

IN THE MATTER OF SUMMARY DISPOSITION 2009-03

BETWEEN

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

AND

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

Preliminary Matter – Arbitral Jurisdiction

Job Arbitrator:	Ronald S. Keras
Counsel for the Association:	Mr. Brian Whitfield
Counsel for the Union:	Mr. Rob Ashton
Witnesses:	
Kinder Morgan Vancouver Wharves:	Mr. Dave Klitch
Local 500:	Mr. Gordie Westrand
In Attendance:	
Local 500:	Mr. Paulo Branco
Hearing:	March 15, 2009 Vancouver, BC
Decision Published:	March 19, 2009

I

The Union issue was that Kinder Morgan Vancouver Wharves was in violation of Article 1.03 and Article 1.05 of the Collective Agreement as work being carried out at Berth 2-3 was the movement of cargo. The Union sought an order to direct Vancouver Wharves to hire longshore workers on a man to man basis until the job is finished.

The Association stated that the work being done was commissioning. The Association raised a preliminary issue of arbitral jurisdiction as the commissioning work was not “under the control” of the Association member, Vancouver Wharves Terminal. Kinder Morgan’s project is a new liquid bulk tank system for diesel / jet service.

This hearing and finding is with respect to the preliminary matter.

II

Association witness, Assistant General Manager, Mr. Dave Klitch, testified that the commissioning of the diesel / jet system was being managed by Kinder Morgan’s Canadian head office from Calgary and that until it was complete and handed over to Vancouver Wharves it was not Vancouver Wharves system – not under Vancouver Wharves operation. He said that Kinder Morgan owned Vancouver Wharves Terminal and has other investments in BC and Alberta. Mr. Klitch testified that Vancouver Wharves was not involved in the project or the commissioning and would not take over the operation of the diesel / jet service

until about the end of March or early April 2009. Mr. Klitch testified that the Kinder Morgan team running the project was a separate entity from Vancouver Wharves. Mr. Klitch said that in the commissioning process 30,000 barrels of material will be used. Mr. Klitch advised that longshore employees are currently being trained for the new system and that when the new system is turned over to Vancouver Wharves the movement of the test material, whether waste (likely too much waste product for a vacuum truck to remove) or salable product will be the work of the longshore members.

Mr. Gordie Westrand, President of Local 500, former bulk operator and bulk operator trainer, testified that he and three other trainers were involved in the commissioning of the new Vancouver Wharves Agri System in 1997 or 1998. Mr. Westrand advised that they were brought in to work with the company who built the system and that they were also brought in to see how it operated. Mr. Westrand testified that if the disputed commissioning was being done without cargo it could be commissioned without longshore members.

III

The Association argued that Vancouver Wharves does not have control of the project or the commissioning and that it is Vancouver Wharves Terminal which is a member of the Association, not Kinder Morgan Canada.

Article 1.03 reads as follows:

This Agreement shall apply to all such persons employed and despatched pursuant to the terms of this Agreement for the performance of work in connection with the movement of inbound or outbound cargo from the time it enters or leaves the dock, or with the movement of cargo from the stow to release from conventional or other ship's gear or vice versa, and so long as it remains at a dock and under the control of a member of the Association covered by this Agreement. Work in connection with the movement of such outbound and inbound cargo shall include the operation of stationary and mobile cargo handling devices and equipment; to or from railroad cars, trucks, trailers, other vehicles, barges or scows when any or all of the foregoing are alongside within reach of conventional or other ship's gear and comes under the control of a member of the Association covered by this Agreement up to the point at which it is stowed in or discharged from a deepsea or coastwise vessel.

The Union argued that there is no distinction between Kinder Morgan and Kinder Morgan Vancouver Wharves and as such the Association's issue concerning the Job Arbitrator's jurisdiction should be dismissed and the Union's issue should be heard on its merits.

IV

It is the Association's assertion that Vancouver Wharves Terminal does not have control of the diesel / jet service project or control of the commissioning of the project; consequently the Association had the burden of proof. Authors Brown and Beatty in *Canadian Labour Arbitration*, Fourth Edition, within paragraph 3:2400, describe the burden:

... the general principle is that “the onus of proof in all cases rests primarily on him who asserts a claim to establish and prove it and not on the other side to disprove the claim”.

In this case with respect to the preliminary matter it is the Association who had the burden of proof to the civil / balance of probabilities standard, however should the issue proceed on the merits of the case the burden of proof will be the Union’s as it is the Union’s assertion that the Employer is in violation of Article 1.03 and Article 1.05 of the Collective Agreement.

In its submission regarding its onus the Association offered the testimony of Mr. Klitch as well as an argument supported by a number of prior cases including *Re B. C. Maritime Employer’s Association and International Longshoremen’s and Warehousemen’s Union – Canadian Area*, Job Arbitrator A. F. Kotowich, wherein the Job Arbitrator, in his Summary Disposition No. 22-86 dated September 7, 1986 wrote:

Since the employer (Western Stevedoring Co. Ltd.) was not authorizing this work, this provision does not apply.

The Terminal Award, being a contract between Western Stevedoring Co. Ltd. and the Vancouver Port Corporation, does not fall within the scope of this Arbitrator’s jurisdiction.

..... the Arbitrator is convinced the work at Lynn Terminals is solely the responsibility of the Port Corporation and Western Stevedoring Co. Ltd. is not involved.

In the above case Western Stevedoring was the Association member and the Vancouver Port Corporation was not. Those primary facts in that case were quite clear. In the instant case the significance of the distinction between Kinder

Morgan Vancouver Wharves Terminal and Kinder Morgan Canada is not as clear. Are they separate companies or is Vancouver Wharves simply a division of or a department within Kinder Morgan Canada?

In *Re B. C. Maritime Employer's Association and International Longshoremen's and Warehousemen's Union – Canadian Area*, the Job Arbitrator R. S. Keras in Summary Disposition No. 19-98 dated September 21, 1998 wrote:

With respect to the Job Arbitrator's jurisdiction to hear the issue raised by the Union it depends on the particular circumstances. The Job Arbitrator does not have jurisdiction with respect to the work of sampling, surveying, and monitoring for quality associated with the sale of the product. The Job Arbitrator does have jurisdiction to hear the merits of the case where an allegation is made that Certaspec is doing work "in connection with the movement of cargo."

In the instant case the Union's assertion is that the Employer is moving cargo, and with respect to the preliminary matter, the Union's assertion is that there is no clear distinction, as argued by the Association, when the project is taking place on Kinder Morgan Vancouver Wharves property; when those in charge of the project are Kinder Morgan personnel and when there are two Kinder Morgan Vancouver Wharves management personnel participating on the project site.

In *Re B. C. Maritime Employer's Association and International Longshore and Warehouse Union – Canada*, Industry Arbitrator, Donald R. Munroe, Q.C. in his Award #20(53a)-8(7a) (a Re-Hearing of Summary Disposition No. 03-97), dated May 12, 1998 Arbitrator Munroe described the "material facts" at page 2 as follows:

In February 1996, Star Shipping A/S, Bergen (which I will call Star Bergen) entered into a Charter Party agreement with Prime Resources Group Inc. (Prime). In short, Prime chartered a ship (“Star Hydra”) from Star Bergen – the purpose being the transportation of bulk crushed ore

Arbitrator Munroe beginning at page 10 wrote:

I agree with the Job Arbitrator that the real substance of the case is “...whether the disputed work came under the control of a member of the (BCMEA)”; that is to say, whether the disputed work was under the control of Star Canada. In fact and in law, such control did not exist. In my view, that statement holds true whether one looks at Star Canada independently of the other entities involved, or as a wholly-owned subsidiary of Star Bergen. Plainly on the face of the FIOS Charter Party arrangements, Star Canada was not able, as the ship’s agent, to exert control over the loading of the vessel.

In the above case it was clear that Star Canada had no control over the vessel loading. In the instant case the Association argued that Vancouver Wharves was / is in the same position as Star Canada. The Union argued that the Star Canada case was not on point as in the instant case one cannot distinguish between Kinder Morgan Canada and Kinder Morgan Vancouver Wharves.

In support of the Association’s position Mr. Klitch said that the project manager was out of the Canadian Kinder Morgan head office in Calgary and that he reported to the Vice President at the Canadian head office in Calgary and that the Calgary Vice President reported to head office in Houston Texas. He testified that Vancouver Wharves management were not involved in the project or the commissioning and would not be involved until later this month or early next month when the diesel / jet service is turned over to Vancouver Wharves, except

recently for two personnel in a peripheral manner; one regarding site safety and the other observing and learning the operation. Mr. Klitch testified that it is Vancouver Wharves Terminal who is the member of the BCMEA. Mr. Klitch described the Kinder Morgan (Calgary) team as a separate entity.

The Union's submission included two documents, both of which describe Vancouver Wharves as "Kinder Morgan Canada Terminals Limited Partnership". The Union also voiced a concern about protecting work if there is an Employer access to a unilateral decision of non "control" or non control of convenience. The Union argued that there would be no way of establishing an Employer's control pursuant to Article 1.03 and Article 1.05 if the Employer can simply decide when they are Kinder Morgan Canada and when they are Kinder Morgan Vancouver Wharves.

When selecting Canada on the Kinder Morgan web site it lists Vancouver Wharves location as the "Regional Office" and describes the "Dry & Liquid Bulk – KM Terminals:" as "Vancouver, BC (KM Vancouver Wharves)". If Vancouver Wharves is a regional office of Kinder Morgan Canada, is it a separate company?

No documentary evidence was proffered at the hearing which shows a legal corporate distinction between Kinder Morgan Canada and Kinder Morgan Vancouver Wharves Terminal. It is unclear whether Kinder Morgan Vancouver Wharves Terminal is a separate legal Company from Kinder Morgan Canada (Calgary) or not. In my view there exists some doubt that there is a legal corporate distinction between the two Kinder Morgan's of the type that existed in the cited cases above or of the type contemplated by Article 1.03 of the Collective

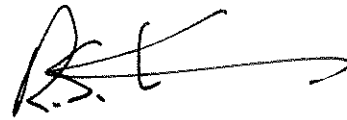
Agreement. I am unable to conclude that the Association has discharged its onus on this occasion.

As a result, on a careful review of the Parties submissions, I find that the Job Arbitrator has the jurisdiction to hear the merits of the case.

It is so ordered.

I thank counsel for their helpful submissions.

Dated in Vancouver, British Columbia this 19th Day of March 2009.



Ronald S. Keras
Job Arbitrator

File: 512