IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 409
5406563 & 5413861

BETWEEN	NEW ZEALAND STEEL MINING LIMITED Applicant
A N D	NEW ZEALAND AMALGAMATED ENGINEERING PRINTING & MANUFACTURING UNION INCORPORATED Respondent

Member of Authority:	T G Tetitaha
Representatives:	P Skelton QC and M Tushingham, Counsel for Applicant A N McInally, Counsel for Respondent
Investigation Meeting:	23-24 April 2013 at Auckland
Submissions Received:	18 and 24 April 2013 from Applicant 18 and 24 April 2013 from Respondent
Date of Determination:	11 September 2013

DETERMINATION OF THE AUTHORITY

A. Remnant mining is defined in paragraphs [3] (a) and (b) of the determination.

B. Remnant mining by Cloutmans was not agreed by both parties.

C. The oversized material work is mining within clause 3.1 of the collective agreement.

D. The company is not able to use Cloutmans to do remnant mining and oversized material work because:

a) the work does not require special skills under clause 67.2.1 bullet point 3 of the collective agreement; and

b) it failed to investigate alternatives under clause 67.1.1 preventing the company using clause 67.2.1 bullet point 1 of the collective agreement peak workloads

E. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed 28 days from the date of this determination. The other party shall have a further 14 days in which to file and serve a reply.

Index **Paragraph**

Employment relationship problem

[1] New Zealand Steel Mining Limited (the company) mines iron sand at Waikato North Head for transportion to Glenbrook Mill. The sand is used in the iron manufacturing process or sent offsite for export. New Zealand Amalgamated

Engineering Printing & Manufacturing Union Incorporated (the Union) is a party to the collective agreement governing the employment relationship between the company and its employees.

[2] The parties are seeking a declaration regarding the work that is being undertaken by contractors, Cloutmans Brothers Mining and Dredging Limited (Cloutmans), at the Waikato North Head mining worksite in two areas known as BC55 and BC65 and at a dumpsite. The disputed work comprises remnant mining and oversized material processing work. The dispute is whether the parties conduct and/or the collective agreement allows the contractor to do the work or not.

Remnant mining

[3] The company alleges remnant mining work comprises:

(a) Mining iron sand using a truck and shovel;

(b) Bringing the sand to within reach of the bucket wheel excavators (BWE);

(c) Pushing the sand from above or below the BWEs (to enable them to mine it, making it safer for the BWE operator preventing potential slope failures from inundating the machine and the operator's cab);

(d) Removing unsuitable material so that the unsuitable material avoids the BWEs and does not dilute or contaminate the remaining material mined by the BWE;

(e) Digging out drains and areas of high water content or perched water (to enable the BWE to operate without sinking).

[4] The Union disagrees all of the above activities are all remnant mining. It submits paragraphs (a) to (b), are remnant mining, but paragraphs (c) to (e) are mining support work which contractors may do under the collective agreement.

Oversized material

[5] Oversized material or material which was too large to be filtered into iron sand was placed in a dumpsite one kilometre from the Waikato North Head worksite.

[6] Cloutmans were contracted to obtain specialist machinery to process this oversized material. The parties agreed to an eight week trial that started in January 2013.

Parties' positions

[7] The company submits the disputed work is remnant mining which it is entitled to use a contractor to perform. This is because the work is:

(a) Work which is currently carried out by contractors and agreed by both parties (clause 67.2.1, bullet point 4);

(b) Alternatively, specialist skills not possessed within the company (clause 67.2.1, bullet point 3); and

(c) Alternatively, peak workloads over and above the normal fluctuations in routine work (clause 67.2.1, bullet point 1).

[8] The work need not fall within every category. If it falls within one of the categories, the company submits it has the right to engage a contractor to perform that work.

[9] The company submits it is entitled to use contractors to process oversized material because:

(a) The work is not covered by the collective agreement;

(b) Alternatively, the work comprises specialist skills not possessed within the company; and

(c) Alternatively, the work comprises peak workloads over and above the normal fluctuations in routine work.

[10] The Union disagrees. It submits there was no agreement for contractors undertaking remnant mining. It seeks a determination that the performance of remnant mining activities would, in the absence of agreement, be a breach of clauses 67.1 and 67.2 of the collective agreement. It further submits the oversized material work undertaken by Cloutmans is not work of a kind that can be performed by a contractor.

Issues

[11] The following issues arise out of this dispute:

Remnant Mining

(a) Was remnant mining by Cloutmans agreed by both parties?

(b) Does remnant mining require specialist skills not possessed within the company?

(c) Is remnant mining peak workload over and above the normal fluctuations in routine work?

Oversize Material

(d) Is the oversize material work covered by the collective agreement?

(e) Does the oversize material work require specialist skills not possessed within the company?

(f) Is the oversize material work peak workload over and above the normal fluctuations in routine work?

Legal Framework

[12] This dispute is about the interpretation and application of the collective agreement. The necessary inquiry is what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. To be properly informed the Authority must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. The objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear.[1]

---

[1] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444; (2010) 9 NZBLC 102,874 (SCNZ) at [19]

[13] Agreement can be inferred from the totality of the parties conduct.[2] It can take the form of forbearance, waiver or acquiescence.[3]

[14] Where the contractual intention is clear from the words used, the Authority must give effect to it.[4] The first and often the last port of call will be the language that the parties chose to adopt. Such language must be read and understood in the context of the collective agreement as a whole.[5]

Issue One – Was remnant mining by Cloutmans agreed by both parties?

[15] The company submits with the knowledge of the Union, Cloutmans has been performing remnant mining at the Waikato North Heads mining worksite since 1985. It submits the Union's conduct infers agreement to Cloutmans performing remnant mining, through acquiescence, forbearance or waiver.

[16] The Union denies any conduct indicative of agreement, forbearance, waiver or acquiescence. All proposals for remnant mining as they understood it to be using contractors, has been met with objection and the work either did not proceed, was done under protest or a formal agreement was reached for e.g. in the case of the oversized material work.[6] No document was executed between the parties for remnant mining.

Collective Agreement

[17] Documentation evidencing the alleged agreement between parties is a useful indication of their intentions.[7] The starting point is the New Zealand Steel Collective Agreement effective 1 June 2011 to 31 May 2013 (collective agreement).

[18] The collective agreement defines the type of work these employees do as *the mining, concentration and slurry pumping of iron sands, the conversion of iron sand concentrate to iron ...*[8]

---

2 J Burrows (ed) *Law of Contract in New Zealand* (4th ed, Lexis Nexis, Wellington, 2012) at [3.3.1]; *Brogden v Metropolitan Railway Co.* (1877) 2 AC 666 (HL) at 682

3 H Beale (ed) *Chitty on Contracts* (30th ed., Sweet & Maxwell, London, 2008) at [2-073] – [2-076]

4 *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558 (CA) at 566 -567

5 *Secretary for Education v New Zealand Educational Institute Te Riu Roa* [2002] 2 ERNZ 470 (EmpC) at [26]

6 Respondent's bundle of documents (RBD) Document R

7 *Hutton & Ors v Provencocadmus Ltd & Anor* [2012] NZEmpC 207 at [80]

8 Applicants Bundle of Documents (ABD) p 9 clause 3.1

[19] Contractors may be used instead of employees to undertaken work in the circumstances set out below:[9]

> ***67. Contractors***
>
> ***67.1 PRINCIPLES***
>
> *67.1.1 The parties to the [collective agreement] acknowledge that contractors may be required to supplement the domestic workforce to meet intermittent peak workloads, provision of specialist services and capital works. It is agreed that contractors will not be preferred for reasons such as:*
>
> - *securing cosmetic reductions in employment numbers;*
> - *relative productivity statistics; or*
> - *failure to investigate adequately other alternatives.*
>
> *67.1.2 It is the company's firm intention to have available a domestic workforce which has the ability/skills/equipment to carry out the routine tasks, inclusive of maintenance tasks, on its sites.*
>
> *67.1.3 No permanent employee will be laid off as a result of the use of contractors.*
>
> ***67.2 PURPOSE – CRITERIA FOR USING CONTRACTORS***
>
> *67.2.1 Contractors may only be used for:*
>
> - *'**Peak workloads**': i.e. workload over and above the normal fluctuations in routine work;*
> - *'**Works**': i.e. erection, installation or commissioning of new plant and equipment;*
> - *'**Specialist services**': i.e. use of special skills not possessed within the company;*
> - *Work which is currently carried out by contractors and agreed by both parties.*

[20] The collective agreement excludes *other agreements, whether in writing or not* from being binding upon the parties unless included or given binding status within the collective agreement (clause 4.1).

Other Documentation

[21] The company produced copies of various documents between the company's predecessors and Cloutmans. The documents are alleged to evidence Cloutmans

---

[9] ABD p 46

undertaking remnant mining at this work site since 1985 and up to and during the term of the collective agreement.

[22] The documents are unclear about what is remnant mining as opposed to mining support work. A draft 1985 Scope of Work[10] is alleged by Mr Clark Baker, Cloutmans manager/co-ordinator and employee since 1976, to show 'remnant mining'. This is the reference to work *in areas of remnant mining* loading sand and/or clay from *remnant areas* un-mined by the BWE or ongoing production from developed or yet to be developed areas.[11] The activity is not explicitly described as remnant mining despite the term being part of Cloutmans codes since 1985.[12] More confusingly, the document is headed *Mining Support Services and Associated Earthmoving* creating the impression it may be mining support work.

[23] The 1992 agreement contains a definition of remnant mining to *remove and transport remnant mining material … within reach of BWE as directed.*[13] This appears consistent with the definition of remnant mining set out above in paragraph [3](a) to (b). The definition of mining support in clause 3 is consistent with paragraph [3](c) to (e) including *clear spillage from under conveyor belts , transfer points, drives and tail blocks ... drainage of mining benches ... levelling out benches for BWE and BWE travel [to enable BWE]… to mine to full reach off any conveyor* and *pushing off high faces ... [none] expected 1992/93.*[14] Despite clause 3 headed 'mining support' the company submits clause 3.7 is a reference is to remnant mining. This cannot be correct. There are separate definitions in the agreement between mining support and remnant mining. There is no basis to infer clause 3.7 should be read more widely to include remnant mining. There is no financial breakdown showing remnant mining (if any) that occurred during this period.

[24] The 1995 agreement does not contain a definition of remnant mining, but has the same definition of mining support as the 1992 agreement excluding pushing off high faces.[15] Despite clause 3 headed 'mining support' the company submits clause 3.7 is a reference to remnant mining. This cannot be correct. Previous agreements have contained separate definitions for mining support and remnant mining. There is

---

10 ABD pp 129 - 132
11 ABD p 130 clause 6
12 Brief of Evidence (BOE) C Baker dated 5 April 2013 para 6 - 8
13 ABD p 151
14 ABD p 148 clause 3.2, 3.6, 3.7 - 3.9
15 ABD p 167 cl 3

no basis to infer clause 3.7 should be read more widely to include remnant mining. This is supported by Cloutmans Fixed Price Contract breakdown which records remnant mining as 0 under the 1995 contract and for the last 12 months.[16] The omission of remnant mining and 0 record for remnant mining infers it may not have occurred, despite Mr Baker's uncorroborated evidence to the contrary.

[25] The 1999/2000 agreement refers to mining support and remnant mining but does not attach the Schedule defining either term or a Fixed Price Contract breakdown.[17]

[26] Two unsigned 2002 agreements,[18] an unsigned 2003 agreement (with the notation *unknown applicability*)[19] and a signed agreement for the period 2002 to 2008[20] contain a new definition of remnant mining:

> ***15. REMNANT MINING***
>
> *15.1 Pushing off of mining faces where these have been left from prior mining operations and are deemed to be too high or unsafe*
>
> *15.2 Recovery of high grade material from areas inaccessible to normal mining operations. For example below RL31. This will not exceed a quantity mutually agreed between the company and contractor.*

[27] The agreements contain the same definition of mining support as the 1992 agreement including *pushing off high faces as necessary* for levelling out benches for BWE. The Fixed Price Breakdown showed 0 for remnant mining.[21] Despite clause 3 headed 'mining support' the company submits clause 3.7 is a reference to remnant mining. This cannot be correct for the reasons stated above. Mr Baker proposed the invoicing for remnant mining occurred outside of the fixed price contract. There is no corroborating evidence of this practice before the Authority.

---

16 ABD p 172

17 ABD p 173 – 177. The company submits there are definitions provided at pp194 and 198 but these relate to the 2002 contract SPG 2002/1054.

18 ABD pp 178 – 199; pp 223 - 243

19 ABD pp 200 - 221

20 ABD pp 245 – 266 includes handwritten notation indicating renewed to 2008 at p 245

21 ABD pp 193 – 194, 198 - 199 unsigned 2002 agreement; pp 237 – 238, 242 - 243 unsigned 2002 agreement; pp 213 – 214, 218, 220 unsigned 2003 agreement; pp 260 – 261, 265 - 266

[28] In 2002 the Union became aware of Cloutmans remnant mining activity and sent an email objecting to this occurring without agreement between the parties. A company email which was part of this correspondence defined remnant mining as *a term we use to recover material (normally high grade) that we are unable to reach with our [BWE] mining method because it is too deep – below the lowest bench. It involves moving the material up to where the [BWE] can reach it.* [22] This definition is consistent with remnant mining in paragraph [3](a) to (b).

[29] There is no record of what and how much remnant mining occurred during the 1985 to 2002. The parties accept no remnant mining occurred from 2004 to 2007.

[30] In 2010 a letter evidencing further agreement appended Cloutmans 12 month budget from 1 September 2010 for remnant mining of $27,800.00 and an unsigned 2002 agreement.[23]

[31] Mr Baker produced a schedule of invoices for the period 2010 to 2012 allegedly showing remnant mining work charged to the company under code 20.[24] The Schedule does not detail what remnant mining activity was invoiced in terms of paragraph [3] above.

[32] Mr Dougal Francis, NZ Steel Mining Manager produced a Summary of remnant mining activities based upon its Daily Production Reports for the period 2009 – 2012 (Summary). He submitted the reports and Summary evidenced remnant mining activity by Cloutmans during this period.[25] It does detail various activities the company alleges was remnant mining until 7 December 2011. From that date onwards the phrase 'remnant mining' is used without further description.

[33] There are discrepancies where activities in the Summary did not appear to have a corresponding invoice. Mr Baker explained at hearing the discrepancies were because planned activities may not have occurred at the set time, changed or did not occur at all. This indicates the Authority cannot rely upon the Summary to accurately reflect the remnant mining that occurred.

---

22 RBD Document O
23 ABD pp 267 - 295
24 BOE C Baker dated 5 April 2013 para 26, ABD p 293
25 Brief of Evidence (BoE) D Francis dated 5 April 2013 para.18 and Appendix 1.

Parties Conduct

[34] The parties accepted the Union had raised concerns about contractors undertaking remnant mining in 2002 and June 2012.

[35] Mr Baker, a Cloutman's employee since 1975, believed remnant mining work had been performed by Cloutmans since 1985. At hearing he stated this work was intermittent (two weeks per annum at most) and primarily pushing to the wheel with the odd piece of high face pushing off work. This would appear to be work falling within paragraph [3] (a) to (b) above.

[36] A presentation by the company to Union employees in December 2012 described remnant mining as *pushing/trucking out of reach high grade material to the bucket wheels for mining.*[26] This appears consistent with the definition of remnant mining set out above in paragraph [3](a) to (b). At hearing Mr Francis stated this definition was incomplete and the writer was not 'an expert' on remnant mining.

Determination

[37] Standing back and considering the evidence, the Authority determines the parties intended remnant mining to be defined as set out in paragraphs [3](a) to (b). The company's agreements with Cloutmans prior to 2002, a 2002 email and a 2012 presentation are consistent with the definition of remnant mining in paragraphs [3](a) to (b). The definition of mining support in company's agreements with Cloutmans prior to 2002 are consistent with paragraph [3](c) to (e) above. After 2002, the company's definition of remnant mining changed to include paragraph [3](c) activity.

[38] Clause 4.1 of the collective agreement expressly excludes inferred agreement. The Union deposed to a practice of putting agreements for use of contractors in writing. This did not occur here.

[39] The Union's conduct in not protesting the remnant mining earlier than 2002 is unsurprising. There was ample scope for the Union to fail to detect remnant mining by Cloutmans prior to 2002. The Union believed the remnant mining work in paragraph [3](c) to (e) was mining support. The work was intermittent, ranging from

---

[26] Respondent's Bundle of Documents (RBD) Document H, p7

none to days to two weeks.[27] The Union was not privy to the company's agreements with Cloutmans and there was evidence it had not attended planning meetings where remnant mining work was discussed.[28] There is evidence the Union objected to remnant mining from 2002. There is no evidence of their involvement in planning remnant mining activities prior to 2002.

[40] The Authority determines the remnant mining work currently carried out by Cloutmans was not agreed by both parties.

Issue Two - Does remnant mining require specialist skills not possessed within the company?

[41] The company submits Cloutmans remnant mining work falls within 'special skills not possessed within the company' (clause 67.2.1). It submits if employees and equipment do not exist at the worksite, the company may use contractors. None of the mobile plant is owned by the company. There is no evidence the workforce has people to do this highly skilled work. It is not obliged by the collective agreement to obtain equipment or train workers.

[42] The Union disagrees. It gave evidence there were people within its workforce who possess the skills to do the work[29] but accepts some of the work undertaken for remnant mining such as pushing off or high pace excavation work does require some skill not possessed within the company. It submits the equipment may be available through the company's subsidiaries and/or other associated companies bound by the collective agreement.

[43] *Skill* is defined as *expertness, practised ability, facility in an action; dexterity or tact. Special* is defined as *particularly good; exceptional; out of the ordinary*.[30]

[44] Clause 67.2.1 refers to the absence of *skills* not equipment or plant. There is no basis to read this word more widely to include equipment or plant. This would make the principles set out in clause 67.1 redundant because the company could sell

---

27 Respondent witnesses were referred the Summary and identified remnant mining as per para.[3](a) to (b) above occurring 17 August to 29 October, 3 to 8 November 2010; 17 to 20 January, 18 to 19 October, 15, 28 to 30 November, 7 to December 2011, 9 to 11 January, 2 to 17 February 2012

28 At hearing it was accepted the Union had not been to the planning meetings where Cloutmans remnant mining activities were discussed for (at least) 2 years. Employees were unable to be released from work due to production demands.

29 Reply BOE S Easton para. 19; BOE Mark N C Palmer para. 6

30 The New Zealand Oxford Dictionary, Oxford University 2005

its plant and equipment and rely upon its absence to justify replacing the domestic workforce with contractors under clause 67.2.

[45] Mr Baker deposed to the skills required as much the same as other digger and truck movement of materials using an excavator and dump truck. At hearing he believed it took 2 to 3 months to become familiar and 5 to 6 months to learn the job.

Determination

[46] The words *special skills* do not include specialised equipment. The skills required for remnant mining are not *special* meaning exceptional or out of the ordinary. The skills are acquired relatively quickly and even more so if the employee was a former or current employee.

[47] The Authority determines remnant mining does not require special skills. Therefore the company cannot use contractors under clause 67.2.1 bullet point three.

Issue 3 - Is remnant mining peak workloads over and above the normal fluctuations in routine work?

[48] The company submits there is no one available from the domestic workforce to undertake remnant mining work. Even if it was, this was not 'routine work' because it was intermittent. If it is not routine work, the company is entitled to use contractors under clause 67.2.1 for remnant mining.

[49] Remnant mining, although intermittent, is routine work. The company provided a definition of *routine* being *a regular course of procedure; an unvarying performance of certain acts; regular or unvarying procedure or performance*. The definition does not preclude intermittent work from being routine. A routine may be followed but not always at the same time. Remnant mining work has occurred for some years, despite variance in the times it occurs.

[50] Peak workloads is defined as *[unexpected] workload over a defined period that the current workforce is unable to undertake* (clause 64.5). The fact remnant mining is routine work does not prevent it falling within this definition where the domestic workforce is fully employed elsewhere.

[51] However, the parties have agreed contractors will not be preferred for reasons such as failure to investigate adequately other alternatives (clause 67.1.1). Temporary

employees may be employed for peak workload (clause 64.5.1). At hearing Mr Francis admitted there had been no consideration of alternatives to contractors.

[52] The collective agreement does not require the company to purchase equipment. It does require investigation of alternatives such as temporary employees and purchasing or leasing equipment. The company may then conclude these alternatives are not viable and justify preferring contractors under clause 67.2.1. It cannot justify preferring contractors without investigating alternatives.

Determination

[53] Remnant mining is routine work. The failure to investigate alternatives prevents the company from preferring contractors under clause 67.2 peak workloads.

Issue 4: Is the oversize material work covered by the collective agreement?

[54] The company submits oversize material work is not covered by the collective agreement because it is not 'mining' or 'the conversion of iron sand concentrate to iron' (clause 3.1). The material has been previously mined and transported to a stockpile. The work involves crushing or breaking down oversized material that was too large to be processed into iron sand concentrate then transporting it to the processing plant. It is 'mining support' work if anything.

Determination

[55] The processing of oversized material is mining. It is similar to remnant mining - a term used to recover high grade material unable to be reached using another mining method [BWE].[31] The machinery differs but the same mining principle applies to the processing of oversize material as to the BWE. Because of the determination this work is mining, it cannot be mining support.

[56] The Authority determines oversize material work is mining and covered by the collective agreement.

Issue 5: Does the oversize material work require specialist skills not possessed within the company?

---

31 RBD Document O email from company describing remnant mining

[57] The company submits it does not own the equipment or employ people with the skills to undertake the oversized material work.

[58] At hearing Mr Baker deposed the skills required to operate this machinery were a truck and digger driver of medium experience (2 -3 level out of 5). This appeared similar to the skill level required for remnant mining. The Authority has dealt with this issue previously in paragraphs [41] to [47] above. The skills do not meet the definition of *special* above.

Determination

[59] The Authority determines the oversized material work does not require specialist skills.

Issue 6: Is the oversize material work peak workloads over and above the normal fluctuations in routine work?

[60] The company submits the work is intermittent and not routine but falls within the peak work load exception.

[61] The Authority has dealt with this issue in paragraphs [48] to [52] above. The company has failed to consider alternatives. This prevents it from preferring contractors under clause 67.2 peak workloads.

Determination

[62] The failure to investigate alternatives prevents the company preferring contractors under clause 67.2 peak workloads.

[63] Accordingly, the Authority makes the following determination:

A. Remnant mining is defined in paragraphs [3] (a) and (b) of the determination.

B. Remnant mining by Cloutmans was not agreed by both parties.

C. The oversized material work is mining within clause 3.1 of the collective agreement.

D. The company is not able to use Cloutmans to do remnant mining and oversized material work because:

a) the work does not require special skills under clause 67.2.1 bullet point 3 of the collective agreement; and

b) it failed to investigate alternatives under clause 67.1.1 preventing the company using clause 67.2.1 bullet point 1 of the collective agreement peak workloads

E. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed 28 days from the date of this determination. The other party shall have a further 14 days in which to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority