3-3-2003

# Re Aliant Telecom Inc and AC&TWU

Innis Christie

IN AN ARBITRATION

BETWEEN:

ATLANTIC COMMUNICATION AND TECHNICAL WORKERS UNION

(The Union)

and

ALIANT TELECOM INC.

(The Employer)



RE: POLICY GRIEVANCES 01-01 dated February 6, 2001, concerning the Contracting out of cable work, and 01-05 dated November 8, 2001 concerning the contracting out of work on the internet dial-up help desk

BEFORE: Innis Christie, Arbitrator

HEARING DATES: May 21, 22, 23, 30 and 31, October 25, November 7 and 8 and December 12 and 13, 2002

AT: Halifax, N.S.

FOR THE UNION: Ronald A. Pink, Q.C., counsel
Bettina Quistgaard, counsel
Gary Grant, President ACTWU
Dean Macdonald, Business Agent ACTWU
Lloyd Brown, Chief Steward, ACTWU

FOR THE EMPLOYER: Jan McKenzie, counsel
Heather Calder, counsel
Allana Loh, Labour Relations Officer
Elizabeth Spinney, Manager: Industrial Relations
David Curnew, Manager: Industrial Relations
Pat O'Brien, Director: Industrial Relations
Brock Sampson, Director: Broadband Services

DATE OF AWARD: March 28, 2003

Policy Grievances 01-01 dated February 6, 2001 and 01-05 dated November 8, 2001 alleging that the Employer contracted out of "CITE work" contrary to the Collective Agreement between the Employer and the Union effective January 1, 1999 - January 1, 2002, which the parties agree is the Collective Agreement applicable here. Specifically, the allegation is that the Employer contracted out the work of bargaining unit members on hanging and splicing cable to carry high speed internet and DTV services, which the Union alleges is contrary to the Letter of Intent which is Appendix M to the "Craft" part of the Collective Agreement, and the work of bargaining unit members on the internet dial-up help desk, which the Union alleges is contrary to the Letter of Intent which is Appendix E to the "Common" part of the Collective Agreement. The Union requests an order that, in the case of the cable installation work, damages be paid for the lost work and, in the case of the work on the internet dial-up help desk, that the work be returned to the bargaining unit.

At the outset of the hearings in this matter the parties agreed that I am properly seized of it, that I should remain seized after the issue of this award to deal with any matters arising from its application, including the determination of the amount of any compensation to which any members of the Union would be entitled if I were to allow this Grievance, and that all time limits, either pre- or post-hearing, are waived.

With respect to the contracting out of the work on the internet dial-up help desk the Union sought interim relief pursuant to section 60(1)(a.2) of the *Canada Labour Code*. Over the objection of the Employer, a hearing to consider the Union's request was held on February 13, 2002. The Union sought an order precluding the contracting out of the work in issue until the conclusion of the arbitration

scheduled for hearing in May. In the result, I denied the interim relief sought by the Union.

AWARD

Narrowly stated, the issues before me are whether the Employer breached the Collective Agreement when, from February 12 to March 16, 2001, it contracted with Cablecom Ltd. to have that company's employees "hang" and splice cable for the provision of the full range of services, including broad band, or high-speed, internet services and digital TV, to a new subdivision in Halifax; and when, later in 2001, it contracted out the operation of the dial-up help desk for its Sympatico customers to I.T.C. Ltd. in New Brunswick. The question is whether, in contracting out the work in question, the Employer breached the commitment it made in the two Letters of Intent that are part of the Collective Agreement. The Employer did not dispute that, for purposes of this arbitration, it is bound by the Collective Agreement negotiated by its predecessor, MTT, nor did it dispute that the letters of intent in Appendix E to the "common part" and Appendix M to the "craft part" are part of the Collective Agreement binding upon it.

The more specific questions which underlie the issues before me are: "was the work in question was "CITE work?"; if it was, "what were the Employer's obligations under the letters of intent" and, finally, "did it breach them". Because of the way the case was presented, I will answer the second question first. In other words, I will first address the question of what the Employer's obligations were under the letters of intent, at least in so far as they arise here, and then turn to whether the cable work and the help desk work in question here were "CITE work" and whether, in contracting them out, the Employer breached the Collective

Agreement. I have decided that the Employer did not breach the Collective Agreement in either of these instances, but my conclusions on what the Employer's obligations were under the letters of intent and on what constitutes "CITE work" may be of more interest to the parties than that "bottom line".

The Letter of Intent entitled "New Technologies/New Business Opportunities" which appears as APPENDIX E to the "Common" part of the Collective Agreement (referred to below as "the common part") , at p. 37, provides:

> **New Technologies/New Business Opportunities**
>
> For the purpose of this Letter, CITE means the new positions created as a result of the Company expanding its provisioning of services in Communications, Information, Transactions and Entertainment.
>
> MTT's movement to CITE will create new unionized job positions which shall be part of the bargaining units. As these job positions arise, the Company will discuss with the Union full details of the quality and cost of service we wish to provide within the competitive business. This includes rates of pay, job skill requirements and the retention of skilled employees. This will allow both parties the flexibility to deal with these new CITE positions.
>
> The CITE positions shall be filled in accordance with the job posting and transfer provisions of the Collective Agreement. In the event that no internal employees fill the vacant positions the jobs will be filled by new hires if no other alternatives are available. The Self-Development program initiative will prepare our employees with the new skills to meet the challenges in this emerging business.

Appendix M to the "Plant Workers", or "Craft" as it is commonly called, part of the Collective Agreement (referred to below as "the craft part") is a separate Letter of Intent; an expanded version of Appendix E to the "common part" It is alleged to apply to the cable work here, but not to the help desk work. The first two paragraphs are identical to those in Appendix E, except that they are numbered:

**New Technologies/New Business Opportunities**

1) For the purpose of this Letter, CITE means the new positions created as a result of the Company expanding its provisioning of services in Communications, Information, Transactions and Entertainment.

2) MTT's movement to CITE will create new unionized job positions which shall be part of the bargaining units. As these job positions arise, the Company will discuss with the Union full details of the quality and cost of service we wish to provide within the competitive business. This includes rates of pay, job skill requirements and the retention of skilled employees. This will allow both parties the flexibility to deal with these new CITE positions.

In what follows I refer to these letters of intent simply as Appendix E and Appendix M.

The third paragraph of Appendix M commences with the words "Permanent CITE positions" rather than simply with the words "The CITE positions" as does the third paragraph of Appendix E. James Nunn, who was Manager of Employee Relations and a member of the Employer's bargaining team for the negotiation of Collective Agreement, testified that the parties' mutual intent was that the two appendices should be identical and that the omission of the word "permanent" from Appendix E was a slip-up. This testimony was not challenged and I have proceeded on the basis that the third paragraphs of both refer to permanent CITE positions, although, in the result, I do not suggest that anything turns on this for purposes of these Grievances.

The sentence about the Self-Development program at the end of the third paragraph of Appendix E, set out above, appears as paragraph 5 in Appendix M, and there are an additional five paragraphs which deal with the issue of jobs for employees in "non-core classifications" in "non-core business units" who are "displaced by outsourcing" of those units:

3) Permanent CITE positions shall be filled in accordance with the job posting and transfer provisions of the Collective Agreement. In the event that no internal employees fill the vacant positions the jobs will be filled by new hires if no other alternatives are available.

4) It is essential for MTT to focus available resources on CITE growth positions. Therefore, MTT must be able to exit declining non-core business units. The non-core classifications are limited to the following:
- Maintenance Technician
- Apparatus Shop Technician
- Garage Service Attendant
- Printer
- Storekeeper & Shipper
- Garage Mechanic
- Mail Car Chauffeur

5) Employment transition plans that may be implemented for of those employees displaced by outsourcing non-core business units are defined but not limited to the following:
- Job Postings for core or new CITE jobs
- An opportunity to go with the outsource company
- VSO

The Self-Development program initiative will prepare our employees with the new skills to meet the challenges in this emerging business.

6) The Company commits to work together with the Union to limit the impact of existing non-core classifications. The Company recognizes the limitations to employment transition in areas outside Halifax and therefore will give consideration to creating opportunities for transition in the districts. The Union commits to work with the Company to achieve the transition of employees to the new opportunities in the timeframes required in exiting the business.

7) The Company and the Union will discuss other employment options for those employees who are not successful in the transitions options noted above. This may include temporary work assignments, permanent and CITE and core positions as outlined in the Collective Agreement. All rates associated with these jobs will apply.

8) Non-core job classifications noted above that have no employees left in them will be removed from the Collective Agreement in the next round of bargaining. If in the future the Company decides to hire employees to do this work of work of a similar nature it shall be deemed as work of the bargaining unit(s).

The Self-Development Program referred to in both letters of intent is itself the subject of a "Letter of Understanding" between the parties, which is Appendix G to the "common part":

> **Subject: Self-Development Program**
>
> Both parties are in agreement with the following guidelines for the development of a Personal Development Program:
>
> It is expected that this development program will evolve over time. Initially this training will be focussed on raising the general level of knowledge of CITE (Communication, Information, Transactions, Entertainment), how it relates to the technology MTT uses and the products and services we offer our customers. It could very well move to a more technically robust format as the process matures and our needs change.
>
> In the initial stages the training topics may include ....
>
> ... Each module would involve approximately thirty (30) hours of study. This training will be taken on the employee's own time.
>
> ...
>
> It is not intended that this training will replace the current training an employee is given to carry out their daily work responsibilities.

Contracting out is not explicitly otherwise addressed in the "common part" of the Collective Agreement. The "craft part", however, provides as follows with respect to contracting out:

> 6.3 The Company agrees that it will not contract out work where regular employees , who have the actual experience to do the work, are on lay off and the necessary special tools and equipment are available. The company also agrees that it will not lay off regular employees where contractors are carrying out work in that classification providing any necessary special tools and equipment necessary to do the job are available.

If its conditions are met, this applies to the cable work in issue here. Appendix N of the "craft part" also addresses contracting out. It is a "Letter of Agreement" with

respect to a change discussed between the parties on March 22, 1996 in "the terms and conditions related to the contracting out of craft bargaining unit work as it relates to both Temporary and Permanent Lay Off as described in item 9 of the TLO agreement [see below] and clause 6.3 of the Collective Agreement."

The help desk work would similarly be subject to the following provision in the part of the Collective Agreement which applies specifically to "Clerical Workers" (referred to below as the "clerical part"):

> 14.9 No bargaining unit work will be contracted out while there are regular employees in the bargaining unit on lay off and subject to recall who have the ability to do the work.

The Union's primary position is that, on the face of them, the letters of intent apply to the work in issue, Appendix E to both the help desk work and the cable work and Appendix M to the cable work, and the plain language of both appendices prevents the Employer from contracting out the work in question. The Union's position is that by stating in Appendix E and Appendix M that "CITE work", which includes the work in question, "shall be part of the bargaining units" the Employer bound itself not to contract out such work. Union counsel agreed to the introduction of a great deal of extrinsic evidence by both parties because, he said, although the language of the letters of intent is not ambiguous, it has to be understood "in context".

The Employer also took a primary position on the plain language of Appendix E and Appendix M; the opposite one, that the language of both makes it clear that they do not prevent the contracting out of the work in question. She, however, urged more strongly than did Union counsel that the mutual intent of the parties underlying both Appendix E and Appendix M could only be understood after

careful consideration of the negotiations from which they resulted. In her submission the purpose of, and the intent behind, the Letters of Intent could be best ascertained through consideration of the context in which they were negotiated. The Employer submitted that these Grievances should be dismissed on three bases:

> 1. The work in question is not CITE work as envisioned by the Letters of Intent. Line and splicing work is the traditional core work of the "craft" bargaining unit. Work on the "Dial-up" help desk relates to the analog technology which MTT used from the early 90's onward.
>
> 2. Alternatively, even if the work in question could be held to fall within the definition of CITE work it was not the subject of the Letters of Intent because it was being performed by MTT before the CITE Letters of Intent were negotiated, and the intent behind those letters was to deal with the bringing of new work into the Collective Agreement.
>
> 3. In the further alternative, even this was work covered by the Letters of Intent, they do not prohibit contracting out.

I will address each of these submissions, but, as I have already said, because of the way the case was presented, I will first address the question of what the Employer's obligations under the letters of intent were with respect to contracting out. I will then address submissions 1 and 2 together, first in relation to the contracting out of the work on the Sympatico dial-up help desk and then in relation to the line and splicing work.

**1. What are the Employer's obligations under Appendix E and Appendix M with respect to contracting out?** I do not think it could be disputed, nor was it, that the context in which the Letters of Intent were negotiated was, and continues to be, one of an Employer struggling to survive and prosper in an intensely competitive, recently "de-regulated", business with rapid technological change at its heart. Since 1992 with respect to long distance telephone service and since 1997 with respect to local service, the CRTC has not only allowed competition, it has

mandated competition, at the simplest level by requiring the Employer to share its poles and lines with competitors. Thus the business environment is doubly unpredictable; the technology upon which and with which the Employer's work is done is constantly evolving, and it is doing so in a competitive framework built by the regulators and subject to change by them.

That is the context in which the history of the negotiation of the Collective Agreement before me here, and of its predecessors since the early 90's, must be understood. Over that decade MTT reduced its workforce from over 3000 to not much more than half that number while it, and the Union, faced the need for changing skill sets. As a consequence the Union has given a high priority to job security. In the summer of 1996 there was an eight week strike, essentially over job security. The Union sought a "no lay-off" guarantee, which it did not get in the resulting Collective Agreement. Over that same decade, under regulated competitive pressure, the Employer has become Aliant, a modern telco resulting from the combination of MTT with NB Tel and Newfoundland Tel, with significant corporate ties to Bell. These concerns not only underlie the provisions of the Collective Agreement, they appear on its face, particularly in the Letters of Intent that are central to the issues before me here.

As part of this environment, I note that while the Collective Agreement was made effective January 1, 1999, it was in fact signed August 3, 1999. The merger of MTT into Aliant occurred in stages in the early Spring of 1999, in the midst of collective bargaining.

The Employer's position is that the environment in which they were negotiated supports the conclusion that the Letters of Intent in Appendix E and Appendix M

are "enablers"; that they were negotiated to serve the need for rapid and unforeseeable change. The Union's position is that they were negotiated to provide as much job security as possible in that environment. The question, then is whether the Letters of Intent are to be interpreted as intended to facilitate change or as intended to enhance job security, in particular by restricting contracting out, more than the Collective Agreement otherwise does in Article 6.3 of the "craft part" and Article 14.9 of the "clerical part".

With respect to the use of evidence of the history of negotiation between the parties, counsel for the Employer quoted from my award in *Re Strait Crossing Joint Venture and IUOE/Iron Workers* (1997), 64 LAC (4th) 229, at 238-9, and counsel for the Union took no issue with what I stated there:

> My purpose in quoting so extensively from the authorities on this subject is to make it clear that, while evidence of negotiating history may be relied upon, including evidence of what was said during negotiations, both to show that language is ambiguous and to resolve that ambiguity, such evidence must be clear and cogent. Evidence of what people thought, even when corroborated by evidence of their actions, does not easily meet that requirement. Such evidence does not alone provide a basis for concluding what the parties agreed upon, or appeared to have agreed upon.

Before considering the evidence adduced by the parties of the proposals exchanged between them in the course of negotiating Appendix E and Appendix M I think it useful to quote the further cautionary statement from the award of a board chaired by Arbitrator Hope in *Re Sealy (Western) Ltd. and Canadian Bedding and Furniture Ltd. and Teamsters Union, Local 351* (1982), 5 LAC 360, at 368-69:

> It is not the unilateral expectations of the parties that assists an arbitrator. It is their mutual expectations to be derived from the exchanges between them in bargaining, either in the form of written memoranda or in verbal exchanges proven in evidence. ... Undoubtedly the intentions of the parties can be interpreted by inference where the language selected is unclear. In addition, the task of interpretation frequently

> encompasses the need to imply the intentions of the parties with respect to circumstances and conditions not directly contemplated by them in their bargaining. But the mutual intention of the parties must be found on the basis of an examination of what passes between them.

The Union's main witness with respect to the negotiation of the language of Appendix E and Appendix M was Gary Grant, the President of the Union for the three and a half years prior to the hearing and an employee of the Employer and its predecessors for some twenty-nine years. He has been involved in the negotiation and administration of collective agreements, first as a shop steward and then as a member of the Union Executive, since 1975. He and Bruce Lambert, who was then the Business Manager for the Union, were involved in the negotiation of all parts of the Collective Agreement before me here. Mr. Grant is currently involved in the complex re-negotiation with the Employer of this Collective Agreement and those for the other Atlantic provinces.

The Employer's main witness with respect to the negotiation of the language of Appendix E and Appendix M was James Nunn, who was Manager of Employee Relations and a prime member of the Employer's bargaining team for the negotiation of this Collective Agreement. Dwight Isenor, the Employer's chief negotiator, has since retired. Mr. Nunn also testified in considerable detail on the rapid evolution of the Employer's business since the early 90's. That evidence was essentially undisputed. I have not set it out here, but it did provide me with some understanding of the context, which both parties agreed is important.

In the Collective Agreement effective November 1, 1992 to October 28, 1995 employment security reached its apex, as counsel for the Employer put it. As part of that, the Employer stated in a letter to the Union that it could not foresee that it would require the permanent layoff of any employees in the craft bargaining unit

and the parties agreed on a "Temporary Lay Off", or TLO, arrangement, which included the language limiting the Employer's right to contract out that now appears as Article 6.3 of the "craft part", set out above.

In bargaining for the Collective Agreement effective from October 29, 1995 to October 31, 1998, in the business environment of the mid-nineties, the Employer sought more flexibility in the structuring of the workforce. The Union was unwilling to give up any of the job security its members had won in the previous round of bargaining. The result, after a six week strike, was some lessening in job security, including amendment of the TLO arrangements, but with ample recognition of the importance of job security, as evidenced by Attachment 4 to Appendix "K" to the 1995-98 Collective Agreement. The contracting out provision that now appears as Article 6.3 of the "craft part", set out above, was retained.

These competing concerns had only heightened by the Autumn of 1998 as the parties commenced bargaining for the Collective Agreement before me here. The Employer document setting out its "CONTRACT NEGOTIATION PROPOSALS" dated November 6, 1998, which is in evidence, contains the following introductory page:

> **SPECIFIC INTERESTS OF THE COMPANY RELATED TO THE NEGOTIATIONS BETWEEN MARITIME TEL & TEL (MT&T) AND THE ATLANTIC COMMUNICATION & TECHNICAL WORKERS' UNION (AC&TWU)**
>
> 1. **FLEXIBLE WORKFORCE** - THE COMPANY IS INTERESTED IN OPPORTUNITIES TO IMPROVE WORKFORCE FLEXIBILITY RESULTING IN A CROSS-FUNCTIONAL, SKILLED WORKFORCE THAT COVERS MULTIPLE AREAS OF THE BUSINESS TO MEET CURRENT SERVICE REQUIREMENTS AND OPPORTUNITIES FOR FUTURE CITE (COMMUNICATIONS, INFORMATION, TRANSACTION & ENTERTAINMENT) BUSINESS.

2. **COMPETITIVE COSTS** - THE COMPANY MUST BE ABLE TO ALIGN ITS COSTS TO THE MARKETPLACE TO MAINTAIN COMPETITIVENESS.

3. **LABOUR / MANAGEMENT RELATIONSHIP** - THE COMPANY IS COMMITTED TO WORK WITH THE UNION TO REACH A COMMON UNDERSTANDING AND AGREEMENT OF CORPORATE GOALS AND A COMMON INTEREST IN ACHEIVING THESE GOALS.

**The proposals contained under the four sections of this document are related to the accomplishment of these three main elements as well as some administrative details.**

I note the reference to "future CITE (Communications, Information, Transaction & Entertainment) business", which is the "business" that is the focus of the Grievances before me.

The Union documents setting out its proposals include:

**1998 Proposal - Clerical Section**

**Amend 15.11 to read as follows:**

No bargaining unit work will be contracted out ***or farmed out where regular employees in the bargaining unit are subject to layoff or on recall and who have the ability to do the work.***

**1998 Proposal - Craft Section**

**NEW - New Technology**

***When the Company is creating or going into new business, they will not farm out or contract out said work. The Company will train the unionized employees to do said work.***

Counsel for the Employer argued that the Union had made different job security proposals for each part of the Collective Agreement, and that none of them went as far as the Union claimed, in the Grievances before me here, it in fact achieved in

Appendix E and Appendix M; i.e that the Employer could never contract out CITE work. These proposals appear to me to state the reach of the Union's proposals. Whether, on the face of them, they propose the CITE work will never be contracted out is a matter of interpretation. Certainly, they propose that CITE work will not be contracted out as the Employer creates or moves into new CITE areas.

The Employer's proposal, dated January 7, 1999, in response to this "New Technology" Union proposal for the "craft part" was:

> The Company reserves the right to chose which businesses it will enter and exit. The Company will provide opportunities to bargaining unit employees for work in new businesses when the requisite skills are available at market rates.

Dated January 22, 1999, the Employer put forward two new proposals which dealt explicitly with contracting out aspect of the Union's proposal, which would involve the Union but which conceded nothing in terms of decision making power:

> **Contracting Out**
>
> In cases where regular employees are on layoff, the Company will meet with the Union prior to the engagement of new contractors to do work that is normally performed by these employees. The purpose of the meeting will be to explain the issues involved and discuss options available as per the Letter of February 16th. [which dealt with workforce reduction, and now appears as Appendix K to the "craft part" of the Collective Agreement]

> **Contracting Out**
>
> In cases where the Company would see a requirement for layoff, the Company will meet with the Union, prior to the engagement of contractors to core business areas. The purpose of the meeting will be to discuss options available as per the Letter of February 16th.

At some point in that period the Union put forward a proposal which introduced "CITE" to the language on this issue. It tied this to the need for job security and to the self-development of employees, as does the language of Appendix E and Appendix M, as follows:

> The Company agrees that **New Work** generated by MTT by providing CITE services will be the work of the Bargaining Units.
>
> As we move to new technology, it is important to both the Company and the Union to work together to ensure the stability of our present day workforce.
>
> As the Company becomes more flexible, it is essential that the unionized employees share in some of the efficiencies created by both flexibility and new technology. The unionized workers, themselves, may have to contribute some of their own time to help the Company broaden its knowledge base. Some of the employees may choose not to become part of this new training.

This was countered by an Employer proposal, which is in evidence, dated 99-02-04 (which would appear, if the Employer was consistent in its dating practices, to be February 4, but counsel for the Employer said was April 2):

> **New Technology / New Business**
>
> When bargaining unit employees are affected by the Company's decision to discontinue an area of business, they will be provided with an opportunity to transition to new business positions through the acquirement of skills.
>
> When employees move from old business to new CITE positions they shall be paid at market rates, however, when market rates are less than the employees' previous wage rate, consideration to the rate paid will be based on the value of the skills the employees bring to the new job and the effect it would have on the cost structure of the new business.

Between the presentation of this proposal and May 6 the Employer proposal was further developed to the point where it took on the general shape of Appendix M to the "craft part". According to Mr. Nunn, the hiatus in bargaining resulted from the announcement of the merger of MTT into Aliant. There is no dispute that the

bargaining for the "craft part" took the lead, and that Appendix E to the "common part" was intended to mirror its language in so far as it is relevant to other bargaining units, and to have the same effect for purposes of the issues before me here. In any event, on May 6 the Employer's Chief Negotiator presented the following proposal:

> **Letter of Intent Re: New Technology / New Business Opportunities**
>
> New technology and new business ventures create employment opportunities. *These new employment opportunities will be considered as unionized positions* under the following terms: first as opportunities for surplus employees; second as opportunities for employees affected by the Company's decision to discontinue an area of business. This may also include job postings and new hires for unionized positions. [italics added]
>
> It is agreed to involve the Union in discussions to assess the options that will allow us to bring new business and new opportunities inside the Company. The union will be involved at the point that Network Operations are asked to input to the business case with respect to their ability to step up to the new opportunity. These new employment opportunities for bargaining unit employees will, through the acquirement of skills, be used to minimize job loss. A wage protection plan for existing employees will be provided through the transition period.
>
> When employees move from old business to new opportunities they will be paid at competitive rates based on the business case. However, when those rates are less than the employee's previous wage rate, the previous rate will be maintained for a period of twelve (12) months for all employees. ... [with an elaborate arrangement for transitioning down over 36 months]
>
> When the Company has exited an area of business the classifications or job titles in which no work has been performed for twelve (12) months will be removed from the Collective Agreement.

To a significant degree bargaining over these matters was concerned with the words, "These new employment opportunities will be considered as unionized positions", which I have italicized in the first paragraph of the proposal just quoted. I note that this was the first use of the word "positions", to which I return below in

determining whether the work that is the subject of these Grievances was "CITE work".

The next day, May 7, the Union put forward a rather different proposed **"Letter of Intent Re: New Technology / New Business Opportunities"**. Mr. Grant emphasized in his testimony that the use of the word "will" was regarded by the Union as very significant. I set out here only the first third of the Union's proposed letter of intent:

> All new technology and new business ventures created by MTT will create employment opportunities for the unionized workforce. These new employment opportunities will be unionized positions and these positions will be filled under the following terms:
>
> 1. First as opportunities for the surplus employees as identified pursuant to the letter of February 16, 1996.
>
> 2. Opportunities for employees affected by the company's decision to discontinue doing the work and having it done by a contractor, subject to the Collective Agreement.
>
> 3. Job posting as per the Collective Agreement.
>
> 4. New hires for unionized positions.
>
> It is agreed that the Company will have meaningful discussion with the Union concerning terms and conditions of employment for these new employment opportunities prior to the establishment of the aforesaid terms and conditions. ...

The Employer responded that same day with what is identified as a "Draft Company Counter Proposal" that differed from the quoted portion of the Union's proposal only in the critical opening paragraph:

> New technology and new business ventures created by MTT that create employment opportunities for the unionized workforce will be filled under the following terms:

The Union insisted on its language for this paragraph and on May 10 the Employer suggested a return to "some of the words" from its own May 6 version:

> New technology and new business ventures create employment opportunities. These new employment opportunities will be considered as unionized positions under the following terms:

On May 17 the Employer put forward for review and discussion both its May 7 and its May 10 versions, although the word "as" had been dropped from the May 10 version. There is no evidence on whether either or both parties thought this to be a change of any significance.

On May 26 the Union put forward the following:

> The Company agrees that all non-management CITE positions shall be placed in one of the bargaining units. These positions shall be filled in accordance with the job posting provision or any other provision of the Collective Agreement.

The remainder of the Union proposal of May 26 is also important, because it makes it clear that at this stage the Union was seeking significant substantive, not merely procedural, rights in the proposed letter of intent, or at least that it was putting the Employer to the test on this point. After allowing for new hires where vacancies are not filled internally, the Union's proposal continued:

> The wage rates for the CITE positions will be initially set by the Company. If the Union is dissatisfied with the rate set the dispute will be referred to arbitration in accordance with 20.1 of the Common Section of the Collective Agreement.

> The arbitrator will have the authority to reset the rate of pay. It shall not exceed the rate proposed by the Union or be less than the rate proposed by the Company.

The Employer's proposal of the next day, May 27, demonstrated no movement in this direction, but took on very much the appearance of what is now Appendix M in the "craft part" of the Collective Agreement, not just in the opening paragraph but in what are now paragraphs 3-8. There were, however, still critical differences in what are now paragraphs 1 and 2:

> **New Technology / New Business Opportunities**
>
> For the purpose of this Article, CITE means the new positions created as a result of the Company expanding its provisioning of services in Communications, Information, Transactions and Entertainment.
>
> MTT's movement to CITE will create new unionized job opportunities. As these job opportunities arise, the Company will discuss with the Union full details of the new employment opportunity. This will include rates of pay and job skill requirements, so that both parties can proceed forward with an understanding of the requirements for the new business opportunity.

The third paragraph provided, much as Paragraph 3 now does:

> The CITE positions shall be filled in accordance with the job posting provision of the Collective Agreement. In the event that no internal employees fill the vacant positions the jobs may be filled by new hires.

On May 27 the Union countered with wording that accepted the wording of the Employer's introductory paragraph and of this third paragraph, except "may", the sixth word from the end, was changed to "will". The arbitration mechanism had disappeared. The changes suggested to the second paragraph were only the following:

> MTT's movement to CITE will create new unionized job ~~opportunities~~ *positions*. As these job ~~opportunities~~ *positions* arise, the Company will *have meaningful* discuss*ion* with the Union ~~full details of the new employment opportunity~~. This will include rates of pay and job skill requirements, so that both parties can proceed forward with an understanding of the requirements for the new business opportunity.

In the fifth paragraph, dealing, as Paragraph 6 of Appendix M now does, with the exiting of non-core business, the Union's May 27 proposal concluded with the sentence, "The Protection provided by the Collective Agreement must never be diminished". This phrase was never agreed to by the Employer.

By June 1 the word "positions" had become part of the shared text between the parties and the Employer had introduced the words italicized in the quote below. These words do support the submission by counsel for the Employer that, generally, Appendix E and Appendix M were intended to be facilitative. By June 7 the shared version of what is now paragraph 2 of Appendix M dated June 7, 1999 otherwise reflected the Employer's May 27 proposal:

> MTT's movement to CITE will create new unionized job positions. As these job positions arise, the Company will discuss with the Union *full details of the quality and cost of service we wish to provide within the competitive business*. This includes rates of pay and job skill requirements *and the retention of skilled employees*. This will allow both parties *the flexibility to deal with these new CITE positions*.

On June 7 the word "Permanent" was introduced to paragraph 3, modifying "CITE positions".

The shared version of the Letter of Intent dated June 8, which is in evidence, is what is now Appendix M to the "craft part" of the Collective Agreement. The

paragraphs had been numbered and two bolded phrases had been agreed upon and inserted into the June 7 language. The first is critical to the Grievances before me:

> 2.) MTT's movement to CITE will create new unionized job positions **which shall be part of the bargaining units**. As these job positions arise, the Company will discuss with the Union full details of the quality and cost of service we wish to provide within the competitive business. This includes rates of pay, job skill requirements and the retention of skilled employees. This will allow both parties the flexibility to deal with these new CITE positions.
>
> ....
>
> 4.) It is essential for MTT to focus available resources on CITE growth positions. Therefore, MTT must be able to exit declining non-core business units. **The non-core classifications are limited to the following:** ...

For the Employer, James Nunn testified that the Employer considered the insertion of the phrase "which shall be part of the bargaining units" a minor change. Gary Grant agreed in cross-examination that there was virtually no discussion of this insertion on June 8 but testified that there had been "endless" discussion of the issue prior tot that. He was adamant that the inclusion of the word "shall" as it appears in this phrase was key for the Union's bargaining team.

The phrase "which shall be part of the bargaining units" (although using the words "placed in" rather than "part of") first appeared in the Union's May 26 proposal, which called for a very different commitment than the Employer was prepared to make. I have difficulty accepting that its significance to the Union was not understood by the Employer's bargaining team, particularly in light of the exchanges around the wording of this paragraph between May 26 and June 8, not all of which are set out above.

Mr. Nunn's testimony was that the phrase "which shall be part of the bargaining units" was inserted into paragraph 2 of Appendix M and Appendix E in recognition of concerns arising from the merger of MTT into Aliant. Several months earlier, in late March or early April, Bruce Lambert, then the Business Manager for the Union and its chief negotiator, was concerned about the effect of the merger on the Collective Agreement that would be the product of the bargaining. He proposed language to make it clear that Aliant, now the Employer, would be bound. The text of his proposal was:

> For Common Section of the Collective Agreement (White Pages)
>
> Add:
>
> 1.6 The parties to this Agreement are the Atlantic Communication & Technical Workers' Union (the "Union") and MT&T and any successor employer (the "Company").
>
> 1.7 (a) The parties agree that this Collective Agreement applies to all work, jobs, occupations, job titles and classifications which are the work, jobs, occupations, and classifications, job titles of MT&T at the date of the signing of this Agreement, and to such additional work, jobs, occupations, job titles and classifications as may be added during the life of this Agreement.
>
> (b) The parties agree that all work normally performed in the Province of Nova Scotia by MT&T at the date of the signing of this Agreement shall continue to be performed in their exclusive work and in the exclusive jurisdiction of the Union for the duration of this Agreement.
>
> (c) The parties agree that all work normally performed by in the Province of Nova Scotia by MT&T at the date of the signing of this Collective Agreement shall continue to be performed in the Province of Nova Scotia by the Union in accordance with this Agreement.
>
> (d) The Company agrees that no work normally performed by the bargaining units covered by the Collective Agreement at the date of the signing of this Agreement shall be transferred, contracted out, or in any other way divested such that this work is performed by any other portion of the Company outside Nova Scotia or by any other employee either inside or outside Nova Scotia.

Dwight Isenor, the Employer's chief negotiator, responded in writing on April 5, as follows:

> The company acknowledges you concerns regarding the merger announcement. However, with reference to your proposed agreement titled. " For Common Section of the Collective Agreement (White Pages) ' we are not willing to sign such a document.
>
> Such an agreement could position MT&T in a role supporting on union over another. We have clearly indicated that our position will be to remain neutral.
>
> The issues you have outlined in the proposed agreement are and continue to be issues presently being negotiated; therefore we should allow this process to go forward.
>
> The Company, in announcing the merger, has indicated to the Union that as a result of the merger there will be little or no impact to the unionized workforce.
>
> The Company's wish is to continue on with the negotiations and to get a signed contract which we intend to honour as we have in the past.

Mr. Nunn testified that the purpose of insertion of the phrase "which shall be part of the bargaining units" was to assure the Union that the work in question would not go to other parts of Aliant. If that was their purpose, those words seem curiously inapt.

Mr. Nunn also stated that the only discussion between the parties about contracting out was that Union was adamant that the language of Article 6.3 of the "craft part" of the Collective Agreement had to stay. Employer's counsel asked rhetorically; "Why would Employer have given up a principal bargaining stance with no discussion?" Why did the Union not make it clear to the Employer what it thought it was getting?

It is clear, however, that there was a great deal of discussion around exiting non-core business, which Mr. Nunn must have meant to exclude from this characterization of the course of bargaining. Unfortunately, on this key point I have no testimony from either of the chief negotiators. Mr. Isenor, who has since retired, was not called by the Employer and Mr. Lambert, who is still employed by the Employer but is no longer a Union official, was not called by the Union. On the evidence before me, I do not accept that it is accurate to say that there was no discussion round contracting out in the context of the negotiation of the Appendix E and Appendix M.

**Decision on the Employer's obligations under Appendix E and Appendix M with respect to contracting out.** The most obvious or usual meaning of the words "MTT's movement to CITE will create new unionized job positions which shall be part of the bargaining units" in Appendix E and Appendix M is that as those "job positions" are created they are to be part of the work of employees in the bargaining units covered by the Collective Agreement. In context, the words "will create new unionized job positions" are predictive, not promissory. But there is no obvious way to read " which shall be part of the bargaining units" as being other than promissory. It is apparent from the history of the negotiations that resulted in Appendix E and Appendix M that one of the roots of those negotiations was the Union's concern, as expressed in its original proposals, that as the Employer got into "new business", it would not "farm out or contract out" the work involved. I therefore do not accept the Employer's submission that to interpret Appendix E and Appendix M as limiting contracting out is to give the Union more than they had ever sought.

I note that counsel for the Union submitted that the words "will create new unionized job positions" are also promissory. He argued that in his testimony under cross-examination Mr. Nunn had agreed that the word "will" is "mandatory" and that in introducing this phrase in the course of bargaining the Union was seeking to impose a positive duty on the Employer. I accept that at one point in his cross-examination Mr. Nunn did agree with those propositions when they were put to him by counsel. However, the whole thrust of Mr. Nunn's testimony was to the effect that such was not his understanding of what the Employer agreed to in the end.

As I have already stated, the most readily apparent meaning of the words "will create new unionized job positions" in paragraph 2 of Appendix E and Appendix M is that they are simply predictive. If they were held to be promissory, the promise they entail would be so broad and vague as to be unenforceable in any event. I hold them to be simply predictive of what will happen. In fact, up to the time of the hearing in this matter, they had proved not to be a very good prediction, but that is irrelevant to this ruling.

On the evidence, the right to contract out appears to have been very much on the minds of the parties during these negotiations, so I cannot accept the suggestion that this was something that came out of the blue, and must therefore be given no significant meaning. The Employer was very much concerned with getting out of non-core areas of its business, particularly those now listed in paragraph 4 of Appendix M to the "craft part" of the Collective Agreement. I agree with the statement of counsel for the Union, that paragraph 4 simply allows the Employer to contract out the work of the classifications listed there free of the constraints of Article 6.3. It says nothing about core work, or CITE work.

The constraints of Article 6.3 were, and are, very real, and the Employer was further limited by the restraints Article 6.5 places on temporary layoffs. The parties had been unable to negotiate any special arrangements for the print-shop employees in particular. Starting on May 5, 1998 and continuing intermittently until April 19, 1999, the parties were involved in hearings before arbitrator Susan Ashley on the issue of whether the Employer had "constructively laid off" print shop employees whose work had been contracted out, but who had been kept on the pay-roll although they were given no work to do. I note that the learned arbitrator's award finding that there had been no "lay-off" of the print shop employees and that the Employer had not otherwise breached the Collective Agreement by acting, as the Union had alleged, "unreasonably", was made on June 14, 1999, six days after the parties signed off on Appendix E and Appendix M.

Counsel for the Employer cited arbitration awards to the effect that if a collective agreement is to be interpreted as limiting an employer's right to contract work out there must be clear language to that effect. The *Sealy* award (1982, Hope, Chair), quoted above, was one of the earliest arbitral authorities she relied on. The board there stated, at p. 370, following the passage already quoted:

> ... The requirement for clear language in order to inhibit or obstruct the right of the employer to conduct its business in any way it chooses was summarized by the Labour Relations Board of British Columbia in Federated Co-operatives Ltd. and Retail, Wholesale & Department Store Union, Local 580, [1980] 1 Can. L.R.B.R. 372...as follows:
>
> > ... since the seminal arbitration award in Re United Steelworkers of America and Russell Steel Ltd., (1966), 17 L.A.C. 253 (Arthurs, Chairman) it is safe to say that 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.

*Russell Steel* and a number of subsequent awards to the same general effect as *Sealy*, many of which were put before me here by counsel for the Employer, were reviewed by Arbitrator Bruce Archibald in his 1989 Award between the predecessors of these parties reported at 8 LAC ($4^{th}$) 22. In that award he concluded that the following language did not prohibit contracting out:

> 2.5 UNION SECURITY
>
> The company agrees that persons employed outside the Bargaining Unit shall not for the duration of the Agreement perform work which is performed by Union members except in a situation which is an emergency.

After considering the history of the negotiation on the Collective Agreement before him, the learned arbitrator held that this provision was intended to prevent the encroachment on bargaining unit work. To extend it to contracting out would be, he said "ambush by arbitration".

My conclusion is that the language of the second paragraph of both of these letters of intent addresses contracting out. In summary, it means that, as a starting point, the Employer must make non-management CITE work, whatever that is, part of the work of employees in the bargaining units to which the Collective Agreement applies. It cannot contract the work out without dealing with the Union, presumably in good faith, on the terms and conditions of employment for the CITE work in question. Subsequent to that, whether or not the parties reach agreement on the terms and conditions under which the CITE work is to be done, the Employer is governed by the Collective Agreement. It has neither more nor less right to contract the work out than it has with respect to any other work done by employees in the bargaining units.

Although Appendix E and Appendix M do not use the specific term "contracting out", to conclude that in agreeing that "new unionized job positions" "shall be part of the bargaining units" the parties intended to limit the Employer's right to proceed directly to contract out new CITE work is simply to give effect to language which is reasonably clear, to that extent at least. Notwithstanding Mr. Nunn's testimony as to his understanding of the purpose of the words, the course of the parties negotiations makes it clear that this was not "ambush by arbitration", although the Employer might be thought to have given in on this point without much of a battle at the end.

Counsel for the Union, on the other hand, submitted that it would make no sense to conclude, as I have, that the language in question precludes the Employer from contracting out the new "job positions" initially, but does not preclude the Employer from doing so once it has brought those new "job positions" into the bargaining units and conducted the required discussions with the Union. He argued that in agreeing that the Employer could exit the non-core positions set out in paragraph 4 of Appendix M and, in paragraph 8, that non-core job classifications with nobody in them could be removed from the Collective Agreement "at the next round of bargaining", the Union had given up a great deal, which it certainly would not have done if it had been the understanding that it had gained so little. I have considered this submission but am unconvinced by it.

In my view my conclusion here makes as much sense as does applying the contracting out clauses in the Collective Agreement to any of the other work done by members of the Union. In the "craft part", for example, the requirements of Article 6.3 must be met, as must any other limitations on contracting out work under that part, and those limitations are serious.

**The "emerging issues" letter.** In reaching these conclusions I have considered the "emerging issues" letter or memorandum of understanding, as it is headed, prepared by David Rathbun, MTT's Vice-President of Human Resources at the time, and presented to the Union on July 8, well after June 8, when, on the evidence, the negotiating teams had settled on what is now the language of Appendix M. The letter provides spaces for the signatures of Mr. Lambert and Mr. Grant on behalf of the Union as for those of Mr. Rathbun and Mr. Isenor for MTT. It was never signed.

The Union argued that the emerging issues letter proved that once the Employer realized what its negotiators had committed it to, it sought to back-peddle. The Employer relied on this letter as evidence that the Employer never thought Appendix E and Appendix M precluded contracting out in the way the Union says it does. It relied on the testimony of both James Nunn and Allana Loh, Industrial Relations Advisor with the Employer, who, as well as developing language for the current Collective Agreement, kept the Employer's notes of much of the bargaining. Both testified that the letter was offered as part of a "wrap-up" meeting, and was intended to clarify the position the parties had reached when they had "signed off on CITE". Ms. Loh's notes, which are in evidence, as well as her testimony, indicate that the Union negotiators, and Mr. Grant in particular, took no exception to the language of the letter, although he was clear that the Union "could not sign" the letter without considering it. After considerable detailed discussion about provision for part-time and seasonal employees, Mr. Lambert stated that he could not sign the letter "without running it by my crew".

In response to the Union's argument that the letter was an attempt to back-peddle, counsel for the Employer asked why, then, did the Employer sign a Collective Agreement that included the words here under dispute, even though the Union had refused to sign the emerging issues letter.

The emerging issues addressed in the letter are "New Company Investments and Acquisitions", "Distribution Channels" and "Operational Efficiencies". The most relevant passages are under the heading of "New Businesses":

> It is understood that the company, in order to support its growth agenda, must introduce new businesses in a timely and profitable way. It is also understood that the union considers it essential to protect the job security of its members and to grow its membership. This goal is materially threatened in an environment where increased competition is likely to lead to less market share, loss of business and shrinking margins, especially in traditional markets. Consequently the union is very interested in the company's goals to evolve to CITE.
>
> New businesses may be developed internally, provided by third party vendors, acquired through strategic partnerships through the acquisition of companies and so on. ... It is no longer a given that the jobs associated with these new businesses will go to union members. ...
>
> The company **with the Union** will carefully review new business introduction processes to include a thorough analysis of their impacts on the union's expectations. This does not mean that all future jobs should go to the union but rather that the company carefully define what skills **and required training** costs, productivity levels and speed to market that would be required to support new businesses. ... When the union can satisfy the requirements associated with the provision of service and support for new businesses, immediately or with appropriate training, our unionized employees will be strongly considered for these roles. This is a philosophy and a guideline rather than a rule because there may be circumstances where some jobs cannot be given to the union, or at least, not right away.

Under the heading "Conclusion" is the statement "The company and the union will adopt the following framework for dealing with these emerging issues:" followed by three paragraphs, the salient parts of which are:

> ... the difficult decisions, which must be made by both parties, have a better chance of being complementary if all the issues are **clearly reviewed and discussed with the Union.**
>
> The company is committed to ensuring that the opportunities for the CITE jobs, which are necessary in the provisioning of service and support for new businesses, are strongly considered for union members provided that the underlying issues of cost, quality, productivity, **training** and speed to market are met. This will be reflected in the various processes used to introduce new products and services whether these are developed internally or acquired through other means. ... [emphasis in original]

As I said, I have considered this letter, and the submissions with respect to it, in reaching my conclusions here. The Union refused to sign, so this letter cannot be taken to reflect the mutual expectations of the parties. The fact that the Employer signed the Collective Agreement, with the language currently under dispute unchanged from June 8, is at best ambiguous. It may be that the Employer concluded that it had what it needed, or it may be that it concluded that it could do no better without destroying the consensus it had achieved with the Union.

I do not think this unsigned proposed letter of intent is of assistance in dealing with the other issues to which I return below, so I will not refer to it in those connections.

**The Collective Agreement Q and A.** A couple of weeks after the signing of the Collective Agreement on August 3 the parties jointly produced a document entitled "Collective Agreement Q and A" which carries on its front page the self-explanatory words "This document does not contain all changes to the Collective Agreements. It is intended only to clarify some new language and answer some anticipated questions." The Union relied on the text of this document to support its submissions as to what the parties had intended in agreeing to the language of

Appendix E and Appendix M, both of which are set out verbatim in the document, as "new language". The evidence is that this "Q. and A." was widely used in selling the new Collective Agreement to the Union membership.

The most directly relevant parts of the "Q. and A." document are contained in the first section directed to the "common part" of the Collective Agreement, including Appendix E. What is said there is applicable to Appendix M and is not repeated in the section on the "craft part", where Appendix M is set out. On pp. 6 and 7, under the heading "Letter of Intent New Technology / New Business Opportunities", the following appears:

> Q. What is the new work that the letter addresses?
> A. This new work is unionized job positions created as a result of MTT extending its provisioning of services in CITE.
>
> Q. What bargaining unit will this new work go into?
> A. The Company will determine the bargaining unit to which the new work applies based on the current job descriptions and definitions and will review this with the Union. Significant variations from the job descriptions and definitions will be discussed with the Union prior to the placement of the new work in the bargaining unit.
>
> Q. What will be the rate of pay?
> A. The rate of pay will be determined based on the quality and cost of service we wish to provide within the competitive business.
>
> Q. What level of skills will be required?
> A. Job skill requirements will be established for all new unionized positions. The Company and the Union will discuss full details of new positions.
>
> Q. How will these jobs be filled?
> A. The new CITE positions will be filled in accordance with the job posting and transfer provisions of the Collective Agreement. If the jobs are not filled within the Company, new hires may be considered.
>
> [3 Q and A's re training; specifically the Self-Development Program referred to in paragraph 5 of Appendix M]
>
> Q. Why did the Union put such strong emphasis on this new work?

> A. From all indications from the Company, our legal advisors and other unions across North America, it is of the utmost importance to get these new jobs into the bargaining units to secure the future of our unionized members and our union.

Mr. Grant in his testimony and Counsel for the Union in his argument invoked particularly this last question and the answer to it in support of the Union submission that Appendix E and Appendix M should not be interpreted as allowing the Employer to ever contract out CITE work. Why, they asked, would the Union have placed such emphasis on getting this work into the bargaining units if it was the intent of the parties that the Employer could contract it out "the next day". How could such an intent be attributed to the Union, and does this evidence not indicate that such was not the Employer's intent either?

As a starting point, the intent of the parties must, of course, be taken to be that which they have manifested in the words agreed upon in the Collective Agreement, not in some subsequent document. Nevertheless, where the words of the Collective Agreement are ambiguous, subsequent behaviour, which could include an explanatory document like this "Q. and A.", may be taken into account, if it is of sufficient relevance, just as negotiating history is taken into account. *See Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 41 and 42:

> *Ex post facto* evidence is admissible only if relevant to the case. In *Cie minière Québec Cartier v. Quebec (Grievances Arbitrator)*, [1995] 2 S.C.R. 1095, L'Heureux-Dubé J. applied precisely this principle when reviewing an arbitrator's decision on an employee's dismissal grievance.
>
> Relevance is determined on the basis of what must be proved in an action.

Whether subsequent behaviour is relevant depends on whether, logically, it has value in determining what the parties' mutual intention was at the time of signing the Collective Agreement. If, as a matter of fact, the parties did agree on the

language in an explanatory document which addresses and clarifies the ambiguity in issue, it would be relevant. (I do not address the related legal issue of when one of the parties may be estopped by its representations of what a collective agreement means, when the other party has relied to its detriment on those representations.)

The Employer submitted that none of the language of the "Q. and A.", including on the last item quoted above, supported the Union's position that what the parties had intended was that the Employer would never be able to contract out CITE work, and Mr. Nunn testified that he had never heard the "Q. and A." being given that interpretation in the session with supervisors and shop stewards that he attended.

I find that the language of the "Q. and A." supports the Union position that new CITE work was to be brought into the bargaining units. I am, however, unable to find in its words, any more than I can in the words and Appendix E and Appendix M themselves, any unambiguous indication that the parties mutually intended to detract from or add to provisions elsewhere in the Collective Agreement relevant to contracting out.

**Conclusion on the Employer's obligations under Appendix E and Appendix M with respect to contracting out.** As I stated above, Appendix E and Appendix M mean that, as a starting point, the Employer must make any non-management CITE work it undertakes, whatever that is, part of the work of employees in the bargaining units to which the Collective Agreement applies. The Employer cannot contract the work out without dealing with the Union, presumably in good faith, on the terms and conditions of employment for the CITE work in question. Subsequent to that, and whether or not the parties reach agreement on the terms

and conditions under which the CITE work is to be done, the Employer is governed by the Collective Agreement. It has neither more nor less right to contract the work out than it has with respect to any other work done by employees in the bargaining units.

Whether, on this interpretation of Appendix E and Appendix M, the Employer has sufficient flexibility to be competitive in a difficult business environment and whether the Union's members have sufficient job security are not questions for me to answer. They are hugely important issues for both parties; issues upon which they have been struggling to find compromises for the last decade and issues that may never be settled to the satisfaction of either, let alone both.

As the Collective Agreement now stands, new CITE work taken on by the Employer must be brought into the bargaining units, the Employer must discuss the matters set out in paragraph 2 of Appendix E and Appendix M with the Union and fill permanent CITE positions in accordance with paragraph 3. Whether or not it has done those things appear to me to be questions that are properly the subject of the Grievance Procedure, although reaching a rational conclusion may not be easy. There will always be the question of whether the work in question is CITE work; the issue to which I turn below in relation to the Grievances before me here.

Beyond that, at one extreme the Employer may claim that it has not "expand[ed] its provisioning"; that it has left the work in issue to be done by another corporate entity. If there is a corporate or contractual relationship with that other corporate entity such a claim may give rise to a grievable issue. At the other extreme, if, as was the case with the introduction of digital TV, the Employer simply uses employees in existing classifications at the rates set out in the Collective

Agreement, the Union may think there is nothing to complain or grieve about, even if it was not consulted. Those are matters of process between the parties.

If, at any subsequent stage, the Employer contracts any CITE work out it must do so in accordance with the applicable part of the Collective Agreement; Article 6.3 of the "craft part", Article 14.9 of the "clerical part" and any other special provisions in Appendix M or any other part of the body of the Collective Agreement or its appendices.

**2. Was the work on the Sympatico dial-up help desk and the line and splicing work in question CITE work subject to Appendix E and Appendix M?** There are two instances of contracting out that are the subjects of these grievances. The first, which is the subject of Grievance 01/01 filed by the Union on February 6, 2001, involved a contract with Cablecom Ltd. under which its employees worked on the Employer's broad band high speed internet connection project from February 12 to March 16, 2001. Although that was the first grievance I have chosen to deal with it second.

**Decision on work on the Sympatico dial-up help desk.** The second instance of contracting out before me is the subject of Grievance 01/05 filed by the Union on November 8, 2001. It involves a contract with I.C.T Ltd. of New Brunswick under which the work of the Sympatico dial-up help desk has since been done by employees of that company.

From 1995 to 1998 the Sympatico dial-up help desk service was provided to MTT customers by Bell Ltd.. In June of 1998 it was brought in house. From the point of view of the Collective Agreement this was accomplished by a letter of agreement

between the parties. The parts of that letter that seem to me to be most relevant here are:

> This is an agreement between MT&T and the AC&TWU Clerical Workers. It has been established based on Appendix F of the Collective Agreement and the commitment to work jointly to avoid permanent lay-offs.
>
> This agreement will be effective from March 1, 1998 to March 1, 2001.
>
> The Company and the Union have agreed to create three new job titles; ... at specific rates of pay and under such conditions that the Company many compete for work currently not performed by the bargaining unit.
> ...
> These new job titles will not be subject to the posting process.
> ...
> We have agreed that initially all these positions will be filled with temporary employees and that there will be unlimited use of temporary employees in these positions.
>
> Temporary employees will be allowed to remain in these positions indefinitely until replaced by regular employees. Regular employees that have been declared redundant may displace these temporary employees.
> ...
> All other conditions of the Collective Agreement will apply.

Since the signing of this letter no laid off clerical employees have responded to the some 52 postings of Help Desk jobs.

In April-May 2000, after the announcement of the merger of MTT into Aliant, the Employer decided to replace the temporary help desk employees with permanent employees. The jobs were evaluated and a new pay level set. Permanent jobs were posted in early May of 2000. The hiring of full and part-time employees for these jobs grew rapidly, with many of them moving on to other jobs with the Employer, so that there was a great deal of "churning".

However, since January of 2000 the Employer's broad band high speed business had been growing rapidly and its Sympatico dial-up business had been growing but at a slower rate. For a while the Help Desk served both, but it became apparent that the two required different skills and training. In the summer of 2001 the Employer decided to contract out work on the Sympatico dial-up help desk and concentrate in house on help desk services for its broad band high speed internet customers across the four merged telcos. From October 2001 on any person hired as a Help Desk Support Clerk got a letter making it clear that he or she was hired on a temporary basis with an expected termination date of December 31, 2001, although in orientation they were told that in the past many temporary employees had become regular employees.

The RFP for the contracting out was issued in November 2001, and that prompted the Union's Grievance. The parties to the contracting out signed a letter of intent on December 6 and the contract itself was signed February 11, 2002, two days before the interim hearing before me, at which I denied the Union's application for injunctive relief. The contracting out of the Sympatico dial-up help desk turned out to be delayed until February 28, 2002. From then on there has been virtually no Sympatico dial-up help desk work performed by employees of the Employer. The point of contact for customers is still an Aliant telephone number and there are still some aspects of the Sympatico dial-up customers concerns, such as billing, that are dealt with by the Employer's continuing in house help desk, although it services almost entirely broad band high speed internet customers. The details of these connections between the I.T.C. Ltd. Help Desk and the Employer's continuing in house help desk do not seem to me to be relevant.

The evidence is that since the contracting out of the work of the Sympatico dial-up help desk there have been no regular employees laid off.

Because I have concluded that Appendix E and Appendix M do not preclude the employee from contracting out CITE work once it has been brought into the bargaining units in accordance with the requirements of those letters of intent, I must dismiss the Union's Grievance 01-05 dated November 8, 2001. Clearly that work had been brought within the bargaining units and was therefore not immune from being contracted out, provided Article 14.9 of the "clerical part" of the Collective Agreement was respected. There was no evidence or argument that such has not been the case. Therefore, even if I were to find that work on the Sympatico dial-up help desk was CITE work, which I do not, or that it could have been intended to be covered by Appendix E, which I do not think could have been the case, I would hold that the Employer has not breached its obligations in relation to that work.

Mr. Grant testified that the Employer had held out that work on the Sympatico dial-up help desk was CITE work. He and counsel for the Union stressed that in the video produced by the Employer and shown to its employees about "the move to CITE" the Sympatico dial-up help desk appears. Mr. Nunn testified that the Sympatico dial-up help desk had simply been put forward by the Employer as an example of the kind of arrangement it contemplated arising under Appendix E and Appendix M; a situation where the Employer had gone into new work in which it had only been able to be competitive because the Union had agreed to change the existing rates of pay, skill requirements and so on.

The evidence is clear that the special arrangement for the hiring for the Sympatico dial-up help desk was made long before the CITE language now found in Appendix E and Appendix M was put on the table between the parties. I do not find it to have involved unionized job positions that were "new" after the time of the signing of the Collective Agreement. While permanent jobs on the Sympatico dial-up help desk were posted in May of 2000 the job positions there were "unionized" from the outset, in that the arrangements for pay and other terms and conditions of employment were agreed with the Union and the employees were in the bargaining unit. Thus that work was not "CITE work", although, had Appendix E been in place in 1998 when the Employer brought that work in house, it would have been.

I also accept alternative submission by counsel for the Employer, which in the case of the Sympatico dial-up help desk work may only be a different perspective on the same point, that Appendix E cannot have been intended to govern the arrangement under which Sympatico dial-up help desk work was to be done because it was already in place when the Collective Agreement was signed. There is nothing to indicate that Appendix E or Appendix M is to have retroactive effect. Indeed, their whole tenor is the opposite; entirely forward looking. The move in May 2000 from the use of temporary to permanent employees to do the work on the Sympatico dial-up help desk was not the creation of new unionized positions. It was a change in the status of unionized positions.

I accept that Mr. Grant and the Union generally may have thought that Appendix E to the "common part" of the Collective Agreement applied to the Sympatico dial-up help desk. The video may have furthered this misunderstanding and Mr. Nunn's testimony was that the Union negotiators were never told that Appendix E did not

apply to the Sympatico dial-up help desk, but I cannot, on these bases, conclude that it did apply to the contracting out of the work on the Sympatico dial-up help desk. The letter agreement between the Union and the Employer, which must be regarded as part of the Collective Agreement, was in place before the parties even started negotiating Appendix E.

**Decision on line and splicing work on copper and fibre cable to carry broad band high speed internet connection and digital TV.** The actual contract document, which is in evidence has as its title "PLACE DTV FACILITIES KEARNEY LAKE ROAD" and as "Nature & Necessity of Work" states;

> THIS JOB PROPOSES TO PLACE FIBRE AND COPPER CABLE ALONG KEARNEY LAKE ROAD IN THE ROCKINGHAM EXCHANGE.
>
> THIS WORK IS NECESSARY TO PROVIDE DIGITAL TELEVISION SERVICE.

The broad band high speed internet connection, which the Employer markets as "mPowered" delivers a speed of transmission acceptable for the transmission of large amounts of data only up to 4 kilometres from the Central Office in Halifax. Extending the Employer's broad band service therefore requires the installation of WIC's within that distance of the customers to be served. A WIC is a Walk In Closet which, it suffices to say, replicates the Central Office functions such that the "footprint" of the broad band high speed internet connection service can be extended. Fibre cable is used to connect the WIC to the Central Office and mostly copper is used to connect the customers to the WIC. While the use of WICs has greatly increased with the advent of broad band high speed internet connection the Employer has been installing neighbourhood WICs for at least ten years. The

Employer has been using fibre cable for at least 20 years, and, of course, copper wire is traditional.

From February 12 to March 16, 2001 Cablecom Ltd. did the line and splicing work involved in extending the "mPowered" high speed internet connection to new subdivisions on the Kearney Lake Road on the outskirts of Halifax. Cablecom's employees installed cable, connected it to a WIC or WICs and ran connections from the WICs to customers' houses. This involved hanging the cable on new or existing poles and splicing both fibre and copper. All of this is work routinely done by employees in the bargaining unit to which the "craft part" of the Collective Agreement applies.

Cablecom was engaged because the Employer could not otherwise meet public commitments made by its senior management in 2000 to have broad band high speed internet connection available to 70% of the home in Nova Scotia within six months, later extended to June 2001, and then in part to December 2001. The evidence is that this "broad band project" was an ill-conceived commitment, undoubtedly made under competitive pressure, with no serious regard to the availability of the resources, human and material, needed to meet it. A self-imposed commitment could not, of course, relieve the Employer of its obligations under the Collective Agreement, but much of the Employer's evidence seemed directed to convincing me that the Employer simply could not fulfil that commitment without contracting the work in question out to Cablecom. I hasten to add that the fact that the self-imposed commitment was ill-conceived does not mean that in trying to meet it the Employer necessarily breached the Collective Agreement; it simply does not excuse a breach.

There are two possible breaches of the Collective Agreement involved; a breach of Article 6.3 of the "craft part" and a breach of Appendix M. The Grievance before me alleges that "the company is violating the collective agreement and the letter on CITE work by having the CITE work done by non-bargaining unit people" The "Settlement Requested" is "Stop contracting out CITE work immediately and all damages, cost paid". On the face of it this Grievance is, therefore, directed to the alleged contracting out of CITE work, although much of the evidence, it seems to me, is concerned with a possible breach of Article 6.3. While I note that there do not appear to have been any "regular employees, who [had] the actual experience to do the work ... on layoff", I have concerned myself here only with the alleged breach of the Appendix M, i.e. the letter on CITE work, which is, of course, part of the Collective Agreement.

There was a great deal more evidence put before me, by the Union through the testimony of Gary Grant, Victor Fraser and Tim Martin, and by the Employer though the testimony of Micheal Feener and Rose Anne Heatherington, about exactly what work was done by Cablecom, whether any of the employees of the Employer were available to do it, on overtime, by transfer from other parts of the Province and so on, and on what the other demands on the "craft" workforce were at the time. In light of my conclusion here, I do not think it necessary to set out that evidence or make findings of fact beyond what I have already stated.

Counsel for the Employer submitted that line and splicing work is the traditional core work of the "craft" bargaining unit. Alternatively, she submitted even if the work in question could be held to fall within the definition of CITE work it was not the subject of the Letters of Intent because it was being performed by MTT before

the CITE Letters of Intent were negotiated, and the intent behind those letters was to deal with the bringing of new work into the Collective Agreement.

While I have concluded that, with respect to "craft work", the Employer can contract CITE work out, provided it has first made the work part of the bargaining unit and then met the requirements of both paragraph 2 of Appendix M and Article 6.3, I have not decided that, if this was CITE work, the Employer met the requirements of paragraph 2 here. Thus the issue of whether the work in question was "CITE work" and subject to Appendix M must be addressed.

At bottom, the Union's case on this issue was that high speed transmission, of the sort that requires the installation of WICs, is only needed to deliver very data heavy services. Those services include e-mail with large attachments like photographs but it is mainly necessary for using internet websites for music, webcasts, digital movies and the like, which are clearly part of what the acronym CITE stands for. That same fibre and copper installation will continue to carry e-mail and connect to the internet as it has for nearly ten years, and to carry Plain Old Telephone Service, as fibre has done for some twenty years, but these new products cannot be delivered without the broad band high speed internet connection marketed by the Employer as "mPowered". In other words, this sort of installation is necessary to extend the customer's options to include CITE products. Therefore, the Union claims, the installation of that infrastructure is "CITE work". As Mr. Grant stated in his testimony, in the Union's understanding CITE work covered by Appendix M included "any work on infrastructure that has potential to carry new CITE services".

I do not accept that interpretation. It may have been what the Union thought, but there is no evidence that the Employer shared that understanding or even that it was made clear in the course of negotiations that that was the Union's interpretation.

Mr. Nunn testified that in signing the Collective Agreement, and specifically Appendix E and Appendix M, the Employer had no clear idea of what might constitute CITE work. The whole point, he said, was that both the Employer and the Union knew that it was impossible to say where technology and competition might take their business, even over the life of a single Collective Agreement. They were providing for the unforeseeable, where different services requiring different skills in a different market would probably be required if the Employer was to compete.

Mr. Nunn testified that the use of the term CITE in the Collective Agreement had nothing to do with the use of that term in the documentation of the "Polaris Project", which had preceded the negotiation of the Collective Agreement. The Polaris Project was a corporate initiative involving the greater use of fibre cable to allow expansion of the broad band high speed internet connection; "mPowered" as it is called. I do not accept that there was no relationship.

I have considered Mr. Nunn's testimony under cross-examination about negotiations after the hiatus that ended in May, 1999, with respect to the nexus between CITE and the "Training and Self-Development Program" which is now Appendix G to the "common part" of the Collective Agreement. In particular, I have considered the Employer's proposal on this which commences:

> It is expected that this training program will evolve over time. Initially this training will be focused on raising the general level of knowledge of **CITE,** how it relates to the **technology** MT&T uses and the **products and services** we offer our **customers**. It could very well move to a more technically robust format as the process matures and our needs change.
>
> The focus of this training is to be on knowledge and skills that will differentiate our employees in the market place. This training will provide skills that will be transferable to any job that deals in the Communication Information Transaction and Entertainment field. This training will enhance the job-related training provided to employees to deliver on their daily job responsibilities. [emphasis in original]

There follows a diagram which places the "CITE" above and the phrase "Employee Interaction in the delivery of CITE services" below three interacting boxes; "Products & Services", "Technology Platforms" and "Customers". Below, under the heading "Training Topics", the document states:

> In the initial stages the training topics will include things like:
> Computer fundamentals
> Computer internetworking fundamentals
> Internet Protocol based networks
> How technology rich services work (mPowered)
> Technology we use (DMS switches, fibre optics, wireless/cellular

This demonstrably belies any suggestion by Mr. Nunn that there was no connection during negotiations between the concept of "CITE", as it is referred to in Appendix E and Appendix M, and "Technology Platforms", of which the Polaris Project was an example, and is a term that might be thought to include upgraded infrastructure generally.

However, this conclusion does not make the Union's case. It only supports my understanding that the "new positions" referred to in Appendix E and Appendix M might well be created to deal with "technology platforms". It does not go to show that, by definition, all work on new technology platforms is done by employees in

"new positions". Obviously, broad band high speed internet connection is necessary for many of the Employer's services, other than POTS, to be provided satisfactorily, but that still does not mean, as the Union suggested, that the parties intended all work on the broad band high speed internet connection infrastructure to be CITE work.

I have decided that the work done under the contract with Cablecom which is the subject of this Grievance was not "CITE work" for the purposes of Appendix M. It did not involve, in the words of paragraph 1, "new positions created as a result of the Company expanding its provisioning of services...". More specifically, although it involved new work "created as a result of the Company expanding its provisioning of services" it did not involve "new positions" created for that reason, within the plain meaning of the phrase "new positions" in this context. The testimony before me of the course of negotiations did not demonstrate any special meaning mutually ascribed to the phrase "new positions" by the parties.

Before elaborating further on this conclusion, I note that I have considered Roseanne Heatherington's testimony on her meeting with Bruce Lambert in the first or second week of January, 2001. I have not decided whether, on the facts, the Employer could be held never to have discussed the particular pieces of work, jobs or tasks that were contracted out with the Union in the way contemplated in paragraph 2 of Appendix M. If I had concluded that this was CITE work that meeting and its aftermath would, perhaps, have been relevant. Given my conclusion here, I need not deal further with it.

In this connection I also wish to note the argument by the Union that the very fact that the Employer's managers concerned themselves about whether the contracting

out to Cablecom contravened the Collective Agreement, and perhaps Appendix M in particular, indicates that this was CITE work. In my opinion operational managers who knew that the contracting out of the printers' work had been a major concern for the Union, and therefore for the Employer, were simply displaying sensible caution in taking advice from IR before proceeding. Beyond that, I hope managers who chose to consult with the Union when they are not strictly obliged to will not be called upon to pay for having done so.

Returning to my conclusion that the work in issue contracted out to Cablecom did not involve "new positions", while the term "position" is not defined in Appendix E or Appendix M, or elsewhere in the Collective Agreement, it must mean an identified bundle of duties which an employee is paid to do or to be able to do. In one sense every additional employee occupies a new position, but this special arrangement for "new positions" cannot have been intended to apply whenever the work force is simply expanded. The Collective Agreement provides perfectly adequately for that in its rates of pay. A "new" position must mean a different bundle of duties than MTT employee's have done in the past; different because it involves doing tasks not previously done by employees of MTT, or different because it involves a different bundling of tasks previously done.

The Union placed some emphasis on the phase "expanding its provisioning of services" in the first paragraph of Appendix E and of Appendix M. I agree that the work in issue here was "created as a result of the Company expanding its provisioning of services", in the sense that it was providing new and better services to both its old and its new customers. Clearly, doing so created more work, but that does not mean that it created "new positions".

Not every new task or every new way of doing the work, or every new combination of tasks will mean that those who do it occupy new positions. What employees do and how they do it evolves. To be a "new position" the bundle of duties must be different enough that it does not fit within an existing classification or job title, or the like, for which there is an agreed rate of pay under the Collective Agreement. If the Employer is prepared to pay the established rate for a somewhat changed bundle of duties no issue peculiar to Appendix E or Appendix M arises. There is nothing new about disputes over which classification a somewhat changed job fits into.

Hanging and splicing copper and fibre cables and splicing copper and fibre, either separately or one to the other, have been done for a long time. It cannot have been the intention of the parties that the terms and conditions under which that work is done is to be re-negotiated in accordance with Appendix M unless the work was to be done employees by occupying "new positions".

The problem for the Union here was not that the Employer failed to make new positions "part of the bargaining unit"; the problem was that the Employer contracted our work normally done by members of the bargaining unit. That, however, was not what was grieved, probably because it could not be proven, as required by Article 6.3 of the "craft part" that "regular employees, who [had] the actual experience to do the work, [were] on lay off..."

**Summary and Conclusion.** The language of the second paragraph of the letters of intent in both Appendix E of the "common part" of the Collective Agreement and Appendix M of the "craft part" of the Collective Agreement addresses contracting out. It means that, as a starting point, the Employer must make new non-

management CITE work positions part of the work of employees in the bargaining units to which the Collective Agreement applies. It cannot contract that work out without first dealing with the Union, presumably in good faith, on the terms and conditions of employment for the CITE work in question. Subsequent to that, whether or not the parties reach agreement on the terms and conditions under which the CITE work is to be done, the Employer is governed by the Collective Agreement. It has neither more nor less right to contract the work out than it has with respect to any other work done by employees in the bargaining units.

Because I have concluded that Appendix E and Appendix M do not preclude the employee from contracting out CITE work once it has been brought into the bargaining units in accordance with the requirements of those letters of intent I must dismiss the Union's Grievance 01-05 dated November 8, 2001 with respect to the Sympatico dial-up help desk. Clearly that work had been brought within the bargaining units and was therefore not immune from being contracted out, provided Article 14.9 of the "clerical part" of the Collective Agreement was respected. There was no evidence or argument that such was not the case.

Moreover, the evidence is clear that the special arrangement for the hiring for the Sympatico dial-up help desk was made long before the CITE language now found in Appendix E and Appendix M was put on the table between the parties. I do not find it to have involved unionized job positions that were "new" after the time of the signing of the Collective Agreement. While permanent jobs on the Sympatico dial-up help desk were posted in May of 2000 the job positions there were "unionized" from the outset, in that the arrangements for pay and other terms and conditions of employment were agreed with the Union and the employees were in the bargaining unit. Thus that work was not "CITE work", although, had Appendix

E been in place in 1998 when the Employer brought that work in house, it would have been. However, there is nothing to indicate that Appendix E or Appendix M is to have retroactive effect.

I do not accept the Union's interpretation of CITE work covered by Appendix M as including any installation necessary to extend the customer's options to include CITE products. Hanging and splicing copper and fibre cables and splicing copper and fibre, either separately or one to the other, have been done for a long time. I do not take it to have been the intention of the parties that the terms and conditions under which that work is done were to be re-negotiated in accordance with Appendix E unless the work was to be done by employees occupying "new positions". While the term "position" is not defined in Appendix E or Appendix M, or elsewhere in the Collective Agreement, it must mean an identified bundle of duties which an employee is paid to do or to be able to do. A "new" position must mean a different bundle of duties than MTT employee's have done in the past; different because it involves doing tasks not previously done by employees of MTT, or different because it involves a different bundling of tasks previously done. No "new positions", understood in this sense, were contracted out to Cablecom.

For all of the above reasons these grievances are dismissed.

Innis Christie
Arbitrator

SAP