IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE LABOUR RELATIONS CODE, R.S.B.C. 1996 c. 244

BETWEEN:

**CARIBOO PULP AND PAPER COMPANY**

(the "Employer")

AND:

**UNIFOR, LOCAL 1115**

(the "Union")

**CAR WASH GRIEVANCE**

**AWARD**

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| Arbitrator: | Koml Kandola |
| Counsel: | Mark Colavecchia, for the Employer<br>Rebecca Kantwerg, for the Union |
| Date of Hearing: | November 2, 2020 (via videoconference) |
| Date of Decision: | November 23, 2020 |

## I. INTRODUCTION

1 This is a collective agreement interpretation matter. The Union grieves the Employer's decision to not provide car wash vouchers during the winter season to Jason Baker, a new employee, on the basis of his hire date (the "Grievance"). The Union submits this decision was contrary to Article 25 of a memorandum of agreement, which forms part of the parties' collective agreement. The Employer submits that Article 25 is silent on how and when car wash vouchers are to be provided, and that its decision in this regard was in accordance with its residual management rights. It says that the Grievance should be dismissed.

## II. EVIDENCE

2 The parties provided an agreed statement of facts (the "Agreed Statement of Facts") and a joint book of documents. The Union also called one witness, Ben Reuther, who is the Union's Vice-President. After the Union closed its case, the Employer stated it would not be calling any witnesses.

3 The Agreed Statement of Facts provides as follows (with document tab numbers omitted):

> 1. The worksite is a pulp and paper mill located in Quesnel, B.C. (the "Mill").
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> 2. The current term of the parties' Collective Agreement is April 30, 2017 – April 30, 2021.
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> 3. A Memorandum of Agreement (the "MOA") forms part of the parties' Collective Agreement. Article 25 of the MOA states:
>
> > 25. CAR WASH
> >
> > The Company will maintain the present car washing facilities.
> >
> > Increase the value of a single car wash voucher to reflect the value of a car wash in Quesnel. To contain the increasing costs and administration the Company will select a single supplier of this service. There will be 8 (eight) vouchers equivalent to the Motherlode "Gold" wash issued to each employee.
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> 4. The language of Article 25 has remained the same since the 2003-2008 Collective Agreement.

5. The Mill has a parking lot for its employees. Cars that are parked in the parking lot are exposed to fall out year-round from the Mill. As such, employees at the Mill have to wash their cars more frequently.

6. Because employees have to wash their cars more frequently, the Employer has provided and agreed to maintain car wash facilities at the Mill (the "Mill Car Wash") that employees can use to wash their cars. This agreement is recorded in Article 25 of the MOA. When it is open, the Mill Car Wash is available to each employee.

7. The Mill Car Wash is closed during the winter season every year, typically between October 1 and March 31. The MOA at Article 25 requires the Employer to provide employees with eight Car Wash Vouchers for a local car wash in Quesnel, the Motherlode "Gold" Wash, for the purpose of compensating employees for the car washing they need to do in the winter months when the Mill Car Wash is closed. The Motherlode Wash is a local car wash service in Quesnel, and the "Gold" wash is a particular car wash service that can be purchased at the Motherlode Wash. The Employer provides the eight Car Wash Vouchers to employees by loading an electronic car wash card on or around October 1 of each year.

8. Article 25 does not expressly specify when the Employer will provide employees with the eight Car Wash Vouchers.

9. The Employer provides employees with the eight Car Wash Vouchers on or around October 1 each year. If a new employee commences employment after October 1 but prior to January 1 of the ensuing year, the Employer provides the employee with eight Car Wash Vouchers. If, however, the employee commences employment after December 31, the Employer does not provide the employee with any Car Wash Vouchers (the "Employer's Policy"). The employee will, however, be provided with eight Car Wash Vouchers on or around the ensuing October 1. The Employer does not provide any employee with a pro-rated number of Car Wash Vouchers.

10. On January 7, 2019, Jason Baker commenced employment with the Employer as a millwright. He is an employee and included in the bargaining unit. Mr. Baker did not receive an electronic car wash card and he did not receive any Car Wash Vouchers when he commenced employment on January 7, 2019. He was, however, provided with a car wash card and eight Car Wash Vouchers on or around October 1, 2019.

> 11. When the Union became aware that Mr. Baker did not receive any Car Wash Vouchers, Ben Reuther, Union Vice President, wrote to the Employer (Alexandra Carter, Andrew Generous) to bring the issue to their attention.
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> 12. The Union attempted to resolve the issue informally without going to Standing Committee, however, the Employer was not willing to resolve it on the basis proposed by the Union. This prompted the Union, and in particular Mr. Reuther, to raise the issue at a November 19, 2019 Standing Committee meeting.
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> 13. The Union filed the Grievance on December 3, 2019. The Grievance is a Union Grievance.

4 The parties also agree that Car Wash Vouchers are issued more than once during the employment relationship (i.e. on or around October 1 each year), though Article 25 does not expressly state this.

5 The Collective Agreement also contains a Letter of Understanding, dated June 29, 2017, which states as follows (the "LOU"):

> Any time the car wash is down as a result of mechanical failure for more than seven consecutive days between April 1st and September 30th during the terms of the 2017-2021 Collective Agreement, the Company will provide an additional car wash voucher.

6 As noted, Mr. Reuther, who has worked at the Mill for 22 years, gave evidence at the hearing. Mr. Reuther described the nature of the fall out that can fall or settle onto employees' cars parked in the parking lot at the Mill, as including: sewer foam, salt cake, spray from black liquor or white liquor, sawdust, and fly ash. His evidence was that some types of fall out occur more or less frequently than others. For example, he could only recall one occasion in which white liquor spray had settled on cars in the parking lot.

7 Mr. Reuther testified that the Union was not aware of the Employer's Policy before Mr. Baker told the Union that he had not received any Car Wash Vouchers for the 2018-2019 winter season. In this respect, Mr. Reuther's evidence was that there are not many employees who are hired to start work each year between January and March 31, and in some years the Employer does not hire any employees to start work in that timeframe.

8 Mr. Reuther testified that, in negotiating the language in Article 25, the Union's intent was that all employees should receive eight Car Wash Vouchers during the winter season (from October to March). I note there was no evidence that Mr. Reuther was a member of the Union's bargaining committee or otherwise had any direct role in

collective bargaining. In addition, in cross-examination, Mr. Reuther acknowledged that he did not know what the Employer's intent was in negotiating Article 25.

9 In any event, his view was that the right to receive eight Car Wash Vouchers did not depend on when the employee was hired, nor was it restricted to a calendar year, and instead was intended to cover the winter season.

10 In cross-examination, Mr. Reuther agreed that Article 25 does not specify when the Employer must provide the Car Wash Vouchers to employees. He agreed that Article 25 commits the Employer to provide eight Car Wash Vouchers and "no more and no less", and that if the Union had wanted to secure more than that, it would have to negotiate language to that effect. In this regard, Mr. Reuther agreed that if an employee was hired on March 30 (i.e. the day before the end of the winter season) and got eight Car Wash Vouchers that day, and then also received another eight Car Wash Vouchers in October of that year at the commencement of the next winter season, the employee would receive 16 Car Wash Vouchers in total that year. Mr. Reuther agreed that this was "not ideal" and "not the intent of the language". Mr. Reuther also agreed that the Employer had to choose a cut off date in implementing Article 25, and that the manner in which the Employer provided the Car Wash Vouchers ensured no employee would receive more than eight Car Wash Vouchers in a year. Further, Mr. Reuther agreed that, to his knowledge, there was no evidence of the Employer having ever given an employee more than eight Car Wash Vouchers in a calendar year.

11 With respect to the LOU, Mr. Reuter's evidence was that it was negotiated because the Employer did not always maintain the Mill Car Wash. However, his evidence was that, to his knowledge, there has not been a need to apply the LOU. Further, in cross-examination, he agreed with the suggestion that the LOU "has nothing to do with the Grievance".

12 The parties did not introduce any evidence of bargaining history or past practice.

## III. POSITIONS OF THE PARTIES

13 The Union submits that, in interpreting collective agreement language, an arbitrator should adopt a purposive approach. It says the purpose of the Car Wash Vouchers in Article 25 is to compensate employees for the loss of the Mill Car Wash in the winter season, and that this is regardless of their hire date. The Union says this purpose is also consistent with the LOU, under which all employees get the benefit of the Car Wash Vouchers in the circumstances it covers, regardless of when they begin employment.

14 Anticipating the Employer's argument regarding residual management rights, the Union asserts that "where the parties have bargained a subject and incorporated the terms of their agreement on that subject into the collective agreement, the employer is generally not permitted to make unilateral changes regarding that subject in a manner

inconsistent with the parties' agreement". The Union says that Car Wash Vouchers have been negotiated and addressed in Article 25 of the MOA, and the Employer does not have residual management rights to issue the Car Wash Vouchers in a manner inconsistent with the purpose of Article 25.

15 The Union asserts that the Employer's unilateral decision to only issue the Car Wash Vouchers between October 1 and December 31 undermines the purpose of Article 25, by leaving new employees who start work after December 31 without the Car Wash Vouchers, despite still attending work during the remainder of the winter season. In this respect, the Union notes that Article 25 refers to "each employee" receiving the Car Wash Vouchers.

16 Accordingly, the Union says it is not within management's rights to determine which employees get the Car Wash Vouchers. In any event, it says that, even if the matter of when the Car Wash Vouchers can be issued did fall within management rights, the manner in which the Employer issued them was unfair, unreasonable and arbitrary.

17 The Union also submits that it is clear there are words missing from Article 25, i.e. that the Car Wash Vouchers are to be provided "each winter season". It says there are two doctrines that arbitrators can rely on in such circumstances. First, an arbitrator may imply terms into a collective agreement to give it business or collective agreement efficacy. Second, where there is an apparent gap in the collective agreement language, an arbitrator can reconstruct the parties' hypothetical intent on the matter to fill that gap.

18 The Union says the plain language of Article 25 requires that the Employer issue eight Car Wash Vouchers to each employee employed during the winter season. In addition, the Union says it can be implied into the language of Article 25 that the eight Car Wash Vouchers are to be issued to each employee "every winter season". Alternatively, the Union says there is a gap in the Collective Agreement, in that it is not silent on the topic of Car Wash Vouchers, but does not say how many Car Wash Vouchers are given to an employee who starts work halfway through the winter season. It says the most reasonable mutual intention that can fill the gap is that all employees, without limitation, get eight Car Wash Vouchers. As a further alternative, the Union says the Employer ought to give employees who start work in the latter half of the winter season four Car Wash Vouchers.

19 The Union relied on numerous case authorities, all of which I have reviewed.

20 The Employer submits that collective agreement interpretation requires a search for the parties' mutual intention, not the unilateral aspirations of one party. In determining the mutual intention of the parties, the presumption is that the parties intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions. In the Employer's submission, it is simply not possible to read Article 25 and conclude that the parties intended for any employee to receive more than eight Car Wash Vouchers in any given year.

21 Further, it says that allowing the Grievance would require the Employer to provide certain employees with 16 Car Wash Vouchers in any given year, i.e. twice as many as is require by the express language of Article 25. It says to accept the Grievance would be to amend the express language of Article 25, which an arbitrator does not have jurisdiction to do.

22 The Employer notes that Article 25 does not specify when the Employer will provide the employees with the Car Wash Vouchers. Accordingly, the Employer says it was entitled, pursuant to its residual management rights, to determine when it would provide the Vouchers. The Employer says that, pursuant to its residual management rights, it has provided each employee with eight Car Wash Vouchers one time in each calendar year, January 1 to December 31, and that is all that is required by Article 25.

23 Further, the Employer submits that it was entitled to pick a cut-off date for providing the Car Wash Vouchers, and that December 31 of each year is entirely reasonable. In the Employer's submission, this is the "perfect compromise", as employees hired after October 1 but before January 1 receive eight Car Wash Vouchers for a period that is less than the full winter season (i.e. the Employer "loses" and the employee benefits). At the same time, employees hired between January 1 and March 31 do not receive any Car Wash Vouchers until October of that calendar year (i.e. the employee "loses" and the Employer benefits). The gains and losses are equal for both parties, and this cannot be an unreasonable exercise of management rights.

24 The Employer says the approach it has adopted is entirely consistent with Article 2, and does not constitute a unilateral "change" or inconsistency with the language in Article 25. The Employer acknowledges that there is no evidence of past practice and while there is no evidence that it has always issued Car Wash Vouchers in this manner, there is also no evidence that it has done anything other than its current practice.

25 The Employer asserts that if the Union seeks a monetary benefit or to take away the Employer's inherent right to manage, it must negotiate clear and unequivocal language to that effect. It says there is no basis, either in the express language of Article 25 or on the evidence, to support the Union's argument. Further, the Employer submits that its application of Article 25 provides employees with eight Car Wash Vouchers per calendar year, and this is neither unreasonable, discriminatory, arbitrary or adopted in bad faith.

26 The Employer also asserts there is no basis upon which to imply terms or fill an alleged gap in the language of Article 25, which it says its clear on its face. In this respect, it notes there is no evidence of the parties' intent when negotiating the language.

## IV. ANALYSIS AND DECISION

27 The object of collective agreement interpretation is to discover the mutual intention of the parties. As has long been held, the primary resource for that interpretation is the collective agreement language itself: *Pacific Press v. G.C.I.U. Local 25-C,* [1995] B.C.C.A.A.A. No. 637 (Bird, Q.C.).

28 An arbitrator is to look for the mutual agreement of both parties, not the unilateral intentions of one side: *University of British Columbia,* BCLRB No. 42/76. Further, the arbitrator's role is to decide the merits of the dispute under the terms of the collective agreement, not to add provisions or to simply resolve the difference based on an intuitive assessment of what is fair: *Construction Labour Relations Assn. and SMWIA, Local 280,* [2015] B.C.C.A.A.A. No. 96 (Saunders), para. 61.

29 Despite earlier cases to the contrary, it is now settled that onus of proof has no application to the legal interpretation of a disputed term in a collective of agreement. Onus of proof does, however, continue to apply to the proof of facts: *Crown Packaging and Unifor Local 433 (Waxer Grievance)*, [2019] B.C.C.A.A.A. No. 48 (Pekeles), para. 90.

30 I agree with the Union that the purpose of a particular provision is a guide to interpretation, including in cases interpreting provisions providing a benefit. However, while it is trite to say that collective agreements do not address every contingency, it has also been recognized that, in order to flow naturally from the contractual language, the benefit must be one that was intended to apply in the circumstances: *Wolverine Coal Partnership and USW, Local 1-424 (Monthly Allowance)*, [2014] B.C.C.A.A.A. No. 100 (Nichols) ("*Wolverine Coal Partnership*"), para. 58.

31 In the present case, there is no dispute that the Mill Car Wash is closed during the winter season every year, and that the winter season is typically from October 1 to March 31. As set out in paragraph 7 of the Agreed Statement of Facts, the parties agree that Article 25 requires the Employer to issue eight Car Wash Vouchers to a local car wash, and that this is "for the purpose of compensating employees for the car washing they need to do in the winter months when the Mill Car Wash is closed". There is also no dispute that Article 25 is silent on when the Employer is to issue the Car Wash Vouchers, and that the Employer typically provides employees with eight Car Wash Vouchers on or around October 1 each year.

32 The Union says the Employer's Policy is inconsistent with Article 25, and that eight Car Wash Vouchers must be provided to any employee who works in the winter season regardless of when they were hired. The Employer asserts that its interpretation, as embodied in the Employer's Policy, is entirely consistent with and meets the requirements of Article 25. In asserting their respective interpretations, the parties agree that there is no evidence of past practice or bargaining history before me.

33 I find that, based on the plain, clear, and express language of Article 25, the parties' intent was for the Employer to issue eight Car Wash Vouchers: no more and no less. The parties agree that the purpose was to compensate employees for car washing during the winter season when the Mill Car Wash is closed. However, that does not automatically lead to the conclusion that every employee must receive eight Car Wash Vouchers regardless of when they were hired.

34 To disregard the date of hire would be to conclude that the parties intended for certain employees (i.e. those hired after December 31 but before March 31) to receive more than eight Car Wash Vouchers in a given year. The Union did not deny, and in fact asserted, that as a result of its interpretation, an employee hired on March 30 should be entitled to eight Car Wash Vouchers upon hire, with one day remaining in the winter season, and an additional eight Car Wash Vouchers as of October 1 the same year when the next winter season commenced. I find that result would be contrary to the express language of Article 25, which requires the Employer to provide eight Car Wash Vouchers, and would also be contrary to the Union's own evidence, where Mr. Reuther agreed that would not be "ideal" and could not be the intent of the language. Further, that result would be inconsistent with the Union's own interpretation. The Union asserts the purpose of Article 25 is to compensate employees for car washing during the winter season, regardless of when they were hired. However, there would not be any reasonable purpose served by providing an employee hired on March 30, with one day remaining in the winter season, with eight Car Wash Vouchers upon hire and a further eight Car Vouchers on October 1 of that year, nor did the Union address that issue in its submissions.

35 With respect to the Union's reliance on Article 25's reference to "each employee", I find that, for the reasons set out above, the reference to "each employee" must logically be rooted in the date of hire. Otherwise, certain employees would receive 16 Vouchers, while others would receive only eight.

36 In contrast, the interpretation advanced by the Employer, which is to provide eight Car Wash Vouchers in a calendar year, is consistent with the express reference to "eight" vouchers in Article 25, and with the evidence that was put before me.

37 The Union argues that where the parties have bargained a subject and incorporated the terms of their agreement on that subject into the collective agreement, the employer is not permitted to make unilateral changes regarding that subject, citing for example *British Columbia v. BCGEU Local 247* (1988), 2 L.A.C. (4th) 247 (Hope) and *Toronto Star Newspapers Ltd. and Southern Ontario Newspaper Guild Loc. 87* (1983), 10 L.A.C. (3d) 1 (Picher). I take no issue with the case law the Union cited in that regard. However, I find those cases simply do not apply to the case at hand as, in my view, the Employer's Policy does not constitute a unilateral change to Article 25, nor is it inconsistent with the language in Article 25. To the contrary, for the reasons set out above, I find that the interpretation advanced by the Union would be inconsistent with the express wording of Article 25.

38 Further, I do not accept the Union's argument that there clearly are words missing from Article 25, such that I should resort to implying a term into Article 25 or engage in a gap analysis.

39 With respect to implying terms, the Union acknowledges that arbitrators must be careful to avoid implying terms that the parties did not agree to. Further, and in any event, the case law relied upon by the Union indicates that an arbitrator may only imply a term into the collective agreement if: it is necessary in order to give business or collective agreement efficacy; and if, having been made aware of the omission of the term, both parties to the agreement would have agreed without hesitation to its insertion: *McKellar General Hospital and O.N.A.* (1986), 24 L.A.C. (3d) 97 (Butler). The Union asserts this test was more recently expressed as an "either/or" test in *Telus Communications Inc. v. T.W.U.*, [2011] C.L.A.D. No. 26 (Germaine). Ultimately, I cannot find that in this case, implying a term into Article 25 that would result in the issuance of Car Wash Vouchers to any employee who worked during the winter season, regardless of their hire date, is something necessary to give the collective agreement efficacy and make it work. As set out above, I have found the interpretation advanced by the Employer is reasonable and fair, and hence, workable. Nor do I find that implying such a term is something "so obvious that it goes without saying", or is something the Employer would have agreed to without hesitation had it been made aware of the omission. There is simply no basis upon which I could make such a finding.

40 I also decline to invoke the gap analysis in the circumstances of this case. In *Andres Wines (B.C.) Ltd.* and *B.F.C.S.D. Local 300*, BCLRB No. 75/77, Chair Weiler dealt with an application for review of an arbitration award that addressed whether laid off employees were entitled to certain fringe benefits under the collective agreement. Chair Weiler noted that "there was no indication at all on the face of this contract that the parties had turned their minds to the particular problem", and that, where the situation had arisen previously, the employer's practice in administering the agreement had been erratic: paras. 2 and 3. Chair Weiler held there was "nothing that unusual about the presence of such an apparent gap in the terms of a collective agreement" (para. 4), and stated:

> …In the absence of any clear indication of the mutual intent of the parties – gathered from either their language or their behaviour – the arbitrator must, in effect, reconstruct some kind of hypothetical intent. What is it reasonable to assume that typical labour negotiators, having analyzed the nature and purpose of the contract benefit in question, would agree to as a sensible judgment about who should enjoy the benefit in this unusual situation?

41 I have no evidence of past practice or bargaining history before me on the basis of which I could attempt to reconstruct the parties' hypothetical intent. I am left only with the express language of Article 25, the Agreed Statement of Facts, and Mr. Reuther's evidence. For the reasons already set out, neither the language of Article 25 nor the evidence before me indicates a mutual intent to issue eight Car Wash Vouchers

to employees during the winter season regardless of their hire date. Using the language in *Andres Wines*, I cannot find that a typical labour negotiator, having analyzed the wording, nature and purpose of Article 25, would agree, as a sensible judgment, that certain employees could receive 16 Car Wash Vouchers in a year under that provision, while others only received eight Car Wash Vouchers. Put another way, I find that the benefit sought by the Union does not flow naturally from the language of Article 25, when it is viewed with its purpose and the proper context in mind: *Wolverine Coal Partnership*, para. 59.

42 With respect to the LOU, I find the LOU provides no assistance in interpreting Article 25, nor does it have any bearing on the issue before me. Further, the evidence was that it has never been applied.

43 The Union argued that even if the issue of when the Car Wash Vouchers are to be provided falls within management rights, the Employer exercised its rights in a manner that was arbitrary, in bad faith or unreasonable. I find there is no basis on which I could conclude that the Employer's actions were arbitrary, in bad faith or unreasonable. As noted, while there is no onus of proof in the legal interpretation of a disputed term, onus of proof continues to apply to proof of facts. I have already found the Employer's interpretation was reasonable. There is simply no evidence of arbitrary or bad faith conduct by the Employer. To the contrary, Mr. Reuther agreed that the Employer is entitled to pick a cut off date in order to implement the language of Article 25, and the Employer's rationale for choosing December 31 is already set out.

44 Last, I find there is no basis upon which to consider proration of the benefit. Both parties agreed that the proration of a benefit requires express, clear language, which is absent in this case. In addition, in the Agreed Statement of Facts, the parties have agreed the Employer has never prorated the Car Wash Vouchers.

## V. CONCLUSION

45 For the reasons set out above, the Grievance is dismissed.

DATED this 23rd day of November, 2020, in North Vancouver, BC.

"*KOML KANDOLA"*

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Koml Kandola
Arbitrator