

IN THE MATTER OF A GRIEVANCE ARBITRATION  
PURSUANT TO INDUSTRIAL RELATIONS ACT  
RSNB C. I-4

Between:

Saint John Typographical Union, Local 85

and

New Brunswick Publishing, Telegraph Journal (A Division of  
Brunswick News)

AWARD

William Goss, Q.C., Employer Counsel  
Sean Fitzpatrick, Union Counsel

Douglas C. Stanley, QC, Chair  
James LeMesurier, Employer Nominee  
Joey Kelly, Union Nominee

Hearing Held: June 19, and September 10, 2013, Saint John, NB

Date of Award: October 17, 2013

This is a grievance being heard pursuant to the *Industrial Relations Act* of New Brunswick and a collective agreement between the parties. The grievance is in the form of a letter, dated July 20, 2012, from Bruce Bartlett, the President of the Union, addressed to Jamie Irving, the Publisher of the Telegraph Journal, as follows:

I write to request that the Company apply our advertising department collective agreement to advertising department staff now employed at the Company's offices in Rothesay.

In the event the Company is not prepared to treat these employees as part of our bargaining unit, please accept this letter as a grievance filed pursuant to our collective agreement. In such event, we grieve the Company's failure to apply the collective agreement to these employees as a violation of the jurisdiction and other articles of our collective agreement, and as remedy we request that the collective agreement be applied to these employees and that these employees and the Union be made whole.

As well, and in the alternative, we grieve the company's transfer of advertising department work to these employees as being motivated by anti-union considerations in violation of the Industrial Relations Act, and as remedy we request that the work be returned.

The Employer replied by letter dated July 23, 2012, from Gail Lebel, Director of Human Resources, as follows:

This will acknowledge receipt of your email/letter dated July 20, 2012 which has been referred to me for a response. To the extent that your letter is intended as a grievance, or grievances, you may consider this as the Company's response.

The “KV Style” operating division of Brunswick News Inc., located in Rothesay NB, is a separate and distinct business unit presently employing approximately fourteen (14) employees. It is not contemplated by nor included in the unit “New Brunswick Publishing Company/Telegraph Journal division of Brunswick News Inc. Saint John, N.B.” as defined by the jurisdiction provisions of our collective agreement, and we could not simply “impose” our collective agreement on that work-force, even if we were inclined to do so, which we are not.

As to your suggestion that recent structural changes were in any way motivated by “anti-union considerations, we categorically reject any such assertion. This was a purely “business” decision driven exclusively by the pressing need to search for new and innovative ways to generate the revenue we need to sustain the Telegraph Journal in its present form in the hyper-challenging environment for newspaper publishing. Simply put, if we don’t generate the necessary revenue then we would have no alternative but to cut costs, with all the negative implications that would entail. There are no “easy” or “painless” solutions. I repeat, this was a restructuring driven by the needs of the business, and nothing else.

We trust you understand our position on these issues.

At the opening of the hearing of this matter Counsel for the Employer advised that the Employer was objecting to this Board’s jurisdiction to deal with that part of the grievance that states:

As well, and in the alternative, we grieve the company’s transfer of advertising department work to these employees as being motivated by anti-union considerations in violation of the Industrial Relations Act, and as remedy we request that the work be returned.

The Parties agreed that the Board would adjourn and rule on this preliminary issue after receiving written submissions from both parties. In a Ruling issued on August 19, 2013, to the effect that we lacked jurisdiction to consider the Union’s “alternative” position that the Company’s actions constituted a violation of the Labour Relations Act.

The sole remaining issue between the parties is whether the Union’s collective agreement extends to the advertising employees working in

the office of KV Style in Rothesay. That requires us to interpret the collective agreement, Article 2.01, as follows:

2.01 This Agreement covers all employees of the New Brunswick Publishing Company/Telegraph Journal division of Brunswick News Inc., Saint John N.B., employed at or out of its Advertising Department, (retail sales, classified sales), save and except those working at ad setting/graphics, the Director of Marketing, Director Sales, Sales Manager, Classified Sales Manager, Marketing Manager, Production Manager, Assistant to Production Manager, those employed for not more than 24 hours per week and those excluded by the Industrial Relations Act.

The history of the collective agreement reference to “New Brunswick Publishing Company/Telegraph Journal Division of Brunswick News Inc., Saint John N.B.” is the history of newspaper amalgamations in New Brunswick. The correct name of the Employer is Brunswick News Inc.. Brunswick News came about through the amalgamation of Summit Publishing Ltd., which published a newspaper in Moncton and Fredericton, and New Brunswick Publishing Company Ltd. which published two newspaper in Saint John (the Telegraph Journal and the Evening Times Globe, the latter is no longer published).

The collective agreement was not amended until the current agreement commencing 2011. Previous collective agreements made no reference to the Telegraph Journal but simply to “employees of New Brunswick Publishing Company Limited, Saint John, N.B. employed at our out of its Advertising Department”. It was always understood that the bargaining rights applied only to the employees of the Telegraph Journal and not the other Brunswick News newspapers. New Brunswick Publishing as an entity no longer exists.

The Telegraph Journal is a province wide publication with a daily circulation of 30,300. Of those 9,580 are distributed in the City of Saint John. The other newspapers, the Gleaner in Fredericton and the Times Transcript in Moncton have a more limited Municipal/Regional distribution. In addition to these three daily newspapers Brunswick News has over a dozen other smaller publications throughout the province.

Because the case involves representation rights and could affect employees now considered to be outside the bargaining unit, both counsel served notice on those employees advising them of their right to appear and be represented at this hearing. None did.

The case proceeded by way of agreed facts and documents.

The issue arose when the Company advised the Union of a restructuring. On July 11, 2012, Gail Lebel, Director of Human Resources, wrote to Bruce Bartlett, the Union Vice President as follows:

Re: Telegraph Journal Advertising Sales Representative (Outside Sales)

According to Article 11.01 of the Advertising and Production Contract with the Saint John Typographical Union No. 85, New Brunswick Publishing Company/Telegraph Journal Division of Brunswick News Inc., Saint John N.B. will be implementing a major change that impacts the operations of the Telegraph Journal. Effective immediately, we will be eliminating the Outside Display classification which includes the External Sales and Key Account Manager positions at the Telegraph Journal at 210 Crown St. in Saint John. The Employees that are impacted by the change are the following:

- Ann Sands
- Carey Valardo
- Diane McMillan
- Beth Peterson
- Melinda Filmore

There is no alternate employment within the bargaining unit. Therefore, according to article 11.04 of the collective agreement, each impacted employee will receive three (3) weeks pay for each year of continuous service to a maximum of fifty-two (52) weeks. The calculation of a week's pay for commission will include the average commission paid over the preceding twelve (12) months. Employees in receipt of severance pay will forfeit any right to rehire by the Company.

The Inside Sales and Classified Clerk positions will continue to operate out of the Telegraph Journal and will continue to be covered under the collective agreement.

Individual employees received letters the same day from Jane Northrup, Regional General Manager of Brunswick News.

The Union's position is that the reference in Article 2.01 to the employees of "Telegraph Journal division of Brunswick News Inc., Saint John N.B., employed at or out of its Advertising Department", means the "Advertising Department of the Telegraph Journal". They are not claiming bargaining rights to any other Brunswick News publications. The Union alleges that the employees, described by the Company in their reply to the grievance as employees of KV Style, are, in fact, the "Advertising Department of the Telegraph Journal".

The employees in question are listed in two newspaper advertisements that appear in the Telegraph Journal with the heading "MEET YOUR BRUNSWICK NEWS/TELEGRAPH JOURNAL TEAM". The names of thirteen employees are listed in the ad along with what appear to be sales regions, e.g. "west north", or areas of specialty, e.g. "Real Estate Guide". (Exhibits #10, #11). Of the thirteen listed and pictured in the ad, twelve work in the KV Style office in Rothesay, one - Theresa Allan, works in the Telegraph Journal building in Saint John. Allan is a 30-year employee with the Telegraph Journal and is still considered by the employer as being in the bargaining unit.

Counsel for the Union submitted that it was telling that the lone employee remaining in the Saint John office reports to a supervisor at KV Style. Also, that the Employer describes this unit of employees working at KV Style as "The Telegraph Journal Team" in their advertising.

Notwithstanding this singular difference in location all 13 of these employees report to one manager, Chelsea Smith. Two of the employees listed in the advertisement had been working out of the Telegraph Journal building until the Spring of 2012 when they volunteered to transfer to the KV Style office. The remainder were all hired to work out of the KV Style office in Rothesay. Two of the employees were hired to primarily solicit advertising for KV Style. Everyone else's primary function is to solicit advertising for the Telegraph Journal. In addition to

these 13 employees, there is an administrative support employee in the KV Style office whom the Union alleges falls within the bargaining unit.

The Union maintains that the only explanation they have ever been given as to what the KV Style Division means is that the office where they work is at KV Style in Rothesay. The Reply to the Grievance describes KV Style as a “separate and distinct business unit” or “an operating division of Brunswick News Inc.”.

The Union’s bargaining rights go back to 1970’s. From that time until 2011 the employees solicited advertising for the Telegraph Journal from that paper’s offices on Crown Street in Saint John. In 2011 a new program called One-One-All was introduced. Under this program the ad Departments at the three Brunswick News newspapers could sell ads for any of the Brunswick News newspapers. The reality of the One-One-All program was that advertising staff at the other papers in the Province were likely to sell ads for the Telegraph Journal, the only publication with province wide distribution. On the other hand, the Telegraph Journal advertising department were not as likely to sell ads to businesses in Saint John to appear in the Gleaner in Fredericton, or the Times Transcript in Moncton.

The Kennebecasis Valley is a growing suburban area adjacent to the city of Saint John. It encompasses two municipalities Rothesay and Quispamsis. KV Style started in 2005 and has had two advertising sales staff for some time. When the One-One-All program came into effect those two employees could then sell Telegraph Journal advertising in the Valley excluding Saint John. Prior to the One-One-All program this territory was served exclusively by the Telegraph Journal advertising department.

The Union maintained that prior to 2011 there was an employee member of their bargaining unit working in Fredericton, a position that has since been eliminated, and a similar position in Moncton that was also part of their bargaining unit notwithstanding the location. Employer Counsel could neither confirm or deny that fact.

The Union’s case is that in 2012 Brunswick News moved the “Telegraph Journal Advertising Department” from the offices on Crown Street in

Saint John to the KV Style offices in Rothesay. The Union’s position is that the Company did that by not replacing employees who retired or quit their jobs in Saint John and hiring employees to work at KV Style selling advertising for the Telegraph Journal. (Exhibit #14 lists all employees described as Kennebecasis Valley – Advertising Sales Reps, their date of hire, location and whether they previously worked in the Saint John Telegraph Journal office.) In July 11, 2012, five of the six employees remaining in the Saint John office were laid off. In the meantime employees were being hired in the KV Style office to do their work – to sell advertising in the Telegraph Journal and accounts were transferred to these employees.

According to the Union, the Company took the position that the existing employees were not doing their work satisfactorily and that they needed a change in personnel and this is how they accomplished that change.

Counsel for the Company submitted that by mid 2012 the Employer’s perception was that the Telegraph Journal advertising unit was “dysfunctional and non-performing”. In support of their claim that there were “issues” that compelled this “reorganization” the Company filed a Leave of Absence Report on the Advertising Sales Group in Saint John, Ex# 13, as follows:

NAME	LEAVE	RETURN	REASON	NOTES
Allen, John	23-Jan-11	3-Jan-12	Medical	Resigned 01/11/12
Drew, Robin	19-Apr-11	24-May-11	Medical	Resigned 06/15/11
Ballard, Bill	9-June-11	unknown	Medical	Resigned 01/15/11
Splane, Tiffany	20-July-11	unknown	Medical	Resigned 11/3/11
Sands, Ann	13-Sep-11	13-Feb-12	Medical	
Fillmore, Melinda	31-Oct-11	3-Jan-12	Medical	
Fillmore, Melinda	25-May-12	unknown	Medical	
Duplessi, June	27-Apr-12	27-Apr-12	Medical	

Counsel for the Employer submitted that by any number of measures the unit was “not performing and not generating revenue”, that there was a crisis and legitimate business reasons for the restructuring. Counsel submitted that by the summer of 2011, the problems were so severe that two (2) Key Account Managers (Denise Hansen and David Marshall) were actually moved from the Saint John office of the Telegraph Journal to the KV Style office, (on 17-Aug-11 and 24-Oct-11) months before the lay-offs of July 2012. Furthermore, at least one-half of the employees working at KV Style were hired to work there before the restructuring in 2012. Two employees who had been in the Saint John office applied for and were offered jobs that were advertised for KV Style. To counter the claim that there were production problems the Union cited the fact that two of the employees laid-off were won prizes for sales in 2011.

The one employee who remains working in the Telegraph Journal office in Saint John and member of the bargaining unit is Theresa Allen, a thirty year employee. She is responsible for the “Real Estate Guide” a significant generator of advertising revenue. The Union alleges that she was asked to move to the KV Style office but refused. Theresa Allen is included in the group of employees listed in the two newspaper advertisements that appear with the heading “MEET YOUR BRUNSWICK NEWS/TELEGRAPH JOURNAL TEAM”.

The Company states they have no knowledge of Theresa Allen being asked to move to the KV Style office. The Company asserts that she “asked to be laid off”, and when she was told she would not be laid off she asked to be allowed to stay working from the Saint John office.

Of the twelve who work in the KV Style office in Rothesay, the Union says that all but two (2) sell advertising for the Telegraph Journal as their primary function, two (2) primarily solicit advertising for KV Style. However, under the One-One-All program any of them can solicit advertising for the Telegraph Journal. The Union argues that from a “functional point of view” they are the Advertising Department of the Telegraph Journal. They do the same work as the employees laid off from the bargaining unit.

Counsel for the Company points out that the “Sales Team” in the two newspaper advertisements (Ex#10, 11) sell advertising for all 20 of Brunswick News publications and that the Union is not correct in describing two employees as being hired to sell advertising for KV Style only. Although they are identified in the ad as covering the territories of Quispamsis and Rothesay (Kennebecasis Valley) they are selling advertising in those areas for the Telegraph Journal and other Brunswick News publications.

Counsel for the Employer referred us to a decision of the NB Labour and Employment Board, *Graphic Communications International Union, Local 36C and Brunswick News Inc, Moncton NB and Moncton Typographical Union, No. 636 (Intervenor)*, [1998] N.B.L.E.B.D., No. 15; 43 C.L.R.B. (2d) 80. That case arose out of the transfer of the printing of the Telegraph Journal from Saint John to Moncton and an application for successor rights and Complaint of Unfair Labour Practice brought by the Union that had represented the employees in Saint John who were laid off as a result of the transfer. The Labour and Employment Board found in that case that the printing work that had been done in Saint John was legitimately transferred to Moncton with employees being given a choice between severance or transfer.

Counsel for the Union argued that the key words in article 2.01 are “employed at or out of its Advertising Department” and that if an employee is working at or out of the Advertising Department of the Telegraph Journal then they are covered by the agreement. Whether you are employed in the advertising department of the Telegraph Journal is a factual matter – do the employees primarily sell advertising for the Telegraph Journal.

Counsel argued that the words “Saint John NB” in 2.01 are a descriptive of “the Telegraph Journal Division of Brunswick News” and not a geographic limitation on of the bargaining unit.

The Union seeks by way of remedy an order that the company apply the collective agreement to these employees. Counsel was clear that the Union is not claiming that all employees who sell advertising for the Telegraph Journal are members of the bargaining unit. Their position is

that if that is the employees "primary function" then the employee is a member of the Advertising Department of the Telegraph Journal just as the employees who were laid off were prior to their lay-off. They rely on the fact that in the past the unit included employees who were not located in Saint John as evidence that this was always the situation.

Counsel for the Employer argues that the key words in the language of article 2.01 is the reference to "Saint John NB" and that the bargaining unit description is "geographic" or tied to the one location. Further, that the employees that are the subject of this grievance are not within that geographic description and therefore not in the bargaining unit described in the collective agreement.

Counsel submitted that the words "Saint John NB" define everything that precedes them in the language of 2.01. Specifically that they define "the employees of New Brunswick Publishing Company/Telegraph Journal division of Brunswick News Inc".

## AWARD

This case turns on whether the recognition article in the collective agreement contains a "geographic limit" to the unit description.

We have in front of us more than a few cases with clear language describing a bargaining unit with geographic boundaries. At para 5-6 of the NB Labour Board decision you find the Chairman's summary of the jurisdictional language from the two collective agreements in the case before him:

Moncton Typographical Union Local No. 636 of the International Typographical Union is the certified bargaining agent for an all-employee group of employees in Moncton Publishing's pressroom in Moncton and is a Local of TNG-Canada.

Graphic, the Applicant, is the certified bargaining agent for three groups of employees, including the pressroom

employees, at the publishing business of the Company in Saint John.

In *Re Abitibi Paper Company Ltd. and Office and Professional Employees International Union, Local 214*, Arbitrator Burkett found that the language of the Agreement defined the geographic scope of the unit. The language is found at Para. 7 of the Award, as follows:

The Employer agrees to recognize the Union as the sole bargaining agency for employees of the Sault Ste. Marie Division engaged in office work while employed in the mill and woods offices located in Sault Ste. Marie ...

The Employer had relied on *Toromont Industries Ltd. and I.A.M. & A.W.*, 192 LAC (4<sup>th</sup>) 1 (Surdykowski), on the preliminary issues raised in this case. The jurisdictional language in that case is discussed at paras. 19-22, the certification language adopted by the parties in the agreement, which the Arbitrator accepted to be as follows:

All employees of the company at or out of the City of Thunder Bay or the Town of Dryden, save and except management etc.

In another case considered on the preliminary issue, *Kenora Forest Products and C.E.P., Local 234*, (2005) Carswell Ont, 10675 (Davie), the recognition language of the agreement was:

2.01 The Company recognizes the Union as the bargaining agent of all employees of the sawmill owned and operated by Kenora Forest Products Ltd. in Kenora, save and except foremen, persons above the rank of foremen, office, clerical and sales staff.

In *Giant Yellowknife Mines Ltd. and C.A.S.A.W., Loc. 4*, 16 L.A.C. (4th) 413 (Bird), a case relied on by the Union in the preliminary matter, the union's jurisdiction is spelled out in two clauses read together, as follows:

1.01 The term "employee" or "employees" as used in this Agreement, means all employees of the Company at the Company's property at Yellowknife, Northwest Territories, except managerial, supervisory, technical and certain other specific personnel described and excluded by the order of the Canada Labour Relations Board issued on the 18th day of

November A.D. 1976 as amended by the Order of the Canada Labour Relations Board issued on the 11th day of April, A.D. 1986.

.....

2.01 The Company recognizes the Union as the exclusive bargaining agency for all employees covered by this Agreement ...

In all the above examples the parties used clear language to place geographic limits on the scope of the bargaining unit. These examples stand in contrast to the language of the agreement we have in front of us.

This Agreement covers all employees of the New Brunswick Publishing Company/Telegraph Journal division of Brunswick News Inc., Saint John N.B., employed at or out of its Advertising Department,

The reference to “Saint John N.B.” in the above passage is clearly descriptive of the “Telegraph Journal division of Brunswick News Inc.,” and are not a limit on the scope of the unit. If it said “**in** Saint John” it would at least introduce an ambiguity. Here, given the importance of precise language in an agreement around jurisdiction, it is difficult to read “Saint John NB” in the context, as representing the intention of the parties to place a geographic limit around the unit. This seems even clearer when you look at the two previous collective agreements where the wording was:

2.01 This Agreement covers all employees of New Brunswick Publishing Company Ltd., Saint John N.B., employed at or out of its Advertising Department ...,

The words “employed at or out of” are commonly used in reference to jurisdiction. They are commonly followed by a “geographic reference” as in the *Toromont* case above. Here the reference is to “at or out of its Advertising Department” with no geographic reference. The use of the words “out of” have to have some meaning and in fact they suggest that though we are referencing the employees of the “Telegraph Journal division of Brunswick News Inc., Saint John”, an employee in the unit might work “out of” the Advertising Department but be located

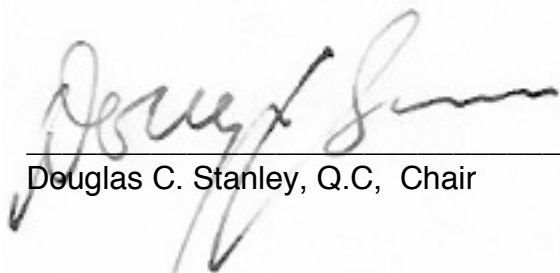
elsewhere.

Are the employees the subject of this grievance the Advertising Department of the Telegraph Journal? That is a matter of fact that has to be determined by looking at the evidence of what they do and how they are portrayed by their employer. The Employer may have had legitimate reasons for this "reorganization". The Q&A sent to employees with their notice of termination is very careful to say that the sales function is being eliminated "at the Telegraph Journal location" not that it is being eliminated. The Telegraph Journal is still going to have an advertising sales unit. Moving either the employees or the work to a location in Rothesay did not take them outside the scope of the bargaining unit as described in the collective agreement.

On the basis of the evidence we heard it is our conclusion that the employees in question are within the scope of the bargaining unit and the collective agreement applies to them.

The Union is entitled to a declaration to that effect and to be made whole.

DATED THIS 17th DAY OF OCTOBER, 2013



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Douglas C. Stanley, Q.C., Chair

I concur (signature on file)

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Joey Kelly, Union Nominee

See dissent attached

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James LeMesurier, Q.C., Employer Nominee