IN THE MATTER OF AN ARBITRATION

BETWEEN:

TECK COAL LIMITED (LINE CREEK OPERATIONS)

(the "Employer")

AND:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 115

(the "Union")

ARBITRATOR:	John Kinzie
COUNSEL:	David McDonald, for the Employer John MacTavish, for the Union
DATE OF HEARING:	October 28, 2014
PLACE OF HEARING:	Fernie, British Columbia

AWARD

I

This proceeding is concerned with a policy grievance filed by the Union claiming that the Employer is violating Article 13.07 (c) of the collective agreement by not paying employees' travel expenses to see a specialist where that specialist practises anywhere within the area served by the Employer's busses which take employees to and from the Line Creek Mine site.

Article 13.07 (c) of the collective agreement reads as follows:

> "The Company shall pay travel expenses to a maximum of $100.00 per trip for expenses incurred by an employee who is required to travel to attend a specialist for consultation, treatment or hospitalization. This benefit is restricted to employees and shall be reimbursed through an expense statement supported by receipts."

The Employer denied the grievance. It maintains that Article 13.07 (c) does not require it to pay expenses when the employee is able to see a specialist within the Elk Valley. It submits that employees are required to "travel" before they are entitled to have their expenses paid and that requirement, it contends, necessitates that they must leave the local area. It further maintains that there was a common understanding between the parties that travel expenses within the Elk Valley were not compensated.

The Union does not agree with the position taken by the Employer. It submits that the language the parties have used in Article 13.07 (c) is clear. It says that that language does not impose any geographical limitation on the Employer's obligation to pay an employee "who is required to travel to attend a specialist for consultation, treatment or hospitalization."

I was appointed by the Director of the Collective Agreement Arbitration Bureau pursuant to Section 86 of the Labour Relations Code to hear and determine this grievance.

II

The background facts to this proceeding are as follows.

The Employer owns and operates five mines within the Elk Valley. The Elk Valley in southeastern British Columbia is bordered by Elkford in the north, Fernie in the south, and the Municipality of Crowsnest Pass to the east which is operationally located in the town of Coleman but also includes the towns of Blairmore and Bellevue. These eastern portions of the valley are actually within the boundaries of the Province of Alberta. The Line Creek Mine is located about one-half way between Elkford and Sparwood.

Employees are able to drive their own vehicles to the Line Creek Mine site, but the Employer also provides bussing for them to the site from designated locations in Fernie, Elkford, Sparwood, and Crowsnest Pass. These busses take employees to the site in time for shift changes and return employees to the designated locations after their shift is over. The busses are not available to transport employees at other times of the day to different locations within the Elk Valley.

None of the towns or cities within the Elk Valley are very large. While most, if not all of them, have general medical practitioners, over time, very few of them have had specialists located within their boundaries. Reference was made to an orthopedic surgeon in Blairmore, a surgeon in Sparwood, and an internist in Fernie. However, employees living in the Elk Valley in need of specialized medical attention have generally been referred outside the valley to specialists located in larger centres such as Calgary and Lethbridge in Alberta and Cranbrook in British Columbia.

The Employer has paid employees' travel expenses in accordance with the provisions of Article 13.07(c) when the travel has involved trips to places such as Calgary, Lethbridge and Cranbrook to see a specialist. However, when Calvin Hughesman, an employee of the Employer, went to see a specialist in Blairmore from his home in Elkford, a distance of some 76 kilometers one way, the Employer denied his claim. It is this denial that gave rise to the policy grievance that is before me in this proceeding.

Article 13.07(c) first appeared in the 1989-92 collective agreement. No one who was involved in that set of negotiations was called to testify in this proceeding.

On September 16, 1992, the Employer's predecessor published guidelines for completing expense sheets for travel expenses to see a specialist. Those guidelines include the following:

> "According to the Collective Agreement, employees *only* are eligible for certain travel expenses to attend a specialist appointment for consultation, treatment or hospitalization as stated in Article 13.07(c).
>
> *Note: Travel expenses, will include travel for vision and dental care where specialist services are required, and are not available in the immediate area. The employee must be referred out of the area for such services by his family doctor or dentist.
>
> As previously mentioned, this would not apply to travel outside the area for what is considered routine services as the fitting of glasses, contact lenses, or normal orthodontic appointments.
>
> The intention of this travel allowance is to cover off reasonable out-of-pocket expenses up to a maximum of $100.00.
>
> The following are general guidelines for what is considered reasonable expenses:

a) Bus ticket, airfare, or personal vehicle, kilometers @.11¢/Km.

b) Meals required to get to and return from the appointment (3 daily meals up to a $40.00 maximum).

• Breakfast	$10.00 maximum
• Lunch	$10.00 – 15.00 maximum
• Supper	$25.00 maximum

***NOTE** Remember meals covered are for the employee only and would only apply to meals required which correspond with the appointment time.

c) Accommodation when required in meeting an appointment. i.e. A person living in Sparwood having an appointment in Cranbrook or Lethbridge would not normally require overnight accommodations.

The Company requires written confirmation of your appointment with the specialist. If an appointment has been postponed, or rescheduled and you do not find out until *after* you have made the trip, you must obtain notice of cancellation from the specialist office or treatment center before expenses will be covered."

The document encompassing these guidelines stated that they were to be published to all employees via posting on bulletin boards. However, no one who was involved in the preparation and/or posting of this document was called to testify in this proceeding. No one testified as to whether this document was ever actually posted on bulletin boards.

Employees endeavoured to arrange specialist appointments for their days off. However, when that was not possible, appointments were made for regular days of work. In the latter circumstance, Article 17.07(a) of the collective agreement came into play. It provides that:

"a) **Personal Leave With Pay** may be granted for the following situations:

1. Reasonable time off required to attend a scheduled medical appointment which could not be arranged for an alternate time when the employee was not scheduled to work.

2. Reasonable time off required for an initial visit to a specialist for consultation and diagnosis."

During collective bargaining in 2005, issues arose regarding employees not submitting detailed receipts for the purposes of Article 13.07(c) and, in the Employer's opinion, taking too much time off for medical appointments and initial visits to specialists under Article 17.07(a). The Employer questioned what was a "reasonable time off" for the purposes of that provision. Following those negotiations, a joint group developed a chart establishing reasonable travel times from various locations within the Elk Valley to locations outside the valley where specialists practised. These travel times were then used to assist in determining what would be a "reasonable time off" for the purposes of Article 17.07 in a particular case.

Dan Mackay was a member of that group. He has worked at the Line Creek Mine since 1981. In 2013, he left the Union's bargaining unit to take a staff position. While he was in the bargaining unit, he held a variety of Union positions including shop steward, chief shop steward, and chairman of the health and welfare committee. He testified that during the group's discussion of reasonable travelling times, locations within the Elk Valley as destinations did not come up for discussion because there were very few specialists in the valley.

Shortly thereafter, Mackay filed his own grievance in respect of travel expenses for attending a specialist's appointment in Cranbrook. At the time, Mackay was living in Jaffray which is southwest of Fernie on the road to Cranbrook. Mackay drove the approximately 47 kilometers from Jaffray to Cranbrook to see his specialist. That day was a regularly scheduled work day for him and he had personal leave to attend the appointment. Following his appointment, he drove from Cranbrook, back through Jaffray, and through Fernie to the Line Creek Mine site. After his shift was complete, he drove back to his home in Jaffray. The grievor claimed for all of the mileage he had covered that day, not just for the travel to Cranbrook from Jaffray and back to Jaffray.

The Employer denied his claim in part on the basis that the Employer never paid mileage to employees for using their own vehicles to travel to and from work.

Ultimately, the Employer and the Union were able to settle the Mackay grievance. The terms of that settlement were set out in a letter dated March 19, 2007 from Chris Bleich, the Employer's Superintendent, Employee Relations, to Gordon Chaisson, the Union's Business Agent responsible for the Line Creek Mine bargaining unit. In that letter, Bleich advised Chaisson that:

> "The current practice of the company of reimbursing the *mileage portion* for an expense submitted under 13.07(c) for an employee to attend a specialist appointment is to reimburse the employee for his mileage from his home to the appointment and from the appointment to his home.

The new practice of applying 13.07(c) for the purposes of calculating the *mileage portion* of an expense claim will be:

1) If an employee reports to work for part of the day and then leaves the minesite to attend a Specialist appointment, he/she will be paid mileage from the minesite to the Specialist (sic) office and mileage from the Specialist to his/her home.
2) If an employee attends a Specialist appointment and then reports to work, he/she will be paid mileage from his/her home to the Specialist (sic) office and from the Specialist's office to the minesite.
3) If the employee does not come to work before or after the appointment, then mileage from his/her home to the Specialist's office and mileage from the Specialist's office to his/her home to a maximum of $100."

In his evidence, Chaisson said that Hughesman's case was the first time he had heard the Employer's view that it was not obligated to pay travel expenses under Article 13.07(c) for travel to see a specialist within the area serviced by the Employer's busses. He testified that he had been the Union's business agent for the Line Creek Mine bargaining unit from 1996 until he retired in June, 2013.

Mackay, on the other hand, was a shop steward or chief shop steward for the bargaining unit for much of the same time. In fact, Mackay would often act as the business agent when Chaisson was absent due to vacation or the like. Mackay testified that it was his understanding that if an employee lived within the Employer's bus route and was seeing a specialist who was also located within the bus route, his travel expenses were his own responsibility. He said he was asked by other employees about their entitlement to Article 13.07(c) travel expenses in these circumstances and he always replied the same way – not if the travel was within the geographical boundaries of the Employer's bus routes. He estimated that he had been asked maybe six times.

In cross examination, Mackay was asked if he could tell Union counsel who these six employees were. Mackay replied that he could not. He was then asked if he could remember with any particularity, when these conversations had taken place. He said that he could not. He then acknowledged that the number six was a guess. He also acknowledged that he could not say where any of the conversations had actually taken place. He could only guess that it was probably on the shop floor.

III

I now turn to address the issues that arise for determination in this proceeding.

Article 13.07(c) of the parties' collective agreement provides that the Employer must pay for travel "expenses incurred by an employee who is required to travel to attend a specialist for consultation, treatment or hospitalization" subject to certain limitations.

There are certain limitations expressly set out in the provision. They include the fact that the benefit is "restricted to employees", is "to a maximum of $100.00 per trip", and must be supported by "an expense statement" and "receipts". However, the Employer contends that there is a further limitation on its obligation to pay under Article 13.07 (c). It says that it is only obligated to pay expenses if the travel to attend a specialist takes the employee outside the geographical area serviced by the Employer's busses, or put another way, outside the Elk Valley. The Union disagrees. The Union says that Article 13.07(c) contains no such limitation. That is the central issue that has to be decided in this case.

This is an interpretation case and the answer to that issue depends on the mutual intentions of the parties to the collective agreement. In searching for the parties' intentions in a dispute such as this, arbitrators have looked first to the words they have used in their agreement to express those intentions. Parties are presumed to have intended what they have said. However, the words the parties have used in the provision in dispute are not intended to be interpreted in isolation. Instead, they are to be read in the context of the collective agreement as a whole, giving those words their normal and ordinary meaning unless to do so would lead to an absurdity or inconsistency with the rest of the agreement. See Brown and Beatty, *Canadian Labour Arbitration* (4th ed.) paras. 4:2100 and 2110.

If there is a *bona fide* doubt as to what the parties intended from a consideration of the words they have used, arbitrators have had regard to various forms of extrinsic evidence to assist them in resolving that doubt. One source of such evidence is the exchanges the parties may have had across the bargaining table when they were negotiating the provision in dispute. They may have discussed the very issue in dispute and the evidence regarding their exchanges across the table may disclose that they had reached a consensus on that issue. A second source of such evidence is the practice of the parties in applying the provision in dispute. The employer may have interpreted the provision in dispute in a particular way and the union, with knowledge of how the employer was interpreting and applying it, may not have grieved or objected. In both cases, such evidence would provide the arbitrator with evidence of what the parties mutually intended by the words they used in their collective agreement.

However, caution should be exercised in the use of various forms of extrinsic evidence to assist in the interpretation of a collective agreement. This point was made by the Labour Relations Board of B.C. in *Board of School Trustees, School District No. 57, Prince George*, BCLRB No. 41/76, where the Board stated that:

> "The significance and weight accorded to parole evidence should be directly related to the degree of ambiguity in the collective agreement. In most instances the text of the agreement (and by the text I mean not only the language of the provision itself but the entire collective agreement) and common sense rules of construction will favour one interpretation. That is not to deny that an ambiguity, or another interpretation is possible. In such

> circumstances only very persuasive and unequivocal parole evidence would justify the less obvious interpretation. Conversely, in an agreement whose two different interpretations are equally attractive, the significance of extrinsic evidence is far greater. But the point to emphasize is that an arbitration board's recognition of an ambiguity does not compel it to decide the meaning of the agreement according to the parole evidence it hears. It is the agreement and not the extrinsic evidence which must be interpreted. The evidence will assume greater or lesser significance according to the degree of ambiguity in the text. If the parole evidence itself is equivocal the Board is merely deprived of one tool in its interpretative function. In all instances it must settle the difference with regard to the wording of the agreement.
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> Secondly, there is extrinsic evidence of various types and value. At one end of the spectrum is objective evidence such as negotiating minutes signed by both parties or the past practice of parties. Such evidence must be given considerable weight because in both examples it reflects a *mutuality* of intent measurable by objective standards. At the other end of the spectrum is subjective evidence of a party's intentions or impressions of what in fact was achieved at a bargaining session. Unless such impressions are supported by evidence validating those impressions, they are of no value. The intent of one party is only significant when the extrinsic evidence allows an arbitration board to attribute it to the other party."
>
> (at 8-9)

Further, in this regard, there are the limitations discussed in *John Bertram & Sons Co. Ltd.* (1967), 18 L.A.C. 362 (P.C. Weiler):

> "... it would seem preferable to place strict limitations on the use of past practice in our second sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) 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; (4) 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."

(at 368)

In my view, it is clear from a reading of the words the parties have used in Article 13.07(c) that that provision does not expressly, in clear terms, impose a limit on the Employer's obligation to pay travel expenses to the effect that the travel must be outside the area serviced by the Employer's busses, or put another way, outside the Elk Valley. The question then becomes, it seems to me, whether the use of the term "travel" creates such a limitation.

David McPhillips had to address the meaning of that term in *Fletcher Challenge Canada, Elk Falls Division*, Award dated May 25, 2000. With respect to its meaning, he had this to say:

> "... here it must be observed that the title of the policy in question is the Travel Policy Guidelines. In my opinion, the normal and ordinary meaning of the term 'travel' is to go to a place at some distance or to journey: 'Black's Law Dictionary, Sixth Edition, West Publishing Co., 1990; Shorter Oxford Dictionary, Third Edition; Dictionary of Canadian Law, Second Edition, Carswell, 1995. The term 'travel' can also be used in the sense of a movement from any place to another but the ordinary meaning in the context of this type of agreement would, in my opinion, involve going away on business as opposed to a more narrow meaning such as moving from one building to another or going a few meters off-site."
>
> (Quicklaw, at para. 32)

Applying those principles to this case, the use of the term "travel" in Article 13.07(c) would, in my view, support a mutual intention that the travel must involve "some distance" or a "journey" of some length. Thus, in my view, an employee resident in Fernie going to see the internist in Fernie would not be entitled to claim travel expenses. However, that circumstance is qualitatively different from an employee like Hughesman who had to travel to a different town altogether involving a 152 kilometer round trip. In my view, his trip required him to go "some distance" to see his specialist or, put another way, engage in a "journey" to see him. I am of the further view that the distances within the area serviced by the Employer's busses or, put another way, within the Elk Valley, are such that the use of the word "travel" in Article 13.07(c) does not support the implied limitation asserted by the Employer.

In summary, when the words of the collective agreement are considered in light of the accepted principles of collective agreement interpretation, they clearly favour, in my view, the interpretation of Article 13.07(c) advanced by the Union. Thus, the principles set out in *John Bertram & Sons Ltd., supra*, and quoted above would suggest that it

would not be appropriate to use past practice evidence to assist in the interpretation of the collective agreement in this case because there is a "clear preponderance in favour of one meaning stemming from the words and structure of the agreement, as seen in their labour relations context . . . ." (at 368). To reach a different interpretation of the agreement based on such evidence raises the potential problem of the arbitrator altering or amending the collective agreement which would be in excess of his jurisdiction.

Board of School Trustees, School District No. 57, Prince George, supra, still leaves open the possibility of an ambiguity and a different meaning based on the extrinsic evidence, but, in those circumstances, comments that:

> ". . . only very persuasive and unequivocal parole evidence would justify the less obvious interpretation."
>
> (at 8)

What is the nature of the extrinsic evidence in this case?

First of all, there is no evidence regarding the parties' negotiations with respect to Article 13.07(c). Thus, there is no evidence as to whether the parties considered the very issue that is in dispute in this proceeding and, if so, what they had to say about it.

Secondly, with respect to evidence of the parties' practice after Article 13.07(c) was included in the collective agreement, we have the Employer's guidelines which appear to have been published in 1992, the Employer's practice of not paying travel expenses where travel was within the bus route or within the Elk Valley, and Mackay's evidence regarding his communications with fellow employees to the effect that the Employer did not pay travel expenses in these circumstances.

The 1992 guidelines in the first Note states that "the employee must be referred out of the area for such services . . . ." In my view, the use of the term "area" in that sentence refers back to the phrase "immediate area" in the preceding sentence. The word "immediate" is defined in the *Concise Oxford Dictionary* (7th ed.) as meaning in part:

> "(of Person or thing in its relation to another) not separated by any intervening medium; . . . nearest, next . . . ."
>
> (at 498)

Having considered the matter, I am of the view that the use of the phrase "immediate area" in the guidelines is consistent with the use of the word "travel" in Article 13.07(c). "Travel" contemplates a "journey" or moving "some distance", i.e., beyond the employee's "immediate area". If an employee's specialist lived in his own town or city, then I am of the view that his going to see him would not entitle him to travel expenses because the specialist practises in his "immediate area". However, in my view, Blairmore, where Hughesman's specialist practised, was not in the "immediate

area" of Elkford, Hughesman's place of residence. Some 76 kilometers separate the two towns.

In summary, I am of the view that the 1992 guidelines do not provide "persuasive" and "unequivocal" evidence supporting the Employer's "less obvious interpretation" of Article 13.07(c).

I accept the Employer's evidence that it has not previously paid travel expenses for employees to see specialists in the area serviced by its bus route or in the Elk Valley. However, the impact of this evidence is reduced, in my view, by the fact that there has never been that many specialists practising in this area for employees to see. Thus, the issue would not have arisen that frequently. I should also say that I am persuaded that that was the reason towns within the bus route or the Elk Valley were not raised during the 2005 group discussions on reasonable travelling times, not because the Union accepted the Employer's practice of not paying travel expenses in such circumstances.

However, while the conduct of the Employer has been consistent and unequivocal, the extent to which that conduct can be attributed to the Union is not as clear. Chaisson, the Union's long time business agent for this bargaining unit, testified that he had not been made aware of the issue until Hughesman came to see him. He then filed a grievance against the Employer's refusal to pay him his travel expenses.

Mackay testified that he was aware of the Employer's position and advised employees of that position with the result that those employees do not appear to have pursued the matter. However, Mackay could not particularize this evidence in any way with times, dates, places and names. His inability to do so does not make his evidence very persuasive, in my view.

More fundamentally, though, I am not convinced that Mackay, as a shop steward or even chief shop steward, was a member of the "union . . . hierarchy who [has] some real responsibility for the meaning of the agreement . . . ." See *John Bertram & Sons Ltd., supra*, at 368. In my view, Chaisson, the Union's business agent for the Line Creek Mine bargaining unit, was the member of that hierarchy who had that responsibility and Mackay never raised the issue with him. When Chaisson first became aware of it, he grieved it.

In summary, I am of the view that the Employer's interpretation of Article 13.07(c) cannot be attributed to the Union. Thus, in my view, it can not be said the Employer's past practice in administering Article 13.07(c) reflects a "mutuality of intent" as contemplated by *Board of School Trustees, School District No. 57, Prince George, supra*. This past practice evidence does not persuade me to the conclusion that it is the better evidence of what the parties had intended than are the words they have used in Article 13.07(c) to express them.

The Employer expressly declined to raise an issue of estoppel. Consequently, I do not propose to address that issue and whether that doctrine would apply in all the circumstances of this case.

In conclusion, I am of the view that Article 13.07(c) does not impose a geographical limitation on the ability of employees to recover their travel expenses for seeing a specialist to the effect that their travel must take them outside the bus route of the Employer's or outside the Elk Valley. Thus, I am of the view that Hughesman was entitled to be reimbursed for his travel expenses to see his specialist in Blairmore from his home in Elkford.

It is so declared.

I retain jurisdiction to deal with any difficulties that might arise in connection with the implementation of this Award.

Dated this 12th day of March, 2015.

JOHN KINZIE
ARBITRATOR