

IN THE MATTER OF AN ARBITRATION

BETWEEN

ALGOMA STEEL INC.

(the “Company”)

and

UNITED STEELWORKERS OF AMERICA, LOCAL 2251

(the “Union”)

INDIVIDUAL GRIEVANCES

22-0018, 22-0019, 22-025622-0051, 22-0169, 23-0182

CHIEF ARBITRATOR: John Stout

APPEARANCES:

For the Company:

R. Ross Dunsmore - Dunsmore Law

Mike Mannarino – Senior Business Partner

For the Union:

Mark Molinaro

Bob Roussain

HEARINGS HELD BY ZOOM VIDEOCONFERENCE ON AUGUST 4, 2023

AWARD

INTRODUCTION

[1] The Union “recalled” me to address an issue arising from my December 16, 2021 award involving General Nature Grievance 19-0035 “Right of First Refusal.” The Union takes the position that the Company has failed to implement my December 19, 2021 award and as a result the dispute has “now spread” across multiple occupations.

[2] I directed the parties to file briefs outlining the background facts and positions that they would rely upon in addressing this issue.

[3] The Union has submitted a brief that includes three individual grievances involving Electrical Maintenance Technicians (EMTs), two grievances involving Truck Drivers and one Hoistman grievance. It is the Union’s position that all of these individual grievances must be resolved in the same manner as the December 16, 2021 award because they arise from similar facts involving employees who have been denied their right to be scheduled in accordance with their preference pursuant to Article 5.02.40. (ER224 Form).

[4] The Company submitted a much more extensive brief that included will say statements and case law. In their brief, the Company raise a preliminary objection to my jurisdiction to re-open the original proceedings. The Company asserts that the doctrine of *functus officio* applies, and I have no jurisdiction to re-examine and alter the December 19, 2021 decision in any manner. The Company points out that the issues raised by the Union arise from individual grievances involving different facts. The Company takes the position that while the December 16, 2021 award may be relevant to resolving the individual grievances, it is not determinative of any result. The Company asserts that I must consider the facts raised by the individual grievances and then decide the new matters.

[5] The Union maintains that I have jurisdiction to resolve the issue. They take exception to the Company's will say statements and case law as going beyond my direction. The Union asserts that if these grievances are not on their face resolved by the December 16, 2021 award, then they ought to be permitted an opportunity to file responding will says and case law before I decide the matter.

DECISION

[6] After carefully considering the evidence and submissions of the parties, I find that I am *functus* with respect to the December 16, 2021 award. The issues raised by the Union in this matter are not issues fairly raised by the General Nature Grievance that was resolved by the December 16, 2021 award. Instead, these are different individual grievances that arise under different factual circumstances.

[7] Any discussion or analysis with respect to the common law principle of *functus officio* must begin with the Supreme Court of Canada's decision in *Chandler v. Alberta Association of Architects* [1989] 2 S.C.R. 848 ("*Chandler*"). In *Chandler*, Justice Sopinka, writing for the majority, addresses the common law doctrine of *functus officio* and its application to administrative tribunals. His words beginning at page 861 are informative:

...As a general rule, once a tribunal has reached a final decision in respect of the matter that is before it in accordance with its' enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change in circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, *supra*.

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgements of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the

tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas, supra*.

Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981). 41 N.R. 214 (F.C.A.)

[8] Thus, there is a recognition that the doctrine of *functus officio* applies to administrative proceedings, which would include this matter. However, the principle must be adopted with flexibility and in context, having regard to the nature of the proceeding.

[9] In addition to the doctrine of *functus officio*, there exists other common law and equitable doctrines that arbitrators apply in a labour relations context, including the doctrines of *stare decisis*, *res judicata*, issue estoppel and abuse of process. These doctrines are all generally based upon the principle of certainty and finality, which is paramount in the labour relations world. The *Labour Relations Act, 1995* requires that every agreement provide for the final and binding settlement of all differences between the parties arising from the interpretation, application administration or alleged violation of a collective agreement.

[10] In this case, my December 16, 2021 award resolved the General Nature Grievance at issue and is final and binding. I may only address an issue that was fairly raised by the grievance and not dealt with in my award. That does not mean that a party who is unhappy with an award may raise a new issue that they ought to have raised in the prior proceeding. Arbitrators expect parties to proceed with their best case and not to lie in the weeds only to come later with a new or novel argument see *Inergi v. Society of United Professionals (Medical Absence Report Form Grievance)*, [2021] OLAA No 221 (Stout).

[11] I do not see the individual grievances before me arising from my December 16, 2023 award. These are separate and distinct individual grievances arising under different factual circumstances. There are certainly some similarities in the facts when compared to the facts in my December 16, 2021 award. However, there are some notable differences in the type of work that is being undertaken. These individual grievances raise new issues that are not fairly arising from my December 16, 2021 award. In regard to the December 16, 2021 award, I am *functus officio*, see *Algoma Steel inc. and USW, Local 2251 (Contracting Out Grievance)* [2008] OLAA No. 409 (Harris)

[12] I have no doubt that my December 16, 2021 award is relevant as it addresses the use of contractors and management's scheduling obligations. The Union claims that the Company is giving priority on day shift to contractors over Algoma employees. The Company has filed detailed will say statements that contradict the Union's assertions and raise issues of skill, ability and most importantly safety. In my view, these new issues are very important and did not fairly arise in the General Nature Grievance I resolved in the December 16, 2021 award. On their face, these new issues may distinguish my December 16, 2021 award to the extent that management must take into consideration, skills, ability to perform the work and safety.

[13] Management is not responsible for training a contractor's employee and if the contractor's employees cannot safely perform certain work, then that work cannot be contracted out. Moreover, the Company is responsible for managing the workforce and determining the type of work that will be undertaken at any given time, see Article 4. There are a number of other provisions in the Collective Agreement that may need to be considered to resolve these individual grievances and those other provisions must be considered in the new factual context.

[14] In terms of proceeding, I do not believe it would be fair and reasonable to ignore the Company's will say statements. By the same token, the Union ought to be afforded the opportunity to file their own will say statements. Therefore, I am scheduling this matter to be heard on September 28 and 29, 2023. The parties are

to consult on exchanging any additional material, including will say statements from the Union, which may be filed and advise each other of any witness that will be cross-examined.

[15] I also encourage the parties to try and resolve these grievances in a fair and reasonable manner. It would be an odd result that management would be forced to schedule employees in a manner that would jeopardize safety. After all the parties also have obligations to consider under the *Occupational Health and Safety Act*, which may take precedence over collective agreement obligations. It would also be an odd result to require management to train contractors to perform core work normally performed by bargaining unit employees. I would hope that there is some practical solution to resolve these grievances.

[16] I remain seized and the matter will continue on September 28 and 29, 2023.

Dated this 13th day of August 2023 in the City of Toronto, Ontario.

A handwritten signature in dark ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

John Stout, Chief Arbitrator