

IN THE MATTER OF ARBITRATION BETWEEN

AINSWORTH ENGINEERED (USA), LLC)
"Employer")
AND) FMCS Case No. 070616-57673-3
USW, LOCAL NO. 1095) Supervisors Performing Bargaining
"Union") Unit Work

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: October 25, 2007

DATE OF RECEIPT OF POST-HEARING BRIEFS: December 14, 2007

APPEARANCES

FOR THE EMPLOYER: Douglas R. Christensen, Attorney
Dorsey & Whitney LLP
50 South 6th Street, #1500
Minneapolis, MN 55402

FOR THE UNION: Gerald A. Parzino, USW Staff Representative
USW Local No. 1095
14664 Forman Street
Forest Lake, MN 55025

THE ISSUE

Did the parties agree to add additional claimed incidents of supervisors performing bargaining unit work to the original filed grievance?

Did the Company violate Article 12, Supervision Working, specifically Sub-Section 12.01 on grievable occasions? If so, what is the proper remedy?

If so, what remedy applies?

BACKGROUND

Ainsworth is a Canadian forest products company for more than 50 years. The Company operates in Canada and the United States, including the Minnesota strand board (“OSB”) mill involved in this arbitration. The Union represents the production and maintenance employees at the Grand Rapids mill.

PERTINENT CONTRACT LANGUAGE

ARTICLE VIII

Working Hours

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- 8.10 Call time is paid for the inconvenience of having to report immediately when off duty for some unforeseen reason for immediate work.
- A. If an employee is called in for work at a time other than the employee’s scheduled reporting time, they shall receive two (2) hours call time at the employee’s straight time hourly rate plus time worked but not less than five (5) hours pay on any one call.
 - B. Employees who are notified at least twelve (12) hours in advance of the start of their newly scheduled shift shall not be entitled to Call Time.
 - C. Call Time will not be paid for recall from layoff.
 - D. An additional Call Time will be paid if an employee, who was called to work to do a job, finishes that job and then agrees to stay and work on a different project. In no case however shall there be more than two Call Times made to the same employee for such call-in period.

ARTICLE XI

Grievance Procedure

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Step 3. If the grievance is not settled in Step 2, it may be appealed to arbitration in accordance with the procedure and condition set forth below by a written notice of such appeal given by the Union to the Company within seven (7) days following the next scheduled Local No. 1095 regular meeting.

The parties agree to follow each of the preceding steps in the processing of the grievance. Any time limits stated will be calendar days unless stated otherwise. The above time limits may be extended or the grievance placed in abeyance by mutual agreement.

- A. Arbitration shall be conducted by a single Arbitrator who shall be selected in accordance with the procedures of the Federal Mediation and Conciliation Service.
- B. The party seeking arbitration shall make application to the FMCS for a panel of seven (7) Arbitrators in the immediate area from which an Arbitrator for the case

- shall be promptly selected by the parties. In each case, the parties shall attempt to agree on an Arbitrator from the agreed list. If they cannot agree, an Arbitrator shall be selected from the list of Arbitrators as follows. A coin shall be tossed to designate who strikes the first Arbitrator off the list. Alternate choices shall follow until one Arbitrator is left. If the Arbitrator selected is unable to serve within a reasonable time, the selection process shall be repeated within 30 days of receipt of the list. Each party may exercise its option to reject one (1) panel submitted by the FMCS and upon rejection of said panel a second panel will be furnished. The Company and the Union may mutually agree to a single arbitrator.
- C. The functions of the Arbitrator shall be to interpret and apply the Agreement and shall have no power to add to, subtract from, or to modify any of the terms of the Agreement (exception 25.03).
 - D. The decision of the Arbitrator shall be final and binding upon both parties.

ARTICLE XII Supervisor Working

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12.01 Shift Supervisors, back-up (relief) supervisors, any salaried employee and Supervisors of the Company may not perform work done by employees in the bargaining unit except in emergencies when the absence of a covered employee could cause the shutdown of any part of the Production, Finishing or Shipping line.

12.02 Supervisors may relieve employees for rest and lunch breaks. On all start-ups, at least one qualified individual and the Supervisor will start up the plant equipment, with the crew scheduled for that shift. All start-up crews shall retain their regular schedules. Start-up crew is the crew scheduled for a full shift following the scheduled start-up.

12.03 No hourly employee will be required or asked to fill in for any salaried or supervisory position due to vacation or other absences, except in emergency cases.

ARTICLE XIX Employee Benefits

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19.01 The Company agrees to maintain the negotiated benefit program for permanent employees as follows:

A. Medical insurance is covered under the Ainsworth Managed Care Plan administered by Blue Cross/Blue Shield of Minnesota.

Single employee pays 10% and Family pays 15% of premium cost which will be recalculated each year.

Monthly Premium Cost for 2006

	Total Monthly Cost	Company Portion	Employee Portion
Single	\$284.00	\$255.60	\$ 28.40
Family	\$786.67	\$668.67	\$118.00

Medial insurance premiums in the event of a layoff: Full-time employees who are laid off will be able to maintain their medical and dental insurance for the balance of the month of their layoff plus the two (2) months following date of layoff by continuing to pay their share of the monthly health care premiums.

LETTER OF AGREEMENT JANUARY 2007 (U-7)

As a resolution to Grievance 15-06 USW #1095 and Ainsworth Engineering USA, LLC, Grand Rapids, MN agrees to the following:

- The four senior employees will each receive 56 hours pay.
- This resolution will apply to total layoff intermittent work opportunities only.
- During the layoff intermittent production work opportunities will be offered to the senior employees who have been qualified and worked the job in the last five years.
- If there is no senior employee who has previously qualified and worked the job, the current senior qualified employee will be offered the intermittent work opportunities.
- During the layoff General Labor work will be offered by plant seniority.

THE MOTION TO LIMIT ARBITRATION

On April 25, 2007, Jim Rasley, the Union President, filed an Issue Form in accordance with Article XI concerning an incident on April 17, 2007. In the section entitled, "Describe Issue," Rasley wrote, "when the millwrights were getting ready to work on a piece of equipment Phil opened up an electrical panel and tested the power lines to see if there was power. This was not an emergency since the line was already down and would not be starting for a long time."

The Union contended that this incident violated Article XII, which states that supervisors "may not perform work done by employees in the bargaining unit except in emergencies..." When the parties were unable to resolve the disputed incident raised in the Issue Form, it was given grievance number 8-07 and appealed to the next steps, and then to arbitration.

At the hearing, the Union introduced a document entitled "Supervisors Working Grievance Issues List per Darryl Showen." This list details eleven separate incidents when supervisors allegedly performed bargaining unit work, including ten incidents for which no Issue Forms or grievances were filed. Rasley testified that Showen (who was unavailable to testify because of a serious medical condition) told him that he did not need to follow the requirements of Article XI if other instances arose when the Union believed a supervisor performed bargaining unit work; he could add those instances to grievance 8-07.

The only evidence, other than Rasley's testimony, that the Union offered in support of the alleged waiver of the provisions of Article XI was six e-mails in which the Union contends the Company agreed to waive the provisions of Article XI. The first of those e-mails, dated April 18, 2007, discusses the incident in grievance 8-07, and it contains no specific waiver. The next e-mail is addressed to Bob Lignell and dated June 20, 2007 and states that the Union wants "to add the supervisors doing labor work, and the supervisors troubleshooting the debarker trying to get the sizer working to the grievance concerning supervisors doing electrical work." The e-mail itself contains no specific discussion of any waiver of the provisions of Article XI.

In the next e-mail the Union introduced, dated July 16, 2007 and addressed to Claude Leonard, states "Add Brian Samala working with Mike getting the bottles unloaded to the grievance concerning supervisors doing our work." The e-mail itself contains no discussion of any waiver by the Company of Article XI.

The next e-mail the Union offered, addressed to Claude Leonard and dated July 17, 2007, references a concern with "supervisors doing our work," another reference to the incident discussed in the July 16 e-mail – but does not describe what the exact concern is and does not request that it be added to grievance 8-07. The e-mail itself contains no discussion of any alleged waiver by Ainsworth of the provisions of Article XI.

The next e-mail the Union offered was a June 27, 2007 e-mail to Claude Leonard that states, "last Monday night someone was in the Liebherr's." Once again, the e-mail itself does not contain a discussion of any waiver by the Company of the provisions of Article XI. There is no request that the incident discussed in the e-mail be added to grievance 8-07.

Finally, the Union offered an e-mail addressed to Claude Leonard dated August 25, 2007 stating, "I am still waiting to hear from you on who did the welding on the golf cart." Once again, the e-mail itself does not contain a mention of any alleged waiver of the provisions of Article XI and no request that the incident be added to grievance 8-07. The Union offered no document in which the Company agreed to do so.

Thus, other than Rasley's testimony concerning Ainsworth's alleged waiver of the provisions of Article XI with respect to the ten additional incidents the Union's only evidence presented in support of this alleged waiver was six e-mails. Those e-mails only reference four of the ten additional incidents the Union presented at the hearing. None of those e-mails proved that Ainsworth agreed to waive the provisions of Article XI.

Despite the fact that there are eleven incidents referenced in Union Exhibit 1, the Union only presented testimony regarding five of those incidents. The Union presented no evidence regarding the six other alleged incidents referenced in Union Exhibit 1.

Rasley testified regarding the first incident referenced in Union Exhibit 1, the particular incident described in grievance 8-07. He testified that he was told that Phil Daigle, a supervisor, opened an electrical panel to test the power lines to determine if there was power. Rasley contended that this was bargaining unit work that should have been performed by a senior

electrician and that the Company should have called a senior electrician in from layoff to perform the work.

Randy Hemphill, a Union press operator, testified about the third incident referenced in Union Exhibit 1. Although Union Exhibit 1 references this situation as occurring on both May 7 and May 8, 2007, Hemphill only testified about it occurring on one occasion.

The next incident referenced on Union Exhibit 1 that the Union offered testimony about was the June 25, 2007 incident involving the Liebherr machine. Both Rasley and Ricky Erickson, an equipment operator, testified that, on or around June 25, 2007, a non-Union employee moved the Liebherr.

The Union also offered testimony regarding the sixth incident referenced as Union Exhibit 1 – the July 2007 work involving hydraulic bottles. Both Rasley and Jenny Larson, a Union plant utility worker, testified about this incident on behalf of the Union, while Randy Richardson, a supervisor, testified about it on behalf of the Company. The Union's witnesses contended that the rigging of slings, the unloading, and the uncrating of the hydraulic bottles was all bargaining unit work, that supervisors improperly performed some of this work, and that the Company should have called Union members in from layoff to perform all of the work. The Union's witnesses compared the hydraulic bottle work that was performed in 2007 to similar work that was done in 2006.

Richardson, who was present during the majority of the work performed, testified that Union members performed the sling rigging and unlading work connected with the hydraulic bottles in 2007, just as they had in 2006. He acknowledged that, for safety reasons, he assisted Mike ZumMallen, a Union member, with some aspects of the sling rigging work as he had done with similar work on a number of occasions. Richardson testified, without contradiction, that there was no uncrating work connected with the delivery of the hydraulic bottles in 2006, and, thus, no uncrating work was performed by anyone in 2006.

Richardson further testified that the Company has always treated uncrating work as receiving work which is not work covered by the Collective Bargaining Agreement. Consequently, the majority of the uncrating work connected with the delivery of the hydraulic cylinders in 2007 was properly performed by Ainsworth's non-Union receiving employees and supervisors. Additionally, in an effort to provide the Union workers on duty at the time with extra work, Ainsworth permitted them to assist with the uncrating work.

The final incident referenced in Union Exhibit 1 that the Union offered testimony about was the last incident referenced on that document – an occasion on August 13, 2007 when the Union contends that a supervisor rather than a millwright welded a piece of metal on a golf cart. Rasley testified that management told him that a supervisor welded the roof support on the golf cart because it broke and because the cart was unsafe to operate in that condition. Rasley admitted that the welding work in question would have taken only a few minutes to perform, regardless of who performed it.

ON THE MOTION TO DISMISS

At the hearing the company challenged any and all additional Union complaints of supervisors working other than documented in original grievance filed on April 25, 2007. When in fact the Union provided proof the mutual agreement to add additional complaints to the April 17, 2007 grievance did exist. At the hearing, the Union presented this proof through the testimony of Local #1095 President Rasley and Exhibits U-2, 3 and 4. President Rasley's testimony indicated both verbal communications and written e-mail correspondence between him and Company managers took place within the agreement. Not once did any Company manager who was copied on the e-mail indicate they would not accept the additional complaint or indicate additional grievance's needed to be filed for any additional violations. Nothing presented in the Company's case at the hearing indicated any manager did not accept any additional complaints or issues. In fact under U-2, p. 3, the July 16, 2007 reply e-mail from Claude Leonard Company Manager thanks President Rasley for his July 16, 2007 e-mail adding the violation of salaried employee Brian Samala unloading hydraulic bottles to the supervisors doing bargaining unit work.

The Company made it very clear to the Union they knew they were violating the contract and were going to continue to violate the agreement due to economic concerns. Acting Mill Manager Dave Sorby made the following statement at the June 15, 2007 grievance meeting, "If we strictly follow the Collective Bargaining Agreement we have a problem economically, we are not going to recall employees for every little job." The Union was able to verify this statement through the testimony of President Rasley and Union Exhibits U-5 and 6. Staff Representative Parzino's notes and Local #1095 Recording Secretary Mike Thompson's written statement.

Through the testimony of Union witnesses Jim Rasley, Ricky Erickson and the written statement and daily log of Mobil Mechanic Mike ZumMallen. Again the Union's testimony and exhibits document that Supervisor Randy Richardson was put on notice he was violating the contract in the work he was performing yet he and Brian Salmala a salaried storeroom employee continued to co the work daily.

Through the assistance of a Federal Mediator and fulfillment of Article VI interpretation of Contract, the Company and the Union were able to reach a grievance resolution and sign a Letter of Agreement in January of 2007 for intermittent work opportunities. In an effort to simplify the recall procedure and reduce training costs the Union agreed to surrender a portion of our seniority rights and work with the Company on this Letter of Agreement. What we didn't expect was the Company was going to clearly and willfully violate the contract and have no intentions of using the Letter of Agreement.

POSITION OF THE UNION

Although the Company challenged any and all additional issues and or violations added to the original April 17, 2007 grievance. At the hearing, the Company's case only challenged one of eleven union documented violations. The single violation challenged and introduced through only Company witness Supervisor Randy Richardson is a violation which was in

addition to the original April 17, 2007 grievance. The Company challenged and attempted to justify the July 17-27, 2007 violation of rigging, unloading, and uncrating of hydraulic bottles.

In Supervisor Richardson's testimony he attempted to claim operating power equipment such as saws, cutting shipping banding, installing links, slings and cables (rigging) and removing blocking from shipping containers in salaried work. This work is clearly bargaining unit work. He further tried to justify the salaried storeroom person does this type of work on a regular basis. Richardson also testified he personally assisted in this same manor for the arrival of the hydraulic bottles in 2006 with two union millwrights.

Supervisor Richardson's testimony was challenged by the rebuttal testimony of Union witness Jenny Larson. Larson who works as a plant utility person and works in multiple areas of the mill did in fact work on the arrival and unloading of the 2006 hydraulic bottle shipment. Larson's testimony indicated that not just the millwrights worked on the 2006 hydraulic bottle unloading. When in fact it was two millwrights and two plant utilities, one of which was her, and Randy only recorded and documented the materials that were received. Larson further testified she regularly works in the Shipping Department and the shipping job responsibilities include both shipping of finished product and also receiving of raw materials, parts and equipment. The arbitrator heard no other challenges from the Company for the original April 27, 2007 Supervisor doing electrical work violation or any of the other violations addressed by the Union and agreed by several different management personnel to be included in the original April 17, 2007 grievance.

The Union has clearly shown through their witnesses, testimony and exhibits that the Company clearly and willfully violated Article 12.01 of the Collective Bargaining Agreement. The Company did not even challenge their violations in ten of the eleven Union complaints and clearly admitted with the attempt to justify or minimize their willful violations to the labor agreement in the other.

Therefore, USW Local #1095 respectfully requests the Arbitrator to rule in its favor, sustain the Union's grievance of all eleven documented violations committed by the Company and honor the Union's Settlement Desired as presented at the hearing. Including, any settlement award should count as hours worked for all employees' compensated for the Company's violations. And any settlement award should be considered a violation of the Collective Bargaining Agreement, holding the Company liable for the cost of the arbitration hearing as defined in Article 11.02H, p. 19, of the contract.

POSITION OF THE COMPANY

The Union has not met its burden of proving by clear and substantial evidence that any of the incidents it presented at the hearing, other than the specific incident referenced in Grievance 8-07 are arbitral. The parties have provided for a grievance procedure in their Collective Bargaining Agreement and have limited an arbitrator's authority to only those matters which have properly been carried through the grievance procedure. The Union improperly attempted to broaden the scope of grievance 8-07 by asserting additional issues, and arguments at the

arbitration hearing. The Union should not be allowed to advance additional issues for the first time at the hearing.

The Company was unfairly disadvantaged by the Union's improper tactic, and it did not have a fair opportunity to prepare to meet those new and untimely claims, issues, and arguments. Arbitrators have consistently disallowed the presentation of such claims in such circumstances.

When the issue of timeliness is raised by a party to a grievance, the arbitrator must consider this issue prior to evaluating the merits of the dispute. Where the parties to a Collective Bargaining Agreement have established definitive time limits, an arbitrator is obligated to enforce the negotiated time limits. A grievance that is not timely filed under the terms of the parties' Collective Bargaining Agreement is not arbitral.

In general, arbitrators will strictly construe contract provisions setting forth time limits for processing grievances through the various procedural steps and to arbitration, and will dismiss grievances where there has been a failure to observe such limits.

Additionally, an arbitrator's authority is limited to a determination of the merits of the claim of contract violation alleged in the submitted grievance. Arbitrators are careful not to expand the scope of a grievance at the arbitration hearing absent a strong indication that the issues were within the reasonable contemplation of the parties during the processing of the matter through the steps of the grievance procedure.

In the present case, the Union improperly attempted to expand the scope of the arbitration hearing beyond the one specific incident referenced in its written grievance. Arbitral authority makes clear that any issue which is not stated on the face of a written grievance or discussed by the parties during the processing of that grievance should not be addressed by the Arbitrator. The Union has not presented the required clear and substantial evidence that Ainsworth waived the untimeliness of the ten issues referenced in Union Exhibit 1 that were not referenced in grievance 8-07. Nor has the Union presented clear and substantial evidence that Ainsworth agreed to expand the scope of the Arbitrator's authority to allow him to consider any additional incidents not specifically mentioned in grievance 8-07. The Company's response to grievance 8-07 shows that the parties' discussions with respect to the grievance concerned only the incident detailed in the written grievance.

There is not clear and substantial evidence that any of the ten other incidents that the Union improperly included on Union Exhibit 1 were reasonably contemplated by Ainsworth as falling within the scope of grievance 8-07. Therefore the Arbitrator should not consider those subsequent incidents. To do so would allow the Union to circumvent the grievance process and the Company's right to notice of the Union's claims prior to the Arbitration hearing. The Arbitrator should limit his consideration here only to the specific incident referenced in grievance 8-07.

Company's Case on the Merits

The burden of proof has been described as being the “burden of persuasion.” The burden of persuasion is that party’s duty to make such an evidentiary showing that it is entitled to a decision in its favor. The amount and quality of evidence necessary for a favorable decision is often referred to as the “quantum of proof.”

The general rule followed by arbitrators in non-disciplinary proceedings is that the grieving party bears the initial burden of presenting sufficient evidence to prove its contention. Therefore, a union usually must demonstrate initially that the action taken by an employer is inconsistent with some limitation contained in the Collective Bargaining Agreement.

Many arbitrators have ruled that employers have not violated collective bargaining agreements when a supervisor performed bargaining unit work for a short or de minimus period of time. “The doctrine of de minimus is generally applied by arbitrators where it is determined that the contract violation is trivial or insignificant, in such situations, a remedy is not necessary.” While there is no universal rule for what is de minimus, “[m]ost arbitrators have found that, to qualify under the de minimus doctrine, a supervisor’s performance of bargaining unit work must be of extremely short duration, typically no more than 30 minutes.” Ainsworth did not know that the other claims, issues, and arguments presented by the Union at the hearing were grievances, and they were not processed as such and they should not be considered by the Arbitrator.

Supervisors doing electrical work, opened electrical cabinet checked disconnects. The Company does not dispute that on April 17, 2007 supervisor Phil Diagle performed approximately 60 to 90 seconds of work that would typically be performed by a Union member. However, the de minimus or minor nature of the work should excuse the incident.

Daigle’s actions were a reasonable response to the circumstances and they did not have the effect of damaging the bargaining unit. Daigle merely performed an extremely small amount of work which, for efficiency reasons, needed to be done without delay. The quantity of the work involved and the effect on the bargaining unit was de minimus.

In addition, the Union offered no evidence that any qualified Union member was available at the time to perform this work. The Union failed to offer any such evidence, the Union’s claim of a contract violation with respect to this incident must be denied.

In sum, the Union’s claim of contract violation with respect to this incident should be denied because the work performed was de minimus and because the Union failed to prove up all the necessary elements of its claim.

Supervisor doing electrical work, adjusted log sizer turning PLC. The Union failed to offer any evidence regarding this May 21, 2007 alleged incident. For that reason, the Union’s claim of a contract violation with respect to this alleged incident must be denied.

Supervisor doing electrical work, adjusted PLC to keep line running to cut down oversized board. The testimony at the hearing about this May 7 and August 8, 2007 incidents showed that, if Diagle performed any bargaining unit work, he spent, at most, a few minutes doing so, which, for efficiency reasons, needed to be done without delay. It would be inequitable and improper to penalize the Company under such circumstances and any such work which was performed should be excused under the de minimus doctrine.

Supervisor operating heavy equipment operated Liebherr. The evidence presented regarding this June 25, 2007 incident showed that Supervisor Hanson drove the Liebherr, a piece of equipment leased by Ainsworth, around the parking lot for a brief period of time to determine whether he recalled how to operate it, in case he needed to do so in an emergency. Nothing about this brief operation of the Liebherr implicates any bargaining unit work.

Supervisor rigged slings, unloaded and uncrated hydraulic bottles, millwright and general labor work. The evidence presented at the hearing concerning this incident showed that Union members performed the bargaining unit work connected with the unloading of the hydraulic bottles and supervisors and receiving employees (with some assistance from union members) performed the non-bargaining unit work of uncrating the hydraulic bottles.

The Union's attempt to compare the 2007 hydraulic bottle work with 2006 hydraulic bottle work when the Union contended Union members did all the work as unpersuasive. Richardson explained that, in 2006, there simply was no uncrating work, and, thus, the Union's comparison was not a valid comparison. Richardson also testified that receiving and uncrating work has never been treated as bargaining unit work.

With respect to the rigging of slings, he testified that, for safety related reasons, from time-to-time, he provided some assistance to ZumMallen. To the extent Richardson's involvement with rigging slings in connection with the 2007 hydraulic bottle project can be seen as the performance of bargaining unit work, it was the performance of a relatively small amount of work which, for safety and efficiency reasons, needed to be done without delay. It would be inequitable and improper to penalize the Company under such circumstances, and any sling rigging work performed by Richardson should be excused under the de minimus doctrine.

Moreover, the Union offered no admissible evidence concerning the amount of work done by non-Union employees that it contends should have been done by Union employees. The absence of this proof is fatal to the Union's claim. The Union also offered no evidence that any qualified Union member was available to perform the work at issue.

Supervisor painted board, to use up paint general labor work. The Union failed to offer any evidence regarding this August 4-5, 2007 alleged incident.

Supervisors sorted and inventoried coveralls, plant utility work. The Union failed to offer any evidence regarding this August 6-7, 2007 alleged incident.

Supervisors ran condensation line from air condition to drain, millwright work. The Union failed to offer any evidence regarding this August 8, 2007 alleged incident.

Supervisors removed condensation line from air conditioner to drain, millwright work. The Union failed to offer any evidence regarding this August 8, 2007 incident.

Supervisor worked golf cart, millwright work. The Company does not dispute that this August 13, 2007 incident occurred and does not dispute that for safety-related reasons, a supervisor spent a few minutes welding a broken roof support on a golf cart. The supervisor's actions on that day were a reasonable response considering the circumstances and they did not derogate the bargaining unit. The de minimus nature of the work should excuse the incident. In addition, once more, the Union presented no evidence that any qualified Union member was available to perform the welding work in question.

The expense of the Arbitrator should be borne by the Union. Article XI of the parties' Collective Bargaining Agreement provides that "[t]he expenses of the Arbitrator shall be borne by the party against whom the decision is rendered." (See Joint Exhibit 1, Article 11.02H). Obviously, if the Arbitrator denies the Union any relief on all of the eleven incidents the Union referenced in Union Exhibit 1, the decision will have been rendered against the Union. In the event the Arbitrator chooses to award the Union some relief with respect to some of the eleven incidents the Union brought forward, Ainsworth requests that the Arbitrator provide the parties with guidance as to which party, on balance considering the number of claims the Union prevails on as compared to the number of claims on which it sought relief, the decision is rendered against.

DISCUSSION AND OPINION

The threshold issue in this matter concerns the Company's motion to dismiss all claims alleging the performance of bargaining unit work by supervisory personnel which were not specifically mentioned in the grievance marked 8-07. The motion to dismiss as non-arbitrable other claims detailed in Union Exhibit 1 relies on the Company's contention that the labor contract's procedural requirements for correct filing and processing of such claims were never met by the Union nor were these procedural requirements ever waived by the Employer.

The Union's defense against the challenge to arbitrability of the ten claims listed in Union Exhibit 1 but not reduced to written Issue Forms or grievances rests on the testimony of local president Rasley and the e-mail communications with Company managers contained in Union Exhibits 2,3 and 4.

Analysis: The role of an arbitrator is to discern the true intent and purpose of contract language in dispute and to give force and effect to such bargained for purpose. I need not look far or search deeply to discover the purpose and intent of Article XI which sets for the parties agreed upon Grievance Procedure.

Section 11.01 states at the outset:

The purpose of this section is to provide an orderly method for the settlement of a dispute between the parties over the interpretation, application, or claimed violation of any of the provisions of this Agreement.

It should be noted that while the Article XI goes on to provide for deviating from the procedure “by mutual agreement,” no penalty is mentioned for failure to comply with the specific form or time limits. In short, the Collective Bargaining Agreement expressly contemplates the possibility of waiver but not of automatic forfeiture.

The question thus becomes, “Did the Company waive the formal filing requirements of the Grievance Procedure? To correctly answer this question requires determining the fundamental purpose of providing that:

all grievances must state specifically what the alleged employee is seeking and specify the article or section of the contract that has been violated.

The purpose and intent of this language is obviously to provide the Employer with clear and timely notice of sufficient particulars as to permit an informed response to the claim. The Company’s challenge to arbitrability argues that the Union’s record of e-mails asserting various violations of the contract fails to provide sufficient advance notice as needed for the Company to mount an informed and effective defense.

Analysis: In the first instance, it is important to respond to the Company’s insistence that the Union prove by clear and substantial evidence that management waived strict compliance with the grievance filing requirements for ten of its asserted incidents of supervisors performing bargaining unit work. This line of challenge would better apply in more settled circumstances than are presented in this matter.

The sparse facts describe a plant where regular operations were suspended, the majority of the work force on lay off, including local union leaders, supervisors, and only sporadic work activity – usually related to maintenance and new installation – being performed. In sum, an industrial relations setting far removed from business as usual, where strict compliance would be less difficult to achieve.

The e-mails in evidence as Union Exhibits 2, 3 and 4 clearly reflect the difficulties in maintaining customary union-management communications during this period of disruption in mill operations. At one point acting manager Claude Leonard advises local union president Jim Rasley on August 27, 2007 that “As it was mentioned last week with the meeting with Catherine keep everybody in the loop same as before. But you can take Dave Sorby and Darrel Showen off the list as they are no longer employees of Ainsworth.” It should be noted here that as of April 18, 2007, Sorby and Showen were the chief management contacts for the grievances under discussion at the time (Union Exhibit 2).

Rasley earlier had asked Leonard on June 27, 2007 “with Dave, Darrel and Bob no longer at the mill shouldn’t we take them off the mailing list or are they still keeping up with what is happening from their home computers?” (Union Exhibit 3).

Over this same span of time the composition of the union leadership team was also undergoing substantial changes as reflected in Rasley's e-mail to Leonard of July 17, 2007 stating: "Also please add Jenny Larson (Matson) to your union officer distribution list. We have decided to have an additional officer since most of the (Union) officers are working elsewhere at this time." (Ibid.)

These obvious difficulties in maintaining a stable and consistent group of representatives on both sides of the grievance processing machinery adds even greater credibility to the Union's position that the Company waived strict adherence to the written contractual grievance filing requirements. Further, the realities of such shifting casts of characters involved in discussion of the working supervisors issue with many of those formerly involved no longer available to testify about accommodations sought and reached in this regard renders unrealistic and unreasonable the Company's demand that the Union now produce "clear and substantial proof of waiver."

Instead of the rigorous burden of proof exemplified in the arbitration citations offered by the Company in support of its call for strict compliance, under circumstances not even remotely comparable to those in the instant case, this present analysis will focus on the intent of the grievance filing requirements rather than on merely rigid procedural formality in the face of a highly unsettled situation.

Accordingly, I find that Rasley's sworn testimony firmly squares with the gist of communications exchanged between him and management representatives over the period of the several months in spring and summer of 2007 when the subject matter of the instant grievances over supervisors performing bargaining unit work was under active discussion. It must be emphasized that the key concern and intent of negotiated grievance procedures is to accomplish due notice in the interest of facilitating voluntary settlement where possible and where these efforts fail to provide the Employer full opportunity to investigate into the facts and prepare its position should the issue proceed to arbitration.

Turning to the question of waiver, the note of June 20 shifts the management contact persons from Showen and Sorby to "acting contact" Robert Lignell. Rasley, per his testimony that Showen advised the Union not to bother filing additional Issue Forms but rather to simply add to list of supervisors doing bargaining unit work incidents, writes "We want to add the supervisors doing labor work and the supervisors trouble shooting the debarker trying to get the sizer working to the grievance concerning supervisors doing electrical work."

It seems apparent that Rasley would not have presumed to depart in this informal way from the requirement of an Issue Form for the debarker incident without an understanding that it was appropriate under the circumstances to do so. Conspicuously, neither Lignell nor any other management representative raised any objection to Rasley's manner of expanding on the list of incidents it was grieving in regard to this subject matter.

Quite to the contrary, after Leonard succeeded Lignell as named management contact for grievance discussions, Rasley continued to act in submitting more incidents to this list in the informal manner consistent with the existence of the claimed waiver, e.g., he wrote to Leonard

on July 16 “Add Brian Samala with Mike getting the bottles unloaded to the grievance concerning supervisors doing our work.”

All possibility of doubt that the Company waived strict compliance with the filing of Issue Forms for additional allegations of supervisors doing bargaining unit work dissolves in light of Leonard’s response to the Rasley request that Samala being added to the grievance list. Rather than raising any procedural objection to Rasley’s latest request or denial of waiver, Leonard accepts the addition with courteous thanks stating: “Thank you for pointing out the addition of Brian Samala to your grievance concerning management performing union related work.”

Leonard clearly investigated the incident or at least knew of the salient facts involved because he went on to answer Rasley concern as follows: “Brian is a member of receiving in the stockroom and his duties are to perform the verification and inspection of parts for mill process. We are pleased to verify that union members did the required unloading in a safe, timely and successful manner on the first two containers.”

There being no question remaining over the issue of waiver by authorized management of the strict procedural requirements of Article XI, there remains, however, the issue of whether under the informal communications followed sufficient due notice was provided to the Company to allow for adequate investigation and preparation of defense against the claims raised in each of the incidents grieved. This last concern will be addressed in the review of the separate incidents grieved, on the merits.

Ruling

Based on the foregoing discussion and analysis, the Company’s Motion for Summary Dismissal for lack of arbitrability is hereby denied.

On the Merits

While summary dismissal of the entire grievance package would not be justified, there are, in fact, certain flaws in the addenda to the original incident involving opening of the electrical panel. Specifically, the reported operation of the Liebherr equipment on June 27, 2007

Analysis. The credible testimony described the mere movement around the yard area of the Liebherr equipment by a supervisor for the sole purpose of familiarizing himself with a piece of machinery whose operation he was assigned to direct. The dispositive fact contractually is the Article 12.01 prohibition against the performance of bargaining unit work by supervisory personnel.

Union Exhibit 3 shows that Leonard investigated this incident and informed Rasley that the supervisor involved “did not perform any work just drove it around by the parking lot by the garage and parked it.” The Union presented no testimony to rebut this version of the incident.

In the absence of the actual performance of some bargaining unit work, the claim for remedy in this incident is hereby denied.

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The Union presented two incidents involving essentially the same performance of bargaining unit work. Those two incidents dated April 17, 2007 and May 18, 2007 both assert that a supervisor opened an electrical cabinet for the purpose of checking possible line disconnects by testing wires within an electrical panel.

The Company does not dispute that these tasks constitute bargaining unit work but argues that the short time involved – less than two minutes – falls within arbitral limits of what can and should be remediable under the de minimus doctrine. The Union contends for payment of the contractual call-in rate of five hours at the senior electrical wage rate.

Analysis: The facts of these situations show that no licensed and qualified bargaining unit electrician was available at the mill site at the time these tasks were performed and that considerable delay in carrying out other work activities would have resulted from delaying the necessary testing and checking of the circuit panel while calling out a bargaining unit electrician. Further, it was not disputed that the tasks were performed by a supervisor who is licensed and experienced to do so.

This kind of claim of supervisors briefly performing unit work appears with some frequency in arbitration. The strong emphasis in published awards apply a common sense analysis to such claims. That well established analysis holds that bargaining unit work of extremely brief duration performed in the interest of avoiding delays in other work activities do not qualify for any wage payment remedy.

The logic to this line of reasoning relies on an ancient legal adage: De minimus non curat lex, better known simply as – a claim can be so minor as to have no realistic remedy in law. When the de minimus doctrine joins with what is commonly known as “shop law” (the special province of arbitrators) the result is that the needs for common sense efficiency must prevail over more legalistic formalities is essentially the same reasoning that prompted the Company’s Motion to Dismiss.

On the basis of the foregoing analysis, the Union’s remedy plea over the electrical testing and checking performed by a supervisor on April 17 and May 18, 2007 is hereby denied.

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Additional claims submitted by the Union on behalf of a senior electrician cover the following dates and alleged incidents:

5/7/07:	Adjustment for timer on the log sizer
5/7/07:	Adjustment of PLC control for the saw line while cutting OSB panels
5/8/07:	Adjustment to PLC control for the saw line while cutting OSB panels

The Company's denial of claims for bargaining unit work admittedly performed by supervisory personnel on the dates and on the work activities listed above, argues that either the Union presented insufficient evidence on the amount of time involved or where any such alleged work was done by Supervisor Diagle it was for so brief a time as to fall under the de minimus doctrine.

Analysis: The testimony of union steward Hemphill involving his observations of Daigle's role in working on schematics and in making multiple adjustments over a two day period was entirely credible and on the most part withstood vigorous cross examination.

Hemphill did modify his estimate of the amount of time required to perform the disputed work. Further, the testimony on the time required to adjust the timer on the log sizer was also indecisive.

The problem remains that remedy determinations should be based on objective, verifiable data and the testimony of Union witnesses use generalized estimates – little better than best guesses. This fact creates a genuine arbitral dilemma consisting on the one hand of a firm finding of contractual violation and on the other of an imprecise basis for calculating remedy.

Faced with such a dilemma arbitrators commonly find that the best solution consists of remanding the issue of remedy to the parties for voluntary settlements. If the parties fail to reconcile their differences over remedy, then it becomes the responsibility of the arbitrator to impose such settlement as can be reasonably fashioned within the limitations of the information adduced in the record.

That is precisely the course hereby directed in the instant case.

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This same principle applies to the following claims remaining where remedy should be afforded:

8/09/07:	Installation of condensation piping for air conditioning unit
8/10/07:	Removal of condensation piping for air conditioning unit
5/13/07:	Welding performed on the golf cart

Analysis of Contractual Violation Charge

Insufficient information was presented by the Union regarding the charge of supervisory performance of work on the air conditioning unit. That part of the claim, relating to bargaining unit work allegedly performed by a supervisor on 8/09-10/07 is dismissed.

The Company argues that work on welding the support for the golf cart support took “only a few minutes.” As a former plant manager familiar with welding procedures, I know that it takes more than just a few minutes just to get gear ready for welding parts. The actual

operation, done properly, requires a pre heat, application of flux, placement of the actual weld using the torch and follow-up which could include cool down, filing, testing and clean up of tools and work area.

In like vein, the work performed by supervisors on the rigging, unloading, cleaning, placement of press cylinders or bottles was sometimes continuous and at other times intermittent making it difficult to assess the remediable portion of time involved. Absent uncrating, which has been shown to be non-bargaining unit work, there was, however, significant amounts of time obviously spent by supervisors on performance of work that should have been assigned to using more bargaining unit labor employees on the clock.

Also labor classification employees should also have been employed for several hours of work sorting coveralls and painting boards in early August.

DECISION

In remanding the few incidents noted, for voluntary resolution, I must observe that the costs of this arbitration will have exceeded the price of remedy by a substantial margin. I have no intention of adding to costs by granting a continuance for briefing on remedy – suffice to note that the parties will be well served by accommodating their differences and bringing this matter to closure in the interests of brighter future for this mill and its workers.

In the unlikely event, however, that the parties are unable or unwilling to reach agreement on remedy, I am prepared to fashion a directed remedy on the basis of whatever information on the probable amount of time involved in the various work activities as can be gleaned from the record.

I retain jurisdiction for the sole purpose of remedy, if needed, for a period of ninety (90) calendar days from issuance of this award.

The final disputed item concerns which party bears the fee and expense costs of the Arbitrator. The Company proposes that the Union should be deemed the loser, and therefore be responsible for the total bill because in the Company's calculation the majority of its claims were denied.

In plain truth, I find the position that any win/loss ratio can be nicely calibrated unrealistic. The amount of space dedicated to denial of the Company's arbitrability challenge, where the Union prevailed, is about equal to the entire analysis of the separate incidents on the merits.

Accordingly, the sensible answer to the issue of which party should be deemed the loser for purposes of responsibility for payment of the Arbitrator's bill is that there are no winners or losers in this contentious dispute. Rather, both must share equally in the failure to reach voluntary settlement of this array of essentially minor but vexing disputes that ultimately cost far more to arbitrate than to voluntarily reconcile.

1/14/08
Date

John J. Flagler, Arbitrator