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Re Burrard Yarrows Corporation, Vancouver Division, and International Brotherhood of Painters, Local 138

Innis Christie

C McIntosh

W Yule

RE BURRARD YARROWS CORPORATION, VANCOUVER DIVISION, AND INTERNATIONAL BROTHERHOOD OF PAINTERS, LOCAL 138

I. Christie, C. McIntosh, W. Yule. (British Columbia) June 3, 1981.

UNION GRIEVANCE alleging improper contracting out.

A. Pape and *M. McRae*, for the union.
M. J. Weiler and others, for the employer.

AWARD

The union which is the grievor here is one of 11 unions signatory to the collective agreement with Burrard Yarrows Corporation —

Vancouver Division. As an industrial collective agreement this poly-party agreement is somewhat unusual in that it provides for a form of closed shop union security with a role for the union hiring hall. At the same time it makes provision for seniority. Appendix "A", art. III, "Union Security", provides in s. 1:

> The Company agrees to employ only members of the Union having jurisdiction in the classifications listed in Schedules 1 to 10 inclusive to this Appendix so long as the Union is able to supply competent men. The Union agrees to, as far as possible, keep a list of unemployed members and the Company to have free choice of such members as long as they remain in good standing with the Union, subject to the provisions of Article XIX — Seniority. In the event of the Union being unable to supply competent men from its membership, the Company shall have the right to employ any available competent men, and such men shall be granted a permit from the Union and must make application to become members of the Union within thirty (30) days. Union membership will not be unreasonably withheld from any applicant.

(Appendix "A" contains the general provision of the collective agreement affecting all but the office employees. All references to articles hereafter are to articles of Appendix "A".) Article XIX — "Seniority" is a long and complex provision but its essence, which is all that need concern us here, is that where "the skill and ability of the men concerned is equal, length of service with the Company, in their classification . . . shall be the determining factor in deciding the order of rehiring and layoff". The fact that seniority is accorded this role makes the relationship at Burrard Yarrows significantly different from that which arises under the normal construction collective agreement; a fact worth mentioning because the union, which is the grievor here is, like most of the other signatory unions to this collective agreement, primarily a construction industry union. These provisions of the collective agreement are part of the context in which the provisions more directly addressed to the contracting out of work, which are set out below, must be considered.

In planning for the fitting out of the "Queen of Surrey", a new British Columbia Ferry Corporation ferry, the company decided to subcontract the application of a new non-skid exterior deck coating called Epoxo. Consequently, very early in 1980 it received bids from Raeco Limited for both the supply and application of Epoxo, for which Raeco alone has the sales franchise. By a purchase order sent to Raeco in the summer of 1980, probably in July initially, and certainly no later than August 27th, the company contracted for the purchase of the required material, for its application by Raeco employees and for Raeco's warranty. The

work of cleaning the decks in question and applying the primer coat which goes on under Epoxo commenced in February, 1981. Subsequently, the Epoxo was applied with a trowel by Raeco employees.

Toward the end of February, probably on Wednesday, February 25th, the painters' shop steward, Jim Clark, advised Carl Anderson, the company's joiner and painter foreman, that the members of his union were unhappy about the fact that Raeco employees were rolling paint on one of the decks in question. Anderson replied that the paint was primer for Epoxo and that Raeco would be doing the whole job. Anderson testified that he went on to tell Clark about cases in the past where a different deck coating, Dexotex, had been trowelled on and then roller painted with a latex paint by Raeco employees without objection by the painters. Anderson testified that the following morning Clark said to him, "It's O.K. now Carl". However, it was not "O.K." because complaints were passed on to Michael McRae, the union's business manager. On Friday, February 27th, or Monday, March 2nd, McRae visited the "Queen of Surrey" and talked briefly to two Raeco employees who were in the course of applying primer with a roller and brush.

Having ascertained later that day or the next that Raeco Limited had collective agreements only with unions representing labourers, bricklayers and tile setters, none of which are signatory to the poly-party collective agreement with the company, on Tuesday, March 3rd, McRae went to see Dennis Hall, the company's operations manager. Hall contacted Carl Anderson, with whom he had had discussions about this matter in the preceding day or so. Coincidentally when Anderson was contacted the owner and manager of Raeco Limited, Mr. McAdie, was with him. Thinking the whole matter could be settled amicably Anderson took him along to meet with Hall and McRae.

No purpose is served by detailing here the discussions over the rest of the week of March 2nd. Suffice to say that the matter was not worked out, there were some failures to communicate, some disagreements over the facts and some misunderstandings, and on Friday the members of the painters' union left the job. Following an application to the Labour Relations Board they returned to work on the basis that this matter would be speedily set down for arbitration.

The evidence of Mr. McRae, the witness for the union, and that of Mr. Hall and Mr. Anderson, who were called by the company, was not always on all fours, but I think there is little doubt with regard to the following additional facts:

(a) Raeco Limited has been doing work of a somewhat similar nature to that in issue for Burrard Yarrows Vancouver shipyards for nearly 25 years. The application of Dexotex, a thicker and less paint-like predecessor to Epoxo, involved the rolling of a latex paint over the Dexotex, which was trowelled on. Although Raeco has no agreement with any of the unions signatory to the collective agreement no objection has ever been taken to its work in the shipyard.

(b) Other employees, belonging to unions not signatory to the poly-party collective agreement, glaziers and teamsters in particular, have worked in the shipyard on occasion without having been "permitted" by any of the signatory unions. On other occasions signatory unions have explicitly "permitted" members of such unions to work in the shipyard.

(c) The company issues purchase orders, including the purchase order in this case, which contain, among the conditions to which the supplier of goods or services is made subject, the following:

> 13. Labour
> The supplier is responsible for ensuring that only Union Labour is employed in the processing, manufacture or installation of equipment covered by this order.

The purchase order in this case also had typed on the face of its second page this statement: "Sub-contractor to ensure that Union Labour only is employed in carrying out this work at the shipyard."

(d) Painters who are members of Local 138 have seldom worked at Burrard Yarrows shipyard with trowels in the application of deck coatings or in any other context. Some probably did so on a tug built for northern service some five or six years ago but certainly they did not usually do trowel work at the shipyard. On the other hand Local 138 has members who as a matter of course do trowel work in the construction industry and in that context the trowel is a tool of their trade.

(e) Epoxo was specified by B.C. Ferries Corporation as the deck covering for the "Queen of Surrey". Raeco will either sell Epoxo or both supply the material and do the work with its own employees, but only in the latter case does it give a warranty. Deck coverings have been a troublesome aspect of ferry construction for the company. In the case of the "Queen of Surrey" the company's business judgment was that it should pass on the risk associated with the new product, Epoxo, by acquiring the warranty of Raeco Limited.

(f) Raeco's employees put about 1,000 man hours into the job in question, cleaning the deck, painting it with primer and applying Epoxo.

(g) The union had members unemployed in February and March, 1981, and with reasonable notice could have provided men with the necessary skills to do the job done by Raeco employees.

The issues

The first issue is whether the company was entitled to contract out the work in question. Article XV — s. 14 provides:

> The Union agrees to work with the employees of, and on materials supplied by outside contractors, providing subcontractors employ only Union labour. Time permitting, prior to contracting in or out, the appropriate Unions will be contacted to see if they can come up with a better arrangement or solution.

The company argues that under the general principles of arbitral jurisprudence it is entitled to contract out unless there is some specific limitation upon its right to do so and that this provision buttresses that right, provided that the subcontractors "employ only Union labour".

The company interprets that phrase as meaning "labour belonging to any union". The union, on the other hand, submits that art. XV — s. 14 limits contracting out to contractors employing members of their own union (or, perhaps, members of one of the other signatory unions) because ss. 1 and 2 of art. I, the definitions article of Appendix "A", provide:

> Section 1
> Where the word "Unions" is used in this Appendix, it shall be deemed to refer to all of the Unions listed on the first page of the Collective Agreement between the Parties, except the Office and Technical Employees' Union, Local No. 15.
>
> Section 2
> Where the word "Union" is used in this Appendix, it shall be deemed to refer to each such Union individually.

The second issue, which is only significant if we find that the company is entitled to contract out in the circumstances, is whether the company was obliged by art. XV — s. 14 to contact the painters' union, Local 138 to see if they could "come up with a better arrangement or solution" before contracting out to Raeco Limited. That depends on whether, in the words of the provision of the collective agreement, "time permitt[ed]" and on whether the grieving union here was an "appropriate union" which had to be contacted.

The third issue, which arises if we find in favour of the union on either of the preceding two, is whether damages are appropriate and, if so, their nature and measure.

Decision

1. *Contracting out*

In *Federated Co-operatives Ltd. and Retail, Wholesale & Department Store Union, Local 580*, [1980] 1 Can. L.R.B.R. 372, the British Columbia Labour Relations Board stated, at p. 379:

> ... since the seminal arbitration award in *Re United Steelworkers of America and Russel Steel Ltd.*, (1966), 17 L.A.C. 253 (Arthurs, Chairman) it is safe to say, in the absence of the kind of motivation which would render contracting out either a lockout or an unfair labour practice under the Labour Code of British Columbia, an employer is not prevented from contracting out unless there is an express prohibition contained in the collective agreement.

In *Re Robin Hood Multifoods Ltd. and Miscellaneous Workers, Wholesale & Retail Delivery Drivers & Helpers, Local 351* (1980), 26 L.A.C. (2d) 371 (Ladner), the board of arbitration, at p. 376, suggests that this statement "may not have been a fully considered one" but, nevertheless, goes on to find, in light of the past practice and negotiating history there that contracting out was not prohibited by the collective agreement before it. Clearly, any union that argues that contracting out is prohibited by its collective agreement has a steep uphill battle in the absence of an express provision. In this general context, the thrust of the first sentence of art. XV — s. 14 of the collective agreement before us seems clear. In the statement that "the union agrees to work with the employees of, and on materials supplied by outside contractors, providing subcontractors employ only Union labour" the important thing is the proviso, not the union's agreement to work with the employees of, and on materials supplied by, outside contractors. What is unusual in this industrial, as opposed to construction, setting is that the union's obligation to work does not apply where the subcontractors employ other than "Union labour".

At first blush, were it not for the fact that the word "Union" is capitalized, it would seem beyond question that what was intended here was simply that in return for the union buttressing the company's right to contract out its members have been excused from working with non-union people. However, the word "Union" is capitalized, and ss. 1 and 2 of art. I contain a special definition of the word "Union", as set out above. Thus, the union submits that "Union labour" in art. XV — s. 14 must mean "Local 138

labour" or, at least, labour belonging to one of the signatory unions.

The natural response, perhaps, to which the union submission gives rise is "If the first sentence of Article XV — Section 14 means, as you say, that only labour belonging your own union can be employed by sub-contractors why bother with the second sentence which assures that you will be contacted to see if you can come up with a better arrangement or solution?" The answer, Mr. Pape submitted on behalf of the union, lies in the fact that, unlike a construction collective agreement, this collective agreement contains seniority provisions. Thus, according to his interpretation, while the first sentence of art. XV — s. 14 protects the work of the union membership as a whole the second sentence protects those of its members who are or have been employees of Burrard Yarrows and have acquired seniority there against intrusions by other members of their own union employed by subcontractors.

Mr Pape's explanation of the meaning of art. XV — s. 14 is not implausible on the question of why consultation might be requested but it does not persuade me that "Union labour" in that section, notwithstanding the capitalization of the word "Union", has the special meaning he contends for. The definition of the word "Union" in art. I — s. 2 is significant of course, but I cannot see how it can be applied to the words here in question and make sense. Article XV — s. 14 commences with the words "The Union agrees". I suppose the word "Union" there could be "deemed to refer to each such Union individually" as art. I — s. 2 states, but to similarly deem the word "Union" where it appears in the phrase "only Union labour" "to refer to each such Union individually" drives us to the conclusion that each union individually is agreeing to work with employees of, and on materials supplied by, outside contractors only where those sub-subcontractors employ members of *that individual union*. That produces the absurdity that where a subcontractor comes on to the site the only unionized employees who will work with his employees are those who belong to the same union they do. In other words, the rigorous application of the definition sections means that, for instance, the plumbers' union is only undertaking to work with the employees of a contractor who belong to the plumbers' union and will not work with the unionized employees as a sheetmetal contractor or a refrigeration contractor. Ship construction is highly integrated work so, obviously, the clause cannot mean that.

Alternatively, to support the union argument here the words "Union labour" in art. XV — s. 14 might be said to mean "Labour

which belongs to any of the signatory unions". This meaning is somewhat more plausible but it has moved away from the strict use of the definitions in art. I — ss. 1 and 2 and substituted the meaning of "Unions" where the word is "Union".

Even if we accept that the shift from the definition of "Union" to the definition of "Unions" is permissible we are left with the fact that art. XV — s. 14 deals not only with the employees of outside contractors but also with "materials supplied by outside contractors". The term "Union labour" appears only once so, without question, it must be given the same meaning for both purposes. On a different plane, it would produce a particular absurdity if we were to hold that the painters' union was not obliged to work on materials supplied by outside contractors who did not employ members of the painters' union or one of the other signatory unions. Countless components of ships upon which members of Local 138 routinely work are purchased from manufacturers who are unionized but not by one of the signatory unions.

These textual considerations suggest that the true meaning and intent of art. XV — s. 14 is not to be determined purely and simply by the application of the definitions in art. I — ss. 1 and 2. The application of those definitions is, to say the least, sufficiently ambiguous that we should turn to past practice or other evidence of the intent of the parties.

As stated above, there was some conflict in the evidence about the extent to which outside contractors employing non-members of the signatory unions had worked on the company's site, but clearly it has happened. Most significantly, Raeco Limited itself, whose employees are unionized but who did not belong to any of the signatory unions, has been working on the company's site for the past 25 years. Clearly, members of the signatory unions, including the painters, have been working with Raeco's employees over that time, including quite recently. Quite apart from any other instance of past practice the undoubted facts about Raeco itself establish a past practice which does not accord with the interpretation of art. XV — s. 14 put forward by the union here.

While it might in itself not be entitled to great weight, in this context it is of some significance that the company, in dealing with suppliers of both goods and services, was content to put a "Union labour only" warning on its purchase orders which certainly would not have conveyed to outsiders the very special meaning that the union here seeks to attach to it. I am satisfied that the company never shared what the union now claims was its intent with respect to art. XV — s. 14.

In sum, both as a matter of interpretation of the text of the collective agreement and on the basis of past practice we must conclude that art. XV — s. 14 does not condition the union's agreement to work with the employees of subcontractors, and therefore the company's right to subcontract its work, upon the subcontractors employing members of any particular union or unions, but simply on the fact that they employ unionized labour.

2. *Contacting the union*

The second sentence of art. XV — s. 14 provides: "Time permitting, prior to contracting in or out, the appropriate Unions will be contacted to see if they can come up with a better arrangement or solution." On the evidence there can be no doubt that there was ample time for the appropriate unions to be contacted with respect to the contracting out here in question. Counsel for the company did not even attempt to argue to the contrary. Nor did he attempt to argue that the painters' union, Local 138 had in fact been contacted. Rather, he submitted that because the painters' union, Local 138 had never done the kind of work involved in the application of Epoxo, in this context it was not an "appropriate Union" within the meaning of this provision.

The requirements of the second sentence of art. XV — s. 14 are not onerous. It only applies if time permits and the company is not obliged to get the union's assent; it need only contact them and "see if they can come up with a better arrangement or solution". It is therefore not necessary to give the phrase "the appropriate Unions" a restrictive definition in order to preserve every considerable freedom of action for the company.

Counsel for the company submitted that an "appropriate" union in this context would be one that had normally and regularly done the work which was to be contracted out. Given that contracting out frequently becomes an issue where there is something new about the work in question we should be slow to ascribe any such restrictive intent to the parties. To allow the company to characterize the work as "new" and thereby avoid the process of consultation is to destroy the whole point of giving the unions a chance to suggest how or what parts of it might be done by their members. Moreover, the very fact that the reference is to the "appropriate *Unions*" rather than "Union" suggest that what was intended was to include situations where the work to be contracted out did not obviously fall to one union; work, in other words, which was not normally and regularly done by any one union.

It is, therefore, my opinion that the words "the appropriate Unions" in art. XV — s. 14 include any signatory unions which according to their constitutions, practice and other indicators of work jurisdiction claims known generally to people in the field could be expected to claim some significant part or all of the work being contracted out.

Here the work in question involved, to a significant degree, the application of primer with a roller which was obviously work to which painters might lay a claim. It also involved the trowelling on of a deck covering and, while there might be more room for argument with respect to the past use of trowels by members of Local 138 at the Burrard Yarrows Vancouver shipyard, people in the field, like Mr. Anderson, could surely be expected to know that members of the painters' union do such work elsewhere.

The evidence suggested that, since the decks were being cleaned with disc sanders, the cleaning and the application of primer would belong, in any case, to the Marine Workers and Boiler Makers Industrial Union, Local No. 1, which is signatory to the collective agreement. Whether or not that would be so is not before us. It may well be that the union should also have been contacted. The fact is that the company contacted neither the marine workers nor the painters, Local 138, so it can hardly be heard to justify on that ground its conclusion that the grieving union, Local 138, was not an "appropriate Union".

Our conclusion on this second issue must, therefore, be that the company breached its obligation to contact the grievor union to see if it could "come up with a better arrangement or solution" before contracting out the work here in question to Raeco Limited.

3. *Damages*

Having concluded that the company breached the collective agreement by not contacting the grievor union prior to contracting out the work in question to Raeco Limited "to see if they [could] come up with a better arrangement or solution", the question is "what damages are appropriate?". The union sought "*Blouin Drywall* damages". That is it asked this board of arbitration to ascertain the amount of wages lost to its unemployed members qualified to do the work in question by virtue of what it alleged was an improper contracting out, and to order the company to pay that amount, plus appropriate fringe benefits, to the union to be held in trust for distribution to those members: see *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters*

& Joiners of America, Local 2486 (1973), 4 L.A.C. (2d) 254 (O'Shea); quashed 6 L.A.C. (2d) 34*n*, 48 D.L.R. (3d) 191, 4 O.R. (2d) 423 (Ont. Div. Ct.); restored 9 L.A.C. (2d) 26*n*, 57 D.L.R. (3d) 199, 8 O.R. (2d) 103 (Ont. C.A.). Following the decision of the Ontario Court of Appeal similar orders have been made, for example in *Re McKenna Brothers Ltd. and Plumbers Union, Local 527* (1975), 10 L.A.C. (2d) 273 (Shime), and it is to be noted that in the leading construction industry decision of the B.C. Labour Relations Board, *R. M. Hardy & Associates Ltd. and Teamsters, Local Union 213*, [1977] 2 Can. L.R.B.R. 357, the then chairman, Paul Weiler stated at p. 373:

> . . . recent developments in the law of arbitration have made [arbitration] a much more effective remedy . . . Suppose, for example, that a contractor subject to the union agreement sub-contracts work to a non-union firm. Even though the job might be entirely finished long before an affirmative order can be obtained from the arbitrator, the union can secure a damage award for earnings lost by its unemployed members and also for the total hourly contributions which would have been made to the union funds in respect of the work in question. (See s. 98 of the Code; also *Blouin Drywall Contractors Ltd.* . . .)

I have no doubt that, had we concluded that the company here breached the collective agreement in contracting out the work in question to Raeco Limited, a *Blouin Drywall* order would have been appropriate; but what is the appropriate remedy where what is involved is a failure to "contact" the grievor union "to see if they can come up with a better arrangement or solution"? In my view the form of the *Blouin Drywall* order is clearly appropriate in this case as well, because if there has been any loss it has been to the union and certain of its members in the same proportions as in *Blouin Drywall, supra*. The difficult issue here is not to whom damages should be payable but whether there can be said to have been any loss in money terms that can be assessed by this board of arbitration. In approaching this issue it must not be forgotten that to conclude in the negative would be to say, in effect, that the company can undertake to consult with the union and then not do so, with impunity.

Before proceeding further I should make it perfectly clear that what we are concerned with here is an undertaking by the company to consult. We are not dealing with a clause giving the union a veto over action taken without its agreement or which calls for arbitral determination. The difficulty in making these distinctions is stressed in the award of the arbitration board in *Board of School Trustees of School District No. 22 (Vernon)* (1980 — unreported (Larson)), and the *B.C.I.T.* award (1979 — unreported (Larson); affirmed B.C.-L.R.B., February 12, 1980, No. 24) considered therein.

While the company thus has the right to proceed unilaterally to contract out to subcontractors who employ "Union labour" in return the company has undertaken that, "time permitting", it will consult with "the appropriate Unions". To have concluded that what the union has here is "merely" a right to consult does not, in the industrial relations context, mean that what the company has promised is without significance. In traditional contract settings the Courts have held that an "agreement to agree" is not binding, and this has been said to mean that a mere promise to negotiate is not enforceable in the ordinary Courts but, even in the traditional contract setting, the correct statement, in my opinion, is that of Lord Wright in the leading case of *Hillas & Co. Ltd. v. Arcos Ltd.* (1932), 38 Com. Cas. 23 (H.L.) at pp. 39-40, where he said:

> If . . . the parties agree to negotiate in the hope of effecting a valid contract . . . There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing yet even then, in strict theory there is a contract (if there is good consideration) to negotiate, though in the event of a repudiation of one party the damages may be nominal, unless a jury thinks that the opportunity to negotiate was of some appreciable value to the injured party.

(quoted in Waddams, *The Law of Contracts* (1977), at p. 27).

In what setting could it be more reasonable to conclude that the "opportunity to negotiate was of some appreciable value" than in the context of collective bargaining. As stated by Richard Brown in "Contract Remedies in a Planned Economy; Labour Arbitration Leads the Way", in Swan & Reiter, *Studies in Contract Law* (1980), at p. 105: "Although one party may do as it pleases if consultation fails to produce a mutually acceptable compromise, discussions ensure that the interests of other participants are considered" (citing Cox, "The Duty to Bargain in Good Faith" (1957-58), 71 Harv. L.R. 1401 at p. 1412). The unions party to this collective agreement thought it worthwhile to bargain for the "opportunity to persuade — to gain the ear of the other" (see *Board of School Trustees of School District No. 22 (Vernon)*, *supra*, at p. 16) and it is that, and any possible benefit to its members which might flow from it, that has been denied the union by the company here. How then can the company, or this board of arbitration, say that this bargained for opportunity to have their interests considered is valueless to the union and its members?

Accepting that the loss of this opportunity is real, we must quantify it for the purposes of a damage award. Brown and Beatty, *Canadian Labour Arbitration* (1977), state at para. 2:1410, pp. 52-3:

> As a general matter and unless the agreement provides otherwise, in assessing damages arbitrators have followed and utilized the same common law principles that are applied in breach of contract cases. Thus, the basic purpose of an award of damages in a grievance arbitration is to put the aggrieved party in the same position he would have been in had there been no breach of a collective agreement. . . . But they have recognized that the general principle is subject to three basic qualifying factors. In the first place, arbitrators have held that the loss claimed must not be too remote, that is, that it must be "reasonably foreseeable". Secondly, the aggrieved party must act reasonably to mitigate his loss. Finally, the loss or damages must be certain and not speculative.

It is the third of these with which we are concerned here. For further elaboration we may turn to the following statement by one of the authors, Donald Brown, in "Developments in the Law of Damages Through Breach of Contract", in Law Society of Upper Canada, *Special Lectures on Current Problems in the Law of Contracts* (1975), at pp. 3-4:

> "Certainty" means two things in the law of damages. In one sense it requires that there be sufficient proof of facts to permit the calculation of damages with reasonable certainty. As well a court must be able to conclude with certainty that a pecuniary loss was suffered by the plaintiff. Both expressions of the certainty requirement, however, are often made subject to the caveat that if all of the available facts are proven and it is clear that some loss was suffered, then, notwithstanding the difficulties involved, the Court is obliged to award a sum as damages even though it may be little better than a guess.

This proposition is amply supported by the highest authority in Canada (see, *e.g.*, *Penvidic Contracting Co. Ltd. v. Int'l Nickel Co. of Canada Ltd.* (1975), 53 D.L.R. (3d) 748, [1976] 1 S.C.R. 267, 4 N.R. 1 (S.C.C.)) but the leading case continues to be the early English Court of Appeal decision in *Chaplin v. Hicks*, [1911] 2 K.B. 786. In that case the defendant, acting in breach of contract, had denied the plaintiff the opportunity that she had earned to be one of 50 finalists in a contest in which there would be 12 winners, and was held liable to substantial, not nominal damages. Thus, the case stands for the proposition that "where the breach of a contract deprives the plaintiff of an opportunity that might or might not have been profitable, his damages are measured by the value of the chance" (Waddams, *The Law of Contracts*, at p. 452). As Fletcher Moulton L.J. said in *Chaplin v. Hicks* itself, at p. 796:

> I cannot lay down any rule as to the measure of damages in such a case; this must be left to the good sense of the jury. They must of course give effect to the consideration that the plaintiff's chance is only one out of four and that they cannot tell whether she would have ultimately proved to be the winner.

On this basis, then, this board of arbitration must exercise the "good sense of the jury" and see that the grievor union and its

members do not go without a remedy for the loss of a valuable opportunity to consult, even though, because art. XV — s. 14 does not require the company to take their suggestions, they might well not have obtained any work through the consultations. Since the company can unilaterally decide to contract out, provided that it has contacted the appropriate unions, including the grievor union, to see, in good faith presumably, "if they can come up with a better arrangement or solution" what we have to assess in this case is the value to the union and its members of their chance of getting the work in question.

There is one other principle which we must consider in estimating the loss to the grievor union and its membership flowing from this breach of the collective agreement by the company. In pointing out that damages are measured by the value of the chance Waddams (cited above), at p. 452, states that: ". . . if the success of the opportunity lies entirely within the control of the defendant, it will be assumed that the latter would have acted in his own interest." This principle is more expansively stated in *McGregor on Damages*, 13th ed. (1972), at para. 270, pp. 192-3, as follows:

> It is vital, however, in all these cases that the person upon whose will the contingency depends should not be the wrongdoer himself. If this be so, then a very different principle may come into play. That principle is that where the defendant has the option of performing a contract in alternative ways, damages for breach by him must be assessed on the assumption that he will perform it in the way most beneficial to himself and not in that most beneficial to the plaintiff. . . . [for example] in an action by an actor for wrongful dismissal, *Withers v. General Theatre Corporation*, [1933] 2 K.B. 536 (C.A.), he recovered no damages for the loss of the opportunity to appear at a famous theatre as the defendant had an option as to the theatres at which the plaintiff should appear.

It might be argued along these lines that since the company here had "the option" of disregarding any "better arrangement or solution" which the union might have suggested if it had been contacted there could not be said to have been any damages. However, this "option" principle is limited by the requirement that the defendant could only exercise his so-called option within the terms of the contract. The defendant in *Chaplin v. Hicks* (cited above), for example, could not have escaped damages by arguing that to avoid the damages he would have not named the plaintiff a winner in the beauty contest (*McGregor on Damages*, at para. 271, p. 193) because by so doing he would have failed to conduct the contest in good faith. By the same token the company here cannot argue that it would have contracted this work out in

order to avoid the damages here in issue. Thus, the question for this board of arbitration remains "What chance would the union and its members have had if the Company had fulfilled its obligations under the Collective Agreement?" As Paul Weiler stated when considering this issue in *Re Int'l Chemical Workers, Local 346, and Canadian Johns Manville Co. Ltd.* (1971), 23 L.A.C. 396 at p. 399:

> This suggests that the true standard applicable in such a case is not what outcome would be most beneficial to one party or the other but, rather, what alternatives might reasonably have been anticipated at the time in question. This is simply an application of the ordinary doctrine, derived from *Hadley v. Baxendale* [(1854), 9 Ex. 341, 156 E.R. 145], of "reasonable foreseeability" as the criterion for assessing contract damages.

In the *Canadian Johns Manville* case, which involved improper denial of overtime during which there was a chance for incentive earnings, Professor Weiler did not award damages because he was able, in the circumstances, to substitute the more appropriate remedy of ordering the company to allow the grieving employee to work alternate overtime hours. In this case, because the subcontractor has completed the work in question this board does not have the alternative of ordering specific performance of the company's undertaking to consult and negotiate, as was available to the arbitrators in *Re Toronto Printing Pressmen & Assistants' Union, Local 10 and Publishers' Ltd.* (1957), 7 L.A.C. 229 (Taylor), and *Re Aimco Industries Ltd. and U.S.W., Local 7574* (1976), 13 L.A.C. (2d) 338 (Beck). Therefore, if the company's breach is not to go unremedied we must award damages, notwithstanding the fact that *Re Eldorado Nuclear Ltd. and Public Service Alliance of Canada, Eldorado Group* (1973), 5 L.A.C. (2d) 94 (Weatherill), is the only Canadian arbitration award I have been able to find in which damages have been awarded for failure to "consult".

Returning to the facts of this case: what cognizance must we take of the fact that Mr. Hall, the company's operations manager, testified that in the circumstances an important consideration, indeed *the* important consideration, in deciding to contract out the application of the deck coating to Raeco Limited rather than merely to buy Epoxo from Raeco was the desirability of obtaining Raeco's warranty? Mr. Hall's credibility in asserting the importance of the warranty is unshaken and I see no basis upon which this board of arbitration can suggest that such a consideration is inappropriate when the company exercises its unilateral right to decide whether to subcontract work out. Nevertheless, we must

try to estimate what the company *would* have done had they complied with their obligations under art. XV — s. 14 to consult the union, not what they *could* have done and the justifications for what they did. It remains conceivable, at least, that had the union been consulted its suggestions and arguments would have overbourne the concern of the company with obtaining a warranty.

In this context, as the Courts have suggested, the quantification of damages is readily little more than a guess, but that does not excuse us from quantifying damages if we are satisfied that damages are real and not merely nominal. The evidence is that the job in question took Raeco's employees about 1,000 man hours. Considering the then current rate for members of the painters' union of $13.40 per hour plus welfare and pension contributions called for by art. XVI of the collective agreement, for purposes of this rough calculation we can use $15 per hour. Thus, we can say that if it were a certainty that the grievor unions' members would have been given the work in question the damages would have been approximately $15,000. We must recognize, however, that had the proper consultation been carried out at least one other union, the Marine Workers and Boiler Makers Industrial Union, Local No. 1, would have had a possible claim on a significant part of the work and that "the chances are" that because of the warranty the company would have decided to contract the work out anyway. In the end, judging broadly as a jury would judge, I have concluded that the union and its employees who were not working and eligible for the work in question must be awarded damages of about $750. To these parties this is not a large amount but its significance is that it represents real, not "nominal" damages.

In saying that damages should be "about $750" I do not mean that the amount should be left in any way uncertain. I mean that damages should consist of a payment to the union of $750 representing lost wages plus a further amount equal to any other moneys that the company would be required to pay to the union or its employees under the collective agreement if it were paying $750 in wages. That total, minus the normal portion of the $750 to be retained by the union itself as dues, is to be paid to the union in trust for distribution to the appropriate people in its membership in accordance with the principle approved in *Blouin Drywall, supra.*

Summary

While the employer did not breach the collective agreement by

contracting out the work in question to Raeco Limited it did breach art. XV — s. 14 by failing to contact the union prior to contracting out to see if they could come up with a better arrangement or solution. Judging broadly as a jury would judge, it has been concluded that the loss of that opportunity to consult is to be remedied by awarding the union and its members $750 as wages, with the appropriate portion thereof to be retained by the union as dues, plus an amount equal to any other payments that the company would have to make under the collective agreement if it paid $750 in wages. As in the *Blouin Drywall* case, cited above, that amount, except for union dues, is to be paid to the union in trust for distribution to those of its members who were not employed and were available to work on the job which was contracted out to Raeco Limited by the company.

The board will retain jurisdiction and in the event that there is any failure to agree on the precise amounts to be paid to the union we will reconvene at the request of either party to settle that matter.