IN THE MATTER OF AN ARBITRATION

BETWEEN:

Algoma Steel Inc., **Employer,**

- and -

United Steelworkers of America, Local 2251 **Union**

BEFORE: Michael Bendel, Arbitrator

APPEARANCES: For the Union:

Mike Da Prat, President
Merle Evans, Vice-President
John Shiels, Chairman, Grievance Committee
Rainer Schmitt

For the Employer:

Ross Dunsmore, Counsel
Steve Orr, Labour Relations Consultant
Louis Seguin, Labour Relations Officer
Brian Ambeault, Superintendent

Heard in Sault Ste. Marie, Ontario, on January 8 and March 19, 2007.

INTERIM ARBITRAL AWARD

I

The union has presented a grievance in which it alleges that the employer has violated the collective agreement by "crossing lines of sequence" in the Slabcast Department between Operators and Mechanics. "Lines of sequence" are an important element in the seniority provisions of the collective agreement, defined (in Article 7.01.10 of the agreement) as "a series of jobs in a department…" The union's complaint is that the jobs in question have been redesigned in disregard for the provisions of the agreement, primarily Article 7.01.10.

At this stage, the employer has moved for the dismissal of the grievance on the ground it is untimely and, in the alternative, on the ground of estoppel. Specifically, the employer says that the union is complaining about decisions taken and implemented as long ago as 2003, decisions that were arrived at after extensive discussion with the union. The employer has also suggested that, since the union is attempting to overturn measures that have provided significant benefits to numerous employees, it would be necessary to give notice of the hearing to the employees in question if the preliminary objections are dismissed.

The parties filed extensive documentary material at the hearing, but no viva voce evidence was presented.

This interim award is limited to the employer's objections.

II

In the 2002-2004 collective agreement, the parties had agreed on the following objective (General Article, paragraph 2):

The parties recognize the necessity of redesigning the workplace so that it becomes less authoritarian, safer and more fair. They agree that costs must be reduced, performance improved, and the skill content of jobs enhanced and that this will require substantial changes in how work is organized, a significant reduction in levels of supervision and other overhead, the creation of opportunities for employees to solve operating problems and the continual upgrading of the skills of the workforce.

In order to manage change, the parties commit to ongoing consultation, problem solving, and discussion between management and the union and among employees at all levels. As part of these consultations, management is committed to providing employees with the opportunity to participate in decisions related to change as early as possible.

The agreement established a Joint Steering Committee, composed of senior management and union officials, to oversee this process of redesigning the workplace (General Article, paragraph 3). It also set out guidelines for workplace restructuring, which specified, among other things, that the "worker participation process shall be consistent with and supportive of this collective agreement" (General Article, paragraph 6).

They had also provided in the 2002-2004 agreement that the employer should have the unilateral power to effect the "combination, amalgamation, creation, or elimination of tasks, jobs, or lines of sequence" (Article 4.02) notwithstanding other provisions of the agreement. However,

the employer had this extraordinary power for a limited time only, “until the earlier of the termination date of the collective agreement or the workforce reduction of 350”. This provision was an acceptance by the union that, in the interests of improving the plant’s future prospects, the employer should be free to reduce the workforce and to implement certain organizational and operational changes even without the union’s concurrence.

In the Slabcast Department, Operators and Mechanics (also referred to as “Mechanical Maintenance Technicians” or “MMT’s”) have traditionally been in different lines of sequence. There has been a well-understood demarcation of duties between the two groups. In 2003 (or possibly even earlier), however, the employer was interested in re-visiting the question of the assignment of duties within the Department. Its concern was for the more efficient use of manpower. In 2003, at an arbitration before arbitrator Brent (award unreported, dated November 13, 2003), the employer explained that, starting in June 2003, it had scheduled some Operators to perform certain maintenance functions in the Slabcast Department in order to make better use of their time (see, in particular, pages 3 & 4 of the award).

At about the same time, the union was concerned with a health and safety issue in the traditional assignment of duties in the Slabcast Department. Specifically, the Operators were at risk of heat stress. In February 2003, it proposed to the employer an Employee Development Plan (“EDP”) in the Slabcast Department. This was in keeping with the spirit of the General Article. (Other EDP’s were under study in other departments.) The initial proposal, drafted by a union official, Mr. Rainer Schmitt, was essentially a job rotation plan among Operators, designed to alleviate heat stress. In keeping with paragraph 6 of the General Article, it respected lines of sequence. The initial plan was discussed and refined several times over the next few months.

By September 2003, in the discussion of the EDP, the employer had proposed that the Operator and Mechanic jobs in the Department be redesigned in the interest of greater efficiency. The traditional division of labour between the two groups would be changed, according to the employer’s proposals. Although this was not in keeping with the General Article, paragraph 6, of the agreement, the union agreed to engage in study and discussion of the employer’s proposal.

Over the next three years, the parties engaged in extensive consultations to advance the initiative of redesigning jobs in the Department. As consensus was reached on various aspects of the plan, those ideas were implemented. In particular, various employees became entitled to a bonus, which has generated over $700,000.00 in extra income for about 50 employees since 2003. In addition, employees have been promoted on the basis of changes in the job design, various positions have been made obsolete, employees have been trained, and other unspecified changes have been made.

In the fall of 2006, the parties reached an impasse in their discussion of this initiative. According to the union, the problem was that there was a sharp increase in the contracting out of jobs in the Department resulting from the job redesign, which it found unacceptable. On October 5, 2006, the union presented this grievance, challenging most of what the employer had done or was proposing to do as regards jobs in this Department. Despite the presentation of the grievance, discussions continued for a while. The union made a final proposal to the employer, entitled Slab Caster Agreement, on November 15, 2006, after which (it appears) the union broke off discussions.

Between June 2003 and October 2006, the union had presented several grievances relating to various aspects of the job redesign, having to do with scheduling, overtime, contracting out, pay and training. Some of them complained that the employer was crossing lines of

sequence. Some of these grievances were withdrawn. Others (it appears) have been referred to arbitration, although no hearing has been held on any of them. None of them, until the present grievance, challenged the essence of the evolving EDP in this Department.

The present grievance, dated October 5, 2006, reads in part as follows:

> This grievance, of a General Nature, is filed because management is crossing lines of sequence between operators and mechanics in the Slabcast Department without the union's agreement, as is required by the CBA. The company is scheduling operators to do the full scope of the daily assignments of the Slabcast Segment Shop MMT's as well as scheduling MMT's to do Operator functions.
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> Management also have operators work overtime on the mechanic's functions. This is a violation of Article 4.01, 7.01.10, 5.02.10, 5.02.11 as well as 7.09.20 and any other pertinent articles of the CBA. Management has scheduled operators to do work way beyond what they claimed in the arbitration between Algoma Steel and USWA in the matter of a grievance concerning production employees being scheduled to do mechanical technicians work in Arbitrator Brent's award. In an attempt to reach a mutually satisfactory arrangement the union has participated with the company in exploring potential plans, that would satisfy objectives while protecting members' rights. It has become apparent to the union due to the fact that there are large manning shortfalls, that the company does not have the sufficient manning or the intent to hire proper manning to honour members' rights. The union decided that further attempts would not resolve the issue and decided that the issue would have to be dealt with in arbitration, therefore the union has no other recourse than to file this general nature grievance.
>
> The company has reassigned the full job of Slabcast segment building that belongs to the MMT via the Mechanical Master Seniority List and in fact have even eliminated overtime opportunities to that work that MMT's are entitled to under Article 1.02.10 by awarding it operators or contractors. The company has not posted for the adequate amount of mechanics or operators to ensure that crossing of lines of sequence would not result in a violation of the assigning of duties.
>
> The union asks for a meeting at Step 2 and that management discontinue their way of scheduling MMT's to the operators line of sequence jobs as well as only scheduling operators to the work of mechanics that was described in the Brent award.
>
> We further request that management post and fill the positions of MMT's and operators. We also request full redress for MMT's and operators. We also request punitive damages and damages for mental distress this has created, to all affected employees.

In its reply, dated October 31, 2006, the employer denied the grievance. It stated, among other things, the following:

> The Union informed the Company on October 5, 2006 that it will no longer participate in these discussions and has filed this grievance. The grievance was filed in an untimely fashion in that no discussion had yet been held at the Joint Steering Committee. This issue was subsequently discussed at the Joint Steering Committee meeting of October 19, 2006…

On November 14, 2006, the union requested an extension of the time period for filing this grievance under section 49 of the Labour Relations Act, 1995, S.O. 1995, c. 1, to which the employer consented on November 19. Later, on November 23, the union requested a further extension, agreed to by the employer on November 24.

Under Article 13.07.10 of the collective agreement, the union may present a General Nature grievance "within twenty-one days after the occurrence of the fact or event upon which such question is based".

IV

The employer has argued that the grievance is out of time, under Article 13.07.10, since no triggering fact or event occurred during the 21 days preceding its filing, and that the arbitrator therefore has no authority to deal with it. The employer further says that it was not until after the start of the arbitration hearing that the full, expansive effect of the grievance became apparent, with the result that its failure to object to the timeliness of the grievance at the earliest opportunity should not be held against it.

In my view, the grievance cannot be judged to be untimely.

I do not agree with the employer that the full extent of the union's claim was not apparent from the face of the grievance. It is possible that, after the start of the hearing, the union explained in greater detail than it had done previously exactly what it was seeking to achieve in this arbitration. However, in my view, the statement of grievance makes it clear that the union is essentially challenging the entire Slabcaster job redesign initiative, as well as seeking compensation for employees who have been adversely affected by it. The scope of the union's complaint is apparent from the face of the grievance.

I note that the employer missed several opportunities to object to the timeliness of the grievance before the opening of this hearing. In particular, in replying to the grievance, it made no claim that the grievance was filed late. Quite the contrary: it objected to it on the ground that it was premature, i.e. that it was presented before the matter had been discussed at the Joint Steering Committee. Having objected to the grievance on the ground of its prematurity, the employer can scarcely now be heard to object on the ground of its lateness. In addition, the employer twice extended the time for the referral of the grievance to arbitration under section 49, which is also impossible to reconcile with its position that the arbitrator has no jurisdiction as a result of the untimely presentation of the grievance.

It follows that the employer's failure to object to the grievance's timeliness before the arbitration hearing precludes any such challenge now.

It is therefore not necessary to consider an alternative possible basis for holding that the grievance was timely, namely that the union was justified in waiting to see whether a comprehensive agreement would be reached before resorting to a grievance about the measures taken by the employer.

V

Before the employer's estoppel argument is addressed, it is necessary to comment on Article 4.02 of the 2002-2004 collective agreement, of which mention has already been made. Article 4.02 gave the employer the power to act unilaterally until such time as the workforce had been reduced by 350. It reads, in part, as follows:

> The Company remains committed to the joint decision making process and will ensure the DSC's [Department Steering Committees] and the JSC [Joint Steering Committee] are involved in any decisions with respect to the workforce reduction of 350 stated above. Until the earlier of the termination date of the collective agreement or the workforce reduction of 350 in the company, the parties agree, in the event the JSC is unable to reach consensus on the combination, amalgamation, creation, or elimination of tasks, jobs, or lines of sequence or on the layoff of employees as set out in the general article section 31 (ii) and (iv), management may proceed with the proposed action providing such action does not result in the contracting out of the work, and providing it does not result in an increase in scheduled overtime.

The current agreement, running from 2004 to 2007, contains no provision comparable to Article 4.02. Under Article 7.01.10 of the current agreement, the employer is prevented from changing lines of sequence without the union's concurrence. It reads, in part, as follows:

> A line of sequence is a series of jobs in a department by which an employee may advance to the top job or revert to the bottom job. New lines of sequence or changes to existing lines of sequence shall be established by agreement between the Company and the Union…

One of the arguments presented by the employer was that the entire Slabcaster EDP project, having been initiated while the employer still enjoyed its extraordinary powers under Article 4.02 of the old collective agreement, was "protected" by Article 4.02. The employer says that, in the consultations it held with the union on the EDP, it was attempting to reach agreement because that was the better way to do business. However, it maintains that, in view of Article 4.02, which gave it the authority to proceed unilaterally with this project, it was not required to reach agreement.

I should state that, as I read Article 4.02, while it legitimized certain unilateral management action that was taken before the workforce reduction of 350 had been achieved, it did not empower the employer to proceed with any unilateral action after that date, even action that had been previously planned or contemplated. I base this conclusion on the language of Article 4.02, which provides that "[u]ntil the earlier of the termination date of the collective agreement or the workforce reduction of 350 in the company… management may proceed with the proposed action". Once the workforce had been reduced by 350, the power to proceed with unilateral action expired. The initiation of the job redesign before that date did not therefore clothe the employer with the unilateral authority to see the project through to completion.

The evidence and the submissions I have received so far do not enable me to determine either:

a) the date that the extraordinary powers conferred by Article 4.02 of the former agreement ceased to be available to the employer; or

b) the date that the various employer actions objected to by the union in this grievance were taken.

I cannot therefore make any ruling at this stage as to whether any of the employer actions at issue in this arbitration were taken by the employer in exercise of its powers under Article 4.02 of the old collective agreement.

Both parties also made submissions in relation to the Brent award of November 13, 2003, referred to above, and its relevance to this arbitration. Arbitrator Brent ruled that the employer was entitled to assign Operators to perform Mechanics' duties as a result of the extraordinary power conferred on it by Article 4.02. In so ruling, she held that, as of the date of the impugned assignments, Article 4.02 was still in full force and effect.

In my view, it is apparent from that award that arbitrator Brent was dealing with the assignment of Operators to perform certain Mechanics' duties. At that stage, there had been no assignment of Mechanics to perform Operators' duties. Most tellingly, lines of sequence remained "entirely separate" (see page 3 of the award). No mention appears to have been made before the arbitrator of the job redesign initiative that had just begun. The present grievance cannot therefore be characterized as an attempt to relitigate what was decided in the Brent award. Res judicata has no application here.

VI

Both parties explained their perspectives on the employer's argument that the union is estopped from challenging the various measures taken to implement the evolving EDP in the Slabcast Department. As I noted above, while the parties submitted voluminous documentary material, no viva voce evidence was adduced. Nor was any case-law cited by either side on the estoppel issue. While the parties have largely stated their positions in generalities, there is obviously considerable force to the position of each side.

The employer says that the union was intimately involved in the process of developing the EDP. It was aware of, and went along with, everything the employer was doing between 2003 and 2006, including the assignment of duties, the crossing of lines of sequence, the wage adjustments, the postings and the promotions. While it presented several grievances, none of which proceeded as far as an arbitral award, it refrained from putting in issue the principle of either the project as a whole or any of the action taken by the employer. The employer says that the union must be taken to have represented that the various implementation measures were acceptable to it. On that basis, the employer moved forward with the job redesign project. It would be unfair to the employer to allow the union to oppose the EDP at the present stage in view of its prior acquiescence.

The union replies that it participated in the EDP project in the Slabcast Department in the spirit of the General Article of the old collective agreement (quoted above). It devoted substantial time and effort to the project. While there was no evidence on the point, it claims that it relied on the employer's representations that union agreement would be needed for the project as a whole. It hoped that the final outcome of the extensive consultation process would be acceptable to it. However, since it had several concerns about the project, particularly the increase in contracting out that resulted from it, it decided to withdraw its support and to enforce its contractual rights, particularly Article 7.01.10. The union says that it would be unfair to hold that its constructive engagement with the employer had deprived it, either temporarily or permanently, of its ability to enforce its contractual rights.

For essentially two reasons, I am unable to find that the union is estopped.

Firstly, I am not satisfied that there was any reliance by the employer on representations made by the union. The employer, according to the submissions it made at the hearing, proceeded with the Slabcaster project in the belief that, in view of Article 4.02 of the old collective agreement, it did not require the union's agreement. While I cannot entirely rule out the possibility that representations made by the union factored into the decisions taken by the employer, that possibility is not borne out by any evidence before me. In my view, it is not appropriate for an arbitrator to assume that there has been reliance: reliance must be proved. In Re Civic Employees' Union, Local 43, and City of Toronto (1967), 18 L.A.C. 273 (Arthurs), for example, it was alleged that the employer was estopped from discontinuing a long-standing local practice. The board of arbitration dismissed that claim since there was nothing in the evidence to support the union's assertion that it had relied on the employer's representation that the practice would be maintained. This is what the board of arbitration stated (at page 280):

> To use a common metaphor, you are not allowed to let someone go out on a limb so that you can saw him off. But in this grievance, the union has not "gone out on a limb". It has incurred neither risk nor detriment. While the union suggested that it "relied...to its detriment during the last negotiations" on the non-enforcement of the city's rights, this assertion is not supported by evidence. There is no showing that the union surrendered any claim or made any concession in the belief that the city would continue the western district's early-leaving privilege. Neither is there evidence that the union would have tried to write the western district's leaving time into the agreement if it had realized that the former practice existed merely on sufferance.

In the present case, while the evidence is consistent with the employer having relied on the union's representations, it is equally consistent with the employer having been indifferent to the union's acquiescence since it believed that it did not require the union's consent. As the employer is advancing estoppel in support of its motion to dismiss the grievance, it bears the onus to satisfy me that the union should be estopped from enforcing its contractual rights. The employer cannot be said to have met its onus on this point.

Secondly, on the basis of the record before me, I am not satisfied that the equities are clearly in favour of the employer's position. In particular, there is substantial weight in the view that the union's constructive engagement with the employer, in the spirit of the General Article, should not be interpreted as a waiver of its contractual rights. The union should not be prejudiced for having suspended judgment and gone along with this initiative in the hope that the eventual outcome would be acceptable to it. The employer's argument seems to suggest that the union should have refused to participate in discussions on the EDP, notwithstanding the General Article, or should have objected, by way of grievance, to every step taken by the employer, and that its failure to assert its contractual rights promptly prevents it from doing so now that consultations have broken down. I have some difficulty accepting that proposition.

VII

The employer has suggested that, if its preliminary objections are dismissed and the hearing proceeds on the merits of the grievance, it will be necessary to give notice to all the employees involved with the Slabcaster EDP since their interests would be adversely affected by the orders sought by the union. Having heard no argument on the subject, I express no views on

whether notice is required. If the parties cannot agree on the matter, I will hear their submissions and issue a ruling.

VIII

For all the above reasons, the employer's preliminary objections are dismissed. The hearing will continue on the dates that have been fixed.

DATED at Thornhill, Ontario, this 30th day of April 2007.

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Michael Bendel,
Arbitrator