07-001

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE CANADA LABOUR CODE

BETWEEN:

BHP BILLITON DIAMOND MINES INC.
(the "Employer")

AND:

PUBLIC SERVICE ALLIANCE OF CANADA/ UNION OF NORTHERN WORKERS
(the "Union")

RETENTION BONUS GRIEVANCE

ARBITRATOR:	WAYNE MOORE
COUNSEL for the EMPLOYER:	THOMAS A. ROPER QC
COUNSEL for the UNION:	LEANNE CHAHLEY
DATES of HEARING:	DECEMBER 3, 4 & 5, 2007
PLACE of HEARING:	EDMONTON, ALBERTA
DATE of AWARD:	OCTOBER 2, 2008

Introduction

As part of the first collective agreement with respect to the Employer's Ekati Mine operation, concluded after lengthy negotiations and an almost eleven week strike, the parties agreed upon a retention bonus incentive scheme. The parties now disagree over how the bonus, which was payable in early 2007, ought to be calculated. The language central to the dispute describes the bonus amount as a percentage, either 4% or 8% depending on certain circumstances, of "the employee's regular base salary (not including things like unscheduled overtime, allowances, or premiums) for 2006" (Letter of Agreement – Discretionary Incentive Programs (the "LOA") B (b) (i) & (ii)).

The Union asserts that it means that an employee who meets the eligibility requirement of the LOA is entitled to the appropriate percentage of their salary as set out in Appendix "A" of the Collective Agreement regardless of how much they actually worked in 2006. For its part the Employer says that "regular base salary" means the amount of salary employees actually earned in 2006 less those items specifically excluded.

Both parties assert that their interpretation is clear on the plain and ordinary meaning of the words in the context in which they appear and of the Collective Agreement as a whole. In the alternative, the Employer submits that if the language is ambiguous then a consideration of the extrinsic evidence of collective bargaining will make its position even clearer. The Union says that the extrinsic evidence will be of no assistance. Finally, and in the further alternative, the Employer submits that if I accept the Union's interpretation then based upon the events at bargaining the Union should be estopped from relying on its contractual rights.

LOA

The relevant portion of the LOA is as follows:

> B. Retention Bonus Program
>
> The Employer will implement a retention bonus program to reward EKATI employees in the bargaining unit for remaining with EKATI for the balance of 2006.

The details of the program are:

a. The bonus payment will be lump sum payment to each eligible employee payable after December 31, 2006. Any deductions required by law will be withheld by payroll.
b. The amount of the bonus will be as follows:
    i. For employees who have been Northern residents for the entire eligibility period, the bonus will equal 8% of the employee's regular base salary (not including things like unscheduled overtime, allowances, or premiums) for 2006.
    ii. For all other employees, the bonus will be 4% of the employee's regular base salary (not including things like unscheduled overtime, allowances, or premiums) for 2006.
c. Each employee will be eligible for the bonus, provided they are hired no later than June 30, 2006, and provided they remain employed at EKATI up to and including December 31, 2006 and have not given notice of resignation before that date.
d. This is a discretionary program. The Employer wil decide if it, or any similar program, will be offered again for future years.
e. The bonus payments are not considered pensionable earnings.

This letter of Agreement terminates effective December 31, 2006.

Facts

The parties presented the following Agreed Statement of Facts. I will not set out the material referenced therein unless necessary.

1. The Union and the Company are parties to their first collective agreement which had an expiry date of August 31, 2007. The agreement was ratified on June 30, 2006. A copy of that collective agreement is attached at Tab 1.

2. This collective agreement was achieved after a lawful strike from April 7, 2006 to the end of June, 2006 during which some employees participated in lawful picketing activities and did not attend at work.
3. On or about January 21, 2007, the Company advised its employees that it would include payment of the Retention Bonus on employee's January 21, 2007 pay. A copy of the memorandum setting this out is attached at Tab 2.
4. Thereafter, eligible employees received Retention Bonus payments from the Company.
5. The Company calculated the Retention Bonus on the amount of annual base salary actually earned by the employee over the 2006 year.
6. As a result, in the case of employees who were at the same level on the Salary Range Table set out on page 28 of the collective agreement, those employees who were absent from the workplace for part of the year received a smaller Retention Bonus than those employees who did nor miss any work time. For example, those employees who participated in the strike were affected in this manner.
7. The Union filed grievance #07-001 on January 29, 2007 and a copy is attached at Tab 3.
8. The Company replied to the grievance on February 10, 2007 and a copy of the reply is attached at tab 4.
9. The Union advanced the grievance to arbitration by letter dated February 23, 2007 and a copy is attached at tab 5.
10. The parties reserve the right to call further evidence in this matter.

The parties did exercise their right to call additional evidence. The Union called Shawn Vincent, currently its Classification & Equal Pay Officer, who at the time of bargaining was a Research Officer assigned to assist Carol Wall the Union's chief spokesperson. As such he assisted in the preparation of the Union's proposals and the analysis of the Employer's proposals. In so doing, he met regularly with Wall and the negotiating committee and attended some but not all of the bargaining sessions. Wall is no longer with the Union and works for the Federal mediation services. In preparation for his testimony Vincent had access to her files and notes from bargaining. The Employer called Kim Thorne its chief spokesperson and Roy Lenardon who at the time was its Vice-President of Human Resources

and External Affairs. Thorne is a management side labour relations lawyer who has negotiated in excess of thirty collective agreements a third of which were first agreements. He attended all of the bargaining sessions but the first. Lenardon attended all of the bargaining sessions.

The first bargaining session after the strike commenced was held on May 25, 2006. The Union presented a proposal for the resolution of the dispute. After considering the proposal overnight the Employer advised that it needed more time to formulate its response and on that basis the parties next met on May 30th. At that meeting Thorne, as was his usual but not universal practice, started by providing an overview of the "final offer" he was presenting on behalf of the Employer. He stated that what the Employer was presenting would not all be liked by the Union but that the Employer had included some changes that it did not like. He explained that the proposal was designed to ensure that the agreement would be ratified. Of particular concern in that regard was the number of employees, estimated at that time to be in excess of 30% of the bargaining unit, that were not supporting the strike and had crossed picket lines to return or continue to work. The Employer's view was that to at least some of that group the reaching of a collective agreement would be perceived as a betrayal and, therefore, took the position that any agreement must address the concern of those employees or the agreement would not be ratified.

With that background the Employer provided the Union with its proposal and Thorne began the process of reviewing the changes it was suggesting to an earlier proposal it had tabled just prior to the strike. The Employer's first demand was the deletion of a compulsory union membership provision that the Employer had earlier agreed to. The second demand was for the inclusion of a provision prohibiting the Union from charging members of the bargaining unit different dues levels as a result of their conduct in working during the strike. This was inserted because the Employer had heard that the Union's constitution allowed it to use the dues structure to collect any income earned by working during a strike. It is not disputed that these proposals, as well as one further down in the proposal relating to the ratification process, were not well received by the Union. Thorne testified that although Wall did not immediately say anything, she stopped taking notes, put her pen down and was visibly shaking. For his part Vincent said the Union was outraged that the Employer would try to re-open items already signed-off. He was not watching Wall but agreed that she was upset.

In any event, Thorne continued down the list of proposals. The eighth item was the LOA which also included an already extant Ekati Incentive Program. The evidence as to what was said with respect to the Retention Bonus is very much in dispute.

Thorne testified that he first explained that the purpose of the bonus was to provide an incentive to employees to remain at Ekati. The payment would be in a lump sum. He explained the cost of living rationale for the distinction between Northerners and Southerners. As to the calculation of the amount Thorne indicated it would be paid on the basis of the appropriate percentage of regular salary earned during the year but would not include unscheduled overtime, allowances and premiums. Finally, in order to be eligible you had to be an employee in June and at the end of that year. Thorne noted that the copy of the proposal in his file had the phrase "base salary" underlined and the marginal note "i.e. total amount of salary over the year". He testified that he made that note prior to his presentation of the proposals to remind himself to make it clear how the bonus would be calculated. He acknowledged that it does not say "earned" but nonetheless specifically recalled advising the Union that it was in relation to earned salary.

Under cross-examination Thorne stated that in a "perfect world" it would have been better if his note included the word "earned" but that he did say it was based on earnings and although not totally sure he believed that he also told the Union that it was similar to the site allowance – a reference to an earlier dispute between the parties that will be more fully addressed below. Thorne testified that because of that earlier dispute and the diligence that the Union had displayed with respect to any questions of pay calculations that he believed that what the Employer was proposing was neither new nor contentious and that if the Union had any concerns or uncertainties it would have raised them.

Lenardon testified that when Thorne explained the Retention Bonus he used the term "earnings" but could not recall specifically whether it was said as just "earnings" or "salary earnings". He also kept notes of the bargaining session and acknowledged that his notes did not include the word "earnings". He explained that as "earnings" was a "given" to him it was not something he would have highlighted in his notes.

Vincent testified that although he recalled Thorne explaining the rationale for the different percentages he does not recall any discussions about how the amount would be calculated. His notes, as well as those of Wall, contain no reference to "earnings". Given his role in the negotiations and the effect of an earnings based calculation on those employees who supported the strike, Vincent believed that that if "earnings" had been raised it would have been noticed by him and recorded in his notes.

Under cross-examination Vincent testified that he relied on his and Wall's notes in the giving of his evidence because he could remember some but not all of what was said. He agreed that his notes did not include all of the elements of the bonus explained by Thorne. He acknowledged that although he does not recall Thorne mentioning "earnings" it is possible that he did do so and that the Union had "tuned out" the Employer after becoming upset about the initial proposals.

After Thorne had completed his review of the Employer's proposal, Wall expressed the displeasure of the Union with the elements of the proposal that related to union security and the internal affairs of the Union. She then advised that the Union would need some time before it could fully respond. The next day the Union tabled its counter proposal which included the acceptance of the LOA. The only clarification sought was that all members of the bargaining unit were eligible for the incentives. That was confirmed by the Employer in its written counter proposal that was provided in the afternoon of May 31st. After that counter proposal was made the negotiations broke off.

Shortly after the breakdown in negotiations the Employer decided to unilaterally implement its last offer with respect to the members of the bargaining unit. In furtherance of that Thorne wrote a letter to Wall dated June 7, 2006 indicating that the Employer's intention to implement a number of changes, including the Retention Bonus incentive, which were described as being "essentially the same as were tabled in the employer's last offer". The Bonus Retention program was addressed in the following terms:

> The Bonus retention program as set out in our last offer will be introduced. This will provide a bonus of 8% of earned salary for Northern Residents, and 4% for other employees, provided they are on the payroll between June 30, 2006 and December 31, 2006.

The Union through legal counsel, not the counsel in this proceeding, responded in a letter dated June 12th in which, amongst other thing, requested the Employer delay implementation pending the determination of certain outstanding legal disputes. No mention is made in this letter of the manner in which the Retention Bonus is to be calculated.

Vincent testified that he was unaware of Thorne's June 7th letter until he saw it in Wall's file. Under cross-examination he agreed that if Wall, the Union or its counsel were concerned about the calculation of the Retention Bonus it could have been raised in its reply to Thorne or in subsequent negotiations that were attended by both counsel and Wall. He was not aware of the issue ever being raised in either of those contexts.

Thorne testified that he and Wall had developed and tried to maintain a professional relationship with respect to bargaining. If either of them had any concerns they would communicate by telephone or email. No concern was ever raised by Wall about the calculation of the Retention Bonus after he sent his June 7th letter up to and including the negotiations that led to the final resolution of the dispute in the latter part of June.

Mention was made earlier to a dispute with regard to the site allowance which requires some explanation. Fairly early in the collective bargaining process a dispute arose between the parties over the manner of the calculation of what was called a site allowance payable to employees under their personal contracts of employment. Like the Retention Bonus the site allowance was percentage based benefit. In April of 2005 the parties reached a Memorandum of Settlement signed on behalf of the Union by Wall. The thrust of Thorne's testimony was that in the process of explaining what was included and how the base salary component was calculated he relied upon a pay stub and that, if not explicit, it was at least implicit, that the calculation of base salary in the context of a benefit such as this related to actual earnings.

Positions of the Parties

Union

Briefly summarized the position of the Union is that the language of the collective agreement is clear and unambiguous. On its plain and

ordinary meaning the phrase "regular base salary" means the amount of the employees' salaries set out in Appendix "A". On that basis it argues that resort to extrinsic evidence is not necessary. Further, and in any event, the Union submits that the bargaining history evidence relied upon by the Employer is of no interpretive assistance. Finally, the Union says that it is not estopped from relying on its contractual rights.

In arguing that the language is clear and unambiguous the Union submits that the appropriate starting point is the purpose of the provision which the collective agreement states to be to reward employees to stay at Ekati until the end of the year. In general terms it observes that provisions with this purpose were until recently rare in collective agreements and are unique in the sense that they are designed not as compensation for or a reward for hard or highly productive work performed but rather for remaining with an employer and not taking another job.

Next, the Union notes that the details of the plan are specific; it will be paid in a lump sum after December 2006, it will be subject to the appropriate statutory deductions, there will be two levels of bonus paid depending on residence, eligibility is based upon specific start by and stay to dates, the continuation of the program after 2006 is discretionary, and it is not pensionable income. The Union contrasts that degree of specificity to what is not specified and that is an intention to distinguish or discriminate against employees who were on the picket line or respecting the strike. The Union also points to the failure to specify the circumstances of paternity or maternity leaves which it argues is consistent with the goal or purpose of retaining employees even if they are absent from work. The significance of these omissions is reinforced by the fact that there are specific exclusions from the calculation of the bonus, namely, unscheduled overtime, allowances and premiums. Given that degree of specificity as to both the plan generally and the bonus calculation specifically the Union submits that if the Employer wished the "regular base salary" to be limited to earned base salary it could have easily included the word 'earned'. In that regard the Union notes that the language in question was drafted and proposed by the Employer through a seasoned negotiator and that it was not amended by the Union.

The Union then submits that resort may be had to the balance of the collective agreement to see how words and phrases are used elsewhere and to provide consistency within the agreement. In that regard the Union notes

that under Article 13.09 I have no jurisdiction to alter or amend the collective agreement.

The Union commences its review of the collective agreement with Appendix "A" which indicates that employees are to be paid an annual salary based on the levels set out therein. It notes that the percentage increases to those salaries are presumably calculated upon these salary levels not any concept of actual earnings. In Article 2, the definition provision, the parties have not defined 'salary', base salary' or 'regular base salary'. In Article 5 the parties have agreed that there will be no discrimination on the basis of Union activity which the Union submits is significant in arriving at an interpretation that is internally consistent. Article 17 addresses the existence of overtime other than that that is regularly scheduled and in 17.02(b) sets out the calculation of the hourly rate as a fraction of the annual base salary. Article 20 through 22 contemplate the ability of employees to take time off. In Article 25.04 severance and loss of recall rights compensation is stated to be paid in terms of salary. Finally, Article 30 is the site allowance that is calculated as a percentage of the base salary. It includes compensation for statutory holidays, scheduled overtime and flight delays whether worked or encountered. In sum, the Union says that in many instances the term salary is used in the collective agreement without a requirement of it being earned. Indeed, where it relates to items such as leaves it is clearly contemplated that this relates to when the employees are off work.

With respect to the plain meaning of the language in dispute directly and in the context of the collective agreement as a whole the Union relied upon arbitral authorities as follows. If the parties, and in this case the Employer, wished to change a conventional meaning of a term it should be expressly stated (see *Amalgamated Electric Corp. Ltd. -and- United Electrical, Radio and Machine Workers of America*, (1952) LAC 949 (Laskin, Dillon & Woodsworth – Ont.)). In establishing that conventional meaning the Union refers to *Wean United Canada Ltd. -and- UAW, Local 1566*, (1975) 8 LAC (2d) 399 (Weatherill – Ont.) the base rate is the salary rate, *Newfoundland Hospital Association -and- Newfoundland Association of Public Employees*, (1987) 32 LAC (3d) 55 (Thistle, Shortall & Orsborn – Nfld.) 'regular salary' means the amount of compensation an employee is entitled to for a specified period of time and not the amount actually paid and *Eastern Provincial Airways (1963) Ltd. -and- Canadian Airline*

Employees Assoc., (1977) 14 LAC (2d) 316 (Woolridge – Nfld.) where actual work was not related to an obligation to pay salary.

In conclusion with respect to its plain and ordinary meaning argument the Union submits that the language is sufficiently clear to meet the onus the Employer seeks to have placed upon the Union of clear, express language to confer a monetary benefit. The only possible uncertainty with respect to the this language is whether the regular base salary used for the calculation of the bonus is that as of December 31st, which the Union submits is the correct basis for the calculation or an amount calculated to accommodate the changes in the regular base salary during the year.

As part of its alternative argument that the extrinsic evidence is "completely unhelpful" in resolving an ambiguity in the language, if one is found, the Union extensively canvassed the evidence with respect to May 30th meeting as well as the June 7th letter and subsequent events.

With respect to the May 30th meeting in the Union's submission at its very highest from the Employer's perspective the most that can be said is that the Employer used the term "earned" once while presenting its proposal. Thorne's evidence was that although he did not record it in his notes he did say "earned". Lenardon's recollection was that earnings was mentioned but he was unable to recall the exact phrasing used by Thorne. This is to be contrasted to Vincent who testified that he did not hear the term "earned" used and that if it had been he would have likely heard it. In the Union's submission this conflict can be easily resolved when considered in the context of the dynamics at the bargaining table at that time. As acknowledged by all, the Union bargaining committee was clearly upset over the first two items in the Employer's proposal. As a result the Union submits the committee was not listening and did not hear what Thorne said. The failure in the circumstances was not to ensure that the parties understood each other.

With respect to the June 7th letter from Thorne to Wall the Union submits it is not helpful because from a practical, but not necessarily strictly legal, perspective the deal with respect to the Retention Bonus had been done on May 31st. In any event, the letter does not claim to exactly replicate what was proposed or said at the bargaining table but only essentially what had been offered. Moreover, it neither sought clarification of the acceptability of the concept of earned salary nor asked if there were any

problems in that regard. Finally, the Union says that it is noteworthy that the letter was not presented at the bargaining table and, therefore, was not part of the bargaining process.

As to the ensuing events the Union submits that it is significant that the issue was never raised or clarified at the bargaining table when mediation resumed later in June. Finally, in that regard the Union submits that it is noteworthy that in the Memorandum of Settlement reached at mediation that the Employer specifically addressed the pension issue, which the Union characterizes as relatively minor, while not including any reference to the Retention Bonus plan.

In summary on this issue the Union submits that the evidence with respect to the Bonus Retention plan from its introduction on May 30th until bargaining was concluded indicates that the parties had different things in mind with respect to the calculation of the bonus and in that sense there was no meeting of the minds or evidence of any agreement in that regard.

In support of those submissions the Union referred to a number of arbitral authorities. I should note that the Union also referenced some authorities with respect to the use of extrinsic evidence in the form of past practice but as that was not relied upon by the Employer I have not canvassed them here.

Vibrant Health Products Inc. -and- Cement, Lime and Gypsum Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge D400, [2004] BCCAAA No. 127 (Moore – B.C.) is a case where the language was found to be ambiguous and where it was determined that the parties genuinely held different views as to the overtime rate they had agreed on. Relying on B.C. Labour Relations Board ("BCLRB") authority the applicable test or approach in those circumstances was stated to be how a reasonable person in the shoes of the other party or a reasonable third party would have interpreted what was said or done in bargaining. The Union also refers to the case for its review of the oft-cited proposition from *Noranda Mine Ltd. (Babine Division) -and- USWA, Local 898*, [1982] 1 WLAC 246 (Hope – B.C.) that an onus is on the union to establish that an employer has in clear and unequivocal language agreed to provide a monetary benefit. In particular the Union relies on the observation of Arbitrator Hope in a subsequent case (*B.C. Hydro and Power Authority -and- IBEW, Local 258*,

(unreported – 1987)(Hope – B.C.)) that it is unlikely that an employer would use unclear or ambiguous terms to reflect its intention when conferring a monetary benefit. On this basis the Union argues that if had intended to pay a bonus based upon the regular base salary actually earned the Employer would have used clear language to that effect.

Federated Co-operatives Ltd. -and- Miscellaneous Employees Teamsters, Local 987, (2004) 130 LAC (4th) 185 (Ponak –Alta.) is a case dealing with the accrual of vacation entitlement while on maternal or parental leaves. Arbitrator Ponak held that vacation entitlement did accrue while employees were on these leaves. The Union relies on this case for the principle that limitations on benefits ought to be expressly stated.

In *Atco Lumber Ltd. -and- IWA-CANADA, Local 1-405*, [2004] BCCAAA No. 105 (Gordon – B.C.) the parties were found to have not turned their minds to the entitlement to a benefit of employees who were absent in certain circumstances. Arbitrator Gordon canvassed the BCLRB and B.C. arbitral authorities in this regard and described the appropriate approach as "a genuine search for the parties' intention in all of the circumstances including the nature and purpose of the provision and the nature of the employee absence" (at para. 32).

United Tire and Rubber Manufacturing (Toronto) Ltd. -and- United Rubber Workers, Local 973, (1979) 23 LAC (2d) 434 (Haladner – Ont.) is an example of a case where the nature of the benefit was taken into consideration in determining if employees not actually working were entitled to it. In this context the Union argues that as both Vincent and Thorne indicated that there was a concern that some striking employees may not return, to interpret the bonus provision in a manner that would compensate returning workers less than those that remained at work would be inconsistent with the purpose underlying the bonus. With respect to that purpose reference was also made to *Cambie Forming Ltd. -and- Construction and Allied Workers' Union, Local 68*, [2006] BCCAAA No. 231 (Germaine – B.C.).

Next the Union refers to a case between these parties with respect to the same round of collective bargaining in relation to a dispute over whether some proposals made by the Employer survived the bargaining process and were included in the collective agreement (*BHP Billiton Diamond Inc. -and- PSAC*, (2007) 161 LAC (4th) 152 (Burke – Can.)). In that case Arbitrator

Burke addresses the concept of mutual mistake in the context of collective bargaining.

The Union also relies on *The Globe & Mail (Advertising Department) -and- The Southern Ontario Newspaper Guild, Local No. 87*, (unreported – February 3, 1987)(Joyce – Ont.) for its observations as to the effect of silence in bargaining on the ultimate interpretation of the collective agreement. Arbitrator Joyce describes silence as an effective and intelligent bargaining tool where a party wishing to avoid confrontation that could potentially derail negotiations can say nothing in response to the explanation of a proposal given by its proposer and instead take its chances with an arbitrator's interpretation of the language. Faced with that silence the proposer of the provision merely has to inquire as to what the other party's position is and act upon the response. In the Union's submission this is what the Employer ought to have done in this case.

Employer

As noted above the Employer also takes the position that the plain and ordinary meaning of the language supports its interpretation of the provision. Its starting point is the ordinary definition of salary as a payment for services rendered (see *Black's Law Dictionary*, 6th Ed. & *Funk & Wagnells,* Canadian Ed.). Next, the Employer argues that there is nothing in the words of the agreement that either requires or necessarily implies that employees who meet the start and stay dates regardless of how long or how much they have actually worked in the calendar year 2006 would be entitled to receive the same degree of bonus. Further, the language of the collective agreement does not meet the onus placed on a union by the arbitral authorities to demonstrate in clear and unequivocal terms the monetary benefit it claims (see *Shaw Cablesystems GP -and- TWU*, [2002] CLAD No. 624 (Hickling, Gallagher & Berry – Can.), *MEC Titanic Productions Ltd. -and- UBCP,* [1997] BCCAAA No. 685 (Taylor – B.C.), *Cardinal Transportation B.C. Inc. -and- CUPE, Local 561,* (1997) 62 LAC (4th) 230 (Devine – B.C.) & *Weyerhaeuser Canada Ltd. -and- CEP, Local 10-B,* [2007] BCCAAA No. 127 (McPhillips – B.C.)). The Employer does not view a purposive analysis as helpful as the underlying purpose, to provide an incentive for employees to stay, is met on either of the interpretations proffered and, therefore, does not advance or aid either interpretation.

In general terms with respect to the interpretive task the Employer focuses on two principles. First, it submits that all of the words agreed to by the parties must be given meaning. In the Employer's submission the Union seeks to equate the LOA's "regular base salary" with the term "salary" set out in Appendix "A" which it argues renders the terms "regular" and "base" redundant. Further, if the Union is correct in its position then the specific exclusions of unscheduled overtime, allowances and premiums are also redundant if it is simply a matter of paying the salary level. Conversely, the inclusion of these exclusions, which are themselves earnings related, only makes sense if the "regular base salary" is itself earned.

Second, the Employer submits that the words should not be interpreted to create an ambiguity. Pointing to the words "for 2006" the Employer argues that the Union's position gives raise to an ambiguity as to what the annual salary for 2006 is given that Appendix "A" expressly contemplates the review of salary rates in June.

As did the Union, the Employer places extensive reliance on other provisions of the collective agreement. Starting with Appendix "A" the Employer notes that it establishes the potential range of the "annual salary" of employees within specific job classifications. Although expressed in terms of being "annual" the Employer submits that it is dependent on actual work performed and, thus, it is earned income. Moreover, as noted above, the Employer argues that it is significant that Appendix "A" does not include or use the term "regular base salary".

The Employer relies on Article 8.07 relating to Union Dues and Check-Off to demonstrate a provision where the parties have within the same article used the terms "earning", "salary" and "pay" interchangeably and all within the context of income earned. Similarly Article 11.03, which addresses the payment by the Employer and then reimbursement by Union of full-time elected officers on leave without pay, in terms of the employees being paid the "regular salary".

The Employer also references Article 17.02 the overtime rate calculation provision. It notes that, unlike the LOA, it specifically mentions "annual" in quantifying the "base salary" to be divided to establish the unscheduled overtime rate.

Article 30 provides for a site allowance of "17% of base salary" which is designed as compensation for statutory holidays, scheduled overtime and flight delays. The Employer notes that the calculation and payment of this allowance is based upon salary earned.

Finally, the Employer refers to Article 33 – Pay Administration which requires the Employer "to provide employees with semi-monthly pay statements showing" amongst other thing "base salary", allowances and unscheduled overtime. In the Employer's submission this is another demonstration of 'salary', and in this case "base salary", being used to reflect earned income.

In the context of these collective agreement provisions the Employer submits that its interpretation is consistent with the general usage of the term salary to reflect income that is earned and does not give rise to an ambiguity. In that regard, and contrary to the Union's assertions in relation to 'conventional meaning', the Employer points to *Pacific Press -and- Communications Workers of America, Local 226,* (1991) 22 LAC (4th) 241 (Fraser – B.C.) & *Amalgamated Electric Corp. Ltd. -and- United Electrical, Radio & Machine Workers of America,* (1952) 3 LAC 949 (Laskin – Ont.).

In the alternative, if the language is found to be ambiguous the Employer relies on extrinsic evidence in the form of bargaining history to support the interpretation it advocates. With respect to the evidential dispute over what was said and communicated in bargaining the Employer makes the following points in support of its position that the concept of the Retention Bonus being earnings based was communicated to the Union. First, there is Thorne's recollection of what he said at bargaining on May 30th which the Employer submits is reinforced by his notes at least to the degree that they demonstrate the area was canvassed or emphasized at the meeting. Second, there is the testimony of Lenardon which corroborates that the concept of earnings was discussed. Third, there is the recognition by Vincent that the concept may have been mentioned but not heard by him and the Union committee. Fourth, there is the June 7, 2006 letter from Thorne to Wall with respect to unilateral implementation. In the Employer's submission this letter not only corroborates the testimony of Thorne and Lenardon but also stands alone as evidence that the position was conveyed by the Employer to the Union in the bargaining process. Finally, the Employer references the earlier discussions during collective bargaining with respect to the Site Allowance. In the Employer's submission this

demonstrates not only the care taken but also the nature of the parties understanding as to the calculation of benefits such as this. Taking all of this into consideration the Employer submits that it must be found that the Employer did clearly communicate to the Union the position that the regular base salary referred to earned income.

In assessing this evidence for the purpose of establishing the mutual intent of the parties the Employer submits that the appropriate test or approach is what a reasonable person or reasonable third party would conclude based upon what happened in bargaining (see *Vibrant Health Products Inc.)* This is an objective assessment of words and conduct (see *Teck Cominco Metals Inc. -and- USWA, Local 480*, (2006) 154 LAC (4th) 161 (Taylor – B.C.)). In the Employer's submission given that the position of the Employer was conveyed on two occasions without question or objection from the Union, although it did question and seek assurances with respect to another aspect of the Retention Bonus, a reasonable objective view of these circumstances is that the Union accepted the position of the Employer.

Turning to the Union's submission the Employer submits that the most the Union can say, as was posited by Vincent in his evidence, is that it did not hear what Thorne said. In response to that the Employer takes two positions.

First, it says that that is simply not the case. It points to Wall's notes of the May 30th meeting which shows her tracking the various components of the Employer's offer including the Retention Bonus. In any event, the Employer position was clearly communicated in the June 7th letter. Finally, the Employer notes that Wall did not testify that she did not hear Thorne or read the contents of his letter.

Second, the Employer submits that even if the Union somehow did not pick up on what was said and written this at most establishes a unilateral mistake on its part and that neither the risk nor the responsibility for that can be placed at the feet of the Employer (see *BHP Billiton Diamond Inc. -and- PSAC*, (2007) 161 LAC (4th) 152 (Burke – Can.). With respect to unilateral mistake the Employer relies on *Teck Cominco Metals Inc.* where it is stated:

> The rationales of fairness and risk assignment explain why, when two parties have held themselves out as reaching a final

> agreement, the law generally will not relieve one party of its unilateral mistake. Consistent with both of these rationales, however, it may be appropriate to provide such relief where the other party – the one not mistaken – knew or ought to have known of the mistake.
>
> (at p. 174)

The Employer submits that there is no evidence that it either knew or ought to have known that the Union had failed to pick up on the nature of its proposal. As to the consequence of a failure 'to pay heed to' or pay attention to' statements made in collective bargaining in the context of an assertion of unilateral mistake see *CSSEA -and- CSSBA*, [2005] BCCAAA No.158 (unreported – June 23, 2005 (Gordon – B.C.).

In the further alternative the Employer also argued that the Union ought to be estopped from relying on its interpretation of the provision. In light of the conclusion I have reached it is not necessary to set out the arguments of the parties in that regard.

Discussion & Decision

Both parties assert that their respective positions in regard to the meaning of the provision represent clear and unambiguous interpretations of the collective agreement. While the taking of these positions cannot and does not mean that the provision is in fact unclear and ambiguous I have concluded that the term "regular base salary" as used in the context of the LOA and the collective agreement as a whole is capable of more than one plausible meaning and, therefore, ambiguous. The authorities relied upon by the parties demonstrate, in my view, that the base term 'salary' is capable of more than one meaning and certainly does not have a conventional meaning that would, in effect, serve as a default position that would govern absent any indications to the contrary. Further, it is clear that in this collective agreement the parties have used 'salary', modified in a variety of ways, to have different meanings. In light of this conclusion it is open to me to resort to extrinsic evidence for interpretive assistance. Before considering that evidence, including making determinations with respect to evidential disputes, in my view, it is appropriate to focus first on the language adopted by the parties. I say that because extrinsic evidence is only an aid to interpretation and need not be considered determinative. Rather, in my

opinion the primary interpretive task should be a consideration of the language of the collective agreement.

I start by observing, as was noted by the Union, that the collective agreement contains no definition of the term 'salary' or any iteration thereof. It is also readily apparent that 'salary' is used extensively in the collective agreement. From a review of the provisions referenced by the parties it is used both to indicate a level or amount of income and the amount of income earned. Finally, in terms of general observations, it is noteworthy that nowhere other than the LOA is the term "regular base salary" used. Thus, I conclude that while collective agreement wide context is an important tool and consistency a key aim of collective agreement interpretation the resort to other 'salary' referencing provisions is of limited assistance in the interpretation of the language in dispute. Rather, in my view, the primary contextual focus must be the language of the LOA itself.

As noted above the phrase "regular base salary", particularly considered in isolation, is not self-defining and is ambiguous in the sense of it being capable of more than one plausible meaning. The parties did not, however, use the term in isolation. Rather, it is stated to specifically exclude "things like unscheduled overtime, allowances or premiums". Both parties used these exclusions to support their positions but from entirely different perspectives. The Union argues that the exclusions support its argument that the provision as a whole is sufficiently specific in nature that one would expect the concept of a limitation to earnings would be set out if that was the parties' intention. From the Employer's point of view the inclusion of these exceptions, which it submits all arise in relation to what is actually earned, is indicative of an intention that "regular base salary" is also that which is earned. I accept the Employer's argument in this regard. In my opinion, if "regular base salary" was simply a reference to the salary figure in Appendix "A" then there would be no need to identify the specific exclusions. I attach some significance to the fact that equivalent terms were not used in that regard. Rather, by using the term "regular base salary" with specific exemptions that are earnings based the parties have, albeit not with absolute clarity, given the base phrase a context based on earnings.

Two other tenets, sometimes expressed as either rules or principles, of collective agreement interpretation are also supportive of the position of the Employer. First, there is the principle that all words used by the parties should be given meaning. I agree with the argument of the Employer that

the Union's interpretation does in many respects render redundant not only the words "regular" and "base" but also, and more significantly, the specific exemptions set out therein. Second, there is the rule that the creation of ambiguities should be avoided. As was correctly acknowledged by the Union, its interpretation would give rise as to an ambiguity as to how the bonus would be calculated in view of the mid-year adjustment of the salary levels.

Finally, I am not persuaded that a purposive analysis is of assistance as the underlying objective of providing bonuses to retain employment is met on either interpretation. While the amounts would clearly vary I cannot say that either interpretation would result in amounts that are inconsistent with that purpose. I have also not found the principle in *Noranda Mine Ltd.* which was relied upon by both parties to be of any assistance. It is not questioned that there was an intention to create a monetary benefit. The Union argues that the Employer, as the author of the language, had intended to limit the benefit it would be expected to do so in clear language. The Employer argues that the onus of clear language is on the Union to support a broader benefit. Thus stated it becomes a case of the *contra proferentem* principle meeting the *Noranda Mine Ltd.* principle. In the end I view these arguments as largely circular and in the circumstances of the facts of this case to be of no assistance.

Taking all of the above into consideration I have concluded that the interpretation advanced by the Employer is to be preferred. My conclusion in that regard is reinforced by a consideration of the extrinsic evidence with regard to bargaining. The first issue to be addressed is the dispute in the evidence. I conclude that the Employer did clearly communicate that its proposal, which was accepted by the Union, was predicated upon the concept of earned salary. I accept the evidence of Thorne and Lenardon that the concept of earned salary was communicated when the proposal was initially made by the Employer on May 30th. Their testimony was effectively unchallenged by Vincent whose initial testimony that it was not said was based on reconstruction, as to what he would have likely heard, rather than on specific recollection. Both the reconstructive nature of his evidence, which in fairness he did not seek to disguise or diminish, and the inherent danger in placing reliance on evidence of this nature was reinforced by his acknowledgement that it may well have been said but just not heard. My conclusion that it was clearly communicated at the May 30th meeting is also supported by the June 7th letter. I do not accept the Union's argument

that the letter is not on its face reflective of what had been proposed on May 30th. While I agree that the letter says that the terms included are only "essentially the same" as what had been proposed the portion of the letter dealing with the Retention Bonus is specific as to being "as set out in our last offer" and makes clear reference to earned salary. This letter written within a short time period after the May 30th meeting and apparently unchallenged in this regard is, in my view, corroborative of the matter having been addressed at that meeting.

I also view the letter of June 7th to itself form part of the bargaining history and as evidence of the clear communication of 'regular base salary' being earned. In my opinion, the notion that only what takes place in formal bargaining sessions may form part of the bargaining history is too narrow and artificial of an approach and does not reflect the realities of collective bargaining in general and the bargaining between these parties in particular. With regard to the latter the evidence of Thorne that he and Wall regularly communicated between bargaining sessions was unchallenged. I also do not accept the Union's argument that by June 7th the deal with respect to the Retention Bonus Plan was, in effect, done and, thus, the letter arrived after the fact. As the Union was painfully aware in the May 30th meeting earlier agreements were not binding and were subject to the conclusion of the entire agreement.

Finally, in this regard I note that I received no evidence from Wall, the chief negotiator and spokesperson for the Union and the recipient of the June 7th letter, that she was not aware that the concept of earned salary was part of the Employer's proposal.

I turn now to consider the effect of those determinations in the context of the other largely undisputed facts with respect to bargaining. In my opinion, those facts when viewed objectively and from the perspective of a reasonable third party support the conclusion that the mutual intention of the parties was to create an earnings based bonus. The Union faced with two opportunities to respond to the clear position of the Employer did not do so although it sought clarification with respect to another aspect of the bonus plan. The Union argues that the Employer failed to ensure that the Union understood the proposal and agreed with it. With respect there is nothing in the circumstances of this case that suggests that either the Employer knew or ought to have known that the Union did not fully appreciate what the Employer was proposing. In my view it is not reasonable to infer or

conclude that based on the Union's reaction to the earlier portions of the proposal on May 30th the Employer should have realized that the Union either did not hear or comprehend what was being offered. This is particularly true where, as here, a clarification was sought with respect to another element of the plan.

I also do not accept the Union's argument with respect to the effect of silence. I recognize that silence in the bargaining process may well play a useful role in the management of the process and in particular the management of emotion. However, in my view, to use it as a vehicle to found later arguments as to intention is potentially highly problematic and, with the greatest respect, strikes me as contrary to and inconsistent with the promotion of efficient and effective good faith collective bargaining. Having said that it is not an issue in this case as there is no evidence that in fact this was the tactic adopted by the Union.

In light of these conclusions it is not necessary to address the argument with respect to unilateral mistake and, as was, indicated above, the same applies to the Employer's alternative argument as to estoppel.

It follows that the Union's grievance is denied.

WAYNE MOORE, ARBITRATOR