IN THE MATTER OF AN ARBITRATION

BETWEEN:

BC FERRY SERVICE INC.

(the "Employer")

AND:

BC FERRY AND MARINE WORKERS' UNION

(the "Union")

Re: Travel Time While on Course

ARBITRATOR:	Judi Korbin
COUNSEL:	Peter Csiszar for the Employer John MacTavish for the Union
HEARING:	April 30, 2012 August 21, 2012 September 21, 2012 October 1, 2012 October 26, 2012 Vancouver and Nanaimo, BC
DATE OF AWARD:	January 25, 2013

2239

The parties are agreed that I have the requisite jurisdiction, under the terms of their collective agreement, to hear and determine the matter in dispute.

This case concerns grievances, filed by the Union on behalf of five employees - Quinn Isaksson, Bryan Fitchell, Steve Greer, Doug Bridal and Michael McNevin - claiming payment for “travelling time” for attendance at training courses.

The Employer claims no travelling time is owed these five Grievors, alleging that it is the employees’ responsibility to take these courses, with the exception of the Marine Emergency Duties (MED) in Article 25.04, and they were not undertaken at the “direction” of the Employer, and/or that any directed or required courses were undertaken within the Employer-defined community or regional area and therefore travel time for training is not compensable.

The relevant collective agreement provisions regarding the issue at hand are found in Articles 25.03 - Leave for Taking Courses, and 25.04 Marine Emergency Duties:

> 25.03 – Leave for Taking Courses
>
> (a) **An employee shall be granted leave with basic pay to take courses at the direction of the Company**. **The Company shall bear the full cost of the course including tuition fees, entrance or registration fees, laboratory fees and course required books, necessary travelling time**, travelling and subsistence expenses and other legitimate expenses where applicable. Fees are to be paid by the Company when due.
>
> (b) An employee may be granted leave with basic pay to take courses at the request of the Company. The Company shall bear the full cost of the course, including tuition fees, entrance or registration fees, laboratory fees and course required books, necessary travelling and subsistence expenses, and other legitimate expenses where applicable. Fees are to be paid by the Company when due.
>
> (c) A regular employee may be granted leave without pay, or leave with partial pay to take courses in which the employee wishes to enrol.

25.04 – Marine Emergency Duties

> **When the Company requires the employee to be in possession of M.E.D. certificates, the employee shall be granted leave with regular pay. The Company shall bear the full cost of obtaining and renewing the certificate including tuition fees, entrance or registration fees, laboratory fees and course required books, necessary travelling time**, travelling and subsistence expenses and other legitimate expenses where applicable. Fees are to be paid by the Company when due. Where the same courses are provided by the Company, employees shall avail themselves of such courses in preference to other facilities.
>
> **(emphasis added)**

Travel status is defined in Article 1.02:

> Travel status means absence of the employee from the employee's regular point of assembly on Company business with the approval of the Company.

Compensation for travelling time is calculated as per Article 22.02:

22.02 – Travel Expenses and Travel Time

All employees shall have one location specified as their point of assembly. The employee shall normally commence and terminate his/her day's work at this point of assembly.

I. Kilometrage

An employee using his/her vehicle shall be entitled to the differential kilometrage expenses for the distance travelled between his/her residence and a temporary point of assembly which is in excess of the kilometers travelled to his/her point of assembly. Employees who are on travel status requiring overnight accommodation may claim actual kilometers up to a maximum of 30 kilometres per day between their accommodation and their temporary point of assembly for each day worked.

II. Travel Time

(a) Travel time that is in excess of an employee's scheduled work day shall be paid at the applicable overtime rate, but shall not be considered as time worked.

(b) Employees required to travel on a day of rest shall have their travel time paid at the applicable overtime rates.

(c) Travel time may be paid or considered as overtime for the purpose of accumulation as elected by the employee under clause 18.15 or 18.16.

Examples – Calculation of Kilometrage and Travel Time

Example 1 – Employee reports directly to a temporary point of assembly and returns home directly from the temporary point of assembly.

Calculation of reimbursable kilometrage:

Return kms from home to temporary point of assembly = 36 kms
Returns kms from home to regular point of assembly = 20 kms
Difference: 36 kms – 20 kms = 16 kms
Reimbursable kilometrage: 16 kms X km rate in Appendix "B"

Calculation of reimbursable travel time:

Return time from home to temporary point of assembly: = 30 minutes
Return time from home to regular point of assembly = 10 minutes
Difference: 30 minutes – 10 minutes = 20 minutes
Reimbursable travel time: = 20 minutes

Example 2 – Employee reports directly to his/her point of assembly and goes to a temporary point of assembly and returns directly home (or reverse).

Calculation of reimbursable kilometrage:

Kilometrage from home to temporary point of assembly: = 16 kms
Kilometrage from home to regular point of assembly = 8 kms
Difference: 16 kms – 8 kms = 8 kms
Reimbursable kilometrage: 8 kms X km rate in Appendix "B"

Calculation of reimbursable travel time:

Time from home to temporary point of assembly: = 25 minutes
Time from home to regular point of assembly: = 15 minutes
Difference: 25 minutes – 15 minutes: = 10 minutes
Reimbursable travel time: = 10 minutes

Points of assembly may be changed by mutual consent of the parties. In those circumstances which require a regular seasonable change of point of assembly, such change can be made twice per year without consultation. Under those circumstances which require a regular seasonal change, the new point of assembly shall be considered to be their normal point of assembly and clauses 22.02 II and 22.03(b) shall not apply.

(emphasis added)

BACKGROUND

Prior to the 1994-1996 collective agreement, Article 25.03 provided at (a): “leave with basic pay to take courses at the request of the Employer,” with no specific mention of necessary travelling time as an included Employer-covered cost.

The current form of the article which arose in the 1994-96 agreement, maintains the previous (a) – now (b) with “may” replacing the former “shall,” and inserts a new (a) which is the same in other respects as the previous (a), but introduces courses taken at the “direction” of the Employer, and adds that necessary travelling time is an Employer borne cost.

Representative Employer forms utilized to initiate and confirm employee’s training enrollment are as follows: (Michael McNevin’s forms were the only grievor forms in evidence).

FYI: Training request – Passenger Safety Management for McNevin, Michael Alexander has an enrollment status of Pending

BC Ferries Automated Notification Service [noreply@bcferries.com]

Sent: April 8, 2010 9:45 AM
To: McNevin, Michael
Attachments: Notification Detail.html (524 B)

To			**McNevin, Michael Alexander**
Sent			**08-APR-10 09:44:16**
ID			**4776754**

Your enrollment status is Pending
for the training course Passenger Safety Management
at course location ‘Coastal Renaissance ‘
beginning on 23-Apr-2010 10:00 through to 23-Apr-2010 18:00.

Enrollment is dependent upon availability of space and/or relief.

A notification will be sent if there is a change in your enrollment status.

FYI: Training request – Passenger Safety Management for McNevin, Michael Alexander has an enrollment status of Enrolled

BC Ferries Automated Notification Service [noreply@bcferries.com]

Sent: April 11, 2010 6:17 AM
To: McNevin, Michael
Attachments: Notification Detail.html (524 B)

To			**McNevin, Michael Alexander**
Sent			**11-APR-10 06:16:50**
ID			**[?]795538**

Your enrollment status is Enrolled
for the training course Passenger Safety Management
at course location 'Coastal Renaissance '
beginning on 23-Apr-2010 10:00 through to 23-Apr-2010 18:00.

Relief will be scheduled or cancelled as required.

Name of Activity here
Participant Information BC Ferries

You are now registered for:

COURSE NAME HERE IN CAPITAL LETTERS

Important Info

- Please call your local Crewing Office to acknowledge receipt of this letter and to discuss possible adjustments to your work schedule.
- **This training is a work assignment, and your enrolment has been confirmed.**

Details

Date:

Time:

Location:

Lunch will be provided

If you have any questions about this training – please contact your Operational Training Office @ _____

Course Description here

(emphasis added)

TESTIMONIAL EVIDENCE

Six witnesses testified for the Union, the five Grievors, plus Kevin Hall, a Labour Relations Officer with the B.C. Ferry and Marine Workers' Union. One witness testified on behalf of the Employer, Cathy Bornn, Manager of Operational Training.

Michael McNevin began his employment with the B.C. Ferry Service in 1993, and since his election in July of 2012 to the position of President of the Ship's Officer Component of the Union, which represents over 700 licensed officers, is currently on leave from his duties as First Engineer on the MV Coastal Renaissance.

Mr. McNevin took the Passenger Safety Management Course (PSM) on April 22-23, 2010, and explained he found out about the course via emails sent by the Employer informing him of his enrollment, that relief had been provided, and of the time, date and location of the course. Mr. McNevin states that he was not asked if he wanted to take the course, and characterized his enrollment as an assignment.

The course itself was held at Duke Point, 20 kms from Mr. McNevin's home. His point of assembly (POA) – Departure Bay – is 6 kms from his home, and it takes longer to travel to Duke Point than it does to Departure Bay. For his travel to and from the course, he was paid differential kilometrage, but not travel time.

Mr. McNevin testified that prior to his grievance, he had never taken a course that required him to travel further than his Departure Bay point of assembly.

In his direct evidence, Mr. McNevin testified that he has considerable experience in the Union, and that no employee ever complained to him about not getting travel time in such circumstances prior to the filing of these grievances, and that he was not otherwise aware of the Employer practice in this regard.

His testimony on this point was contradicted to a degree in cross-examination, when in answer to a question from Employer counsel he agreed that he had union experience over the years, and that he was aware there were some complaints from employees about travel time for training not being paid, including circumstances where employees travelled outside their POA. Mr. McNevin stated he was aware of "the company's behaviour and travel time not being paid," as he put it.

In other words, he was aware of employees complaining about not receiving travel time when he was in some kind of capacity with the Union, and that grievances were not filed. Mr. McNevin also stated in cross-examination that if he received complaints from Union members regarding travel time, he advised them to enquire of Payroll, and if not satisfied to grieve. He said "grievances come from grievors" although he agreed the collective agreement allows for policy grievances. Further, Mr. McNevin was sure "we discussed problems with travel times" but that the Employer's geographic approach was "a new phenomenon," and that the Company had never said, "we're not paying you because you're in your community."

In redirect, Mr. McNevin could not recall that anyone had actually complained to him with the specific elements of being trained somewhere other than his/her POA, further than the POA and so was paid a differential for kilometrage, but not paid travel time.

Bryan Fitchell is a Deck Hand and Relief Second Officer. He also does some training of Deck Hands – such as marine evacuation, sweeper courses, and sea training. His current POA is Langdale, but at the material time it was Horseshoe Bay. On October 14 and 15, 2010, when his POA was in Horseshoe Bay, he attended a PSM course in Tsawwassen. As Mr. Fitchell lived in Lynn Valley at the time, it took longer for him to get to Tsawwassen than his POA at Horseshoe Bay. He was paid for the kilometrage differential but not the travel time differential.

Mr. Fitchell's understanding was this course was a requirement for him to continue working the Horseshoe Bay to Nanaimo run. He was provided with the Participant Information document advising his training was a work assignment, contained earlier in this award, and confirming that he was to report to his course at Tsawwassen.

Mr. Fitchell also took a Specialized Passenger Safety Management course (SPSM), and doesn't believe he was paid travel time for that course either.

Quinn Isaksson, the third witness on behalf of the Union, is a Second Officer, and Horseshoe Bay is his POA. He also took a PSM course on May 16 & 17, 2010, in Tsawwassen, and lives in West Vancouver. As it took longer for him to travel to the course than to his POA, Mr. Isaksson claimed travel time and was paid for the extra kilometrage but not the travel time.

He said that his understanding was that to maintain his currency of competency, he was required by the Company to take the PSM. He was told it was a work assignment and he was to attend – attending was not optional. In his words, "This was mandatory." He testified he also received the employer's Participation Information form confirming his training was a work assignment.

Mr. Isaksson had also taken his SPSM in Nanaimo and was paid travel time as well as kilometrage for that course.

The Union's fourth witness was Mr. Doug Bridal, who is currently a Third Engineer on the Queen of Alberni, Major Vessel – C Class. On June 10, 11 and 12, 2010, he took a Survival Craft Course which he assumed was part of the Marine Emergency Duties (MED) at Pacific Institute in North Vancouver. Mr. Bridal lives in Ladner and his POA is the Tsawwassen Terminal. It is further in both distance and time from Ladner to the Pacific Institute than to the Tsawwassen Terminal. Mr. Bridal testified he was told "he had to go take the course" and was paid for the kilometrage differential but denied the

travel time. Mr. Bridal also received the Participant Information form confirming his training was a work assignment.

The fifth witness for the Union, Steve Greer, is currently a Third Engineer. His POA is Horseshoe Bay and he lives in Lower Lonsdale in North Vancouver. Mr. Greer took a PSM course in November 2010, and a SPSM course in December 2010. Both courses were required to maintain the currency of his ticket. His PSM course was in Tsawwassen on the Spirit of BC. He was paid the kilometrage differential but not the travel time. In Mr. Greer's words, I was told "this was a work assignment – means, no ifs, and, or buts – so you must go whether you want to or not." Mr. Greer also was in receipt of the Participant Information form confirming his training was a work assignment.

Mr. Kevin Hall is currently and since January 7, 2007, a Labour Relations Officer with the B.C. Ferry and Marine Workers' Union, and was involved with the Michael McNevin grievance. Mr. Hall explained the Union's organizational structure and his role as a labour relations officer.

Mr. Hall testified that prior to this issue arising, he had been approached on travel time issues on various occasions but first recalls becoming aware that members taking longer to travel to training than to their POA were not being paid travel time sometime in 2010; around the time the instant grievances were filed.

Mr. Hall also noted that when taking his own training, he did not receive travel time because the distance from his home to his POA was greater than from his home to the training location.

When the travel time issue in this case arose, Mr. Hall states that he made enquiries of other Union staffers and executive members, but was told that none were aware of the "community" concept being used by the Employer.

Mr. Hall also testified as to how the current collective agreement evolved and stated that the parties had opportunities to make changes to the language of the collective agreement in the latest round of negotiations for the current extension to the collective agreement until October 31, 2015 but no attempt was made to change Articles 25.03 or 25.04.

The sole witness for the Employer was Cathy Bornn, who began her employment with the B.C. Ferry Service in 1991, and since 2004 has been the Manager of Operational Training, coordinating all aspects of training for the Employer.

Ms. Bornn noted that there are over 90 different training courses offered to approximately 3,800 employees in the bargaining unit (both licensed and non-licensed), and claimed that while the Operational Training Department is heavily involved in the administration of training, it is the employee's responsibility to maintain the currency of his/her qualifications, characterizing the Employer's training involvement as a "service to employees."

In regard to the training enrolment process, Ms. Bornn testified that following Line Manager identification of employees appropriate for training, the Operational Training Department, in consultation with the Crewing Office, would assist employees to "self-enroll" utilizing the "Training Request" document. Employees training status is initially considered "Pending," with "Enrolled" status confirmed by the OPD through subsequent separate email.

Ultimately, enrolled employees are sent a "Participant Information" form which contains, amongst other course information, the statement that, "This training is a work assignment, and your enrolment has been confirmed." Ms. Bornn was asked in direct examination whether receipt of the Participant Information form indicated an Employer

direction to, or requirement for, the employee to attend training, and she stated that it did not.

An undated memo regarding travel time for training by Ms. Bornn was entered into evidence. This memo directed staff to "… refer any employee who refuses to attend training over travel time to ER and the Line Manager (with notice to Crewing). Please recommend/encourage employees to attend training as the matter is before the company and the union, and refusing such assignments once scheduled would be considered an unapproved absence and could possibly result in consequences for the employee."

Ms. Bornn's testimony regarding "[possible] consequences" was that an employee can choose not to attend, and that she is unaware of any employee being disciplined for choosing not to attend.

Ms. Bornn explained in evidence that in order to establish boundaries for the payment of travel time associated with training, the Employer has designated a number of geographical areas as "community" points of assembly. These community points of assembly sometimes differ from an employee's particular POA.

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While the Employer attempts to train employees as close to home as possible, no travel time is paid if training is held at a location within an employee's "community" POA. (Ms. Bornn noted that the percentage of training occurring within an employee's community POA is approximately 45%).

As well, Ms. Bornn's evidence is that travel time is paid only if an employee has to travel outside of their community POA for MED training. Various examples of travel time for training not being paid by the Employer were provided, including instances where MED training - further to Article 25.04 - was held in North Vancouver for an employee whose POA, was Tsawwassen, and training under Article 25.03 which was provided at

Camosun College in Victoria, for an employee whose POA, was Schwartz Bay. These employees were not paid travel time because, according to Ms. Bornn, the Employer considered their POA and training occurred in the same "community".

In cross-examination, Ms. Bornn confirmed the policy of the Employer is that travel time is not paid when an employee's training is within the Employer's concept of "community." She agreed travel time payment is required for MED training under the collective agreement, but confirmed that the Employer's policy is applied in the same way for MED training as for other training under Article 25.03.

However, the Employer's process is not sacrosanct, and Ms. Bornn noted certain variations in the Employer's "within/outside community POA" travel time methodology, with payment sometimes dependent on how far training occurred from an employee's home, or whether it involved more than one-half hour of travel time, or some other combination of time and distance. Such individual variations are determined on a reasonableness basis by Ms. Bornn and others in the Operational Training Department.

Ms. Bornn claims that the Employer's approach to travel time, as described by her, has been consistently applied since 1991, and that no grievances have been filed on the issue, prior to those before this board. Further, she notes that the Employer's practice has been applied, without challenge, prior to these grievances being filed, to Shop Stewards, and other employees involved with this Union. Ms. Bornn provided no specific examples of Union officials acceding to the Employer's approach to travel time, claiming instead that the Union simply must have known of the Employer's approach/practice.

Ms. Bornn agreed in cross-examination that "community" POA is an Employer generated concept, and that there are no written procedures, or any official or unofficial documents, detailing the Employer's policy or its application.

In cross-examination, Ms. Bornn explained the Employer's concept of community in three regions. One is the Lower Mainland surrounding Vancouver (from the Fraser Valley to the coast on the West, and from Horseshoe Bay to Tsawwassen). Another is Greater Victoria and a third involves the Nanaimo area. Otherwise, according to Ms. Bornn, there are about 40 POAs throughout the province, each of which is a community.

Therefore, any employee who leaves an island such as Bowen Island or Salt Spring, leaves his/her POA and is paid travel time for training, even if the distance travelled is much shorter than some distances in the three large communities. Ms. Bornn does "not know who came up with these boundaries or what criteria was involved," as she put it.

When asked in cross-examination whether Earl's Cove and Langdale are within one community, Ms. Bornn was unable to answer as she explained she never had to deal with that. She did confirm if an employee "had to travel at considerable distance, it would not be considered within their community." She rephrased that to use the concept of "reasonable for the employee – probably a combination of time and distance – but don't really know it."

With respect to the Northern Islands, Ms. Bornn explained that an advisor on her staff would be the person to know the situation there. Ms. Bornn did confirm no exceptions are made to the Employer's policy if an employee lives on a Gulf Island or on Bowen Island, or if he/she has to take a ferry to get to training – no matter how long or short a trip – all are paid travel time for training in addition to kilometrage, within the community concept.

In cross-examination, Ms. Bornn also stated that even though the Employer has made some gratuitous payments for travel time for training, not required by the collective agreement, for some twenty years, that is because, as she stated, "Our philosophy is we try to be fair to the employee – what is reasonable."

This reasonableness philosophy is further reflected in a February 7, 2005 memo issued by Ms. Bornn to colleagues in the Human Resource and Training offices:

> Generally speaking – If a course is required for operational reasons, an employee may be eligible for travel time. We do attempt to use a reasonable formula for calculating this. For example: if an employee normally travels 1/2 hour from their home to work, and the event is located 40 minutes from their home – there would be no need to pay 10 minutes travel time. There is a "reasonable perimeter" around one's POA that would not constitute travel time. However, considerable amounts of travel time are compensated. We have found that people are reasonable on this, and because they are compensated for their mileage, they only request travel time if it is significant. When an individual is required to travel a great distance for a course (ie coming from Prince Rupert), we attempt to schedule their travel within a workday – in other words it may make more sense to replace them in their job, and have them travel within work hours the day before an event.

and in a February 23, 2010 email to Madalin Tapu, an employee with travel time concerns:

> I have reviewed your request with our Employee Relations group, and have confirmed that you are not entitled to travel time for the time you travelled back and forth from your home in Coquitlam to North Vancouver.
> You will be compensated for the mileage and lunch claims as previously discussed.
> This is consistent with our fair compensation policy for employees attending courses in the same region as they live (even if it is not their POA).
> Our travel policies have been in place for many years and create a framework to ensure that paid expenses are administered consistently and promptly.

In reviewing the potential cost burden of the Union's approach to travel time for training, Ms. Bornn stated that the cost would be "the actual cost of travel time" and, as to the administrative burden, she stated "I would think an additional staff member" as a large amount of checking as to where employees lived would be required.

The Employer also submitted copies of its responses to enquiries from employees dated on November 22, 2007, March 5, 2009, February 1, 2010 and July 4, 2010 explaining to employees that they were not paid travel time because their training took place "in their own regional area". Although the employee involved in the November 2007 enquiry stated he would "grieve it", no grievance was filed in that case.

POSITIONS OF THE PARTIES

Union Counsel claims the Employer has violated Article 25.03 (a) (and potentially Article 25.04 in the case of Grievor Bridal), by failing to pay travel time to employees who spent more time travelling from their home to their training, than from their home to their point of assembly.

Counsel contends that the collective agreement is quite clear. If an employee is on course at the direction of the Company, and needs to travel to take that course, the Company must pay the employee for the differential time necessary to do so. The travel time owed is calculated as per the examples detailed in Article 22. There is nothing in the collective agreement, Counsel argues, that qualifies employees' travel time entitlement based on geography.

Counsel notes that each of the Grievors confirmed the receipt of the training enrollment documents from the Employer, including the Participant Information form, which indicated that training was to be considered a "work assignment." These Employer actions, it is claimed, constitute a Company direction to take the training.

Union Counsel argues that the Employer's alleged longstanding and consistent practice of not paying differential travel time for training within a community or area – the system detailed in the testimony of Ms. Bornn – is both ambiguous and absurd. For example, Mr. MacTavish describes an employee living in White Rock, whose POA is Tsawwassen and who must travel to Horseshoe Bay is not paid travel time, as opposed to an employee who travels from Bowen Island to Horseshoe Bay for training (a much shorter distance and time period) and is paid for his travel time. Mr. MacTavish submits that Ms. Bornn's description of the Employer's system was rife with such exceptions incapable of articulation and instances of employees with equally lengthy travel requirements for training, where one received travel time and the other did not, and

revealed a fundamental lack of understanding as to how the Employer's own system works in various locations (e.g. Northern Islands and the Sunshine Coast).

Union Counsel notes the Employer Counsel's argument that the word "necessary" in Article 25.03 constitutes the collective agreement basis for the Employer's "community" approach, and responds by characterizing that position as a stretch of the collective agreement language as a whole (including Article 22), and claims that it is not plausible to conclude that those at the bargaining table used the word "necessary" to mean those outside of such a community, not so described in any policy, written or unwritten, or in the collective agreement.

As for the Employer's longstanding past practice assertion, Counsel states that claim is both vague and poorly particularized, and that even if the Employer were able to establish same, there is no evidence of responsible members of the Union hierarchy being aware of that practice.

Further, if the Union is estopped, Union Counsel notes there was a new collective agreement negotiated after the grievances were filed, and asserts that any estoppel ended with the new collective agreement, as the Employer was on notice before expiry of the previous collective agreement, and failed to change the language.

Counsel cites the following authorities in support of the Union's arguments in this case: *Malaspina Faculty Assn. v. Malaspina University College (Auger Grievance)*, [2003] B.C.C.A.A.A. No. 375 (Jackson); *Catalyst Paper (Elk Falls Mill) -and- Communications, Energy and Paperworkers Union of Canada, Local 1123*, [May 3, 2012] (Hall); *Surrey School District No. 36 v. Canadian Union of Public Employees, Local 728*, [2005] B.C.C.A.A.A. No 112 (Hall); *Hayden Manufacturing Ltd. and Teamsters Local Union No. 213*, [1996] B.C.C.A.A.A. No. 266 (Bruce); *Brandt Tractor Ltd. v. International Union of Operating Engineers, Local 115 (Contravening Provisions of Article 16.04(e) of the 2004-2008 Collective Agreement Grievance)*, [2007] B.C.C.A.A.A. No. 239 (Kinzie);

Durham District School Board and Elementary Teachers' Federation of Ontario [2004], 131 L.A.C (Bendel); *York University v. York University Faculty Assn. (Nicol Grievance*), [1997] O.L.A.A. No. 1073 (Swan); *Inland Aggregates Ltd. v. International Union of Operating Engineers, Local 955 (Benefits Grievance)*, [2002] A.G.A.A. No. 16 (Sims); *Rogers Communications Inc. v. Metro Cable TV Maintenance and Service Employees' Assn. (Group Grievance – XSR (NTMC) Shift Premium Grievance)*, [2011] C.L.A.D. No. 353 (Knopf); *Georgian College of Applied Arts and Technology and O.P.S.E.U., Re*, [1997] O.L.A.A. No. 1090 (Schiff); and *Boliden Westmin Resources Ltd. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 3018*, [2000] B.C.C.A.A.A. No. 91 (Germaine).

Union Counsel asks for the grievances to be upheld, and that I refer the issue of remedy back to the parties to deal with any matters arising.

The position taken by Counsel on behalf of the Employer is that "this matter is purely one of determining the parties' intention related to Articles 25.03 and 25.04 of the Collective Agreement," and that "the established principles of construction with respect to collective agreements apply."

Counsel cites the seminal cases detailing these principles including: *Health Employers Assn. of British Columbia v. Hospital Employees Union*, [2002] B.C.C.A.A.A. No. 130 (Gordon); *Board of School Trustees of School District No. 75, Mission and Canadian Union of Public Employees, Local 593 (Sick Leave for Term Employees During Spring Break)* (October 4, 2002), unreported (Foley); and *Board of School Trustees of School District No. 61 (Greater Victoria) and Greater Victoria Teachers' Association* (November 30, 1992), A-323/92 (Kinzie).

Counsel claims that two of the principal interpretive issues to be decided in this case are:

1. Whether Article 25.03 (a) or Article 25.03 (b) is triggered when non-Marine Emergency Duties training is made available by the Employer, and

2. If Article 25.03 (a) is triggered, how the term “necessary” in the phrase “necessary travelling time” is to be interpreted.

On the first question, Counsel argues, based on the testimony of Ms. Bornn, that such training is made available only at the “request of the Company” (as per 25.03 (b)), rather than at “the direction of the Company” (as per 25.03 (a)). Accordingly, necessary travelling time, which is only available under 25.03 (a), is not owed.

On this point, Counsel suggests there is a substantive distinction between a Company direction, where an employee would be sent to training, more along the lines of the “Company requires” language in Article 25.04 – Marine Emergency Duties (MED), and a Company request for training, which can be and has been denied by employees in the past.

On the second question, Counsel notes that Article 22: Payment for Meals, Kilometrage and Travel Time, even within the examples section regarding the calculation of reimbursable travel time, does not contain the term “necessary” in relation to travel time.

The term “necessary travelling time” is found in Article 25.03 (a), however, and mindful of the interpretive principle that “where an agreement uses different words, one presumes that the parties intended different meaning,” Counsel suggests that the appropriate interpretation of “necessary travelling time” is the Employer practice of establishing a reasonable perimeter – a community or regional area - around an employee’s POA, that would not constitute travel time.

Counsel further distances Article 22 from Article 25.03 by noting that Article 22 and its calculations of reimbursable travel time relate only to temporary changes to an employee’s point of assembly, and not to leaves of absence with pay to take courses,

as specified in Article 25.03. Counsel argues that what may arise from an operational shift change, does not arise for a leave of absence granted to an employee to take a training opportunity.

Turning to past practice, Counsel reviews the legal principles involved, and cites the leading cases that establish and review those principles: *Nanaimo Times Ltd*., [1996] B.C.L.R.B.D. No. 40; Leave for Reconsideration denied in [1996] B.C.L.R.B.D. No. 151; and *International Association of Machinists, Local 1740, and John Bertram & Sons Co. Ltd.*, [1967] O.L.A.A. No. 2 (Weiler).

Counsel also cites: *Selkirk College and B.C.G.E.U. (Medland) (Re)*, [2002] B.C.C.A.A.A. No. 150 (Chertkow); *Coast Hotels Ltd. and Hotel, Restaurant and Culinary Employees and Bartenders Union, Local 40*, [1995] B.C.C.A.A.A. No. 296 (Chertkow); *Surrey School District No. 36 and Surrey Teachers' Association*, [2004] B.C.C.A.A.A. No. 150 (Taylor); and *British Columbia v. British Columbia Government and Service Employees' Union (Market Adjustment Grievance)*, [2010] B.C.C.A.A.A. No. 172 (McPhillips); and claims the determinations in those cases, which uphold longstanding, unchallenged practices, are both relevant and applicable here.

As to the past practice in the instant case, Counsel argues that:

- The past practice of the parties is consistent with and clearly supports the Employer's interpretation and application of Articles 25.03 (a), 25.03 (b), and 25.04.

- Employees have never been paid a travel time differential where their course is conducted within their "community or regional area." This practice has been in place and applied to all employees for at least twenty years.

- The past practice has occurred with significant regularity over the years, without prior challenge or grievance.

- The Employer's practice has been applied to approximately 238,000 training days over 17 years, 1994 through 2010, and actually predates the 1994 language changes to Article 25.03. Following the changes to Article 25.03 noted earlier, the Employer has applied that practice over the span of at least five collective agreements.

- The Union had knowledge of and acquiesced in that practice, and it is inconceivable that responsible representatives of the Union were not aware of the practice.

- The practice is clear, consistent, pervasive and understood by both parties responsible for the negotiation and administration of the collective agreement.

As for what Mr. Csiszar describes as Mr. McNevin's and Mr. Hall's evidence – that they were unaware of the Employer's practice – and that no other employees had approached them with particular concerns, Employer Counsel repeats his contention that it is fundamentally inconceivable that an Employer practice of that scope, regularity and impact would not prompt a complaint, grievance or concern.

Further, Counsel argues that the Union's witness claims that employees with travelling time questions were simply directed to the Employer makes no practical sense, and suggests that the Union has given tacit agreement or permission by its silence and passiveness.

Counsel submits there is a clear, unequivocal and longstanding practice regarding travel time supporting the Employer's interpretation of the collective agreement, but in the alternative, submits that an estoppel arises in the circumstances of this case, and asks for the Union to be estopped from asserting its interpretation of Article 25.03 until such time as the current collective agreement has expired.

Counsel reviews the legal principles of estoppel – see *B.C. Rail Ltd. and the United Transportation Union, Local Nos. 1778 and 1923*, [1992] BCLRBD No. 153 (Hall), and

I.C.B.C. v. Office & Professional Employees' International Union, *Loc. 378* [2002] B.C.C.A.A.A No. 109 (Hall) – and claims all of the components of estoppel cited therein are satisfied in the instant case.

Counsel makes particular note of Arbitrator Weiler's decision in *Corporation of the City of Penticton and CUPE, Local 608*, [1978] BCLRBD. No. 26:

> … if management does take action, and the union officials are fully aware of it, and no objection is forthcoming, then the only reasonable inference the employer can draw is that its position is acceptable. Suppose the employer commits itself on that assumption. But the union later on takes a second look and feels that it might have a good argument under the collective agreement, and the union now asks the arbitrator to enforce its strict legal rights for events that have already occurred. It is apparent on its face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board in District of Burnaby… …, "It is hard to imagine a better recipe for eroding the atmosphere of trust and co-operation which is required for good labour management relations, ultimately breeding industrial unrest in the relationship – all contrary to the objectives of the Labour Code"….

Counsel claims that the Employer has relied to its detriment on the Union's acquiescence in the Company's interpretation of the collective agreement, and would suffer harm or detriment if the Union were allowed to change its position.

Other cases cited by the Employer relevant to the notion of estoppel generally and/or to unequivocal representation arising from silence or inaction include: *District of Chilliwack and Canadian Union of Public Employees, Local 458 (Article 14.01 Arbitration)*, (January 23, 1991), A-53/91, (Hope); *Vancouver School District No. 39 and Vancouver Teachers' Federation*, [1995] B.C.C.A.A.A. No. 185 (McPhillips); *New Westminster School District No. 40 v. British Columbia Teachers' Federation*, [1999] B.C.C.A.A.A. No. 221 (Gordon); *Riverside Forest Products Ltd. and United Steelworkers of America, Local 1-423*, [2005] B.C.C.A.A.A. No. 30 (Gordon); T*aggart Service Ltd. and U.F.C.W., Loc. P818*, [1989] C.L.A.D. No. 15 (Picher); *Norampac v. Communication, Energy and Paperworkers Union, Local 528 (Vacation Pay Grievance)*, [2008] O.L.A.A. No. 392 (Barrett); *Halton (Regional Municipality) and O.N.A., Re*, [1993] O.L.A.A. No. 57 (Verity);

Chilliwack (District) v. Canadian Union of Public Employees, Local 458, [1991] B.C.C.A.A.A. No. 53 (Hope); *Insurance Corp. of British Columbia and O.P.E.I.U., Local 378*, 68 C.L.A.S. 175, [2002] B.C.C.A.A.A. 109 (Hall); *Toronto Transit Commission and A.T.U., Loc. 113, Re*, [1992] O.L.A.A. No. 61 (Barrett); and *Agassiz School Division No. 13 (Re)*, [1997] M.G.A.D. No. 61 (Graham).

In conclusion, Employer Counsel argues that if the Union position were accepted in this case, it would wipe out the longstanding application and understanding re Article 25.03 (a), would require this board to ignore how the article has been applied since its inception, and would result in little, if any, effective usefulness for Articles 25.03(b) and 25.04.

Employer Counsel asks that the grievances be dismissed.

In reply, Union Counsel asserts that it would have been simple for the Employer to adduce evidence to support its claim that Union officials, other than the grievors, had experienced taking courses at a location other than their POA under the Employer's policy and it failed to do so. The Union had sought such examples in its disclosure requests but none was provided. Hence the Union submits there is no evidence of officials experiencing these particular circumstances previous to these five grievors.

As well, in reply, Mr. MacTavish argues that none of these grievors found out about their training before they were assigned to it, and in no way was it at their request.

DECISION

The arbitral prism through which this, and all, interpretive disputes are appropriately viewed is well established, cited by Employer Counsel, and laid out in clear detail in *Pacific Press and GCIU Local 25C (Bird)* [1995] B.C.C.A.A.A. No. 637.

1. The object of interpretation is to discover the mutual intention of the parties.

2. **The primary resource for an interpretation is the collective agreement.**

3. Extrinsic evidence (outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.

4. Extrinsic evidence may clarify but not contradict a collective agreement.

5. A very important promise is likely to be clearly and unequivocally expressed.

6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.

7. All clauses and words in a collective agreement should be given meaning, if possible.

8. Where an agreement uses different words, one presumes that the parties intended different meanings.

9. Ordinarily words in a collective agreement should be given their plain meaning.

10. Parties are presumed to know about relevant jurisprudence.

(emphasis added)

With respect to the collective agreement interpretation, there are two aspects to the Employer's position which must be considered.

1. Employees have not been "[directed]" - pursuant to Article 25.03 (a) – to take the courses.

2. "Point of assembly" – as that term is used in Article 22 – is inclusive of the notion of a community (or regional) point of assembly, and gives meaning to the word "necessary" in Articles 25.03(a) and 25.04.

On the first point, I have concluded, upon consideration of all the evidence, that the logically necessary indices of Employer direction are present in this case.

Contrary to Ms. Bornn's assertion that the Employer's involvement in training is simply provided as a service to employees, the extent of that involvement including; Employer identification of employees to be trained, OPD forwarding, completion and processing of all relevant forms and paperwork, Employer identification of training as a "work assignment", Ms. Bornn's Travel Time memo that employees refusing to attend training assignments once scheduled "would be considered on unapproved absence and could possibly result in consequences for the employee", and Mr. Colin Harris' (Executive Director, Marine Personnel) January 11, 2011, email that "… the training course must be done so it is in effect mandatory", all suggest that Employer involvement is more reasonably considered a direction under Article 25.03 (a) than a request under 25.03 (b).

The fact that none of the earlier responses to queries from employees in evidence, previous to the grievances at issue, were declined on the basis that the Employer did not direct the training, supports this conclusion. Rather, it appears from emails related to these requests for travelling time that they were denied solely on the basis of the community/regional concept for payment held by the Employer.

Another point undercutting the Employer's contention that employees have not been directed, is the simple fact that the concept of "directed" has nothing to do with location of an employee's home, geographic community, or point of assembly. Rather it has everything to do with the actions of the Employer. As the Employer has paid differential travel time for those outside the Employer's definition of community, it can't reasonably be argued that employees within the community are any less directed. Put another way, all employees are equally directed, regardless of where they happen to live, or how their POA has been defined.

As for the Employer argument that the word "necessary" results in the term "point of assembly" being inclusive of the notion of a community POA, I note that the

community/regional concept is not described in the collective agreement, or in any written document between the parties. Further, the notion of an expansive area or community is inherently contrary to the word "point" (of assembly) - a word which is contained in the collective agreement.

While Employer Counsel argues that the word "necessary" is a lynch pin to the Employer's interpretive arguments, it is difficult to give that claim credence when an October 29, 2010 internal memo from Brian Kavanagh, Director, Employee Relations, highlights the phrase "NECESSARY TRAVELLING TIME", and adds the immediate editorial follow-up of "(whatever this means)."

In conclusion, I find no support for the Employer's interpretation of the meaning of "necessary" on a plain reading of the relevant articles.

I now turn to the Employer's focus on the "extrinsic evidence" aspects of this case, specifically the contention that "the practice of not paying travel time differential where [an employee's] course is conducted within their community or 'regional area' is clear, consistent, pervasive and understood by both parties responsible for the negotiation and administration of the Collective Agreement", and thus clarifies the meaning of the Collective Agreement.

This Employer contention must be considered against the established test regarding past practice found in *International Assoc. of Machinists, Local 1740*, *John Bertram & Sons Co. Ltd.,* [1967] OLAA No. 2 (Weiler):

- conduct by one party which is unambiguously based on one meaning attributed to the relevant provision;
- acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection;

- evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.

There is no doubt on the evidence that the Employer has largely maintained a no payment for "necessary travelling time" approach for more than 17 years. However the evidence also reveals exceptions to the Employer's practice have been provided in varying time and distance circumstances unencumbered by formal, or informal, written standards, and determined on the basis of an unspecified standard which is described by the Employer as reasonableness.

It is difficult to conceive of how the Union could clearly express acquiescence to a system which the Employer itself has neither precisely defined, nor clearly communicated to the Union.

Outside of Ms. Bornn's and the Employer's general contention that the Union should have been aware of the Employer's travel time practice, there was no substantive evidence regarding Union acquiescence to the Employer's stated policy. The testimony of Mr. McNevin and Mr. Hall indicated that although they were aware of some travel time problems from employees, the specifics were not known to them and the community/regional concept was only understood around the time the present grievances were filed.

In sum, the Employer's practice evidence is not sufficient to clarify or contradict the interpretation I have found with respect to the words of the collective agreement.

My decision on this matter is supported by Arbitrator McPhillips in *Vancouver School District No. 39 v Vancouver Teachers'* Federation, [1995] B.C.C.A.A.A. No. 185, supra. He stated:

> In the opinion of this board, the wording in the Agreement is sufficiently clear that it would be inappropriate to use past practice to interpret the clear meaning of the provision: Board of School Trustee, District No. 57 Prince George, supra: City of Victoria, supra.

I now turn to the Employer's argument on estoppel.

The estoppel test is well established, and detailed in *ICBC v. OPEIU, Loc. 278*, [2002] B.C.C.A.A.A. No. 109 (Hall):

- intentionally or not, one party has unequivocally represented that it will not rely on its legal rights;
- the second party has relied on the representation; and
- the second party would suffer real harm or detriment if the first party were allowed to change its position.

Repeating the essence of my findings regarding past practice, there can be no finding of unequivocal Union representation, intentional or not, when there is an absence of clarity about what exactly the Employer practice is, and no indication of Union knowledge as to the specifics of the Employer practice, or Union representations in response to same.

The Employer contends that silence can equal unequivocal representation, but not in cases, as here, where the Employer's own position is so equivocal.

Ms. Bornn was unable to explain certain applications of the Employer's policy for payment of travel time and acknowledged there were exceptions based on reasonableness even to the Employer's definition of the policy. It bears repeating that the Union's evidence is that its officers did not understand the specific practice of the Employer or its application prior to the time around the filing of the grievances before this Board. Mr. Hall checked with other union staffers and executive members and found none were aware of the community or regional concept used by the Employer. While Mr. McNevin was aware of some employees' problems with travel time payments and advised them to query payroll and to grieve if not satisfied, he could not recall any case where an employee was paid a differential for kilometrage but not travel time for training outside and further than his/her POA. Management's geographic approach for

payment of travel for training, was “a new phenomenom” which he had not experienced prior to the circumstances leading to his own grievance.

Employer Counsel argues for the applicability of *Taggart Service Ltd. and UFCW, Loc. P818*, [1989] CLAD No. 15 (Picher), however that case is distinguishable given the ongoing discussions and letters between the parties regarding the practice at issue there. There is a significant absence of such evidence in the instant case.

Here, there is no evidence of discussions between the parties regarding the Employer’s policy for payment of travel time for training and the only written communication was responses to a few employees who queried the non-payment of their individual travel time for training. It was not evident these responses were copied to Union officials and none of these employees raised grievances arising from their circumstances.

These circumstances are also distinguishable from those before Arbitrator Hall in *Insurance Corp. of British Columbia and O.P.E.I.U., Local 378*, 68 C.L.A.S. 175 April 16, 2002, supra, wherein he stated the following:

> There is no obligation [for] (*sic*) a trade union to investigate how an employer actually administers the collective agreement: *Re Corporation of the City of Penticton and CUPE, Local 608* (1978), 18 L.A.C. (2d) 307 (Weiler). However, the Corporation’s practice here was so widely known that it must have come to the attention of responsible Union officials. At the very least, the Corporation’s case at arbitration placed a burden on the Union to call evidence that it was not aware of the practice. The Union’s failure to do so raises an adverse inference. And even if the current Union executive was not aware, it does not make “good labour relations sense” to conclude that the Union did not learn of the practice at some point: see *Re Hermes Electronics Ltd. and International Brotherhood of Electrical Workers, Local 1651* (1990), 14 L.A.C. (4th) 289 (Darby), at page 296.

Put simply, in contrast to the situation before Arbitrator Hall, this is not a case where the Corporation’s practice at issue was either understood or widely known so that it came to the attention of responsible Union officials prior to filing these grievances.

Arbitrator Hall's reliance on the *Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608* [1978] B.C.L.R.B.D. No. 26 (Weiler), supra, includes a portion of a cite which was particularly noted by the Employer earlier herein. The full paragraph of that cite bears repeating here:

> But a collective bargaining relationship is quite a different animal. The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems arising on a day to day basis across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language. By and large, it is the employer which takes the initiative in making operational decisions within the framework of the collective agreement. If the union leadership does not like certain management actions, then it will object to them and will carry a grievance forward about the matter. The other side of that coin is that if management does take action, and the union officials are fully aware of it, and no objection is forthcoming, then the only reasonable inference the employer can draw is that its position is acceptable. Suppose the employer commits itself on that assumption. But the union later on takes a second look and feels that it might have a good argument under the collective agreement, and the union now asks the arbitrator to enforce its strict legal rights for events that have already occurred. It is apparent on its fact that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board in District of Burnaby, cited above: "It is hard to imagine a better recipe for eroding the atmosphere of trust and cooperation which is required for good labour/management relations, ultimately breeding industrial unrest in the relationship – all contrary to the objectives of the Labour Code. (See also the observations of Mr. Justice Hutcheon in Larson vs. MacMillan, Bloedel (Alberni), cited as above, at p. 764.) To return to the metaphor which was used earlier, it is equally as acceptable to watch someone go out on the end of a limb, as it is to invite that person out on the limb -- before sawing it off.

The modern Doctrine of Promissory Estoppel is founded on equity and fairness. Chairman Weiler (as he then was) provided compelling guidance with regard to the application of estoppel to parties to collective bargaining who have a continuing and not a transactional relationship.

On the facts, as stated earlier, it cannot be said that this is a case where the Union officials were fully aware of management's actions and failed to object. Rather, the evidence reveals that when the union officials did find out about the employer's

community/regional policy for paying travelling time for training, these grievances were filed.

In other words, in the instant case the employer made an operational decision which was in place for over 17 years, but which was unclear and which the union hierarchy was only fully aware of many years later and at that time, it did object and carried forward these grievances. In these circumstances, the Employer's practice, on its own, is not sufficient to establish an unequivocal representation from the Union leading it to believe that the Union had acquiesced in this policy. In my view, it would be inequitable and unfair to find that an estoppel arises preventing the Union from relying on its collective agreement rights.

In summary, I have found the meaning of the collective agreement to be clear as noted herein and the Union is not estopped from asserting its legal rights.

In the result the grievances on behalf of the five individuals succeed.

As requested by Union counsel, I refer the issue of remedy to the parties and retain the necessary jurisdiction to deal with any matters arising that the parties are unable to resolve.

It is so awarded.

Dated at the City of Vancouver, in the Province of British Columbia this 25th day of January, 2013.

Judi Korbin, Arbitrator