IN THE MATTER OF AN ARBITRATION UNDER THE
***LABOUR RELATIONS CODE of BRITISH COLUMBIA,* R.S.B.C. 1996 c.244**

BETWEEN:

DELTA CEMENT, A DIVISION OF LEHIGH HANSON MATERIALS LTD.

(the "Employer")

AND:

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, LOCAL LODGE D277

(the "Union")

Roller Mill Contracting Out Grievance

ARBITRATOR:	David C. McPhillips
ON BEHALF OF THE EMPLOYER:	Andrew Woodhouse
ON BEHALF OF THE UNION:	Richard L. Edgar and Natasha Edgar
DATES AND PLACE OF HEARINGS:	December 12 and 13, 2019 Richmond, BC
DATE OF AWARD:	January 16, 2020

The parties are agreed that this Board has the jurisdiction to determine this matter which involves three grievances filed by the Union respecting the contracting out to an outside firm (RKM Services) of the weekly preventative maintenance work performed inside the Roller Mill at the Employer's Delta operation.

FACTS:

Delta Cement is part of the Lehigh Hansen Group and operates a facility in Delta which makes cement. The Labour Relations Manager for Western Canada for the Company is Stephen Abrahams. The Maintenance Manager at the Delta plant since 2013 has been Rod McIver, who started with the Company in 1991 and was a millwright until 2000 when he became a Maintenance Supervisor. Andrew Cortese started with the Company as a Plant Engineer in 2015 and he became the Production Manager in April, 2018.

The employees at the site are represented by the International Brotherhood of Boilermakers, Local Lodge D277. The President of the Local is Dan Kerr and Kevin Forsyth is the Union's Business Agent.

In these three grievances the Union claims that the Employer has improperly contracted out the weekly preventative maintenance in the Roller Mill which is a large building at the plant in which rock (limestone, iron, celica, etc.) is crushed and ground by rollers. The Roller Mill produces 280 tons of product per hour and that is then sent to silos or directly into the kiln (at the rate of 250 tons per hour) to be heated (1250° C) and ultimately turned into cement.

The plant operates 24 hours/7 days a week and the Company schedules a major shutdown of three weeks each year in the spring to allow for preventative maintenance work. In the case of the Roller Mill, however, due to the heavy nature of the work and the wear on that equipment, there is more regular maintenance required and that has been performed on a weekly or bi-weekly basis, typically on Wednesdays ("Roller Mill Wednesdays"). The Roller Mill can be shut down for 10 – 12 hours without the kiln being affected as the latter can operate on the excess inventory which is produced by the Roller Mill above the level of the kiln intake (30 tons per hour). However, it is critical this maintenance work on the Roller Mill be done in that narrow time frame as both the shutdown and start up of the kiln are complicated and very time consuming procedures.

This Board heard evidence from two employees, Rick Wright, who has been with the Company (or its predecessor) since the early 1990's, and Ivan Jukic, who was hired in 2012, and both of these individuals have served as millwrights. Their testimony, along with documentary evidence, shows that at one point there were 12 millwrights in the Maintenance Department but that has steadily declined over the years. The following chart sets out the actual number of millwrights in the Department in various years:

1996	12 millwrights
2000	11 millwrights
2005	10 millwrights
2014	8 millwrights
2019	4 millwrights

Their evidence is that prior to 2015 the Company crew of millwrights did almost all of the maintenance work on the Roller Mill, including on the Wednesday shutdowns and the evidence is that it takes about eight millwrights to do that work in the 10 – 12 hours when the Roller Mill is off-line. As well, between six (6) to ten (10) times a year a contractor (Nichols Mechanical and subsequently RKM Services) would be brought in to help on the Wednesday shutdown when it has been identified that there was more work in a particular week than the Company crew could handle on its own during the allotted time frame. Mr. Wright testified that between 2003 and 2013, when he was in the Department, the contractor never did any Roller Mill preventative maintenance without the company's millwrights also being present.

However, things began to change in 2013 and there were no more hires and the number of millwrights in the Department dropped below the eight millwrights needed to work on "Roller Mill Wednesdays". The evidence also is that there was only one millwright posting in the years between 2013 – 2017 and the one internal applicant was not successful. As a result, contractors were more frequently on site doing some of the Roller Mill preventative maintenance work. Mr. Jukic testified that the contractors began doing the Roller Mill regular maintenance "sporadically" after 2015 and by 2018, they were performing all of it.

When collective bargaining began in April, 2017 for the 2017 - 2020 Agreement, on the first day the Union gave the Company "estoppel notice" indicating that "this is to provide the

Company with notice that once bargaining is concluded we will rely on our strict legal rights with respect to the contracting provisions of our current collective agreement".

The evidence is that the parties then agreed (as they had in past negotiations) that once they exchanged proposals those were "locked in" and bargaining would be limited to those items. The evidence is the Company did not change its prepared proposals and the issue of contracting out was not raised at all during the negotiation process.

On December 22, 2017, the Employer gave notice to the Union that "the following contractor will be on site: RKM IW97 Local 2736 – January 1 – December 31, 2018 for roller mill bi-weekly maintenance". As a result, the Company had given notice to the Union that Roller Mill maintenance would be performed by contractors.

After receiving that notice, in a meeting on January 26, 2018 the Union raised the issue with the Employer indicating all the maintenance work was "our work" and also raised the matter of the failure of the Company to give appropriate notices. The Company claimed it had the right to contract out this work on the Roller Mill. As a result, the Union filed Policy Grievances Nos. 621, 622 and 624 with respect to that work on January 31, February 8 and February 21, 2018. It has been agreed by the parties that those grievances cover the contracting out of the work in general and this decision will affect all the contracting out of the Roller Mill maintenance since that time.

Each of the grievances were identical, except for the date, and state as follows:

> 2. Nature of Grievance: Contract/Policy Contracting Out Article:
> Section: Art. 1.02, 1.03, 1.04, LOU CO and/or any other Article in the Collective Agreement that may apply.
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> 3. Description of Grievance: Contracting Out contrary to the Collective Agreement.
> (a) Names of persons involved: RKM Services, the Company, Members of Local D-277
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> (b) Statement and date of occurrence or incident and nature of grievance:
> On February 8, 2018 the Company brough in outside contractors to perform work in the roller mill (Eq #6100) and attached equipment. The work included but was not limited to – maintenance, forklift operation and hole watch for confined space entry.
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> (c) Settlement requested:
> An agreement/declaration that this contracting out was a breach of the collective agreement, damages for said breach, and other remedies as deemed necessary.

There is evidence is that the Employer hired three millwrights in the Spring of 2018 and one in the fall of that year but it appears only one of them remains in the Department.

On January 2, 2019, the Employer again gave the Union notice with respect to the Roller Mill maintenance, this time with different wording. That notice stated, "the following contractor will be on site: RKM IW97, January 1 – December 31, 2019 to assist Lehigh Millwrights on Roller Mill PM".

However, the uncontradicted evidence of the Union witnesses is that during 2018 and 2019, none of the Company millwrights ever assisted in the Roller Mill preventative maintenance. The evidence also indicates that the Company hired four millwrights in the fall of 2019 but it appears that one of them may have left during the week of this hearing, so the complement may be now seven (7) or eight (8) (that was never confirmed at the hearing).

The parties have made reference to the following provisions of the Collective Agreement which is in effect from May 1, 2017 to April 30, 2020:

> 1.03 Contracting Out – Production Work
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> The Company agrees that no production work required by the Company operation will be contracted out, except where fully adequate production equipment breaks down to the extent that essential material movement necessary to the immediate continuing operation of the plant production process cannot be provided, then the Company may contract the necessary equipment for the immediate emergency, and provided further that the Company equipment as set forth above shall be immediately made operative and placed back in operation.
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> 1.04 Contracting Out – Maintenance Work
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> The Company agrees that no maintenance work required by the Company operation will be contracted out except in an emergency or during a major maintenance shutdown, or occasional work requiring equipment or abilities not available at the plant, and only then providing that this contracting out will not result in a lay-off of members in the Bargaining Unit.
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> …
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> LETTER OF UNDERSTANDING
> CONTRACTING OUT
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> The Company agrees with the principle, as set forth in Articles 1.03 and 1.04 of the Collective Agreement, of protecting the job security of Delta Plant employees by minimizing contracting out of production and maintenance work. The parties further agree to the following:
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> (1) Except in emergency situations, the Company shall give written notice to the Union of its intention to contract out maintenance or production work. This notice will be given to a member of the Plant Committee and if no members are available to a Shop Steward, at least one (1) calendar week prior to the date on which the contractor is scheduled to commence the work. If, upon receipt of the written notice, the Union advises the Company it wishes to discuss the contracting out, the Company shall arrange a meeting for this purpose. The parties agree to the formalization of a Contracting-Out Committee with the intent of such Committee being to enhance communications regarding contacting-out issues. The

Committee will post an up-dated "regular" contractors list, with the intent that such posting shall serve as written notice of contracting– out for the named "regular" contractors.

(2) When the Company contracts out work pursuant to Article 1.03 or 1.04 of the Collective Agreement, plant management shall offer the affected employees the opportunity to work; (a) a twelve (12) hour shift if a contractor's crew is on site or (b) if a contractor's crew is on site around the clock, affected employees will be offered the opportunity to work around the clock on twelve (12) hour shifts.

(3) Should the Company contract out kiln bricking work, an equal number of employees, from the Production Department including Yard Crew, to those employed on site by the contractor will be offered the opportunity to work overtime on the same basis as outlined in (2) and subject to the Overtime Equalization provision of the Collective Agreement.

(4) Should the Company contract out castable/plastic or gunite refractory repair work, an equal number of employees from the Production Department, including Yard Crew, to those employed on site by the contractor, exclusive of the "gunite mixer" and "gunite sprayer", will be offered contracting out overtime.

(5) The above provisions (2) and (3) shall not apply when the necessary skills and/or equipment are not available, or in the event that the affected employees have refused the opportunity to do the work in question.

(6) Should the Company contract out maintenance work (mechanical or electrical), an equal number of employees from the maintenance department to those employed on site by the contractor will be offered the opportunity to work overtime on the same basis as outlined in (2) and subject to the Overtime Equalization provision of the Collective Agreement.

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Statements of Intent

LOU Re: Article 3.01

It is understood that the company will not use the language change negotiated in Article 3.01c), d) to create short term employees.

Re Letter of Understanding Re Contracting Out

The Union recognizes the right of the Company to contract out entire projects with no requirements to "piece-meal" the work. It is further understood that if any of the contracted work could be performed by bargaining unit employees, the Letter of Understanding re Contracting Out shall apply.

Should a dispute arise regarding the ability to perform any of the work in question, past practice shall apply.

…

Past Practice

The parties agree that any contract language and/or past practices that are not specifically altered during this set of contract negotiations will remain intact. It is recognized and understood, there may be differences between the parties on the existence and/or application of past practices. Also, there may be differences between the parties of the meaning of specific language in the Collective Agreement. The grievance procedure in the Collective Agreement remains available to resolve such differences.

There was limited bargaining history evidence at the hearing and what was presented related to a section of the Letter of Understanding. Prior to 2014, Point 6 did not exist in the LOU. In bargaining for the May 1, 2011 to April 30, 2014 Collective Agreement the parties agreed to the following inclusion:

> 1) Letter of Understanding re Contracting Out (2) is revised to include the addition of:
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> For each day a contractor is on site, the Company will offer the affected employees working nine (9) hour day three (3) hours of overtime for their regularly scheduled nine (9) hour working days, and twelve (12) hours overtime for their scheduled compressed work week Friday day off so long as a contractor is on site on Friday.

Then in the 2014 – 2017 Collective Agreement, Point 6 was changed to its present form and it remained that way in the 2017 – 2020 Collective Agreement.

In this case, the Union seeks a Declaration that the Employer has breached the Collective Agreement as well an Order that the Union and its members be made whole.

DECISION:

This matter involves the interpretation of the terms of the Collective Agreement between the parties and therefore, the rules set out by Arbitrator Bird in *Pacific Press* [1995] B.C.C.A.A.A. No. 637, offer guidance:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different words, one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

With respect to the issues in dispute in this matter, the parties referred to a number of arbitral authorities: *Genstar Cement Ltd.,* 7 L.A.C. (3d) 358 (Owen-Flood); *Alcan Smelters and Chemicals Ltd.,* 28 L.A.C. (3d) 353 (Hope); *Viterra Inc.,* 230 L.A.C. (4th) 235 (McPhillips); *Lafarge Canada Inc.,* 166 L.A.C. (4th) 211 (Sullivan); *Timberwest Forest Limited,* [1996] B.C.C.A.A.A. No. 214 (Greyell); *Lafarge Canada Inc. (Richmond Plant),* [1990] B.C.C.A.A.A. No. 298 (Munroe); *Canada Cement Lafarge Ltd. (Pacific Region),* [1983] B.C.C.A.A.A. No. 405 (Weiler, J.); *John Bertram & Sons Co. Ltd.,* 18 L.A.C. 362 (Weiler, P.); *City of Trail,* 237 L.A.C. (4th) 298 (Kinzie); *Lehigh Northwest Cement Limited,* [2007] B.C.C.A.A.A. No. 122 (Larson); *Sodexho Marriott Services of Canada at Laurentian University,* [2001] O.L.A.A. No. 207 (Surdykowski); *Coast 2000 Terminals Ltd.,* [2009] B.C.C.A.A.A. No. 120 (McPhillips); *Petro Canada Explorations Inc.,* [1983] B.C.C.A.A.A. No. 538 (Hope); *J.S. Jones Timber Ltd.,* 93 L.A.C. (4th) 72 (Ready); *Kamloops (City),* [1996] B.C.C.A.A.A. No. 611 (Germaine); *FortisBC Inc.,* [2010] B.C.C.A.A.A. No. 193 (Glass).

To begin, in my view, this is a contracting out case and not one in which the dispute is whether the work is properly that of the bargaining unit, including whether the issue of "shared" work has arisen: *Sodexho Marriott Services, supra; Coast 2000 Terminals Ltd., supra; J.S. Jones Timber Ltd., supra; Kamloops (City), supra; FortisBC Inc., supra.* Those authorities address the issue of whether work is "commonly shared" or is "inherently overlapping" between different groups of employees or was "exclusive" to the bargaining unit. The focus there is whether it is bargaining unit work or activities that can be performed by other employees of that employer, for example, management or other excluded employees, individuals in different departments or members of a different bargaining unit within that company. The issue of "shared work" is centred on the scope of the bargaining unit work and the right to assign and allocate work to a company's employees. That is different from the right to contract out work to outside companies, particularly in the context of a collective agreement which contains explicit contracting out language.

The present case is about the contracting out of work to an outside company. Therefore, the arbitral law with respect to contracting out is what concerns us here and that law is well settled. In *Labour Arbitration in Canada,* Lancaster House, Mitchnick and Etherington state, at pp. 303 – 304:

17.2.1 Necessity for Express Provision

> In earlier years, there was considerable arbitral support fro the view that the employer did not retain an inherent right to contract out, as this would effectively nullify the bargaining unit rights otherwise entrenched in the collective agreement. This was the response formulated, for example, by Arbitrator Cross in *Studebaker-Packard Ltd., and U.A.W., Local 525* (1957), 7 L.A.C. 310.
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> Decisions such as that in *Studebaker-Packard* were a manifestation of the "clan slate" approach advocated by Arbitrator Bora Laskin in *Peterboro Lock Manufacturing Co. Ltd. and U.E., Local 527 (1953),* 4 L.A.C. 1499. On the specific question of contracting out, however, this framework was overtaken by a line of awards represented by *Electric Auto-Lite Ltd. and U.A.W., Local 456* (1957), 7 L.A.C. 331, in which Arbitrator Thomas held that it would be improper to imply such a fundamental restriction on management's right to govern the enterprise if the collective agreement itself was silent on the issue. (For further discussion of *Peterboro Lock Manufacturing and Electric-Auto Lit,* see Chapter 16.2.1).
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> Thus, by the time Arbitrator Arthurs rendered his famous award in *Russelsteel Ltd. and U.S.W.A.* (1966), 17 L.A.C. 253, he was able to conclude that, in light of the trend in arbitral law, the union must be assumed to have known of the need to negotiate specific limitations on the right of management to contract out. The award also conclusively resolved the issue of whether a provision prohibiting non-bargaining unit employees from performing bargaining unit work was sufficient to preclude the employer from contracting out such work to a third party. In the arbitrator's view, such a clause did not constitute the kind of explicit restriction that was capable of supporting a union grievance in a contracting out situation.

Therefore, the presumption is that an employer has the right to contract out unless there is a specific restriction contained in the particular collective agreement. This principle has been broadly applied in British Columbia: *Genstar Cement Ltd., supra; Alcan Smelters & Chemicals Ltd., supra; Viterra Inc., supra; Lafarge Canada Inc., supra.*

However, it is also widely accepted that if contracting out has been restricted in some way by the parties, whatever limitations have been included must be given full effect and the employer must establish that it fits within one of the exceptions. In *Alcan Smelters & Chemicals Ltd., supra,* Arbitrator Hope stated the following, at paras. 38 – 43:

> 38 In the contemporary context, one can say that unions must continue to accept the reality that they must negotiate any limitation on contracting out in collective bargaining and have the limitation set out in specific terms in the collective agreement. But the backlash of union response to the contracting out of work is a factor to consider in interpreting any language in which an employer has in fact agreed to limit its right to contract out. The result is that neither side can expect to have their intentions arise by implication as opposed to expressing those intentions in clear language.
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> 39 Where an employer agrees to restrict its right to contract out, it will be accountable for the full scope of limitation consistent with the language to which it has agreed. That is, while unions must bargain to achieve limitations on contracting out, employers must ensure that where they have agreed to limitations in clear language, any exceptions upon which the employer intends to rely must be expressed in language that accurately defines the exception. Where the parties have

> expressed a general restriction on contracting out in clear language, an employer cannot expect that an arbitrator will invoke a strict approach to the interpretation of the language to favour any exceptions relied on by the employer.
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> 40 Both parties relied on an earlier decision of this arbitrator, *Petro Canada Explorations and Energy & Chemical Workers' Union, Local 686* (March 15, 1983), unreported, in support of their positions. The employer relied in particular on the following extract from p.20:
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> > The rule of strict construction with respect to issues of contracting out requires that the union establish that the disputed work fell within its job jurisdiction as defined in the agreement.
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> 41 On p. 31 of the decision the following statement appears: "The reality with respect to vagueness or generality in a contracting out provision is that it favours the employer."
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> 42 That reality arises from the domain in which the parties exist and bargain. That is, a union has no inherent right to claim jurisdiction over work and, conversely, an employer has a residual right to have work performed in any manner it pleases provided it is not in breach of some provision of its collective agreement with the union. Hence, when a union wants to rely on some restriction on the exercise of a residual right by an employer, it must be able to bring itself within the language of a restriction it has negotiated.
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> 43 Because the employer retains that which it has not bargained away, vagueness in the language afflicts the party who must rely on it in asserting a right. But, particularly in light of prevailing attitudes, an arbitrator must presume that an employer will husband its right to contract out in suitable language and that a union will be entitled to the full measure of any language of limitation that has been agreed to by the parties.

With respect to the interpretation of collective agreements, it is important to determine their mutual intention of the parties, to give meaning to all the terms which have been set out and also to provide a "harmonious interpretation" rather than one which will create a conflict between different terms: *Pacific Press, supra*.

Turning to the present grievance, one must begin with the structure of this Collective Agreement. When the terms are reviewed in detail, it is apparent that Articles 1.03 and 1.04 are intended to set out the basic principles which are to be applied with respect to the right to contract out work.

Once again, those provisions state:

> 1.03 Contracting Out – Production Work
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> The Company agrees that no production work required by the Company operation will be contracted out, except where fully adequate production equipment breaks down to the extent that essential material movement necessary to the immediate continuing operation of the plant production process cannot be provided, then the Company may contract the necessary equipment for the immediate emergency, and provided further that the Company equipment as set forth above shall be immediately made operative and placed back in operation.

1.04 Contracting Out – Maintenance Work

The Company agrees that no maintenance work required by the Company operation will be contracted out except in an emergency or during a major maintenance shutdown, or occasional work requiring equipment or abilities not available at the plant, and only then providing that this contracting out will not result in a lay-off of members in the Bargaining Unit.

In the present dispute addressing certain maintenance work, Article 1.04 is the critical provision and it clearly indicates the parties have agreed that contracting out of that work would only be permitted in one of three circumstances: emergency work; a major shutdown; or occasional work requiring equipment or abilities not available at the plant. Further, even when one of those exceptions applies, there is a further limitation that there be no lay-off of bargaining unit members. That is the agreement made by these parties.

The Letter of Understanding needs to be carefully reviewed as well. First, there is the following preamble:

Contracting Out

The Company agrees with the principle, as set forth in Articles 1.03 and 1.04 of the Collective Agreement, of protecting the job security of Delta Plant employees by minimizing contracting out of production and maintenance work.

An initial observation is that the wording in this Letter of Understanding is clearly intended to provide guidelines for contracting out but only with respect to that which has been permitted under Articles 1.03 and 1.04. The LOU does not appear to have been included to redefine or expand the rights contained in those provisions. As Arbitrator Owen-Flood noted, at para. 62, in *Genstar Cement, supra*, the "principles set out in Articles 1.03 and 1.04 are explained and amplified in the letter of understanding that is attached to the collective agreement."

The second point is that the preamble in the LOU clearly sets forth the complimentary objectives of protecting the job security of the plant employees and minimizing the contracting out of production and maintenance work. Certainly, it is very difficult to align those stated purposes with both the seventy-five percent (66%) reduction in the millwright compliment within the Maintenance Department and the very significant increase of work to RKM Services with respect to the weekly preventative maintenance work on the Roller Mill.

Moreover, the Letter of Understanding appears designed to address matters such as the requirement of notice and referral to the Contracting-Out Committee (Point 1). The remaining Points in the LOU deal with the financial consequences of contracting out, specifically the need to provide benefits to certain employees in circumstances where contracting out has been permitted:

> (2) When the Company contracts out work pursuant to Article 1.03 or 1.04 of the Collective Agreement, plant management shall offer the affected employees the opportunity to work; (a) a twelve (12) hour shift if a contractor's crew is on site or (b) if a contractor's crew is on site around the clock, affected employees will be offered the opportunity to work around the clock on twelve (12) hour shifts.
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> (3) Should the Company contract out kiln bricking work, an equal number of employees, from the Production Department including Yard Crew, to those employed on site by the contractor will be offered the opportunity to work overtime on the same basis as outlined in (2) and subject to the Overtime Equalization provision of the Collective Agreement.
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> (4) Should the Company contract out castable/plastic or gunite refractory repair work, an equal number of employees from the Production Department, including Yard Crew, to those employed on site by the contractor, exclusive of the "gunite mixer" and "gunite sprayer", will be offered contracting out overtime.
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> (5) The above provisions (2) and (3) shall not apply when the necessary skills and/or equipment are not available, or in the event that the affected employees have refused the opportunity to do the work in question.
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> (6) Should the Company contract out maintenance work (mechanical or electrical), an equal number of employees from the maintenance department to those employed on site by the contractor will be offered the opportunity to work overtime on the same basis as outlined in (2) and subject to the Overtime Equalization provision of the Collective Agreement.

Finally, it is useful to carefully review Point 6 which the Employer argues establishes its right to contract out the Roller Mill preventative maintenance. There are a number of observations with respect to that specific language.

First, when one examines the actual wording, Point 6 commences "should the Company contract out maintenance work". Giving those words their natural meaning, the provision requires that should the Company contract out work according to the Agreement, then certain consequences will follow. With all due respect, it does not, on its face, create a further right to contract out some work.

Second, the provision is included within the list of items dealing with the compensation required when the Employer properly contracts out work under Article 1.03 or Article 1.04. Moreover, the bargaining evidence indicates the provision was only introduced in 2011 and the contracting out of some of the Roller Mill work had already been going on for a number of years.

Moreover, when Point 6 was amended in 2014, it was simply altered from compensation going to "all affected employees" to compensation on a "one to one" basis. This further supports the conclusion that Point 6 was intended by the parties as solely a "compensatory" provision.

Third, the Employer argues that Point 6 does not refer explicitly to Article 1.03 and 1.04 as does Point (2). However, Points 3, 4 or 5 do not make that specific reference either. Moreover, Points 3, 4 and 6 all make reference to Point (2) which does contain an explicit connection to Articles 1.03 and 1.04.

Finally, if it was intended by the parties that Point 6 be a further "exception" to the restrictions in Article 1.04, as the Employer maintains, then it would have been expected that it would have been placed with the other "exceptions" set out within the Article itself.

Therefore, in my view, Point 6 does not create a right for the Employer to have all the Roller Mill maintenance work performed by contractors.

Next, reference was made to the following "Statement of Intent" contained in the Collective Agreement:

> Re Letter of Understanding Re Contracting Out
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> The Union recognizes the right of the Company to contract out entire projects with no requirements to "piece-meal" the work. It is further understood that if any of the contracted work could be performed by bargaining unit employees, the Letter of Understanding re Contracting Out shall apply.
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> Should a dispute arise regarding the ability to perform any of the work in question, past practice shall apply.

This appears to be a statement that there is no requirement to "piece-meal" the work and apparently incorporates the conclusions of an earlier arbitration decision involving these parties. In my view, this provision is not helpful to the determination of the present case.

Finally, the issue of past practice and how it applies in the present circumstances must be addressed and that gives rise to a number of considerations. First, under arbitral jurisprudence past practice can be used as an aid to interpreting a contractual provision if an ambiguity in the language exists. On the other hand, if the language in the agreement is clear, then a past practice to a different effect is not used to change the meaning of that clear language but it can be used to create the basis for an estoppel: *John Bertram and Sons Ltd., supra; Timberwest Forest Limited, supra; City of Trail, supra.*

In *Timberwest Forest Limited, supra,* Arbitrator Greyell (as he was then) summarized this law, at paras. 25 – 28:

> 25 If past practice is to be helpful to an arbitrator it must assist the arbitrator in gleaning the mutual intent of the parties and it must be clear and reliable evidence. The practice must have continued over a sufficient period of time, must be consistent and must be known to those charged with administration of the collective agreement. In *International Association of Machinists, Local 1740 -and- John Bertram & Sons Ltd.,* (1967), 18 L.A.C. 36 and 368:
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> > "Hence it would seem preferable to place strict limitations on the use of past practice in our second sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice."
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> 26 See also *Re Eastern Bakeries Ltd. and Bakery Confectionary & Tobacco Workers International Union, Local 406* (1990), 9 L.A.C. (4th) 366 (Graser); and *Re North Caribou Forest Labour Relations Association -and- International Woodworkers of America, Local 10424* (1985), 19 L.A.C. (3d) 115 (Hope).
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> 27 But it is important to note evidence of long past practice alone does not create enforceable rights or impose obligations on parties to the collective agreement. Past practice does not alter the language of the collective agreement. As stated by the B.C. Labour Relations Board in *City of Kamloops (supra)* at p. 7:
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> > "An arbitrator is entitled to consider extrinsic evidence to determine the actual intent behind the words used by the parties in their collective agreement: *U.B.C. and CUPE, supra*. P. 18. If the language of the agreement is unambiguous, however, extrinsic evidence cannot be used to alter the meaning of its terms. It is the language itself that constitutes the primary resource for the arbitrator's inquiry and not the extrinsic evidence. In particular, it is clear that absent an ambiguity in the collective agreement, past practice cannot be used to create rights or impose obligations on a party that were not negotiated: *B.C. Forest Products (Caycuse Logging), supra.* Consequently, a remedy based solely upon a violation of the past practice of the parties, however longstanding, is inconsistent with the principles of the Code. Standing alone, past practice cannot be used to create rights that are not found in the collective agreement".
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> 28 In *Canadian Cellulose Company Limited,* B.C.L.R.B. 112/80 the Board stated at pp. 11 – 12:
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> > "In the present case, the particular brand of extrinsic evidence which the arbitrator not only admitted bur relied on is "past practice". The use of past practice as a tool to be used in the interpretation of a collective agreement is one of longstanding. However, as with other forms of extrinsic evidence, the use of evidence of past practice must be tied to determining

> the purpose and meaning of the bargain struck by the parties. *Evidence of least practices which have been or which appear to have been in conflict with the current language of a collective agreement cannot be used to supplant a provision in the collective agreement."*

Turning to the present case, when one reviews the past practice with respect to the Roller Mill preventative maintenance, it appears that prior to 2015, the use of contractors (Nichols and then RKM) likely fit into the "occasional" work exception set out in Article 1.04. However, subsequent to that date, the practice changed and it was no longer "occasional" work but became "regular" and then by 2018 had become "exclusive".

In my view, that practice violated the clear language of this Collective Agreement but, in the absence of Union objection, an estoppel arose preventing the Union from insisting on its strict contractual rights. However, prior to bargaining in 2017, the Union brought an end to that estoppel by giving notice and returned to relying on its strict contractual rights; *City of Trail, supra; John Bertram & Sons Co. Ltd., supra.*

The Employer has also referred to the following "Note" contained in the final section of the Agreement:

> Past Practice
>
> The parties agree that any contract language and/or past practices that are not specifically altered during this set of contract negotiations will remain intact. It is recognized and understood, there may be differences between the parties on the existence and/or application of past practices. Also, there may be differences between the parties of the meaning of specific language in the Collective Agreement. The grievance procedure in the Collective Agreement remains available to resolve such differences.

In my view, this provision on "past practice" cannot be interpreted, in the absence of very clear and unequivocal language, as meaning that a past practice can override the express terms of the Collective Agreement; rather, it more properly should be interpreted as applying where there is a past practice that is not contrary to the terms in the Agreement and, in that case, it requires that the practice will continue to govern unless language to a different effect is added to the Agreement.

In that respect, I agree with the following comments of Arbitrator Larson in *Lehigh Northwest Cement Limited, supra,* at paras. 68 – 69:

> 68 Notwithstanding that we have determined that the collective agreement does not prohibit the implementation of Kronos and that the Company was entitled to proceed as it did, by giving the Union a notice of administrative change, the point made by Mr. Gibson is fundamental to the issue because of our view of the effect of the Letter of Understanding on Past Practice. As we have seen, the letter entrenches

> past practices and prohibits them from being changed. One may properly note in passing that the requirement that any "contract language" not specifically altered during contract negotiations will remain intact, is obviously redundant because by definition a contract is binding by its terms. Nevertheless, the language is effective, within limits, to preserve practices that were in existence at the time the agreement was negotiated.
>
> 69 The effect of the words, "will remain intact" at a minimum, would appear to preclude any attempt by the Employer to abandon a past practice by notice during the term of the agreement, as it might be entitled to do in some instances, in the case of an estoppel. However, as we have already held, the language of the collective agreement does not require that the Employer use a paper system of keeping time using time cards. What it requires is that if the Employer chooses to use a time card system, as it has in the past, the employees are under a contractual obligation to complete them every shift and have them signed by a supervisor. The paper system is not a practice preserved by the LOU.

In conclusion, for all of the above reasons the contracting out of the weekly Roller Mill preventative maintenance falls within the ambit of Article 1.04 of the Collective Agreement and does not fall within the exceptions set out therein. As a result, it is concluded that the Employer has breached the Collective Agreement in assigning all the Roller Mill preventative maintenance work to contractors.

AWARD:

On the basis of the above reasons, the Union's grievances are upheld. As a result, a Declaration is hereby issued that the Employer has breached Article 1.04 of the Collective Agreement by contracting out the work in question.

Further, it is Ordered that the Union and the members of the bargaining unit be made whole. The issue of the appropriate financial remedy is referred back to the parties and, if they are unable to come to an agreement, that matter can be brought back before this Board.

This Board will retain jurisdiction to deal with any matters arising from the interpretation or implementation of the terms of this Award.

It is so Awarded.

Dated this 16th day of January, 2020

"David McPhillips"

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David C. McPhillips
Arbitrator