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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

DASHWOOD INDUSTRIES LIMITED

- The Employer

-and-

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 3054

- The Union

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Robert J. Atkinson	- Counsel
Brad Duguay	- Plant Manager

On behalf of the Union:

Michael McCreary	- Counsel
Ken Fenwick	- Business Representative

Hearing held June 19 and September 21, 1998 and January 15 and February 18, 1999 in London, Ontario.

AWARD

I. INTRODUCTION

Dashwood Industries, the Employer, operates a plant in Centralia, Ontario. For many years the Employer employed drivers and helpers to deliver its products throughout Ontario. The Employer recently contracted with Ryder Integrated Logistics (Ryder) to deliver Dashwood products and offered alternative work to Dashwood drivers and helpers.

The Union grieved that the Employer's arrangement with Ryder was an improper contracting out.

II. THE EVIDENCE

The Employer makes doors and windows in its Centralia plant north of London. The Employer had maintained its own fleet of delivery trucks and employed a complement of drivers and helpers who delivered doors and windows to customers. The drivers and helpers were bargaining unit employees covered by the collective agreement with the Union. In the spring of 1998 the Employer entered into a contract with Ryder to take over the delivery function. The drivers and helpers who had conducted the deliveries were offered other jobs in the plant. Most drivers and helpers accepted those jobs.

Robbie Lawrence worked as a driver for the Employer for some 30 years. He lost that job when the Employer made the changes to the delivery system; he then went to work in the plant. Mr. Lawrence testified that the change in jobs meant that he now earned substantially less money, although much of the decrease was attributable to the reduction in hours worked. He also testified that the Ryder drivers wore uniforms which had “Dashwood” on them, and that the trailers being used said “Dashwood”. However, during cross-examination he accepted that some uniforms were printed with both “Dashwood” and “Ryder”.

Ian Tuck is a Union Steward. Mr. Tuck testified that he first heard of the possibility of the Employer contracting out the delivery function in November 1997. In April 1998 the Union was advised that a decision had been made to contract out the delivery function for "economic" reasons. He testified that the Employer representatives had told the Union that Ryder could deliver windows and doors and Ryder then had the option of picking up a load of other freight for the return trip. Anything carried on the return trip would save the Employer money.

Fraser Hansen is Director of Customer Logistics for Ryder, a division of Ryder Systems Inc., and had been Manager of Business Development. Mr. Hansen was the Ryder employee primarily responsible for securing the contract with the Employer. He testified that Ryder offered customized third party logistics for its clients. He described the contract as one of “dedicated contract carriage”, meaning that certain equipment was used primarily for this contract and particular employees worked primarily on this contract. When Ryder entered into the contract with the Employer, Ryder purchased several of the Employer’s trucks and trailers for which the Employer had no further need. Mr. Hansen testified that the tractors had only Ryder markings on them but that the trailers still had large Dashwood logos together with a small decal to indicate that Ryder owned them.. He said that Ryder is solely responsible for the vehicles and that the risk is solely Ryder’s. Ryder has its own license to operate its trucking business.

Mr. Hansen testified that Ryder employed five drivers and five helpers as well as an on-site manager to fulfil this contract. Although the drivers and helpers worked primarily on the Dashwood deliveries, they were available to work elsewhere if needed by Ryder. The on-site manager scheduled the drivers and planned the loads. He testified that recruitment, hiring, training, work assignment, holidays, payroll, discipline and all other dealings with drivers and helpers were Ryder’s responsibility. Ryder was responsible for all human resource functions with its drivers and helpers.

Mr. Hansen also described two computer programs used in its trucking operation. The first was a proprietary program used to manage the transportation operation including the payroll, trip management, driver performance and invoicing. Ryder used the second computer software to help in developing routes and planning deliveries.

Mr. Hansen described the Employer's former delivery approach as "static" routing - all deliveries to a particular city were made on set days. For example, during one week a route may have had ten deliveries, whereas the following week it may have had twenty-five. Mr. Hansen said the Employer's resources were not being used optimally in the first week and in the following week extra equipment and extra employees may have been needed. He believed that inefficiencies in the Employer's approach to routing resulted in much greater delivery costs than necessary.

Ryder used "dynamic" routing - Ryder had abandoned the assigned days and routes and now developed its routes depending on the current amount of activity. It used the computer software to help plan the routes. The on-site manager obtained information from the Employer as to the products it wished to have delivered and then scheduled the deliveries to make the best use of equipment and employees.

Ryder drivers and helpers worked from the Dashwood plant, and Ryder trucks were loaded by Dashwood employees as they were previously, but now the loading was done on instructions from the Ryder on-site manager. In cross-examination Mr. Hansen agreed that the Ryder on-site manager used an office supplied by the Employer, used an Employer photocopier and fax and had a key to the plant. He agreed that there was no charge for any of this.

Mr. Hansen also accepted that the inefficiencies in the Employer's delivery process had been "systemic", that the problems had not been caused by incompetent drivers and helpers. He

noted, however, that the Employer had not monitored the Dashwood drivers' and helpers' productivity. He said that the Employer had purchased a more efficient delivery system, while reducing liability concerns and freeing itself to concentrate on making doors and windows.

Mr. Hansen was questioned about how Ryder would deal with a driver if the Employer were to say that it did not want that driver to deliver its product. Mr. Hansen made it clear that Ryder wanted to keep Dashwood's business and would therefore respond to any such concern, but he would not agree that Dashwood could compel the dismissal of a Ryder employee.

As for the history of the relationship, Mr. Hansen indicated that the initial approach to the Employer had been made by Ryder some six or seven years earlier. At that time Ryder had made a proposal to the Employer, but it had not been accepted. About four years ago Dashwood sought another proposal from Ryder, but again it was not accepted. Ryder had maintained contact throughout the years to ensure that the Employer knew that Ryder had a continuing interest in securing the business of delivering the Employer's products. The last round of discussions began in the summer of 1997 and the contract was signed in the spring of 1998.

Brad Duguay is the Plant Manager in the Employer's Centralia plant. He began work at the Centralia plant in August 1997. He testified that the Employer had lost money over the last five years and that the Employer was seeking ways to change that result, that is to make a profit. The Employer had considered its costs and had sought a proposal from Ryder for distribution which would save money. He said that the Employer contracted with Ryder for a variety of reasons: its fleet was expensive to maintain; it was difficult to keep up with changing laws; a manager was necessary as distribution required too much time from other supervisors; and Ryder offered a better service. He indicated that the Employer wished to

focus on its core business of making doors and windows and Ryder offered an efficient and "carefree" package. Mr. Duguay reviewed some of the costs associated with the distribution function.

Regarding the approach that would be followed if a driver were viewed by the Employer as unsatisfactory, Mr. Duguay's testimony was similar to that of Mr. Hansen. Mr. Duguay said he would report his concern to Ryder and would expect Ryder to deal with it, in the same way that he expected any other supplier to deal with problems raised by the Employer. However, he did not believe that the Employer could direct the discharge of a Ryder employee.

The parties agreed that the Union made, and later withdrew, a proposal on contracting out in the negotiations for this 1996-1998 collective agreement. If that proposal had been accepted it would have substantially restricted the Employer's ability to contract out work.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The following is the relevant provision of the parties' 1996-1998 collective agreement:

Article 2 - RECOGNITION

. . .

2.02 When an employee covered by this Collective Agreement and the necessary equipment is available for the employee to perform work in any of the job classifications where the employee normally works, no Foremen, person above the rank of Foremen or other persons not covered by this Collective Agreement shall perform work normally performed by the employees in the job classifications except for the purposes of instruction, experimenting or in cases of emergency.

IV. POSITION OF THE UNION

The Union made four submissions:

1. The Ryder employees were employees of the Employer and covered by the collective

agreement;

2. The contracting out was a violation of Article 2.02 of the collective agreement;
3. The Employer had contracted out in bad faith; and,
4. The Employer was estopped from contracting out its distribution function.

The Union submitted that the Ryder drivers and helpers were actually employed by the Employer. The Employer had simply made an alternative contract for the supply of labour. The collective agreement thus governed their employment.

Regarding contracting out, the Union submitted that Article 2.02 was a complete defence. "Other persons" have been doing the drivers' and helpers' work at a time when the drivers and helpers were available to do it. That work was not included within any of the exceptions in Article 2.02. The Union acknowledged that its position was contrary to an earlier award between the parties interpreting Article 2.02, but asked that the earlier award not be followed.

On the bad faith submission, the Union said that the reason given for the contracting out was cost savings. While the Union acknowledged there was no evidence that the Employer had another motive, nevertheless the Union asked that I conclude the change in delivery had not saved money and asked that I infer from that conclusion that the Employer had other motives for contracting out. The Union submitted that the Employer had an obligation to administer the agreement in a reasonable manner and, as it failed to make a sound business decision and misrepresented the reasons for the decision, it had acted unreasonably and in bad faith.

On the estoppel submission, the Union said that the many years during which the Employer delivered its own product amounted to a practice sufficient to support estoppel. The Union had relied upon that practice and did not bargain further protection against contracting out. Had the Union been notified of the Employer's intentions regarding delivery in advance of

the 1996 negotiations, the Union would have more vigorously pursued its proposals to protect employees against the contracting out of work.

The Union relied upon the following authorities: *Re Dashwood Industries Ltd. and United Brotherhood of Carpenters & Joiners, Local 3054* (1992), 29 L.A.C. (4th) 19 (Roberts); *Dashwood Industries Ltd. and United Brotherhood of Carpenters & Joiners of America, Local 3054* (unreported) March 16, 1989 (Bryant); *Re Don Mills Foundation for Senior Citizens and Service Employees' International Union, Local 204* (1984), 14 L.A.C. (3d) 385 (P.C. Picher); *Re Maple Leaf Mills Ltd., Grain Elevator Division and Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees* (1986), 24 L.A.C. (3d) 16 (Devlin); *Re Goodyear Tire & Rubber Co. of Canada Ltd. and United Rubber, Cork, Linoleum & Plastic Workers, Local 232* (1977), 16 L.A.C. (2d) 177 (Gorsky); *City of Pointe-Claire v. Syndicat des employées et employés professionels-les et de bureau, section local 57; et al.* (1997), 146 D.L.R. (4th) 1 (S.C.C.); *Teamsters Local Union No. 419 v. Martha's Garden Inc.* [1997] OLRB Rep. Sept. 891; *Teamsters Local 879 v. A. Cupido Haulage Limited, et al.* [1980] OLRB Rep. May 679; and *Teamsters Local Union No. 419 v. Cottrell Transport Inc., et al.* (unreported) November 1, 1995 (OLRB).

V. POSITION OF THE EMPLOYER

The Employer submitted that this was a true contracting out and the Ryder drivers were not the Employer's employees. This was a contracting out of not only the driving functions but of the whole distribution system. The Employer sold its entire fleet of vehicles, some to Ryder. The sale of some of the Employer's fleet to Ryder was appropriate since the vehicles had been customised to deliver windows and Ryder required this equipment. Ryder was responsible for its own equipment and provided full services to the Employer. Ryder directed the loading, the sequencing of deliveries and the routing of the trucks, provided an on-site manager and used its special technology and expertise. Ryder hired, trained, and

disciplined employees, assigned their work, scheduled and paid its employees. On the issue of discharge of employees, the Employer said that this was a practical business issue - Ryder would listen to its customer, but would ultimately make the decision it considered appropriate.

Regarding the Union's contracting out submission, in the absence of a restriction in the collective agreement, the Employer said that it was free to contract out provided it was a true contracting out and was done in good faith, as was the situation here. In this agreement the only possible reference to contracting out was in Article 2.02 and this very issue had been dealt with in an earlier arbitration award between the parties. Article 2.02 was held not to prohibit contracting out and the language of Article 2.02 has not been changed since that award. "Consistency" and "finality" have long been held to be important values in labour relations and thus the earlier award should be followed unless it was manifestly wrong; in this instance the Employer said the earlier award was correct.

As for the Union's allegation of bad faith, the Employer had several reasons for making the change in delivery. The only concern raised by the Union in support of its bad faith allegation was the cost of the Ryder contract, but the evidence did not demonstrate that the Ryder contract was more costly than the Employer's own delivery system. Even if the Employer had been mistaken and the Ryder contract was more expensive than its method of delivery, the Employer said it would make no difference to the outcome of this grievance. The Employer submitted that a bad business decision did not amount to a violation of the collective agreement.

Finally, regarding estoppel, the Employer submitted that simply acting in a certain manner for a long time was not sufficient to support estoppel. In this instance, the Union's bargaining proposal on contracting out demonstrated that the Union had not expected the old method of delivery to continue. In any event, the Employer said there was no evidence that

the Union had relied on that practice to its detriment.

The Employer relied upon the following authorities: Brown and Beatty, *Canadian Labour Arbitration*, 3rd edition, paras. 5:1300, 5:1400, and 2:3220; *Re United Steelworkers of America and Russelsteel Ltd.* (1966), 17 L.A.C. 253 (Arthurs); *Re Indusmin, Division of Falconbridge Ltd. and Energy & Chemical Workers' Union, Local 306* (1988), 2 L.A.C. (4th) 321 (Weatherill); *Re Citipark, Division of Citicom Inc. and Construction General Workers, Local 60* (1988), 33 L.A.C. (3d) 137 (Herbert); *Re MacMillan Bathurst Inc. and International Woodworkers, Local 2-1000* (1989), 8 L.A.C. (4th) 427 (Springate); *Re Brewers' Warehousing Company Limited and Local 278C, International Union of Brewery, Flour, Cereal, Malt, Yeast, Soft Drink and Distillery Workers of America* (1954), 5 L.A.C. 1797 (Laskin); *Re Toronto Transit Commission and Amalgamated Transit Union, Local 113* (1985), 21 L.A.C. (3d) 346 (Saltman); *Re Toronto Star and Southern Ontario Newspaper Guild* (1990), 18 L.A.C. (4th) 49 (Burkett); *Re Ford Motor Co. of Canada Ltd. and United Plant Guard Workers, Local 1958* (1981), 1 L.A.C. (3d) 141 (MacDowell); and *Re Carecor Health Services Inc. & Participating Hospitals and Ontario Nurses' Association* (1992), 30 L.A.C. (4th) 391 (Knopf).

VI. CONCLUSIONS

1. Are the drivers and helpers who now make the deliveries employed by Ryder or by the Employer?

The Employer said it had contracted out the delivery function and the workers now making the deliveries were employees of Ryder. The Union submitted that these workers were employees of Dashwood and therefore the work had not been contracted out. The first question to be considered is this: Who employs these workers?

There have been many instances in which the issue of who is the employer of particular employees has arisen. Courts, labour boards and arbitrators have developed various approaches to resolving this question. I will refer to two of them.

In *Martha's Garden Inc., supra,* the Ontario Labour Relations Board stated as follows (at para. 19):

The Board's jurisprudence in this area is neither complicated nor controversial: . . .

> The criteria which the Board considers helpful in determining which of two (or more) entities is the employer for purposes of the *Labour Relations Act* include the following:
>
> (1) the party exercising direction and control over the employees;
> (2) the party bearing the burden of remuneration;
> (3) the party imposing discipline;
> (4) the party hiring the employees;
> (5) the party with authority to dismiss the employees;
> (6) the party who is perceived to be the employer of the employees; and
> (7) the existence of an intention to create the relationship of employer and employee.

. . . The cases have generally not assigned any particular order of priority to those factors, but rather have tended to indicate that the weight to be given to each factor must depend upon the facts of each case. However, the Board has tended to attach considerable significance to "overriding control" in determining which of two or more entities is the employer of certain persons. Moreover, the Board has consistently found that neither private arrangements as to who is the employer, nor administrative paymaster arrangements, are indicative of the true employer.

A second way of addressing this issue is set out in *City of Pointe-Claire, supra,* where the Supreme Court reviewed a decision made under the Quebec *Labour Code.* The issue being addressed dealt with which of two potential employers was the employer under the *Code*. Chief Justice Lamer expressed the following conclusion:

> . . . In my view, in a context of collective relations governed by the *Labour Code*, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work - and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration, and integration into the business. (p. 21-22)

Other cases refer to similar criteria. These various approaches are intended to serve as aides in reaching a sound conclusion from a labour relations perspective.

I begin by applying the Labour Board's approach, quoted above.

On the first point, Ryder, primarily through its on-site manager, advises the drivers and helpers when to report for work, what product to deliver, in what order, and using which equipment. The workers report to the on-site manager and deal with him on a day-to-day basis. On occasion, Ryder uses the services of the drivers and helpers for other contracts. I conclude that Ryder exercises primary control and direction over the employees.

The second issue is who "bears the burden of remuneration". While Ryder pays the workers, the cost of the contract between Ryder and the Employer depends in part on how much work these employees perform in making the deliveries for the Employer. In that sense one might say that the Employer is responsible for the workers remuneration; but the cost of delivery is no doubt built into the price of the doors and windows and thus one might pursue this inquiry along the sales chain to the ultimate purchasers of the Employer's products. Under this contract, while the cost is in part dependent on the amount of work required from these workers, Ryder is required to manage its affairs in such a way that it pays these workers and I conclude that it is Ryder which "bears the burden of remuneration".

There was no clear evidence regarding any actual discipline less than dismissal. From the evidence regarding dismissal and from the terms of the contract, I conclude that Ryder would be responsible for any disciplinary action.

Ryder selects and hires the employees.

Based on the evidence regarding the hypothetical situation in which the Employer had

concerns regarding a driver, I conclude that Ryder controls discharge.

Regarding the sixth point, there was no direct evidence as to which party is perceived by the employees as the employer.

Finally, it seems that only Ryder had an intention to create an employer-employee relation as Ryder selected, hired, scheduled, supervised, and paid the drivers and helpers.

Looking at the various factors, the evidence indicates that Ryder, not the Employer, has "overriding control" of the work and of these workers. Thus, applying the Labour Board criteria, I would conclude that these employees are employed by Ryder, not by the Employer.

Applying the approach described in *City of Pointe-Claire,* I would likewise find that Ryder has the greater control over the work life of these employees. The evidence indicates that it is Ryder which selects, hires, trains, supervises, monitors work performance and evaluates, assigns duties, and pays the drivers and helpers. These employees are integrated into Ryder's trucking business, not the Employer's business.

I thus conclude that the drivers and helpers who are now delivering the Employer's products are the employees of Ryder, not of the Employer. As the delivery function is now performed by employees of Ryder, it follows that the Employer has contracted out the delivery function.

2. Was the contracting out done in violation of Article 2.02 of the collective agreement?

Article 2.02 prohibits certain persons from doing work normally done by members of the bargaining unit. I repeat the provision:

Article 2 - RECOGNITION

. . .

2.02 When an employee covered by this Collective Agreement and the necessary equipment is

available for the employee to perform work in any of the job classifications where the employee normally works, no Foremen, person above the rank of Foremen or other persons not covered by this Collective Agreement shall perform work normally performed by the employees in the job classifications except for the purposes of instruction, experimenting or in cases of emergency.

In an earlier award between these parties (see 29 L.A.C. (4th) 19) interpreting this precise language, Arbitrator Roberts concluded that Article 2.02 did not prohibit contracting out. Arbitrator Roberts reviewed the long line of cases which hold that employers may contract out unless there are restrictions on contracting out contained in the agreement. He also carefully reviewed the particular language of this Article. He concluded that Article 2.02 was directed at preserving "the integrity of the bargaining unit from encroachment by non-bargaining unit employees of the company" (at p. 30) and did not limit contracting out. Thus he interpreted the words "other persons not covered by this Collective Agreement" as meaning only other persons employed by the Employer (at p. 30). He concluded that the Article prevented "Foremen" employed by the Employer, other employees of the Employer "above the rank of Foremen" together with any other employees of the Employer from doing bargaining unit work (except in the exceptions listed, none of which are relevant here). Using that interpretation, the Article does not prevent Ryder employees from delivering windows and doors as I concluded above that they are not employees of the Employer. Should I follow that interpretation?

The Employer submitted that consistency and finality have long been held to be important values in administering collective agreements and that an earlier award interpreting provisions of a collective agreement should be followed by a subsequent arbitrator unless that award is clearly wrong. (See, for example, *Brewers' Warehousing Company, supra,* and *Toronto Transit Commission, supra.*) I agree with this position.

I do not find Arbitrator Robert's interpretation of the Article 2.02 to be clearly wrong. In fact, given the general view that limitations on contracting out bargaining unit work need to be clearly stated in an agreement, and given the other possible intention of the parties to limit

the intrusion on bargaining unit work by managerial and other excluded employees of the Employer, I would reach the same conclusion as did Arbitrator Roberts.

In addition, I note that the Union sought to achieve a clear prohibition on contracting out during the bargaining for this agreement. The Employer resisted and the Union withdrew the proposal. In this situation the bargaining history lends additional support for the conclusion that contracting out is not now prohibited by this collective agreement.

For the above reasons, I conclude that Article 2.02 of this collective agreement does not prohibit the contracting out of work.

3. Was the contacting out done in bad faith?

The Union asserted that the contracting out of the distribution function was done in bad faith. It said that I should conclude that it was now more expensive to distribute the Employer's products than it had been previously and from that I should infer bad faith.

The Union did not, however, demonstrate that distribution costs were higher after the contracting out than they were before. While there was some financial information, it was not of sufficient detail or clarity to demonstrate the actual cost of distribution before the contracting out. On the evidence before me it is not possible to determine whether the current distribution method is more expensive. Given that the facts from which the Union suggested I should infer bad faith were not proven, the Union allegation of bad faith fails.

In addition, I should indicate that even if it was now more expensive to deliver the Employer's products, that conclusion alone would not lead to a finding of bad faith. The Employer makes business decisions based on the information it has available to it, using its best projections regarding the future. It may well be that the Employer was wrong in its

predictions in this instance. The contracting out of delivery may have been based on a mistake regarding the costs, but that type of Employer mistake would not violate the collective agreement.

4. Was the Employer estopped from contracting out?

The Union submitted that the Employer was estopped from contracting out the distribution. Estoppel is a principle of fairness which requires three elements:

- a contractual relationship;
- a representation by one party to the second party that it will not rely on its strict legal rights under that contract; and,
- detrimental reliance by the second party on that representation.

Estoppel is then sometimes used to prevent the first party from retreating from its representation where it would be unfair to allow it to do so.

The Union and Employer have a contractual relationship. But did the Employer represent that it would not contract out the distribution function? The Union said the Employer had made such a representation by using its employees to deliver its products for many years. I cannot accept this submission. An employer may act in a consistent manner for many years. But I cannot find that when an employer acts in a consistent manner it is thereby representing that it will continue to do so, or that it will never exercise its right under its collective agreement to act in another manner. There is nothing in this instance to support a representation that the Employer would continue to deliver its own products. I conclude, then, that the Employer's actions did not amount to a representation that it would not exercise its right under the collective agreement to contract out the delivery function.

In addition, the Union has not persuaded me that there was any detrimental reliance. While the Union sought protection against contracting out in recent bargaining and then withdrew

the proposal, there was no evidence as to why it withdrew the proposal and, in particular, no evidence that it did so on the basis of any Employer representation regarding delivery. The Union asked me to infer that it had withdrawn the proposal based on a representation that the Employer would continue to do its own deliveries, but on the limited evidence before me I am unable to do so.

In summary, I conclude that the Employer has contracted out its delivery functions to Ryder; that the contracting out was not a violation of Article 2.02; that the contracting out was not done in bad faith; and that the Employer was not estopped from contracting out the delivery function. The grievance is thus dismissed.

Dated at London, Ontario this 19th day of March, 1999.

Howard Snow, Arbitrator