

IN THE MATTER OF SUMMARY DISPOSITION 2008-09

BETWEEN

**BRITISH COLUMBIA MARITIME EMPLOYERS
ASSOCIATION**
(The Association)

AND

**INTERNATIONAL LONGSHORE AND WAREHOUSE
UNION, CANADA**
(The Union)

| | |
|------------------------------|---------------------|
| Job Arbitrator: | Ronald S. Keras |
| Counsel for the Association: | Mr. Brian Whitfield |
| Counsel for the Union: | Mr. Rob Ashton |
| Witnesses: | |
| Local 500: | Mr. Scott Adair |
| Local 500: | Mr. Al Cuciz |
| Kinder Morgan: | Mr. David J. Klitch |
| In Attendance: | |
| Local 500: | Mr. Rob Wilson |
| Kinder Morgan: | Mr. Alex Goold |
| Hearing: | September 9, 2008 |
| Decision Published: | September 12, 2008 |

I

The Union's issue was that, pursuant to Article 7.03, Kinder Morgan be directed to have labourer(s) walk the length of the string and clean away the debris they find on the rail cars for the safety of workers on site.

The Association's issue was that ILWU members were in violation of Article 7.01 and that they be ordered to cease and desist illegal activity and be ordered to return to work.

Kinder Morgan – Vancouver Wharves Terminal had employed labourers to walk the rail line to pick up debris on the cars, track and platform primarily as a safety precaution in the dumping of sulphur. Kinder Morgan, as a result of a number of site changes, decided to eliminate the 'walking the string' requirement.

Article 7.01 and Article 7.03 read as follows:

7.01 The Union agrees that during the term of this Agreement there will be no slowdown nor strike, stoppage of work, cessation of work, or refusal to work or to continue to work.

.....

7.03 Unless an employee in good faith believes that to perform work under particular circumstances would endanger health or safety, the employee may not refuse to work. A question of health or safety arising on the job shall be investigated immediately and if not settled shall forthwith be dealt with by a representative of the Union and a representative of the Association who shall endeavour to settle the question. If no settlement is reached, either Party may refer the question to the Arbitrator for a Summary Disposition or decision as provided under Article 6 of

this Agreement. The Union pledges in good faith that the provisions of this Section 7.03 will not be used as a means to circumvent the provisions of Section 7.01 of this Article.

II

Union witness Mr. Scott Adair, a bulk operator, testified that he shut down the sulphur operation for safety. Mr. Adair believed the sulphur operation was unsafe without anybody to go look at the cars. In cross-examination Mr. Adair said he would set up the train and would go to the MMY station prior to the actual dumping of sulphur. Mr. Adair believed he was inside the no entry zone while at the MMY station.

Union witness Mr. Al Cuciz testified to the 'walking the track' process and described the variety of potentially dangerous foreign material found. He pointed to numerous entries in the site log book of items found while walking the track.

Association witness Mr. Dave Klitch testified to the engineering reports and changes made at the site subsequent to explosions in December 2006 and March 2008. He advised in detail the steps taken by Kinder Morgan in an effort to minimize the possibilities of an explosion and to control the impact of an explosion, should one occur.

Mr. Klitch advised that the engineering report concerning the March 13, 2008 explosion concluded that a rock from within the cargo hit the ice catcher, which caused the explosion, the point being that it was an example of a situation where a labourer 'walking the track' would not have prevented the incident.

III

The Union advised that this was not a manning issue; it was an issue of safety. The Union pointed out that the two explosions occurred when there were no labourers 'walking the line' and that such is evidence of the requirement to have a labourer or labourers 'walking the line'.

The Union commented that it looks like safety doesn't come first, that production does. The Union was also concerned about the safety of other than the sulphur workers, such as the workers at the agri-dumper and maintenance employees. The Union sought a finding that Kinder Morgan be directed to have a labourer walk the system to look for debris.

The Association argued that "safer" was not the test and that the test was: is there a danger (when nobody is there). The Association reviewed all the steps taken by the Employer, including the fact that employees, including employees in the MMY station, are outside the no entry zone when the dumper is operating.

The Association contention was that the Union wanted a second labourer back and was using safety as a tactic to pressure the Employer. The Association sought an order that there is no danger and that workers are to cease and desist their refusal to work.

IV

I am satisfied that Mr. Adair acted in accordance with Article 7.03. Article 7.03 articulates an important right for workers and I would not, without compelling evidence, conclude that someone is using Article 7.03 in order to conduct an illegal strike contrary to Article 7.01.

When there is a bona fide question of danger, an employee may not stop work “Unless an employee in good faith believes that to perform work under particular circumstances would endanger health or safety” (Article 7.03). When there is a work stoppage it “shall be investigated immediately” and “If no settlement is reached, either Party may refer the question to the Arbitrator for a Summary Disposition” (Article 7.03). That is precisely the process which was followed in this case.

The question to answer in this case is whether or not employees endanger their health and safety by working on the sulphur dumping site without labourers ‘walking the line’.

The answer is found in a review of the remaining procedures in place (without labourer(s) walking the line):

- There is a no entry zone which ensures that workers are a minimum distance from the dumping operation.
- There is a five minute rule which requires workers not to enter the no entry zone for five minutes after the dumping operation.
- The dumper has a fogging system and floor sprays.

- The CN inspection process, while not yet completely satisfactory, has improved as a result of Kinder Morgan's continuing efforts.
- The steel metal beams inside the dumper have been coated with UHMW.
- There is a deluge system in the event of a heat source, including in the event of an explosion.
- The Employer will install a stainless steel ice catcher for the upcoming colder season.
- There is an emergency response plan in place for the site in the event of an explosion.

The Association had pointed to Human Resources and Social Development (HRSD) Canada's "Characteristics of Danger", which in part reads:

Danger is a situation, actual or potential, which requires that the employee be immediately protected from the hazard, condition or activity in order to prevent a probable injury or illness from occurring.

I am not able to conclude that the disputed system is "potentially" a situation which requires that "employees be immediately protected" in order to prevent a "probable injury or illness."

Would the site it be safer with labourers 'walking the line'? I think so. Is it dangerous, pursuant to the meaning of the Collective Agreement and / or HRSD, without labourer(s) walking the line? No.

On the basis of a careful review of the evidence and of the submissions of the parties:

I am unable to conclude that the work stoppage was a violation of Article 7.01.

I do however conclude that the work stoppage was as a result of workers exercising their rights pursuant to Article 7.03.

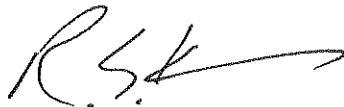
I am also able to conclude that the current disputed procedure does not endanger employees.

In the result, employees are directed to return to work.

All of which is so ordered.

I thank counsel for their helpful submissions.

Dated in Vancouver, British Columbia this 12th Day of September 2008.



Ronald S. Keras
Job Arbitrator

File: 496