

IN THE MATTER OF AN ARBITRATION

BETWEEN:

The Globe & Mail

and

CEP Local 87-M

(Southern Ontario Newsmedia Guild)

(Grievance re: Pagemasters)

Before: William Kaplan
Sole Arbitrator

Appearances

For the Employer: Stephen Shamie
Hicks Morley
Barristers & Solicitors

For the Guild: Tim Gleason
Dewart Gleason
Barristers & Solicitors

Megan Reid
Dewart Gleason
Barristers & Solicitors

The matters in dispute proceeded to a mediation in Toronto on March 1, 2012 and then to a hearing in Toronto on April 9, May 24, October 31, 2012 and January 23, 2013.

Introduction

This case concerns a December 7, 2011 grievance filed by Local 87-M of the Southern Ontario Newspaper Guild (hereafter “the Guild”), asserting a violation of a Letter of Understanding agreed to by the parties and incorporated into their collective agreement.

The grievance states:

The employer has violated the collective agreement, including the letter of understanding re Bell Globemedia interactive by arranging for employees of Pagemasters North America, or other persons outside of the bargaining unit, to produce and/or edit material which is published on the Globe and Mail website.

The letter of understanding (hereafter “the LOU”) is as follows:

RE: BELL GLOBE MEDIA INTERACTIVE

The parties agree that effective the date of signing of this Memorandum of Agreement, the current practice of assigning editorial employees to prepare, produce and edit editorial material associated with Globe and Mail branded sites to Bell Globemedia or its successors will continue. Should The Globe and Mail wish to alter, change or amend this status quo it shall provide the Union with 30 days notice of its intention and the parties will meet and discuss the proposed change in status quo prior to filing any grievance. Should the employer decide to discontinue any Globe and Mail branded site, it is understood that the provisions of Article 20 of the Collective Agreement apply.

This letter shall only be used to enforce the status quo where The Globe and Mail controls the editorial content of The Globe and Mail branded sites.

In brief, the Guild takes the position that the Globe and Mail (hereafter “the Globe” or “the employer”) has violated the LOU and seeks, by way of remedy, a declaration of breach and an order requiring the employer to cease and desist its use of Pagemasters in the copyediting of material published on the employer’s website. The Guild asked that the matter of any monetary remedy be remitted to the parties.

For its part, the employer takes the position that the LOU is no longer operative. In the alternative, the employer submits, given the involvement of Guild members in the editing

of material posted on the web – the last person to review any story before it goes on line is, the Globe asserts, a Guild member – that there has been no LOU breach. The case proceeded first to a mediation, and when the matters in dispute could not be resolved, to a hearing that proceeded over a number of days in 2012 and 2013.

The Background to the Dispute

The employer publishes in print and electronically. The first electronic edition appeared in 1996. This was a website that contained some of the stories from the daily print edition. In June 2000, globeandmail.com (hereafter “.com”) made its debut as a breaking news service. Neil Campbell, a former Executive Editor at the Globe (2001-2010), editor of .com (2000-2001), long time newspaper person, and Director of Operations at Canadian Press (hereafter “CP”), gave evidence about .com’s launch.

In brief, Mr. Campbell testified that the decision was made to separately house .com on King Street, but that Globe journalists would write, edit and post the breaking news, all key editorial content, from the Globe newsroom, and all of which appeared in the “chewy centre” of the webpage. Feature content, lifestyle, recipes, travel, crossword, horoscope, Globe Campus, Investor Gold, etc., that appeared in pillars on the sides of the “chewy centre” – some of which was unique freelance and/or wire copy, and some of which had already appeared in the print version – would be copyedited and/or reshaped by non-union employees working at that separate location on King Street.

Without getting into a lot of detail, Mr. Campbell's testimony was confirmed by both bargaining unit employees and members of management who testified at length. All of this evidence establishes that while there was likely occasional cross-over – the nature and amount of which was disputed – the “chewy centre” of .com containing the key news content was prepared, produced and edited by Globe bargaining unit employees, while the work that appeared in the pillars was not. Accordingly, as a finding of fact, in 2002 when the LOU was negotiated, the evidence establishes that bargaining unit employees were preparing, producing and editing editorial material that appeared on a Globe-branded website (although not all of the material that appeared on that website). That was the 2002 *status quo*.

It is also a fact that the 2002 *status quo* did not include Pagemasters or any equivalent organization. Moreover, it is quite clear from the evidence that Pagemasters is now performing identical work that used to be performed by Guild members during the currency of Bell Globemedia Interactive even though Pagemasters does not copyedit solely for publication on the web. Stated somewhat differently, the fact is that the electronic logs that track stories from assignment to publication, together with the *viva voce* evidence about what work bargaining unit members used to perform, unequivocally establishes that Pagemasters is now performing work that was protected under the LOU.

When .com was first established the Globe was entirely owned by the Thomson family. In January 2001, Bell Globemedia Interactive (hereafter “BGM”) was created combining CTV, Bell, certain specialty channels that Bell had previously acquired, and part of the

Globe not retained by the Thomson family (“convergence”). Sylvia Stead is a long-service senior Globe employee who was involved in the 2002 collective bargaining round as Executive Editor in charge of convergence. Ms. Stead testified generally about convergence, about some of the efficiencies that were achieved, and some of the problems that were encountered. BGM was established to house the various electronic platforms including both the Globe and CTV websites.

Convergence saw both unionized and non-unionized employees working side-by-side. For example, CTV’s national news was not unionized. There were also, as noted above, non-union Globe employees on King Street posting material to the web. In these circumstances, the Guild expressed a concern about protecting its work and its members. Sue Andrew, the Unit Chair who was involved in the 2002 collective bargaining round, testified that the Guild wished to ensure that its members continued to perform editorial work. This was one of the concerns that led to the negotiation of the LOU. While Mr. Campbell was not directly involved in the 2002 collective bargaining round, he was consulted about the LOU. According to Mr. Campbell, with the creation of BGM, the Globe was concerned; not just about a plan in the converged business to reduce reporters, but also about its stories and its brand. The Globe did not want, for example, CTV doing its stories. This is another reason why it wished to keep control of the “chewy centre.”

In 2003, BGM dissolved. There were no successors. In the result, the various specialty channels returned, in effect, to their home base. For example, TSN.ca went back to TSN, CTV.ca went back to CTV and .com went back to the Globe. Employees who worked at the King Street location continued to do so for a number of years before moving to the

Globe building. It is common ground that the LOU, while renewed, was not discussed in either the 2005 or 2009 collective bargaining negotiations.

In May 2010, the Guild was notified that the employer intended to begin outsourcing some of its copyediting work to Pagemasters. Pagemasters is a separate company, one hundred percent owned by CP. According to Ms. Andrew, the Globe had never previously outsourced editorial work of this kind. The decision to outsource some work to Pagemasters was made necessary, management explained, as a result of the 2009 collective bargaining that ended vacation banking. This meant, in effect, a double vacation cohort in the summer of 2010. Pagemasters continued to be used after the summer.

Indeed, the amount of work directed to Pagemasters has increased. No Guild member, however, has lost his or her job as a result. In fact, in 2010 when the Globe first began to use Pagemasters, there were 80 editorial employees constituting 73.6 FTE's. By 2012, there were 81 employees and 75.8 FTE's. Another reason for turning to Pagemasters was stated in a May 26, 2010 email from John Stackhouse to all employees:

...because we have ambitious digital plans...and are keen to further integrate our newsroom by developing greater web skills among our own editing team. We can make that happen by providing some of their previous work to PMNA and diverting people to priority areas. We want to concentrate more resources on what we think is a competitive edge: creation and display of first rate content. This arrangement will also free time for enhanced skills training....

Further information was provided to Guild members in another email from Mr.

Stackhouse on June 1, 2010: "As we told the editing staff last week, there are no lay-offs planned as a result of this decision." However, as noted above, the Guild takes the position that the use of Pagemasters violates the LOU. Moreover, Ms. Andrew testified,

that in addition to fears about possible job loss, the Guild has also expressed concerns about a dilution in quality in Pagemasters-edited text.

Employer Argument

In the Globe's submission, the Guild was attempting to use an out-of-date inapplicable LOU to buttress a claim that would not otherwise be supportable under the job security language of the collective agreement. It was crystal clear, employer counsel continued, that no Guild member has lost his or her job, and that the job security provisions of the collective agreement have not been engaged. That then left this LOU, negotiated to deal with specific circumstances that no longer applied. The LOU was, therefore, employer counsel argued, redundant and/or moot. In the alternative, the Globe took the position, assuming for the sake of argument that the LOU continued in effect, that there had been no breach.

Turning to his first argument, employer counsel argued that the evidence established that the LOU was negotiated to preserve the rights of editorial employees to continue to do the "chewy centre" work should BGM ever be sold. As it turned out, in 2003 BGM was not sold but dissolved and .com returned to the Globe. It was at that point, the work having been returned, and there being no successor as anticipated in the LOU, that the letter became redundant. It was true enough that the parties left the letter in the collective agreement in both the 2005 and 2009 collective bargaining rounds, but that did not mean it continued to apply: it could not as the circumstances to which it could apply no longer existed.

Some years then passed and the Globe contracted out some work to Pagemasters. That particular contracting out was clearly not contrary to the collective agreement. It was noteworthy, and worth repeating, that the editorial bargaining unit complement had increased since the contracting out. No provision of the collective agreement had been engaged, much less breached. The Guild was, employer counsel argued, left with no choice but to file a grievance alleging a violation of the LOU, but that was a LOU that had effectively expired. On this basis, the employer asked that the grievance be dismissed.

In the alternative, the employer argued that even if for some reason the LOU still applied, its terms had not been breached. However, this argument is not sustainable for reasons that will be outlined below. Employer counsel concluded his submissions by asking that the grievance be dismissed.

Guild Argument

In the Guild's view, the LOU continued in effect. It was clear and unambiguous and it would, in those circumstances, constitute reviewable error to consider and apply any extrinsic evidence to assist in its interpretation. Moreover, the evidence that was led was, at best, self-serving. The LOU spoke for itself and it was noteworthy, and legally and factually material, that it was renewed by the parties without amendment in two successive collective bargaining rounds. While it was quite possible that the employer never intended the LOU to operate in current circumstances, that was not relevant to the

proper legal disposition of this dispute. What was required was a reading and then application of the plain language of the LOU.

The truth was, Guild counsel continued, that when the LOU was negotiated the parties had no idea how the electronic version of the newspaper would roll out. Indeed, it very well may be the case that the electronic version of the newspaper is its future with no print version being published at some point. What mattered was that the parties entered into a LOU. It provided that certain work would continue to be performed by Guild members. That deal remained in effect. It required bargaining unit members to edit copy that was posted on line. As a practical matter, and as established in the evidence, which Guild counsel reviewed, it was impossible to contract out the editing of print content while keeping in-house the editing of the material that went on the web.

Very simply, there was no ambiguity about the currency and applicability of the LOU. It was utterly clear: it provided that “the current practice of assigning editorial employees to prepare, produce and edit editorial material associated with Globe and Mail branded sites to Bell Globemedia or its successors will continue.” What that meant was that Globe bargaining unit employees, not Pagemasters, must prepare and produce and edit material that was posted on line. When the LOU was negotiated the *status quo* involved Globe bargaining unit employees preparing, producing and editing material that was posted on the website. There was no real dispute in the evidence about that. That was the *status quo* that the LOU preserved. This was the work that the LOU protected.

If the Globe wished to make a change to the *status quo*, it had to notify the Guild and enter into negotiations before any changes to the current practice were made. Failing that notification, and the successful conclusion of negotiations in the reopener anticipated by the LOU, the practice continued. In the Guild's view, the only other "out" to the operation and enforceability of this letter was if the website was discontinued. In that case, the job security provisions of the collective agreement would apply. But as long as the website remained in operation, and absent the agreement of the parties, the LOU was operative and enforceable.

The evidence established, in the Guild's view, that the Globe was the successor to BGM, It continued its operations as a Globe branded site when BGM was wound up as it succeeded BGM in publishing the website. The fact that the parties renewed the LOU in two separate successive collective bargaining rounds indicated their agreement that its terms continued to apply. There was no reason to believe that the parties renewed a redundant LOU, especially in the face of well-accepted canons of collective agreement interpretation that all provisions must be given meaning. Accordingly, not only was the LOU still in effect, so too were its terms. Given the evidence establishing the *status quo* in 2002, and the evidence about the work currently performed by Pagemasters, the only conclusion that could reasonably be reached was the employer was in breach. As long as the LOU was in effect, and so long as there was a website, the members of the bargaining unit were protected. The Globe could not contract that work out to Pagemasters or to anyone else.

Insofar as the employer's alternative argument was concerned, the Guild reviewed the evidence of the work that was actually performed by Pagemasters and took the position that this was protected work. It was the actual editing work for style, accuracy, clarity and length that was protected by the LOU. The employer's entire case rested, the Guild argued, on the fact that a member of the bargaining unit, a web editor, had some incidental role in the actual posting of material on line, or otherwise, after it had been edited by Pagemasters. This was simply insufficient, Guild counsel argued, to establish compliance with the LOU especially given the Guild's uncontradicted evidence that once a story had been copyedited by Pagemasters it was not going to be re-copyedited by a bargaining unit employee at the Globe. The work that was protected went far beyond simple keystrokes posting a news story on the web.

On careful examination, the Guild concluded, the LOU's guarantee had been turned on its head. In 2002, it was bargaining unit employees from the newsroom who edited copy and the employees at King Street who actually posted it. Now it was Pagemasters who were performing the protected work and Globe employees who posted it. This was not what the parties had agreed upon and it was directly contrary to the LOU's guarantee that the editorial *status quo* would continue. For all of these reasons, and others, the Guild asked that the grievance be allowed and appropriate relief awarded.

Decision

Having carefully considered the evidence and arguments of the parties, I am of the view that the grievance must be dismissed.

Without a doubt, the purpose of the LOU was to protect work being performed by bargaining unit members while BGM, or a successor, was in existence. The evidence established that the Globe was determined to ensure that its key editorial content remained under its control while partnered with Bell and CTV. Equally important, the LOU also protected the job security interests of bargaining unit employees in the face of the understandable uncertainty arising out of convergence and the melding of union and non-union employees in a new venture. Put another way, the LOU protected Globe control and Globe bargaining unit employees while .com came under the BGM umbrella. It then extended that protection into the future if BGM morphed into something else. Instead, BGM was dissolved.

The LOU was negotiated in a context. Context is, of course, important. But more important, and governing, are the actual words of the LOU itself. It provides that: “the current practice of assigning editorial employees to prepare, produce and edit editorial material associated with Globe and Mail branded sites to Bell Globemedia or its successors will continue” (emphasis mine). The protection extended to BGM or its successors. For the reasons set out below, if .com continued as part of BGM, then the assignment of the work described in this case to Pagemasters would violate the LOU. If BGM had become something else, through acquisition or evolution, i.e. if there was a successor entity to BGM, the assignment of the protected work to Pagemasters would violate the LOU.

However, the Globe is not a “successor” to BGM in any labour relations sense. What happened here, in the heyday of convergence, was that the Globe, Bell and CTV pooled operations in a new entity: BGM. Then, in order to ensure that key editorial material remained in its control *and* to ensure that Guild members were not adversely affected by this, or by any subsequent developments, the LOU was negotiated.

The Globe is not the successor of itself. A successor, as is commonly understood and well accepted in the labour relations jurisprudence, is some new entity that steps into the shoes of its predecessor assuming both its rights and its obligations. The principal purpose of successorship is to ensure that the new entity does not, and cannot, avoid its collective bargaining obligations. That is what the clear language of the LOU was intended to ensure given what was then an uncertain future. An agreement was reached, protections negotiated, and contingencies prepared for. However, the underlying arrangement was dissolved and all of the parts reverted to the *status quo ante*. In this case, the parties, the Globe and the Guild, went back to being governed by the terms of their collective agreement, the LOU no longer being of any force or effect.

As indicated above, it is my view that if the LOU was still in force the employer would be in breach for the evidence is overwhelming that the work currently being performed by Pagemasters is the very work that the LOU sought to protect – but at BGM or its successor, not when.com reverted to the Globe. If the parties had wished to negotiate job security arrangements that guaranteed that Guild members would do all copyediting, print and on-line, in perpetuity, they could have easily done so and would not have needed this

very specific LOU. Instead, they limited the protections – understandably – to BGM and its successors in a very specific LOU. Moreover, to interpret the LOU in the manner urged by the Guild would have the practical result of extending its protections from work at BGM, or its successor (which would be appropriate if the LOU was still in effect), to all copyediting work, i.e. for both web and the print edition, something that was, manifestly, never negotiated.

The fact that a bargaining unit employee is involved in the posting on line of a Pagemasters-edited story is legally and factually immaterial to this conclusion. The evidence is conclusive that while a bargaining unit employee may have something to do with material before it is posted on line, in the case of material directed to Pagemasters, virtually of all of the editorial work has already been performed. Had I found that the LOU remained in effect, in light of this evidence, I would have concluded that the employer was in breach.

To elaborate, even substantial work by a member of the bargaining unit such as deciding whether to post (i.e. for competitive reasons), determining whether comments are open or closed, adding related stories, headlines, key words, involvement with photographs, videos, placement, use or non-use of particular computer programs, etc. would not change the finding of fact that work intended to be protected by the LOU is now being performed by Pagemasters.

However, when the LOU effectively expired through the dissolution of BGM, and when the parties reverted to their preexisting rights, it was the collective agreement that governed. In this case, there is no assertion that the job security or any other provisions of the collective agreement have been breached (apart from the LOU). Accordingly, the grievance is dismissed.

DATED at Toronto this 31st day of January 2013.

“William Kaplan”

William Kaplan, Sole Arbitrator