pay group 9 based on the evaluation process described above.

It is further understood that this review will be completed by no later than December 31, 2007, unless agreed otherwise by the company and the union, and that any approved adjustments will be effective from April 1, 2007. In the event it is recommended that a classification's pay grade be lowered, it is also understood that the rate for any employee(s) in that position will be maintained at its current level.

The facts related to the negotiations are relevant to the issue of whether the Letter of Intent is part of the Collective Agreement. There are two bargaining units of employees of the Company represented by the Union, the Operations Unit and the Clerical Unit. This dispute concerns the Operations Unit. Collective bargaining occurred at the same time for both bargaining units. The chief negotiator for the Union was Bob Clarke. The chief negotiator for the Company was Joanne Dunne, former Labour Relations Specialist for the Company. Ms. Dunne left the Company in June, 2007. Prior to the last round of bargaining, the Clerical Unit, but not the Operations Unit, had a job evaluation process in its collective agreement. The Clerical Unit's new collective agreement established a Job Evaluation Committee and set out job evaluation guidelines in Schedule "F". The members of the Union's negotiating committee were familiar with how the process worked for the Clerical Unit. The Company's position during collective bargaining for the Operations Unit was that it would not agree to have a similar job evaluation process as part of the Operations Unit's Collective Agreement.

Schedule "A" to the Collective Agreement for the Operations Unit sets out the hourly wage rates. Wage rates are listed for pay groups 1 to 12, and job classifications are assigned to one of the pay group levels. Group 12 is the highest paid level and Group 1 is the lowest paid level. The job classifications in Groups 9 to 12 are described as "line workers, trades workers, operators and technicians". The issue of wages, in particular, for employees in pay groups 8 and below, was a major issue in dispute in the last round of collective bargaining.

Gerard McDonald testified that wage rates for the Operations Unit are set as a result of negotiations between the parties, having regard to external market and internal equity factors. He said the Company agreed to adjust the wages for classifications in pay groups 9 and up based on market rates. A number of line workers and trades workers had resigned from the Company to accept jobs with other employers. The Company researched the market rates prior to negotiations and determined that its wages for classifications in pay groups 9 and up were below the market rate, but wages for classifications in pay groups 8 and below were in line with the market rate.

The annual percentage increases in hourly wage rates were settled for all pay groups on the basis of annual increases of 1.5%, 3%, 3% and 3% commencing April 1, 2006. In addition, classifications in pay groups 9 received a special adjustment of \$0.50 on April 1, 2007, \$0.65 on April 1, 2008 and \$0.50 on April 1, 2009. The Company's position in collective bargaining was that the additional cents per hour increase was justified, based on market factors, for pay groups 9 and up, but not for pay groups 8 and below. During bargaining, the Union accepted the proposed increases for pay groups 9 and up, but would not accept that pay groups 8 and below would only receive the percentage increases and no additional increase. The Union proposed that classifications in pay groups 8 and below receive an additional increase based on cents per hour, however, the Company would not agree.

Gerard McDonald testified that in about December, 2006 he and the Company's CEO, Ed Martin, were requested by Bob Clarke to attend collective bargaining sessions. Mr. McDonald testified that he attended negotiations in early January, 2007 and discussed non-monetary and monetary issues. The major issue was wages and job evaluation. Mr. McDonald testified that the Company was prepared to review any internal inequities in pay groups 8 and below. He recalled discussing the example of the classification of carpenter and how a review process could result in the classification moving from one pay group to another. The parties discussed a review process that would be completed by December 31, 2007 with any adjustment in pay rates to be effective April 1, 2007. Mr. McDonald testified that he explained to the Union, at a meeting on January 13, 2007, that the Company agreed to an internal equity review, but not a job evaluation process. He testified that he drafted a proposed Letter of Intent headed "Internal Review of Pay Grade Assignments, Operations Unit, Pay Grades 8 and Below". The proposed Letter of Intent was discussed with the Union at a meeting on January 31, 2007. The Company's proposal was that a working group would determine if changes in pay group assignments were required to ensure that classifications in pay groups 8 and below were paid equitably relative to each other and relative to classifications in pay group 9. The Union responded with a revised Letter of Intent that was not acceptable to the Company. Mr. McDonald then drafted the Letter of Intent (exhibit C-8) that was accepted and signed on February 17, 2007.

Bob Clarke testified that, during collective bargaining, the parties agreed on the annual percentage increase to be paid to all pay groups. The Union proposed that pay groups 8 and below receive an additional cents per hour increase to correspond to the cents per hour increase paid to pay groups 9 and up, but the Company did not agree. The Company proposed a joint working group to review pay

group assignments. Following an exchange of proposals, the final text was agreed by Letter of Intent signed on February 17, 2007. The Union withdrew its proposal for a comprehensive job evaluation process. Mr. Clarke did not recall the dates or the details of the exchange of proposals leading up to the signed Letter of Intent.

Mr. Clarke testified that if the issue of wages for pay groups 8 and below was not resolved, then the Union negotiating committee would have asked Union members for a strike vote. Mr. McDonald testified that it was clear that the Union would not agree to a Collective Agreement unless “something could be done” for employees in pay groups 8 and below. Upon the signing of the Letter of Intent, the parties concluded negotiations.

Following the conclusion of negotiations, the Union prepared a 6 page document, with an attached wage schedule, that summarized the Union’s understanding of changes to the Collective Agreement. The summary document was sent by email from the Union to Joanne Dunne of the Company, and she replied by email on February 20, 2007 stating “reviewed your documents below . . . looks fine”. The Union sent the summary document to employees for the purpose of a ratification vote. The summary document included the following:

[Page 1]

The current collective agreement will remain intact with the following changes:

. . .

[Page 4]

Schedule “A” - Hourly Wage Rate

April 1, 2006	1 1/2% retroactive
April 1, 2007	3%
April 1, 2008	3%
April 1, 2009	3%

Cents per hour adjustments for Groups 9 and above:

April 1, 2007	.50 per hour
April 1, 2008	.65 per hour
April 1, 2009	.50 per hour

Job Evaluation - Groups 1 - 8

This review will be completed by no later than December 31, 2007, unless agreed otherwise by the working group, and that any adjustments recommended by the working group will be effective from April 1, 2007.

Gerard McDonald testified that the Union's summary document did not accurately describe the Letter of Intent. The summary document incorrectly referred to a job evaluation, and not an internal review of pay group assignments. The summary document also incorrectly suggested that any adjustment recommended by the working group would automatically come into effect, and not that the working group's recommendations were subject to approval.

Bob Clarke testified that the summary document appeared accurate to him. He understood that the email from Joanne Dunne meant that the Company agreed to insert these changes in the Collective Agreement. He did not recall anyone expressly stating during collective bargaining whether or not the Letter of Intent would be inserted in the Collective Agreement. He assumed that anything jointly signed at the bargaining table would be part of the Collective Agreement. He said that was the normal practice.

Terry Bouzane was a member of the Union negotiating committee. He understood that any agreement to resolve the issue of job evaluation for pay groups 8 and below would be inserted in the Collective Agreement. As a member of the negotiating committee he reviewed the Letter of Intent before it was signed. He said that the Union was prepared to take a chance on a successful outcome of the job evaluation process, anticipating that all classifications could move to a higher pay group level. Mr. Bouzane attended a Union meeting at Bishop's Falls called for the purpose of ratification of the Collective Agreement. Bob Clarke and Union President Jabez Lane explained to the meeting that the job evaluation process would determine if the classifications in pay groups 8 and below belonged at their current pay group level or at another pay group level. Mr. Bouzane agreed that the Company's position during collective bargaining was that it did not want a job evaluation process for all pay groups. Mr. Bouzane understood that the job evaluation process under the Letter of Intent was a "one shot deal".

Following the signing of the new Collective Agreement on March 23, 2007, the Company was informed that employees in pay groups 8 and below were dissatisfied with the wage settlement. Gerard McDonald met with employees in pay groups 8 and below to address their concerns. Part of the presentation he gave to employees in Bay D'Espoir on April 22, 2007, included the following:

The Wage Settlement

Hydro is committed to ensuring that pay level assignments in the 8 and under group are right from an internal equity standpoint

- ◆ Hydro has committed to review the pay level assignments for all employees in pay groups 8 and below
- ◆ We will use an established method (Hay point system) as well as an external advisor
- ◆ A senior company-union committee will oversee the process
- ◆ If this review indicates a basis for making changes, we will make them without hesitation. Any changes will be effective April 1/07.
- ◆ This process will start within the next month.

Bob Clarke testified that the Union encouraged Mr. McDonald to make the presentation to employees, and to explain the justification for the adjustment for employees in pay groups 9 and up, but not for employees in pay groups 8 and below. Mr. Clarke referred to the comment in the presentation that the Hay point system would be the established method used. He believed that this comment supported the Union's position that the Hay system was not followed because the committee did not establish point banding before it assigned classifications to pay group levels.

The parties dispute whether the review process established under the Letter of Intent was properly completed. The Union submits that the committee did not complete the review process, as required by the Letter of Intent, and that the committee should be given direction by the Arbitration Board as to how to complete the process. The Company submitted that the committee has completed the review process and any adjustment to pay group assignments requires approval of Gerard McDonald and Bob Clarke to be effective.

The parties agreed to make changes to the process set out in the Letter of Intent. In particular, the parties agreed (1) there would be 3 representatives in place of 2 representatives from the Union and from the Company on the committee; (2) the classification used from pay group 9 as a benchmark would be Lineworker in place of Electrical Maintenance "A" (this would simplify the process because there were several different Electrical Maintenance "A" positions); (3) the date for

completion of the report was extended past the deadline of December 31, 2007; and (4) the person representing the Company for the purpose of approving the report was changed to Gerard McDonald, in place of the Company's Labour Relations Specialist (formerly Joanne Dunne).

The parties appointed members to the committee established under the Letter of Intent. The Union representatives were Terry Bouzane, co-chair, Israel Penney, Jerry Kearley, and Jabez Lane (alternate). The Company representatives were Hughie Ireland, co-chair, Sam Rose and Geoff Skanes. The committee attended 3 days training in May, 2007, presented by Suzanne Cunningham of the Hay Group. The training manual dealt mostly with the process of job evaluation and assigning points. Terry Bouzane testified with respect to the tool and process recommended by the Hay Group and used by the committee to assign points for each classification. A position description questionnaire was completed. The committee then assigned points in the categories of accountability, know how, working conditions and problem solving. The committee agreed on the point totals for each classification. Mr. Bouzane testified that the committee was not provided with any tool and process by the Hay Group regarding appropriate pay group assignments. The committee discussed various methods of pay group assignments, including pay banding and assigning a certain number of cents per point, but did not agree on a process. The Company representatives and the Union representatives prepared separate reports with recommendations for pay group assignments. The Union representatives on the committee assigned two classifications to a new pay group 8 (a), and assigned other classifications to existing pay group levels. Mr. Bouzane testified that the rationale for having a pay group 8 (a), was that prior to the current Collective Agreement there was a 5% gap between all pay groups from 1 to 12. However, under the new Schedule "A" there would be a 10% gap between pay group 8 and pay group 9. The addition of a new pay group 8 (a) would restore the 5% differential between all pay groups. Mr. Bouzane also testified that classifications were assigned to pay groups by the Union representatives on the committee so that every classification moved up at least one pay group level. The result was that no one moved to a lower pay grouping. Mr. Bouzane testified that the committee made some recommendations that were not authorized by the Letter of Intent, for example, the committee recommended moving the Utility Worker in Bishop's Falls to the GMB classification.

Mr. Bouzane understood that the committee would determine point totals and then refer the matter to Bob Clarke and Gerard McDonald for the final decision. The committee's report submitted January 22, 2008 included the following statement on pay groupings:

Job Evaluation Review of Group 8 and Below

2. Based upon the job evaluation point totals, the following is a list of an agreed to grouping of classification without the pay group assignment, as the committee could not arrive at a consensus.

Group A	Carpenter, Heavy Equipment Operator
Group B	TMA, DSR, GMA Salvage Stores, Driver Groundworker, DPO (Stand By Plant), EMB, MMB, Line Worker "B"
Group C	GMB, Materials Control Clerk, Line Inspector, TMB
Group D	Storesworker, EM Helper, MM Helper
Group E	Security Guard, Cook, Utility
Group 1	Labourer
...	

The committee's report included a list of classifications with assigned points and different pay group assignments made by the Union and Company representatives, which stated as follows:

Union	Pay Grouping		Job Title	Full Points
	Union	Management		
9	9		Lineworker	282
8(a)	8		GMA-Civil "Carpenter"	266
8(a)	8		Heavy Equipment Operator	264
8	7		DSR (Diesel System Rep)	244
8	7		Terminal Maintenance "A"	244
8	7		GMA - Salvage Stores	239
8	7		Driver Groundworker	239
8	7		DPO (Stand By Plant)	239
7	6		Materials Control Clerk	227
7	6		GMB (Old Utility HRD/BDE))	224
7	6		GMB (Old Utility - BIF)	209
6	5		Line Inspector	218
6	5		Stores Worker	207
5	4		Utility	163
5	4		Security Guard	159
5	4		Cook	159
1	1		Labourer	126

Gerard McDonald testified that the committee reached a consensus on the point totals, but did not agree on the pay group assignments. He met with the committee on January 9, 2008. Everyone on the committee agreed that the next step would be to refer the issue to Gerard McDonald and Bob Clarke to make the pay group assignments. Mr. McDonald testified that the pay group assignments could be done by clustering the classifications based on point totals. After he received the committee report, Mr. McDonald prepared a Company recommendation for pay group assignments which was as follows:

Company's Recommendation
Pay Grade Assignments

	Points	Grade	Avg Pts
Line Worker	282		
GMA Civil - Carpenter	266	8	265
Heavy Equipment Operator	264	8	
Diesel System Rep	244	7	
Terminal Maintenance "A"	244	7	
GMA - Salvage/Stores	239	7	241
Driver Groundworker	239	7	
Diesel Plant Operator	239	7	
Materials Control Clerk	227	6	
GMB/Utility Worker HRD/BDE	224	6	226
Utility Worker BIF	209	5	
Line Inspector	218	5	211
Stores Worker	207	5	
Utility Worker*	163	3	
Security Guard*	159	3	160
Cook*	159	3	
Labourer	126	1	126

Mr. McDonald described the Letter of Intent as an agreement to implement internal pay equity and not an agreement to implement a job evaluation plan. The Company's focus was on whether pay group assignments were equitable internally. He said there was no intent to have point banding. As

far as he was aware the Hay Group did not recommend a tool and process for making appropriate pay group assignments within the meaning of paragraph 4 of the Letter of Intent. There was a process of point banding used for the Clerical Unit's job evaluation plan, but the Operations Unit did not have a job evaluation plan. Mr. McDonald testified that the Company's intent was to have a "one time" review. He said that the recommendation to add pay group 8 (a) was in conflict with the Letter of Intent. With respect to the assignment of the Line Inspector to pay group 5, Mr. McDonald said that the Company felt that the Line Inspector belonged in the same group as the Utility Worker BIF. The bumping issue that caused the committee to recommend moving the Utility Worker BIF to the GMB position, could be dealt with in some other way.

Mr. McDonald and Mr. Clarke sent a memo to employees in both the Operations Unit and the Clerical Unit dated February 11, 2008 which stated, in part, as follows:

This is a quick update on the status of these two projects.

The work of the two joint committees has been completed, and their recommendations are now in our hands. We have met on a couple of occasions to discuss these recommendations in detail, but have not yet come to a mutual agreement on all matters referred to us by the committees. Our efforts to do so will continue, and we ask that you bear with us over the next little while.

Bob Clarke testified that without point banding it was not possible to determine the appropriate pay group assignment. Mr. Clarke testified that there was no significant discussion about point banding during the negotiation of the Letter of Intent. He assumed that point banding would apply because that was the method used in the job evaluation process for the Clerical Unit. He understood that the approval of the committee's recommendations would be a "rubber stamp". He said the committee had the right to make recommendations on pay group levels. Additional comments made by the Company representatives were outside the mandate of the committee. He said that although the Union committee members had recommended a new pay group 8 (a), the grievance was not related to the new pay group level. Mr. Clarke said the committee did not finish its work. It agreed on points, but did not agree on pay group assignments. The matter needed to be referred back to the committee to finalize the report. Mr. Clarke thought there was some confusion by committee members who understood that point banding would be done by Bob Clarke and Gerard McDonald.

Union Submission

The Union submitted that the Letter of Intent is part of the Collective Agreement. It was signed by the Company Vice President and the Union Business Manager during collective bargaining. It did not have to be included in the printed text to be part of the Collective Agreement. The subject matter of the Letter of Intent is a review process to determine if members of the bargaining unit are paid fairly and equitably relative to other members. This was a contentious issue in the workplace. The parties would want such an issue to be resolved by an enforceable agreement. The Letter of Intent uses the word “agreed”, sets out a time limit for completion, affects the terms and conditions of employment, and deals with the important subject matter of wages. These factors indicate the Letter of Intent was intended to be enforceable. There would have been no agreement reached in collective bargaining until the issue of wages was resolved. Where the parties intend a document to be binding and enforceable, it is part of the Collective Agreement. The Union referred to arbitral case authorities including *Inergi LP v. Society of Energy Professionals* (2007) 166 L.A.C. (4th) 200 (Gray) (“*Inergi*”), *Eurocan Pulp & Paper Co. v. CEP, Local 298* (1998) 72 L.A.C. (4th) 153 (Munroe) (“*Eurocan*”), and *Niagara Health System v. Ontario Nurses Assn (Quigley)* (2007) 168 L.A.C. (4th) 206 (Reilly) (“*Niagara*”). The Letter of Intent was the subject of negotiations through an exchange of drafts before the final language was agreed. The Company’s chief negotiator approved the Union’s document summarizing Collective Agreement changes which included reference to the Letter of Intent. If the Arbitration Board finds that the Union made a mistake by omitting the Letter of Intent from the signed text of the Collective Agreement, then the Board has the power to rectify the Collective Agreement. Article 36.01 does not apply to the Letter of Intent, because it was not the type of communication referred to by the Article. With respect to the interpretation of the Letter of Intent, the Union submitted that the committee did not complete the review process intended. To have the work of the committee completed by Bob Clarke and Gerard McDonald would be contrary to the terms of the Letter of Intent. The Letter of Intent does not contemplate that there would be separate reports by Union and Company representatives on the committee. Paragraph 4 of the Letter of Intent required the committee to determine pay group assignments using the tool and process recommended by the Hay Group. The reason to involve the Hay Group was to have an objective criteria for assigning classifications to pay group levels. The Hay Group were known to recommend a system of point banding. The Union indicated how assignments could be made by dividing the total number of points between the benchmarks into equal point bands and assigning pay groups based on the points assessed for each classification. The assignment of classifications to pay groups by

Gerard McDonald was in conflict with the Letter of Intent. The Union asked the Arbitration Board to refer the issue back to the committee to complete the process.

Employer Submission

The Employer submitted that the Letter of Intent was not part of the Collective Agreement. The Union has not proven that the parties intended to insert the Letter of Intent in the Collective Agreement. The Arbitration Board has no jurisdiction to compel any change in pay group assignments. The Employer referred to arbitral authorities as to whether an ancillary document forms part of the Collective Agreement. The authorities indicated that a collective agreement may be contained in several documents. However, where a letter of understanding creates obligations not otherwise contained in the collective agreement, then the letter is not enforceable unless it is in writing, signed by the parties, and considered to constitute part of the collective agreement (*Canada Bread Co. Ltd. and Bakery and Confectionary Workers Int'l Union, Local 322* (1970) 22 L.A.C. 98 (Christie), *Re Sudbury Mine, Mill and Smelter Workers Union and Falconbridge Nickle Mines Limited* (1958) 9 L.A.C. 105 (Little)). Although the parties had inserted other letters in the Collective Agreement they had omitted this Letter of Intent. The Letter of Intent had a different style and format compared to other letters set out in the back of the Collective Agreement. The Employer's position in bargaining was firm, it did not want comprehensive job evaluation language to be inserted in the Collective Agreement. At the time the Letter of Intent was negotiated, there was no discussion as to whether or not it would be incorporated in the Collective Agreement. The subject matter of the Letter of Intent did not make it part of the Collective Agreement. The summary document prepared by the Union did not prove the intent of the parties. The summary did not accurately and completely set out the terms of the Letter of Intent. The Arbitration Board could not add language to the Collective Agreement (Article 12.02). The written text of the Collective Agreement was the complete Collective Agreement (Article 36.01). The Employer disputed that the test set out in the *Inergi* case was the commonly accepted test, i.e., the Employer did not agree that a document becomes part of the collective agreement on the basis that the parties intended the document to be enforceable. The Employer distinguished the *Eurocan* case as a situation of a letter of intent that was enforceable after it had been incorporated in a prior collective agreement and then observed over a lengthy period of time, even though omitted from subsequent agreements. The Employer distinguished the *Niagara* case as a situation where there was specific language in the collective agreement to incorporate another agreement. With respect to the interpretation of the Letter of Intent, the Employer submitted that the committee had completed its work and had made

its recommendations on pay group assignments. There was no consensus by the committee. The Committee's recommendations were not enforceable because any changes to pay group assignments required the approval of both Bob Clarke and Gerard McDonald. The Letter of Intent provided for an ad hoc process, not a job evaluation system. The Letter of Intent should be interpreted in the context of the negotiating history. There had been no discussion of point banding. The job evaluation process in the Clerical Unit's Collective Agreement did not apply. The requirements of paragraph 2 of the Letter of Intent were met by the Hay Group providing training to the committee. The parties agreed to various changes to the Letter of Intent, such as changing the number of representatives from 2 to 3 members, changing the benchmark classification in pay group 9, and extending the date for completion of the report. Similarly, the parties had accepted that the Hay Group did not make a recommendation on a tool and process to determine pay group assignments. The Union and Company representatives on the committee did not reach a consensus on pay group assignments and each group submitted a report. The committee passed the issue to Bob Clarke and Gerard McDonald to resolve. The Union did not suggest using point banding at any time prior to May, 2008. The Union was now proposing that the committee use point banding after it had agreed that the work of the committee was completed. The Arbitration Board could not issue any order to amend Schedule "A" of the Collective Agreement, because approval of both Bob Clarke and Gerard McDonald was required. The Company asked that the grievance be denied.

Considerations

The Union grieves that the Employer did not fulfill its obligation and responsibility to complete and implement the job evaluation process for pay groups 8 and below as per the Letter of Intent dated February 17, 2007. The parties dispute whether the Letter of Intent is part of the Collective Agreement. In the event that the Letter of Intent is not part of the Collective Agreement, then it is not arbitrable. However, the parties have asked the Arbitration Board to decide the merits of the dispute and interpret the Letter of Intent, regardless of the Board's ruling on arbitrability.

In their submissions to the Arbitration Board, the parties addressed the issue of arbitrability and then addressed the issue of the interpretation of the Letter of Intent. Having considered all the issues, the Arbitration Board will first address the interpretation of the Letter of Intent and then address arbitrability. The reasons to consider the issues in this order are (1) the parties have requested that the Board interpret the Letter of Intent in any event, and (2) an understanding of the interpretation of the Letter of Intent may assist the Board when analyzing issues of arbitrability.

The Board will address the following issues: (1) What is the interpretation of the Letter of Intent? (2) What provisions of the Letter of Intent would be enforceable, in the event that the Letter of Intent is part of the Collective Agreement? (3) Is the Letter of Intent part of the Collective Agreement?

With respect to the interpretation of the Collective Agreement, and the interpretation of the Letter of Intent, the Board refers to the principles of interpretation applied by arbitrators and discussed in *Brown & Beatty Canadian Labour Arbitration*, 4th edition, in particular, that the object of construction is to determine the intention of the parties from the express provisions used (paragraph 4:2100), that the language should be viewed in its normal or ordinary sense (paragraph 4:2110), that it should be presumed that all the words used were intended to have some meaning (paragraph 4:2120), and that the language is to be interpreted within the context of the document as a whole (paragraph 4:2150).

When interpreting the Letter of Intent, it is important to consider the context of prior agreements between the parties related to wages and job evaluation. Prior Collective Agreements between the parties for the Operations Unit have not set out any process of job evaluation. This situation may be contrasted with the Clerical Unit where a schedule to the collective agreement sets out the job evaluation process. In the Clerical Unit's collective agreement, there is a Job Evaluation Committee that applies a job evaluation process to all positions in the Clerical bargaining unit. In the last round of bargaining, the Letter of Intent for the Operations Unit was negotiated within the context of negotiating the wage rates in Schedule "A" of the Collective Agreement. The Letter of Intent applies to pay groups 8 and below. Schedule "A" of the Collective Agreement lists the wage rates for pay groups 1 to 12 with pay group 1 being the lowest paid group and pay group 12 being the highest paid group. Classifications are assigned to one of the pay group levels listed in Schedule "A". In the current Collective Agreement, the classifications in pay groups 9 to 12 receive an annual cents per hour special adjustment, in addition to the percentage increase agreed for all pay group levels. Pay groups 8 and below do not receive the cents per hour special adjustment. As a result, Schedule "A" provides for greater annual wage increases for pay groups 9 and up, than it does for pay groups 8 and below. The Letter of Intent sets out a process that may lead to an increase in the wages paid to any classification in pay groups 8 and below, in the event that the classification is moved to a higher pay group level.

The process described in the Letter of Intent does not apply to all positions in the Operations Unit. Within the context described, and having regard to the language used in the Letter of Intent, it is

evident that the Letter of Intent does not establish a permanent job evaluation process. The first paragraph of the Letter of Intent refers to “an ad hoc committee” which will be formed to conduct a “job evaluation review of all classifications below pay group 9 in the operations bargaining unit”. The first paragraph also states that the purpose of the review will be to determine if any pay group assignments are required to be changed in order to ensure that the classifications below pay group 9 are paid equitably relative to each other. The second last paragraph states that the Committee may recommend a change in pay grades assigned to classifications based on the “evaluation process described above”. The last paragraph refers to the “review”, which is to be completed by December 31, 2007. The Letter of Intent also states that the Hay Group will be engaged to advise the Committee on the process to follow and to facilitate the work of the Committee “in completing these evaluations”. The subject matter of the Letter of Intent is stated in the heading to be “Internal Review of Pay Grade Assignments”. Having regard to these provisions of the Letter of Intent, and its context, the Letter of Intent describes a job evaluation review process for classifications in pay groups 8 and below, to be conducted by an “ad hoc committee” that will make a recommendation within a specific time frame. The review was intended to be a “one time” review, with the inference that the Committee would cease to operate upon completion of the review.

The Letter of Intent states expressly that the rates and pay groups in Schedule “A” are not subject to review or change. In other words, the structure that establishes pay group levels from group 1 to group 12, and the corresponding wage rates for each pay group level, are not subject to change as a result of the review process. For example, the hourly wage rate in Schedule “A” for the classifications assigned to pay group 6 was \$21.68, effective April 1, 2007. The Letter of Intent provides that classifications may be moved from one pay level to another. As a result of the review process described in the Letter of Intent, the wage rate paid to group 6, for example, would not change, however, a classification in group 6 could be moved to a higher pay group level, such as group 7. Once placed in pay group 7, the classification would receive the higher hourly wage rate paid to group 7, which was \$22.82, effective April 1, 2007. The Letter of Intent does not give authority to the Committee to change the structure of the pay group levels, to create new pay group levels, or to change the hourly wage rates assigned to any pay group level in Schedule “A”.

The process to be followed by the Committee is set out in paragraphs numbered 1 to 5 in the Letter of Intent. Paragraph 1 states that the Committee is comprised of 2 representatives of the Union and 2 representatives of the Company. The parties agreed to amend paragraph 1 so that each party would appoint 3 representatives to the Committee. Paragraph 2 states that the Hay Group will be engaged

to advise the Committee on an acceptable process for establishing point ratings for all classifications in pay groups 1 to 8 and to facilitate the work done by the Committee to complete the evaluations. Paragraph 3 sets out the benchmark classifications in pay group 9 and pay group 1. The benchmark classification for pay group 9 was changed from Electrical Maintenance “A” to Line Worker. The parties agreed that this change would simplify the process. The pay levels assigned to the benchmark classifications were not subject to change. Paragraph 4 states that point ratings and appropriate pay group assignments would be determined for all other classifications relative to the benchmarks “using the tool and process recommended by the Hay Group”. Paragraph 4 provides for a 2 step process. The first step is to assign point ratings to each classification. The second step is to make the appropriate pay group assignment for each classification, based on the assigned point ratings, relative to the benchmarks. For each of these steps, the tool and process recommended by the Hay Group is to be used by the Committee. Paragraph 5 states that “any proposed adjustments” to the pay group assignments will be communicated to the Company’s Labour Relations Specialist and the Union Business Manager for approval. The parties agreed to change the Company’s representative from the Labour Relations Specialist to the Vice President of Human Resources and Organization Effectiveness (the “Vice President”). The reference in paragraph 5 to “proposed adjustments to existing pay group assignments” means, for example, a proposal that a classification in pay group 6 be moved to another group, such as pay group 7. The proposed adjustment is then subject to approval by the Company Vice President and Union Business Manager.

Paragraph 4 states that the tool and process to use to determine pay group assignments will be the tool and process recommended by the Hay Group. The Union submitted that point banding is the appropriate tool and process to use and that the Committee should have used point banding. The Board heard testimony that point banding is a common tool and process recommended by experts in job evaluation to be used to make pay group assignments. The Letter of Intent does not limit the tool and process that may be recommended by the Hay Group. It would be consistent with the Letter of Intent for the Hay Group to recommend point banding or to recommend another tool and process to use to make pay group assignments.

Paragraph 5 of the Letter of Intent refers to “proposed adjustments”. The Letter of Intent states that the Committee may make proposals to change pay group assignments. Therefore, the “proposed adjustments” in paragraph 5 are determined by the Committee. There is no reference in the Letter of Intent to proposals by Employer representatives or Union representatives on the Committee. The determination of point ratings and pay group assignments are made by the whole Committee. The

Letter of Intent contemplates that Company representatives and Union representatives on the Committee will prepare a unanimous report on point ratings, pay group assignments, and proposed adjustments to existing pay group assignments. Therefore, any proposals by Company representatives or Union representatives, that are not unanimous proposals by the whole Committee, are not “proposed adjustments” within the meaning of paragraph 5 of the Letter of Intent. Paragraph 5 contemplates that once the Committee reaches a consensus, the Committee will communicate the proposed adjustments to the Company Vice President (in place of the Labour Relations Specialist) and the Union Business Manager for their approval.

The last paragraph of the Letter of Intent states that “approved adjustments will be effective from April 1, 2007”. An “approved adjustment” means a proposed adjustment that is approved by the Company Vice President and the Union Business Manager. The Letter of Intent does not set out any process with respect to the approval of a proposed adjustment by the Company Vice President and the Union Business Manager. The Letter of Intent does not contemplate that point ratings or pay group assignments are determined by anyone other than the Committee. The Company Vice President and the Union Business Manager either approve, or do not approve, the Committee’s proposed adjustments. There is no authority in the Letter of Intent for the Company Vice President or the Union Business Manager to make an independent determination of pay group assignments. In order to have an approved adjustment, within the meaning of the last paragraph of the Letter of Intent, the adjustment must be proposed by the Committee and approved. Once the proposed adjustments are approved, the Company is required to implement the adjustments effective April 1, 2007. The effect of the adjustment is to change the pay group assignment in Schedule “A” for the affected classification. For example, if an approved adjustment is to move a classification from pay group 6 to pay group 7, then the Company is required by the Letter of Intent to implement the change and Schedule “A” is amended to move the classification to pay group 7.

Assuming that the Letter of Intent is part of the Collective Agreement, what provisions of the Letter of Intent are enforceable at arbitration? To answer this question, the Arbitration Board will consider what obligations of the Company and the Union are set out in the Letter of Intent. The parties to the Collective Agreement are the Company and the Union, acting on behalf of employees in the bargaining unit (section 2 (1) (f), *Labour Relations Act*, R.S.N.L. 1990, c. L-1). The Committee appointed under the Letter of Intent is not a party to the Collective Agreement. Also, the Company Vice President and the Union Business Manager are not parties to the Collective Agreement. In the event that the Letter of Intent is part of the Collective Agreement, the Arbitration Board would not

have authority to give direction to the Committee or review a determination made by the Committee. What direction could be issued by the Arbitration Board to the parties to enforce the Letter of Intent? The parties are obligated by paragraph 1 of the Letter of Intent to appoint representatives to the Committee. In the event that the parties did not appoint representatives, then the Arbitration Board could direct the parties to do so. Paragraph 2 states that the Hay Group will be engaged to advise the Committee. The Arbitration Board could direct the parties to take the required action to engage the Hay Group. The parties could be directed to engage the Hay Group according to the terms of the Letter of Intent, in particular, that the Hay Group be engaged to (1) advise the Committee on an acceptable process to establish point ratings, (2) facilitate the work done by the Committee in completing the evaluations, (3) recommend to the Committee the tool and process to be used to determine point ratings, and (4) recommend to the Committee the tool and process to be used to determine the appropriate pay group assignments. The Arbitration Board would not have authority to direct the Committee as to how to determine point ratings or how to determine pay group assignments. In the event the Committee recommends proposed adjustments, the Arbitration Board would not have authority to direct the Company Vice President or the Union Business Manager regarding the approval of the proposed adjustments. The Arbitration Board could order that the Company implement an approved adjustment effective April 1, 2007, in the event that an adjustment is recommended by the Committee, and approved by both the Company Vice President and Union Business Manager.

Did the parties comply with the Letter of Intent? If not, what provisions of the Letter of Intent would be enforceable given the facts of this case, assuming the Letter of Intent is part of the Collective Agreement? The parties each appointed 3 representatives to the Committee (the Union appointed one additional alternate representative). The Hay Group was engaged to advise the Committee. The Hay Group advised the Committee and provided training to the Committee on point ratings. The Committee used the tool and process recommended by the Hay Group to determine point ratings. The Committee made a unanimous determination on point ratings. The Hay Group did not advise the Committee on the tool and process to be used to determine the appropriate pay group assignments. There is no evidence that the Hay Group was engaged for that purpose. The Employer submitted that the parties agreed to amend the Letter of Intent and agreed not to engage the Hay Group for that purpose. However, the evidence does not support a finding that paragraph 4 was amended in that regard. Paragraph 4 of the Letter of Intent was not followed by the Committee with respect to pay group assignments, because the Committee did not apply a tool and process recommended by the Hay Group. The Committee did not agree on appropriate pay group

assignments. The communication by the Committee of two reports, one report from Company representatives, and another report from Union representatives, did not comply with paragraphs 4 and 5. In the event the Committee cannot agree on a unanimous determination, then the Committee is unable to submit any proposed adjustments under paragraph 5. As noted above, the Arbitration Board would not have authority to direct the Committee as to what determination to make with respect to pay group assignments.

On the facts of this case, there was no proposed adjustment under paragraph 5 of the Letter of Intent, because the Committee did not agree on pay group assignments. There could be no approved adjustment within the meaning of the Letter of Intent, because there was no proposed adjustment communicated to the Company Vice President and Union Business Manager for approval. Assuming that the Letter of Intent is incorporated in the Collective Agreement, there would be no basis, at this time, to make any changes in pay group assignments in Schedule "A". The Committee appointed by the parties did not follow the process in the Letter of Intent. It would be appropriate for the Arbitration Board to direct both parties to appoint new representatives to the Committee for the reason that the parties did not engage the Hay Group as required by the Letter of Intent, the first Committee did not follow all steps of the process in the Letter of Intent and the first Committee has ceased to operate. The new Committee would then start the process from the beginning and determine point ratings and pay group assignments. The new Committee could decide whether or not to use any of the information relevant to point ratings that was collected by the first Committee. It would also be appropriate for the Arbitration Board to direct the parties to engage the Hay Group, as per the Letter of Intent, and in particular, to advise the Committee on the tool and process to use to determine pay group assignments. The Arbitration Board could not direct the Committee how to determine pay group assignments.

Is the Letter of Intent part of the Collective Agreement? In this regard, the Arbitration Board will consider the evidence relevant to intent, the effect of arbitral authorities, and the effect of Article 36.01. The Letter of Intent dated February 17, 2007 was signed on behalf of the Union and the Employer. The Letter of Intent was not included as part of the printed Collective Agreement signed by the parties on March 23, 2007. The Union Business Manager and other Union representatives had the opportunity to read the Collective Agreement before signing it. Bob Clarke, Union Business Manager, testified that the Union had assumed that the Letter of Intent would be part of the Collective Agreement. Mr. Clarke testified that the Letter of Intent was omitted by mistake from the printed Collective Agreement. Gerard McDonald, Company Vice President, testified that it was not

a mistake to omit the Letter of Intent because the Company had never intended the Letter of Intent to be part of the Collective Agreement. The Company's position in bargaining was that it did not want a job evaluation process to be part of the Collective Agreement. There is no express statement in the Letter of Intent itself as to whether or not it will form part of the Collective Agreement. There is conflicting direct evidence as to whether both parties intended the Letter of Intent to be part of the Collective Agreement. The Arbitration Board will review all the evidence relevant to intent. Before the Board further discusses evidence of intent, the Board will review the arbitral authorities.

Arbitrators have addressed whether or not a document that is outside the printed text of the collective agreement may form part of the collective agreement. In *Brown & Beatty, Canadian Labour Arbitration*, 4th edition, at paragraphs 4:1210 and 4:1230, the authors state as follows:

4:1200 Ancillary Documents
4:1210 Generally

In many collective bargaining relationships, a wide variety of ancillary documents such as letters of understanding, minutes of settlement, . . . and closure agreements, may exist physically apart from the formal collective agreement. Whether such documents can be enforced at arbitration will ultimately depend upon whether they can be characterized as constituting or forming part of a collective agreement.

...
4:1230 Incorporation by reference

For an ancillary document to be part of the collective agreement, it must be intended by the parties to be part of the collective agreement and either meet the formal requirements of a collective agreement, or be incorporated by reference into it. Although there may be circumstances where such documents do not form part of the collective agreement because of their failure to comply with the necessary formalities, more commonly whether a document is incorporated as part of the agreement will turn on the parties' intention. In approaching this question, arbitrators have suggested that ancillary documents should only be incorporated by reference where the intention is clearly expressed.

According to arbitral authority, a memorandum of agreement that is signed during collective bargaining, but is not included in the printed collective agreement, logically becomes merged with the collective agreement and ceases to have any independent force or effect (see *Mississauga City and ATU, Local 1572* (1999) 81 L.A.C. (4th) 428 (Springate)). In *Brown & Beatty, Canadian Labour Arbitration*, 4th edition, at paragraph 4:1100, the authors state as follows:

In any event, when a formal collective agreement is preceded by a written, signed, and ratified memorandum of agreement, usually execution of the collective agreement will cause the memorandum to be merged with the agreement unless the parties have manifested an intention to the contrary.

The arbitral case authorities have applied different considerations depending upon whether a memorandum of agreement was signed prior to, simultaneous with or subsequent to the signing of a formal collective agreement. One of the leading authorities to discuss these various situations is *Canada Bread Co. v. Bakery & Confectionary Workers' International Union, Local 322* (1970) 22 L.A.C. 98 (Christie) (The “*Canada Bread*” case) where the arbitrator states, commencing at paragraph 13 as follows:

13 Where a letter of understanding clarifies or spells out the meaning which the parties intend to attach to an ambiguous provision of the collective agreement there is no reason to say that the letter ceases to have effect when the agreement is re-negotiated. If the provision to which the letter refers remains unchanged such a statement of mutual intent by both parties, or a statement of understanding by one party acquiesced in by the other, can quite properly continue to guide a board of arbitration in resolving ambiguity. Of course, the parties may change their notions of the proper meaning to be attached to an ambiguous provision over the course of several negotiations, but the letter of understanding continues to be evidence of how the ambiguity should be resolved which must be considered along with any other evidence of a change in the intent of the parties.

14 Different considerations enter where a letter of understanding or supplementary agreement purports to modify, or to create obligations not contained in, the primary document embodying the collective agreement. In such cases each of the documents must be considered to constitute a part of the collective agreement. It is well established that a collective agreement may be found in several documents. In *Monsanto Oakville (1960) Limited* (1963), 13 L.A.C. 353, at page 361, Professor Laskin (as he then was) said:

Section 1(1)(c) of the *Ontario Labour Relations Act* stipulates, so far as relevant to the matter under discussion, that “collective agreement” means “an agreement in writing between an employer . . . and a trade union that . . . represents employees of the employer . . . containing [various kinds of] provisions . . .”. The only formality is writing, and implicit is the requirement of a signed writing. There is no compelling policy, and certainly no explicit direction that there can be only one document at any one time to which the agreeing employer and trade union must be signatories. So long as the terms of agreement are themselves in writing, they may be identified by other

signed documents which do not themselves spell them out. Counsel for the union herein referred to several decisions of the Ontario Labour Relations Board respecting the effectuation of a collective agreement for purposes of the *Act* by an exchange of letters: . . . and although I am not bound by its views, its experience in the administration of the *Act* on the matter now before me deserves respect.

It would seem correct to say that if a document clearly modifies or adds to, and does not merely clarify an ambiguity in a collective agreement then it must not only be in writing but must be signed by both parties unless the doctrine of estoppel can be relied on. Estoppel is considered below.

15 Since the authority of a board of arbitration is confined to the application of the collective agreement, a board has no jurisdiction to enforce any undertaking which is not part of the collective agreement, either because it is not in writing, as in *British Motor Corporation of Canada Limited* (1965) 16 L.A.C. 315 (Arthurs, arbitrator) or because for some other reason it cannot be considered part of the collective agreement. Apart from the requirement of writing and signatures, whether a document will be treated as part of the collective agreement must depend, in the final analysis, on whether the parties have manifested an intention to make it part of the agreement.

16 The documents in question may have been signed before, contemporaneously with or subsequent to the principal document. As an illustration of the first; where a union and a company have agreed in writing on some of the terms and conditions of employment in a memorandum of settlement of a strike, and have subsequently signed a full collective agreement the preliminary document will not normally be considered part of the collective agreement. This is so because, unless there is some indication to the contrary in the subsequent document (some incorporation by reference of the memorandum of settlement perhaps) an arbitrator would assume the memorandum of settlement was intended only to represent a stage of negotiations and could not stand in contradiction with the final agreement. But, on the other hand, where no final agreement was made, and the requisite intention was deemed to have been manifested, such memoranda have been held to constitute collective agreements, for example in *Smith Brothers Motor Bodies Limited* (1965), 16 L.A.C. 255 (Lane, arbitrator) and *Union Carbide Canada Limited* (1968), 19 L.A.C 412 (O'Shea, chairman).

17 When the parties sign letters of understanding or supplementary agreements contemporaneously with the principal collective agreement document the crucial task of determining which documents are to be treated as part of the collective agreement is particularly difficult. In *Falconbridge Nickel Mines Limited* (1958), 9 L.A.C. 105 (Little, chairman) the Chairman comments, at page 108:

Amendments to agreements are not usually delivered contemporaneously with the execution of an agreement. Letters, such as that dated December 17, 1956, are a device regularly used by parties engaged in collective bargaining to provide for matters outside the agreement and often to prevent disputes regarding such matters being arbitrable. That does not mean that all matters referred to in such letters are in that category. I think it can generally be said if the parties agree to an item by letter which refers particularly to some clause in the agreement, or affects the proper carrying out of the collective agreement, then that item can be arbitrated.

18 Where the principal document of the collective agreement incorporates other documents by reference, or where the other documents, signed by both parties, manifest a clear intention that they constitute part of the collective agreement then there is no basis for treating them otherwise.

The *Canada Bread* case was applied in the situation of a memorandum of agreement signed before the collective agreement in *Re Ontario Liquor Boards Employees Union and The Crown in Right of Ontario* (1981) 29 L.A.C. (2d) 289 (Kennedy) (the “*Ontario Liquor*” case). In that case, negotiations led to the signing of a memorandum of agreement, which included a clause entitled “classification step adjustment” which added a new step at the top of the pay scale. The memorandum of agreement set out an implementation date for the new step on the pay scale, but the date was not incorporated in the signed collective agreement. The parties disputed whether the implementation date stated in the memorandum was part of the collective agreement. The arbitrator decided that the memorandum of agreement became merged with the collective agreement, and the provisions of the memorandum, including the implementation date, were no longer in effect. Therefore, a later date for implementation set out in the printed collective agreement governed. The arbitrator considered the memorandum to be typical of agreements made during negotiations, with final agreement on the language subject to the signing of a formal collective agreement. Once the formal collective agreement is signed, then that document constitutes the entire collective agreement.

As stated in the *Canada Bread* case, a memorandum of agreement signed contemporaneously with the collective agreement is in a different category than documents signed prior to the signing of a collective agreement. Such documents are more likely to be found to be intended by the parties to be part of the collective agreement. An example of such a memorandum was considered in *Artistic Woodwork Co. Ltd. and Canadian Textile and Chemical Union* (1974) 5 L.A.C. (2d) 131 (Shime).

In that case, a memorandum of agreement signed at the same time as the collective agreement, dealt with arbitration of disciplinary action related to strike activities. The memorandum was considered to be a supplementary agreement, designed to create obligations not stated in the primary document, and therefore part of the collective agreement. The arbitration board gave consideration to the categories discussed in the *Canada Bread* case and considered the memorandum to be a document signed contemporaneously with the collective agreement and intended to be part of it.

The arbitration awards on this issue were reviewed in *Barber Industries Ltd. and B.B.F., Local 146* (1990) 17 L.A.C. (4th) 94 (Rooke) (the “*Barber Industries*” case). In that case, the parties signed a settlement agreement stating that the agreement formed the basis for the renewal of the collective agreement. The settlement agreement expressly stated that one of its clauses would not be included as part of the collective agreement. In those circumstances, where the intention of the parties was clearly expressed, the clause was found not to be part of the collective agreement. The *Barber Industries* case may be distinguished from the present case for the reason that the Letter of Intent does not contain a direct expression of intent.

The Arbitration Board has considered *Inergi LP v. Society of Energy Professionals* (2007) 166 L.A.C. (4th) 200 (Gray) (the “*Inergi* case). In that case the parties signed a collective agreement and then subsequently signed an agreement regarding the process of bargaining for early renewal of the collective agreement. The agreement was found to be part of the collective agreement. The document in the *Inergi* case was described as “an agreement” that was being “entered into”, that was intended to create enforceable obligations, and by necessary implication was intended to form part of the parties’ collective agreement. However, on the facts, the *Inergi* case may be distinguished from the present case. The document in the *Inergi* case falls into the third category of documents discussed in *Canada Bread*, namely, a document signed after the signing of the collective agreement. In such circumstances, where the document amends the collective agreement, it is more likely that the intent of the parties is that the document is part of the collective agreement.

Is there evidence of a mutual intent that the Letter of Intent is part of the Collective Agreement? The email dated February 20, 2007 from the Company’s Labour Relations Specialist to the Union, stated that the Union’s summary document listing changes to the Collective Agreement was “fine”. The Union’s summary document refers to “Schedule ‘A’ - Hourly Wages” and states that the job evaluation for Groups 1 to 8 will be completed by no later than December 31, 2007, and that any adjustments recommended by the working group would be effective from April 1, 2007. The

statement in the Union's summary document about the Letter of Intent is incomplete. For example, there is no reference to the requirement in the Letter of Intent that adjustments proposed by the Committee be approved. The best evidence of the final agreement on the language of the Collective Agreement is indicated by the printed Collective Agreement that was signed by the parties. The Union's summary document is the type of document that becomes merged with the Collective Agreement upon the signing of the Collective Agreement, and does not provide clear evidence of intent. What is the evidence of intent from the language used in the Letter of Intent? The document refers to parts of the Collective Agreement and sets out a process that could result in "approved adjustments" to pay group assignments in Schedule "A" of the Collective Agreement. However, it does not necessarily follow from that fact alone that the parties intended the Letter of Intent to be part of the Collective Agreement. There are also various provisions in the Letter of Intent that would not be enforceable at arbitration, as discussed above. The language in the Letter of Intent, by itself, does not provide clear evidence of intent.

The Letter of Intent was signed on February 17, 2007, more than one month prior to the signing of the Collective Agreement on March 23, 2007. The Letter of Intent is the type of document that was signed during negotiations prior to the signing of the formal Collective Agreement. It was not the type of document that was signed simultaneously with the Collective Agreement, as discussed in *Canada Bread* and other authorities. The Letter of Intent is the type of document that merges with the Collective Agreement upon signing of the printed text of the Collective Agreement. The effect of the case authorities is that documents such as the Letter of Intent are not part of the Collective Agreement, where the document is not included in the printed text of the Collective Agreement, unless there is a clear expression of intent to the contrary. The Arbitration Board has considered all the evidence relevant to intent and finds that the evidence does not support a finding that both parties clearly intended the Letter of Intent to be part of the Collective Agreement.

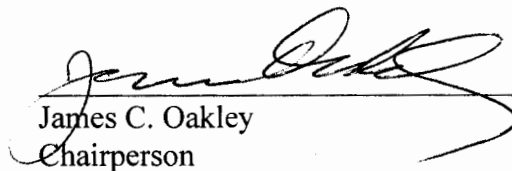
The Board has also considered the effect of Article 36.01 of the Collective Agreement. The parties have addressed the issue of whether an external document, such as the Letter of Intent, can be incorporated in the Collective Agreement, having regard to the operation of Article 36.01. Article 36.01 states that "this document and those referred to herein constitute the sole agreement between the parties". The reference to "this document" in Article 36.01 means the printed and signed text of the Collective Agreement. The Letter of Intent was not included in the printed Collective Agreement, and there is no reference to the Letter of Intent anywhere in the Collective Agreement. Therefore the Letter of Intent is not part of the Collective Agreement by operation of Article 36.01.

In summary, (1) The Letter of Intent establishes a “one time” job evaluation process for classifications in pay groups 8 and below. (2) In the event the process results in approved adjustments there will be an amendment to Schedule “A” of the Collective Agreement to move the affected classifications from one pay group to another. (3) An approved adjustment requires a unanimous proposal from the Committee, and approval by the Company Vice President and Union Business Manager. (4) If the Letter of Intent is arbitrable as part of the Collective Agreement, then the Arbitration Board would, on the facts of this case, (a) direct the parties to appoint members to a new Committee, (b) direct the parties to engage the Hay Group, as per the Letter of Intent, in particular, to recommend to the Committee the tool and process to be used to determine pay group assignments, and (c) direct the Company to implement any approved adjustment. (5) The Letter of Intent is not part of the Collective Agreement and therefore it is not arbitrable, and the Board does not have jurisdiction to enforce the Letter of Intent.


Decision

The Letter of Intent is not part of the Collective Agreement and therefore it is not arbitrable and the Arbitration Board does not have jurisdiction to enforce the Letter of Intent. If the Arbitration Board had jurisdiction, the Board would direct the parties to appoint a new Committee, direct the parties to engage the Hay Group, as per the Letter of Intent, in particular to advise the Committee on the tool and process to be used to determine appropriate pay group assignments, and, upon approval of proposed adjustments, would direct the Company to implement the approved adjustments.

DATED this 9th day of March, 2009.



 James C. Oakley
 Chairperson



 William Alcock

Dissent

 David Curtis