LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION DECISION

UNITE HERE LOCAL 40

UNION

HOSPITALITY INDUSTRIAL RELATIONS
on behalf of
SHERATON VANCOUVER AIRPORT HOTEL

EMPLOYER

(Re: Preliminary Objection to Jurisdiction – Letter of Understanding #9)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Michael J. Prokosh
Representing the Employer:	Jason Koshman
Date of Hearing:	June 23, 2015
Date of Decision:	July 2, 2015

James E. Dorsey, Q.C. • 3380 Redfern Place, North Vancouver, B. C. V7N 3W1 • Tel 604-980-7225 • Fax 604-909-2755 dorseyj@shaw.ca • www.adrweb.ca/james-dorsey

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1. Referral and Objection to Jurisdiction

[1] The union referred the matter of a review of all wage rates of all bargaining unit employees of the Sheraton Vancouver Airport Hotel for mediation/arbitration under Letter of Understanding #9 (LOU #9). The employer objects that the referral is premature because there is no mutual written agreement on the question to be resolved.

[2] The union and employer agree I have jurisdiction under their collective agreement and the *Labour Relations Code* to decide the merits of the employer's objection.

2. Referral under Letter of Understanding #9

[3] Hospitality Industrial Relations (HIR) is party to a collective agreement with the union for the term June 2012 to May 2016. HIR acts on behalf of its members listed in a schedule attached to the collective agreement, which includes the Sheraton Vancouver Airport Hotel, and new members added from time to time with notice given to the union. The current LOU #9, signed on June 11, 2014, is appended.

[4] No committee contemplated in LOU #9 has been established to review: (1) banquet systems and classifications; (2) situations where a single department in a hotel may be more suitable than an existing multi-department and vice versa; and (3) "Classifications and Wage Rates in Specific Departments and/or Hotels." There is no evidence a committee was ever established under previous collective agreements.

[5] In addition to a review committee, LOU #9 contains a process:

> … designed to allow the parties a fast and reasonable process in which to review the above with a view to reflecting the changes within the Industry and/or a particular property within the Industry.
>
> In the exercise of this process, it is not the intent of the parties to, in any way, harm a Local 40 member or members or in any way restrict the ability of the hotel

> to operate normally as allowed by the Collective Agreement, nor is it the intent of the parties to eliminate classifications where there is a reasonable possibility the classification will be utilized in the future.

[6] The process can be instigated by either the union or HIR, but not by a HIR member. The process cannot be used in addition to the grievance procedure to add new classifications and wage rates not in the collective agreement.

> 3. This process may not be used in addition to Article 11.05. The parties may only utilize one process or the other for any single issue.

[7] On March 2, 2015, Union President Robert Demand wrote HIR requesting a "review of the wage rates of the bargaining unit employees at the Sheraton Vancouver Airport Hotel" pursuant to LOU #9. The first step in the process is for the union and HIR to meet. The union asked to meet by March 11th. HIR Executive Director Dan Pelletier replied by email on March 11th:

> Thank you for your letter dated March 2nd, 2015. In your letter you have requested a wage rate review at the Sheraton Vancouver Airport Hotel. It is unclear to me what the union means by a wage rate review. Please provide me with your clarification.
>
> There are approximately 31 classifications at the Sheraton and thousands throughout the HIR Master, if there is a particular classification that you believe needs to be reviewed, please provide me with the specifics at your earliest convenience.
>
> Also, Letter of Understanding #9 contemplates the Union and HIR possibly forming a Committee. If you are interested in that, I would be happy to hear your thoughts.
>
> I look forward to your clarification.
>
> Please feel free to contact me at any time to discuss this further.

[8] A difference over the scope of the requested review was emerging. Mr. Demand replied with emphasis that the union "is requesting review of the wage rates of **all** bargaining unit employees at the Sheraton Vancouver Airport Hotel."

[9] Messrs Demand and Pelletier met March 26th, but were unable to agree on the question to be decided. Mr. Demand wrote Mr. Pelletier that day that the union was moving forward in the process. He wrote, in part:

> LOU #9 states that "5. The parties, as the first order of business, will reduce the question to be decided to writing."
>
> During the Meeting, the parties attempted to reduce the question to be decided, to writing. However, no such agreement was reached.

> Therefore, pursuant to point 8) of LOU #9, the Union is hereby referring this matter (i.e. the review of the wage rates of the bargaining unit employees at the Sheraton Vancouver Airport Hotel, pursuant to Letter of Understanding #9 in the Collective Agreement), to one of the Investigators named in LOU #1; specifically, to Jim Dorsey.

[10] Letter of Understanding #1 contains a list of arbitrators/investigators. Paragraph 8 of LOU #9 states: "Should resolution not be achieved, either party may refer the matter to a person named in Letter of Understanding #1. The Investigators will be selected on a rotating basis with concern to their immediate availability."

[11] The next day, counsel for the union informed me of my appointment as Investigator. It is agreed I was properly selected by the union among the list of arbitrators/investigators.

[12] By April 14, 2015, the first day of "investigation" was scheduled for June 23rd. Among my available dates in the scheduling discussion, the union was available June 8th or 9th, but the employer was not available on those dates. The employer identified June 23rd among my available dates, which was available to the union.

[13] On Monday, June 1st, I followed up with an email seeking to schedule any required dates after June 23rd. The union identified dates I had suggested as options. On Friday, June 5th, I emailed Mr. Pelletier about the additional dates. The following week, HIR retained Mr. Koshman who filed the preliminary objection on June 12th.

3. Employer and Union Submissions

[14] HIR characterises the union's wage rate review approach as too broad and lacking particulars.

> If this Board did have jurisdiction, which the Employer says it does not on account of the clear language in LOU #9, the Union's question (ie: review of all wage rates) is vague, non-specific, and general in nature. If allowed to proceed, it could result in several Master Agreement employers seeking to also review wages across certain bargaining units, classifications and departments. While the Union would argue some wages should be adjusted upwards, several Master Agreement employers would have equally compelling arguments that others should be adjusted downwards. (*Employer Outline of Argument*, ¶ 13)

[15] HIR underscores that no particulars or specifics in the form of wage charts, spreadsheets or wage comparisons were supplied by the union to provide more insight into what the union is seeking and the parameters of the wage review the union

requests. HIR submits the scope of the requested review and resulting question to be resolved must be narrowed in order to have focused direct discussions to achieve a resolution.

[16] The crux of the preliminary objection is that because HIR and the union have not agreed on the question to be resolved no further steps can be taken in the process. HIR submits:

> Neither HIR nor Local 40 can *unilaterally* determine a *question* and refer same to an arbitrator on ***a "plain meaning"*** of the language contained in LOU #9. Put another way, it is a condition precedent that the parties mutually agree on the question and fail to resolve the question before referring it under clause 8 of LOU #9.
>
> Given the broad scope of the language in LOU #9, this makes sense, as to allow either Party to *unilaterally* form and submit a question under clause 8 could result in wholesale wage/classification/departmental reviews tantamount to re-opening collective bargaining. (*Employer Outline of Argument*, ¶ 8 – 9)

In summary, no matter can go to an investigator for mediation/arbitration until the question is agreed and direct discussion efforts to resolve it have not achieved a resolution.

[17] HIR submits a failure to complete the "first order of business", namely reducing the question to be decided to writing, is a bar or "condition precedent" to referral to mediation/arbitration. This, it submits, is the mutual intention and scheme of paragraphs 5 to 8 of LOU #9.

> 5. The parties, as the first order of business, will reduce the question to be decided to writing.
> 6. The parties will then attempt resolution of the questions by way of direct discussion.
> 7. Should resolution of the question be achieved, the parties will execute a document outlining the terms and such agreement will bind the parties for the balance of the Collective Agreement which is in force or for such different time as the agreement may specify.
> 8. Should resolution not be achieved, either party may refer the matter to a person named in Letter of Understanding #1. The Investigators will be selected on a rotating basis with concern to their immediate availability.

[18] HIR submits the "matter" in paragraph 8 can only be the unresolved question reduced to writing. In support, it extrapolates the union's position and approach to predict dire consequences even if there is an agreed question.

> Similarly, the word “matter” in Clause 8 can be nothing other than an unresolved “question”. To hold otherwise would render Clauses 5, 6, and 7, ineffective, and unnecessary. Either party could simply refer questions/matters to mediation/arbitration unilaterally. The provisions requiring the parties to decide upon the question, attempt to resolve it, and then mediate it, would be rendered meaningless if Clause 8 is not read consistently with the Clauses preceding it.
>
> The Union’s interpretation would see LOU #9 as means to obtain mid-contract interest arbitration on any of the matters identified in Clauses 1, 2, and 3 regardless of whether the parties have agreed to the issue/question that would be the subject of the interest arbitration. According to the Union, even if the parties decided upon a question, reduced it to writing, but then could not mutually resolve it, the Union's interpretation (that Clause 8 does not include the word “question”) would mean that either party could then say the matter is broader than the question that was agreed to and increase the scope and subject matter of what is to be mediated/arbitrated. The language does not support that interpretation. (*Employer Outline of Argument*, ¶ 38 – 39)

[19] The union disagrees. This is not a case of departmental integration and mutual agreement is not required to submit a matter to arbitration. Paragraph 2 of LOU #9 states:

> 2. In cases of review, only one party need initiate the process. In cases of departmental integration, mutual agreement of the parties is required before the process can be submitted to binding arbitration.

[20] The union submits LOU #9 contemplates two situations. One is when a question is agreed, reduced to writing and resolved. In that situation, “…the parties will execute a document outlining the terms and such agreement will bind the parties for the balance of the Collective Agreement which is in force or for such different time as the agreement may specify.” (LOU #9, ¶ 7)

[21] The second is when there is no agreement on the question or agreement on the question but no resolution. With no agreement, either party, not just the initiating party, may refer the “matter” to mediation/arbitration.

> 8. Should resolution not be achieved, either party may refer the **matter** to a person named in Letter of Understanding #1. The Investigators will be selected on a rotating basis with concern to their immediate availability. (Emphasis added)

[22] The union submits if the language said either party may refer the “question”, a word used frequently in LOU #9, the employer’s objection might be well founded. However, the parties chose to use a distinctly different and broader word not used elsewhere in LOU #9. The deliberate use of the different word “matter” where it

appears in the flow of the steps in the process contemplates there might not be agreement on a question and either party can break the stalemate and progress through the process by making a referral of the entire matter that initiated the process, provided mutual agreement is not required under paragraph 2.

[23] The union submits using different words presumes they were intended to have different meanings. The employer's objection denies but does not address or overcome this presumption. It simply says two different words – "question" and "matter" – have the same meaning because this suits the basis of its jurisdictional objection.

[24] The consequence, the union submits of the employer's interpretation creates the absurd situation where one party can deny the other party the benefit of the process simply by stonewalling. This might happen because there is no incentive for either HIR or an employer member to agree to any question and accept the possibility of an arbitrated wage increase for some or all of the employer's employees.

[25] Further, the union submits such an interpretation does not encourage cooperative participation between employers and trade unions in resolving workplace issues, or promote conditions favourable to the orderly, constructive and expeditious settlement of disputes. (*Labour Relations Code*, s. 2(d) and (e))

[26] Although HIR raises the possibility of initiating a process to argue for a wage reduction, the union submits the "no harm" intent expressed in LOU #9 precludes a wage reduction.

[27] The union submits this request for a review of all wage rates of employees of a single employer is neither vague nor non-specific. It might not be more specific than is reasonably required under LOU #9, but it is not less.

4. Discussion, Analysis and Decision

[28] Characterizing the LOU #9 process as "interest arbitration" or tantamount to re-opening collective bargaining invokes commonly held concepts of the stage in collective bargaining negotiations at which interest arbitration occurs and commonly shared understandings of the scope of what might be imposed to resolve a collective bargaining impasse. These presumptions circumvent the necessary inquiry into the

purpose of LOU #9 and its role in the application and administration of this collective agreement. The extent to which a single employer wage review under LOU #9 in a Master Agreement applicable to several employers is analogous to interest arbitration in either process or decision-making criteria has not been explored or decided.

[29] No one has yet identified a situation since LOU #9 was first agreed under a past collective agreement when a committee was struck or a process instigated under LOU #9 during the term of a collective agreement. Similarly, no one has addressed the extent to which the grievance-arbitration process under Article 11.05 or a process under LOU #9 in its place is analogous to interest arbitration.

[30] The differences between interest arbitration to resolve a collective bargaining impasse and the role of LOU #9 have not been identified or explored. The intended purpose to reflect changes in the industry or at a property have not been examined. The scope of what was not intended – harm to a union member or restrict normal hotel operation – have not been explored.

[31] For example, under this Master Agreement, an individual employer may pay a premium above the agreed minimum wage rates. What is the implication for the no harm agreement? Does it mean there can be no reduction in the premium paid to an employee or no reduction in the negotiated minimum wage rate in the collective agreement?

[32] Whether differences in premium rates between employers are relevant in any review of wage rates paid by one employer might be a consideration that distinguishes a wage review under LOU #9 from interest arbitration to resolve a collective bargaining impasse. Whether collective agreement minimum wage rates are open to review might be another consideration.

[33] The collective agreement applies to several employers. The process that can be initiated by either party under LOU #9 appears to address inter-hotel differences among those covered by the Master Agreement at the time it is negotiated and, perhaps, among those subsequently covered if there is a change among the employers covered.

[34] Like the earlier questions, the scope of application of LOU #9 to current or new employers covered by the Master Agreement and other questions are for future consideration in the process.

[35] The immediate question is only the preliminary jurisdictional objection by HIR, which cannot be decided on a basis that presumes answers to questions for future consideration. Unexplored presumptions about the intent, meaning and operation of LOU #9 in this Master Agreement are not germane to the preliminary objection.

[36] Reading LOU #9 as a whole, the process scheme contemplates, in the case of a wage rate review, one party initiating the review and advancing that review ultimately to arbitration. I find it is more harmonious in the context of an adversarial mid-agreement process that can result in a binding decision to read the step progression of the process in a manner that does not allow one party to thwart the right of the other to advance the process by simply refusing to agree to the scope or language of the question(s) to be mediated and possibly arbitrated.

[37] It is more consistent with mid-agreement resolution of disputes that one party may advance its issue through a dispute resolution process despite the objections of the other party.

[38] As the union submits, I find there is a deliberate choice in the use of the words "question" and "matter" in the language of LOU #9 that contemplates there will be situations when the scope of the dispute is to be resolved by the mediator/arbitrator. This is not unilateral determination of the question to be resolved by one party. It will be third party determination after hearing both parties. The union does not assert any right to unilateral determination. It states:

> We add that in this case, given that the parties have not agreed to the wording of the question, this Investigator would first need to attempt to mediate how the question should be worded and then attempt to mediate how to resolve the merits of that question/issue. (*Union Submission Letter*, June 22, 2015, p. 13)

[39] I find the absence of agreement to a question by HIR does not preclude the union from referring the matter under paragraph 8 or deny the selected person named in Letter of Understanding #1 from having jurisdiction under the subsequent steps in the mediation/arbitration process.

[40] I find the matter in dispute referred to mediation/arbitration is what was initiated by the union – a wage review of all bargaining unit employees at the Sheraton Vancouver Airport Hotel.

[41] Case management discussion and directions will address pre-mediation disclosure of particulars and documents to help achieve resolution of the question in a manner that affords both the union and employer a fair hearing.

[42] The union raised and both the union and HIR made submissions on whether the principles of estoppel or good faith collective agreement administration and dispute resolution administration should apply to prevent HIR from making its preliminary objection, which the union characterises as untimely and prejudicial. Because of my decision on the merits of the preliminary objection, it is not necessary to address these submissions.

[43] The preliminary objection is dismissed.

JULY 2, 2015, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey

Appendix – Letter of Understanding #9

between

HOSPITALITY INDUSTRIAL RELATIONS

and

UNITE HERE LOCAL 40

DEPARTMENT/CLASSIFICATION REVIEW

It is understood and agreed the parties will establish a committee to review, over the life of this Agreement, the following:

(1) Banquet Systems/Classifications:

To examine and identify banquet systems and classifications contained within properties in the *H.I.R.* group.

(2) Multi-Departments/Single Departments:

To review situations within the Industry, on a hotel by hotel basis, where currently multi-departments exist when a single department may be more suitable or when a single department exists and multi-departments would be more suitable.

(3) Classifications and Wage Rates in Specific Departments and/or Hotels

This process is designed to allow the parties a fast and reasonable process in which to review the above with a view to reflecting the changes within the Industry and/or a particular property within the Industry.

In the exercise of this process, it is not the intent of the parties to, in any way, harm a Local 40 member or members or in any way restrict the ability of the hotel to operate normally as allowed by the Collective Agreement, nor is it the intent of the parties to eliminate classifications where there is a reasonable possibility the classification will be utilized in the future.

1. This process can only be instigated by the signatories, to this Collective Agreement, i.e. *Hospitality Industrial Relations* and UNITE HERE Local 40. The instigation may be the result of a request from one of the signatories or their principals through the signatories.

2. In cases of review, only one party need initiate the process. In cases of departmental integration, mutual agreement of the parties is required before the process can be submitted to binding arbitration.

3. This process may not be used in addition to Article 11.05. The parties may only utilize one process or the other for any single issue.

4. When the process is initiated as outlined above, a meeting will be held at the earliest possible time between a senior officer designated by Local 40 and a senior officer designated by *H.I.R.* They each may be accompanied and assisted by any other person(s) they deem necessary to assist the process.

5. The parties, as the first order of business, will reduce the question to be decided to writing.

6. The parties will then attempt resolution of the questions by way of direct discussion.

7. Should resolution of the question be achieved, the parties will execute a document outlining the terms and such agreement will bind the parties for the balance of the Collective Agreement which is in force or for such different time as the agreement may specify.

8. Should resolution not be achieved, either party may refer the matter to a person named in Letter of Understanding #1. The Investigators will be selected on a rotating basis with concern to their immediate availability.

9. The person will meet with the parties and will attempt mediation of the question.

10. Should mediation be successful, the person will issue a consent award.

11. Should mediation fail to resolve the question, the person will render a written decision. This decision will be brief and to the point.

12. Any award issued under points 10 or 11 will be binding on the parties.

13. Resolutions reached under this process will not be precedent setting.

14. Each party to the investigation will be responsible for its own costs and will share equally the cost associated with the Investigator