IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 194/08
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	BETWEEN	NEW ZEALAND AMALGAMATED ENGINEERING PRINTING & MANUFACTURING UNION Applicant
	AND	SOLID ENERGY NEW ZEALAND LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Tony Wilton, Counsel for Applicant Andrew Shaw, Counsel for Respondent
Investigation Meeting:	Invercargill 14 October 2008
Determination:	18 December 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] New Zealand Amalgamated Engineering Printing & Manufacturing Union (the EPMU) wants the Authority to resolve a dispute over clause 15.4 of the Ohai Opencast Mine Solid Energy New Zealand Schedule (the Ohai schedule) to the National Mining Multi Employer Collective Employment Agreement (the MECA) 2007-2009. The MECA is structured with a common section applying to all employer parties which includes Solid Energy New Zealand Limited (Solid Energy). Each individual employer party also has a schedule dealing with individual terms and conditions of employment.

[2] Clause 15.4 provides under the heading *Transport*: *The employer will continue to provide transport to and from Wairio, Nightcaps and Ohai to the worksite free of charge.*

[3] The obligations of Solid Energy in terms of clause 15.4 originated from the collective employment contract 1998-2001. The obligations were then carried through in exactly the same terms in two further collective agreements before the 2007-2009 MECA. Solid Energy provides a work van to the employees at the Ohai opencast mine to drive to and from work. It pays for the maintenance and fuel for the van. Usually the employee who is furthest away from the worksite drives the van to work picking up the other employees along the way and then on returning drops off the other employees and parks the van at home until the next day.

[4] The EPMU want a determination that an employee driving the van to and from the workplace is doing so at the direction of Solid Energy so as to fulfil its obligations under clause 15.4 and is therefore performing work for Solid Energy and is entitled to be paid for the time occupied in doing so.

[5] Solid Energy does not accept that there is a dispute over the interpretation and application of clause 15.4 of the Ohai Schedule to the MECA.

[6] Although the matter was lodged as a dispute I asked Mr Wilton whether the basis of the problem was in fact something other than a dispute. Mr Wilton confirmed that the matter was a dispute.

Is the employee driving to and from Ohai opencast mine picking up and dropping off other employees in the van supplied by Solid Energy, working at the direction of Solid Energy and entitled to be paid under clause 15.4?

Interpretation principle

[7] Both Mr Wilton and Mr Shaw relied on the applicable principles of interpretation set out by Colgan J in the Employment Court judgment in *Association of Staff in Tertiary Education Inc: ASTE Te Hau Takatini o Aotearoa v. Hampton, Chief Executive of the Bay of Plenty Polytechnic* [2002] 1 ERNZ 491 as follows at 499:

> *…Agreements should be interpreted with reference to their factual matrix or surrounding circumstances. This includes matters such as*

> *the background to the transaction and the practice of the industry or sector in question. The law has now moved on from the earlier position that such evidence was only admissible when the words of the agreement were ambiguous or unclear. Indeed, the current state of the law appears to be that in all cases such reference is possible and even desirable. The Court of Appeal has developed the following approach in contract cases. One looks first at the words used – they must obviously be the starting point – and then at the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of the most natural meaning of the words. This approach has been described as 'cross checking': …*

[8] What has led in my view to the employment relationship problem is that there is no definition of the word *transport* and/or what it is that is to be provided in that regard to the employees under that clause.

[9] Mr Wilton submits that the noun *transport* as defined in the Concise Oxford Dictionary means conveyance or transportation from one place to another place and the means of this. He submits that read in the context of the provision as a whole it is clear that *transport* means the conveyance of the workers to and from the workplace and that the mere provision of a vehicle would not of itself met that requirement. He submits the provision of a driver is an integral part of the transport to and from the workplace.

[10] Mr Shaw submits that there is nothing in the plain words of clause 15.4 as to which employees or other person is to drive the van or that driving forms part of an employee's work duties. Although there are some safety rules provided by Solid Energy about driving the van he submits that there is no reference in the clause to any say that Solid Energy has about how the driving is to be undertaken by the employees and there is no reference to payment for the driver. Mr Shaw submits that the word *transport* in clause 15.4 is in relation to the means of transport being a van provided free of charge and the scope for that transport is to and from work.

[11] On a reading of the plain words in clause 15.4 there is nothing to the effect that an employee is to be paid for driving the work van to and from work. In terms of whether the period spent driving the van is work time, there are other clauses in the Ohai Schedule that define the ordinary hours of work and overtime, including clause 5.4.4 which provides that overtime shall not be payable where the overtime arises from arrangements made between the employees themselves. There is no reference in the clause to who drives the van.

[12] I accept Mr Shaw's submission that the other clauses in the Ohai schedule considered against clause 15.4 weigh against a conclusion when considered with an objective view that the intention of the parties was that driving the van is work time for an employee for which they should be paid. It is necessary though to check that against the factual matrix.

[13] Trevor Hobbs is the Union organiser for the Solid Energy mine site in Ohai. He has been the organiser in that area since 1996. I heard evidence from Mr Hobbs and a previous employee of Solid Energy, Barry Manson. Mr Manson had been an employee for 20 years before he was dismissed from Solid Energy on the ground of redundancy in 1997. Solid Energy provided three witness statements. It was agreed by both parties and the Authority that the previous mine managers, Brian Small and Robert Watson could answer questions about matters in their statements by way of telephone during the investigation meeting. The current New Vale Ohai Mine Manager, Antony (Ant) Stodart gave evidence at the investigation meeting.

[14] Mr Hobbs gave evidence about the transport clause in the collective employment contract between the parties covering the Wairaki Mine which expired on 7 March 1997. That clause provided:

> *6. TRANSPORT OF WORKERS*
>
> *The employer will continue to provide transport from recognised coal mining townships to the worksite free of charge.*
>
> *Workers who are required by the Employer to use their own cars when travelling to and from their work will be paid a motor vehicle allowance of 62c per km, or as determined by the Inland Revenue Department from time to time.*
>
> *But Employers will refund expenses (MOT fees, doctors examination fee, and reasonable travelling expenses) and pay for time lost at ordinary rates of pay to workers who successfully obtain a licence, at the request of the employer.*

[15] There was an identical clause in the successor collective contract which was to expire on 31 October 1998.

[16] Until 1998 Solid Energy hired a contractor to pick up its employees from Wairio, Nightcaps and Ohai in a bus and bring them to and from the work site. The annual cost of this was approximately $85,000.

[17] In 1998 at or about the time of the collective negotiations the Union was represented by the then National Industrial Officer of EPMU, Steve Harris. Mr Hobbs role at the negotiations at that time was a minor one. Solid Energy wanted to make some costs savings and there were redundancies at that time. Discussions took place between Solid Energy and Mr Harris about cost saving measures and Solid Energy proposed to get rid of the transport clause in the 1997 and 1998 collective employment contracts altogether.

[18] The 1998-2001 collective employment contract has identical wording as that in clause 15.4 of the Ohai Schedule. The additional provision dealing with paying workers who use their own cars was not carried forward. Mr Hobbs said in his evidence that whilst agreement was reached about the continuation of the provision of transport to the work site free of charge, the cost of the bus service was to be reviewed annually. The manager at the time, Mr Small, could not recall that.

[19] In late 1998 after the commencement of the 1998-2001 collective contract there was a decision to stop the bus service and to replace it with work vans available to employees with fuel and maintenance costs met by Solid Energy. The evidence supported that there was a discussion about this at the time with the EPMU and at this time or shortly thereafter some transportation rules were provided by Solid Energy.

[20] The evidence as to whether there was an oral agreement at that time was less than clear, which is understandable given the passage of time. I accept Mr Wilton's submissions however that in light of entire contract or completeness clauses in subsequent collective employment agreements, such an oral agreement would not continue to stand. Neither Mr Hobbs nor Mr Manson, who was an employee at that time, but not a Union delegate, were part of those discussions.

[21] The transportation rules that were provided dealt with the need for the driver of the work vans to hold a drivers licence and other matters such as the number of people permitted in the low top and high top vans and common sense rules such as wearing a seat belt and not smoking in the van.

[22] Mr Hobbs was involved in negotiating a collective agreement 1 August 2001 - 31 August 2003 which agreement contained a transport clause with the same words as clause 15.4.

[23] The collective agreement 15 August 2003 – 14 August 2005 included a transport clause with the same words as clause 15.4 of the Ohai Schedule.

[24] In 2005 the Ohai agreement was absorbed into the 2005 – 07 Mining Industry MECA and the transport clause was retained unchanged.

[25] In either late 2006 or early 2007 during the negotiation of the Ohai Schedule to the MECA Mr Hobbs on behalf of his members raised for the first time the issue of employees driving the work vans being paid. There was no agreement to this and the dispute was lodged. For completeness there was no evidence provided of a driving duty to and from work in any employee's job description.

Determination

[26] Solid Energy is obliged under clause 15.4 to continue to provide transport to and from its work site from Wairio, Nightcaps and Ohai. The words *to continue* require consideration of the surrounding circumstances at the time the collective agreement was entered into. At the time the MECA was entered into in 2007 transport had been provided by way of work vans since late 1998. The Ohai schedule contained an entire contract or completeness clause It seems to me that a reasonable person having regard to clause 15.4 with the background knowledge of the parties would read the clause as being a continuation of the provision of transport which existed at the time the collective agreement was entered into, and that is, the provision by Solid Energy of work vans and payment of related expenses and maintenance.

[27] The position of the EPMU is that in order to meet its obligations under clause 15.4 to provide transport, Solid Energy must direct an employee to drive the work van, and that time is working time and the employee is required to be paid.

[28] As a matter of common sense and reality, someone has to drive the work vans. It is necessary though to apply the interpretation principles to determine whether the employee is doing so at the direction of Solid Energy, and that undertaking that driving is doing so during work time and that there should be payment.

[29] I have considered the ordinary and natural meaning of the words in clause 15.4 in the context of the Ohai Schedule as a whole. I do not find that a reasonable person would read clause 15.4 as meaning that an employee has been directed to drive the provided transport, and in being so directed is working and therefore should be paid

for undertaking the driving. There is nothing in the matrix of facts or surrounding circumstances that would change that conclusion.

[30] It was clearly open to the EPMU to put this matter forward as a claim during negotiations but I find Solid Energy has continued to provide transport in the form of a work van for which it meets related costs, both maintenance and fuel and in doing so, has met its obligations under clause 15.4 of the Ohai schedule.

[31] The dispute is resolved in favour of Solid Energy New Zealand Limited.

Costs

[32] I reserve the issue of costs. This matter has been a dispute about a clause which was not drafted to meet the change in the way Solid Energy provided transport. In those circumstances it may be that there will be no order as to costs.

Helen Doyle
Member of the Employment Relations Authority