IN THE MATTER OF AN ARBITRATION

BETWEEN

THOMPSON - NICOLA REGIONAL DISTRICT

(the “Employer”)

AND

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 900

(the “Union”)

RE: MEAL EXPENSE GRIEVANCE

APPEARANCES:	Julie Menten, for the Employer
	Michael Shapiro, for the Union
ARBITRATOR:	Mark J. Brown
DATES OF HEARING:	April 14, 15, 22 and 23, 2021
DATE OF AWARD:	May 3, 2021

I. ISSUE

On May 6, 2020, the Union grieved the Employer's discontinuance of meal expenses under Article 20.03 of the Collective Agreement; and, asserted that proper notice was not given under Article 23.03.

The Union argues that the Employer violated Article 20.03 by unilaterally discontinuing the meal allowance. In the alternative, the Union argues that the Employer is estopped from discontinuing the practice with respect to meal expense payments until the commencement of the next Collective Agreement.

The Employer argues that the meal allowance was a gratuitous Employer policy not a Collective Agreement right. However, the Employer gave the Union notice of its intention to terminate the policy and gave the Union the opportunity to bargain on this matter. In the alternative, the Employer argues that if I conclude that the policy was not gratuitous, the Employer gave adequate notice to terminate the policy.

The Employer argus further that the Union has no basis for an estoppel as it was given clear notice prior to collective bargaining that the policy may not continue and ignored the notice in collective bargaining to its peril. In the further alternative, the Employer argues that the Union is estopped from relying on its strict rights based on its silence.

II. BACKGROUND

The majority of the material facts are not in dispute and will be set out briefly below.

The Employer is a regional district in the southern interior of the Province. It includes ten municipalities. Certain employees of the Employer are in the field for the majority of their work days in any given week. This involves approximately ten employees (Utility employees, By-Law Officers and Building Inspectors); the majority of which are Building Inspectors.

In the parties 1986 to 1988 Collective Agreement, Article 19 (d) Expenses stated:

Employees shall be entitled to expenses as follows:

.20 per kilometer
$5.00 for breakfast
$7.00 for lunch
$10.00 for dinner

Accommodation is at cost, with receipts.

Or any amount equal to that allowed to Thompson - Nicola Regional District Directors, whichever is greater.

All staff members on Thompson - Nicola Regional District business must have the approval of their Department Head prior to any expenses being incurred.

Employees shall not be required to use their own private vehicle to carry out their duties, but if it is mutually agreed that they do so, the expenses as provided for in Article 19 (d) shall apply.

In the 1989 to 1991 Collective Agreement, the above article was amended to state:

19.04 Expenses

Employees shall be entitled to travel expenses in an amount equal to that allowed to Thompson -Nicola Regional District Directors.

All staff members on Thompson - Nicola Regional District business must have the approval of their Department Head prior to any expenses being incurred.

Employees shall not be required to use their own private vehicle to carry out their duties, but if it is mutually agreed that they do so, the expenses as provided for in Article 19.04 shall apply.

The subsequent Collective Agreements between the parties have remained unchanged for decades; with the exception of renumbering. The current Article 20.03 is the same as above.

The Employer's Directors travel expense allowances are set out in the Board of Directors Remuneration and Expense By-Law, which is passed annually. Over the years, the amount allowed for meal expenses has changed. Employees meal allowances tracked the changes in the By-Law.

A "TNRD Expense Claim Submission Guidelines (Draft - July 2009)" document states in part:

The Collective Agreements between the TNRD and both CUPE Local 2587 [now Local 900] and BCGEU contain Clause 19.03 [now 20.03] and 27.8 respectively which outline expenses entitled to the TNRD employees. The collective agreements outline the amounts of meal expenses; the following provides clarification for when the meal expenses apply:

General Expectations

1) Lunch expenses can be claimed on any regular working day that you are working out of Kamloops beyond 30 km from the TNRD office. You must have left the office by 11:00 am and not returned before 2:00 pm.

In 2015, the Director of Finance, Douglas Rae, built the above document into a Corporate Practice Manual, Corporate Practice No. 5.5, Subject Meal Expenses, dated February 16, 2015, which states in part:

PURPOSE: The Collective Agreements between the TNRD and both CUPE Local 2587 [now Local 900] and BCGEU contain clauses which outline expenses entitled to TNRD employees. The Collective Agreements outline the claimable amounts for personal meal expenses; this provides guidance regarding when reimbursement of personal meal expenses would apply.

Other travel

1. On a regular day of work, a lunch per diem expense may be claimed where the employee is required to travel out of town without an overnight stay involved. The claim is only valid if the employee is working at least 30 kilometres away from their regular office base and has left the office no later than 11:00 AM and not returned before 2:00 PM.
2. Lunch per diems for out of town travel without an overnight stay will be a taxable benefit under the Canadian Income Tax Act if it does not occur in connection with a business meeting with other staff or external stakeholders. As such, lunch per diem payments of this type will be reported as a taxable benefit on the employee's T4 slip and subject to additional tax deductions from the employee's regular pay-cheque in the pay period in which the expense reimbursement occurs.

In late 2018 and early 2019, Rae had concerns about the meal expenses. For purposes of this Award it is not necessary to set out all his concerns. They related to administrative inefficiencies and Canada Revenue Agency issues. He recommended to then Chief Administrative Officer, Sukh Gill, that the Employer consider eliminating the meal allowance for employees who were in the field performing the functions of their job. In a survey of other regional districts he concluded that granting such an allowance was “unusual”. While Rae recommended the elimination for financial reasons, Debbie Sell, the Employer’s Director of Corporate Services, had concerns about the elimination from a human resources perspective.

In a letter dated December 21, 2018 to Anita Mori, the Union’s Unit Chair, the Employer served Notice to Bargain a renewal Collective Agreement. The existing Collective Agreement expired December 31, 2018. The parties agreed to commence collective bargaining on April 9, 2019.

The Collective Agreement contains a provision regarding notices.

23.03 Notices

Any notice required to be given personally or to the Employer under the terms of this Agreement shall be given by registered mail addressed to the Employer.

Any notice to be given personally or to the Union under the terms of this Agreement, shall be given by registered mail addressed to the Secretary of the Union.

When either party changes its address, it shall notify the other in writing.

Mori is the Unit Chair not the Secretary of the Union. However, the Employer has consistently sent notices to Mori with no opposition from the Union.

In an email dated March 1, 2019 from Sell to Mori and to the BCGEU Representative, Sell attached a letter noting in the email that the Employer was "reviewing a Corporate Practice regarding meal expenses". The attached letter stated in part:

Re: Review of Corporate Practice 5.5 Meal Expenses

This letter is to advise you that the above Corporate Practice is currently under review. A copy of this Practice is attached to this letter for your convenience.

An initial review of other local government organizations shows that payment of expenses such as lunch per diems during regular working hours while doing work that is part of an employee's regular position is unusual. The expenses that are particularly under review are covered in the "Other Travel" section of the attached Practice. Given the nature of these payments, they are considered a taxable benefit under the Canadian Income Tax Act.

Consideration is being given to removing the payment of these expenses. Should that decision be made, the change to this Corporate Practice will be communicated to all employees.

If you have any questions or require any clarification about what expenses are under review and may be removed, please do not hesitate to contact [Rae].

Mori did not forward this letter to the Union President. In an email dated March 5, 2019, Mori advised Sell that she agreed with comments made by the BCGEU Representative regarding the meal allowance. Mori did not state that meal allowances were a right under the Collective Agreement and not simply an Employer practice.

In an email dated March 28, 2019 from Sell to Mori, Sell attached "two employer notices to the union regarding changes in practice". One related to "Compensation for Callouts on Standby" and advised the Union that "when the new collective agreement becomes effective, employees will no longer be permitted to claim for vehicle mileage or overtime when commuting from their place of residence to work to attend to an emergency. The second related to "Article 18.08 Compassionate Leave" and advised the Union that effective with the new collective agreement, the Employer would strictly apply the Article regarding who was covered by the provision.

As noted above, collective bargaining commenced on April 9, 2019. The Union's spokesperson was Harry Nott, a Union National Representative. At the commencement of collective bargaining, the Employer spokesperson was Julie Menten. She was not in attendance in the last meeting when terms of settlement were finalized.

There was substantial evidence regarding exchanges of proposals. For purposes of this Award it is unnecessary to set out the evidence in detail. Suffice it to say, Nott was aware of the three notices set out above. He did not raise the meal allowance issue because the Employer had not informed the Union that the review was complete and the allowance was going to be removed. Nott believed that it was up to the Employer

to raise the issue if it was going to change the meal allowance.The latter two notices were discussed. Callout was not addressed in the final terms of settlement. Article 18.08 was amended.

Collective bargaining concluded on June 20, 2019 and the terms of the new Collective Agreement, which expires December 31, 2022, were ratified shortly thereafter.

About one month later, Mori and Carmen Sullivan, Union President, were advised as follows by Rae in a letter dated July 23, 2019:

Further to our letter dated March 1, 2019, this letter is to confirm changes to the above Corporate Practice.

The payment of meal per diems while employees are performing their duties as part of their regular working hours will be ceasing. Given the nature of these payments, they are considered a taxable benefit under the Canadian Income Tax Act. The meal payments that are no longer being paid are covered in the "Other Travel" section of the attached Practice. Other meal per diems where an overnight stay away from home or overtime is involved are unchanged.

This change will be communicated to all employees shortly, prior to this change coming into effect.

Sell testified that Gill made the decision to eliminate the meal allowance after collective bargaining was completed which prompted the above letter from Rae. Gill is no longer employed by the Employer and did not testify.

Sullivan was forwarded the March 1, 2019 correspondence by Rae on July 27th as she had not received it. Sullivan responded to Gill in an email dated September 9, 2019:

Please accept this email as our formal notice that should the employer continue with the intent to cease the practice of meal per diems for their CUPE staff we will have no option but to file a grievance and/or a complaint to the BC Labour Relations Board. As discussed in July, this issue was not brought forward during bargaining and is a current condition of employment.

We note the intent to cease the practice has not been disseminated to the employees, and we are hopeful that you have changed direction and are leaving the issue status quo.

In an email dated November 5, 2019 from the Employer to Sullivan, an attached letter dated October 21, 2019 from Gill to Sullivan stated in part:

We are responding to your email dated September 9, 2019 regarding the notice we sent to you on July 23, 2019, about our change to corporate practice 5.5 - Meal expenses. You stated in your email that if we continue with our intent to cease the meal per diem practice you will "have no option but to file a grievance and/or complaint to the BC Labour Relations Board". As we are confused about your position on this issue please advise on what basis you would be filing a grievance (i.e. what provision of the Collective Agreement do you allege has been breached) or filing a complaint to the Board.

In regard to your statement that "this issue was not brought forward during bargaining", we remind you that "meal expenses" had been provided to employees pursuant to an Employer policy. At no time was it part of the parties' Collective Agreement.

We also remind you that we provided the Union with notice of our intention to review and change the policy on meal expenses on March 1, 2019, and prior to the commencement of collective bargaining. The purpose of providing notice was to give the Union an opportunity to negotiate the meal expenses if that was important to it. Once notice is given of an intention to change an Employer policy or rule, which we have the management right to do, there is no further onus on us to raise this in collective bargaining. As this was a change to a policy, not a term of the collective agreement, the onus was on the Union to raise it in collective bargaining. The Union had every opportunity to try to negotiate the meal expense into the collective agreement during collective bargaining if it had wanted to, but it did not.

Additionally, your spokesperson was well aware of the Employer's right to change policies and the Union's right to try to negotiate these into the collective agreement. None of the notices of policy changes were included in the Employer's bargaining agenda, yet Mr. Nott made several attempts to negotiate changes to the other policies in which the Employer had given notice of its intention to change, in particular the change to the callout compensation and language for compassionate leave.

To try to raise the change to the Meal Expense Policy now (and in such an aggressive manner), after collective bargaining has ended, seems to us to be not only inappropriate but in bad faith.

In our view this is a full answer to this issue. We hope that this puts an end to this matter.

The Union did not respond to this letter.

During labour management meetings, and during finance department meetings, the meal allowance was discussed. Mori, as a finance department employee, would have known that the Employer was planning the elimination of the meal allowance.

In November of 2019, Sell reached out to Mori about the Building Inspector rates of pay to discuss researching whether the rates were competitive. Sell and Mori met on November 21 and December 18, 2019 to discuss the matter. Sell asserted that the reason to review the rates of pay was due to the elimination of the meal allowances. However, during the meetings there was no specific reference to the two issues being tied together. Sell did recall noting that the wage increase would apply to all the building inspectors, with the implication being that the meal allowance only applied to some. Mori never communicated the Union's position with respect to the meal allowance removal.

On January 14, 2020, the parties signed a Letter of Understanding which increased the wage rates of all the building inspectors effective January 5, 2020. The Letter of Understanding does not reference the meal allowance removal.

On April 28, 2020, all employees were informed by email that an amended Corporate Practice 5.5 Meal Expenses would be effective May 1, 2020. The Union filed the grievance May 6, 2020.

III. ARGUMENT

The Union argues that the Employer breached Article 20.03 by unilaterally discontinuing travel expense payments to employees who are required to travel out of town as part of their duties without an overnight stay. In the alternative, The Union argues that the Employer is estopped from discontinuing such payments until the commencement of the next collective agreement.

With respect to Article 20.03, the Union argues that the collective agreement entitles members to be paid travel expenses in an amount equal to that allowed to the Employer's Directors. The words "travel expenses" have an objective meaning. It is not in the Employer's sole discretion to decide what is and is not a "travel expense".

The Union argues that Article 20.03 is unambiguous. To the extent that there is any ambiguity in Article 20.03, the Union argues that the 2010 Building Inspector job posting and the employee's ensuing offer letter that was put into evidence, the 2015 Policy, and the decades-long practice with respect to lunch expense payments all make it clear that the Collective Agreement entitles the employees to lunch expense payments when they work at least 30 kilometers away from their regular office during lunch hours. On this point the Union cites *John Bertram & Sons Co.*, [1967] O.L.A.A. No. 2 at paragraph 12.

In the alternative, the Union argues that the Employer is estopped from discontinuing its longstanding and consistent practice until the commencement of the next collective agreement. The Union cites several cases to support its estoppel argument: *Re Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608,* (1978) 18 LAC (2d) 307 (P.C. Weiler); *Simon Fraser University v. Canadian Union of Public Employees, Local 3338,* [2004] B.C.C.A.A.A. No. 224; *Litwin Construction (1973) Ltd.*, (1988), 29 BCLR (2d) 88 (BCCA); *BC Rail Ltd.*, BCLRB No. C152/92; *Vancouver (City) (Re)*, BCLRB No. B12/2008; *BC Emergency Health Services and Ambulance Paramedics of BC, CUPE Local 873 (Posting/rescinding of positions)*, unreported, April 12, 2021 (Somjen); *Vancouver (City) v. Canadian Union of Public Employees, Local 1004 (Backhoe Grease Time Grievance)*, [2009] B.C.C.A.A.A. No. 5 (Steeves); *Finlay Forest Industries Ltd. and Industrial, Wood and Allied Workers of Canada, Local 1-424*, [1997] B.C.C.A.A.A. No. 240 (Blasina); and, *Maple Lodge Farms Ltd. and U.F.C.W., Loc. 175*, (1991) 24 L.A.C. (4th) 211 (Brown).

The Union argues that the decades-long practice (spanning many collective agreements) of paying lunch expenses to members who travel out of town on the Employer's business without an overnight stay amounts to a representation by the Employer that this practice would continue. The Employer also made a number of other representations that the practice with respect to lunch expense payments would continue.

For example, the inclusion of a daily out of town lunch allowance as part of a very competitive benefits package in historic job postings amounted to a representation by the Employer that lunch expense payments would continue. The adoption of the 2015 Policy which provided that members could claim lunch expenses when working at least

30 km away from their regular office base between 11:00 am to 2:00 pm was also a representation by the Employer that lunch expense payments would continue.

The Union argues that the detrimental reliance suffered by the Union was a loss of an opportunity to bargain. Nott testified that had the Union known that the Employer would change its longstanding practice with respect to lunch expenses, the Union would have tabled bargaining proposals in that regard.

With respect to any argument from the Employer that notice was given in the March 1, 2019 letter to Mori, the Union argues that it was not a proper notice to end estoppel because it was equivocal: *Cominco Ltd. and United Steelworkers of America, Local 480 (Jorgenson Grievance)*, [1996] B.C.C.A.A.A. No. 409 (Larson), application for review dismissed in BCLRB No. B375/96. Furthermore, it was not given in a manner prescribed by Article 23.03 of the Collective Agreement.

The Union argues that giving notice that one is merely considering changing a practice is insufficient to end estoppel: *ATCO Electric v. Canadian Energy Workers Assn. (Annual Vacation Grievance)*, [2020] A.G.A.A. No. 2 (Tettensor, Q.C.).

The Employer argues that no estoppel arises on the facts as the Employer's practice of paying for meals was a purely gratuitous practice that did not affect the legal relationship between the parties. Article 20.03 does not define "travel expenses".

The Employer argues that no estoppel arises on the facts as the Employer's practice of paying for meals was a purely gratuitous practice that did not affect the legal relationship between the parties. Article 20.03 does not define "travel expenses". The Employer argues that the common understanding of travel expenses is that travel expenses only apply when an employee travels away from their regular place of work. In other words, if an employee's job is to work "in the field" then they do not incur "travel expenses" simply for completing their duties as required.

The Employer cites the well-established principles of interpretation as set out in *Pacific Press v. Graphic Communications International Union, Local 25-C,* [1995] BCCAAA No 637 (Bird); and, *Cranbrook (City) (Re),* [2001] BCLRBD No 294.

The Employer argues that there is a distinction between what it calls the long-standing "Entitlement Practice" and the long-standing "Amount Practice".

The Employer argues that the Entitlement Practice was pursuant to the Employer's discretion, as set out in the second paragraph of Article 20.03 which states:

All staff members on Thompson-Nicola Regional District business must have the approval of their Department Head prior to any expenses being incurred.

Once entitlement is established, the Amounts Practice applies and the employees are paid the same expense amount as the Board. The only practice that is enshrined in the Parties' collective agreement is the Amount Practice, which is set out in paragraph one of Article 20.03, and which the Employer has never breached:

Employees shall be entitled to travel expenses in an amount equal to that allowed to Thompson-Nicola Regional District Directors.

The Employer argues that the two distinct long-standing practices were set out in the Employer's internal policy prior to 2015, and the Policy was put in writing and distributed to all employees in 2015. The Union had several opportunities to challenge the Employer's statement that the eligibility for a travel benefit is a policy and within its discretion since the Policy was distributed in 2015, but it did not at any time. For example, the Meal Expense Policy was raised repeatedly in Joint Labour Management Committee meetings for a variety of reasons, but the Union did not dispute that the Meal Expense Policy was a policy.

The Employer argues further that the Union is not being consistent in its position. The Employer also had another distinct long-standing practice of paying travel expenses in the form of mileage to employees who are called out when they drive their personal vehicle from home to work and back. As Rae testified, the Board is reimbursed when they use their personal vehicle to drive from home to work, and employees under the Mileage Policy received that same amount when they drove their personal vehicles from home to work on a callout. The Employer gave the Union the Callout Notice prior to collective bargaining that this gratuitous Mileage Policy would be ending. However, the Union never raised this as a violation of Article 20.03.

The Employer argues that past practice cannot be used to create new rights not found in the language of the collective agreement. If I accept the Union's interpretation of Article 20.03, I would be re-drafting Article 20.03. To accept the Union's interpretation, I would need to remove the second paragraph of 20.03. I would need to re-draft the entire first paragraph to go from:

Employees shall be entitled to travel expenses in an <u>amount equal to</u> that allowed to Thompson-Nicola Regional District Directors.

to:

Employees shall be entitled to all travel expenses allowed to Thompson-Nicola Regional District Directors and in an amount equal to that allowed to Thompson-Nicola Regional District Directors.

The Employer submits that the Meal Expense Policy, like in *Re Eurocan Pulp & Paper Co. and Canadian Paperworkers Union, Local 298* (1990), 14 L.A.C. (4th) 103 (Hickling) (affirmed June 27, 1991, B.C.C.A.), was "an indulgence" without any intention to forego any strict legal rights (at para 44).

The Employer argues further that the By-Law is not incorporated into the Collective Agreement by reference in Article 20.03 and is not part of the Collective Agreement. The Employer cites several cases to support its argument regarding ancillary documents: *Petro-Canada Lubricants Centre v CEP, Local 593,* [2000] OLAA No 460; *Canadian Northern Shield Insurance Co and COPE, Local 378 (Retirement Plan), Re,* [2016] BCWLD 591; and, *Brewers' Distributor Ltd v Brewery, Winery & Distillery Workers' Union, Local 300*, [2004] BCCAAA No 54.

In the alternative, the Employer argues that if I find that the Policy was not simply gratuitous, and the Employer was therefore required to give adequate notice of the termination of the Policy, then the Employer says it did give sufficient notice to terminate. The notice need not be express, it can be inferred by conduct. The Union was given notice that the meal allowances may be eliminated and it chose not to raise the matter at collective bargaining and in doing so did so at its peril: *Eurocan, supra;* and*, Ivaco Rolling Mills (Rod Mill) v. U.S.W.A., Local 7940*, [1992] OLAA No 638.

The Employer argues that promissory estoppel represents the most fruitful source of relevant authority on the effect of silence in the context of collective bargaining. Not only is there a duty not to mislead, but arbitrators and the Board have recognized that silence in the face of a positive duty to speak is tantamount to a representation, and that the loss of the opportunity to negotiate a revision may constitute the necessary reliance that brings the doctrine into play: *Mainroad Mid-Island Contracting Ltd & Mainroad North Island Contracting Ltd*, BCLRB No B366/2001. The Union's silence here is a complete bar to its current position. The Employer made the Union aware that the Meal Expense Policy may terminate and that the Employer had the unilateral right to do so. If the Union disagreed with that position, it had an obligation to say so.

The Employer argues further that the Union cannot rely on estoppel. The Employer cites *FortisBC Energy Inc v International Brotherhood of Electrical Workers, Local 213 (Urbanoski Grievance),* [2015] BCCAAA No 25 to set out the elements of the modern doctrine of estoppel.

The Employer argues that the mere existence of a practice, even a long-standing practice, without more, is not sufficient to found an estoppel. This is so because the mere fact of the practice does not import a promise or representation that the practice will continue: *West Fraser Mills Ltd*, [2006] BCLRBD No 199.

The Employer argues that the onus is on the Union to establish the elements of estoppel, as it is asserting that an estoppel exists. The Union cannot do so in this case, as it did not have an unequivocal representation from the Employer that the Meal Expense Policy would continue. In fact, the Union had received the exact opposite message from the Employer prior to collective bargaining in March of 2019, when the Employer put the Union on notice that it was considering removing the Meal Expense Policy. If the Union had wanted to ensure that its members received the Lunch Per Diem, it was required to bargain it during collective bargaining. The Union chose not to do so to its peril. It cannot now grieve what it should have bargained.

In the further alternative, the Employer argues that if I find that the Collective Agreement requires that meal expenses be paid, then the Employer submits that the Union itself is estopped from grieving the termination of the Meal Expense Policy.

The Employer argues that while the Meal Expense Policy was, the Employer asserts, a gratuitous and unilateral Employer policy, if this board finds that it was in fact in reference to a bargained promise, then the Union represented by its silence that it did not dispute that it would be terminated. The Employer gave the Union notice ahead of bargaining that it was considering terminating the Meal Expense Policy. At bargaining, the Union was silent on this issue and did not table any proposals to keep this benefit. Nott testified that the notice only said that the Employer was "reviewing" the policy and would let the Union know what it decided, but this is a misstatement of what the notice expressly stated, that the only consideration was the policy's removal. On this basis, when the Union was silent as to the Meal Expense Policy, the Employer believed the Lunch Per Diem not to be important enough to the membership to include it in bargaining.

After the decision was made to remove the Meal Expense Policy, to off-set the loss of the Lunch Per Diem, the Employer initiated discussions with the Union to increase wages to the Building Inspectors. Later, in January 2020, the Employer and the Union agreed to an increase in salaries for employees who would be particularly impacted by the changes to the Meal Expense Policy. By this point, there was no dispute that the Union was aware the Employer had terminated the Meal Expense Policy and that the wage increases were an offset to this benefit loss. For the Union to go back on this understanding clearly does an injustice to the Employer.

If the Collective Agreement does in fact require that the Employer pay meal expenses as per the Policy, then the Employer says the Union represented that it would not rely on its strict legal rights when it undertook to negotiate salary raises in lieu of the meal expenses. The Employer relied on the Union's silence by raising wages based on the understanding that it would no longer compensate for meal expenses. There is no doubt that the Employer would suffer real harm here. The Employer's budget was set based on the understanding that it would no longer pay meal expenses, and it offered salary adjustments to offset that loss. The Employer would never have agreed to salary increases had the meal expenses still been required.

Not only is the Union estopped from insisting on the Employer paying meal expenses, the Employer says the Union acted in bad faith and knowingly negotiated these salary increases while still contemplating a grievance based on meal expenses. The Union sat on this information and filed a grievance once the salary increases were already in effect, and once the Employer had been placated by the Union's silence into thinking the issue had been resolved: *Bhasin v Hrynew*, [2014] 3 SCR 494.

The Employer argues that if this Board finds that the Meal Expense Policy was a bargained-for promise and that the policy was not properly terminated on notice, then the Employer submits that the January 2020 salary increases must be unwound and the Union must compensate the Employer for this loss. The Employer says this would amount to an unjust enrichment and the Union cannot receive a windfall for its bad faith behaviour.

IV. AWARD

I will first set out some case law that guides my analysis.

The principles to be used for interpretation of a collective agreement are set out in *Pacific Press v. Graphic Communications International Union, Local 25-C*, [1995] B.C.C.A.A.A. No. 637:

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

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

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

4. Extrinsic evidence may clarify but not contradict the 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 that 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. Ordinary words in a collective agreement should be given their plain meaning.

10. Parties are presumed to know about relevant jurisprudence.

With respect to the use of extrinsic evidence arbitrators most often refer to *Nanaimo Times Ltd.*, BCLRB No. B40/96:

It follows that there is no requirement or pre-condition that a party seeking to adduce extrinsic evidence must first establish a bona fide doubt or an ambiguity on the face of the collective agreement prior to the arbitrator admitting the evidence. An arbitrator will accept the evidence when it is proffered (subject, of course, to the usual rules about relevancy and so on). The arbitrator is then able to consider both the language of the disputed provision and the extrinsic evidence when determining whether there is any bona fide doubt or ambiguity about the language of the agreement.

If the arbitrator decides, after considering both the collective agreement language and the extrinsic evidence, that there is no doubt about the proper meaning of the clause in question, the arbitrator then reaches an interpretive judgment without regard to the extrinsic evidence. See *Pacific Press Ltd.*, BCLRB No. B97/94 (upheld on reconsideration BCLRB No. B427/94) where the Board concluded that after considering the extrinsic evidence and finding the language of the collective agreement to be clear, the arbitrator did not need to (and would not be entitled to) resort to extrinsic evidence as an aid to interpretation. This amounts to the arbitrator effectively concluding: "I have considered all of the evidence, both the collective agreement and that which is extrinsic to the agreement, and conclude that what the language means is what it appears to mean to me on first reading."

On the other hand, if an arbitrator concludes that when the language of the collective agreement is considered with the extrinsic evidence, there is some doubt about the meaning of the provision in dispute, the arbitrator is entitled to use extrinsic evidence to resolve the ambiguity or doubt, even in the face of collective agreement language that appeared clear when read in isolation: *Finlay Forest Industries Ltd.,* BCLRB No. B137/94. However, even in these circumstances, an arbitrator is not bound to base his or her decision on the extrinsic evidence simply because the language is somewhat equivocal. The arbitrator is trying to decipher the meaning which the parties mutually intended for the disputed contract language, and should not forget the actual language in concentrating on a mass of extrinsic material: *U.B.C.* Subject to the considerations in *Board of School Trustees, School District No. 57 (Prince George),* BCLRB No. 41/76, with respect to the relative value of various types of extrinsic evidence as disclosing mutuality, an arbitrator's assessment of the weight attached to extrinsic evidence is not properly the subject of review under Section 99: *Board of School Trustees of School District No. 39 (Vancouver),* BCLRB No. B386/95.

In our view, the use of "bona fide doubt" as opposed to "ambiguity" in U.B.C. is of no consequence; one term is not a more stringent standard than the other. Neither are required prior to admitting extrinsic evidence, and both express the notion that an arbitrator must find some doubt arising from the language of the collective agreement in the context of any extrinsic evidence.

The fundamental point, as we have emphasized, is that arbitrators approach their interpretive task with a full appreciation of the circumstances relevant to the disputed contract language. The arbitrator may then determine how, if at all, the extrinsic evidence is of assistance. For example, the collective agreement language may not admit of ambiguity, such that the extrinsic evidence is properly disregarded; alternatively, where ambiguity is found, the evidence may be used as an aid to interpretation. These aspects of an arbitrator's reasoning should be evident on the face of the award (although there is no need for a rote analysis of the U. B. C. concepts). Beyond this, it is not the Board's role to second guess the arbitrator's assessment of ambiguity, the weight attached to the extrinsic evidence, or the interpretation of the collective agreement in light of the extrinsic evidence. (paras. 28-32)

The use of past practice evidence is set out in *John Bertram & Sons Co. v. International Association of Machinists, Local 1740 (Greenwood Grievance)* (1967), 18 L.A.C. 362 (Weiler):

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 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, 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 the 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. (paras. 12-13)

Both parties have raised estoppel. The modern doctrine of estoppel is summarized in *Simon Fraser University v. Canadian Union of Public Employees, Local 3338*, [2004] B.C.C.A.A.A. No. 224:

43 … At least for present purposes, I prefer to adopt what has been said more recently by our Labour Relations Board. Under the modern approach, the traditional compartmentalization of equitable remedies and their strict requirements have given way to a broad principle designed to avoid inequitable detriment. 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. The notion of reliance must be assessed from the perspective of the party raising the estoppel. In the labour relations context, the element of detriment may be satisfied by a lost opportunity to negotiate.

On the issue of notice, and the effect of silence, I cite *Eurocan Pulp & Paper Co. and Canadian Paperworkers Union, Local 298 (1990),* 14 L.A.C. (4th) 103:

> …What constitutes reasonable notice depends upon the facts of each case. In many circumstances a reasonable notice will be one expiring on expiration of the term of the collective agreement, but that is not necessarily so. The essence of promissory and other forms of estoppel is that a party should not be allowed to go back upon its word when it would be unjust and inequitable to do so. Ordinarily one would not have thought it fair or conscionable to permit a party to change the rules before there has been an opportunity to bargain upon the matter, as occurred in the Victoria Times Colonist case. The proximity of bargaining may, however, be one of the factors that could legitimately be taken into account in assessing the equities between the parties. It may not have been good labour relations policy in the Victoria Times Colonist case for the employer to terminate the practice of paying the union bargaining team on the eve of negotiations for a new agreement, but that does not necessarily make its action unfair or unconscionable. There is considerable merit in the view that once a right is questioned, the matter should be addressed in collective bargaining and resolved by negotiation. As arbitrator Hope observed in the Victoria Times Colonist case (at p. 298): "A decision to remain aloof from the collective bargaining process with respect to such an issue may not be a prudent course." A party to negotiations who, after being clearly informed of the position of the other does not raise the issue with a view either to incorporating the practice in the collective agreement or obtaining an assurance that the practice will be continued or the undertaking renewed, takes a substantial risk: see the observations of arbitrator P.C. Picher in Re Longyear Canada Inc. and Int'l Assoc. of Machinists, Local Lodge 2412 (1981), 2 L.A.C. (3d) 72 at p. 80, cited in the Victoria Times Colonist case, supra, at p. 298.

At the outset, there are three arguments that I do not find persuasive.

First, the Union argues that the Employer violated Article 23.03 by sending the three notices to Mori, the Unit Chair, instead of the Secretary of the Union as set out in the Collective Agreement provision. The undisputed evidence is that the Employer has consistently sent notices to the Unit Chair without any opposition from the Union. The Union cannot now assert that a notice is not valid when it has consistently accepted notices sent to the Unit Chair.

Second, the Union put into evidence one job posting and offer letter from late 2010 to attempt to bolster its argument that meal allowances were a long standing practice and included in employee benefits. Without evidence of other job postings I do not accept one posting as necessarily supporting a practice.

Third, I am not persuaded by the Employer's argument relating to the impact of the Labour Management Joint Committee. I acknowledge that the Committee serves a very useful purpose in attempting to resolve matters before they become formal grievances. Meal allowances were discussed for various reasons on occasion; however, it was not until the March 1, 2019 notice from the Employer that the potential of changing the meal allowance provision was formally raised. Subsequent events, including collective bargaining and formal correspondence between the parties, superseded any discussions at the Committee level.

Turning now to other arguments, the key issue before me is the interpretation of Article 20.03. Are the meal allowances a right under the Collective Agreement as the Union argues; or, are they a gratuitous benefit provided by a policy that the Employer can unilaterally change? In this case past practice is used as an aid to interpretation.

In the parties 1986 to 1988 Collective Agreement, Article 19 (d) contained specific reference to expense amounts for mileage, breakfast, lunch and dinner. It also noted that staff "must have the approval of their Department Head prior to any expenses being incurred". In the subsequent 1989 to 1991 Collective Agreement the parties agreed to the language that exists to this day:

19.04 Expenses [now 20.03]

Employees shall be entitled to travel expenses in an amount equal to that allowed to Thompson -Nicola Regional District Directors.

All staff members on Thompson - Nicola Regional District business must have the approval of their Department Head prior to any expenses being incurred.

Employees shall not be required to use their own private vehicle to carry out their duties, but if it is mutually agreed that they do so, the expenses as provided for in Article 19.04 shall apply.

The first paragraph was changed from specific amounts to a reference to "an amount equal to that allowed to Thompson - Nicola Regional District Directors". The balance of the Article remained the same.

The Employer is entitled to establish practices and rules. One of the caveats is that the policy or rule cannot conflict with a provision of the Collective Agreement.

In reading a Collective Agreement, and provisions within, one must read the provision as a whole and not parse out sentences on their own to reach an interpretation.

I am not persuaded by the Employer's argument that the circumstances in the case at hand demonstrate a gratuitous policy with two long standing practices. The Employer argues that the second paragraph of Article 20.03 creates an Entitlement Practice that is exercised at its discretion. Once expenses are approved, the Employer argues that the first paragraph creates the Amount Practice.

To accept that position means that the parties initially agreed to a provision where the Employer, at its discretion, could virtually create a situation where expenses are never paid by ensuring that parameters are established where expenses would not be approved. I am not persuaded that the Collective Agreement can be read in that fashion; and, past practice does not support such a reading.

The July 2009 Draft Guidelines, and the February 2015 Corporate Practice both state that the Collective Agreement outlines amounts for meal expenses, and both set out conditions under which meals would be paid. When a manager schedules an employee to work in a situation where those conditions apply, the Employer is essentially approving the expense. When the employee claims that expense, the Employer verifies that the employee in fact worked that day under those conditions.

For decades the Employer has paid meal expenses to field employees under the terms of the Collective Agreement in that fashion. The only amendment to the Collective Agreement, and the practice, was rather than continually negotiate meal allowance amounts, the parties tied the amounts payable to the employees to be equal to that allowed to the Directors.

Neither am I persuaded by the Employer's argument that the Union is not being consistent. In the callout situation, the Employer was paying employees mileage from their home to the office, and after the callout was complete, from the office to their home even though their work commenced when they reached the Employer's premises. The Collective Agreement did not provide for such a payment and the Director's were not compensated in that way either. The Directors were paid mileage to and from home as they went directly to where they were required to be on Employer business. The situation is not the same and therefore the Employer's estoppel notice on this point was accepted by the Union and it was addressed at collective bargaining.

I agree with the Employer that the By - Law is not incorporated into the Collective Agreement. However, what is incorporated into the Collective Agreement is that employees will receive an amount for expenses that is equal to the Directors. The amount that the Directors receive is determined by the By - Law. How and where the Directors amount is determined is not relevant necessarily. Employees receive an equal amount regardless of how the Directors amount is determined.

I note that during the hearing I asked Union Counsel if there would be a grievance if the Employer had removed meal expense payments to Directors and the answer was no. The amount of the payment to employees is directly tied to the amounts paid to the Directors.

I conclude that given the language of the Collective Agreement, and the long standing practice, the meal allowance payments are a right under the Collective Agreement and not a gratuitous practice.

Given that conclusion, I need not address the Union's alternative estoppel argument.

I will deal with other arguments raised by the Employer. Before doing so I note that a focus of the Employer's position related to the Union's alleged silence and asserted bad faith. In my opinion, the circumstances of this case demonstrate an example where both parties were silent on some issues, assumptions were made, implications were thought to be clear, and transparency was not a priority. All this lead to poor communications on both sides.

The March 1, 2019 notice was not clear. It stated that the meal expenses were "under review" and that "consideration" was being given to removing the payment. The notice is obviously different compared to the other two estoppel notices where it was clear that the Employer was changing practice.

If the notice had been clear that the Employer intended to eliminate the meal allowance unilaterally, the Union's silence would have been problematic for the Union.

While it is not surprising that the Union and Nott considered the meal allowances a Collective Agreement right and that it expected the Employer to raise the matter in collective bargaining if it wanted to change the provision, what is surprising is that neither party even raised the issue at collective bargaining.

The Employer argues that the Union had an obligation to raise the matter if it believed that the Employer could not change what it believed was a gratuitous practice. The Union argues that the Employer was obligated to raise the matter as it is a Collective Agreement right. Because the Employer was reviewing the issue and a decision had not yet crystallized, one would think that the parties would have had an open and transparent discussion at collective bargaining irrespective of their formal positions. By not raising the matter, both parties took that path at their peril.

The Union's strategic position was that the Employer needed to raise the issue at collective bargaining to eliminate the meal allowance. The Employer's strategic position was to wait and see if the Union raised the issue; and if it did not, it was a sign that it was not important to its members.

By not being transparent at collective bargaining, both parties "rolled the dice" that their respective position was correct and would be upheld.

Gill made the decision to remove meal allowances shortly after collective bargaining. While he did not testify, and I do not draw an adverse inference as urged by both Counsel, given the timing of Gill's decision and testimony of others, I conclude that any "review" was actually complete and the decision was made because the Union did not raise the matter at the bargaining table so Gill concluded that the issue was not important to the employees. Had a fulsome discussion occurred at the bargaining table, the conclusion may have been different.

After the Employer issued the July 23, 2019 letter confirming that the meal allowance was going to be changed, the Union made its position clear on September 9, 2019. The Employer responded setting out its position on October 21, 2019.

There was no obligation on the Union to respond to the Employer's letter. The Union's position was clear. If the Employer implemented the change it would grieve the matter. The Employer assumed that its letter ended the matter but did not confirm so.

The Employer argues that the Union acted in bad faith in negotiating a wage rate increase for Building Inspectors in January of 2020, in lieu of the elimination of the meal allowance while continuing to contemplate a grievance on the meal allowance issue.

The Employer assumed that the Union's position on the meal allowance had changed by virtue of no response to its October 21, 2019 letter even though the Union stated in its September 9, 2019 letter that it would grieve the matter if the Employer implemented the change. The Employer reached out to the Union to increase the Building Inspector wage rates as the current rate was not competitive. The Employer asserted that part of its reasoning for approaching the Union was due to the meal allowance elimination.

However, in the two discussions with Mori, Sell never specifically tied the wage increase for the Building Inspectors in part to the loss of the meal allowance. Sell asserted that it was implied as she stated that all the Building Inspectors would get the wage increase, whereas only some received the meal allowance. However, the conduct of the parties demonstrates that one can conclude that the matters were mutually exclusive for several reasons.

First, the Letter of Understanding does not reference the increase being in lieu of the meal allowance elimination even though the parties were accustomed to that type of reference as demonstrated in the terms of settlement for the Collective Agreement renewal where wage rates were increased and flex time was removed.

Second, the meal allowance was eliminated for all field employees but only the Building Inspector wage rates were increased.

Third, meal allowances were still being paid at the time and in fact continued for months after the new wage rates were effective.

Given all the foregoing reasons, I conclude that the Employer violated Article 20.03 of the Collective Agreement by eliminating meal allowances to field employees while the Directors continue to receive meal allowance. The employees shall be made whole. I retain jurisdiction with respect to remedy if the parties cannot resolve the matter themselves.

"Mark J. Brown"

Dated this 3rd day of May, 2021.