

IN THE MATTER OF SUMMARY DISPOSITION 2010-01

BETWEEN

**BRITISH COLUMBIA MARITIME EMPLOYERS
ASSOCIATION**

(The Association)

AND

**INTERNATIONAL LONGSHORE AND WAREHOUSE
UNION – CANADA**

(The Union)

Univar Canada Limited
Preliminary Matter - *res judicata*

Job Arbitrator:	Ronald S. Keras
Counsel for the Association:	Mr. Jack Vogt
Counsel for the Union:	Mr. Mike Rondpré
Witnesses	
Local 500 Business Agent:	Mr. Rob Ashton
Association Witness:	Mr. Tom McIntyre
Univar Canada Ltd.:	Mr. Mike Martel
Local 500:	Mr. Duffy Minchau
In Attendance	
Western:	Mr. Keith Moger
Local 500:	Ms. Jane Sansom
Local 502:	Mr. Chris Verbeek
Univar:	Ms. Robin Lee
Hearing:	May 27, 2010 June 14, 2010
Location:	Vancouver, BC
Decision Published:	June 24, 2010

I

The Union's issue was described in a February 4, 2010 pay claim letter to the Association from Local 500 Vice President, Mr. Mike Rondpré, as outside drivers coming into Univar and loading their trucks with Ethanol, which the Union alleged was Collective Agreement work.

The Association raised a preliminary matter asserting that the job arbitrator was without jurisdiction based on its argument that the same matter had been previously heard and decided; therefore the doctrine of *res judicata* applies. The Association referred to *BC Maritime Employers Association and International Longshore and Warehouse Union – Canada*, Summary Disposition 2009 – 07 dated July 14, 2009 which was with respect to the Kinder Morgan truck rack operation.

II

Association witness and Univar Terminal Manager, Mr. Mike Martel, testified that the truck rack at Univar was a typical industry load rack built by the same company who had built the Kinder Morgan truck rack. The Univar loading product is Ethanol. Mr. Martel described the loading process and the time it takes to connect and disconnect trucks for loading. Mr. Martel testified that trucks show up randomly any shift seven days a week and that the average number of trucks per shift may go from the current 2.03 to 2.44 trucks per shift.

Association witness Mr. Tom McIntyre testified that he had seen the Univar system as well as the Kinder Morgan system and said that both racks were built by the same manufacturer, using similar equipment and were similar to other truck racks in the industry. Mr. McIntyre advised that Ethanol was flammable and that Univar must treat the vapours and that at Kinder Morgan there was not a requirement to treat vapours for the diesel / jet fuel.

Union witness and Local 500 Business Agent Mr. Rob Ashton described liquid loading at a number of waterfront sites in which Collective Agreement employees hook up and stand by while pumping and unhook. He testified that employees stand by for the duration of the pumping; that is, they are required to stay in the area during pumping.

The Union's case included the introduction of a Univar video of the pumping operation by the non Collective Agreement drivers. The Association objected to the introduction of the video at the current hearing. The Job Arbitrator reserved on the decision of the videos' admissibility and allowed viewing of the video with Mr. Martel's and Union witness Mr. Minchau's comments and descriptions of the process.

III

The Association argued that the truck rack operation at Univar was the same as the operation at Kinder Morgan except that the connect and disconnect times were less at Univar. The Association made reference to the fact that the same industry drivers' regulations outlined in the Canadian Petroleum Products Institute (CPPI)

Driver's Manual apply at Univar as apply at Kinder Morgan. The Association argued that the present pay claim was governed by the Kinder Morgan decision and that the Union was not free to re-hear the same matter.

The Association's case included reference to *BC Maritime Employers Association and International Longshoremen's and Warehousemen's Union – Canadian Area*, Summary Disposition 16-98 [1998] at page 8:

As stated earlier the Union is not completely barred from raising an allegation that certain Employers are implementing staggered coffee breaks and not complying with the requirements of Summary Disposition 13 – 98. To do so successfully the Union has a number of hurdles as the Union has the onus to prove their contention. The Union must point to “new evidence” that was not available at the time of the Summary Disposition 13 – 98 hearing. That new evidence must be sufficient to distinguish it from the evidence adduced at the Summary Disposition 13 – 98 hearing. It must be clear and convincing “new” evidence that an Employer or Employers are not in compliance with the decision. A review can not be applied to numerous situations to the extent that it results in an absurd application of the criteria. That evidence must in some way tie into the Collective Agreement (see *Re Corporation of the City of Toronto and Canadian Union of Public Employees, Local 79*, (Brunner) L.A.C. 58 (4th) page 309).

Summary Disposition (SD) 16 – 98 quoted *Pharma Plus Drugmarts Ltd. and United Food & Commercial Workers, Local 175*, [1991] 20 L.A.C. (4th) 251 (P.G. Barton), April 30, 1991. Beginning at page 255, in reference to the doctrine of *res judicata*, Arbitrator Barton comments as follows:

... One of the reasons behind *res judicata* is to force the parties to do the best job in the first hearing. If they know that they are going to have another opportunity at a second hearing they may not fully

address the question of what evidence to call. However, simply by saying they are going to call different evidence they are entitled to get another try. It seems to me that if the evidence was available and could have been called, the fact that it was not is not a good reason for hearing the case again.

...

... Essentially these arbitrators feel that if the same parties try to reopen an earlier grievance by trying to bring a subsequent one to argue the same issue based upon the same parts of the collective agreement, on new facts but facts which are essentially the same as those resolved in the previous grievance, they should not be allowed to do so.

In the instant case the Association asserts that the “new” evidence was evidence that was available to the Union in the Kinder Morgan case had the Union exercised reasonable diligence. The Association’s submission included re *Telus Communications Inc. v. Telecommunications Workers’ Union*, [2006]158 L.A.C. (4th) 67 (J. L. McConchie), October 30, 2006, in which, at page 11, Arbitrator McConchie quoted the *British Columbia Court of Appeal in Lim v. Lim* [1999] B.C.J. No. 2317 as follows:

...I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of **res judicata** applies, except in a special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly

belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. (p.4; emphasis added)

The Association argued that the above case was another example of support for its *res judicata* assertion in the instant case. The Associations argument included reference to *Canada Safeway Ltd. and United Food and Commercial Workers International Union, Locals 175 & 633* [2004], 128 L.A.C. (4th) 175, File No. MPA/Y400237, (M. B. Keller) April 23, 2004. Arbitrator Keller at page 189 commented:

Leaving aside the strictly legal approach to this question (which is sound) it is useful to focus on the labour relations policy implications of the matter. The whole legislative focus of the grievance/arbitration process is to provide finality to disputes between parties. Indeed, that is why the courts in general are reluctant to interfere with awards of arbitrators and are prepared to extend judicial deference unless the arbitrator is manifestly wrong. It is why referrals to the courts of an award of an arbitrator are by way of judicial review and are not appeals. Parties to an issue, once litigated are entitled to finality. It is that finality that permits a party to conduct itself in a particular way in the future, as the employer did here. If that finality did not exist, it would be harmful to the relationship between the parties and issues between them could never be viewed as being settled.

In the result, therefore, although there may be some factual differences between the matter before me and Mr. Rayner the essential facts are not different and I am unable to formulate a clear conviction that the conclusions reached by Mr. Rayner were wrong. As Arbitrator Liang wrote in *Re Stelco* [p. 127]:

It is possible that I might have reached a different conclusion in this case were it not for the prior arbitration award. But this does not justify my departing from that award here. The fact remains that the issue has been determined.

The Association concluded with its assertion that the Union's pay claim should be dismissed as the Job Arbitrator was without jurisdiction to hear what is essentially the same matter heard in the Kinder Morgan case.

The Union's submission included reference to *BC Maritime Employers Association and International Longshore and Warehouse Union – Canada*, October 21, 1998, in which Industry Arbitrator Donald R. Munroe, Q.C., at page 7, included the following comments:

... The Association says, in effect, that Articles 1.03 and 26.01(2) must be read sequentially for present purposes; that is to say, that one must first satisfy the "pre-conditions" established by the former provision before moving on to consider the latter. I think a better proposition is that the two provisions must be read together: which is to say, the collective agreement must be read as a whole. Taking that course, I note firstly that Article 1.03 says that the collective agreement applies to "...the performance of work in connection with the movement of inbound or outbound cargo"; it does not say that the collective agreement applies to "...the movement of inbound or outbound cargo". I cannot presume that the phrase "in connection with" is superfluous.

The Union argued that this case supported its position that the work in question is Collective Agreement work as it was work associated with the movement of cargo. The first sentence of Article 1.03 of the Collective Agreement 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.

In addition to the above reference the Union referred to the Univar video and its calculation that the driver spent 11 minutes and 27 seconds carrying out Collective Agreement work in which the elapsed time, it argued, defeated the *res judicata* assertion of the Association.

In re *BC Maritime Employers Association and International Longshoremen's and Warehousemen's Union – Canadian Area*, August 8, 1997 Industry Arbitrator Donald R. Munroe, Q.C. described the Parties Job Arbitrator process as follows:

The parties are well aware of the respective roles of the Job Arbitrator and the Industry Arbitrator. Briefly, the role of the Job Arbitrator is the summary disposition of on-site disputes in the interest of ongoing production. The Job Arbitrator is on retainer; is on call; and is expected to decide issues placed before him with the greatest possible expedition. In a phrase, the Job Arbitrator is an “instant arbitrator”. A proceeding before the Job Arbitrator can occur on short notice any day of the week, any time of the day or night.

The Union's purpose in pointing to the above quote was to show the nature of the Job Arbitration process as part of its “rough justice” argument that the process is expedited and that technical procedural road blocks to hearing a similar case are not consistent with the Parties practice nor the Collective Agreement, specifically Article 6.02 (f) and 6.05(a) which read:

6.02 JURISDICTION OF JOB ARBITRATOR:

...

(f) Powers of the Job Arbitrator shall be limited strictly to the application and interpretation of this Agreement as written. The Job Arbitrator shall have jurisdiction to decide any and all disputes arising

under this Agreement including cases dealing with the resumption or continuation of work.

6.05 REQUIREMENTS:

(a) The Arbitrators shall be bound by the rules, laws and procedures from time to time in force and effect with respect to arbitrations, except in respect of proceedings concerning the making of a Summary Disposition by the Job Arbitrator, and be bound by the specific applicable terms of this Agreement.

The Union also referred to *BC Maritime Employers Association and International Longshoremen's and Warehousemen's Union – Canadian Area* [1981], Summary Disposition #10/81, (Joseph M. Weiler) May 27, 1981, in support of its argument of an appropriate re-hearing as new evidence becomes available. Arbitrator Weiler at page 2 commented as follows:

DECISION OF THE JOB ARBITRATOR:

The principle of res judicata is incorporated into Article 6.04 of the Agreement. The purpose of this provision is to prevent the losing party in an arbitration from simply applying for a rehearing of the issue. Under Article 6.04 the parties agree to be bound by the decision otherwise there would be no finality of the “Summary Disposition”, and no one would know what are their respective rights on this Agreement. In the case of a shut down, this would produce a wholly unnecessary loss of production, etc., completely inconsistent with the spirit of this Agreement.

However, the principle of res judicata does have some exceptions. Where the facts have changed in a significant manner, it can hardly be said that the previous ruling should be binding on the parties. Where there has been a qualitative change in a factual context, parties are free to request a new ruling from the Arbitrator rather than be tied to a previous ruling that may bear no realistic relationship with the facts at hand in a subsequent dispute. In these situations, the parties may seek

a new ruling arising out of this new factual context. The need for a new ruling is particularly acute when the issue is the safety of the operation. Where facts are not available at the first hearing or where both sides are unaware of the facts or do not see the necessity to place this evidence before the Arbitrator, and when subsequent experience demonstrates that these facts are crucial to the adjudication of the rights of the parties under the Agreement, the parties should be allowed to get a ruling from the Arbitrator on this new basis. However, these are rare circumstances and this decision should not be interpreted as an invitation to either side not to present all the available relevant evidence at the first opportunity to litigate their rights under the Agreement. In my judgment, there was no attempt by either side at the hearing on May 25 to fail to adduce all relevant available evidence to the Arbitrator about the safety of loading this flour. On May 27 the Arbitrator arrived at Ballantyne Pier at the end of a shift, several of the gang who had been directed to load the five high pallets had already been released and had gone home, and neither side saw fit to demonstrate for the benefit of the Arbitrator how safe was this manner of loading the flour. In these circumstances, I cannot find any fault on either side in failing to present this evidence before my ruling. For these reasons, I am persuaded that I should view the actual operation of loading these five high tiered pallets of flour to determine whether this process is safe.

The Unions submission included reference to *BC Maritime Employers Association and I.L.W.U. Canadian Area*, Summary Disposition November 19, 1980 (W. M. Dunbar). At page 1 Arbitrator Dunbar outlined the Association allegation:

The Association charged the Union of obstruction tactics in this dispute, claiming that it would take three minutes to dump the material into the car and the man could then tend to the repairs.

And at page 2 Arbitrator Dunbar commented as follows:

Any material, while in his care and handling, must be considered to be cargo to all intents and purposes.

The Arbitrator rules that the material under discussion must be classified as cargo and supports the Union's position as per Article 24 – Section 24.03 (8).

The Union's reference to *Artcraft Engravers Ltd. and Graphic Communications International Union, Local 517* [1990], 12 L.A.C. (4th) 363, (G. G. Brent) June 28, 1990 was as an example of a case where an Arbitrator did not follow a prior decision. At page 369 Arbitrator Brent stated:

... Most arbitrators agree that where the parties have had an arbitration award dealing with the same issue and involving the same or essentially the same collective agreement language, the previous award should be followed unless it is wrong or patently unreasonable. The reasons for such approach are obvious, and certainly the parties should consider that they are entitled to rely on previous decisions, all else being equal.

Arbitrator Brent concluded that he would not follow the previous award and outlined his reasons for such conclusion in the decision. Based, in part, on the above decision the Union argued that Summary Disposition 2009 – 07 was wrong as “we didn't have the evidence before us”.

IV

With respect to the admissibility of the Univar video the Association argued that in the Kinder Morgan case the Union could have sought an adjournment if it wanted a view or video of the operation and they did not, therefore the Union should not be permitted to now introduce such evidence. The Union argued that it was called to the Kinder Morgan arbitration on the basis of an Association issue, attended the

hearing and met the case that was available to it at the time and should not now be barred from presenting new evidence which was not available at the time of the Kinder Morgan hearing.

There are two main points in consideration of allowing or not allowing the video evidence. First, there is no basis to know what the outcome of a Union requested adjournment in the Kinder Morgan case may have been. The Association had called the hearing and it is reasonable to assume it wished to proceed on that day. Second, the Univar video evidence is not the same as the Kinder Morgan *viva voce* evidence as, in part, the video evidence contains the connect and disconnect of the Ethanol venting / exhaust system at Univar, which is an additional step that was not required in the Kinder Morgan diesel / jet fuel operation.

I have concluded that the video evidence showing a driver loading a truck at Univar is allowed. Such evidence was not available at the time of the Kinder Morgan hearing as the new Kinder Morgan truck rack system was not in production operation at the time of the hearing. The Univar video contains the additional evidence of the exhaust connect / disconnect.

Turning to the *res judicata* issue *Black's Law Dictionary, Fifth Edition* (Henry Campbell Black, M.A.) definition of *res adjudicata*, (a less common spelling of *res judicata*), p.1173, follows:

The term designates a point or question or subject-matter which was in controversy or dispute and has been authoritatively and finally settled by the decision of a court; that issuable fact once legally determined is conclusive as between parties in same action or subsequent proceeding.

The Association argued that the *res judicata* principle was on point at the Job Arbitrator level of adjudication given Summary Disposition 2009 – 07. One Union argument was that SD 2009 – 07 was under appeal to the Industry Arbitrator and therefore the *res judicata* principle could not apply. Both parties agreed that at the Industry Arbitrator re-hearing of SD 2009 – 07 the Parties will be free to introduce new or additional evidence.

In *Canadian Labour Arbitration, Fourth Edition, Brown & Beatty* at 1:3100 The Same Agreement and the Same Parties, the authors state:

...where precisely the same grievance is brought a second time by the same party or grievor, arbitrators have applied the doctrine of *res judicata* and have held the second grievance to be inarbitrable.⁵ As well, at one time some arbitrators held themselves to be strictly bound by an earlier interpretation of the same collective agreement.⁶ Today, while agreeing generally that such an interpretation should be followed, they nevertheless claim the right not to be bound when they are of the view that the decision in the earlier award was “clearly wrong”.⁷ The prevailing view has been summarized as follows:

It is not good policy for a Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of the Agreement. Nonetheless, if the second Board has the clear conviction that the first award is wrong, it is its duty to determine the case before it on principles that it believes are applicable.⁸

Accordingly, in the application of such a standard, arbitrators generally feel obliged to explain in some detail the reasons for not following the earlier award.⁹

Where the previous award interprets a general statute or decides a question of general law which on judicial review would attract the “correctness” standard of review, however, it has been held that the

aforementioned deferential standard accorded to a prior arbitration award should not be applied.¹⁰

Of course, if the issues are not precisely the same, then this policy will be weakened and will more readily give rise to reasoned distinctions.¹¹

In the adjudication of the preliminary matter it is necessary to separate the issue of the possibility of a decision that is different from the Kinder Morgan decision on the merits from the preliminary question of jurisdiction pursuant to the doctrine of *res judicata*.

The adjudication of the preliminary matter requires an assessment as to whether the Univar matter is “precisely the same” (*Brown & Beatty* above) as the Kinder Morgan matter or if there exists sufficient differences to require a separate adjudication for the Univar matter on its own merits.

The Union argument about the Job Arbitrator (“instant arbitrator”, above) process and methodology: the “rough justice” argument, vis a vis the doctrine, while a considering factor, is not sufficient on its own to preclude a *res judicata* finding. The fundamental of the doctrine stated as an appropriate question is: are the circumstances, in substance, the same or are there sufficient Univar differences as to require its own hearing? A finding that the differences are sufficient to adjudicate the Univar pay claim on its merits would not necessarily infer a different outcome, it would simply be a recognition that the Univar circumstances are not “precisely the same”.

Univar similarities to the Kinder Morgan case are:

- 1) same Collective Agreement

- 2) same Parties
- 3) similar equipment
- 4) same equipment manufacturer
- 5) similar process by drivers

and the differences are:

- 1) different Employer
- 2) different site
- 3) additional step to the process re exhaust / venting hose connection
- 4) visual view (via video) of the loading process which was described via testimony in Kinder Morgan
- 5) the Association brought the Kinder Morgan matter before the Job Arbitrator
- 6) the Union brought the Univar pay claim before the Job Arbitrator

The similarities support application of the doctrine. Of the differences: site, Employer and which party brought the matter to Job Arbitration - on their own are not sufficient differences to defeat the Association *res judicata* assertion. Differences must be sufficient for the adjudicator to conclude that there exists the possibility of a different outcome to the extent that a separate adjudication is required for a reasoned conclusion on the merits.

The connect and disconnect of the exhaust / venting system was not part of the process at Kinder Morgan but is a requirement for the Univar Ethanol loading. Is it a substantive difference? Mr. Martel testified that the venting is a requirement and that drivers are required to stay in the area as stipulated in the CPPI driver's manual. The exhaust / venting system has one connect and one disconnect for each

truck except that Super B trucks will have two venting connect / disconnects. The Association argued that such connect / disconnects are incidental as each only takes a few seconds.

I view the submitted case law of both Parties as a reasonably accurate reflection of the doctrine, in particular as applied in collective agreement arbitral decisions. Job Arbitrator Weiler's May 27, 1981 decision (above) is a decision within the industry and his following comments are relevant:

Where facts are not available at the first hearing or where both sides are unaware of the facts or do not see the necessity to place this evidence before the Arbitrator, and when subsequent experience demonstrates that these facts are crucial to the adjudication of the rights of the parties under the Agreement, the parties should be allowed to get a ruling from the Arbitrator on this new basis. However, these are rare circumstances and this decision should not be interpreted as an invitation to either side not to present all the available relevant evidence at the first opportunity to litigate their rights under the Agreement. In my judgment, there was no attempt by either side at the hearing on May 25 to fail to adduce all relevant available evidence to the Arbitrator about the safety of loading this flour.

Arbitrator Weiler's comments are helpful. To a degree, they buttress the Union's Article 6.02(f) and Article 6.05(a) "rough justice" argument. Arbitrator Wieler's comments also recognize the "rare circumstances" in which a matter is re-heard. Similarly to the 1981 Weiler case, I found no indication at the Kinder Morgan hearing of an attempt by either party to fail to produce all relevant evidence they were aware of at the time. The Wieler decision, importantly, in my view, recognizes "when subsequent experience demonstrates that these facts are crucial

to the adjudication of the rights of the parties under the Agreement, the parties should be allowed to get a ruling from the Arbitrator on this new basis”.

One of the cites presented at the SD 2009 – 07 hearing was Arbitrator A.V.M. Beattie’s review of the *de minimis* principle. Arbitrator Beattie was adjudicating a case in *Re Carling O’Keefe Breweries of Canada Ltd. and Western Union of Brewery, Beverage, Winery & Distillery Workers, Local 287* [1987] 31 L.A.C. (3d) 69 (A.V.M. Beattie). His observations and conclusions were representative of the submitted case law concerning the *de minimis* principle. At page 81 Arbitrator Beattie commented:

I am of the view, and I believe the view to be held generally by arbitrators, that in so interpreting and applying prescribed guidelines there must be some scope, albeit narrow, for common sense. Surely if a foreman provides momentary assistance to a bargaining unit employee no one should be heard to suggest that the integrity of the bargaining unit is being threatened. This common sense approach is the foundation for the principle in law of “*de minimis non curat lex*” (the law does not care for, or take notice of, very small or trifling matters)”: Black’s Law Dictionary, 4th ed., p. 482.

In SD 2009 – 07 the disputed work was found to be Collective Agreement work. For such work to be found to be *de minimis* it needed to be a “very small” amount of work and that assessment needed to be made on a precise accounting of the amount of work and the time it took to do it. The SD 2009 – 07 finding is described beginning at page 16:

..... the undisputed evidence is that the expected volume, at least initially, will be five trucks per shift, that trucks will likely be super B trucks with up to seven connections taking a total work time of

seventy seconds per truck. That is slightly **less than six minutes a shift**. (emphasis added)

In the result, on a careful review of the submissions of the Parties and based on a volume of work of five trucks per shift coupled with the driver requirements of the CPPI drivers manual, the Association's *de minimis* argument succeeds.

To arrive at a *de minimis* finding in the above case took a careful accounting of the time spent by a driver to load a truck multiplied by the number of trucks per shift, all based on *viva voce* evidence about the planned (not yet in production operation) truck rack system at Kinder Morgan. The nature of the *de minimis* finding was that the amount of work and the time taken to accomplish such work would be so insignificant as to attract application of the *de minimis* principle. Given such required precise scrutiny, care must be exercised in arriving at a finding concerning the *res judicata* assertion in the instant case.

In my view the differences between the evidence in the Kinder Morgan case and the evidence in the Univar preliminary matter hearing coupled with the precision required for a *de minimis* conclusion in the Univar circumstances (i.e. not a "momentary assistance" [*Carling O'Keefe*, supra] circumstance) are sufficient to require a hearing on the merits. The issues are not "precisely the same" (*Brown & Beatty*, supra). A *de minimis* finding must be based on a precise measurement.

In the result I find that, based on a careful review of the evidence and the submissions of the Parties, the differences between the Kinder Morgan case and the instant preliminary matter coupled with the precision associated with a *de minimis* finding in these particular circumstances are sufficient to allow a hearing on the merits of the Union's Univar pay claim.

I thank counsel for their helpful submissions.

Dated in Vancouver, British Columbia this 24th Day of June 2010.

Ronald S. Keras
Job Arbitrator

File: 551