IN THE MATTER OF AN ARBITRATION

Pursuant to the *Labour Relations Act, 1995*

Between:

OUTDOOR OUTFITS LIMITED
(the Employer)

- and -

UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175
(the Union)

Re: Union Policy Grievances: Union Representation Visits
Grievances: R2-19-0868, R2-19-0909 and R2-19-1041

A W A R D

APPEARANCES:

For the Employer: Muneeza Sheikh, Counsel
Michael VanderMeer, Student-at-law
Franklin Switzer
Molly Leung

For the Union: Brittany Ross-Fichtner, Counsel
Adam Veenendall, Student-at-law
Christina Mayberry
John DiNardo

The hearing of this matter was held in Toronto on December 17, 2019, and continued by way of written submissions received up until January 27, 2020.

This Award deals with the parties' respective rights with regard to their "Union Representation" clause.

The Employer, Outdoor Outfits Limited, is a uniform outerwear manufacturer. It is located in downtown Toronto. The workplace has been in operation for almost 75 years and has continually been owned and managed by the Switzer family. The employees have been organized for over 60 years. They were originally represented by the United Garment Workers of America, who later merged with UFCW, Local 175 (the Union). This Local has represented the employees for the last 20 years. The bargaining unit is comprised of approximately 23 employees who perform all the cutting, operating, pressing and general work.

Christina Mayberry is the current Union Representative assigned to this bargaining unit. Franklin Switzer is the Vice President of Outdoor Outfits.

The parties' Collective Agreement expired on April 30, 2016. At the time of this hearing in late 2019, the parties were in the midst of prolonged and difficult negotiations over the terms of their contract's renewal and they were engaged in proceedings pending before the Ontario Labour Relations Board.

The dispute that gave rise to this hearing concerns Article 4:

> ARTICLE 4 – UNION REPRESENTATION
>
> 4.02 It is understood and agreed, that the Union Business Representative will be admitted to the factory premises during working hours, when on Union business, after permission has been given by Management and such permission will not be unreasonably withheld.

Other relevant provisions of the Collective Agreement, including the Preamble, are:

> WHEREAS THE PARTIES desire to co-operate in the establishment of conditions within the industry which will tend to secure to workers a living

wage and to the Employer a fair and adequate adjustment of disputes which may arise between the parties within a view to securing uninterrupted operations and for the objectives of maintaining general stabilization of the industry.

BOTH PARTIES entering into the Collective Agreement so hereby declare their approval of and acceptance of and agreement to abide by the following:

. . . . . .

Article 5 – Management Rights

5.01 The Union agrees that it is the exclusive function of the Company:

(1) to conduct its business in all respects in accordance with its commitments and responsibilities, including the right to generally manage the work in which it is engaged . . . .

(3) . . . . . It is further agreed that these functions shall not be exercised in a manner inconsistent with the expressed provisions of this Agreement.

Article 8 – Garment Pricing

8.02 The rate for piece work on new styles or operations shall be agreed upon between the Manufacturer, the Union Representative and a Committee to be elected as herein provided to be known as the "Shop Committee".

8.10 The Company will provide the Union Business Representative with access to its premises for the sole purpose of initialing its rate sheet. . . .

Article 19 – Leave of Absence

19.01 Employees shall be granted leave of absence for Union business for a period of up to one (1) year, without loss of seniority and without cost to the Company.

On Wednesday, August 28, 2019, Ms. Mayberry sent an email at 4:56 p.m., giving Franklin Switzer notice of her intention to have a "Unit visit" the following day at noon. Mr. Switzer responded on Thursday, August 29th, at 9:00 a.m., as follows:

> I am unaware of any grievance or other union business at our office at noon tomorrow. Before we consider whether to grant permission, please advise us

what the purpose of the visit is. If you want to have a union meeting, that can be on employees' own time and not on our premises.

The Union immediately filed a policy grievance alleging "denied union representation visit/violation of past practice/anti-union animus".

On Monday, September 23, 2019, Ms. Mayberry sent Franklin Switzer another email indicating her intention to attend the factory premises on Friday of that week and asking to be advised if there were "any issues or concerns" about the visit. The following email exchange took place over the next two days:

Mr. Switzer: What is the union business, as per the collective agreement, for which you wish to attend?

Ms. Mayberry: I have advised you of the reason in my previous email.

Mr. Switzer: The collective agreement permits you to attend for union business. Having a membership meeting is not "union business" permitting you to attend our office during the workday. That is what union meetings after hours are for. I presume that you availed yourself of our closing an hour early to facilitate such a meeting so recently.

Ms. Mayberry: I have requested permission to visit and discuss Union Business. The specifics do not have to be disclosed to the Employer . . . . If the Employer is denying access again, please let me know so an additional grievance can be filed.

Mr. Switzer: As per the collective agreement, for us to provide consent, we have to know what the union business is. In any event, as you acknowledge, you have advised us of your purpose which is to have a membership meeting. That is not a purpose permitted by the collective agreement. We do not consent to that. If you disagree, you are free to grieve.

On September 26, a second Union policy grievance was filed, alleging a denial of Union representation.

On November 25, 2019, Ms. Mayberry sent Mr. Switzer an email with a further policy grievance, alleging that the Employer denied a union representation visit on November 22, 2019.

The Union referred the first two grievances to arbitration pursuant to Section 49 of the *Labour Relations Act* and the parties put the third one before me as well A hearing was convened on December 17, 2019. At that time it was agreed that the parties would exchange written submissions concerning the implementation and administration of Article 4.02 and seek a ruling on the following three (3) questions:

1. What constitutes "reasonable notice" under Article 4.02?
2. What constitutes “union business” under Article 4.02?
3. Is the Employer entitled to ask or be told by the Union what the nature of the union business is before considering whether to grant admission to the factory premises?

The Submissions of the Union

The Union relies on what it calls the “right to access” clause, Article 4.02, and asserts that it should be applied and interpreted in a purposive manner to facilitate the effective representation of its members, relying on *Canada Post Corp. v. C.U.P.W*., [2009] O.L.A.A. No. 664, [2010] 100 C.L.A.S. 258 (Burkett), reversed on other grounds in *Canada Post Corp. v. C.U.P.W.,* 2010 NSSC 331, 192 A.C.W.S. (3d) 983 (at para. 21).

Dealing first with the question of what amounts to “reasonable notice” for a factory visit, the Union acknowledged that it should provide the Employer with “as much notice as is practicable” and endeavor to provide at least 24 hours’ notice. However, it was pointed out that circumstances may arise where the Union is unable to provide 24 hours’ notice. In such circumstances, the Union submitted that if the Employer is able to accommodate a last-minute access request, the visit should be allowed. In support of this, the Union relied on Arbitrator Louisa Davie’s decision in *WHL Management Ltd.*

Partnership v. U.F.C.W., Local 175, [2011] L.V.I, 107 C.L.A.S. 64. The Union also relied on Arbitrator Janice Johnston's decision, issued May 28, 2012, with the same parties, wherein she urged the Employer to establish a protocol to accommodate last-minute access requests.

On the issue of what constitutes "Union business" under Article 4.02, the Union submitted that the phrase "Union business" is a 'general category' that should be given a broad and liberal interpretation, capturing "a wide range of activities", including servicing the Union's membership and facilitating the Union's ability to conduct the business of the Union, as it deems fit.

It was acknowledged that "Union business" is not defined in the Collective Agreement, however, reference was made to Article 19 to support its contention that a broad, liberal and purposive construction should be given that avoids any interference with the Union's ability to fulfill its representational responsibilities.

The Union further submitted that in assessing the meaning of "Union business", it is important to protect the purpose behind a union access clause, which was said to include the Union's ability to ensure that it can fulfill its responsibility to supervise the Collective Agreement and protect the interests of its bargaining unit members. It was submitted that arbitrators have recognized many "core functions" of union's activities that can be considered "Union business". In support of this, the Union relied upon the following cases: *Kennson Bindery Services Ltd. and UNITE,* 2001 CarswellOnt 10024, 63 C.L.A.S. 82, at para. 14,32 and 33 (Surdykowski); *Tupperware Canada v. U.F.C.W., Local 832,* 1991 CarswellMan 480, [1991] 19 L.A.C. (4th) 151, 22 C.L.A.S. 487 (Man. Arb.), at para. 18, 36 and 37 (Steel); *Toronto Dress & Sportswear Manufacturers' Guild Inc. v. I.L.G.W.U., Locals 72, 192, 199*, [1979] O.L.A.A. No. 101, 24 L.A.C. (2d) 179 at para. 8, 15 and 24 (H.W. Arthurs); *John Howard Society of Waterloo-Wellington and UFCW, Local 175, Re*, [2018] 134 C.L.A.S. 178, 288 L.A.C. (4th) 359 at para. 81 and 84 (Marcotte); *Hamilton-Wentworth Catholic District School Board and OECTA, Re*, [1999] O.L.A.A. No. 671, 57 C.L.A.S. 380 at para. 20 and 36 (Herlich); *Ontario (Metrolinx – Go*

Transit) and ATU, Local 1587, Re, [2014] O.G.S.B.A. No. 17, 117 C.L.A.S. 393 (Ont. GSB at para. 57); *Canada Post Corp.* and CUPW, 2009 CarswellOnt 8475, [2009] O.L.A.A. No. 664, [2010] L.V.I. 3881-2, 100 C.L.A.S. 258 (Burkett).

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The Union submitted that the Employer is not entitled to know the purpose of the Union's visit to the factory or attach further conditions or limitations beyond the parameters of Article 4.02. It was asserted that the Collective Agreement provides a broad right to access the workplace for any matters relating to "Union business".

The Union asserted that when one of its representatives notifies the Employer that s/he intends to visit the workplace for "Union business", the Union is certifying that the visit falls within the ambit of Article 4.02 and that the Employer is not entitled to further information. It was also submitted that the phrase "*will be admitted*" in Article 4.02 demonstrates that the Article contains no conditions on, or allows the Employer an assessment of the type of 'business' the Union wishes to engage in during a workplace visit.

The Union asked for a declaration clarifying the nature of its rights under Article 4.02 that adopts these submissions. The Union also asked that I remain seized with any issue arising from the interpretation, application and/or implementation of this Award.

The Submissions of the Employer

The Employer asked that this arbitrator pay heed to the context of Article 4.02, the facts of the situation and to follow past arbitral decisions in order to determine the "true intention of the parties" from the words of their Collective Agreement. In support of this, the Employer relied on *Tupperware Canada v. U.F.C.W., Local 832, supra*; *WHL Management Ltd. Partnership v. U.F.C.W., Local 175*, *supra*; *Atco Lumber Ltd. v. IWA-Canada, Local 1-405*, 2001 CarswellBC 3362, [2001] B.C.C.A.A.A. No. 23 (Munroe); *Lambton (County) and SEIU, Local 1 Canada (100-219-784), Re,* 2017 CarswellOnt 8598, 131 C.L.A.S. 208 (Surdykowski).

The Employer submitted that there is no "inherent or free-standing right of access" to its premises for a non-employee Union representative, such as Ms. Mayberry. While it was acknowledged that the Union has a statutory right to represent the interests of the bargaining unit, it was stressed that this right does not depend on the Union's right to access the workplace during working hours. In support of this, the Employer relied on *N.A.B.E.T. v. CFTO-TV Ltd*., 1995 CarswellNat 1592, 1995 CarswellNat 1593, (CLRB); *Kennson Bindery Services Ltd. and UNITE, supra*; *John Howard Society of Waterloo-Wellington and UFCW, Local 175, supra*; *Northern Ontario Joint Council of the Retail Wholesale & Department Store Union, District Council of the U.F.C.W. v. Parmalat Dairy & Bakery Inc.*, [2009] 185 L.A.C. (4th) 40, 98 C.L.A.S. 157 (Kirkwood) [hereinafter referred to as *Parmalat Dairy and Bakery Inc*.].

The Employer stressed that there has to be a balance between the Union's right to represent the employees and the Employer's property rights, including the right to run its business smoothly and efficiently, as was recognized in *Wal-Mart Canada Corp. v. UFCW, Local 1400*, 2012 CarswellSask 6942012, CarswellSask 694, [2012] S.L.R.B.D. No. 16, (Saskatchewan Labour Relations Board); *Wire Rope Industries Ltd. v. U.S.W.A., Local 3910*, 1982 CarswellBC 2620, [1982] B.C.C.A.A.A. No. 317. This arbitrator was urged to reject the notion of a "broad and virtually unqualified right of Union access" to the Employer's premises.

On the question of what constitutes "reasonable notice", the Employer submitted that the Union should provide "as much advance notice of its intended visits as possible, and in any event not less than 48 hours". The Employer promised that if it is able to accommodate the request "without undue inconvenience", it would do so. The Employer pointed out that the 24 hours' notice accepted in the *WHL Management Ltd. Partnership* case, *supra*, arose under different language and circumstances. It was stressed that this workplace has "limited space" for meetings, with employees operating on a single weekly shift schedule. The only meeting space available for the Union is in the lunchroom/kitchen. This was said to create a situation that makes it difficult for the

Employer to accommodate “last minute” requests. It was suggested that these circumstances should make it easier for the Union to plan visits in advance.

On the question of what constitutes “Union business” under Article 4.02, the Employer asked that the term be interpreted in the “entire context” and “harmoniously” with the scheme of the Collective Agreement, resulting in the Article being applied so that access is seen as “exceptional and limited”. It was submitted that the presence of Union representatives is intended to be “solely for the administration of the Agreement and fulfillment of those duties arising from the Agreement”. It was stressed that access is contingent on the Employer’s permission and should be limited to the purpose of conducting Union business related to the parties’ contract. The Employer also argued that its management rights clause recognizes its right to manage work and reinforces the “presumption” that it retains the basic right to control access to the workplace. This was said to be reinforced by the preamble to the Collective Agreement that mentions the parties’ objective of “securing uninterrupted operations”. It was said that the Employer’s ability to maintain control of the workplace includes the scheduling of factory access. The Employer also pointed to Article 8 and the Grievance Procedures, claiming that a Union representative’s access should be restricted to these specifically defined responsibilities under the Collective Agreement.

In response to the cases cited by the Union, the Employer argued that they do not stand for the propositions posited by the Union and/or that they are based on different language and contexts.

On the question of whether the Union is obliged to advise the Employer about the nature of the business purpose for access prior to gaining admission to the premises, the Employer submitted that it is entitled to confirmation that the Union seeks to attend for a purpose ‘permitted’ by the Collective Agreement. It was acknowledged that the Employer does not expect to be told the “details of the Union representatives’ reasons for the visit”. However, the Employer argued that it is entitled to “an express representation that the Union is complying with the terms of the Agreement”. In support

of this, the Employer relied on *Parmalat Dairy and Bakery Inc*., *(supra), WHL Management Ltd. (supra)* and *John Howard Society, supra.* It was submitted that if the Union representative refuses to confirm that they are coming for Union business, then s/he is not entitled to access.

The Union's Reply Submissions

The Union responded to the Employer's submissions that the size and nature of its premises are a reason to adopt a restrictive reading of the access provisions by submitting that the physical parameters of the workplace are irrelevant to the interpretation of the phrase "reasonable notice."

The Union argued that the Employer's suggested interpretation of "Union business" goes against the general arbitrable consensus that favours a broad, liberal and purposive construction of a union's right of access provisions. The Union also submitted that the Employer's interpretation of Article 4.02 would effectively amend or vary the terms of the Collective Agreement by deleting or restricting the phrase "union business" to the "administration of the collective agreement".

The Union emphasized that there is nothing in the Collective Agreement creating a condition that entitles the Employer to ask or be told the nature of the Union business in considering an access request. It was argued that it would take "clear and express language" to support a requirement for the Union to supply the Employer with the nature of the Union representative's requested visit to the premises.

THE DECISION

It is important to note that neither party presented evidence at this hearing. The only context for the analysis of this dispute is the uncontested contents in the documentation filed, the Collective Agreement and the parties' submissions. While each case of a requested access and a denial will turn on the specific facts and circumstances of the

occasion, the parties have sought general guidance for the interpretation and application of Article 4.02. That is the sole purpose of this Award.

This is not a case about whether there is any "free standing right" for a non-employee Union representative to access this workplace. The parties have defined their rights and obligations with regard to Union access in Article 4.02. The parties have included a "Union representation" clause that allows for Union access. The Union's right to access is limited by the language that prescribes that the access shall be for "Union business" and that it will take place "after permission has been given by management". In turn, the Employer's management rights are restricted by Article 4.02 that dictates that management cannot assert an unfettered right to deny access; it cannot be "unreasonably withheld". That language amounts to a specific limitation of the broad management rights set out in Article 5.01 and as constrained in 5.01(3).

Both parties have relied on the *Tupperware* decision, *supra,* for purposes of interpreting Article 4.02. That case is very helpful because of its 'union access' clause that included the condition of employer consent for such access. Its rulings on specific fact situations are of lesser importance than its *obiter dicta* that has been followed by arbitrators ever since. The *Tupperware* decision pointed out that neither party has an "absolute" right under union access provisions. This language should be interpreted and applied to preserve a "balance" between the interests of each party, as follows:

> 36. . . . . The nature of the considerations involved are the legitimate interest of the employer in ensuring that the operation of the work place is not unduly disrupted and the legitimate interest of the certified bargaining agent in facilitating communication between its representatives and employees in the unit at the work place. . . .
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> 38 Such access might in the final analysis benefit the employer as well as the union. … This is the way in which good personal relations are built up, in which problems are anticipated and resolved informally; it is the cement of sound industrial relations": *Toronto Dress & Sportswear and Garment Workers, Local 72, 192 & 199* (1979), 24 L.A.C. (2d) 179 (Arthurs).

These principles take us to the specific questions raised by the parties.

1. *What amounts to "reasonable notice prior to a Union representation visit"?*

The documentary evidence filed reveals that before this dispute arose, the parties seemed to arrange access visits very easily, sometimes on even one day's notice. At other times, when the requested time was not amenable to the Employer, the Union graciously accepted the offer of a proximate alternative date. This reveals a respectful pattern that has sadly been broken.

It may be of little help to the parties to say the obvious; what constitutes "reasonable notice" will depend on the facts of each situation.

In another case relied upon by both parties, it was said:

> [33] . . . . the timing of the request will certainly impact any assessment as to whether the denial was "unreasonable." The greater the length of time to consider the request for access the more likely it is that the Employer will be able to arrange its affairs and grant access. Absent other circumstances, a denial following sufficient notice of the request is more likely to be found unreasonable, while a denial following insufficient notice is more likely to be reasonable. Although it may be difficult to quantify proportions, or determine with exactitude the relationship between the length of notice and the grantor a denial of an access request, logic suggests that it will be more difficult for the Union to maintain a denial is unreasonable when it has given little advance notice. Equally, it will be more difficult for the Employer to claim a denial is reasonable when it has had sufficient notice of the request to enable it to arrange its affairs. When the Employer denies the access request, the claim of reasonableness will decrease in proportion to the increase in the length of notice received by the Employer.
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> [34] What is sufficient notice? . . . . In my view it is not reasonable to expect or insist that the Union Representative make a request for access upon 1 or 2 weeks' notice. To deny access merely because the request was not made 1 or 2 weeks in advance would be an unreasonable denial.
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> [35] . . . . In my view the Union Representative should give as much notice as is practicable when access to the Employer's premises is sought. Preferably at least 24 hours notice should be provided. Where less than 24 hours notice is provided the Union runs the risk that its request can't be accommodated for bona fide

> business reasons . . . and that the Employer's denial will be viewed as reasonable.
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> [36] That is not to suggest that the Employer's denial of an access request made with less than 24 hours' notice will always be seen to be reasonable. Undoubtedly there will be circumstances and occasions when the Union is unable to provide that type of notice, or when urgent circumstances render it impracticable for the Union to provide that advance notice. Certainly, even where less than 24 hours of notice is provided the Employer may not have legitimate business reasons for denying the request. . . . That is to say, short notice in and of itself is not sufficient reason for the Employer to refuse an access request, particularly where the only collective agreement requirement is that the Union Representative "calls ahead."
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> [See *WHL Management Ltd. Partnership, supra*]

I readily adopt Arbitrator Davie's comments later in that decision where she wrote: "If arbitrators could order parties to use common sense in their dealings with each other they would do so routinely. However, arbitrators do not have that power. An arbitrator only has authority to enforce the collective agreement and applicable legislation," (para. 38). This wisdom was imparted in the context of an employer who gave no reason for refusing requested access and a union that immediately filed a grievance in response to the denial without ever asking for the reasons why. Arbitrator Davie pointed out, quite properly, that the communications between the parties concerning an access request can impact both the reasonableness of the request and the denial. This is a lesson that parties to this case should heed.

Common sense dictates that less than 24 hours' notice will rarely be "reasonable" unless there is a clear explanation for such short notice and there is no legitimate reason for the Employer to withhold permission.

Obviously, if a predicament arises requiring the immediate presence of a Union representative, such as a serious health or safety issue, a work refusal or other similar emergent situations, the amount of notice will be shorter than if a routine business visit is being contemplated. In the event of an emergency, it may be in

both parties' interests to have Union representation immediately available to help secure "uninterrupted operations" as the preamble to the Collective Agreement contemplates.

In non-emergency situations, it would seem to be "reasonable" for the Union to give as much notice as is practicably possible. Forty-eight hours is presumptively "reasonable" and I note that the Employer has also accepted this period in its submissions as being "reasonable".

It must be stressed that each future situation will turn on the facts. The timing, the frequency and the notice given for the requested visits may be determinative. If the Union were to provide a clear explanation as to why it was requesting a visit on less than 48 hours' notice and if the Employer could provide a clear indication as to why permission may not be granted and/or offer a proximate alternative, this will go a long way to avoiding the costs of arbitration and the negative effects on labour relations that have resulted from the parties' unfortunate dealings in the recent months.

2. *What is meant by "Union business" in Article 4.02*?

The Employer has argued that "Union business" relates only to "administering and acting on [the Union's] rights and responsibilities as set out in the Agreement". The Union has argued that this phrase encompasses its "ability to ensure that the Union can fulfill its responsibility to supervise the collective agreement and to protect or 'service' the interests of its bargaining unit members." The Employer's reading of the Collective Agreement would restrict Union 'business' to specific provisions in the contract that relate to the grievance procedure, 'Garment Pricing' and rate sheets. I agree with the Employer that "Union business" involves its responsibilities "naturally arising" from the collective agreement. But that does not end the matter. A union's responsibilities include much more than the few clauses that the Employer suggests. A union has the right and the statutory responsibility to represent its members in all aspects of the administration, application, interpretation and alleged

violations of a collective agreement. Where there is a “union representation” clause allowing access for “union business”, this must mean that the parties have contracted to allow the union onto the employer’s premises so that the union can effectively fulfill its responsibilities to supervise the collective agreement and to protect the legitimate interests of its members, see *Tupperware Canada, supra,* that adopts an earlier seminal decision that arose from the garment industry, the very industry wherein these parties are engaged:

> 19 The inclusion of an access clause in a collective agreement is not unusual. Many collective agreements provide that certain union officials are entitled to access to the employer's premises as part of a myriad of other provisions to ensure that the union is able to effectively discharge their responsibilities to supervise the collective agreement and adequately protect the legitimate interests of their members.
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> . . . . .
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> 37 In determining what is reasonable it should be noted that not only does the union have an interest in "facilitating communication" but the union also has a legitimate interest in being a visible presence:
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> > The occasional presence of a representative on the shop floor enables the union to "show the flag", to remind employees of the union's support for them, and of the availability of the union, should its services be needed. And finally ... employees may be able to approach a union representative on the shop floor more easily and confidently than they might do if they were sent to the room designated for the union representative's use as a result of a specific request to the employer.
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> > (*Re Toronto Dress & Sportswear Manufacturers' Guild Inc. and I.L.G.W.U., Locals 72, 192 & 199* (1979), 24 L.A.C. (2d) 179 (Arthurs) at p. 181.)

The term “union business” has now come to be understood to envelop numerous functions and responsibilities that generally involve the servicing of its members and the administration of a collective agreement in all its respects. This was ably summarized by Arbitrator Surdykowski in *Kennson Bindery, supra:*

> 32 There may have been a time when the question of whether a union's right to access to a workplace includes a right to hold a general meeting

> with bargaining unit employees was open to debate. Arguably, business of that nature should not be conducted in the workplace, and any difficulties that a union encounters in meeting with employees outside of the workplace is not the employer's problem and should not involve the employer. On the other hand, it is equally arguable that it is appropriate for the exclusive bargaining agent to have access to the employees it represents in the workplace for both general and specific (e.g. grievance) purposes. However, this debate is closed. *It is now well established that subject to an employer's legitimate business concerns, a union is entitled to meet with employees in the workplace, and that it is unreasonable for an employer to refuse the union access unless it is entitled to do so under the collective agreement or it otherwise has a legitimate basis for doing so.*
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> [Emphasis added]

It is acknowledged that the language in the *Kennson Bindery* case is somewhat different from our parties' Article 4.02. However, the *Kennson Bindery* provision provided that the union could have access "in order to discharge the Union's duties as collective bargaining agent" and that the employer's permission could not be unreasonably withheld. There is no significant difference between the meaning of the *Kennson Bindery* contract and the one between the parties at hand. A union's "duties as a collective bargaining agent" are synonymous with "union business". It should also be noted that Article 4.02 is in a "Union Representation" provision. Therefore, Article 4.02 must be applied to facilitate all aspects of the Union's representation of the bargaining unit.

It is not helpful to create a list of all things that might constitute "Union business". It is a broad term that allows the Union to fulfill its statutory duties of fair representation under the *Ontario Labour Relations Act,* related statutes and the Collective Agreement. To be clear, if, in the course of such representation, the Union needs to hold a "membership meeting", that is a legitimate aspect of "Union business" under this Collective Agreement.

I adopt Arbitrator Burkett's directive in his *Canada Post* decision, *supra*:

> 21. The purpose of any right to access clause is to facilitate a union's ability to effectively represent its members in their employment relations. Such a clause represents a mutual acknowledgement that it is in the best interests of both parties that the union understand the productive processes and the functions performed by its members and the working conditions under which they work so as to be better able to deal constructively and creatively with health and safety issues, job evaluation issues, staffing issues, shift arrangement issues, proposed technological changes and a host of other such issues.

Therefore, it is important to give a broad and purposive application and interpretation to Article 4.02 in order to give effect to the labour relations goal of ensuring contract compliance and efficient dispute avoidance and resolution. As a result, there must be a presumption that access will be granted unless there is a legitimate operational or business rationale for the denial or the delay.

The *Kennson* decision, *supra,* also gives a clear direction that an employer has to have a "reasonable" business or operational basis for refusing access. For example, access can be denied or delayed if it will disrupt production. Accordingly, for Article 4.02 to be practically and reasonably applied in the future, the Employer should provide reasons to the Union if it needs to deny or delay access in response to a request. This will lead to better understanding and less grievance/arbitration costs.

3. *Is the Employer entitled to ask or be told by the Union what the nature of the 'Union business' is before considering whether to grant admission to the factory premises?*

In the denials of the Union's requested access to the premises that gave rise to this dispute, the Employer had asked, "What is the union business, as per the Collective Agreement, for which you wish to attend?" This signaled that the Employer wanted to know how the requested visit related to the Collective Agreement. The Employer has submitted that although it does not expect to be told "the details of the Union representative's visits", it should be entitled to be

told “a reason” for the visit. To assess the Employer’s position, it is helpful to consider *Parmalat Dairy and Bakery Inc., supra:*

> Although the Company has the exclusive right and power to manage its business . . . , those rights and powers are limited by other provisions in the collective agreement, ... in which the parties agreed that the purpose of the Union's visits is limited to interviewing employees, and to dealing with matters relating to the administration of the collective agreement. Although the "administration of the collective agreement" provides a broad scope for the purpose of access, the Union does not have access for all matters, as it agreed in Article 4.01, that it is not entitled to do any Union business on the property. Therefore, the Company has the right to require the Union to provide a reason for the visit, although, as it acknowledges, there does not have to be a specific issue for the access. The Company may not like the reason, but if the purpose falls within the general administration of the collective agreement, or is for the purpose of interviewing employees, the Union is entitled to such access.

The language in *Parmalat Dairy and Bakery Inc*., *supra,* is different and more restrictive than the language in the case at hand. However, the principles help understand our parties’ rights. The *Parmalat Dairy and Bakery Inc*. contract specifically limited the reasons for a union’s access, so it was held that the employer had the right to know the reason for the visit in order to determine whether the reason fell within the provision’s defined parameters. Therefore, it takes specific language to limit a union’s right to access in an “access” clause. There is no similar restrictive language in our parties’ Collective Agreement limiting the reasons for access, other than for “union business”. No language in this Collective Agreement supports the Employer’s contention that “access” should be read as ‘exceptional’ or ‘limited’. As explained above, “union business” has to be interpreted broadly. Therefore, while the Employer may not like or understand why the Union chooses to visit, if the purpose relates to “Union business”, the Union is entitled to access unless there is a legitimate business reason for the Employer to delay or deny the requested access.

On the other hand, common sense and principled labour relations entitle the Employer to be assured that a Union representative’s requested visit relates to

Union business. Stating that the purpose is for “Union business” did little to satisfy this Employer, even though the phrase arises specifically from the Collective Agreement and should suffice unless there is reasonable cause to suspect abuse. Therefore, to avoid further disputes, especially during tense collective bargaining, the Employer should be told and be satisfied with a statement from the Union affirming that the purpose of the visit will be to conduct Union business relating to the discharge of its responsibilities under the Collective Agreement and/or to service the bargaining unit. There is substantial importance in preserving the confidentially of a union’s communications with its bargaining unit and its members, see *WHL Management Ltd., supra.* Therefore, the Employer is not entitled to know the specific nature of each visit or to be told which aspects of the contract or the nature of the Union business the Union intends to address.

Accordingly, while the Employer should be advised and assured that the general purpose of Union access to the premises is to conduct Union business relating to the discharge of its responsibilities under the Collective Agreement and/or to service the bargaining unit. Access can only be denied or delayed for legitimate employer/operational reasons.

Conclusions

1. What amounts to “reasonable notice prior to a Union representation visit”?

    a) Each situation will turn on its specific facts
    b) 24 hours’ notice is presumptively too short
    c) 48 hours’ notice is presumptively sufficient
    d) The Union should provide reasons for less than 24 hours’ notice
    e) The Employer should provide reasons for denying or delaying access

2. What is meant by “Union Business” in Article 4.02?

   Anything related to the effective fulfillment of the Union’s responsibility to supervise the Collective Agreement, service its bargaining unit and meet its obligations under the *Ontario Labour Relations Act* and employment related statutes.

3. Is the Employer entitled to ask or be told by the Union what the nature of the “Union business” is before considering whether to grant admission to the factory?

   The Employer is entitled to be assured that the purpose of the Union Representative’s visit is for “Union business” relating to its responsibilities under the Collective Agreement and/or to service the bargaining unit pursuant to its responsibilities under the *Labour Relations Act* and related statutes. The Employer is not entitled to any other specific information.

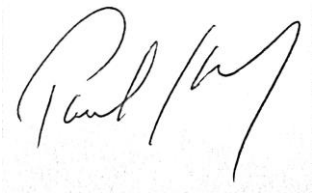
4. The Union Representative’s access cannot be unreasonably delayed or denied by the Employer once reasonable notice has been provided and the Union has given the assurances specified in paragraph 3 above.

   The reasonability of any delay or denial will depend on whether there is/are legitimate operational or business reason(s) and whether those reasons were provided to the Union at the time.

At the parties’ request, the analyses and decisions articulated above resolve the three grievances filed before me, without prejudice to their positions in proceedings pending

before the Ontario Labour Relations Board. I remain seized with the implementation of this Award.

Dated at Toronto this 10th day of February, 2020



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Paula Knopf - Arbitrator