IN THE MATTER OF AN ARBITRATION

UNDER THE *LABOUR RELATIONS CODE*, R.S.B.C. 1996 c. 244

BETWEEN:

LAFARGE CANADA INC.

(the "Employer" or the "Company")

AND:

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, LODGE D385

(the "Union")

(Luis Aguilar – Hours of Work Grievance)

ARBITRATOR:

Randall J. Noonan

APPEARANCES:

Ryan Copeland, for the Employer

Richard Edgar and Natasha Edgar, for the Union

HEARING DATES: March 10, 11, and April 6, 2020

AWARD: April 29, 2020

AWARD

In 1992, the Employer's former Plant Manager, Tom Roberts, wrote a letter. That letter was appended to the collective agreement between the parties. And then it wasn't. The fate of Mr. Roberts' letter is closely tied to the fate of the Union's grievance and the outcome of this arbitration award.

I. INTRODUCTION

1. This arbitration took place over three hearing days. The first two days were carried out in a traditional manner in a meeting room. During those two days, all the evidence was presented. The third day, undertaken during a period of physical distancing because of the COVID-19 virus, was done by way of video conference with counsel and their respective clients participating. The parties presented their arguments on that day.

2. The Union's grievance challenges the Employer's decision to place the Grievor, Mr. Aguilar, into an afternoon 8-hour shift position that commences at 3 pm on some days and 1 pm on others. I used the word "placed" deliberately, as the parties may disagree on the characterization of that placement. The Union sees the placement as being the result of a transfer of the Grievor from his regular "day" shift to the afternoon shift, while the Employer says it may also be seen as an assignment into a vacant position for which there were no applicants. Under either characterization, the Union claims that the placement violates the collective agreement insofar as the placement is to a shift that is not permissible under the language of the agreement.

3. Each party called three witnesses whose evidence, in large part, dealt with past practice and bargaining history. The Grievor was not called by either party.

4. The Union says that past practice and bargaining history show that the creation of a permanent 8-hour shift, other than what is set out for "Day Employees" whose hours of work are 7:00 am to 3:30 pm with a one-half hour unpaid lunch break, is not permissible except in "abnormal" circumstances or with the agreement of the Union. The Employer, on the other hand, argues that the collective agreement, through a combination of management rights and the specific provisions of Articles 4.01(d), 4.05 and 17.01, allow it an unfettered right to establish and fill 8-hour shifts starting at any time for any legitimate business purpose that it may determine.

5. The most significant element to the Employer's case is that it claims that a prior restriction on its right to create new 8-hour shifts and place employees in those shifts was deliberately removed by agreement of the parties and that, since the removal of that restriction, the Employer is free to do what it has done in this case. I say "most significant" because the Employer admits that it could not do what it has done here if the prior restriction had not been removed. That prior restriction was Mr. Roberts' letter.

II. THE COLLECTIVE AGREEMENT

6. The most relevant provisions of the agreement are Articles 2.03, 4.01, 4.05, and 17.01.

7. General management rights are set out in Article 2.03:

> It is the Company's right to operate and manage its business in all respects in accordance with its responsibilities and commitments provided it does not violate the specific Terms and Conditions of the Agreement, and abides by all applicable Provincial and Federal Statutes including the Human Rights Legislation.

8. For hours of work purposes, there are two general categories of employees set out in the collective agreement – "Day Employees" and "Shift Employees." Articles 4.01(a) and (c) set out the work hours and work days per week for Day Employees:

> 4.01 (a) Day Employees' Work Week
>
> The standard work week for day employees shall be forty (40) hours in five (5) consecutive days of eight (8) hours each, Monday to Friday.
>
> (b) For calculation purposes, the week for day employees shall be considered as the seven (7) consecutive days commencing at 00:01 A.M. Monday.
>
> (c) Day Employees' Work Week
> The standard working day for day employees shall be the eight and one-half (8.5) consecutive hours commencing at 7:00 A.M. with one-half (1/2) hour unpaid lunch break.
>
> By mutual agreement with the Union, the regular starting time can be changed from time to time to meet operational requirements.

9. Shift Employees fall into two categories – "continuous" and "non-continuous." Article 4.01(d) and several sub-articles that follow deal with Shift employees:

> (d) Shift Employees' Work Week
>
> The standard work week for employees working continuous shifts shall be in accordance with the Shift Schedule attached to this Agreement, which provides for two (2), twelve (12) hour shifts per day, seven (7) days per week. This schedule shall be effective during the life of the Agreement.
>
> Note: For non-continuous shifts, unless otherwise agreed, shift workers will be assigned to eight (8) hour shifts.
>
> Definition: A non-continuous shift is a shift other than the day shift that does not operate twenty-four (24) hours a day, seven (7) days per week.

(g) Shift Employees' Work Day

The normal shift for continuous shift workers will be 6:00 A.M. to 6:00 P.M. and 6:00 P.M. to 6:00 A.M. This schedule to be effective during the life of this Agreement and may be changed by mutual agreement.

10. Article 4.05(a) deals with shift changes:

> 4.05 (a) All employees shall be given seventy-two (72) hours notice of change of their regularly scheduled hours, including assignment to shift work with confirmation in writing.
>
> When the Company is unable to give the employee(s) the seventy-two (72) hours notice prior to changing their regularly scheduled hours, the employee(s) shall be paid at the rate of double (x2) time **[one (1) hour straight time plus one (1) hour premium time]** for all hours worked during such period of seventy-two hours notice. (bold highlighting in the original)

11. Article 17.01 is a lengthy article that deals with job postings. The most significant part of that article, for the purposes of this matter, is the first paragraph:

> Article 17 – Job Posting
>
> 17.01 When there is a vacancy or a new job created, excluding Labourer, those employees who wish the job shall be considered for the job in order of plant seniority ranking, taking into consideration ability. It is understood that in considering application for Lead-Hand, ability and experience shall be given substantially greater weight and in addition the qualities of leadership will be an important consideration. All vacancies and new jobs created, excluding Labourers, shall be immediately posted seven (7) calendar days on the bulletin boards in order to give any employee an opportunity to make application for such job or jobs. Such application shall be in duplicate, one (1) copy to be sent to the Company and one (1) copy to the Union. In the event that no application is received for job posting, the Company will determine if the junior employee will be assigned or if the position will be filled by hiring a new employee. (emphasis added)

12. The real issue in this case is whether the Employer is entitled, under the Collective Agreement, to establish an 8-hour non-continuous shift or shifts that are for regular, as opposed to abnormal work, and are not necessarily temporary in nature.

III. BACKGROUND

13. The Employer operates a cement production plant in Richmond, B.C. (the "Plant"). As well as production workers, there are several other categories of employees – for example, maintenance, laboratory, stores, and office workers. The Richmond site, which is the only site covered by the Collective Agreement, is far from the only site operated by Lafarge. Among others, it also operates a facility in Kamloops, B.C. which is covered by a different collective agreement.

14. The Plant normally operates 24 hours a day and 7 days a week. Any interruption in production can be very costly.

15. Generally, the normal shifts worked by production workers have been "day" shifts, which run from 7:00 am to 3:30 pm, Monday through Friday, and "continuous" shifts which are 12 hour shifts of two days (6:00 am to 6:00 pm), two nights (6 pm to 6 am) followed by 4 days off. The "continuous" shift workers normally work on one of four shift teams – A, B, C and D – in order to cover the 24/7 operations. There are exceptions to these general hours for specific groups of employees (truck loaders, material handlers and certain maintenance employees) that are specifically dealt with in the collective agreement.

16. There are many times during any given year, however, when there are departures from those hours and from normal production routines. The plant typically goes through two major scheduled maintenance shutdowns each year (there could be more) during which overhauls of the kiln and other machinery take place. There may also be unscheduled production shutdowns from time to time if unexpected

issues arise. Those issues could be mechanical in nature or, in at least one instance, due to faulty limestone supply arriving at the plant. Sometimes issues arise that constitute "emergencies" as that term is defined in the collective agreement:

> Definition of Emergency that applies to all references to 'emergency' within the Collective Agreement. "Any activity that needs to be initiated without undue delay and which will be carried out continuously until completion".

There may also be departures from the norm when new machinery is brought into play and training or special procedures are required to make such new equipment operational. There is also time for "start-ups" to get machinery, including the kiln, back into operation after maintenance shutdowns. For convenience, I will refer to these types of circumstances as "abnormal."

17. What these "abnormal" circumstances have in common is that they are extraneous to the normal production process. During those abnormal times, day employees may be called upon to change shifts, extend their hours or perform functions outside of their normal routine. Under the "Note" in 4.01(d), employees may be assigned to "non-continuous" 8-hour shifts. Again, 4.01(d) offers a definition of a non-continuous shift: "A non-continuous shift is a shift other than a day shift that does not operate twenty-four (24) hours a day, seven (7) days per week."

18. There is some disagreement between the parties as to how shifts are assigned during such abnormal events. Union witnesses believe they are dealt with by having day employees work what is referred to as a 7 and 7 shift. That is, some will start at 7:00 am and work at straight time from 7:00 am until 3:00 pm and then work overtime from 3:00 pm until 7:00 pm, the first two hours at time-and-one-half and the last two hours at double time. The next shift then works from 7:00 pm until 3:00 am at straight time and then at overtime until 7:00 am in an identical manner as the earlier shift. The lunch breaks during those shifts are paid breaks. The Employer, on the other hand, says there are many times when employees' shifts are changed to completely different start times. It has presented a chart showing assigned start

times for various employees, including the Grievor, as being other than 7:00 am or 7:00 pm. It says there are many times when an employee has been assigned to non-continuous 8-hour shifts that start at other times.

19. On one significant point, however, all witnesses agreed. Prior to the matters giving rise to this arbitration, the assignment of employees to 8-hour non-continuous shifts, regardless of start times, has only been used for those types of abnormal circumstances (outside of normal production) discussed above and only on a temporary basis with a clear end-date to that assignment.

20. Shift change assignments are made operational by way of "Shift Change Notices" given to the employees who will be assigned to those non-continuous shifts.

The Disputed Shift (or "Position")

21. In 2019, the Employer's Plant Manager, Pascal Bouchard, determined that it would make sense for the Company to try an afternoon shift for one employee as a heavy machine operator. The shift would be for 8 hours and the plan was to try it out on a temporary basis during the Plant's busy period. This was the first time the Employer had contemplated instituting an afternoon shift that, although originally temporary in nature, could turn into a permanent shift. It was not for an abnormal purpose, but rather normal work would be done by the employee given the position.

22. On July 5, 2019, the Employer posted a position pursuant to Article 17.01 for a "Temporary Production Yard Operator for Afternoon Shift (15:00-23:30 hrs)." The qualification set out in the posting was "Heavy Equipment Operator (HEO)." The start date for the position was July 22, 2019 and no end date was cited. Bidding for the position was to close at 12:00 pm on July 17th. The position was posted as "Interoffice Correspondence" and placed in several locations on the Plant's site including the maintenance shop, the yard and the control room.

23. Mr. Adeem Khan is the Production Engineer at Lafarge. He signed the job posting. Mr. Khan says that the position was posted as temporary because July was a busy period for the Company and a lot of materials are moved then. In discussions between him and Mr. Bouchard, they decided to "give this a try." They were not sure how it would work out.

24. Sometime shortly after the posting went up, Phyllis Van Rhyn, a laboratory technician for the Employer and the Financial Secretary of the Union, approached Mr. Khan and told him that, in the Union's view, it was an improper posting in that there was no afternoon shift contemplated by the collective agreement.

25. The position was not filled and the posting was taken down. The Union thought that was a consequence of Ms. Van Rhyn's entreaty to Mr. Khan. The Employer says that is not the case. It was taken down because there were no applicants for the position. At any rate, the position was not filled within the bidding time set out in the posting. Nothing was done to fill the position until near the end of September 2019. At that time, the Employer determined to assign the Grievor to the position.

26. Mr. Bouchard testified that the posting was unique for a temporary job. He could not remember any other time there had been a posting for a temporary job that did not have an end date.

The Grievor

27. The Grievor, Mr. Luis Aguilar, is a Heavy Equipment Operator. He is involved in moving raw materials into equipment as part of the production of cement. He commenced employment with the Employer in 2017. The offer of employment to him set out the hours of work: "Your hours of work will be 7:00 am to 3:30 pm. This position requires flexibility in hours as some overtime and night shift work will be required and will be scheduled as per the collective agreement."

28. On September 27, 2019, the Grievor was issued a "Shift Change Notification" from the Employer that read, in part:

> "As discussed, you are required to work the following shift: Monday – Thursday 3pm to 11 pm and Friday 1pm to 9pm….This shift will be considered temporary while we look and train a junior Union member and in no way sets precedint for future employees to pick which hours they wish to work. The shift will in the future consist of Monday to Friday 3 pm to 11 pm schedule. This agreement has been made specifically for this one exceptional instance and has been agreed upon by both Luis and Management." [sic]

It is this Shift Change Notice that led to the grievance.

29. Mr. Aguilar began working the afternoon shift as set out in the Shift Change Notice and continues to work on that shift to the present day. The Employer did train a junior union member to take over the shift. However, Mr. Aguilar apparently indicated that he did not want to return to his previous shift and that he preferred to remain on the afternoon shift. The Employer has left him on the afternoon shift as a result. There is no end date set for the afternoon shift work.

30. There is no dispute between the parties that the work Mr. Aguilar performs on the afternoon shift is the same as what he had done on the 7:00 am to 3:30 pm shift. In other words, it is the same work but with a different start time.

31. There is no provision in the Collective Agreement requiring the Employer to provide Shift Change Notices to the Union and it does not do so. The last sentence of the Shift Change Notice indicates that the "agreement" had been made between "both Luis and Management," that is, between the Grievor and Management. To be clear, whatever discussions had taken place or whatever agreements had been reached did not involve the Union. The Union became aware of the Shift Change Notice when an individual member brought it to the Union's attention.

32. Mr. Bouchard testified that the Shift Change Notice was also unique. No other shift change notices had been used in the past to move an employee into a new job.

IV. BARGAINING HISTORY

33. Both parties offered evidence of bargaining history relating to the background of Articles 4.01(d) and 4.05 in particular.

Article 4.05 and the Roberts letter

34. Article 4.05 first appeared in the parties' 1990-1994 collective agreement. The clause was to allow the Employer to assign employees to shifts outside their regularly scheduled hours without incurring high financial costs.

35. Prior to the introduction of Article 4.05, overtime costs arising out of the abnormal situations discussed earlier were prohibitive for the Employer. There was an earlier arbitration between these parties (although the name of the Union was referred to differently) that dealt with a related but different issue. Witnesses for both the Union and the Employer in instant case agreed that the facts as set out in that earlier arbitration were correct. In that earlier arbitration, *Lafarge Canada Inc. v. United Cement, Lime & Gypsum Workers Union, Local 385* (August 6, 1993), (unreported) (Longpré) (hereafter the "Longpré Decision"), the panel described those costs to the Employer:

> Under the terms of the collective agreement that expired in October 31, 1990 the Employer occasionally assigned employees who normally worked day shift to work shift work. This often occurred when there was a maintenance shutdown which required certain members of the maintenance crew to work twelve hour shifts. Generally this occurred for a two or three day period. The collective agreement imposed significant penalties on the Employer in making this change of shift. The example used during the hearing was the case where employees would work twelve hours on Monday, Tuesday, and Wednesday night; for each twelve hour shift they received 32 hours pay. Thursday they were returned to day shift for which they received eight hours pay although they would not work. Friday they resumed their normal work day on day shift.

36. Negotiations for the contract that became the 1990-1994 collective agreement commenced in 1991. Those contract negotiations broke down and that led to a lengthy strike. Arbitrator Longpré went on to discuss that series of events:

> Negotiations for a renewal collective agreement began in 1991. The Employer proposed a number of concessionary demands. Some of those proposals addressed the elimination of the cost incurred when day workers were temporarily transferred to night shift. Negotiations continued until April 1991 when the Union went out on strike. The strike continued until March, 1992. The final settlement significantly reduced the cost of transferring the day worker to night shift. For the Monday and Tuesday twelve hour shift the employee receives fourteen hours pay. For Wednesday's shift the employee receives sixteen hours pay. As a result of this reduction in costs, the Employer now continues to schedule the employees on night shift until Friday. The employee is then returned to day shift the following week. Working the employee the entire week is at the core of this grievance.

37. The Union contended that employees should be returned to the day shift immediately after the work that spurred the shift change was completed and not be kept on the altered night shift for the remainder of the week. The arbitration award denied the Union's grievance and found that it was not a violation of the collective agreement to leave the day employees on the night shift for the remainder of the week. Although the issue in the Longpré Decision was somewhat different from that in the instant case, some of the conclusions reached and comments made in that case are relevant to the issues here, as will become apparent.

38. Article 4.05 arose during the 1991 negotiations and it is that clause that permitted the Employer to move day shift employees to shift work upon providing the notice set out in the article.

39. Rob Lauzon testified on behalf of the Union. He was president of the Union local from 1989 to 1994 and then became Business Manager of the Union District until

2010. He went on to become an International Representative of the Union until his retirement in 2017, after which time he continued to act as a consultant. He was a negotiator for the Union from 1990 through 2010. He testified that during the negotiations in relation to Article 4.05, the Company never suggested that it could change day employees to different hours of work for anything other than abnormal events.

40. Mr. Lauzon testified that, while the Union agreed to the new Article 4.05, it did so based on representations that were made to it during the negotiations that the clause was intended for use only during abnormal situations and would not allow for the permanent transfer of day work to shift work. To provide assurance to it, the Union sought written confirmation of that background to the agreement. In response, Tom Roberts, who was then Plant Manager, wrote a letter addressed to the local confirming the Union's understanding. That letter (the "Roberts letter") reads as follows:

> March 23, 1992
>
> TO: Local D385
> FROM: Tom Roberts, Plant Manager
> Re: Clause 4.05 of New Collective Agreement
>
> Clause 4.05 of the new Collective Agreement provides in its entirety as follows:
>
> > Day employees, excluding those who are posted spares, shall be given seventy-two (72) hours notice of change of their regularly scheduled hours, including assignment and [sic] shift work.
> >
> > When the Company is unable to give employee(s) the seventy-two (72) hours notice prior to changing their regularly scheduled hours, the employee(s) shall be paid at the rate of double time for all hours worked during such period of the seventy-two (72) hours notice.

> Day employee(s) whose regularly scheduled hours are changed due to planned kiln and related equipment shutdowns (4 per year), will be given ninety-six (96) hours notice prior to such change.
>
> When the Company is unable to give employee(s) the ninety-six (96) hours notice prior to changing their regularly scheduled hours, the employee(s) shall be paid at the rate of double time for all hours worked during such period of the ninety-six (96) hours notice.
>
> The purpose of this letter is to confirm representations made by the Company to the Union during negotiations regarding the intent of these amendments. Specifically, the seventy-two hours notice is designed to allow the Company the flexibility of addressing emergency or abnormal operating requirements without incurring substantial penalties. It is not intended that this Clause will be used to allow for the permanent transfer of day work to shift work, nor is it intended to transform permanent day workers to permanent shift workers.
>
> I trust that the foregoing accurately reflects what was agreed to during negotiations, and that you will advise me immediately should the Union have any contrary understanding.
>
> Yours truly,
>
> Tom Roberts,
> Plant Manager

41. The Roberts letter was appended to the collective agreement and remained so until 2000.

42. By the time of negotiations that led to the 2000-2004 collective agreement, Mr. Roberts was no longer the Plant Manager. Mr. Lauzon testified that Mr. Roberts was viewed very unfavourably by the Union. When Mr. Roberts was no longer around, the Union wanted to delete his letter of 1992 because they wanted no reference to him in the collective agreement. The Union therefore brought a

proposal forward in 2000 to remove the Roberts letter as an appendage to the collective agreement. According to Mr. Lauzon, the Union did not intend to alter the meaning of Article 4.05 in any way or to allow for a broader application than had been previously agreed to. The sole purpose in proposing the change was to remove the reference to Mr. Roberts in the collective agreement. The practice under the language from 1992 through 2000 had been consistent with the representations made in 1992 and Mr. Lauzon didn't think the letter needed to be there anymore.

43. The Employer entered bargaining notes from the 2000 negotiations. In relation to removal of the Roberts letter, they are brief.

> Steve [Brooks]: I believe this [the Roberts letter] went in at the request of the union. The concern at the time was that we would schedule people all over the place. Intent of the letter is to address issues at any given time. My interpretation is that it is restrictive to management. Want to be clear that you are not reading something else into it.
>
> Rob [Lauzon]: No. Just to clean up the contract (i.e. Refer to Tom Roberts). Intended just to prevent putting people on shift all the time which costs you money and you won't do that anyway.
>
> Steve: On that basis, I agree.

44. Steve Brooks was the lead negotiator for the Employer in 2000, 2004 and 2008. He had been involved in negotiations before 2000, including those in 1991, but not as lead negotiator. In discussing the Union's proposal to remove the Roberts letter, he testified that the bargaining notes were a better reflection of what was said than his current memory. He testified that beyond what is in the notes, there was no discussion as to why the Union wanted to remove the Roberts letter. Nevertheless, he viewed the removal of the letter from the collective agreement as being the removal of a restriction on management rights. In short, he saw the removal as clearing the way for the use of Article 4.05 to assign shifts outside of the restrictions referred to in the Roberts letter.

45. Two changes were made to Article 4.05 in 2004. The article was amended so that the shift change notices would be required for "all" employees as opposed to the earlier "day" employees, and the required notice had to be confirmed in writing. Those changes do not impact on the outcome of this case.

Article 4.01(d)

46. This article, which deals with hours of work and the work week for Shift Employees, has been in place since the 1990 collective agreement. However, a significant change was made in 2004 when the "Note" was added. That change was pursuant to a Company proposal. It reads:

> Note: For non-continuous shifts, unless otherwise agreed, shift workers will be assigned to 8 hour shifts.

47. In 2008, Article 4.01(d) was modified again by the addition of the definition of "non-continuous":

> Definition: A non-continuous shift is a shift other than day shift that does not operate twenty-four (24) hours a day, seven (7) days per week.

48. Steve Brooks testified that management's concern in bringing forward the 2004 proposal to add the Note was that, outside of Day Employees, only 12-hour shifts were referenced in the collective agreement. Employees had been assigned to 8-hour shifts but the practice of doing so was confusing. When asked whether the Employer had made any representations as to how that clause would apply, Mr. Brooks said that the only example he gave was to maintain the current practice and give people guidance in the future as to why 8-hour shifts would be used. He went on to say that there was not a lot of discussion around its use. Although it never came up that the Employer would not use it for other purposes, he said that it was well understood by both sides that it would be for maintenance and shutdown purposes. He testified that he did not say it would not be used for other purposes but said that there was no reason that would have come up.

49. Mr. Lauzon also testified about the addition of the Note. He similarly said that the Note reflected what was already happening. He did not see it as a substantive change to the practice of assigning shift changes or the purposes for which shift changes would be made.

50. Regarding the 2008 addition of the definition of non-continuous shifts, both Mr. Brooks and Mr. Lauzon testified that it was put in primarily to provide guidance to both Union and Employer personnel in the future. They both understood how it worked, but they were concerned that after they were no longer doing the bargaining, it might not be so clear to others. They therefore decided that inserting the definition made sense.

V. PAST PRACTICE

51. The parties each provided evidence of past practice but came to different conclusions as to its significance.

52. For the Union, Mr. Lauzon testified that, without exception, the Employer had never instituted shift changes or alternate start times of shifts without seeking mutual agreement of the Union except for abnormal or emergency events.

53. The main point of factual contention between the parties was around the assignment of shift changes during abnormal times. In the Union's view, as testified to by all of its witnesses, the abnormal circumstances would be dealt with by the 7 and 7 shift method. That is, again, having some employees start at 7:00 am, working straight time until 3:00 pm, time-and-one-half until 5:00 pm and then double time until 7:00 pm. At that point a night shift would take over and work the mirror image schedule until 7:00 am the next day.

54. The Employer disagreed with that view. Its witnesses testified that there were many times when day employees were changed to non-continuous 8-hour shifts that

started at times other than 7:00 am. It introduced a chart that shows there were many shifts that had started at 3:00 pm and 5:00 pm.

55. All witnesses agreed, however, that whatever the start time of alternate shifts, in the past they had only been used for abnormal events and not for the purpose of moving an employee into a new permanent job.

The Kamloops Agreement

56. Mr. Brooks testified that both he and Mr. Lauzon were also the lead negotiators for the collective agreement covering a different local of the Union at Lafarge's Kamloops facility. The Kamloops collective agreement was entered into evidence. It shows a different approach to hours of work in that it sets out some very specific times for shift employees to start 8-hour shifts.

57. During the hearing, counsel for the Union objected to the admission of the Kamloops agreement on the basis of relevance. The Employer argued that it is relevant in that it shows that the same negotiators knew how to specify shift times other a standard 7:00 am start if they wanted to restrict the Employer's ability to start shifts at any time of the Employer's choosing. I determined to admit the Kamloops agreement subject, of course, to weight it would be given.

58. When asked about the Kamloops collective agreement, Mr. Lauzon testified that the Union did not see the need for language in the Richmond agreement that mirrored that of the Kamloops agreement. He testified that there were different circumstances in Kamloops and that there was not the same history and past practice as there is in Richmond.

59. The Employer did not pursue the Kamloops agreement in closing argument. At any rate, I find that the Kamloops agreement is of no assistance in determining the mutual intent of the parties to the Richmond agreement. The background against

which it was bargained is different from that of the Richmond agreement and there could be myriad reasons for that.

VI. THE UNION'S ARGUMENTS

60. The Union claims that this matter can be determined by reference alone to Articles 4.01 (a) and (c) dealing with Day Employees. Under 4.01(a), the standard work week for Day Employees is defined as 40 hours Monday through Friday. Under 4.01(c), the standard day for Day Employees is defined as being eight and a half hours starting at 7:00 am and having a one-half hour unpaid lunch break.

61. Article 4.01(c) goes on to contemplate that there can be different regular start times to accommodate operational requirements, but, the Union claims, such changes require mutual agreement of the Union.

62. In this case, says the Union, the Employer changed the start time of the Grievor, a Day Employee, from 7:00 am to 3:00 pm on Mondays through Thursdays and to 1:00 pm on Fridays to meet an operational requirement. It did not have the mutual agreement of the Union and it has, therefore, violated the collective agreement.

63. The Union says that this case is a "trial balloon," that is, an attempt by the Employer to circumvent the mutual agreement requirement of 4.01(c) and to avoid overtime costs. If the Employer could not get all that needed to be done during the day shift, it had two options: it could call a Day Employee into an afternoon shift on overtime (either a call out or by offering optional overtime), or it could obtain agreement of the Union.

64. The Union argues that the position to which the Grievor was assigned is not a temporary position. There is no end date to the assignment and it has all the indicia of being permanent notwithstanding that it first appeared as a temporary posting. See *Re ADT Security Systems Inc. and IBEW, Local 213*, [2015] CarswellBC 3527 (McPhillips).

65. The Union argues that the Employer is using an artificial linguistic interpretation and ignoring decades of past practice to obtain a benefit it did not obtain in bargaining.

66. In relation to the Roberts letter, the Union says that it made clear the intention of Article 4.05. It was agreed that that clause was not to be used to change shifts for other than emergency maintenance or abnormal operating requirements and that the clause would not allow for the permanent transfer of day work to shift work nor transform day workers into shift workers.

67. The Union goes on to say that the fact that the Roberts letter was removed as an attachment to the collective agreement at the Union's behest did not in any way change the meaning or purpose of Article 4.05 or otherwise affect the legal rights of the parties. The letter continues to exist and is clear extrinsic evidence as to the meaning of the language of 4.05.

68. In relation to the Note in Article 4.01(d), the Union claims that it was intended to enshrine an existing practice to continue to use shift changes in limited circumstances. It in no way takes away the rights set out in Articles 4.01(a) and (c).

69. In relation to past practice, the Union says that it supports its case. It is clear, says the Union, that shift changes were never used to do what was done in this case. There is a decades-long trail of past practice during which shift changes were used only for abnormal or emergency situations and only for temporary defined periods of time.

70. Regarding the chart produced by the Employer showing shift time starts (in abnormal circumstances) at other than 7:00 am, the Union states that no acceptance of that practice can be attributed to it because the Union was never given notices of those shift changes and was unaware of them. Besides, even though it appears that there are several hundreds of such shift changes reflected on the chart, that number still represents a tiny fraction of the total number of shifts worked, so whatever

evidence of past practice the chart shows should be disregarded. In other words, the Union claims that the preponderance of past practice supports its interpretation and that the relatively small number of exceptions, which were unknown to the Union, should not be taken to reduce the significance of that preponderance of practice.

71. Mr. Bouchard testified that he considered that he appointed the Grievor to the afternoon shift position pursuant to article 17.01, that is, as a new position for which there were no applicants and to which the Company appointed the Grievor as the junior employee with the necessary qualifications. However, argues the Union, that position was not raised by the Employer either in its opening or in its particulars. This, argues the Union, shows a "desperation" to the Employer's arguments. Further, the Union claims, the appointment of the Grievor had none of the indicators of it having been done pursuant to 17.01. There was no mention of 17.01 in the Shift Change Notice, the position was not filled within seven days as required by 17.01 and the Union was not notified of the successful candidate.

72. The Union argues that the position to which the Grievor was assigned was not a new job as contemplated by Article 17.01. It says that a new job means more than just the same work with a different start time. Here the Grievor was assigned to do exactly the same work he performed as a Day Employee, just at a new time.

73. The Union raised an alternative argument and says that if it is not correct in its position that the shift change is not permissible under the strict terms of the Collective Agreement, that the past practice of the Employer and the representations made at the bargaining table and reflected in the Roberts letter raise an estoppel against the Employer.

VII. THE EMPLOYER'S ARGUMENTS

74. The Employer says that this grievance concerns the Employer's assignment of the Grievor from his regular 8 hour, Monday to Friday shift schedule to an afternoon shift, also of 8 hours duration and also Monday through Friday.

75. Key to the Employer's argument is that the Note in article 4.01(d) entitles the Employer to create an afternoon shift. Indeed, it says, there is no restriction on when an 8-hour non-continuous shift can start.

76. The Employer says it made no explicit representation in 2004 or at any time since that the Employer would not use 4.01(d) to create different 8-hour shifts.

77. Article 4.01(c) provides that the standard workday for a Day Employee is an 8-hour shift commencing at 7:00 am and that the start time can only be changed by mutual agreement. The Employer claims that this means that it would need the Union's agreement to, for example, change the day shift to a 6:00 am start time. But it says that is not what occurred here. In this case, the Employer says, it created an afternoon shift to respond to its operational needs.

78. The Employer acknowledges that it is true that the Roberts letter restricted its ability to create alternate 8-hour shifts to be used for other than emergency or abnormal purposes on a temporary basis. However, it claims that when the letter was removed from the collective agreement in 2000, the letter ceased to have effect. With the Roberts letter gone, the Employer says that it was unencumbered by the restrictions set out in the letter and is therefore free to do what it did in this case. It claims that without the Roberts letter, the Collective Agreement gives the Employer the unfettered right to transfer employees to shift work with appropriate notice.

79. The Employer argues that it is clear from the words Mr. Lauzon used at the bargaining table in 2000 that the Union understood that removing the Roberts letter from the collective agreement eliminated a restriction on management rights:

> Steve: I believe this went in at the request of the union. The concern at the time was that we would schedule people all over the place. Intent of the letter is to address issues at any given time. My interpretation is that it is restrictive to management. Want to be clear you are not reading something else into it.
>
> Rob: No. Just want to clean up the contract (i.e. Refer to Tom Roberts). Intended just to prevent putting people on shift all the

> time which costs you money and you won't do that anyway.
> (emphasis added)

80. The Employer's bargaining notes indicate that Mr. Lauzon said "you *won't* do anyway." The Employers says that if Mr. Lauzon thought the Employer did not have the right to do it, he would have said "you *can't* do anyway." The use of the word "won't" shows that Mr. Lauzon was taking a gamble that, with the removal of the Roberts letter, the Employer would not exercise its unrestricted right to use shift changes as it sees fit. He lost that gamble.

81. The Employer goes on to argue that, under the collective agreement, letters of understanding are renewed periodically and if they are not renewed, they are removed and are of no further force and effect. The removal of the Roberts letter means that it has no further force and effect.

82. The Employer points out that Roberts letter did not mention Article 17.01. Therefore, it claims, that even if the letter did continue to have some force, it would not prevent the appointment of an employee to a vacant position under 17.01.

83. In relation to past practice, the Employer says that the fact that the language has never been used to create or fill a position other than in abnormal circumstances cannot be an indication of past practice that is helpful to the Union. There has just never been another time when the Employer decided that it needed an ongoing afternoon shift. In other words, the circumstance has not arisen before. The practice between 1992-2000 is not helpful because it took place when the Roberts letter had effect. When there is a significant change to the collective agreement, the practice before the change does not inform the practice after it: *Toronto Transit Commission and ATU,* [1999] O.L.A.A. No. 154 (Davie); and *Northwest Territories and the Union of Norther Workers* (1997), 65 L.A.C. (4th) 211 (Hope).

84. However, argues the Employer, past practice can be used to show that the Union accepted that employees can be assigned to 8-hour shifts that start at times other than 7:00 am. Although the Shift Change Notices are not copied to the Union, the

fact that there are so many of them indicates that the Union should have known: see *Teck Metals Ltd. (Trail Operations) v. United Steelworkers, Local 480 (Special Assignments Policy Grievance),* [2013] B.C.C.A.A.A. No. 126 (McPhillips).

85. The Employer asserts that the Union has had many opportunities to seek clarification that the Employer would not use Articles 4.01(d), 4.05, and 17.01 to create 8-hour shifts that do not start at 7:00 am. It never sought such clarification so it cannot now claim there is such a restriction. When a union does not make inquiries about the meaning of language bargained, that fact can be relevant to the outcome of the grievance: *Robert Q. Airbus Inc. v. Teamsters Local Union No. 879 (Benefit Plan Grievance),* [2019] O.L.A.A. No. 440 (White).

86. Given the removal of the restrictions contained in the Roberts letter and the subsequent use of Article 4.01(d) to assign employees to 8-hour shifts that start at other than 7:00 am, the Employer argues that it is not restricted in the use of Articles 4.01(d), 4.05 and 17.01 from creating and filling a new afternoon shift. It can rely on its management rights: Brown & Beatty, Canadian Labour Arbitration, 5th Edition, paragraph 4:2310; *Bell Canada v. Communications, Energy and Paperworkers Union of Canada (Advance Technical Services Unit Contracting Out Grievances),* [2011] C.L.A.D. No. 131 (M. Picher).

87. Article 17.01 is a specific provision allowing the Employer to create and fill new positions. As a specific provision, argues the Employer, it takes precedence over other more general collective agreement provisions: *Health Employers Assn. of British Columbia v. Hospital Employees' Union (Muir Grievance),* [2016] B.C.C.A.A.A. No. 22 (McPhillips).

88. The Employer says that the elements of estoppel do not exist on the facts. The instant case is the first time that the Employer attempted to create an afternoon shift through the posting language of Article 17.01. It never waived its right to do so either through representation or action. Since the Roberts letter was removed, the Employer never waived the right to move day workers to shift work. The Employer

provided several cases that discuss the elements of estoppel: *Oceanview Development Service Corp. International (Canada) ULC v. Construction and Specialized Workers' Union, Local 1611 (Hours Worked Grievance),* [2014] B.C.A.A.A. No. 33 (Nichols); *Fording Coal Ltd. v. USW Local 7884,* [2002] B.C.C.A.A.A. No. 205 (Lanyon); *Surrey School District No. 36 v. CUPE, Local 728,* [1998] B.C.C.A.A.A. No. 268 (McEwen).

VIII. ANALYSIS

89. Collective agreements are, by their very nature, imperfect instruments. They are typically bargained under pressure by parties who share certain understandings of their unique workplaces and practices. Parties often bargain language which is designed to deal with the circumstances they have in mind at the time it is bargained without full consideration of how that language may apply in somewhat different circumstances. The result may be that the negotiated language may be clear and precise in relation to the circumstances contemplated at the bargaining table, but less so when applied to other circumstances.

90. Given that, it is the arbitrator's job to determine the mutual intention of the parties and apply that intention to the circumstances at hand. Much has been written as to how that mutual intention is determined. See, for example, the myriad cases cited in Brown & Beatty, *Canadian Labour Arbitration,* Canada Law Book, Fifth Edition, para 4:2100.

91. In determining the mutual intention of the parties, the guidance set out in *Pacific Press v. G.C.I.U., Local 25-C,* [1995] B.C.C.A.A.A. No. 637 (Bird) is often cited:

    1. The object of interpretation is to discover the mutual intention of the parties.

    2. The primary resource for an interpretation is the collective agreement.

3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.

4. Extrinsic evidence may clarify but not contradict the collective agreement.

5. A very important promise is likely to be clearly and unequivocally expressed.

6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.

7. All clauses and words in a collective agreement should be given meaning, if possible.

8. Where an agreement uses different words, one presumes the parties intended different meanings.

9. Ordinary words in a collective agreement should be given their plain meaning.

10. Parties are presumed to know about relevant jurisprudence.

92. In discerning the intention of the parties, it is expected that they "meant what they said" in converting their agreement to writing. As Arbitrator McPhillips stated in *BC Hydro and Power Authority v. International Brotherhood of Electrical Workers, Local 258 (Wage Adjustment Grievance)*, [2018] B.C.C.A.A.A. No. 83:

> 59. A number of rules set out by Arbitrator Bird in *Pacific Press, supra*, have particular application to the present circumstances. The first of them is that the primary source for determining the intention of the parties is the actual terms they chose to insert into their agreement. In that respect, it is to be expected that the parties put their minds to the issue and meant what they said in converting their agreement to writing: *University of British Columbia and CUPE*, [1996] B.C.L.R.B.D. No. 42; *Brown and Beatty, supra; Insurance Corporation of British Columbia, supra; Rosewood Manor*, 15 L.A.C. (4th) 395 (Greyell); *Victoria Times Colonist*, 203 L.A.C. (4th) 297 (Germaine); *Western Forest Products Inc.*, [2012] B.C.C.A.A.A.

> No. 42 (McPhillips); *Cariboo Pulp & Paper Co.*, [2012] B.C.C.A.A.A. No. 49 (McPhillips); *Lakeland Mills Ltd.*, [2012] B.C.C.A.A.A. No. 19 (Lanyon); *Howden & Parsons*, [1970] C.L.A.D. No. 18 (Weiler).

93. However, with that in mind, the key to extrinsic evidence referred to in points three and four of the *Pacific Press* list is that it may disclose a meaning that expands or narrows the scope of what might otherwise appear to be the case as reflected in the language agreed to by the parties to express their agreement. That is particularly so when such evidence clearly shows what was in the minds of the negotiators when the language was bargained. In *University of British Columbia v. C.U.P.E., Local 116*, [1976] B.C.L.R.B.D. No. 42, a panel of the B.C. Labour Relations Board, chaired by Paul Weiler, discussed why extrinsic evidence is often crucial in discovering the mutual intention of the parties:

> 14. Secondly, it is important in industrial relations that the arbitrator decipher the *actual* intent of the parties lurking behind the language which they used: and not rely on the assumption that the parties intended the "natural" or "plain" meaning of their language considered from an external point of view. An employer and a trade-union don't simply negotiate about an isolated transaction and then go their separate ways. They have to live together for a long time and resolve a great many problems which will arise over the course of their relationship. Suppose the parties do have a clear understanding about the bargain they have reached, but use language which poorly expresses their intended meaning: what will happen if a rule of law prevents the aggrieved party from establishing that intent? The likely result is an atmosphere of distrust between the parties and a potential for future industrial unrest, either during the contract term or at negotiations for its next renewal.
>
> 18. The parties do not draft their formal contract as a purely literary exercise. They use this instrument to express the real-life bargain arrived at in their negotiations. <u>When a dispute arises later on, an arbitrator will reach the true substantive merit of the parties' positions under their agreement only if his interpretation is in accord with their expectations when they reached that agreement</u>. Accordingly, in any case in which there is a *bona fide* doubt about the proper meaning of the language in the agreement – and the

> experience of arbitrators is that such cases are quite common – arbitrators must have available to them a broad range of evidence about the meaning which was mutually intended by the negotiators. (emphasis added)

94. This issue was further discussed in *Re Burnaby (District)*, [1978] B.C.L.R.B.D. No. 19 (Weiler) at the bottom of page 3:

> Too often the so-called "plain meaning" of the words used in a contract is really the superficial meaning, the one which automatically springs to mind when the words are read casually and from an external point of view…And in the final analysis, the objective of an arbitration board in resolving that doubt is to select the meaning which actually was intended by both of these parties in their concrete setting: not to make a judgment about which is the more obvious construction of the language when it is read in the abstract.

95. Past practice, particularly when combined with bargaining history, will often be useful in deciphering the meaning which was actually intended. In *Coast Hotels Ltd. v. Hotel, Restaurant and Culinary Employees and Bartenders Union, Local 40,* [1995] B.C.C.A.A.A. No. 296 (Chertkow), the panel said this:

> 48. Firstly, we do not agree with the contention of the union that the language of article 14.02 is so clear and unequivocal that it must be construed in the manner suggested by it. To the contrary, we are of the view that the language is reasonably capable of being interpreted either as the union claims or as the employer asserts. Thus, extrinsic evidence of past practice and bargaining history can and ought to be canvassed by this board if such evidence assists us in arriving at our conclusions as to the mutual intent of the parties with respect to that provision.
>
> 50. Having said all of that, upon a close analysis of the evidence of the employer's unwavering, consistent and unchallenged past practice going back at least until 1985 (and in all likelihood for some years prior thereto when three of the four properties in question were part of the Delta Hotel chain), that evidence is persuasive of the mutual intent of the parties to this collective agreement. Nor is this a case of only limited evidence of past

> practice which was rejected in the *Hawker-Siddeley* case cited by the union. The past practice here is for a significant number of years. It has been unchallenged by the union until the filing of the policy grievance, the subject of these proceedings. So too, this is not a case like the Port Mellon decision cited by Mr. Honcharuk, where the board found there was no evidentiary foundation that informed union officials were aware of the employer's practice.

96. It is now settled law in labour arbitrations that there is no special onus on either party to show that its interpretation is the correct one. Arbitrator John Hall discussed this point in *Catalyst Paper (Elk Falls Mill) v. C.E.P., Local 1123,* [2012] B.C.C.A.A.A. No. 73 at paragraph 25:

> 25. The notion that a party has a special onus or burden to establish its interpretation of a collective agreement has been overtaken by subsequent authorities in this Province. Most (and perhaps all) of the leading arbitrators who once espoused that approach have expressly charted a different course. See, for instance, *Pope and Talbot -and- CEP, Local 1092,* [2006] BCCAAA No. 224 (Hope) at paragraph 92. The current state of the law is exemplified by *The Board of Education of School District No. 36 (Surrey/BCPSEA) and BCTF/Surrey Teachers Association (March 6, 2009),* unreported (Korbin):
>
> > With respect to the Employer's reliance on the *Wire Rope* and *Noranda* line of cases, arbitrators have not, in recent history, strictly adhered to the notion that the Union bears any additional onus or burden in cases such as this. It is my view that as this is a matter of interpretation, my role is to find the mutual intention of the parties within the competing interpretations put forward by the parties, in such an analysis, neither party bears any special onus of proof.

97. With these principles in mind, I will apply them to the Collective Agreement.

Article 4.05 and The Roberts Letter

98. The Employer says that article 4.05 provides it with an unfettered right to change the shifts of employees upon giving appropriate notice. I will discuss later why that interpretation does not comfortably fit with a harmonious reading of other Collective Agreement provisions dealing with shift changes.

99. The Employer in this case has candidly conceded that it could not have done what it did if the Roberts letter still had application. I agree with the Employer's acknowledgment. The Roberts letter is clear that the language of 4.05 was to have a restricted use. For ease of reference, I repeat the key parts of that letter:

> Specifically, the seventy-two (72) hours notice is designed to allow the Company the flexibility of addressing emergency maintenance and abnormal operating requirements without incurring substantial penalties. It is not intended that this Clause will be used to allow for the permanent transfer of day work to shift work, nor is it intended to transform permanent day workers to permanent shift workers.

100. The Employer says, however, that the Roberts letter was removed from the collective agreement in 2000 and thereafter is of no force and effect. The Employer points out that letters of understanding are reviewed and incorporated into the next collective agreement and that if they are not incorporated, they cease to have effect. It claims that the removal of the Roberts letter from the collective agreement has freed the Employer from the constraints set out in the letter.

101. Again, the task of an arbitrator is to discern the mutual intention of the parties. The question then is whether, when the Union proposed removing the letter as an appendage to the collective agreement and the Employer so agreed, was it the mutual intention of the parties to alter the effect of Article 4.05?

102. The Employer says it was. It points to the fairly minimal bargaining notes from the 2000 round of bargaining. Those notes reflect that the proposal for the removal of the letter was a Union proposal. The Union said it was "*Just to clean up the contract (i.e. Refer to Tom Roberts). Intended just to prevent putting people on shift all the time which costs you money and you* ***won't*** *do that anyway"* (emphasis added). Mr. Lauzon did not say "you ***can't*** do that anyway," which the Employer claims he could have said.

103. The Employer invites me to find that the use of those words by Mr. Lauzon was an acknowledgement that the Union understood it was removing the restrictions on the use of Article 4.05 for other than abnormal circumstances. If he had used the word "can't" instead of "won't," that would have indicated Mr. Lauzon's understanding that the restrictions were still in place. Instead, argues the Employer, when he used the word "won't," it showed that he was acknowledging that the restrictions were removed and that he was "gambling" that the Employer would not rely on Article 4:05 to assign employees to different shifts. The Employer argues that that was just a bad bet by the Union.

104. In my view, the Employer is reading too much into the use of the word "won't" instead of "can't." I find that the discussion reflected in the notes does not show a clear intention to remove restrictions.

105. In reaching that conclusion, I start with the inherent unlikelihood that the Union would bring forward a proposal that would significantly diminish its members' rights and remove the restriction on management of transferring employee shifts except for emergency or abnormal circumstances. There was no *quid pro quo* - nothing in the way of a bargain that would have induced the Union to give up a significant right. There was no proposal from the Employer indicating that it needed such restriction removed. There was no discussion that clearly reflected that the Union intended, by the removal of the letter from the collective agreement, to change the legal relations of the parties. When asked by Mr. Brooks about the

intention of the Union, the first sentence of Mr. Lauzon's response reflects the intention, "Just to clean up the contract (i.e. Refer to Tom Roberts)." I do not think one can take the use of the word "won't" instead of "can't" (assuming that the notes are an accurate verbatim reflection of the exchange) as negating what the stated purpose of the removal was - merely to "clean up the contract."

106. There is, however, an even more fundamental issue in relation to the removal of the Roberts letter from the collective agreement that negates the interpretation suggested by the Employer. That is the status of the letter.

107. The Union referred to authorities under which letters of understanding were removed from collective agreements. The Union referred to *British Columbia (Workers Compensation Board) and CEU (Presidents Salary),* [2014] B.C.C.A.A.A. No. 113 in which Arbitrator Burke (as she then was) found that removal of a letter of understanding was more a matter of "optics" than of substantial change. It also referred to *BCTF and CEP Local 464*, [2008] B.C.C.A.A.A. No. 54 (Dorsey), and to *Molson Coors v. N.U.P.G.E.* (2010), 104 C.L.A.S. 49 (Tacon). The Employer distinguished each of those cases in its argument. Given my views on the status of the Roberts letter, I do not find it necessary to deal with those authorities.

108. The Roberts letter was a unilateral document. That is to say, it was authored and signed by the Employer. It was not headed "Letter of Understanding" although there are many letters of understanding in the collective agreement and each of them bear that heading. It was not jointly signed by the Employer and the Union, as are the letters of understanding found in the collective agreement. In my view, the Roberts letter, as a unilateral Employer document, did not bestow and could not withdraw rights that exist under the terms of the collective agreement, in particular, under 4.05. Nor did purport to do so. Rather, the gist of the letter is that it confirms representations that were made at the bargaining table when the language was negotiated and confirms the intention of the clause – it is for flexibility in addressing

emergency or abnormal circumstances and not to be used for the permanent transfer of day work to shift work.

109. What the Roberts letter confirms is the purpose of the shift change provisions of article 4.05. The representations made and understandings reached at the bargaining table existed before and after the Roberts letter. It merely confirmed them. If the letter had just been written to the Union and never appended to the collective agreement, it still would have been evidence of the mutual intention of Article 4.05. If it had never been written at all, Mr. Roberts could have been called to testify at any proceeding in relation to what was said at the bargaining table. The Union could have given evidence of what Mr. Roberts said at the bargaining table. In any of those circumstances, it is not what Mr. Roberts said in a letter or in hypothetical testimony that would be the source of rights set out in the Collective Agreement. Rather, his letter or testimony would be, as it is in the circumstances of this case, extrinsic evidence of the mutual intention of the parties in relation to the meaning of Article 4.05. It is extremely persuasive extrinsic evidence regarding the intent and purpose of the provision. Its removal does not alter that intent absent equally compelling evidence that the parties intended to alter their bargain.

110. The life of the Roberts letter as an appendage to the collective agreement may be over. However, like Hamlet's father, its spirit lingers and affects the parties to this day. Article 4.05 cannot be relied upon by the Employer as providing it an unfettered right to permanently transfer day work to shift work or to transform permanent day workers to permanent shift workers. I find that the mutual intention of the parties was not changed when the letter was removed.

<u>The Operation of the Collective Agreement</u>

111. Even in the absence of the Roberts letter, however, my conclusion regarding Article 4.05, when read in conjunction with Articles 4.01(c), 4.01(d) and 17.01, would be the same.

112. The question in relation to the interpretation of the Collective Agreement boils down to this – given its management rights and using the language of Article 4.01(d), combined with the right to implement shift changes set out in Article 4.05 and the right to create and fill positions under Article 17.01, can the Employer, without mutual agreement of the Union, create and fill an 8-hour non-continuous shift at any time of its choosing as a regular standard shift, that is, not just for abnormal work situations? I find that the Employer cannot do so for these reasons.

Article 4.01(d)

113. Articles 4.01(a) and (c) set out the work week and hours of work for Day Employees while 4.01(d) does the same for Shift Employees. Given the Note in 4.01(d), it is clear that shift workers can be on 12-hour "continuous" shifts or 8-hour "non-continuous" shifts.

114. The Grievor, according to the Employer, is now no longer a Day Employee but rather is a Shift Employee working a non-continuous 8-hour shift that starts in the afternoon. It relies on the definition at the end of 4.01(d) which states, "A non-continuous shift is a shift other than day shift that does not operate twenty-four (24) hours a day, seven days a week." By that reckoning, the Grievor cannot be a Day Employee because a Day Employee, by definition, starts at 7:00 am.

115. I agree with the Employer that, on its face, the Note in Article 4.01(d) would appear to provide it with the unfettered right it claims. That is particularly so when it is combined with the right to change shifts set out in Article 4.05. Neither of those clauses cite any restrictions on the Employer's right to assign or change "non-continuous" shifts. However, when read with Article 4.01(c) and when understood in the light of extrinsic evidence both of bargaining history and past practice, it is apparent that while this "plain reading" may be, as Chairperson Weiler noted in *Re Burnaby (supra)*, the "superficial meaning, the one which automatically springs to

mind when the words are read casually and from an external point of view," it is not the reading that reflects the mutual intention of the parties.

116. The very logic used by the Employer militates against its reading of Article 4.01(d). The Employer says that the Note at 4.01(d) provides it with an unfettered right to create 8-hour non-continuous shifts that start at any time. However, it also acknowledges that it is restricted by 4.01(c) from changing the start time for Day Employees unless it has agreement of the Union. The example it cites is that if it wanted to have the start time for a Day Employee or Employees moved from 7:00 am to 6:00 am, it would need the Union's agreement. In my view, it cannot be that both of those statements are correct.

117. By necessary implication, if the Employer is right, then the only thing that distinguishes a Day Employee from an 8-hour non-continuous Shift Employee is the start times of their shifts.

118. If the Employer has the right to create and fill any 8-hour shift that starts at any time other than 7:00 am, there is no logical reason why it could not start the shift for an employee at 6:00 am and call it a non-continuous 8-hour shift. It would be non-continuous because it doesn't start at 7:00 am, the starting time for Day Employees. If it is non-continuous, by the Employer's logic, no Union agreement is required. If that is right, then the Employer would not violate the collective agreement by starting a non-continuous shift at 3:00 pm, as it did in this case. However, there would also be no reason why it could not have started it at 6:00 am (which the Employer cited as the hypothetical example for which it would have needed Union agreement) or at 2:00 pm, or at 11:00 am, or even at 7:15 am. No Union agreement would be required in those circumstances if the Employer is unfettered by Article 4.01(d).

119. If, through any combination of 4.01(d), 4.05 and 17.01, the Employer had an unfettered right to create 8-hour shifts with any start times of its choosing, that would, in my view, render 4.01(c) meaningless from a practical perspective. The

7:00 am start time which it sets out would just be one of any number of potential times for the working day and there would be no reason why it would be distinguished in the collective agreement as the standard working day for Day Employees. There would be no circumstance for which mutual agreement to change the regular starting time would be required.

120. As set out in *Pacific Press*, all clauses and words in a collective agreement should be given meaning, if possible, and, when construing two provisions, a harmonious interpretation is preferable to one which places them in conflict. The Note in article 4.01(d) clearly has meaning and that meaning should not be one that conflicts with 4.01(c). Similarly, articles 4.05 and 17.01 have meaning in relation to shift work but that meaning should not conflict with 4.01(c).

121. Articles similar in nature to Article 4.01(c) have been discussed in several arbitration cases. In *Re Centre de counselling de Sudbury and USW (Plante)* (2018), 293 L.A.C. (4th) 99 (Bendel), the language in issue was Article 18.01 which read: *"The normal work week shall consist of thirty-five (35) hours per week, seven (7) hours per day, Monday to Friday, Inclusive. The normal hours of work shall be from 8:30 am to 4:30 pm with a one (1) hour lunch break. The employee's daily schedule may vary, subject to the agreement of the immediate Supervisor."* That clause is similar in concept to Articles 4.01(a) and 4.01(c) here. Commenting on that clause, Arbitrator Bendel said, at para. 20:

> Arbitrators have consistently held that provisions such as article 18.01 allow an employer only limited room for manoeuvre. Provisions such as these exist not solely for the purpose of defining the hours beyond which overtime compensation is due, but primarily for the purpose of restricting the employer's prerogative as regards scheduling. While the designation of "normal hours" in an agreement implicitly acknowledges that employees might be required to work "abnormal hours", these provisions are not a mere "pious hope" that employees will be scheduled to work the normal hours.

122. Similarly here, the establishment of a "standard working day" commencing at 7:00 am constitutes more than a "pious hope" that Day Employees will be scheduled for that standard work day except in abnormal circumstances.

123. How, then, can Articles 4.01(c) and 4.01(d) work together? The language of the clauses as well as the extrinsic evidence presented at the hearing provide the answer to the harmonious relationship between these clauses.

124. Article 4.01(c) provides the hours for the "standard" work week for Day Employees. Day Employees are those who are not Shift Employees. Continuous Shift Employees (those who work on regular shifts that operate 24 hours a day, 7 days per week) have a defined "standard" work week and hours set out in 4.01(d) and 4.01(g). Non-continuous Shift Employees, (that is, those to whom the Note in 4.01(d) applies) do not have a defined "standard" work week or hours.

125. The extrinsic bargaining history evidence in relation to 4.01(d) is key to its interpretation. The evidence of both Union and Employer witnesses was that the Note was added in 2004 to codify a practice that had developed before then. That practice was to assign Day Employees to do shift work during abnormal times. Until then, the collective agreement only had language dealing with 12-hour shifts and that, according to Employer witness Steve Brooks, had caused confusion when assigning people to 8-hour shifts during those abnormal times. In his words, the right of the Employer to unilaterally assign 8-hour shifts had to be negotiated. The only representations he made at the bargaining table were that the new Note would maintain current practice and give guidance to people in the future as to why there were 8-hour shifts.

126. The unwavering practice from the time Mr. Brooks made those representations at the bargaining table until when the matters giving rise to this case arose, was that the 8-hour non-continuous shifts were used only for abnormal events. Employees assigned to those non-continuous shifts were assigned on a temporary basis and

reverted to their standard hours later. In other words, the past practice aligns with the representations made by the Employer at the bargaining table.

127. I conclude that the Note in 4.01(d) does not open the door for "standard" non-continuous 8-hour shifts. Rather, it codifies the practice that existed prior to its introduction into the collective agreement and that continued afterwards until 2019. It relates to shifts that are not "standard" or "normal" shifts but rather, similar to Article 4.05, it deals with shifts that arise out of emergency or abnormal events.

128. As mentioned earlier, the Employer provided a chart showing numerous examples of assignments to 8-hour shifts that apparently did not start at 7:00 am. The Employer was unable to identify the exact reason that any of those assignments had been made. However, according to Plant Manager Pascal Boucher, all those assignments had been temporary in nature and for abnormal circumstances. The assigning of the Grievor to an ongoing afternoon shift was a first. I find the chart produced by the Employer does not detract from the conclusion that Articles 4.01(d) and 4:05 deal with shifts that arise out of emergency or abnormal events.

Article 17.01

129. During his testimony, Plant Manager Pascal Bouchard testified that when he did not receive any applications for the Heavy Equipment Operator position in response to the July posting, he appointed the Grievor, Mr. Aguilar, to the position. Mr. Aguilar, he said, was the junior qualified employee and the assignment was made pursuant to Article 17.01 of the Collective Agreement. That proposition was not put forward by the Employer in its Opening or in the particulars it provided to the Union in advance of the hearing.

130. In closing argument, the Employer says, essentially, that 17.01 provides another independent way it could accomplish what it did in this case. It says that 4.01(d) and 4.05 provide it with an unfettered right to transfer Day Employees to different

8-hour shifts. It says that 17.01 allows it to create a different 8-hour shift and then assign the junior qualified employee to the position in the absence of applications for it. It claims that even if the Employer does not enjoy the unrestricted rights it claims from other articles because of the Roberts letter, that letter did not mention Article 17.01 and therefore did not in any way fetter the Employer's rights under Article 17.01.

131. I find that the Employer position on this point fails for several reasons.

132. The Union invites me to find that, from a factual perspective, an assignment under Article 17.01 was not what occurred in this case. It says that Article 17.01 contains a number of provisions that relate to the posting and filling of positions that were not complied with and that, therefore, this could not have been a 17.01 assignment. For example, it says that under Article 17.01, job awards are to be made within seven calendar days of closing bids for the position. The closing of bids for the posted position was in July whereas the assignment of the Grievor to the position was not made until September.

133. The Union also says that the position posted was not a vacancy or new job as those terms are understood in the collective agreement. It says that the reality is that the job is exactly the same job the Grievor was performing during his standard day shift with the only difference being the starting time of the shift. Whether a new job has been created, the Union argues, is a question of fact, and is not just determined by an employer's characterization.

134. In *Westcoast Energy Inc. and Energy & Chemical Workers' Union, Local 862,* [1994] B.C.C.A.A.A. No. 305 (Coleman), the arbitrator stated:

> 25. I do not accept the employer's argument that it is up to management to determine whether a new job has been created or not. That is a question of fact (see *Re St. Joseph's Hospital (London) and London and District Service Workers' Union, Loc. 220* (1982), 4 L.A.C. (3d) 116 (Rose); *Re Sperry Inc. and U.A.W., Loc. 641* (1985), 20 L.A.C. (3d) 385 (Hinnegan); *Re Ex-Cell-O*

> *Corp. of Canada Ltd. and I.M.A.W., Loc. 49* (1975), 8 L.A.C. (2d) 248 (Weatherhill); *Re General Chemicals Ltd. and C.A.W., Loc. 89* (1993), 38 L.A.C. (4th) 24 (Brandt); *Re Windsor Public Utilities Com'n and I.B.E.W., Loc. 911* (1974), 7 L.A.C. (2d) 380 (Adams)). In *St. Joseph's Hospital, supra* (at pp 123-4), the arbitration board dealt with the deletion of an existing classification and the creation of a new, lower classification, and adopted the following approach:
>
> > The test to be applied in determining whether a new classification has been established was outlined in *Re Nurses' Assoc. and Joseph Brant Memorial Hospital* (1972), 24 L.A.C. 104 (Hinnegan), and more recently enunciated in *Re Peterborough Civic Hospital and Ontario Nurses' Assoc.* (1979), unreported (Beck). In the latter case, the arbitration board stated the test is whether "*there has been a substantial change in the quality of the job duties and responsibilities* amounting to the establishment of a new classification" (at p. 18). Whether the scope of job duties is being contracted (as in the present case) or expanded (as in *Re U.S.W., Local 5871 and Steel Co. of Canada Ltd),* (1964) 15 L.A.C. 201 (Lande), it must ultimately be determined whether the resultant job represents a new and substantially different classification.
>
> …..
>
> > This board is left with the difficult task of determining at what point a change in job duties amounts to *more than just a change of emphasis, or a different mix of functions already falling within and existing classification.*

135. Given that the parties agree that there was no difference in the job functions between those performed by the Grievor on his day shift and those to which he was assigned on the "afternoon" shift, there is obviously a serious issue as to whether that change in shift start time constituted a "new job" subject to article 17.01 or not. Ultimately, however, I do not think it is necessary to determine that issue in this case.

136. Regardless of whether the assignment of the Grievor to the new shift times was an assignment under Article 4.01(d), a change of regularly scheduled hours under

Article 4.05, or an assignment to a new job under Article 17.01, I find that it is not allowed under Article 4.01(c) of the Collective Agreement. Mutual agreement with the Union is required to permanently change the hours of a Day Employee to an 8-hour shift that does not fit within the work week and work hours set out in articles 4.01(a) and 4.01(c). Although the afternoon assignment was originally posted as temporary, in practice it has become permanent; that is, ongoing and without any end date. It was not put in place to deal with abnormal circumstances but rather for the completion of normal work that otherwise had been done on the regular day shift. The need for that mutual agreement cannot be avoided by creating "new jobs," that is, the same work at different start times and appointing employees to those jobs under 17.01.

137. During the hearing, the Union argued that the Employer is restricted by past practice to assigning Day Employees to the "7 and 7" system for abnormal times, that is, having the shift start at 7:00 am and end at 7:00 pm with overtime hours included and then from 7:00 pm to 7:00 am. The Employer says that there is lots of past practice where it assigned different start times for 8-hour shifts in abnormal times. I do not find it necessary to determine that issue as it does not arise from the facts in this case. The issue here is whether the Employer violated the Collective Agreement by assigning the Grievor to an ongoing, essentially permanent shift for work that was not abnormal in nature. The issue of which hours may be assigned as starting times for abnormal shift work would have to be determined against a different factual background.

<u>The Longpré Decision</u>

138. In the 1993 Longpré decision, *supra*, the panel determined that the Employer did not violate the collective agreement when it kept Day Employees on alternate shifts until the end of the week during which the emergency or abnormal work giving rise to the change was completed. It could return the employees to their regular shifts the Monday of the following week. That was a different issue than what is before

this board. However, some of the comments of that panel are apposite here. That panel came to a similar conclusion when it discussed Article 4.05 at page 7:

> In our view, Article 4.01(a) and (c) which establishes the normal shift, does not erode the language of Article 4.05 which was subsequently clarified in the Roberts Letter. Article 4.05 gives the Employer the unqualified right to transfer "day employees" to shift work. Roberts' Letter sets out the intention of the Employer in negotiating this clause*: the intention of the clause is to permit flexibility in addressing emergency situations and abnormal operating requirements.* The only clarification in Roberts' Letter supports the Employer's position. That is, transfers will not be permanent. (emphasis added)

139. I agree with the approach taken in the Longpré Decision. It, combined with the findings in this case, provides a harmonious interpretation of articles 4.01(c), 4.01(d), 4.05, and 17.01. Those clauses allow the Employer considerable latitude in assigning Day Employees to shift work. However, that latitude may only be exercised in relation to emergency or abnormal work circumstances and on a temporary basis. For other circumstances, mutual agreement with the Union is required.

140. Article 2.03, the management rights clause, is of no assistance to the Employer here. On its face, those management rights are limited: "It is the Company's right to operate and manage its business in accordance with its responsibilities and commitments *provided it does not violate the specific Terms and Conditions of this agreement…"* Given my determination that the assignment of the Grievor to the afternoon shift violates specific terms of the Collective Agreement, Article 2.03 does not provide sanction for the Employer.

141. Both parties provided submissions on the issue of estoppel. Given my conclusions on other points, it is unnecessary to deal with that issue.

IX. CONCLUSION

142. I find that the Note in Article 4.01(d) and the shift change provisions in Article 4.05 are intended to deal with assignments to shifts other than standard shifts to address emergency maintenance or abnormal operating requirements of the Employer. Such shift assignments are temporary in nature. They do not create an unfettered right to commence ongoing non-continuous shifts as standard shifts for the employee or employees involved. Article 17.01 cannot be used to avoid the requirement for mutual agreement to change shift times in circumstances that are not abnormal or temporary.

143. For these reasons, the grievance is allowed and I declare that the assignment of the Grievor to the afternoon shift violated the Collective Agreement.

144. The parties have asked that I leave it to them to resolve issues of monetary remedy. I remain seized to determine any issues relating to the interpretation or implementation of this award or of remedy should the parties not agree.

DATED and effective at New Westminster, British Columbia on April 29, 2020.

RJ Noonan

RANDALL J. NOONAN

Arbitrator