

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Toronto International Film Festival

(“the Employer” or “TIFF”)

-and-

**International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists
and Allied Crafts of the United States, its Territories and Canada, Local 58**

(“IATSE” or the “Union”)

Bargaining Unit Work/Contracting Out Grievance

Sole Arbitrator

Marilyn Silverman

Appearances:

For the Union:

Ernie Schirru, Counsel
Jim Brett, President, IATSE Local 58
Eric Kruka, Shop Steward, IATSE Local 58
Robert McPherson, Call Steward, IATSE Local 58
Arian Cowan-McLeish, TIFF Revisor
Sean Rogers, TIFF Revisor

For the Employer:

Greg McGinnis, Counsel
Natalie Lue, Vice President Production and Visitor Experience
Diane Cappelletto, Director of Technical Production Services

Hearings held in Toronto on November 28, 2012, February 14 and 26, 2013.

Award issued on May 28, 2013.

A W A R D

1. The dispute between the parties arises out of work performed by Deluxe Toronto (“Deluxe”) for the 2012 Toronto International Film Festival.
2. The Employer is in the business of presenting and promoting films, most notably the annual 11-day long festival (the “Festival”) which is an internationally regarded film festival.
3. This case arises from the increasing use of Digital Cinema Packages (DCPs) that have largely replaced the traditional 35 mm film and HD cam formats at the Festival.
4. The material facts are largely not in dispute. In 2010 TIFF experienced a problem in the screening of one of its films at the Festival. One DCP screening was missed.
5. Again, in 2011, 12 DCP screenings were missed as a result of problems with film formats compatibilities.
6. Most films for the Festival are received very late in the process, a day or so before the Festival begins, so the time to ensure that films will play is very compressed. This is no fault of TIFF, which sets an earlier deadline, but in practice most of the work on the films needs to be done right before the Festival begins. The parties acknowledge this is unavoidable. The parties accept that timely and proper screening is of critical importance to the Festival.
7. After 2011, given the increasing number of films that were submitted in DCP format and the necessity of ensuring that screenings occur, TIFF decided to contract with Deluxe for the entire process of key management and quality control. The union asserts that part of the work given to Deluxe ought to have been done by its members. The work claimed is the physical verification work.

8. Natalie Lue, the Vice-President of Production & Visitor Experience, explained the decision to use Deluxe. In 2011 the verification and key generation were done independently. She did not then know they could be done together, much more efficiently. In 2011 the TIFF revisors verified what they received, but they were limited in what they could do. She was asked if the revisors had access to the server and screening room could they have loaded and done physical verification after 2011. She responded that there was no space, time and equipment. When asked why TIFF did not create a situation whereby its manpower could be used, she responded that TIFF did not have the infrastructure to address the volume of work required immediately before and during the Festival. She further stated that the DCPs were checked on Deluxe's proprietary software. Ms Lue described that, unlike film and HD cam, DCP is a format that can be fixed.

9. TIFF's new strategy was adopted in consultation with Deluxe. Deluxe and TIFF had a relationship that pre-existed the screening problems in 2010 and 2011. Deluxe had delivered trailer packages that played before films, advised TIFF on technical issues, provided Deluxe screening rooms and post-production work. TIFF did not engage in any sort of assessment as to whether Local 58 revisors could be incorporated into the Deluxe processes. There was also no discussion with the Union on what was to occur.

10. Jeffrey DeWalde of Deluxe described his contract with TIFF for the Festival and what services his employees provided. The work contracted to be done by Deluxe for TIFF consists of three aspects. Firstly, Deluxe does a quality control check of the DCP drives to ensure DCI (digital cinema initiative) compliance and that all the files are working properly. This involves physical verification and completion of an associated 5-point inspection report. Quality control includes making necessary fixes to the files, using Deluxe's mastering team and its proprietary software. Secondly, Deluxe generates keys – a security feature created for each screening that must be independently generated and authenticated. Thirdly, Deluxe provides 24-hour technical support for any problems with a key or drive.

11. IATSE's claims only the quality control work of physical verification and completion of the associated 5-point inspection report.

12. The screening difficulties that prompted TIFF to contract with Deluxe are technical and were described in detail in the evidence. To summarize, the keys need to work so that each copy of the film is the same, secure and accurate. In addition, the technology must ensure that films can work on different projectors and servers in the various TIFF venues.

13. A Dolby test server is required to perform the testing of the DCP to ensure its compatibility with the servers used at the TIFF venues during the Festival. TIFF arranges for that test server to be provided to Deluxe. Work is done at a secure Deluxe facility.

14. The quality control process at Deluxe ensures that the DCP is able to load and play at the TIFF venues, as it should. It confirms proper functioning of the content and the subtitles. Although Deluxe and TIFF contemplated in their contract that Deluxe would advise TIFF of any content problems and TIFF would then deal with the content owner as to how to proceed, in practice this did not occur. Given the very tight time constraints between receipt of the DCPs and the screenings, Deluxe had to take on the task of fixing any errors. This fixing was done by Deluxe's DCP mastering staff. The DCP would be referred back for re-verification and completion of the inspection report.

15. Sean Rogers, a revisor and member of Local 58, gave evidence of the quality control work of a revisor.

16. Mr. Rogers describes the role of the revisors for film, HD Cam and DCPs. For DCPs, the revisors look at the file information, not the film content as they do with 35mm and HD Cam. In each scenario, if there are problems, the revisors contact others to fix the problems. Although he would review and match up key information, he is not involved in the creation of the keys. He has loaded DCPs onto servers for other venues but not for TIFF. Mr. Rogers' evidence is that once the file is loaded onto the server, the inspection process for DCPs is much the same as for the HD cam. If there were a problem with the ingestion of the DCP onto the server, it would not be referred to the revisors. In 2011 he completed the inspection form. He did not ingest the files onto the server. He said that once the DCP is

loaded onto the server, it was Mr. Rogers view that the inspection process would be the same as what he does for HD Cam.

17. Deluxe hires contractors, who have access to a server, to mount the files and perform the visual inspection. The only job of the contractors is to mount the files, perform the visual inspection and fill out the inspection form, similar to the ones the Local 58 employees complete. The contractors do not fix the problems, once identified.

18. At times there is communication between the contractors doing the inspections and the mastering team. If problems were identified by the contractors, the mastering team fixes them and a new inspection report is generated.

The Collective Agreement

19. A number of provisions are referred to by the parties:

2. UNION SECURITY AND RECOGNITION

2.01. The TIFF recognizes the Union as the sole and exclusive bargaining agent for a bargaining unit of employees described as follows:

“All projectionists in the employ of the Toronto International Film Festival Inc. and/or Toronto International Film Festival Group in the City of Toronto, save and except the Booth Manager, Assistant Booth Manager, Revision Manager and Assistant Manager and Technical Representatives and persons above those ranks.

Clarity Note

The parties agree that the bargaining unit does not include those engaged in the installation, repair and/or maintenance of the equipment (e.g. video coordinators, video technicians, etc ...) but does include revisors and employees engaged in the operation of equipment. The parties further recognize that the bargaining unit cannot include people who are *bona fide* employees of venues rented by Toronto International Film Festival Inc.”

2.02. Nothing in this Collective Agreement shall prevent the TIFF from having another employee from outside the bargaining unit (including a member of management) perform projection or revision work:

- (a) For internal staff meetings held by TIFF at its own facility save and except where a projectionist is required to operate from the projection booth.
- (b) In relation to community outreach and/or educational programs;
- (c) In circumstances where the need to perform such work is not reasonably foreseeable in advance and there is no employee covered by this agreement immediately available to perform it.
- (d) In circumstances where the individual assigned to perform such work does not show up for work or leaves work before the end of his/her assigned shift and there is no employee covered by this agreement immediately available to perform it.
- (e) For the purposes of conducting or undergoing training or testing.

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2.04 For the following work, the TIFF agrees that it shall only hire members of the Union who are in good standing with the Union or those employees who obtain a valid work permit from the Union to perform the work covered by the terms of this agreement:

- (a) Projection work, at the Toronto International Film Festival;
- (b) Festival-related revision work;
- (c) Festival- related projection work;
- (d) Non-festival related projection work, including work in TIFF Bell Lightbox.

The Union agrees to supply workers when requested to do so with the requisite skills, ability, qualifications to perform the above-noted work required by the TIFF under the terms and conditions of this agreement. The TIFF has the right to refuse, on reasonable grounds only, anyone referred by the Union.

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2.06

- (a) If the Union is unable to supply a person with the requisite skills, abilities and qualifications when requested to do so, the TIFF may arrange for the performance of the work in question in such manner as it sees fit. The TIFF may impose a good faith deadline of filling a work assignment.
- (b) TIFF will make reasonable efforts to first provide training through the joint Skills Development Committee, to one or more Union projectionists or revisors as applicable before exercising its rights under Article 2.06(a).

2.07. For work other than that listed above in Article 2.04, the Group will hire and employee individuals who have the skills, ability and qualifications to perform the required work. The Group may advise the Union of its staffing needs and invite the Union to supply names of members who would be interested in performing the work. The Union acknowledges that it is the Group's practice to contact first those individuals who have performed work for the Group in the past. Individuals so hired must either be members of in good standing of the Union or obtain a valid work permit from the Union to perform the work covered by the terms of this agreement. The Union shall not unreasonably refuse a work permit to any such individual.

2.08 The Group will provide all new employees who are not dispatched by the Union with a copy of this collective agreement and advise the employees how to contact a representative of the Union. The Group will advise the Union of all new employees, and provide the Union will each new employee's address and telephone number.

2.09 Regardless of whether the Union supplies the employees or the TIFF hires employees directly, the terms of this collective agreement shall apply to all employees coming within the scope of this collective agreement.

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4. MANAGEMENT RIGHTS

4.01 The Union recognizes that the management of the TIFF and direction of the working forces are fixed exclusively with the TIFF. Without restricting the generality of the foregoing, the Union acknowledges that it is the exclusive right of the TIFF to:

- (a) operate and manage its affairs and any of its facilities in as efficient and economic a manner as it sees fit;
- (b) hire, retire, assign, direct, promote, demote, classify, transfer, lay off and recall employees;
- (c) suspend, discharge or otherwise discipline employees;
- (d) determine: the nature and kind of activities to be undertaken by the TIFF; the events to be held; the services to be rendered and the method by which services will be rendered; the kinds and locations of equipment; the media to be used and exhibited; the control of materials and goods; the methods, processes and techniques of work; the schedules of work including overtime; the number and kind of personnel to be employed; the standards of performance;
- (e) enter into agreements (written or otherwise) with third parties for any and all purposes related to: the rental, licence, or use of third party facilities and/or equipment for TIFF activities; the funding and/or sponsorship of events or other activities by third parties; the rental, licence or sue of TIFF facilities or other property of the TIFF;

- (f) make studies of and institute changes in jobs, job content, or job assignment; discontinue, reorganize, limit, combine, substitute any operation or part thereof; determine all other aspects of the TIFF's operation;
- (g) make, enforce and alter from time to time reasonable rules and regulations to be observed by employee including, but not limited to, rules and regulations respecting confidentiality, conduct, dress, safety and security of the TIFF, its property and personnel;
- (h) establish reasonable standards of skills, qualifications, productivity and quality for projection and revision consistent with its goals as a leader in the film community, and to create and administer methods (including written, oral and/or practical tests) by which to measure whether employees and potential employees meet these standards.

The TIFF agrees that it will not exercise the above-noted rights in a manner inconsistent with the express terms of this Collective Agreement.

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5. CONTRACTING OUT USE OF TIFF PROPERTY BY THIRD PARTIES

5.01 The Union acknowledges that the TIFF operates in a variety of venues, almost all of which are owned and operated by third parties. Further, films and other materials exhibited by the TIFF are often projected using equipment owned by third parties. As such, the TIFF does not always have the right to decide who operates the equipment in venues or on equipment owned by third parties. In situations where the TIFF is responsible for projection of film and/or video, the TIFF shall not contract out the projection of such film and/or video to any other party that does not have an agreement with the Union which covers the work falling within the scope of this agreement, unless the supplier or the venue or equipment in question requires the TIFF to use the supplier's *bona fide* projectionist employees (or contractors).

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Submissions

20. The Union knows that DCP is the preferred format and its use will increase in future. IATSE's position is that the language in the Collective Agreement resolves the issue in its favour. The Union submits that its revisors did quality control work and verified the content of the films in precisely the same way that Deluxe does through its contract employees. IATSE understands that the revisors do not fix problems that arise with the content, nor do they have a role in key management. But the physical verification (run time, aspect ratio and

subtitles) are what the contractors do for Deluxe. The Union submits that the physical verification did not intermingle with other quality control tasks.

21. The Union relies on the evidence of Mr. Rogers and Mr. DeWalde in concluding that, regardless of whether 35MM, HD cam or DCP are used, they are subject to the same physical verification or quality control regardless of the format – run time, aspect ratio, subtitles etc. They all have to be physically verified to complete the five-point inspection reports, whether that is done by IATSE or by the contractors.

22. Also, if coding issues or errors arise in the DCI component of the quality control, Deluxe tries to fix them. The Union concludes from this that the physical verification work is severable from the repair work, and that the physical verification part of quality control should be done by its members.

23. The Union asserts that the three individuals who did the verification work for Deluxe had no computer expertise although had done some contract work in the past. The Union says then that there is no skill or ability impediment to the revisors being able to do the quality control function done by the contractors.

24. Of the bundle of tasks that Deluxe took on, the Union says that the physical verification alone is the bargaining unit work claimed. This excludes the problem solving and key management that Deluxe also does.

25. IATSE disputes that the cost and resources issues should play any role in this determination, because TIFF did not even investigate whether or not a venue could be secured in order to engage in the physical verification work, including securing the necessary equipment.

26. The Union looks next to the interpretation of the Collective Agreement. Article 2.01 includes, in its description of bargaining unit work, the position of revisors.

27. The Union submits that the evidence is clear that the Local 58 members have the skill and ability to perform the physical verification. No request was made by the employer to supply revisors to perform the physical verification work. TIFF contracted out the work without regard to its contractual obligations to Local 58.

28. The parties made extensive submissions on whether contracting out is permitted under the collective agreement, with substantial supporting caselaw. Given that I decide this matter on the scope of the bargaining unit work, and not on the issue of contracting out, I do not describe those submissions of the parties.

29. In the result, the Union asks for a decision that TIFF violated the Collective Agreement by contracting out the physical verification work and that such violation entitles it to damages. It asks that the matter be bifurcated with the declaration of the violation being the only remedy at this time and a direction that the parties meet and resolve the issues.

30. The Employer says that the change in technology could not have been predicted and its impact was not one that could have been in the contemplation of the parties when the collective agreement was negotiated. In the Employer's view, the factual matrix behind this change is to highlight that the analogies drawn by the union between DCP and film have no application.

31. TIFF submits that the work at issue is not "revision work". It says that the work the IATSE revisors did in 2010 and 2011 did not involve the physical checking of the DCPs, nor projecting the images on the screen to verify the subtitles and sound.

32. The employer asserts that the work that Deluxe did in 2012 was entirely different and a reaction to the difficulties that had occurred before in relation to the DCP failures. TIFF says that, although there are a severable set of tasks with DCPs that are analogous to work that needs to be done on film, such as filling out inspection reports, the significant technical work does not overlap and is not relevant in the DCP context. The employer says that to parse out the work that may be done by the Local 58 members is not realistic. What

the Deluxe contractors do is a different, non-severable task, something quite new. TIFF argues that to parse out the work into separate stages, as the union recommends, is not achievable. Rather this is a non-severable, new task. On this latter point TIFF says further that Local 58's suggestion that a location be rented during the process, that more servers be negotiated and that further supervision of the process occur all to enable the revisors to do the work is not reasonable. It asserts the inevitable delays and errors of not managing this process as a whole would be chaotic.

33. In the result TIFF urges me to find that the work performed by Deluxe is not work of the revisors and that changing from a physical to a digital product is a qualitative change.

Analysis and Decision

34. There are two aspects to this decision. One is whether the physical verification to complete the 5-point inspection portion of the quality control work performed by Deluxe in 2012 is work of the bargaining unit; specifically revisors' work. The other is whether, if it is bargaining unit work, the Employer has the right to contract that work out under the terms of the Collective Agreement.

35. In determining the first question, I turn to the work that Deluxe did in 2012 to see if that was "revision work" as defined under Article 2.04 of the Collective Agreement.

36. In 2012 Deluxe provided distinct sets of services, among them: physical verifying the DCP and completing the inspection report; correcting errors; and creating and distributing the required keys. Only the first of these tasks is claimed by Local 58.

37. For the complete DCP process to be performed in the efficient and expeditious manner needed during the phase of the Festival when the DCPs arrive, I am persuaded that the disputed work must be done as a composite whole process. I agree with the employer that the way the work on a DCP quality control work must be performed, requires that it be

done as a non-severable process because of the way the format and the tasks related to handling of DCPs as a digital product and what is done for 35mm and HD cam is different.

38. The Deluxe equipment and proprietary knowledge that enables Deluxe to perform BOTH the key management function as well as the quality control function, including the validation and fixing of the DCPs to enable them to be screened, makes this work of a character that is different than what the revisors did.

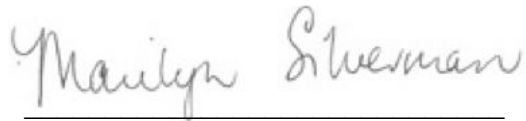
39. It is true that the items verified and the resulting five point inspection report is a common feature in what the revisors did on film and HD cam and what the Deluxe employees do in DCPs. But the work the revisors could perform is not reasonably or logically severable from the other functions required. The work is a composite, integral function. The entire process the key management and the quality control work, must be done as a single piece of work; it cannot be separated out and performed as different components. The Employer would be unable to have the work performed as an entire process if it were to assign a small portion of the quality control work (the physical verification) to Local 58 employees. It would need to be done in a separate physical space, equipment would have to be purchased and provided and the logistics of an integrated process which is required would then be defeated.

40. The fact that certain tasks or features are common between the DCP work and the other physical verification the revisors do does not detract from this analysis. Those tasks that the Union suggests can be severed are part of an overall integrated process. The process of getting the DCP ready for screening is a different process that relates to a whole digital product. That process as described is not bargaining unit work.

41. Having made this determination, I need not deal with alternative contracting out argument.

42. For the reasons given, the grievance is dismissed.

Dated at Toronto on May 28, 2013

A handwritten signature in cursive script that reads "Marilyn Silverman".

Marilyn Silverman,
Arbitrator