

IN THE MATTER OF AN ARBITRATION
Pursuant to the *British Columbia Labour Relations Code*

BETWEEN:

GRAND FORKS CONCRETE AND GRAVEL LTD.

EMPLOYER

AND:

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 115

UNION

(Pay Rate Dispute)

AWARD

Arbitrator:	Bruce M. Greyell, Q.C.
Representing the Employer:	Don McCarthy Tom Schiller – (Argument only)
Representing the Union:	Brandon Quinn
Date of Hearing:	January 16, 2007
Place of Hearing	Kelowna, B.C.
Written Argument:	January 19, 26 February 2 & 5, 2007

The Undersigned was appointed pursuant to Section 86 of the *Labour Relations Code* to resolve a dispute between the parties concerning a classification and pay rate dispute. The parties agreed I was properly appointed and had jurisdiction to determine the matter in dispute.

The issue for determination is whether the Grievor, Mr. Tyson Orser should progress from the Driver 2 to the Driver 1/Operator wage rate set out in Appendix "A" of the collective agreement.

A number of the facts were agreed to it at the commencement of the hearing.

1. Grand Forks prepares and delivers concrete to residential and construction customers in and around Grand Forks B.C. Grand Forks also delivers gravel to these customers. Grand Forks is owned by Mr. Don McCarthy.
2. The Union was granted an industrial certification for Grand Forks in 2003. The parties negotiated a first collective agreement, with a term from May 13, 2003 to May 31, 2005. The agreement was signed April 6, 2006.
3. That agreement expired in May of 2005. The parties met in June and July of 2005, and negotiated a new collective agreement effective from May 13, 2005 to May 31, 2008.
4. While Grand Forks operates all year round, it does not keep all of its employees working all year round. A small complement of employees work throughout the winter and then in the spring, when operations ramp up, employees are either recalled or new employees are hired. These employees will then work for what is called the "season", and will be laid off sometime in November. It is understood that a new "season" does not occur until after the employee's anniversary date of hire with the Employer.

5. The Grievor, Tyson Orser was hired by Grand Forks in March of 2005, at the beginning of the 2005 season. He was hired under the "starting" wage rate for an employee with a Class 1 driver's licence, found in Appendix "A" of the collective agreement.
6. "Drivers" are employees who deliver concrete and gravel. For concrete, once the truck is filled at the work site, drivers deliver the concrete and make sure that it has the desired level of viscosity. For gravel, drivers drive a dump truck to make deliveries. The dump truck is driven both by itself, and with a "pup trailer", which is towed behind and effectively doubles a load. Drivers also have other duties, such as addressing customer concerns, cleaning their trucks, etc.
7. Every employee in the bargaining unit, with the exception of the foreman/dispatcher is a driver. Presently all employees are employed as a Driver 1/Operator, 2 or 3.
8. Drivers can drive with either a Class 1 or Class 3 licence. A Class 1 licence allows drivers to drive any of the trucks used by Grand Forks. A Class 3 licence allows drivers to drive all vehicles, but does not allow for the driving of the dump truck with the pup trailer attached.
9. Appendix "A" originally divided drivers with a Class 1 Driver's licence into two sets, "Driver/Operator" and "Starting Driver". A Starting Driver may progress to a Driver/Operator if he met "required performance standards".
10. Originally, the term "required performance standards" was supposed to be defined by Grand Forks in a written policy. No such policy has ever been drafted.
11. Appendix "A" was changed in the last round of bargaining.
12. All of the drivers of Grand Forks have been with the company for several years and the Grievor was the first new hire as a driver since the Union was certified.

13. In November of 2005, at the end of the 2005 season, the Grievor was laid off. He returned to work for Grand Fork in March of 2006. Upon his return, he began being paid the "Driver 2" rate.
14. On April 21, 2006, Tyson met with Mr. McCarthy, and Mr. Wright. At that meeting, McCarthy refused to pay Tyson the Driver 1/Operator rate.
15. On May 1, 2006, the Union filed this grievance.
16. The Grievor worked the remainder of the 2006 season working at the Driver 2 rate, plus the \$0.50 paid under the Grand Forks' unilaterally introduced wage schedule. He was again laid off in November for the winter months.

The new collective agreement negotiated during the summer months of 2005 contained significant changes to Appendix "A", the wage schedule. In the former collective agreement there were two classifications relating to drivers: a "Driver/Operator" classification and a starting wage classification which read "Starting wage for new employees who possess Class 1 Driver's Licence and have at least two years of prior driving experience". Appendix "A" also contained the following notation:

In order to operate the PUP, Class 1 BC Driver's Licence is required. The wage rate of \$18.50 per hour is contingent upon the employee possessing this licence at the time of hire.

Employees who do not possess a Class 1 BC Driver's Licence at the time of hire will start at a wage of \$16.50 per hour.

New employees, hired after May 13, 2003, will be placed on the above incremental wage scale:

Employees who do not obtain their Class 1 Driver's Licence will not progress beyond a wage scale of \$16.50 per hour until they have this Licence. All other employees may progress to the \$18.50 wage rate based on meeting required performance standards.

In the current collective agreement the parties amended the classifications of drivers in Appendix "A" to include "Driver 1/Operator", a "Driver 2 (1st Season with Class 1 Licence)" and a "Driver 3 (Class 3 Licence)" classifications.

In addition, the notes to Appendix "A" were amended. The amended language appears in highlighted form in the new collective agreement and reads as follows:

In order to operate the PUP, a Class 1 BC Driver's Licence is required. The wage rate of **Driver 1/Operator or Driver 2** is contingent upon the employee possessing this licence at the time of hire.

Employees who do not possess a Class 1 BC Driver's Licence at the time of hire will start at a wage Driver 3.

Employees who do not obtain their Class 1 Driver's Licence will not progress beyond a wage scale of **Driver 3** until they have this Licence. All other employees may progress to the **Driver 1 or 2** wage rate based on meeting required performance standards **and time served with the Company.**

The issue in this case concerns why these amendments were made and what the parties intended by the language changes.

The Union called three witnesses to give evidence at the hearing: Mr. Brian Lefebvre, the Union Business Manager, Mr. Bill Wright, the Shop Steward and Mr. Tyson Orser, the Grievor. Mr. Don McCarthy represented the Employer at the hearing and gave evidence on its behalf. The evidence of Lefebvre and McCarthy is important as it relates to the amendments made to the collective agreement during bargaining and because the parties differ in their interpretation of the collective agreement.

Negotiations leading to the current collective agreement occurred during two meetings between Lefebvre and McCarthy in June and July, 2005. The two evidently settled the terms of the agreement at this time with the exception of for Appendix "A". Lefebvre testified that because of the uncertainty over the language contained in Appendix "A" of the previous agreement and as specific concerns had been raised about the Grievor's wage rate should he return to work for the Employer for a second season, he raised the matter at the bargaining table. He testified he raised the issue of how one was to progress on the wage scale from a first year driver to a second year driver. He testified that McCarthy agreed with him that the existing Appendix "A" was "troublesome" in setting out how a driver progressed and that the two agreed they would each put language together for a revised Appendix to take a look at. Lefebvre testified he then drafted what is now the current Appendix "A". On September 12, 2005 Lefebvre faxed

McCarthy a copy of the revised collective agreement containing the current Appendix "A" with the following note:

Don, all of the changes are in bold. Have a look at Appendix "A" plus let me know if it makes more sense [sic]. We also need to discuss how and when Tyson Orser progresses to the next wage level.

The agreement he faxed contained some incorrect information and on September 15, after being so informed by McCarthy's assistant, he re-faxed the agreement with this note:

Trudy: I have corrected Appendix "A". I apologize for any inconvenience. Please have Don review + contact me if there are any changes. Have him pay particular attention to page 25.

Page 25 was Appendix "A".

Lefebvre testified the employees had ratified the terms of the new collective agreement in August and he was anxious to have it completed. He testified he did not hear from McCarthy in response to the request contained in his faxed messages. McCarthy did not contact him to discuss Appendix "A". Lefebvre testified he received a signed copy of the last page of the agreement on or about April 6, 2006. He testified he first became aware there was an issue over the Grievor's wage rate for the 2006 season when he received a faxed letter from McCarthy on or about April 24, 2006. That letter reads:

Employees who have a Class #1 Drivers License and who have started after May 13th, 2003, will start at Drivers #2 for their first year of employment. After that, according to the contract, these employees may progress to Driver #1 based on required performance standards and time served with the company. Performance standards are equipment knowledge, operations and equipment breakage. Time served with the company is a much less subjective qualifier. As we discussed, one year is not a long time to learn and gain the valuable experience needed. I feel, and we have discussed, that the progression to Driver #1 will be more than just the one year.

I feel an increase of \$0.50 (fifty cents) per year extra will be added to their wage, provided no accidents or equipment damage occurs. Also, attitude is a very big factor and this will be considered prior to progression.

I understand that Bill wants Tyson to move directly to Driver #1 on his anniversary date. This is not as "automatic" as they feel. As Appendix "A" states, and that is what we agreed, employees may progress and by performance standards in bold "time served with company".

I met with Bill, Tyson and Mike on Friday April 21st, 2006. This is where they talked to me about Tyson's wage. Tyson explained that customers were very mad and he defends me (I think he meant the company). It seemed to be that the more he talked that I didn't give him his demand that he wasn't going to defend the company from the hostile contractors. The result of the Kettle River purchase means that Tyson should get more hours from the extra business. I don't understand this threat since he is only defending himself getting more hours. I hope his attitude as well as the rest of the crew stays positive for all parties interests.

I have signed the contract and this letter will become company policy. This will then allow Tyson to get a \$0.50 raise starting on his one year anniversary date. Please let me know so this can be made effective. I understand that a grievance may be put in so I will wait for either option.

Thank you

Lefebvre testified that McCarthy had not raised the issue of "required performance standards" during bargaining. He said the two may have discussed whether one year was time enough to learn and gain experience before moving to a Driver 1 position but that there was not agreement on that issue. In cross examination McCarthy asked Lefebvre why he left the word "may" in his draft of Appendix "A" if he expected the Grievor would automatically move to the higher rate after his first season. Lefebvre responded that it was his view "may" meant progression was contingent upon the Grievor "meeting required performance standards" and his time served with the Company. Lefebvre's position was that the Grievor had met both qualifiers. He was performing to the same standard as other drivers and had finished his first season with the Employer.

The testimony of Wright and the Grievor pertained to the nature of the duties the Grievor performed and the quality of his work. The effect of their testimony was that the Grievor performed most, if not all duties performed by the other drivers. The Grievor's main function was to drive but he also had experienced with batching (the mixing of aggregates, cement and water). McCarthy suggested to Wright that drivers were responsible for the screening of aggregate and, from time to time the digging of basements. Wright testified he was the only driver who did screening work and had not dug basements and did not know if anyone else had. He did acknowledge he had done

snow removal and that perhaps Mike Tomashewsky, the lead hand, had done this work but no other driver had that he was aware of.

Wright testified the work force was composed of a lead hand and five other drivers. He said it took about one season for a driver "to be very good" at his routine. He testified there were no complaints or concerns with the Grievor's work and that he could do the work performed by the other drivers. The Grievor testified he received his Class 1 licence in February, 2005 prior to commencing work with the Employer. He testified he felt he had grasped the duties of the job quickly and that he had had no problems during his first season. He said he had received a number of name requests throughout the season. He was laid off in November, 2005 and returned for a second season commencing in March, 2006. He testified he started the season at the Driver 2 rate (\$17.75) and sometime later was given a \$0.50 per hour increase by the Employer. He was not sure whether this increase was made retroactive to his anniversary date. He believed he was entitled to be paid at the Driver 1/Operator classification under the new collective agreement and met with McCarthy, Wright and Tomashewsky on April 21 to express concerns about his wage rate. That meeting led to McCarthy's letter of April 24, 2006. The Union subsequently filed a grievance which led to this arbitration.

Mr. McCarthy testified on behalf of the Employer. He said that his recollection of the negotiations which resulted in the current collective agreement was quite different from that of Lefebvre's. He said the parties never did discuss how or when the Grievor would progress to the Driver 1/Operator wage. He testified that while it was not his intention to hold the Grievor back from progressing, he was of the view the retention of the word "may" in Appendix "A" protected the Company's interests and it was up to the Employer to decide when the Grievor would progress to the top driver rate of pay. He equated "required performance standards" with the potential for damage to transmissions, clutches, other mechanical or body damage and attitude issues. He stated "one year (experience) is not the same as 30 years (experience) for drivers". He said that it was never his intent that after one year or season a driver would go to top rate but, rather, that he felt it fair a driver would progress to top rate at \$0.50 per hour increments per year. In cross examination McCarthy acknowledged the Grievor was doing a good job

as a driver and that there had been no complaints about his performance. He was pressed in cross examination about whether he had any discussion with Lefebvre about Appendix "A" between September, 2005 and April 6, 2006. He initially testified he was "not sure" if he had such a conversation or not between those dates but then maintained he did have such a conversation which he thought had occurred in March, 2006. He acknowledged that while he had intended to make a proposal concerning Appendix "A" he had not sent anything in writing to the Union in response to Lefebvre's fax in September, 2005. He maintained he did have discussions with Mr. Lefebvre on the issue but said he could not substantiate the time or date of such discussions.

At the conclusion of the evidence Mr. McCarthy sought an adjournment to obtain the assistance of counsel for the presentation of argument. The parties agreed such argument would be submitted in writing according to an agreed upon schedule. I think it necessary at this time to make this notation about those written arguments. The Employer retained Mr. Schiller to reply to the Union's submission. Mr. Schiller in his usual fashion, presented full and able submissions. In the Employer's Reply the argument however contained a number of assertions of fact which were not adduced in evidence at the hearing (including a document which was not filed in evidence). Mr. Quinn for the Union has quite properly taken issue with those submissions and in his Reply to the Employer's Reply has made reference to a number of inconsistencies between the evidence as asserted in the Reply and that adduced at the hearing. Mr. Quinn has left it to this Arbitrator to review his notes of the hearing to draw appropriate conclusions. In particular, the Union has drawn my attention to paragraphs 5 and 7 of the Employer's reply and has asked me to disabuse myself of the letter enclosed with the reply (a letter from the Union to the Labour Relations Board) dated August 17, 2006. As the letter was not adduced in evidence at the hearing and no application has been made to reopen the hearing, I am not at liberty to consider that letter as evidence in this case. In any event, the letter was in the hands of the Employer at the date of the arbitration hearing and accordingly, it is doubtful that an application to reopen the hearing could have succeeded. I intend to rely solely on the evidence adduced at the hearing. Mr. McCarthy, as a lay person, was given every latitude to

present the Employer's case and I am satisfied he was very aware of the issues involved in the arbitration.

Union's Argument

The Union argues Appendix "A" as amended in the last round of collective bargaining clearly sets out an intent that a driver will progress from a Driver 2 to a Driver 1/Operator classification and pay rate after their first season of employment. This intent is found both in the language "time served with the Company" and the use of the words "1st Season". Prior to these changes Appendix "A" required only that drivers meet the Employer's required performance standards. The Union concedes that the word "may" as found in Schedule "A" does grant some discretion to the Employer to decide whether a driver has met the "required performance standards" but says that the employer had never set such standards in any written policy and that, in any event, the evidence demonstrated the Grievor was performing his job at a comparable level to the other drivers who were receiving the Driver 1/Operator rate. The Union says "may" is circumscribed by the terms of the agreement and does not grant the Employer a broad discretion not to advance drivers or, alternatively, to advance drivers at the discretionary amount of \$0.50 per season as the Employer had intended to do in this case. The Union also argues bargaining history demonstrates the mutual intention of the parties to change the language was to clarify when drivers would progress. The draft which Lefebvre sent to McCarthy was sent specifically to address the Grievor's situation. McCarthy was silent following the draft and therefore accepted the plain meaning of Appendix "A" when he signed the agreement on April 6, 2006. The Union relies on the following arbitral authorities: *Fletcher's Fine Foods and U.F.C.W., Local 1518 (Re)*, 135 L.A.C. (4th) 264 (Moore); *Nanaimo Times Ltd. (Re)*, [1996] B.C.L.R.B.D. No. 40 (Hall); *British Columbia School Employers' Assn. v. British Columbia Teachers' Federation*, [2000] B.C.C.A.A.A. No. 43 (Dorsey); *Sullivan and Driedger on the Construction of Statutes*; 4th Edition (Butterworths 2002) pgs. 56 – 61; *Regina v. Moore*, 49 O.R. (2d) 1; *Royal Jubilee Hospital and H.E.U. (Re)*, 65 L.A.C. (4th) 169 (Hope); *British Columbia Hydro and Power Authority and I.B.E.W.*, [1996] B.C.C.A.A.A. No. 72 (Greyell).

Employer's Argument

The Employer argues the Union must establish the Union has breached the collective agreement by "clear and unequivocal", "very clear", or "clear and cogent" evidence given that it is seeking to establish "serious obligations" which assert the right to both a reclassification and a "large hourly rate increase".

The Employer argues the language of the revised Schedule "A" in the current collective agreement is imprecise and ambiguous. In particular, the Employer says that Lefebvre's fax of September 12, 2005 constitute an "admission" of such an ambiguity as it contained the following sentence: "we need to discuss how and when Tyson Orser progresses to the next wage level". This, says the Employer, identifies there was no meeting of the minds on the issue as to how and when such progression was to occur. The matter had yet to be resolved. The Employer argues it "is highly improbable" and quite inconsistent with the evidence – that the imprecise and ambiguous language of Appendix "A" demonstrates an intention to both reclassify the Grievor and to give him the sought after and significant wage increase. The Employer argues it would have been a simple matter for the parties to have replaced "may" with "shall" such that the wage increase would be mandatory and not subject to the Employer's discretion. By retaining use of the word "may" the Employer argues it is clear on the language of Appendix "A" that the Employer has retained discretion in the matter of wage increases. The Employer argues the Union has not demonstrated by clear and cogent evidence that the mutual intention of the parties was for a driver to move to the highest driver classification after his first season. The Employer also points to Article 7.01 of the collective agreement which provides that Appendix "A" contains minimum rates for the various classifications and argues that the collective agreement does permit the Employer to increase wages beyond those set out in the classification. Accordingly, the Employer argues it is entitled to raise the Driver 2 rate by incremental increases of \$0.50 per year.

The Employer relies on the following arbitral authorities: *Brown & Beatty, Canadian Labour Arbitration (4th Edition: looseleaf) Volume One at Para: 3:2400;* *British Columbia and Hydro Power Authority –and- International Brotherhood of Electrical Workers, Local Union 258* (Unreported, January, 1987) at page 18; *Re Board of School Trustees of School District No. 39 (Vancouver)* (1996), 53 LAC (4th) 33; *Genstar Cement Limited –and- United Cement, Lime Gypsum & Allied Workers International Union, Local 277* (Unreported) February, 1987 (Fraser), at page 18; *Richmond Plymouth Chrysler Ltd.* IRC Decision No. C189/91; *British Columbia Telephone Company –and- Telecommunication Workers’ Union* [1985] 2 WLAC 413 (Hope) at page 427; *Wire Rope Industries Ltd.* (1982), 4 LAC (3d) 323 (Chertkow); *Re ABF Freight Systems (BC) Ltd. –and- General Truck Drivers & Helpers Union, Local 31* (1987), 28 LAC (3rd) 246 (McPhillips); *Re UEW Local 512 and Tung-Sol of Canada Ltd.* (1964), 15 LAC 161 (Reville); *Fletchers Fine Foods –and- U.F.C.W., Local 1518*, 135 LAC (4th) 264 (Moore).

Decision and Analyses

The issue for determination for this case is an interpretive one. In such a case the task of the arbitrator is to determine the mutual intent of the parties underlying the language in issue. As stated in the seminal case of *University of British Columbia –and- Canadian Union of Public Employees, Local 116* (1977), 1 CLRBR 13 at 20:

First – and most important – the arbitrator is looking for the mutual agreement of both parties, not the unilateral intentions of one side. Without some reciprocal assent from the other side, the fact that one party had an intention may indicate no more than what it wished to achieve and it is question-begging to conclude from this evidence alone that its wish has been fulfilled. For that reason, arbitrators should be very cautious in using private documents or communications of either side.

As I stated in *British Columbia Hydro and Power Authority –and- International Brotherhood of Electrical Workers, Local 258* [1996] B.C.C.A.A.A. No. 72:

It is trite that in examining both the language of the Collective Agreement and in considering such relevant extrinsic evidence put forward as an aid to interpretation, the intention to be determined is that not of one party but rather the mutual intent of both parties. The language used by the parties forms a

presumptive framework for the determination of mutual intent. That is not to suggest an arbitrator can or should ignore extrinsic evidence of bargaining history or of the practice of the parties in administering the Collective Agreement provision as an aid to interpretation. Indeed, in British Columbia an arbitrator is enjoined from taking a strictly literal approach to contract interpretation. In Consumers Glass Company –and- United Glass and Ceramic Workers of America, Local 257 (1977), 1 CLRBR 234 at 236 the B.C. Labour Relations Board stated:

“Accordingly, an arbitrator must always examine the special language and context of the agreement, or canvass any evidence of negotiation history or past practice, to see whether these parties actually intended a legal result which differs from the normal operation of such a clause.”

In Re North Caribou Forest Labour Relations Association –and- International Woodworkers of America, Local 1-424, (1985), 19 LAC (3d) 115 Arbitrator Hope stated at p. 119:

“Whereas other arbitral jurisdictions requires a preliminary finding of ambiguity before extrinsic evidence is considered, in British Columbia the question addressed by the parties in every interpretation is whether they [sic] is any doubt as to the meaning intended by the parties and an arbitrator is directed to look at extrinsic evidence in his consideration of that initial question. The point is addressed on p. 18 of the decision as follows:

Instead [of making a preliminary finding of ambiguity], the arbitrator, when he begins the task of interpretation, will be able to do so with a full appreciation of the relevant exchanges which eventually culminated in the formal document. With that material before him, the arbitrator can decide [sic] whether he entertains any doubt about [sic] the meaning intended for the provision in question and, if so, whether the negotiation history is helpful in resolving that doubt.

In U.B.C. and C.U.P.E. the board dealt with extrinsic evidence of bargaining history but it is implicit that the general principles enunciated apply to all forms of extrinsic evidence. That was made clear in District of Burnaby and C.U.P.E., Local 23, [1978] 2 Can L.R.B.R. 99 (Weiler), when the board applied U.B.C. and C.U.P.E. to evidence of past practice.”

But within the context of a consideration of such extrinsic evidence it must also be noted that the clearer the language the parties have used the less the meaning of that language is open to debate. In other words the greater will be the presumption the parties intended the natural and plain meaning of the language to apply.

I must also address the onus of proof required to be met in order for the grievance to succeed. The Employer has raised this as a significant issue. In *B.C. Hydro, supra*, I reviewed a number of the authorities commencing with the decision of Arbitrator Hope in *Norana Mines (Babine Division)* (1982), WLAC 246, Mr. Hope revisited his comments in *Noranda, in British Columbia Hydro and Power Authority*, unreported, January 5, 1987 and *Board of School Trustees of School District No. 39 (Vancouver)* (1996), 53 LAC 4th 33. These and other decisions were reviewed by Arbitrator Dorsey in *British Columbia Public School Employers Association –and- British Columbia Teachers Federation* (2000 (B.C.C.A..A.A. No. 43) February 15, 2000). I accept Arbitrator Hope's approach in *Board of School Trustees (supra)* where he stated at p. 51:

I agree with the proposition that where all facts necessary to support a particular interpretation have been proven, there is no separate or further onus that arises with respect to the questions of law relating to the task of interpretation. But I am able to agree with the union's submission if it is intended to incorporate the conclusion that the onus on a party asserting a particular interpretation does not extend to proof of the facts upon which the interpretation depends. I favour the approach of the authorities in which the issue is seen in the context of a prima facie case. That is, a party advancing an interpretation in support of an assertion of a breach of a collective agreement must prove prima facie the facts that support the interpretation asserted. Thereafter, the other party bears the onus of proving facts relied on to refute the interpretation asserted. However, I agree that if and when all relevant facts in a dispute have been proven, the resulting issue of interpretation becomes a question of law and no onus applies.

In my view the proper principles to be drawn from this and the other arbitration cases are that the party which is asserting an interpretation of the collective agreement bears the onus of establishing on the balance of probabilities that that interpretation is the more likely one. The significance of the benefit and clarity of the contract language are appropriate factors to be taken into account in this assessment.

In my view, the disposition of this case is clear. I conclude, the language changes contained in the new Appendix "A" were intended to address the progression of drivers – particularly the Grievor – after he completed his first year (season) of driving. The evidence established the Union went into bargaining in the Summer of 2005 with the intent of addressing how the Grievor would progress. I find Lefebvre and McCarthy specifically discussed their respective positions as to how the Grievor would progress.

They agreed to exchange proposals. The Union forwarded its proposal setting out how it saw the Grievor progressing. McCarthy was well aware of the Union's view of how drivers progressed. The Employer did not respond to the Union's proposal. I accept the evidence of Lefebvre that he had no contract with McCarthy between September 15, 2005 and April 24, 2006 concerning Appendix "A". Lefebvre's evidence was clear on the point; McCarthy's much less so. The contract was signed April 2, 2006 containing the Union's proposed Appendix "A". As stated, the Employer received that Appendix knowing how the Union interpreted the language and chose not to respond. In these circumstances the Employer must be taken to have accepted the language contained in the revised Appendix "A" and the interpretation placed on that language by the Union.

The Employer takes the position the wording is vague and ambiguous and that the Union has not established its case by clear and cogent evidence. The Employer points to Lefebvre's request in the September facts that "we also need to discuss how and when Tyson Orser progresses to the next wage level". In my view, the language of the revised Schedule "A" is clear and straight forward. Appendix "A" in the prior collective agreement provided for two wage categories for drivers: a "Starting wage for new employees who possessed a Class 1 Driver's licence ..." and a "Driver/Operator". The latter was paid \$2.00 an hour more. The agreement also provided "all other employees may progress to the \$18.50 wage rate based on meeting required performance standards". There were only two categories below the \$18.50 rate – general labourer and the starting wage rate for new employees. According to the evidence of Lefebvre, which was not disputed by McCarthy, this language was inserted into the first agreement by the then negotiator for the Employer because the Employer contemplated introducing written performance standards for drivers. It is common ground it has not done so.

The amendments in the new Appendix "A" contain quite different language relating to drivers. Those amendments include classifications for a new Driver 3 (Class 3 Licence) rate, a Driver 2 (1st Season with Class 1 Licence) rate and a Driver 1/Operator rate. The Driver 2 rate is qualified by the term (1st Season with Class 1 Licence). The relevant change to the text of Appendix "A" added the words "and time served with the

Company". The natural and plain meaning of that sentence is that employees may progress to the Driver 1 wage rate based on meeting two criteria: required performance standards and time served with the Company. As stated, there were no written performance standards in effect for drivers. The evidence established the Grievor performed equally as well as other drivers in the Driver 1/Operator classification. The Employer is quite at liberty to set reasonable performance standards. In this case it has not done so and therefore cannot rely on an assertion that this language presents an obstacle to the Grievor's progression. This is particularly so when the evidence established the Grievor was performing as well as the other drivers. There was no evidence he was not meeting required performance standards. McCarthy testified generally these standards were intended to protect against undue wear and tear on vehicles and attitude problems. But these were not issues with which he was concerned about the Grievor.

In my view, the phrase "and time served with the Company" must be read in conjunction with the words "1st Season" found within the description of Driver 2 classification. Both terms were added to the collective agreement at the relevant time and in my view logically must relate. Any other interpretation would render the language "1st Season" meaningless. According to the Employer's interpretation, a driver could remain in the Driver 2 classification for an indefinite time. I do not accept the Employer has the discretion to do what it did in this case. That is, to grant a \$0.50 per hour increase to the Grievor with the intent of increasing his wage by \$0.50 for each further year of service. To accept such position would render the classification and wage increment scheme set out in Appendix "A" meaningless and in particular would render the words "1st Season" meaningless. The Employer's argument simply does not conform to the plain language of the collective agreement.

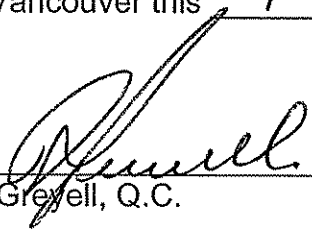
Conclusion

Accordingly, I find on the plain reading of the language of the collective agreement and from the extrinsic evidence adduced before me that the Grievor was entitled to be paid the Driver 1/Operator rate as and from the completion of his first anniversary of employment with the Company. The grievance succeeds. The Grievor is to be made

whole in accordance with the above finding. I will retain jurisdiction over the implementation of this Award in the event the parties cannot agree.

IT IS SO AWARDED

Dated at Vancouver this 9th day of March, 2007



Bruce M. Greyell, Q.C.

