



ALUMASAFWAY INC. Applicant v THE INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 119, Respondent

LRB File No. 014-20; February 10, 2021

Vice-Chairperson, Gerald Tegart; Board Members: Maurice Werezak and Allan Parenteau

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Association of Heat & Frost Insulators and
Asbestos Workers, Local 119:

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Unfair labour practice application - Alleged failure to bargain in good faith – Negotiations based on draft agreement provided by union not resulting in executed agreement – Employer acting on draft agreement – Board finds no agreement reached – Estoppel not applicable.

REASONS FOR DECISION

Introduction:

[1] Gerald Tegart, Vice-Chairperson: This is an application by AlumaSafway Inc. (“Aluma”) claiming the International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 (“the union”) is or has been engaged in an unfair labour practice or a contravention of *The Saskatchewan Employment Act*. Aluma asks for an order to this effect and an order requiring the union to refrain from this conduct. The conduct alleged relates to a dispute as to which collective agreement applies between the parties with respect to maintenance and shutdown work at the Husky Upgrader (“the upgrader”) in Lloydminster, Saskatchewan.

[2] The hearing of this matter proceeded by Webex on September 15 and 16, 2020.

Evidence:

[3] Aluma called three witnesses. Rick Moran is employed by Aluma as its general manager for central Alberta. His responsibilities extend to work performed by Aluma at the upgrader. He testified with respect to Aluma’s dealings with the union regarding maintenance work at the upgrader related to the period relevant to the application.

[4] Matthew Sell works for Aluma in high end industrial sales. He markets their services to multiple customers of all the Aluma product lines. He deals with customers and with other contractors. He has input into service proposals and reviews contracts. He reports to Mr. Moran.

He is familiar with the Husky operations and has been involved in shutdowns and maintenance since 2013. He was involved in discussions with the union regarding the shutdowns in the period relevant to the application.

[5] Neil Nilson is Aluma's insulation contracts manager, a position he's held for twelve years. He negotiates and manages contracts and has responsibilities related to most things related to Aluma's insulation work.

[6] The union called one witness. Chuck Rudder has been the union's business manager for approximately 17 years. He has responsibility for a range of matters, including contract negotiations. He acts as the lead negotiator for the union and has exclusive authority to negotiate and sign collective agreements.

[7] The union is the certified bargaining agent for a craft bargaining unit of insulators employed by Aluma. Aluma has a long relationship with Husky and has carried on work at the upgrader for many years, including maintenance and shutdown work done by insulators. Mr. Moran testified that Husky has become increasingly focused on cost control in recent years and a contractor must be competitive to work there. The work is awarded through bids, which Aluma regularly submits. The company isn't necessarily awarded work, but it was awarded a contract for maintenance and shutdown in 2020.

[8] There isn't a single collective agreement governing the union's provision of workers to the company's projects. There are two umbrella agreements that are available to be enabled for application to work over a specific time period - the National Maintenance Agreement ("the NMA") and the Allied Council Agreement ("the ACA"). Work can also be governed by site-specific collective agreements.

[9] A February 19, 2016, letter from Vince Engel, president of the Allied Council, to Mr. Moran indicated the ACA was to be enabled at the request of the union for the upgrader shutdowns in "2017 to 2010", an apparent typographical error intended to refer to years 2017 to 2020. A further letter from Mr. Engel to Mr. Moran dated January 17, 2017, enabled the ACA for spring shutdown in 2017.

[10] On April 19, 2018, Mr. Moran sent an email to Mr. Rudder and to Robin Mullock, who was the Regional Manager for the Prairie Arctic Regional Council of Carpenters, Drywallers, Millwrights and Allied Workers. The re line read "Husky maintenance bid" and the email stated:

Please forward the most current NMA agreement that you would consider using to cover the maintenance for several of the Husky locations including SAGD, and the upgrader/refinery in Saskatchewan. Need this as quickly as possible. 3 year contract.

[11] Mr. Moran testified that this request related to a bid for maintenance work, rather than turnaround work.

[12] Mr. Mullock replied on April 20 that the carpenters local was not prepared to enable the NMA at that time and invited a phone call.

[13] Mr. Moran replied April 23:

Ok>>We will run with this agreement Robin>>... Chuck are the insulators following the same path?

[14] Mr. Rudder's April 24 email in reply stated:

We have other contractors who are also looking at this package; therefore, we will be utilizing the Allied Council Agreement for Husky's work.

They are familiar with that agreement, and from what I understand, they are still using it.

We can look at extending the same conditions as we previously did for the last Shut Down, but I have to also discuss enabling this agreement with the Vince, and the other bidders.

What is the closing date on this contract?

[15] Mr. Moran replied the same day:

Bid is handed in Tuesday next week. We need to wrap this up by Friday so we have enough time to fill in the myriad of spreadsheets that are required. I'll send you what the carpenters have approved us to use as a guideline.

[16] On April 26, Mr. Moran sent an email reminding Mr. Rudder he needed the wage schedule and asking for the most current agreement. Mr. Moran replied on April 27:

We will be enabling under the Allied Council Agreement; using the same conditions we did for the 3 year Shut down work. ... Vince would have the most current agreement.

[17] Mr. Moran replied the same day:

Ok sounds good>>we will go with this>>actual numbers would be good to get just to make sure we don't make a mistake in the bid<<

[18] In the fall of 2018 Aluma initiated a discussion regarding the 2020 shutdown at the upgrader. Mr. Moran sent an email dated September 14 to Mr. Engel at the Allied Council and Mr. Mullock at the carpenters union:

Could you both send me the rate sheets and agreements that you will be working with for the 2020-2022 shutdown bid for the Husky upgrader. As a note we will not accept any rate changes once you have submitted these rates as the contract is for the time period noted and we are not allowed any alterations to the bid during that time period. If you do not forward an agreement or rates we will not bid this project to Husky for your trade. Need them asap.

[19] Mr. Engel forwarded the email to Mr. Rudder the same day.

[20] On September 19, Mr. Rudder sent an email to Mr. Nilson, with a copy to Mr. Moran:

Hi Neil,

Attached is an agreement for the Shutdown turnaround work for 2019 to 2021, which is confidential in Nature

Highlights or low lights, which ever you want to call them are;

39.00 per hr Mon -Friday

1 ½ O.T. Sat & Sun with a hourly shift premium attached of 3.00 per hr.

Ratio is 1-1 for first 16, the 2 JM -1 there after.

Read through it all, and if you have any questions, do not hesitate to contact me.

[21] Attached to the email was a written agreement specific to shutdown work at the upgrader (“the proposed agreement”). The name of the attachment, as described in the email, was “DRAFT Husky Shutdown, Turnaround Agreement 2018 – Ver1.pdf”. The face page of the proposed agreement read as follows:

*SHUTDOWN/TURNAROUND MAINTENANCE AGREEMENT FOR THE HUSKY
LLOYDMINSTER HEAVY OIL UPGRADER SITE LLOYDMINSTER, SASKATCHEWAN*

BETWEEN:

*THE INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ALLIED
WORKERS, LOCAL UNION 119
(Hereinafter referred to as the “Union”)*

And

(Hereinafter referred to as the “Employer”)

Purpose:

For the SHUTDOWN/TURNAROUND work for the Husky Oil Heavy Upgrader Site located at Lloydminster, Saskatchewan.

Effective Date of signing.

Expires JANUARY 31, 2022.

[22] Mr. Sell's September 19 email asked for clarification:

Hi Chuck

Neil asked me to email you directly and we are wondering if you would clarify if the \$3.00 premium applies to the 1.5x overtime or to both 1.5 time and 2 times overtime.

Although it may be rare in this situation they may need to work a statutory holiday during the month of the shutdown and foreman and up will likely work a hot shift during the big shutdown 12 hours paid 13 so need to understand the premium if you could help.

[23] Mr. Rudder replied the same day:

Premium is only Sat & Sundays where 1 ½ applies. Does not apply to 2x time.

[24] Mr. Sell wrote back on September 20:

Hi Chuck

1 more question on Saturdays and Sundays is the overtime premium paid up to 12 hours and then Doubletime and for week days if the work is a 5-8 shift is the overtime premium paid for up to 12 hours as per the current MOU's that are in place in Saskatchewan?

Also is there anything that can be done on the Straight time pay for A&D testing? All testing here is on the workers time but we pay for the test?

Please let me know

Thanks

Matt

[25] Mr. Rudder replied within minutes:

Hours after 10 are double, we can do 1 hour for the A/D testing.

[26] The proposed agreement was economically advantageous to Aluma when compared to the ACA.

[27] Apart from a brief discussion between Mr. Rudder and two other representatives of Aluma at a meeting Husky called at the upgrader on January 9, 2020, this appears to have been the last communication between the parties in relation to whatever bid Aluma may be submitting respecting the upgrader until Aluma contacted the union in January of 2020 to seek execution of the proposed agreement. Mr. Moran, Mr. Sell and Mr. Nilson made the assumption they had

agreed to terms with the union based on the proposed agreement and the email exchange, and proceeded to develop and submit a bid to Husky.

[28] Aluma did not succeed on its bid for 2019, but was successful for the 2020 shutdown.

[29] By email dated January 20, 2020, Mr. Nilson wrote to Mr. Rudder, structured as a reply to his original email of September 19, 2018, that attached the proposed agreement:

Good morning Chuck: It looks like this agreement was never signed. As AlumaSafway is getting ready to mobilize men to site, we should formalize it. Can you contact Rick M and we can get dual signatures and put this one to bed? Thanks....Neil

[30] Mr. Rudder replied within minutes:

Hi Neil,

The Sun has long since set on this Draft Agreement we offered to Aluma. The last agreement we worked under was the Allied Council agreement, which we agreed to Enable for x 1 ½ on Saturdays, and 0.75 cents under the JM rate. We consider this the agreement of record for the 2020 shutdown.

[31] Mr. Moran sent an email about four hours later:

Hello Chuck

So approx... 16 months ago this contract came out for bid from Husky. As you can plainly see below you gave us this particular contract to use in our bidding. We used this contract to bid this work. Your promise is clear. So I don't understand how you could back out of this now when the bid has been awarded based on your promise. Just because time has elapsed since the bid was completed and awarded does not give you the right to change your mind and refer to Sunsets and draft agreements as your reasoning for this abrupt change. You have been aware of this contract for a long time and you choose to let the clock tick down to zero and then try to force change after we are actually starting the contract this month and actually on site setting up.

There is no option for us here. I don't want lower or higher contract options. Just the ones promised to us at the time of bidding.

[32] Mr. Rudder replied by email the next morning:

The Draft agreement, was just that a Draft of a potential agreement for Husky. Never signed by either party, so it remains a "DRAFT AGREEMENT".

If you recall, we enabled the 2017 -2020 shutdown through the Allied Council, (see attached) therefore we will still honor those enabled terms through the Allied Council agreement.

Your attempt at claiming that the Confidential unsigned Draft Agreement is somehow binding, is absolutely absurd, furthermore, for you to suggest that I somehow let this clock tic down, on a Draft Agreement that I forwarded off to Aluma, where it sat apparently until

yesterday is even more absurd. I also cant fathom, how you claim there was some sort of promise made by the union, that we have now broken.

The Enabled terms we gave you through the Allied Council Agreement is the only commitment we ever made for this work, and we will continue to honor that commitment.

[33] Mr. Moran testified he had no further discussions with Mr. Rudder. He contacted counsel for Aluma and the within application was executed January 24 and filed January 27.

[34] The union was asked to dispatch workers to the site and did so.

[35] Mr. Moran, Mr. Sell and Mr. Nichol understood the terms of the proposed agreement along with the additional information provided in the limited email exchange were intended by the union to be an offer of terms to be used by Aluma in its bid on the shutdowns at the upgrader for the years included in the terms. They understood it to be an offer Aluma could accept, and that with that acceptance the terms would become legally enforceable.

[36] Mr. Rudder testified that he is not only the lead negotiator of agreements for the union, but is also the person with exclusive authority to negotiate and sign collective agreements on behalf of the union. He stated it was not his intention to provide the proposed agreement as an offer Aluma was invited to accept, but rather as a basis for discussion. He understood at the time that the ACA might be wound up, at least in relation to work at the upgrader. He said the union had been working on the proposed agreement as an alternative to the ACA if that turned out to be the case. The union did not want to be put in a position where the NMA would be the only available alternative, and he understood some contractors, including Aluma, preferred the NMA. He described the proposed agreement as a work in progress. He said he and Mr. Nilson had prior phone discussions concerning this, although Mr. Nilson said in cross-examination that he didn't recall such discussions.

[37] Mr. Rudder was asked on cross-examination whether the union ever withdrew the proposed agreement. He answered that it had never been formally offered.

[38] He stated that he didn't know until January of 2020 that Aluma had used the terms of the proposed agreement for the purposes of its bid.

Analysis and Reasons:

[39] Aluma's application is premised largely on its assertion that the proposed agreement became a legally enforceable agreement between the parties based on its terms and the email

correspondence between the parties in September of 2018. This requires us to first determine whether there was an offer from the union that Aluma could accept.

[40] Mr. Rudder testified he did not intend to make an offer on behalf of the union. Aluma asks us to reject Mr. Rudder's testimony and to conclude from the email exchange and the context within which it occurred that the union was proposing terms Aluma could rely on for its bid and that would form the basis of a collective agreement between the parties.

[41] There's no doubt the emails from September of 2018, on their own, could lead one to conclude the union was making an offer of terms Aluma was able to accept, and that the offer and acceptance would create a binding agreement. The proposed agreement and its covering email appear to have been sent to Mr. Nilson, with a copy to Mr. Moran, in response to Mr. Moran's email to Mr. Engel asking for the rate sheets and agreement the union would be working with for the 2020 to 2022 shutdowns. Mr. Moran had indicated he needed this "asap" and the response came five days later. The proposed agreement was specific to shutdown/turnaround work at the upgrader, although it did not name Aluma as the contracting party. Mr. Sell asked for clarification on certain terms the day the proposed agreement was received and Mr. Rudder responded promptly. Mr. Sell sought further clarification the next day and Mr. Rudder again responded promptly.

[42] However, the emails and the proposed agreement aren't entirely consistent with Aluma's position. The face page of the proposed agreement says it will be effective the date of signing, which never occurred. Mr. Nilson suggested an agreement would normally be signed after their bid was successful, although his email to Mr. Rudder on January 20, 2020, begins: "It looks like this agreement was never signed.". Whether this is meant to be a reference to Aluma's failure to formalize the agreement at some earlier point when they were awarded the 2020 contract, or its failure to formalize it once Aluma officials concluded they had successfully negotiated it with the union in 2018, isn't clear.

[43] As noted earlier, the attachment to Mr. Rudder's email that contained the proposed agreement was labelled a "DRAFT" (in capitals) agreement.

[44] The language used by both sides in the email exchange is capable of both interpretations. It would not be uncommon for one party to contract negotiations to provide a draft for discussion purposes to focus those discussions. On the other hand, it would not be uncommon for one party

to provide a draft intended as the basis of an offer. In both instances, subsequent discussions related to clarification and amendment might occur.

[45] Therefore, we don't find the email exchange itself to be definitive.

[46] When Mr. Rudder initially replied to Mr. Nilson's email request for the union to sign the proposed agreement on January 20, 2020, he described it as a "Draft Agreement we *offered* to Aluma" (our emphasis). The use of "offered" here may support Aluma's position. However, this must be read in the context of the larger email exchange at that time. In his email the next day, Mr. Rudder states the "Draft agreement, was just that a Draft of a potential agreement for Husky. Never signed by either party, so it remains a 'DRAFT AGREEMENT'".

[47] Furthermore, we have direct evidence from Mr. Rudder denying that he intended to provide an offer Aluma could accept. In order to find the proposed agreement was provided as an offer capable of acceptance, we would have to conclude Mr. Rudder did not tell the truth under oath.

[48] There was nothing material in Mr. Rudder's testimony that would support a conclusion we should make such a finding. He presented as a sincere, straightforward witness. He didn't avoid answering questions on cross-examination, beyond the usual wariness apparent in many witnesses in proceedings before the Board. His evidence was internally consistent. On the central point related to the purpose of providing the proposed agreement, his evidence isn't contradicted in any meaningful sense by the oral testimony of other witnesses, although they had a different understanding of what had transpired.

[49] The onus lies with the applicant, Aluma, to prove the facts necessary to establish the fundamentals of the agreement it argues existed here. We are not satisfied the evidence as a whole establishes that the union made an offer in September of 2018 that was capable of acceptance by Aluma. The discussions concerning the proposed agreement could have led to an agreement, but did not. The fact Aluma officials believed they had an offer they could accept does not alter that.

[50] Even had there been an offer capable of being accepted, Aluma did not do what was necessary to accept it. While Aluma argues its actions in completing the bid based on the proposed agreement indicate its acceptance, that acceptance was never communicated to the union at that time and the union had no reason to take Aluma's silence as acceptance. Mr. Rudder testified that he assumed the ACA would continue to apply once the discussions in September of 2018 went quiet. Aluma could have avoided the consequences that precipitated the current

application had it simply but explicitly communicated its intention to use the proposed agreement in its bid before submitting the bid. This, in turn, would have forced the union to clarify its position.

[51] Finally, on this point, could it be said that an offer from the union based on the proposed agreement remained outstanding until January of 2020, when it was accepted by Aluma through the email from Mr. Nilson to Mr. Rudder asking that the agreement be signed? This requires a conclusion that the offer remained outstanding, without acceptance by Aluma, from September of 2018 to January of 2020.

[52] An offer to contract that does not contain an express deadline for acceptance will expire if not accepted within a reasonable time: see *Canadian Encyclopedic Digest*, Contracts II.2.(c) para. 45. We find that, if there was an offer, January of 2020 was outside the reasonable time within which it could be accepted. Any such offer would have been in response to a request from Aluma for rates and an agreement needed “asap”. It strains credulity that Aluma would then wait roughly sixteen months to accept an offer.

[53] It also runs counter to Aluma’s position that it had accepted the agreement in September of 2018 and had begun to act on it when it submitted its bid sometime shortly thereafter. If the agreement hadn’t yet been accepted in 2018, how could Aluma have acted in reliance on it? How could Aluma have been assured that the union wouldn’t withdraw its offer before Aluma got around to accepting it and the parties got around to signing it?

[54] In reaching these conclusions, we observe that the misunderstanding between the parties could easily have been avoided had either side taken the care to clarify the status of the discussions before Aluma prepared and submitted its bid. Both parties appear to have treated this more lightly than the circumstances required. A modicum of due diligence by either could have avoided these proceedings.

[55] In its written brief Aluma sets out what are described as three issues to be determined:

(a) Local 119 has failed to bargain in good faith with respect to the [proposed agreement], by reneging on the [proposed agreement] after all terms had been agreed to;

(b) Local 119 has failed to complete its collective bargaining obligations with respect to the [proposed agreement]; and

(c) Further, and in the alternative, Local 119 is estopped from reneging on the [proposed agreement], based on the representations made by Chuck Rudder.

[56] The first of these assertions, that the union reneged on the agreement, is premised on the existence of a legally enforceable agreement between the parties based on the proposed agreement provided by the union in September of 2018 and the email correspondence at that time. Since we have concluded that no agreement was reached at that time, this assertion must fail.

[57] The second assertion relates to the union's refusal to execute the proposed agreement when asked to do so in January of 2020. Once again, since we have concluded that no agreement was reached, there was no obligation on the part of the union to execute the proposed agreement.

[58] While not specifically argued by Aluma, we will address the question of whether the union's conduct in its interactions with Aluma in September of 2018 when the proposed agreement was under discussion constitutes a failure to bargain in good faith. The discussions at that time did not, according to our finding, lead to the conclusion of an agreement. The evidence indicates that the parties made different assumptions about the state of the discussions when communications ended. Aluma officials thought they had a deal and proceeded to finalize and submit their bid. Mr. Rudder testified he assumed the proposed agreement was no longer necessary because the ACA wasn't being wound up and would continue to be used. These circumstances do not indicate an absence of good faith on the part of either party.

[59] Aluma advanced the third assertion, which argues estoppel, in the alternative to the other two. The Aluma written submissions characterize the test for estoppel as it applies in the instant circumstances as a three-part test:

- (i) A representation was made by [the union];
- (ii) The representation was relied upon by Aluma; and
- (iii) The reliance was to Aluma's detriment.

[60] In order to find that estoppel applies, all three elements must be satisfied.

[61] With respect to the first element, Aluma argues that Mr. Rudder represented to Aluma that the proposed agreement was to be applied to the 2019 to 2021 shutdown/turnaround work at the upgrader, and that this representation encompassed the further representations that the union and its workers would perform the work at the upgrader for those years under the terms presented in Mr. Rudder's emails to Aluma officials.

[62] For reasons similar to those provided above with respect to our finding that the proposed agreement never became a legally binding collective agreement, we find that the union did not make the representations suggested by Aluma when Mr. Rudder provided the proposed agreement to Aluma in his September 19, 2018, email. We accept Mr. Rudder's testimony that he did not provide the proposed agreement as an offer for Aluma to accept, but rather as a basis for discussion. Having reached that conclusion, we must also conclude that the proposed agreement was not provided as a basis for the upcoming bid without an agreement being concluded between Aluma and the union.

[63] As noted earlier, all three elements must be established to find the union is estopped from renegeing on the proposed agreement. Since the first element has not been established, we find that the principle of estoppel does not apply in these circumstances.

Conclusion:

[64] The application is dismissed.

[65] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **10th** day of **February, 2021**.

LABOUR RELATIONS BOARD

Gerald Tegart
Vice-Chairperson