IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

FORTISBC ENGERY INC.

(the "Employer")

-and-

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 213

(the "Union")

(Reduction of Benefits - Union and/or Policy Grievance - Don Urbanoski, *et. al.*)

ARBITRATOR:	John B. Hall
APPEARANCES:	Stephanie Gutierrez, for the Employer John MacTavish, for the Union
HEARING:	January 27 & 29, 2015 in Vancouver, B.C.
AWARD:	February 19, 2015

AWARD

I. INTRODUCTION

The parties disagree over the interpretation of certain provisions in their Collective Agreement which reduce the annual vacation received by employees. They disagree as well over the interpretation of a separate provision which reduces what are known as "Choices Days" and "Legacy Days" entitlements. The provisions are worded in similar but not identical terms. Vacation is reduced by a combination of Articles 20.05 and 20.05.1 which read:

> **20.05**
> Leave of absence for sickness or any purpose up to a total of one (1) month in any period (excluding paid vacation) shall not reduce the annual vacation an employee would otherwise qualify for.
>
> **20.05.1**
> Where a leave exceeds one (1) month, the employee's Annual Vacation with pay shall be reduced by one eleventh (1/11) for each full month of absence in excess of one (1) month. For the purpose of this proration, "absence" shall not include time off work for Annual Vacation, Legacy Days, Choices Days or Overtime Bank Days.

Legacy Days and Choices Days for employees subject to the "Legacy Model" in the Collective Agreement are described respectively in Articles 35.03.1 and 35.03.2 (reproduced below). Their reduction is contemplated by a single provision:

> **35.05**
> Choices Days and Legacy Days entitlements shall be reduced by one-eleventh (1/11th) for each full month of absence in excess of one (1) months absence in the preceding year. For the purpose of this proration "absence" shall not include time off work for Annual Vacation, Holidays, True Bank Days, Legacy Days or Choices Days, or Overtime Bank Days.

While the reductions for vacation and for days off are not worded identically, the parties maintain they should be applied in the same fashion -- although they part company over the proper interpretation in both cases. It is common ground that "absence" will result in the

associated benefits being reduced on a pro-rated basis. The issue in dispute is how this "absence" is determined.

The Union's position, put simply, is that "absence" means a single extended period of leave and was never intended to encompass a series of leaves. Thus, unless "… a leave exceeds one (1) month …" (to quote from Article 20.05.1), an employee's entitlements should not be reduced. It submits the Employer has misinterpreted the reduction language by accumulating all absences in a calendar year, and has accordingly breached the Collective Agreement terms providing for the benefits in question. Among other arguments, the Union points to Article 8.02.1 where the parties have in contrast referred expressly to "ten (10) *accumulated* months in any 12-month period" (italics added).

As foreshadowed, the Employer maintains the reduction calculations should be determined according to accumulated absences during the year. It submits this interpretation follows from the plain wording of the provisions when interpreted purposively and within the context of the Collective Agreement as a whole. It says further that the Union's interpretation would result in absurd and inequitable outcomes. If there is any doubt about the Collective Agreement language, the Employer relies on a consistent practice spanning "around four decades" whereby absences have been accumulated to pro-rate the benefits. Finally, and in the further alternative, the Employer submits the Union is estopped from grieving the longstanding practice.

II. THE IMMEDIATE BACKGROUND

Mr. Don Urbanoski is a Customer Service Technician. He has worked for the Employer and its predecessors since 1974 and has been located in the Castlegar area for the past 15 years. Mr. Urbanoski typically works from 8:00 am to 4:00 pm (with a 30 minute unpaid lunch break). However, he is on call from 4:00 pm until 8:00 am for two weeks a month, and will usually receive four or five calls "at all hours" during that period.

Records tendered by the Union at arbitration show the following absences for Mr. Urbanoski during the 2013 calendar year:

January 29 - 1 hour paid absence
March 6, 21 and 22 - 1 hour paid absence each day
April 25 - 1 hour paid absence
May 6 and 16 - 1 hour paid absence each day
May 27 to 31 - 7.5 hour STD absence each day
June - 7.5 hour STD absence on all weekdays except for June 10 when he attended work and sustained an injury
July - 7.5 hour STD absence on all weekdays
August - 7.5 hour STD absence on all weekdays
September - 7.5 hour STD absence on all weekdays
October 1 to 11 - alternating 7.5 and 3.5 hour STD absences
October 14 to 25 - vacation
October 28 to 31 - 1.5 hour STD absence each day
November 1, 4, 7, 8, 12, 13, 14 and 15 - 1.5 hour STD absence each day plus 1 hour paid absence on November 1 and 12

Mr. Urbanoski could not recall what caused his absence that began on May 27, but testified he returned to work on June 10. He was off work for the rest of that month; for all of July and August; and began a graduated return to work on September 30 which continued until he resumed his regular shift on November 18 (he additioanlly took two weeks of vacation during October).

Mr. Urbanoski's vacation and days off for 2014 were reduced as follows, according to calculations prepared by the Employer (bold in original):

Total absences in 2013: 726.25 hours
Less 1 month: 162.5 hours
Total absences less 1 month = 726.25 - 162.5 = **563.75 hours**

563.75 hours = 3.47 month absence (563.75/162.5) = **3 months absence reduction**

2013 AV = 225 hours
2013 AV reduction = 225 x (3/11) = 61.25 hours
2013 AV after reduction = 225 - 61.25 = **163.75 hours**

2013 Choices Legacy = 52.5 hours

2013 Choices Legacy reduction = 52.5 x (3/11) = 14.25 hours
2013 Choices Legacy after reduction = 523 - 14.25 = **38.25 hours**

2013 Choices = 60 hours
2013 Choices reduction = 60 x (3/11) = 16.25 hours
2013 Choices after reduction = 60 - 16.25 = **43.75 hours**

Thus, the Employer included all of the hours associated with Mr. Urbanoski's absences during 2013 in calculating the reductions. Based on the Employer's interpretation of the Collective Agreement, nothing turned on the facts that he returned to work on June 10, and that he was on a graduated return to work program during October and November. However, the vacation reduction only affected Mr. Urbanoski's time off and the "AV Differential" (i.e., the difference between vacationable earnings and vacation entitlement taken or paid out) was paid to him.

The grievance was filed by Rav Ghuman, the Assistant Business Manager responsible for the bargaining unit, on February 26, 2014:

> Re: FortisBC -and- Local 213 of the IBEW (Reduction of Benefits Union and/or Policy Grievance, Don Urbanoski et al)
>
> The Union hereby submits this grievance for consideration at Stage 3 of the Grievance Procedure in accordance with Article 16.01.5 of the collective agreement.
>
> Without in any way limiting the scope of this grievance, the Union alleges the Employer has contravened Articles 20.05.1 and 35.05 by unfairly accumulating calendar months and hours of absence to reduce Mr. Urbanoski's entitlement of Annual Vacation (Article 20.05.1) and his entitlement of Choices Days and Legacy Days (Article 35.05).
>
> The Union hereby asks for a declaration the Employer has violated, misinterpreted and misapplied the collective agreement, statute and/or common law; an order or agreement requiring the Employer to make the grievor(s) whole with interest under the *Court Order Interest Act*, RSBC 1996, c.79; and any other remedy that is just and equitable in all the circumstances.

Mr. Doug Slater, the Employer's Labour Relations Manager, testified that he knew the calculation of Mr. Urbanoski's entitlement was an issue before receiving the grievance. He first

became aware of the subject when Gord Van Dyck, the former Assistant Business Manager, raised it as an "informal issue" in or around November 2013. According to Mr. Slater, Mr. Van Dyck "was trying to understand the calculation" and asked him how it had been done by the Employer.

III. EXTRINSIC EVIDENCE

(a) Negotiation History

Neither party led evidence regarding actual exchanges during past rounds of collective bargaining. However, the Employer called Mr. Slater to identify relevant excerpts from prior Collective Agreements (including some with the Employer's various predecessors).

The current Article 20.05 (or what I will refer to as "the vacation reduction language") was the final clause in the Annual Vacation provisions of the Collective Agreement expiring March 31, 1968:

> (g) When an employee's leave of absence for any purpose, excluding paid vacation and V.O. exceed three months in a calendar year, his vacation with pay in the following calendar year will be reduced by 1/12 for every full month in excess of three months leave of absence.

The language was moved to the Leave of Absence provisions of the Collective Agreement expiring August 31, 1969:

> (f) Leave of absence for sickness or any purpose up to a total of three months in any period (excluding paid vacation) shall not reduce the annual vacation an employee would otherwise qualify for. Where a leave exceeds three months his annual vacation with pay may be reduced in ratio to his absence in excess of the three months.

Aside from the change in placement, the reduction was changed for some reason from mandatory to permissive (i.e., "…annual vacation with pay *may* be reduced in ratio to his absence in excess of the three months").

A specific ratio for the reduction of annual vacation was negotiated as part of Article 21 in the 1969-1971 Collective Agreement:

> (f) Leave of absence for sickness or any purpose up to a total of three months in any period (excluding paid vacation) shall not reduce the annual vacation an employee would otherwise qualify for. Where a leave exceeds three months his annual vacation with pay may be reduced by 1/9 for each full month of absence in excess of the three months.

This Collective Agreement also saw the genesis of the current Article 35.05 (or what I will refer to as "the days off reduction language"). At that point, the time off was known as "SWLY", which stood for Shorter Work Year Leave and was defined under Article 38(a) as "… a leave of absence with pay, based on service during the preceding year, which is scheduled off at the discretion of Hydro". Article 38(b) dealt with Entitlement, and provided in part:

> Shorter work year leave entitlement will be reduced by 1/9 for each full month of absence in excess of three months' absence in the preceding year. For the purpose of this proration "absence" shall not include time off work for annual vacation, shorter work year leave, and vacation overtime (including training leave, lay-off covered by V.O., and sabbatical leave).

The foregoing language apparently continued unaltered through the 1984-1986 Collective Agreement, although by then the vacation reduction language had become Article 20.06 and the days off reduction language was found at Article 35.02.4 of the agreement. For reasons unexplained at arbitration, both clauses were "split" in the Collective Agreement expiring March 31, 1994 where the vacation reduction language read as follows:

> 20.05 Leave of absence for sickness or any purpose up to a total of three months in any period (excluding paid vacation) shall not reduce the annual vacation an employee would otherwise qualify for.

> 20.05.1 Where a leave exceeds three months, his annual vacation with pay shall be reduced by 1/9 for each full month of absence in excess of three months.

The days off language was still concerned with "SWYL", and the Entitlement provisions read in part:

> 35.02 Entitlement
>
> * * *
>
> 35.02.4 Shorter work year leave entitlement will be reduced by 1/9 for each full month of absence in excess of three months' absence in the preceding year.
>
> 35.02.4.1 For the purpose of this proration "absence" shall not include time off work for annual vacation, shorter work year leave, and vacation overtime (including training leave and lay-off covered by V.O.).

There were no changes to the vacation reduction language in subsequent Collective Agreements, including the one having an expiry date of March 31, 2006:

> 20.05 Leave of absence for sickness or any purpose up to a total of three months in any period (excluding paid vacation) shall not reduce the annual vacation an employee would otherwise qualify for.
>
> 20.05.1 Where a leave exceeds three months, his annual vacation with pay shall be reduced by 1/9 for each full month of absence in excess of three months.

The days off reduction language in the same Collective Agreement had been "collapsed" to a single clause:

> 35.06.3 Shorter work year leave entitlement will be reduced by one-ninth (1/9th) for each full month of absence in excess of three (3) months absence in the preceding year. For the purpose of this proration "absence" shall not include time off work for annual vacation or shorter work year leave.

I was informed at arbitration that the parties' ensuing Collective Agreement (i.e., that which followed the March 31, 2006 expiry) was never reduced to writing. There was a

memorandum in some form, although it was not tendered in evidence. From other documentation, including email correspondence from the then Manager of Labour Relations, there appear to have been at least three changes to the reduction language. First, the threshold was changed from three months to one month for both the vacation and days off reduction. Second, and as a consequence, the ratio was changed from 1/9 to 1/11 for each full month of absence in both provisions. And third, an expanded exclusion for various absences was added to both provisions, building on that found previously in the days off reduction language. Other email correspondence indicates that the conversion from SWYL to the current system of Legacy and Choices Days was effective as of January 1, 2007 (although nothing turns on the actual date).

Thus, and as confirmed by Mr. Slater's testimony that there were no changes to the applicable terms in bargaining for the current 2011-2015 Collective Agreement, the cumulative result is that the present language existed as well under the prior Collective Agreement. The relevant text provides more fully:

20. LEAVE OF ABSENCE

* * *

20.05
Leave of absence for sickness or any purpose up to a total on one (1) month in any period (excluding paid vacation) shall not reduce the annual vacation an employee would otherwise qualify for.

20.05.1
Where a leave exceeds one (1) month, the employee's Annual Vacation with pay shall be reduced by one eleventh (1/11) for each full month of absence in excess of one (1) month. For the purpose of this proration, "absence" shall not include time off work for Annual Vacation, Legacy Days, Choices Days or Overtime Bank Days.

* * *

35. TRUE BANK, CHOICES AND LEGACY DAYS

* * *

35.03 Legacy Model - Interior Region, North Island Unit and Sea to Sky Unit

35.03.1 Legacy Days

All employees on the Legacy Model - Interior Region, North Island Unit and Sea to Sky Unit shall work a seven and one-half (7 ½) hour day, five (5) days per week.

Legacy Days is a time off entitlement earned based on service during the current calendar year. Employees are entitled to up to seven (7) Legacy Days.

35.03.2 Choices Days

Choices Days is a time off entitlement earned based on service during the current calendar year. All employees shall be credited each calendar year with ten (10) Choices Days (the equivalent of 4% of the base wage), prorated for partial years. These Choices Days may be taken as time off or converted to a Health Spending Account, RRSP, or cash, in any combination not exceeding the 4% entitlement.

* * *

35.05

Choices Days and Legacy Days entitlements shall be reduced by one-eleventh (1/11th) for each full month of absence in excess of one (1) months absence in the preceding year. For the purpose of this proration "absence" shall not include time off work for Annual Vacation, Holidays, True Bank Days, Legacy Days or Choices Days, or Overtime Bank Days.

The term of the current Collective Agreement expires on March 31, 2015. Negotiations for a renewal agreement unexpectedly occurred in the fall of 2014. The parties were at the time discussing "LNG continuation" and the prospect of "rolling over" the Collective Agreement was proposed by the Union on the second to last day. Mr. Ghuman described the proposal as "spur of the moment"; neither party had prepared for formal collective bargaining and no language proposals were exchanged. A four year wage rate extension was resolved, but there were no other changes to the Collective Agreement. The present grievance had, of course, been filed earlier in February 2014. There was no discussion over the reduction language and, indeed, Mr. Ghuman did not believe there was discussion around any Article.

(b) Past Practice

The Employer introduced both oral and documentary evidence regarding past administration of the vacation and days off reduction language.

The oral evidence can be canvassed in relatively succinct terms. Ms. Beverly MacGillivray is the current Payroll/Human Resources Information Systems Manager. She started in the Payroll Department with one of the Employer's predecessors in August 1999. It was her uncontradicted testimony that the Employer has followed a consistent practice of pro-rating vacation and days off entitlement since that time. That is to say, the Employer has been accumulating absences during the preceding year for the purposes of both calculations. The unmistakable inference from other evidence is that the Employer's practice pre-dates 1999 by at least several years. Ms. MacGillivray testified that the proration of vacation and days off would be "visible" to employees because they see their time bank balances on pay statements and can access information via the "Employee Express" system. No pay statements were introduced at arbitration to show whether employees receive the actual calculations or are simply provided with aggregate figures.

The more challenging question is whether the Union was aware, or should have been aware, of the practice. This question is relevant to both the Employer's reliance on past practice as an aid to interpretation and to its alternative plea of estoppel. The Employer tendered a number of documents intended to establish knowledge on the part of the Union, as well as to confirm the longstanding nature of its practice. The Union raises two main objections to these documents. It submits several are inadmissible because they do not constitute "business records" within the meaning of the *Evidence Act* and were not properly identified by a witness at arbitration. The second category of documents, submits the Union, are admissible but should be given no weight as they are irrelevant and/or were improperly redacted.

I intend to leave the Union's objections aside for now given my conclusions later in this award, and will first review the contents of the documents. Again, the main consideration is whether they can establish knowledge (or imputed knowledge) on the part of the Union, as the

Employer's practice of accumulating absences for purposes of calculating both vacation and days off is beyond contention.

Exhibit 7

This is a short internal memorandum dated "1984.06.07" dealing with "Pro-ration of SWYL for Leaves of Absence" and, more specifically, the situation where "the employee's absence started or ended during a month (not on the first or last day)". It concludes by stating: "In applying 35.02.4 they use total cumulative *days* absent in the year, with a month being defined as 21.7 *days*" (italics added). It is not clear whether the memorandum was concerned with an actual employee absence and, if so, whether the absence was continuous or broken. However, there is no suggestion the Union was aware of the circumstances.

Exhibit 5 / Tab 10

This is an internal Employer memorandum dated May 31, 1984. It deals with the "situation" of an employee who was absent on sickness and income continuation "from 29 March to 19 July 1983". The employee disagreed with his vacation being prorated by 1/9 because he had not been away one full month in excess of the three months under then Article 20.06 of the Collective Agreement. The author of the memorandum stated that "the employee should not be reduced", and wrote in part: "The program established to apply Article 20.06 is cumulative, i.e. it adds up all absences". It was further noted that this "program has been in existence since 1974".

Part of the reason for not reducing the employee's vacation in this case was a duplication of prorating due to a strike. Further, the situation was acknowledged by the Employer in final argument to have been a single absence, as opposed to an actual accumulation of absences (that is, it did not concern the issue in dispute here). Nor is there any suggestion that the Union was aware of the situation.

Exhibit 5 / Tab 11

This is another internal email communication and is dated September 13, 1991. There were two subjects, one of which was SWYL entitlement. In terms of the latter, the author wrote in part: "The number of hours absent as a result of WCB, sick leave, and leave without pay in a calendar year [are] accumulated and divided by 173 *hours* to determine equivalent months" (italics added). However, the actual circumstances again involved a single long term WCB absence and there is no suggestion the Union was aware of the communication. I note as well that this communication advised that absences are accumulated in "hours", whereas the 1984 memorandum described the calculation as being done in "days". The distinction is potentially material where an employee such as Mr. Urbanoski is on a graduated return to work program.

Exhibit 5 / Tab 12

This is a memorandum dated May 25, 1998. It is addressed to Rick Dowling of the IBEW, Local 213 from Fred Green, a former Labour Relations Manager. The time recorded on the document indicates it was "faxed" at 1708 hours. The body of the memorandum reads (all emphasis in original):

> Further to our previous telephone discussions, memos and faxes. I have again discussed this matter with my associates and we are still of the view that your position, thank heavens, is incorrect. Our calculations **do** take into consideration the three months absence pursuant to Article 20.05.1. Your calculation contains a fatal flaw in that you're looking at just a **part** of the year, instead of the **whole** year.
>
> Although your chart states correctly that he is not entitled to any AV or SWYL for the period January 21 through August 5, 1997, you then base his AV entitlement on the period August 6, 1997 to February 1, 1998 (despite Article 22.07) and his SWYL entitlement on the period August 6, 1997 to December 31, 1997, without giving any weight in your equations to the period January 21, 1997 through August 5, 1997.
>
> The question to be answered in 35.02.4 and 20.05.1 is: *How many full months of absence did he have in excess of three months in the calendar year?*
>
> And to get [the] answer, we ask ourselves:

"How many working days of absence did he have in 1997 ?" The answer is 224.

> 224 missed working days in 1997 = 10.3 months
> divided by 21.74 working days per month
>
> So if he missed 10.3 months, that is 7.3 months or 7 full months in excess of three months, pursuant to Article 20.05.1. His annual vacation with pay is thereby reduced 119 X 7 = 7/9ths. That leaves 2/9ths and that is his entitlement.
>
> Put another way, there is no reduction for being absent for three full months. But after being absent for three full months, for each of the remaining nine months that he is absent there is a corresponding entitlement reduction of 1/9th. So if he were absent for all 9 remaining months, the reduction would be 9/9ths or 100% and he would have no entitlement. In other words the three free months do not stand in isolation from the other nine. They are an integral part of the whole.

As the Employer observes, this memorandum asks the question: "How many working days of absence did he have in 1997?" thereby suggesting a cumulative calculation. However, it cannot be ascertained from the face of the document whether the employee had a single or multiple absences during the period under examination. Moreover, that does not appear to have been the focus of the parties' attention at the time; rather, as shown by the emphasized words, they were at odds over whether a "part" or the "whole" year should be used for the calculation (and, once again, the Employer advised the calculation was made according to "days of absence" and not "hours" which is the current practice).

This is one of the documents which the Union submits should be excluded because it is not a "business record" and was created during a disagreement between the parties. The Union also advised that it was unable to find a copy of the memorandum in its records.

Exhibit 5 / Tabs 13 and 15

The first document is an email dated August 18, 2006 sent by the then Manager of Labour Relations to two Union representatives. It reads in part (emphasis in original):

> 2. After talking to Deb, I need to clarify that the amendment of Article 20.05.1 (to accurately reflect the 19/17 legacy days being given up front) should read… "..by

> **1/11** for each full month of absence in excess of **1 months absence in the current entitlement year."**

The Employer advised in final argument that this document was intended to show the timing of the 1/11 formula, and does not bear on the reduction calculation. The series of emails at Tab 15 was introduced for the same purpose, and also shows the addition of the proration sentence now found in both the vacation and days off reduction clauses.

Exhibit 5 / Tab 14 and Exhibit 6

The first part of this document is an email dated February 13, 2009 from Kim Elliott, a Labour Relations Coordinator, to an employee named Ken Johnstone. It was copied to other Employer representatives, but not to the Union. The text reads (emphasis in original):

> File: Articles 20.05.1
> 22
> 35.06.3
>
> Hi Ken:
>
> Further to your conversation with Theresa Robinson in Payroll and our conversation of February 11, 2009 regarding the pro-ration of your AV and Choices Banks, this is to confirm our long-standing practice of pro-rating based on **accumulated** absences. Pro-ration has been applied in this manner for 35 years, since 1974, however, the reduction was changed from 1/9th for each full month of absence in excess of 3 months to 1/11th for each full month of absence in excess of 1 month during the last round of negotiations.
>
> Regarding your reference to the Bob Law grievance (this was not an aribtration award as you had indicated), the settlement of this grievance was done on a "without-prejudice/-precedent basis" and is not applicable to your situation.

As will be explained more fully below, and according to the Employer's records, Mr. Johnstone was absent for one month plus a total of 1.37 months in 2008 (rounded down to one full month); his vacation and days off entitlements were reduced accordingly. This calculation was based on accumulated absences and there would have been no reduction based on the Union's interpretation of the relevant provisions.

I note as well that Ms. Elliott's email advised Mr. Johnstone of the change "from 1/9th for each full month of absence in excess of 3 months to 1/11th for each full month of absence in excess of 1 month during the last round of negotiations". It will be recalled that the applicable terms and conditions of employment in force at the time had not been reduced to writing. Thus, the most recent Collective Agreement available to Mr. Johnstone would have been that with the March 31, 2006 expiry date. His entitlements would not have been reduced under the former three (3) month threshold.

Mr. Marwick, a former Labour Relations Manager, was one of the Employer representatives copied on Ms. Elliott's email to Mr. Johnstone. Mr. Marwick replied to the email on February 18, 2009 with this message sent only to Ms. Elliott:

> For the file:
>
> I discussed this issue with Gord at an afternoon meeting yesterday, and clarified this matter for him.
>
> Gord is not intending to pursue this matter further.
> Jeff.

The most logical inference is that "Gord" in the above message was Gord Van Dyck, the former Assistant Business Manager responsible for representing the Union's members in the bargaining unit.

Exhibit 5 / Tabs 19-29

These documents are a series of extracts from payroll records showing reductions in vacation and days off for the years 2002 through 2012. They were "pulled" from the Employer's records by Ms. MacGillivray. The Union recognizes these documents as "business records". However, it submits they should not be relied on because they were improperly redacted (i.e., no employees are identified), and because they "don't show anything" relevant. In terms of the

latter, the Union notes the documents show various calculations but do not reveal whether the reductions were based on a single absence or on multiple absences during the year.

The latter point was conceded by both Ms. MacGillivray and Mr. Slater. While Ms. MacGillivray stated that the Employer has always "accumulated" absences, she acknowledged that Tabs 19-29 do not detail whether individual employees had a series of absences or a single absence during the preceding year. As a consequence, the Employer undertook an "audit" of three employees shortly before the arbitration and provided some of the results to the Union on the morning of the hearing. One of the employees was a Brad McDonald who was absent during 2002; the second was Mr. Johnstone who, as described above, was absent during 2008 and challenged his reduction in early 2009. The third employee was not identified at arbitration, and his records from 2012 were not tendered by the Employer. The Employer did not "audit" any other employee absences aside from those of the Grievor.

There is no need to elaborate on Mr. Johnstone's circumstances at this juncture. Mr. McDonald was absent continuously during 2002 from January 1 until June 23 on sick leave and long term disability. His only other absence during 2002 was due to a five day suspension in October. Ms. MacGillivray acknowledged in cross-examination the parties' competing views of the reduction provisions would not have made any difference to Mr. McDonald's entitlements in 2003. As a consequence, the only direct evidence of an employee having been affected previously by the Employer's interpretation of the Collective Agreement is that pertaining to Mr. Johnstone.

Mr. Ghuman testified that he was not aware of how the Employer was calculating the vacation and days off reductions until he became involved in the present grievance. He also spoke with Mr. Van Dyck (the former Assistant Business Manager) who said he was not aware of the Employer's practice either. In preparation for the arbitration, Mr. Ghuman had someone search all of the Union's records and nothing related to the reduction language could be located.

IV. ANALYSIS

An appropriate starting point is the frequently cited "rules of interpretation" summarized in *Pacific Press -and- Graphic Communications International Union, Local 25-C*, [1995] BCCAAA No. 637 (Bird):

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 (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.

As Arbitrator Bird additionally cautioned: "Not all rules of interpretation are rigidly binding. Common sense and special circumstances must not be ignored" (para. 27).

Thus, the overarching objective in any contract interpretation dispute is to determine the mutual intent of the parties. The primary resource for this exercise is the Collective Agreement itself. That is because "… the parties are assumed to have intended what they said": Brown & Beatty, *Canadian Labour Arbitration*, at paragraph 4:2100. The same leading reference also notes:

> … [A]rbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense, unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense. (para. 4:2110)

The guidelines for the use of extrinsic evidence by British Columbia arbitrators were confirmed by our Labour Relations Board in *Nanaimo Times Ltd. -and- Graphic Communications International Union, Local 525-M*, BCLRB No. B40/96. Such evidence may be used to resolve ambiguity even when the collective agreement language seems clear when read in isolation; indeed, both the collective agreement and the extrinsic evidence should be examined to determine whether there is any *bona fide* doubt about the meaning of the clause in question. However, an arbitrator is not obliged to rely on extrinsic evidence, and cannot use it to effectively vary the terms of the parties' bargain.

An important feature of this present case is the Employer's reliance on extrinsic evidence which it says constitutes a past practice reflecting the parties' intentions regarding Articles 20.05, 20.05.1 and 35.05 of the Collective Agreement. The "strict limitations" regarding the use of past practice as an aid to interpretation were enunciated many years ago in *International Association of Machinists, Local 1740 -and- John Bertram & Sons Co. Ltd.* (1967), 18, LAC 362 (P.C. Weiler). In addition to the usual passage which is typically quoted, it is worth recalling the underlying rationale for the limitations:

> A second use of "past practice" is quite different and occurs even where there is no detrimental reliance. If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, which explicitly involves the interpretation of the agreement according to one meaning, and that this conduct (and, inferentially, this interpretation) be acquiesced in by the other party. If these facts obtain, the arbitrator is justified in attributing this particular meaning to the ambiguous provision. The principal reason for this is that the best evidence of the meaning most consistent with the agreement is that mutually accepted by the parties. Such a doctrine, while useful, should be quite carefully employed. Indiscriminate recourse to past practice has been said to rigidify industrial relations at the plant level, or in the lower reaches of the grievance process. It does so by forcing higher management or union officials to prohibit (without their clearance) the settling of grievances in a sensible fashion, and a spirit of mutual accommodation, for fear of setting precedents which may plague either side in unforeseen ways in future arbitration decisions. A party should not be forced unnecessarily to run the risk of losing by its conduct its opportunity to have a neutral interpretation of the terms of the agreement which it bargained for.

> Hence 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. (pp. 367-68)

A later explanation of the concept, and one that remains highly instructive, can be found in *Board of School Trustees of School District No. 38 (Richmond) -and- British Columbia Nurses' Union,* [1983] BCCAAA No. 16 (Hope):

> The Employer led evidence to indicate that increments paid to part-time nurses on that basis were paid by mistake and that would appear to be the case. Evidence of past practice must consist of a great deal more than evidence that a particular event occurred. At the least there must be evidence of a practice occurring in circumstances which would sustain the inference that the parties were agreeing to particular interpretation of ambiguous language. The test of evidence of past practice was described in *Dominion Consolidated Truck Lines Limited and Teamsters Union Local 141* (1981) 28 L.A.C. (2nd) 45 (Adams). See the following comments extracted from context on page 49 and the authorities therein cited:
>
> > "Rather we would find that where parties in collective bargaining refer to a "practice" they are referring to the accepted "way of doing things"; their uniform and constant response to a recurring set of circumstances ... *But regardless of how it is intitiated, like all binding past practices, the course of conduct must occur with sufficient regularity, and continue long enough to be accepted by both parties as the normal way of operating presently and in the future* ... The party asserting a practice bears the burden of proving it by clear and definite testimony." (*Richmond*, at para. 4; italics added)

In this case, there can be no doubt that the Employer has been calculating both the vacation and the days off reductions based on "accumulated" absences for a very lengthy period. The only question is whether the Union's acquiescence can or should be inferred, such that the

practice can be regarded as having been "accepted by both parties as the normal way of operating".

In this respect (and bypassing again the subject of what constitutes a "business record"), there are only two potential instances where the Union might be found to have had actual knowledge of the Employer's practice. The first was the memorandum from Mr. Green dated May 25, 1998. However, when one reads the full text as reproduced above, it is readily apparent that the principal point under discussion was whether the reductions should be based on "part of the year" (as apparently calculated by Mr. Dowling) or on "the whole year" (as calculated by Mr. Green). In other words, the memorandum was not written to address the matter now in dispute. The Employer places considerable emphasis on the question posed at one point by Mr. Green; namely: "How many working days of absence did [the employee] have in 1997?" However, I agree with the Union's submission that it is not clear from the resulting answer whether the total reflected a continuous or a cumulative number of days (nor did Mr. Green state expressly that the calculation should be based on "accumulated" working days). As a consequence, the memorandum cannot be construed as notice to the Union of the Employer's actual practice regarding the reduction language.

The other instance where the Union may have had actual knowledge stems from Mr. Johnstone's inquiry in February of 2009. He was clearly told in Ms. Elliott's email of the Employer's "… longstanding practice of pro-rating based on **accumulated** absences" (emphasis in original). But this communication was not sent to the Union, and it is complicated by the fact that there appears to have been some uncertainty as well over the 1/9th and three months versus 1/11th and one month formula for pro-ration. This is significant because Mr. Johnstone would not have faced a reduction under the old formula (and recall that the Collective Agreement with the new formula had not been reduced to writing). The even more problematic complication results from the evidence of what was communicated to the Union on this occasion. The evidence consists solely of the email sent by Mr. Marwick to Ms. Elliott:

For the file:

> I discussed this issue with Gord at an afternoon meeting yesterday, and clarified this matter for him.
>
> Gord is not intending to pursue this matter further.
>
> Jeff.

The Union accurately observes that this communication raises a series of questions, including: What was "this issue" and/or "this matter" (recalling that Ms. Elliott's email dealt with at least two substantive questions)? Further, what was communicated to "Gord"? There is compelling merit as well to the Union's assertion that Mr. Marwick should have been called to give direct evidence and be subject to cross-examination on such a critical element of the Employer's case.

The Employer seeks to answer these criticisms by relying on Section 92(1)(b) of the *Labour Relations Code*, and by arguing it was not required to call all of the individuals who authored the documents it tendered because that would unnecessarily have prolonged the proceeding. While I acknowledge the general thesis of this submission, the desirable objective of expediency in labour arbitration cannot supplant the onus on the Employer to establish the facts underlying its legal position. Nor was I provided with any explanation for why Mr. Marwick could not be called as a witness. Assuming his email to Ms. Elliott is admissible (contrary to the Union's strong protestations), it can only be "… received in evidence for what [it is] able to establish": *FortisBC Energy Inc. -and- International Brotherhood of Electrical Workers, Local 213* (unreported) August 15, 2011 (McConchie), at p. 8. Put simply, I am not persuaded that the document marked as Exhibit 6 establishes that responsible Union officials knew the Employer was pro-rating vacation and days off based on accumulated absences and should be taken to have acquiesced in that practice. But even if it did, I would not find this single incident is sufficient to constitute a "past practice" in accordance with the prevailing authorities.

The Employer maintains in the alternative that knowledge should be nonetheless imputed to the Union:

> In any event, even if the Union did not have any knowledge of the practice, which is simply not true, *the Union should be deemed to have knowledge, given that the practice is longstanding, spanning multiple decades, consistent, and open*. The Employer's evidence is that the proration is specifically set out in each employee's time bank statements, and that this proration affects about 20 to 30 members of the bargaining unit per year. That means that hundreds of employees have been affected by the provisions at issue. (Closing Argument at para. 73; italics added)

The authorities put forward in support of this position include *Vancouver (City) Vancouver Board of Parks and Recreation -and- Canadian Union of Public Employees, Local 15*, [2004] BCCAAA No. 238 (Munroe). See also *Re Insurance Corp. of British Columbia and O.P.E.I.U., Local 378* (2002), 106 LAC (4th) 97 (Hall). The issue in *City of Vancouver* was whether paragraph 3.1 in Schedule "E" to the parties' collective agreement applied to the pay treatment of auxiliary employees. The employer relied in part on a consistent past practice spanning a number of years. Arbitrator Munroe addressed the practice evidence as follows:

> With one exception, the employer's pay-administration of the collective agreement, in all the above circumstances as regards the issue at hand, has been as the employer asserts in this proceeding to be correct. Again with the one exception, that has been the case both before and subsequent to the introduction into the collective agreement of what is now Schedule "E", para. 3.1 (approximately 10 years prior to the filing in late 2002 of the individual grievance from which this policy proceeding emerged). The union was aware of the employer's practice prior to the 1986-1987 negotiations (as witness the bargaining demand at that time). And the employer's practice was reiterated to the union in the draft report dated October 8, 1987. There is no direct evidence of union knowledge of the practice continuing subsequent to the introduction into the collective agreement of what is now Schedule "E", para. 3.1. However, the practice, which is acknowledged by the union, was in respect of an important monetary interest affecting a substantial body of employees, and would have been transparent for some employees from pay day to pay day. *It strains credulity to think that responsible union officials were unaware of the practice. At the least, the documentary history surrounding the practice, the fact that the practice went to an important pay interest, the transparency of the practice, and the acknowledgement of the continuing existence of the practice subsequent to the introduction into the collective agreement in the early 1990's of what is now Schedule "E", para. 3.1, place an evidentiary burden on the union to call evidence that it simply did not know that the practice had continued unabated. This, the union did not do. In my view, the union must be taken to have been aware of the practice throughout*. (para. 37; italics added)

Thus, the award in *City of Vancouver* can be distinguished on two grounds. First, the union there "was aware of the employer's practice" at one point. The same finding cannot be made here. Second, the nature of the practice "place[d] an evidentiary burden on the union to call evidence that it simply did not know that practice had continued unabated". The Union did lead evidence before me through Mr. Ghuman to disavow any knowledge of the Employer's practice. The absence of knowledge on the part of the Union can also be inferred from Mr. Slater's testimony. It will be recalled that Mr. Van Dyck contacted him to ascertain how the Employer was calculating the reductions when the "informal issue" first arose in relation to Mr. Urbanoski.

I agree as well with the Union's submission that, in order to impute knowledge, it is first necessary to find that the practice made a difference to the vacation and days off entitlements of employees. This is implicitly conceded by the Employer when it asserts that "… employees have been affected by the provisions at issue" (Closing Argument at para. 73). In this regard, it is not sufficient to merely demonstrate that employees have had their entitlements pro-rated. Rather -- and this evidentiary element is essential -- the Employer must demonstrate that its application of the reduction language had an effect on the level of benefits received by employees. Otherwise, the Union and its members would have no reason to be aware of the practice.

The documents at Tabs 19-29 of Exhibit 5 show that 20 to 30 employees had their vacation and days off reduced in accordance with the Employer's methodology during each of the years 2002 through 2012. But the documents do not reveal either the nature nor the duration of the employees' absences. It is tempting to infer that at least some of those reductions resulted from an accumulation of absences. But that inference should be resisted for three reasons.

First, the Employer only introduced evidence regarding the "audits" of two employees over the ten years: Mr. McDonald in 2002 and Mr. Johnstone in 2008. In Mr. McDonald's case, the Employer's interpretation of the Collective Agreement did not have any impact on the resulting reduction. (As an aside, nor did that interpretation make any difference to some of the situations canvassed by the internal memoranda introduced to show the Employer's "consistent

practice".) Thus, on the evidence, there is no more reason to infer that employees *were* affected than for inferring that they *were not* affected.

Second, and related, when Mr. Johnstone was impacted by the accumulation of his absences during 2008 he in fact raised the issue with the Employer in early 2009. This invites a finding that other employees would have taken similar action had they been aware of any adverse affect (and, for reasons given earlier, Mr. Johnstone's circumstances do not assist the Employer in establishing that the Union was aware of a "past practice".)

Third, and as a sufficient reason alone, I am not prepared to infer the circumstances urged by the Employer when it could have presented direct evidence of employees being affected by its interpretation of the Collective Agreement. It was suggested by counsel in final argument that it would have been "burdensome to prove an effect on everyone", but that would not have been required. I note the Employer was able to "audit" three employees on the proverbial eve of the hearing. No explanation was given for why this step was not taken at an earlier date, and there was nothing to suggest it was a challenging exercise that could not have been undertaken more broadly. In my view, it was well within the Employer's means to lead sufficient evidence from which one might reasonably infer that employees have in fact been affected by its longstanding practice. The Employer's failure to meet this onus is fatal to the argument that relevant knowledge should be imputed to the Union.

In summary to this juncture, the extrinsic evidence of past practice cannot be relied on to resolve the immediate contractual difference. I turn then to the language of the Collective Agreement which, in any event, is the primary position of each party.

I have determined that the parties' reliance on other Collective Agreement provisions does not assist in ascertaining what they mutually intended by the clauses in contention. For instance, the Union points to Article 8.02.1 which provides that "[a] vacancy of less than ten (10) *accumulated* months in any 12-month period is a temporary vacancy" (italics added), and contrasts the absence of the word "accumulated" in the reduction provisions. It submits the parties would have used the same word in Articles 20.05, 20.05.1 and 35.05 had that been

intended. On the other hand, the Employer relies on Article 7.03.3(c) which uses the terminology of "continuous, unbroken" to modify years, and argues the concept should not be imputed into the reduction provisions. I have noted in my deliberations that Article 8.02.2.6 refers to a period of "twelve (12) consecutive months", while there is no modifier in other provisions where the same concept is implicit. For example, Article 7.03.4 reads:

> **7.03.4**
> Employees who cannot be recalled due to an accident or illness, confirmed by a medical certificate from a mutually-agreed physician, will have their twelve (12) month recall period extended for the period of the illness or disability to a maximum of an additional six (6) months.

It seems obvious in this context that the period being described is a single or continuous absence from the workplace, due to a layoff, which may be extended by illness or disability. Thus, the absence of words such as "accumulated" or "continuous" in the reduction language does not assist either party's position.

The Employer relies in part on the description of "absence" found in the second sentence of Articles 20.05.1 and 35.05 (the wording is identical except that "Holidays" are omitted from the former; in practice, nothing turns on this omission):

> . . . For the purpose of this proration "absence" shall not include time off work for Annual Vacation, Holidays, True Bank Days, Legacy Days or Choices Days, or Overtime Bank Days.

The Employer submits the exclusion of paid time benefits which occur throughout the year (many of which are only a day in duration) lends support to its position that employees will only have their entitlements reduced if their absences total up to the threshold of two full months. It argues the second, exclusionary sentences would otherwise be meaningless in both provisions.

The problem with this aspect of the Employer's submissions is that it overlooks the negotiation history. More specifically, the exclusionary sentences only took their present form relatively recently; that is, following the Collective Agreement ending March 31, 2006. Until that time, the sentence was not part of Article 20.05.1 and then Article 35.06.3 excluded only

"annual vacation or shorter work year leave". There is no evidence from which it can be inferred that the parties intended any particular meaning by adding the current wording, or that the change was meant to alter the original intent. Moreover, the second sentences are not rendered meaningless under the Union's interpretation of the Collective Agreement, as a Holiday (to take but one example) will likely fall within any two month absence and would accordingly be excluded from the calculation of a "full month".

The Employer aptly argues that the "core of the language has been the same since 1969". It will be recalled more specifically that the current Article 35.05 was introduced as part of the 1969-1971 Collective Agreement, and continued for many years in the following form:

> Shorter work year leave entitlement will be reduced by 1/9 for each full month of absence in excess of three months' absence in the preceding year. For the purpose of this proration "absence" shall not include time off work for annual vacation, shorter work year leave, and vacation overtime (including training leave, lay-off covered by V.O., and sabbatical leave).

There is no suggestion by either party that the later conversion of SWLY to Legacy and Choices Days heralded any change to the original intent. The reduction of annual vacation was a pre-existing concept. It was continued in the 1969-1971 Collective Agreement as follows:

> (f) Leave of absence for sickness or any purpose up to a total of three months in any period (excluding paid vacation) shall not reduce the annual vacation an employee would otherwise qualify for. Where a leave exceeds three months his annual vacation with pay may be reduced by 1/9 for each full month of absence in excess of the three months.

There are some obvious similarities between these provision, including the three month period and the 1/9 ratio. But there are some very important distinctions as well. First, the vacation reduction was at the time discretionary ("*may* be reduced") while the SWYL reduction was mandatory ("*will* be reduced"). Second, the SWYL reduction turned on "absence in excess of three months' absence *in the preceding year*". The words in italics were not found in the vacation reduction language, and support the concept of absences being accumulated over the

entire year for purposes of the days off reduction. The same distinction exists in the present Collective Agreement.

Third, the vacation reduction language was plainly premised on a single absence: "Where *a leave* exceeds three months …" and is still worded in the singular today -- unlike the days off reduction language which has always, and more ambiguously, referred to "absence". In my view, inclusion of the word "total" in the first sentence of the vacation reduction language (now Article 20.05) is not sufficient to ignore this distinction, particularly as the first sentence is likewise drafted in the singular: "Leave of absence for sickness or any purpose up to a total of …". This can be contrasted with other provisions (such as Article 11.01 reproduced below) which refer to "leaves of absence" in the plural. Further, the word "total" is not redundant under the Union's interpretation, as a single lengthy absence might be attributed to more than one type of leave. Indeed, that is precisely what occurred with Mr. McDonald: he was absent during 2002 from January 2 until March 5 on sick leave, and was then absent from March 6 until June 23 on long term disability. The total period would constitute the "[l]eave of absence". The word "full" ahead of "month of absence" in both Articles 20.05.1 and 35.05 does not advance the Employer's position. The word is part of the proration calculation, and effectively "rounds down" the full month(s) in excess of one month. Stated differently, the word "full" is not determinative of whether the total absence must be a single leave or may be an accumulation of leaves. The foregoing interpretation gives meaning to all of the words found in Articles 25.05 and 25.05.1 and accordingly satisfies the seventh *Pacific Press* rule of interpretation.

In support of its position, the Union relies on the *Interpretation Act* definition of "month" (i.e., "a period calculated from a day in one month to a day corresponding to that day in the following month, less a day"); *Black's Law Dictionary* (5th Edition); and, authorities which hold that periods of time generally are to be calculated on a calendar basis: see, among other awards, *Ontario (Alcohol and Gaming Commission) -and- Ontario Public Service Employees Union*, [2001] OLAA No. 189 (Whitaker), at para. 17; *Marmon/Keystone Canada Inc. -and- International Assn. of Bridge, Structural and Ornamental Reinforcing Iron Workers, Local 712*, [1999] BCCAAA No. 143 (Chertkow), at paras. 38 and 46-47; and *Ainsworth Lumber Co. and Cariboo Woodworkers Assn.*, [1998] BCCAAA No. 84 (Stevenson).

But the presumption in favour of calculating periods on a calendar basis cannot override a clear expression of intention to the contrary (see *Ainsworth*, at para. 23). I find Article 35.05 evinces a sufficient intent to rebut the presumption when the phrase "in the preceding year" is taken into account. That phrase -- which, to repeat, is missing from the vacation reduction language -- signals an accumulation of all absences during the entire year, as opposed to being "in any period" (the terminology found in Article 25.05). It is helpful to recall as well that the original definition of SWYL was ". . . a leave of absence with pay, *based on service during the preceding year"* (italics added). Unlike the definition of service for purposes of vacation entitlement reviewed below, approved leaves of absence were not mentioned in the SWYL definition, and the phrase "during the preceding year" again opens the door to an accumulation of absences during that entire period.

It is appropriate to reiterate the eighth rule of interpretation in *Pacific Press*; namely, where an agreement uses different words, one presumes that the parties intended different meanings. At the end of the day, neither party's interpretation can apply to both Articles 20.05 and 20.05.1 and to Article 35.05 given the history of those provisions and the unmistakably different wording which has been used from the outset. In reaching this conclusion, I have not overlooked the Employer's contention that the Union's interpretation would lead to an "absurd and inequitable consequence". In that respect, the Employer posits these scenarios:

> The Union's interpretation would mean that as long as an employee returns to work for one hour every two months, even if he or she only at work six hours a year, he or she will have no deduction for AV, Legacy Days or Choices Days. So, an employee who is off work for the vast majority of the year would be entitled to full Annual Vacation, Legacy and Choices Days, while an employee who was absent work for two continuous months and at work for the remaining ten months would be pro-rated. (Closing Argument, at para. 32)

A partial answer to the Employer's concern is that the first scenario seems highly improbable (and could likely be precluded by the Employer in any event). But a complete answer lies in the realization that arbitrators may only strive to avoid interpretations that might give rise to anomalies when faced with "two linguistically permissible interpretations". For

reasons given above, the plain language of Articles 25.05 and 25.05.1 precludes an accumulation of absences for purposes of reducing an employee's vacation entitlement. (Parenthetically, even if the Employer had been able to overcome the other limitations on the use of past practice, it would still have faced the "clear preponderance" in favour of the plain meaning of the words in those Articles.) I note moreover that vacation is based on "service" which is explicitly defined in Article 22.01 as meaning "accredited Service as defined in Article 11". The earlier provision reads:

> **11. Service**
>
> **11.01 Accredited Service**
> Accredited Service means the total of all periods of service as a regular or temporary employee of the Company, or as an employee of a predecessor company or organization, which includes credit for all paid time off and *approved leaves of absence*. … (italics added)

This definition supports the Union's argument that vacation entitlement should only be reduced for leave of absence to the extent it has been "clearly and unequivocally expressed" (see the fifth *Pacific Press* rule of interpretation). It also negates the Employer's assertion that "if you're not at work, you don't earn or get the time off". By the express terms of the Collective Agreement, service for purposes of vacation entitlement includes "credit for all paid time off and approved leaves of absence".

Accepting, as I do, the Union's interpretation of the vacation reduction language in Articles 25.05 and 25.05.1 (but not its position regarding the days off reduction language in Article 35.05) makes it necessary to consider the Employer's alternative argument based on estoppel. The elements of the so-called "modern doctrine" were identified in my *ICBC* award as follows:

> … An estoppel may arise where: (a) intentionally or not, one party has unequivocally represented that it will not rely on its legal rights; (b) the second party has relied on the representation; and (c) the second party would suffer real harm or detriment if the first party were allowed to change its position. The requirement of unequivocal representation or conduct is a question of fact, and

> may arise from silence where the circumstances create an obligation to speak out. (p. 108)

The findings above regarding the Union's lack of knowledge regarding the Employer's longstanding practice are largely dispositive of the estoppel question. There was certainly no express representation by the Union and, absent knowledge, I find there was no "obligation to speak out". Thus, the circumstances can be distinguished from *Manitoba (Department of Family Services and Housing) -and- C.U.P.E., Loc. 2153* (2005), 142 LAC (4^{th}) 173 (Peltz). In that award, the union argued the employer could not count holiday pay as part of a contractual requirement to "provide a guarantee for the number of hours of work assigned per week". Although the argument succeeded, the arbitrator found that employees and several local union executive members must have been aware of the employer's practice of including holiday hours as part of the guarantee, and reasoned:

> It would be reasonable to expect a Union challenge to be raised, at some point during the three or more years duration of the practice, since individual employees were periodically being shorted on their take home pay. From the Employer perspective, silence by the Union on a direct pocket book issue would reasonably lead management to conclude that there was no problem. This in fact was the evidence at least on the management side. Despite estoppel being raised as an issue by the Employer during the current arbitration proceedings, however, the Union chose to call no evidence explaining its silence. I agree with the Employer that the evidentiary onus lies on the Union, in these circumstances, to show why it did not or could not raise an objection sooner.
>
> Considering all the facts as set forth above, I conclude that there was a representation by silence in this case, sufficient to meet the test for an equitable estoppel and barring the Union from asserting its strict legal rights under Article 15.03(a) of the collective agreement. While the Union did not know about the practice, it had constructive or imputed notice. Under all the circumstances, it would be inequitable to allow the Union to enforce its rights against the Employer after a period of acquiescence which extended into collective bargaining. (pp. 191-92)

The arbitrator went on to find that the estoppel ended on the expiry date of the collective agreement because "the parties knew about the problem prior to expiry" (p. 192). On this point, see also *TRW Canada, Carr Division -and- C.A.W., Local 397* (1989), 4 LAC (4th) 310 (Palmer), where the mere filing of the grievance was sufficient notice to the employer that the

union wanted to revert to the specific collective agreement language. Thus, the approach in *Manitoba* was not unlike the evidentiary burden used by Arbitrator Munroe in *City of Vancouver* to impute knowledge to the union. But the same outcome does not follow here given Mr. Ghuman's testimony, as well as my earlier findings that the Union should not be deemed to have been aware of the Employer's method of pro-rating absences.

V. CONCLUSION

The grievance succeeds in part: the Union's interpretation of Articles 20.05 and 20.05.1 is accepted, while the Employer's interpretation of Article 35.05 prevails. The question of remedy in light of this result is referred back to the parties, and I retain jurisdiction to make a final determination if they are unable to resolve Mr. Urbanoski's vacation time entitlement from last year.

DATED and effective at Vancouver, British Columbia on February 19, 2015.

JOHN B. HALL
Arbitrator