

IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ACCURCAST INC.

- The Employer

-and-

NATIONAL AUTOMOBILE, AEROSPACE AND GENERAL WORKERS UNION OF  
CANADA (CAW - CANADA), AND ITS LOCAL 351

- The Union

AND IN THE MATTER OF a Union policy grievance regarding the quality technician  
position

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Mark E. Geiger - Counsel  
Mitchell Goldman

On behalf of the Union:

Richard Laverty - National Representative  
Mike Ouellette - Plant Chairperson  
John Leach - President, Local 351

Hearing held March 2, 2009, in Wallaceburg, and April 7, 2009, in London, Ontario.

# AWARD

## INTRODUCTION

In this policy grievance the Union protested that quality assurance technician work was being done by non-bargaining unit members. The central issue raised by the grievance was whether this disputed quality assurance technician position was included in the parties' 2004-2007 collective agreement, an issue which required a resolution of the parties' disagreement as to which of several versions of the collective agreement recorded their actual agreement.

## BACKGROUND

The parties reached agreement on two preliminary matters at the hearing.

The parties agreed that my appointment under Section 49 of the Ontario *Labour Relations Act* was out of time. Nevertheless, they proceeded with a hearing on the basis that they appointed me to act as a consensual arbitrator under Section 48 of that *Act*.

As for the second matter, the parties are in the midst of an interest arbitration before Arbitrator Weatherill to replace the 2004-2007 collective agreement. One of the issues before Arbitrator Weatherill is whether the position of quality assurance technician should be included in the next collective agreement. The parties agreed that my decision on whether the quality assurance technician position was included in the 2004-2007 collective agreement would apply, as well, to the collective agreement which will replace it.

Accurcast Inc. (the Employer) operates an aluminum diecast facility in Wallaceburg,

Ontario, primarily producing parts for the auto sector. The Employer bought the facility in 2003 after the previous owner's bankruptcy. The National Automobile, Aerospace and General Workers Union of Canada (CAW - Canada), and its Local 351, the Union, represents these employees and had also represented the employees of the former owner.

Before finalizing its purchase of the facility, the Employer negotiated a start-up collective agreement with the Union. That start-up collective agreement included the position of quality technician, a position which had been included in the collective agreements between the Union and the previous owners of this facility. Many positions covered by the start-up collective agreement were not initially filled. Although the Employer has gradually built the business and gradually increased the workforce, this Employer has never employed a bargaining unit employee as a quality technician.

A 2004-2007 collective agreement was negotiated by the parties. A tentative agreement was reached but it was rejected by the Union members. The parties engaged in further discussions at which time the Union was represented by Bob Jenner, then a national representative of the Union but now retired, and the Employer was represented by Mitchell Goldman, one of the Employer owners. Mr. Jenner and Mr. Goldman agreed to a 15 cent per hour wage increase. The Employer said that they also agreed to remove the quality technician position from the bargaining unit; the Union disputed that assertion.

In any event, the Union then submitted a second package, Exhibit 4, to its members for ratification as the 2004-2007 collective agreement. Exhibit 4 was not a draft collective agreement. Instead, as was a common union practice, the Union had prepared a document titled "Highlights" of the agreement which reflected the changes to the collective agreement. Exhibit 4 included the 15 cent per hour increase and it also

included the following comment next to the disputed quality technician position - "it is The Company's intention to eliminate this position." This package was ratified by the Union members.

Following ratification the Employer prepared and provided to the Union a draft of the Employer's understanding of the terms of the 2004-2007 collective agreement. That draft collective agreement was filed before me as Exhibit 12. Exhibit 12 included the 15 cent wage increase and it removed the quality assurance technician position from the list of jobs covered by the collective agreement. The Union raised no question about the Employer's removal of the quality technician position and the Exhibit 12 collective agreement was signed by the parties.

Another version of the 2004-2007 collective agreement has been widely circulated in the Employer's facility as being a copy of the 2004-2007 collective agreement and was before me as Exhibit 5. However, as neither party asserted that Exhibit 5 was their true agreement, there is no need to describe that version further.

In 2007 Mr. Jenner, the Union national representative, forwarded the Union's proposals for a new collective agreement to begin in 2007. Three points about those proposals should be noted:

1. The Union's proposed changes were based on Exhibit 12, the collective agreement prepared by the Employer and signed by the parties, an agreement which did not include the quality technician position.
2. Those proposals indicated that the Union wished to add the position of quality technician to the jobs listed in the bargaining unit.
3. Mr. Jenner confirmed in a subsequent e-mail to the Employer that the Union proposals for the job classifications article included adding the quality technician position.

I was also provided with a list of employees laid off by the former employer and the job position held by each such employee at the time of lay off. The list is used by this Employer when the need for additional employees arises. The list includes persons identified as “quality technicians” and the Union relied upon the list and the fact that it includes quality technicians in support of its position that quality technicians are in the unit.

Two witnesses from the Union and one witness from the Employer testified.

John Leach is the President of the Local Union. Mr. Leach testified that he had been involved in the bargaining for the 2004-2007 agreement. He identified a document filed as Exhibit 3 as the current collective agreement. However, Exhibit 3 did not include the 15 cent per hour wage increase, an increase which the parties agreed to late in their bargaining. It did, however, include the quality technician position. Exhibit 3 has pages 1 through 54 and page 54 is followed by the signed signature page, that is page 51, from Exhibit 12 - the Employer version of the final negotiated collective agreement.

As for the comment in the Union ratification document next to the technician position that “it is The Company’s intention to eliminate this position,” Mr. Leach said that the matter had been a “bone of contention” in the negotiations and that the Union had agreed to put something in the agreement to indicate that the Employer wanted to remove the position from the bargaining unit. Mr. Leach said that he understood that the parties would then engage in further discussions about this matter.

In cross examination, Mr. Leach agreed that after the Union rejected the first settlement it was possible that there were issues of which he was unaware which had been discussed between Mr. Jenner for the Union and Mr. Goldman for the Employer.

Mike Ouellette is the Union’s plant chair for this bargaining unit. He testified that he had not

been involved in the negotiations for the 2004-2007 collective agreement. However, he said that when he took office about 2 years ago he had found in the previous Union plant chair's desk a copy of what he had understood to be the collective agreement. This was Exhibit 3, the document which Mr. Leach had identified as the parties' 2004-2007 collective agreement.

Mitchell Goldman is one of the Employer owners and he is active in running the Employer's business. Mr. Goldman said that he had been involved throughout the 2004-2007 negotiations and particularly at the end of those negotiations. He testified that after the Union rejected a tentative agreement he and Mr. Jenner, who was the Union national representative and the person with whom all negotiations were conducted, had further discussions on two issues. Mr. Goldman said that the Union wanted a 25 cent per hour wage increase and the Employer wanted to remove the quality technician position. Mr. Goldman said that the agreement which Mr. Jenner and he had reached had been a 15 cent per hour increase and the removal of the quality technician position. After they had agreed to those two changes, Mr. Goldman said he had revised the collective agreement to incorporate the two changes, added signature lines and sent it to the Union (the e-mail and the attached collective agreement were filed as Exhibit 12 in this hearing). He said that was the document which had been signed by the parties.

Mr. Goldman then reviewed the Union proposals from Mr. Jenner for a new collective agreement to replace the 2004-2007 agreement. Mr. Goldman said that the Union's initial proposal included the addition of a quality technician position to the bargaining unit. He also identified a subsequent e-mail from Mr. Jenner dated November 26, 2007, in which Mr. Jenner stated that the Union proposal for the job classification article included "... add Quality Technician ..."

Finally, I heard evidence regarding the role of the quality technician and why the Employer sought to remove the position from the bargaining unit but that evidence does not assist me in resolving this grievance.

UNION SUBMISSION

The Union acknowledged that its submissions on the grievance depended upon a conclusion that the quality technician position was contained in the 2004-2007 collective agreement.

The Union submitted that the issue of the quality technician position had been in dispute during the 2004 negotiations. In the Union document ratified by its members the Union had alerted its members, in good faith, that the Employer intended to remove the position from the bargaining unit. However, the removal of the position should not have been done in a unilateral fashion - instead the parties should have negotiated the matter.

The problem was exacerbated by the absence of a clear collective agreement. Based on all the documents, the Union said that I should find that there was never a clear resolution of this issue.

#### EMPLOYER SUBMISSION

The Employer said that the documents and evidence clearly indicated that the parties had agreed to remove the quality technician position from the collective agreement. As such, there was no violation of that agreement in having the quality technician work done by persons outside the bargaining unit.

In the alternative, the Employer had sent its understanding of the collective agreement to the Union, that version had been signed by the parties and the Union had raised no concerns about the Employer's removal of the quality technician position, such that the Union was now estopped from asserting that the position was still in the unit. On this issue, the Employer relied upon *Onyx Industrial Services, Ltd. v. United Steelworkers of America, Local 3692* [2007] O.L.A.A. No. 198, 89 C.L.A.S. 129 (Marcotte).

#### CONCLUSIONS

My task as an arbitrator is to interpret and enforce the parties' collective agreement. While the parties agreed that they had a collective agreement, they disagreed as to its terms.

*The terms of the collective agreement*

A decision as to the terms of the collective agreement requires a determination as to the agreement reached in the final negotiations conducted between Mr. Goldman, for the Employer, and Mr. Jenner, for the Union, after the Union members had rejected a tentative settlement. The parties accepted that Mr. Goldman and Mr. Jenner had agreed upon a 15 cent per hour wage increase. But the parties differed on what agreement Mr. Goldman and Mr. Jenner reached regarding the quality technician position.

After that final negotiation two documents were prepared which were intended to reflect the agreement reached. Both include the 15 cent per hour increase but they differed on the quality technician position. I consider those two documents first.

One document is Exhibit 12, the draft collective agreement which Mr. Goldman prepared. It simply removed the quality technician position.

The second document is Exhibit 4, the Highlights document which was prepared by the Union and put to the Union members for ratification. Next to the disputed technician position in the list of job classifications that document stated "it is The Company's intention to eliminate this position." While the statement is ambiguous, this Union document clearly signalled that something had occurred in the negotiations regarding the quality technician position. Ratification documents generally include those changes to the collective agreement which the parties have agreed upon. It is uncommon for a union to record in its ratification document an employer proposal which the employer did not achieve. Although the words "it is The Company's intention to eliminate this position" are not as clear as words such as "This position has been eliminated" would have been, they are consistent with an agreement to eliminate this

position.

In addition to these two documents, there was other evidence on this issue of the quality technician position which assists in determining the parties' agreement.

Mr. Goldman, who was involved on the Employer side in the final negotiations for the 2004-2007 agreement, testified that he and Mr. Jenner, for the Union, had agreed to remove the disputed position from the bargaining unit as part of a package which included the 15 cent per hour wage increase. As noted, both those changes are reflected in Exhibit 12, the version of the collective agreement which Mr. Goldman prepared.

Mr. Jenner did not testify before me. However Mr. Jenner's views as to the 2004-2007 collective agreement were before me through his various documents. Recall that in 2007, before he retired, Mr. Jenner had made the Union proposals for the next collective agreement. At that time he based the Union proposals on Exhibit 12 which did not include the quality technician position. Those Union proposals indicated that the Union wished to add the position of quality technician to the jobs listed in the bargaining unit. Mr. Jenner confirmed in a subsequent e-mail to the Employer that the Union proposals for the job classifications article included adding the quality technician position. The only plausible interpretation of Mr. Jenner's writings is that he understood that the quality technician position had been removed from the 2004-2007 collective agreement.

Mr. Goldman, for the Employer, and Mr. Jenner, for the Union, were the two persons centrally involved in the final negotiations for the 2004-2007 collective agreement. They both understood that they had agreed to remove the quality technician position from the 2004-2007 collective agreement as part of the package that included the 15 cent wage increase.

Although it was urged upon me by the Union as being persuasive, I do not find the recall list which provides the name of all former employees and their job positions at the time of lay off by

the former employer to be of any assistance in determining what the parties agreed to on this issue of quality technician.

Based on all the evidence, I conclude that the parties agreed to remove the quality technician position from the collective agreement late in the negotiations for the 2004-2007 collective agreement.

*What document is their collective agreement?*

Although there were several versions of the collective agreement, only two - Exhibit 3 and Exhibit 12 - were urged upon me as being the parties' true agreement. I focus on those two versions.

I begin with Exhibit 3. The 15 cent per hour wage increase is not found in Exhibit 3, the version of the agreement which both Mr. Leach, the President of the Union Local, and Mr. Ouellette, the Union plant chair, said was the collective agreement. Had these parties intended Exhibit 3 as their collective agreement I would have expected them to have included the 15 cent per hour increase. In addition, Exhibit 3 has two pages each numbered 51 and the page 51 which has been signed by the parties is from Exhibit 12. Had these parties intended Exhibit 3 as their collective agreement I would have expected them to have simply signed that agreement instead of signing a page from Exhibit 12 and appending it. Moreover, Exhibit 3 includes the quality technician position which I concluded above the parties had agreed to remove from their collective agreement. I reject Exhibit 3 as being the parties' collective agreement.

On the other hand, Exhibit 12 contains the 15 cent per hour wage increase and does not include the quality technician position. Exhibit 12 accurately reflects the agreement reached by Mr. Goldman and Mr. Jenner. Moreover Exhibit 12 was signed by the parties. Finally, Mr. Jenner used Exhibit 12 as the current collective agreement when he made his proposals for the next collective agreement. I conclude that the parties' 2004-2007 collective agreement is the one

prepared by the Employer and filed before me as part of Exhibit 12.

For clarity, I note that, pursuant to the agreement the parties reached at the start of this hearing and my conclusion above, the parties have agreed that the quality technician position will not be included in their next collective agreement.

*Disposition of the grievance*

Since the parties agreed to remove the quality technician position from their 2004-2007 collective agreement, I find that the Employer did not violate that collective agreement by having quality technician work performed by persons outside the bargaining unit.

The grievance is dismissed.

Dated at London, Ontario this 4<sup>th</sup> day of May, 2009.

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Howard Snow, Arbitrator