

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**UNIFOR, Locals 30-O and 34-O**

(the "Union")

**and**

**Bell Technical Solutions Inc.**

(the "Employer" or "BTS")

**Before:** Yvon Seveny, Sole Arbitrator

**Hearing Dates:** January 14, April 1 and 14, 2025

**Appearances:**

**For the Employer:** Allison MacIsaac, Counsel; Matthew Wronko, Articling Student; Jessica Mitchell, Senior Labour Relations Consultant; Steve Jessup, Senior Manager Field Operations; Greg Lapenski, Field Operations Manager; Myles MacMillan, former Field Operations Manager with BTS

**For the Union:** Micheil Russell, Counsel; James Fling, President Unifor Local 34-O; Lance Tryon, Vice-President Unifor Local 30-O; Mike Snell, Chief Steward Unifor Local 30-O and Grievor; Mark Saunders, Grievor

**DECISION**

**What these grievances are about**

1. This matter involves two grievances, the first filed by Mark Saunders, being Grievance No. 34O-2022-0038 involving a matter occurring on March

24, 2022 (the "March 24 grievance"), and the second filed by Mike Snell being Grievance No. 30-O-22-51B involving a matter occurring on November 22, 2022 (the "November 22 grievance"). Each grievance alleges that the Employer, Bell Technical Solutions Inc., violated the Collective Agreement and in particular Letter of Agreement No. 4 ("LOA No. 4") when, in each instance, a Field Operations Manager ("Manager") was observed performing traffic control work which the Union asserts is bargaining unit work.

2. The Union called James Fling and Mike Snell as its witnesses. The Employer called Steve Jessup, Greg Lapenski and Myles MacMillan as its witnesses.

3. LOA No. 4 provides for the following:

**AGREEMENT ON WORK BELONGING TO THE BARGAINING UNIT**

Although the Collective Agreement does not include specific limitations on Operations Managers performing work belonging to the bargaining unit, we clearly intend to support the following principles:

1) All Operation Managers, either permanent or temporary, have many responsibilities and will not be used to replace Technicians, Cable Pullers and Logistics Attendants.

2) On the other hand, this principle should not prevent an Operations Manager from working with their team members to reinforce their training, get a better understanding of appropriate work methods or provide support.

4. This matter involves the parties' disagreement on the interpretation of the words "replace" and "provide support" in LOA No. 4.

5. In its initial response denying the March 24 grievance the Employer stated (in part):

As discussed at the Step 1 meeting that the management team will make an effort to secure two technicians to perform a road crossing with in [sic] reason and to not put a customer or the load in jeopardy. If that is not possible, the Manager will support and assist to get the job done safely and efficiently.

6. The Employer provided a similar response to the November 22 grievance.

7. In further denying the March 24 grievance at the next step, the Employer stated (in part):

... We will utilize a technician if available without impacting business needs, if not available then a manager can assist.

8. The Union referred to the following cases: *Worthington Cylinders of Canada Corp. v. U.S.W.A., Local 9143*, 2004 CarswellOnt 2342, 123 LAC (4th) 248, 76 CLAS 68 (Surdykowski, Arbitrator); *Greater Essex County District School Board v. C.U.P.E., Local 1348*, 2012 CarswellOnt 5509, 110 CLAS 358 (Crljenica, Arbitrator); *Nova Scotia Power Inc. and IBEW, Local 1928*, 2021 CarswellNS 644, 149 CLAS 265, 333 LAC (4th) 253 (DeMont, Arbitrator); *Toronto Humane Society v. Teamsters, Local 419*, 2006 CarswellOnt 2656, [2006] L.V.I. 3632-4, [2006] OLAA No. 74, 147 LAC (4th) 55, 84 CLAS 296 (Barrett, Arbitrator); *Bell Technical Solutions and Unifor, Local 46 (Beck)*, 2019 CarswellNat 3584, 139 CLAS 182, 302 LAC (4th) 269 (Misra, Arbitrator); and *Sherbrooke Community Centre v. SEIU*, 2002 CarswellSask 171, 2002 SKQB 101, [2002] 7 WWR 145, 112 ACWS (3d) 691, 216 Sask. R. 169 (Sask. QB).

9. The Employer referred to the following cases: *Douglas Aircraft Co. v UAW, Local 1967*, 1976 CanLII 2115 (ON LA) (Gorsky, Arbitrator); *Versacold Group Warehouse v Teamsters Local Union No. 419*, 2009 CanLII 69316 (Surdykowski, Arbitrator); Shorter Oxford English Dictionary Definition "support"; *DHL Express (Canada) Ltd. and C.A.W. Locs. 4215, 144 & 4278 (Re)*, 2004 CanLII 94640 (Hamilton, Arbitrator); *Ontario Public Service Employees Union (Butters) v Ontario (Liquor Control Board)*, 2018 CanLII 77319 (ONGSB); *Telus Communications Inc. v. TWU*, 2008 CarswellNat 4989 (Sims, Arbitrator); *British Columbia Maritime Employers Association and International Longshoremen and Warehouse Union – Canada*, 2009 CarswellNat 6838 (Keras, Arbitrator); and *Atlantic Oil Workers Union, Local No. 1 and Ultramar Canada Inc.*, 1996 CarswellNS 659 (Outhouse, Arbitrator).

10. Both parties referred to Arbitrator Ian Anderson's decision in *Stepan Canada Inc. and Unifor, Local 17-O (07-12)*, 2014 CarswellOnt 2448, 118 CLAS 37, 2014 CanLII 8589; and Arbitrator Beattie's decision in *Carling O'Keefe Breweries of Canada Ltd. v. Western Union of Brewery, Beverage, Winery & Distillery Workers, Local 287*, 1987 CarswellAlta 808, [1987] AGAA No. 13, 31 LAC (3d) 69, 7 CLAS 95 (Beattie, Arbitrator). Each party referred to decisions of Arbitrator Surdykowski setting out similar principles of collective agreement interpretation. The Union referred to *Ontario Power Generation ("OPG") and The Society of United Professionals ("Society")* 2019 CarswellOnt 8460, 139 CLAS 237. The Employer referred to *Ontario Power Generation v Society of United Professionals*, 2013 CanLII 87655.

**What do “road crossings” involve:**

11. BTS’s operations in this matter take place over a wide area that includes Ottawa City and the 613 area surrounding Ottawa including the Ottawa Valley. There are twelve Field Operation Managers employed in the region overseeing the work of more than 400 bargaining unit employees.

12. Simply stated, BTS Technicians are dispatched to customers’ residences to install or repair Bell internet and other communication services. On occasion the connection box that the Technician needs to attach an aerial drop service wire will be on the opposite side of the street from the customer’s residence. In such occurrences the Technician at the customer’s residence (referred to as the “prime Technician”) will call his Manager if the Technician concludes that traffic control persons are required to stop traffic while the prime Technician crosses the road with the wire.

13. The parties provided copies of BTS’s policies setting out the procedures for road crossings and traffic control. Once a Manager is contacted and advised that traffic control is required, the Manager will check an app titled “ToGo” which would show where each of that Manager’s assigned Technicians are located. The Manager will then contact Technicians to come to the location of the residence to perform traffic control. This often requires two Technicians, which was the case in the matters leading to these two grievances.

14. While waiting for the traffic control persons to arrive, the prime Technician will do all the preparatory work they can, including setting up ladders to the hydro poles, hanging the drop wire on the pole on the customer’s side of the street, and filling out BTS’s Traffic Protection Plan form.

15. Once the traffic control persons arrive, they will put on the mandated personal protective equipment, including hard hats and safety vest. They then set out the safety cones on the roadway and take their spots on the roadway with traffic control stop, slow, etc., signs. Once traffic is stopped, the prime Technician will cross the road with the wire, climb the ladder and attach the wire to the service box. Based on the evidence given by the witnesses about the time it takes from reviewing the traffic control plan, setting up the cones and signs, conducting the road crossing, and taking down the safety cones and signs, involves between 5 to 10 minutes.

16. The evidence of Steve Jessup was that safety cones and traffic control signs are available to Technicians from several locations if not already in their vehicles. These include all BTS work locations and BTS storage lockers in more remote or rural locations. All Technicians have cones, and some have traffic

control signs in their vans. As well, Managers have signs and cones in their vehicles. The Manager will coordinate with the designated Technicians assigned to traffic control where to get the closest signs and cones. All of this is with a view to minimizing delay and creating convenience. To this end Mr. Jessup said that the Managers would look for an available Technician who was 10 to 30 minutes away. The first Technician to arrive may have to wait for the second Technician to arrive.

17. Steve Jessup said that road crossings only occur occasionally because most homes are now serviced by buried wires. It is also the case that where there are aerial wires connected to hydro poles in urban settings, the wires are already on both sides of the street. Mr. Jessup estimated there were 4 or 5 road crossings a day among the more than 400 bargaining unit employees employed in the region. He also estimated that Managers perform traffic control infrequently or about once a month.

### **The Managers' Performance of Traffic Control Work:**

18. There is no dispute that on March 24, 2022, Myles MacMillan performed the work of a traffic control person and that on November 22, 2022 Greg Lapenski similarly performed the work of a traffic control person. Each of Messrs. MacMillan and Lapenski were Managers who are excluded from the bargaining unit.

#### *(a) The March 24 Grievance*

19. On March 24, 2022, Mr. MacMillan operated as one of the two traffic control persons for a road crossing at a residence in North Gower, Ontario. This matter involved the installation of voice and internet service requiring an aerial drop on the opposite side of the road from the residence.

20. The prime Technician Tim called Mr. MacMillan advising that traffic control would be required for the road crossing. Mr. MacMillan testified that he looked at his ToGo app. He said he called about 10 Technicians. He said about half of the Technicians did not answer the call as they were on jobs. He called Mark Saunders who was just finishing a job, so he was available and about 20 minutes away. Mr. MacMillan had him come to the residence for traffic control. Mr. MacMillan said the others he spoke with were 20 minutes or more away from the residence and at least one of them did not have the signs to do a road crossing. Mr. MacMillan said that he had the road crossing signs and cones and as he was about 10 minutes away from the residence, he "decided to do the crossing".

21. Mr. MacMillan arrived at the residence. He waited for about 10 minutes for Mr. Saunders to arrive. They then reviewed the Traffic Control Plan. They shut the road as Tim did the crossing, which took about 5 to 10 minutes. Mr. MacMillan packed up the signs and cones he had brought, and Mr. Saunders went off to his next job. Mr. MacMillan then drove to his next task about 20 minutes away.

22. Mr. MacMillan said in cross-examination that the entire matter took about one hour of his time. This included checking his ToGo app, calling about 10 Technicians, his 10 minute drive to the residence, 10 minutes waiting for Mr. Saunders, 5 to 10 minutes for all tasks associated with the road crossing itself, and a 20 minute drive to his next activity.

*(a) The November 22 Grievance*

23. On November 22, 2022, Greg Lapenski operated as one of the two traffic control persons for a road crossing at a residence in Bancroft, Ontario. This matter involved a new installation of service that was to have been completed on November 20, 2022. For reasons unknown the Technician sent that day did not complete the installation. The customer called BTS on November 21 to say there was no service and another Technician (Jon) was assigned for November 22. Jon arrived and called Mr. Lapenski and advised that the service had indeed not been completed and that a road crossing was necessary to install an aerial drop wire. Mr. Lapenski headed to the residence to check on matters. Mr. Lapenski said it took him about 20 minutes to drive to the residence.

24. Jon advised Mr. Lapenski that he had one Technician (Calvin) available for traffic control but needed a second. Mr. Lapenski went into the ToGo app which he says showed there was another Technician (Dylan) who Mr. Lapenski said was then working at another residence about 25 minutes away in Maynooth, Ontario. The map the Employer tendered as evidence showed that Dylan would have been about 21 minutes away. Dylan also had a pending job in Pembroke. It would be an hour and about 49 minutes to Pembroke.

25. Mr. Lapenski said he decided to perform the traffic control as Jon had everything ready, Calvin had also arrived, the customer had bad service because of the delay of two days, Dylan was on the job in Maynooth and Mr. Lapenski said he did not know when Dylan would be finished.

26. After the road crossing was completed and Mr. Lapenski was letting traffic go, a Bell van passed through with a BTS Technician (Lance). Mr. Lapenski said he did not know that Lance was in the area as he reported to a

different Manager and he was not in the habit of looking at Technicians on ToGo who were assigned to other Managers.

27. Technicians enter certain details of each job history from their cell phones. The job history for the Maynooth job Dylan attended says that he arrived at the residence at 10:46 a.m. and was finished at 12:25 p.m. Mr. Lapenski said that he arrived at the Bancroft residence at around 12:45 p.m. The road crossing would have occurred sometime after 12:45 p.m.

28. Mr. Lapenski said that when he got to Bancroft, he “had no idea when Dylan would be done” but believed Dylan was still at the Maynooth site. There was no evidence that Mr. Lapenski attempted to contact Dylan to ascertain what was the status of the Maynooth job.

29. Mr. Lapenski and other of the Employer’s witnesses said that the job tickets may not be accurate. The times recorded depend on when the Technician pushes the button on his phone. So, for example, a Technician may arrive at a site but not push the button stating he arrived immediately. However, there was no explanation for why a Technician would push the button recording that the job was complete if it was not and that Technician was still working at that site.

30. The Employer says that I should draw an adverse inference against the Union as it did not call Dylan to testify that he had indeed completed the Maynooth job by 12:25 p.m. However, there was no evidence that Dylan had pushed the complete button before completing the job. Rather, it is the case that Mr. Lapenski did not testify that he at any time called Dylan to check on the status of the job in Maynooth or checked the ToGo app again around 12:45 p.m. when Mr. MacMillan arrived at the Bancroft site. Notwithstanding the Employer’s witnesses’ assertions that time stamps may not be accurate, the Employer did not call any evidence that Dylan’s having recorded that the Maynooth job was completed by 12:25 p.m. was not accurate.

31. The best evidence available on this point is the job ticket showing that Dylan had completed the Maynooth job at 12:25 p.m., which is 20 minutes before Mr. Lapenski arrived at the Bancroft residence and even more time before Mr. Lapenski would have performed the traffic control function. There is therefore no basis for drawing an adverse inference against the Union on this point.

### **The Parties’ Positions**

32. The Union takes the position that LOA No. 4 is clear in prohibiting Operation Managers from replacing Technicians or other bargaining unit

personnel by performing bargaining unit work which includes traffic control. The Union points to the exceptions in LOA No. 4 which are "to reinforce their training, get a better understanding of appropriate work methods or provide support". It says that when Managers perform traffic control this does not fall within these exceptions including "support" but rather is the replacement of a Technician who would otherwise be performing the traffic control task.

33. The Union requests that the Employer be directed to cease performing traffic control work.

34. The Employer denies that it has breached the Collective Agreement and in particular LOA No. 4 as alleged. It says that the Union has not established that performing traffic control work is an exclusive bargaining unit task.

35. Notwithstanding the above, the Employer says that it endeavors to use bargaining unit employees to perform traffic control, however, if no Technician is reasonably close by or available, a Manager will assist with the road crossing which situation the Employer says occurs infrequently. It says that in doing so the Manager is providing "support" within the meaning of LOA No. 4.

36. The Employer submits that when interpreting LOA No. 4 I should consider the preamble to the Collective Agreement that sets out the following statement of values:

The Company and the Union recognize their common interest to put in place conditions favorable to the development and profitability of the Company, which will, amongst other things, improve job opportunities. The parties jointly accept to use all practical means to ensure the development and profitability of the Company since they recognize the importance of quality and productivity in light of the competition and their ability to maintain market share.

In order to reach these objectives, the Company and the Union share the following values:

- ▶ Customer focus;
- ▶ Importance of employees as resources;
- ▶ Transparency with employees through ongoing communication;
- ▶ Commitment to promote the quality of products and services offered by the Company;
- ▶ Ongoing quality and innovation;



- ▶ Constructive exchanges between the Union and the Company in order to maintain harmonious and respectful labour relations;
- ▶ Versatility of employees in an ongoing learning environment;
- ▶ Positive human relations.

37. In support of its assertion that traffic control work is not an exclusive bargaining unit task, the Employer says that the above statement of values permits traffic control work to be performed by Managers because of the parties' joint agreement to operate efficiently and with customer focus.

38. In the alternative, the Employer asserts that the grievances should be dismissed as, it says, the traffic control work performed by the Managers in these grievances is *de minimus* as performing traffic control and the road crossing only takes approximately 5 to 10 minutes to perform. It says that I should not consider the travel time it would take a Technician to arrive at and leave a site when performing traffic control.

39. In response to the *de minimus* argument, the Union says that travel time must be considered as part of the Technicians' duties when performing traffic control being approximately 20 minutes arriving and 20 minutes leaving a site and, therefore, any *de minimus* argument must be dismissed.

## **Analysis**

40. The starting point in both parties' submissions was consideration of the principles of interpretation of collective agreements as set out by Arbitrator Surdykowski. In *Ontario Power Generation ("OPG") and The Society of United Professionals ("Society")*, *supra*, Arbitrator Surdykowski stated the following:

### **(a) Principles of Interpretation**

35. The fundamental presumption is that the parties to a collective agreement purposely chose the language they have used to express their shared intention. That is, it is presumed that the parties wrote what they meant and meant what they wrote.

36. Therefore, the fundamental rule of collective agreement interpretation is that the words used must be given their plain and ordinary meaning unless it is clear from the structure of the provision read in context that a different or special meaning is intended, or the plain and ordinary meaning result would be illegal or absurd. All words must be given meaning. Different words are presumed to have different meanings. Specific provisions prevail over general

provisions. Both the words that are there and the words that are not there may be significant, particularly when the parties, like the Society and OPG in this case, are sophisticated users of collective agreement language. Words or phrases cannot be either inferred or ignored unless it is essential to the purposive operation of the collective agreement.

37. All interpretation presumptions are rebuttable.

38. The Supreme Court of Canada's decision in *Creston Moly Corp. v. Sattva Capital Corp.*, [2014] 2 S.C.R. 633, 2014 SCC 53 (S.C.C.) (CanLII) makes two things clear. First, an arbitrator tasked with interpreting a collective agreement is not merely a linguistic technician. Second, extrinsic context evidence is always admissible to the extent that it may inform the interpretation of a collective agreement. (Paragraphs 46-50 and 55-60 of the decision of Rothstein J. writing for the unanimous Court are particularly instructive.) The Supreme Court of Canada of Canada has made it clear that an arbitrator must interpret collective agreement language within the context of the agreement read as a whole, and the broader context of relevant circumstantial facts that were or ought reasonably have been known to both parties when the contract was made - as established by evidence (*Sattva*, paragraph 47). Extrinsic context evidence is admissible because it may inform the interpretation of a collective agreement by demonstrating the mutual intention of the parties. However, as Rothstein J. put in paragraph 60 of *Sattva*, context cannot change or "overrule" the meaning of the words used by the parties.

39. It is well established that extrinsic evidence is also admissible as an aid to interpretation in order to establish or resolve an alleged ambiguity.

40. As a practical matter, the arbitrator's task remains what it has always been; namely, to determine the objective contextual labour relations meaning of the collective agreement, with the words used being the most important consideration. When it comes to collective agreement interpretation the words used matter most.

41. As a general matter, a grievance arbitrator has no jurisdiction to amend a collective agreement (whether or not the collective agreement specifically says so). Article 16.7(i) of the collective agreement in this case specifically prohibits a grievance arbitrator from amending the agreement "save only any policies and procedures which conflict with the terms of this Agreement."

41. The threshold question in this matter is whether the traffic control task is bargaining until work. On this question the Union points to the following from *Worthington Cylinders of Canada Corp.*, *supra*:

22. Outside of the construction industry, bargaining units are generally described in terms of the employees covered by the collective agreement rather than in terms of work performed. Nevertheless, the concept of bargaining unit work is universally recognized as being fundamental to the

operation and integrity of a collective agreement. Simply stated, "bargaining unit work" is the work that is normally performed by bargaining unit employees. It is fundamental to the collective bargaining interests of unions and the employees they represent that bargaining unit employees have a right to perform the work that they have normally done. Otherwise, an employer so inclined could easily avoid the intent or effect of a collective agreement. The nature and extent of the proprietary right that bargaining unit employees have to perform bargaining unit work will depend upon what the particular parties have negotiated in their collective agreement. The word "exclusive" is sometimes used rather loosely to describe the right to perform bargaining unit work. However, the fact is that the collective agreement that actually restricts the right to perform bargaining unit work exclusively to bargaining unit employees is the exception rather than the rule. The extent to which work is actually reserved to bargaining unit employees depends on the terms of the particular collective agreement in that respect, including any specific bargaining unit work, or management rights or contacting [sic] out provisions.

23. In this jurisdiction, an employer begins with a virtually unfettered right to assign work and conduct its business, as it considers appropriate. Unless a collective agreement provides otherwise, bargaining rights are not defined in terms of work performed, and there is no right to do particular work, nor any restriction on the employer's right to allocate or transfer work. That is, in the absence of a prohibition, assigning work to non-bargaining unit personnel or contracting work out is presumptively allowed. Accordingly, much of the collective bargaining struggle consists of the union fighting to restrict or fetter the employer's rights in that respect in order to protect the integrity of the bargaining unit, and the employer trying to retain as much freedom and flexibility in that respect as possible. The collective agreement that the parties agree to and sign represents the resolution of that struggle. Where the parties subsequently disagree about what they agreed to in that respect, it is left to an arbitrator to make the determination for them.

42. In answer to the threshold question in this matter, the traffic control task is indeed bargaining unit work. The evidence was clear that the traffic control is work normally and routinely performed by members of the bargaining unit whenever it is required. It is work that is regularly assigned by Managers to Technicians. There is nothing in the performance of traffic control that speaks to the "responsibilities" of Operations Manager as that word is used in LOA No. 4.

43. As well, the recognition and scope provision in Article 1.01 is clear, unambiguous and straightforward. The bargaining unit covered by the Collective Agreement between the parties consists of all "employees employed in the Province of Ontario save and except Operations Managers and persons above the rank of Operations Managers and save and except all office, clerical and sales employees".

44. Next, LOA No. 4 contains an express and mandatory restriction on Operation Managers' performance of bargaining unit work as follows:

1) All Operation Managers, either permanent or temporary, have many responsibilities and **will not be used** to replace Technicians, Cable Pullers and Logistics Attendants. [emphasis added]

45. The heading to LOA No. 4 specifically refers to the parties' "Agreement on work belonging to the bargaining unit".

46. The Employer asserts that the term "replace" in LOA No. 4 must be given an interpretation similar to the use of the word "replace" in Article 10.06 and Letter of Agreement No. 7 ("LOA No. 7"). Those provisions are the following:

**BUMPING**

**10.06** a) The Full-Time employee who is designated as a surplus employee in their Service Territory may, in the following order:

- i) **replace a Part-Time Employee** in the Adjacent Service Territory, as set out in Appendix "D";
- ii) bump the Full-Time employee having the least seniority in the Adjacent Service Territory, as set out in Appendix "D";
- iii) **replace any other Part-Time Employee** in the bargaining unit;
- iv) be laid off;

b) The surplus employee may choose to be laid off at any time during the process.

c) Any full-time employee who replaces another employee as a result of the application of Article 10.06 a) will maintain their status. However, the employee's hourly rate will be frozen at their current step until the maximum hourly rate of their new job title exceeds their current hourly rate. [emphasis added]

Letter of Agreement No. 7 (in part)

**AGREEMENT ON UPGRADE OF STATUS FOR ALL CATEGORIES OF EMPLOYEES**

...

A list of employees will be prepared as of April 1st and October 1st, and the LRC will work towards the following percentages in order to provide the required flexibility in the common locality:

- i) 65% of technicians as Regular Full-Time Employee

15% RFT-1  
 15% RFT-2  
 35% RFT-3

ii) 35% of technicians as Regular Part-Time Employees

During the regular LRC meetings, held every two (2) months, the committee will review the number of employees who have left the bargaining unit since the last LRC meeting. If the number of Full-Time employees leaving the bargaining unit causes the percentages of Full-Time employees to drop below the percentages in point (i) above, the Company will **replace these Full-Time employees**. [emphasis added]

...

47. The Employer says that "replace" in LOA No. 4 should be interpreted as requiring the displacement of a Technician from their position with a Manager. The Employer says that "replace" in LOA No. 4 contemplates a bargaining unit employee losing their job.

48. I do not agree. As stated in *Ontario Power Generation ("OPG") and The Society of United Professionals ("Society")*, *supra*, words must be read within "the structure of the provision read in context" (at para. 36). That point is also set out at page 296 of *DHL Express Canada Ltd.*, *supra*. The context of the word "replace" in LOA No. 4, being a provision to protect bargaining unit work from performance by non-bargaining unit employees, is entirely different than the context of either the bumping provisions in Article 10.06, or LOA No. 7 which is directed to the maintenance of the percentage of full-time employees in the bargaining unit.

49. As also stated in *Ontario Power Generation ("OPG") and The Society of United Professionals ("Society")*, *supra*, words should not be given an interpretation that would lead to an absurdity (at para. 36). If "replace" in LOA No. 7 is given the interpretation the Employer argues for, this would lead to the result that non-bargaining unit employees (Operation Managers) could perform all or any of the work of bargaining unit without restriction for as long as they desire so long as no bargaining unit employee is laid off. The use of the word "replace" not only applies to the bargaining unit work of traffic control that is the subject matter of this case. It applies equally to all bargaining unit work of all bargaining unit employees including Technicians, Cable Pullers and Logistics Attendants.

50. As the heading of LOA No. 4 clearly states, the agreement of the parties here is about "work belonging to the bargaining unit" and not positions which situations are dealt with in provisions such as Article 10.06 and LOA

No.7. An interpretation that “replace” only occurs if a bargaining unit employee is terminated because of Operation Managers performing bargaining unit nullifies the agreement of the parties to ensure that bargaining unit work is performed by bargaining unit employees.

51. Yet further, if Operations Managers could perform any and all bargaining unit work they chose to perform so long as no one is laid off, there would be no purpose in having included the exceptions in paragraph 2 including to “provide support” as there would be no restrictions on Operations Managers performing bargaining unit work so long as no bargaining unit employee is terminated. The Employer’s argued for interpretation would make the exceptions of Operations Managers “working with their team members to reinforce their training, get a better understanding of appropriate work methods or provide support” redundant. There is no need for exceptions if Managers can perform any and all bargaining unit work so long as no bargaining unit employee is terminated.

52. It is my conclusion that the reference to “replace” in LOA No. 4 prohibits Operations Managers from replacing bargaining unit employees by performing any bargaining unit work. LOA No. 4 is specifically directed at the protection of bargaining unit work and does not only get triggered if a bargaining unit employee gets laid off or otherwise terminated.

53. The next issue involves the interpretation of the word “support”. Both parties described that as one of the exceptions in LOA No. 4. As stated in *Toronto Humane Society, supra*, where the Collective Agreement provides a prohibition on non-bargaining employees performing bargaining unit work, the onus is on the Employer to prove that the performance of such work by a non-bargaining unit person falls within any listed exceptions. The Employer has not met that onus in this case.

54. It is my conclusion that the Union is correct in its submission that the reference to “provide support” in paragraph 2 of LOA No. 4 does not include an Operations Manager replacing Technicians in the performance of bargaining unit work. That is what occurred when each of Messrs. Lapenski and MacMillan filled in as one of the two traffic control persons. When an Operations Manager fills in as one of the persons performing traffic control for a road crossing, that Manager is indeed replacing a Technician who would otherwise be assigned to perform that work.

55. The Employer says that each of Messrs. MacMillan and Lapenski took all reasonable steps to have a Technician perform the traffic control, but they were each unable to locate a Technician who was within a reasonable distance

and available to perform that work. The Employer points to the following from *Stepan Canada Inc., supra*:

23. In this case, there is no dispute that if K1 had not been operated on the nightshift of November 27/28, the Company would have been unable to honour its delivery commitment to a customer. There is no dispute about the significance of that commitment, and therefore of the work which was done: both the Union and the Company recognize that on time delivery is key to the business. In addition, there had been complaints from the customer in question about past failures to meet that delivery commitment. There was, therefore, a threat of real harm to the business were the work not performed. There is no suggestion that the Company was seeking to undermine the bargaining unit or was in any other sense acting in a manner that was not *bona fide*. Genuine attempts were made by the Company to contact bargaining unit members to do the work prior to the supervisor doing so. Further, there is no suggestion that the Company acted imprudently when it entered into the commitment to ship the product on November 29 or scheduled its production in order to meet that commitment.

56. Unlike the situation in *Stepan, supra*, the evidence does not disclose that Messrs. Lapenski and MacMillan exhausted all other avenues before they undertook the traffic control work. Rather, the evidence was clear that Messrs. Lapenski and MacMillan decided that it would be more convenient if they did the road crossings themselves rather than making reasonable efforts to assign a Technician to each of those road crossings.

57. While I do not wish to describe all the possible ways an Operations Manager may provide support to Technicians performing traffic control for a road crossing, one example comes from Mr. Jessup's evidence that Operations Managers who have traffic control signs or other equipment in their vehicles will provide those items to a Technician performing traffic control when necessary, or direct the Technician to a location where they can obtain the signs or other equipment. Such action is commensurate with the reference in the Shorter Oxford English Dictionary where "support" is defined as including "assistance" or "backing up a person". That is markedly different from replacing a person.

58. In Mr. MacMillan's case he decided not to assign a Technician who did not have the traffic control signs and performed that work himself believing it to be more efficient as he was 10 minutes away from the site. His evidence was that Technicians he did speak with were about 20 minutes away. As such, Mr. MacMillan decided to replace any one of those Technicians and perform what was bargaining unit work himself.

59. In Mr. Lapenski's case, the best evidence, Dylan's ticket, showed that he had completed the job he was on about 20 minutes before Mr. Lapenski arrived at the site of the road crossing. He said that he believed that Dylan was still working on the Maynooth job, but he did not take any steps to call Dylan or check the ToGo app after his initial check. As well, no other reasonable steps were taken such as checking with other Managers to see if a Technician was available. The work protection provisions of LOA No. 4 apply to the entire bargaining unit and not just to the Technicians reporting to any one Manager.

60. In the present case, each of Messrs. Lapenski and MacMillan decided not to assign a Technician and to do the traffic control work themselves as they viewed doing so to be more efficient. It may have indeed been more efficient, however, in each instance that constituted a violation of LOA No. 4. On that point, I do not agree that the statement of values in the preamble to the Collective Agreement can or should be interpreted as permitting Managers to perform bargaining unit work when they view it to be more efficient.

61. In response to the Employer's submissions on this point, the Union referred to the following from the Saskatchewan Court of Queen's Bench's decision in *Sherbrooke Community Centre, supra*:

15. The award in this case is driven by the premise that the preamble of the collective agreement plays a role in governing the relationship between the parties. In effect, that which is a mere expression of a desire or an aid to interpretation is elevated to a term of the agreement. In my respectful opinion, this approach is patently unreasonable.

16. The preamble to a contract is nothing more than an introduction to that about which the parties have actually agreed. It puts the agreement into context. It describes the goals of the agreement. It speaks to what went before and the spirit in which agreement was achieved. On the other hand, it does not contain any promises. It does not contain any restrictions or commitments. It could be removed entirely without in any way altering that which was agreed to and set out in specific terms.

17. In *Collective Agreement Arbitration In Canada*, by Palmer, Butterworths 1991 (3rd ed.) at p. 163, the author says this.

The general purpose clause creates no substantive rights, but is merely a statement of intention and cannot override any subsequent explicit provisions . . . Its effect is set out in *Canada Packers*, 9 L.A.C. 200 . . . as "The preamble to an agreement is a mere recital and not a substantive term . . . It may afford some guide to interpretation of substantive clauses, but of itself, it has no independent vitality as a source of rights or obligations". It is for this reason, perhaps, it has been called "a pious hope clause".



18. In *United Packinghouse Workers, Local 114 v. Canada Packers Ltd.* (1958), 9 L.A.C. 200 the following was stated at p. 202.

The preamble speaks of the contribution that a relationship of good will and mutual respect can make to the welfare of the enterprise. It is, however, a mere recital and is not a substantive term of the agreement. It has no more force in relation to the obligations of a collective agreement than a preamble in a statute has in relation to the enactments of that statute. It may afford some guide to interpretation of substantive clauses, but of itself, it has no independent vitality as a source of rights or obligations.

See also *U.E., Local 512 v. Canadian Westinghouse Co.* (1955), 5 L.A.C. 2101 (Ont. Arb.) and *QBD Cooling Systems Inc. v. C.U.O.E., Local 101* (1996), 57 L.A.C. (4th) 263 (Ont. Arb.).

62. What the Employer says here is that I should have consideration to the statement of values in interpreting the words "replace" and "support". It says that any interpretation I give to those words must take into consideration the concept of "efficiency" with a focus on service to customers. It is my considered view that if the parties wished to include exceptions for efficiency and customer focus in LOA No. 4, they could have done so but they did not.

63. Notwithstanding the Employer's submission that the statement of values should be considered as an aid to interpretation, there is no getting around the fact that saying that the mandatory prohibition on Operation Managers not replacing bargaining unit employees in the performance of their work should give way to an Operation Manager performing that work if they consider it better for the customer or more efficient is to add further exceptions to LOA No. 4 that the parties have not added themselves.

64. On this point, the Union referred to the following from the decision in *Bell Technical Solutions supra*:

71. In order to interpret the collective agreement before me, I must look at the words the parties used in Article 20 in its entire context. I am satisfied that the parties meant the sub-headings to have meaning. As Arbitrator Reville wrote in the Toronto Typographical Union decision, cited above, at p. 322:

The board is further fortified in this interpretation by the heading of art. 6, "Struck Work Clause". Headings are used in documents to explain the section or group of sections placed under them (see *Martins v. Fowler*, [1926] A.C. 746), and have been said to be a better guide to construction than a preamble (see *Eastern Counties and*

London and Blackwall Railway Cos. V. Marriage (1860), 9 H.L. Cas. 32, 11 E.R. 639).

72. What the Employer is essentially asking me to do is to read into the collective agreement a provision that is not there. At Article 14.03 of the collective agreement the parties have agreed that "the Arbitrator has no jurisdiction to modify, strike out or add to the Agreement".

73. In *Bell Technical Solutions v. C.E.P.*, cited above, Arbitrator Pam Picher addressed an employer argument that a phrase be read into an hours of work provision in the collective agreement. The arbitrator noted, at para. 29, that to add a phrase to a critical clause as suggested by counsel for BTS "would be for the Arbitrator to add to the language of the collective agreement. As set out in Article 14.04 of the agreement, however, "[t]he Arbitrator has no jurisdiction to modify, strike out or add to the Agreement", and she declined to do so. That is the same language that is before me in this case, and it is beyond my jurisdiction to read into Article 20.03 that the Employer can consider whether an employee seeking a temporary transfer is meeting their existing job requirements, or is on a performance management program. I agree with Arbitrator Picher's analysis (at para. 33 of that decision), which when applied to the facts before me suggests that since the parties did not include the criterion of "performance on their existing job meets requirements" in the temporary transfer provision, even though they had it for permanent transfers (at Article 20.01(e)), they must be taken to have excluded it intentionally.

65. As already noted above, the heading to LOA No. 4 points to the agreement between the parties to protect work belonging to the bargaining unit. The prohibition on Operations Managers performing bargaining unit work includes mandatory language: "Operations Managers ... will not be used to replace Technicians ...". The parties then added their joint exceptions. It would constitute a prohibited amendment to the Collective Agreement (Article 14.06) for me to interpret "replace" as giving way to an Operations Manager's view that their performing bargaining unit work would be more efficient thereby providing better service to the customer.

66. Lastly on this point, not only do I agree with the comments in the decision above that headings provide "a better guide to construction than a preamble", it is also a common principle of interpretation that specific provisions prevail over general provisions (see for example *Ontario Power Generation ("OPG") and The Society of United Professionals ("Society")*, *supra*, (at para. 36).

**The De Minimus Argument:**

67. The Employer says the totality of the traffic control work takes between 5 to 10 minutes, which is the time it takes to set up the traffic control, cross the road and take down the traffic control. It says that I should not include any travel time to and from the location where the traffic control work is being performed as the Employer has never agreed that travel time is exclusive bargaining unit work, travel is an overlapping function, and it is not part of the road crossing or traffic control work itself.

68. The Union says that I must consider the totality of the work required by a Technician to perform the traffic control function. This not only involves the 5 to 10 minutes spent at the site setting out and removing cones and signs, as well as performing the traffic control itself, but also includes the time necessary to travel to and from the site where traffic control takes place, as well as the first Technician arriving for traffic control and then waiting for the second to arrive.

69. A claim about travel similar to BTS's was made by the Employer in *Nova Scotia Power Inc., supra*. The relevant passages read as follows:

131. The evidence in this case is not controversial. What is controversial is whether the bargaining unit work should be defined narrowly as the Employer would have it, or broadly as the Union would suggest. Put differently, is the bargaining unit work limited to filling out the form or does it include travelling around the plant, taking readings, and returning those readings in the proper form to a Supervisor. Likewise, is the Union work silencing alarms or is it sitting at the control panel monitoring gauges, alarms, and communications for the shift.

132. I am persuaded by the Union to take the broader view. For the reasons set out below the Union must prevail.

70. I too am persuaded to take the broader view. Travelling around a plant by walking in the performance of an employee's duties is not qualitatively different from travelling in a vehicle in the performance of a Technician's duties.

71. I do not accept that travel is an overlapping function in this case. The work of a Technician assigned to perform traffic control includes the totality of the activities that are necessary to perform those duties. Travel time must be considered in the context of who is engaged in any travel and for what purpose. While Operations Managers are engaged in travel time, this does not make the travel time bargaining unit employees are engaged in an overlapping function. Travel time cannot be isolated from the persons traveling or the

purpose for which they are engaged in traveling. Operations Managers travel for managerial purposes. Bargaining unit employees do not. Bargaining unit employees travel during paid working hours for the purpose of performing bargaining unit work. That is separate and apart from the purpose of travel time engaged in by Operations Managers.

72. Mr. Jessup's evidence was that Managers try to assign Technicians to traffic control who are within 20 to 30 minutes of the site. This means that when a Technician is directed to perform traffic control, this would occupy approximately 40 minutes to an hour of their time, all of which is paid work time.

73. When Mr. MacMillan performed traffic control, he travelled for 10 minutes to get to the site, he waited 10 minutes for Mr. Saunders to arrive, the road crossing took 5 to 10 minutes, and he travelled for 20 minutes to his next location. As such, that is 45 to 50 minutes of working time to perform the road crossing. This would have been similar for Mr. Lapenski. In each case, their performance of bargaining unit work is commensurate with those times.

74. Therefore, the road crossing function begins when a Technician is contacted and starts to travel to site and concludes after the road crossing and when the Technician reaches their next destination. If traffic control had been assigned to Technicians in each of these circumstances, they would have spent 50 minutes to approximately one hour engaged in the totality of that assignment. Instead, the excluded Operations Managers spent that portion of their time on each of those days performing what is bargaining unit work.

75. In *Nova Scotia Power Inc., supra*, referring to the decision in *Truro (Town) v. C.U.P.E., Local 734*, Arbitrator DeMont noted the following:

157. The Union also provided *Truro (Town) v. C.U.P.E., Local 734* 1991 CarswellNS 797, 1991 N.S.L.A.A. No. 18, 19 L.A.C. (4th) 123, 21 C.L.A.S. 579. In that case Arbitrator MacLellan held that a supervisor acting in an emergency situation of potential street flooding would have been an acceptable emergency under the applicable article. However, because the supervisor went on to check a few more sewers, taking all of 45 minutes, he stepped across the line into bargaining unit work. Arbitrator MacLellan concluded the 45 minutes work went beyond the *de minimis* level. Arbitrator MacLellan wrote that performing functions "that can be foreseen, in my view, violates the intent of [the article]."

76. Likewise, the total amount of time spent by Messrs. Lapenski and MacMillan in the service of traffic control is well beyond any *de minimus* standard. As also noted earlier, this is not a case involving an emergency and the Operations Managers did not take all reasonable steps to secure a Technician for those tasks. This is therefore not a matter where a *de minimus*

principle can or should be applied. The Employer's alternative argument in that regard is dismissed.

### **The Emergency Cases**

77. I was provided with several cases with specific exceptions to prohibitions on performing bargaining unit work in situations involving "emergencies". These include *Telus Communications Inc., supra*; *Stepan, supra*; *Carling O'Keefe Breweries of Canada Ltd., supra*; *Ontario (Liquor Control Board), supra*; and *Ultramar Canada Inc., supra*. There is no exception for emergencies set out in LOA No. 4 and I make no comment on the impact of LOA No. 4 in circumstances where an actual emergency exists. However, that is not this case.

### **DECISION**

78. I declare that the Employer has breached LOA No. 4 of the Collective Agreement when the traffic control work was performed by Field Operation Managers who are not bargaining unit personnel.

79. I direct that the Employer cease permitting Field Operations Managers to perform traffic control work in violation of the Collective Agreement.

80. For the reasons set out above, the grievances are sustained.

81. I remain seized for the purposes of dealing with any dispute concerning the implementation or application of this Award, as well as any issue with respect to any make whole request arising as a result of this award.

82. I thank counsel for their thorough and most helpful submissions.

DATED at Toronto, Ontario this 20th day of May, 2025.

"Yvon Seveny"

Arbitrator