IN THE MATTER OF AN ARBITRATION

BETWEEN:

FORTIS BC INC.

(the "Employer")

AND:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 213

(the "Union")

ARBITRATOR:	John Kinzie
COUNSEL:	Charles Harrison, for the Employer John MacTavish, for the Union
DATES OF HEARING:	September 17 and 18, 2014
PLACE OF HEARING:	Kelowna, British Columbia

AWARD

I

This proceeding is concerned with a grievance by the Union dated January 21, 2014 claiming that the Employer had diminished the vacation entitlement for certain employees the Union claims had worked during the labour dispute between the parties in 2013.

The immediate past collective agreement had expired on January 31, 2013. Collective bargaining continued after its expiry, but it did not produce a new collective agreement. Subsequently, the Union and its members undertook limited job action, to which the Employer ultimately responded with a lockout on June 26, 2013. The dispute was finally resolved on December 16, 2013 with an agreement to submit all outstanding bargaining items to final and binding interest arbitration. Dalton Larson was selected as the interest arbitrator and as of the dates of the hearing, he had not published his award in respect of that dispute.

During the dispute, some members of the Union's bargaining unit had to perform work for the Employer pursuant to essential services designations and orders issued by the Labour Relations Board of British Columbia (hereinafter the "Board"). Other employees were required to be on standby to deal with emergency situations should they arise.

Article 31.08 of the collective agreement provides that:

> "For each period of 30 consecutive days an employee is absent from work, a portion of one-twelfth of the vacation he would otherwise be eligible to earn shall be deducted from his vacation entitlement in the following year; PROVIDED that, time spent on paid leave, to a maximum of 12 consecutive months from the commencement of such paid leave, shall be considered as time worked."

For those employees who did not perform any work for the Employer between June 26, 2013 and their return to work in December, 2013 pursuant to the Board's essential services orders, they had their vacation entitlement reduced in accordance with the provisions of Article 31.08. For those who were required to work during the dispute pursuant to those orders, their vacation entitlement was not reduced unless there were periods of 30 consecutive days in between days of work. There is no difference between the parties in respect of these two distinct groups of employees.

Where the difference arises is with respect to those employees who were required to be on standby in the sense of being available for call out in the event of an emergency pursuant to those orders. The Employer maintains that employees on standby who were not called out to work were not at work. They were simply available for work and it submits that that is not sufficient for the purposes of Article 31.08. The Union disagrees – hence the grievance.

II

The background facts to this proceeding are as follows.

The Employer is responsible for the generation, transmission, and distribution of electrical power in a geographical area comprising Princeton to the west, north of

Kelowna and Kaslo to the north, Creston and Crawford Bay to the east, and the border with the United States of America to the south. The Union represents all of the employees employed in the generation, transmission and distribution of that power except for those excluded by the Labour Relations Code, supervisory employees, and office employees.

The most recent collective agreement between the Employer and the Union encompassed a term running from February 1, 2009 to January 31, 2013. In previous rounds of negotiations between the Union and the Employer as well as its predecessor, West Kootenay Power Ltd., work stoppages had occurred which would have had an impact on employees' vacation entitlement. However, in those circumstances, the parties had agreed that employees' vacation entitlement would not be impacted. This can be seen in return to work agreements signed in 1990, 1992, and 2001. One example of such language is that found in the June 1, 2001 Memorandum of Agreement signed between West Kootenay Power Ltd. and the Union where paragraph 6 (e) read:

> "The Company has agreed that there will be no pro rating of vacations that are accruing for 2002. In other words vacation entitlement for 2002 will be as if no strike had occurred."

The expiring collective agreement also contained provisions relating to employees who were required to be on standby and those who were called out to perform work. Article 27 of that agreement dealt with "premiums and upgradings" and Article 27.05 addressed "standby premiums". It provided that:

> "An employee who is required by the Company to be on standby at a time or times other than his regular working hours shall be paid:
>
> (a) A sum equivalent to one hour's pay at his base rate according to his classification for each day of standby on a regular scheduled day of work.
>
> (b) A sum equivalent to five hours pay at his base rate shall be paid to employees on standby on a regular scheduled day of rest or on one of the 10 statutory holidays covered by the Agreement.
>
> (c) An employee shall have the authority, after being called out, to require another employee to assist him. When the employee on standby requires two or more employees to assist, the employee on standby will receive the Crew Leader rate of pay in accordance with Marginal Paragraph 27.03.
>
> (d) The duration of callout time for which the employee is paid will be deemed to commence at the time the employee leaves

> for the job site in the vehicle provided or stipulated for such purpose and will terminate when the employee declares the job completed."

Article 28 of that collective agreement set out the overtime provisions and Article 28.03 dealt with the "emergency callout rate". It provided that:

> "(a) Work performed by an employee on an emergency callout shall be paid for at double the base rate.
>
> (b) An employee called out to work at a time other than the beginning of his regular shift shall receive a minimum pay of four hours at the prevailing base rate. However, if the employee is called out more than once a work day or day of rest he shall not be paid more than he would have received at his Overtime Pay rate had he worked from the commencement of the first callout to the termination of the final callout, within a work day or rest day."

Collective bargaining for a renewal of the 2009-2013 collective agreement began on January 7, 2013, but hit an impasse by February, 2013. The Union took a strike vote which, according to Mike Flynn, the Union's Business Manager at the time, produced a "strong" mandate for the Union to pursue its demands. The Union served strike notice in March of 2013, which in turn caused the Employer to apply to the Board for essential services designations and orders.

The Board issued its first essential services designation order on April 24, 2013, BCLRB No. B85/2013. The terms of that order in fact reflected what had been agreed to between the parties. The order first of all identified the "facilities, productions and services" that were "necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia." In the preamble to Section 2, it then provided that:

> "To ensure that the facilities and services designated as necessary or essential are supplied, provided or maintained by the parties in full measure, the Board makes the following orders to come into effect in the event of a general work stoppage or job action of a scope potentially affecting the delivery of essential services: in other words, the Union can engage in partial job action provided that it does not affect essential services without triggering the terms of this order. In the event of a dispute over whether a general work stoppage or job action of a scope affecting essential services is taking place, the Company point person will contact the Union point person in an attempt to resolve the dispute. If the parties cannot agree, it is open to the Company to declare a lockout for the purpose of bringing the following into full effect

> (at which point Company benefit coverage will cease in the absence of a Union commitment to pay benefit costs subject to the offset set out in section 2(xiii) below): . . . ."

The first recourse for maintaining these essential services was to management and excluded staff. Section 2 (i) provided that:

> "The Employer shall utilize the services of all of its management and excluded personnel who are qualified to the best extent possible. Management and excluded personnel shall work sixty hours total per week and be placed on standby for 24 hours a day, seven days per week to respond to essential service requirements. The Employer shall, if requested by one of the unions, record the daily number of hours and locations worked by each excluded personnel and forward a written record of such hours and locations worked to the unions every three days."

The office staff represented by the Canadian Office and Professional Employees Union, Local 378 would also be affected by any dispute between the Employer and the Union.

Section 2 (xiii) then went on to provide that:

> "Members of the unions working pursuant to the requirements of this Order shall have the terms and conditions of their employment governed by the applicable collective agreement last in force between the Employer and the employees' union except as altered by this Order. IBEW employees on standby during any job action will receive 5 hours pay for every 24 hour period of standby. Employer to cover benefit cost for the number of employees regularly scheduled plus the number of standby positions (to be offset against Union cost to maintain benefits)."

Following publication of the Board's order, the Union commenced limited job action against the Employer. On June 26, 2013, the Employer responded with a full lockout which activated the terms of the Board's April 24, 2013 order.

The labour dispute continued through the summer of 2013. On September 13, 2013, the Board issued a revised essential services designation and order. See BCLRB B176/2013. The revised order continued the Employer's obligation to "utilize the services of its management and excluded personnel who are qualified to the best extent possible." With respect to the need for bargaining unit members to perform essential services, the order directed in Section 2 (ii) that:

> "a. Each Union shall schedule its members to work in accordance with the Essential Service Designations in the attached Schedules. The Unions shall provide the necessary

information to the Employer for the preparation of payroll and, if possible, shall provide the schedule in advance. Where a shift is designated in the schedule, that shift shall not be split between employees unless otherwise agreed to by the parties. Members of the Unions scheduled to work as directed by this Order shall be the only members of the Unions who work. Members of the Union will not be required to work with excluded personnel unless there are insufficient bargaining unit members to perform essential services, in which case management and excluded or contractors will fill the gap (this provision does not alter the attached SCC schedule).

b. The Employer shall direct those scheduled employees to perform the duties of their employment that it determines to be necessary or essential to comply with this Order.

c. Each Union shall instruct its members to perform the work as directed by the Employer in (b) above.

d. Every employee shall perform the duties of his employment as directed by the Employer in (b) above.

e. Schedules, directions and instructions, in (a), (b) and (c) above shall be governed by the terms and conditions of the applicable collective agreement last in force between the Employer and the Unions except as altered by this Order.

f. The collective agreement shall be altered so that employees on standby during any job action will receive 5 hours pay for every 24 hour period of standby."

The attached schedules included the number of qualified employees who were to be on standby based on region, department and classification.

During the fall of 2013, there were two concerted efforts made to resolve the collective bargaining dispute. One occurred in September, 2013 and involved the assistance of Vince Ready. Mr. Ready prepared a series of recommendations for settlement which were taken back to the Union's membership for approval. The membership did not vote in favour of the recommendations and that brought that effort to a halt.

A second effort occurred in the latter part of October, 2013 and just involved the Employer and the Union representatives. They were able to conclude a memorandum of agreement resolving the dispute, but again, the Union's membership failed to ratify it.

Both Mr. Ready's recommendations and the October, 2013 memorandum of agreement contained a return-to-work agreement which in turn provided in part that:

> "All employees who return to work shall suffer no loss of seniority or Company service. This provision shall not serve to override the collective agreement including marginal paragraph 31.08."

The Union had sought the old language protecting employees' vacations from being negatively impacted by the labour dispute, but had not been successful in persuading the Employer to agree.

Finally, the parties resumed discussions in early December, 2013 to see if a settlement of the dispute could be found. Those discussions did not appear to be bearing any fruit when the Employer proposed that the parties submit the outstanding issues to binding interest arbitration. After some back and forth over the terms and conditions under which such arbitration would take place, the parties ultimately reached an agreement on them in a memorandum of agreement dated December 16, 2013. The provisions of Article 31.08 is not one of those outstanding issues.

Again, in the December 16, 2013 return to work agreement, the parties recognized that Article 31.08 would apply to vacation entitlement. However, the Employer did agree with the Union that employees could "choose to carry over up to a maximum of 15 vacation days from their unused 2013 entitlement." That was an increase from the five days agreed to in the October, 2013 return to work agreement.

Evidence was also tendered regarding the standby system both generally and during the 2013 labour dispute. Generally, employees sign up at the beginning of each year if they wish to be scheduled for standby duties. Employees are assigned to those duties for a week at a time on a rotational, trade basis. While they are on standby, they must remain ready and available to attend work on short notice if they are called out to deal with an emergency situation. Remaining ready and available to attend work meant that employees could not drink, venture too far away from work locations, and had to have child arrangements made. Call out decisions were made by the Employer.

During the labour dispute, scheduling of employees for standby duties was undertaken by the Union in accordance with the terms of the Board's essential services designations and orders. Again, employees were scheduled on a weekly basis to fill the categories delineated in the schedules attached to the Board's order. The Union consciously rotated employees through these standby duties to take advantage of the requirement set out in the April 24, 2013 order that the Employer was to cover the benefit costs of those employees who worked during the dispute as well as those scheduled for standby duties.

While many employees were scheduled for standby duties during the labour dispute, very few were actually called out to work on an emergency basis. In fact, that

only happened on seven different occasions during the period of the almost six months labour dispute for a total of 108.5 hours worked.

III

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

The central issue to be determined is whether employees who were on standby during the Employer's lockout from June 26 to December 16, 2013 were "absent from work" within the meaning of Article 31.08 of the collective agreement. There is no dispute that all employees were *prima facie* "absent from work" during the lockout. There is also no dispute that those employees who were required to work during the lockout pursuant to the Board's essential services designations and orders were not "absent from work" during those periods where they actually performed work. The issue in this case pertains solely to those employees placed on standby who were not called in to perform any actual work.

The Union maintains that those employees placed on standby were not "absent from work" during the periods of their standby assignments. Put another way, it contends that they were "at work" or "working" during these periods. In support of this contention, it refers me to *Government of the Province of Manitoba*, Award dated June 2, 1999 (M.H. Freedman, Q.C.).

That case involved home care nurses being placed on call. However, the collective agreement did not contain any provision relating to standby pay or to call out pay. On this basis, the employer asserted that the grievance was inarbitrable because the collective agreement was silent on this issue. Mr. Freedman responded to this assertion by stating that:

> "What is really at issue between the parties here is whether, when the nurses in Brandon, and for a certain time period in Winnipeg, are required to participate in the on call program, they should be paid for the time which that requirement demands of them to make themselves available, even if they are not actually in receipt of a call during that period. Understood this way, which I think is the real substance of the matter, it can be seen by a review of the Agreement that, if the time during which they make themselves available is regarded as time worked, then the Agreement is in fact not silent on this subject."
>
> (at para. 106)

Mr. Freedman then had regard to a series of earlier arbitration awards which he noted were "conflicting to some extent." (at para. 125). However, he was persuaded by a line of reasoning of M.K. Saltman in *Religious Hospitallers of Hotel-Dieu of St. Joseph of the Diocese of London* (1983), 11 L.A.C. (3d) 151 and *Town of Midland* (1987), 31

L.A.C. (3d) 251. Both cases dealt with employees who had to remain available for work during their lunch hours. In *Town of Midland, supra*, Ms. Saltman commented that:

> "The collective agreement gives no assistance as to the meaning of the phrase 'time worked'. However, there is authority to suggest that 'time worked' may include a period in which no work is actually performed but in which the employee remains under the employer's direction and control and/or in which the employee's responsibilities to the employer continue: see *Religious Hospitallers of Hotel-Dieu of St. Joseph of Diocese of London and Service Employees' Union, Loc. 210* (1983), 11 L.A.C. (3d) 151 (Saltman), upheld on judicial review, July 10, 1984 (Ont. Div. Ct. (unreported)); *Re Hamilton St. R. Co. and A.T.U., Loc. 107* (1981), 1 L.A.C. (3d) 355 (Shime); *Re Int'l Nickel Co. of Canada Ltd. and U.S.W.* (1975), 8 L.A.C. (2d) 433 (O'Shea).
>
> In this case, the employer issued a policy restricting the use of the lunch break for employees engaged in snow removal operations. The effect of the policy was to prohibit these employees from returning to the shop for the duration of the lunch break (except in limited circumstances). Although there was no direction that the employees eat lunch in their vehicles, even the employer admitted that there was no other alternative. The only restaurant that was open at that time of the night was outside the town limits where the employees were restricted from going. Even their homes, for the most part, were off limits. Therefore, it must be concluded that the employees were confined to their vehicles (although they might get out and walk around) and that they remained under the direction and control of the employer for the period of the lunch break.
>
> . . .
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> The evidence unequivocally establishes that the employees remained under the direction and control of the employer for the period of the lunch break even if their responsibilities did not continue. It is because the employees were restricted in the use of the lunch break and not because there were no restaurants open at night that they remained under the employer's direction. As the employees were not free to utilize their lunch period as they wished, the lunch period must be considered to be 'time worked' for the purposes of the overtime provisions of the collective agreement. This does not mean that the employer is obliged to transport employees to the shop for the lunch break but so long as the employer restricts the manner in which the employees may

> utilize their lunch breaks, the employees are subject to the employer's direction and entitled to payment at overtime rates (provided, of course, that they have performed their regular duties for eight hours a day)."
>
> (at 254-256)

With respect to the circumstances before him in his case, Mr. Freedman then stated:

> "How are these principles applicable to the facts here? Nurses who work in the program mostly work out of their homes. Their actual place of work may be their home, the patient's home or possibly the office. They must when required by the Province make themselves available such that if they are called they are in a position to provide actual nursing service. Their freedom of action is clearly restricted and limited during the period when they are required to be on standby. They must stay within paging distance, and must maintain themselves in a physical and mental condition such that they can provide professional nursing service if required. They are not free to do what they wish or plan their time without regard to the possibility that they may be called.
>
> At the same time they are clearly not under quite the same degree of control and direction by the employer as those employees in the lunch break cases (they do not have a fixed place of work, like the employees in those cases). They are free to travel within paging distance wherever they wish, and, so long as they maintain themselves in a condition such that they can perform their nursing work if required, they are free to do as they wish.
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> . . .
>
> Taking the evidence in its entirety I think the better view is that when nurses in Brandon were and are required to participate in the standby program and to limit their freedom of action accordingly, they were and are 'at work' or 'working' for the purposes of the Agreement. Not only did they have to participate in the program or be subject to discipline if they did not, but once on standby their freedom of action was restricted, and in my view significantly. For all practical purposes they had to be in the same mental and physical state as they would have been if they were actually providing professional nursing services."
>
> (at paras 134-135, 138)

He subsequently concluded that

> ". . . nurses in both cities are at work when they are on call. This conclusion also resolves the question of arbitrability for the reasons given above."
>
> (at para. 146)

As Mr. Freedman noted, there were decisions going the other way. One of those was *Maple Leaf Mills Inc.* (1995), 50 L.A.C. (4th) 246 (A.C.L. Sims, Q.C.). That case involved maintenance employees being required to be on call to return to work if there was a breakdown of any of the plant equipment. The collective agreement under consideration there did not contain a provision for standby pay, but did include one for emergency call-ins. The maintenance employees were not paid for being on call, but were paid in accordance with the emergency-call-in provision if they were called back to actually perform work. The grievance sought pay for the employees for the time they were on call as hours worked. Mr. Sims described it this way:

> "The specific question this grievance raises is whether the hours when employees carried pagers as required constituted '[a]uthorized work performed in excess of the normal work week or normal work day', within the meaning of art. 12.1."
>
> (at 254)

Mr. Sims dismissed the grievance. In doing so, he stated that:

> "There is no provision dealing with the situation in which the junior maintenance employees find themselves. There is, however, a call-in pay provision. It would be totally inconsistent to say that an employee on standby will receive a premium call-in pay when, on the Union's claim, the employee would already be entitled to overtime pay for the hours he stood by in the off chance of being called in.
>
> To the extent the cases referred to above deal with this situation, they uniformly hold that time spent on standby is not time worked. Carrying a pager may be an inconvenience, and remaining within the pager's range is undoubtedly so, but this does not turn being on standby into working time as contemplated by the collective agreement. This is true whether or not the Employer's rule is validly imposed under the *KVP* test. For this reason, I must dismiss the grievance as filed."
>
> (at 254)

The Employer, on the other hand, referred me to a different line of cases. Those cases included *Government of the Province of British Columbia*, Award dated April 10, 1987 (Chertkow) and *Greater Vancouver Regional District*, Award dated March 8, 2002 (S. Kelleher, Q.C.) They involved collective agreements that contained provisions for employees to be paid while on standby. The issue in those cases was whether the employees were entitled to be paid their regular rates of pay or overtime based on certain duties they had to perform while they were on standby.

In *Government of the Province of British Columbia, supra*, Mr. Chertkow records that counsel for the union asserted

> "... that conceptually, 'stand-by' pay means being available for work; it is not the performance of work. She challenges the employer's fundamental position of assigning 'duties' to Duty Officers who are on stand-by. When a Duty Officer performs the duties associated with that function he ought to be paid the appropriate rate for the performance of that work. She points to the definition of 'standy-by' (sic) in Websters New Collegiate Dictionary, namely; 'ready or available for immediate action or use'. In support of the union's fundamental position in that regard, she cites the decisions in *Re Leco Industries Ltd. and Oil, Chemical and Atomic Workers International Union, Local 9-819*, 26 L.A.C. (2d) 80, (Brunner) and *Re The Crown in Right of Alberta and Alberta Union of Provincial Employees*, 25 L.A.C. (3d) 276, (Elliott)."
>
> (at 20)

Ultimately, Mr. Chertkow accepted her argument on that point stating that

> "... 'stand-by' means, as argued by counsel for the union, making oneself immediately available to do work. In its normal context and on its plain meaning, it does not encompass the concept of actually doing work."
>
> (at 24-25)

However, Mr. Chertkow went on to conclude that the fact that the employees on standby had to perform various core functions of their job while at home took them out of the standby category into one of actually performing work and thus entitled them to be paid according to the call out provisions.

Greater Vancouver Regional District, supra, involved

> ". . . the issue of whether an employee who is being paid for 'stand-by' time is entitled to overtime when he or she spends time on the telephone engaged in the Employer's business."
>
> (at 2)

The arbitration board concluded that they were. It recognized that there was a distinction between an employee simply being on call and an employee actually performing work. In this regard, Mr. Kelleher (as he then was) commented that:

> "In our view, what emerges from the authorities is the principle that when an employee, whether on call or not, is required to perform work for the Employer without leaving home, he or she is *prima facie* entitled to be compensated.
>
> How does that principle apply here? The issue must turn on the interpretation or application of Article 3.06(b). Was Mr. Beattie 'called out to work' when he was telephoned at home and he remedied a problem by giving telephone instructions?
>
> We agree with Mr. Hodgins that the normal meaning of 'stand-by' does not encompass both being ready to work for the Employer and actually performing work."
>
> (at 11)

In the final analysis, I am of the view that the answer to the central issue in this proceeding turns on the mutual intentions of the parties. The primary source for determining those intentions are the words they have used in their collective agreement to express them. It is true that the conduct of the parties during the six month period in question was the subject of two Board essential services designations and orders, but both those orders specified that employees' terms and conditions of employment would be governed by the terms and conditions of the applicable collective agreement last in force between the Employer and the union except as altered by the orders. Thus, the question becomes – did the Employer and the Union intend that employees on standby would be regarded as working or being at work?

The arbitral jurisprudence establishes that when interpreting the words the parties have used to express their intentions, they should be given their normal and ordinary meaning unless doing so would give rise to an inconsistency within the collective agreement or an anomaly or an absurdity. Words are to be read in the context of the collective agreement as a whole and harmony is to be sought, while conflict is to be avoided.

In my view, these principles are reflected in *Government of the Province of British Columbia, supra, Greater Vancouver Regional District, supra*, and *Maple Leaf*

Mills Inc., supra. The word "standby" was given its normal and ordinary meaning of being ready and available to work as opposed to being actually at work and performing work. This status was distinguishable from those circumstances captured by the call-out provisions in the collective agreement which captured employees who were actually performing work and therefore were entitled to their regular wages or overtime pay for the work they were performing.

I am of the further view that the circumstances present in *Government of the Province of Manitoba, supra*, and *Town of Midland, supra*, were different. In those cases, the subject matters of standby, or being on call during an unpaid lunch break, had not been expressly addressed by the parties to those collective agreements. In my view, what the arbitrators did in those cases was adopt an approach similar to the approach discussed by the Board in *Andres Wines (B.C.) Ltd.*, BCLRB No. 75/77; [1978] 1 Canadian LRBR 251.

In that case, the Board was dealing with an appeal of an arbitration board decision that found that regular employees were entitled to claim certain benefits under the collective agreement despite being on layoff and even though there was not any express language to that effect. One of those claimed benefits was payment for statutory holidays that occurred during the layoff. In his decision, Paul Weiler, Chairman of the Board at the time, stated:

> "For example, in creating a benefit such as statutory holidays, the focus of attention of the parties naturally is going to be on the number and the selection of such holidays. It is hardly likely that this penumbral question – whether payment for such holidays may be claimed by workers on layoff – will be at the forefront of their minds. Thus, one may readily appreciate why the parties will have neither the foresight, the time, nor the inclination to canvass every such possibility and attempt to reach explicit agreement about it.
>
> But the fact of the matter is that such events do occur during the term of the agreement. The parties may not then reach an accommodation during the grievance procedure. When they take the issue to arbitration, their arbitrator does not have the luxury of deciding not to decide. He must make up his mind about the implications of their general contract language for this peripheral problem. In the absence of any clear indication of the mutual intent of the parties – gathered from either their language or their behaviour – the arbitrator must, in effect, reconstruct some kind of hypothetical intent. What is it reasonable to assume that typical labour negotiators, having analyzed the nature and purpose of the contract benefit in question, would agree to as a

> sensible judgment about who should enjoy the benefit in this unusual situation?"
>
> (at 253)

In both of those cases, in my view, the arbitrators constructed "some kind of hypothetical intent" that because the employees were under a form of direction and control of the employer, they should be regarded as working and paid accordingly. No conflict or disharmony arose because there were no express provisions in the collective agreements under consideration dealing with the subject matter. On this basis, I am of the view that the results in these two separate lines of cases can be rationalized.

In the case before me in this proceeding, the collective agreement contains express provisions dealing with standby and emergency call out. In the case of standby, employees are not paid as if they are actually performing work. Instead, they are paid a premium which is not equivalent in wages to what they would have earned if they had actually been working for the hours they were actually on standby. They only receive such wages if they are actually called out to perform actual work. Contrary to the Union's submission, I am of the view that the Board's essential services designations and orders did not change the nature of the payment to employees on standby. It still remained a premium, albeit a higher one, not wages based on hours on standby.

In my view, to give standby the meaning the Union says I should give it would, first of all, not accord with its normal and ordinary meaning, i.e., being ready and available to work, but not actually working. Secondly, it would create an inconsistency within the agreement between the standby provision and the emergency callout provision. If being on standby was time worked, why should employees not be paid accordingly, rather than just a premium which does not equate in wages terms to the hours the employees were scheduled to be on standby.

In my view, such anomalies and inconsistencies are to be avoided. I am of the further view that harmony is achieved in the interpretation of these provisions by distinguishing between standby, i.e., the status of being ready and available for work, and callout which involves actually performing work. The difference in pay agreed to by the parties then also makes sense. A premium is paid to employees on standby to compensate them for the inconveniences created by being assigned to standby status, while employees called out to work and actually performing work are paid wages for that work. The fact that employees are not paid wages consistent with their time on standby directly conflicts with the Union's contention that that time is time worked.

I have considered the decision in *Regional Health Authority (Southeast)*, [2004] N.B.L.A.A. No. 2 (Bladon) which involved, *inter alia*, a claim by on-call employees to have their statutory holidays rescheduled on the basis that that were "required to work" on the holiday within the meaning of Article 25.05 (a) of the collective agreement. The collective agreement also contained provisions regarding standby pay and call-in pay. The arbitrator upheld that part of the grievance, stating that

> "Here the employees are given a pager by the employer and required to respond in the event that they are called in. This is a unilateral decision made by the employer under Article 24.01. The employer acknowledged that the employees may be disciplined if they failed to respond to a page. They are then not free to enjoy the holiday in a way other employees not 'on call' may. 'On call' employees remain subject to the control of the employer for the length of the 'on call' period which is usually 24 hours. Consequently they may be said to be 'required to work' within the meaning of Article 25.05. As the board asked rhetorically in Re Meaford General Hospital, supra, a) if an employee is not at work, how can he be disciplined? And b) how can the employee be required to wear a pager if he is not at work? As a result employees 'on call' on a holiday are 'required to work' although they are not scheduled to work until they are called in. They therefore meet the criteria of Article 25.05 and are entitled to have their holiday rescheduled in the event that they are not called into work. (sic) in addition to Standby pay under Article 24.04 and Holiday pay under Article 25.01."
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> (Quicklaw, at para. 11)

In reaching this conclusion, the arbitrator preferred the reasoning in the lunch hour on-call decisions including *Town of Midland, supra*, over that found in *Maple Leaf Mills Inc., supra* and *Izaak Walton Killam Hospital* (1992), 29 L.A.C. (4th) 332 (Christie).

Having considered this decision, and with respect, I do not agree with its conclusion that standby or on-call employees are "required to work". I prefer the reasoning of the arbitrators in *Government of the Province of British Columbia, supra*, *Greater Vancouver Regional District, supra* and *Maple Leaf Mills Ltd., supra*, that standby involves being ready and available to work, but not actually working. The call-in pay provision addresses the circumstances of the employee who is actually "required to work". In my view, that reasoning more accurately captures the mutual intentions of the parties before me in this proceeding.

Having considered all of the evidence and argument and for the reasons discussed above, I have concluded that the Employer and the Union did not intend that employees on standby would be regarded as working or at work within the meaning of their collective agreement. They only intended that such employees would be ready and available to come to work on short notice if the need arose. For the inconvenience of remaining ready and available to do so, the Employer agreed to pay the standby employees a daily premium, not wages for work performed. In accordance with this interpretation, standby employees cannot be regarded as being at work for the purposes of Article 31.08. Instead, in my view, they are "absent from work" while on standby befitting their locked out status.

Accordingly, the Union's grievance must be dismissed. The Employer has not violated the collective agreement by diminishing the vacation entitlement of those employees who were only assigned standby duties during the period of the Employer's lockout.

It is so awarded.

Dated this 9th day of January, 2015.

John Kinzie

JOHN KINZIE
ARBITRATOR