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

BETWEEN:

CARIBOO PULP & PAPER LTD.

(the "Employer")

AND:

UNIFOR, LOCAL 1115

(the "Union")

AWARD

(Bargaining Unit Work Grievance)

ARBITRATOR:	Allison Matacheskie
APPEARANCES:	Rebecca Kantwerg, for the Union Mark Colavecchia, for the Employer
HEARING DATES:	June 20 and 21, 2022
AWARD:	July 29, 2022

I. INTRODUCTION

1. The issue in this case is whether the Employer has breached the collective agreement by assigning bargaining unit work to excluded staff.

II. FACTS

2. The Employer operates a pulp and paper mill in Quesnel, British Columbia. Each year, production is stopped for a mill-wide maintenance shutdown. Every year, they alternate between a mini and major shutdown. In 2020, it was a mini shutdown.

3. The subject of this grievance is gas testing during shutdowns. Since 2013, the Employer has contracted out gas testing to IDL Projects Inc., which provides safety services. The purpose of gas testing is to ensure the air quality is safe when maintenance is done in a confined space. Hundreds of gas tests will be done during a shutdown and infrequently during normal operations.

4. On February 18, 2020, the Employer gave the Union notice of its intent to contract out to IDL and the Union did not object. The reason provided in the notice was "the scope of this work is too large for the mill to dedicate its workforce against while at the same time tending to core maintenance activities".

5. In late April 2020, the mill was shut down for a production curtailment. It ended just before the start of the 2020 shutdown. All employees on layoff due to the curtailment were recalled for the 2020 shutdown and assigned duties related to the shutdown like spark and tank watch. It was approximately half the size of a mini shutdown as it only dealt with essential maintenance. The Employer wanted to avoid overtime during the shutdown as much as possible.

6. Sometime before the shutdown, the Employer decided to limit its use of IDL due to the COVID-19 pandemic. The intent was to limit the number of IDL employees coming to Quesnel and the workplace during the pandemic for the safety of the community and the employees. The Employer did not advise the Union of its decision not to contract out the gas testing.

7. The Employer assigned the gas testing to excluded staff from the Tech Group who needed minimal training due to their prior experience with gas testing or familiarity with the environment. Prior to 2010, gas testing was done exclusively by Shift Technicians, who were excluded from the bargaining unit. In 2010, the position of Shift Technician was eliminated, and gas testing was assigned to the security/first aid attendants in the bargaining unit (FAS). The FAS Department

Procedure Manual was revised in 2010 to reflect this change in assignment. Between 2010 and 2012, temporary employees were hired as bargaining unit members to do the gas testing during shutdowns. Under the terms of the collective agreement at the time, employees who worked during the limited time required for a shutdown did not acquire recall rights when laid off. The Employer says temporary employees and excluded staff from the Tech Group did the gas testing during the shutdowns from 2010 to 2012. The Union says that excluded staff only helped the temporary employees do the gas testing which would fit within the exception for staff performing bargaining unit work. The Employer also says only gas testing during normal mill operations was assigned to FAS. The Union says the task of gas testing was assigned and the timing of the work being done is irrelevant.

8. On May 15, 2020, Samantha Wright, the Quality Assurance Supervisor at that time, sent an email with the gas testing schedule. Three excluded staff were assigned to perform this task from 7:00am to 5:00pm and three other excluded staff were assigned from 5:00pm to 3:00am. The FAS would perform any gas tests required between 3:00am to 7:00am. The shutdown was from May 19 to 25, 2020. On May 22, 2020, Wright updated the schedule. From May 23 to 25, 2020, the FAS would perform all gas testing during the night shift and one excluded staff did it on day shift

9. As the Employer only has two devices for gas testing, it rented eight devices from IDL to conduct the high number of gas tests required during the shutdown.

10. During the shutdown all FAS employees worked their full-time schedule. Some worked overtime. Their various essential duties during a shutdown were providing first aid or medical response, manning the front gate to monitor access on and offsite, directing contractors and visitors, issuing hot work permits and daily checklists and inspections of equipment. They also conducted the COVID-19 health screening which required everyone coming onsite to answer a questionnaire.

11. During past shutdowns, three FAS were scheduled per day shift and three per night shift for all days of the shutdown. This resulted in overtime. During past shutdowns, the FAS did not do the gas testing.

12. The Employer contracted again with IDL for the shutdowns in 2021 and 2022. No staff or bargaining unit employees did any gas testing during these shutdowns.

III. SUBMISSIONS

13. The Union submits that the collective agreement is the product of a long history of industry-wide negotiations in the pulp and paper industry and the language of its provisions, and the Statement

of Policy, have been interpreted by arbitrators for years. It says prior awards regarding other parties bound by the same language must be followed unless I am persuaded they are clearly wrong: *Pope and Talbot,* [2006] BCCAAA No. 224, *Prince George School District No. 57,* [1977] 1 CLRBR 45.

14. The Union submits that the test for determining if staff have been assigned bargaining unit work in violation of Article IV of the Collective Agreement and Article II of the Statements of Policy is set out in *Canadian Forest Products Ltd., Howe Sound Pulp Division and Canadian Paperworkers Union, Local 1119,* (January 5, 1979) J. Weiler (unreported). It says this test has been subsequently followed and applied in *MacMillan Bloedel Limited, Powell River Division and Canadian Paperworkers Union, Local 76* (April 22, 1983) Vickers (unreported) ("*MacMillan Bloedel Powell River"),* and *Cariboo Pulp & Paper Co. v. Unifor, Local 1115 (Bargaining Unit)* (2020), 313 LAC (4th) 365. It summarizes the test as follows: excluded staff may not do the kind of work which is done by the bargaining unit employees unless the following three conditions are met: (a) the work is in the nature of help and for the purpose of maintaining the practical and efficient operation of the mill, (b) the occasion of the supervisor doing the work is a temporary occasion and (c) the performance of the work does not displace or exclude the bargaining unit workers.

15. The Union submits that the focus is on the tasks done when determining if the work is of the "kind normally done by bargaining unit employees": *Canadian Forest Products,* at page 14, *Cariboo (Bargaining Unit)* at paragraph 105. It says the protection is broader than the precise work that is presently done by the bargaining unit employees. The Union asserts that gas testing became the kind of work normally done by bargaining unit employees when it was transferred from management to FAS in 2010.

16. The Union submits that the gas testing during a shutdown is done in the same way the bargaining unit performs gas testing. It also relies on the job postings, Confined Atmospheric Air Monitoring Policy and FAS Department Procedure Manual, that all reference gas testing as a responsibility of the bargaining unit. It also submits it is relevant that when the Employer gave notice to the Union of contracting out, it did not state the reason was that the work was not normally done by the bargaining unit, but rather the scope of work was too large for the FAS to be able to do it.

17. It also relies on the fact that the temporary workers hired to work the 2010 to 2012 shutdowns were bargaining unit members.

18. The Union submits that the timing of the work does not define what the work is. It says the Employer's argument that the bargaining unit employees did not perform gas testing during a

shutdown is legalistic and should be rejected in the same manner as the legalistic argument rejected in *Northwood Pulp and Timber Ltd. and CPU, Local 603*, [1991] 23 CLAS 386, at paragraph 44. It submits that in *Canadian Forest Products* the supervisors performed the work in stores, when no bargaining unit employees were on shift in the stores, and in *Cariboo (Bargaining Unit)* the new system had not been turned over to the bargaining unit yet did not change the nature of the work being done. It says it was still bargaining unit work despite the timing of when it was performed.

19. The Union submits the only relevant past practice is the last 10 years where gas testing has been done exclusively by the bargaining unit. The Union submits that the work in question being performed by a contractor for many years does not detract from the conclusion that bargaining unit employees have normally performed the work: *Cariboo Pulp & Paper v. CEP, Local 1115 (Code of Ethics)*, [2011] BCCAAA No. 88. 107 CLAS 176 at paragraph 56. It says while past practice evidence of work being done by bargaining unit employees versus excluded staff may be relied on to determine whether work is of the kind normally performed by bargaining unit employees, evidence that the Employer has contracted out cannot be relied upon.

20. The Union submits it would be unfair and not reflective of the parties' intentions to find the Employer has the unilateral power to exclude work from the bargaining unit by contracting it out. It says the Union gained the provisions restricting contracting out through bargaining and exceptions should not be implied: *Howe Sound Pulp & Paper Ltd. and Unifor, Local 1119*, [2014] 118 CLAS 145 BCCAAA No. 23, at paragraph 6. It also relies on the following from *Eurocan Pulp & Paper Co. and Canadian Paperworkers' Union, Local 298*, [1993] BCCAAA No. 30, at paragraph 31:

> … In sum, if the company had elected to do the work with its own employees instead of using a contractor (as might well have been the case), there clearly would have been work available for the laid off employee(s). In the straightforward circumstances of the case, I believe that conclusion must lead to the further conclusion that the company was in violation of Article XXV(b)(i) of the collective agreement.

21. The Union submits that the potential impact on the bargaining unit must be considered. It says in *MacMillan Bloedel Co. and CEP, Local 76*, [1993] BCCAAA No. 333, the arbitrator did not accept the argument that because major stand-alone projects were always contracted out, it remained bargaining unit work and found the employer breached the collective agreement when it assigned painting work to contractors when the painters in the bargaining unit were on lay off. It says the question of whether the contracting out replaces the bargaining unit workforce must be determined

on an objective basis: *Cariboo Pulp and Paper Co. and Unifor, Local 1115,* [2014] BCCAAA No. 73.

22. The Union submits that the onus is on the Employer to establish the exception to the rule that staff cannot do bargaining unit work. It says it is an exception with three parts that must all be met. It says the Employer has not established the work was help, was a temporary occasion or for the purpose of maintaining the practical and efficient operation of the mill and bargaining unit employees were not displaced or excluded from the work. It submits the "help" must be minor in nature: *Cariboo (Bargaining Unit)* at paragraph 14. The Union submits the gas testing by staff was not a temporary occasion. It notes that in *Canadian Forest Products,* at page 21, the arbitrator found "there is a qualitative difference between unanticipated incidents and the regular operation of the store by a supervisor". The Union says that properly interpreted, an occasion would be one gas test and not all the gas testing performed during the shutdown to the exclusion of the bargaining unit.

23. The Union submits that it is relevant that employees were available for overtime. It says the bargaining unit employees were displaced or excluded as they were left at home when they could have been doing gas testing. It says for previous shutdowns three FAS employees were scheduled on day shift and three on night shift. In the 2020 shutdown, they were only scheduled two employees on day shift and two on night shift. Therefore, they were deprived of the additional shift. The Union relies on the following from *Canadian Forest Products,* at page 21:

> …if a counterman were not included for that shift, where the task of receiving a shipment might take several hours (as compared to five minutes as in the issuance of a screwdriver) where the job can be anticipated well in advance and proper scheduling of counterman ensured as to not disrupt the practical and efficient operation of the mill, in my view, to deprive the counterman of this job is to displace or exclude him within the meaning of Article II.

24. The Union also asserts that the arbitrators in *MacMillan Bloedel Ltd. And PPWC, Local 8, (Harmac Division),* 1986 CarswellBC 3660, 2 C.L.A.S. 52 and *MacMillan Bloedel Powell River* found that bargaining unit employees were not displaced or excluded because the employer made reasonable efforts to offer them the work on a voluntary basis. In this case it says the employees were not offered the opportunity to conduct the gas testing on overtime before it was assigned to the staff, and this violates the collective agreement.

25. In summary, the Union submits it has met its onus of establishing that gas testing is the kind of work done by employees in the bargaining unit. It says the Employer bears the onus of establishing

it has met the exception to the rule that staff may not perform bargaining unit work and has not met that test.

26. For remedy, the Union seeks damages for the Employer's conduct. It says where an employer improperly assigns bargaining unit work outside of the bargaining unit, the appropriate remedy is a monetary award to ensure the employer is not rewarded: *SGS Supervision Services Inc.*, [1997] BCCAAA No. 383, at paragraph 63, *British Columbia Forest Products Ltd., MacKenzie Pulp Division v. CPU, Local 1092* (1983), 10 LAC (3d) 43, at paragraph 6. It says the proper remedy is that the Employer pay lost wages, lost union dues and pension contributions.

27. The Employer submits that gas testing on shutdowns is not bargaining unit work as it has been performed by staff, bargaining unit employees and a contractor. It says the majority of gas testing in the mill has been performed by IDL. In the alternative, the Employer says if gas testing is bargaining unit work, the use of staff in the 2020 shutdown did not violate the collective agreement as it did not undermine or threaten the integrity of the bargaining unit.

28. The Employer submits that arbitrators have affirmed that the Statements of Policy are not terms of the collective agreement but only intended to be supplement guides to the interpretation of the collective agreement: *Northwood Inc.,* [1998] BCCAAA 480. The Employer asserts that for the implied restriction on excluded staff performing bargaining unit work to be breached, it must affect the integrity of the bargaining unit or be sufficient to bring the excluded staff within the bargaining unit: *Cariboo (Bargaining Unit),* at paragraph 90.

29. The Employer submits that in the absence of an express reservation of work jurisdiction, what is bargaining unit work becomes a question of fact to be determined on the basis of past practice: *Mission Hill,* [2019] No. 5, at paragraph 97. The Employer submits the Union must demonstrate that the work in issue was performed by bargaining unit employees to the exclusion of persons outside the unit. It relies on *Northwood,* at paragraph 14, where the arbitrator dismissed the grievance as salaried employees regularly performed the work in question. It also relies on *Unifor, Local 30 and Irving Pulp & Paper Ltd.* (2019), 306 LAC (4th) 388, at paragraph 81:

> In implying the existence of such a restriction, arbitrators have set out a threshold test that must first be satisfied before the implied restriction can begin to operate. As set out in *Weyerhaeuser Co. and USWA, Local 1-2171 (Contracting Out), RE, supra,* at paragraph 72, "Specifically, the Union must prove that the disputed work is bargaining unit work in the sense that it was work performed by bargaining unit employees to the exclusion of persons outside the bargaining unit. Unless this threshold test is satisfied, there is no jurisdictional claim to protect and the implied restriction on the assignment of work is not

> attracted." It is the Union who bears the burden of establishing, on a balance of probabilities, that the disputed work is bargaining unit work in the sense that it is work which normally and traditionally had been done by members of the bargaining unit to the exclusion of persons outside the unit.

30. The Employer submits that gas testing on shutdowns has not been exclusively performed by members of the bargaining unit and is not bargaining unit work. It says staff performed gas testing until 2013 and, since then, the majority has been performed by IDL including two shutdowns that have occurred since the 2020 shutdown. It says had it not been for the COVID-19 pandemic, IDL would have performed all the gas testing on the 2020 shut down. It submits that however the "work" of gas testing is defined, whether during normal operations or during shutdowns, the majority has been performed by people outside of the bargaining unit. It says the bargaining unit employees have never exclusively done the gas testing at the mill and, therefore, it is not bargaining unit work.

31. The Employer submits that if it was proper to use IDL to perform gas testing on shutdowns, then it was proper for staff to do so on this one-time limited, temporary occasion for the practical and efficient operation of the mill where no employees were displaced or excluded. It also notes that the FAS have never done gas testing during shutdowns. They have other duties to perform and do not have time to do the significant amount of gas testing required during a shutdown. It says the FAS only perform approximately 12 gas tests during a year. In a shutdown, IDL performs hundreds.

32. The Employer submits that in order for the Union to prove excluded staff performed bargaining unit work in violation of the collective agreement, it must establish that: (a) the work in issue is the kind of work performed by bargaining unit employees, i.e. bargaining unit work, (b) excluded staff performed the bargaining work normally, typically or routinely, i.e. it was not temporary or for a limited time such that it would bring staff within the bargaining unit, (c) it was not practical and efficient for staff to perform gas testing during the 2020 shutdown and (d) it resulted in the displacement or exclusion of bargaining unit employees. It asserts that the Union has not met this test.

33. In the alternative, the Employer submits if gas testing during shutdowns is bargaining unit work, the use of staff to perform gas testing on the 2020 shutdown was not a violation of the collective agreement as it did not undermine or threaten the integrity of the bargaining unit. It says the work done was temporary as it was only a few days, it has not happened since, and it did not result in the displacement or exclusion of any bargaining unit employees as there were no employees on layoff and all FAS employees worked their regular shifts. It says it would not be practical or efficient for

the Employer to have the FAS employees do the gas testing as they would not be able to do their other required duties during the shutdown. It says it was practical and efficient for the staff to do it during the 2020 shutdown which was half the size of the Employer's mini shutdowns; and this assignment easily fits within the exception of staff performing bargaining unit work.

34. The Employer says the Union's focus on overtime and expectations is misplaced. The Employer is not obligated to provide FAS employees with overtime, regardless of what they may expect. It also says the employees would not be expecting to do gas testing on the 2020 shut down as they had not done it on any previous shutdown.

35. The Employer submits the Collective Agreement does not contain provisions requiring it to provide bargaining unit employees with overtime before it may contract out or have staff perform bargaining unit work. The Employer submits it is important to note that the arbitrator in *Cariboo (Bargaining Unit)* did not interpret Article II of the Statements of Policy and Article IV of the collective agreement to require that the Employer first offer the work in issue to bargaining unit employees on overtime. The Employer submits that arbitrators have concluded that overtime provisions in an agreement do not limit the assignment of bargaining unit work to non-bargaining unit employees: *Brown and Beatty, Canadian Labour Arbitration, 5th ed. Para 5.16.* The Employer asserts it is management's decision whether an employee is available to be assigned the work and relies on *British Columbia and BCGEU,* [1993] BCCAAA No. 284 at paragraphs 13-15:

> I turn first to an analysis of article 16.05 of the Master Agreement. The operative words are "overtime work shall be allocated equitably to qualified employees considering their availability and location". "Availability" for overtime depends on whether or not the work in question is either part of the employee's regular job duties or has been assigned to an employee by the employer. In the instant case, fire suppression duties are not part of Mr. McArthur's regular job. That being the case, it is entirely within the employer's discretion whether or not to assign him such work. If it does, he then becomes "available" for overtime for the purposes of article 16.05. If it does not, as in the instant case, then an employee in the position of Mr. McArthur has no right or entitlement to claim work which attracts standby or overtime.
>
> The fact that the grievor has been trained for and has had many years of experience in fire suppression duties does not make him "available" for those duties merely because of such training and experience. As was found in Re Wire Rope Industries Ltd. and U.S.W., *4 L.A.C. (3d) 323,* at page 329:
>
> > . . . there was work "available", [but] it was not available for that employee because management chose not to make it available.

> It is not the grievor's view that he is "available" that governs. It is management's decision to make him available for the duties that must prevail.

36. In conclusion, the Employer denies that it breached the collective agreement when it had staff members perform gas testing during the 2020 shutdown because it is not bargaining unit work. In the alternative, if I find that gas testing on shutdowns is bargaining unit work, the Employer says it fits squarely within the parameters of the exception to the implied restriction as the work was temporary, it was help in relation to the practical and efficient operation of the mill, and there was no displacement or layoff of FAS employees or any other bargaining unit employees capable of performing gas testing.

37. The Employer submits that if a violation is found, a declaration would provide the appropriate remedy. It says if there is no loss to any bargaining unit employee, damages are inappropriate. It says non-compensatory damages should be exceptional and only awarded where a declaration is inadequate: *Lilydale Inc.*, [2013] BCCAAA No. 152.

38. In response to the Union's argument, the Employer disputes the Union's claim that if the Employer had notified the Union in advance that staff were going to do the gas testing, something could have been worked out. It says it is not possible to come up with a way that FAS could do the gas testing and all the FAS shutdown work. It also notes that the employees knew about staff doing the gas testing by May 15, did not raise concerns and a grievance was not filed until July 6, 2020.

39. The Employer takes exception to the Union's claim it intended to replace the FAS employees. It says the key here is practical and efficient operation of the mill. It says it had no effect on the bargaining unit. It also says I must consider the context of the curtailment and goal to avoid overtime while getting everyone back to work. It says the only thing FAS did not do is overtime and this shut down was 50% of a small shut down.

40. In response to the assertion there is no evidence the Employer is trying to replace the bargaining unit, the Union says its key argument is the implications the Employers' argument will have on the contracting out provisions. The Union submits it is irrelevant that it did not grieve right away as the Employer is not saying it is too late and there is no time limit in the collective agreement. It also asserts the desire to save costs and not pay overtime is irrelevant.

IV. ANALYSIS

41. There is no express provision in the collective agreement prohibiting excluded staff from performing bargaining unit work. However, there is an implied restriction to the extent that it may threaten the integrity of the bargaining unit or bring the excluded staff into the bargaining unit. In *Cariboo (Bargaining Unit)*, the arbitrator considered the same collective provisions that are at issue in this case and found at paragraphs 90 and 92:

> In this case, Article IV of the Collective Agreement does not expressly prohibit excluded staff from performing the type of work done by members of the bargaining unit. It is well-established that absent express language conferring exclusive jurisdiction to a union over specified work, an employer is free to assign the work as it sees as being appropriate. However, arbitrators have generally found seniority, job posting, layoff, recall, job classification and union security provisions as establishing an implied collective agreement restriction on the ability of excluded staff to perform bargaining unit work. That restriction is generally seen as precluding bargaining unit work being done by excluded staff to such an extent it effectively brings a supervisor into the bargaining unit.
>
> ….
>
> Article IV of the Collective Agreement recognizes the need to preserve the integrity of the bargaining unit. I accept that in furtherance of that objective, implicit in Article IV is a restriction on management's ability to do work performed by members of the bargaining unit.

42. I also agree with the arbitrator's conclusion in *Cariboo (Bargaining Unit)* at paragraph 93 concerning Article II of the Statements of Policy:

> In this case, the parties have agreed to specific language in Article II intended to provide guidance regarding how the integrity of the bargaining unit is to be protected in this Collective Agreement.

43. Article II of the Statements of Policy says:

> Employees and employers recognize that supervisors are excluded from the provisions of the B.C. Standard Labour Agreement and accordingly it is improper for supervisors normally to do the kind of work which is done by those defined as employees in the Agreement.
>
> It is also recognized that for the practical and efficient operation of the mills there are occasions when a supervisor must help. Such occasions must be temporary in nature and must not result in the displacement or exclusion of employees under the Agreement.

44. In *Canadian Forest Products,* at page 13-14, the arbitrator considers Article II of the Statements of Policy and finds:

> In my view, the parties by this language have provided that as a general rule supervisory staff may perform only the functions of management and direction and may not in the ordinary course of affairs do the kind of work that is normally performed by employees in the bargaining unit. At the same time, in paragraph 2 of Article II the parties have carved out an exception to this general prohibition against supervisory staff doing bargaining unit work. This exception has several components:
>
> (i) such work must be in the nature of "help" and must be for the purpose of maintain the practical and efficient operation of the mills;
>
> (ii) the occasions when the supervisors may perform bargaining work must be temporary in nature;
>
> (iii) the performance of this work by supervisors must not result in the displacement or exclusion of bargaining unit employees.

45. This sets the framework for determining if the gas testing done by excluded staff during the 2020 shutdown threatened the integrity of the bargaining unit.

46. The first question is whether gas testing during a shutdown is bargaining unit work. This is a question of fact to be determined on the basis of past practice: *Mission Hill,* at paragraph 97. Prior to 2010, the Shift Technicians did the gas testing. This excluded position was eliminated in 2010 and gas testing was formally moved to the bargaining unit as reflected in the revision to the FAS Department Procedure Manual to include gas testing. Subsequent job postings for FAS include gas testing as a job requirement and the Confined Space Atmospheric Air Monitoring Policy states that FAS has the responsibility for gas testing. I do not put any weight on the fact that gas testing was done exclusively by staff prior to 2010 as it is not a situation where the Employer could be going back and forth between using excluded and bargaining unit employees. It made a definite and clear end to using the excluded employees.

47. There is no dispute that since 2010, gas testing has been bargaining unit work during normal operation of the mill.

48. From 2010 to 2013, the Employer hired temporary employees in the bargaining unit to conduct gas tests during shutdowns. The excluded Shift Technicians supervised and trained the temporary employees. Ms. Wright acknowledged in cross-examination that the Shift Technicians would perform gas testing during shutdowns for troubleshooting or when the temporary employees were swamped. Based on this, I find that the work of gas testing during shutdowns was performed by bargaining unit employees from 2010 to 2012 and the Shift Technicians were only directing or helping.

49. By 2013, due to attrition and technological change, the excluded staff were no longer qualified to train and supervise temporary employees and the FAS were too busy with other essential shutdown responsibilities to be able to conduct gas testing during a shutdown. For these reasons, the Employer decided to contract out the gas testing to IDL.

50. I agree with the Union that the timing of the work being done is not relevant to determining if it is bargaining unit work. The work of gas testing is the same during normal operations and shutdowns. The only difference is the amount of work that needs to be done over a short period of time.

51. This case is not about the validity of contracting out. The Union has not challenged the use of IDL, but rather has challenged the Employer's ability to assign gas testing to supervisors once it decided not to contract out. I find the Employer cannot rely on the work being contracted out as evidence of past practice that the bargaining unit members did not exclusively do the work in a dispute about the application of the principles in Article II related to the prohibition against supervisory staff doing bargaining unit work. In this case, the review of past practice to determine if bargaining unit members have exclusively done work is based on a consideration of excluded personnel and bargaining unit members doing the same work. As noted in *Cariboo (Code of Ethics),* at paragraph 57:

> The bargaining unit employees have normally performed the work as defined above. They cleaned the precipitators during the mill operation in a troubleshooting role and during the shutdown, although it occurred some years ago before [a contractor] was utilized. However, that fact does not detract from this conclusion.

52. In this case the Employer had no intention of supplanting the bargaining unit by having staff do the gas testing. It was dealing with a unique set of circumstances where it decided not to use the contractor due to COVID-19 and used excluded staff for the gas testing as the FAS were busy doing other essential tasks. It also wanted to avoid the use of overtime due to the recent curtailment. However, I agree with the Union's submission that if the contracting out of bargaining unit work was considered time when the bargaining unit did not exclusively do the work, this would threaten the integrity of the bargaining unit. If this was the case, when the contract was over, the Employer could claim it is no longer bargaining unit work and assign gas testing regularly to excluded staff.

53. The reason the Employer provided for contracting out reinforces that gas testing is bargaining unit work even during a shutdown. The notification system has a dropdown menu that reasons for contracting out can be selected from. One of the options is that the work is not normally performed

by the bargaining unit. From 2013 to 2019, the Employer did not select that option. Instead, the reason it generally provided was "the scope of the work is too large for the mill to dedicate its workforce while at the same time tending to core maintenance activities". This leads me to infer that the Employer did not consider gas testing to no longer be bargaining unit work during a shutdown.

54. As set out above, I find that the work during shutdowns was done by the bargaining unit temporary employees with staff only helping from 2010 to 2012. I do not include the use of contractors from 2013 to 2019 in this consideration of past practice. I do not put any weight on staff performing the work prior to 2010 as the Employer made a clear end to that practice and bargaining unit employees have exclusively done the work during normal operations since 2010. Based on these findings, I conclude gas testing whether during normal operations or during a shutdown is bargaining unit work.

55. The next step in this analysis is to consider the exception under Article II as explained in *Canadian Forest Products* at page 14. There is no dispute that FAS could not handle all the required gas testing during the shutdown and do the other essential functions of their job. The use of excluded staff to do gas testing is clearly in the nature of help and for the purpose of maintaining the practical and efficient operation of the mill.

56. I find it was temporary in nature as it was for an isolated occasion of a shutdown where the Employer made a reasonable decision not to use the services of a contractor due to COVID-19 and the FAS were too busy to handle all of the work. It did not continue to use staff for gas testing in the 2021 and 2011 shutdowns. In *Cariboo (Bargaining Unit)*, at paragraph 116, the arbitrator found it "was occasional, unusual and done on an interim basis with a fixed time frame". I also find this to be an unusual and interim use of staff to do bargaining unit work.

57. The last part of the framework set by Article II is whether the performance of this work by supervisors resulted in "the displacement or exclusion of employees". The language in Article II of the Statements of Policy is different than the language used in the contracting out language in Article XXV (b) which states:

> The Company will not bring a contractor into the mill:
> (i) which directly results in the layoff of employees, or
> (ii) to do the job of employees on layoff, or
> (iii) to do the job of a displaced employee working outside of their job category.

58. The Union says that the language in Article II protects work including overtime opportunities which is different than avoiding layoff. The Employer says that there is no right to overtime, and the

FAS were not displaced or excluded as they all worked their full-time schedule during the shutdown. In *Canadian Forest Products*, at pages 20-21, the arbitrator explained what kind of work would displace or exclude a bargaining unit employee:

> Consequently even if a counterman were not scheduled for that shift, where the task of receiving a shipment might take several hours (as compared to five minutes as in the issuance of a screwdriver), where the job can be anticipated well in advance and proper scheduling of counterman ensured so as not to disrupt the practical and efficient operation of the mill, in my view to deprive the counterman of this job is to displace or exclude him within the meaning of Article II. On the same vein, where a major breakdown occurs in the mill necessitating a continuous flow of material from mill stores over a substantial portion of an off-shift, the counterman should be called out to perform this work. There is a quantitative difference (that becomes a qualitative difference) between an unanticipated single issuance of an item from mill stores by a tour foreman, and a continuous operation of the mill stores by that tour foreman through a substantial portion of a shift. It is this latter type of practice that Article II indicates is inconsistent with this Collective Agreement's protection of the integrity of the bargaining unit.

59. As the bargaining unit employees in *Canadian Forest Products* would be called off-shift, it would presumably be overtime. In *MacMillan Bloedel (Harmac Division)* at paragraph 109, the arbitrator found:

> The welding job the supervisor performed was temporary in nature, taking only a small part of the shift to perform. Because the work should have been done promptly in order to avoid a production loss and because management made a reasonable effort to offer the work on a voluntary basis to welders who were presumably available and in accordance with their seniority list there was no displacement or exclusion of bargaining unit employees.

60. Similarly, in *MacMillan Bloedel Powell River*, the arbitrator considered the use of overtime and found at pages 17-18:

> In the exercise of their legitimate right not to work overtime, bargaining unit members were not available to do the work. The "operation of the plant ... the ... economy of operation, quality and quantity of output..." (Article I, Section 1) required the intervention that followed. While it is not normal for supervisors to do the work, it was, in my opinion, help required for the practical and efficient operation of the mills, temporary in its nature and did not result in the displacement or exclusion of employees under the agreement (Article II(a), Statements of Policy).

61. The Employer relies on the statement in *Brown and Beatty*, at 5:16, that:

> …arbitrators have generally taken the position that the overtime provisions in an agreement do not limit the assignment of bargaining unit work to non-unit employees, although ultimately the question in each case is one of construction of the agreement.

62. The cases in the footnote for this statement relate to contracting out and I do not consider it to be applicable to the question of assigning bargaining unit work to excluded staff rather than offering it to bargaining unit employees as overtime. The most recent case in the footnote is *Dominion Diamond Ekati Corp. v. Public Service Alliance of Canada,* (2017) 277 LAC (4th) 429 where the arbitrator found at paragraph 40:

> In my view, the law is well settled that ***overtime*** provisions, unless very explicit in reference to contracting out, cannot serve as a contracting out restriction where no such restriction exists in the collective agreement, as is the case here.

63. Similarly, the *BCGEU* case relied on by the Employer did not deal with the issue in this case which is whether the Employer can assign bargaining unit work to the excluded staff to avoid overtime.

64. Most importantly, the *Brown and Beatty* commentary states that ultimately the question in each case is one of construction of the agreement, which in this case, is the application of Article IV of the collective agreement under the guidance of Article II of the Statements of Policy.

65. In the 2020 shutdown, the FAS were scheduled for their full-time regular shifts and would be presumably available for overtime. The Union called a FAS employee as a witness who testified she was available for overtime and expected it. No layoffs resulted from the staff conducting the gas testing during the 2020 shutdown. However, as the Employer made the decision to assign the work of gas testing to its workforce and as assigned it to excluded staff, the implied restriction against staff performing bargaining unit work must be considered. Applying the analysis from *Canadian Forest Products,* I find that the amount of work is significant as hundreds of gas tests were required during the shutdown and six excluded staff were assigned for 10 hour shifts for days and nights for the first few days and then one excluded staff was assigned for the day shifts for the remaining days of the shutdown. The FAS were fully utilized for their regular full-time hours doing other essential work during the shutdown and were not available to do all of the required gas testing. However, FAS were available to do gas testing on overtime shifts. When the Employer assigned bargaining unit work to excluded staff without offering it to the FAS who were available to do the work on an overtime basis, it excluded them from work opportunities. This means the assignment of staff resulted in the exclusion of bargaining unit employees.

66. I appreciate the Employer wanted to avoid overtime following the curtailment and impact of COVID-19 and that it would not automatically think of the FAS performing the gas testing during

the shutdown as they had never done it previously. However, as set out above, the long use of a contractor for gas testing in shutdowns does not remove the work from the bargaining unit. Once the decision was made to keep the work inhouse, the implied restriction when assigning bargaining unit work to excluded staff had to be considered.

67. In conclusion, all three elements in Article II must be met for the implied restriction against assigning bargaining unit work to excluded staff to not be applied. I find the bargaining unit work performed by the excluded staff was help required for the practical and efficient operation of the mill, temporary in nature but it excluded employees from overtime opportunities. As the condition of not displacing or excluding bargaining unit employees has not been met, I find that Article IV of the collective agreement has been breached.

68. For remedy, I issue the declaration that assigning gas testing to supervisors in the 2020 shutdown was in violation of the collective agreement. For further remedy, overtime under the terms of the collective agreement is voluntary and it is unknown how many FAS employees would have accepted the offer of overtime besides the one employee who testified, and it is uncertain how much overtime there would have been. I order lost wages and pension contributions for overtime shifts that would have been worked by FAS during the 2020 shutdown. I remain seized in the event the parties do not reach agreement on how to implement this order.

DATED at Vancouver, British Columbia this 29th day of July 2022.

Allison Matacheskie, Arbitrator