IN THE MATTER OF AN ARBITRATION UNDER THE BRITISH COLUMBIA *LABOUR RELATIONS CODE*, R.S.B.C. 1996, C. 244

BETWEEN:

COAST MOUNTAIN BUS CO.

(the “Employer”)

-AND-

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES, LOCAL 378 (MoveUP)

(the “Union”)

(Work Jurisdiction Grievance – Order of Proceeding)

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| ARBITRATOR: | Ken Saunders |
| APPEARANCES: | Jennifer A. Hogan, for the Employer |
| | Jessica Burke and Henry Godard-Rebstein, for the Union |
| DATE OF AWARD: | March 5, 2026 |

## I. INTRODUCTION

1 This award concerns a difference about which party should proceed first at the hearing of a grievance regarding the scope of the Union's exclusive work jurisdiction.

2 The Employer assigned the disputed work to the Security Services Training Officer position ("Training Officer"). The Labour Relations Board determined that the Training Officer is excluded from the bargaining unit in *Coast Mountain Bus Co.,* 2025 BCLRB 35. However, the Board declined to decide whether the Union "[…] has exclusive jurisdiction over the duties that were previously performed by the bargaining unit and which are now performed by the Training Officer; that is a question of collective agreement interpretation…": at para. 33. The parties subsequently referred that interpretive dispute to me for adjudication.

3 This award is based on the parties' written submissions, including their exchange of particulars.

## II. BACKGROUND

4 Article 1.06(a) of the parties' collective agreement provides:

> Duties normally performed by employees within the bargaining unit will not be assigned to or be performed by non-bargaining unit employees except to overcome immediate, short-term operational or personnel difficulties when bargaining unit employees capable of performing the work are not available. The Employer will advise the Union prior to any such contracting out.

5 The Employer implemented the Training Officer position in April 2024.

6 Scott Arnold was appointed from the Transit Security Officer position within the unit to the new Training Officer position.

7 The Union contends that Arnold's previous job included "[…] preparing and delivering the transit security training for the Security Services Department and organizing the training curriculum of the Security Services Department as a bargaining unit employee."

8 The Union's principal claim is that:

> The duties assigned by the Employer to the Training Officer role were normally performed by bargaining unit employees (specifically,

> the work of preparing and delivering transit security training for the Security Services Department and organizing the training curriculum of the Security Services Department), including with respect to the purpose, tasks, and end product of this work.

9 The Employer responds, in part, that Arnold started delivering five-week onboard training to newly hired Transit Security Officers in or around 2017 or 2018 (one to two per year). He was the only bargaining unit employee to do so, save for one or two instances when Arnold was unavailable due to extenuating circumstances. Arnold performed this task until appointed to the Training Officer position in 2024. It contends that the excluded Security Operations Supervisors also delivered the same onboard training. The Employer further asserts that excluded Security Operations Supervisors initially developed the training curriculum as standard operating procedures. In 2020, the curriculum was published in a training manual. Arnold initially prepared a draft manual completed by other Security Operations Supervisors. Arnold also developed the Transit Security Officer New Recruit examination in 2022.

10 The Employer contends that, as the Training Officer, Arnold is responsible for onboard training (3 to 4 annually), presenting other course offerings, associated administrative tasks, along with refresher and corrective training.

11 The Employer submits that "the work of preparing the training curriculum and delivering onboard training" (the "Disputed Work") does not fall within "Duties normally performed by employees in the bargaining unit…" for the purpose of article 1.06(a). Alternatively, it says that the current complement of employees is not qualified to do that job. Further, the number of Transit Security Officers ("TSO") has increased since the introduction of the Training Officer. The Employer submits in its particulars, in part, as follows:

> The Employer's position is that the Disputed Work is not work normally performed by employees in the bargaining unit. The Disputed Work is not in the job description of TSOs or SOCs [Security Operation Coordinators]. It is distinct from on-the-job training TSOs and SOCs provide to TSOs after they have completed the Onboard Training. Between 2017/2018 and May 13, 2024, Mr. Arnold was the only bargaining unit employee who performed the Disputed Work and, when he did perform the Disputed Work, he was paid a premium equivalent to the Acting SOC rate. During that same period, the Disputed Work was also performed by SOSs [excluded Security Operations Supervisors].

## III. POSITIONS OF THE PARTIES

12 The Union acknowledges that it presumptively proceeds first as it is the party asserting a violation. However, the Union submits that the circumstances warrant a departure from the ordinary order of proceeding for reasons of efficiency and fairness.

13 The Union says that the primary factual issue is whether the excluded Security Operations Supervisors performed the duties at issue before the Employer implemented the Training Officer position. It is common ground that members of the unit (Arnold and, on several occasions, another employee when Arnold was unavailable) previously did this work. The Union submits that it has less evidence and access to information regarding the extent to which excluded employees performed the Disputed Work, the extent to which the Training Officer currently performs the Disputed Work and the Training Officer's current duties. It points out that Arnold previously occupied a bargaining unit position in which they performed the disputed work and is thus a witness within the Employer's purview. It submits that if the Employer proceeds first, the hearing will be better focused, given the Employer's knowledge of the critical facts at issue, particularly regarding work performed by those in excluded positions and the extent of any overlap with bargaining unit positions.

14 The Union cited the following authorities: *Teck Coal Ltd. and USW*, *Local 9346* (Oliver), 2019 Carswell BC 4176 (Sullivan); *British Columbia Maritime Employers' Association and ILWU*, (unreported) March 12, 2020 (McPhillips); *Cancer Care Ontario v. O.N.A*., [2003] O.L.A.A. 13 (Keller); *Bruce Power LP v. Society of Energy Professionals*, [2011] O.L.A.A. No. 579 (Davie); and *London (City) and CUPE, Local 101* (PY04-13) [2016] O.L.A.A. No. 161 (Hayes).

15 The Employer submits that the key issue is whether the Disputed Work is "normally performed" by members of the bargaining unit as provided under Article 1.06(a) of the collective agreement. It submits that there are no factual circumstances within the Employer's unique knowledge that justify an exception to the rule that the Union should proceed first. It submits that the material information is reasonably attainable now that the Union knows from the Employer's particulars which excluded staff it says did the work at issue. Further, the Employer submits that even if the information it provided is insufficient to maintain the presumptive order of proceeding, it will be prejudiced as it will not know the case it has to meet and is deprived of its right to bring a no evidence motion in the event the Union's evidence does not comprise a *prima facie* violation. The Employer argues that the requirement for the Union to proceed first and establish a *prima facie* violation is a matter of fundamental fairness, so that a direction shifting the order of proceeding can only be justified in exceptional circumstances: *Ottawa Carleton District School Board v. Ontario Secondary School*

*Teachers Federation, District 25* (Vethanany Grievance), [2012] O.L.A.A. No. 61 (Baxter) at para. 30. The Employer submits in part:

> […] This is the Union's grievance. It is for the Union to establish that the Disputed Work is work normally performed by employees in the bargaining unit. If the Union does not have the evidence it requires to make its case – either because Mr. Arnold was the only bargaining unit employee who performed the Disputed Work prior to the creation of the Position and/or because there are currently no bargaining unit employees that perform the Disputed Work, that is not a compelling reason for the Employer to proceed first. The Employer ought not to be required to make the Union's case.

16 The Employer argues that the Union bears the onus to establish exclusive jurisdiction over the work at issue. Only if the Union has established a *prima facie* violation will an evidentiary burden shift to the Employer to answer the Union's claim: *Dufferin-Peel Catholic District School Board v. Canadian Union of Public Employees, Local 2026* (Policy 2026-11-10 Grievance), [2015] O.L.A.A. No. 124 (Sheehan) The Employer further submits that there is no rule that an employer proceed first regarding the adjudication of claims that excluded employees are performing bargaining unit work. It submits that the Union is well situated to call evidence to show that members of the unit (apart from Arnold) performed the work at issue. The Employer argues that the work Arnold performs in his current role is not material to whether the Disputed Work is "normally performed" by members of the unit.

17 The Employer cites the following additional authorities: Gorsky, Uprich et al, *Evidence and Procedure in Canadian Labour Arbitration* (Thomson Reuters) (electronic version), ch 9 at 9:22; *Bloorview School Authority v. Canadian Union of Public Employees, Local 440* (Grievance C-10050, Flu Vaccine), [2016] O.L.A.A. No. 44 (Knopf).

18 The Union submits in reply that the issue of whether the Disputed Work was normally performed by members of the unit or by excluded supervisors, and whether it is now being performed by Arnold in the excluded position, is information within the Employer's sole possession. The Union acknowledges that the Disputed Work was primarily and normally performed by Arnold when they were a member of the unit, prior to their appointment as Training Officer. It submits that the critical issue is whether the duties which Arnold normally performed as a member of the unit before their appointment are the same as the duties which they now perform as Training Officer. It reiterates that Arnold is now an excluded employee, so that the Union is hindered in its ability to access his evidence in these regards.

19 The Union adds that the Employer's particulars identifying the work performed by excluded personnel are in dispute, and concern conduct within the exclusive knowledge of those persons. Accordingly, the Union is hindered in its ability to bring its own evidence concerning the actions of those individuals.

20 The Union contends that any prejudice that may result from the Union's evidence raising issues which could not be reasonably anticipated can be remedied by a right of reply. Further, the Union submits that a no-evidence motion would have no reasonable prospect of success, given that it is agreed that Arnold normally performed the Disputed Work as a bargaining unit employee.

## IV. ANALYSIS AND DECISION

21 The parties' difference concerning the order of proceeding is a matter within my discretion to determine procedural issues under Section 92(1) of the B.C. *Labour Relations Code,* R.S.B.C. 1996 c. 244 (the "Code"). That discretion must be exercised consistent with the overriding duty of fairness and my duty under Section 2(d) of the Code to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes.

22 The general arbitral rule is that the party bringing the grievance proceeds first. An exception may be justified by considerations of fairness or efficiency, evaluated in light of the impact of that exception on the responding party. Where the grieving party has asserted a viable claim in the exchange of prehearing disclosure, such as a statement of particulars, it may be appropriate for the responding party to proceed first, even though it does not bear the overall onus.

23 Examples of reversal in the authorities cited above often include cases in which the facts most central to resolving the dispute are within the respondent's unique knowledge, thereby avoiding the need for extensive rebuttal evidence. There is no hard-and-fast rule dictating a reversed order of proceedings for claims involving work jurisdiction or bargaining unit status, although this type of claim often prompts the issue. Each case must be decided based on its own factual and legal matrix. Further, it is for the party seeking an exception to establish a compelling justification evaluated alongside the impact on the respondent's interests, recognizing that it is not up to the respondent to establish the grieving party's case. A lost opportunity to bring a "no evidence" motion is relevant but is not determinative, particularly if it is at the expense of a fair and efficient hearing, where a viable *prima facie* case is particularized, so that the responding party can answer claims it is uniquely or otherwise best situated to speak to. Concerns about the sufficiency of disclosure can be addressed at the pre-hearing stage.

24 The parties' particulars and submissions arise in the context of a dispute over work jurisdiction where there are contested claims regarding work historically shared between included and excluded employees. There appears to be no dispute that Arnold did the Disputed Work while a member of the unit. The Employer also asserts that some excluded employees performed that work before Arnold's appointment.

25 The Employer contends that the Union must establish that the Disputed Work is within its exclusive jurisdiction. The Employer did not clarify exactly what it means by that in terms of the applicable legal test. The Union does not directly dispute that legal proposition, except by claiming the disputed work was "normally" done by Arnold (for the most part) when in the unit and now does as Training Officer. The Union also does not clarify exactly what "normally" means in terms of the applicable legal test.

26 I have advanced these observations because the arbitral test used to define work jurisdiction may vary. This point was elaborated on in *Kamloops City and Canadian Union of Public Employees, Local 900* [1996] B.C.C.A.A. No. 811 (Germaine), beginning at paras. 50-106, and paras. 99 and 100 ("Kamloops"). In *Kamloops*, arbitrator Germaine discussed different arbitral approaches to language conferring jurisdiction over work "normally done" by members of the unit, particularly in cases where the work was historically performed by bargaining unit and excluded employees. In some awards, such provisions have been interpreted to mean that work within the Union's jurisdiction must be done by members of the unit to the exclusion of those outside the unit. In *Kamloops*, arbitrator Germaine adopted an approach that preserves the proportionate share of work performed by members of the unit; see paras 99-100 and 105-106 in particular.

27 I have not concluded that *Kamloops* provides the final word. The parties have not argued this point, and arbitral authorities on this topic are legion. My point in raising *Kamloops* is to illustrate that resolving contested jurisdiction over work historically performed by both included and excluded employees is likely to involve arguably different lines of arbitral authority and require a fact-intensive analysis. Regardless of which approach is used to delimit the Union's work jurisdiction, I find that the bulk of the evidence will at least include a historical comparison between what Arnold did when they were in the unit and what they now do as the Training Officer. The evidentiary analysis will also likely include consideration—perhaps alongside other factors—of the nature, purpose, and extent of the Disputed Work performed by other excluded employees before the position of Training Officer was established, compared to what Arnold now does in that role.

28 The Employer has fairly particularized its claim regarding the Disputed Work done by excluded employees before the creation of the Training Officer position. However, the Union has put these claims at issue, and I conclude on balance that

although it is possible for the Union to proceed first, the Employer is in the best position to call most of the evidence to describe the performance of the Disputed Work by excluded employees—both before and after its initiative to create the Training Officer position. Practically speaking, I find it reasonable to infer that Arnold and other excluded employees will have the bulk of this information from firsthand experience and will not be equally available to the Union as witnesses. Arnold is in the best position to speak to what they did before their appointment. In my judgment, insisting that the Union proceed first will likely result in a protracted hearing, as it will likely result in extensive rebuttal evidence after the Union has heard the detailed explanations given by the Employer's witnesses. For these reasons, I conclude the practical circumstances are such that the values of fairness and efficiency outweigh the Employer's interest in mounting a potential no-evidence motion at the conclusion of the Union's case.

29 The Employer submits that it does not know the case it has to meet. As I understand it, that submission was not developed beyond an assertion in argument. Regardless, the Employer is free to apply for additional particulars if it contends that the Union has not exhausted its means of knowledge in the exchange of particulars and the submissions to date.

## V. CONCLUSION

30 The Employer will proceed first. The Union continues to bear its overall onus of proof to the extent it is ever relevant. The Employer will be extended a liberal right of reply.



Ken Saunders, Arbitrator

Dated March 5, 2026, in Vancouver, British Columbia.