IN THE MATTER OF: A Union grievance dated November 24, 2016 alleging failure to pay proper IT Technician vehicle compensation, and an arbitration under the *Labour Relations Code*.

BETWEEN:

BOARD OF EDUCATION OF SCHOOL DISTRICT 39 (VANCOUVER),

Employer,

- and –

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 15,

Union.

AWARD

Appearances:

Michael Hancock, for the Employer.
David Tarasoff, for the Union.

Hearing dates and location:

April 18-20, 2018; Vancouver, B.C.

Introduction

The Vancouver School Board ("the Board" or "the Employer") rescinded its longstanding Mileage Reimbursement Policy ("the Former Policy") in June 2014 as a result of budgetary pressures and a review that concluded the Board was paying considerably more than other school districts and comparable public sector organizations. This had a significant negative impact on itinerant Information Technology Technicians ("ITT's"), employees who are required to hold a driver's licence and who attend at locations throughout the school district to install, maintain and support computer equipment and systems. Under the Former Policy, ITT's were paid the Tool Rate, as were some itinerant teachers, trades employees and outside workers who regularly used their vehicles for business related travel and transported tools or specialized equipment. In 2014, the Tool Rate was $3.23 per km (for the first 177 km/month).

Under the policy implemented by the Board effective July 1, 2014 ("the New Policy"), ITT's were paid the new Non-Trades Rate. The changes were phased in over four years. At the time of the arbitration hearing, even after a series of adjustments for cost increases, the Non-Trades Rate was $1.11 per km (for the first 257 km/month). The Employer expected to save $600,000 to $750,000 per year by implementing the New Policy.

The grievance as originally filed in November 2016, contained admitted misunderstandings about the basis for calculating the mileage rate under the New Policy. (It is now agreed that the cost of business insurance and $3M liability coverage has been included in the new rates.) The Union further acknowledged that

there was a substantial delay in presenting the grievance due to certain internal organizational difficulties. As a result, the Union did not claim relief for the period prior to the grievance filing. However, in its primary submission at arbitration, the Union said that the collective agreement precluded the Board from unilaterally altering the Former Policy. While the Union had an opportunity to provide input to the Board during the deliberation process, the Union never agreed to the changes. Article 11.J of the agreement provides as follows:

> **J. Present Conditions**
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> Any conditions and welfare benefits, or other conditions of employment at present in force which are not specifically mentioned in this Agreement and are not contrary to its intention, shall continue in full force and effect for the duration of this Agreement.

The Union said that this provision required the Employer to continue the Former Policy because the mileage benefit is not specifically mentioned in the collective agreement. On this basis, the Union requested a declaratory order that the Tool Rate under the Former Policy is extant and continues to apply to ITT's, along with any cost refreshers since 2014 pursuant to the terms of the Former Policy.

In the alternative, if the adoption of the New Policy was authorized under the collective agreement, the Union argued that the distinction between ITT's and trades employees is arbitrary and discriminatory. This violates the Employer's express obligation under Article 11.R.2(a) to treat employees fairly and equitably:

> **R. Employee Rights**
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> **2. Fair and Equitable Treatment**
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> (a) Employees will be treated fairly and equitably. There will be no infringement on the dignity or status of any employee.

Trades employees previously received the old Tool Rate and, under the New Policy, are allowed to claim reimbursement under the new Trades Rate, currently set at $1.85 per km (on the first 177 km/month). This is $0.74/km more than the rate for ITT's, now classified as Non-Trades. However, just like the trades, ITT's have tools and equipment they must transport in their personal vehicles as they move from site to site within the District. According to the Union, the Board has an archaic and unfair understanding of information technology tools and equipment. Distinguishing between the trades and ITT's for mileage reimbursement purposes is arbitrary and discriminatory. As alternate relief, the Union sought a declaration that the Trades Rate be applied, with full compensation, or at the very least, an order be issued that the Board revisit and revise the New Policy in a fair, reasonable and non-punitive manner.

For comparative purposes, it should be noted that the Canada Revenue Agency (CRA) standard rate for business use of a personal vehicle is $0.54/km. This is the rate now established by the Board under the New Policy as the Casual Rate, applicable to employees using their personal vehicle for less than 50 km of business travel per month. Payments to employees in excess of the CRA rate are deemed by CRA to be income and are taxable as such. Thus, the Union regarded the implementation of the New Policy as an unauthorized, unilateral and significant income reduction suffered by ITT's, for which a remedy must be available.

In response, the Employer stated that there was no arbitral jurisdiction over the interpretation or application of the Board's mileage policies. Article 11.P of the collective agreement makes it clear that there is a standard policy applicable to employees and that rates are set by the Finance Division of the Board. Through its

standing committees, the Board received both public and bargaining agent submissions on budget-related topics including the New Policy. The Board was required by law to balance its budget and it was deemed inappropriate to continue paying employees five or six times the CRA mileage rate. The Union was invited but made no representations concerning the New Policy.

In the Employer's view, the "present conditions" clause did not assist the Union, as the Board's mileage policy is in fact specifically mentioned in Article 11.P, as follows:

> **11. GENERAL PROVISIONS**
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> **P. Mileage**
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> Employees in schools who do not normally claim mileage under the standard policy of the Board may claim and shall be paid from school funds at the casual rate in effect and set by the Finance Division if, as and when required by the Principal to use the employee's vehicle on school business.
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> Mileage claims by persons in schools are arranged between the employee and the Principal. Mileage claims which are paid by central office are required to be submitted at the end of the month during which the mileage costs were accrued through the appropriate department head to the Accounts Department.

The Employer maintained it was not required to obtain Union consent to change its policy. The New Policy came into force as of July 1, 2014, the same date the new collective agreement commenced, so in any event, it is the New Policy that is extant, not the Former Policy. Moreover, there was nothing unfair about the distinction between trades and ITT's. The collective agreement covering the trades has specific provisions dealing with tools and equipment. At most, any order should require the Board to reconsider. The Employer also said it relied on the Union's silence during the consultation process and during collective bargaining for the 2014-2019

collective agreement (signed on September 15, 2015), such that an estoppel should apply until the end of the current agreement, if the Union succeeds in its grievance. The Board lost the opportunity to bargain and further, it relied on savings from the New Policy in meeting its statutory duty to balance the budget.

As to estoppel, the Union denied that the requisite elements were present on the facts. There was a delay, but the Employer has conflated delay with estoppel.

Evidence

Witnesses

The Union presented four witnesses. Ian Parkinson ("Parkinson") has been employed by the Board since 2008 as an itinerant or field ITT, formally known as a Technology Deployment and Operations Technician. Warren Williams ("Williams") is currently President of Local 15 and previously served as Chief Shop Steward. He is an Aboriginal Education Enhancement Worker for the Board. Michael Reed ("Reed") is a CUPE National Representative and was Union Spokesperson at the 2014 bargaining table. Finally, Kathie Currie ("Currie") is a Staff Representative who has worked for the Local Union since 2011. She signed and filed the present grievance.

Two witnesses testified on behalf of the Employer. Lisa Landry ("Landry") is Assistant Secretary Treasurer for the Vancouver Board of Education. She played an integral role in developing the New Policy for consideration by the Board. Joann Horsley-Holwill ("Holwill") has been Senior Manager of Labour Relations for the

Board since 2013 and was responsible for communication with affected unions around the mileage policy review.

The ITT job function

Parkinson testified that he holds an A-Band position (Posting, Ex. 3-1; collective agreement, Ex. 1, p. 76). Other ITT's hold similar positions, described as Systems Technician (B-Band, Ex. 3-2) and Systems Architect (C-Band, Ex. 3-3). Parkinson confirmed the following elements of his job, other than creating software applications (Ex. 3-1):

> **Job Band Description:**
> Completion of Grade 12 plus up to 3 years post-secondary training and up to 4 years related experience plus a valid British Columbia driver's license. Working within specifications and standards, installs, maintains and supports computer equipment and application software and troubleshoots hardware and software problems. Work may include identifying problems and initiating solutions, training staff and/or students, installing equipment and providing feedback about the equipment. Liaises with vendors and suppliers. Prepares and maintains database records, statistics and records of equipment servicing.
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> **Required Qualifications:**
> Completion of Grade 12 plus a minimum two year Diploma in a relevant technology discipline or equivalent training certification. A minimum of two years' experience required in a relevant computer/technology discipline. Experience of working in a K-12 education organization. Skill in implementing, problem solving, and supporting Apple and Microsoft computer, mobile, directory, server, and printing technologies. Candidate must demonstrate three core competencies …
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> **Some Example of Duties:**
> - Performs information technology functions to support the division
> - Receive phone calls, emails, and online submissions, and records, categorizes, prioritizes, and assigns requests for technical services
> - Installs and configures computer and mobile technologies, systems and application software, services, network equipment, printers, scanners, and other technologies in schools and District locations
> - Provides first level technical support, troubleshooting, and training series to clients and team members

- Provides feedback on applications and system features, advise on use, and implement and support as directed
- Creates and deploy software system and application packages
- Installs technology hardware and software including updates
- Identifies problems, monitor, administer, and problem solve various system, network, and operational issues
- Prepares and maintain records and statistics
- Liaises with vendors and suppliers
- Performs other work within the band as assigned
  (Emphasis added)

ITT's are dispatched by the Help Desk Supervisor and begin each work day at the particular school site where they are assigned. While new computers are delivered to the site, Parkinson said he looks after iPad and laptop delivery himself, as a precaution. He carries a series of work-related items in his vehicle while moving around the district: network cables (up to 25 feet in length), adapters, USB's, power supplies, servers, external drives, and hand tools such as screwdrivers and pliers. None of his tools and equipment are purchased personally.

Parkinson stated that everything fits in his car without difficulty. He owns a Toyota Matrix and uses it for work purposes. He rejected the notion that public transit would be a viable option. At times, his basic kit equals the weight of three car batteries and cannot be readily carried. In a typical month, he drives about 120 km on Board business and never exceeds 257 km/month. He now receives $1.1132/km under the Non-Trade Rate whereas under the Former Policy, he was paid around $3/km under the old Tool Rate.

Under cross examination, taken through the details of his personal vehicle use and his mileage claims (Ex. 2-19), and accounting for months when he has neglected to file his claims on time or has lost the records, Parkinson confirmed the following information as a rough estimate. He drives about 7,500 km/year and around 6,300

km is personal use. He uses his vehicle for Board purposes about 15% of the time. The Employer noted that the Former Policy assumed 49.7% business use of vehicle and the New Policy reduced this to 30%, still more generous for Parkinson than his actual use for business purposes. Parkinson agreed that his Matrix is about the same size as the Ford Focus, which is the proxy vehicle used by the Board to calculate costs under the New Policy.

The trades collective agreement

The Employer has a collective agreement with the Bargaining Council of Vancouver School Board Construction and Maintenance Trades Unions (Ex. 2-20, "the trades agreement"), covering nine different trades. Under Article 9, Working Conditions, the Employer has agreed to replace tools damaged on the job and to provide tool insurance. Regarding mileage reimbursement, the Employer must consult before changing the rates. The relevant provisions of the trades agreement are as follows:

> **ARTICLE 9 Working Conditions**
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> **Tools**
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> **9.01** For trades where hand tools are provided by the Employee, the tools of the Journeyman starting a new job shall be in good condition and shall be kept so on Board's time. …
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> **9.03** The Board will repair or replace all tools damaged or broken on the job; broken or damaged tools are to be reported immediately by the Employee. If so requested by the Employer, the Employee will submit to the Maintenance Supervisor, an inventory of tools carried.
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> **9.04** The Employer must assure the safety of members' tools against fire and burglary or loss when working over water or in such other areas where tools cannot be retrieved while in his/her employ and in the event of such a loss thereby replace same. …

9.05 Employee Vehicles

Ownership and/or use of a vehicle shall not be a condition of employment. No Employee will be permitted to use his/her own motor vehicle in a manner which is unfair to other members or against the best interest of the Union.

9.06 The responsibility for transportation of the individual and tools from one job site to another is that of the Employee, who shall be reimbursed as per the Vancouver School Board auto allowance schedule. This includes toll and parking costs that are incurred as required in the course of duties of a working day. For short term circumstances the Board will make every reasonable effort to accommodate alternative arrangements, providing there are no additional costs to the Board. The rate schedules shall be reviewed annually or as required. The Board trades shall be consulted, through the Ad Hoc Mileage Committee, prior to any changes to rates. The Joint Liaison Committee will also receive an explanation of the derivation of the rates at the next J.L.C. meeting. The Employer will provide a CRA T-2200 travel claim form to employees at the same time that the T4s are issued on an annual basis.

9.07 Tool Insurance

1) Eligibility

a) In order to qualify for tool insurance coverage, Vancouver School Board trade personal must submit an annual inventory of their tools. A current inventory must be submitted to the maintenance department on a standardized form …

b) The inventory must itemize all personal tools which are used for Vancouver School Board business. The inventory must also include the associated replacement costs, model, make, and serial number, for all tools which the individual wishes to have covered.

c) Management reserves the right to reject coverage of certain personal tools which are not required for Vancouver School Board maintenance or construction work. (Emphasis added)

The trades agreement also lists the specific tools of the trade that must be provided by Journeymen and Apprentices in each trade.

Holwill testified that she has chaired the Employer bargaining committee since 2001 and has received proposals from the trades to enshrine mileage rates in the trades collective agreement. The intent was to remove the Employer's discretion to change

the mileage policy from time to time as needed. She stated that the Board has consistently rejected any language that limits its ability to set the policy. When the New Policy was under consideration in 2014, the Board did consult the trades as required by Article 9.06 of the trades agreement. The trades were unhappy about the reduced mileage rates and grieved the changes, arguing that the Employer was not entitled to make the changes unilaterally. It was also argued that the trades were not properly consulted. The trades grievance went to arbitration and was denied.

The Board's mileage policy review

In her testimony, Landry described the process by which the Board reviewed and revised its policy on mileage reimbursement, beginning in February 2014. Management was projecting a $15.88M budget shortfall for 2014-2015. Mileage payments were examined as part of a broader process to deal with the fiscal challenge. Two years earlier, an external consultant had reported that eligibility under the Old Policy was unclear, the policy was overly complex and savings could be achieved by revising the policy. When Landry and her team examined the Old Policy, they found there was no working definition for "travel on a regular basis", which was an eligibility requirement for both the Tool and Non-Tool Rates. There was no definition of the term tools, equipment or materials. Employees self-assessed and submitted their claims for payment. Many were receiving the most favourable rate, the Tool Rate. The team considered resolving the complexity problem by eliminating the different rates and adopting the CRA rate for everyone, but this was deemed too drastic. However, a survey confirmed that rates under the Former Policy were considerably higher than those paid by comparable organizations. At the time, the Tool Rate was about six times the CRA rate.

It was also discovered, primarily using Canadian Automobile Association (CAA) data, that the formulas for proxy vehicle costs and the percentage of recoverable fixed costs were too generous, said Landry (Ex. 2-8, p. 5-8). The Former Policy had been calculated using fuel-inefficient cars and out of date leasing costs (9.9%). It assumed an unrealistically low number of personal annual kilometers driven by an employee, which thereby overstated the percentage of business use. In the result, the allocation for business use was adjusted from 49.7% to 30%. However, out of consideration for the impact on employees, this allocation was ultimately phased in with 5% annual increments.

As for defining "tools", the team concluded it was too difficult to draft a workable definition and opted to assign mileage rates by occupational category or job function. Since the trades had a collective agreement obligation to own and transport tools, they were assigned the new Trades Rate.

On February 14, 2014, the Senior Management Team completed its Review of Vancouver Board of Education Mileage Reimbursement Policy ("the Review") and sent the following memorandum (Ex. 2-8) to the Board's Finance and Legal Committee ("Finance Committee"):

> The current Vancouver Board of Education ("VBE") Mileage Reimbursement Policy ("the Policy") was initially adopted in 1982. A number of revisions have been made since. The Policy provides for reimbursements to be made to individual employees on a per kilometer basis for the use of their personal vehicle for business purposes.
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> The Policy provides for three mileage reimbursement rates: casual, non-tool and tool. The casual rate is based on the current Canada Revenue Agency ("CRA") Automobile Allowance rate. This rate is intended to recover the full operating and capital costs of operation a vehicle. Reimbursements based on the casual rate are non-taxable.

The non-tool rate is intended for employees who use their personal vehicle for VBE business purposes on a regular basis. This category includes itinerant teachers, school support staff and certain district staff. School administrators are not eligible for any mileage reimbursement.

The tool rate is intended for employees who use their personal vehicle for VBE business purposes on a regular basis and who are required to transport tools, materials or specialized equipment. This category currently includes reimbursements to trades, outside workers and certain itinerant teachers. Both non-tool and tool rate reimbursements are treated as taxable income.

In the past, the Policy and rate structure has been reviewed on a five-year basis. The last review was completed in 2008. The attached report provides a comprehensive review of the VBE Mileage Reimbursement Policy. The following comments are made in the report:

- The VBE is spending approximately $1.9 million per year on mileage reimbursements.
- The majority of expenditures ($1.5 million) are related to the tool rate.
- All other school districts and public sector organizations surveyed provide mileage reimbursements at or below the CRA rate.
- The average mileage reimbursement rates for the VBE are considerably greater than other school districts, public sector organizations and the driving costs published by the Canada Automobile Association.

The following recommendations are proposed in order to bring the Policy more in line with other school districts, public sector organizations and actual costs, while still respecting the three-tiered rate structure that has been in place for more than 30 years.

- The proxy vehicles used to calculate the non-tool and tool rates should be changed to reflect less expensive and more fuel efficient vehicles.
- The maximum percentage of fixed costs that should be recovered for the business use of personal vehicles should be changed from 49.7% to 30%. This change could be phased-in over a four-year period (e.g. a reduction of 5% points each year).
- The tool rate should be applied only to trade employees.
- In order to qualify as a “regular user” of personal vehicles for VBE business purposes and therefore be eligible for the non-tool rate, a minimum of 50 kilometres should be travelled in a month.
- The current minimum of $100 per month for trade employees should be eliminated.

The above recommendations are estimated to result in a reduction of mileage reimbursement costs between $600,000 to $750,000 per year, once fully implemented.

Most collective agreements with VBE employee groups note that employees who use their personal vehicles for VBE business purposes will be reimbursed based on the

> Board approved policy. The Trades Collective Agreement also states that rate schedules shall be reviewed annually or as required and that the Trades should be consulted prior to any changes to rates. It should be noted, however, that mileage reimbursement rates are set by Board policy; they are not negotiated as part of collective agreements.
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> In order to provide adequate time to consult with the Trades and other stakeholders, it is proposed that any approved recommendations not take effect until July 1, 2014. It is proposed that this item be placed on the March 12, 2014 Committee V agenda to hear comments from stakeholders. The Board would then consider and approve any recommendations in early April, 2014.

The recommendation to limit the tool rate to trades employees was based on the following analysis (Review, at p. 8):

> There is no definition of "tool", "equipment" or "materials" in the current Mileage Reimbursement Policy. Given the variety of tools, equipment and materials transported, it may be difficult to draft an acceptable definition. Accordingly, it may be easier to determine eligibility based on employee group or job function.
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> Trades are the only employee groups who are required under their collective agreement to transport their tools. Although other groups may be required to transport equipment or materials from site to site, the amount and frequency is not believed to be as great as it is for trade employees. It should be noted that with the increased use of VBE fleet vehicles for the Grounds Department, the number of CUPE 407 members receiving a tool rate mileage reimbursement will decline.

The Review was considered by Finance Committee on February 19, 2014, with the recommended new provisions to be generally effective July 1, 2014 (Ex. 2-9). Stakeholders were requested to consider the report and bring any feedback to the March 2014 Committee meeting for discussion. Representatives of nine bargaining units attended the February Committee meeting but no one appeared on behalf of the Union. At the March 12, 2014 Committee meeting, according to Landry, Williams attended for the Union, but she did not recall him providing any comments. In his testimony, Williams said he was not President at the time and may have been asked to be there on behalf of the Union, but he had no specific recollection of the

meeting. A detailed brief was presented on behalf of teacher psychologists, speech pathologists and area counsellors, explaining their job function as itinerant teachers who regularly used their vehicles to transport tools and materials to work sites. They defended their past eligibility for the Tool Rate and opposed the changes contained in the Review (Ex. 2-9). Several other unions made oral presentations.

Finance Committee reported to the Board at the April 7, 2014 Board meeting, summarizing a variety of points raised during the presentations and indicating that recommendations would be brought forward to the 2014/2015 budget process (Ex. 2-10). The Board resolved that the Finance Committee report be received (Ex. 2-11). On June 11, 2014, the Committee again dealt with the Review and considered the input provided by stakeholders on March 12, 2014, as well as a consultation meeting with the trades held on March 26, 2014 pursuant to the trades agreement. Finance Committee passed a motion to recommend that the Board rescind the Former policy and adopt a new policy as described in the Review. A Draft Mileage Reimbursement Policy was attached with three rates: Trades, Non-Trades and Casual (Ex. 2-12).

In parallel, there were Budget meetings taking place, including a stakeholder session on April 14, 2014 and public input sessions on April 15-16, 2014.

On June 16, 2014, in open session, the Board adopted the New Policy as recommended and also enacted the 2014/2015 Budget Bylaw (Ex. 2-13).

Under cross examination, it was pointed out to Landry that only 26 CUPE Local 15 members claimed Tool Rate reimbursement in 2013 under the Former Policy (Ex. 2-8, p. 8), with a total payment of about $96,000. At that time, the Employer's total

reimbursement cost was about $1.5M so reducing ITT's rates would not have a significant effect on the anticipated savings, it was suggested. Landry disagreed. If ITT's were allowed the new Trades Rate, other employee groups would demand it as well, and the new policy would unravel, she stated. She did not dispute the dollar values but doubted the practicality of the suggested scenario.

Landry confirmed that ITT's are required to have a driver's licence and basically must provide a vehicle to do the job. She conceded it would be untenable to do the job by travelling on public transit or bicycle. She agreed that a laptop might be considered as a "tool" for ITT's but noted that she herself carries a laptop and a phone. She acknowledged that ITT's also transport cabling and various devices, which they believe qualify as tools for purposes of the mileage policy. In her evidence, Holwill said that ITT's are not required to own a vehicle, may opt for public transit and if necessary, can get help from CUPE Local 407 members (outside workers) to transport large items. She conceded this might be less efficient than using a personal vehicle. She herself does not consider a laptop, cables and a screwdriver to be specialized equipment. Landry said that ITT's ticked the Tool Rate box on the form under the Former Policy and were paid accordingly for many years. There was confusion among supervisors about whether ITT's were eligible.

Holwill testified that her role in the mileage review process was to communicate with the Board's unions on any labour relations issues raised by the review. She made sure they were notified of public meetings but aside from the trades consultation at the Ad Hoc Mileage Committee, there were no separate meetings with the unions. Because of the potential impacts, she took extra care to communicate the fact that there might be a change in policy and that the unions may want to be heard. She logged her phone calls (Ex. 2-19) and confirmed that on

February 13, 2014 she left a message for Sung Wong, the CUPE National Representative at the time, about the upcoming Finance Committee meeting scheduled for February 19, 2014. There was never any response from CUPE Local 15.

Under cross examination, Holwill confirmed that senior management conducted its review and drafted recommendations to the Board prior to soliciting stakeholder input. She conceded it may have been beneficial to receive earlier comments but management worked toward the meeting schedule of the Committee and the Board. The trades had a specific provision in their collective agreement requiring a consultation but CUPE Local 15 did not have an equivalent clause. All Board employees were equally affected by the review and all unions were encouraged to provide input.

Williams testified that he had little familiarity with mileage issues until the grievance surfaced. He had not deeply studied the 2014 review report. He uses his personal vehicle for some Board business and claims at the CRA rate. He conceded that the evidence in the present arbitration showed that ITT's were not using their vehicles for business 50% of the time, which was the assumption used in calculating the Former Policy rates. He agreed that Parkinson's usage for business was closer to 20%. Williams acknowledged it was reasonable for the Board to seek greater clarity in applying the mileage policy but insisted the Union's agreement was necessary to make changes. He said the Board was under great pressure in 2014 over its finances and agreed there were opportunities for Union input.

Filing of the grievance

Williams testified that after the budget and the New Policy were adopted, the Union became aware of the mileage rate implications. Between June and September 2014, complaints were received from members. However, even then, he was not clear that ITT's would be affected until he was advised that they do carry tools but were being paid the Non-Trades rate. Meanwhile, collective bargaining began in September of that year. The Union had already tabled its proposals. Williams said he tried to raise mileage as an additional item but this required consent. The Employer would not agree, he said. There were no Employer proposals dealing with mileage.

Reed was the Union Bargaining Committee spokesperson in the fall of 2014. He said a number of issues were brought to him by Williams after the exchange of proposals and he met with Holwill to discuss them. In his notes (Ex. 4), made to take into the meeting, he recorded the following with respect to mileage:

> Apparently there have been changes made to the mileage rates paid to IT staff working for VSB; they were previously paid the same rate as the trades, as they have to carry their own tools and equipment to multiple locations, sometimes daily. This has a huge impact on these employees, and the new rates do not seem to be a fair application of this new policy; we would like to discuss that with you.

Reed testified he presented the mileage issue pretty much as laid out in his notes. Under cross examination, he conceded the issue was framed as an unfair application of the policy, not an objection to its adoption. Holwill testified she had no recollection of the discussion as described by Reed.

The grievance was filed on November 24, 2016. Williams explained that the delay was due to turnover among the National Representatives. He said that over the years,

the Union has not been required by the Employer to adhere to strict time limits for grievances under the collective agreement.

Currie, currently the Local Union Staff Representative, testified that the mileage issue only came to her attention sometime in 2016. She held a series of meetings with members to figure out what had happened with mileage. She raised the matter with Holwill informally 3-4 weeks prior to filing the grievance. However, she was unaware of member complaints being raised in 2014. Currie acknowledged not having the full background at the time of filing but did assert in the grievance that affected employees were not being compensated fairly and equitably compared to other Board employees performing trade and technical services.

Argument and analysis

The Present Conditions clause – Article 11.J

The Union cited *Vancouver School District No. 39 v. International Union of Operating Engineers, Local 963 (Heir Grievance)*, [2001] B.C.C.A.A.A. No. 440 (Jackson) where free parking was held to be a "condition of employment" continued in force by a present conditions clause similar to Article 11J (at para. 3, 8). In *Langara College v. C.U.P.E., Local 15*, [1997] B.C.C.A.A.A. No. 117 (Glass), dealing with the very same contract language as Article 11J, again free employee parking was continued notwithstanding the employer's attempt to implement fees for parking at the workplace. *Glades Lodge Ltd. v. C.U.P.E., Local 1259*, [1988] N.S.L.A.A. No. 11 (Veniot) interpreted a clause continuing current "working conditions" and held that the employer could not unilaterally require employees to punch in and out of coffee breaks. In the present case, the Union argued that

payment of the Tool Rate is a more fundamental right for ITT's than the parking and punch-in issues reviewed in the foregoing authorities. The Union said that by virtue of Article 11.J, rates under the Former Policy must be continued for the duration of the agreement, either as working conditions or conditions of employment, or both, until the Employer negotiates otherwise with the Union.

The Union asserted that mileage is not a matter "specifically mentioned" in the collective agreement as a working condition or other condition of employment, so the terms of Article 11.J are applicable in the present case. The Union noted that the parties themselves have set out detailed working conditions in Article 6 of the collective agreement (entitled "Working Conditions") – days of work, hours of work, basis for salary schedule, shift differential, modified work schedule, overtime, stand-by and call out, trial periods, temporary positions, filling of temporary assignments, clothing, job sharing and acting in a senior capacity. Mileage is not mentioned. Admittedly, mileage is referenced in Article 11.P of the agreement but only in a negative sense. Employees who do not claim under "the standard policy of the Board" are to be paid from school funds at the casual rate, according to Article 11.P. The clause also references the monthly submission of forms. There is no substantive mileage provision in the agreement, only an allusion to the existence of the Board policy. At most, it is a passing reference to employees not covered by the policy, said the Union.

A clause similar to Article 11.J was considered in *City of Port Moody v. Port Moody Fife Fighters Union, Local 2399 (Compressed Work Week Grievance)*, [2012] B.C.C.A.A.A. No. 9 (Burke), where (at para. 40-41) the analysis of arbitrator Munroe in *City of Vancouver v. Vancouver Fire Fighters' Union, Local 18*, [1995] B.C.C.A.A.A. No. 418 award was reviewed. In *Port Moody*, the employer

eliminated the longstanding compressed work schedule of the Fire Prevention Officer, relying on management rights. The union in that case pointed to the following language in the collective agreement: "… any general conditions presently in force but which are not specifically mentioned in the Agreement shall continue in full force and effect …" (para. 11). The arbitrator decided that the Fire Prevention Officer's work week was not a general condition under the agreement. She stated that caution should be exercised when interpreting a possibly expansive "general conditions" clause (at para. 41), adopting comments to this effect by Arbitrator Munro in *Vancouver Fire Fighters*. Such a clause should not restrict an employer's fundamental right to schedule work beyond specifically negotiated limitations already in the agreement. In the present case, said the Union, Article 11.P is not a restrictive provision with respect to the payment of mileage rates. Therefore, the present conditions clause (11.J) can and should be given a robust interpretation, not a cautious one. The intent was to continue existing working conditions such as the Tool Rate. If the Employer was dissatisfied, it was required to negotiate changes to the Former Policy and secure the agreement of the Union. This was not done. As a result, when the new collective agreement came into force on July 1, 2014, the Former policy remained extant and ITT's continued to be entitled to receive the Tool Rate.

The Union acknowledged that due to delay in initiating the grievance, it would not seek compensation prior to a date 45 days before the filing of the grievance.

In response, the Employer denied there was arbitral jurisdiction in the present case to review an ancillary policy not incorporated by reference in the collective agreement: Brown & Beatty, *Canadian Labour Arbitration*, at 4:1230; *Telecommunication Workers Union v. Telus (Tubbs Grievance)*, [2013] C.L.A.D.

No. 357 (Chankasingh) at para. 90-91; *B.C. Hydro and Power Authority and I.B.E.W., Local 258 (Remote Incentive Policy)*, [2016] B.C.C.A.A.A. No. 13 (Fleming) at para. 56-67, 75); *Four Seasons Hotel v. Hotel, Restaurant & Culinary Employees' and Bartenders' Union, Local 40*, [1994] B.C.C.A.A.A. No. 13 (Hope) at para. 48-50).

On the merits, the Employer characterized the Union's line of argument as inconsistent. The Union seeks to rely on the Former Policy as a working condition under Article 11.J but then says that Article 6 exhausts the list of working conditions, such that mileage is not specifically mentioned in the agreement.

Like the Union, the Employer cited *Vancouver Fire Fighters, supra*, but the Employer argued that the cautionary principle articulated by Arbitrator Munroe was directly applicable in the present case. In the *Vancouver* decision, the union wanted to retain scheduling practices whereby fire fighters took training classes during worktime. The union relied on a general conditions clause (Article 13.6). Arbitrator Munroe's approach was as follows (at para. 21-22):

> … That takes us back to Article 5 (Hours of Work) of the collective agreement. It contains a number of agreements between the parties about hours of work. Some of the agreements found in Article 5 comprise limitations on what otherwise would be viewed as the traditional rights of management to schedule and re-schedule the work force. Were we to interpret and apply Article 13.6 of the collective agreement (the "general provisions" clause) in the manner which is here suggested by the union, the effect would be to impose on the employer an additional fetter on its traditional management rights of scheduling and re-scheduling - i.e., additional to those specifically negotiated by the parties and included in Article 5. … As this case aptly illustrates, it would mean that the employer would be prevented from altering a prior scheduling practice so as to reduce or eliminate overtime costs which may have been tolerable in more financially buoyant times, but which today are more difficult to sustain.

> Broadly construed, Article 13.6 likely would be capable of producing the result sought by the union in the prosecution of this grievance. However, we think that a certain amount of caution must be exercised in one's approach to a vaguely-expansive "general conditions" clause like Article 13.6 - especially where, as here, its potential application may have an impact on other more clearly-expressed aspects of the parties' total bargain. Of some assistance in deciding this case is the following phrase in Article 13.6: "...but which is not specifically mentioned in the Agreement." In our view, the dispute between the parties in the instant case is properly reduced, in the final analysis, to this question: whether an underlying intention of Article 13.6 was that the employer would be limited in the exercise of its fundamental management rights - the scheduling and re-scheduling of the work force to achieve desired efficiencies - beyond the specifically-negotiated limitations in that respect as contained in Article 5 (Hours of Work).
>
> As we have said, the argument by the union is not altogether without merit. However, upon full consideration, we think the answer to the question just posed must be in the negative. In our judgment, the union has not demonstrated to a preponderance of probabilities the breach of the collective agreement which it alleges in this proceeding.

Applied to the present case, said the Employer, there is language in the agreement (Article 11.P) whereby the parties confirm that mileage will be set by standard Board policy. It was not bargained as a collective agreement right requiring the Union's consent before changes could be made. In this context, the Union cannot use the present conditions clause to restrict the Employer's rights under the agreement. As held in both *Vancouver* and *Port Moody*, caution must be exercised with a vaguely expansive general conditions clause to ensure there is no impact on clearly expressed aspects of the parties' total bargain. The same principle was embraced in *Langara College v. Langara College Faculty Association*, [1998] B.C.C.A.A.A. No. 527 (Kelleher), as follows (at para. 56-60):

> Article 18 requires that working conditions, benefits or other conditions of employment continue in force. But Article 18 has no application to "working conditions, benefits or other conditions of employment" which are "specifically mentioned" in the Collective Agreement.

> Arbitrator Donald Munroe, Q.C., discussed this in *City of Vancouver and Vancouver Firefighters Union* (1995) 52 L.A.C. (4th) 89. Article 13.6 of the collective agreement in that case provided;
>
> > It is agreed that any general conditions presently enforced but which are not specifically mentioned in the Agreement shall continue in full force and effect for the duration of this contract.
>
> In that case the employer sought to save money by rescheduling training classes so that they were no longer during working hours. It was common ground that the scheduling changes did not violate the hours of work provisions of the agreement. The union relied on Article 13.6.
>
> Arbitrator Munroe held that the words "but not specifically mentioned in the Agreement" were significant. There were other specifically negotiated limitations on the right of management to schedule and reschedule its workforce. The arbitrator did not accept that Article 13.6 placed further limits on the exercise of management rights.
>
> I find that reasoning persuasive. …

In the present agreement, said the Employer, mileage is specifically mentioned, in the very same Article. This is the short answer to the Union's argument based on present conditions. In the parking cases cited by the Union, the agreements were silent on the subject. "Having addressed the topic of mileage, it is not open to the Union to obtain through the 'back door' what it never attained, or attempted to attain, in 11P": Employer Argument, para. 23. As Holwill testified, the Board maintained a consistent position in bargaining with all its unions that mileage would remain a matter of Employer policy and not a right embedded in the collective agreement.

In reply on the question of arbitral jurisdiction, the Union cited *Saam Smit Westminster v. Canadian Merchant Service Guild (Call-Out Rotation Grievance)*, [2016] B.C.C.A.A.A. No. 59 (McConchie) for guiding principles. The Union said the mileage policy is not an ancillary document. The issue here is whether an existing working condition has been continued in force pursuant to an express

provision of the collective agreement, and there is jurisdiction for an arbitrator to answer such a question.

I do not find it necessary to decide the jurisdiction issue. On the merits, I agree with the Employer position on Article 11.J. The payment of mileage might properly be construed as a working condition or a condition of employment but Article 11.J does not avail the Union because of the references to mileage in Article 11.P. For convenience, the relevant provisions are reproduced:

> **J. Present Conditions**
>
> Any conditions and welfare benefits, or other conditions of employment at present in force which are not specifically mentioned in this Agreement and are not contrary to its intention, shall continue in full force and effect for the duration of this Agreement.
>
> **P. Mileage**
>
> Employees in schools who do not normally claim mileage under the standard policy of the Board may claim and shall be paid from school funds at the casual rate in effect and set by the Finance Division if, as and when required by the Principal to use the employee's vehicle on school business.
>
> Mileage claims by persons in schools are arranged between the employee and the Principal. Mileage claims which are paid by central office are required to be submitted at the end of the month during which the mileage costs were accrued through the appropriate department head to the Accounts Department.

As discussed in the *Vancouver Fire Fighters* line of cases, it is necessary to consider "other more clearly-expressed aspects of the parties' total bargain." The Union correctly emphasizes that there is no full-fledged statement of employee entitlements regarding mileage contained in Article 11.P. It is more of a passing reference to the Board's policy. The article addresses employees who do <u>not</u> claim under the standard policy rather than those who do so. Still, the thrust of Article 11.P is that the parties recognize mileage reimbursement as a matter of Board policy, as it has

been for many years. This was the bargain. The rate is set by the Board's Finance Division, not by collective bargaining. It would be inappropriate for an arbitrator to alter the terms of the parties' bargain based on a present conditions clause such as Article 11.J.

Fair and Equitable Treatment – Article 11.R.2(a)

In the alternative, the Union submitted that the collective agreement provides for fair and equitable treatment of employees. An arbitrator has jurisdiction to review the Employer's mileage policy for compliance with the assurances in Article 11.R.2(a), reproduced here for convenience:

> **R. Employee Rights**
>
> **2. Fair and Equitable Treatment**
>
> (a) Employees will be treated fairly and equitably. There will be no infringement on the dignity or status of any employee.

The Union cited *Simon Fraser University v. Association of University and College Employees, Local 6, Teaching Staff Support Union*, (1983) 2 C.L.R.B.R. (N.S.) 329, [1983] B.C.L.R.B.R. No. 169, a selection case, in which the Labour Relations Board endorsed the following broad principles (at p. 344-345):

> The procedure by which the Employer makes semester appointments is not specifically set forth in the collective agreement. This allows the Employer to exercise a wide discretion in both the selection of the personnel who are involved in the appointment process and the selection of the successful applicant. On the facts of this case the Employer exercised its discretion by appointing Dr. Calhoun as Chairman of the Divisional Selection Committee even though he had, prior to the session at which the grievor's application was to be considered, advised Dr. Lincoln, the Chairman of both the Department and the Departmental Review Committee, that the grievor should not be selected.

> In our opinion, a clear principle which arises from Part 6 of the Code may be expressed as follows: within the context of a collective agreement, a party who has a discretion must exercise it "reasonably" so as not to defeat the legitimate rights and expectations of the other parties to the collective agreement. A party who, in the exercise of its discretion, acts in a manner that is arbitrary, discriminatory or in bad faith, does not act reasonably. Reasonableness also includes, by its very nature, an element of fairness. This principle is all pervasive in the arbitrable jurisprudence which has developed throughout Canada over the last 30 years. A lengthy line of arbitral jurisprudence has noted a general presumption that in organizing the work force, including the assignment of work, filling of vacancies, making of transfers, promotions and demotions, management initiative is subject to an overriding qualification that its decisions be in good faith, and not be arbitrary or discriminatory. This presumption exists notwithstanding management's ability to be fettered only by clear and express language. …

The Union therefore argued that the Employer's decision to adopt the New Policy was reviewable both on general fairness grounds as well as for breach of Article 11.R.2(a).

The Union did not dispute the Employer's budget and costing justifications for changing and lowering the rates, as developed in the Review and as explained in Landry's evidence. The Union did, however, maintain that ITT's could easily be accommodated at the Trades Rate without significantly impacting the Board's total overall costs. The Union's main point was that for many years, the Board paid ITT's and trades employees the Tool Rate. Both occupational groups were, for all practical purposes, required to use a vehicle for work and both groups transported tools and equipment in the course of doing the job. None of those facts have changed. However, the New Policy now discriminates against ITT's by denying them the benefit of the Trades Rate. To the extent that administrative convenience was a rationale for the changes made in 2014, the Union submitted that this was not a defensible position. The collective agreement specifies fair and equitable treatment, even if a little more effort is required to administer mileage claims.

The Union rejected the Employer's position that differences between the trades agreement and the Local 15 agreement justify differential treatment of ITT's. Yes, trades employees must provide their own tools but that is an irrelevant factor, since the mileage payment is made to compensate for on the job travel and transport of tools, regardless of who owns the tools. Article 9.05 of the trades agreement specifies that ownership or use of a vehicle is not a condition of employment. Ironically, by contrast, a driver's licence is a requirement for ITT's (Job Band Description). The evidence was clear that public transit is not a feasible alternative for ITT's, said the Union. Yet it is ITT's who have been relegated to the lower Non-Trades Rate. An examination of the trades agreement reveals that there is greater diversity among the different trades in terms of their tool lists than there is between the trades generally and ITT's. Yet all trades are paid the Trades Rate and ITT's are not. These are the hallmarks of an arbitrary, unreasonable and unfair pay practice, in the Union's submission.

The Union refuted the argument that ITT compensation under the New Policy is still generous, being considerably above the CRA rate, albeit lower than the Trades Rate. The issue is fair and equitable treatment of employees. It is no answer that the ITT rate could be even worse.

The Union requested that ITT's be paid the Trades Rate or at a minimum, an order be issued requiring the Board to revisit and revise the New Policy in a fair, reasonable and non-discriminatory manner.

In response on the merits, the Employer characterized Article 11.R.2(a) as a provision intended to protect basic human dignity and prevent individuals from

being singled out for improper treatment. The clause must be read conjunctively, not disjunctively. It calls for employees to be treated in a manner which is both fair and equitable. The Employer cited *Board of Trustees of School District No. 39 (Vancouver) v. Vancouver Municipal and Regional Employees' Union (Collective Agreement Grievance)*, [1983] B.C.C.A.A.A. No. 589 (Albertini), dealing with a grievance under essentially the same language as Article 11.R.2(a), where the grievor was denied return to her former position following an adoptive leave. It was held that a negative impact does not equate to unfair and inequitable treatment (at para. 29-31):

> I agree with counsel for the [union] that the collective agreement should be read as a whole when deciding the interpretation of any one part of the agreement. While Article 10(H) does appear to give the School Board the unfettered right to fill any position that is vacant due to the incumbent being on adoption leave, it is a discretionary right. That discretion must be exercised in accordance with the provisions of the entire collective agreement. Article 12(S) - Employee Rights - clearly mandates the School Board to exercise its discretion in a manner that ensures that employees are treated "... fairly and equitably."
>
> After carefully considering all of the evidence and the arguments of the parties, I have concluded that the School Board did not violate any of the provisions of the collective agreement when it filled the grievor's job. There was neither evidence nor suggestion that the School Board discriminated against the grievor.
>
> While Article 12(S)(2) requires that the School Board treat employees fairly and equitably, it does not require the School Board to grant every request made by an employee in isolation of its own needs. A decision made by the School Board that adversely affects an employee is not, on that basis alone, unfair. (Emphasis added)

The Employer argued that the facts overwhelmingly support a conclusion that nothing about ITT mileage reimbursement was unfair or inequitable. The Board has not discontinued mileage. It continues to pay more than a compensatory level. As Parkinson admitted, he can do his job with the vehicle he now has, which matches the Non-Trades proxy vehicle, and his fixed costs are much less than the 30%

assumed in the proxy costing. For fairness, the transition from 49.7% business use to 30% business use in the costing was staged in 5% annual increments.

The Non-Trades Rate far exceeds the CRA rate, which is received by employees in comparable public sector organizations.

The rate was calculated based on relevant and rational factors, as described in the Review, and the Union has not disputed the costing.

The trades have different collective agreement obligations regarding tools at the job site and this was reasonably taken into account by the Board. Costing for trades employees was based on assumptions about the kinds of tools and equipment these employees need to transport.

There is no "me too" language in the CUPE Local 15 collective agreement. Thus, there is no basis for the Union to allege unfairness toward ITT's simply because another group receives a higher rate.

The Employer found there was undue complexity and imprecision in the Former Policy. It was too difficult to define qualifications for the different rates, so the Board decided it would apply the new Trades Rate to trades employees only. This operated to the disadvantage of ITT's but it was a reasonable judgement call by the Employer in the circumstances.

Finally, said the Employer, the process for adopting the New Policy was open and fair. The Review was available to the Union and input was solicited. The Union did

not pay attention at the time but it had the opportunity to be heard. The collective agreement did not require any kind of notification and consultation.

In summation, the Employer asserted the following (Written Argument, para. 29, 32): "Objectively speaking the treatment of CUPE 15 employees under the Policy can be criticized only for its generosity. … The position of the Union seems to be that because the Board previously overpaid for mileage reimbursement, it must continue to do so."

As for remedy, the Employer submitted that if the New Policy fails to treat ITT's fairly and equitably, it is not the case that ITT's must be paid the Trades Rate to resolve the unfairness. There are various alternatives and the Employer must be given the chance to reconsider and revise the New Policy: *Cargill Ltd. v. United Food and Commercial Workers of Canada, Local 175 (Progressive Discipline Grievance)*, [2011] O.L.A.A. No. 269 (Steinberg) at para. 24.

In reply on Article 11.R.2(a), the Union agreed that the clause is to be read conjunctively. The Union insisted that relatively unequal payments do raise a dignity issue for ITT's. It is a matter of basic fairness in compensation.

Again, I do not find it necessary to address the Employer's jurisdiction argument. I am not persuaded that the change to ITT mileage payments breached Article 11.R.2(a) of the collective agreement. To be sure, it is jarring for employees when they have received a very favourable rate for a lengthy period of time and then lose the enjoyment of that rate. The former Tool Rate, the present Trades Rate and even the Non-Trades Rate now paid to ITT's all represent payment levels in excess of strict compensation for costs incurred due to business use of personal vehicle as

judged by CRA. As a result, the amount over and above the CRA rate is reported as income. Reducing the ITT mileage rate triggered a loss of income. It is understandable that ITT's objected to an adverse outcome but this *per se* does not mean the Board failed to treat them fairly and equitably, or infringed their dignity or status.

I agree with the Employer that the factual circumstances enumerated in its argument, taken as a whole, support a finding that there was no collective agreement breach caused by paying ITT's the Non-Trades Rate. While the Union was critical of the Board for taking into account administrative efficacy in drafting the New Policy, this was hardly an inadmissible factor in a large public-sector organization facing budgetary pressures. In any event, ease of administration was only one of several considerations, as discussed in the Review. I find that the Review was careful and thorough. It was a response to legitimate Employer concerns. While the Union was not consulted during the preparation of management's report, there was on open process with stakeholder input once the issue was placed before Finance Committee. Again, this is not determinative but some weight should be given to the Employer's conduct in revising the mileage policy. As Holwill's evidence showed, the Board was acutely aware of the impact on employee interests and took extra steps to ensure that the unions were informed of the potential changes.

The differing collective agreement provisions as between trades and ITT's were also a factor. Article 9.06 of the trades agreement specifies that "responsibility for the transportation of the individual and tools from one job site to another is that of the Employee." I appreciate the Union's point that ITT's have the same responsibility in practice. In addition, tool ownership and insurance are not logically related to transportation costs. However, the Review went further and considered the amount

and frequency of tool transport, which is directly relevant to reimbursement (at p. 8):

> Trades are the only employee groups who are required under their collective agreement to transport their tools. Although other groups may be required to transport equipment or materials from site to site, the amount and frequency is not believed to be as great as it is for trade employees.

There was evidence before me concerning ITT tools and equipment but no comparative evidence that disputed the above-noted assumption in the Review. The Employer was entitled to take into account all these factors in deciding that only trades should receive the tool rate (renamed the Trades Rate). It is not an arbitrator's role to pass judgment on the correctness of such management decisions, taken in good faith for valid business reasons. I am unable to find that ITT's were not treated fairly or equitably. Ultimately, this is a compensation issue that may be addressed in collective bargaining.

The parties made extensive submissions on the subject of estoppel, but given my conclusion that there was no breach of the collective agreement, it is not necessary to address estoppel.

The grievance is denied.

ISSUED on July 16, 2018.

ARNE PELTZ, Arbitrator