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Résumé de l'article

Un arbitre vient à la conclusion qu'en vertu des dispositions de la convention collective de travail en cause, les employés techniciens assignés par un sous-traitant lié par contrat avec la Société Radio-Canada pour la production d'une série d'émissions télévisées, étaient directement dirigés et contrôlés, dans leur travail, par l'équipe de production de cette dernière Société, et cela d'une façon constante et continue, tout comme s'il s'était agi de ses propres employés.

Il s'agit alors d'un contrat de services personnels et non d'un contrat à forfait ou d'« entrepreneur », pour autant que ces employés sont concernés.

De plus, il ne s'agit pas d'un travail exhorbitant des fonctions ordinaires de la Société couvertes par la convention en cause, mais d'opérations techniques identiques à celles couvertes par cette convention.

Enfin, le contrat entre l'employeur (Radio-Canada) et le sous-traitant (Editel Production Limited) en est un, dans les faits, de « location d'équipement » (rental of equipment) et lorsque l'employeur loue de l'équipement, tel que stipulé à l'article 47.1 de la convention collective, NABET a juridiction sur cet équipement.

Si (quoiqu'il n'y ait aucun élément de mauvaise foi en l'occurence de la part de l'employeur) l'employeur était autorisé à continuer la pratique prévue à ce contrat de sous-traitance, ceci équivaudrait, en fait, à enlever au syndicat (NABET) et à ses membres la juridiction sur un travail ailleurs couvert par la convention collective en vigueur et exécuté normalement par ces derniers.

Aux termes de cette décision, l'expression « assigner » à l'article 47.2 de la convention collective inclut, non seulement l'assignation de travail à des employés de Radio-Canada autres que ceux représentés par NABET, mais aussi à des « personnes » qui viennent de l'extérieur, du moment qu'elles agissent sous la surveillance et la direction constante de cette Société.

En conséquence, considérant les exigences de la convention collective à son article 47, l'arbitre fait droit au grief syndical.

Il est important de remarquer qu'il s'agit d'une décision « de principe » et qui doit valoir pour l'avenir. Elle ne devrait pas s'appliquer à l'émission même qui en est l'objet. Radio-Canada devrait pouvoir continuer la production de cette émission selon le contrat intervenu avec le sous-traitant, car il n'y a pas mauvaise foi de la part de Radio-Canada, il s'agit d'un litige de caractère nouveau entre les parties dont chacune pouvait prétendre avoir la bonne interprétation ; les dommages seraient trop considérables envers tous les intéressés si on y mettait fin présentement, aucun préjudice n'est causé aux membres du syndicat en matière de travail et de sécurité d'emploi; enfin, Radio-Canada n'a pas présentement, les disponibilités en personnel technique pour mener seul cette émission à bonne fin selon l'horaire et la programmation déjà établis.[1]

(1) In the Matter of a Special Arbitration based on a memorandum of agreement and in the matter of an Arbitration of a grievance processed under the provisions of a Collective Bargaining Agreement in operation between: Canadian Broadcasting Corporation, Employer, and National Association of Broadcast Employees and Technicians, Trade Union. Board of Arbitration: His Honour Judge J.C. Anderson, single arbitrator. Belleville, Ontario, June 28, 1966.

JURISPRUDENCE DU TRAVAIL

CONVENTION COLLECTIVE — Sous-traitance

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membres du syndicat en matière de travail et de sécurité d'emploi ; enfin, Radio-Canada n'a pas présentement, les disponibilités en personnel technique pour mener seul cette émission à bonne fin selon l'horaire et la programmation déjà établis. [1]

AWARD

Under the authority of a memorendum of agreement, which reads as follows :

« Notwithstanding anything to the contrary contained in Articles 58-68 inclusive (Grievance Procedure), in the currently effective Collective Agreement between the Canadian Broadcasting Corporation and the National Association of Broadcast Employees and Technicians, executed March 13, 1964, the parties hereto undertake and agree that the grievance attached hereto, and identified as grievance N-19, will be submitted to final and binding arbitration in the following manner:

1) The parties agree that Judge J.C. Anderson will be the sole arbitrator and that he will be requested by the parties to render his decision prior to 6:30 p.m., June 19, 1966.

2) The parties further agree to seek to arrange an arbitration hearing on the earliest possible date following the date of this agreement, in order that they may present argument and evidence to the arbitrator.

3) The parties further agree that the fee and expenses of the sole arbitrator will be shared on an equal basis between the Corporation and the Union.

It is jointly recognized that this procedure has been adopted in the interests of achieving an early settlement of the instant grievance and is not to be considered by either party as establishing a precedent for future arbitrations. »

A Meeting to hear the evidence and submissions with respect to a grievance was held at my Chambers, in the Court House, Belleville, Ontario, on Thursday, June 16th and Friday, June 17th, 1966.

The grievance reads as follows:

« N-19 Jurisdiction — Feu Rouge Feu Vert — Articles 47 & others »

« The National Association of Broadcast Employees and Technicians protests that the declared intention of the Management of the Corporation to use persons who are not within the bargaining unit or are not employees of the Corporation to install, set-up, operate and maintain equipment to be used on remote locations for CBC originations in connection with the series of programs presently identified as « Feu Rouge, Feu Vert », is contrary to the provisions of the Collective Agreement, and particularly Article 47 thereof.

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« The Union demands that the Management of the Corporation abandon its said intention and agree to use, and use, its employees who are members of the bargaining unit to perform the said work. »

Management Position

> « Management has noted the Union's grievance N-19 and the claim that the CBC's method of operation intended for use on the program series « Feu Rouge Feu Vert » is contrary to the provisions of the collective agreement, and particularly Article 47 thereof.
>
> Management rejects the Union's contention in this regard and contends that there is no barrier in the agreement to proceeding in the manner intended. »

There were some meetings at which discussions took place in an attempt to resolve the issue raised by the grievance, but resolution of the problem was not achieved, and thus the Memorandum of Agreement, quoted above, referring the matter to me as Sole Arbitrator.

BACKGROUND

The Canadian Broadcasting Corporation decided to produce a television series entitled Feu Rouge, Feu Vert, consisting of sixty-five (65) recorded programs, to be broadcast daily from Monday to Friday, over the facilities of the French network of the Corporation, beginning Monday, June 6th. The series was to originate from the Martinique Hotel in Montreal. It was decided that the program would not be completely produced by CBC personnel, but an arrangement was entered into with Editel Productions Limited, which arrangement is set out in the form of a contract dated the 2nd of June, 1966, a copy of which is an Exhibit to this Award.

The Union was notified sometime previous to the work, which is referred to in the contract, being started, and sometime following the notification, a grievance was filed.

The discussions took place concerning the grievance, as early as June 3rd, but since the problem was not resolved, the first two (2) weeks of the program was abandoned, and the matter was referred to me under the terms above set out.

The problem involved in connection with this arbitration is one which raises some, if not all, of the problems generally, with relation to the question of contracting out.

According to Dr. John F. Young, in his study of contracting out work in industry in Canada, there has been relatively little contracting out, « excepting in areas peripheral to the main business of the employer ».

Dr. Young also indicates that in processing and manufacturing of products, there has been relatively slight reliance on outside contractors.

The isue which raises its head here is an issue which may be summarized by saying that the Corporation wishes to use employees not in the bargaining unit, as it proposed to use in this case, in the interests of efficiency and in the interests of meeting the demands that it is called upon to meet with the equipment and personnel presenly available. The Union regards the issue as one of job security in the broadest sense. If the Union did not challenge the Corporation under the facts of this particular case, no one presently in the Union would be losing employment nor losing money by reason of lay-offs.

However, as the practice of contracting out becomes prevalent, it has other implications for the labour movement. The implications are with respect to Union Security and secondly the implications in regard to Union Jurisdiction and Structure, and it would seem to me that in this case, the issue is not so much that of loss of membership, but rather of structure and jurisdictions. Nor can it be said that the technicians who are represented by NABET, perform work which is on the periphery of the main business of the Canadian Broadcasting Corporation. The work which they perform is an integral part of the business of the Corporation and therefore the issue raised here is an important one, not only to the Corpoation, but to the Union likewise.

I shall now set out the clauses in the Collective Bargaining Agreement which seem to me to be pertinent.

First there is the introduction which expresses the intent and purpose of the agreement, by saying that it is intended to recognize the community of interest between the Canadian Broadcasting Corporation and the National Association of Broadcast Employees and Technicians in promoting cooperation between the Corporation and its employees, consistent with the rights of both parties.

Secondly there is the definition of employees in Article 2.1, which means a person employed in the classifications within the bargaining unit as defined. Then there is the Management Rights clause which is expressed in Article 3 of the contract, and I refer particularly to Article 3.2 which reads as follows:

> « Other rights and responsibilities belonging to the Management of the Corporation and hereby recognized, prominent among which, but by no means wholly inclusive are: the right to decide the number and location of plants, the amount and type of supervision necessary, of machinery and technical equipment, methods, procedures and standards of operation, operating schedules together with the selection, procurement, designing and engineering of equipment, which may be incorporated into the Corporation's plants, the selection, direction and determination of the size of the work forces, including the right to hire, transfer, promote, retire or to suspend or discharge for proper cause, or to relieve employees from duty because of lack of work. »

Of course, these rights are to be exercised in accordance with the provisions of the Collective Agreement.

The next Section to which reference is made is Article 47, and I reproduce here Article 47.1, 47.2 and 47.3.

> ARTICLE 47.1
>
> « Employees as defined in Article 2 of this Agreement shall continue to install, set up, operate and maintain Corporation owned or rented equipment, or any device obtained in the future to replace such equipment, when used on Corporation premises or Corporation remote locations for CBC originations. For the purpose of this Article, Corporation originations shall mean live broadcasting, video, and audio recording, on the air playback, rehearsal, studio and control room audition, and closed circuit transmission. Corporation equipment shall include the following » :
>
> ARTICLE 47.2
>
> « The Corporation agrees not to assign to persons outside the bargaining unit duties performed by members of the bargaining unit, but it is agreed that the

Corporation shall not be required to alter the existing practice with regard to the following: »

ARTICLE 47.3

« This Article shall not apply to the Corporation's broadcasting activity involving originations and/or pick ups from affiliated or non-owned broadcasting stations. It is understood, however, that the Corporation will not engage in this activity to circumvent the Union's jurisdiction. »

A great deal of evidence and a number of exhibits were submitted by the Union, and some by the Corporation, to establish that when any work, which was capable of being done by members of NABET, was not being done by employees within the jurisdiction of this Agreement, that the Corporation and the Union had come to mutual understanding, expressed in Memorandums and waivers, in relation to specific situations. I think it is safe to say, that in most of these situations, these Memorandums and waivers, insofar as they may be considered to be waivers, were arrived at to deal with specific and limited situations, which might be more accurately described as being on the periphery of the jurisdiction of the contract, and in any event, were arrived at, to meet certain specific situations.

These past practice arrangements have, according to my view, been useful, and have been used by the Corporation and the Union, to meet practical problems as they arose, and with no thought of having a body of precedents built up by reason of solutions arrived at, and therefore at the outset, I have come to the conclusions that the issue which is raised here, in a form which is vital to both parties, has not been faced before by the parties and dealt with by arriving at a general solution, and I have to come to the conclusion that all the past practices and precedents that were described, and illustrated by the Exhibits filed with me, should have no real effect on me in attempting to determine whether or not this grievance should be upheld.

It is conceded, I think, by both the Corporation Counsel, and the Union Counsel, that if a production is purchased from an outside firm, as a package and in its entirety, in a form ready to be used or put out over CBC facilities, that the production of this package does not fall within the jurisdiction of NABET.

It is also conceded that the Corporation may be engaged in an activity involving originations or pick ups from affiliated or non-owned broadcasting stations, provided the Corporation does not engage in this activity to circumvent the Union's jurisdiction, and Counsel for the Union further conceded that if, under the contract with Editel, hereinbefore referred to, there is a factural finding that the equipment therein described is in fact rented equipment, then this Union through its members, must operate such equipment. Rent, in these circumstances, means « payment by contract or otherwise, for the use of equipment ».

It also, I think, is clear, that if the personnel used by Editel were engaged to do work which is ordinarily performed by members of NABET, and were simply hired through an outside agency, but still were in fact employees in the same, or nearly the same relationship to the Corporation that the direct employees of the Corporation represented by this Union are, that the Corporation could not do something indirectly which it cannot do directly, and in that sense, the question arises as to whether or not the contract with Editel « is a contract for a service, or simply a contract for the services of the technical personnel ».

I now proceed to a closer analysis of the contract with Editel, and what I see is involved in this contract as it relates to the wording of Section 47.1 of the contract.

This contract is drawn in the usual form of a contract which would, on the face of it, make the contractor an « independent contractor ». It states that the contractor undertakes to render the services listed in the contract, and then goes on to state what those services are intended to be.

It will be noted that the program is to originate from the Martinique Hotel, which, under the terms of the contract, the parties agree is a « remote location ».

The contract also provides that the Corporation will pay the rental, if any, of the Martinique Hotel. Then: and this is important, the contractor undertakes to make available certain technical facilities including cameras, recorders, cables, and which I presume includes the necessary technical facilities, to produce the program mentioned in the contract, and particularly I draw attention to the words « **undertakes to make available the following facilities** ». This, in itself, indicates that the contractor puts at the complete disposal, not of himself or his organization, but at the disposal of the Corporation, production crew, the technical facilities therein mentioned. Then the contract further states that the contractor makes available certain technical personnel, therein more particularly enumerated, and from this it is easy, and, I think proper, to decide that there is an implication that these technical personnel are made available to the CBC production crew. Further, both the equipment and the crew must be available and ready at certain times and certain days therein spelled out, and to be made available for « dry run » purposes, and the Corporation undertakes to assign the necessary production personnel normally required for such undertaking; (that is the undertaking to produce a variety program which is known as « Feu Rouge, Feu Vert »), and then the days that the recording and programs will be made is set out in the schedule to the Agreement, and then the contract further provides that if the recording is not judged suitable by the Corporation, for broadcasting, that the contractor shall remedy it, or the Corporation will not have to pay for the same, but this suitability is confined to being not suitable for reasons of a technical nature.

According to the evidence, there was to be supplied at the Martinique Hotel, at the time the programs were to be made, a full production crew. It is noteworthy, and I make this as a finding, that the technical personnel which the contracor undertakes in the agreement to make available are in the same classification as technical personnel which are within the Union, and even all the technical facilities, either have or can be properly operated by Union personnel on immediate notice or with a very short familiarization period.

In this instance, there was no technical producer assigned to the work by Editel, and if I understand the import of the evidence correctly, it is clear that if a similar program originated in a CBC studio, with CBC production crews and CBC technical facilities, and CBC personnel, there would ordinarily be a technical producer as part of the overall crew.

In this case, the contractor was not required to make available a technical supervisor, so that whatever functions he was to perform must be either done by one of the technical personnel therein outlined, or assumed by the producer, or someone assigned by him.

When a television program is being produced with certain necessary technical equipment, and certain necessary technical personnel, the entire production is under the direction of

one man, and in this case, that one man is the CBC producer assigned to this show. This producer or director, of this show, as is customary, has other assistants who would perform necessary functions as part of the producer's crew. In other words, the CBC assigned to the show a full production crew.

It is the producer's function, as I understand it from the evidence, to direct the technical people to perform their functions in the manner in which the producer wishes the function to be performed.

At the beginning, the technical staff would be provided by the producer, with specific instructions as to what they were to do on the set at certain times, and generally how they were to do it, but during the course of the production, the production crew is constantly there, and instructions would be amended or changed, depending on the producer's conception of how the artistic flow of the program was going along.

From the evidence, I think it is not unfair to conclude, for example, that if a camera is mounted on a boom, the producer might require the cameraman to take a close-up of one of the artists, and move rapidly up, down, sideways or backwards, depending on the effect that the producer wants to have of that shot. Similarly, the producer would be relaying instructions to the technical personnel in charge of the audio side of the program. The audio operators must take their instructions or cues from the producer, and this, of course, as I understand it, means bringing in music through voices or putting into the program a specific sound effect such as a bell or gong.

In other words, the production crew, and particularly through the producer, in the evolving of a variety program of this kind, where there are settings, actors, assistants, musicians, and technical personnel, is expected to keep all these people directly under his control. All of them, including the technical personnel, must follow his instructions throughout the production of the program on a constant minute by minute basis, and if there is no technical director, as there is not in this instance, then the technical supervision would come direcly under the control of the program producer.

Therefore, it is apparent according to my findings, that the technical equipment was intended to be under the complete, constant, direct and specific control of the CBC production crew; in other words the technical equipment was not to be used by the contractor or any of his personnel, in any independent fashion at all, but the equipment was to be used in a fashion just the same as if the equipment had been directly rented by the CBC and the program was being produced by CBC production crew and CBC technical crew, and therefore I have come to the conclusion that while the contract is expressed as being a contract for « service », in effect the technical equipment was to be put completely under the control of the CBC crew and therefore the equipment was, in effect, being rented by the CBC. That is, payment was to be made to the contracor for hire of technical equipment.

It is true, at the same time, technical personnel were to be made available, but the equipment was being used exactly in the same fashion as if it had been the subject of a separate rental agreement, except that technical personnel were to be made available with the equipment.

I find that the contractor was not intended to have, nor did have, nor was required to have any employee who would direct the work of the technicians. The technicians were

to be directed by the CBC production crew, and this direction was on the job, minute to minute, constant direction, and was to continue at certain times each day during the whole period of filming.

It is apparent from the evidence that the contractor was not expected to produce a product or semi-finished product. Even the video tape was supplied by the CBC. The only element of judgment in performing the tasks that the technical personnel had to bring to bear in the program production, was that they should be skilled in the techniques of their particular technical classification, and actually operate the machines, when, how and under what circumstances as they were directed.

According to my understanding of the evidence, the product that the contractor was expected to produce, could not be put together in any other way than by the constant supervision of a production crew, and even in the technical aspects of the program, the people who were to be made available as technical personnel, were expected to render service in keeping with their classifications, and use such techniques as qualified people should, and if they did not, then the contractor was not to receive pay for their services.

In other words, if these employees did not perform their work in a manner which they were expected to perform, by reason of their classifications and qualifications, the contractor would not be paid. They had a master and servant relationship to the CBC similar to its direct employees.

The CBC retains the right to discipline, demote, or discharge employees if the product of their employment is not in keeping with the technical requirements of the classification in which they are working, and in which they are paid, and in this instance, the end product can be refused and no payment made, if the technical personnel do not work at satisfactory technical standards.

Therefore, I have come to the conclusion that under the terms of this Agreement, the technical employees were simply employees assigned by the contractor to the CBC and were directed and controlled on a continuous and constant basis in all respects, as if they had been direct employees of the CBC, and thus I find that this contract is a contract for services and not a contract for service as far as the employees themselves are concerned, and so the Corporation, (though not with any element of bad faith involved) if it had been allowed to continue its operations in the manner it set about to do so, would have been taking jurisdiction away from the NABET personnel who ordinarily do the work that the Editel personnel were required to do under the direct, complete supervision and control of the CBC production crew, and I find the contract was a contract for rental of equipment, and when the CBC rents equipment under Article 47.1 of the Collective Agreement, NABET has jurisdiction over such equipment.

In coming to the conclusion that the Editel contract was a contract for the hire of services of technical personnel, I am reinforced by a decision in the case of « Performing Rights Society Limited v. Mitchell & Booker Limited, reported in (1924) 1 King's Bench Division, page 762 ». In this case, it was held that on the true construction of the agreement between the Defendant and the band, constituted the latter the servants of the Defendants and not independent contractors, and it considered the test for deciding whether a person is a servant or an independent contractor.

Among other things that were said by the Court which are relevant I think, to the facts of this situation, is the fact that the Court quoted with approval Macdonnell's Master and Servant, 2nd Edition as follows:

> « A servant is defined as one who for a consideration agrees to work subject to the orders of another. »

and secondly that in Pollock on Torts, 12th Edition, page 79, it is therein stated:

> « The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, « retains the power of controlling the work. »

The Judgment goes on to state. « An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand »

Again, in Salmond's Law of Torts, 6th Edition, « A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master »

In the above case, the orchestra artists agreed to appear and perform both afternoon and evening each day, including Sundays, at such times as may be fixed by the Management. The artists provided their own instruments. The contract provided for seven (7) hours of daily services, and the Court concluded that the band was engaged in such fashion as to make them the direct employees of the proprietor, and not employees of the so-called independent contractor.

One other case which is useful in deciding principles which set down tests which can be used to decide whether a contractor is an independent contractor or not, is the case of « The City of St. John v. Charles Donald, reported in (1926) Canada Law Reports, at page 371, and the trial Judge, in considering this case, said that if it had been necessary for him to decide the question as to whether it was an independent contractor or not, the requirements that the work was being carried out under the direction of the City's Engineer, and requiring the contractor and his foreman and servants to obey at all times the orders of the Engineer, are among the considerations which should be used to determine the independence of the contractor. In the case which was cited earlier, it was pointed out that the question as to whether a man is a servant or an independent contractor is often a mixed question of fact and law, and the contract has to be construed in the light of the relevant circumstances, which includes consideration of the written document.

Then McCardie J., in Performing Right Society vs. Mitchell & Booker, says: — « The final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of the detailed control over the person alleged to be the servant. »

Of course, on the facts of this case, we heard no evidence that Editel had any foreman or superintendent directing the work of the technical personnel. In fact, the only direction came from the CBC production crew, and I have come to the conclusion as already has

been earlier stated, that the technical personnel, which Editel was required to make available, were, in the real sense of the word, servants of the CBC Corporation, and thus, in effect, in the position of employees being subject to the minute to minute direction of the CBC.

DISCUSSION OF THE GRIEVANCE UNDER THE TERMS OF ARTICLE 47.2 OF THE CONTRACT

The Corporation says that Article 47.2 simply means that it agrees not to assign to persons in the employ of the Corporation, but outside the bargaining unit, duties performed by Members of the bargaining unit, and takes comfort from the work « assign ».

The work « assign » in the English translation, means in the sense of a task being assigned to someone, but the French translation, which is equal and co-ordinate to the English translation when interpreting the contract, has a slightly different meaning which might be summed up in the word « entrust », but the word « assign » in its English translation is wide enough to include assigning to persons, both Corporation employees and non-Corporation employees. The English dictionary meaning of « Assign » most appropriate here means « allot to ».

It will also be noted that whereas Article 44.1 talks about an employee being temporarily transferred from one area of the Corporation to another, and other Sections talk about « employees », this Section (47.2) talks about « persons ».

It is true that Section 47.2.1, 47.2.2, 47.2.3, 47.2.4, 47.2.5, 47.2.6 and 47.2.7, are all cases which are exceptions to the limitation on assigning to persons who are already employees of the Corporation.

On the other hand, 47.2.8 is also an exception to 47.2 and in this case, the Union has agreed to allow the Corporation to assign to outside contractors, certain specific work. The outside contractors are certainly not employees of the Corporation.

I interpret « persons outside the bargaining unit » (47.2) as including persons who are not employed by the CBC, as well as persons who are not under NABET jurisdiction, but who are nevertheless CBC employees.

The situation which arises when an « independent contractor » performs a « service » which in the actual execution of the work to produce the service is not under the order or control of the CBC personnel, was not, in my opinion, in contemplation by the parties when this Section (47.2) was agreed upon. Otherwise the Section would have contained words which would make it abundantly clear that sub-contracting was prohibited.

This Section (47.2) simply prohibits the CBC from allotting work (not a service) to anyone whether the persons be other CBC personnel or otherwise, and of course, it would also prohibit the CBC under any arrangement, which on the face of it, may be recited as being a contract, which in actual effect is an arrangement for services, for work, done under the effective control of the CBC and not for work being done in the nature of an independent service.

Since I have earlier decided that the arrangement with Editel was in effect an agreement for rental for services then Section 47.2 prohibits such an arrangement and on this

finding of fact, the CBC in making the Editel arrangement is in breach of Section 47.2, as I have earlier found it to be an arrangement for services and is also in breach of Section 47.1 under which I have found the Editel contract to be a rental arrangement for equipment.

RESIDUAL RIGHTS CONCEPT OF MANAGEMENT'S PREROGATIVES

For the purpose of discussion of this grievance it might be useful to examine the situation as if the contract were silent on « contracting out » and on the assumption that Editel is actually an independent contractor. In dealing with the residual rights concept, a number of matters must be considered.

1) Past Practice

In dealing with the facts of this case, nothing can be learned from past practice which would affect the problem of sub-contracting.

2) Justification

Sub-contracting may be done for many reasons such as economy, maintenance of personnel for peak periods, securing programs by the use of equipment not available to the CBC, etc.

3) Effect on the Union

If sub-contracting is used as a method of discriminating against the Union, and substantially prejudices its status and the integrity of the bargaining unit, this, I think, must be considered.

In this case, there is no suggestion that what the Corporation wished to do, was done in bad faith or with any idea of substantially prejudicing the bargaining unit. However, such sub-contracting as was contemplated here, is not on the periphery of the main business of the Corporation, but is in an area which is directly related to the main product of the Corporation, and if sub-contracting takes place, it not only affects the number in the unit, but the work done under the sub-contracting may be done by members of another unit, or by employees or personnel who are not Union members at all.

4) Effect on the Unit Employees

The sub-contracting work of technical personnel means that work which is normally done by the unit employees will be done by some other group of employees, and while there is no immediate likelihood of the work force being decreased by such sub-contracting in this particular situation, at the same time, if it becomes prevalent, it could, in the long run, affect at certain times, the amount of work, and certainly the amount of overtime which the unit employees might otherwise have.

5) Availability of Properly Qualified Employees

Certainly in this case, the skills possessed by members of the bargaining unit were sufficient to perform the work contemplated. On the other hand, at this particular time, it has been established that there were no other members of the bargaining unit readily avail-

able over the period of time, and the actual day to day time necessary to perform the work, to produce the program.

6) Availability of Equipment and Facilities

It was established that the necessary equipment and facilities were not presently available to produce the contemplated program, and that they could not be readily or economically purchased. At the same time, it was not established that such equipment and facilities could not have been secured under a strict rental arrangement.

7) Regularity of Sub-contracting

This is almost the first time where work of this nature and this extent, has been sub-contracted. On the other hand, the evidence discloses that by reason of the increasing demand for programming, and by reason of the changing nature of television production, that the Corporation would, if it could, under the terms of the contract, likely increase in frequency, arrangements similar to that made with Editel.

8) Unusual Circumstances Involved

This has to do with whether or not there was an emergency necessitating the action taken by the Corporation. There was not a special emergency. If steps had been taken earlier, and if it had been well understood that the Corporation could not do what it attempted to do, it could not be said that in this instance there was any emergency or otherwise really unusual circumstances involved.

9) History of Negotiations on the Right to Sub-contract

As near as one could gather from the evidence, there has been no direct negotiations on the strict issue of sub-contracting and therefore this does not influence the particular situation.

10) Reasonableness and Good Faith

In this situation, there is no question about the good faith of the Corporation, considering that it was of the opinion that it had the complete right to do what it set out to do and also, no present individual would lose work, if it was allowed to do what it wanted to do in respect to this particular program.

I conclude that in the circumstances of this case, the accepted standards of evaluating the propriety of sub-contracting, under the residual rights concept, were not cut down by the considerations which I have discussed above, and thus if I had to come to a conclusion in relation to the grievance based on the residual rights concept, and on the assumption that the Editel contract was that of an independent contractor, I would have decided that the facts of the case were such that would not warrant an exception being made to the residual rights theory and the grievance would have been denied.

The only remaining matter I wish to consider is the question of the compliance with the Award.

I uphold the grievance in principle under the terms of the contract, but I am of the opinion that the Corporation should not be required to cancel the contemplated « Feu Rouge,

Feu Vert » program, but should be allowed to complete it under the arrangements it has made with Editel.

I have to come to this conclusion for a number of reasons:-

1) That the convenience of the production crew and the artists, and the availability of the equipment must, in producing a program of this kind, override the convenience of supplying from the present personnel of the Corporation, the necessary technical personnel.

2) The program must be produced according to its schedule and programmed on the air according to schedule, and that it is impossible for the CBC to do so with its present personnel, without greatly disrupting its other programs, and it would be unnecessarily expensive to cancel the program.

3) The CBC has a full schedule of programs, and is contemplating training technical personnel for the introduction of colour television, and new personnel properly trained are not readily available.

4) No present NABET employee is losing employment, or perhaps earnings by reason of the Editel arrangement.

CONCLUSION:-

The issue arising out of this grievance is a new issue and it is one where there was a real question to be decided for the first time. The Corporation should be allowed a reasonable time to comply with the effect of the Award and should not be compelled to cancel the program « Feu Rouge, Feu Vert », the plans for which are far advanced, and because if it is not allowed to continue, the whole preparation for the program would be wasted and the program would have to be cancelled.

However, the decision herein made, upholding in principle the Union's grievance, will prevent the Corporation from making any new arrangement such as was made in the so-called Editel contract.

The prohibition which this decision carries will not prohibit, if proper preparation is made, the extra programming which the CBC requires.

There was no evidence before the Board that equipment could not be secured from Editel or some other firm, under a direct rental arrangement.

There was no evidence before me that would indicate that it would be impossible to make the personnel of Editel, or the personnel of any other securing their services for any other firm, casual or temporary employees of the CBC, for the purpose of securing their services for any particular programs.

The grievance therefore succeeds and I place an interpretation upon the contract which will prohibit the CBC from making any arrangement whereby in effect technical equipment is rented and technical services are hired from an outside source.