IN THE MATTER OF AN ARBITRATION

BETWEEN:

RIO TINTO

(the "Employer")

AND:

UNIFOR, LOCAL 2301

(the "Union")

(together the "Parties")

(Job Posting for 4th Class Power Engineers –
Grievance No. 3004370 – Paul Thomopoulos;
Grievance No. 3004371 – Libby Bothelho;
Grievance No. 3004372 – Mike LaBossiere; and
Grievance No. 3004378 – Kevin Anderson)

ARBITRATOR:	Amanda Rogers
COUNSEL:	Stephanie Gutierrez for the Employer
	Peter Shklanka for the Union
HEARING:	May 16-20, 2022, November 3 and 4, 2022, January 17, 23 and 24, 2023
DECISION:	March 3, 2023

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1. This matter pertains to four grievances filed by the Union in which it challenges the Employer's addition of a 4th class PE certification and a Level 1 water ticket as minimum qualifications for two posted Power Engineer (PE) positions (the "Grievances").

2. The Grievances were filed on behalf of the above noted individuals, the Grievors, who allege they ought to have been awarded these positions because they meet the minimum qualifications for the PE learner program. According to the Union, 11-LU-#2 – a letter of understanding the Parties entered into in 1993 – requires that the Employer hire for PE vacancies by seniority amongst internal applicants who have a minimum grade 12 education or proof of successful completion of the 4th class BCIT or other accredited academic correspondence course.

3. In other words, under the Union's interpretation of 11-LU-#2, there are only two ways the Employer may hire PEs into the Utilities Department. They are either hired as the senior internal applicant with the minimum requirement of grade 12 completion or completion of the correspondence course into a PE learner position, or they are hired as external applicants with their certifications under the limited exception recognized in 11-LU-#2 for an "immediate need" in the work area. Absent that limited exception, the Union asserts PEs must be hired at the learner level and progress through their certifications while working in a PE learner position in the Utilities department.

4. Thus, the issue to be determined in this case is whether the Employer is prevented from internally posting for and/or hiring a qualified PE from amongst its own employees. A secondary issue that has arisen from the Grievances, is whether the PE learner program may commence in the Gas Treatment Centre (the "GTC"), thus giving employees who complete their certifications while working as GTC operators the ability to post directly into PE vacancies as qualified applicants. According to the Union, while the Employer may progress GTC operators through the PE certification process, as it has been doing, this does not give these employees "super seniority" to post directly into PE positions ahead of more senior employees who lack the certifications but who meet the minimum requirements for the PE learner program.

5. The language of 11-LU-#2 is as follows:

Engineer Second Class Certification Learner Progression

ENTERED INTO THIS 14th day of October, 1993, Updated July 2017

The purpose of this Letter of Understanding is to record the agreement reached between the parties regarding the creation of a learner program leading to a Power Engineer Second (2nd) Class certification at BC Works.

1. General Conditions
   (a) Entry into the Power Engineer learner system requires minimum grade 12 education or proof of successful completion of the 4th class BCIT or other accredited academic Correspondence Course and for selection purposes, all of these educational attainments will be considered equal.

   (b) The progression from 3rd to 2nd Class Power Engineer certification as recognized by the BC Boilers Branch is a voluntary learning program.

   (c) Everyone will be allowed to progress to the 2nd Class Engineer position training level 13, if they so choose and be paid at that rate.

   (d) The progression to 2nd Class Power Engineer certification as recognized by the BC Boilers Branch is not required at BC Works but will remain a voluntary learning program where the Company will pay for the cost of exams as a support for the participants' initiative. The Company will pay the cost of the correspondence course and books for the second class level.

   (e) Designated trainers when required will be selected according to the Collective Labour Agreement Appendix I Gangleader's provision.

   (f) The Company will provide for paid study time at work and time off for writing exams. Classroom time will be paid at straight time or equivalent time off. Classroom time is defined as attendance at class when formal instruction is being given by BCIT or equivalent. Where possible, classes will be held in Kitimat but if not available, arrangements will be made to attend classes offered by BCIT in

Burnaby or elsewhere and travel will be in accordance with Appendix VI.

(g) The Company reserves the right to hire from outside a fully qualified 2nd or 3rd Class Power Engineer if there is an immediate need. The Joint Apprenticeship Committee will meet to ensure the immediate need is consistent with Boiler Branch Regulations.

(h) Employees who cannot achieve the 4th class level in the time frame required, (eighteen (18) months) will not be eligible for a position within the job classification. If the employee is not successful they will be reassigned to another job opening.

(i) Employees who cannot achieve the 3rd class level in the time frame required, (thirty-six (36) months after achieving the full 4th class certification) will not be eligible for a position within the job classification. If an employee is not successful they will be reassigned to another job opening.

(j) To maintain skill levels, employees will be rotated through all Power Engineering jobs as described in the Boiler Branch Regulations.

- The Joint Apprenticeship Committee will work with the Area to develop a schedule.

(k) The parties agree the Power Engineers training will be treated similar to the Trades Apprentices and governed as per Appendix VI. The joint Apprenticeship Committee shall oversee the process.

2. Requirements (entry and promotion):

(a) Training Level 1 (entry Level)
(b) Training Level 2
  (i) Successful completion of one exam for 4th Class Power Engineer that is recognized by the BC Boiler Inspection Branch, and,
  (ii) Demonstrated ability to do the work.

(c) Training Level 3
  (i) Successful completion of two exams for 4th Class Power Engineer that is recognized by the BC Boiler Inspection Branch.
  (ii) Demonstrated ability to do the work.
  (iii) Minimum six (6) months experience at training level 1 and 2.

(d) Training Level 4
   (i) Certification as a full 4th Class Power Engineer from the BC Boilers Branch, and,
   (ii) Successful completion of one exam for 3rd Class Power Engineer as required by the BC Boiler Inspection Branch and,
   (iii) Demonstrated ability to do the work.

(e) Training Level 5
   (i) Successful completion of two exams for 3rd Class Power Engineer as required by the BC Boiler Inspection Branch, and,
   (ii) Demonstrated ability to do the work.

(f) Training Level 6
   (i) Successful completion of three exams for 3rd Class Power Engineer as required by the BC Boiler Inspection Branch, and,
   (ii) Demonstrated ability to do the work.

(g) Training Level 7
   (i) Certification as a full 3rd Class Power Engineer from the BC Boilers Branch,
   (ii) Demonstrated ability to do the work.
   (iii) Minimum eighteen (18) months experience at training levels 4, 5 and 6.

3. Power Engineer Wage Rates:

Training	Class	23-Jul-17	24-Jul-17	24-Jul-18	24-Jul-19	24-Jul-20
Level 1	Entry	38.747	40.209	41.515	42.853	44.031
Level 2		40.850	42.376	43.735	45.128	46.369
Level 3	Fourth	41.489	43.034	44.410	45.820	47.080
Level 4		42.584	44.162	45.566	47.005	48.297
Level 5		43.684	45.295	46.727	48.195	49.520
Level 6		44.779	46.422	47.882	49.380	50.73
Level 7	Third	48.012	49.752	51.296	52.879	54.332

(a) The Shift Engineer (2nd or 3rd class) will be live-filed and paid the Gangleader rate in accordance with Article 9 and Appendix I of the Collective Labour Agreement. The 3rd class relief Shift Engineer while working in the Shift engineer position will be paid the Gangleader rate as per Appendix I.

6. Also relevant to these proceedings are Articles 5 and Article 9.01, which read as follows:

> Article 5 - RIGHTS RESERVED TO MANAGEMENT
>
> 5.01
> The Union understands and agrees to recognize that the Company has the right to manage and operate its Plants. This right includes but is not limited to: the hiring and directing of the working forces, the right to retire, promote, demote, transfer, discipline, lay-off, suspend and discharge employees for just cause; the determination of job content, the evaluation of jobs, the assignment of work and the determination of the qualifications of an employee to perform work; the methods and processes and means of manufacturing; the making, publication and enforcement of rules for the promotion of safety, efficiency and discipline and for the protection of the employees and the Company's Plants, equipment, products and operations.
>
> 5.02
> The Company understands and agrees that the exercise of its rights in this Article does not relieve the Company of its obligations arising out of any other provision of this Agreement, or limit the rights of the Union or employees arising out of any other provision of this Agreement.
>
> Article 9 – SENIORITY
>
> 9.01
> (a) Company seniority shall apply in cases involving the promotion, demotion, transfer, lay-off and recall of employees, and to those reassignments described in Section 9.01(d), unless it can be demonstrated that the skills, competence, efficiency and qualifications of one of the employees concerned are appreciably greater….

FACTS

7. The Employer runs an aluminum smelter in Kitimat, British Columbia. This operation utilizes numerous tradespeople and operators and is subject to various regulatory requirements. Its operations are 24-7 and are divided into separate work areas including the GTC, the Wharf, and Conveyors among others.

8. PEs work in a distinct department of the Employer known as Utilities. The department operates with four 12-hour shifts, with two certified PEs per shift – a shift engineer and an assistant shift engineer – and generally two spare PEs across all four shifts to cover absences. The department also has a Chief Power Engineer, who is excluded from the bargaining unit. There is also a senior dayshift PE to assist with technical support, lockouts, isolations, etc.

9. PEs historically have had a range of responsibilities. According to the evidence, the main ones include:

a. boiler operations
b. HTM heaters
c. responsibility for wastewater and potable water monitoring operations

10. The boiler operations at the plant are regulated under the *Safety Standards Act* pursuant to the *Power Engineers, Boiler, Pressure Vessel and Refrigeration Safety Regulation*, BC Reg 104/2004 (the "PE Regulations"). The regulating authority is Technical Safety BC, colloquially referred to by its previous name, the "Boiler Branch." The boiler area constitutes a "2nd class plant" under the PE Regulations. That designation requires that each shift be staffed at a minimum with a 3rd class shift engineer and a 4th class assistant shift engineer. Prior to around 2012, the Employer had been classified as a 1st class plant – which required at minimum 2nd and 3rd class certified shift engineers and assistant shift engineers.

11. The potable water operations are also regulated under the *Drinking Water Protection Act Regulation*, BC Reg 200/2003 – legislation enacted in the wake of the Walkerton tragedy. Under that legislation, PEs working on the Employer's potable water operations need to have, or work under, a person with a minimum Level 1 water ticket, which is the lowest level ticket under that regulatory scheme. The applicable regulator is Northern Health Authority.

12. All shift engineers and assistant power engineers possess the requisite certifications set out above. There is no dispute that an employee who does not yet have the PE 4th class certification cannot work on regulated equipment. While they can observe and study, they are

prohibited by law from performing actual work. While an employee without a level 1 water ticket may work under an employee who has their ticket, the evidence was that this would not be operationally feasible under the current scheduling and division of work.

13. Quinlan Harris, who held the position of Chief Power Engineer until March 2022 when he left the company, testified it takes about 2.5 years to progress through the PE learner system. His evidence was that it takes about twelve months to complete the 4th class PE course work, followed by 6 months of "firing" time which is completed through job shadowing. Learners must then pass a provincial exam to be certified as a 4th class PE. Under the Employer's PE learner program, after successful completion of the PE certification, learners then begin the process of obtaining a water ticket – which requires 1800 hours.

14. While it was put to Mr. Harris in cross-examination that the water ticket and PE certifications could be pursued simultaneously, he remained steadfast that it is far preferable to focus on one and then the other, and that doing the training concurrently would not set candidates up for success.

15. Mr. Harris testified that failure to abide by the regulatory requirements could result in the operating permits of the company being revoked, and the plant being fined and/or shut down. Mr. Harris' evidence was that two qualified PEs were held out of service following the Parties' labour dispute because they had allowed their water tickets to expire during the strike.

16. Dave Owens currently works for the company in Utah as the Principal Advisor Operational Readiness and was Superintendent, Plant Operations in Kitimat from around 2018 until sometime in 2021. He testified that the entire operation would need to be shut down if the Employer were unable to operate the water treatment site, as the potable water it provides is used for safety showers, emergency eye wash stations and for drinking.

History of the PE Learner Progression and Hiring into the Utilities Department

17. The evidence is that, since 11-LU-#2 was negotiated by the Parties in 1993, employees have, for the most part, been hired into PE positions either through the PE learner program or as qualified external hires.

18. There is no dispute the Employer can post externally for a PE position requiring minimum certification when there is "immediate need" and that the Employer has done so on several occasions without objection from the Union.

19. The evidence is that a majority of current PEs, however, entered their positions through the PE learner program and were hired by seniority with grade 12 as the minimum qualification.

20. The precise position PE learners held while engaged as learners was a bit murky in the evidence. For instance, there was no evidence about the entry point into the PE learner program between 1993 when 11-LU-#2 was first negotiated and 1999. The evidence is that the Employer did not keep records were not kept electronically.

21. Mr. Owens testified that prior to moving to Utah, he had worked in the Employer's Kitimat operations for approximately 26 years.

22. Mr. Owens' evidence was that he understood that as of 1999, the PE learner program was entered into through the Scrubbers' positions and that the senior qualified Scrubber operator would be given the opportunity to move into the learner role. He was able to name a number of individuals who had entered the Utilities area this way. Mr. Owens testified that his understanding was entry level learners at that time were not directly placed into PE roles, but rather, they continued to work doing scrubber operator duties until they were qualified for a PE position and they could post into a vacancy. The Employer pointed to a 2013 PowerPoint, which explained that in Utilities at that time, there were four positions per shift in the steam plant: Shift Engineer, Assistant Shift Engineers, Scrubbers Panel and Scrubbers Field.

23. Mr. Owens described the GTC as a "newer version of the same thing" noting that when the Employer shut the old plant down the scrubber work was moved into the GTC. His evidence was that there a lot of similarities but that the GTC uses newer technology.

24. Union Chief Shop Steward Michael Langegger testified he has worked for the Employer for approximately 22 years as a PE. His evidence was that it takes 1800 hours of work or about 12 months to complete a water ticket.

25. According to Mr. Langegger's evidence, employees had exclusively been hired into PE positions either through the learner program – based on a minimum grade 12 requirement – or under the limited exception to hire a 3rd class certified PE from outside the company due to an "immediate need" for certified PEs.

26. Mr. Langegger and Union President Martin McIlwrath testified that the only other exception to PEs progressing into the position through the learner program resulted from the explicit agreement of the Union in 1999 when, as part of a reorganization, the then departments of Conveyors and Scrubbers were merged into the Utilities department. At that time, the Employer and Union entered into a letter of understanding that set out a process for employees brought into Utilities through this reorganization to enter the PE learner progression if they wished. Mr. Langegger acknowledged that these employees were grandparented and that employees hired after the merger would be required to follow the learner program.

27. Mr. McIlwrath testified that the understanding between the Parties was that entry into the Utilities department was with your seniority and as long as an employee had completed grade 12, they were considered equal and got into the department by seniority. According to his evidence, a certification never gave an employee a leg up on seniority, and the selection criteria is meeting the minimum requirement for the learner's program in 11-LU-#2. He testified that the Employer is limited to seeking an external candidate when there is an immediate need for a 3rd class certified PE and also prohibited from posting externally for a 4th class PE entirely due to the absence of an explicit right to do so in 11-LU-#2.

Discussions about the PE Learner System in 2017 Collective Bargaining

28. The PE learner system was discussed by the Parties during collective bargaining in 2017. At that time, the Employer sought changes to reflect the fact that the plant had moved from 1st class to a 2nd class plant.

Discussions about the GTC as the Entry Point to the PE Learner Program

29. The evidence is that on December 13, 2017, the company, including then Superintendent, Plant Services John Pedro and Labour Relations Manager at the time Scott Blackman, met with former Union President Sean O'Driscoll, and two other Union representatives, Cam Wiebe and Darren Stamper, to discuss re-starting the PE progression through the GTC.

30. Mr. Pedro was unavailable to testify. However, Mr. Blackman, who took notes during that meeting, testified that the Employer explained its long-term vision of PEs doing GTC work and possibly conveyors in the future. According to his evidence, the company recognized that there were going to be numerous vacancies in Utilities and that it needed to ensure there were adequate certified PEs available to comply with regulatory requirements.

31. According to Mr. Blackman's evidence, the company was flexible on its succession plan, as it didn't need additional certified PEs right away. Mr. Blackman testified that the purpose of this December 2017 meeting was to get the Union's input on how these learner positions would be posted. His evidence was that the Union agreed that learner positions would be posted through the GTC, and the Parties agreed to grandparent existing GTCs so that the learner progression was optional for them. The understanding, according to Mr. Blackman, was that new GTC operators would be required to progress through the PE learner program.

32. Mr. Blackman's evidence was that, at least to him, it was clear the Union and the Employer were talking about reinitiating the link between the GTC and Utilities so that the

learner progression would start in GTC and progress as it had done previously with the Scrubbers. While Mr. Blackman was cross-examined about why this agreement was not explicitly recorded in his notes, he was able to point to notations that showed the total number of PEs would decrease given the added flexibility and that indeed, that was the whole vision. Mr. Blackman's evidence was that it was the Union who suggested that the PE learner progression be used through the GTC, so that positions would be posted through the GTC and then incumbents would enter the learner progression to eventually become PEs. He testified that this was "reverting back to how we ran the old plant" – now learners would be in the GTC, but once they completed their certification they would become PEs. According to Mr. Blackman, who no longer works for the Employer, he was "shocked" when he received a call requesting he testify in these proceedings. His evidence was that making the GTC the entry point for the learner system was a "win-win" by getting employees more training and higher wages.

33. Mr. Blackman testified that there was never any discussion of a variance to 11-LU-#2, and that the Employer had the management right to do what it was doing. His evidence was that he believed the Union knew full well the company had the right to determine job qualifications and thus there was nothing that needed to be altered or varied. Mr. Blackman was also clear in his evidence that the participants at the meeting all understood that GTC operators did not need PE certifications to perform their work as a GTC operator.

34. Mr. O'Driscoll remembered the December 13, 2017 meeting as being about the "issue with coverage in the steam plant". When asked whether the company explained its long-term vision that PE's would eventually do everything including GTC and conveyors, Mr. O'Driscoll could not recall but agreed this conversation could have taken place.

35. According to his evidence, he understood that the Employer wanted to add a requirement that GTC operators complete PE training so that they would have adequate coverage when PEs were off sick or on vacation. He remembered that the company was looking for coverage on the steam plant side and that it wanted to start cross-training across the GTC for the PE work and was asking for the Union's input on how it should post these positions. He

testified he told the Employer to go ahead and post the GTC operator positions with the requirement that the incumbents would progress through the PE certification process and stated that "there's a letter that stipulates how that works." In Mr. O'Driscoll's view, it was a positive thing for GTC operators to be able to train into higher wages and he supported the initiative.

36. The evidence is that, following these discussions, the Employer posted and filled GTC positions in 2018, 2019 and 2020 with the understanding that these GTC operators would progress through the leaner progression per 11-LU-#2.

The PE Postings Giving Rise to the Grievances

37. The PE Postings ultimately leading to the Grievances were posted on or about April 15, 2021 and are numbered 2021-055, and 2021-056. As indicated at the outset, these postings required applicants to have a PE 4th class and Level 1 water treatment ticket as minimum qualifications.

38. The background to these postings was the subject of much evidence, including some previous postings with similar qualifications that were never ultimately filled. It all started on January 15, 2020, when Dave Owens, the then head of Plant Services, submitted via email a requisition for a 3rd class PE position to replace an employee who was retiring. In the requisition, he listed the position as requiring a 3rd class PE certificate. The requisition did not reference a water ticket.

39. Mr. Owens testified the company has rules around posting vacancies such as that a retirement notice must be submitted and approved before a posting can go out to replace the retiring employee. In order to post for a replacement, Mr. Owens explained, there needs to be a vacancy. He testified that workforce allotment is determined at a higher level and would require a sound business case to change.

40. The posting (2020-041) went up the same day Mr. Owens submitted the requisition and was posted by Heather Graziani in Human Resources. It listed a 3rd class Power Engineer Certificate as a required qualification.

41. A number of individuals applied on the posting. On February 3, 2020, it was offered to and accepted by a then temporary employee named Leonard Vroon, who participated as an incumbent in these proceedings. Mr. Vroon had his 3rd class PE certificate at that time and was awarded this position over more senior employees who applied for the position but who did not have their PE certification.

42. Shortly after Mr. Vroon accepted the PE position, on February 5, 2020, Mr. Owens put in a subsequent requisition to post for another PE vacancy, this time to fill a position being vacated by an employee in Utilities who had accepted an excluded position on Mr. Owens' recommendation. Again, Mr. Owens listed the position as requiring a 3rd class PE certification. A posting (2020-042) was created for this position on February 18, 2020.

43. On February 18, 2020, however, when the Union became aware of the 3rd class PE posting filled by Mr. Vroon, Mr. McIlwrath emailed Heather Graziani – the Workforce Coordinator—Business Support who was responsible for putting up the postings – and copying Human Resources Manager Crystal McCracken. Mr. McIlwrath expressed the Union's opposition to minimum requirement of a PE certificate and requested that the posting be replaced with a new posting for a PE 4th class to be offered "by seniority". In his email Mr. McIlwrath expressly referenced 11-LU-#2 as the operative language for hiring into the Utilities department.

44. Ms. Graziani's evidence is that Mr. McIlwrath called her about the posting very upset and told her that the Employer did not have the right to post for 3rd class and could only post for a 4th class. She testified she did not know whether he was correct, as her job was mostly about benefits and payroll issues and she was not responsible for labour relations or interpreting the Collective Agreement. Ms. Graziani testified she consulted Ms. McCracken

following her conversation with Mr. McIlwrath, who she recalled had just gotten back from vacation.

45. Ms. McCracken testified that following her conversation with Ms. Graziani, she reached out to the area to try and understand whether the Employer required a 3rd or 4th class PE. In a brief conversation, the evidence is that that the area confirmed it only needed a 4th class certification. An updated requisition was provided listing the 4th class certification and water ticket as minimum qualifications required for the position.

46. Ms. McCracken's evidence was that she did not understand at that time that the 4th class certification and water ticket were to be minimum qualifications for the position because these certifications were regulatory requirements. Her evidence was that, in her rush to get the postings up, and in an attempt to satisfy the Union's concerns, she ultimately posted the two vacant PE positions with the 4th class PE certificate and the level 1 water ticket listed as "preferred qualifications".

47. Ms. McCracken testified she was very new in her position at the time and that the position had a steep learning curve. Ms. McCracken testified she was hired into her position with the mandate to improve the relationship with the Union, and that she approached issues with the Union in a collaborative and cooperative spirit rather than a confrontational one.

48. Within hours of the updated postings going up, Mr. McIlwrath sent an email to Ms. Graziani copying Ms. McCracken stating the Union's position that, pursuant to 11-LU-#2, the minimum qualification for the PE position is completion of grade 12 and requesting that the preferred qualifications be removed from the posting.

49. Ms. McCracken's evidence is that in the spirit of consultation and collaboration, and without understanding the regulatory requirement for a fully-certified PE nor having further conversations with Mr. Harris or Mr. Owens, she agreed to remove preferred qualifications and instructed Ms. Graziani to post with the learner language only.

50. Mr. Owens and Mr. Harris both confirmed in their evidence that no one consulted them about the subsequent changes to the postings. After the postings went out, the evidence is that Mr. Owens reached out to Ms. McCracken and explained that the certifications weren't "nice to have" options, but that the Employer needed the applicants to have these tickets because they were filling shift engineer vacancies and the certifications to comply with regulatory requirements.

51. Mr. Owens' evidence was that that after the postings were pulled, he and Mr. Harris reached out to Ms. McCracken "a couple times a week" to find out where the process was, and that Mr. Harris submitted many clarifications to support why the Employer could not hire for these vacancies at the learner level.

52. Ms. McCracken could not remember precisely when the postings were pulled. She testified they were put on hold for a while, while the Employer tried to work out the issue with the Union. Ultimately, they were never filled.

Initial Discussions on the Dispute Over the PE Learner System and the Postings

53. The evidence is that, later in February, Ms. McCracken met with Mr. McIlwrath and Union Business Agent Cliff Madsen at the Union hall at which time they discussed a variety of issues including the PE postings. During that meeting, all three of them remember Mr. McIlwrath and Mr. Madsen explaining how the PE learner progression had historically operated and that the Union explained that if the company wanted to do it differently, it would have to seek the Union's approval for a variance to the Collective Agreement.

54. Where the evidence differed, is that Mr. McIlwrath and Mr. Madsen both testified that Ms. McCracken agreed in that conversation that the Employer was, in fact, seeking a variance, although Mr. Marsden under cross -examination agreed he did not recall Ms. McCracken specifically using the term "variance". His evidence was that she responded to the Union's explanation that the company needed to seek a variance with "I guess I am". He remembered

that Ms. McCracken was very new in the position and that she would come to the Union hall often to discuss issues.

The global COVID-19 pandemic, the Strike, and the Parties' Relationship Enhancement Program

55. It goes without saying that the COVID-19 pandemic impacted the Employer's operations and took a lot of attention away from other issues.

56. Despite that, though, the evidence is that meetings took place between the Parties in an attempt to resolve these issues. The Parties met on June 3, 2020 for instance. During that meeting, Ms. McCracken attempted to explain the regulator requirements around water ticket.

57. Mr. Madsen did not recall Ms. McCracken explaining the water ticket requirement at the June 3, 2020 meeting. What he remembered is her expressing the Employer's desire to start the PE learner system through the GTC, and that she may have mentioned the Employer's Modernization project in the course of the discussions. In fact, he remembered her indicating that there had been an agreement with the Union back with Mr. Pedro and Mr. O'Driscoll, and that he and Mr. McIlwrath challenged that none of that could have been agreed to without the membership's input. Mr. Madsen remembered Ms. McCracken using the term letter of understanding as a possible solution to the dispute.

58. Ms. McCracken's evidence was that she never agreed the Employer was seeking a variance. According to Ms. McCracken's evidence, it was the Union that kept saying the company needed a variance and that she was trying to find a mutually agreeable path forward. She described discussions with the Union as "going around in circles". According to Ms. McCracken's evidence, she simply told Mr. McIlwrath and Mr. Madsen that that she would take the information they had provided away. Ms. McCracken did agree that she discussed the idea that perhaps the Employer and the Union could work together to draft a letter of understanding. But she was adamant in her evidence that she was not seeking a variance because she didn't even know at that point what she would be looking to vary.

59. Ms. McCracken agreed under cross-examination that she never explicitly told the Union that its interpretation of 11-LU-#2 was wrong but testified she was "trying not to be argumentative" and that she tried to work through to help the Union understand the connection between the GTC and Utilities and the Employer's regulatory requirements.

60. Human Resources Manager Ashley Medeiros, who had returned from maternity leave in February 2020, was also a part of these multiple discussions with the Union. She similarly testified that the company in these meetings tried to explain the plan for the GTC to be the entry point to the learners program and why that worked and was beneficial to everyone. Ms. Medeiros echoed in her evidence that the Employer was working on open communication and collaboration at the time and was trying to get everyone aligned.

61. In the summer and fall of 2020, the Parties were engaged in a relationship enhancement process wherein they were having discussions to try and work through over 400 grievances. The evidence is that the present issue was continually bumped forward while the Parties worked through other disputes.

62. On October 1, 2020, the Union emailed the Employer asking for the status of the two class power engineer positions (2020-041 & 2020-042) that were posted back in February. Mr. McIlwrath wrote "The Company was looking for a variance, but we did not agree to it. I believe the positions still need to be filled…". Ms. Graziani responded that same day advising that the postings had been canceled "a few months back" and that the Employer would look at posting "if required".

The Union Objects to PE Learner Progression as a Mandatory Requirement for GTC Position

63. On February 5, 2021, after years of GTC positions being posted with the requirement to complete the PE learner progression, the Union raised an objection to the Employer requiring individuals being hired into the GTC area to complete their PE certification and achieve their water ticket. The evidence is that the Union suggested, and the Employer ultimately accepted,

that the GTC position should offer incumbents the *option* to complete PE and water certification, but that achievement of these certifications would be voluntary, and not mandatory for the position. GTC positions posted since that time have had the option to complete the PE learner program.

64. Mr. McIlwrath testified it was his initial understanding that GTC operators were required to complete the PE certification process because the GTC was now being regulated by the boiler branch. He testified that when he learned that the PE certification was not required for the GTC operator position, his belief was that the Employer was building a spare pool to use to fill in for vacation and that kind of thing and that he indicated to the Employer that it ought to make progression through the PE certification process optional rather than a requirement of the job, and that the Employer subsequently did post GTC operator positions with the option to progress through the PE certification process.

65. Mr. Madsen provided similar evidence. He recalled being at the February 5, 2021 meeting, and discussing with the Employer that the PE certification progression for GTC operators ought to be optional. He testified that the Union "didn't see the synergy" between the two departments, and that people working in the GTC had been unable to get their firing time and that it seemed to be on a somewhat voluntary basis already. Mr. Madsen testified he recognized that the company was offering a higher rate of pay for those who completed their certifications, and that making progression through the certification process optional for GTC operators meant that those who wanted to, could get themselves in a better situation in retirement.

The Greenbelt Initiative and the Employer's Continued Attempts to Get the Union on Board with the PE Learner System Commencing through the GTC

66. As previously noted, the Employer posted GTC operator positions in 2018, 2019 and 2020 specifying that incumbents were required to progress through the PE certification process. However, the evidence is that this did not take place.

67. Mr. Owens testified that despite the Employer's intention that GTC operators would progress through the PE learner program within the timelines specified in 11-LU-#2, there were some delays in getting GTC operators certified due to extraordinary employee turnover. According to Mr. Owens' evidence, the Employer was required to replace 7 out of 10 GTC operators in about an 8 or 9 month period. He described the department at that time as being in "survival mode" noting that release dates for summer had been held back. Mr. Owens' testified that once things stabilized, he focused his attention on what could be done to get more operators through the PE learner program.

68. Mr. Owens testified that due to the lack of progress in the GTC, he initiated a "Greenbelt" initiative, which he described as a specific problem-solving tool meant to address succession planning for the Utilities department. Mr. Owens explained that entry into the PE learner program through the GTC was the underlying assumption of the initiative, as he had been told by Mr. Pedro that this was the plan agreed to with the Union – that the PE learner program would be undertaken by GTC operators so that they had certified PE available to fill PE vacancies as they occurred. Mr. Owens' evidence was that Mr. Pedro told him back when he took over the role from Mr. Pedro that the company was reinitiating the learner program through the GTC and that this had been agreed to in a meeting with Mr. Blackman and Mr. O'Driscoll back in 2017.

69. On Feb 14, 2021, Mr. Owens presented a PowerPoint explaining the Employer's "Greenbelt" initiative. Mr. Owens testified that the purpose of the presentation was to outline the challenge of getting the learner program up and running so that GTC operators could get their tickets as part of the succession planning necessary to ensure that Utilities continued to be staffed with certified PEs. The Union was invited to attend this presentation, and Mr. McIlwrath and Union representative Shaun Boomers did attend the meeting on behalf of the Union; however, the evidence is that they both left part-way through after expressing their confusion to Mr. Owens about why they were even there.

70. In cross-examination, Mr. Owens was asked why there was nothing in his Greenbelt presentation about the GTC employees automatically progressing into PE positions. His

response was that the entire initiative was predicated on that notion. According to his testimony, the intent was that the GTC was the entry department for Utilities. Without that, he testified, he would just be getting higher paid employees with qualifications they didn't need.

71. Mr. Owens' evidence was that Mr. McIlwrath and Mr. Boomers came to speak with him in his office during a break in the presentation and asked why they had been invited and whether there was any value to them being there. According to Mr. Owens, he explained he wanted "visibility" and to be clear about the Employer's intent to reinitiate the learners program. Mr. Owens' memory was that Mr. McIlwrath suggested that the Employer should mirror what is done in the Warehouse, where employees are given the choice whether they want to progress through training or not. Then he and Mr. Boomers left.

72. Mr. McIlwrath's evidence was that he felt this was some kind of management strategy meeting – not a joint meeting – and that he did not usually attend meetings like that. He testified he did not know what the company was looking for from the Union, but it was certainly not anything the Union agreed to. When it was put to Mr. McIlwrath in cross-examination that the entire point of the Greenbelt initiative was to train up GTC operators to becomes PEs in the Utilities Department, he testified that "maybe it went over [his] head" that that was the intent, but that he did not understand why the information was even being shared with him and felt uncomfortable at that meeting. According to his evidence, his focus was talking about the progression through the PE certification process to get better pay if they wanted it.

73. That evidence was consistent with Mr. Madsen's evidence. Although he did not attend the Greenbelt Initiative meeting, he testified he knew it was something the Union had determined it "did not want to be a part of."

74. According to Mr. McIlwrath, there was no discussion nor agreement that the GTC would be entry point into the PE learner program. While he acknowledged that the Union had agreed to GTC operators progressing through the PE certification process, he was adamant there was never any agreement that those employees who completed their certifications were

progressing through the PE learner program so that they would have super seniority for PE openings once certified. Mr. McIlwrath was adamant in his evidence that GTC operators who were progressing through the PE certification process were not learners under the 11-LU-#2 and did not hold 4th class PE positions.

75. The evidence is that the Employer invited participants from the Utilities department, Human Resources, and the Union to a meeting held on March 4, 2021.

76. Mr. Harris prepared a Power Point presentation which he led participants through which described the succession challenges in Utilities with retirements that might come in, and the progress of GTC operators who were on their way to completing their PE certifications. Both Mr. Owens and Mr. Harris testified the company was looking to explain to the Union this looming problem and to discuss the structure of the PE learner program from GTC. Mr. Owens testified the company was open to ideas from the Union and was looking to "talk and figure out a way forward."

77. By all accounts, that meeting was not fruitful. The Union was adamant that the GTC was not the entry point into the PE learner program and that if the Employer wanted to post internally for a certified PE, it was required to seek a variance to the Collective Agreement from the Union, and that it should put its request for a variance in writing so that the Union could take it back to discuss amongst its executive. Mr. Madsen testified the Union made clear what the Employer was contemplating was not in line with 11-LU-#2 and that it was basically a "hardstop" for the Union. He believed he mentioned that the Employer could use temporary employees to get past any hurdle if there was such a thing. That memory is bolstered by the evidence of Ms. McCracken who testified that the Union insisted in that meeting that the company could use temporary employees with tickets while newly-hired PE learners were progressing through the learner program.

78. Mr. Harris' evidence was that the meeting quickly degraded into a back and forth and in circles until it was clear the Parties were not going to see eye-to-eye and the meeting ended.

Similar evidence was tendered by Ms. Medeiros, who described the meeting as “going in circles”.

79. Mr. McIlwrath testified these meetings with the Employer were examples of its attempt to get the Union to agree to a variance. He testified that the Union did not agree that the Employer could not meet its regulatory needs by hiring through the normal learner progression and that it accordingly would decline any request for a variance in any event.

80. Mr. McIlwrath testified that in the last 10 years the company, through attrition, has downsized areas so that it is operating in crisis mode all the time and that it has set out work levels so that they can “cry wolf and say we don’t want to use the learner progression and hire direct and trample seniority rights.” According to his evidence, the Employer can manage it, and if the company had done it correctly in the first place, it would probably have certified individuals in those positions as of the date of the arbitration hearing.

81. Following the March 4, 2021 meeting, Mr. McIlwrath sent an email to Ms. McCracken including the Scrubbers LU, which he characterized as an example of a formerly agreed to variance of 11-LU-#2. When asked during her evidence why the Employer did not pursue a similar letter of understanding for the GTC or a variance, Ms. Medeiros explained this was not what they were looking at as this was not a reorganization and the Employer already believed it had the right to set the qualifications.

The Grievances and Aftermath

82. On April 6, 2021, the Union filed 3 grievances on behalf of individual members asserting they had been denied 4th class PE positions in favour of more junior applicants in breach of the Collective Agreement: Paul Thomopoulos, Libby Bothelho, and Mike LaBossiere.

83. The Parties discussed this issue again in a meeting on April, 7 2021. Notes from that meeting indicate the Employer once again explained its need for qualified PEs in Utilities, and its plan to train employees while they worked in GTC positions so that they could fill PE

vacancies as qualified PEs when vacancies arose. The notes further indicate the Employer explained that it believed it had the right under the selection language in the Collective Agreement to choose an applicant with superior skills and ability, and that it noted that it used to have a lot of PEs but that it was facing a potential shortage in the near future. The Union maintained that the PE position was a seniority position and that the Union had not agreed GTC operators would have super seniority by virtue of their PE training. It reiterated that the Employer would have to put its request in writing.

84. As earlier indicated, on April 15, 2021, the Employer went ahead and posted the disputed postings (2021-055 and 2021-056) with the minimum requirement that applicants possess a 4th class PE certificate and a 1st class water ticket. Mr. Vroon and another previously temporary employee were the successful applicants for these permanent full-time positions.

85. According to Mr. Owens, the Employer was required to post the two PE positions with 4th class certificate and level 1 water ticket as minimum qualifications since it had lost two certified PEs and it needed to replace the two certified PEs. He noted that those in the GTC progressing through the learner system were still months from completion of their PE 4th class certification, and then still had to achieve their water tickets.

86. The evidence is that this issue was again discussed in a labour management meeting on May 5, 2021, wherein the Union once again noted it had not received any request for a variance from the Employer in writing and asking what the company was looking for.

87. On May 14, 2021, the Union filed a grievance on behalf of Kevin Anderson alleging that he was improperly denied one of the two job postings for a 4th class PE because the positions were awarded to employees with less seniority.

The Employer's Delay in Filling the PE Positions

88. According to Ms. McCracken's evidence, there was never any intention for the company to leave the PE positions vacant for so long, and that the hope was always that the Employer would be able to come to an agreement with the Union but that, obviously, it was unable to.

89. Ms. Medeiros shared that hope and optimism. Her evidence was that, while it was always the Employer's position that it had the right to post the PE positions with qualifications and to start the PE learner progression in the GTC, it tried to work with the Union to come to a reasonable solution.

90. Mr. Owens testified he and Mr. Harris certainly had wanted to fill these roles earlier and were concerned about the ongoing vacancies. Their evidence was that they kept asking for updates from Human Resources regularly. Mr. Owens testified that it was his understanding that this issue kept getting bumped from the agenda of the Parties' ongoing relationship enhancement meetings.

91. Mr. Owens explained that the department was able to maintain its regulatory compliance throughout this time by utilizing three temporary employees for an extended period. According to Mr. Owens' evidence, this was risky, because these temporary employees could accept permanent employment outside the department and, in fact, approximately 20 permanent full-time positions outside the department were going to soon be posted which ultimately prompted the Employer to post the two certified PE postings in April 2021.

92. While Mr. Owens acknowledged in his evidence that the Employer could have posted for learners, he testified the need at the time was for qualified PEs, not learners. According to Mr. Owens' evidence, the company was facing risk that the temporary employees would leave and the Collective Agreement contains language limiting how long the Employer could continue to use them after they accepted new roles. He also noted that there were a large number of retirements that could happen at any time.

Collective Bargaining 2021

93. The parties engaged in collective bargaining in the summer of 2021. At that time, the Employer introduced a proposal to amend 11-LU-#2 so that it, amongst other things, recognized that: "In situations where 4th class certification is required by BC Boilers Branch Regulations, the Company will post the position with the 4th class certification as a minimum requirement." The Employer also proposed to amend 11-LU-#2 to explicitly recognize its right to hire a fully qualified 2nd, 3rd, **or 4th** Class Power Engineer if there is immediate need.

94. As noted, the Employer's evidence was that it always believed it had the management right to set the qualifications and that its proposal was for clarification. According to Ms. Medeiros' evidence, while the Employer was hopeful that the clarification would avoid the need for litigation over this ongoing issue, the proposal was ultimately withdrawn, and the decision was made that this issue would need to be resolved through arbitration.

95. In July 2021, the Union went on strike until October 4, 2021, when the current Collective Agreement was ratified. 11-LU-#2 remained unchanged in the new Agreement.

Evidence about Previous PE Postings for Certified PEs

96. Ms. Medeiros testified that the Employer had previously required PE certifications on at least a couple of postings without the Union objecting. She pointed to a Job Postings record from October 15, 2014 which specified that the successful applicant was required to have 4th class certification on file with the company no later than October 29, 2014. Ms. Medeiros was also able to point to records showing a PE position was posted in October 2015 as well, this time with a 3rd class certification required to be filed with the Employer. Her evidence was that the Employer did not keep electronic records prior to 2014 and that although she had looked through storage boxes, she was unable to find any earlier examples.

POSITIONS OF THE PARTIES

Union's Position

97. According to the Union, the minimum requirements for a PE position are set out in 11-LU-#2 at paragraph 1(a), and the Employer may not unilaterally deviate from those requirements except in the explicit circumstances laid out in that letter of understanding. While the Union acknowledges that employers generally have the right to set job qualifications, it argues that the Collective Agreement in this case expressly states the requirements for a PE position and is an exception to the rights the Employer otherwise has under Articles 5 and 9 of the Collective Agreement.

98. The Union submits that the mere existence of the LOU at issue demonstrates a mutual intent by the parties to agree to provisions that would limit otherwise broader discretion on the part of the Employer as to who it accepted into PE positions and with what qualifications. For example, it states, to the extent that Article 9 might confer on the Employer the ability, within limits, to set qualifications for a posting, 11-LU-#2 sets out very expressly what limits those can be with respect to PEs, at para. 1(a). In the Union's submission, this language would have no real meaning or effect if it was also the mutual intent of the parties to allow the Employer to give priority to persons with certain levels of PE certification status or other requirements like a water ticket. The Union queries, what is the point of coming to agreement on minimum allowable qualifications if the Employer has the discretion to post positions with more qualifications in any particular case, if it so chooses?

99. The Union asserts that the language of 11-LU-#2 indicates an intention by the parties to come to agreement on language that ensures predictability as to when the training progression will produce certified PEs and that the parties understood the significance of making the training progression in the manner by which a PE position was to be filled. Thus, it says, paragraphs 1(h) and 1(g) set out maximum periods of time in which an employee must achieve certifications for 4th and 3rd class, respectively.

100. The Union rejects the suggestion that there was a regulatory requirement that the Employer had to post for a 4th class certified PE at the time it did, or at any other time covered by the evidence. It says this contention is rebutted by the fact that the Utilities department operated with no additional 4th class PEs for well over a year after the original 2020 posting for the retirement replacement went up. The Employer met its regulatory requirements with the use of temporary employees, temporary assignments, and persons in the PE floater positions. The Union stresses that there was no law or regulation, moreover, that prevented the Employer from posting for PE positions through the training progression in 11-LU-#2. With respect to the water ticket, Mr. Owens had just written two requisitions for two postings with no water ticket requirement. He had been employing as a PE at least one individual, Leonard Vroon, and perhaps others, who did not have his water ticket.

101. The Union notes that the Employer is a singular legal entity bound by the Collective Agreement. It says Ms. McCracken amended the PE postings in agreement with the Union's position and that, contrary to her evidence, this was not a spur of the moment slip. The Union emphasizes that she had spoken to Mr. Owens and his department repeatedly as well as to the Union and that she had reviewed the Collective Agreement language the Union was relying on. The Union highlights that she never told the Union that these postings were a mistake, nor did anyone else tell the Union these postings were a mistake, or anything to the effect that the Union's interpretation of the language was wrong in the meetings where PEs were discussed.

102. The Union stresses that, to the extent the Employer is asserting it was required to hire applicants who already possessed the PE certifications, this was a problem of its own creation. The Union points to the evidence that GTC operators who were hired into postings requiring mandatory PE training could not complete it in the time required in this progression and, in fact, did not come even close to completing the training for a 4th class certificate in the timeframe indicated in the LOU. According to the Union, this is because they could not complete the training because they were doing GTC training first. Also, they were working in another department and therefore had difficulty getting firing time in the Union's submission. The Union asserts that this evidence demonstrates the patent unsuitability of this language to

another department or other groups of employees, since the timelines make no sense except as a means of training up PEs in their home department.

103. The Union urges an interpretation of the language of 11-LU-#2 that is harmonious and gives meaning to the words used by the Parties. In its submission, the LOU is a complete code governing what the Employer can require to hire PEs and the hiring of PEs is essentially based on seniority.

104. In addition, or in the alternative, to the extent that there is any doubt as to the meaning of this language, the Union submits that its position is supported by a long-standing and consistent past practice, and collective bargaining negotiations. The Union submits that the postings at issue in this case are the only relevant examples of the Employer posting with either 4th class PE certification requirement, or a water ticket requirement, in the history before this panel. With respect to the water ticket requirement, the Union observes it was not on the original requisitions drafted by Mr. Owens, nor was it included in the posting that Mr. Vroon was offered and accepted.

105. In the Union's submission, the evidence supports a clear, unequivocal agreement between the Union and Employer as to the interpretation and application of 11-LU-#2, consistent with the Union's position in these proceedings. The Union points to what it characterizes as a consistent and long-standing practice of the Employer employing PEs trained internally through the training progression, except about three instances of 3rd class hires.

106. Further, in addition to past practice evidence, the Union asserts the evidence supports that the Employer agreed with the Union's interpretation in the course of the Parties' discussions. The Union argues that the Employer, through its Human Resources Manager, agreed with the Union's position. If the Employer was internally divided about the regulatory requirements having to be the determining factor, those divisions, the Union asserts, are irrelevant. The Union contends that Ms. McCracken's newness at the plant is not a reasonable excuse for the Employer's position. The Union takes issue with the fact that the Employer did

not express to the Union, at any point in the protracted discussions, that the Union's interpretation was in fact wrong.

107. The Union rejects the idea put forward by the Employer that by not filling the February, 2020 PE postings, but waiting, it was expressing its disagreement with the Union's position on those postings, characterizing the Employer as relying on a lack of candor and actions that are themselves contrary to collective agreement administration principles to support its position. The Union asserts that, in not filling the postings, and not providing the Union and applicants with a reasonable and timely explanation, the Employer was abusing the posting provisions of the Collective Agreement.

108. According to the Union, at no time did the Employer assert a different interpretation of the language than what the Union put forward: not in bargaining, not in the labour relations and Green Belt and other discussions that preceded bargaining. The Union draws attention to the fact that there is nothing in the negotiations notes indicating that the Employer was tabling this proposal as a means of clarification. In fact, the Union says it put its position on the existing language to the Employer at the bargaining table and suggested the Employer was putting forward the proposal to get around that language.

109. In the Union's submission, the nature of the Employer proposals and what was communicated around those proposals in bargaining clearly reflect that the Employer understood it needed a change in the language to allow it to post for 4th class PE positions with certification as a minimum requirement.

110. The Union argues that the Employer cannot avoid its contractual commitments with respect to job posting requirements by structuring its training and hiring decisions in a manner that undermines its obligations under the Collective Agreement. According to the Union, the evidence shows that through its own decisions, the Employer created the conditions which it now seeks to use as justification for posting for a 4th class PE with a water ticket.

111. In summary, the Union states the Collective Agreement language is clear on its face and the past practice, collective bargaining evidence as well as the agreement of the Employer itself when a dispute on this interpretive issue was raised by the Union, all support the Union's interpretation of the language. The grieved postings violated the language of the LOU, and the Grievances should be allowed.

112. In respect of remedy, the Union seeks findings and declarations that the Employer is in violation of the Collective Agreement. It provided in its opening to these proceedings an overview of the relief it is seeking. The Union requests that I remain seized and address the issue of appropriate remedies.

113. The Union relies on the following authorities: *Air Liquide Canada Inc. Edmonton v. Unifor Local 777 (Semeniuk Grievance),* [2017] A.G.A.A. No. 1; *Rio Tinto Alcan Inc. v. Unifor, Local 2301 (Mandatory Overtime Policy Grievance)*, [2016] B.C.A.A.A. No. 110; *Chilliwack General Hospital v. British Columbia Nurses' Union (Smith Grievance)*, [1994] 47 L.A.C. (4th) 270; and *KMC Mining (BC) Ltd. v. International Union of Operating Engineers, Local 115 (Allowances Grievance)*, [2012] B.C.C.A.A.A. No. 50.

Employer's Position

114. The Employer's position is that it is within its management rights to post the PE positions with the PE certification and water ticket as minimum qualifications as made clear in Article 5.01 of the Collective Agreement and in the arbitral jurisprudence. That article, it says, explicitly recognizes the Employer's right to operate its plants, determine job content, organize work, and determine qualifications. Further, the Employer points to arbitral jurisprudence confirming the basic proposition that employers have the right to set qualifications for work unless the addition of those qualifications can be said to be arbitrary, discriminatory, or done in bad faith.

115. The Employer objects to the Union's characterization of 11-LU-#2 as constituting a complete code with respect to entry into the Utilities department. This interpretation, it

argues, is contrary to the plain language of the agreement, which the Employer argues does not restrict it from posting for qualified shift engineers when they are required. To the contrary, the Employer submits, there is no explicit restriction on the Employer's right to determine the qualifications for open PE positions necessary for regulatory compliance. According to the Employer, the Union has it backwards – suggesting that 11-LU-#2 has to explicitly give the Employer the right to set these qualifications rather than recognizing this as an inherent management right that requires clear language to circumscribe. In the Employer's submission, 11-LU-#2 simply set out the terms and conditions of a learner program that leads to certification. It does not restrict the Employer from hiring qualified PEs when it needs them.

116. The Employer stresses that, pursuant to the principles of collective agreement interpretation, the primary resource is the collective agreement, and any extrinsic evidence may only clarify but not contradict the collective agreement. It further advances that an important promise such as a severe restriction on management rights to determine qualifications, is likely to be clearly and unequivocally expressed – which is not the case here. Rather, the purpose of 11-LU-#2 is described as setting out the learner progression for obtaining certification. The Employer notes the absence of any language explicitly indicating that the Employer must hire into Utilities through this entry level position. It also notes the absence of any language indicating that the minimum qualifications for the learner position are the same and only minimum qualifications allowed to fill a full-time permanent PE position. With respect to the explicit reference to the Employer's ability to hire 3rd class PEs externally, the Employer explains this is simply recognizing the Employer's right to hire from outside when there is an immediate need. According to the Employer, nothing in 11-LU-#2 precludes it from internally posting PE positions requiring certifications where such is required.

117. The Employer further notes the complete absence of any language in 11-LU-#2 about departments. Nothing in that agreement, it says, restricts the company's ability to reorganize its departments nor is there any reference to the PE learner progression having to start in the Utilities department. The Employer points to the fact that the starting point for the PE learner progression was historically the Scrubbers position – and that the GTC effectively replaced

those positions after the Kitimat Modernization Project. Unfortunately, it notes there is a lack of historical information about how positions were posted prior to this time.

118. The Employer observes that, in respect of past practice, there is evidence that it posted for certified PEs internally in the past without objection from the Union. It notes the 2014 posting for a 3rd class PE went without objection. Further, it points to evidence that in 2017, an internally-trained employee was awarded a third class PE position, again without objection by the Union.

119. The Employer relies on the evidence of its witnesses that the Union's former President Mr. O'Driscoll agreed that the PE learner program would be reinitiated through the GTC. While it notes Mr. O'Driscoll did not recall this part of the conversation, the Employer points to Mr. Blackman's evidence which it says demonstrated a clear recollection and which it notes was consistent with Mr. Owens' testimony that Mr. Pedro told him about the conversation with the Union. The Employer states that this evidence ought to be preferred over Mr. O'Driscoll's to the extent there is any conflict. The Employer observes that, following that conversation with the Union, it posted and filled GTC positions with the ability for the incumbents to progress through the PE learner program in 2018, 2019 and 2020. Even if there was a misunderstanding on the part of all three Union representatives, which the Employer suggests is implausible, certainly, it says the company walked away from those 2017 discussions with the understanding that the link between GTC (formerly Scrubbers) and Utilities was being reinitiated and it took steps to post for GTC operators on that understanding and without objection by the Union.

120. The Employer rejects the suggestion by the Union that it has failed to mitigate upcoming vacancies in Utilities, or that it is responsible for not starting more learners through the PE progression. The Employer points to the fact that it had numerous individuals in GTC who had been hired with the commitment to undertake the PE learner progression. It also relies on the evidence of Mr. Owens that there were "once-in-a-lifetime" delays in getting the GTC operators trained as PEs due to high employee turnover during an approximately 18 month period, and that the Employer's Greenbelt initiative was specifically deployed to address this issue and get individuals trained up so that they could fill upcoming vacancies.

121. Further, according to the Employer, it is unable to assess when PE vacancies will occur since there is no mandatory retirement, yet many PEs are or will soon be eligible for retirement. The Employer notes that, at the time it posted for qualified PEs, there were approximately 10-20 temporary positions that were being converted to full-time regular positions, and this meant that the temps working in Utilities may post into regular positions in other work areas. Further, the Union's suggestion that the Employer could have kept using temporary employees to fill full-time vacancies for the time it took a PE learner to complete the requisite certifications would actually have required a variance, since there are temporal limitations on the use of temporary employees. In the circumstances, the Employer asserts it exercised its management rights reasonably by posting internally for full-time regular PEs with the requisite certifications. In the Employer's submission, the Union's position is unreasonable in that it is asserting the company cannot post for what it needs, but that it should instead be posting for an entry level position, putting the successful applicant through 2.5 years of training while going to the Union and asking for permission to use temporary coverage in a way that would otherwise violate the Collective Agreement.

122. The Employer denies it ever agreed to the Union's interpretation of 11-LU-#2 or that it ever sought the Union's permission to deviate from the requirements of the Collective Agreement. While the Employer acknowledges its communications with the Union were not "perfect," it suggests that the Employer was trying to be collaborative and non-confrontational by attempting over the course of a year to explain to the Union its need for certified PEs so the Parties could get to a "reasonable place" and avoid the need for lengthy and costly litigation. The Employer emphasizes that Ms. McCracken was new to her role, and that she knew little about the history of the PE learner program nor the Parties' Collective Agreement.

123. The Employer refutes that its proposal in bargaining to change the language in 11-LU-#2 was an acknowledgement that without those changes it did not have that right. The Employer characterizes its bargaining proposal as an attempt to clarify its existing right with the introduction of revised language in 11-LU-#2 explicitly recognizing the Employer's right to post for qualified PEs so that it could avoid costly litigation. The Employer flat out denies its proposal

constituted any admission that it lacked this right without this change. Again, while it acknowledges that it did not explicitly disagree with the Union's stated interpretation of the language, the Employer asserts it withdrew its proposal and decided to go to arbitration instead which is why the Parties are here in this process.

124. Even if the Employer was not able to post the PE position with the certifications as minimum requirements – which it expressly denies – the Employer indicates that Article 9.01 of the Collective Agreement is a relative ability selection clause, meaning seniority applies unless a candidate's skills, competence, efficiency and qualifications are appreciably greater. There is nothing in 11-LU-#2, the Employer argues, that requires the Employer to award a full-time shift engineer position to a grade 12 educated senior employee over a more qualified junior applicant. Further, the Employer observes that even in cases with a clear and explicit line of progression, arbitrators have recognized that employers may post for higher qualifications when needed to maintain the integrity of the line of progression.

125. The Employer emphasizes that it is required to meet its regulatory obligations and notes that serious consequences can flow from a failure to do so.

126. The Employer relies on the following authorities: *Pacific Press v. Graphic Communications International Union, Local 25-C*, [1995] B.C.C.A.A.A. No. 637; 2. *Nanaimo Times Ltd. and Graphic Communications International Union, Local 525-M*, BCLRB No. B40/96; *Cariboo Pulp & Paper Co. v. Communications, Energy and Paperworkers Union of Canada, Local 1115 (Job Posting Grievance)*, [2011] B.C.C.A.A.A. No 134; *Enersul Limited Partnership v. Unifor Local 686-B*, 2018 CanLII 91260 (AB GAA); *Andres Wines (B.C.) Ltd. v. United Brewery Workers, Local 300* (1984), 14 L.A.C. (3d) 238); *Eurocan Pulp and Paper Co. v. Communication, Energy and Paperworkers Union of Canada, Local 298 (Jonkman Grievance)*, [2000] B.C.C.A.A.A. No. 359; *Eurocan Pulp and Paper Co. v. Communications, Energy and Paperworkers Union, Local 298*, [2005] B.C.C.A.A.A. No. 74; *Cariboo Pulp and Paper Co. v. Communications, Energy and Paperworkers Union, Local 1115 (Vacancy Grievance)*, [2009] B.C.C.A.A.A. No. 135; and *Re Alcan Smelters & Chemicals Ltd and Canadian Association of Smelter & Allied Workers, Local 1* (1987), 29 LAC (3d) 58.

ANALYSIS

127. As stated at the outset, the issue to be decided in this case is whether the Employer is prevented from internally posting for a qualified PE or whether it may only hire qualified PEs externally when there is immediate need. In other words, the issue is whether PEs must be hired as learners or as external qualified hires. Absent immediate need, is the employee with the most seniority and a grade 12 education entitled to be hired into a learner progression? A secondary question that arises is whether the PE learner progression set out in 11-LU-#2 can commence in the GTC, so that those who have completed the training are able to post directly into PE vacancies when they arise ahead of those who meet the minimum qualifications for the learner program in 11-LU-#2.

128. As a starting point, I note that management rights are residual, meaning an employer has the right to direct and organize its operations to the extent that its actions are not contrary to law or to the terms of the collective agreement including the implicit requirement that management rights be exercised reasonably. In other words, an employer is able to make operational decisions provided they are not contrary to law or the collective agreement and they are not unreasonable.

129. The right to set job qualifications is a recognized management right. Employers may determine the minimum qualifications for a position unless there is clear language in the collective agreement restricting this right and so long as they don't act arbitrarily, unreasonably or in bad faith (see for example, *Air Liquide Canada Inc. Edmonton v. Unifor Local 777 (Semeniuk Grievance), supra.*)

130. In this case, the Employer's right to set qualifications is an expressly recognized management right in Article 5 of the Collective Agreement – which expressly references the Employer's right to determine "job content, the evaluation of jobs, the assignment of work and the determination of the qualifications of an employee to perform work", amongst other things.

131. Thus, for the Union to be successful in this case, it must prove that the Collective Agreement expressly prohibits the Employer from requiring a 4th class PE certification and water ticket as minimum qualifications for positions posted internally. There is no allegation in the present case that the Employer's inclusion of these requirements on the disputed job postings was arbitrary, unreasonable or done in bad faith.

Does 11-LU-#2 Prohibit the Employer from Posting for Qualified PEs Internally?

132. The well-established principles of collective agreement interpretation are set out in *Pacific Press v. Graphic Communication International Union, Local 25-C* (1995) B.C.C.A.A.A. No. 637 (Bird) at para. 27:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different words one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

133. It is beyond dispute that the Parties' intention in negotiating 11-LU-#2 was to establish a learner progression through which employees could become certified to work as PEs. The letter of understanding sets out the timeframe for progression through the program and the wages

attached to each milestone reached in the learner progression. It also sets out the minimum qualifications for being hired into a learner position as the completion of grade 12.

134. The question is, does 11-LU-#2 prohibit the Employer from hiring qualified PEs internally, either by posting a PE position with the requisite certifications as minimum conditions, or through selection of an internal applicant who already has these certifications over a more senior internal applicant who does not? Put another way, are there only two ways by which an employee may enter the Utilities department: either as a learner or as a qualified external applicant when there is "immediate need"?

135. All things considered, I find that is not a reasonable interpretation of 11-LU-#2.

136. 11-LU-#2 does not explicitly state that the learner progression is the only point of entry into the Utilities department. On that basis, the language of 11-LU-#2 can be contrasted with language in other collective agreements wherein entry into a particular department was explicitly limited to particular minimum qualifications such as the language at issue in *Cariboo Pulp* 2011, *supra*, for example. In that case, the collective agreement language at issue was:

> **(A) ENTERING THE DEPARTMENT**
>
> 11. *Applicants for postings to the department will possess a minimum Fourth Class Stationary Engineer's certificate or a completed correspondence course or be actively engaged in a Fourth Class correspondence course.* Actively engaged is defined as having purchased the course prior to the date of posting. Fourth Class Stationary Engineer certificate or a completed Fourth Class correspondence will be considered as equal as far as qualification for entry is concerned.
>
> 12. *Applicants for bottom line jobs in the line of progression shall agree as a prerequisite to entering the Department, to obtain their Fourth Class Stationary Engineer Certificate within eighteen (18) months.*

137. Even in that case, though, where the language expressly sets out that the minimum qualification for entering the department is a fourth class certificate or active engagement in

completing the certification, the employer was still found to have the right to post for more highly qualified internal applicants when the operational needs of the department required it.

138. The union in *Cariboo (2011), supra* argued, as the Union does in this case, that the employer ought to have foreseen the pending vacancy and should not be allowed to bypass the sufficient ability job selection language in their collective agreement by requiring applicants to have higher than the specified minimum requirements for entry into the department when it could have ensured more learners were progressing though the program.

139. Arbitrator Hall dismissed this argument, finding the line of progression had been compromised because not enough employees were upgrading their credentials and that in the circumstances, the employer was entitled to post for more highly qualified applicants.

140. Similar facts were found to allow an employer to hire outside the line of progression in the *Eurocan 2005*, *supra*. In that case, Arbitrator Lanyon considered whether the employer's requirement for a 3rd class ticket violated similarly clear language specifying the minimum requirements for entry into the department. The union's pitched solution to the employer's needs was that the employer should have added more training, more overtime, or more use of temporary employees.

141. The language in those cases can be contrasted with the language in 11-LU-#2 – which specifies the minimum qualifications for entry into the "learner progression," not the Utilities department. It is clear from the words used and the content of the agreement that the intent of the Parties was to set out a learner program whereby employees progress through the certification process to become qualified for available PE vacancies. 11-LU-#2 is silent on whether the Employer can hire outside of the learner progression when it needs to.

142. There is no language in 11-LU-#2 that restricts the right of the Employer to hire for a certified PE when it has need for a fully-certified PE. As noted, to find the existence of such a restriction on management's rights would require clear language to that effect. As demonstrated with the earlier cited cases, even in cases with clearer language stipulating the

minimum qualifications for entry in a *department* rather than a *learner position* as the language at play in this dispute, hiring outside of progression is reasonable where circumstances require it.

143. I accept that the Employer in this case was legitimately concerned about its continued ability to meet its regulatory requirements and that it had made legitimate efforts to train up employees to become certified PEs through its GTC department. It was the Union who objected to this training being a mandatory requirement for entry into the GTC despite the Union's agreement to this requirement in 2018, 2019 and 2020. Regardless, further circumstances outside the Employer's control made it unable to advance learners through the program as quickly as planned.

144. It simply cannot be said, nor is it alleged in this case, that the Employer has engaged in any bad faith manipulation by inserting the PE certifications as minimum qualifications for the impugned postings. These certifications are regulatorily required, and the Employer sought to retain internal employees rather than resort to hiring external qualified applicants.

145. In my view, the Employer reasonably re-established a viable learners program through the GTC as a succession plan for upcoming PE vacancies. Entry into the PE learner progression makes sense given that employees can occupy meaningful positions while undergoing their training and move into actual PE positions as they become vacant. It is consistent with historical practice and makes sense from an operational perspective. It is also not restricted under the Collective Agreement.

146. I accept that the Employer in this case was acting in good faith and reasonably in all the circumstances. Despite its best efforts, it had two vacancies left by 2nd and 3rd class Pes vacating their positions and its learners had not sufficiently advanced through the progression due to unusual and unexpected circumstances which included unexpectedly high employee turnover in the GTC and a global pandemic.

147. The evidence is that, faced with this situation, and the knowledge that the temporary employees upon whom the Employer was relying to meet its regulatory obligations could transfer out of the department due to upcoming permanent full-time vacancies, as well as six eligible retirements in the near future with no certainty about when those eligible for retirement would actually choose to retire, the Employer decided to post for qualified Pes.

148. While the Union in this case has asserted the Employer could have continued to rely on temporary employees while employees commenced and progressed through the PE learner progression, I find there was no requirement that the Employer do so. In fact, I note there is restrictive language in the Collective Agreement about the use of temporary employees that would have required the Union's agreement to deviate from as acknowledged by Mr. McIlwrath in his evidence. The Union's position that the Employer ought to have sought a variance to utilize temporary employees while it maintained PE learners in superfluous positions and hoped they passed their certifications is the Union overstepping its role of enforcing the Collective Agreement and dictating to the Employer how to solve its operational challenges to the Union's preferences.

149. Given the absence of language restricting the Employer from hiring certified Pes when necessary, and in all of the circumstances, I cannot find the Employer was restricted from posting the disputed PE positions with the 4th class PE certification and water tickets as minimum qualifications.

Does 11-LU-#2 Prevent the PE Learner Progression from Commencing in the GTC?

150. 11-LU-#2 is silent in respect of which department's employees will enter the learner progression or what job the learners will hold while they progress through the program. It does not contain language that says the PE progression must start in the Utilities department nor any language prohibiting the Employer from commencing the progression through the GTC – which, of course, did not exist at the time the agreement was negotiated.

151. The historical evidence is that learners historically performed scrubber work while they progressed through the certifications required for PEs and that they did not, as learners, automatically move into PE positions when they became qualified PEs. Rather, they continued to hold their original position performing scrubbing work – whether that was in the Reductions department as it was prior to the Modernization project – or in the Utilities department under the Scrubbers LU or in the period before the learner program was put on hold.

152. I accept that the Union and the Employer agreed in 2017 the PE learner progression would be re-initiated through the GTC. Such agreement is consistent with the historical progression of the learner program and with the Parties' negotiated commitment to a viable in-house learner program. While Mr. O'Driscoll did not have a clear memory of the conversation, I accept that the evidence of Mr. Blackman which was clear and which I note was supported by the evidence of Mr. Owens about what he was told by Mr. Pedro and his actions in creating the Greenbelt Initiative. On a balance of probabilities, I find it more likely than not that the Union agreed the learner progression would be through the GTC.

153. Bolstering this finding is the incontrovertible evidence that after the 2017 conversation with the Union, the Employer posted the GTC operator positions in 2018, 2019 and 2020 stipulating that successful applicants would progress through the PE learner progression without objection from the Union. I do not accept that the Union reasonably believed that GTC operators' progression though the PE certification was not part of the learner progression under 11-LU-#2. In my view, as indicated, I find the more probable explanation is that the Union understood that the GTC would be the entry point for the PE learner progression, but perhaps had not thought through the implications of that in terms of entry into the Utilities department.

154. The learners program benefits both the Union and the Employer. It provides the ability of employees to train in-house for higher paying positions within the company if they so choose while assisting the Employer in retaining employees who may otherwise seek those opportunities elsewhere. It truly is a "win-win," and the Parties should ensure the program is successfully maintained through mutual cooperation.

Is the Employer Prohibited from Hiring a Certified Employee over a Non-Certified Employee Under Article 9.01?

155. Even if the Employer were prohibited from posting PE vacancies with a 4th class PE certification and level 1 water ticket as minimum qualifications – which I have already found is not the case – I find the Employer was within its right under Article 9.01 to select an employee with lesser senior employee already certified with those credentials.

156. Article 9.01 is a relative ability clause, meaning that seniority is the deciding factor only when two applicants are relatively equal to one another in terms of their appreciable skills, competence, efficiency and qualifications. In other words, if the "skills, competence, efficiency and qualifications" of a more junior applicant are "appreciably greater" than another employee with more seniority, the junior applicant will be awarded the position over the less qualified but more senior employee.

157. In its submission, the Union asserted that the Employer cannot chose an applicant for the PE position who is already certified with the regulatorily-required certification for a PE position over an employee who has not completed these certifications. With respect, I disagree with that proposition. There can be no question, that employees who are certified with the regulatorily-required certifications for the PE position have appreciably greater "skills, competence, efficiency and qualifications" than an employee who does not have these certifications, and who will take approximately 2.5 years to complete these certifications.

158. Such an interpretation of Article 9.01 is consistent with the plain language of the provision, as found by Arbitrator Hope in *Re Alcan Smelters & Chemicals Ltd. and Canadian Association of Smelter & Allied Workers, Local 1* (1987), 29 L.A.C. (3d) 58 (Hope) – a case involving the Parties' predecessors and the same Collective Agreement. In that case, that Union argued that a junior applicant should have been awarded a job as a first aid attendant in the Kitimat smelter because of her superior qualifications.

159. The successful applicant in that case had been employed at the smelter at Kitimat for 13 years prior to his appointment but had no previous experience as a first aid attendant. He had, however, been certified by the Workers' Compensation Board (WCB) as a first aid attendant and held a Grade B certificate. The grievor, by contrast, was the junior employee, having less than six years of seniority at the time of the appointment, but having worked as a first aid attendant at the Employer's Kemano power transmission facility, and 16 years of experience total in first aid, including 13 years as a first aid attendant in various capacities and three as a volunteer ambulance attendant. In addition, the grievor held a WCB Grade A first aid attendant certificate, being the highest grade available, and she had held a valid WCB instructor's certificate since July of 1976. The disputed position in that case called for a Grade C certificate.

160. In granting the grievance, Arbitrator Hope noted that Article 9.01 contemplates a job competition wherein the Employer must assess whether an individual applicant's skills and abilities are appreciably greater than another's – not simply whether an applicant meets the threshold requirements for a position as the Employer had erroneously done in that case.

161. I note that there is no language in 11-LU-#2 that expressly requires that the most senior employee who has completed grade 12 be awarded a vacant PE position. Nor is there any language in 11-LU-#2 expressly indicating that the competition process under Article 9.01 does not apply to positions in Utilities. In the absence of clear language limiting the applicability of Article 9.01 to the hiring of PEs, I find the Employer was within its right to determine that applicants who already had completed the certifications necessary to directly move into a PE role were more qualified than those only meeting the minimum requirements for a learner position.

Does Extrinsic Evidence Impact the Outcome of this Case?

162. While the Union relies extensively on extrinsic evidence in this case, I note extrinsic evidence is only helpful in deciphering collective agreement language that is ambiguous or unclear. It cannot alter the plain meaning of language in a collective agreement nor import

words into an agreement that are not present. I have already found that the language does not support the Union's interpretation.

163. In any event, the past practice evidence in this case is not helpful to the Union's position.

164. As I have already noted, the evidence is that PE learners historically performed scrubber work while completing the PE certifications. Since 2018, the Employer was posting GTC positions with the requirement – or later, the option – to complete the PE learner progression. As already stated, I accept the Employer had the agreement of the Union, or at minimum its acquiescence, to start the PE learner progression in the GTC.

165. In my view, nothing turns on fact that the Employer altered, cancelled, and then re-posted the disputed PE positions throughout its discussions with the Union. In making this finding, I accept the Employer's explanation that it was trying to work with the Union to improve relations and reduce the number of issues requiring litigation. It is clear that the Employer worked diligently to try and find solutions to the problems raised by the Union. For instance, when the Union suddenly objected to the PE learner progression as being mandatory for GTC operators after years of posting positions with this requirement, the Employer agreed to make progression through the PE learner program optional for new GTC hires. When the Union objected to the postings for the PE positions because the Employer had listed the PE certification as a minimum qualification, the Employer tried to work with the Union to balance those concerns with its need to meet its regulatory requirements.

166. I accept that Ms. McCracken was new in her position and was unfamiliar with the issues she was discussing. I also find she was somewhat hamstrung by her mandate to approach conflict with the Union in a collaborative and non-confrontational manner to improve upon the history of tension and acrimonious relations between the Parties that had culminated in a recent strike.

167. The evidence does not support that the Employer ever expressly agreed with the Union's interpretation. While I agree it could have and ought to have been clearer in stating its position that its actions were not, in fact, a breach of the Collective Agreement, I accept that the Employer was trying a less confrontational and more collaborative approach with the Union after a lengthy labour dispute and pursuant to a relationship enhancement agreement. The Union suggests the Employer's presentations and meetings about the learner progression starting in the GTC were to persuade the Union to agree to this concept. Respectfully, I do not agree. The evidence supports only that the Company was trying to use rationality to persuade the Union that what it was doing was good for employees and made logical business sense. It is clear the Employer did not agree with, nor was it willing to acquiesce to, the Union's interpretation of the fact that it did not fill the positions for quite some time while it tried to find a mutually agreeable path forward.

168. The Union suggests that the Employer's proposal to change 11-LU-#2 and its subsequent withdrawal of that proposal supports its position that the Employer knew it did not have the right to add qualifications to PE postings. While I agree it would have been preferable for the Employer to clearly state to the Union its position that it believed it already had this right, and that its proposal sought only to resolve any uncertainty the Union had about that, I cannot find the Employer's failure to do so alters the clear and plain meaning of 11-LU-#2. It did, however, exacerbate tension between the Parties and undermined efforts to improve the relationship. It is a well-settled labour relations principle that a good relationship requires clear communication and respectful disagreement. Clarity and transparency are necessary components of functioning labour relations.

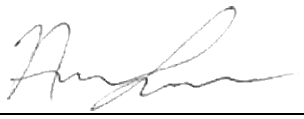
CONCLUSION

169. In sum, I find the Employer has the right to set the minimum qualifications for the PE position and is not restricted by 11-LU-#2 from posting PE positions with 4th class PE certification and a water ticket as minimum qualifications. Further, with or without the certifications as minimum qualifications, the Employer is within its rights under Article 9 to select an internal applicant who is already certified as a PE over an employee with only a grade

12 education or completion of the correspondence course. As stated, an employee who can step immediately into a PE role is a candidate with appreciably greater “skills, competence, efficiency and qualifications”.

170. The Grievances are dismissed. It is so ordered.

Dated at the City of Vancouver in the Province of British Columbia this 3rd day of March, 2023.



Amanda Rogers, Arbitrator