Case Name:

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Union (United Cement, Lime and Gypsum Workers' Division), Local D359 v. Lehigh Inland Cement Ltd. (Temporary Discontinuance Grievance)

IN THE MATTER OF a Collective Agreement between the United Cement, Lime and Gypsum Workers' Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Union, Local D359 and Lehigh Inland Cement Limited
AND IN THE MATTER OF a Group Grievance (No. 05/09) Concerning Temporary Discontinuance and Contracting Out
Between
The United Cement, Lime and Gypsum Workers' Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Union, Local D359, Bargaining Agent, and Lehigh Inland Cement Limited, Employer

[2010] A.G.A.A. No. 8

Award No. Alta. G.A.A. 2010-005

Alberta
Grievance Arbitration
Edmonton, Alberta

Panel: J. Leslie Wallace (Chair); Brenda Kuzio (Union Nominee); Paul Workman (Employer Nominee)

Heard: December 21-22, 2009.

Award: March 15, 2010.

(125 paras.)

Labour Arbitration -- Management rights -- Assignment of work.

Labour Arbitration -- Employee rights and benefits -- Remuneration -- Wage rates.

The employer operated a cement plant. Every spring the plant had to undergo a major maintenance shutdown. During that period, employees were not laid off but rather were assigned to utility labour work at lesser hours and lower wage rates. No employee was laid off, but most of the affected employees lost money from either the loss of hours or the lower rate, or both. The union alleged that this contravened the collective agreement. The employer responded that this was a management rights case, and the question to address was whether there was anything in the collective agreement to restrain the employer's ability to manage its workforce in the way it did. It stated that management devised an elegant method of responding to the need for cost containment, while observing its obligation to continue the employment of its existing workforce, all within the requirements of the collective agreement.

HELD: Grievance allowed in part. Under the collective agreement and the employer's management rights to organize its workforce, the employer possessed the right to temporarily discontinue some of its existing jobs, create new temporary ones, and reassign, rather than lay off, the incumbents of the discontinued classifications. The employer was not permitted to contract out work that could have been performed by employees who had been reassigned. In addition, employees who did not voluntarily bump to other positions during the shutdown, but were compulsorily assigned to labour crews or other positions below their own position in the wage scale, were entitled to payment at their normal wage rate.

Appearances:

For the Union: Vern Bartee (Counsel), Don Maes, Stuart Bilodeau, Glenn Rosseker, Vivienne Bartee.

For the Employer: Kent Davidson, Q.C. (Counsel), Dale Weston (Co-Counsel), Dan Thillman, Tom Leggett, Ken Bouska, Al Shuster (December 22 only).

Reasons for award were delivered by J. Leslie Wallace (Chair). Brenda Kuzio (Union Nominee) delivered separate concurring reasons. Paul Workman (Employer Nominee) delivered separate partially dissenting reasons.

AWARD

J. LESLIE WALLACE (CHAIR):--

I. Introduction

1 Lehigh Inland Cement Limited ("Lehigh" or the "Employer") operates a large cement plant in northwest Edmonton and a limestone quarry near Cadomin, Alberta that supplies it. Every year in the spring, the Edmonton plant must undergo a major maintenance shutdown. This Award arises out of a grievance about the way the Employer organized and scheduled the spring 2009 maintenance shutdown.

2 At the time the grievance arose, Lehigh employed 97 hourly employees between the two locations: 82 in the Edmonton Plant, comprising 26 maintenance technicians and 56 production employees; and 15 at the Cadomin quarry, comprising 11 production and 4 maintenance employees. These employees are in a bargaining unit represented in collective bargaining by the United Cement, Lime and Gypsum Workers' Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Union, Local D359 ("Local D359" or the "Union"). Their 2006-2010 collective agreement (the "Agreement") applies.

3 The cause of the grievance is that in the spring 2009 shutdown, Lehigh temporarily discontinued some of its production jobs and reassigned the affected employees. It reassigned most of them to utility labour work at lesser hours and lower wage rates, supporting the maintenance and contractor workforces carrying out the shutdown work. No employee was laid off, but most of the affected employees lost money from either the loss of hours or the lower rate, or both.

4 The Union says that this was in contravention of Agreement in Principle No. 5 incorporated into their collective agreement (hereafter the "Manning Agreement"). The meaning of the Manning Agreement is the central issue in this proceeding. A secondary issue is the applicability or not of Article 1.04, the "contracting out" article of the agreement. The employees were temporarily discontinued during a period when Lehigh had a contractor on site. The Union says this contractor's workforce included a number of labourers doing work that should have been done by bargaining unit members. The Union says that in these circumstances, Letter of Understanding No. 12 ("LoU #12") entitled the affected employees to compensating work opportunities.

5 The Manning Agreement, Article 1.04 and Letter of Understanding No. 12 were all new in the 2006-2010 collective agreement. The Union seeks to rely on extrinsic evidence of the bargaining toward this agreement to support its case. We heard this evidence while reserving on its admissibility. The Employer says that we should not take account of extrinsic evidence and should dismiss the grievance because the Agreement, on its face and properly interpreted, allowed it to do precisely what it did in implementing this shutdown. In particular, it says, it has abided by the Manning Agreement by avoiding layoffs during the maintenance shutdown.

6 A final element of the grievance is that the employees assigned to the utility labour crew were paid at the labourer rate instead of their previous wage rate in the discontinued job. The Union says that this is a violation of Article 8.03 of the Agreement.

7 This Award is structured as follows. We start by outlining the extrinsic evidence of bargaining history that the parties dispute. This evidence concerns the bargaining in late 2006 and early 2007 that resulted in the 2006-2010 collective agreement. There follows a review of the sections of the Agreement that are necessary to understand the dispute. We then turn to the events of the spring 2009 maintenance shutdown that led to the grievance. We recap the parties' arguments before this board. We conclude with our analysis and reasons on all subjects, in the following order: the extrinsic evidence; the meaning and effect of the Manning Agreement; estoppel; the contracting out dispute; and the temporary wage rate issue.

II. Facts

A. The Bargaining History

8 The previous collective agreement between the parties, from 2002 to 2005, contained little language clearly directed toward the job security of employees in the bargaining unit. The most significant job security provision was Section 1.04 on "Assignment of Work":

> **1.04** The Company reserves the right to subcontract any part of its operation, but agrees not to transfer any of its work to any other concern for the purpose of eliminating the job classifications listed in Appendix "A" or "B" or which results in an employee being laid off.

9 Collective bargaining toward the 2006-2010 collective agreement was prolonged and difficult. Bargaining took place against a recent history of both temporary layoffs and job losses within the bargaining unit. During the previous agreement, in the wake of a sale of the company, bargaining unit jobs had been reduced from approximately 117 to 97. The Union had been largely unsuccessful at preventing these layoffs and job losses through grievance arbitration invoking Section 1.04. It resolved to make job security its primary issue in the 2006 negotiations. The Union was, however, optimistic about the negotiations. In 2006 Alberta was nearing the crest of an economic boom that was expected to be a long-term one. Production at the plant could be described as frantic. All of the company's cement was being sold as quickly as it could be produced, at historically high prices, and the company's imperative was to minimize down time and invest in higher production.

10 The Union put into evidence before us its notes of the bargaining. The Union's incoming proposals contained a number of proposals aimed at restoring some of the lost positions. It sought stronger language restricting contracting out. It sought removal of a section of the agreement that said that certain language was not to be taken as a guarantee of employees' hours. Lehigh's negotiating committee resisted all these demands, until on approximately Day 7 of the negotiations the parties agreed to address the Union's job security concerns on a "go forward" basis, i.e. there would be no bargaining to expand the number of bargaining unit positions, but there would be efforts to protect the current complement of approximately 97 jobs, which company negotiators considered "more or less sustainable".

11 On Day 11 the subject was contracting out. The Employer has contracted out significant amounts of work in recent years, some of it specialty work that bargaining unit members cannot do, but some of it work that the Union considers they can perform. The Union outlined its position, which included: that overtime would be offered bargaining unit members when a contractor was on site; that "contractors will not be in" when there is a discontinuance or layoff; and that it wished to "maintain [numbers] in all positions within the bargaining unit".

12 On January 11, 2007, at some unspecified Day between Day 11 and Day 27 of bargaining, the Union withdrew its incoming proposal to remove Section 5.11, the "No Guarantee of Work" provision of the previous Agreement. It did so after getting from the Lehigh negotiating committee an interpretation of Section 5.11 (Exhibit #15) that said:

> In our view, the meaning of section 5.11 is clear. There can be no interpretation of any of the other sections of Article 5 (Hours of Work and Overtime) that would imply that the employer must guarantee work to any employee for those hours specified in the Collective Agreement or for any other hours.

At this point, the Employer had not committed to any form of what would later become the Manning Agreement.

13 By Day 24 the negotiating committees had explored the subject of manning levels in more depth. After identifying 90 current employees and seven forthcoming postings, Lehigh lead negotiator Al Shuster is recorded in the Union's notes as saying, "We guarantee that these numbers would stay in place until the end of the Agreement"; and later, "This gives the guys the guarantee of work for the duration of the Agreement".

14 On February 5, 2007, Day 25 of the bargaining, Lehigh first committed formally to the idea of a Manning Agreement. It started its counter proposal tabled that day with:

> 1 Manning Security: Lehigh Inland Cement Limited is prepared to provide the union written confirmation of the total number of bargaining unit positions that will remain in effect for the duration of the collective agreement. It is understood that if necessary management can allocate these positions as business needs dictate. The basic premise is that the total number of positions will remain in effect for the duration of the collective agreement.
>
> This offer of manning security will not supersede clause 13.09 Temporary Discontinuance and Temporary Layoff.

15 This proposal was rejected. The Union objected to the last sentence of this proposal. It said that an agreement on manning levels did not give sufficient protection to union jobs if employees could still be temporarily discontinued or laid off.

16 On Day 27 the discussion had returned to contracting out. The negotiating committees reviewed a list of types of work that Lehigh had used outside contractors to

perform. Most of the list involved specialty work that the in-house maintenance workforce did not perform, like vibration analysis, mobile equipment diagnostics, chiller maintenance and sandblasting. But prominent in the list of jobs that the Union maintained its members could perform were "refractory" and "brick/scale" work. These are both types of work re-lining the kiln that is at the heart of any cement plant. "Brick/scale" work involves tearing out and removing the old masonry lining and replacing it with new brick. "Refractory" work is, as we understand it, removing and replacing anchors in the kiln walls, and casting, molding and applying non-masonry materials, generically called "plastic" in the trade, to the walls. The Employer had recently used contractors to do the refractory work. Much of the brick/scale work had also been done by contractors during the economic boom because the opportunity cost of down time had led Lehigh to compress maintenance turnarounds into the shortest time possible.

17 The Union's notes capture some of the discussion about the refractory work this way:

> Union (*Stuart Bilodeau)*: Due to lack of manpower and shorter shutdowns we aren't able to do this work.
>
> Employer (*Dan Thillman)*: I could see us using our guys as labour help to pass and transport material.
>
> Union (*Don Maes):* We'll get back to you on this.
>
> Employer (*Al Shuster)*: I think we are in agreement with you, that during economic slowdowns, we would want to use our guys.

18 And on the subject of brick/scale work:

> Employer *(Dan Thillman)*: It is important to keep the current practice. I can see us using our people during a slowdown.
>
> Union (*Stuart Bilodeau)*: We still maintain that this is our work. Contractors are only here to backfill our guys because equipment needs to be back up quicker.
>
> Employer *(Dan Thillman)*: If we ever got into that situation, we would discuss with you what work is to be done.

19 Then the Employer raised the question of whether and to what extent a contracting out restriction might apply in a catastrophic breakdown. There was this exchange:

> Employer *(Thillman)*: If we had a tornado rip through the plant, or a business interruption, we wouldn't be able to keep everyone employed.
>
> Union *(Bilodeau)*: We just want to ensure that if guys are on layoff, and contractors are in doing work that guys that are off can do, you will recall them.

Employer *(Thillman)*: We would, it would be in our best interest to use our people.

20 By now the parties were in mediation and the two job security issues of manning levels and contracting out were the last, most difficult, issues left on the table. On Day 28, the Employer came back with a revised proposal on Manning Security, removing the explicit language that the offer did not supersede Article 13.09; but limiting the guarantee to the 18 employees in the Maintenance department. This offer was again rejected. The Union countered with a proposal (Ex. #12) that Lehigh agree to "fully employ" 98 bargaining unit members as categorized in the proposal, and agree that "current positions will continue during the life of this collective agreement". Lehigh did not accept this proposal, either.

21 On the last day of bargaining, Day 31, the Employer advanced the proposals on manning and contracting out that eventually became the language of the collective agreement. It is convenient to set out the new collective agreement provisions at this point:

AGREEMENTS IN PRINCIPLE

5. Manning Levels for Term of this Collective Agreement

The Company confirms that the minimum number of employees will be ninety-seven (97) as defined in Appendix 'A" and 'B' will be as follows:

Total Edmonton Plant	82
Maintenance – Mechanical	18 (15 Repairmen, 2 Apprentices, 1 Heavy Duty Mechanic)
Electrical & Instrumentation	8
Production	56
Total Cadomin Quarry	15*
Production	11
Maintenance	4* (3 Mechanics, 1 Apprentice)

[Editor's Note: Note* is included in the image above]

From time to time due to availability of people, there may be vacancies, but these vacancies will be filled by bargaining unit members in accordance with Section 13.13. In no event shall employees be laid off during the collective agreement except for permanent partial or total closure of the plant.

Section 1.04 Assignment of Work

> Should the Company subcontract any part of its operation, the Company agrees not to transfer any of its work to any other concern when an employee is discontinued or laid off from his current position or suffers a reduction in regular hours, or which prevents a laid off employee from being recalled.

Notable by its absence in the proposal for a Manning Agreement is the Employer's earlier language that Article 13.09 on temporary discontinuance supersedes the Manning Agreement. Nor, however, is there any reference in the bargaining notes that the Manning Agreement would oust the application of Article 13.09; there is no indication that the parties explored whether and how discontinuance could take place in the presence of the Manning Agreement.

22 These proposals broke the deadlock. In discussion at the table, the following exchange occurred (again, as recorded in the Union's notes):

> Union *(Bilodeau)*: We would like a letter of intent as to what the new Section 1.04 language means to both parties, as well we would like a L.O.U. as to how this will be implemented.
>
> Employer *(Shuster)*: The intent is pretty clear that if there is someone on layoff that can perform a job that a contractor is in doing, we can't do that.
>
> Union *(Bilodeau)*: We don't want a contractor in doing a job that someone on layoff can perform.
>
> Employer *(Shuster)*: You have language that will not allow us to do that. Our intent is to not do that.
>
> (...)
>
> Employer *(Shuster)*: In our opinion you have all the protection you are asking for. We wouldn't be able to contract out a job if an employee is on layoff/ discontinued can perform that function.
>
> Employer *(Thillman)*: The language in my opinion now says that we can't bring a contractor in if we have someone on layoff.
>
> Union *(Maes)*: So you think the new language says you can't contract out while someone is on layoff?
>
> Employer *(Thillman)*: Yes, I think that is what it means.
>
> Union *(Bilodeau)*: You're saying that you don't want to use contractors while you have someone on layoff, we just want the company's intent.

Employer *(Shuster)*: You have exactly what you want with the new language. You got the guarantee of head count, you got the guarantee of no contracting out if someone is on layoff.

23 At some point in the bargaining, we did not learn precisely when, the third element in the parties' solution to the job security dispute was agreed to. This was what became Letter of Understanding #12, which reads:

12. Overtime

The parties agreed during the 2006 negotiations that when work is contracted out under Section 1.04, the current practice will govern. The employees in the affected classification (i.e. Repairmen, Labourers, Claypit Operator, etc.) will be given the opportunity to work a twelve (12) hour shift that day. Exceptions will be for capital projects, construction, or work that requires special skills and equipment.

The parties agreed, and it is readily apparent from the bargaining notes, that the reference to "current practice" reflects an exemption from operation of LoU #12 of contracting out of specialty work that members of the bargaining unit are not able to do.

24 With these last outstanding issues agreed between the negotiating committees, a memorandum of agreement was prepared. During this process, Lehigh management prepared and circulated to the Union negotiating committee Exhibit #14, a summary of what it called the "key changes" in the new proposed agreement. It contained one line on costing, called "Total of all increases". This line recorded increases of 8.34%, 6.27%, 6.13%, and 5.20% in the first through fourth years of the proposed agreement. The memorandum was ratified and became the Agreement governing this grievance.

B. The Collective Agreement

25 At this point we find it useful to set out the other provisions of the Agreement that bear on this case.

26 Section 1.03 is a typical, broad management rights clause:

Section 1.03 Management Rights

The Union recognizes that any of the rights, powers or authority the Company had prior to the signing of this Agreement are retained by the Company except those specifically abridged, delegated, granted or modified by this Agreement.

27 Article 5 deals with Hours of Work and Overtime. The production workers at the Edmonton Plant are shift workers. Section 5.02, on "normal" working hours, refers to Letter of Understanding No. 10, which sets out in detail the application of the 12-hour production shift schedule for them. The schedule involves a night shift from 1800 to 0600 hours, and a day shift from 0600 to 1800 hours. Production shift employees work three shifts one week and four the other during each two-week period, for a total of 84 hours biweekly. The day shift gets four hours of afternoon shift premium from 1400 to 1800 hours; the night shift gets four hours of afternoon shift premium from 1800 to 2200

hours, and eight hours of night shift premium from 2200 to 0600 hours.

28 Section 5.09 limits management's ability to change shifts in a way that takes affected employees below a threshold of 80 hours bi-weekly:

> ***Section 5.09 Shift Changes and Minimum Hours for Shift Employees***
>
> It is understood that no employee shall be scheduled to work less than eighty (80) hours in any two (2) week period as a result of a shift change by the Company.

29 Section 5.11, the "no guarantee of work" article earlier referred to, reinforces the idea that the hours set by Article 5 are "normal", not minimum, hours:

> ***Section 5.11 No Guarantee of Work Implied***
>
> Nothing in this Article is to be taken as a guarantee of work to any employee for such hours or for any other hours.

30 The Agreement in several places contemplates maintenance shutdowns as a time when employees' normal working hours may change. Letters of Understanding #7 to #10 are incorporated by reference into Section 5.02 of the Agreement. They set out the 10- and 12-hour shift schedules for employees at, respectively, the Edmonton clay quarry, the physical laboratory, the Cadomin quarry, and plant production workers. Letters #7, #8 and #9 contain an exception for maintenance shutdowns in these words or a close variation:

> During plant shutdown periods it is understood and agreed that this "modified work schedule" may change. At such time the current provisions of the Collective Agreement will apply.

LoU #10 applicable to the production workers does not contain these words; but it reserves a broad power in the Employer to change the 12-hour shift schedule after consultation with the Union, as follows:

> Should business needs dictate, the Company and the Union shall meet to discuss different shift configurations. Subsequent to these discussions, the Company shall establish shifts as required.

This language is very similar to that of subsection (d) of Section 5.02, "Normal Working Day and Week", which says (emphasis added):

> 1 Both parties agree to look at different shift configurations should the need arise. This clause is intended to address specific needs, for example, rail loading and maintenance. The intent is not to override 5.02(a) *except in the case of emergencies and shutdowns.*

31 Article 8 concerns Rates of Pay and Job Classification. Section 8.01 incorporates by reference Appendix "A" and "B" to the Agreement, which set out the 11 job classifications in the Edmonton Plant and the eight classifications at Cadomin, with their

corresponding regular hourly rates for each of the four years of the agreement. There are additional provisions for summer relief employees, chargehands, apprentices, and employees with certification in more than one skilled trade. Significantly for our purposes, the Appendices say nothing about the hours these employees work.

32 Section 8.03 is titled "Temporary Job Payment":

Section 8.03 Temporary Job Payment

When an employee is required temporarily to fill a job, other than his regular job, his rate of pay shall be decided as follows:

1 If the rate of pay for the temporary job is lower than his regular rate of pay, he shall be paid his regular rate of pay.

1 If the rate of pay for the temporary job is higher than his regular rate of pay, he shall receive such higher rate of pay for a minimum of four (4) hours once work on the temporary job has commenced. Should he work in excess of four (4) hours on the temporary job, he shall be paid at that higher rate of pay for the remainder of that shift.

33 Section 8.05(a) says that employees voluntarily bumping downwards, however, are paid at the lower wage rate:

Section 8.05 Exercise of Seniority

1 When an employee exercises his seniority to replace an employee at a lower job rate, such lower rate shall become effective when the employee assumes his new duties.

34 Article 13 concerns Seniority. Seniority is an important principle under the Collective Agreement, and this lengthy Article sets out the many ways in which it is used. Of importance to this case is that it plays an important role in circumstances of temporary work reduction. Section 13.08 sets out some definitions:

Section 13.08 Discontinuation of Jobs & Layoff Provisions

1 DEFINITIONS

When used in this Agreement:

1 The term *"temporary discontinuance"* means the cessation of a job for a period of time and the reassignment or layoff on a temporary basis of the employee who normally performs the job. A temporary discontinuance of a job due to a planned or unplanned curtailment of plant or quarry operations may result in a reduction in the working force for a projected period of time of up to 12 months.

1 The term *"permanent discontinuance"* is when the Company has eliminated a job or when a job has been temporarily discontinued and has not been reactivated for a 12 month period.

A permanent discontinuance may result in the "indefinite layoff" which is a reduction in the working force for an unknown or indefinite duration.

1 The term *"bumping"* means the exercise of seniority rights by an employee as a result of the discontinuance of jobs or layoffs.

(...)

35 Section 13.09 sets out the process by which seniority rights apply in a case of temporary discontinuance. The discontinuance activates employees' bumping rights. More senior employees can displace less senior ones provided they meet ability and fitness requirements in the job they bump to. The less senior ones can in turn exercise bumping rights over employees less senior again. The effect is a cascade of temporary personnel changes, until the employees who either elect to take a layoff or are too junior to displace anyone else, go on layoff until the discontinued jobs are reactivated:

Section 13.09 Temporary Discontinuance & Temporary Layoff

1 In the event the Company announces the temporary discontinuance of a job or operation or a temporary layoff, the employees in the classifications affected will have their jobs discontinued or be laid off according to their seniority with the junior employees' jobs being discontinued first.

1 If an employee's job is to be temporarily discontinued he may apply in writing to the Plant Human Resources Department, within seven (7) days of being given notice of such job discontinuance, to bump an employee with lesser seniority provided he meets the requirements of ability and fitness to perfom the work as defined in Section 13.06.

1 An employee who is bumped by a more senior employee as a result of the temporary discontinuance of a job or a temporary layoff may also make application to displace an employee with lesser seniority in accordance with the procedure in (b) above.

1 An employee who bumps a less senior employee shall be given a fair training and assessment period on the job not exceeding two (2) weeks or ten (10) working days unless it becomes obvious

that the employee is not capable of performing the job.

1 An employee who does not elect to bump a less senior employee or whose seniority is not sufficient to bump another employee shall be laid off and recalled pursuant to the provisions of Section 13.06 and Section 13.11.

C. The 2009 Spring Maintenance Shutdown

36 We noted earlier that the negotiations that led to the current Agreement happened during an economic boom, when Lehigh barely kept pace with the demand for cement in its market. The lack of inventory and the cost of lost sales led it to compress the 2007 and 2008 shutdowns into the shortest possible time, approximately 18 to 21 days. It did this by scheduling the maintenance 24 hours a day, seven days a week; maximizing the overtime offered to its maintenance workforce; and, at least in part because overtime is voluntary under the Agreement, greatly increasing the use of outside contractors to complete the work. Under this kind of shutdown schedule, most of the process attendants have to work, often at overtime rates, to administer safety lockout procedures on a 24-hour basis.

37 In the fall of 2008 there occurred the worldwide financial crisis. In Alberta this led to a steep drop in energy prices and demand, deferral or cancellation of heavy oil projects, cutbacks in drilling programs, and a general slump in industrial, commercial and residential construction. The immediate result was a drop in cement demand in the order of 30%. Lehigh's Edmonton plant went from selling almost 1.2 million tonnes per year to a projected 850,000 tonnes.

38 This led to a fundamental rethinking of the April-May 2009 maintenance shutdown (the shutdowns are scheduled to coincide with the least busy time of the year, when road bans are in effect). Plant Manager Dan Thillman explained that, from minimizing down time, the imperative changed to minimizing cost. The largest discretionary elements in the costs of a shutdown are overtime and outside contractors. Lehigh managers planning the shutdown aimed at an outage of 45 days. This allowed them to plan the maintenance work on a Monday to Friday, days only schedule that eliminated most of the overtime.

39 They also turned their minds to how to reduce the use of outside contractors. The new schedule coincided with the regular hours of the in-house maintenance workforce, eliminating the need to engage contractors to work at times that Lehigh could not count on its own maintenance force accepting overtime. It also created opportunities to redeploy members of the production workforce. One such opportunity was to divert production employees to "man watch". This is the labour-intensive safety function of observing entrance and exit from vessels and other enclosed spaces, monitoring air quality and associated tasks, that in a compressed shutdown had been contracted out at a cost of around $500,000. Another opportunity was to reassign production employees to materials hauling and clean up, both labouring functions in support of the contractor and in-house trades crews.

40 This plan was disclosed to the Union at a labour-management meeting at the beginning of April, 2009. It was communicated to all employees in a memo from Dan

Thillman dated April 6, 2009. The memo explained the shift in focus to cost control and then stated the approach as follows:

> The 2009 outage schedule and manning requirements can be divided in 3 time groups:
>
> 1 Preheater scaling and scaffolding Tentatively April 14-25
>
> 1 Production crews will be on the regular 12 hour shift
>
> 1 Finish mills will be operated as required
>
> 1 Production shift personnel not required for finish mill operation will work on clean-up, man watch and other shutdown related duties.
>
> 1 Maintenance contractor window Tentatively Apr 27-May 12
>
> 1 Production positions not required for plant operation will be temporarily discontinued as per 13.09 of the Collective Agreement
>
> 2 Position requirements will be as per the attached Position Preference Form
>
> 3 Unless otherwise noted, employees will follow the Day worker schedule per 5.02a *[which is 8 hours per day, 0700-1500 hrs., 40 hours per week]*. The purpose is to provide adequate coverage for man watch and clean up requirements to support shutdown work. Overtime will be on an as required basis.
>
> 4 Central Control Room Operators will remain on the 12 hour shift schedule.
>
> 5 Affected maintenance personnel will be offered to work 12 hours as per Letter of Understanding 12.

41 Attached to this memo were two things: a letter to each employee affected by a temporary discontinuance of his job during the shutdown, and a "Bump Application Form" setting out the available work during the discontinuance period and seeking the employee's bumping preferences. The form listed 24 available regular production positions, of which 10 were specified to operate on reduced, eight-hour shifts. It also listed "all" (an unspecified number) labourer positions and maintenance positions, because it was management's intention to operate these positions at or above full strength

during the shutdown period in order to meet what it considered to be the obligations of the Manning Agreement.

42 Union Secretary Treasurer Glenn Rosseker, who is employed in the classification of "Lab Analyst -- Shift" in the Edmonton plant, testified about the way in which the discontinuances and bumping played out among the workforce. In his own case, he had approximately 12 years of seniority. This was not enough to keep his own job during the shutdown. Nor did he have the combination of seniority and skills to bump into one of the more desirable remaining production or maintenance jobs. He was obliged to transfer onto a utility labour crew for the period of the shutdown, aside from one week when he covered a vacation for the incumbent in one of the two Shift Lab Analyst positions still working during that time. He worked for eight hours a day instead of his normal 12, though with some overtime. During his time on the utility labour crew, Mr. Rosseker performed a number of tasks: man watch, removing masonry rubble, passing materials to tradesmen, cleanup, and a substantial amount of "bricking", i.e., laying down new refractory brick around the shell of the kiln. Lehigh paid Mr. Rosseker according to the classification he worked in on that day. For example, as a labourer he earned a maximum of $26.45 per hour; as a kiln bricker, $31.61.

43 The Union put into evidence (Ex. #18) Mr. Rosseker's calculations of his monetary losses while his regular position was discontinued between April 24 and May 31. Mr. Rosseker produced four sets of calculations, as follows:

1 By working only his normal 12-hour shift, with no overtime, and following the usual shift rotation with the associated shift differentials, he calculates he would have earned $9,138.72.

2 Had the Employer observed what the Union says is the proper application of the collective agreement, he calculates that he would have earned $17,365.74. This amount assumes that he was working his normal 12-hour shift, and picking up all of the 12-hour overtime shifts made available under LoU #12 because contractors were on site; and also that on the labour crew he would attract his usual hourly rate of $30.94 as a Lab Analyst except when working at a higher rate (e.g. as a Kiln Bricker).

3 In fact, Mr. Rosseker earned $13,331.33 during the discontinuance period. This reflects the overtime he actually worked, the higher rate he got while working as a Kiln Bricker, and the seven working days that he covered vacation in his regular position as Lab Analyst.

4 Finally, he calculated that, by the Company's application of the Agreement, it could theoretically have paid him as little as $6,622.99 had he worked only a 40-hour week at the lower Labourer rate; in other words, had it not scheduled him for any overtime during the shutdown.

44 The Union entered as Ex. #19 a summary of the personnel moves during the shutdown. It shows that Mr. Rosseker's experience was common, but not universal, among the discontinued employees. Four of them (Milligan, Huls, Budzinski and Cretney) had trades qualifications and were able to move into positions on the expanded maintenance crew at the higher Repairman rate. One (Fisher) moved from Storesman to a Lab Analyst position, also at a slightly higher hourly rate. Six more (MacNeil, Koopmans, Hosack, Mildenberger, Sihota and Martin) kept their existing classifications or made a lateral transfer at no change in hourly rate, though all of them went down to eight hours per day. And two others (LaRocque, Rathor) bumped into jobs at a loss of $1.00 per hour or less. The financial brunt of the discontinuance appears to have been borne by Rosseker and the 14 other employees who were relegated to the Labourer or other classifications at the bottom of the wage scale. They generally lost in the vicinity of $3.50 to $4.00 per hour, over a number of hours reduced, usually, from 84 to 80 per bi-weekly period.

45 During the 2009 shutdown, the principal outside contractor engaged by Lehigh was a company referred to as Jen Spec. Jen Spec is a refractory contractor. It has done work for Lehigh on previous maintenance shutdowns. Mr. Thillman testified that Jen Spec has been used, and was engaged this time, to do all of the refractory work: initial inspection, tearout of old material, removal of the steel and ceramic anchors, preparation of the area for new anchors and material application, welding in the new anchors, and applying the new refractory "plastic". He stated that Lehigh relies on Jen Spec to decide or make recommendations about technical points like spacing of the anchors, and to advise it of new materials and other advances in the field.

46 Mr. Rosseker had an opportunity to work in close proximity to and observe the Jen Spec personnel working in the kiln. He testified that he observed three Jen Spec labourers performing work in support of its refractory tradesmen. He saw them doing what he described as "a lot of the manual work", shoveling rubble, jackhammering old materials from the kiln wall, operating the forklift, carrying broken brick and rubble out of the kiln to dispose of it, and passing materials to the journeymen on the crew. He learned that the three labourers are members of the Construction and General Workers Union ("Labourers"), Local 92. Mr. Rosseker testified that the tasks he saw them doing were tasks that bargaining unit members could do and in fact had done over the years he has worked at Lehigh.

47 Mr. Thillman said that he spoke to the principal of Jen Spec about these three labourers. He was told that these three have a long-standing relationship with Jen Spec and Jen Spec name hires them from the Labourers hiring hall. Mr. Thillman said that these labourers operate the gun that applies the gunite, or sprayable concrete, to the kiln surfaces. Jen Spec's principal told Mr. Thillman that he considers them to be technicians (which we take to mean, not "unskilled" labourers). Mr. Thillman advised that Jen Spec has performed work several times since the Agreement was signed off, and this is the first such complaint from the Union about it.

48 The Jen Spec labour crew appears to be an example of another discussion point in bargaining that we heard about. This is "piecemealing", the parties' expression for the idea of conceptually breaking down a contractor's contract into its constituent parts and

assessing each part for whether it amounts to bargaining unit work. The Employer has resisted this approach when the issue is raised by the Union. There seems to be no agreement between the parties about the extent to which Lehigh can let a contract for "specialty" work including small amounts of ancillary work the bargaining unit is capable of doing, while still avoiding application of the contracting out clauses of the Agreement. The Jen Spec labourers are the focal point of the Union's subsidiary argument that there has been a violation of Article 1.04 of the Collective Agreement.

III. Argument

49 The Parties' arguments may be summarized this way. The Union starts from the proposition that the Employer has by entering into the Manning Agreement, abridged its management rights. The Manning Agreement states that, except for a permanent partial or total closure of the plant, there shall be no layoff of employees during the collective agreement. The inevitable result of the discontinuation process the Employer engaged in under the authority of Section 13.09 of the Agreement, is that there will be a layoff of employees unable or unwilling to bump. The Manning Agreement does not permit this. The text of the Manning Agreement does not say that Article 13.09 of the Agreement may supersede it. Indeed, the Employer in bargaining agreed to remove language that would allow Article 13.09 to supersede the Manning Agreement.

50 The Manning Agreement, the Union says, confirms the employment security of the existing 97 employees "as defined in Appendix 'A' and 'B'". This reference should be read as incorporating the classification and wage structures set out in those Appendices and the hours that occupants of the classifications work, as set out in Letters of Understanding 7 to 10 of the Agreement. In this way, the Manning Agreement is an agreement that the hours, wage rates and shift schedules that the 97 employees were working at the time the Agreement was entered into are preserved for the entire four years of the Agreement. The bargaining evidence shows that this measure of security was the goal of the Union throughout the negotiations. The Union insisted that temporary discontinuance of jobs under Article 13.09 was not compatible with the security it sought. The Employer acquiesced and withdrew the language that would allow it to maintain the power to discontinue. The Employer distributed Ex. #14, a costing of the memorandum of agreement based on continuance of the *status quo* for the full four years. From this, we should consider that the Employer shared the Union's intention and the Union achieved the security it sought.

51 The Union asks us to take the Employer's position to its logical extreme. If there is no guarantee of classification, wage rate or hours in the Manning Agreement, what is to prevent the Employer from discontinuing and reclassifying the entire production workforce as labourers scheduled to work two hours per week?

52 The discontinued employees' existing wage rates are independently protected by Section 8.03, "Temporary Job Payment". This section obliged the Employer to pay the employees displaced downwards in the pay scale by the shutdown at their regular rate of pay. Section 8.05(a), which provides that employees using bumping rights "to replace an employee at a lower job rate" is inapplicable to the employees who did not replace another one, but were relegated to the utility labour crew, like Mr. Rosseker.

53 The Employer's conduct in bargaining generates an estoppel. By withdrawing the language that Article 13.09 would supersede the Manning Agreement on February 5, 2007, the Employer represented to the Union that it would not rely on the Article to reduce hours. It intended the Union to act on this representation, and the Union did, to its detriment. The Employer cannot now use the process of temporary discontinuance of jobs in the face of that bargaining history.

54 The Union argues that, in any event, the Employer violated Section 1.04 of the Agreement by engaging Jen Spec to do the labour work that members of the bargaining unit were capable of doing. It says that once the Union has established the contracting out, the onus shifts to the Employer to justify it. The Employer has not so justified the contracting out. It is therefore prohibited by Section 1.04 as a subcontracting "when an employee is discontinued or laid off from his current position or suffers a reduction in regular hours ...". The Employer was obliged by LoU #12 in these circumstances to offer employees in the affected classification the opportunity to work a 12-hour shift while the contractors were on site.

55 The Employer responds that this is at its root a management rights case, and the question to address is whether there is anything in the collective agreement to restrain the Employer's ability to manage its workforce in the way it did. It says that what management did in this case was to devise an elegant method of responding to the need for cost containment, while observing its obligation to continue the employment of its existing workforce, all within the requirements of the Collective Agreement.

56 The Manning Agreement is simple, clear and unambiguous, the Employer says, so that extrinsic evidence of negotiations is neither necessary nor permissible. It is a commitment to maintain the employment of 97 employees in the stated categories and to not lay off, nothing more. It contains no guarantee of hours, nor indeed any reference at all to hours. All proposals to do with "normal" or "regular" hours were withdrawn long before the negotiations turned to the Manning Agreement, which only reinforces that the Manning Agreement was never about hours. Section 5.11, the "no guarantee of hours" provision, continues to exist; and Letters of Understanding #7 to #10 setting out "normal" schedules continue to state that they may change during the time of a plant shutdown.

57 There is nothing in the Manning Agreement that ousts the provisions on temporary discontinuance. The Manning Agreement and Article 13.09 are not inconsistent with each other. They are compatible, and this board is obliged to read them together and give them their natural meaning: that the Employer may in a shutdown temporarily discontinue the work of an employee and reassign him, but cannot lay him off. The Employer has the ability to reduce employees' hours in this process, so long as it does so in good faith. Management's good faith was well established by the evidence.

58 The Employer argues that it was entitled to pay employees displaced downwards in the pay scale by the discontinuance process at the lower wage rate. Section 8.03, "Temporary Job Payment", does not apply because it is meant to address the case of a temporary, "fill-in", transfer from the employee's "regular job". It says that the displaced employee's "regular job" no longer exists when it has been temporarily discontinued under Section 13.09.

59 The Employer further argues that the negotiations around Article 13.09 are not capable of forming a representation that could generate an estoppel against it. It was a simple exchange of proposals. The withdrawal of the "no precedence" language on February 5 meant nothing, because it was superfluous. There was no need for the language because Article 13 did not conflict with the Manning Agreement.

60 The Employer says that the Union's separate argument based on contracting out cannot prevail. It agrees that it cannot contract out the work of employees who are on layoff, but none of them were laid off at the time. The Union was frank in admitting that it has no concern about the contracting out of work that is beyond the skills of the bargaining unit. This shared understanding is reflected in the reference in LoU #12 to the "current practice", and the evidence established that since at least 2002, the specialty refractory work done by Jen Spec has been contracted out, including the ancillary labouring work done by the three employees in question. In any case, there was evidence that these labourers possessed some technical skills not shared by members of the bargaining unit. The Employer adds that it would be commercially unreasonable to expect it to contract out to a specialist refractory contractor while insisting on its own employees performing some of that work, especially when the Employer cannot compel overtime.

IV. Decision

61 We conclude that the most important element of the grievance, concerning the Manning Agreement, must be dismissed. The other elements of the grievance, involving contracting out and the wage rate paid to displaced employees, should succeed. Our reasons follow.

A. Extrinsic Evidence and the Manning Agreement

62 We conclude that the extrinsic evidence of negotiations is not admissible to interpret the Manning Agreement, on two bases. First, it does not establish a shared intention on the parts of Union and Employer. Second, there is in any case no ambiguity, patent or latent, in the wording of the Manning Agreement that it might be used to resolve.

63 The well-worn rules that arbitration boards apply to the use of extrinsic evidence (that is, evidence of meaning outside of the words of the collective agreement itself) are summarized in the following passages from Brown & Beatty, *Canadian Labour Arbitration, 4th ed.* (Looseleaf: Canada Law Book: 2006) at s. 3:4400*ff* (footnotes omitted):

> Although there are numerous exceptions, the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing. If the written agreement is ambiguous, however, such evidence is admissible as an aid to the interpretation of the agreement to explain the ambiguity but not to vary the terms of the agreement. The two most common forms of such evidence in labour arbitrations are the negotiating history of the parties leading up to the making of a

collective agreement, and their practices before and after the making of the agreement. And in addition to its use as an aid to interpretation of a collective agreement or a settlement agreement, or to establish an estoppel, it may be adduced in support of a claim for rectification. However, for such evidence to be relied upon it must be "consensual". That is, it must not represent the "unilateral hopes" of one party. Nor can it be equally vague or as unclear as the written agreement itself.

(...)

3:4401 "Ambiguity" in the terms of the agreement

(...)

Where an ambiguity is patent, that is, where it appears on the face of the agreement, an arbitrator may resort to extrinsic evidence as an aid to its interpretation. Where an ambiguity is latent, that is, where it is not apparent on its face, an arbitrator may rely upon extrinsic evidence not only as an aid to resolve the ambiguity once it is established but also to disclose the ambiguity. However, arbitrators have had a difference of opinion as to what constitutes an ambiguity. One view holds that more than the arguability of different constructions of the collective agreement is necessary to constitute an ambiguity. Another view is that an ambiguity exists if there is no clear preponderance of meaning stemming from the words and structure of the agreement. (...)

1 Nevertheless, there appears to be agreement amongst arbitrators that silence itself cannot amount to ambiguity in the meaning of the agreement, since "silence" may merely indicate that the parties did not agree to anything.

64 The extrinsic evidence we heard shows that the Union was motivated to achieve job security for the existing workforce; that it wanted to first expand and later maintain the size of the bargaining unit; and that it was wary of the Employer's ability to temporarily discontinue jobs for up to 12 months under Section 13.09 of the Agreement. Job security proved to be a difficult bargaining issue, one of the last issues on the table on the way to a mediated settlement. In order to get to the point of agreement, each side along the way made a decision to withdraw a proposal that might bear on how maintenance shutdowns could occur. The Union early in the discussions withdrew its demand that Section 5.11, the "no guarantee of hours" article, be removed. Union witness Stuart Bilodeau acknowledged that the Union negotiating committee had abandoned the thought of achieving a guarantee of hours in the body of the Collective Agreement. It does not follow from this evidence, though, that the Union was thereby agreeing to allow the Employer to reduce hours in a shutdown. It may be readily inferred from the rest of the evidence, and we do so, that the Union hoped to instead get the guarantee through a separate Manning Agreement.

65 For its part, the Employer on February 5, 2007 withdrew from its proposal on a

Manning Agreement the explicit reference that Section 13.09 on temporary discontinuance superseded the Manning Agreement. Employer witness Dan Thillman testified that the negotiating committee ended up taking the view that the language was superfluous, "because we already had that language in the collective agreement". In other words, they considered that Section 13.09 could continue to be effective even if the Manning Agreement did not carry an explicit disclaimer. They hoped to achieve wording in the Manning Agreement that would not impair the ability to discontinue and reassign employees. This contradicts the Union's notion that by withdrawing the explicit reference to Section 13.09 in the Manning Agreement the Employer was agreeing to the Union's position that temporary discontinuance could not operate in the face of the Manning Agreement. The Employer was no more agreeing to the Union's position by dropping this language than the Union was agreeing to the Employer's position that there would be no guarantee of hours when it abandoned the proposal to eliminate Section 5.11.

66 What this conveys to us is that the extrinsic evidence led demonstrates the "unilateral hopes" of each party, not a shared understanding of how the Manning Agreement would operate in a shutdown. Each party made a calculated decision to withdraw a proposal in hopes of getting a Manning Agreement that would serve its purposes. Then, on the last day of bargaining, each party made another calculated decision that the language of the proposed Manning Agreement was adequate to serve those purposes. The Union considered that it had an ironclad guarantee of a *status quo* that included employees' positions and hours. The Employer considered that it had granted an ironclad guarantee only against layoff. Had the proverbial onlooker asked the negotiating committees about precisely the scenario that this grievance involves, the different views would have been evident -- and there might well not have been a memorandum of agreement at that point. Each party accepted the risk of an adverse interpretation of the Collective Agreement in order to reach that agreement. And it did so whether or not it had a clear sense of the other side's intent.

67 Such calculated decisions to withdraw proposals or agree to memorandum language and let latent disagreements be settled by the grievance and arbitration procedures occur regularly in bargaining. In this way, the extrinsic evidence well illustrates the wisdom of the rule that extrinsic evidence should only be used to find a shared contractual intention in the face of ambiguous contract language. Even if there were ambiguity, and we find there is not, this extrinsic evidence would not be capable of leading to a resolution. The dispute must be resolved by the wording of the Agreement itself, to which task we now turn.

68 We remind ourselves of these truisms. An arbitration board interpreting a collective agreement should presume that all the words used by the parties in the text have meaning. Interpretations that achieve this are preferred over those that do not. Interpretations that read provisions of the contract harmoniously are preferred over those that read them as being in conflict.

69 We start by addressing the Union's argument that the Employer violated the provision of the Manning Agreement that "in no event shall employees be laid off during the collective agreement ...". This argument proceeds on the basis that a discontinuance is really a layoff, because the inevitable result of the bumping process set out in Section

13.09 is that someone, the junior employees or those unwilling to bump, will be laid off. We do not accept that argument. The definition of "temporary discontinuance" appears at Section 13.08(a). It says (emphasis added):

> The term *"temporary discontinuance"* means the cessation of a job for a period of time and the reassignment or layoff on a temporary basis of the employee who normally performs the job.

It is plain from this that "discontinuance" is not the same as a layoff. It is a termination of the work functions performed by an employee. It does not necessarily result in a termination or suspension of the employment relationship or a reduction of the workforce. A discontinuance can, Section 13.08(a) says, result in a "reassignment" or a "layoff". "Layoff" is well understood as a reduction of the workforce, permanent or temporary. "Reassignment", however, is not defined. It can no doubt include a voluntary reassignment to the current job of another employee through exercise of the bumping rights set out in Section 13.09. But we think that in its natural meaning, it can also mean a compulsory assignment to a job newly created by the Employer.

70 It would be a normal incident of the management right to organize the workforce that Lehigh could create new temporary positions to assist in a maintenance shutdown, subject only to any express restrictions in the Agreement. Far from restraining that power, other provisions of the Agreement confirm the Employer's right to create temporary jobs like the newly created utility labour crews in this case. Section 13.02(a) allows the Employer to hire individuals for "temporary assignments ... which are not normally considered to be part of the operation of the Edmonton Plant ...". Section 13.15 states that the Employer can create new temporary positions of 30 days or less without following certain other provisions of the Seniority Article, including the obligation to post the job in Section 13.13 (we note that this grievance does not allege a breach of the posting provisions of Section 13.13, so no issue arises that these utility labour positions appear to have been for more than 30 days). We conclude, then, that in this Agreement the Employer power to "reassign" a temporarily discontinued employee carries its natural broad meaning, to include the power of reassignment to a temporary labour position created for purposes of the maintenance shutdown.

71 It follows from this that we do not agree with the Union's argument that a discontinuance amounts to a layoff -- and therefore a breach of the Manning Agreement. Layoff of someone, not necessarily the incumbents of the discontinued positions, would indeed be inevitable if the Employer had no power to create new positions to absorb the discontinued employees. But in our view, it does have that power.

72 We are also unable to agree with the Union's submission that the text of the Manning Agreement protects the entire *status quo* of positions, classifications and hours of work for the 97 employees in the bargaining unit. As the Employer notes, there is no mention of hours of work in the Manning Agreement. It plainly commits the Employer to maintain a minimum number of 97 *employees* for the life of the Agreement. It also goes somewhat further. The words "as defined in Appendix 'A' and 'B'" must carry some meaning. Appendices "A" and "B" are titled "Classification of Occupations & Wages" -- respectively, for the Edmonton Plant and the Cadomin Quarry. As the titles suggest, they

contain only the classifications that employees occupy and the regular wages rates they are paid. There is no reference in the Appendices to their hours of work.

73 Together with the numbers of employees mentioned in the Manning Agreement, the effect of the reference to the Appendices must be to commit the Employer to maintain not just the overall number of 97 employees, but also the range of classifications set out in the Appendices, and the distribution of employees among the categories that the Manning Agreement states. So, the Employer must maintain a minimum of 82 employees at the Edmonton Plant, comprising a minimum of 18 in the Maintenance -- Mechanical group (15 Repairmen, 2 Apprentices, 1 Heavy Duty Mechanic); 8 in the Electrical & Instrumentation group; and 56 Production employees, undifferentiated as to classification. (Parenthetically, it would seem from this last feature that so long as the range of classifications is maintained and the overall number of employees does not diminish, the Employer could change the manning levels of individual classifications within the Production group; e.g., by deleting a Janitor position and adding another Lab Analyst).

74 But while we consider that the Manning Agreement in this way goes beyond a bare guarantee that Lehigh will continue to employ 97 employees in the bargaining unit, we cannot make the further leap to say that it guarantees their hours of work. There is simply no language in the Manning Agreement, nor in either Appendix 'A' or 'B', that indicates an intention to depart from what the parties say so clearly in Section 5.11: that the shift schedules of the Agreement do not guarantee any particular number of hours to employees. Nor is there an intention apparent to restrain the Employer's usual ability to alter shift schedules in a maintenance shutdown that appears in Section 5.02 and Letters of Understanding #7 to #10. In the absence of such language -- and clear language would be required -- we consider that we must read the Manning Agreement in harmony with these other contract clauses and conclude that management continues to enjoy its usual prerogative to change the number and configuration of hours its employees work; provided it observes its obligation to administer shift changes in such a way that no shift employee is scheduled for less than 80 hours per two week period (Section 5.09).

75 The Union objects that this interpretation of the Manning Agreement would lead to the absurd result that nothing would prevent the Employer from temporarily reassigning the entire production workforce to work as labourers for two hours per week. We do not agree with that suggestion. There are practical limits upon the numbers that the Employer can reassign to other classifications; some must remain in their regular jobs during a shutdown, and it may be that the practical maximum number of employees who can be reassigned out of their regular jobs to a labourer job is something close to the 15 employees so affected in this case. Further, the notion of constructive layoff places limits on the Employer's ability to reduce hours. Too dramatic a cutback of hours will invite the conclusion that in effect, the employee was laid off contrary to the Manning Agreement: see Brown & Beatty, *id.,* s.6:2210 and cases cited therein. The reduction of hours from 84 hours per bi-weekly period to the 80 hours that is normal for day workers under the Agreement (and that is also guaranteed to shift workers by Section 5.09) does not raise concerns of a constructive layoff.

76 Overall, we are unable to see from the bare words of the Manning Agreement and the other provisions of the Agreement that it brings into play, any other sensible meaning

that might be assigned. There is no patent ambiguity that would allow us to consider the extrinsic evidence of negotiations. Nor did the extrinsic evidence reveal to us any other plausible meaning that could lead to a finding that a latent ambiguity exists. It follows that the extrinsic evidence is inadmissible even if it were conclusive of a shared intention.

77 And it follows that no violation of the Manning Agreement is made out. By a combination of Section 13.09 of the Agreement and its management rights to organize its workforce, Lehigh possessed the right to temporarily discontinue some of its existing jobs, create new temporary ones, and reassign, rather than lay off, the incumbents of the discontinued classifications. The Manning Agreement did not prevent this, nor did it prevent the reduction of hours to 8 hours per day.

B. Estoppel

78 Having concluded this, we must address whether the Employer is nevertheless estopped from temporarily discontinuing these jobs by its conduct in negotiations.

79 It is well established that a party to a collective agreement may be precluded by the equitable doctrine of estoppel from relying on its strict collective agreement rights. The estoppel may be founded upon a representation made by words or conduct during the bargaining process. Brown and Beatty in their *Canadian Labour Arbitration, 4th ed., id.* at s.2:2211 state the elements of estoppel this way:

> 1 the essentials of estoppel are: a clear and unequivocal representation, particularly where the representation occurs in the context of bargaining; which may be made by words or conduct; or in some circumstances it may result from silence or acquiescence; intended to be relied on by the party to whom it was directed; although that intention may be inferred from what reasonably should have been understood; some reliance in the form of some action or inaction; and detriment resulting therefrom.

80 Arbitrator McDowell in *Re Beatrice Foods Inc.* (1994) 44 L.A.C.(4th) 59 states the principle of estoppel in a collective agreement context this way (at 68):

> In my view, the principle of estoppel is available to avoid the inequitable application or administration of a collective agreement, and may be applied where:
>
> > 1 there is a representation by words or conduct that a particular legal regime will be maintained, and
> >
> > 1 where the other party relies upon that representation and, expecting the *status quo* to continue, foregoes the opportunity to negotiate appropriate contract language.
>
> The principle is reciprocal. It is available whether an employer, relying on union behaviour, seeks to confirm a state of affairs less generous than

> the negotiated terms, or whether a union, relying upon employer behaviour, seeks to maintain a state of affairs more generous than the agreement provides.

And see also Mitchnick & Etherington, *Collective Agreement Arbitration* (Toronto: Lancaster House: 2006), chapter 16.5, "Use of Extrinsic Evidence to Found an Estoppel", pp. 289-294.

81 One of the recurring thoughts in these and other authorities is that there must be a clear and unequivocal representation emerging from the bargaining history or the parties' past practice before a party will be estopped from relying on its strict collective agreement rights. Mitchnick and Etherington, *id.,* at 292 say:

> Moreover, if the position sought to be established through evidence of negotiating history is not consistent with the collective agreement as written, arbitrators have required that the party asserting estoppel prove its case with "clear and cogent" evidence. As Arbitrator Adams held in *Sudbury District Roman Catholic Separate School Board and O.E.C.T.A.* (1984) 15 L.A.C. (3d) 284, evidence that is circumstantial or equivocal will not suffice to vary the effect of the parties' written agreement.

82 It would seem that the need for a clear and unequivocal representation is especially great when negotiating history is relied upon to found an estoppel. This is so because collective bargaining is a highly adversarial process. It is mitigated only somewhat by the duty to bargain in good faith, the parties' ongoing relationship, and the shared interest in achieving a collective agreement. It is unreasonable to expect that the parties' motivations, assumptions and expectations will be wholly transparent to each other during bargaining. There is almost always a certain amount of keeping one's own counsel, and of holding one's cards close to the chest. Full disclosure of motivations might be a desirable feature of collective bargaining in theory, but not necessarily in practice, even if it could be achieved. As noted earlier, it is not uncommon for collective agreements to be reached by both sides accepting language they interpret differently, and mutually accepting the risk that they may not be correct. There is a role for studied silence and equivocation in reaching such bargaining solutions. Arbitrators are therefore circumspect about fashioning estoppels out of such "representations" unless they clearly frustrate a party's legitimate expectations that bargaining will be honest, conscientious and carried out in good faith.

83 We would also observe that it will generally be easier to establish an estoppel out of silence or the less-than-direct statement at the bargaining table where the bargaining is happening against the backdrop of an established past practice. In such cases, the *status quo* is apparent. It will be relatively easy for a party's conduct at the bargaining table to convey the message that the *status quo* will continue. Where there is no past practice, as where the collective agreement provision under negotiation is a new provision, there is no *status quo.* It will be inherently more difficult to give the other party an expectation of sufficient strength to warrant suspending the operation of the collective agreement through an estoppel, without a direct and unequivocal statement of how the new contract

term will be applied.

84 In this case, the latent issue between the parties was, would the Employer be able to use the process of temporary discontinuance of jobs during a maintenance shutdown in the presence of the Manning Agreement? The Manning Agreement was new. There was no past practice that might have generated an expectation by the Union. At no time did the Employer explicitly tell the Union that it would not or could not temporarily discontinue jobs. What the Union says it relied upon are: the Employer's removal of the supercession language in the first version of the Manning Agreement it proposed; the Employer's knowledge from discussions both at the bargaining table and in sidebar encounters that the Union considered a Manning Agreement that allowed Section 13.09 to operate was unacceptable; the statements in bargaining by Company lead negotiator Al Shuster to the effect that the Company's proposal gave the employees the guarantee of work for the duration of the agreement; and the Employer's representation of the costing of the Agreement, which proceeded on the basis of full employment in the bargaining unit at existing hours and rates.

85 We are unable to find in this combination of circumstances a representation sufficiently clear and direct to warrant the finding of estoppel that the Union seeks. For the reasons given above, the Employer's withdrawal of the supercession language from later proposals on the Manning Agreement is not a representation that there would be no temporary discontinuances in the face of the Manning Agreement. At most, the Union might have interpreted the withdrawal to mean that the Employer did not feel it needed that language. The Employer's motives for reaching that conclusion -- whether it abandoned the explicit language because it agreed with the Union's position, or because it considered that other language in the Agreement protected the right to temporarily discontinue jobs -- were not explored. The Employer did not misrepresent its intentions on this point; the Union was simply left to draw its own conclusion about the Employer's motives, and to bear the risk that it misapprehended them.

86 The Union's objections during bargaining that a Manning Agreement which allowed Article 13.09 to operate was unacceptable, do little to generate the representation that the Union seeks to rely upon. The statements to that effect by the Union that we heard about occurred early in exploration of the idea of a Manning Agreement. More than a month passed before the memorandum of agreement was reached. Much of this time passed under high pressure, in mediation and with the possibility of a strike vote looming. What is unacceptable to a party early in bargaining may become acceptable under such pressure. The Union did not tell the Employer late in the bargaining that it was operating in the belief that the Manning Agreement precluded temporary discontinuance of jobs. Nor did the Employer volunteer that it believed the contrary. Had either party said something specifically addressed to that point, it might be easier to fashion a "representation" out of their dealings. But as it was, the mutual silence about the issue in the late stages of bargaining cannot reasonably be interpreted to be a promise of any kind about whether and how temporary discontinuance would operate with the Manning Agreement in force.

87 The Union also relies upon Mr. Shuster's comments in bargaining. We have examined the bargaining notes and the witnesses' testimony carefully. Mr. Shuster's

statement that "This gives the guys the guarantee of work for the duration of the agreement", occurred on Day 24 of bargaining, February 1, 2007. This was, again, very early in discussion of the idea of a Manning Agreement. It occurred, according to the Union's notes, a few minutes after the Employer set out 97 positions and Mr. Shuster said, "We guarantee that *these numbers* would stay in place until the end of the Agreement". In this context, the phrase "guarantee of work" is at least as capable of meaning "guarantee of jobs" as "guarantee of jobs and hours". A later comment by Mr. Shuster reinforces this. On Day 31, March 21, 2007 (the last day of bargaining), he is recorded as saying to the Union, "You got the *guarantee of head count*, you got the guarantee of no contracting out if someone is on layoff" (emphasis added). Last, any assertion that Mr. Shuster had stated on behalf of the company that it was guaranteeing employees' hours is undermined by the fact that, not long after the comment, on February 8, 2007, the Employer rejected the Union's proposal for Manning Agreement language that would have had the Employer commit to "*fully employ* a minimum of 98 bargaining unit members". All this considered, Mr. Shuster's comments can only be viewed as equivocal on the subject.

88 The last aspect of the alleged representation by the Employer is its costing numbers in the summary of the Memorandum of Agreement that Human Resources Manager Ken Bouska prepared and shared with the Union. We do not find this point persuasive of a representation that would generate an estoppel. Costing numbers in a document like this are estimates only. They are built on assumptions that may or may not turn out to be correct. To the extent that the authors of such documents even turn their minds to issues of collective agreement interpretation, their assumptions about what the collective agreement means may be as right or wrong as any other assumptions informing the numbers. In our opinion, the costing figures could not reasonably be understood to convey the message the Union asks us to take from them.

89 Individually and together, these dealings between Employer and Union in bargaining simply do not reach a level of clarity and certainty of meaning that we can say a representation was made that there would be no temporary discontinuances in the face of the Manning Agreement. The estoppel argument must fail.

C. Contracting Out

90 The contracting out issue is the most difficult aspect of the grievance. This is mostly so because the two provisions of the Agreement dealing with contracting out, Section 1.04 and Letter of Understanding #12, are in language that is awkward and that obscures the relationship between them. The difficulty is compounded by the sketchiness of the evidence about the work of the three Jen Spec labourers whose participation in the kiln rebuild is at the foundation of this part of the dispute.

91 We repeat the relevant provisions here. Section 1.04 says:

> ***Section 1.04 Assignment of Work***
>
> Should the Company subcontract any part of its operation, the Company agrees not to transfer any of its work to any other concern when an employee is discontinued or laid off from his current position or suffers a reduction in regular hours, or which prevents a laid off

employee from being recalled.

Letter of Understanding #12 says:

> **12. Overtime**
>
> The parties agreed during the 2006 negotiations that when work is contracted out under Section 1.04, *the current practice will govern.* The employees in the affected classification (i.e. Repairmen, Labourers, Claypit Operator, etc.) will be given the opportunity to work a twelve (12) hour shift that day. Exceptions will be for capital projects, construction, *or work that requires special skills and equipment.*
>
> (emphasis added)

These provisions of the Agreement must further be read against the Manning Agreement, which as we note above commits the Employer not to lay off employees from the current workforce of 97. In particular, the existence of the Manning Agreement makes the references to "layoff" in Section 1.04 of no consequence to the 97 employees in the bargaining unit whose jobs are protected.

92 The first thing to note about both Section 1.04 and LoU #12 is that they contemplate Lehigh contracting out work. Section 1.04 starts, "Should the Company subcontract any part of its operation ...". LoU #12 starts, "The parties agreed ... that when work is contracted out under Section 1.04 ...". Neither provision can be easily read as an outright prohibition on the practice of contracting out, either generally or in specific situations, without making these words contradictory to the rest of the text of the provision.

93 Next, it appears that the two provisions are aimed at protecting different employee interests. Section 1.04 speaks of an employee who is "discontinued ... from his current position", "laid off", or who "suffer[s] a reduction in regular hours". The job security interests protected are the entitlement to active employment, the entitlement to work in one's current position, and the entitlement to one's regular number of hours.

94 By contrast, LoU #12 looks to be aimed at the protection of employees' opportunities to work overtime. The title of LoU #12 is "Overtime". And though titles are generally not treated as operative parts of the collective agreement, in this case the title appears to reflect the thrust of the text. The following considerations point to an intent that LoU #12 be limited to the problem of missed overtime: LoU #12 grants an entitlement to all the members of the "affected classification" to be offered a 12-hour shift on the day of the contracting out. The concept of an "affected classification" points to an aspect of the contracting out that equally affects all members of the classification. Depriving the workforce of an overtime opportunity affects all members of the classification more or less equally, especially under an agreement like this one that contains a formula for overtime equalization (LoU #4). Contracting out so as to require a layoff of one employee in the classification, but not the others, does not affect all equally. It is thus difficult to see how there is an "affected classification" when one member of the classification only is laid off. As well, it would be curious if the Agreement prescribed, as a remedy for a contracting out that results in one employee being laid off, that all

members of the classification would get the windfall of a 12-hour shift that day. Accordingly, it appears to make most sense to treat LoU #12 as being aimed exclusively at loss of overtime opportunities, while Section 1.04 is aimed at protecting jobs and regular hours.

95 Turning back to Section 1.04, we next note that while it contemplates subcontracting ("Should the Company subcontract any *part of its operation* ..."), the prohibition is upon the transfer of "work" ("... the Company agrees not to transfer any of its *work* ..."). Within a subcontracted "part of its operation", there may be many units of "work" that are capable of being transferred. The use of these different words within the Section suggests that Lehigh may be entitled to subcontract a job, but still be under an obligation not to subcontract certain work functions. One obvious possibility that emerged from the evidence is that of "piecemealing": The Employer may be entitled to engage a subcontractor, but not to include "bargaining unit work" within the scope of the contract. We examine this issue more closely presently.

96 It is a problematic aspect of Section 1.04 that the prohibition on transfer of work is framed to apply to contingencies that are a mixture of statuses and effects. To explain: When one examines the words of Section 1.04, it at first looks like an absolute prohibition on contracting out of work -- "*any*" work -- when an employee -- any employee -- falls into one of four categories. The first two categories are that the employee is either laid off or discontinued. Each of these categories is expressed as a status. It does not appear from the bare words that the layoff or the discontinuance must be the result of the decision to contract out the work, or that the discontinued or laid off employee must be in any way affected by the decision to contract out. But these words are joined to two other categories: that the employee "suffers a reduction in regular hours", or that the contracting out prevents a laid off employee from being recalled. These latter two possibilities are expressed in words ("suffers" or "prevents") that convey the idea of a causal link between the contracting out and the reduction in hours or the inability to recall the laid off employee.

97 The interpretive problem created by this approach is illustrated by asking this question: Can the Employer by Section 1.04 contract out work when an employee is on layoff but the contracting out does not prevent him from being recalled? The bare words, "the Company agrees not to transfer any of its work ... when an employee is discontinued or laid off from his current position", suggest not. But if that is so, why are the words, "or which prevents a laid off employee from being recalled", even necessary? They would be pure surplusage; the contracting out would be prohibited whether or not it prevents a recall. Such an interpretation would offend the principle that all words in the agreement should be presumed to have meaning, and an interpretation that affords all words meaning should generally be preferred over one that does not.

98 To the interpretive problems we have noted must be added the observation that a strict reading of the words, "the Company agrees not to transfer any of its work ... when an employee is discontinued or laid off from his current position", results in a prohibition that can operate such that the restraint on management is seriously disproportionate to the particular employee interest involved. Let us take this speculative example, which for our purposes ignores the effect of the Manning Agreement: Lehigh, in response to a major

market downturn, eliminates one of the two 12-hour production shifts. Fifteen production employees (the precise number is not important) are laid off. The spring maintenance shutdown takes place. A small amount of specialized work, let us say a day's worth of non-destructive testing, must be done. No one in the bargaining unit can do this work. Lehigh wishes to contract it out. Are we to read Section 1.04 of the Collective Agreement to say that the Company cannot do so unless it returns all 15 production employees to full-time hours -- or practically, pays them as if that were the case? Can it be contended that Section 1.04 is meant to operate as a requirement that the Employer restore its workforce to full employment and full hours before it can implement even the most minor subcontracting that does not in fact deprive the bargaining unit of employment opportunities? Or to put it another way, that it was the intent of the parties that in such a situation the Employer would be obliged to pay employees what amounts to windfall earnings in order to implement a minor contracting out, when the employees' loss of wages from the layoff or reduction of hours is not caused by the contracting out, but by the economic downturn?

99 To ask the question is essentially to answer it: the Employer would face a huge wage bill in order to have this essential maintenance work done, while individual employees would have no economic interest in the performance of that particular work. At such an extreme, Section 1.04 would be so drastic, so commercially onerous, that we deem it unworkable. And if it is objected that the example is fanciful because the Manning Agreement exists and prohibits a layoff, we consider that it would also be unworkable if we posited a different management response to an economic slowdown: say, a reduction of hours across the entire production workforce. Again, the disproportion between the restraint on management and the employee interest in the context of the particular contracting out, is too extreme to be reconciled with notions of commercial or labour relations sense.

100 All of this -- the language permissive of subcontracting, the mixing of prohibitions based on "status" with prohibitions based on "causation", the problem of surplusage in the last phrase of Section 1.04, and the possibility of gross disproportion between the prohibition and the interests protected -- leads us to believe that there is something missing from the text of Section 1.04, and that this may be one of the rare cases in which it is justifiable to imply missing words into a collective agreement.

101 The test for implying words into a collective agreement is that applicable to contracts generally. It is stated this way by Brown & Beatty, *Canadian Labour Arbitration, 4th ed.* (Looseleaf: Canada Law Book: 2006) at s.4:2100, citing *McKellar General Hospital* (1986) 24 L.A.C. (3d) 97 (Saltman):

> The implication of terms into a collective agreement may be necessary on occasion, to give effect to the collective agreement. One board has held that two conditions are necessary in this regard:
>
> 1 if it is necessary to imply a term in order to give "business or collective agreement efficacy" to the contract, in other words, in order to make the collective agreement work;

and

1 if, having been made aware of the omission of the term, both parties to the agreement would have agreed without hesitation to its insertion.

102 The words missing from Section 1.04 are not difficult to find. The parties start LoU #12 with the cryptic statement that "...when work is contracted out under Section 1.04, the current practice will govern". "Current practice" is not defined. But it was spoken of extensively in bargaining. It is very clear from testimony and from the notes of bargaining on Day 27 that the parties were in agreement on the principle that the Employer should be under no prohibition against contracting out work that the members of the bargaining unit are not equipped to do. They identified a number of types of specialty work where that was the case -- non-destructive testing, x-ray testing, heater maintenance, ventilation and air conditioning, mobile equipment diagnostics, vibration analysis, sandblasting and chiller maintenance. In each of these cases the Union accepted the Employer's right to continue contracting out this work with a note saying that the "Union [is] O.K. with current practice". The reference in LoU #12 to "current practice" is a direct lift of this expression. The additional words at the end of LoU #12, "or work that requires special skills and equipment", reinforce the idea that new contracting initiatives are not objectionable unless they impair employees' job security.

103 This language is therefore meant to exempt from LoU #12 the kinds of contracting out for which the company could show an existing, current practice. What the parties did not do, however, is to ensure that the idea behind the words "current practice" was incorporated into the text of Section 1.04. This idea, again, is that contracting out should not impair employees' job security; employees able to perform the work should have priority over contractors. To capture this idea, it is necessary to add to Section 1.04 the italicized words:

> **1.04** Should the Company subcontract any part of its operation, the Company agrees not to transfer any of its work to any other concern when an employee *who can do the work* is discontinued or laid off from his current position or suffers a reduction in regular hours, or which prevents a laid off employee from being recalled.

104 The tests for implying words into a collective agreement are met in this case. First, the addition of the missing words gives the article "collective agreement efficacy". It is more consistent with the permissive opening words of Section 1.04 ("Should the Company subcontract any part of its operation...") than the alternative. It allows Section 1.04 to be read with a parallel structure, where in all four contingencies there is a causal relationship between the contracting out and the damage to employee job security. It gives the last phrase, "or which prevents a laid off employee from being recalled", independent meaning, in this way: the phrase would cover the situation of a contracting out where no laid off or discontinued employee is capable of doing the work, but another member of the bargaining unit is capable; and by assigning that employee to the work, it opens up an opportunity for a laid off employee to be recalled. And it removes the onerous and

anomalous effect that the article could prohibit except at extreme expense a minor contracting out of specialized work that has no effect on employee job security.

105 Second, the implication of these words satisfies the "officious bystander" test: that is, had the omission been noted during bargaining, we consider that it would have been immediately agreed to by the parties. The discussion at the bargaining table on Day 31 recorded at paragraph [22] of these reasons is only the clearest expression of the parties' common intention to this effect. This common intention also informed the entire discussion around "current practice" that was incorporated into LoU #12.

106 For these reasons, and taking into account that the Manning Agreement prohibits a layoff in this case, we read Section 1.04 as prohibiting a contracting out only if an employee able to do the contracted work is discontinued from his current position or has had his hours reduced.

107 We considered the possibility of implying another term into Section 1.04. It might be argued that all of the bargaining discussions around "current practice" point to an approach even more permissive of contracting out, that is: that so long as the Employer could point to a current practice of contracting out that included the contracting of work that members of the bargaining unit are able to perform, the contracting is permissible. This might warrant reading Section 1.04 to say, "Should the Company subcontract any part of its operation *it currently does not* ...". By such a reading, it would be permissible to contract out labourer jobs, for example, as part of a specialized contract that the bargaining unit was not able to perform, if that is what Lehigh had done in the past. We do not believe, however, that the law of implied contract terms can go so far as to permit such an interpretation. Whether or not such an interpretation might improve the "collective agreement efficacy" of the document (a debatable proposition), it fails the "officious bystander" test. The bargaining evidence around "piecemealing" shows clearly that the Union objected to the practice of contracting out bargaining unit work as part of a larger contract, while the Employer wished to maintain its ability to do so. They disagreed about this practice right to the end of the bargaining, when the dispute was ended by the adoption of Section 1.04. There is thus no room to imply these other words into Section 1.04, and the dispute over the Jen Spec contract must in this respect be settled by interpreting the article as the parties wrote it (with the exception that the words "who can do the work" are implied).

108 It should be added that the same result obtains if we analyze the problem as one of ambiguity rather than simply missing language. It might be argued that Section 1.04 is ambiguous in the word's broader sense that Section 1.04 is uncertain or difficult of application in relation to the facts of the case: see Brown & Beatty, *Canadian Labour Arbitration, 4th* ed., s. 3:4401. Thus, the argument proceeds, resort should be had to the evidence of the parties' bargaining discussions to inform the interpretation of Section 1.04, and their discussions of "current practice" point to an intention that the contracting out of the Jen Spec labourers' work is allowable so long as there is a current practice of letting contracts that include this work.

109 The difficulty with this approach is again that the evidence about "piecemealing" is equivocal. It does not disclose that there was any agreement between the parties about the

practice of including in a contract for specialized work a small amount of work that members of the bargaining unit are capable of performing. Instead, as we stated above, the parties disagreed about the problem of "piecemealing" right up to the end of bargaining. Their canvassing of "current practice" only addressed the broad types of work that might be the subject of a contracting out (like vibration analysis, non-destructive testing, and so on). It did not address, much less produce agreement on, the question whether small amounts of bargaining unit work might be included in an otherwise permissible contract. In the absence of any evidence of agreement on that issue, the extrinsic evidence is just not helpful, even if we treat the problem as one of ambiguity.

110 We therefore turn to the question whether the Jen Spec contract offended Section 1.04, as we interpret it above.

111 Most of the Jen Spec work contracted out did not fall afoul of Section 1.04. The specialized refractory work that comprised the bulk of the contract was work that the members of the bargaining unit were not equipped to do. We find, however, that the inclusion of incidental labourer work in the Jen Spec contract did impair the job security of members of the bargaining unit, and did offend Section 1.04. From the limited evidence we heard, the Jen Spec labourers appear to have done some work, like operating the gunite applicator, that bargaining unit members could not. But it is also the case that much of their work was typical labourer work: demolition, cleanup, transporting and disposal of rubble and other spent materials, and passing materials to journeymen. Bargaining unit employees on the utility labour crew, some of whom had been discontinued from their current positions and all of whom had suffered a reduction in hours, were manifestly capable of doing these tasks.

112 Whatever the merits of the Employer's "piecemealing" argument, that it is unreasonable to expect it to hive off the incidental labour work from a contract like this, it remains the case that by Section 1.04 it committed to not transfer *any* of its work that has one of the four enumerated effects. The word "any" must be taken to mean what it says. But for the contracting out of the incidental labourer work, at least some of the members of the utility labour crew would have had to do it. They would not have suffered the reduction of hours, or as great a reduction of hours, during the shutdown as they did. The prohibition in Section 1.04 is therefore engaged and this element of the grievance is established.

D. "Temporary Rate of Pay"

113 The Union argues that it was a breach of Section 8.03 of the Agreement to pay the discontinued employees reassigned onto the utility labour crews at the labourer rate rather than their regular rate before the reassignment. This article was not specified in the Grievance Form (Ex. #3) or the submission to arbitration (Ex. #4). Each of these statements of the grievance, however, alleged the breaches of the named articles to be "without limitation". The Union outlined this aspect of the grievance in its opening statement, and the Employer without objection joined issue on the subject in its final argument. We consider, then, that this alleged breach is properly and fairly before us. We find that it has merit.

114 Section 8.03 gives an employee "required temporarily to fill a job, other than his

regular job" the benefit of the higher of the two rates of pay. The meaning of "required" seems clear enough: the section applies to compulsory assignments. Section 8.05 by contrast provides that where an employee exercises seniority to voluntarily bump downward in the wage scale, the lower rate applies.

115 The Employer argues that the members of the labour crew were not required to fill a job "other than their regular jobs" because they had no regular job; their regular jobs had been discontinued. It views Section 8.03 as being aimed at very short-term "fill in" assignments. The problem we have with this suggestion is that there is no express definition of "temporary" in Article 8.03, nor anywhere else in the Agreement. At other places in the Agreement, it is used to refer to periods of up to 90 days (Section 13.14); up to 30 days (Section 13.15), and up to 12 months (Section 13.02(2)). There is nothing in the context of the Agreement, moreover, that takes the word "temporary" in Section 8.03 outside of its normal meaning of a state of affairs that has a definite or expected ending time. By normal usage, an assignment to another job for the duration of a 45-day maintenance shutdown qualifies as a "temporary" job. There is just no basis in the agreement to draw a line between a three-day cover-off of an ill employee, and a six- or seven-week assignment of a discontinued employee to a utility labour crew.

116 If the labour crew assignment fits the category of "temporary" job, then a job that an employee normally performed and that he has a settled expectation of returning to at the end of the assignment falls within the normal meaning of "his regular job". A temporarily discontinued employee has a priority to return to his last held job when the discontinued job is reactivated (Section 13.12). This priority gives the discontinued employee a settled expectation of return to the discontinued job. And although the Agreement's treatment of temporary discontinuance allows for the possibility that it may become a permanent discontinuance, it cannot be said that in the context of an annual maintenance shutdown there is any realistic likelihood that the employee's "regular" job will cease to exist.

117 We find, then, that the employees who did not voluntarily bump to other positions during the shutdown, but were compulsorily assigned to the labour crews or other positions below their own position in the wage scale, were entitled to payment at their normal wage rate.

V. Conclusion and Remedy

118 To summarize the results of our analysis: (1) The Manning Agreement aspect of the grievance must be dismissed. The organization of the spring 2009 maintenance shutdown did not violate the Manning Agreement; (2) No estoppel is made out that prohibited the Employer from doing as it did; (3) The contracting out article of the Agreement, Section 1.04, contains implied words that prohibit contracting out only if employees able to perform the work are discontinued or on reduced hours. Even so, the inclusion of at least some labourer work as part of the Jen Spec contract was a breach of Section 1.04; and (4) The evidence established that the Employer violated Section 8.03 of the Agreement when it paid employees compulsorily reassigned downwards in the wage scale the lower wage rate rather than the rate applicable to their regular jobs.

119 As remedy for the breach of Section 8.03, we direct payment of the difference in wage rates for the applicable hours worked during the shutdown by the employees who were compulsorily reassigned downwards in the wage scale.

120 The appropriate remedy for the breach of Section 1.04 would be, in the absence of any specific provisions of the collective agreement, to make whole the particular employees who lost hours by the inclusion of this work in the Jen Spec contract. This might produce problems of identifying who those employees are, and exactly how much work they lost thereby. In this case, however, the specific provisions of LoU #12 are engaged. Because everyone in the temporarily-expanded labourer classification was scheduled for 80 hours biweekly rather than their regular 84; and because all work over 40 hours per week is classified as overtime (Article 5.03(b)); it can safely be concluded that the result of the contracting out was to deprive members of that classification of overtime opportunities. By LoU #12, all of them were entitled to an opportunity to work a 12-hour shift, rather than the eight they were scheduled, on the days that the Jen Spec labourers were working. They are entitled to the difference between 12 hours' earnings and what they actually earned on those days. And, given our finding that by Section 8.03, the members of the utility labour crew compulsorily reassigned downwards were entitled to their regular wage, it follows that they should have received overtime based on their regular wage rates, not the utility labour rate.

121 We direct that compensation be paid in accordance with these reasons. We leave it to the parties to settle the precise amounts owing, and reserve jurisdiction to settle any dispute over quantum that persists.

122 Ms. Kuzio concurs with this Award. Mr. Workman dissents in part. They authorize release of this Award, together with their following remarks.

ISSUED at Edmonton, Alberta, this 15th day of March, 2010.

J. Leslie Wallace
Arbitration board chair

DISSENT OF PAUL WORKMAN, EMPLOYER NOMINEE

123 [1] PAUL WORKMAN (EMPLOYER NOMINEE) (dissenting):-- I concur with the majority in respect of the grievances concerning the Manning Agreement and the breach of Section 8.03. However, I dissent from the Award of the majority in respect of the granting of the grievance concerning contracting out. In my view the majority has misinterpreted the language of Article 1.04 and Letter of Understanding #12. In my view the extrinsic evidence is not so equivocal as to support the conclusions drawn in paragraphs 108 through paragraph 112. It follows that I do not support the penalty flowing from the conclusions of the majority.

"Paul Workman"

CONCURRING REMARKS OF BRENDA KUZIO, UNION NOMINEE

124 [1] BRENDA KUZIO (UNION NOMINEE) (concurring):-- I concur with the award subject to this one proviso -- I believe that the language in Article 1.04 is clear and unambiguous and that it can be read in harmony with the rest of the collective agreement.

Therefore the plain meaning of 1.04 has to be given effect just as the words are written (and that is, there can be no contracting out while any of the conditions set out in that clause exist). These conditions are listed as when an "employee is discontinued or laid off from his current position or suffers a reduction in regular hours, or which prevents a laid off employee from being recalled". Although not allowing any contracting out when one of these conditions exist may have financial consequences to the employer, the parties are intended to have meant what they have written into the collective agreement. Furthermore, by limiting this, there are financial consequences to the bargaining unit members.

125 [2] Having said that, I am prepared to accept that if my interpretation is not right and that words ought to be implied, the addition of the words "*if employees are able to perform the work*" as stated by the Chairman and the interpretation thereto set out in this award is correct.

"Brenda Kuzio"

qp/e/qlspi/qlaxw

* After Louis Pitte retires, the Company will hire one person in either Edmonton or Cadomin in any classification as determined by the Company.