IN AN ARBITRATION

BETWEEN:

GREATER VANCOUVER REGIONAL DISTRICT,

the "Corporation" or "Employer"

AND:

GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES' UNION,

the "Union"

RE: **Article 3.15 (d) / mileage to transport laptop**

AWARD

Arbitration Board:	Rod Germaine, Chair Bob Beaumont, Union Nominee Michael A. Wagner, Employer Nominee
For the Union:	Craig D. Bavis
For the Employer:	Alan J. Hamilton, Q.C.
Hearing:	May 5, 2004; Vancouver, B.C.
Date of Award:	August 25, 2004

Introduction

[1] This is a policy grievance affecting two employees, Kaz Galazka and Francis Wong (the "grievors"). The Union contends the grievors are entitled to be paid mileage for using their personal vehicles to transport an Employer-issued laptop computer. The claim is made pursuant to Article 3.15 (d) of the collective agreement:

> Employees who are required by the Corporation to use their personal automobiles to transport equipment or tools to the job will be paid mileage to the job, on the job and back to their residence, provided that such mileage claimed is within the boundaries of the Greater Vancouver Districts.

The Employer, the Greater Vancouver Regional District (the "Corporation"), says the grievors do not qualify for the mileage benefit under this or any other contract provision.

Background

[2] The Corporation provides a range of services to the residents of its constituent municipalities. Water distribution and sewage disposal are among the more important of those services. Employees in the position of Digital Control Software Specialist ("DCSS") are responsible for the computer application used to manage and control the water and sewer systems. Messrs. Galazka and Wong are the only employees in the position of DCSS, and the program they administer for this purpose is called the Supervisory Control and Data Acquisition ("SC&DA") system.

[3] The Corporation's Lake City Operations Centre in Burnaby is the control centre for the water and sewer systems. The grievors work a regular day shift, Monday to Friday, at that location. But the Corporation requires coverage outside of regular business hours to deal with any problems which may occur with the systems. As a consequence, one of the grievors must be on stand-by after work hours. The grievors alternate this stand-by duty.

[4] In the event of a problem, the DCSS on stand-by is called out. But the DCSS is seldom required to return to Lake City Operations Centre in order to respond to the problem. The DCSS accesses the SC&DA system from a remote location, most often the DCSS's residence, and is usually able to successfully address the problem.

[5] Until May 2003, the grievors relied on their own personal computers to access the SC&DA system when they were called while on stand-by. However, considerations of safety and security moved the Employer to restrict access to the SC&DA. The Employer provided each of the grievors with a laptop equipped to access the SC&DA either wirelessly or by a high speed connection. It is not disputed that the Employer requires each of the grievors, when on stand-by, to take the laptop home with him and have it in his possession.

[6] Although the laptops were issued to the grievors in May 2003, the Employer's administration of the mileage benefit in Article 3.15 (d) was the subject of management attention a year earlier. In a memorandum to Department Managers dated May 28, 2002, Tom Heath, Manager, Operations & Maintenance ("O&M"), said:

> **RE: O&M DEPARTMENT RULES FOR MILEAGE PAYMENTS FOR CARRYING TOOLS**
>
> The issue of mileage payment for carrying tools has been problematic from time to time owing to lack of definition as to what constitutes tools!
>
> For the purposes of clarification and consistency, the O&M Department is adopting the following approach in its Divisions:
>
> - Carrying small, portable tools in a personal vehicle will not attract payments. The question we will ask is – could the tools reasonably be carried on public transit?
> - Examples include: Cell-phones
>
> Laptop
>
> Gas detector
>
> - Carrying more substantial items, e.g. electrician's tool set, will continue to be cause for mileage payment. Every effort will be

made to eliminate these occasions by deploying a District vehicle to on-call staff, for example.

The term "on-call" was a reference to stand-by status under the collective agreement.

Collective Agreement

[7] Article 3.15 (d) is part of a larger mileage provision. The terms of the provision are unchanged in substance since 1960:

> **3.15** Mileage Rates
>
> (a) Employees may charge mileage allowance only when requested to use their automobiles on Corporation business by the Corporation.
>
> (b) Employees who normally work out of any permanent Corporation office or Corporation residence shall compute their mileage from these points.
>
> (c) Employees who normally go directly from their home to the job shall compute their mileage from the check point closes to their home. These check points, subject to change, are: Head Office, Beach yard, Lake City, Little Mountain and Westburnco.
>
> (d) Employees who are required by the Corporation to use their personal automobiles to transport equipment or tools to the job will be paid mileage to the job, on the job and back to their residence, provided that such mileage claimed is within the boundaries of the Greater Vancouver Districts.
>
> (e) When the use of a private automobile by an employee does not fall within the above provisions, management retains the right to determine how the operating conditions shall be applied.
>
> **Schedule of Rates**
>
> | *Monthly Mileage* | *Rate* |
> |---|---|
> | 1 - 50 miles | .95 per mile |
> | 151 - 625 miles | .38 per mile |
> | Over 625 miles | .35 per mile |
> | | |
> | 1 - 241 kilometers | .59 per kilometer |
> | 242 - 1005 kilometers | .24 per kilometer |
> | Over 1005 kilometers | .22 per kilometer |

[8] As the Employer contends, Article 3.15 is strictly confined to the mileage benefit; it does not encompass any consideration of stand-by status. However, the two concepts are linked in a long-standing policy of the Employer. In 1978 the Employer agreed to "formalize" existing policies and publish them with the collective agreement. The current collective agreement contains thirteen such policies, the first of which is this:

> 1. Policy re Payment of Mileage for Stand-By Call Out
> Employees for whom stand-by has been arranged and who are called out to work separate from their regular shifts and who are paid only for the time worked will be paid mileage for the use of their personal automobiles from their residence or point of contact, on the job, and back to their residence, provided that such mileage claimed is within the boundaries of the Greater Vancouver Districts.

[9] The relevant call out and stand-by provisions of the collective agreement are as follows:

> **3.06** Call Out
>
> (a) Work Outside of Regular Shifts:
> Employees for whom stand-by has not been arranged and who are called out to work separate from their regular shift will receive two hours pay at prevailing overtime rates if they are sent home without working.
>
> (b) Employees for whom stand-by time has not been arranged and who are called out to work separate from their regular shifts will receive two hours pay at straight time rates plus pay for the time worked at the prevailing overtime rates.
> Employees for whom stand-by time has been arranged and who are called out to work separate from their regular shifts will receive pay at the prevailing overtime rates.
>
> (c) Employees who start work prior to a normal shift and continue to work during the normal shift or employees who continue to work beyond the normal shift will be paid the applicable rates for such time worked...
>
> **3.07** Stand-By
>
> (a) Effective 2003 March 23, the allocation of stand-by time within the System Operations Division will be determined by the Superintendent...
>
> (b) Where operations of the system require regularly scheduled stand-by time, remuneration will be made as follows:

> (i) Where stand-by time is shared by treatment plant operators or other regular groups at an operation or installation then stand-by time will be paid for at the rate of one hours' pay for each eight (8) hours of stand-by...
>
> (ii) Where stand-by of less than eight (8) hours is required for Forestry operations...

[10] The relationship between work and stand-by under this collective agreement was considered by Arbitrator Stephen Kelleher, as he then was, in *Greater Vancouver Regional District and GVRDEU (Beattie)* (2002), 110 LAC (4th) 72 (the "*Kelleher* award"). The grievor claimed overtime for work performed on the telephone at his home when he was called while on stand-by. Arbitrator Kelleher held "the normal meaning of 'stand-by' does not encompass both being ready to work and actually performing work" and he found the normal meaning was applicable. While the grievor was not "called out" in the sense that he did not have to leave his home and physically attend at a work site, he was nevertheless called "away from non-work activities" to perform work for the Employer. As a consequence, the grievor "was 'called out' in essentially the same way that employees in other contexts physically attend at work". On that basis, the grievor was entitled to overtime pay.

Parties' positions

[11] In the Union's submission, the "overarching" principle applicable to the interpretation of Article 3.15 (d) is that an employee performing a service for the benefit of the employer is entitled to compensation for that service. Thus, the collective agreement provides that employees are compensated for transporting equipment or tools in their personal vehicles. The Union says the grievors fall within both the principle and the provision. The Union emphasizes the cost saving derived by the Employer; if the grievors did not transport their laptops they would be required to return to the Lake City Operations Centre to perform call-out work.

[11] The Union argues that, although there were no computers when the parties negotiated the mileage benefit, the language of the collective agreement "must encompass...[the] reality" that employees are now able to work from their homes. The Union cites authority for the proposition that, when an employee performs work for the employer at home, the employee's home is the employee's "place of work": *Treasury Board (Transport Canada) and Heath* (1994), 43 LAC (4th) 346 (Turner), at 353); the *Kelleher* award, at paragraph 34. While the Employer has not explicitly directed the grievors to use their personal vehicles, the Union contends the requirement is implicit. Having regard to safety and security issues arising from the nature of a laptop, the Union argues it is a reasonable expectation that the grievors will use their own cars to transport the laptops. Since the grievors are therefore required to transport equipment between two places of work, the Union contends they should be compensated for the use of their personal vehicles.

[12] Alternatively, the Union says that, notwithstanding the May 2002 Memo issued by Mr. Heath, the practice is that equipment and tools will be transported either by means of a vehicle provided by the Employer or in the employee's personal vehicle. In the Union's submission, that practice also represents the Employer's "real expectation". The Union argues that, consistent with this reality, Article 3.15 (d) should construed to mean that use of a personal vehicle is required whenever a vehicle is not provided by the Employer. Thus, mileage for transporting tools should be paid *because* the Employer has not supplied a car.

[13] The Employer urges caution; it contends the Union's monetary claim based on implication rather than the words of the contract. The Employer submits that, consistent with its pre-computer origins, the language of Article 3.15 (d) does not contemplate the performance of work at the employee's home. Rather, it concerns transport to and from the employee's regular job site. Further, on the strength of the *Kelleher* award, the Employer emphasizes that work is not the same as stand-by status. While Policy No. 1

extends the mileage benefit to employees on stand-by, it is expressly limited to travel to the job and back after the employee is called out to work. In the Employer's submission, a journey *to* the job is contemplated, not a journey from the job to the employee's home.

[14] The Employer also emphasizes that the claim is made for transporting the laptop whenever one of the grievors is on stand-by, whether or not the grievor is called out to perform work. In the Employer's submission, the Union is seeking to "shoe horn" a *stand-by* benefit into a *work*-related benefit.

[15] The Employer distinguishes between requiring an employee to maintain possession of equipment on stand-by and requiring the use of the employee's personal vehicle to transport the equipment. In this respect, the Employer relies on its administration of the mileage benefit in accordance with Mr. Heath's May 2002 memorandum and reiterates the position adopted in response to the grievance. That position was stated in a letter to the Union from Scott Pellow, Supervisor, Engineering & Technical Services, dated July 29, 2003:

> Laptops and other small portable tools such as cell phones, pagers, gas detectors, etc, do not normally require a personal vehicle for purposes of transport and therefore the Corporation, in this instance, is not requiring the employee to use their personal vehicle for such purposes.

[16] The Employer's criterion, it is submitted, is convenience, not the expense and fragility of the laptop, as well as the safety and security factors surrounding the importance of the laptop to the management and control of the water and sewer systems. Further, in the Employer's submission, the Union is precluded from relying on any implicit requirement to use personal vehicles when the facts are that the Employer has explicitly informed the grievors they are free to use public transit. Finally, the Employer asserts its expectation is that employees will take advantage of public transit or arrange for a ride to work with a spouse or others.

Analysis

[17] The issue is whether Article 3.15 (d) applies to the grievors' use of their personal automobiles to transport the laptop computer from their normal work place at the Lake City Operations Centre to their respective homes when they are on stand-by and, for that reason, required to take the laptop with them after work. The determination of that issue turns on the meaning of Article 3.15 (d), the interpretation of which is disputed.

[18] On what basis is the arbitration board to determine the correct interpretation? The essence of the interpretative task is to ascertain the intention of the parties from the language they used to express their agreement. For the most part, the words of the agreement are to be given their plain and ordinary meaning. On occasion, a secondary meaning may be indicated by the context or to avoid an absurdity. In addition, an arbitration board may derive assistance from extrinsic evidence of bargaining history or past practice if that evidence exposes the mutual intention of the parties with respect to the words of the collective agreement.

[19] Neither party sought to introduce evidence of negotiating history or, in any formal sense, past practice. We therefore accept the Union's reply submission that the intention of the parties respecting the meaning of Article 3.15 (d) must be derived solely from the contract language. We emphasize the point because of the various contentions respecting the "expectations" of the parties. There were conflicting assertions respecting the Employer's expectations in relation to the employees' use of personal vehicles. In addition, the Union relied on the grievors' "reasonable expectation" that they are required to use their vehicles. We decline to place weight on such considerations for a number of reasons.

[20] As far as the Employer's expectations are concerned, there was little or no direct evidence to establish what those expectations actually are. Each of the parties invited the arbitration board to draw inferences, the Union suggesting the "real expectation" is that

employees will use their personal vehicles, and the Employer insisting that it expects some employees to use alternative forms of transportation. In our view, it would be dangerous to formulate any factual conclusions in these circumstances. But, even if the Employer's expectations were established as a probability, they remain nothing more than subjective view of one of the parties concerning relevant patterns of conduct. That is hardly sufficient to afford any insight into the meaning of the disputed words in the collective agreement; such expectations bear no resemblance to the kind of practices which may assist an arbitration board because they reflect the parties' common understanding about the meaning of their collective agreement. It will be worthwhile to recall the generally accepted restrictions on the use of past practice evidence:

> ...there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen from their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice. (*John Bertram & Sons Co. Ltd.* (1967), 18 LAC 362 (Weiler), at 368)

[21] We have not forgotten the Union's reference to the grievors' reasonable expectation. We will return to that argument below. Suffice it to say here that the suggestion of reasonableness is not enough to dispense with the other indicia of the kind of past practice which will assist the interpretation of collective agreement language.

[22] With that, we return to the words of Article 3.15 (d). For ease of reference, we quote the language again:

> Employees who are required by the Corporation to use their personal automobiles to transport equipment or tools to the job will be paid mileage to the job, on the job and back to their residence, provided that such mileage claimed is within the boundaries of the Greater Vancouver Districts.

[23] Having regard to the ordinary meaning of these words, the entitlement to mileage provided by the clause is dependent on at least three components. First, the employee must be "required" by the Employer to use her or his own vehicle. Second, the requirement must be for the purpose of transporting equipment or tools. Third, the mileage is paid for transportation "to the job, on the job and back" to the employee's residence.

[24] The second component is not disputed; it is agreed that the laptop is "equipment" or a "tool" in the sense intended. However, the other two components are in issue. In relation to each of those components, the question remains the same: what did the parties intend by the words in question, as applied to the facts at hand?

[25] As we have recorded, the Union makes more than one argument that the grievors are required to use their own vehicles to transport the laptop computers. The first is that the grievors are implicitly required to use their own vehicle by virtue of the nature and circumstances of the equipment in question. Given the value of the laptop, its fragility, and its vital importance to the operation of the water and sewer systems, the contention is that safety and security considerations implicitly require the grievors to use their own vehicles. The Union's reliance on this "reasonable expectation" of the employees indicates that, in the view of the grievors and the Union, the Employer would be well advised to maximize security and safety by directing the grievors to transport their laptop in their own vehicles. This view of the wisdom of the Employer's professed comfort with the laptops being carried on public transport may well be valid. But we refrain from adding our opinion to the Union's evaluative assessment of management's judgment because that is not the mandate of this tribunal. The point is that the requirement for the use of vehicles cannot be implied because it would be prudent.

[26] Management's actual position is the so-called convenience test inherent in Mr. Heath's May 2002 memorandum. The laptop is expressly referenced as an example of a tool which employees are not required to transport in personal vehicles because it can be

conveniently carried on public transit. The memorandum was introduced into evidence by the Union but it is not clear when the grievors were apprised of it. There is no evidence, however, to suggest that the grievors were given any other direction after May 2002. As the Employer contends, the suggestion of an implicit requirement to use personal vehicles must fail in view of this explicit direction to the contrary.

[27] The Union's alternative contention is that the language of Article 3.15 (d) should be construed to mean that the grievors were required to use their vehicles because they were not provided with a vehicle by the Employer. To some extent, this argument is based on the assertion of an Employer expectation that employees use their own vehicles and we have already explained why that assertion is unhelpful. The argument also relies on the Employer's practice of supplying vehicles to employees who are required to transport equipment or tools. This particular practice is not in dispute; Mr. Heath referred to it at the end of his May 2002 memorandum. If that reference remains accurate, the practice is not uniform; the Employer makes "every effort" to supply a vehicle when it requires "substantial items" to be transported by the employee. But, in any event, that practice does not contradict or undermine the management direction contained in the May 2002 memorandum.

[28] The Union also attacks the content of the May 2002 memorandum on the ground that it is inconsistent with the collective agreement. As we read it, the memorandum is not an interpretation of Article 3.15 (d). Rather, it states Employer policy respecting its discretion under the provisions of Article 3.15. The scheme of the provision as a whole is to give the Employer the discretion to "request" that an employee use her vehicle (Article 3.15 (a)), to "require" an employee to use her vehicle to transport equipment or tools (Article 3.15 (d)), and to "determine how the operating conditions shall be applied" (Article 3.15 (e)). By adopting the so-called convenience test, the Employer has identified circumstances in which it will not require employees to use personal vehicles to transport equipment or tools, as well as circumstances in which it will. The convenience test stated in the May 2002 memorandum is therefore a clarification of the words

"required by the Corporation" in clause (d). As such, it provides both management and employees with a better understanding of the provision. We do not detect any inconsistency with the contract language or the benefit provided by it.

[29] The Union has not suggested the May 2002 memorandum reversed any previous practice or that the Employer is estopped from adopting the convenience test. In the absence of any direct evidence respecting practices prior to the memorandum, no such suggestion would be tenable. In short, the Union has failed to establish that the grievors are required to use their personal vehicles to transport the laptop computers.

[30] The foregoing conclusion makes it unnecessary to address the final component of the entitlement to mileage under Article 3.15 (d). We make these brief comments. We accept the Union's submission that the grievor's home must be a work site when they are called out and use the laptop to perform work from their home. On the same basis, any place the grievors happened to use the laptop for this purpose would equally be a work site. In logic, then, it is problematical to confine the claim to mileage from the Lake City Operations Centre to the grievors' respective homes. In any event, the use of the words "to the job, on the job and back" clearly conveys the intention to make the benefit payable when the employee transports equipment or tools to perform work somewhere. Even if that were to encompass the grievors' homes on the basis the Union urges, we are inclined to accept the Employer's submission that the language of the provision cannot be stretched to the point that it becomes a benefit to employees on stand-by, whether or not they are called out to work. Such an interpretation would be consistent with Policy No. 1, under which mileage is paid to employees on stand-by only if they are actually called out to work.

[31] With respect to the Union's "overarching" principle, we acknowledge the force of the proposition that the Employer has issued the laptops to the grievors as a matter of convenience and cost saving to the Employer. There is a risk of oversimplifying the appropriate consequences of this reality because the laptops are also a convenience to the

grievors. But we appreciate that the grievors perceive the Employer to be deriving a significant benefit because the grievors are not required to return to the Lake City Operations Centre when they are called out to work while on stand-by. It may be, as the Union contends, that some mileage for transporting the laptops would be a fair exchange for the benefit to the employer. But this board does not have the authority to create that benefit. On the current language of the collective agreement, the claim for mileage fails. The more powerful overarching principle is that the benefit must be negotiated before an entitlement can be claimed.

Conclusion

[32] In the absence of extrinsic evidence of past practice or negotiating history, the board must determine the intention of the parties by reference to the language of Article 3.15 (d). Having regard to the words of the clause in the context of the provision and the collective agreement as a whole, the board has concluded the mileage benefit for transporting equipment or tools in a personal vehicle is not payable unless three elements have been established: the use of a personal vehicle must be required by the Employer; it must involve transportation of equipment or tools; and, the transportation must be "to the job, on the job and back".

[33] In the circumstances here, it is agreed that the laptop computer qualifies as equipment or a tool; the second element is not in issue. But the Union has not established the first element.

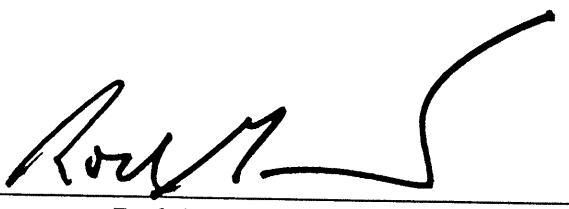
[34] The Union makes a case for the prudence of transporting the laptop computer in a vehicle, but the evidence does not support a finding that the Employer requires the grievors to use their vehicles for this purpose. On the contrary, the Employer has clarified when it will require the use of personal vehicles. The Employer has adopted a test of convenience, and it takes the position that the laptop computer may be conveniently

transported on public transit. The Employer has therefore explicitly declined to require the grievors to use their personal vehicles.

[35] The Union's efforts to circumvent that position fail. The grievors' reasonable expectations relate to whether the convenience test is sound management policy, not the relevant question of whether the grievors have been required to use their own cars to transport the laptops. Further, the Employer's practice of endeavouring to provide a vehicle where the convenience test would entitle the employee to mileage does not assist the interpretation of Article 3.15 (d) in the circumstances at hand.

[36] In view of that conclusion, it is not necessary to come to any definitive decision respecting the third element of entitlement. The grievance fails.

[37] Dated at Vancouver, British Columbia, this 25th day of August 2004.



Rod Germaine, Chair

"*Bob Beaumont*"

Bob Beaumont, Union Nominee

"*Michael A. Wagner*"

Michael A. Wagner, Employer Nominee