Case Name:

Arts Club of Vancouver Theatre Society v. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories, and Canada, Local 118

IN THE MATTER OF an Expedited Arbitration Pursuant To Section 104 of the British Columbia Labour Relations Code (Case No: 50966/04T)
Between
The Arts Club of Vancouver Theatre Society ("the employer"), and
International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories, and Canada, Local 118 ("the union")

[2004] B.C.C.A.A.A. No. 73

Award No. X-013/04

British Columbia
Collective Agreement Arbitration

R.B. Blasina, Arbitrator

Heard: March 31 and April 19, 2004.
Award: April 28, 2004.

(55 paras.)

Re: Assignment of Duties and Responsibilities

Appearances:

Gregory R. Anctil, for the employer.
Miriam Gropper, Q.C., for the union.

AWARD

I

1 This matter includes a number of grievances protesting that the Employer is utilizing the Assistant Stage Manager ("ASM") to perform bargaining-unit work contrary to Article 23 of the collective agreement, "Assignment of Duties and Responsibilities". The parties agree that an ASM may perform certain bargaining-unit work which is listed in the collective agreement. However, the Employer would assert that an ASM may be given primary responsibility for such work; and, only were additional help required, would it have to employ a Union member. The Union, on the other hand, would assert that an ASM may only perform such work in an ancillary capacity to assist the Union member.

2 The parties are currently engaged in collective bargaining for renewal of the collective agreement. They request a third-party interpretation of the collective agreement, after which they will endeavour to settle the outstanding grievances. This arbitrator will retain jurisdiction pending final resolution.

II

3 The Employer is a non-profit Society which produces live theatre in Vancouver. It has three theatres: the Stanley Theatre and the Granville Island Theatre which it uses as venues for its shows; and, the Revue Theatre which it leases to third-parties. As a live theatre producer, the Employer also has other facilities where scenes, sets, costumes etc. are built, and where preparatory rehearsals are conducted prior to moving the show to its performance venue.

4 The Employer employs members of a number of unions representing diverse bargaining units. These include the Canadian Actors' Equity Association ("Actors' Equity") which represents Performers, Directors, Choreographers, Stage Managers ("SMs"), ASMs, and Apprentice Stage Managers ("Apprentices"). The Employer has been party to collective agreements with Actors' Equity since 1964. Pursuant to that collective agreement, the Employer has been required to employ an SM and, since 1979, to employ an ASM, on every show. The Employer has at times employed an Apprentice, but never two ASMs. It does not appear that an Apprentice was employed on any of the productions presently in issue. SMs, ASMs, and Apprentices are considered to be "stage management". They are non-bargaining-unit employees for the purpose of the immediate collective agreement.

5 The Union represents technical and ancillary employees associated with producing a show. The collective agreement lists "Regular Employees" in such categories as Production Assistant, Wardrobe Maintenance, Production Secretary, Building Maintenance, 2nd Carpenter, 2nd Electrician, Head Scenic Carpenter, Head Properties, Head Electrician, Head Wardrobe, and Head Scenic Artist. The collective agreement also lists "Temporary/Casual Employees" in such categories as Painter, Carpenter Grip, Electrician, Scenic Carpenter, Props, Seamster, Wig Maintenance, Cutter, Scenic Artists, Crew Chief, Assistant Rental, Board Operators, Head Rental, and Running Crew. Employees in these categories were first represented by the National Association of Broadcast Employees and Technicians ("NABET"); and, the term of the first collective agreement was from January 1992 to the end of October 1993. The Union successfully raided in 1993, and it has since negotiated two successive collective agreements whose terms were from November 1, 1993 to December 31, 1997, and from January 1, 1998 to June 30, 2003.

6 Persons employed in the above-listed categories may be utilized at different phases of the production process. The "running crew" refers to those technical people who are required during the actual performance of the show. The "running crew" comes together at the "technical rehearsal" phase after all of the elements of a show have been "built", and rehearsals have moved from the rehearsal hall to the theatre stage. These technical rehearsals usually go on for nine or ten working days prior to the show being performed before an audience. The running crew is responsible for all of the technical functions associated with the performance of the show. The personnel required will vary with the needs of the performance. One of the job categories is simply called "Running Crew"; this would be a factotum position. Any member of the running crew may be expected to do a variety of work. An individual may have a primary responsibility, but be expected to provide assistance in other areas when possible. Typically, the running crew controls the lighting and operates the follows-spots, controls the sound board, operates the flies, moves props and changes sets, and assists with the rapid dressing changes of performers.

7 The SM is responsible for directing the technical and ancillary tasks that are associated with the performance. The SM is provided a copy of the script and begins "building the book", i.e. the SM makes notes and starts putting together a manual describing all the tasks to be performed by the running crew. This process continues and evolves through the rehearsal hall and technical rehearsal phases. During technical rehearsals, the SM will be in the seating area or the light/sound booth at the back of the theatre. During public performances the SM will be in the light/sound booth. The SM is able to communicate directly with everyone on the running crew via headset. Usually there will also be one Union member in the light/sound booth working on both lights and sound, although more may be required depending on the "size" of the show.

8 The ASM represents the SM in the stage area. The ASM's role is more "hands-on". The ASM will be directly involved with: dressing, e.g. putting actors into costumes or placing costumes; live sound cues, e.g. dropping a crash box filled with glass to create a live noise effect; prop changes, e.g. moving a piece of furniture or moving a wineglass between scenes; curtains, e.g. moving a curtain or operating the "grand drape" (the main curtain), but not the flies (i.e. other large curtains

containing painted background scenes); scene changes e.g. operating trucks or turntables which are platforms upon which scenes have been constructed; and, operating spot lines, e.g. a string or light rope for lowering or raising some light curtain or prop.

9 The Apprentice would be enrolled in a stage-manager training program. An Apprentice would work in the stage area, similarly to the ASM, and would tend to concentrate on matters relating to props and costumes.

III

10 Prior to the NABET collective agreement, stage management was unencumbered by contractual restrictions upon "hands-on" work. However, Article 23 of the first collective agreement provided:

ARTICLE 23

Duties and Responsibilities

23.1

The Company agrees to continue the current practice of assigning duties and utilization of production equipment for Arts Club Theatre productions or work directly related to productions to employees as defined in Article 2.1 of this agreement. Duties and responsibilities for bargaining unit employees will continue as per current practice.

23.4.7

Stage management personnel may continue performing duties related to theatre productions provided this practice does not displace a bargaining unit employee.

23.5

It is agreed that the above provisions of Article 23 shall not be used for the purpose of eliminating full-time or part-time employees or to avoid the hiring of same.

Michael Wood has been the Employer's Production Manager since 1983. Mr. Wood has participated as an Employer representative at every set of collective agreement negotiations. Mr. Wood testified that under the NABET collective agreement, stage management was permitted to do whatever it did before, except that the Employer could not use stage management to eliminate full-time or part-time bargaining-unit employees. Articles 23.4.7 and 23.5 were never the subject of any grievance by NABET.

11 Mr. Wood testified that during collective bargaining in 1994, the Employer and the Union

discussed restrictions that would be placed on SMs and ASMs. Mr. Wood identified some proposals that were exchanged. These were worded as expressing permission for stage management to perform particular bargaining-unit work. The 1993-1997 collective agreement provided:

ARTICLE 23

Assignment of Duties and Responsibilities

23.1 The Company agrees to continue to assign duties and the utilization of production equipment for Arts Club Theatre productions or work directly related to productions to bargaining unit employees as per current practice.

23.6 It is understood that the following practices by persons outside the bargaining unit are recognized by the Union, and the Company shall not be required to alter such practices:

...

(d) Stage Management may perform bargaining unit work as follows:

(i) An apprentice Stage Manager may be assigned bargaining unit work after at least one (1) bargaining unit member (running crew) is hired, and shall be paid at the running crew rate;(sic)
(ii) The Stage Manager and/or the Assistant Stage Manager may operate or perform: dressing, live sound cues, props changes, curtains, flying, repatching, scene changes including scenery and stage truck manipulation (manual or motorized), Followspot cues, and the operation of turntables. (sic)

23.7 It is agreed that the above provisions shall not be used to:

(a) eliminate or avoid the hiring of bargaining unit employees. (sic)
(b) cause a reduction in hours of work, a layoff or a termination of

> bargaining unit employees, or to avoid the recall of bargaining unit employees on layoff or to avoid the payment of penalties or premiums to bargaining unit employees or, as a result of working on a continuing basis, prevent an increase of the workforce or to replace an employee on leave or vacation. (sic)

There was no extrinsic evidence provided of what discussion there was, if any, of the relationship between Articles 23.6(d) and 23.7. Mr. Wood understood that the Employer would only be obliged to hire a Union member for duties which were not listed in Article 23.6(d)(ii).

12 During collective bargaining in 1998, the parties again discussed what tasks stage management were permitted to perform. Mr. Wood referred to his notes of November 25, 1998. Article 23.6(d) was thereafter amended. The order of the subsections was reversed; and the list of duties was amended. There was no discussion of the relationship between Articles 23.6(d) and 23.7. The 1998-2003 collective agreement, which is still in force and effect, provides:

> ARTICLE 23 Assignment of Duties and Responsibilities
>
> 23.1 The Company agrees to continue to assign duties and the utilization of production equipment for Arts Club Theatre productions or work directly related to Arts Club Theatre productions to Bargaining Unit employees as per current practice.
>
> 23.6 It is understood that the following work practices by persons outside the bargaining unit are recognized by the Union, and the Company shall not be required to alter such practices:
>
> ...
>
> (d) Stage Management may perform bargaining unit work as follows:
>
> (i) The Stage Manager and/or the Assistant Stage Manager may operate or perform dressing, live sound cues, props changes, curtains, scene changes and may operate scenery and (manual or motorized) stage truck or turntable manipulation, the Grand

Drape, and spot lines operated from the stage deck.

(ii) An apprentice Stage Manager may perform costume, and/or props changes after at least one (1) bargaining unit member (running crew backstage) has been hired. The Employer agrees to inform the Union when, and to what capacity, an apprentice Stage Manager will be utilized backstage.

23.7

It is agreed that the above provisions shall not be used to:

(a) eliminate or avoid the hiring of bargaining unit employees;
(b) cause a reduction in hours of work, a layoff or a termination of bargaining unit employees, or to avoid the recall of bargaining unit employees on layoff or to avoid the payment of penalties or premiums to bargaining unit employees or, as a result of working on a continuing basis, prevent an increase of the workforce or to replace an employee on leave or vacation. (sic)

13 Mr. Wood provided a list of the shows which the Employer has produced at the Stanley Theatre and Granville Island Theatre since 1994. The list stated the number of Union members who were employed on the running crew; and, of these, the number who were utilized backstage, i.e. in the same area where the ASM would be working. For example, the Employer produced "Private Lives" at the Stanley Theatre in 2004 with a running crew of two, i.e. two Union members. Of the two Union members, one was assigned backstage. Therefore, there was one ASM and one Union member employed backstage. In 2004, the Employer produced "Jacques Brel" at the Granville Island Theatre. The running crew was composed of two Union members, neither of whom was utilized backstage. Therefore the ASM would have been alone. Were any bargaining-unit work required, the ASM would have done it. There were 87 shows listed, and on average there were three Union members on the running crew, of whom on average there was one backstage. However, for 26 of the shows listed, no Union member was utilized backstage.

14 Mr. Wood estimated that it would cost the Employer an additional $62,000 per year were it required to have a minimum staffing of one Union member backstage. Mr. Wood testified that while the ASM's job was to assist the SM, the ASM would also work as part of the running crew. He acknowledged that the running crew duties which an ASM would perform, would be those same duties as a Union member would perform. Mr. Wood testified, "If there was too much for the Assistant Stage Manager to do, then we would bring a IATSE person in to assist."

15 Other provisions of the collective agreement to which reference was taken at the arbitration

were: Article 2, "Definition of Bargaining Unit"; Article 3, "Employee Definition"; Article 13, "Employee Categories"; and, Article 30, "Salary Groups and Wage Scales". These need not be cited in this award given that Article 23 of the collective agreement contains express wording concerning the performance of bargaining-unit work by non-bargaining-unit employees. However, it is noted that Article 13.4 defines a "Full Time Regular employee" as one who is regularly assigned forty hours of work per week, a "Part-Time Regular employee" as one who is regularly assigned less than forty hours of work per week, and, a "Temporary or Casual employee" as one who is "hired for a particular show or project or as and when required".

IV

16 Martin Elfert, Union Business Agent, described the chronology of events leading to the grievances in issue. In April 2002 the Employer was showing "Girl in a Goldfish Bowl" at the Granville Island Theatre. Mr. Elfert received a complaint from a Union member that the ASM was performing bargaining-unit work. Mr. Wood's list of shows indicates that the Employer was utilizing a running crew of one Union member, and that this person was not being utilized backstage. On April 11, 2002 Mr. Elfert wrote Mr. Wood asking for information, however Mr. Wood did not reply. Mr. Elfert received a similar complaint from a Union member regarding the production of "Witness for the Prosecution". This production was not named in the list of shows, and presumably was shown at the Stanley Theatre. On May 3, 2002 Mr. Elfert forwarded two grievances claiming violations of Article 23 on the basis that "the employer did instruct or permit individuals not dispatched by the Union to perform bargaining unit work in violation of the collective agreement." One grievance referred to "Girl in the Goldfish Bowl" for the period of March 28 to April 27, 2002, and the other referred to "Witness for the Prosecution" for the period of April 26 and 27, 2002. Mr. Elfert's thinking was that "If the work in question were not performed by a stage manager, then the work wouldn't happen; or alternatively, the Employer would have to hire a bargaining-unit member to make the work happen." In other words, Mr. Elfert understood that stage management was being used in place of bargaining-unit employees, and not in supportive capacity.

17 Mr. Wood responded by letter to Mr. Elfert dated May 6, 2002. Mr. Wood wrote that he was not aware of any breach of the collective agreement, and that the Employer did not intend to contravene the collective agreement. Mr. Wood suggested that there may be a difference of interpretation, and he suggested a meeting. They met on May 13, 2002, and, on June 3, 2002 Mr. Elfert wrote Mr. Wood a "without prejudice" offer of resolution. Mr. Wood, by letter dated July 8, 2002, rejected Mr. Elfert's proposal. Mr. Elfert therefore wrote Mr. Wood on August 8, 2002 repeating his earlier offer but this time "not made without prejudice"(sic):

> First, it is the Union's view that the assignment of bargaining unit work (including hair, wigs and make-up work) to Stage Management is in direct and clear violations of Article 23.7 and is not saved by Section 23.6(d). The Union asserts that the plain meaning and language in Article 23.7 supports its position

> and does not leave room for a probable alternative interpretation.
>
> Second, we acknowledge that in the past the Employer may have assigned bargaining unit work to Stage Managers and that these incidents were not necessarily the subject of a grievance. We understand that the vast majority of these incidents arose unbeknownst to the Union and/or certainly without its express permission. However, if for some reason the Employer has taken the Union (either by its words or conduct) to have agreed to waive its right under the Collective Agreement to preclude the assignment of bargaining unit work to Stage Managers then, please treat this letter as formal notice of its termination of such a waiver from this date onward. (sic)
>
> As you are aware, the Union is committed to ensuring healthy labour relations with the Employer. In furtherance of that goal and given the unique circumstances of this case, the Union has decided, as a good will gesture, to suspend grieving these matters (including the May 3rd grievances) until the expiry of the current Collective Agreement on June 30, 2003. If however, the Employer chooses to continue its practice of assigning bargaining unit work to Stage Management following the renewal of the Collective Agreement, then the Union will not hesitate to grieve this matter up to, and possibly including, arbitration.
>
> Please further note that this letter is not made without prejudice and may be relied upon by the Union at a future date in matters relating to these issues. (sic)

Mr. Elfert testified to the effect that the Employer seemed to have been following a past practice of which the Union had not been aware, and which the Union considered to have been prohibited by the collective agreement. He testified that it was not the Union's practice to search for grievances, but that the Union would deal with matters brought forward by its members. He testified that the Union thought it "fair to give the Employer time to get into compliance with the collective agreement." The Employer did not respond to Mr. Elfert's letter of August 8, 2002; and Mr. Elfert testified, "We understood for the better part of a year that we'd found a resolution by this letter."

18 However, Mr. Elfert telephoned Mr. Wood on July 4, 2003 to remind him of the June 30, 2003 deadline as Mr. Elfert had expressed in his letter of August 8, 2002. As a result of that conversation, Mr. Elfert was given to understand that the Employer "would not abide by the deadline." On July 7, 2003 Mr. Wood wrote Mr. Elfert:

> Further to our phone conversation on July 4th, regarding your letter of June 3rd, 2002 and my subsequent reply on July 8th, 2002, I feel I must again stress that

there appears to be a difference of opinion as to the intent of this article.

Article #23 - 'Assignment of Duties and Responsibilities' - deals with the issue of what duties can be performed by non union staff and clause #23.6(d) deals specifically with those duties which stage management can perform.

Clause 23.6 - Preamble; It is understood that the following work practices by persons outside the bargaining unit are recognized by the Union, and the Company shall not be required to alter such practices. (sic)

The entire article, from clause 23.1 to clause 23.6 clearly lays out the parameters in this regard and as such, one can read clause 23.7 as being somewhat redundant.

I should also point out that past practice has had stage management personnel at the Arts Club Theatre performing these duties for the past 40 years and any change to this practice will be a significant cost to the Company. This financial impact will certainly have a detrimental affect on other areas of production, adversely affecting full time and part time staff hired to build the shows. Moving limited financial recourses to add additional and unwarranted running crew will result in fewer bargaining unit members being hired to build the shows and we may have to reconsider the amount of full time artisans currently on staff. (sic)

19 The Union now takes the position that the first two grievances of May 3, 2002 have been reactivated. On July 11, 2003 Mr. Elfert filed the first of five further grievances:

Collective Agreement Article(s) violated: Article(s) 23, "Assignment of Duties and Responsibilities" and any others that may be applicable. (sic)

The Union grieves that on or about the period of July 1 to July 5, 2003 during the production "Fully Committed." the Employer did instruct or permit individuals not dispatched by the Union to perform bargaining unit work in violation of the Collective Agreement. (sic)

Relief and remedy sought: Monies equal to that amount which would have been earned by one "Running Crew" for the duration of this period. (sic)

On this production, "Fully Committed", the Employer had utilized a running crew of two Union members, neither of whom was utilized backstage.

20 On August 8, 2003 Mr. Elfert filed a grievance which concerned the production of "I Love You. You're Perfect. Now Change." The grievance was similarly worded. For this production, the Employer had utilized a running crew of two Union members, neither of whom was utilized backstage.

21 There followed an exchange of correspondence between Messrs. Elfert and Wood from August 2003 into December 2003. In his letter to Mr. Elfert of September 25, 2003, Mr. Wood stated:

> Clause 23.7 was intended to ensure that the Company did not hire additional Stage Managers over the minimum two required by the Equity, in order to avoid the hiring of Bargaining Unit employees and that these individuals would continue to perform specific tasks during the run of a show. In the original Collective Agreement (1993), "The Stage Manager and/or the Assistant Stage Manager may operate or perform; dressing, live sound cues, props changes, curtains, flying, repatching, scene changes, including scenery and stage truck manipulation (manual or motorized) follow spot cues and the operation of turntables". (sic)
>
> When the current agreement (1998) was negotiated, there were further restrictions by the Union placed on what Stage Managers can do in the operation of shows as follows, "The Stage Manager and/or the Assistant Stage Manager may operate or perform; dressing, live sound cues, props changes, curtains, scene changes and may operate scenery and (manual or motorized stage truck or turntable manipulation, the Grand Drape, and spot lines operated from the deck. (sic)
>
> In view of these specific changes in the respective Collective Agreements (as highlighted above), I fail to see how the Union cannot understand that Stage Management are permitted under the current Agreement to perform those tasks as outlined in the pertinent clauses.
>
> In reference to Clause 23.7, it should be considered that prior to the Union's association with the Company, Stage Management performed all backstage duties, including those tasks the Union now questions and as past and current practice is recognized in this Agreement, no Union positions have been eliminated, as they did not exist at that time. (sic)

In his letter to Mr. Wood of October 14, 2003, Mr. Elfert stated:

> Article 23 read in its entirety is clear: Stage Management may assist bargaining unit members in performing their duties. The grievances currently before you detail instances in which Stage Managers performed backstage duties instead of bargaining unit members thereby, to paraphrase the Contract, eliminating or avoiding hiring IATSE Stagehands.

22 On December 8, 2003, the Union initiated a grievance regarding the production of "Singing in the Rain", and, on February 6, 2004 the Union initiated two grievances, one regarding the production of "Dirty Blonde", and the other of "Jacques Brel". The Employer had utilized a running crew of nine Union members, of whom six were utilized backstage, during the first; a running crew of four Union members, of whom three were utilized backstage during the second; and, a running crew of two Union members, neither of whom were utilized backstage during the third.

23 It was not Mr. Elfert's assertion that any bargaining-unit work done backstage by the ASM would violate the collective agreement. He opined that a violation would have occurred if the task would not have been done were it not for the ASM. He would not object if the ASM was performing a function in the interest of mere expediency because he submitted that would not result in anyone else being displaced. In cross-examination, Mr. Elfert was asked, "What if any work [the SM or ASM] did was what was listed at 23.6(d)(i)? Would that be a violation of the collective agreement?" Mr. Elfert answered, "It would be, yes. Because it does not pass the test of 23.7, which means you did not hire a minimum of the IATSE staff person." However, Mr. Elfert would not agree that he was interpreting Article 23.7 as requiring a minimum call-out of one Union member backstage. He concluded his testimony by submitting that a displacement of a Union member would also occur in circumstances where a Union member was utilized elsewhere at a particular time such that the work done by stage management was "not participation". He re-affirmed the principle, as he expressed it, that were it not done by stage management, it would not have been done.

24 Mr. Wood agreed in cross-examination that it was his position that Article 23.6(d)(i) reserved certain technical functions for the ASM to perform. He acknowledged that the ASM was more within the actors' group than the technical group, "But when they're on stage they're part of the entire group." Mr. Wood interpreted Article 23.7 as merely preventing the Employer from hiring more than one ASM to perform bargaining-unit work.

V

25 Counsel for the Union submitted that those provisions of the collective agreement described the bargaining-unit, and defining the "employee" and "employee categories", and the salary groups and wage scales, per se implied some restriction on non-bargaining-unit employees performing bargaining-unit work. She submitted however that Articles 23.6(d) and 23.7 are express provisions, and these would restrict the Employer's discretion more severely. Counsel for the Union submitted that the preamble to Article 23.7, i.e. "that the above provisions shall not be used to", means that the

preceding provisions of Article 23, and particularly in this case Article 23.6(d)(i), were subject to Article 23.7. She further submitted that the Actors' Equity collective agreement was not relevant to the application of the collective agreement between the Employer and the Union. She submitted that the Employer was obliged to comply with both collective agreements. Counsel for the Union submitted that Article 23.6(d)(i) would permit SMs and ASMs to do bargaining-unit work; but, when read with Article 23.7, they were permitted to work in addition to a bargaining-unit employee, and not in place of a bargaining-unit employee. Counsel for the Union submitted that if there was no bargaining-unit employee utilized backstage, the ASM could not have been performing a supervisory role; and any bargaining-unit work done by the ASM must have been done in place of a Union member. Counsel for the Union also noted that the collective agreement provided for part-time and temporary employees. She submitted that the prohibition against eliminating or avoiding the hiring of bargaining-unit employees, would extend to these categories.

26 Counsel for the Union submitted that the Union had recognized that there had been a past practice, and therefore it had considered itself estopped. However, she submitted, past practice does not change the meaning of the collective agreement. She noted that the changes made to Article 23.6(d) in the 1998-2003 collective agreement further circumscribed the bargaining-unit work a SM or ASM could perform, and that there was no alteration to Article 23.7. She submitted that the evidence demonstrated a breach of Article 23.7 in those cases where the ASM worked alone backstage.

27 Counsel for the Union relied on the following authorities: Re Irwin Toy Ltd. -and- United Steelworkers (1982), 6 L.A.C. (3d) 328 (K.M. Burkett, W. Mills, T.W. Sargeant, Q.C.); Re Nova Scotia Department of Transportation & Communications -and- Canadian Union of Public Employees, Local 1867 (1991), 19 L.A.C. (4th) 23 (M.J. Veniot, Q.C.); Re North West Company Inc. -and- Retail, Wholesale & Department Store Union, Local 468 (1996), 57 L.A.C. (4th) 158 (M.H. Freedman, Q.C.); and Re Slocan Forest Products Ltd. -and-Industrial Wood and Allied Workers of Canada, Local 1-424, [2001] B.C.C.A.A.A. No. 326 (R.B. Blasina); Unreported: October 18, 2001.

28 Counsel for the Employer submitted that the closest expression of what was bargaining-unit work was found in Article 23.1, "as per current practice". He therefore submitted that the guiding principle to interpreting the collective agreement was "past practice", and he noted the references to "practice" contained in Article 23.6. Counsel for the Employer submitted that the collective agreement must be read as a whole, and that the provisions should be interpreted such that they are in harmony with one another. He submitted that the Union's interpretation of Article 23.7 was erroneous because the Union would have the provision prohibit any performance of bargaining-unit work by an SM or ASM. Counsel for the Employer stated that the Union seemed to be taking a softer position at arbitration by suggesting that stage management may "assist" bargaining-unit employees; however, he submitted, this would presuppose that a bargaining-unit employee had to be hired first, and therefore that the parties had agreed to a minimum staffing level. Counsel for the Employer submitted that no minimum staffing was required by Article 23.6(d)(i); and, that where

minimum staffing was required, it was expressly stated as in Article 23.6(d)(ii) dealing with the utilization of an Apprentice.

29 Counsel for the Employer submitted that past practice was the prevailing principle adopted in the first collective agreement with NABET, and continued in the two subsequent collective agreements with the Union. He submitted that the collective bargaining history showed that the parties knew specifically what work stage management was performing, and would be permitted to perform. He noted that Article 23.7 was not changed between the second and third collective agreements with the Union. He submitted that the Union had not interpreted Article 23.7 as prohibiting stage management from performing the work described in Article 23.6. He submitted that Article 23.7 had not changed, but that the Union's interpretation of Article 23.7 had changed. Counsel for the Employer submitted that the Employer would only violate Article 23.7 were it to deliberately employ and use additional stage management to avoid hiring bargaining-unit employees. He submitted that this had in fact not occurred. He submitted that the past practice and the Actors Equity collective agreement, required that one SM and one ASM be hired first, and then bargaining-unit employees as needed. He submitted that this does not create a breach of the collective agreement with the Union. He submitted that there has never been a case where the Employer has brought in bargaining-unit employees, and then sent them home because it gave the work to an ASM. Counsel for the Employer submitted that the list of productions provided by Mr. Wood showed that the Employer has not changed how it is staffing productions, and that there is no evidence of there having been a reduction over time in the number of bargaining-unit employees utilized.

30 Counsel for the Employer further submitted that Article 23.7 spoke to intent, i.e. "the above provisions shall not be used to". He submitted that the test of a breach was not the "but for test" advanced by the Union. He submitted that the Employer would have breached Article 23.7 if its intent had been to achieve what was prohibited therein. He submitted that the Employer's intent was to utilize stage management according to the way it always had, i.e. past practice; and, because that was the efficient and practical way to carry out staffing. He submitted that the Employer had no "ulterior motives". He submitted that there had been no threat to the integrity of the bargaining-unit, and that the only interpretation of Article 23.7 that made sense was that its purpose was to protect that integrity. Finally, Counsel for the Employer submitted that the stage management described in Article 23.6(d) were not "real" managerial employees who would have the authority to hire and fire. He submitted that they were in effect required to perform the same tasks as the bargaining-unit employees, albeit as members of another bargaining-unit.

31 Counsel for the Employer relied on the following authorities: Re Kootenay-Columbia School District No. 20 -and- Canadian Union of Public Employees, Local 1285, [1998] B.C.C.A.A.A. No. 246 (D. Stevenson); Unreported: June 4, 1998; Re Alcan Aluminum Ltd. -and- Canadian Association of Smelter and Allied Workers (CASAW), Local 7, [1993] B.C.C.A.A.A. No. 221 (R.B. Blasina, J. Bannon, J. Clifford); Unreported: July 2, 1993; Re Prince Rupert School District No. 52 -and- International Union of Operating Engineers Lodge 882-B, [2003] B.C.C.A.A.A. No.

148 (R.B. Blasina); Unreported: June 26, 2003; Re National Association of Broadcast Employees and Technicians -and- Lethbridge Television, A Division of Westcom TV Group Ltd., [1995] CL.A.D. No. 217 (D.C. Elliott); Unreported: March 17, 1995; Re National Association of Broadcast Employees and Technicians -and- Sunwapta Broadcasting, a division of Electrohome Ltd., [1996] C.L.A.D. No. 216 (D.C. Elliott); Unreported: March 15, 1996; and, Re Gerdau Cortice Steel Inc. -and- United Steelworkers of America, Local 8918 (2000), 92 L.A.C. (4th) 314 (J.F.W. Weatherill).

VI

32 Arbitrators have held that where the collective agreement sets out classifications of employees, and provides for seniority rights, then a restriction on the employer's right to assign bargaining-unit work to non-bargaining-unit employees will be implied: Irwin Toy, supra; Nova Scotia Department of Transportation, supra. The restriction would not be absolute, but rather would apply for the limited purpose of protecting the integrity of the bargaining-unit. Arbitrator Veniot, Q.C. stated in Nova Scotia Department of Transportation, supra, p. 40:

> The implying of a restriction against the unfettered right to make work assignments is done only because it is necessary to do so to protect the integrity of the bargaining unit. It is not possible to say generally, that any assignment of bargaining unit work would necessarily impair the integrity of the bargaining unit. ...
>
> Accordingly, I find that it is necessary to imply only a qualified, and not an absolute, prohibition against the assignment of bargaining unit work outside the unit.

33 However, where the collective agreement contains an express restriction on management rights, then the employer's management rights would be fettered more strictly than had only an implied restriction existed. In Slocan Forest Products, supra, this arbitrator stated at [paragraph]22:

> An implied restriction would provide a minimum standard of protection to the bargaining unit. An express restriction would provide some higher standard. It is unlikely that the parties would have agreed to an express restriction in order to dilute even the minimum standard that silence would have implied. It is also unlikely that an express restriction would merely prohibit excluded employees from performing bargaining-unit work to that measure which would bring them into the bargaining unit. That would be redundant.

34 Past practice may provide an indication of the parties' mutual intent when they negotiated a provision. However, past practice cannot be used to vary the meaning of a provision; and the reliability of past practice is doubtful lest the evidence display acquiescence by those who have real responsibility for the meaning of the collective agreement: Kootenay-Columbia School District,

supra; Alcan Aluminum, supra; Re Int'l Ass'n of Machinists, Local 1740 -and- John Bertram & Sons Co. Ltd. (1967), 18 L.A.C. 362 (P.C. Weiler, D. Wren, H.M. Payette) cited in the above cases; and, Nova Scotia Department of Transportation, supra. "Indiscriminate recourse to past practice has been said to rigidify industrial relations at the plant level, or in the lower reaches of the grievance process.": John Bertram, supra, at p. 368. This Union's policy has been to deal with complaints or grievances that are filed, and not to search for grievances. It would seem an accurate observation to note that employers tend to resent those unions which do actively search for grievances. The Union's policy will not be held against it; there is no evidence of acquiescence; and the past practice does not provide a reliable guide to interpretation.

35 Past practice may also provide a foundation to apply the equitable doctrine of estoppel. The doctrine of estoppel is concerned with giving effect to strict legal rights in context with the factual circumstances in order to achieve an equitable remedy. This need not be considered right now, given the immediate terms of reference.

36 Within the preamble of Article 23.1 and within Article 23.6 are found the terms "current practice", "following work practices", and "such practices". These terms do require explanation as matters of law.

37 Prior to the collective agreement between the Employer and NABET, there was no bargaining-unit, and therefore not such a thing as "bargaining-unit work". Under Article 23.1 of the 1992-1993 collective agreement, the Employer agreed "to continue the current practice of assigning duties and utilization of production equipment" to those employees who would now be included in the bargaining-unit. The provision was expressed redundantly because it also stated, "Duties and responsibilities for bargaining unit employees will continue as per current practice." In other words, Article 23.1 defined bargaining-unit work as that work which those employees who were now in the bargaining-unit had been performing.

38 It was Article 23.4.7 of the 1992-1993 collective agreement which permitted stage management to perform what was now considered to be bargaining-unit work, i.e. "continue performing duties related to theatre productions provided this practice does not displace a bargaining unit employee." Although expressed in this award as "bargaining-unit work", these duties were not to be the exclusive domain of the bargaining-unit. Furthermore, the parties did not negotiate a specific list of functions; it would seem that stage management personnel were liberally permitted to do such bargaining-unit work as they had done in the past, provided no bargaining-unit employee was "displaced" as a result. Under Article 23.5 of the 1992-1993 collective agreement, it was further agreed that the discretion to have non-bargaining-unit personnel perform bargaining-unit work "shall not be used for the purpose of eliminating full-time or part-time employees or to avoid the hiring of same." Finally, Article 23.5 applied, without exception, to all non-bargaining-unit personnel contemplated in "the above provisions of Article 23". Mr. Wood was correct that the Employer could not hire additional ASMs, for example, in order to employ fewer union members. However, Articles 23.4.7 and 23.5 would also have prevented the utilization of the

first or a single ASM to such an extent as would displace, eliminate, or avoid the hiring of any bargaining-unit employee.

39 In the first collective agreement between the Employer and this Union, i.e. the 1993-1997 collective agreement, Article 23.1 was amended slightly, but in substance remained the same. Article 23.1 constituted a commitment to assign work "to bargaining unit employees as per current practice." Article 23.1 did not codify any past practice with respect to assigning bargaining-unit work to non-bargaining-unit personnel, just as it had not in the preceding collective agreement. There then followed provisions which circumscribed what bargaining-unit work a non-bargaining-unit employee would be permitted to do.

40 Article 23.6 began with a preamble which expressed the Union's acceptance of non-bargaining-unit personnel performing "the following work practices"; and, thereafter these were specifically listed. Article 23.6(d)(ii) stated:

> ARTICLE 23
>
> Assignment of Duties and Responsibilities
>
> 23.6
>
> It is understood that the following practices by persons outside the bargaining unit are recognized by the Union, and the Company shall not be required to alter such practices:
>
> ...
>
> (d) Stage Management may perform bargaining unit work as follows:
>
> ...
>
> (ii) The Stage Manager and/or the Assistant Stage Manager may operate or perform: dressing, live sound cues, props changes, curtains, flying, repatching, scene changes including scenery and stage truck manipulation (manual or motorized), Followspot cues, and the operation of turntables. (sic)

"The" is a definite article, and the expression, "the following work practices" refers not to past practice, but must be taken to mean the practices described in the subsections which follow. The

expression, "such practices" which is found at the end of the preamble of Article 23.6 hearkens back to, and clearly means, "the following work practices".

41 The canon of construction, "expressio unius, exclusio alterius" describes the proposition that a general word or phrase will take meaning from related specific words or phrases. Ordinarily this canon of construction is not considered reliable. However, as the very follow-up to the preamble reference to "the following work practices", it does seem that the permitted bargaining-unit functions listed in Article 23.6(d)(ii) were intended to be specific and exclusive. Alternatively, one would conclude that the preamble of Article 23.6 was general in nature, and was overridden by the special or specific subsections which followed. Therefore, where the preamble of Article 23.6(d) would permit stage management to perform bargaining-unit work, the work being contemplated would be only that work specifically listed below. This seems to have been confirmed by the parties' 1998 collective bargaining.

42 In the still-applicable 1998-2003 collective agreement, subsections (i) and (ii) of Article 23.6(d) were reversed in order such that it was now Article 23.6(d)(i) which applied to the SM and ASM. Of critical relevance though is that the parties amended the scope of the subsection by specific deletions or additions: i.e. "flying", "repatching", and "follow spot cues" were deleted, and, "Grand Drape" and "spot lines operated from the stage deck" were added. This had the effect of further circumscribing what an ASM would do. One would again conclude that the SM and ASM are permitted to perform only that bargaining-unit work specifically listed in Article 23.6(d)(i) of the current collective agreement.

43 Although Messrs. Wood and Elfert tended to communicate with one another in terms of "what" stage management could do, their real disagreement was not over the list of duties, but over "when" and "to what degree". It is with respect to Article 23.7 that the parties differed. There was no extrinsic evidence provided of the collective bargaining discussions which resulted in the introduction of Article 23.7 in the 1993-1997 collective agreement, or its continuation in the 1998-2003 collective agreement. Nevertheless, we have the agreed wording, and it is that wording which must be given effect.

44 Firstly, Article 23.7 begins with the words, "It is agreed that the above provisions shall not be used to". The Employer would read these as going to intent, thus prohibiting intentional conduct. The Union would read these as going to effect. Given that a person is presumed to intend the natural and foreseeable consequences of his act, it would seem unnecessary to a finding of compliance or breach to enter into a discussion of a dichotomy between a subjective and an objective test, or to engage in an evaluation of the substance of the motive being asserted. If the Employer has organized the work in such a way that leads to one of the results prohibited by Article 23.7, then it will have breached the provision regardless of its moral innocence. It is at the remedial stage that the Employer may find relief, should some equitable doctrine be found to apply.

45 Pursuant to Article 23.7(a), the discretion permitted the Employer to have stage management

perform the bargaining-unit work described in Article 23.6(d) "shall not be used to ... eliminate or avoid the hiring of bargaining unit employees". The Employer is obliged, pursuant to its collective agreement with Actors' Equity, to employ one SM and at least one ASM. The Employer would interpret Article 23.7(a) as merely preventing it from hiring additional ASMs in order to avoid employing Union members on the running crew.

46 First of all, the Employer's collective agreement with Actors' Equity would not justify a violation of its collective agreement with the Union. The Employer is legislatively and contractually obliged to operate its business in a way which would not violate either collective agreement - even if that would result in higher production costs.

47 The plain meaning of Article 23.7(a) is that "The Stage Manager and/or the Assistant Stage Manager" referred-to in Article 23.6(d)(i) shall not perform the bargaining-unit work permitted them to such a degree as to substantively deny the need for an otherwise-available bargaining-unit job. Since Article 23.7(a) actually refers to "bargaining-unit employees", and since Article 13.4 refers to "Employee Categories" such as "full time regular", "part-time regular", "temporary or casual", a job would contain the measure of duties expected of an employee in any of these categories. From here on, the provision becomes ambiguous.

48 We know from Article 23.6(d) that certain types of bargaining-unit work are permitted. However, Article 23.7(a) is ambiguous - as indeed also is Article 23.7(b) - in that it fails to express a precision of measurement or degree. Although Article 23.7 is expressed in the negative, an alternate expression of the issue is to ask what measure or degree of permitted bargaining-unit work is permitted? The answer will ultimately depend on the facts in any particular case, and it is the imprecise and litigation-inviting standard of reasonableness which likely would apply.

49 The Employer would say that Article 23.7 would only restrict the employment of additional stage management. The collective agreement does not say that. Article 23.7 applies to all stage management. The Employer would say that it could utilize an ASM in the performance of the permitted bargaining-unit work to such a degree that it would only employ a Union member if the ASM needed assistance. That is not supported by the collective agreement. Finally, Article 23.7 should not be interpreted as merely protecting the integrity of the bargaining-unit. Such an interpretation would diminish the provision to redundancy.

50 The Union would permit stage management to participate in bargaining-unit work in a supporting capacity vis-à-vis Union members. That seems closer to the spirit of the collective agreement. However, the Union would say that the Employer could not utilize an ASM for example to perform a bargaining-unit function which could not have been done otherwise, had the ASM not been present. Article 23.7 does not say that. Contrary to its denial, the Union would indeed require a minimum staffing of one bargaining-unit member backstage at all times. That is not supported by the collective agreement. Such a minimum call-out is required only by Article 23.6(d)(ii) if an Apprentice is utilized. A minimum call-out requirement would be a significant incursion into the

Employer's management rights. If that was intended for Article 23.6(d)(i), the parties should have expressed it.

51 Pursuant to Article 23.7(b), the discretion permitted the Employer to have stage management perform the bargaining unit work described in Article 23.6(d)(i) "shall not be used to:"

> 23.7(b) cause a reduction in hours of work, a layoff or a termination of bargaining unit employees, or to avoid the recall of bargaining unit employees on layoff or to avoid the payment of penalties or premiums to bargaining unit employees or, as a result of working on a continuing basis, prevent an increase of the workforce or to replace an employee on leave or vacation.

For the purpose of this case, it is the words "cause a reduction in hours of work" which would require particular attention.

52 Firstly, "cause a reduction in hours of work" cannot be given a meaning as would amount, for example, from such words as "cause a reduction in workload". Stage management would then be prohibited from performing any bargaining-unit work; and, that clearly was not the intent.

53 The expression "reduction in hours of work" is immediately preceded by "eliminate or avoid the hiring of bargaining unit employees" (Article 23.7(a)) and is immediately followed by "a layoff or a termination of bargaining unit employees, or to avoid the recall of bargaining unit employees". It would seem that the prohibition of "a reduction in hours of work" would preclude the Employer from utilizing stage management in a way as would cut back the hours of the running crew across the board as an alternative to laying-off or not calling-in a Union member. It could also refer to a situation where a bargaining-unit employee was called in late or sent home early. It is not immediately clear how those circumstances could happen in practice given the very nature of the running crew. It may be that this was only expressed for greater certainty.

54 The wording which the parties have used has its limitations. However, an arbitrator whose jurisdiction is to uphold the collective agreement does not have the jurisdiction to amend it. If greater clarity is required, the collective bargaining table will be the place for the parties to achieve it.

In summary:

1. Article 23.6(d) provides an exclusive and specific list of the bargaining-unit work which Stage Management are permitted to perform;
2. Article 23.6(d)(ii) requires a minimum call-out of one Union member for the running crew backstage only if an Apprentice Stage Manager is utilized;

3. Article 23.6(d)(i) which concerns the utilization of a Stage Manager and/or Assistant Stage Manager does not require a minimum call-out of one Union member for the running crew backstage;
4. Article 23.7 applies to all stage management; it applies to the utilization of every Stage Manager, Assistant Stage Manager, or Apprentice Stage Manager;
5. Article 23.7(a) prohibits the Employer from utilizing stage management to perform bargaining-unit work in order to "eliminate or avoid the hiring of bargaining unit employees"; i.e. to a degree as would deny an otherwise available bargaining-unit job;
6. Article 23.7(b) should be interpreted in the same spirit and consistent with Article 23.7(a), and the prohibition against causing a "reduction in hours of work" does not mean causing a reduction in workload.

55 Finally, I retain jurisdiction over the outstanding grievances, including the jurisdiction to make additional declarations or orders as may be required, and including the jurisdiction to determine which grievances are currently outstanding.

qp/e/nc/qlmmm