

**FINDINGS AND DECISION
IN A DISPUTE**

between

CITY OF ST. JOHN'S
("the Employer")
and

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 569
("the Union")

Grievors: Mr. Ken Dymond
Mr. Bruce Brophy
Mr. Brian Brothers

APPEARANCES:

For the Employer:

Presenter: Mr. Blair Pritchett
Advisor: Ms. Karen Dinn, Supervisor, Human Resources
Witnesses: Ms. Karen Dinn
Mr. Mike Gamberg, Maintenance Repair Foreman

For the Union:

Presenter: Mr. Ed. White, CUPE
Advisor: Mr. William Sheppard
Witnesses: Mr. Bruce Brophy
Mr. Brian Brothers
Mr. Ken Dymond
Mr. Wayne Furlong

Arbitrator: Mr. John A. Scott

The Statement of Grievance reads: the city violated articles 4:05, 8:06, 23:03 and other articles of the C/A by assigning the above employees to do the work of a main. I classification as outlined in the e-mail sent to Mr. Gamberg on 05/06/2009 (copy attached)

The Requested Adjustment reads: these employees be paid according to article 23:03 of our C/A - Ken Dymond 15 hrs. ; Bruce Brophy 11.5 hrs.; Brian Brothers 3.5 hrs.; and that they suffer no loss of pay and or benefits.

The hearing took place in St. John's on December 14, 2010.

THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed and had authority to hear the case;
- the Chairman's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were either properly observed or are waived;
- there are no other points to be raised as to arbitrability or other preliminary objections;
- issues of quantum, if any, would be considered separately and if the parties do not reach agreement within sixty (60) calendar days they will be referred to the Arbitrator for resolution;
- the Arbitrator will remain seised of the matter for period of sixty (60) calendar days after its publication should issues of interpretation of the Award arise.

ITEMS TAKEN INTO EVIDENCE:

- Consent #1 The Collective Agreement to June 30, 2010
- " #2 Maintenance Repairperson I Job Description
- " #3 Job Description Maintenance Repairperson II
- " #4 Grievance: case # 569-09-05 (21) (5)
- " #5 05/06/2009 e-mail: Mr. Tony Bennett to Mr. Mike Gamberg
- BB #1 Job Analysis Questionnaire

ARTICLES FROM THE COLLECTIVE AGREEMENT CONSIDERED

4:05 Employer shall not discriminate

The Employer agrees that there shall be no discrimination, interference, restriction, or coercion exercised or practiced with respect to any employee in the matter of hiring, wage rates, training, up-grading, promotion, transfer, layoff, recall, discipline, classification, discharge or otherwise by reason of age, race, creed, colour, national origin, religion, political affiliation or activity, sexual orientation, gender, gender identity, marital status, place of residence, physical or mental disability, nor by reason of his membership or activity in the Union, nor for any reason prohibited by the human rights legislation.

8:06 Definition of a Grievance

A grievance shall be defined as any difference arising out of interpretation, application, administration, or alleged violation of the Collective Agreement, or a case where the Union feels the Employer has acted unjustly or improperly.

23:03 Temporary Assignment Pay

Where an employee is required to perform temporarily any work in a classification paying a lower rate of pay than he is receiving at the time, he shall continue to be paid his then regular rate of pay provided that this provision shall in no way limit the right of the Employer to demote any employee for just cause in which event such employee shall receive the wage applicable to the lower classification to which he is demoted. If an employee is required to perform temporary work in a classification paying a higher rate of pay than he is receiving at the time, he shall be

paid such higher rate of pay only during the continuance of such temporary employment and on the discontinuance of such temporary employment such employee shall revert to his former rate of pay. Any work or employment shall be deemed temporary for the purpose of this section unless the employee is appointed thereto in writing.

24:04 **Changes in classifications**

When the duties of any classification are changed or increased, or where the Union and/or an employee feels he is unfairly or incorrectly classified, or when a position not covered in Appendix "A" is established during the life of this Agreement, the rate of pay shall be subject to negotiations between the Employer and the Union. If the parties are unable to agree on the reclassification and/or the rate of pay of the job in question, such dispute may be considered as a grievance and may be submitted at Step 3 of the grievance procedure. The new rate shall become retroactive from the time the position was first filled by the Employee.

OPENING STATEMENTS

For the Union, Mr. White explained that the Union is not seeking the Grievors' reclassification, but rather that they be paid the right rates of pay for the duration, as set out in the grievance form, of the Maintenance Repairperson I tasks they were assigned to do.

For the Employer, Mr. Pritchett indicated that there is little dispute as to the facts. The question is whether the work performed falls into the higher pay rate, or was it within the range of the Maintenance Repairperson II job. The Employer argues it was completed by the three Grievors, who are Maintenance Repairperson IIs, within their scope of work. In the Employer's view, the grievance must be denied.

The First Union witness was Mr. Brian Brophy, a City employee since 2002, first as an Equipment Operator and, for the last several years, as a Maintenance Repairperson II. He does not hold a Journeyman Certification.

Asked whether, as a Maintenance Repairperson II he is required to do "cabinet making" as specified on the Maintenance Repairperson I Job Description,(Consent #2), he said "No." He also testified that as a Maintenance Repairperson II he does not do "finish" carpentry, furniture repairs, painting, glass and glazing repairs or other tasks specified in Consent #1.

He described "renovation work" as the phrase appears in Consent #1 to include "stripping out and replacing studs and that sort of thing." Asked whether he is required to refer to codes, he said,"To an extent, yes."

His attention was drawn to the Maintenance Repairperson II Job Description (Consent

#3) and he confirmed that he does do all the 8 categories of tasks listed thereon under "Duties". He also testified that other services he provides include plastering, weather stripping, installing door sweeps and ceramic tiles in bathrooms. He works

... all over the City... We do the housing units. The Maintenance Is are assigned to City Hall, the Mews Centre and Pippy Park... Mr. Gamberg directs our work through work orders. Normally we go in, assess what needs to be done, and list the needed materials.

Asked if there is any direct supervision by management during the work day, he said: "Not usually, no."

Referred to the e-mail Mr. Bennett sent to Mr. Gamberg, (Consent #5) Mr. Brophy confirmed that he had built a new ramp, and enlarged a door frame. "The steel door came out. We did not install a new door. That was delivered." He confirmed that they had installed new cupboards and windows and a prepared for the new "garage door... overhead door". He also testified that Maintenance I Repairpersons do not do these jobs.

On Cross Examination, Mr. Brophy confirmed that he sometimes does framing work. "If someone gives us a work order we go do it... Yes, we installed a window at Fishery Row. " He also confirmed that the tools listed on Consent #3 are those in normal daily use, and that Mr. Mike Gamberg, their Direct Supervisor for five years, assigned the work listed in Consent #5, which was completed. Mr. Brophy does not recall having had any discussion with Mr. Gamberg at the time about whether the work was outside their classification. This was the first occasion they had installed new clapboard for the City, but they have installed windows, but not doors, for the City before. The ramp was "into a shed... Yes, to get a lawn tractor into the shed . That's what the garage door was for."

On Redirect Examination, Mr. Brophy confirmed that they had obtained a work order from Mr. Gamberg. Asked whether it would be normal for Mr. Gamberg to meet them on the site to go over the job, Mr. Brophy said: "Not normal, no."

The second Union Witness was Mr. Brian Brothers, a City employee since 1989 when he was hired as a Maintenance Repairperson II. He holds a Journeyman certificate in carpentry. He confirmed that the 8 tasks listed in Consent #3 do not represent what a journeyman carpenter does, nor does the tool set it lists meet a journeyman's needs. Those tools, plus the power tools

are what he uses daily in his work for the City, which includes some renovation work. Mr. Brothers was formerly a Maintenance Repairperson I, but was bumped out by a senior person.

Over the years they add our Maintenance Repairperson I tasks to the Maintenance II Repairperson's jobs. All the time the buildings are getting older. Both classifications require you take training: WHMIS, power line, fall arrest training.

Mr. Brothers testified that he does not normally work with a direct supervisor. "You just pick up your work order and go."

On Cross Examination he confirmed that a Journeyman Ticket is not required for the Maintenance Repairperson II, and acknowledged that there are duties done by both classifications. "Yes, there are a lot of overlaps."

Mr. Brothers identified as BB#1 a copy of the Job Analysis Questionnaire he and others had personally completed in 2004-2005. His attention was drawn to his answer to a request that he give "examples of the job duties you were considering in" estimating the amount and types of experience required to do certain tasks. Among those he listed was "Installing Windows". He said: "I did not write this as a Maintenance Repairperson II only. I was told to take the form and fill it out. "

However, Mr. Brothers agreed that, as a Maintenance Repairperson II, he has done a number of the tasks normally done by those classified as Maintenance Repairperson I as well as those normally done by those classified as Maintenance Repairperson II.

Mr. Brothers also agreed that the Job Analysis Questionnaire (BB #1) was used by a joint management - union committee to rate the jobs, and that BB #1 was his input into that rate-setting procedure. He also acknowledged there was an appeal process in place: "Yes, there was; but I did not think it was ever done."

On Redirect Examination, Mr. Brothers confirmed that windows are installed by Maintenance Repairperson II classified workers.

The Third Union Witness was Mr. Ken Dymond, who has been employed with the City since 1984. "Today I am a Maintenance Repairperson II." He does not hold a Journeyman's certificate. He confirmed that he does all the tasks listed under the 8 headings on Consent #3. He agreed that Consent #3 actually represents what he does on a daily basis, but that:

It has changed. There is more detailed work, more carpentry. Installing doors and windows is not normal, no. Today we do quite a lot of renovation work. It is hard to estimate exactly how much in a 40 hour week, because we get work orders.

Mr. Dymond described the ramp they had installed,

... using 2x12 and 2x10 lumber. We were told they wanted access to the shed for driving in the mower. We removed the main door, prepared for the overhead door, trimmed the lumber with the band saw ... new headers, new jack stud... whatever was right. Flashing windows... yes. We removed all the old window wood, removed the old sill and installed a new sill, and then new plaster and the finish trim inside... We're assigned work in all the 42 non profit units. The Maintenance Repairperson I does nothing there, other than the hardware technician."

He also listed the training courses and safety courses he had completed and other trades qualifications held. He testified that, "We are given a written work order by Mr. Gamberg" and there is no other direct supervision provided. "We assess what needs doing, and do it." Asked whether Mr. Gamberg or anyone else checks their work frequently, Mr. Dymond said: "Not unless we call him."

On Cross Examination, Mr. Dymond confirmed he has worked as a Maintenance Repairperson II since the mid- to late '90s , and does not hold a Journeyman's Certificate. It is nor required for a Maintenance Repairperson II.

There was no redirect examination.

The Final Union witness was Mr. Wayne Furlong, who was hired by the City in 1988, and has been Shop Steward since October 2010. He is familiar with Article 23:03, *Temporary Assignment Pay*, which reads, in part:

... If an employee is required to perform temporary work in a classification paying a higher rate of pay than he is receiving at the time, he shall be paid such higher rate of pay only during the continuance of such temporary employment and on the discontinuance of such temporary employment such employee shall revert to his former rate of pay. Any work or employment shall be deemed temporary for the purpose of this section unless the employee is appointed thereto in writing.

Mr. Furlong testified he has seen this provision applied within Local 569, for instance in bumping up an Operator Class 2. "It happens from time to time.... Labourers get bumped to Class 2s."

On Cross Examination, Mr. Furlong confirmed that "it only applies to someone qualified, but a 2nd Class Operator does not have to the HEO in his job classification."

There was no redirect examination.

The First Employer Witness was Ms. Karen Dinn, who has been employee of the City since 1984 and Supervisor of Human Resources at the Municipal Depot since 2002.

I deal with HR issues for the CUPE 569 bargaining unit: in addition to some payroll issues, whatever needs to be done for CUPE 569. We are satellite to the main HR at City Hall.

She is familiar with the Job Analysis Questionnaire (BB #1) and with its administration and use.

I was part of implementing it. It was in the CUPE Collective Agreement and we started implementing it in 2004-5... It was agreed to use the CUPE national job evaluation system. It lets employees have the jobs reviewed and a committee assesses a salary rating... The National Representative came and did the training in the CUPE system. It was the same for all committee members, two from Management, and two from the Union and an alternative from each side. (That then went to three from each side.) The system used was agreed.

We had the Job Analysis Questionnaire fine tuned, and sent out information to the employees, via a couple of newsletters, that they would be getting questionnaires like BB #1, and we'd be doing some information sessions... The President of the Union was a member of the committee. The CUPE National Representative, did the information sessions to explain to the employees that the relevant information was based on the positions not on the persons: not on what education YOU have, but on what the JOB needs. We did probably three to five of these sessions... Every classification had an opportunity to complete the Questionnaire. BB #1 was completed by Mr. Brothers and others. Employees were told in the Information sessions that they could complete it as a group or individually.

Once they were completed they were submitted to the Supervisor for review. Supervisors could not alter anything, but could comment on the sheet in the areas provided, (as on the page reviewed in earlier testimony). Once the form was completed by the employees and reviewed and initialled by the Supervisor, if he was OK with it, it went to the committee for rating....All the positions were rated. It was about a six month process.

Each committee member got the Job Analysis Questionnaire and had a sheet to attach the experience needed. That was done factor by factor: experience, knowledge, judgement, dexterity... *etc.*, for each Questionnaire. If the numbers were in agreement, that would be it. If we weren't in agreement, we'd discuss it. It was a very good working committee, I must say. We'd basically talk it out. We listened to each other. You could only do it on the basis of what was in the Questionnaire. The Questionnaire was the bible, Oh yes.

This all fed into the pay bands, once we had all the positions rated. The information was sent out to the bargaining unit members, and they were invited to give additional information if they disagreed with it. The pay bands were negotiated, and we negotiated job evaluation on its own. We had a one year agreement, and the CUPE National Rep was present. We put banding points in to show weights, and accumulated the banding points for certain dollar amounts to it.

It compared different positions in the bargaining unit. This was a different Committee for the negotiations, but probably had some of the same members as the first committee. There was a link between the Job Analysis Questionnaire and the ultimate pay rate. The information provided was the basis of the ultimate pay rate set. You could request reconsideration and you could add information if you needed to.

It was noted that the Job Analysis Questionnaire process was done in 2005, and Ms. Dinn was asked what happens five or six years later if someone feels the rating is not fair any more. She answered that:

The Employer can do a change of duties form that goes to the committee. Not all are accepted. The committee reviews this with the original and sees if there is a change required. We have not had this for the Maintenance Repairperson II, but it has been done for several positions.

On Cross Examination, Ms. Dinn was asked whether employees embellish their responses to the Job Analysis Questionnaire in order to secure more points. She said:

I can't say. If we felt anything was exaggerated we'd go back to the employee and the Supervisor. We did not do it with this job, but we did it in other jobs where there might have been some embellishment with regard to experience.

Asked whether the documents were adjusted after the process moved on to bargaining, she said "No, not with respect to ratings or the total points for experience." Asked whether there had been some changes to caps, she said:

Yes, to salaries for welder, and an autobody repair maybe. We may have changed others in negotiations. I'm not sure... We used job descriptions in conjunction with the Job Analysis Questionnaires. There were no changes to the job descriptions unless we saw it was necessary from the Questionnaires.

On redirect Examination, Ms. Dinn was asked whether the Job Description for Maintenance Repairperson II had been redefined, and answered: "Not so far as I know."

ARGUMENT

For the Union, Mr. White suggested the matter was quite simple. Employees classified as Maintenance Repairperson II were obviously assigned Maintenance Repairperson I duties. The Collective Agreement requires, at Article 23:03, that in such circumstances the employees must be paid at the higher rate.

There is no mention of a minimum time frame. It could be half a day or even less. There is no double or premium time involved. It is simply a matter of paying for that higher rated work. The Maintenance Repairperson IIs were asked to do the more complex work of the Maintenance Repairperson Is. There is no reference to renovation work in any of the 8 "duties" listed on the Maintenance Repairperson II job description (Consent #3).

Clearly, there is overlap. But the core duties have evolved over the years. The job has evolved. Look at the Questionnaire (BB #1) In the work order check list there is no reference to framing or construction work. There is no reference to replacing clapboard. This work was clearly renovation work, and should have been done by employees rated as Maintenance Repairperson I. Also some of the training being given seems to suggest work falling more into the Maintenance Repairperson I position than to Maintenance Repairperson II.

Mr. White directed the Arbitrator's attention to three cases drawn from the Arbitral Jurisprudence: *Re B.C. Ferry Corp. & B.C. Ferry & Marine Workers Union, Grievor Mr. Ken White* 56 C.L.A.S. 376 1999 CLB 12279 Albertini; *Re Emergency & Health Services Commission & C.U.P.E. local 873*, 94 C.L.A.S. 89, 2008 CLB 4080 C. Sullivan; *Re Treasury Board (Solicitor General Canada - Correctional Services) & Lajoie* 75 C.L.A.S. 426, 2003 CLB 13924 Tessier.

Based on a reading of some of the above Arbitral Jurisprudence, Mr. White argued that there is clearly a need to redefine the duties of the Maintenance Repairperson II, and urged the Arbitrator to make such an order. The framing and similar work should be going to engineers.

The evidence shows that the Maintenance Repairperson II work has been expanding. The Employer must pay them accordingly.

In the Union's view, the grievance must be upheld, including an order that the duties be reviewed and a determination made of which duties are to be performed by which classification.

For the Employer, Mr. Pritchett argued the evidence shows that the role of the Maintenance Repairperson II does not require a trades person's certification, and that in fact some of them do not have any such qualification. They do things like painting, dealing with glass, flooring, installing and repairing doors, and framing work.

Mr. White refers to "renovation work". But what is "renovation work?" Maintenance Repairperson IIs do drywall, window and door removal and replacement in their regular maintenance duties. They do not do "finish work" like cabinetry or furniture repair which fall into the Maintenance Repairperson I classification.

There is no reason why overlap should not happen. But the duties must fall within the job description of the Maintenance Repairperson II. And this is established by the completed Job Analysis Questionnaire (BB #1) which sets the rate of pay. That shows that, generically, the work complained of was being done by those with the Maintenance Repairperson II classification.

There is no evidence that the Employer has expanded the work assigned to Maintenance Repairperson II. The Maintenance Repairperson IIs are paid at the rate agreed for their work through the bargaining process. Mr. Furlong's testimony concerning those that are normally bumped up under Article 23:03 is informative. If you operate as an HEO you must have the qualification to do so. That is what gets the higher pay. The HEO is not an element in the work of a Class 2 Operator. Maintenance II Repairpersons do not require the higher classification's certification, and the work they do is properly within their classification.

Mr. Pritchett directed the Arbitrator's attention to *St. Mary's Cement (Bowmanville Plant) v. National Automobile, Aerospace, Transportation and General workers Union (CAW-Canada) Local 22* (Sowden Grievance) [2009] O.L.A.A. No. 207, 183 L.A.C. (4th) 170. Jane H. Devlin (Sole Arbitrator). The definition of scope is key.

In the Employer's view, *Re Treasury Board (Solicitor General Canada - Correctional Services) & Lajoie* 75 C.L.A.S. 426, 2003 CLB 13924 Tessier does not address the question raised in the instant grievance. Similarly, *Re B.C. Ferry Corp. & B.C. Ferry & Marine Workers Union, Grievor Mr. Ken White* 56 C.L.A.S. 376 1999 CLB 12279 Albertini involves no overlap which is a central feature of the instant case.

Finally, if the Union is convinced, (relying on *Lajoie*) that there has been some evolution of the work, then the appropriate procedure is not to arbitrate it, but to set in motion the agreed process under Article 24 and seek a review of the classification.

In the Employer's submission, the question is What is the core duty of the Maintenance Repairperson II? The evidence shows that those in that classification have not been assigned work that falls outside that core duty as the grievance claims.

The Employer argues that the Grievor must be denied.

In Rebuttal for the Union, Mr. White pointed out that BB# 1 makes no mention of doing framing or construction work. Renovation work is the role of Maintenance Repairperson I. Those classified as Maintenance Repairperson II do not do any trades persons' work. To be assigned that work is to attract the higher rate of pay.

The Union is not seeking reclassification. The Union accepts that there is overlap. But when tasks fall within the Maintenance Repairperson I classification, the higher rate applies, and should be paid.

The Grievance should be sustained.

CONSIDERATIONS

At issue between the Parties is the Union's claim that the Employer has violated Article 23:03 of the Collective Agreement by failing to pay the Grievors, who are all classified as Maintenance Repairperson II, "the higher rate of pay" it claims is due them in respect of their "temporary employment" on tasks that, in its view, fall within the scope of Maintenance Repairperson I.

The Union called evidence on the tasks performed by Grievors as summarised in Mr. Bennett's 05/06/2009 e-mail to Mr. Gamberg (Consent #5) in the light of the two job descriptions, Consent #2 for Maintenance Repairperson I, and Consent #3 for Maintenance Repairperson II. The Union insists that the issue is properly one of "temporary assignment pay" as covered by Article 23:03, and that it is not seeking to remedy a classification problem or to secure reclassification.

The Employer pointed to an overlap naturally implicit in the two job descriptions. It also called evidence from Ms. Dinn on the Job Analysis Questionnaire process conducted in 2004-5, on which classifications and wage rates were set. The Employer argues that some, at least, of the tasks at issue were reported among tasks of those employed in the Maintenance Repairperson II

classification at the time of the Analysis. The Employer also argues the issue is not a matter for grievance but appropriately managed under the process set up to deal with classification issues.

Powers of the Board: I note that Collective Agreement provides, at Article 9:04 in part, that:

.... The decision of the Board of Arbitration shall be final, binding and enforceable on all parties, and may not be changed. The Board of Arbitration shall not have the power to change this Agreement or to alter, modify, or amend any of its provisions. However, the Board shall have the power to dispose of a grievance by any arrangement which it deems just and equitable.

Evidence re the work done: Mr. Bennett's 05/06/2009 e-mail to Mr. Gamberg (Consent #5) lists the following four tasks completed by the Grievors which, in the Union's view, are "work of a Maintenance Repairperson I":

- building a new ramp
- enlarging a door frame and installing a new door
- installing new clapboard
- installing new windows

In Mr. Brophy's evidence for the Union it emerged that the Grievors had not in fact installed a new door, but had enlarged a door frame for the new (overhead) door.

The Union pointed to these tasks as "renovation work", and not among the eight job types listed in Consent # 3 as proper to the Maintenance Repairperson II job description, which reads:

DUTIES:

1. The maintenance of landscaped areas, common walkways and parking lots, including ice and snow control and the removal of debris and garbage from the properties to the designated areas.
2. The maintenance of interior common spaces on a regular basis, if applicable, including the removal of debris and garbage to designated areas.
3. The investigation of tenant complaints concerning maintenance problems to determine the appropriate course of action.
4. The repair of maintenance problems, excluding those requiring a particular trade such as plumbing and electrical work.
5. The referral of any undesirable condition that exists on the property(ies) to the Manager, Division of Property Management, so that appropriate action can be taken.
6. The completion of any painting that may be required.
7. The preparation of vacant units for occupancy for new tenants.
8. Perform other services, as the Manager, Division of Property Management may require from time to time in connection with those above....

... **The above statements reflect the general duties considered necessary to describe the principal functions of the job identified and shall not be considered as a detailed description of all the work requirements that may be inherent in the job.** (Boldface type in original)

The Union invited the Arbitrator to compare this list with the equivalent section from the job description for Maintenance Repairperson I (Consent #2), which reads as follows:

DUTIES:

1. The incumbent shall perform a wide array of maintenance chores such as cabinet making, "finish" carpentry, furniture repairs, sparkling, painting, glass and glazing repairs, commercial door hardware repairs, renovation work, installation and repairs to suspended ceilings and various types of flooring. Other maintenance work as required...

The above statements reflect the general duties considered necessary to describe the principal functions of the job identified and shall not be considered as a detailed description of all the work requirements that may be inherent in the job. (Boldface type in original)

The Employer challenged the Union's characterisation of the four tasks as "renovation work". It pointed to BB #1, the Job Analysis Questionnaire completed by bargaining unit members in 2004-5 as part of the job classification and pay rate setting process conducted then, and argued that tasks similar to the four cited in Consent #5 appear there as among the work done by Maintenance Repairperson II employees at that time.

I note that one page of BB #1 notes "installing windows" and "doors (interior and exterior" and, on the next page also refers to "siding..." I also note that a later page reports "window & door replacements". However, toward the end of BB #1 a "check-off list" appears on which checking, cleaning, painting and tasks such as replacing, repairing, and regrouting appear frequently, but installing and building do not. I conclude that, while there is evidence in one or two of these BB #1 reports of installation of windows and even of doors and "siding", the clear bulk of the evidence provided by BB #1 indicates that a Maintenance Repairperson II is primarily concerned with restoring the units to presentable levels of repair and cleanliness, rather than with renewing them or building new elements. I note that the Maintenance Repairperson I job description captures this distinction explicitly when it speaks of "renovation".

Based on my reading of the documents provided, I am persuaded by the testimony relating to the building of a ramp, enlarging the door frame for the new overhead door, and installing new windows and clapboard, that these tasks fall more naturally under the heading of "renovation" as it appears in the job description of the Maintenance Repairperson I than under any of the 8 task types listed in the job description for Maintenance Repairperson II.

The Employer argued, however, that overlap is unavoidable, and that the evidence of BB #1 concerning windows (and doors and siding) should serve to establish the Employer's position. I note, in this context, the identical proviso that is appears in bold on both the Consent #s 2 & 3 which reads: **"The above statements reflect the general duties considered necessary to describe the principal functions of the job identified and shall not be considered as a detailed description of all the work requirements that may be inherent in the job."**

I accept that overlap is natural and to be expected. I also am aware that the Collective Agreement is explicit in providing for control of situations, like overlap, when a temporary assignment is made at the margins of the scope of each classification. Article 23:03 specifies what is to happen in movement both to lower and to higher assignments.

Where an employee is required to perform temporarily any work in a classification paying a lower rate of pay than he is receiving at the time, he shall continue to be paid his then regular rate of pay provided that this provision shall in no way limit the right of the Employer to demote any employee for just cause in which event such employee shall receive the wage applicable to the lower classification to which he is demoted. If an employee is required to perform temporary work in a classification paying a higher rate of pay than he is receiving at the time, he shall be paid such higher rate of pay only during the continuance of such temporary employment and on the discontinuance of such temporary employment such employee shall revert to his former rate of pay. Any work or employment shall be deemed temporary for the purpose of this section unless the employee is appointed thereto in writing.

I note that the final line of 23:03 is quite precise in specifying that this provision applies to "Any work..." The only exception is when "the employee is appointed thereto in writing". Neither party to the instant dispute argued, or provided evidence to show, that any of the Grievors had been "appointed thereto in writing", or that Mr. Gamberg's work order constituted their having been "appointed in writing".

Under Article 9:04, I do "not have power to change this Agreement or to alter, modify, or amend any of its provisions." Article 23:03 is clear in its application to "any work" of the sort described, and I am therefore required to find in accordance with that Article.

Evidence re Pay or reclassification: But the Employer argued that Union's complaint is not properly a matter to be considered under Article 23:03, but as a matter for an application for reclassification.

I note that the Union made it very clear that it is not seeking a reclassification but rather seeking to assert its rights under Article 23:03. On the question of the Union's choice to grieve rather than seek reclassification I also note, in passing, that Article 24:04 expressly provides that "If the parties are unable to agree on the reclassification and/or *the rate of pay of the job* in question, such dispute may be considered as a grievance..." (emphasis added).

I find no ground in the Collective Agreement to question the appropriateness of the grievance. I also note that, at the outset of the hearing, both Parties agreed both that "all matters pertaining to the grievance procedure ... were either properly observed or are waived", and that "there are no other points to be raised as to arbitrability or other preliminary objections."

DECISION

In light of the foregoing considerations, I therefore find that

**THE GRIEVANCE IS SUSTAINED. THE EMPLOYER IS TO PAY THE
GRIEVORS ACCORDING TO THE PROVISIONS OF ARTICLE 23:03.**

Respectfully submitted as the decision of the Arbitrator.

John A. Scott, Arbitrator

March 22, 2011