IN THE MATTER OF AN ARBITRATION

BETWEEN:

ISLAND FIBRE LTD.

(the “Employer”)

AND:

UNITED STEELWORKERS, LOCAL 1-1937

(the “Union”)

(Jack Howe Grievance)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Don Bahen for the Employer
	Sandra Banister, Q.C. for the Union
HEARING DATE:	May 1, 2013 Vancouver, BC
DECISION:	July 2, 2013

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This arbitration board is constituted under the terms of the parties' Collective Agreement.

At issue is whether or not the Employer violated the Collective Agreement when it failed to offer available work to Mr. Jack Howe, the grievor – in this case on Tree Farm License #46 (TFL 46).

Island Fibre took over a stump to dump contract on TFL 46 around December 2011. The previous contractor on TFL 46 was Island Pacific Logging (I.P.L.).

The governing provisions for successor contractors, which is the case here, are found in a Letter of Understanding commonly referred to as the "Woodlands Letter". The essence of the Woodlands Letter is to allow the licensee which in this case is Teale Jones, to contract all of the work on the TFL to a contractor on a stump to dump basis.

The Employer taking on the contract inherits the Collective Agreement, including their employees and the seniority list from the previous contractor.

The grievor in this case had been employed by the previous contractor building roads and all related duties, including loading blasting charges. However, he could not ignite the blast because while employed by the previous contractor he did not possess a blasting certificate – a requirement under the British Columbia *Workers Compensation Act*.

At the time of the change of contractors, approximately December 2011, the grievor was laid off and has never been recalled – his seniority and recall rights have expired. As well, he has lost other Collective Agreement benefits.

Upon learning that other employees with no seniority were working in the operation he filed a grievance; hence this arbitration.

The undisputed evidence is that from time to time the grievor diligently checked with the Employer to determine if there was any available work, but to no avail.

As well, the evidence is clear that the grievor did write and pass his blasting certificate exam on April 12, 2012. I am also satisfied that the grievor made the Employer aware of this fact via telephone.

In sum, the Union asserts the grievor is fully qualified to perform the road building work for which the Employer brought in employees with less or no seniority to perform.

Therefore, the Union requests an order granting:

- the grievor be made whole for all work performed by employees with less or no seniority between the date of layoff and the date of this award;

- the grievor's seniority and benefits be fully restored; reimbursement for all medical expenses incurred as a result of his loss of benefits; as well as any other out of pocket expenses.

It is the position of the Employer that the grievor was not qualified to perform the work in question due to not having his blasting certificate or, alternatively, not being provided proof of same.

Further, the Employer asserts the Union did not follow the proper procedures in bringing this matter forward, i.e., the matter was not referred

through the camp committee and also the time limits in the grievance procedure were not followed.

DECISION

I will first deal with the Employer's assertion that the time limits were not followed. It is clear on the evidence and documents that upon learning that employees with less or no seniority were working in the Employer's contract site, that a grievance was filed and continuously discussed by the parties throughout the time of its original filing and the referral to arbitration. While there may have been some extended periods of time between different stages of the grievance procedure, it is equally clear that for a certain period of time after the grievance was filed the Employer took the position that the matter was not arbitrable – a position it later abandoned.

Further, on the facts of this case it is not disputed that certain road building work was performed while the grievor was laid off, and there is no prejudice to the Employer in hearing this case on its merits. Consequently, pursuant to the *Labour Relations Code* of British Columbia I will exercise my discretion and relieve against any alleged time limit infractions and decide the case on its merits.

Turning now to the merits of the case, the issue to be decided is whether the grievor is capable and qualified to perform the disputed work. I find he is qualified and capable for the following reasons.

In terms of the issue at hand, I find the reasoning in *Weyerhaeuser Co. (South Island Timberlands) v. United Steelworkers of America, Local 1-80*, [2006] B.C.C.A.A.A. No. 16 to be compelling. In that case, the company used junior employees from Northwest Bay at Cowichan while Cowichan employees were laid off. The grievance on behalf of the employees was successful. There, like here, there were two operations and the employer wanted to bring in employees

who were placed at the bottom of the seniority list if no one was competent. Arbitrator Kinzie stated at paragraph 49:

> However, the Cowichan operation is recognized, and has been for a considerable period of time, as a separate and distinct operation from the Northwest Bay operation and, in particular, insofar as the seniority of the employees working in the two operations. Thus, in my view, when the Employer assigned the Northwest Bay employees to work in the two operation's dry land sort, shop and warehouse and to log in the traditional work areas of the logging employees of the Cowichan operation, those Northwest Bay employees would have become employees of the Cowichan operation. They would be performing the work traditionally performed by the Cowichan employees.
>
> (emphasis added)

He goes on to state the crux of the problem at paragraph 52:

> What has created the issue in this case is the fact that there were Cowichan logging, dry land sort, and warehouse employees on lay-off from their regular jobs during the period of time that the Northwest Bay employees were working on those jobs south of the Nanaimo River. If the laid-off Cowichan employees would have been competent to perform the jobs being performed by the Northwest Bay employees, and there is no evidence before me to suggest that they were not, the Employer would be in breach of the collective agreement, having violated the seniority rights of these Cowichan employees.
>
> (emphasis added)

I am also persuaded in my ruling by the following facts:

1. While working for the previous contractor prior to this Company taking over the contract, the grievor did perform road building work and all related duties except as mentioned earlier the setting off of the blasting charge.

2. Prior to the disputed work being available in this case the documentary evidence supports the fact that the grievor had successfully attained his

blasting certificate thereby fully qualifying him to do all phases of road building.

3. Also, I find on the grievor's evidence that he did advise the Employer that he had attained his blasting certificate.

4. Since his layoff with this Employer the grievor has performed all phases of road building work with another contractor without difficulty.

5. Finally, in reaching my conclusions I have not ignored the evidence called by the Employer through Mr. Wellmann. The best that can be concluded from his evidence is that he had never observed the grievor performing certain aspects of the road building duties; whereas the grievor's evidence is clear he has performed the work.

In the result, I award:

1. The Employer violated the Collective Agreement by not recalling the grievor to perform the available work on the date for which the work was performed as agreed by the parties at the hearing, plus any other work for which the grievor ought to have been called to perform since the date of the filing of the grievance. In particular, such duties performed include: drilling, blasting and excavating. Subject to mitigation, the grievor should be made whole in this respect.

2. The grievor's seniority be fully restored.

3. The grievor's benefits be fully restored and he be reimbursed for any out of pocket expenses subject to proof by receipts and made whole with respect to his pension contributions.

I shall retain the necessary jurisdiction to resolve any issues arising out of the implementation of this award.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 2nd day of July, 2013.

Vincent L. Ready