Borden Ladner Gervais LLP
Lawyers • Patent & Trade-mark Agents
1200 Waterfront Centre
200 Burrard Street, P.O. Box 48600
Vancouver, B.C., Canada V7X 1T2
tel: (604) 687-5744 fax: (604) 687-1415
www.blgcanada.com

BORDEN
LADNER
GERVAIS

June 26, 2009

FILE NO: 550963/000027

BY EMAIL

GABRIEL M. SOMJEN
direct tel: (604) 640-4013
direct fax: (604) 622-5930
email: gsomjen@blgcanada.com

Taylor, Jordan, Chafetz
Barristers and Solicitors
1010-777 Hornby Street
Vancouver, BC V6Z 1S4

Attention: Donald J. Jordan, Q.C.

North Labour Law Corporation Law
Office
303-1777 Third Avenue
Prince George, BC V2L 3G7

Attention: Sarbit Deepak

Dear Sirs/Mesdames:

Re: Northstar Lumber, a division of Fraser Mills Ltd. – and- United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local No. 1-424 (Gary Thomson and Dan Burt Grievance) (Section 104 – CaseNo. 59257/09T)

Enclosed is my Award with respect to the above-noted matter.

Yours truly,

Borden Ladner Gervais LLP

By:

Gabriel M. Somjen

GMS/ed
Enclosure
c.c. CAAB
Attn: Mark Clark

IN THE MATTER OF THE *LABOUR RELATIONS CODE*,
R.S.B.C. 1996, c.244

AND IN THE MATTER OF AN ARBITRATION

Between

Northstar Lumber, A Division of West Fraser Mills Ltd.

Employer

And

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-424

Union

(Grievance of Gary Thompson and Dan Burt – Section 104; Case No. 59257/09T)

AWARD

Gabriel Somjen – Arbitrator

Northstar Lumber, a Division of
West Fraser Mills Ltd.
Donald J. Jordan, Q.C.
Taylor, Jordan, Chafetz
Barristers and Solicitors
1010 – 777 Hornby Street
Vancouver, BC V6Z 1S4

United Steelworkers, Local 1-424
Sarbit S. Deepak
North Labour Law Corporation
303 – 1777 Third Avenue
Prince George, BC V2L 3G7

DATE OF HEARING: June 15, 2009
DATE OF AWARD: June 26, 2009

This arbitration arises from a grievance alleging that the employer Northstar Lumber, a Division of West Fraser Mills Ltd. (the "Employer") breached a Letter of Understanding at page 95 of the Collective Agreement which states:

> **Working Foremen**
> It is agreed that Foremen and persons excluded from the bargaining unit shall not perform work usually performed by employees in the bargaining unit except for instruction, experiments, quality control or in an emergency where no one in the bargaining unit is either available or capable of performing the work required.

I

The parties agreed to a Statement of Agreed Facts as follows:

1. Northstar Lumber, a Division of West Fraser Mills Ltd. (the "Company") operates a sawmill in Quesnel, British Columbia.

2. The Company is a party to a collective agreement with the United Steelworkers, Local 1-424 (the "Union") which is the certified bargaining agent for certain employees at the Company sawmill. The collective agreement is in effect from July 1, 2003 to midnight June 30, 2009, a copy of which is attached as Exhibit "1".

3. The Company's sawmill closed due to market conditions on December 19, 2008. Since approximately April 5, 2009, the Company has operated the whole log chipper with bargaining unit employees working in an adjacent building known as the site residual building. Since December 19, 2008, one "administrative" bargaining unit employee worked sporadically in the Company office (approximately one day every two weeks); the office is located on the sawmill site on the third floor of the mill facility itself.

4. The sawmill site, which is adjacent to the city of Quesnel, occupies 140 acres. There is an access road from the gateway to the site to the mill facility itself which is approximately 2.2 kilometers long. When the mill is in operation, this access road is maintained by a contractor and, at times, bargaining unit employees. The maintenance function includes removal of snow from the access road during the winter months. Snow removal in the areas immediately adjacent to the mill facility is exclusively performed by members of the bargaining unit when the mill is operating. Bargaining unit members, particularly Gary Thompson and Richard Armstrong, removed snow from the access road and exclusively immediately adjacent to the mill facility after the mill was closed on December 19, 2008, up to and including approximately mid-January 2009. The purpose of snow removal is, at all times, to ensure appropriate access for those wanting access and the city of Quesnel Fire Department, and in particular to ensure that fire hydrants are accessible, in accordance with the British Columbia Fire Code 3.3.2.742). Mr. Thompson and Mr. Armstrong used a forklift with

plow attached to remove the snow and the Union says that the snow removal took approximately 3-4 hours in total.

5. Since approximately after mid-January, 2009, the Company has used non-bargaining unit supervisory staff to engage in snow removal both on the access road and immediately adjacent to the mill facility. The purpose of the snow removal is to ensure appropriate access for those wanting access and the city of Quesnel Fire Department, and in particular to ensure that fire hydrants are accessible, in accordance with the British Columbia Fire Code 3.3.2.7.(2) which requires:

> (2) Maintenance — Private hydrants, fire department connections and private valves controlling the water supplies to fire protection shall be kept accessible to fire fighters and their equipment at all times.

6. The current grievance relates to the performance of snow removal by supervisor and non-bargaining unit employee Pat O'Flynn utilizing a forklift with a plow attached. The current grievance was filed on January 30, 2009, as soon as the Union became aware of the snow removal by Mr. O'Flynn. The grievance is attached as Exhibit "2". Bargaining unit employees were on lay-off, were available and were capable of performing the snow removal work that Mr. O'Flynn performed.

7. The Company says that the time involved in snow removal using the forklift and snowplow by Mr. O'Flynn as of February 22, 2009, the date of the 3rd step grievance meeting, was approximately 11 hours. Since that date, there has been an additional approximately 5 hours work by Mr. O'Flynn using the forklift and snowplow.

8. The Union and the Company cannot confirm the exact number of hours it took for the snow removal on any particular day nor can they confirm the calendar days on which snow removal was done. The parties agree that if the Arbitrator finds that there has been a breach of the collective agreement, the issue of remedy be left to the parties to determine amongst themselves and that the Arbitrator retain jurisdiction on the issue of remedy in the event the parties cannot resolve the matter themselves.

No *viva voce* evidence was called in the hearing.

II

The Union argues that in light of the Letter of Understanding at page 95 of the Collective Agreement, the work done by non-bargaining unit personnel doing snow clearing was in violation of the Letter. The consequence for the bargaining unit employees on layoff was not only lost hours of work but also retention on the seniority list and continued entitlement to health and welfare and dental benefits.

The Union argues that the Letter of Understanding is a complete prohibition of non-bargaining unit employees from doing bargaining unit work. The Employer did not argue that the snow removal work in question fell within any of the exceptions in the language of the Letter of Understanding.

The Union referred to the case of *Re McLaren Forest Products Inc., Babine Division and United Steelworkers, Local 898*, 11 L.A.C. (3d) 21 (Hope) as being the seminal case on this issue. In *McLaren* two mining operations were closed and the employer laid off bargaining unit employees. It kept a nucleus of management employees to keep the operations in some degree of readiness, should the operation reopen. Under that collective agreement there was a clause relating to bargaining unit work which stated:

> 1.02 The Company recognizes that it is not the function of persons of or above the rank of Shift Boss to perform work which is currently being performed by an employee in the bargaining unit, except under emergency conditions, or for the purpose of training, instruction and experimentation. In no case shall an employee in the bargaining unit lose income by reason of the performance of such work by such other persons.

Arbitrator Hope reviewed the competing arguments in that case and concluded:

> 78 In this dispute the union relied in large part on the job classification schedule appended to the agreement for its assertion that the disputed work fell within the protected category. The employer did not deny that certain of the work performed by supervisory employees was similar in terms of job task to work performed by members of the bargaining unit during normal operations. But it must be recognized at the start that similarity of job task is not determinative of whether work is to be construed as work normally performed by a bargaining unit member. Work within a bargaining unit may require, for example, the skills of a journeyman such as a carpenter, machinist, or mechanic. That does not mean that all work requiring those skills would be considered to be work of a particular bargaining unit. It may well be that those skills are required in jobs that fall both within and without the scope of work performed by employees within a particular bargaining unit.
>
> 79 I agree with the submission of the employer that it is a jurisdictional concept which is raised, not a specie of work. In the jurisdictional approach the fundamental question must be addressed on the basis of the purpose for which work is performed. Work which has not been performed by members of the bargaining unit, even work which requires similar skills and qualifications, does not become work within the jurisdiction of the bargaining unit simply by reason of the similarity of tasks.
>
> ...
>
> 89 In the *Holophane* case the disputed work was done during a shut-down of short duration and was bargaining unit work. In this dispute there was no production work to be done. This was not a case where some work was taken from the

> bargaining unit. It was a case where all work was taken from the bargaining unit. It was not analogous to a partial lay-off, with or without an expectation of recall. Nor was it analogous to a total lay-off with an expectation of recall. It was a complete cessation of operations. Whether the operations ever resume is contingent entirely on market vagaries. In short, all work "currently being performed by the bargaining unit", ceased being performed after the shutdowns. After that, caretaker tasks which had never been done were commenced for an entirely different business purpose. It is not surprising that the parties were unable to find arbitral authority which imitated that fact pattern.
>
> 90 Non-bargaining unit personnel were not hired to perform maintenance functions usually performed by members of the bargaining unit. They were maintained in employment as an essential management nucleus in the event the market winds began to blow fair. They were essential if the operations were to be started up again. But there were no management tasks for them to perform. It was on that basis that they were given the limited work necessary to preserve the asset.
>
> 91 The term "bargaining unit work" is not defined in the agreement, but some insight into its meaning can be derived. Article 1.02 expresses its protection in terms of "an employee in the bargaining unit". Article 1.01 extends to all employees "as defined in art. 2". Article 2.02 defines "employee" as being "all employees of Noranda Mines Limited, Babine Division at its Mine and Plant operations near Granisle, B.C.". On the evidence before me there were no mine and plant operations near Granisle at the material time. All operations were closed down.
>
> 92 As in any disputed interpretation the fact in dispute which must be proven is the mutual intention of the parties with respect to a particular interpretation or application of the collective agreement. The evidentiary burden of proof is imposed on the party who asserts a particular interpretation upon which they must rely in order to succeed in the dispute. In this dispute the onus was upon the union to establish that intermittent work done in a caretaker role in the unique circumstances was work "currently being performed by an employee in the bargaining unit". On a reasonable interpretation of the agreement the least requirement is to tie the disputed work to normal operations, if only obliquely. I must conclude that the disputed work has not been established by the union to be work of a kind which had been currently performed by members of the bargaining unit. Similarity of task is insufficient to meet that onus. The only inference is that no bargaining unit work of any kind survived the shut-down. The work which emerged was sporadic, unrelated to production or operations and directed to a different business purpose. As each operation shut down, the work which had been currently performed at that operation ceased to exist.

The Union distinguishes that case on the basis that the "caretaking work" which was done by management employees had not previously been done by bargaining unit employees.

The Union argues that in the present case the snow clearing work around the mill had always been done by bargaining unit employees and was even done for a short time after the current shutdown. The Union argues that the purpose of the snow clearing was the same during active operations of the mill and during the shut down.

In the case of *Slocan Forest Products Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-4* [2001], B.C.C.A.A.A. No. 326 (Blasina) the employer had closed down its operations for three, two-week periods. A similar clause was contained in that collective agreement:

> **Section 5: Working Foreman**
> Employees outside the bargaining unit will not perform work that is normally done by employees in the bargaining unit. However, nothing in this Agreement shall be construed as prohibiting foremen from doing work for purposes of instruction, provided by doing so a lay-off of bargaining unit employees does not result, or in the case of an emergency when regular employees are not available, provided that every effort is made to find a replacement.

In that case Arbitrator Blasina reviewed the *McLaren* case (*supra)* and concluded:

> 20 Arbitrator Hope took a "jurisdictional approach" to resolving the grievance. This sensibly required, a purposive characterization of the disputed work, and this required an exercise of judgment beyond simply noting any similarity of task. Having stated that work should be characterized by the "purpose" for which it is performed, Arbitrator Hope then referred to "work which has not been performed by members of the bargaining unit" (underlining added for emphasis), i.e. presumably including similar work performed by excluded employees for a different purpose than that when performed by bargaining unit employees. It is such work which he held would "not become work within the jurisdiction of the bargaining unit". Arbitrator Hope was concerned with guarding against the provision being used to claim work that was not bargaining-unit work. In that case Arbitrator Hope came to the conclusion that the union was taking the collective agreement restriction too far.
>
> 22 The "jurisdictional approach" should apply regardless of whether the collective agreement was silent or contained some express prohibition against supervisors performing bargaining-unit work. A purposive judgment would have to be made in either case. In the former context, where an implied restriction would apply, one would still have to determine if the disputed work was bargaining-unit work before deciding whether so much of it was being performed by supervisors such that the integrity of the bargaining unit was being violated. In the latter context, where an express restriction would apply, one would still have to determine if the disputed work was bargaining-unit work before deciding whether it was being performed by supervisors such that the express provision was being violated. An implied restriction would provide a minimum standard of protection to the bargaining unit. An express restriction would provide some higher standard. It is unlikely that the parties would have agreed to an express restriction in order to dilute even the minimum standard that silence would have implied. It is also unlikely that an express restriction would merely prohibit excluded employees from performing bargaining-unit work to that measure which would bring them into the bargaining unit. That would be redundant.
>
> 23 In McLaren Forest Products, supra, Arbitrator Hope concluded that the disputed work did not violate Article 1.02 of the collective agreement because it was not of a kind "currently being performed by an employee in the bargaining unit" and that it was unrelated to production and therefore for a different business purpose; at p. 46:

> In this dispute the onus was upon the union to establish that intermittent work done in a caretaker role in the unique circumstances was work "currently being performed by an employee in the bargaining unit". On a reasonable interpretation of the agreement the least requirement is to tie the disputed work to normal operations, if only obliquely. I must conclude that the disputed work has not been established by the union to be work of a kind which had been currently performed by members of the bargaining unit. Similarity of task is insufficient to meet that onus. The only inference is that no bargaining unit work of any kind survived the shut-down. The work which emerged was sporadic, unrelated to production or operations and directed to a different business purpose. As each operation shut down, the work which had been currently performed at that operation ceased to exist.

Arbitrator Blasina distinguished the *McLaren* case:

24 The facts in McLaren Forest Products, supra, are distinguishable from those in the immediate case. In that case, the "caretaker" functions undertaken by the managerial employees were assigned for the purpose of maintaining in employment a cadre of management personnel so that the employer could resume operations should market conditions improve; and, the tasks undertaken were for the purpose of keeping operations in a state of readiness. This was found not to have been the purpose underlying the performance of similar tasks when undertaken by bargaining-unit personnel.

25 In the present case, the shut-downs were for definite periods, and there was no issue of maintaining the employment of supervisors lest they leave and not be available later. Further, in the present case supervisory employees were required to maintain security, and particularly while the worksite was otherwise unoccupied. This was not their former practice or purpose, while it was fundamental to the security role of the storekeeper/security employees. Although more will be said about this later, it can be said at this point that the supervisors were performing what was normally bargaining-unit work.

...

37 In the present case, the supervisors were assigned full-time for the duration of the shut downs to duties that fell within the duties associated with the storekeeper/security classification. The Company laid-off storekeeper/security persons, not because security was no longer needed, but because it assigned supervisors to perform the security function. Any justification which would flow from the overlapping function argument is merely superficial in the circumstances of this case. The Company has breached Article XVI(5).

38 I need not consider whether the supervisors were effectively transferred into the bargaining unit, and I would note that they had every expectation of resuming supervisory duties upon completion of each of the two-week shutdowns. However, for the limited periods of shutdown, they were not employed in their supervisory capacity, and they performed only work that was normally performed by storekeeper/security persons, while storekeeper/security personnel were laid off. Borrowing the expression of Arbitrator Venoit from Nova Scotia (Department of Transportation), supra, cited in J.S. Jones, supra this "leads inevitably to the

> conclusion that the Employer extends recognition and reserves work to the bargaining unit as matters of its grace and favour only." Apart from its breach of Article XVI(5), the Company has undermined the integrity of the bargaining unit; and, notwithstanding that the Company may genuinely have believed it exercised its management rights reasonably, in reality it did not.

In the *Brenda Mines Ltd. v. United Steelworkers of America, Local 7618 (Bargaining Unit Grievance)* [1985], B.C.C.A.A.A. No. 370 (Albertini) there was a lengthy shutdown (eight months). Non-bargaining unit employees were assigned to various work such as firewatch, winterization, painting, etc. The employer relied on the *McLaren* decision and in the *Brenda Mines* case Arbitrator Albertini distinguished it on the basis that:

> 56 The Employer relies heavily on the McLaren, supra decision. I am satisfied after a careful reading of the McLaren division (sic) that the facts of this case are distinguishable. Arbitrator Hope referd (sic) to the allegation made by the union in that case:
>
> > The material allegation of the union related to work assignments of a caretaker nature made after the operations of the employer had been shutdown ...
>
> 57 In the McLaren case the clause in question referred to work "currently being performed by the bargaining unit". Arbitrator Hope found that those tasks ceased being performed after the shutdown. He then found that "... caretaker tasks which had never been done were commenced for an entirely different business purpose". Counsel for the Employer in this case argues that the tasks were done for a "different business purpose" therefore Article 3.01(d) has no application. Counsel submits that work "normally performed" must be for the business purpose for which the Union was certified. The normal business of the Employer is the production of metal. When the operation is shutdown there is no "normal" work remaining.
>
> 58 I read Arbitrator Hope's in a different context. The work in question in the McLaren case was not articulated in the decision. Reference is repeatedly made to "caretaker tasks". I read the McLaren case to stand for the rejection of a union's claim for work which is of a "caretaker" nature when a mine is not in operation. To that extent I agree with the conclusion in the McLaren case.
>
> 59 The argument put forth by counsel for the Employer that a mine when it is in a state of shutdown is in a different "business" therefore work performed during that shutdown is not "normally performed" by members of the bargaining unit is too far reaching to be acceptable. That proposition would render meaningless any work protection provision whenever there is a hiatus in production.
>
> 60 In this particular case there is no dispute as to the work which was done. The reason given for assigning the work to staff was not only for caretaking purposes but to allow the Employer to retain the staff needed if and when the mine started producing. Some portions of the work performed were, on the evidence adduced by the Employer, not of a "caretaker" nature. I am satisfied and find, as a fact, that some of the work performed by staff during the 1983-1184 (sic) shutdown was work "normally performed" by members of the bargaining unit.

> 61 If the Union had proven only a similarity of work it would not have met its onus in the claim presented. In this case however, the work, in some instances, goes beyond a mere similarity. All of the work performed on the floatation cells, chutes, launderers and pump boxes was not "similar to", it was precisely the work that would have, at some point in time, been performed by members of the bargaining unit. Similarily, the prestart-up that took place prior to calling members of the bargaining unit back is directly tied in to the normal operations of the Employer and, as such, is work "normally performed" by members of the bargaining unit:
>
> 62 I agree that the remaining tasks can be categorized as caretaker duties. During a shutdown the Employer is expected to provide a firewatch, maintain roads and, in general, take care of the facilities and grounds pending a resumption of full operations.

He therefore found that some duties were normally performed by bargaining unit members and were protected by the language of the collective agreement while other duties such as firewatch, maintenance of roads, etc. were "caretaker duties" and were not prohibited by the clause. He concluded:

> 65 In summary, I find that the Employer violated Article 3.01(d) when it assigned the work on the flotation cells, chutes, launderers, pump boxes and the pre-startup to non-bargaining unit persons.
>
> 68 The remaining tasks, in my view, correctly fall into the category of "caretaker" duties. Tasks which have never been "normally performed by an employee in the bargaining unit".

III

The Employer argued that a review of these and other cases demonstrates that the type of clauses prohibiting management from doing bargaining unit work must be examined not on the basis of the type of work done but the purpose for which the work is done.

The Employer argued firstly that the Union has not shown that its members' have exclusively done snow clearing work even during normal operations (see for example Agreed Statement of Facts, Clause 4). The Union countered this argument by saying that all snow clearing close to the mill has been done by bargaining unit employees. On this point I conclude that the function of snow clearing has not been done exclusively by bargaining unit employees (shared responsibilities between contractors and bargaining unit employees has been the norm in the past) but that the narrow function of snow clearing near the mill using a forklift with a plow has always been done by bargaining unit employees.

However, the main thrust of the Employer's argument is that when work is for caretaking purposes as opposed to relating to production, it is not protected by a clause such as the one in the Letter of Understanding. If the work is not for normal production purposes it is not protected even if it is the same type of work that bargaining unit employees would do during normal production.

In support of that argument the Employer relied on a number of cases. For example: *Prince George School District No. 57 v. United Brotherhood of Carpenters and Joiners of America Local 2106 (Bargaining unit work Grievance)* [1990], B.C.C.A.A.A. No. 241 (Larson):

> 31 Arbitrators have refused to extend protection to bargaining unit work if the work is not done for normal operational or productive purposes. Even if the work is bargaining unit work, an employer may not be found to be in breach of the implied provisions of a collective agreement who assigns that work to non-bargaining unit employees, where that work does not serve a normal operating purpose.

Also in *United Keno Hill Mines Ltd. v. United Steelworkers of America, Local 924 (Mine Closure Grievance):*

> 19 Applying that test, I note in this dispute that the purpose of the work of the four non-bargaining unit employees after the flooding was three-fold. Firstly, they were intended to provide continuity in the event the mine is reopened. That is not work that would be performed by members of the bargaining unit in any event. Secondly, and coincidentally, they were required to perform minimal tasks required to facilitate their own living requirements. Finally, there was a certain amount of testing required which, on the uncontradicted evidence, would be performed by non-bargaining unit employees in ordinary circumstances. In short, one cannot say that the employees left at the mine are performing work that would normally be performed by members of the bargaining unit. The employees are performing a caretaker function which does not fall within any of the classifications set out in the collective agreement and is not contemplated in the wage structure and other provisions relating to bargaining unit employees.

Even Arbitrator Blasina who had decided the *Slocan Forest Products* case (*supra*) made a distinction in another case, *Hayes Forest Services Ltd. v. United Steelworkers, Local 1-85 (Dispatcher Job Grievance)* [2007], B.C.C.A.A.A. No. 152. The Employer relies here on that distinction:

99 Slocan Forest Products, supra, was a case where the Employer, during two-week shut-down periods, utilized supervisors to perform warehouse/security duties ordinarily performed by bargaining-unit employees in the storekeeper/security classification. The collective agreement did contain a provision, Article XVI(5), which prohibited excluded employees from performing "work that is normally done by employees in the bargaining unit." Supervisors, in practice, did do some storekeeper and security duties as an ancillary aspect of their supervisory duties. Slocan Forest Product, supra, was an award by this arbitrator, and I there cited the following passage from p. 42 of Re McLaren Forest Products Inc., Babine Division -and- United Steelworkers, Local 898 (1983), 11 L.A.C. (3d) 21 (H.A. Hope, Q.C.):

> But it must be recognized at the start that similarity of job task is not determinative of whether work is to be construed as work normally performed by a bargaining unit member. Work within a bargaining unit may require, for example, the skills of a journeyman such as a carpenter, machinist; or mechanic. That does not mean that all work requiring those skills would be considered to be work of a particular bargaining unit. It may well be that those skills are required in jobs that fall both within and without the scope of work performed by employees within a particular bargaining unit.
>
> I agree with the submission of the employer that it is a jurisdictional concept which is raised, not a specie of work. In the jurisdictional approach the fundamental question must be addressed on the basis of the purpose for which work is performed. Work which has not been performed by members of the bargaining unit, even work which requires similar skills and qualifications, does not become work within the jurisdiction of the bargaining unit simply by reason of the similarity of tasks.

100 In Slocan Forest Products, supra, a number of cases were submitted for the proposition that for work to be considered "normally" performed by the bargaining-unit, and thus belonging to the bargaining unit, it must be work which was performed exclusively by the bargaining unit: Re Kincardine & District General Hospital --and-- Ontario Nurses' Association (1994), 42 L.A.C. (4th) 199 (R.L. Verity, Q.C., R.A. Blair, R. Filion); Re Miramichi Pulp & Paper Inc. –and—Canadian Paperworkers Union, Local 689(1993), 35 L.A.C. (4th) 289 (T.K. Kuttner, J. Dunnett, G. McWilliam); Re J.S. Jones Timber Ltd., supra (cited by the Union in the present case); Re Kamloops (City) –and—C.U.P.E., Local 900 [1994] B.C.C.A.A.A. No. 455, December 13, 1994 (V. Ready). I concluded that when clauses such as Article XVI(5) of the Slocan-I.W.A. collective agreement expressed a protection for work "normally" done by the bargaining-unit, these clauses were not intended to grasp, exclusively for the bargaining unit, that work which had been shared and thus was also normally performed by non-bargaining-unit employees. However, I upheld the grievance because, "... for the limited periods of shutdown, [the supervisors] were not employed in their supervisory capacity, and they performed only work that was normally performed by storekeeper/security persons, while storekeeper/security personnel were laid off." (Slocan Forest Products, supra, para38).

The Employer also notes that in the *Brenda Mines* case (*supra*), Arbitrator Albertini found that prestart-up work which would normally be done by bargaining unit employees was protected by a clause similar to ours:

> 61 If the Union had proven only a similarity of work it would not have met its onus in the claim presented. In this case however, the work, in some instances, goes beyond a mere similarity. All of the work performed on the floatation cells, chutes, launderers and pump boxes was not "similar to", it was precisely the work that would have, at some point in time, been performed by members of the bargaining unit. Similarily, the prestart-up that took place prior to calling members of the bargaining unit back is directly tied in to the normal operations of the Employer and, as such, is work "normally performed" by members of the bargaining unit.

However, he decided other "caretaking" work which was not part of normal production operations was not protected.

Our present case is more difficult to categorize since some snow clearing work was done during normal operations by bargaining unit employees. The purpose then was to keep the area clear for persons coming to the mill and for fire protection reasons.

During the shutdown the same type of work was done and to some extent for the same functional reasons, although obviously not to keep the road clear for production but rather for persons still having business with the mill and for fire protection.

Having reviewed these arguments and the particular facts of this case, I conclude that the snow clearing here was not protected by the Letter of Understanding for the following reasons:

1. Although the same type of work (*i.e.* snow clearing) was done by bargaining unit employees during production at the sawmill, the snow clearing during the shutdown was done to protect the asset (the mill) rather than to facilitate operational use of the asset.

2. The manager doing the work did it as an ancillary caretaking function associated with other duties (the total amount of time in question was only 16 hours). He was not doing it as a full time replacement for normal bargaining

unit employees (as was the case with some of the work in the *Brenda Mines* case and in *Slocan (supra)*).

3. In the present case there is no known period of shutdown or anticipated start up time as was the situation in some of the cases referred to.

4. Some of the work claimed here had been done by bargaining unit employees, but some had been done by contractors in the past (Agreed Statement of Facts, Clauses 4 and 5). A portion of the work (the snow clearing in proximity to the mill) had always been done by bargaining unit employees, but the function of snow clearing had been shared between employees and contractors. I therefore find that snow clearing work had not been done exclusively by bargaining unit employees, even during production.

For these reasons I find that the type of work being claimed, although similar in function to work done by bargaining unit employees during production times, was "caretaking" work within the sense of the various cases referred to. Also the type of work (snow clearing) had not been exclusively done by bargaining unit employees. I conclude this case is more similar to *McLaren*, and to the "caretaking" aspects of the *Brenda Mines* case. Therefore the grievance is denied.

June 26, 2009

Gabriel Somjen, Arbitrator