

ARBITRATION AWARD

BETWEEN:

NEWFOUNDLAND AND LABRADOR ASSOCIATION
OF PUBLIC AND PRIVATE EMPLOYEES
(hereinafter called the "Union")

AND:

LEWISPORTE TOWN COUNCIL
(hereinafter called the "Employer" or the "Town Council")

GRIEVANCE: Policy Grievance re contracting out

COUNSEL: For the Union

Hubert Sutton

For the Employer

John Peddle

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on September 2, 2008. The parties agreed as follows:

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

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between the parties, expiry date January 31, 2009
- Consent 2 - Grievance Form dated July 25, 2008
- Consent 3 - Letter dated July 10, 2008 from Hubert Sutton, Employee Relations Officer of the Union to Barry Pond, Town Manager of the Town of Lewisporte
- Consent 4 - Minutes of Labour Management meeting dated July 24, 2008
- Consent 5 - Collective Agreement between the parties, effective February 1, 1999 to January 31, 2004
- MB - 1 Town of Lewisporte - Tender for Building Lot Clearing and Grubbing - The Pilot, Lewisporte, Newfoundland and Labrador
- MB - 2 Newspaper article in The Pilot, Lewisporte, Newfoundland and Labrador, re Lewisporte Town Council

Nature of the Grievance

The Union grieves the awarding of a tender by the Lewisporte Town Council for clearing and grubbing of building lots. The Union submits that the Town Council's actions violate the contracting out provisions of the Collective Agreement. The Town Council submits that there is no violation of the Collective Agreement.

Collective Agreement

The relevant articles of the Collective Agreement are as follows:

Article 3 Management Rights

3.01 All functions, rights, powers and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Union as being retained by the Employer.

...

Article 28 Contracting Out

28.01 The Employer shall not contract out bargaining unit work that provides Municipal Services through the life of this Agreement. Municipal Services means:

- (1) Water and Sewer repairs (Capital Works)
- (2) Street Maintenance
- (3) Garbage Collection & Disposal
- (4) Curb and Sidewalk Construction
- (5) Stadium Operations
- (6) Land Development (Sub-division)
- (7) Equipment Repairs
- (8) Snow Clearing
- (9) Sanding and Salting
- (10) Recreation and Beautification
- (11) Repairs to the following Town properties:
 - (a) Town Hall
 - (b) Fire Hall
 - (c) Town Garage
 - (d) Stadium
 - (e) Bowling Alley
 - (f) Pumphouse

- 28.02 Foremen and other employees outside the bargaining unit shall not perform bargaining unit work.
- 28.03 The Employer agrees to give the first opportunity to Union members to work on any grants or special projects by Council before hiring persons outside the bargaining unit.
- 28.04 The Employer has the right to appoint a working foreman for special work projects deemed necessary by Council. Such appointments shall be done in accordance with Article 15.02 (b).

...

Memorandum of Understanding
Contracting Out

Notwithstanding the language of Clause 28:01 of the Collective Agreement, the parties hereby agree that there may very well be times when all Town equipment and employees are working to capacity and at that time there may arise a need to carry on work that would have to be completed within a short time frame.

In extenuating circumstances such as this, there would be no objections to work being awarded to someone other than Town employees providing the Union is advised, no qualified bargaining unit member will suffer a loss in pay or benefits, or the opportunity to work overtime as a result of this action.

Evidence

The witnesses called by the Union were Malcolm Ball, Local Union President and Stadium Attendant and John Combden, Equipment Operator. The witness called by the Employer was Perry Pond, Town Manager.

The Lewisporte Town Council owns land used to develop residential building lots. The Council has developed and sold residential building lots for several years. The employees of the Town Council perform work associated with the residential lot development, in particular, installation of curb and gutter, installation of water and sewer lines and hookup, and road construction and grading. Road paving is done by a paving contractor. The lots are sold by the Town Council before clearing and grubbing, i.e. before clearing of trees or grubbing of bog or other material. In the past clearing and grubbing has been done by the buyer of the building lot.

Malcolm Ball testified that the event that led to the filing of the grievance was the publication in the Lewisporte newspaper, The Pilot, of a call for tender by the Town of Lewisporte for “building lot clearing and grubbing”. The notice gave information about how to obtain copies of specifications from the Town Office, and stated that sealed tenders would be received up to June 6, 2008. Mr. Ball also referred to a newspaper article published in The Pilot on July 3, 2008. The article stated that at the Town Council’s June 24, 2008 meeting, Council accepted the lowest price for clearing and grubbing submitted by A & B Construction. Mr. Ball testified that the Town had never before done clearing and grubbing of building lots. John Combden testified that the Town Council employs equipment operators, who could do the work of clearing and grubbing the building lots.

Perry Pond, Town Manager, testified that the Town Council sold about 15 building lots in 2007 and about 3 building lots in 2008 up to the date of the hearing. He said that some of the building lots the Town Council currently has available for sale have boggy areas and potential buyers are seeking assurance about the quality of the land for building. The Town Council considered that the lots could be made more attractive to potential buyers if the Town Council had a contractor clear and grub the lots before they were sold. The cost of the clearing and grubbing would then be added to the price of the lot. The clearing and grubbing of each lot takes about 2 days using heavy equipment. Mr. Pond testified that the Town Council owns some heavy equipment, including an excavator. Mr. Pond testified that the Town Council did not consider clearing and grubbing to be municipal services within the meaning of Article 28.01 of the Collective Agreement. The Town Council had no intention to lay off any employees as a result of contracting out the clearing and grubbing work.

The Union sent a letter to the Town Council dated July 10, 2008 stating that it considered the awarding of the tender for clearing and grubbing building lots to be a violation of the Collective Agreement and that the Union would be filing a grievance. The Union also requested a meeting to discuss the issue. A meeting of the Labour Management Committee was held on July 24, 2008. At that meeting the Town Manager, Perry Pond, advised that the Town Council had no intention of taking this work away from the private sector and having it done by the Town Council’s employees. It was agreed at the meeting to refer the dispute to arbitration, and the Employer agreed not to proceed with the work pending the arbitration decision.

Union Submission

The Union submitted that the Town Council owned the land and does land development work including road construction and water and sewer installation. The work is performed by the Town's employees. The Town Council assigns its employees to start the development work. By contracting out the clearing and grubbing work, the Town Council will not allow its employees to finish the work. In the past, the Town Council sold the building lot and the buyer did the clearing and grubbing work. In those circumstances the Town Council did not do the work and there was no violation of the Collective Agreement. The Union could not grieve against the buyer of the lot. Once the Town Council decides to do the work, then the work is bargaining unit work. The work is included within the meaning of land development under Article 28.01 (6). The Town Council has added another service, and added the cost of that service to the price of the building lot. There were no exceptions listed in the Collective Agreement that would permit the contracting out. The work of developing the land is bargaining unit work from the time the Town Council starts the work until it is finished. There was also a violation of Article 28.03, as the work was a project by the Town Council. The Union asked that the grievance be allowed and a declaration ordered.

Employer Submission

The Employer submitted that municipal services are the services the Town Council decides to provide. The grievance was submitted as a policy grievance and the only redress available is a declaration. There was no proof of violation of Article 28.03. There was no grant or special project and Article 28.03 did not apply. The issue to be decided is the interpretation of Article 28.01(6). Bargaining unit work was work customarily performed by members of the bargaining unit. Clearing and grubbing of building lots was not land development as defined in the Collective Agreement. The work had been done by the buyer of the building lots. The work was never done by the bargaining unit. The Town Council had never done the work and was not equipped to do the work. The Employer retained its management right to contract out the work under Article 3.01. There was no loss of income to any member of the Union. The Employer referred to arbitration awards in *Transport and Allied Workers Union, Teamsters Local 855 and Town Council of Harbour Grace*, April 23, 2003 (Clarke), *Communications, Energy and Paperworkers Union of Canada, Local 1093 and Abitibi Consolidated (Stephenville Division)*, April 12, 2001 (Oakley), and *Communications, Energy and Paperworkers Union of Canada, Local 1093 and Abitibi Consolidated (Stephenville Division)*, August 28, 2001 (Oakley). The Employer requested that the grievance be denied.

Considerations

The issue is whether the contracting out of clearing and grubbing residential building lots is a violation of the Collective Agreement.

The arbitral authorities state that an employer may contract out work in the absence of language prohibiting contracting out in the Collective Agreement. In Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 5:1300, the authors state as follows:

A determination that certain tasks fall within the class of work normally performed by bargaining unit employees does not imply that the employees have a proprietary right to that work. To the contrary, in the absence of specific language in the collective agreement providing otherwise, it is now universally accepted that bargaining unit work may be subcontracted to non-employees, as long as the subcontracting is genuine and not done in bad faith. Whatever the view may have been in the earlier awards, it is now settled that to prohibit subcontracting, the agreement must expressly so provide.

The parties have agreed to specific language in the Collective Agreement that restricts the ability of the Employer to contract out work. Article 28.01 states that the Employer shall not contract out bargaining unit work that provides municipal services. Article 28.01 sets out a list of items that are within the meaning of municipal services. Article 28.03 states that the Employer agrees to give the first opportunity to Union members to work on any grants or special projects before hiring persons outside the bargaining unit.

When interpreting the language of the Collective Agreement, the Arbitrator will consider the principles of interpretation applied by arbitrators. The Arbitrator refers to the principles of interpretation 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 of the collective agreement (paragraph 4:2100), that the language should be viewed in its normal or ordinary sense (paragraph 4:2110), and that the language is to be interpreted within the context of the collective agreement as a whole (paragraph 4:2150) and the industrial relations practices of the parties (paragraph 4:2300).

I will first consider whether the contracting out of clearing and grubbing building lots would violate Article 28.01. The relevant item in the list of municipal services in Article 28.01 is item (6), “Land Development (Subdivision)”. I will consider the meaning of this item within the context of the Collective Agreement and the industrial relations practices of the parties. There is no dispute with respect to the factual background. The Town Council owns land that is used for residential land development. The employees of the Town Council perform work that is associated with land development, in particular road construction, installation of water and sewer lines, and installation of curb and gutter. The work currently performed by employees is within the meaning of land development. In the past, the work of clearing and grubbing the lots has not been performed by Town employees or by outside contractors hired by the Town. The lots are sold before the trees are cleared, and before any bog or other material is grubbed and removed from the lots. The buyers of a lot are expected to hire their own contractor to do the clearing and grubbing of their own lot. The work of clearing and grubbing each lot usually takes about 2 days with heavy equipment. There is no issue with respect to the ability of members of the bargaining unit to operate the heavy equipment used for the work.

To determine whether land development includes clearing and grubbing, the Arbitrator has considered the type or nature of the work already performed by Town Council employees that is considered to be land development. The type of work performed by employees includes all work associated with the development of a residential subdivision, prior to the sale of a building lot to the buyer. The Town Council has not done work normally done by the buyer after the purchase of the lot from the Town Council, such as clearing and grubbing, or house construction. By clearing and grubbing the lots before they are sold, the lots could be more attractive to potential buyers. The cost of the clearing and grubbing would be added to the price of the lot. The Arbitrator has considered that the proposed clearing and grubbing work is work of the same type or nature as the work currently performed by Town Council employees, such as road construction, water and sewer installation, and curb and gutter installation. The proposed work would be performed on Town Council owned building lots and would be done for the purpose of assisting with the sale of the building lots. The objective of land development is the sale of building lots and the development of a residential subdivision. Although the Town Council employees have not performed clearing and grubbing work in the past, it is the same type of work, done for the same purpose. A characteristic of land development (subdivision) work, within the meaning of item (6) in Article 28.01, is that the objective of the work is the development of the subdivision and preparation of residential building lots for sale.

Having regard to all the circumstances, the clearing and grubbing of building lots, for the purpose of the sale of the lots, is land development (subdivision), within the meaning of Article 28.01 (6). Therefore, contracting out the work violates the prohibition against contracting out in Article 28.01. The Arbitrator will issue a declaration accordingly.

With respect to Article 28.03, the evidence presented does not support a finding that there is a “grant or special project” by the Council and I do not find any violation of Article 28.03.

Decision

The grievance is allowed. The proposed work of clearing and grubbing of building lots is included within land development (subdivision) and is therefore work that provides municipal services within the meaning of Article 28.01(6) of the Collective Agreement. The contracting out of clearing and grubbing building lots is a violation of Article 28.01 (6) of the Collective Agreement.

DATED this 6th day of November, 2008.

James C. Oakley
Arbitrator