IN THE MATTER OF AN ARBITRATION UNDER THE
***LABOUR RELATIONS CODE of BRITISH COLUMBIA,* R.S.B.C. 1996 c.244**

BETWEEN: BC PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
on behalf of School District 52 (Prince Rupert), School District 82 (Coast Mountain), and School District 87 (Stikine)

(the "Employer")

AND: BRITISH COLUMBIA TEACHERS' FEDERATION
on behalf of Prince Rupert District Teachers' Union, Coast Mountain Teachers' Federation, and Stikine Teachers' Association

(the "Union" or "Federation")

(2014 Strike Allowances Grievances)

ARBITRATOR:	David C. McPhillips
COUNSEL FOR THE EMPLOYER:	Michael Hancock
COUNSEL FOR THE UNION:	Robyn Trask
DATES OF WRITTEN SUBMISSIONS:	June 14, 2016 Vancouver, BC
DATE OF AWARD:	July 25, 2016

The parties agree this Board has the jurisdiction to determine this interpretation matter. In these grievances, the Union asserts that three northern School Districts improperly refused to pay the Remote Recruitment and Retention, Isolation and Travel Allowances for the period during which there was a strike in June and September of 2014.

FACTS:

The British Columbia Public School Employers' Association ("BCPSEA") is the accredited bargaining agent for all public school boards, including the Prince Rupert (School District 52), Coast Mountain (School District 82) and Stikine Boards of Education (School District 87). The British Columbia Teachers' Federation (the "BCTF") is the certified bargaining agent representing teachers employed by all public school boards. The Prince Rupert Teachers' Association, Coast Mountain Teachers' Federation, and Stikine Teachers' Association are the relevant local teachers' associations for teachers employed by these School Boards.

In this industry, local working agreements consist of a mix of provincial and local matters. Provincial matters are negotiated by the provincial parties and cannot be unilaterally altered by the local parties without the consent of the provincial parties.

The evidence in this case was entered primarily through an Agreed Statement of Facts. The parties are in agreement that the past practice evidence with respect to the payment of the allowances in question in prior situations of strikes or unpaid leave is very inconsistent (very aptly described by Counsel as a "schmozzle") and, as a result, would not prove helpful in this interpretive exercise. Therefore, that part of the evidence will not be reproduced in this decision.

In March 2014, job action by the teachers began across the province and, on May 26, rotating strikes began for four days with teachers being on strike in each school district in the province for one day. Also in May, the government imposed a series of partial and full lockouts. Beginning May 26, teachers were locked out of school districts from more than 45 minutes before and after class time, and directed not to work during recess or lunch hour. All secondary teachers were scheduled to be locked out on May 25 and 26, and both elementary and secondary teachers were scheduled to be locked out on

May 27. The School Districts deducted 10% of teachers' wages for the duration of the partial lockout but the Recruitment and Retention and Isolation allowances were not affected.

Teachers continued their rotating strike for four days on June 2, 3, 5 and 6 and teachers were on strike in each school district in the province for one of those days. Teachers resumed rotating strikes for a further four days on June 10, 11, 12 and 13 and teachers were again on strike in each school district for one day. On June 17, 2014 teachers began a full strike and that continued until the end of the school year.

The first day of the new school year was scheduled for Tuesday, September 2, 2014 but the strike remained in effect. Then, in a province-wide vote on September 18, 2014, teachers voted to ratify a proposed collective agreement and the strike ended. It was agreed that September 19, 2014 would be a paid day for teachers and schools would re-open on Monday September 22, 2014. (There is an outstanding grievance regarding pay for September 19, 2014 in some school districts.)

Therefore, the dates involved with respect to the claims in these grievances are the following:

Rotating Strike – one day for each District	SD 52 – May 27 SD 82 – May 26 SD 87 – May 26
Rotating Strikes – two days for each District	SD 52 – June 2, June 11 SD 82 – June 6, June 12 SD 87 – June 6, June 12
Full Strike	June 16 – 20 June 23 – 27 September 2 – 5, 8 – 12, 15 - 18

The three Allowances at issue in the present grievances (Recruitment and Retention, Isolation, Travel) were deducted from the teachers' pay for each of the strike days at the end of June in the Prince Rupert, Coast Mountain and Stikine Districts. As well, the three School Districts all pro-rated and deducted the Recruitment and Retention Allowance for the days in September 2014 prior to the strike ending. School District 82 (Coast Mountain) and School District 87 (Stikine) also pro-rated and deducted the Isolation Allowances for September 2014. As well, School District 87 (Stikine) pro-rated and deducted the Travel Allowance for September 2014. In those three School Districts, other allowances for positions of Special Responsibility, Department Head, and First Aid

were paid in their entirety and no deductions were made for the period of the strike. In Prince Rupert, the Isolation allowance (which applies to less than five teachers in the Prince Rupert District) was paid in its entirety and so that his not at issue here. As POSR and Department Head allowances are not normally paid until October in School District 52, no deductions were made to those allowances.

On October 14, 2014 the Prince Rupert District Teacher's Union filed a grievance (52-2014-0005) with respect to the failure to pay the Recruitment and Retention Allowance during the strike. That grievance stated:

> Re: Grievance #2014-01 Recruitment and Retention
>
> The local is initiating a Provincial Matters grievance to step 3 of the grievance procedure pursuant to Article A.6 of the Collective Agreement. The Union believes that the Collective Agreement has been violated, including but not limited to LOU No. 6 for the following reasons: The Recruitment and Retention Allowance is an annual allowance that continues each year an employee continues to work in an identified school district. The allowance is paid monthly because that is how the pay structure works and this is how other allowances are paid.
>
> Deducting an annual allowance during job action was unjust as teachers have remained employees of the School District and are entitled to the yearly allowance.

On October 15, 2014, the Stikine Teachers' Association filed the following grievance (87-2014-0001) regarding the Employer's failure to pay a variety of allowances, including the Recruitment and Retention, Isolation and Travel allowances:

> Re: Step Three Grievance – General Application – Allowances #14-15-01
>
> The Stikine Teachers' Association is submitting a Provincial Matters Grievance to Step Three of the grievance procedure pursuant to Articles A.6.5 and A.6.4 of the Collective Agreement.
>
> The Association believes that the School District #87 is in violation of the Collective Agreement, including but not limited to Article B.27, B.28, B.30, B.31, B.32, B.34.
>
> Our annual allowances have been deducted from our paycheques for the days we were on job action.

In Stikine, the Employer subsequently paid the Coordinator Allowance, Moving Allowance and the First Aid Allowance and, as a result, those aspects of that grievance are no longer in dispute.

On February 10, 2015 the Coast Mountain Teachers' Federation filed a grievance (82-2015-0001) regarding the Employer's failure to pay the entirety of both the Recruitment and Retention and Isolation allowances. It stated:

> Re: Step 3 2015-02-10A Salary and Economic Benefits
>
> The Union is filing a grievance as the employer has reduced the Isolation and Recruitment and Retention Allowances during the month of September. We received confirmation from payroll with respect to these actions, January 29, 2015. We look forward to a meeting as soon as possible.

The parties are in agreement that the amount claimed by the Union in respect of these grievances is relatively minor but are of the view that there are significant interpretive principles with respect to these allowances that need to be addressed.

There are a number of provisions in the Provincial Agreement and the Local Agreements which were referenced by the parties at the hearing. Each Local Agreement contains a salary grid setting out the specific wage rates and the Provincial Agreement states the following with respect to salary:

> SECTION B SALARY AND ECONOMIC BENEFITS
> ARTICLE B.1 SALARY
>
> 1. The local salary grids are amended to reflect the following general wage increases:
>
> a. July 1, 2014–June 30, 2015
>
> i. Effective September 1, 2014: 2.0% increase
>
> ii. Effective January 1, 2015: 1.25% increase
>
> b. July 1, 2015–June 30, 2016
>
> i. Effective May 1, 2016: Economic Stability Dividend (ESD), if applicable
>
> c. July 1, 2016–June 30, 2017
>
> i. Effective July 1, 2016: 1.0% increase
>
> ii. Effective May 1, 2017: ESD, if applicable
>
> d. July 1, 2017–June 30, 2018
>
> i. Effective July 1, 2017: 0.5% increase
>
> ii. Effective May 1, 2018: 1.0% increase plus ESD, if applicable
>
> e. July 1, 2018–June 30, 2019
>
> i. Effective July 1, 2018: 0.5% increase
>
> ii. Effective May 1, 2019: 1.0% increase plus ESD, if applicable
>
> 2. The following allowances shall be adjusted in accordance with the increases in Article B.1.1 above:
>
> a. Department Head
>
> b. Positions of Special Responsibility
>
> c. First Aid
>
> d. One Room School
>
> e. Isolation and Related Allowances

f. Moving/Relocation
g. Recruitment & Retention
h. Mileage/Auto not to exceed the CRA maximum rate
…

ARTICLE B.6 SALARY INDEMNITY PLAN ALLOWANCE

1. The employer shall pay monthly to each employee eligible to participate in the BCTF Salary Indemnity Plan an allowance equal to 2.0% of salary earned in that month to assist in offsetting a portion of the costs of the BCTF Salary Indemnity Plan.

2. In paying this allowance, it is understood that the employer takes no responsibility or liability with respect to the BCTF Salary Indemnity Plan.

3. The BCTF agrees not to alter eligibility criteria under the Plan to include groups of employees not included as of July 1, 2006.

The Local Agreements also each contain a provision with respect to the payment of salary. For example, in Prince Rupert Article B.12 states:

12. Payment of Salary

a. Teachers whose employment in the district commences or terminates during a calendar month shall be paid for that month according to the following formula:

$$\frac{\text{the number of days worked in that month}}{\text{number of school days in that month}} \times \text{1/10 annual salary as per Agreement}$$

b. Payment of Salary – Adjustment

Except where otherwise agreed, for the purpose of adjustment to teacher pay the following shall be used:

i. the per diem rate shall be 1/195 of the appropriate Salary Grid position.
ii. the hourly rate shall be 1/975 of the appropriate grid position.

With respect to the Remote Recruitment and Retention Allowance, Provincial Letter of Understanding No. 5 is significant for our purposes:

LETTER OF UNDERSTANDING No. 5
BETWEEN:
BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
AND
BRITISH COLUMBIA TEACHERS' FEDERATION

Re: Teacher Supply and Demand Initiatives

The BC Teachers' Federation and the BC Public School Employer's Association agree to support the recruitment and retention of a qualified teaching force in British Columbia.

Remote Recruitment & Retention Allowance:

a. Each full-time equivalent employee in the schools or school districts identified in Schedule A is to receive an annual recruitment allowance of $2,300 upon commencing employment. Each part-time equivalent employee is to receive a recruitment allowance pro-rated to her/his full-time equivalent position.

b. All employees identified will receive the annual recruitment allowance of $2,300 as a retention allowance each continuous year thereafter. Each part-time employee is to receive a retention allowance pro-rated to her/his full-time equivalent position.

c. The allowance will be paid as a monthly allowance.

Signed this 13th day of June, 2012

It is agreed the Recruitment and Retention Allowance was first introduced by the parties in 2006 and was included in the relevant Local Agreements as a means of attracting and retaining teachers in the remote areas of the province where teacher supply was an issue. Letter of Understanding No. 12 was included in the 2006 – 2011 Agreements and stated the following:

LETTER OF UNDERSTANDING No. 12
BETWEEN:
BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
AND
BRITISH COLUMBIA TEACHERS' FEDERATION

Re: Teacher Supply and Demand Initiatives

The BC Teachers' Federation and the BC Public School Employer's Association agree to undertake the following initiatives to support the recruitment and retention of a qualified teaching force in British Columbia. The parties further agree to establish a joint Public Education Recruitment and Retention Support Committee comprised of two representatives of the BCTF and two representatives of BCPSEA to develop and administer the initiatives.

Remote Recruitment & Retention Allowance:

1. Effective July 1, 2008, a 3% increase shall be applied to the category 4, 5, 5+ and 6 maximums in the districts listed below:

SD 49 Central Coast
SD 50 Haida Gwaii/Queen Charlotte
SD 52 Prince Rupert
SD 59 Peace River South
SD 60 Peace River North
SD 81 Fort Nelson
SD 82 Coast Mountain
SD 85 Vancouver Island North
SD 87 Stikine
SD 91 Nechako Lakes
SD 92 Nisga'a

No grid steps other than the maximums identified above shall be adjusted as a result of the implementation of this increase.

2. All employees in the school districts above to receive a recruitment allowance of $2,200 upon commencing employment.

All employees identified above, upon the completion of a second continuous year of employment and each continuous year thereafter, to receive the recruitment allowance above as a retention allowance.

3. The parties agree that the joint Public Education Recruitment and Retention Support Committee will review demographic and other data to establish criteria for the designation of other school districts or schools within a district, if any, deemed appropriate for eligibility of the Recruitment & Retention Allowance. Effective July 1, 2008, the Committee will receive funding of $3.5 million per year for this purpose.
Original signed by:

Jinny Sims	Jacquie Griffiths
BCTF President	BCPSEA Chief Negotiator

During the term of that Collective Agreement, issues arose concerning the application of various aspects of LOU No. 12 and those were referred to arbitration. Arbitrator Irene Holden issue a Consent Award on July 4, 2008 which stated, in part:

CONSENT ORDER

Eligibility

1. Term and temporary employees are eligible to receive the Retention and Recruitment Allowance ("the allowance").
2. In districts where only specific schools are deemed eligible, itinerant teachers, if not working full time in schools which attract the allowance, are eligible to receive the $2,200 allowance only, on a pro-rated basis according to the number of days worked at schools attracting the allowance. Such itinerant teachers will be expected to provide a report indicating the time they spent in the eligible schools. Similarly, employees whose status is temporary or continuing and work as permanent Teachers on Call, if not working full time in schools which attract the allowance, are eligible to receive the $2,200 allowance only, on a pro-rated basis according to the number of days worked at schools identified as attracting the allowance.
3. Employees on layoff and/or recall are not eligible to receive the allowance.
4. Employees on Letters of Permission working in a school or school district attracting the allowance are eligible to receive the allowance.
5. Seconded employees are eligible to receive the allowance, as long as the school district receives reimbursement for the allowance from the organization to which the employee is seconded. The school district will report the allowance as part of the gross earnings to the seconding organization. If the organization refuses to reimburse the school district for the allowance, the employee will be informed that the allowance is not being reimbursed and will therefore not be paid by the school district. The employee will then be able to make an informed decision to accept or decline the offer of secondment.
   Where the employee is paid directly by the seconding organization, the school district shall report the allowance as part of the employee's gross earnings.
6. Those employees on employer paid leaves will be eligible to receive the allowance; those on unpaid leaves will not be eligible. If the paid leave has a cap or maximum

amount associated with the leave, the allowance will form part of the gross salary on which that cap or maximum is calculated. So, for example, where teachers are eligible to receive maternity or paternity leave top-up, the allowance will be paid to those on maternity/paternity leave top ups, up to the maximum of the percentage of salary the employee is eligible to receive (95% of gross salary in some cases).

7. Teachers on accumulated sick leave shall be eligible to receive the full allowance.
8. Teachers who are on Workers' Compensation leave are eligible to receive the allowance as long as they are in receipt of full salary from the school district, according to the local provisions of the Collective Agreement.
9. For teachers on the BCTF Salary Indemnity Plan the allowance will form part of the gross earnings on which Plan deductions and payments are calculated.
10. Teachers on Union Leave shall be eligible to receive the allowance. The Union will reimburse the teachers' school districts. The allowance shall form part of the gross earnings on which benefits and benefit deductions are calculated.

Payment Methodology

11. The allowance will be paid monthly.

Deemed Earnings

12. The allowance will be deemed earnings for purposes of the Pension Plan and Salary Indemnity Plan.

General Wage Adjustments

13. The flat rate portion of the allowance will remain at $2,200 for this year only. Effective July 1, 2009, the general wage increase will be applied to the allowance.

Movement Between School Districts

14. If an employee moves to another school district of school throughout the course of the school year, the allowance will be pro-rated, based on the school district or school in which the employee is working. Consequently, if one school district or school attracts the allowance and the other school district or school does not, the allowance will only be paid to the employee while working in the school district or school attracting the allowance.

…

Letter of Understanding No. 12 was amended in 2011 – 13 Collective Agreement and became Provincial Letter of Understanding No. 6 (which subsequently became LOU No. 5):

LETTER OF UNDERSTANDING No. 5
BETWEEN:
BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
AND
BRITISH COLUMBIA TEACHERS' FEDERATION

Re: Teacher Supply and Demand Initiatives

The BC Teachers' Federation and the BC Public School Employer's Association agree to support the recruitment and retention of a qualified teaching force in British Columbia.

Remote Recruitment & Retention Allowance:

a. Each full-time equivalent employee in the schools or school districts identified in Schedule A is to receive an annual recruitment allowance of $2,300 upon commencing

employment. Each part-time equivalent employee is to receive a recruitment allowance pro-rated to her/his full-time equivalent position.

b. All employees identified will receive the annual recruitment allowance of $2,300 as a retention allowance each continuous year thereafter. Each part-time employee is to receive a retention allowance pro-rated to her/his full-time equivalent position.

c. The allowance will be paid as a monthly allowance.

Signed this 13th day of June, 2012

Each of the Local Agreements also had a specific salary grid which now incorporated the 3% Remote Recruitment and Retention Allowance which had been referenced in LOU No. 12.

The other two allowances at issue in this dispute are the Isolation (both at Stikine and Coast Mountain) and the Travel Allowances (Stikine). It is agreed these were established to deal with attraction and retention issues and were intended to address the higher cost of living, travel and the lack of amenities in these remote areas.

In the Stikine District, which has four schools, 200 students, and comprises an area larger than the State of Washington, the Isolation and Travel Allowance were first bargained in 1988. Those provisions (the ones provided at the hearing were from the 2006 – 2011 Agreement as the existing provisions are in the process of being melded) state as follows:

ARTICLE B.27 ISOLATION ALLOWANCE

1. An isolation allowance shall be paid semi-monthly to each teacher, as per their current F.T.E., at the following locations:

Effective:	July 1, 2006:	July 1, 2007:	July 1, 2008:	July 1, 2009:	July 1, 2010:
Telegraph Creek:	$ 138.27	$141.73	$ 145.27	$ 148.90	$ 151.88
Atlin:	$ 65.09	$ 66.71	$ 68.38	$ 70.09	$ 71.49
Dease Lake:	$ 58.29	$ 59.75	$ 61.24	$ 62.77	$ 64.03
Lower Post:	$ 53.59	$ 54.93	$ 56.30	$ 57.71	$ 58.86

…

ARTICLE B.30 TRAVEL ALLOWANCE

1. A 1.0 FTE teacher shall be eligible for travel allowance for himself/herself and his/her dependents. A dependent spouse is one who is employed for fifty percent (50%) or less and/or who does not receive a travel allowance from some other source. A dependent child is a natural or adopted preschool child, a natural or adopted child attending elementary or secondary school. All dependents must reside north of the 57th parallel to qualify for an allowance.

2. A part-time teacher shall have his/her travel allowance pro-rated for himself/herself as per his/her current FTE.
3. A teacher teaching less than full time, who is the spouse of a full time teacher, shall receive full travel benefits as a dependent spouse.
4. Travel allowances shall be paid in semi-monthly installments to each teacher based on the following annual rates:

Effective:	July 1, 2006:	July 1, 2007:	July 1, 2008:	July 1, 2009:	July 1, 2010:
Employee:	$ 1,568.25	$ 1,607.46	$ 1,647.64	$ 1,688.83	$ 1,722.61
Dependent Wife/Husband:	$ 1,322.56	$ 1,355.62	$ 1,389.51	$ 1,424.25	$ 1,452.73
Dependent Child over 12:	$ 1,322.56	$ 1,355.62	$ 1,389.51	$ 1,424.25	$ 1,452.73
Dependent Child over 2 & under 12:	$ 1,129.14	$ 1,157.37	$ 1,186.30	$ 1,215.96	$ 1,240.28

5. Teachers shall be responsible for notifying the district office upon any change in dependent status. Such changes will be retro-active to the first day of the pay period in which it is received.

In the Coast Mountain School District, the provision with respect to Isolation Allowances states:

ARTICLE B.27 ALLOWANCES (P)

1. Isolation Allowance (P)

   a. The Board shall pay an annual isolation allowance in addition to the annual salary to teachers assigned to teaching positions in the following areas, in accordance with the table below:

Geographic Area	01-Jul-06	01-Jul-07	01-Jul-08	01-Jul-09	01-Jul-10
Stewart Area	$ 3,137	$ 3,215	$ 3,295	$ 3,378	$ 3,445
Kitwanga Area	$ 993	$ 1,018	$ 1,044	$ 1,070	$ 1,091
Hazelton Area	$ 836	$ 857	$ 879	$ 901	$ 919

   b. The allowance shall be payable in equal installments in accordance with Article B.9 (PAY PERIODS).

This Allowance was first introduced in 1982 and then subsequently amended in 1988 to read as follows:

ARTICLE 16 ALLOWANCES

16.1 Isolation Allowance

The Board shall pay an annual isolation allowance in addition to the annual salary to teachers assigned to teaching positions in the following areas, in accordance with the schedule below:

Geographic Area	Allowance
Stewart Area	$ 2,482/annum
Kitwanga Area	$ 775/annum
Hazelton Area	$ 648/annum

> The allowance shall be payable in equal installments in accordance with Article 14. The amount of the allowance shall be increased by 14% effective July 1, 1989.

There was also evidence presented at the hearing that under the Salary Indemnity Plan (SIP) contained in Article B.6 of the Provincial Agreement which is set out above, "salary" is treated as including the Recruitment and Retention, Isolation, Co-ordinator and Department Head allowances but does not include the Travel Allowance.

It is also agreed by the parties that when teachers are paid for days of work in the summer they do not receive any allowances for that time period as the entirety of these allowances are paid during the school year. As well, it is agreed that Recruitment and Retention allowances are pro-rated for part time employees. Thus, if an employee increases their FTE status during a school year, his/her Recruitment and Retention allowance would be increased accordingly; if an employee decreases their FTE status during a school year, his/her Recruitment and Retention allowance would be decreased. As well, it is agreed that if a teacher leaves a school district in the middle of a school year, then the allowance ceases being paid. Moreover, Teachers Teaching On Call (TTOCs) do not receive the Recruitment and Retention, Isolation or Travel Allowances.

There was also written and oral evidence entered with respect to a "settlement agreement" of a dispute in Prince Rupert following the 2014 strike. An issue arose concerning whether employees had been properly compensated for Friday, September 19, which was the first day back after the strike. The provincial back to work agreement indicated all teachers would receive a full day's pay and, as indicated, that matter is presently the subject of an arbitration with respect to other school districts. However, in Prince Rupert, the parties addressed the issue and after considering their options, the following settlement agreement was entered into on September 30 on a without prejudice or precedent basis:

> With respect to the Article B.1.12 of the collective agreement and its application to the calculation of teacher pay for the month of September 2014, the parties agree, on a without precedent and without prejudice basis, as follows:
>
> 1) Article B.1.12(b) provides that, "except where otherwise agreed", an adjustment to a teacher's pay is calculated as a per diem deduction from pay equal to 1/195 of the appropriate Salary Grid position. As a result, the pay calculated for September 30, 2014 reflected a deduction of 13/195 from the pay of a teacher with a 1.0 fte contract, and proportionately less for a teacher with less than a 1.0 fte contract.

2) The parties agree that, taking into account all of the factors affecting teacher's pay in September 2014, it is important to demonstrate that teachers have been paid for the days worked according to their schedule.
3) The school calendar in September 2014 provides for 21 scheduled days which, except for the teacher strike, would have been paid. Following the conclusion of the strike, 8 of those days were worked by a teacher with an 1.0 fte contract, and proportionately fewer days were worked by a teacher with less than an 1.0 fte contract.
4) Therefore, as provided for in Article B.1.12(b), the parties agree that:
    a. A teacher will be paid for September 22, 23, 24, 25 26, 29 and 30, 2014 7/21 times 1/10 of their annual salary; and
    b. A teacher will be paid for September 19, 2014 for a full day at the full-time equivalent of their annual salary, whether or not they hold a full time assignment.
5) Annual salary will include allowances for Department Head, Positions of Special Responsibility, Isolation and Related Allowances, and Recruitment and Retention Allowances.
6) The district agrees to make an additional payment to teachers to reflect the agreement in this memorandum of understanding as soon as possible.

The Employer asserts that point 5 of this settlement agreement indicates that the parties in Prince Rupert came to an agreement that the allowances at issue here would be deducted for all strike days in September. The Union's evidence is that the entire settlement discussion revolved around payment for the day of September 19 and that it was the Employer which had prepared the draft of the final agreement. The Local Union President, Kathy Murphy, testified that the issue of allowances was never discussed by the parties and certainly was never considered by the Union executive when this agreement was signed.

In these grievances, the Teachers' Federation seeks a declaration that there has been a violation of the Collective Agreement, an Order that the affected teachers be made whole and an Order for future compliance.

DECISION:

The first matter to be addressed is the Employer's claim that the Prince Rupert grievance is not properly before this Board as the September 30 settlement agreement reached in Prince Rupert is dispositive of that matter. The Union argues that the agreement was made on a without prejudice or precedent basis and, therefore, cannot be relied on in these proceedings. As well, the Union submits that the agreement reached by the parties was not intended to address the matters at issue in these grievances.

In my view, the agreement can properly be entered into evidence by the Employer as the "without prejudice or precedent" term would apply to restrict its use in other circumstances but it does not prevent the agreement from being raised as the basis for a claim that the parties have already settled the issue which is the subject of the present dispute.

However, the position of the Employer that the terms of the settlement is dispositive of the merits of the present grievance with respect to Prince Rupert is rejected. The evidence of Ms. Murphy is accepted with respect to her claim that the focus of the parties was never directed to the issue of the allowance deductions and the mutual intent of the parties was simply to address the calculations related to the wage payment for the date of September 19. As an aside, it should be noted that, even if there had been an agreement found relating to the allowances, it would only relate to the September dates and the claims for the June dates would not be affected.

Turning to the merits of this case, this is an interpretation matter and the appropriate principles to be applied were identified by Arbitrator Bird in *Pacific Press,* [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 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 indicated, there is no extrinsic evidence which is helpful in these circumstances so we are left with the language of the Agreements and its plain and ordinary meaning as the principal basis upon which to determine the mutual intention of the parties: *S.E.I.U, Local 268, supra; Massey-Harris-Ferguson Ltd.,* 5 L.A.C. 2123

(McRae); *City of Lethbridge,* 4 L.A.C. (3d) 289 (England); *School District No. 87 (Stikine), supra; Western Forest Products Ltd.* (McPhillips)*, supra; British Columbia Public School Employers Association,* May 13, 2008 (Holden); *Surrey School District No. 36 (Surrey),* [2004] B.C.C.A.A.A. No. 150 (Taylor); *Coast Hotels Ltd.,* 50 L.A.C. (4th) (Chertkow).

The essence of the Union's submission is that these disputed allowances are in the nature of "annual" allowances which are designed to encourage teachers to work in the remote school districts and the only criteria for eligibility is that an individual employee must be a full time employee of the school district in question. It maintains that these allowances are "status based" and are distinguishable from salary and payments which are a function of employees "being at work": Brown and Beatty, *Canadian Labour Arbitration,* Canada Law Book, Fourth Edition, para. 4:2110; *Calgary (City) (Coffee Allowance Grievance)*, [2003] A.G.A.A. No. 73 (Warren); *Calgary (City) (Tool Box Grievance)*, [2005] A.G.A.A. No. 36 (Tettensor); *Salvation Army Living,* [2000] O.L.A.A. No. 822 (Samuels); *H.S.A.B.C. and CEP, Local 465,* 99 L.A.C. (4th) 337 (McPhillips); *S.E.I.U., Local 268 and USWA Local 5481* 43 L.A.C. (4th) 76 (Aggarwal); *Re: School District No. 87 (Stikine),* [1989] B.C.C.A.A.A. No. 422 (Hope).

For its part, the Employer asserts two positions. The first is that regardless of whether these allowances are considered to be "status" or "service" based, they would not be owing during the course of a strike when employees have chosen to withhold their teaching services from their employers unless there was clear language requiring such payments contained in the Collective Agreement: *Western Forest Products* [2012] B.C.C.A.A.A. No. 42 (McPhillips); *Vancouver Island University,* [2013] B.C.C.A.A.A. No. 93 (McConchie); *Pacific Press Ltd.,* [1985] B.C.C.A.A.A. No. 186 (Hope); *British Columbia Public School Employers' Association,* 110 C.L.A.S. 317 (Taylor); *Hydro Quèbec v. Syndicate des employées de techniques professionnelles 2000,* [2008] 2 S.C.R. 561; *Tree Island Industries Ltd., supra; Western Forest Products, supra* (Lanyon); *Crown Life Insurance Company,* B.C.L.R.B. No. 52/81; *M&I Air Systems Engineering,* [2006] O.L.A.A. No. 725 (Herman); *Sydney (City),* 10 L.A.C. (4th) 137 (Outhouse).

The Employer's second position is that these allowances are not "annual" entitlements to which employees are entitled because of their "status" but rather are in the

nature of benefits that are "service-based". As such, they must be earned through attendance at work and that would not be the case when the employees are on strike: *Tree Island Industries Ltd.*, [1997] B.C.C.A.A.A. No. 33 (Jackson); *Western Forest Products,* [2008] BCCAAA No. 159 (Lanyon); *Wolverine Coal Partnership,* [2014] B.C.C.A.A.A. No. 100 (Nichols).

In this decision, the first substantive issue to be addressed is the proper characterization of these three allowances in dispute. In that regard, a number of case authorities were cited by the parties with respect to whether a benefit should be characterized as a "status" or "work related", in other words, whether it is a product of their status as employees or is gained through the passage of time at work. It should be noted that the jurisprudence is clear that a benefit is owing if it has already "vested" in an employee, for example, through vacation entitlement being based on seniority or an employee who is in receipt of sick leave benefits or maternity leave benefits: *Salvation Army Community Living, supra; Western Forest Products,* (Lanyon), *supra; Tree Island Industries Ltd., supra; Foothills School Division No. 38,* 142 L.A.C. (4th) 230 (Sims); *York Region Board of Education,* 11 L.A.C. (4th) 345 (Marszewski); *Weston Bakery Ltd.,* 57 L.A.C. (4th) 120 (Albertini).

There are a number of the arbitral authorities which have concluded that certain benefits were "status" driven under those particular collective agreements. For example, in *Calgary (City), (Tool Allowance Grievance), supra,* there was a clause in that agreement which stated that there would be "tool allowance" and that employees would receive an annual payment of $450.00 which would be made no later than pay period 24. Arbitrator Tettenson found the allowance should not be pro-rated during the period of a strike and stated, at para. 119:

> 119 The employees specified are required to provide and maintain a tool kit to prescribed standards; under the article, they are entitled to an annual payment. The obligation to provide the required tools is the same whether the employee actually works 6 months or 11 months; whether a new employee is hired in May or September. If it seems anomalous or unfair that a new employee or departing employee, who works part of the year should receive the same allowance, this is a function of the language adopted by the parties. They have bargained for an annual rather than a monthly payment. There is nothing in the article which supports the interpretation that the payment may be pro-rated based on actual time worked during the course of the year; there is nothing in the article or the background circumstances to support the interpretation that the payment was only intended to provide some compensation for one element of the cost of the tool kit. They analysis applied in the David Bell Mine, re: *Health Sciences Association of British Columbia* and *Re: Service Employees International Union, Loc. 268* cases applies

> her. The only condition for the annual payment is that the employee holds one of the positions specified. To accept the position advanced by the City would amount to amending this article.

In *HSABC, supra,* the issue was whether "gas payments" were owing while employees were on leave. The decision concluded that they were and stated, at para. 19:

> 19 In my view, there is nothing explicit on the face of the language of Article 19.1 which indicates the gas payments are conditional on the employee's performing work; the only pre-condition to the benefit appears to be that there is an employment relationship as a member of the labour relations staff. The parties clearly do put a restriction on the car payments for out-of-town travel in the last sentence in 19.1 and in 19.2 in the sense that they are payable only when the employee is working. Similarly, the payment of car insurance in Article 19.1 is solely for the difference in the coverage for personal use and business use and, therefore, that is a "work-related" expense also. Additional, in Article 19.3, reimbursements for the additional insurance costs are provided only for accidents which occur while on Union business.

In *SEIU, supra,* the award concluded a "car allowance" had to be paid while employees were on leave. Arbitrator Aggarwal noted, at para. 15:

> 15 The parties have provided one, and only one, criterion for the entitlement of the car allowance, i.e. that an employee should be a union representative. The parties have attached no other condition or stipulation, whatsoever, for the payment of a car allowance. The wording found in art. 19.06 does not include any reference to the use of car for the employer's business. If the parties would have intended to make the car allowance payable only when the car is used for the employer's business or employee's attendance at work, they would have said so in art. 19.06. To accept the employer's argument that the car allowance was intended to be paid only when the car is used for the employer's business, would amount to adding in or amending the provision of the agreement. I am afraid I have neither the jurisdiction nor the power to do so.

In *David Bell Mine,* 24 C.L.A.S. 532, the clause stated "the Company shall pay each employee a transportation allowance of $125 per month". Arbitrator Joyce determined this did not require that employee to be at work and concluded, at pp. 11 – 12:

> At the same time, one cannot deny that the two provisions are loose, even by the company's current application. An employee now receives the premiums even if he attends at work for only one day in a month. The transportation allowance is the same no matter how far the employee lives from the worksite. It is paid whether or not the employee actually has an expenditure. Those two anomalies are understandable because it is difficult to draw too many fine lines in the negotiation of this type of provision so a saw-off is drawn; instead of a transportation allowance of, say, $75 for an employee who lives "X" miles from the mine, and $175 for an employee who lives "Y" miles from work, the parties say, "the hell with it" and give $125 to all; that is what negotiating is all about and whoever seeks to put a more sophisticated brush to it than that has not signed too many collective agreements.

However, there are also a number of arbitration cases, one of which involves these parties, in which certain benefits or allowances have been found to be "work or

service" related. In *School District No. 87 (Stikine), supra,* the issue was whether the "travel allowance" had to be paid to a teacher who was on a one year "Extended Leave" for educational purposes. The Travel Allowance clause stated:

> CLAUSE IX – TRAVEL ALLOWANCE
>
> (a) A teacher teaching full-time may make two travel claims per teaching year (September 1 – August 31) for transportation outside the district for himself/herself and his/her dependents. Where such a claim is made the names of the dependents who made the trip must be listed. (A dependent is a spouse who is employed for 50% or less of the teaching year, a pre-school child, a child attending elementary/secondary school within or outside the district, or a child who is homebound for whatever cause.
>
> …
>
> (d) The maximum allowable claim for a teacher and his/her dependents is the cash equivalent of the return airfare, Canadian Pacific, economy class and family plan at the time of travel – from Whitehorse to Vancouver (Atlin teachers) or Watson Lake to Vancouver (all other teachers).

In that case, Arbitrator Hope concluded the travel allowance was not owing under the particular circumstances and stated, at paras. 25 – 26:

> 25 A review of the relevant provisions indicates that travel expense claims are limited to actual expenses and that it is contemplated that expenses will be paid after teachers have returned to the district. Moreover, the entitlement to travel expenses is limited to teachers who are in active employment and who have, in effect, taken a vacation from their duties on a short-term basis. The language of the travel allowance provision does not expressly exclude teachers on extended leave, but that is not the relevant test. The test is whether the language read in the context of any relevant extrinsic evidence discloses a clear mutual intent to provide travel allowance benefits to employees on extended leave.
>
> 26 Applying that test to the facts present in this dispute, I note that there is absent from the language any expression of a clear intention that travel allowance benefits will extend to such leaves …

In *Calgary (City) (Coffee Allowance Grievance), supra,* Arbitrator Warren found the coffee allowance benefit to be work related and stated, at paras. 86 – 87:

> 86 During the period of strike between February 22, 2001 and April 11, 2001, there was no collective agreement in force nor did the current agreement have any retroactive application that employees would be paid coffee money for the period during the strike. The employer was relived of its contractual responsibility to pay employees or to provide them with work related benefits. As employees crossed the picket lines, they were paid the same pay and the same work related benefits including coffee money that they had been paid under the collective agreement that was terminated on February 22, 2001 being the date of the commencement of the strike. Unlike in Canada Safeway case (supra), when the current agreement became effective on the date of ratification, April 12, 2001, neither the memorandum of settlement nor the current collective agreement contained any specific language which produced "retroactive application that captured time accrued

> under the old collective agreement during the interregnum". That distinguishes the Canada Safeway case from our case, in result. The authority of the Union to bargain on behalf of its members was not violated by the action of the employer paying and extending these work related benefits to employees who crossed the picket line.
>
> 87 The grievance is based on a claim for coffee money during the period of time when there was no collective agreement in existence and in our view this Board is without jurisdiction to grant the relief claimed in the grievance.

In *Wolverine Coal Partnership, supra,* which is a case with somewhat similar issues to the ones in the present grievances, Arbitrator Nichols addressed the payment of a Northern Allowance while employees were on layoff. She concluded that benefit was not owed to employees and observed, at paras. 59 and 65:

> 59 On the evidence, the Policy was originally established by the Employer to provide a financial benefit in order "to encourage employees to live and work" in the Northern part of the Province … Accordingly, it is reasonable to conclude that the purpose of the benefit was to offset the costs of living in the North in order to work for the Employer, not simply to live in the North per se. I note that, while an employee on layoff maintains employment status, there is no obligation to remain in the North for the duration of the recall period or to wait out the period without working for others …
>
> …
>
> 65 The payment of the Northern Allowance is a significant monetary benefit. On the Union's interpretation, its potential magnitude would double as a direct result of the negotiated extension of recall rights. However, on the evidence, the extension was not intended to have a cost implication; it was considered a language issue. In my view, had the parties intended that Allowance would be payable to employees on layoff, which would now be over the newly bargained 24 month period, it would be reasonable to expect that they would have discussed the implications of that aspect of the bargain and would have provided for the entitlement in clear and unambiguous language.

In conclusion with respect to these arbitral authorities, the awards make it very clear that the conclusion about whether these were "status" or "work related" benefits was based on the language of the particular agreement and the imputed intention of the particular parties.

Turning to the facts of the present matter, there are indications which point in each direction, that is, that these allowances may have been intended to be "status driven" or "service or work-related".

The first and most obvious argument in favour of the "status" characterization is that the allowances are repeatedly described in the parties' documents as being "annual" allowances. As well, there is nothing in the Collective Agreement that expressly states that an employee must be working to receive them. The provisions only state that an individual must be an "employee" in the School District to qualify for the benefit.

A further factor supporting a finding of a "status basis" is a consideration of the purpose of a clause: *Pacific Press Ltd.,*(Hope), *supra; Wolverine Coal Partnership, supra*. These parties have agreed that the purpose for including these allowances in the Agreements was and is to encourage teachers to relocate and remain in these remote areas of the province where supply of teachers is an issue and also to recognize the additional costs associated with living in these northern regions. As such, once the employees are in residence, it can be argued that the benefit should be owing.

As well, the evidence is clear that other "annual allowances", such as Department Head, Special Responsibility and First Aid, were paid by the School Districts during the course of the strike in 2014. Another consideration which applies specifically to the Travel Allowance in Stikine (Article 13.40) is that the benefit also applies to the dependents of teachers so it appears it is "relationship" based and is not a function of a person having to be at work during a particular period.

A further consideration is that the provisions in the Agreement for deductions (Article B.12 in Prince Rupert, Article B.25 in Coast Mountain and Article B.32 in Stikine) refer to deductions or adjustments from "salary" and, in that respect, no mention is made of these allowances. As indicated above, the Prince Rupert Agreement states:

> b. Payment of Salary - Adjustment
>
> Except where otherwise agreed, for the purpose of adjustment to teacher pay the following shall be used:
>
> i. The per diem rate shall be 1/195 of the appropriate Salary Grid position.
> ii. The hourly rate shall be 1/975 of the appropriate grid position.

Another aspect in favour of a "status" finding is that it is agreed that if employees in these School Districts work outside the school year (for example, in the summer), they would receive a pro-rated pay of the salary based on the specific daily formula (e.g. $1/195^{th}$ of the salary) but they do not receive any amount pro-rated on the allowances with the result that the allowances have been clearly disconnected from salary in those situations.

Finally, there was also a direction issued by the BCPSEA during the strike which indicated that deductions for Special Responsibilities, Department Heads and First Aid would not be pro-rated because of the strike and it is unclear on what basis that

distinction was drawn. On its face, it would seem the same rationale might be applied to the Recruitment and Retention, Isolation and Travel Allowances.

However, there are equally compelling arguments in favour of these allowances being "work or service related" and treated as flowing to the employee as part of his/her monthly compensation package.

First, it is common ground that these allowances are paid on a "monthly" basis as part of an employee's regular remuneration. LOU No. 5 expressly states "the allowance will be paid as a monthly allowance" and that appears on its face to indicate that it is intended to be treated as a "monthly" allowance. The BCTF submits that this is simply a matter of "convenience" but there is no evidence to establish that is the case. Moreover, it would seem that a single, annual payment would actually be more convenient for the parties if that was truly their intention.

The second reason leading to the conclusion is that these allowances are service based is that they are "prorated" for part time employees. For example, if a teacher has an FTE of .8, then he/she receives .8% of that allowance. If these allowances were truly tied to "status", then one would logically expect that all employees residing in the remote area, including part-time teachers, would receive the same allowance and that there would not be a proration. In the same vein, the fact the allowances are not paid to Teachers Teaching on Call further indicates these allowances are not tied only to where a person is living but require that other criteria also be met.

A further observation is that it is agreed by the parties that if a teacher was to leave the school district in the middle of the school year (having received at that point one-half of his/her allowance in monthly payments), he/she would not receive the remaining unpaid portion of the allowances. Again, if these were truly "annual" allowances, then the entire allowance should be owing as it already would have vested by the fact he/she had had the "status" of an employee during part of that school year.

Similarly, the Employer correctly points out that if a new collective agreement came into force part way through the school year which either reduced or increased the allowance provisions of the collective agreement, it would not be permissible for the Federation (in the first case) or the School District (in the second case) to take the

position that the allowances had already vested for the school year and were not affected by the changes to the collective agreement.

Another consideration supporting a "service based" conclusion is the evolution of the Recruitment and Retention Allowance itself. Once again, the critical sections in the original Letter of Understanding No. 12 are the following:

> 1. Effective July 1, 2008, a 3% increase shall be applied to the category 4, 5, 5+ and 6 maximums in the districts listed below:
>
> SD 49 Central Coast
> SD 50 Haida Gwaii/Queen Charlotte
> SD 52 Prince Rupert
> SD 59 Peace River South
> SD 60 Peace River North
> SD 81 Fort Nelson
> SD 82 Coast Mountain
> SD 85 Vancouver Island North
> SD 87 Stikine
> SD 91 Nechako Lakes
> SD 92 Nisga'a
>
> No grid steps other than the maximums identified above shall be adjusted as a result of the implementation of this increase.
>
> 2. All employees in the school districts above to receive a recruitment allowance of $2,200 upon commencing employment.
>
> All employees identified above, upon the completion of a second continuous year of employment and each continuous year thereafter, to receive the recruitment allowance above as a retention allowance.

That LOU established a Support Committee to "develop and administer the initiatives" contained therein and a number of issues arose which were ultimately placed before Arbitrator Holden. Her decision, which was issued with the consent of the parties, drew the following conclusions which are relevant for our purposes:

> 3. Employees on layoff and/or recall are not eligible to receive the allowance.
>
> …
>
> 6. Those employees on employer paid leaves will be eligible to receive the allowance; those on unpaid leaves will not be eligible. If the paid leave has a cap or maximum amount associated with the leave, the allowance will form part of the gross salary on which that cap or maximum is calculated. So, for example, where teachers are eligible to receive maternity or paternity leave top-up, the allowance will be paid to those on maternity/paternity leave top ups, up to the maximum of the percentage of salary the employee is eligible to receive (95% of gross salary in some cases).
>
> …
>
> 10. Teachers on Union Leave shall be eligible to receive the allowance. The Union will reimburse the teachers' school districts. The allowance shall form part of the gross earnings on which benefits and benefit deductions are calculated.
>
> …

Movement Between School Districts

14. If an employee moves to another school district of school throughout the course of the school year, the allowance will be pro-rated, based on the school district or school in which the employee is working. Consequently, if one school district or school attracts the allowance and the other school district or school does not, the allowance will only be paid to the employee while working in the school district or school attracting the allowance.

In my view, those conclusions with respect to employees on lay-off, unpaid leaves and those who move between school districts would also lead to the conclusion that these allowances are not a "status-based" benefit.

Moreover, the parties subsequently re-negotiated LOU No. 12, first as LOU No. 6 (2011) and then as LOU No. 5 (2014). The critical sections of the revised Letter of Understanding state:

> Remote Recruitment & Retention Allowance:
>
> a. Each full-time equivalent employee in the schools or school districts identified in Schedule A is to receive an annual recruitment allowance of $2,300 upon commencing employment. Each part-time equivalent employee is to receive a recruitment allowance pro-rated to her/his full-time equivalent position.
>
> b. All employees identified will receive the annual recruitment allowance of $2,300 as a retention allowance each continuous year thereafter. Each part-time employee is to receive a retention allowance pro-rated to her/his full-time equivalent position.
>
> c. The allowance will be paid as a monthly allowance.

There are a number of observations to be made in that regard. First, the 3% was removed from the LOU and placed in the salary grid itself. Second, there were no significant changes made to the body of the LOU such that it could be concluded that the Holden Consent Award no longer had application. There was also certainly no evidence of any bargaining discussions which indicated the parties were contemplating any fundamental changes. Indeed, one alteration which was made stated to the LOU was that "this allowance will be paid as a monthly allowance" which adopts point 11 of the Holden Consent Award and seems to support the conclusion that the allowance is not to be treated as a one-time annual allowance.

Another, albeit less important, consideration is that these allowances are treated as part of the compensation package on which the 2% contribution to the Salary Indemnity Plan is calculated. As well, while there have been cases which distinguish between a

"benefit" and an "allowance", that distinction does not appear to have been drawn in this situation as the "allowance" provisions are contained in the Salary and Benefits sections of these Collective Agreements.

Finally, the previous decision of Arbitrator Hope in *School District No. 87 (Stikine), supra,* which admittedly addressed only the Travel Allowance in Stikine and its application in an Extended Leave situation, clearly ties that benefit to "active employment".

As indicated above, when one reviews the foregoing considerations, it appears that there are arguments in support of both characterizing these allowances as "status" based or as "work dependent". In the result, it is difficult to determine with any certainty what these parties actually intended with respect to their nature; indeed, it is highly likely that this uncertainty is the cause of the very inconsistent practices, both among and within the affected School Districts, with respect to the payment of these allowances in strike and leave situations.

Given this ambiguity with respect to the parties' intentions about the nature of these benefits, that brings us to a consideration of how these parties might have intended these benefits to be treated in a strike situation. It is apparent from the evidence that the parties did not put expressly their minds to this issue (they may wish to do so in future negotiations) and, thus, we must take a look at the broader context of how such matters are generally treated under a collective bargaining regime and in the context of the *British Columbia Labour Relations Code*.

The basic premise that appears to be widely accepted is that,in the absence of clear intention to the contrary, "common sense" dictates that employers will not subsidize employees who are in the process of preventing them from operating and compensate the employees for services which they are not providing: *Tree Island Industries Ltd., supra; Crown Life Insurance Company, supra; Western Forest Produces, supra* (Lanyon); *M&I Air Systems Engineering, supra; Sydney (City), supra; Pacific Press,* (Hope), *supra; British Columbia Public School Employers' Association, supra.* As an example, in *Western Forest Products, supra,* Arbitrator Lanyon explicitly stated, at para. 33, that "once again we start with the general principle that when an employee goes on strike they forfeit the right to any wages or benefits payable under the collective agreement".

In *Tree Island Industries, supra,* Arbitrator Jackson distinguished between an ongoing work relationship and a strike situation. In the latter case, she concluded that the payment of benefits would be "incongruous". She observed, at paras. 78, 85 and 90:

> 78 There is nothing in any of these four decisions that suggests – let alone determines – that employee status when a collective agreement is in force necessarily attracts the same rights or creates the same employer obligations as it does when a legal strike has taken place.
>
> …
>
> 85 We agree that there is undisputed evidence that these parties have interpreted Appendix "A" in a way that obliges the Employer to pay the monthly contribution even if an employee is laid off or recalled for a portion of the month. No doubt this obligation is founded on the monthly nature of the premiums – see, among others, Re Caland Ore, supra – as well as on the specific language of sections (e) and (g) in Appendix "A". However, that obligation has arisen when the collective agreement is in effect. We do not agree that this interpretation can, without more, be said to apply when no collective agreement is in effect for a portion of the month. In our view there is a significant distinction between the payment of monthly contributions for employees when a collective agreement is in force throughout the month, and a situation where a collective agreement is not in force because of a lawful strike. In the former situation all of the employees are subject to the collective agreement for the portion of the month when they do not work. By contrast, in a strike situation the individuals – albeit still employees – are not subject to the collective agreement for a portion of the month. Nor is the Employer.
>
> …
>
> 90 First, the very nature of a strike or lockout is that both parties suffer economic loss: the employer, by the withdrawal of labour and the resulting loss of revenue, and the Union members by the loss of wages and benefits. For the Employer to lose its work force – the entire bargaining unit – and corresponding revenue for half of August but the employees still be entitled to demand the same benefit contributions seems incongruous. We note the reasoning in Re City of Sydney, supra, is in the same vein when the arbitrator talked about "the common sense approach" in rejecting a claim by employees for holidays that occurred while a strike was ongoing. We see the strike situation as quite different from one where a work force remains on the job for the entire month and the Employer continues to receive revenue but a number of employees are laid off or recalled.

In *Crown Life Insurance Company, supra,* the British Columbia Labour Relations Board adopted a similar line of reasoning and stated the following in the context of an unfair labour practices case:

> We start from the premise that it cannot be too surprising to trade unions or their members that an employer would discontinue premium or benefit coverages upon the commencement of a strike in respect of those employees who participate in the strike. Absent unusual circumstances, such a step should not be viewed as constituting a penalty or coercion or intimidation within the meaning of either Sections 3 or 5 of the Labour Code. Certainly, such a step is coercive in the general sense that it is designed to bring about an alteration of position which might not otherwise have occurred. But the whole system of strikes and lockouts is coercive in that general sense. And, as we suggested

> above, a cut-off of premium or benefit coverages is a fairly normal and predictable consequence of a resort to such economic sanctions.

In *Sydney (City), supra,* Arbitrator Outhouse observed that the expectation in the normal course is that during a strike benefits will not be paid unless the parties have expressly agreed to do so. He stated, at para. 12:

> The foregoing authorities, in our view, tell rather strongly against the position taken by the union in the present case. While not determinative of the issue, they certainly point to the conclusion that employees are not, as a general rule, entitled to be paid for holidays which occur during a strike or other lawful work stoppage. Of course, there is nothing to prevent parties to a collective agreement from providing otherwise should they so choose. However they have not expressly done that in the present case and, indeed, we are satisfied from the evidence that they did not turn their minds at all to the question of retroactivity in relation to the holiday pay provisions. In these circumstances, we are strongly inclined to follow the common sense approach to the issue outlined in *Olsonite Manufacturing*. Based on practice and arbitral precedent, it would seem that employees going on strike have little if any reason to expect that they will be paid for holidays which occur while they are on strike. They would readily recognize, as would their union, that such an unusual result could only be achieved by hard bargaining. As already indicated, no such bargaining occurred in the present case and we are persuaded, therefore, that to uphold the grievance merely on the strength of the general duration clause would be out of step with the legitimate expectations of the parties and, to quote Brown and Beatty, 3rd ed. (1988), para. 8:1300, at p.8-7, "would lead to inequitable, impractical or unintended effects".

Finally, in *M&I Air Systems Engineering, supra*, Arbitrator Herman addressed the practical implications associated with a work stoppage and the reasonable expectations of parties to a collective agreement. He stated, at paras. 21 – 21:

> 20 When employees go on strike, they are implementing a decision to withdraw their services in concert in order to apply pressure to an employer to get it to agree to their position in bargaining. Employees and employer are in a confrontational contest, each exerting what economic strength they have to wring concessions or a change in position from the other. The employees could attend at the workplace and work but voluntarily have made the decision not to work, when they are otherwise able to, because of the labour dispute. On the other hand, as the collective agreement has expired at that point, the employer is not required to apply its terms and conditions. Thus, generally speaking, while on strike, employees know that they will forfeit their pay and benefits during the period of the strike.
>
> 21 When the reason for absence from work on a qualifying day is that the employees are on strike and choosing not to work, it would not be reasonable for the Employer to still be required to pay for the holiday. In effect, the Employer would be subsidizing the withdrawal of services by the employees, in a context where it would not otherwise be required to financially support the employees on strike against it. Having chosen voluntarily to withdraw their services on one of the qualifying days for entitlement to holiday pay, the Employer cannot reasonably be expected to pay the employees for the holiday as if they had worked on that day.

Therefore, it is my view that, in line with these authorities, if these parties had intended that certain benefits and allowances were to continue during the course of a strike/lockout, that intention should have been clearly expressed so that there would be no doubt that it was their intention to deviate from this "common sense" approach that such benefits would not be provided during a labour dispute.

Put another way, the general labour relations principle is that employees will forgo or forfeit their right to wages and benefits when they go out on strike. It must be assumed that parties to a collective agreement, including these very sophisticated ones, know the context in which they fashion their bargain and if they have different expectations from the prevailing approach, they must expressly state so.

Therefore, when taking all of the above considerations into account, it cannot be concluded that these parties mutually intended the Allowances in dispute here would be paid by these School Districts during the course of a strike. On that basis, these grievances are dismissed.

AWARD:

For all of the above reasons, these grievances are denied.

Dated this 25th day of July, 2016.

"David McPhillips"

_____

David C. McPhillips
Arbitrator