LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION AWARD

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 2000

UNION

VICTORIA TIMES COLONIST, A DIVISION OF CANWEST PUBLISHING INC.

EMPLOYER

(Re: Substitute Replacement of Regular Situation Holders)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Allan E. Black, Q.C.
Representing the Employer:	Michael H. Korbin
Dates of Hearing:	November 18 – 19, 2009
Date of Decision:	December 10, 2009

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1. Grievance and Jurisdiction

[1] Commencing September 2008, Director of Production, Steve Majorki, was assigned responsibility for the compositor department. On February 13, 2009, following an acute downturn in business, Mr. Majorki wrote Chapel Chair Matt Hopkins that: "… due to the decline in work volumes and the surplus of situation holders Subs will only be hired when solely authorized by the General Foreman." This was a dramatic departure from decades of practice.

[2] The union gave the employer notice it considered this to be a breach of the collective agreement. The union said the employer could address a surplus of regular situation holders by dismissing employees with severance pay in accordance with collective agreement. The employer considered this option to be too costly. Subsequently, the employer denied work to substitutes for regular situation holders and the union grieved.

[3] The union also grieved that the employer was not acting in accordance with the status quo ante or prevailing conditions clause of the collective agreement, which states: "The conditions prevailing prior to any action or circumstance which results in a dispute shall be immediately reinstated and maintained until a decision is reached" (Section 2(a)). The union told the employer it would be seeking "to be made whole for any and all shifts lost as a result of the grievance filed, until the date of any award or settlement."

[4] The union and employer agree I am properly constituted as an arbitrator under their collective agreement and the *Labour Relations Code* with jurisdiction to

finally resolve the grievances.

2. Hiring Regular Employees and Replacing Absent Employees

[5] This industry and the relationships between its unions and employers are steeped in history and tradition. Early scribe guild members sitting in rows wrote what was dictated by a fellow scribe sitting in a chair at the front. Because of the frequency with which they were doing work for religious organizations, they referred to themselves as members of a chapel and the reader as the chapel chair. This terminology survives in the constitution and bylaws of local typographical unions in which chapel chairs perform the duties of job stewards and other leadership responsibilities in the local union, including resolving differences among members and overseeing the maintenance of working conditions. The constitution and bylaws of this union state that it was founded in 1884.

[6] The independence of scribes, who later became typesetters and are now called compositors, was fostered and protected by printing guilds and their union successors. Some of the traditions and jargon from the guilds have continued and are included in this collective agreement. For example, a regular full-time shift position is called a situation and journeymen with full-time shifts with an employer are called regular situation holders.

[7] One tradition is the way in which qualified journeymen obtained work through the local guild or union, not the employer. Journeymen who wish to substitute for a regular situation holder placed their name on a slip of paper put on a slip-board or substitution board at the bottom of the list. Placement on a board gives priority standing ahead of anyone who comes after if the journeyman maintains the position. Journeymen on the sub-board are expected to show-up regularly to see if they will be hired for a shift and to maintain their priority on the board. The chapel chair hires the highest priority available substitute when a journeyman is needed to substitute for a regular situation holder or an extra person is required.

[8] The hiring of apprentices, the rights of journeymen holding regular situations, the hiring of substitutes and the authority of foremen are governed by

the union's General Laws, which can be supplemented in some respect by local union by-laws. The General Laws of CEP Local 2000 have provisions on apprenticeship (Article I); foremen and hiring, discharge and job security of journeymen (Article II); organization of departments in printing offices (Article III); struck work (Article IV); hiring substitutes (Article V); regular situations and overtime work (Article VI); and prohibitions (Article VII).

[9] Article II, Section 10 of the General Laws reflects some of the relationship between the foreman and journeymen in a printing office. It states:

> A foreman shall not designate any particular day, nor how many days, a journeyman shall work in any one week provided, the Journeyman must engage a substitute when absent. Any journeyman covering a situation is entitled to and may employ in his stead whenever so disposed any competent journeyman without consultation or approval of the foreman: provided, local unions may adopt laws requiring the employment of substitutes in the order of their priority standing; or for specified periods of severe unemployment emergencies, with the consent of the Union Officers, may establish provisions for equitable distribution of subbing among eligible substitutes. (Article II, Section 10)

[10] A regular situation holder taking a day off can personally hire a substitute for the shift, regardless of the substitute's priority on the board, in accordance with the rules of the local union (Hiring – Section 1). Section 18 of the current collective agreement reflects this unique relationship of a union member employed by the employer hiring a replacement to be paid and employed by the employer.

> Any substitute hired to cover for a situation holder must be competent to perform the class of work of the member whose place he takes and be eligible to work at straight time rates; provided if no such substitute is available the situation holder may hire out of classification if a legitimate switch is available, and the foreman is consulted as to the legitimacy of such a switch. Foreman's decision as to legitimacy of such a switch shall be final. Provided that his decision shall be eligible for review by Joint Standing Committee.

[11] A union membership, the sub-board, the chapel chair, local rules and showing-up are the avenues to work without applying or speaking to a foreman or the employer. Section 4 of the current collective agreement states: "New journeymen members of the Union shall not be prohibited from starting work because they have not been interviewed by the General Foreman," who is a representative of management, but a member of the union.

[12] The General Laws allow local unions to adopt by-laws in specific situations. One relating to the protection of priority for absent regular situation holders and the hiring of substitutes during their absence is allowed under Article V, Section 6 of the General Laws, which states:

> Any journeyman engaged to serve the Communications, Energy and Paperworkers Union of Canada, Local 2000, a local union, or to perform work in the interest of the organized labour movement shall employ while absent the first available competent priority substitute. Journeymen performing aforesaid work, or any journeyman incapacitated by illness, shall not suffer loss of situation priority standing while so employed or so incapacitated, in the event a substitute is not available. Available priority substitute competent to perform the work must be employed on any new situation created because of the absence of a situation holder whose priority is protected under the provisions of this section or other sections of Union laws or contracts. Local unions shall adopt laws specifying the time, which shall be not less than thirty nor more than ninety calendar days, after which such new situations shall be filled. Should a substitute with greater priority become available, such substitute shall be placed on said situation. Upon returning to work for duty full priority rights shall be restored to the situation holder who was absent.

The by-laws of this local union provide as follows:

> Situation holders, or substitutes having one (1) year's priority standing in any office, may engage in pursuits other than composing room work, for a period not to exceed ninety (90) calendar days, without loss of situation or priority. Application for this permission shall be made to the Executive Committee and the prior substitute competent to perform the work shall be employed to fill situation during such period. (Substitutes – Section 14)
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> No regular shall be allowed to put on a substitute for a longer period than ninety (90) calendar days except by permission of the Executive.
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> Priority substitute competent to perform the work must be placed on all situations after the situation holder has been absent from his/her situation for a period of 30 calendar days: provided, should said priority substitute be engaged on a stretch at time of vacancy he/she may complete said stretch before being required to comply with the mandatory provisions of this section. (Hiring – Sections 5 - 6)

[13] Work is distributed and overtime avoided by local rules that require a regular situation holder or the union to hire a substitute to replace the regular situation holder when the regular situation holder has worked a full shift.

[14] In keeping with this trade tradition, the first article of the current collective agreement provides that the employer will employ only members of the union to do work within the union's jurisdiction and that management will "respect and

observe" the prescribed union by-laws and General Laws, attached to the collective agreement, which do not conflict with the agreement. The union agrees to furnish journeymen capable of performing all work within the union's jurisdiction and "it is further agreed by the Union to be its obligation to furnish sufficient journeymen to meet the normal requirements of the Company and thereby make it unnecessary for members to work in excess of four shifts in any regularly scheduled work week" (Section 1). The union's work jurisdiction is agreed in Sections 27 to 30 of the collective agreement.

[15] To fulfill this obligation, the union's by-laws provide that "To meet contract requirements of supplying situation holders" the Shop Steward has authority to require substitutes to be available and to accept placements under penalty of losing their priority standing on the sub-board and being barred from priority in any printing office for sixty days. (Substitutes – Section 3) The union adduced evidence of the current Victoria Press Chapel board, including a picture of it, with its slips for the regular situation holders and the substitutes.

[16] It is expressly agreed the employer has control over the hiring of substitutes when a regular situation holder is on vacation. Section 16(g) of the collective agreement states: "It is agreed that the Company shall not be obliged to fill the position of employees on vacation but may do so at its own discretion, therefore, regular employees on vacation shall not employ substitutes to fill their positions."

[17] It is agreed by the union and employer that the positions of regular situation holders do not have to be filled by the regular situation holder or union when the employee is absent on shifts (1) taken in lieu of statutory holidays; (2) taken off for jury duty; (3) taken off for bereavement leave; and (4) on workers' compensation wage indemnity.

[18] The tradition and the independence and personal control that typesetters or compositors have had to choose to work or not to work a specific day is reflected in the testimony of retired compositor and former chapel chair Brewis Lomax. After apprenticing in Kelowna, he came to Victoria in 1963 and placed his name on the sub-board in October. He obtained some substitute work before Christmas,

but after Christmas work was scarcer. At the time, the employer could layoff regular situation holders who were backed off the regular situation board to priority on the sub-board until work increased in March.

[19] Mr. Lomax's wife gave birth on Boxing Day and in January a senior regular situation holder hired Mr. Lomax to work a day while he attended a funeral. Sections 1 and 2 of the hiring bylaws of the local union currently state:

> A journeyman member may personally hire a competent substitute of his/her choice, providing that the sub has shown at least twice in each of the previous two (2) weeks, except when hired by the Union, when he/she shall engage the prior competent substitute.
>
> The substitute of choice will be required to be on the floor at the commencement hour of the shift. The hire will take place in the presence of the Shop Steward, the sub of choice is then responsible to cover said hire.

If the Shop Steward is "covering a situation at the request of a regular or in his absence", the Shop Steward must hire "the prior competent substitute" – most senior on the sub-board list (Section 4).

[20] While at the funeral, the regular situation holder took ill and Mr. Lomax continued as his substitute until thirty calendar days had passed, when he was displaced or bumped in accordance with Section 6 of the local union hiring by-law quoted above. Mr. Lomax became a regular situation holder after the summer of 1964 when there were approximately eighty regular situation holders on the board.

[21] Mr. Lomax remained with the employer until his retirement December 31, 2001. During those years he took sick days off and, for a period of years when his children were young, he regularly took Saturdays off to coach baseball. The chapel chair hired a substitute for those days.

[22] At times, the union is unable to provide a substitute for an absent regular situation holder. The uncovered shift is referred to as a "dark" shift.

3. Arbitrating Management Respecting and Observing Union By-laws

[23] The employer's agreement that management will "respect and observe" the conditions prescribed in union by-laws, incorporated as part of the collective agreement to the extent they do not conflict with the other terms of the collective

agreement, is an express reservation on the employer's management rights.

[24] The legacy of the tradition of travelling (or tramp) printers seeking work or preferring itinerate work and the role the union plays in hiring and distributing available work as it relates to the collective agreement between this employer and union was recognized in 1984 by Arbitrator McColl:

> Two important features arise out of the relationships that are created between the Local and the International which are recognized by the provisions of Section 1 of the Collective Agreement. They amount to this: First of all, the Collective Agreement acknowledges what is commonly called the union shop. That is the Union provides to the Employer, employees who are members of the Union, upon request to the Union office. It is, of course, a condition precedent of employment that only members of the Union will be employed within the work jurisdiction defined by the certification and the Collective Agreement.
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> The second feature which emerges from an understanding of the various documents is the fact that by agreement with the International Union, members throughout North America may be issued with an International travelling card which will permit them to work within sister or sub-locals of the International anywhere in North America. This occurs where the member receives his travelling card, enters into the jurisdiction and places his name on the hiring list. The purpose is to allow flexibility of movement from one jurisdiction to another for members of the Union. Section I of the Collective Agreement in question is similarly contained in other newspaper agreements across North America. Thus, this rather unusual relationship is common to most daily newspapers throughout North America. It is a situation which has been nurtured by the International Union and accepted by most employers through the process of collective bargaining. As the employer gains the benefit of having qualified persons dispatched by the Union, it can raise no objection to the resultant interchange of personnel which must arise when these provisions are implemented.
>
> Arising out of all of this is the understanding that in the International office, no collective agreement will contain a provision which would permit a closure of the hiring board. Only in the rarest of circumstances would such a provision be approved by the International which must approve all collective agreements entered into by the sister or sub-locals. It is to be observed that Section 10 of Article II of the General Laws permits a journeyman to replace himself when absent from his regular shift without consultation or approval of the foreman, and, if done, without fear of disciplinary sanctions being imposed for absence from work.
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> Perhaps, the most important feature arising out of the Collective Agreement between the parties is the concept that the substitution of employees is a matter internally delegated to the Union under the provisions of the General Laws and the by-laws of the Union. By virtue of the provisions of the Collective Agreement, it is not a matter into which the Employer is entitled to intrude or in respect of which it retains any residual rights. In other words, the selection of substitutes is by agreement

> removed from management's prerogative. In saying so, I am mindful of the fact that the Collective Agreement itself provides that the Employer agrees to respect the conditions prescribed by the by-laws and the General Laws, provided that they are not in conflict with the Collective Agreement. It is necessary, therefore, to examine the provisions of the Collective Agreement to determine whether or not there is any conflict on the subject matter, in respect of which the Collective Agreement would then prevail. (*Times-Colonist (Victoria)* [1984] B.C.C.A.A.A. No. 111 (McColl) (QL), ¶ 6 – 9)

[25] In 1980, Arbitrator Ladner had similarly concluded the "respect and observe" provision of a collective agreement was "...strong and unequivocal language and can, I think, only be interpreted as incorporating the General Laws into the parties' Collective agreement." The employer could not waive the provision. It was for the benefit of both the employer and union, which had obtained a guarantee of work in the absence of a reduction in the number of regular situations. (*Vernon Interior Printers Ltd.* [1981] 5 W.L.A.C. 43 (Ladner), quoted in *News Publishing Co. Ltd.* [1996] B.C.C.A.A.A. No. 193 (Korbin) (QL), ¶ 26 and *Victoria Times-Colonist* [1985] B.C.C.A.A.A. No. 439 (Owen-Flood) (QL), ¶ 120 - 126)

[26] Because the operation of the collective agreement and obligations between the union and employer incorporates the union's General Laws and by-laws, an interpretation of the collective agreement requires an interpretation of the General Laws and by-laws. This raises issues about the extent to which an arbitrator is expected or required to interpret, apply and enforce the union's by-laws. Section 2 of the collective agreement addresses grievances and dispute resolution. Paragraph (h) states: "Provided, that the Union laws not affecting wages, hours or working conditions and the General Laws of the Communications, Energy and Paperworkers Union of Canada, Local 2000 shall not be subject to Arbitration."

[27] In 1989, this employer grieved the local union executive granted a 68 year old regular situation holder compositor a ninety day leave of absence for a third consecutive summer that the employee combined with his annual vacation to pursue recreational interests. The leave cost the employer an additional amount for benefits for both the regular situation holder and a substitute. The union argued interpreting its General Laws, Constitution and by-laws and its exercise of

discretion was a matter for the union and not reviewable by the employer or an arbitrator. It was not argued that the leave was a "working condition" and beyond paragraph (h).

[28] In dismissing the employer's grievance, Arbitrator Hope agreed with the employer that the dispute was not completely removed from arbitral review, but concluded the scope of arbitral review was limited.

> However, accepting that I have the jurisdiction to review a dispute that turns in part upon an interpretation of the by-laws or general laws, I find I am not able to agree with the interpretation urged by the employer. Firstly, I do not agree that the language of the collective agreement permits the employer or an arbitrator to insist on an interpretation of the general laws or by-laws contrary to the interpretation applied by the union itself unless that interpretation is perverse. In this dispute the general laws define the right relied on by the union in clear terms and it perceives its by-law as implementing that right. Even though the local by-laws do not contain an express recognition of the right to grant a leave of absence every 12 months, that meaning is not excluded. The provision in the collective agreement exempting the union laws from arbitration applies to remove the language from the type of review urged by the employer.
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> But, barring perversity or bad faith in a context that amounts to a breach of the collective agreement or the contractual obligations of the employee or employees concerned, an arbitrator has no jurisdiction to review such discretionary matters as granting or withholding of a leave of absence by the union.
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> *********
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> The union itself has imposed limits on that discretion, saying it should not be used to permit employees to seek other employment. But the union has not chosen to deny its use for recreational purposes. Furthermore, there is no history of a practice in which use of the provision for recreational purposes has been restricted or denied. Here the leaves granted to Mr. Zedel fall well within the words of the provision. There is no evidence of perversity or bad faith and there is no basis for reviewing the decision of the union. The employer's remedy is to be found in the collective bargaining process where it can pursue the restriction it seeks to implement. The employer raised the general issue in the last round of bargaining. Obviously it is free to raise the specific issue in the next round. In any event, no breach of the agreement by the union was made out and the grievance is dismissed. (*Times-Colonist* [1990] B.C.C.A.A.A. No. 403 (Hope) (QL), ¶ 17, 26 and 28; 14 L.A.C. (4th) 244)

[29] Other arbitrators have not been as deferential as Arbitrator Hope to union interpretation of its General Laws, Constitution and by-laws. In 1995, a union grieved an employer had failed to abide by the sub-board hiring provisions by

hiring a compositor it formerly employed instead of another compositor, who the union said had priority on the sub-board. Arbitrator Korbin in 1996 held the hiring process was a "working condition" and the sub-board provisions incorporated into the collective agreement were reviewable by an arbitrator. The union had to prove the grievor had priority. She denied the grievance finding the grievor had not complied with the sub-board rules and did not have priority. (*News Publishing Co. Ltd.* [1996] B.C.C.A.A.A. No. 193 (Korbin) (QL))

4. Past Practice, Bargaining History and Technological Change

[30] The longstanding past practice in the administration of the regular situation holder board and the sub-board is not in dispute. The General Foreman prepares a weekly shift schedule with shifts assigned based on information about the availability of regular situation holders and substitutes from the Chapel Chair. The General Foreman has access to the Chapel Chair's daily diary and the union boards located on the employer's premises.

[31] Except for the five situations listed above, an absence by a regular situation holder, regardless of its length, has always been filled by the regular situation holder or the union when a substitute is available. Dark shifts are very much the exception. The union does not require or seek the employer's consent to fill a regular situation with a substitute.

[32] The Chapel Chair determines which substitute is entitled to fill the regular situation and monitors and records which regular situation holders are not working and which substitutes are filling their regular situations.

[33] The Chapel Chair informs the General Foreman, as a representative of the employer, when a regular situation holder will be absent and the name of the substitute who will fill the regular situation so the substitute is paid in place of the regular situation holder. The General Foreman informs the payroll personnel who is to be paid for the shift.

[34] Under the thirty day rule, a lower priority substitute filling a regular situation can be displaced by a higher priority substitute.

[35] On occasion, when there is an increase in the volume of work or an anticipated concurrent absence of regular situation holders, the General Foreman will notify the Chapel Chair that the employer requires a substitute to do extra work or will require more substitutes than have slips on the sub-board to cover the anticipated absences.

[36] There have been repeated discussions about the hiring and substitute process at collective bargaining. In July 1983, Mr. Majorki, who had been a union officer, became Production Manager. In January 1984 a regular situation holder hired a substitute for his designated shifts. The employer refused to allow the substitution and the union grieved. An arbitration hearing was held in April and a decision allowing the grievance was issued the same month (*Times-Colonist (Victoria)* [1984] B.C.C.A.A.A. No. 111 (McColl) (QL)).

[37] About the same time, negotiations for a renewal of the collective agreement were concluded. The council of unions negotiating collectively with the employer had rejected an employer proposal made in January that "subs to be hired at the discretion of the foreman and absent employees to be replaced at supervisory discretion." The Mailers Union No. 121, the union in arbitration before Arbitrator McColl, accepted an employer proposal to "eliminate guarantees of jobs and substitute a mere guarantee for named individual for their lifetime with mandatory retirement." The agreement was: "Journeyman members may not engage substitutes without the approval of the general foreman except as required to meet contract manning .... " The compositors rejected the lifetime guarantee. (*Victoria Times-Colonist* [1985] B.C.C.A.A.A. No. 439 (Owen-Flood) (QL), ¶ 81 – 85)

[38] In May 2002, the employer proposed major changes to Section 1 of the collective agreement and other sections that transferred authority over hiring substitutes to the employer. For example: "No substitute will be hired without Company approval." The union rejected the proposals and the employer ultimately abandoned them.

[39] In December 2006, the employer again proposed a major revision to Section 1 of the collective agreement, which the union rejected and the employer

ultimately abandoned.

[40] Because of accelerating technological change in recent decades, there has been a continuous reduction in the number of compositors required to build and prepare advertisements for the newspaper. There were seventy or so regular situation compositors when Ron Tucker added his slip to the sub-board in 1995. Prior to moving to Victoria in 1995, Mr. Tucker had been a substitute in Vancouver since 1988. He continues to be on the sub-board and has not become a regular situation holder. Today, there are eleven regular situation holders on the board and Mr. Tucker is the highest priority substitute.

[41] Section 32 (a) of the collective agreement defines technological change:

> Any change in technology, method (1), or procedure (2) during the period of the collective agreement which decreases the number of employees that existed when the current contract was negotiated with the Union except for normal layoff, such as those occurring as a result of a decline in the volume of business.
>
> e.g. hot metal to cold type
>
> e.g. change in computer operation

The employer guarantees no regular situation holder (full-time or part-time employee) will lose employment through the introduction of technological change (s. 32(b)), but the number may be reduced by attrition (s. 32(d)). The number of employees at January 2, 2007 was twelve (s. 32(b)). Through attrition, it is currently eleven.

[42] Although not in the collective agreement, the employer acknowledges it agreed during collective bargaining that the guarantee for the twelve not losing employment through technological change was extended to encompass loss of employment through layoff.

[43] As part of the resolution of an extra work grievance, the employer agreed "not to engage outside contractors to do compositors work" for the term of the collective agreement (Letter of Agreement No. 7).

[44] Other than waiting for attrition, the employer acknowledges the only way for it to reduce the number of employees with guaranteed employment during the term of the collective agreement is by dismissing with severance pay under

Article 23 of the collective agreement.

5. Financial Circumstances Reason for No Substitutes Decision

[45] Mr. Majorki explained the decision not to hire substitutes without prior authorization by the General Foreman in his February 13, 2009 letter:

> As we discussed today, changing economic conditions have caused an acute downturn in our business and negatively impacted our revenue streams.
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> All expense categories for all departments are being revisited and adjusted accordingly to help offset some of our revenue shortcomings.
>
> In addition to the overall economic status of our business the following is specific to the Comps:
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> - Significant declines in ads flowing through Composing
> - Severe decline in advertising revenue
> - Significant decline of business has severely impacted our revenue to the extent expense reductions are critical
> - Decline in work volume means excessive staff
> - Added expense of Subs working when no meaningful work available

[46] Mr. Majorki testified the number and size of advertisements and the revenue they earned declined dramatically following banner performance in the September 2007 to August 2008 fiscal year. Mr. Majorki testified the employer was not paying its share of the central services and debt servicing costs being carried by Canwest Publishing Inc. By agreement, this financial information is not summarized for public disclosure in this decision.

[47] In June 2009, the employer discontinued publication of the newspaper on Mondays because of the regular losses on that edition. Steps were taken in all departments to reduce expenses. Little overtime was worked from September 2008 to February 2009. Since February only 0.5 overtime hours have been worked in this department. The cause was an unforeseen computer and pagination problem.

[48] The employer's cost for a substitute is approximately $400 per shift plus benefit costs. The employer decided it could achieve cost savings by not having substitutes replace regular situation holders in circumstances in which they had done so for decades. Mr. Majorki testified that, although in most weeks more than five compositor shifts were surplus to need and workload demands, the

employer would abide by the contractual guarantees for the eleven regular situation holders.

[49] The person most impacted by the employer's decision is Mr. Tucker, who testified he earned approximately $45,000 per year as the priority substitute. Since February 13th, he has used his vacation earned in 2008. He has continued to show-up as required of a substitute, but, at the date of the arbitration hearing, had worked only ten shifts. Although he has not worked enough to qualify for continuing medical coverage, the employer has voluntarily maintained it for him. He has not worked enough shifts to qualify for statutory holidays or to earn vacation in 2009.

6. Previous Arbitration Decisions on Hiring Substitutes

[50] In January 1984, a sub-local of the International Typographical Union, the Victoria Mailers Union No. 121, represented employees in the mailing and composing rooms. The union grieved the employer had refused to allow a substitute hired by a regular situation holder to replace him in the mail room on the basis the substitute was not required. There was a letter of understanding guaranteeing jobs for twenty-seven journeymen. Mr. Majorki, a former union officer and General Foreman, had become Production Manager in July 1983 and testified for the employer.

[51] Arbitrator McColl found there was no conflict between the collective agreement and the union's by-laws and General Laws. As quoted above, he found the matter of substitution is assigned by agreement to the union. He decided Article II, Section 10 of the union's General Laws gives individual employees a specific contractual right.

> The right is this: An employee is entitled to absent himself from a regular shift without having to provide an excuse to his employer, provide that, in doing so, he obtains a competent substitute who is a member of the Union to act in his place. (*Times-Colonist (Victoria)* [1984] B.C.C.A.A.A. No. 111 (McColl) (QL), ¶ 25)

[52] Arbitrator McColl found the letter of understanding guaranteeing jobs for an agreed number of positions was a manning agreement, which will have the natural consequence that "on occasion there will be more persons employed

than are actually necessary to do the job" (¶ 32). The job guarantee and letter of understanding did not derogate from the right to be absent and designate a substitute.

[53] The issue in that arbitration concerned "an interpretation of the Collective Agreement relative to the ability of employees in the mailroom being permitted to substitute other Union members while absent from a regular shift" (¶ 1). In allowing, the grievance, Arbitrator McColl decide the regular situation holder was "within his contractual rights when he designated the Grievor to be his substitute on the shift in question and it was not open to the Employer under the provisions of the Collective Agreement to deny the Grievor his opportunity of employment" in place of the regular situation holder (¶ 39).

[54] The uniqueness of this agreement between unions and employers in the newspaper industry was noted by Arbitrator McColl who stated:

> I am not aware of its existence in any other trade agreements in this jurisdiction. Given the general trade agreements that exist in this province, an employee who absents himself from work is required to provide to his employer a reasonable excuse for that absence if he wishes to avoid disciplinary action. He is not generally entitled <u>as a right</u> to designate a substitution. I am not aware of any collective agreements outside the newspaper industry which permit employees such a right. (¶ 26)

With respect to the designation of substitutes, "no residual rights are reserved to management" (¶ 29). Article II, Section 10 of the General Laws, with a minor change from "Executive Council" to "Union Officers" is the same today as it was in 1984.

[55] In 1985, the employer challenged the substitution practice as ill founded and not supportable at arbitration under the collective agreement between the employer and the Vancouver Topographical Union No. 226. The employer's position was "there was no requirement within the Collective Agreement permitting the hiring of a substitute in the absence of a regular or a regular part-time journeyman" (*Victoria Times-Colonist* [1985] B.C.C.A.A.A. No. 439 (Owen-Flood (QL), ¶11).

[56] Under the technological change provisions of the collective agreement,

the employer guaranteed employment to the present regular full-time and part-time employees. This was agreed following a six month strike during the 1973-74 round of collective bargaining. The number of ninety-six at the time could be reduced by attrition. Employees absent on vacation and in other paid absence situations were considered to be employees within the guaranteed number. The employer argued in 1985 this manning agreement did not include substitutes. The guarantee was to the seventy-one incumbent employees in 1985, not to the positions.

[57] The union's general laws were identical to those in the 1984 arbitration. The employer sought to distinguish the 1984 arbitration on the basis that it dealt with the interpretation of a manning clause guaranteeing positions, while this collective agreement gave guarantees to incumbents, not positions (¶ 51 - 52). Mr. Majorki testified for the employer that ninety percent of the time there was a surplus of compositors. He needed only fifty-two employees represented by the Victoria Mailers Union No. 121 and the Vancouver Topographical Union No. 226, instead of the total of eighty in the composing and plate making rooms (¶ 58 – 59). The employer argued the technological change guaranteed conflicted with Article II, Section 10 of the union's General Laws if it guarantees positions and therefore has no application (¶ 100 – 104; and 111).

[58] Arbitrator Owen-Flood did not agree there was a conflict between the technological change guarantee and the union's General Laws on substitution (¶ 151). He held as follows:

> ... I do not see any conflict between those parts of the General Laws dealing with the obligations re substitution and the Collective Agreement.
>
> One could say that the question of when substitutes are or are not allowed is an occupied field that has been expressly occupied by the terms of the Collective Agreement in the case of vacations (section 16(g) of Exhibit 1) and subsequent understandings between the parties in respect of workers compensation, Jury duty and bereavement leave.
>
> I do not see how one could escape from any other conclusion especially in the light of the fact that in earlier negotiations on this very identical wording the employer sought to achieve the same result by negotiating a language change. That language change bid was rejected by the Union and the employer accepted that rejection.
>
> Furthermore, the exemption re employees on vacation in section 16(g) was

> one that was achieved by negotiation by the Company.
>
> [Counsel for the employer] further contended that Section 10 of the General Rules is so clumsily and badly drawn as to be almost meaningless.
>
> I agree that it is clumsy, I agree that it is badly drawn, I agree that it is in the language of gobbledegook but nevertheless I cannot agree that it is so clumsily and badly drawn and such gobbledegook as to be meaningless. I find its meaning quite clear. The germane part of it says "the journeyman must engage a substitute when absent. Any journeyman covering a situation is entitled to and may employ in his stead whenever so disposed any competent journeyman without consultation or approval of the foreman ...." This provision is subject to certain exceptions one of which is set out in the Collective Agreement and some of which have been subsequently agreed to by the parties.
>
> Like Mr. McColl, I understand fully why the company seeks this interpretation, but nevertheless, I am bound to apply and interpret the Collective Agreement. I can do no else. When you read the Collective Agreement and the General Laws incorporated therein, I can find no conflict. The situation is clear. Save whether there has been an agreement to the contrary, the employee has a right and a duty to employ substitutes.
>
> Rightly or wrongly, that is the effective of the Collective Agreement and the General Laws incorporated thereby. If that is to be changed, that change must be achieved by negotiation and not by rights arbitration.
>
> Therefore, I dismiss the grievance. (¶ 151 – 159)

[59] Using the word "gobbledegook" to characterize the wordy jargon in the General Laws does not detract from its clarity. It reflects the uniqueness of the industry and the depth of the trade tradition that is an underpinning of the relationship embodied in the collective agreement.

7. Interim Status Quo Ante or "Conditions Prevailing" Clause

[60] The heading for Section 2 of the collective agreement is "Interpretation and Grievance Procedure." Section 2(a) includes: "The conditions prevailing prior to any action or circumstance which results in a dispute shall be immediately reinstated and maintained until a decision is reached" (Section 2(a)).

[61] This infrequently negotiated type of clause is commonly referred to as a remedial or interim status quo ante (state of things before) clause (see Leo B. McGrady, "Status Quo Clauses", *Labour Arbitration – 1981* (The Continuing Legal Education Society of British Columbia), c. 6)

[62] In 1977, Arbitrator Thompson decided, in the context of the issue in dispute,

the clause obliged the employer "to maintain practices prevailing when the grievances were filed, and that it complied with that requirement" (*Pacific Press Ltd.* [1977] B.C.C.A.A.A. No. 7 (Thompson) (QL), ¶ 30; 15 L.A.C. (2d) 133). The union had argued for an earlier time.

[63] In September 1980, in a dispute flowing from the merger of two newspapers in Victoria, the union argued subsequent layoffs were contrary to the technological change clause of the collective agreement and that no change could be made because of the status quo ante clause. On an expedited basis, the Labour Relations Board heard and decided whether the clause delayed the layoffs until the central issue was arbitrated. The Board summarized the history of the clause in this industry in British Columbia.

> The evidence before me is that the status quo ante clause has been in the parties' collective agreements for some 30 years. I have no doubt that it was picked up from standard form ITU/newspaper publisher contracts of which it had been a part for many years prior to that. At that time, agreements between employers and trade unions in the printing and other craft industries were based more on "Union Rules" than on negotiated settlements. Employers had little if any choice which employees they would hire or keep. The trade-union supplied the labour and prescribed the work practices. It was in that setting that the status quo ante clause initially came into being. (*Canadian Newspapers Company Limited* [1980] B.C.L.R.B.D. No. 56)

[64] In 1971, Arbitrator Peter Seitz considered the status quo ante clause in a dispute between the International Typographical Union and the New York Times. His decision gained acceptance among other American arbitrators and had been cited to arbitrators in British Columbia prior to the 1980 dispute before the Labour Relations Board. The Board recounted the treatment Arbitrator Seitz's decision had received in British Columbia prior to 1980.

> The status quo ante clause has been interpreted in a number of previous cases. Perhaps the leading case is the 1971 decision involving the New York News and a sister local of the ITU. The arbitrator was Peter Seitz, a leading American arbitrator with considerable experience in the newspaper industry. The case arose when the company notified employees of certain changes in starting times. The change was designed as an economy measure. Its effect was to eliminate a considerable amount of post-shift work at overtime rates. The ITU insisted that the company could not change a "condition" of employment which had been challenged until the grievance and arbitration procedure had run its course. The arbitrator

made these interpretative judgments:

"1. The 'Status Quo' provisions of the agreement ...may be invoked by either party thereto if the action sought to be delayed is prohibited by the agreement expressly, or by necessary implication from an express provision or, if not prohibited thereby, is inconsistent with a long established and mutually accepted practice, usage or understanding.

2. Such 'Status Quo' provisions may not be invoked by any party where the action sought to be delayed is claimed to be within the rights or powers of the party seeking to take it and such rights and powers are expressly conferred in the written agreement or necessarily to be implied from such express provisions or such action is consistent with a long established and mutually accepted practice, usage or understanding.

3. If the interpretations and guides provided in '1' and '2' above do not resolve a controversy as to whether the 'Status Quo' provisions may be invoked and there is a demonstrable basis for a claim that the action sought to be delayed will cause irreparable harm or damage for which the Joint Standing Committee or a Board of Arbitration may not be able, in a decision on the merits, to accord adequate relief, the 'Status Quo' provisions may be invoked..."

The arbitrator went on to find "considerable merit" in the company's contention that a particular provision of the agreement conferred on management by "necessary implication" the right to change starting times. He expressed the view that that provision should take precedence over the "vague provision" that conditions existing before the dispute be maintained. The arbitrator continued:

> The status quo clause should be read in the light of its manifest purpose and objective and should not be read literally or applied mechanistically.
>
> Thus I reach the conclusion that the status quo clause does not freeze all 'conditions' until an arbitration award is issued; it freezes a 'condition' the changing of which is protected by the agreement or by long-established and mutually accepted practice – or even if not so protected where irreparable injury is threatened and no adequate relief is foreseen.
>
> By the same token, where it appears that the party seeking to take the action is supported by the agreement or by 'practice' and it cannot be shown that the grieving party will be irreparably injured and where the Joint Standing Committee or Board decision could afford him adequate relief by money payments or otherwise, the status quo provisions should not prevent the party seeking to change a condition, from placing it into effect without delay and relegating the other party to the normal grievance and arbitration machinery for its remedy."

That award has been followed in a number of jurisdictions including British Columbia where it has been applied at least twice. The first instance was a dispute involving Pacific Press Limited and the ITU. The second was in a dispute between Pacific Press Limited and the Newspaper Guild. The Guild contract has a similar status quo ante provision. Needless to say,

counsel for the employer relied heavily on that body of arbitral jurisprudence.

[65] The first British Columbia decision the Board referred to is an unreported 1979 decision dealing with substitute coverage (*Pacific Press Limited*, March 3, 1979 (J. Weiler)). The second is *Pacific Press Limited* [1980] B.C.C.A.A.A. No. No. 15 (Brown) (QL); 27 L.A.C. (2d) 42). Arbitrator Brown chose to follow the decisions of Arbitrators Seitz and J. Weiler. He explained why:

> Literally interpreted this clause would restrain any management action in the fact of a union challenge. However, the employer provided copies of a series of American arbitration awards which adopted more restrictive interpretations of similar provisions in the context of the newspaper industry. Although these awards come from another country, they do form part of the industrial relations climate of the newspaper industry throughout North America and merit careful consideration. The leading award is *New York News* (Seitz, 1971 [unreported]).
>
> Furthermore, the *New York News* decision was adopted in an award by Professor Joe Weiler, who interpreted language which is similar to that here in dispute in a case involving the employer and another union with which the Guild engages in joint bargaining. I stated earlier that an arbitrator should rarely depart from an earlier award between the parties. The same degree of respect should be attributed to Professor Weiler's award.
>
> He summarized the *New York News* decision in three propositions [unreported]:
>
> (1) The *status quo* provision can be invoked if the action sought to be delayed is prohibited by the agreement expressly, or by necessary implication from an express provision, or if not prohibited thereby, is inconsistent with a long-established and mutually-accepted practice, usage or understanding.
>
> (2) Such *status quo* provisions may not be invoked by any party where the action sought to be delayed is claimed to be within the rights or powers of the party seeking to take it and such rights and powers are expressly conferred in the written agreement or necessarily to be implied from such express provisions or such action is consistent with a long-established and mutually-accepted practice, usage or understanding.
>
> (3) The *status quo* provisions may be invoked where there is a demonstrable basis for a claim that the action sought to be delayed will cause irreparable harm or damage for which the grievance procedure or arbitration board may not be able to afford adequate relief.
>
> I propose to follow these awards.
>
> Professor Weiler noted that irreparable harm within the meaning of this test may occur even to a grievor whose initial challenge to management action fails at arbitration. In applying the test one must assume that the rights

> asserted by the union are valid and then ask if such rights existed would they be irreparably damaged by management action prior to arbitration. (¶ 54 – 58)

[66] Arbitrator Weiler's summary misstates Arbitrator Seitz's third proposition, which was quoted by the Labour Relations Board as follows:

> 3. If the interpretations and guides provided in '1' and '2' above do not resolve a controversy as to whether the 'Status Quo' provisions may be invoked and there is a demonstrable basis for a claim that the action sought to be delayed will cause irreparable harm or damage for which the Joint Standing Committee or a Board of Arbitration may not be able, in a decision on the merits, to accord adequate relief, the 'Status Quo' provisions may be invoked...".

[67] Arbitrator Seitz's first proposition states when the clause may be invoked. The second states when it may not be invoked. The third proposition considering irreparable harm is to be resorted to when the neither of the first two is conclusive.

[68] Both decisions in British Columbia prior to 1980 considered the matter of irreparable harm. This may account for the following observation by the Labour Relations Board:

> I think it fair to observe that the two British Columbia arbitrators who have adopted the Seitz award have done so without critical analysis. I confess to having some difficulty with that award. It seems to mix the status quo ante issue with the merits of the main grievance itself; and it arguably amounts to a re-writing of the agreement between the parties based on one arbitrator's intuitive sense of the equities (cf. Simon Fraser University [1976] 2 Can LRBR 54 at 58). At the same time, there is some force to the argument that the Seitz award, consistently followed as it has been, has established a presumptive framework within which the parties have bargained for the continued inclusion in their collective agreements of the status quo ante provision (cf. Insurance Corporation of British Columbia (Decision No. 32/80 at p. 6)). The Seitz award was written in 1971; the Pacific Press/ITU award was published in March of 1979; the current agreement between the parties was reached in June of 1979. Given that chronology, it might well be argued that the parties have actually adopted those two awards as correctly interpreting their agreement; further, that it makes little sense to carve out the City of Victoria from the rest of the North American continent insofar as the interpretation of an industry-wide clause is concerned.
>
> Having said all of that, I find it unnecessary to decide whether I should include myself amongst those who have followed Seitz.* That is because I have concluded that the status quo ante clause applies only to work practices cases as distinct from termination cases. The clause speaks of maintaining "conditions" -- not "conditions and employment". No doubt the word "conditions" is broad enough in the abstract to embrace the concept of "employment". After all, one of the fundamental conditions of

> employment is the employment itself. But language used in one clause of an agreement is not interpreted in the abstract. It must be interpreted in the context of the agreement as a whole. It would be wrong to look at one clause in isolation from all others as one searches for the full intent of the parties. Moreover, in some circumstances, the context of an agreement includes not only the language used in its several clauses but also its history.
>
> (*Although, if it had been necessary to make such a decision, and if I had decided to follow the Seitz approach, it would be on the "presumptive framework" rationale; not because I find the approach itself to be persuasive.)

[69] Because of other provisions of the collective agreement, the Board determined the status quo ante clause was not to apply to cases of discharge, which the union conceded, and, by extension, to layoffs because they are in the same "generic category." It dismissed the union's grievance the layoffs breached the status quo ante clause in Article 2(a).

[70] In 1982, Arbitrator McColl decided whether the clause delayed a layoff until the grievance was decided (*Pacific Press Ltd.* [1982] B.C.C.A.A.A. No. 427 (McColl) (QL); 7 L.A.C. (3d) 314). He cited and relied on Arbitrator Weiler's summary of the three propositions from Arbitrator Seitz without noting the difference between the summary of the third proposition and the original. There is no reference to any submission that irreparable harm is not necessary to invoke the status quo ante clause. Arbitrator McColl decided the union had not led any evidence to prove irreparable harm: "What I am saying is that based upon the narrow issue, irreparable injury cannot be inferred or presumed without supporting evidence" (¶ 8). There is no reference to the Labour Relations Board's decision in this preliminary decision, but it appears to have been referred to in a later decision on December 8, 1982 (see *Pacific Press Ltd.* [1993] B.C.C.A.A.A. No. 277 (Bird) (QL), ¶ 14 and 19).

[71] Restatement of Arbitrator Weiler's misstated summary, rather than the original statements by Arbitrator Seitz, was repeated in 1991 in *Canadian Newspaper Co.* [1991] B.C.C.A.A.A. No. 147 (Klassen) (QL), but without consequences for the decision. The first proposition was met and the employer was found to have contravened the status quo ante clause when it disciplined

employees for breach of a new employer rule (¶ 85 - 87). There is no discussion about irreparable harm or the interaction of the first and third propositions as summarized by Arbitrator Weiler and quoted in the decision.

[72] Arbitrator Kelleher decide in March 1993 that the status quo ante clause did not apply to scheduling employees to work Friday night on a straight time basis in February 1992 after paying an overtime rate from September 1991 when the work was first required and the union and employer were in a bargaining dispute. He found the collective agreement allowed payment at a straight time rate. He held it was compelling that the three propositions from Arbitrator Seitz, as quoted by the Labour Relations Board in 1980, had created a presumptive framework for the intervening collective bargaining and successive renewal of the collective agreement without amendment. The practice from September to January did not qualify as a "long standing and mutually accepted practice" and the status quo ante or conditions prevailing provision in the collective agreement did not apply in accordance with Arbitrator's Seitz' second proposition. (*Pacific Press Ltd.* [1993] B.C.C.A.A.A. No. 115 (Kelleher) (QL))

[73] In a layoff grievance-arbitration decide in September 1993, Arbitrator Bird cited Arbitrator Seitz's three propositions as quoted by the Labour Relations Board, not as summarized by Arbitrator Weiler (*Pacific Press Ltd.* [1993] B.C.C.A.A.A. No. 277 (Bird) (QL), ¶ 16). He decided the status quo ante clause did not provide a remedial benefit for the laid off employees or to the union without distinguishing among the previous approaches:

> In the collective agreement before Chairman Munroe, the grievance procedure provisions contain the same status quo ante clause as is in the collective agreement before me. They also contain a clause whereby the employer is required to compensate a reinstated employee for wages lost while discharged and awaiting the outcome of his or her grievance. Chairman Munroe finds there is a conflict between the two clauses and decides that the status quo ante clause does not apply in discharge cases or layoff cases.
>
> In Pacific Press Limited and Vancouver-New Westminster Newspaper Guild, Local 115 - The Newspaper Guild, the Company took the position that the status quo ante clause did not apply to a layoff. The union disagreed. Arbitrator McColl reviews the previous decisions in British Columbia and comes to two conclusions. First, to apply the clause to a

> layoff the union had to prove irreparable injury but did not do so. Second, if he is wrong in his first conclusion, the clause does not apply to layoffs, as previously decided by Chairman Munroe. Arbitrator McColl finds again in his award of November 25, 1982, above, that actual proof of irreparable injury in a layoff is required before an employee can rely upon the status quo ante clause. In his view, an arbitrator cannot assume that an irreparable injury results from a layoff. There must be evidence to support a finding of irreparable injury.
>
> The collective agreement before me contains the status quo ante clause and a provision for compensating a reinstated employee. This situation parallels that in Canadian Newspapers, decided by Chairman Munroe, as I have already described. Recognizing that the Union has this obstacle to get over, counsel for the Union asked me to consider the Union's position separately from that of the employees. The Union has a distinctly separate interest in the outcome of the grievance and therefore should be able to rely on the clause. In my opinion, the Union is in a difficult position. It has not proved that irreparable harm will occur to the Union or the employees as a result of a layoff. By irreparable harm I mean harm resulting from the layoff for which I as an arbitrator will be unable to provide an adequate remedy. As an arbitrator I can provide a wide range of remedies in the case of a wrongful layoff, including damages for lost pay and benefits and reinstatement.
>
> Over many years arbitrators and the B.C. Labour Relations Board have given restrictive interpretations of status quo ante clauses. If the Union wanted a wider interpretation it should have bargained for it. I assume that the Union was aware of these restrictive interpretations when it last agreed to it. I adopt the "presumptive framework" analysis by Chairman Munroe and accept arbitrator McColl's Newspaper Guild as correctly decided. The Union's claim here is wholly derivative, e.g. for dues. If no employee has a legal claim under the status quo ante clause, neither does the Union. I hold that the status quo ante provision has no application here. (¶ 18 – 21)

A copy of Arbitrator McColl's December 8, 1982 decision, relied on by Arbitrator Bird, was neither provided nor available to me.

[74] For discussion of the application of a status quo ante clause to layoff and discharge in another Canadian jurisdiction see *Brunswick News Inc. (c.o.b. Daily Gleaner) v. Fredericton Typographical Union, Local 664* [2000] N.B.J. No. 90 (QL)). In quashing an arbitration decision applying the clause to a layoff as patently unreasonable and illogical, the court reviewed four arbitration awards, including three from British Columbia discussed above, and concluded:

> From the four cases I find that these arbitration awards generally accept that the status quo clause may be invoked if an express provision of the Collective Agreement appears to be violated. I find that in each case there is a recognition that the clause should not be applied literally and must be read in the context of the entire agreement. It is also clear that the word

"discharge" includes both firing and being laid off. (¶ 13)

8. Union and Employer Submissions

[75] The union submits the employer has contravened a fundamental and longstanding right under the collective agreement for regular situation holders to employ substitutes when absent except in a limited number of agreed situations. The right arises under union rules that are part of, and not in conflict with, the collective agreement. The union submits:

> Notably, while Arbitrator's are not bound by strict rules of *res judicata,* the Union submits that in this case a finding that this issue is *res judicata* based on the *Owen-Flood Award, supra,* would be appropriate; in the alternative, the Union [submits] that you should exercise your discretion to follow that award to ensure a fair and consistent approach to this issue, especially as it involved the same issue and the same parties.
>
> Such an interpretation is also consistent with other jurisprudence in the industry. For example, Arbitrators have upheld similar unusual trade union rights in this industry, relying on the union's general laws and bylaws as incorporated by a respect and observe provision. ...
>
> As in the *McColl Award, supra,* and the *Owen-Flood Award, supra,* the Union asks you to interpret the Collective Agreement in conjunction with the General Laws and Bylaws, incorporated therein. The Union submits that, when considered in this fashion, the Collective Agreement is clear and unambiguous and it clearly and unambiguously supports the Union's interpretation.
>
> The Union asks you to follow the decisions of Arbitrator McColl and Arbitrator Owen-Flood.
>
> Further, the Union submits that the language of the Collective Agreement, when considered even absent the jurisprudence, clearly supports a finding that regular situation holders and/or the Union (via the Chapel Chair) have the right to engage / assign substitutes to fill a regular situation where a regular situation holder is absent (save for the exceptions noted by the Union ...). (*Union's Written Argument*, ¶ 61 – 65)

The rights of the regular situation holders and the union are clearly and unambiguously stated in the collective agreement and the union's interpretation is supported by both the past practice and bargaining history.

[76] The union submits the employer breached the status quo ante provision of the collective agreement.

> The Employer subsequently continued to violate the Collective Agreement, and continues to do so, by refusing to allow the Union and/or its regular situation holders to assign substitutes to fill regular situations when a regular situation holder is absent. It is important to understand that the

> vast majority of the work substitutes previously received prior to the Employer's directive, often for many years, came from filling regular situations in precisely this scenario. Therefore, the effect of the Employer's actions is to deprive long term employees of their ability to earn a (sufficient) livelihood. (*Union's Written Argument*, ¶ 9)
>
> ********
>
> The Union submits that the Employer's continuous contraventions of the Collective Agreement and the longstanding past practice between the parties also constitutes a separate and independent breach of the Status Quo Provision; the Union seeks for a clear and definitive ruling from you that the Status Quo Provision was breached in this case .... (*Union's Written Argument*, ¶ 12)

[77] Further the union submits:

> ... there is irreparable harm to it, and to the relationship between the parties, because the Employer essentially took advantage of the "work now, grieve later" principle and failed to honour the Status Quo Provision, by engaging in, and continuing to engage in, violations of the Collective Agreement despite the Union invoking the Status Quo Provision which clearly should have operated in this case so as to protect the status quo pending a determination on the merits. (*Union's Written Argument*, ¶ 101)

In this situation, the irreparable harm is clear from the evidence that:

> Substitutes get most of their work through covering regular situations, so they have been deprived of much of their livelihood and, in this case, for a lengthy period of time ...
>
> While the actual financial loss itself is compensable, ongoing financial hardship has been recognized as irreparable harm to employees because of the stress it can cause, and because an employee may well miss important financial obligations with consequences that cannot be compensated, such as court ordered child support payments, and/or mortgage payments: *United Parcel Service and Teamsters, Loc 938 (Barrant)* (2002), 109 L.A.C. (4th) 312 (Knopf), at p. 330 ...;
>
> Substitutes have to continue showing up on the shop floor twice per week to maintain seniority, despite there being no chance of them being assigned work in exchange (unless there is extra work);
>
> As substitutes cannot continue to accrue vacation (because they are not receiving shifts), and have been forced to cash out some or all of their previously accrued vacation to receive a paycheque to support themselves in the interim, substitutes have been prevented or limited from taking real / meaningful vacations; and
>
> Substitutes have suffered other monetary losses, in addition to lost wages, including, *inter alia:* lost accrued pension contributions, lost accrued vacation days, lost statutory holiday pay and any other lost benefits. (*Union's Written Argument*, ¶ 100)

There should be a clear finding of a breach "to discourage repeated violations by the Employer of the agreement between the parties" (*Union's Written Argument*, ¶

103). (*TFL Forest Ltd.* [2007] B.C.C.A.A.A. No. 145 (Dorsey) (QL), ¶ 142)

[78] The employer acknowledges it confronts two previous arbitration decisions against its interpretation of the collective agreement and that the union has decades of past practice and bargaining history in favour of its interpretation. Rising to the challenge, the employer submits Arbitrator Owen-Flood's decision was clearly wrong.

> In the alternative, if you conclude that his decision is not clearly wrong, then we submit that for absence of an RSH [regular situation holder] due to sickness, there is no obligation to replace with a substitute unless and until the RSH has been absent for 30 calendar days or longer. That issue was not before Arbitrator Owen-Flood and he expressed no views about it. (*Company's Argument*, ¶ 5)

[79] The employer submits the correct premise from which to reason is that:

> ... management has the fundamental right to organize and reorganize its workforce, and that an arbitrator ought not to impose upon an employer any restriction on such fundamental management rights unless it has clearly and unequivocally bargained such restriction. Surely the right to determine how many employees are needed to meet production requirements, to determine the normal requirements of the Company, is a fundamental management right, as is the right to determine whether to replace an absent regular employee with a substitute. We draw support from this by Section 3 of the Collective Agreement which provides that "operation, authority and control of the composing room shall be vested exclusively in Management through its representative, the General Foreman". Section 3 buttresses the management rights that the Employer inherently has to determine such matters as whether to replace an absent employee with a sub – i.e. whether there is an operational need to do so.
>
> When the matter is viewed this way, the fundamental question is whether Article II, Section 10 of the General Laws clearly and unequivocally requires management to permit a substitute to replace a RSH when such replacement would result in the Union furnishing more than sufficient journeymen to meet the normal requirements of the Company – i.e. where there is no work that the substitute needs to do and there is no operational or production need for this replacement. We say that Section 10 does not clearly and unequivocally require management to permit this. To impose this type of onerous obligation on an employer, to force it to incur what is now a cost of $400 per shift that is totally unnecessary, would require the clearest of language that would have to say that a RSH is permitted to be replaced by a sub even when not needed by the Employer or when the result of engaging the sub is to provide excessive journeymen in relation to the normal requirements of the Company. (*Company's Argument*, ¶ 8 - 9)

(See *Wire Rope* [1982] B.C.C.A.A.A. No. 317 (Chertkow) (QL), 4 L.A.C. (3d) 323; *Fortis BC* [2008] B.C.C.A.A.A. No. 29 (Hickling) (QL), ¶ 60).

[80] The employer submits the context of the union's obligation to furnish capable journeymen in Section 1 of the collective agreement is that of an employer and union hiring hall relationship in which the union risks a liability if it does "furnish sufficient journeymen to meet the normal requirements of the Company." This is the context in which Article II, Section 10 of the General Laws is to be interpreted and applied. The union has transferred this obligation to regular situation holders by requiring them to engage a substitute – they "must" – because, if they are absent and do not engage a substitute, the union will face potential liability.

[81] In this context, neither the regular situation holder nor the union has a right when the normal requirements of the Company do not require a replacement during an absence. If a replacement is not required, then Article II, Section 10 is not triggered and there is no breach of Section 1 of the collective agreement. To have substitutions when they are not required is to turn the order of obligations under the collective agreement on its head by allowing the union and employees to provide more employees than needed to meet the normal requirements.

[82] The employer submits the guarantee in Section 32 simply identifies the number at January 2, 2007 and protects them from loss of jobs due to technological change. It does not define "the normal requirements of the Company", which is subject to the business fluctuations that affect production requirements. "The concept of "normal requirements" is by its very nature fluid and it changes over time given changing conditions" (*Company's Argument*, ¶ 15).

[83] The employer submits there is no manning agreement under this collective agreement. There is an agreement to schedule forty-four shifts each week, but not to fill them.

[84] The employer submits Arbitrator Owen-Flood erred by relying on a failed employer bargaining proposal. "Fundamentally, the subjective intention of a party making or rejecting a proposal is not determinative of contractual rights and certainly cannot create a contractual right" (*Victoria Times-Colonist* [2006] B.C.C.A.A.A. No. 54 (Germaine) (QL), ¶ 57).

[85] Similarly, the employer submits, Arbitrator Owen-Flood's musings that Article 16(g) dealing with vacations occupied the field of when substitutions are and are not allowed is incorrect.

> Article 16(g) is specific to vacations, it does not stand for the proposition that the Employer is required to permit substitutes to replace RSH's in every other situation even where there is no operational need to do so. That would be to place a very heavy weight on a provision dealing with vacations. (*Company's Argument*, ¶ 20)

[86] Finally, the employer submits, Arbitrator Owen-Flood made his decision before enactment of Section 2 of the *Labour Relations Code*:

> Further, the Owen-Flood decision was made at when we did not have section 2 in the Code, which requires arbitrators to exercise their powers and perform their duties in manner that "fosters the employment of workers in economically viable businesses" and "encourages cooperative participation between employers and unions in adapting to changes in the economy and developing a workforce and workplace **that promotes productivity**". The result sought by the Union here could not be more to the contrary of these fundamental purposes of the *Code* as it entrenches inefficiency, lack of productivity, and contributes to making a business economically unviable.
>
> Accordingly, we submit that Arbitrator Owen-Flood's Award is clearly wrong and it is open to you to conclude that on a proper construction of the language, bearing in mind the hiring hall context, there is no requirement on the Company to permit a substitute to replace a RSH when such substitute is not needed to meet the normal requirements of the Company and therefore the Company has not breached the Collective Agreement. (*Company's Argument*, ¶ 21 – 22 – original emphasis)

[87] In the alternative, the employer submits there is no obligation to "fill the situation" unless and until the regular situation holder is absent more than thirty calendar days. This interpretation of the mutual intention of the union and employer, which was never practiced and never previously advanced by the employer before Arbitrator Owen-Flood in 1985 or any arbitrator since, follows this line or reasoning. Article V, Section 6 of the General Laws is a limiting exception to the right to have a substitute replace an absent regular situation holder in two situations – absence to serve union office and due to illness. In these situations, the absence is not to be filled until it has continued for thirty days and then by the substitute with greatest priority. Local by-laws that conflict with this have no force or effect. And the specific provision, Article V, Section 6 of the General Laws, prevails over the general provision, Article II, Section 10 of the General Laws

based on "… the principles of contract interpretation that specific provisions override general provisions and that which comes first overrides that which comes later" (*Telus Communications Inc.* [2008] C.L.A.D. No. 166 (Taylor) (QL), ¶ 78; *John Bertram & Sons Ltd.* (1967), 18 L.A.C. 362 (Weiler), p. 368).

[88] In arriving at this interpretation of the General Laws, the employer prefers and urges the non-deferential approach in *News Publishing Co. Ltd.* [1996] B.C.C.A.A.A. No. 193 (Korbin) (QL) and not the deferential approach in *Times-Colonist* [1990] B.C.C.A.A.A. No. 403 (Hope) (QL). The issue in dispute is a working condition and the latter approach is inconsistent with an arbitrator's mandate under Section 82 of the *Labour Relations Code* to determine and decide the real substance of the matter in dispute and not to defer to an interpretation advanced by one party to the dispute.

[89] The employer submits evidence of past practice cannot be used to alter or vary the meaning of the collective agreement (*British Columbia Ferry Corporation* [1996] B.C.C.A.A.A. No. 386 (Kelleher) (QL), ¶ 28 -30). The clear preponderance of the meaning of the General Laws is as the employer advances. Therefore, past practice cannot be used to alter that meaning. Consequently:

> There is no obligation to permit a substitute to replace a RSH when that is not needed for operational reasons or to meet the normal requirements of the Company. Alternatively, if you do conclude that there is such an obligation, then Article V, Section 6 creates a clear exception to that obligation in the event that sickness or illness has caused the RSH to be absent unless and until that absence lasts 30 calendar days. (*Company's Argument*, ¶ 30)

[90] The employer submits the action taken by the employer in February 2009 is clearly within its collective agreement rights and it did not have to delay implementation under the status quo ante or conditions prevailing clause in accordance with the second proposition stated by Arbitrator Seitz in 1971, which was endorsed by the Labour Relations Board in 1980 and applied by Arbitrator Kelleher in 1993. Alternatively, there has not been any irreparable harm established by the union in the evidence.

9. Discussion, Analysis and Decision

[91] The employer's agreement under Section 1 of the collective agreement to respect and observe the conditions prescribed by the union's by-laws and General Laws incorporates these written collateral documents as enforceable terms of the collective agreement. Their mutually agreed provisions limit the employer's management rights under Section 3 of the collective agreement.

[92] The presumptive right of management to organize its business and to hire and replace or not replace absent employees has been expressly negotiated away under this collective agreement. Management's exclusive authority to operate and control the composing room is limited by the express agreement it has made to give regular situation holders the right to employ substitutes for all but a few limited absences without recourse or approval by the employer or its representative, the General Foreman. I agree with Arbitrator McColl's conclusion in 1984 that on the subject of designating substitutes "no residual rights are reserved to management" (*Times-Colonist (Victoria)* [1984] B.C.C.A.A.A. No. 111 (McColl) (QL), ¶ 29).

[93] Arbitrators have recognized the antecedents and uniqueness of this agreement in this industry. It is in many respects still a legacy of early collective agreements based on pre-existing union rules, rather than negotiated settlements premised on management residual rights.

[94] Arbitrators have recognized the costs this may impose on the employer as a result of periodic overstaffing. An employer guarantee for a number of regular full time positions and relinquishment of the right to control replacement of absent regular situation holders in those positions has a foreseeable cost.

[95] This employer has quantified that cost in the current business cycle and decries it as inefficient and unnecessary. Arbitrator Owen-Flood correctly held the employer to its collective agreement bargain in 1985 despite Mr. Majorki's estimate that he needed only fifty-two of the eighty journeymen. Mr. Majorki's estimate today that he needs only five of the eleven compositors is no more determinative of the issue than it was in 1985.

[96] In successive collective agreements before and since 1985, the employer has repeatedly agreed to a limitation on its presumptive and Section 3 management rights. It is likely there have been sound business reasons over the decades for the employer making and renewing these agreements and not having pressed its demands for more control and authority to a collective bargaining impasse or to achieving what it did with the Mailers Union in 1985.

[97] A contextual approach to the interpretation of the language of this collective agreement requires consideration of the entire context, not simply one perspective based on a singular focus addressing current inefficiencies that flow from a decades' old agreement with consistent application and interpretation. Despite the absence of evidence in 1985 or in this arbitration of the benefits for the employer flowing from this arrangement, it is probable there has been, and continues to be, a benefit to the employer from having the union and employees manage substitutions with competent journeymen and a union obligation to avoid overtime and its attendant costs to the employer. Although the extent to which that benefit offsets some or all of the cost of periodic overstaffing has not been explored in the evidence, this is a feature of the context and relationship that must not be ignored.

[98] The entire context includes an understanding that the union's historical role, General Laws and local by-laws include securing employment for its members, protecting their freedom to choose to work or forego one or more shifts for other endeavours, such as coaching children, and providing ease of access to work in a printing office by itinerate members without challenge from an employer.

[99] The union's regular situation holder board and sub-board and its rules that govern them are as much, or more, for the benefit of union members as for this and other employers. At times, the interests of the union and its members might be divergent from the interests of an employer, but the interpretive context in which the agreement is interpreted must consider the interests of both the union and the employer.

[100] Characterizing the relationship between the union and employer under this collective agreement as a hiring hall relationship invokes the circumstances of

periodic and often unpredictable fluctuations of work as can occur in the long shoring or construction industries. This is a mischaracterization of the relationship between this union and employer. Perhaps, the analogy was more appropriate at a time when typographical unions dispatched compositors to multiple printing offices.

[101] However, this collective bargaining relationship is for the purpose of daily publishing of a newspaper requiring a constant and dependable supply of competent journeymen to meet predictable production. In this circumstance, the "normal", not the daily fluctuating, requirement is foreseeable as long as the newspaper is in operation. It is not contemplated to be the fluctuation in demand and supply that is expected to occur in most hiring halls. It is not an ill defined and fluid, constantly changing requirement that neither the union nor the employer can reasonably predict nor anticipate or have established mechanisms to manage.

[102] Under this collective agreement, the "normal" requirement was agreed to be twelve positions. It was agreed this number could decrease through attrition. This is the number of positions for which the employer regularly schedules shifts each week with four shifts per week for each position. There has been no agreed change that guarantees employment for named individuals, rather than staffing the normal requirement for an agreed number of positions as there was in 1985 with the Mailers Union. The union agrees to supply for this number of positions and the employer agrees to have the union do that in accordance with its General Laws and by-laws under penalty of liability if the employer incurs overtime.

[103] This context enables the union to maintain a sub-board on which a journeyman like Mr. Tucker will maintain his slip and regularly show-up with a realistic expectation he will be able to earning a living wage throughout the year. It assures the employer that, despite occasional redundancy, it will always have competent journeymen supplied by the union so it can publish its daily newspaper and promise its customers and subscribers that the newspaper will be published as scheduled and contracted. This staffing assurance is an assessment and management of foreseeable risks. It promotes productivity in the same manner

that redundancy and insurance in other aspects of the business can be said to promote productivity.

[104] Equal attention to language must be given to the characterization of an agreement as a "manning" agreement. The term has been used to describe both a guarantee to individuals and to positions in collective agreement language, arguments and analysis and decisions in the various negotiations and arbitrations over the decades between this employer and the unions representing its employees. The label is less important than the commitment. Currently, under this collective agreement, the mutual commitment is to maintain, schedule and have the union and regular situation holders fill eleven positions. And the employer schedules shifts for eleven positions.

[105] In this context, it is unambiguous that the agreed "normal" requirement for positions to be staffed under Section 1 of the collective agreement that was mutually contemplated and agreed for the term of this collective agreement is to be determined by reference to the number of regular situation holders for which the employer guarantees protection against loss of employment by the introduction of technological change under Section 32 and by contracting out. This is the same number the employer guaranteed there would be no layoff.

[106] This interpretation of the language of the collective agreement is reinforced by the evidence of constant past practice, which the employer acknowledges is the manner in which it has administered both previous collective agreements containing the same language and the current collective agreement since it was negotiated.

[107] This dispute does not require a close analysis of the extent to which it is agreed in Section 2(h) of the collective agreement or permissible for the union and employer to place interpretation of these by-laws and General Laws beyond arbitral review or whether an arbitrator should approach interpretation of these union documents in any manner different than the terms of the main collective agreement document or other documents collateral to a collective agreement, such as insurance or health and safety documents.

[108] The "right and duty" that regular situation holders have and the restrictions on the General Foreman, the representative of management (Section 3), are clearly stated in Article II, Section 10 of the General Laws. They has been clearly understood by the union and employer over the decades, consistently administered and repeatedly enforced in previous grievance-arbitrations.

[109] The new question is whether Article V, Section 6 with its thirty and ninety day direction limits Article II, Section 10 in the manner in which the employer advocates. I have concluded it does not. The scheme is that a regular situation holder may select any substitute, regardless of his or her priority (or seniority) to replace the regular situation holder when absent for any reason. The union allows this diminishment of priority status (or seniority) in substitute selection by a regular situation holder. The union may limit this substitute selection and a substitute's continued right to work "for specified periods of severe unemployment emergencies" and it may "adopt laws requiring the employment of substitutes in the order or priority standing" (Article II, Section 10).

[110] A regular situation holder is absent engaged to serve the union or "incapacitated by illness" will not lose priority if there is no substitute. His or her priority is "protected" (Article V, Section 6). An available competent priority substitute must be employed on the "new situation" created by such an absence. Without an express restriction, the substitute, regardless of his or her priority, could work in the new situation indefinitely. To address the possibility of a low priority or less senior journeyman continuing to work in the new situation created by the absence when there are competent journeymen on the sub-board with higher priority, the local union must adopt laws

> ... specifying the time, which shall be not less than thirty nor more than ninety calendar days, after which such new situations shall be filled. Should a substitute with greater priority become available, such substitute shall be placed on said situation. Upon returning to work for duty full priority rights shall be restored to the situation holder who was absent. (Article V, Section 10)

[111] This local union has adopted a law allowing a regular situation holder to personally hire a substitute.

> A journeyman member may personally hire a competent substitute of his/her choice, providing that the sub has shown at least twice in each of the previous two (2) weeks, except when hired by the Union, when he/she shall engage the prior competent substitute.
>
> The substitute of choice will be required to be on the floor at the commencement hour of the shift. The hire will take place in the presence of the Shop Steward, the sub of choice is then responsible to cover said hire. (Hiring –Sections 1 and 2)

The local union has adopted laws to meet the requirements of Article V, Section 6 of the General Laws.

> No regular shall be allowed to put on a substitute for a longer period than ninety (90) calendar days except by permission of the Executive.
>
> Priority substitute competent to perform the work must be placed on all situations after the situation holder has been absent from his/her situation for a period of 30 calendar days: provided, should said priority substitute be engaged on a stretch at time of vacancy he/she may complete said stretch before being required to comply with the mandatory provisions of this section. (Hiring – Sections 5 - 6)

[112] The thirty day rule has nothing to do with the hiring of a substitute to fill a new situation when the absence of a regular situation holder arises. It is directed to the length of time during which a substitute personally hired by an absent regular situation holder can remain in a new situation despite having less priority than other competent substitutes.

[113] The union has administered this by-law as it is written and intended and the employer's inventive interpretive twist seeks to have it interpreted entirely out of context and entirely for its benefit. The union's by-law was adopted for the benefit of priority substitutes, not the employer, and to reinforce the value of priority on the sub-board, not to limit the regular situation holder's right to personally hire a substitute or to limit the work available to union members on the sub-board.

[114] There are agreed exceptions. They are not in dispute now and were not in dispute in 1985 when Arbitrator Owen-Flood correctly arrived at the same conclusion as I have. As he concluded: "The situation is clear. Save whether there has been an agreement to the contrary, the employee has a right and a duty to employ substitutes" (*Victoria Times-Colonist* [1985] B.C.C.A.A.A. No. 439 (Owen-Flood) (QL), ¶ 158) The employer's decision of February 13, 2009 and subsequent implementation of that decision was contrary to Section 1 of the

collective agreement. The grievance is allowed.

[115] The employer's implementation of its decision of February 13, 2009, was, in the words of Arbitrator Seitz's first proposition an action "prohibited by the agreement expressly" and was "inconsistent with a long established and mutually accepted practice, usage or understanding." Using the three propositions stated by Arbitrator Seitz in 1971 as the presumptive framework within which Section 2(a) of the collective agreement was successively renewed and negotiated since 1980, the language and intent of Section 2(a) is clear.

[116] Implementation of the decision in the employer's February 13, 2009 letter should have been delayed in accordance with the agreement that: "The conditions prevailing prior to any action or circumstance which results in a dispute shall be immediately reinstated and maintained until a decision is reached." This is not a situation in which irreparable harm is a consideration under the three proposition approach. The first proposition was met. That ends the matter. To the extent this approach differs from decisions of arbitrators who relied on a misstatement of Arbitrator Seitz's third proposition I disagree with them. The grievance that the employer contravened Section 2(a) is allowed.

[117] Therefore, I decide, declare and order as follows:

1. The employer contravened Section 2(a) of the collective agreement, the status quo ante provision, by implementing and maintaining its decision of February 13, 2009 and not delaying implementation of that decision pending a determination on the merits of the union's grievance.
2. Regular situation holders and the union have a right and duty to hire substitutes to fill regular situations, when a regular situation holder is absent, except in the five circumstances when it is agreed a substitute is not to be employed.
3. The employer must immediately cease and desist from prohibiting regular situations holders and/or the union from hiring a substitute to fill a regular situation when a regular situation holder is absent, except in the five circumstances when it is agreed a substitute is not to be hired.

4. The employer must fully compensate substitutes for all lost wages and benefits from February 13, 2009 to the date of this decision and any appeal or judicial review arising from this decision.

[118] I retain and reserve jurisdiction on the interpretation and implementation of this decision. As agreed, I specifically retain jurisdiction on the amount of compensation and calculation of benefits to be paid by the employer to Mr. Tucker and any other substitute.

DECEMBER 10, 2009, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

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