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

BETWEEN:

CARIBOO PULP & PAPER COMPANY

(the "Employer")

AND:

UNIFOR LOCAL 1115

(the "Union")

AWARD

(Glen Barker Grievance)

ARBITRATOR:	Allison Matacheskie
APPEARANCES:	Donald J. Jordan, QC, for the Employer Craig Bavis, for the Union
HEARING DATE:	July 6, 2020
LOCATION:	Virtual hearing
AWARD:	July 15, 2020

I. INTRODUCTION

1. This case concerns a grievance for a one-day suspension for not attending work and whether the "work now, grieve later" principles apply.

II. FACTS

2. A scheduled maintenance shutdown of the full facility commenced on May 6, 2019. The electricians in maintenance are critical employees for the first stage of the shut-down as they insulate the equipment and lock it down to ensure it is safe for other employees to perform the maintenance or project work safely. An electrician is also assigned during the shutdown to "chase the whistles" or "be on the radio" which means handling time-sensitive electrical issues at the beginning of the shutdown and as they arise later. The mill has two facilities and there are usually two electricians assigned to handle these issues around the clock.

3. A lot of overtime is worked during a shut-down. There are two groups of electricians. Tour workers are scheduled in advance for 12-hour shifts and shift workers are scheduled for 8-hour shifts. For overtime, tour workers are asked to work additional 12-hour shifts and shift workers are asked to agree to stay for more hours during shifts. During a shut-down, shift workers are generally asked to agree up front to do a 10-hour shift and additional hours as required. In the week that these issues arise, most electricians worked 14 to 15 hour shifts.

4. Turning to the facts related to the key issues in dispute, Mr. Barker is a tour worker. On March 27, 2019, Mr. Barker advised he could work overtime shifts on May 5, 6 and 13. He was scheduled to work the night shift on May 6.

5. The employees are members of an industry pension plan. Every few years, a pension seminar is attended by multiple employers and unions covered by the plan. It provides valuable information on changes to the plan or legislative changes affecting pension. The last pension seminar was in 2016 and the Union had seven members attend and the Employer had three representatives attend.

6. There was a pension seminar scheduled for May 6, 2019 in Prince George commencing at 10:00am. Mr. Barker was aware of the pension seminar when he accepted the overtime shift starting at 6:00pm on May 6. He did not hesitate to accept the overtime shift as the Union had already decided that Mr. Ben Ruether would attend the seminar on behalf of the Union. As the pension seminar was scheduled at the same time as the shut-down, the Union decided to send

only one person rather than multiple attendees as it had in the past. It chose Mr. Ruether as he was the Vice-President, familiar with the pension plan issues and members regularly asked him about pension issues. As there would be only one person attending it was important for the Union to have someone attend who had these qualifications. Mr. Barker is the President, equally familiar with the pension plan issues and a regular "go to person" for the membership.

7. Prior to May 1, Mr. Ruether made a request to his supervisor, Mr. Conrad Peterson, for union leave to attend the pension seminar. Mr. Ruether is also an electrician in the maintenance department and was scheduled to work the day shift on May 6. As the request for time off was during a shut-down, Mr. Peterson did not have the authority to make the decision and took it to Mr. Andrew Generous, the Maintenance and Reliability Manager. Mr. Peterson came to the meeting with some options on how it may be possible to accommodate the request. During the arbitration, he was not able to recall what the proposed options were. Mr. Generous denied the request as all options required replacement of another electrician who was already scheduled to work. Mr. Peterson then advised Mr. Ruether that his request for union leave was denied.

8. The Employer and Union have regular quarterly meetings about contracting out issues. There was one on May 1, 2019 and the parties took that opportunity to also discuss the issue of the denial of Mr. Ruether's request for union leave to attend the pension seminar. The Employer was clear in that meeting that it was not saying no to anyone going but was saying no to any maintenance people going who were scheduled to work that day. The Employer suggested that the Union could find someone else to go to the seminar. Mr. Barker's response on behalf of the Union was that if Mr. Ruether could not go, "I'll go then". He said that his shift on May 6 was overtime and so it was voluntary. The Employer responded "you have already committed to that shift. You would be considered AWOL if you do not come".

9. At the end of the meeting, the Employer said "it's just unreasonable because it is the first day of the shut-down. We need our maintenance people here". The Union responded that the Employer needed to comply with the collective agreement and "I guess we know what we're doing then, right [Mr. Barker]".

10. There were other employees not scheduled to work on May 6 who were either Union committee members or members of the Union executive. The Union elects employees to be pension delegates at the local level who serve as a resource to other members on pension issues. An employee in operations elected as a pension delegate who would not be critical for the shut-

down could have likely attended the pension seminar. However, as he intended to retire the Union did not consider him a viable attendee

11. There was no further discussion about the issue after May 1, 2019. On May 6, 2019, at 1:40pm, Mr. Barker sent a text to Mr. Peterson saying:

> Hi Conrad just about to leave [Prince George] I don't think there's any way that I can be there for 6 haven't had any sleep today at all if you want I can come in between 10 and midnight for the rest of the shift.

Mr. Peterson responds:

> you should be here for your shift at 6 but if you cannot make it at 6 please come in when you can.

12. Mr. Barker returned from Prince George, got some sleep and attended at work mid-shift.

13. In the meantime, Mr. Chris Laberge, another electrician, was working the day shift on May 6. As he was the most senior employee on shift, he had been offered overtime at the beginning of the shift. He accepted and so was already working more than the 8-hour shift. Mr. Laberge worked 10 hours described as "regular" and then 8.5 hours as "holdover". I assume the 8.5 hours is covering for Mr. Barker's 12-hour shift until he arrived midshift. There is no evidence before me on how or when Mr. Laberge was asked to work more overtime. I assume he was asked to work the extra overtime when Mr. Peterson received Mr. Barker's text at 1:40pm saying he could not make it into work at the commencement of the shift or when Mr. Barker did not attend at 6:00pm.

14. On June 10, 2019, Mr. Barker was disciplined with a one-day suspension. The disciplinary letter states that the discipline is "as a result of your absence without leave for your scheduled night shift on May 6, 2019. It was explained to you why you could not miss work during a critical maintenance period for the mill, yet you willfully chose to ignore those instructions and not arrive until nearly halfway through your shift".

15. The Collective Agreement provisions related to union leave are as follows. Article 14 provides for union leave for those appointed or elected to full-time office which the parties agree is not relevant to this case. The other provision is Article 29 of a Memorandum of Agreement between the parties referred to as the "Codification". It states:

> The Company will grant reasonable time off from work to committee members and members of the Executive Board of the Union for the purpose of conducting Union business as per present practice.

III. SUBMISSIONS

16. The Employer relies on Article 1(1) of the Collective Agreement which requires the Employer and Union to cooperate fully for the advancement of certain conditions, including the "safety and physical welfare of the employees, economy of operation, …and protection of property". It acknowledges that a general-purpose clause is of less weight and significance when other specific terms of the collective agreement expressly deal with the matters in dispute but asserts it can provide guidance for the determination of the reasonableness of the Employer's decision.

17. The Employer made arguments about a document referred to as the Statement of Principle which has provisions concerning the voluntary nature of overtime. I will not set out the arguments here as the Union conceded at the arbitration that it was not relying on the Statement of Principle that says that "if an employee is requested to work [overtime], the employee has the right to come in or not to come in and no penalty can be imposed by the employer for the failure of the employee to come in…". The Union no longer argues that Mr. Barker could change his mind about an overtime shift accepted.

18. In response to the Union's argument that this is a case about union leave being denied, the Employer says that the union leave provisions in Article 14(1) do not apply as this is not a full-time leave of absence request and the Union never relied on Article 29 of the Memorandum of Agreement codifying local agreements which provides that:

> The Company will grant reasonable time off from work to committee members and members of the Executive Board of the Union for the purpose of conducting Union business as per present practice.

19. The Employer says the arguments by the Union about denial of union leave are irrelevant as Mr. Barker never requested union leave. It says the only reason the Union gave for Mr. Barker's non-attendance at work on May 6 was that it was an overtime shift and therefore voluntary and he did not need to attend. Mr. Barker did not turn down a request for overtime. He agreed to it and then resiled from that commitment to work after a clear direction that he would be AWOL if he did not show up for work.

20. The Employer also submits that it is not appropriate to look at this case with the benefit of hindsight and say that it was an unreasonable denial of union leave as it was never presented in that way.

21. In the alternative, the Employer says if it was a union leave request, it was reasonable for the Employer to take the position that the Union representative going to the pension seminar could not be an electrician due to the need for all electricians to be working during the initial stages of the shut-down.

22. The Employer and Union both rely on *Re Union Gas Ltd. And Canadian Electrical Workers' Union, Local 6,* [1979] O.L.A.A. No. 69 for the applicable principles determining if a failure to attend work due to a need to attend a meeting for union business amounts to insubordination or meets the test for an exception under the "work now, grieve later' principles. It says, at paragraph 34:

> The principle which emerges from the above cases is that the refusal to obey because of a concern about union business must be of an emergent nature to justify the refusal. In the recent case of *RE Lakeside Packers, Division of Lakeside Feeders Ltd., supra,* all of the decided cases were reviewed, and the principle formulated was as follows [p. 103]:
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> > …it is only when the actions of the union official can be rooted in the authority of the collective agreement or his particular status and that there is an urgency or important principle to be recognized which supersedes the ordinary paramount right of the employer for discipline and authority in management, that a union official may challenge the authority of the employer.

23. When discussed in the May 1 meeting, the position of the Union was that they had decided that only Mr. Barker or Mr. Ruether would attend, and the Employer could not question that decision. The Employer says that the reasonableness of the request for union leave includes who is going in the context of a shutdown where certain employees are critical. It says it was clear in discussions with the Union that it was not saying no one could attend, but rather that all maintenance employees and, in particular, electricians need to be at work on the first day of the shut-down.

24. The Employer submits that it was not "necessary or emergent" that the President or Vice-President of the Union, who were both electricians, attend the pension seminar on the first day of the shut-down when electricians are critical. It relies on *Re Canada Safeway Ltd. And Retail clerks Union, Local 409,* [1982] O.L.A.A. No 9, at paragraph 20:

> The right of a union official to absent himself from work in certain circumstances has also been recognized… The principle which is to be extracted from these cases

> has been identified in *Re Union Gas Ltd. And Canadian Chemical Workers' Union, Local 6 (1979), 18 L.A.C. (2d) 91 (McLaren)*, as follows [pp. 262-3]:
> …. the refusal to obey because of a concern about union business must be of an emergent nature to justify the refusal….

The Employer submits that there was no emergent need for Mr. Barker to attend the pension seminar as the information obtained could have easily been passed on by another committee member or member of the Union Executive attending. It notes that an employee designated as a pension delegate for the Union (albeit close to retirement) and other employees who had attended the seminar in 2016 could have attended instead of Mr. Barker. The Employer maintains its position that the electricians, including Mr. Barker and Mr. Ruether, were critical on the first days of the shut-down and, therefore, not an unreasonable denial of Union leave.

25. The Union submits that this case is rooted in the Employer's unreasonable breach of the Collective Agreement provision that allows for union leave. It says that the Employer cannot interfere with the Union's decision on who is the appropriate union representative to attend to union business. The Union says the Employer is going down a dangerous road of interfering with the administration of a trade union. It says the information obtained at the pension seminar which is put on every few years and attended by employer and union representatives is critical to learn about changes to the plan or relevant legislation. Mr. Barker and Mr. Ruether are the key individuals in the Union who handle questions from the membership about their pension and they need to be informed and up to date.

26. The Union says it does not agree with the Employer's characterization of its reasons for Mr. Barker or Mr. Ruether attending as an *ex post facto* justification. It relies on *Re Drug Trading Co. Ltd. And Energy & Chemical Workers Union, Local 11, (1991)* 19 L.A.C. (4th) 315, at paragraph 24, where the Arbitrator found the employer was not taken by surprise due to a lack of a written request for union leave. It says the Employer was fully aware that Mr. Barker was making the request for the same reason Mr. Ruether had previously in writing.

27. The Union submits that the principles in *Re Union Gas, supra*, at paragraph 34, allow for an exception where there is an "important principle to be recognized". It says the general-purpose clauses in the Collective Agreement also provide guidance. Section 2 states "…it is recognized to be the duty of the Union to explain fully to its members, its and their responsibilities and obligations under this Agreement". The seminars are put on every few years and are an invaluable resource for union officials to understand the pension or legislative

changes to be able to answer questions from the membership. Only Mr. Barker or Mr. Ruether, as President and Vice-President of the Union, were routinely asked questions by the membership. The Union says that the facts of this case fit into the analysis for the "work now, grieve later" principle as it could not be adequately addressed under the grievance procedures. It relies on *Re Union Gas, supra,* at paragraph 31, where it states:

> The rationale of these cases is founded on the premise that the grievance process will be ineffective, futile, or will not provide a proper redress to the grievor so that disobedience does not really affect the right of the employer to maintain discipline and symbolic authority.

28. The Union says that if discipline is warranted, then Mr. Barker's intent and understanding of his rights is relevant to the determination under *Wm. Scott,* [1979], BCLRB Decision No. 46/76, whether the discipline is excessive. It says a written warning is more appropriate. It relies on *Re International Woodworkers of America, Local 2-500 and Stancor Central Ltd. (Peppler Division), (1979)* 23 L.A.C. (2d) 255, at paragraph 10, where Arbitrator Weiler substituted a one-day suspension for the termination and found "even if discipline were valid on strict legal grounds, the fact of Evan's *bona fide* and reasonable beliefs about his conduct and the way in which the company decision was made, would require an equitable treatment".

29. The Union submits the importance of the seminar is not diminished by the Employer's decision not to send anyone to the pension seminar due to the shut-down. The Union acknowledges the importance of having workers present during the shut-down which is why it decided to send only one union representative, rather than seven like it did for the last seminar. The Union relies on the fact that it was only sending one representative to support the reasonableness of its decision that it had to be either Mr. Barker or Mr. Ruether.

30. The Union submits that the Employer did not give any real consideration to its suggestions for alternatives on how the Employer's requirements for scheduling could be accommodated to enable Mr. Barker or Mr. Ruether to attend the pension seminar. It also asserts that there was no significant cost impact as Mr. Barker would have been paid overtime on that shift as any other employee would. It also says that the scheduling was managed without any detriment to the Employer as a shift worker, Mr. Laberge, worked more overtime to cover Mr. Barker's absence and the Employer did not have less than a full complement of employees at work during the shut-down.

31. The Union also made an argument on the interpretation of Article 29 and asserts it is focused only on the reasonableness of the "time" and that the time must not be an undue burden on the Employer. It says Article 29 gives a substantive right to union leave without any pre-conditions of operational requirements which is common in other agreements. It also relies on the terms in Article 29 that say reasonable time off for conducting union business will be granted "as per present practice". In the past, union leave has been given to attend the pension seminar with seven employees attending in 2016.

32. In reply, the Employer submits that it is willing to accept the Union's argument that Article 29 only related to the amount of time asked for during the leave as it says there is no provision on union leave except for Article 14(1) for full-time leave requests. It says the only other provision is Article 14(5) which provides for employee leaves and gives the Employer more discretion as it only has an obligation to "endeavor to arrange leave to suit the employee's wishes": *Twinpack Inc. v. Communications, Energy & Paperworkers Union of Canada (Nichols Grievance)* [1995] B.C.C.A.A. No. 90. In the alternative, the Employer also submits that there is no evidence or argument to support the Union's assertion that the mutual intent bargained in Article 29 is for the Union to dictate when Union leave is granted and to whom and the Employer is limited to only a consideration of whether the amount of time is reasonable. It says the determination of reasonableness of Union leave is also tied to the individual, especially during a shut-down with critical roles to be filled.

33. The Employer also says that the reference in Article 29 of granting reasonable time off "as per present practice" has no application to the facts in this case. The fact that the Employer had granted leave in the past to attend the pension seminar is irrelevant as this is the first time it coincided with a shut-down of the mill.

IV. ANALYSIS

34. As the Union is no longer relying on the fact that the shift for Mr. Barker on May 6 was an overtime shift, I decline to make any rulings that would affect the parties going forward on the enforceability of the Statements of Principle and whether or not overtime is voluntary. It is not necessary for this case and the unique circumstances are not a good foothold for a ruling on that provision.

35. I dismiss the Union's argument that Article 29 provides a substantive right to time off for union business with the Employer only maintaining a right to decide if the amount of time is reasonable. I accept the Employer's alternative argument that there is no evidence before me to establish that was the mutual intent of the parties. It would also potentially result in there being no union leave provision except for Article 14(1) which is for full-time union leave and this is not consistent with the parties' practice concerning union leave provided under Article 29 for times like the pension seminar in 2016.

36. I find that this case is about a request for union leave and the question before me is whether Mr. Barker's non-attendance on May 6 meets the requirements for an exception under the "work now, grieve later" principles. If it does not, discipline for not attending the full shift is warranted under *Wm. Scott, supra.*

37. The meeting on May 1 concerning the denial of Mr. Ruether's request for union leave to attend the pension seminar got side-tracked by Mr. Barker's reliance on the shift he had agreed to work being an overtime shift. However, I find that the Employer knew that the purpose of Mr. Barker's intent to not show up for his shift was due to the denial of Mr. Ruether's request for union leave to attend the seminar and the Union's belief that this resulted in the need for Mr. Barker to attend. In the same vein as the decision in *Re Drug Trading Co. Ltd. And Energy & Chemical Workers Union, Local 11, supra,* I find that the Employer knew the purpose of the request for time off was for union business. I dismiss the Employer's arguments that it was not a request for union leave because Mr. Barker did not expressly request it as union leave in writing, using the leave form, or verbally in the May 1 meeting trying to reach resolution on the question of union attendance at the pension seminar. Mr. Ruether made a union leave request in writing which was denied. In the discussion on May 1 on how to deal with the denial of Mr. Ruether's union leave request and the Union's need to have someone attend during the shut-down, Mr. Barker said, "I'll go then". I find that the Employer knew the intent of Mr. Barker was to not attend work on May 6 so he could attend the pension seminar as a union representative.

38. Turning to the substance of the matters in dispute, Mr. Barker was disciplined for not attending the full shift on May 6. The question is whether the circumstances fit under the exceptions to the "work now, grieve later" principles in arbitral law. If they do, there is no cause for discipline.

39. For the question of balancing the interests of the Employer and the Union both parties rely on *Union Gas Ltd.-and- Canadian Chemical Worker's Union, Local 6, supra.* It states, at paragraph 34:

> The principle which emerges from the above cases is that the refusal to obey because of a concern about union business must be of an emergent nature to justify the refusal. In the recent case of *Re Lakeside Packers, Division of Lakeside Feeders Ltd., supra,* all of the decided cases were reviewed, and the principle was formulated as follows [p. 103]:
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> > …it is only when the actions of the union official can be rooted in the authority of the collective agreement or his particular status and that there is an urgency or important principle to be recognized which supersedes the ordinary paramount right of the employer for discipline and authority in management, that a union official may challenge the authority of the employer.

40. I agree with the Union that this fits into "an important principle to be recognized" that "may" supersede the right of the Employer to manage the workplace. It was an industry wide pension seminar of significant value to both employers and unions covered by the plan. This is evidenced by both parties sending multiple persons to previous seminars and the acknowledged complexity and importance of the pension plan.

41. I also agree with the Union that grieving the denial of Mr. Ruether or Mr. Barker's request for union leave would not provide an effective redress to the grievance as the pension seminar would be over with no union representative attending before the grievance process could be completed.

42. However, the decision on whether it was an unreasonable denial also requires an analysis of the interests of the Employer related to the leave request.

43. Both parties accept that the pension seminar was important, and it was critical to have electricians to handle the time-sensitive processes on the first day of the shut-down. I agree with the Employer that the reference to "as per present practice" in Article 29 does not apply to the circumstances in this case as it was the first time the pension seminar was scheduled on the same day as the first day of the shut-down. It is a significant distinguishing fact from previous leave requests. The question comes down to whether it was reasonable for the Employer to deny Mr. Barker's leave request to attend an important seminar on the first day of a shut-down due to his employment status as an electrician. I find there was no intention to interfere with the

Union's administration of its internal affairs. Mr. Barker's status as an electrician was the key factor for the Employer in denying the leave.

44. At the time of the most relevant discussion of the issue on May 1, the Union did not explain its position that it was only sending one representative to the seminar and therefore needed someone familiar with pension issues able to handle membership enquiries going forward. The Employer's suggestion of others in the Union leadership being able to attend was a reasonable proposal considering the need for maintenance employees to be on shift on the first days of the shut-down. The Union did not explain why it thought that option was not viable, but instead took the position that as Mr. Barker was working an overtime shift, it considered it voluntary and he could just not attend work without penalty.

45. Mr. Barker acknowledged he was not clear on his non-attendance for the May 6 shift which is why he sent the text saying he did not think he could get to work by 6:00pm as scheduled but would attend after if needed.

46. The Employer managed his non-attendance by having Mr. Laberge work additional hours until Mr. Barker attended. Mr. Laberge worked an 18-hour shift but did not cover the entire shift. If he had, it would have been in excess of 18 hours.

47. In these circumstances, I find it was a reasonable denial of the request for Mr. Barker to have union leave on May 6. The need to have all electricians on shift as scheduled in the first days of the shut-down was critical. The Employer's proposal of non-electrician Union representatives attending the seminar was not given any consideration by the Union. The Union did not provide the explanation it did during the arbitration that as the Union was only sending one representative due to the shut-down, it needed to be someone familiar with pension issues who would be remaining with the company for the foreseeable future. I find that the Employer was justified in saying at the end of the May 1 meeting, "it's just unreasonable because it is the first day of the shut-down. We need our maintenance people here". As the denial was reasonable in these circumstances, the non-attendance for union business does not amount to an exception to the "work now, grieve later" principles and therefore discipline is warranted.

48. Under *Wm. Scott, supra,* there are many factors to consider whether the discipline is excessive. The Union has argued that if discipline is warranted, a written warning is appropriate, and I agree. Mr. Barker had a *bona fide* belief in his ability to not attend work as it was an overtime shift. He also did not intend to cause any disruption to the work needed to be done

during the shut-down which is evidenced by the fact that he attended work as soon as he had enough sleep to be able to attend. I find this was not premeditated. The Union's focus was on having one person attend and the discussion on May 1 resulted in a spur of the moment response when Mr. Barker stated, "It is an overtime shift and I don't need to accept it". Mr. Barker is a long service employee with no previous discipline.

49. In these circumstances, I substitute a written warning which will record Mr. Barker's non-attendance at a scheduled shift due to a misapprehension about his rights as a Union representative to not report for work and instead attend a seminar related to Union business.

50. I allow the grievance in part. The discipline is upheld with a written warning substituted for the one-day suspension.

DATED at Vancouver, British Columbia this 15th day of July 2020.

Allison Matacheskie, Arbitrator