

FINDINGS AND DECISION

IN A DISPUTE
between

CITY OF ST. JOHN'S
("the Employer")

and

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1075
("the Union")

Grievor: Fire Lieutenant Don Quinn

APPEARANCES:

For the Union:

Presenter: Mr. Ian Patey LLB
Advisor: Fire Captain Nurse
Witnesses: Fire Captain Nurse
Mr. Rick DeHann
Mr. John Hussey

For the Employer:

Presenter: Mr. Denis Mahoney LLB
Advisor: Mr. Kevin Breen, Director of Human Resources
Witness: Mr. Don Byrne

ARBITRATION BOARD

For the Employer: Mr. Claude Horlick

For the Union: Ms. Judy Vanta

Chairman: Mr. John Scott

The grievance was heard in St. John's, Newfoundland on October 31 & December 18, 2007

The Statement of Grievance reads: "... The Association wish to grieve a decision of the Employer regarding payment of unused annual leave upon retirement for Fire Lieutenant Don Quinn. The articles the Association wish to grieve are Article 13:00, 15:00 and any other article of the fire fighters collective agreement that may apply together with any City policy...."

THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed and had authority to hear the case;
- the Chairman's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were either properly observed or are waived;
- There are no other points to be raised as to arbitrability or other preliminary objections;
- all witnesses were excluded until all their testimony had been heard;
- issues of quantum, if any, would be considered separately and if the parties do not reach agreement within sixty (60) calendar days they will be referred to the Board for resolution;
- the Board will remain seized of the matter for period of sixty (60) calendar days after its publication should issues of interpretation of the Award arise.

ITEMS TAKEN INTO EVIDENCE:

- Consent #1 Collective Agreement ending December 31, 2006
- " #2 Statement of Grievance, February 13, 2006
- " #3 E-mail - Fire Chief Dwyer to Fire Captain Nurse, 2006/02/16 10:01 AM
- " #4 E-mail - Mr. Nurse to Fire Chief Dwyer, 2006/02/16 01:57 PM
- " #5 Letter - Fire Chief Dwyer to Fire Captain Nurse, Feb. 20, 2006
- " #6 Letter - Fire Captain Nurse to Fire Chief Dwyer, 2006 02 27
- " #7 Letter - Fire Chief Dwyer to Fire Captain Nurse, March 1, 2006
- " #8 Letter - Mr. Ronald Penney LLB to Fire Captain Nurse, 26 July 2006
- " #9 Letter - Fire Captain Nurse to Fire Chief Dwyer, 2006-08-08
- " #10 Email - Deputy Chief Jack Hickey to Fire Captain Nurse, 2006/08/14 12:34 PM
- " #11 Email - Fire Captain Nurse to Deputy Chief Hickey, 2006/08/14 02:44 PM
- " #12 Letter - Fire Captain Thomas Clark, to Fire Chief Dwyer, March 3, 2006
- " #13 Letter - Fire Chief Dwyer to Fire Captain Thomas Clark, March 8, 2006
- " #14 Letter - Fire Captain Nurse to Fire Chief Dwyer, March 11, 2006
- " #15 Letter - Fire Chief Dwyer to Fire Captain Nurse, March 13, 2006
- " #16 Letter - Fire Captain Nurse to Fire Chief Dwyer, March 11, 2006
- " #17 Letter - Fire Chief Dwyer to Fire Captain Nurse, March 24, 2006
- " #18 Sign Off Sheet, September 14, 2004
- " #19 Sign Off Sheet, October 28, 2004
- CN #1 Former Collective Agreement, ending December 31, 2003
- DB #1 City Opening Proposals, April 12, 2004, Article 15 Annual Leave
- " #2 Initial Proposals IAFF Local 1075, April 14, 2004
- " #3 City Proposal #2, May 5, 2004
- " #4 City Proposal #2, May 6, 2004, Article 14
- " #5 City Proposal #3, September 14, 2004, Annual Leave Article 15
- " #6 Collective Agreement CUPE Local 1289 Article 17:06
- " #7 Collective Agreement CUPE Local 569 Article 20:11

COLLECTIVE AGREEMENT ARTICLES CONSIDERED PARTICULARLY

ARTICLE 8 - GRIEVANCE PROCEDURE

8.08 The arbitration board named under this provision shall hear relevant evidence adduced relating to the difference or allegation and argument there-on by the parties or counsel on behalf of either or both of them and make a decision on the difference or allegation and the decision shall be final and binding upon the parties and upon any person on whose behalf this Agreement was made. The decision of the majority of the members of an arbitration board named under this provision shall be the decision of the board and if there is no majority, the decision of the chair shall be the decision of the board.

8.09 The arbitration board named under this provision shall not have the power to alter or change any of the provisions of this Agreement or to substitute any new provisions for any existing provisions, or to give any decision inconsistent with the provisions and terms of this Agreement. However, the arbitration board shall have the power to dispose of any discharge of discipline grievance by any arrangement which in its opinion it deems just and equitable.

ARTICLE 13 - SICK LEAVE

13.05 Subject to Clause 13.07, when an employee has reached the maximum of the sick leave which may be awarded him/her in accordance with this Article, s/he shall, if s/he is still unfit to return to duty, proceed on annual leave (including current, accumulated and accrued leave) if s/he is eligible to receive such leave, or if not, on special leave without pay.

13.06 Where, in the opinion of the Director, it is unlikely that an employee will be able to return to duty after the expiration of his/her accumulated sick leave, s/he may be required by the Director to undergo a medical examination. If it appears from such examination that it is unlikely that the employee will be able to return to duty, then the employee may be retired when his/her accumulated sick leave has expired or at retirement age, whichever occurs first, and paid such pension award as s/he may be eligible to receive.

ARTICLE 15 - ANNUAL LEAVE

15.01 Subject to 15.01 (c), the maximum amount of annual leave which an employee (other than a **relief/temporary employee**) shall be eligible for in any year, shall be as follows:

- (a) Rotating Shift Employees
 - (i) Less than one year of service -**Twelve (12) hours** of a twenty-four (24) hour shift for each month of service which the employee has had in the year concerned up to a maximum of **one hundred and twenty (120) hours.**
 - (ii) **In the calendar year of the 1st anniversary** **120 hours**
and each year thereafter
 - In the calendar year of the 5th anniversary** **144 hours**
and each year thereafter
 - In the calendar year of the 10th anniversary** **192 hours**
and each year thereafter
 - In the calendar year of 15th anniversary**

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|-----|--|------------------------|
| | and each year thereafter | 216 hours |
| | In the calendar year of the 20th anniversary | |
| | and each year thereafter | 240 hours |
| | In the calendar year of the 25th anniversary | |
| | and each year thereafter | 264 hours |
| (b) | Non rotating shift employees: | |
| | One year or more | 15 working days |
| | In the calendar year of the 5th anniversary and each year thereafter | 20 working days |
| | in the calendar year of the 15th anniversary and each year thereafter | 25 working days |
| | In the calendar year of the 25th anniversary and each year thereafter | 30 working days |
| (c) | (i) no annual leave may be taken by an employee until s/he has had not less than sixty (60) days of service prior to taking leave; | |
| | (ii) when an employee has had not less than sixty (60) days of service, s/he may anticipate annual leave to the end of the period of his/her authorized employment or to the end of the year concerned, whichever is the shorter period. | |
| | (iii) when an employee becomes eligible for any additional leave, s/he shall receive such leave for the full year in which his or her anniversary falls. | |

15.02 For the purpose of this Article, an employee who is paid full salary of wages in respect of not less than two-thirds ($\frac{2}{3}$) of the days in the first or last calendar month of his/her service shall, in each case, be deemed to have had a month of service, otherwise their vacation entitlement for that month shall be pro-rated and their annual entitlement adjusted.

15.03 Annual leave shall be documented and confirmed by the Director or his/her designate.

15.04 Annual leave may be deferred, withheld or curtailed in such manner and to such extent as the Chief Commissioner may deem necessary if the exigencies of the public service so require.

- 15.05 (a) **The amount of vacation that an employee may carry over to the next year shall not exceed that employee's normal entitlement and thus the maximum amount of unused vacation that shall be due to any employee at any time is limited to twice his annual entitlement**
- (b) Annual Leave displaced with sick leave can be carried forward over and above 15:05 a & b, but must be taken within one year.
- (c) Subject to Clauses 15.03, 15.04 and 15.09, the annual leave accumulated by an employee pursuant to sub-clauses (a) or (b) hereof may be taken by him/her at any time in addition to his/her concurrent annual leave.
- ~~(d) Annual Leave displaced with sick leave can be carried forward over and above 15:05 a & b, but must be taken within one year. (Duplicated in error .. See "(b)" above.~~

- 15.06 Where an employee qualifies for sick leave of a minimum of one shift or more during the vacation period for rotating shift workers; or 1 day or more for non-rotating employees, the period of vacation so displaced shall be reinstated for use at a later date subject to the operational requirements of the Department and the approval of the Director. Any claim for sick leave under this Article must be certified by a medical doctor.
- 15.07 In an incomplete year before termination of employment for any reason other than retirement, an employee may receive a proportionate part of his/her annual leave for that year computed in full days on the basis of complete calendar months.
- (a) On retirement an employee shall be entitled to the same vacation or vacation pay which she/he would have earned if she/he continued in employment to the end of the calendar year.
- 15.08 Periods of special leave without pay in excess of twenty (20) days in the aggregate in any year shall not be reckoned for annual leave purposes and the employee's period of service shall be noted accordingly.
- 15.09 (a) Vacation leave shall be scheduled annually on the basis of seniority within the classification and within the period commencing June 22 of each year until five (5) periods of vacation have concluded. Vacation shall be scheduled for one (1) period at Christmas, this period will include New Years Day. For the purposes of granting vacation leave, classification seniority shall be used.
- (b) Employees who are entitled to more than **one hundred and forty four (144) hours** of annual leave each year shall take leave over and above **one hundred and forty four (144) hours** outside the periods stated in Article 15:09 (a). For the purpose of granting vacation leave, classification seniority shall be used.
- 15.10 Part-time employees who work in excess of 50% of the normal working hours for their classification shall be eligible for annual leave on a pro-rata basis in accordance with the provisions of this Article.
- 15.11 Vacations shall be posted in each division by Feb. 28 of each year. **An employee may defer any or all of his/her scheduled Annual Leave provided notice in writing is received by the Employer 30 days prior to the commencement of the individuals scheduled vacation period.**

ARTICLE 29 - AMENDMENT BY MUTUAL CONSENT

- 29.01 This Agreement is the entire Agreement of the parties hereto, terminating all prior agreements and practices with respect to the matters specifically referred to herein.
- 29.02 Any provision of this Agreement other than the duration of agreement may be altered or amended by mutual consent of the parties hereto.

ARTICLE 40 - RELIEF EMPLOYEES

40.07 Vacation

The provisions of Article 15 shall not apply and relief employees shall receive, in lieu of vacation, vacation pay amounting to 6% of gross bi-weekly earnings. Such vacation pay will be paid with the employees (*sic*) regular pay cheque.

CORRESPONDING ARTICLES FROM PRIOR COLLECTIVE AGREEMENT (CN #1)

ARTICLE 15 - ANNUAL LEAVE

- 15.01 Subject to 15.01 (c), the maximum amount of annual leave which an employee (other than a part-time employee) shall be eligible for in any year, shall be as follows:
- (a) Rotating Shift Employees
 - (i) Less than one year of service - One half (½) of a twenty-four (24) hour shift for each month of service which the employee has had in the year concerned up to a maximum of six (6) shifts.
 - (ii) Vacation Years - 1 to 10 calendar year of service: 6 shifts
Vacation Years - 11 to 20 calendar year of service: 8 shifts
Vacation Years - 20 + calendar year of service: 10 shifts
 - (b) Non rotating shift employees:
 - (i) Less than one year of service - One and one quarter days for each month of service.
 - (ii) Vacation Years - 1 to 10 calendar year of service: 15 days
Vacation Years - 11 to 20 calendar year of service: 20 days
Vacation Years - 20 + calendar year of service: 25 days
 - (c)
 - (i) no annual leave may be taken by an employee until he/she has had not less than sixty (60) days of service prior to taking leave;
 - (ii) when an employee has had not less than sixty (60) days of service, he/she may anticipate annual leave to the end of the period of his/her authorized employment or to the end of the year concerned, whichever is the shorter period.
 - (iii) **When an employee becomes eligible for any additional leave, he/she shall receive such leave for the full year in which his or her anniversary falls.**
- 15.02 For the purpose of this Article, an employee who is paid full salary of wages in respect of not less than two-thirds () (*sic*) of the days in the first or last calendar month of his/her service shall, in each case, be deemed to have had a month of service, **otherwise their vacation entitlement for that month shall be pro-rated and their annual entitlement adjusted.**
- 15.03 Annual leave shall be documented and confirmed by the Director or his/her designate.
- 15.04 Annual leave may be deferred, withheld or curtailed in such manner and to such extent as the Chief Commissioner may deem necessary if the exigencies of the public service so require.
- 15.05 In respect of leave which may be carried forward, the following shall apply:
Rotating Shift Employees
- (a) An employee may carry forward to another year any portion of annual leave not taken by him/her in previous years until, by so doing, he/she has accumulated:

- (i) Eight (8) shifts of annual leave, if he/she is eligible for six (6) or eight (8) shifts in any year;
- (ii) Ten (10) shifts of annual leave, if he/she is eligible for ten (10) shifts in any year.

Non-rotating Shift Employees

- (b) An employee may carry forward to another year any portion of annual leave not taken by him/her in previous years until by so doing he/she has accumulated:
 - (i) twenty (20) days annual leave, if he/she is eligible for fifteen (15) or twenty (20) days in any year.
 - (ii) twenty-five (25) days annual leave, if he/she is eligible for twenty five (25) days in any year.
- (c) Subject to Clauses 15.03, 15.04 and 15.09, the annual leave accumulated by an employee pursuant to sub-clauses (a) or (b) hereof may be taken by him/her at any time in addition to his/her current annual leave.
- (d) **Annual Leave Displaced with sick leave can be carried forward over and above 15:05 A&B, but must be taken within one year.**

15.06 Where an employee qualifies for sick leave of a minimum of one shift or more during the vacation period **for rotating shift workers; or 1 day or more for non-rotating employees**, the period of vacation so displaced shall be reinstated for use at a later date subject to the operational requirements of the Department and the approval of the Director. Any claim for sick leave under this Article must be certified by a medical doctor.

15.07 In an incomplete year before termination of employment for any reason other than retirement, an employee may receive a proportionate part of his/her annual leave for that year computed in full days on the basis of complete calendar months.

- a) On retirement an employee shall be entitled to the same vacation or vacation pay which she/he would have earned if she/he continued in employment to the end of the calendar year.

15.08 Periods of special leave without pay in excess of twenty (20) days in the aggregate in any year shall not be reckoned for annual leave purposes and the employee's period of service shall be noted accordingly.

15.09

- a) Vacation leave shall be scheduled annually on the basis of seniority within the classification and within the period commencing June 22 of each year until four (4) periods of vacation have concluded. Vacation shall be scheduled for one (1) period at Christmas, this period will include New Years Day. For the purposes of granting vacation leave, classification seniority shall be used.
- b) Employees who are entitled to more than six (6) shifts of annual leave each year shall take leave over and above six (6) shifts outside the periods stated in Article 15:09 (a). For the purpose of granting vacation leave, classification-seniority shall be used.

- 15.10 Part-time employees who work in excess of 50% of the normal working hours for their classification shall be eligible for annual leave on a pro-rata basis in accordance with the provisions of this Article.
- 15.11 Vacation schedules shall be posted in each department by Feb. 28th of each year and shall not be changed except by mutual consent.

AGREED STATEMENT OF FACTS

The Parties provided the Board with an agreed statement of facts as follows:

- 1) The Grievor had twenty days annual leave for calendar year 2004 that he was entitled to carry forward into calendar year 2005.
- 2) The Grievor also accumulated thirty days annual leave for calendar year 2005.
- 3) The Grievor had fifteen days annual leave that were placed on the annual leave schedule in 2004, during which period he was off on sick leave.
- 4) The Grievor commenced sick leave on February 10, 2005 and remained off on sick leave until January 31, 2006, which was the date of his retirement.
- 5) In 2006 the Grievor also accumulated thirty days annual entitlement according to the provisions of the Collective Agreement.
- 6) On retirement it is agreed that Fire Lieutenant Quinn was paid 75 days annual leave, sixty days of which was annual leave entitlement, and fifteen days of which is disputed by the City, but no repayment is sought. The Association claims the Grievor should have been paid 80 days, and is claiming the five extra days that were not paid.
- 7) The days claimed are carried forward days. That is the issue before the Board. The dispute concerns the twenty days to be carried forward as distinct from the fifteen which were, in fact, paid.

OPENING STATEMENTS

FOR THE UNION, Mr. Patey described the grievance as over the interpretation of Article 15 insofar as it concerns Fire Lieutenant Quinn's annual leave entitlement due him at the time of his retirement. The Union claims that the Collective Agreement is clear on its face. Mr. Quinn was entitled to all annual leave in his annual leave bank: a total of eighty days. The City also argues the Collective Agreement is clear, and interprets it as requiring that the annual leave owing is sixty days. (In the Employer's view, 15 days paid were in error, but is not seeking repayment.)

From the fact that there are two opposed interpretations, it is clear that there is a latent ambiguity in the Collective Agreement. It is the Union's submission, therefore, that the Board hear extrinsic negotiating history and past practice evidence in order to make a determination.

At issue is Article 15, governing unused annual leave, and particularly what happens to annual leave while the employee is on sick leave. Normally the annual leave carryover is limited to one year in addition to the one year entitlement; so that an employee is entitled, at most, to two times the annual leave entitlement. However, the Collective Agreement makes an exception for an employee on sick leave. In such a case any annual leave that has been displaced can be carried over, so that, in that circumstance, one can exceed the two times maximum.

The Union argues that the Collective Agreement is clear on this, and that the accrued annual leave should include any annual leave displaced by sick leave. If a firefighter returns to work, the Collective Agreement allows for that displaced leave to be taken so that the returning employee does not lose the earned benefit. The Collective Agreement, and past practice, both allow that, on retirement, an employee is paid out any unused portion of annual leave as vacation pay.

It is clear that annual leave is an earned benefit. In the Union's view, pay out of earned benefits on retirement must include annual leave displaced by sick leave. Thus, a firefighter should be able to receive as pay in lieu of leave any earned annual leave that exceeds the double annual leave entitlement. In the Union's view, that is what the Collective Agreement says.

The Union acknowledges the Collective Agreement is silent about payment of leave on retirement, but that has been the past practice. In the most recent negotiations there was no change to the Collective Agreement that could justify any change to the annual leave payout on retirement. Nothing has changed in the new Collective Agreement to eliminate the past practice. **FOR THE EMPLOYER**, Mr. Mahoney noted two opening features of this Agreement. First, there are only two situations in which a person can be paid for annual leave: retirees, and relief employees, who get 6%. All others take annual leave with pay. It is not normal practice to pay out annual leave. Second, this is a new Collective Agreement, with significant modifications to Article 15, including the clause in dispute.

Mr. Mahoney invited the Board to look at Article 15.05(a) and (b). These are key, but not, in the Employer's view, the only Articles in play. This Article sets out the rule that the maximum is two times the annual leave entitlement. This is the new language of the new Collective Agreement, and the force of this rule is the main thrust of the Employer's argument.

Article 15.05(b) is the sick leave clause in effect in 2005, when the Grievor had fifteen days scheduled. It was, therefore, appropriate that only those fifteen scheduled days should go forward. But the issue of retirement is an even more important consideration.

In the case of retirement, any sick leave displaced annual leave over the maximum of two times must be taken within one year. If it is not taken, it is not paid out. The Grievor simply does not have any contractual right to have that excess annual leave paid out. There is no provision in the Collective Agreement to require it.

Mr. Mahoney agreed that both the Union and the Employer find the Agreement clear. In Mr. Mahoney's submission, therefore, no extrinsic negotiating history or past practice evidence is appropriate. There is no estoppel argument. Evidence of past practice is not applicable. Mr. Mahoney also directed the Board's attention to Article 29.01 which specifies: "This agreement is the entire Agreement of the parties hereto, terminating all prior agreements and practices with respect to the matters specifically referred to herein." Thus, there are no grounds to admit extrinsic evidence of negotiating history or past practice. The Parties must argue the meaning of this new Agreement as it stands.

The Grievor is entitled to sixty days, but the overpayment is not being sought to recover the fifteen days. The Parties seek an interpretation. The City is anxious to have the Collective Agreement language clarified.

Argument on the admissibility of extrinsic evidence

For the Union, Mr. Patey invited the Board to consider Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para. 3:4400 which sets out the conditions for the use of extrinsic evidence where an ambiguity is found in a collective agreement, and addresses the definition of latent ambiguity. The Parties have diametrically opposed positions as to what the clear language of the Collective Agreement says at Article 15.05. The meaning of "displaced" offered by the Employer is not the correct understanding of what the word means, in the Union's submission.

The Employer argues that the only annual leave that can be calculated is leave that was scheduled prior to the employee going on sick leave. Nowhere does Article 15 make such a reference to scheduled or non scheduled. It is an arbitrary distinction that the City has introduced. The Union's interpretation of "displaced" is any annual leave that persons cannot take because they are on sick leave. It is clearly an earned benefit, and should be treated as such.

Subclause 15.05(b) does not define the word "taken" in terms of a distinction between retiring employees and those returning to the workforce. In the Union's submission, the use of "taken" does not mean that failure to return to work dis-entitles the employee from the benefit.

In the Union's view, the fundamental problem for the City's position is that in the three instances that have been grieved, the initial adjudication supported the Union's interpretation of Articles 15.05(a) and (b). (Consent #5, Consent #13, Consent #17). In all, the interpretation was that the employee was entitled to twice the annual entitlement and then to any excess in respect of the annual leave that was displaced by sick leave. Three separate rulings have gone in favour of the Union, and have rejected the City's interpretation.

There is little or no doubt that there is at least a latent ambiguity in Article 15.05. The Union seeks permission to introduce bargaining history in order to show that the changes to Article 15 do not affect the earned benefit entitlement as it was administered under the previous contract, and that the City's current interpretation is inconsistent with past practice. The Union seeks permission to lead extrinsic evidence to this effect.

For the Employer Mr. Mahoney argued that the general rule on extrinsic evidence is that it should be excluded. The Association says the language is clear. The Association can't have it both ways. The Collective Agreement is either clear or it is not. The Association cannot speak out of two sides of its mouth by claiming that the Collective Agreement is clear and that there is an ambiguity.

The facts are very clear as well. The new Collective Agreement at Article 15, including 15.05, contains new contract language. Evidence of past practice is simply inadmissible under Article 29.01. For these two reasons the Union should be prohibited from introducing past practice evidence.

On the question of negotiating history, the City has evidence on the issue of bargaining history as well; and, in the City's view, it lends support to the City's interpretation. The City will want to call the Union's chief negotiator on that issue. But, nonetheless, the Employer does not want to lead this evidence in view of the clear and unambiguous sense of the language of the Collective Agreement. The Board should give the words their ordinary meaning. There are no special terms. The words are simple and straight forward. The words are "due", "displaced" and "taken". The link between scheduled and non-scheduled is directly tied to the word "displaced."

The Union claims that all the annual leave days are "in the bank" and therefore are due. The Collective Agreement does not, however, use the word "due". It says "taken". Retirees do not get annual leave paid out. They can take the leave, but not have the annual leave paid out. The City wants the language to be respected.

Mr. Dwyer's decisions in this matter (Consent #s 5, 13, & 17) have no authority for the Arbitrator. There is nothing in the jurisprudence to suggest that a difference in interpretation constitutes an ambiguity. There is no case law authorizing such an interpretation or supporting such a proposition. The City does not deny that there were mistakes made. These matters were referred on to the City's lawyer, Mr. Penney, who gave the correct interpretation, in the City's view (Consent #8). Mr. Penney's was the single decision that applied to all three cases.

In his rebuttal comments for the Union Mr. Patey again reminded the Board of the comments of Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para. 3:4410.

The Board considered the arguments of the parties, and ruled that, in view of the wording of Article 29.01(a), past practice evidence would not be permitted.

The Parties would be permitted to present argument on the issue of latent ambiguity, and to introduce negotiating history evidence that might disclose the existence of such a latent ambiguity. The Board will weigh any such negotiating history evidence.

THE FIRST UNION WITNESS was Fire Captain Charles Nurse who has 31 years service with the department and has been President of the Association for the last three years. He was also President from 1990 to 1994, served as Past-President from 1994 to 1996, served on negotiating and grievance committees, and held other positions in the bargaining unit. He was Chief Negotiator for the 1994 round, and sat as a member of the bargaining committee during the latest round

representing Local 1075. The contract expired in 2003. Negotiations took place during 2004. Mr. Nurse testified they had received a proposal from the Employer on Article 15.

As a committee, we got a proposal on Article 15 dealing specifically with Article 15, annual leave. The committee did a review of all articles put forward.

Mr. Nurse identified as CN #1 a copy of the previous Collective Agreement that expired on December 31, 2003, and confirmed that Article 15.01 in Consent #1 differs from Article 15.01 as it appears in CN #1. In particular, the change reflects the specification of durations. In Consent #1 durations are registered in hours, whereas in CN #1 they are registered in days.

That change, from my recollection, came from the Employer; and it was proposed as a non-monetary issue. 15.05(a) in Consent #1 does represent a change over CN #1. The language is converted to hours from shifts, and as a result the language at 15.05(a) was inserted. This was a non-monetary language change to reflect the overall amount of annual leave to which employees are entitled... When you go into negotiation you normally do the non-monetary items first and then go to salary and benefits at the end of bargaining. Monetary issues are dealt with last.

Asked if changes to Article 15 were treated as monetary items by the Union, he answered:

No. We had discussion among ourselves; the members of the committee did. It was Don Byrne, Rick DeHann, John Hussey, the Treasurer, and Scott Tilley and myself. The only change was to change shifts and days to hours. The Employer said that it was an administrative issue because it would be easier to handle hours rather than shifts and days.

Asked if there was any exchange or proposals concerning Article 15, Mr. Nurse said:

The only exchange I recall on that would have been coming from the Employer. The number of shifts and days were reflected in the number of hours as in the current Collective Agreement at 15.01.

Asked whether there was any proposal to change the entitlement, Mr. Nurse answered:

No, not in that round. They may have. I don't recall what proposals were calling for. We may have been looking for more annual leave.

Asked whether all the proposals concerning Article 15 came at once, Mr. Nurse said:

A number of proposals from them we consented to as not having monetary effect ... Yes, 15.05(a) was put forward as having no implications for anyone going on annual leave.

Asked whether the Employer had sought to limit entitlement under Article 15 during negotiations, Mr. Nurse answered: "Not to my knowledge."

Asked whether he claims, therefore, that there is still no change in terms of current practice, Mr. Nurse answered:

I do. The only change is how the annual leave is posted on the computer. It's a new posting in hours. It shows how much you can carry forward from the previous year to this year, and calculated in hours. Under the current Collective Agreement the calculation shows hours versus shifts and days.

Asked whether the current Collective Agreement operates according to his understanding of what was negotiated, Mr. Nurse answered: "Yes, it does."

Mr. Patey asked Mr. Nurse whether he understands that the proposed change to 15.05(a) in particular was to reflect what was already being done prior to negotiations, that the Employer would allow an employee to carry forward one year's entitlement? Mr. Nurse answered: "That's what we have always been eligible to do under normal circumstances."

Asked for his understanding of what was intended by Article 15.05(b), Mr. Nurse answered:

That basically was always in the Collective Agreement and already operating. It allowed an employee to accrue additional annual leave. It operates no differently now as then. I carry one year forward from one year to next, and if I am on sick leave, then any annual leave is displaced by sick leave because you can't be on two types of leave at one time. So I was able to accrue annual leave while on sick leave ... (If the leave was not used) one of two things happen. If you run out of sick leave, then you can use annual leave, or if you go to retirement and get paid at the end of the retirement year ... 15.05(b): retire and use unused annual leave in lieu of pay. Look at 15.05(d) and also 15.07(a) ...

Asked what happens if someone returns to work, Mr. Nurse answered:

The annual leave to which he is entitled is based on what he had on the book prior to sick leave and what he accrued while on sick leave... If he returned to work he'd be required to take the excess over the total. He must take any unused annual leave so as to maintain his annual rate of two years.

Asked what happens if the employee does not return to work but retires, he answered:

He is entitled to the equivalent of any unused annual leave, or take the annual leave prior to his payout date. He has the option. He could take his annual leave. He has the option to use the annual leave.

Asked whether the current Collective Agreement operates on his understanding of what was negotiated, Mr. Nurse answered, "Yes."

ON CROSS EXAMINATION, Mr. Nurse testified that he was a member of the six person committee negotiating for the Association. The other members were Mr. Don Byrne, Mr. Rick DeHann, Mr. Scott Tilley, Mr. John Hussey "and perhaps one other." Mr. Nurse confirmed he was not the chief negotiator. Asked whether he had taken notes during negotiations, Mr. Nurse answered, "They're not in front of me, no." Asked whether he had reviewed any notes prior to his testimony, Mr. Nurse said:

I reviewed the sign off sheets and the previous Collective Agreement, the 2002 contract wage re-opener, and I went over some of the notes with other members of the bargaining committee, material retained from the collective bargaining. I don't have any notes personally. I don't have my own notes. I reviewed these documents initially when we initiated the grievance in February of 2006.

Asked whether he is aware of any notes of the discussion between the Parties at the table concerning the changes to Article 15.05, Mr. Nurse answered:

No, none other than the exchange proposals, whatever they may have contained... (I was referring) just to the written exchanges. I've reviewed someone else's notes. I've discussed them with Rick DeHann, Secretary of the Local at the time. It was Rick DeHann's own notes on the final documents. It was similar to my own – just jotted notes.

He confirmed that he had discussed them with Mr. DeHann, but does not think he had discussed them with anyone else:

No, I don't think there was. John Hussey might have been there, actually. The conversation was 10 or 15 minutes duration.

Mr. Nurse agreed to Mr. Mahoney's request that he provide these notes for examination prior to the conclusion of the cross examination. Mr. Nurse said that all he has are documents finally exchanged. He speculated that Mr. DeHann holds the bargaining file for the Association relating to the 2004 negotiations. Asked why he did not have the documents with him at the time, Mr. Nurse answered:

I did not think there was any necessity to do so since they were not required when I testified before other Boards.

Mr. Nurse confirmed that Consents #s18 and 19 are the sign off sheets representing issues to which both Parties had tentatively agreed. He confirmed that Article 15.05(a) in Consent #18 is in bold indicating that Article 15.05(b) is part of the tentative agreement that the Parties had

reached. Mr. Nurse confirmed that Mr. Don Byrne, the Chief Negotiator, signed Consent #s 18 and 19, and that the changes proposed under Article 15.01 were designed to convert calculations in shifts and days into hours. "Yes, that was the intent."

Asked whether that was the full extent or just the final outcome or result of the issue, Mr. Nurse answered: "I think I testified as to what the Employer proposed and its reasons and what it resulted in." Mr. Nurse was reminded that, in his direct testimony, he had described this as a non-monetary issue. Mr. Nurse said: "Yes, members of the bargaining unit did not see it as a loss or a gain."

Asked whether there was an amendment to annual leave provisions in this Collective Agreement, and whether annual leave entitlement was enhanced, Mr. Nurse answered: "I may have missed that. You may be correct on that." Asked whether, therefore, it would be proper to say that it was a monetary change, Mr. Nurse answered: "Yes, it is a monetary issue."

Asked whether all the changes in Article 15 were negotiated between September and October 2004, Mr. Nurse answered:

Yes, the Parties were dealing with monetary... and non-monetary issues were overlapping. They may have overlapped. But my testimony was that the shift from days and shifts to hours was not a monetary but an administrative issue.... However, monetary and non-monetary issues were overlapping at this particular part of the negotiations.

Asked whether he can recall who proposed what, Mr. Nurse answered:

To the best of my knowledge, the Employer made the proposal concerning 15.01 shift to hours.

Asked whether he knows who made the proposal to enhance the annual leave, Mr. Nurse said:

I can be pretty sure it enhanced the 24 hour shift, because it was a loss in the previous contract.

Asked who had tabled the change in Consent #18 concerning the maximum due at any time, Mr. Nurse answered: "To the best of my knowledge it would have been the Employer."

Asked whether he is certain of that, Mr. Nurse answered:

I am certain of it to the extent that it would have been the same, as the Employer was the one who put the change of shift days to hours, and proposed the carry over and the maximum accrual. I feel it was the case. I can't remember for sure.

Asked if he would agree some elements of Article 15 came from the Association, he said:

Yes. The Association questioned why the change was being made. It was nothing to do with an increase in shifts.

Asked who reassured him on this point, Mr. Nurse said: "Kevin Breen." Asked whether he actually recalled Mr. Breen saying this, Mr. Nurse said:

Based on my understanding of the exchange of proposals, it was clearly an administrative issue.

Asked if he could be certain it was Mr. Kevin Breen who said that 15.05 would not result in a loss, Mr. Nurse answered: "Yes. Mr. Breen was the Chief Negotiator." Asked whether it was therefore his *assumption* that Mr. Breen had made this comment, Mr. Nurse answered:

No. That was what was exchanged to us across the table. It had to be him because he was Chief Negotiator at the time.

Asked how Mr. Breen had tied Articles 15.05 and 15.01 together, Mr. Nurse answered:

I don't know how he tied it together. I don't know. It was to deal with the accumulation of sick leave. That was put across the table to us.

It was pointed out to Mr. Nurse that the two sign-off sheets (Consent #s 18 & 19) were signed six weeks apart, with 15.01(a) (Consent #19) signed on October 28, 2004. Mr. Nurse answered: "It was supposed to have been no change from the previous Collective Agreement."

Asked whether he would acknowledge there were proposals to increase the entitlement. Mr. Nurse answered: "Yes. That skipped my mind."

Asked whether he was actually present for the discussion on Article 15.05(a) and (b), Mr. Nurse answered:

I'm pretty sure I was. I don't recall missing any days that the committee was at the table... It's possible (I did miss a day or two). I do remember this being discussed. I do remember it being discussed with our Chief Negotiator, Don Byrne. It was while we were in a caucus. I don't have the date on that. It was not away from the bargaining. I wanted to ensure that we were losing nothing in the change from days and shifts to hours or the change in 15.05(a). I had this discussion with Don. ... It was while we were at the bargaining table and after we had broken away from talks. It could have been at the Cabot Hotel. I don't recall who was there. It was Don and myself, and possibly someone else. I can't recall anyone else... My discussion with Don was this 15.05 language. I wanted it to be sure it would be no different from what we were doing, and he confirmed that was the case. I distinctly remember discussing 15.05 with Don, and that this language was not to reflect anything other than what we were doing, and he concurred.

Asked why he had been concerned about the possibility of a loss, Mr. Nurse answered:

I wanted to ensure that it was the case. I did not call a special meeting. He indicated that it was no change to the *status quo*.

Mr. Mahoney suggested that Mr. Nurse must have been concerned if he had raised these questions. Mr. Nurse responded:

Any change may result. That's the normal process. It's normal when there is a language change is going on.

Asked whether he recalls the City wanting to bring the Firefighter's Agreement into line with the other contracts with other City employees, Mr. Nurse answered: "Absolutely not. Not concerning 15.05." Asked whether he recalls discussion involving other bargaining units, Mr. Nurse answered, "No I don't." Asked whether he recalls a particular retired fire captain being mentioned by name at the table, Mr. Nurse answered, "No, I don't."

It was pointed out to Mr. Nurse that under his interpretation of Article 15.05 a firefighter might receive up to three times the annual entitlement if one added 15.05(a) and (b) together. Mr. Nurse answered: "15.05(a) and (b) would allow up to more than two times the entitlement." Mr. Mahoney named a particular firefighter currently on sick leave, and asked what would happen if such an employee were on extended sick leave. Mr. Nurse acknowledged...

It might add up to 120 days if the employee did not return to work, but I don't know anyone who has accumulated that much. But it is possible, yes.... Yes he could if he does not return to work; he could get up to four times the yearly entitlement. Yes, absolutely.

Asked if he is aware that the computer continues to show days and shifts, and whether he is making an assumption that this change applied to both Articles 15.01 and 15.05, he said:

It's possible. I have not looked at those on day shift. But the committee was told that it was purely an administrative issue... It's a fair assumption.

Mr. Nurse agreed with Mr. Mahoney that there are only two categories of employees who are paid out annual leave: relief employees, who are paid 6%, and retirees.

Yes, others than the retirees – those on sick leave – get the accrued annual leave unless they die, and then it goes to the estate... Article 15.05(a) shows that it is accrued, so I would say that accrual has to be compensated. I believe we had members who died and it was paid out.

Mr. Nurse confirmed Article 15.05(d) is bolded in the previous Agreement (CN #1).

That clause was new for that Collective Agreement... The wage re-opener explains that, to the best of my understanding... Fire Lieutenant Quinn was eligible for the entitlement under Article 15.07(a)... Article 15.05(b) is what entitles a bargaining unit member like Mr. Quinn to get the additional disputed days, and Article 15.07(a) entitles the Grievor to what we claim... In my view it is both of these clauses together that entitle Mr. Quinn to the additional 20 days... That's correct.

Asked what would happen if the firefighter were to return to work, Mr. Nurse answered:

Under 15.05(a) the bargaining unit member can accumulate a maximum of two times the annual leave. One can carry it forward from one year to the next, though he is required, under Article (b), to use up any excess over the two year total... What he'd have to do is to arrange to take the days off in the single year after his return to work from sick leave.

Asked what else Mr. Quinn would have to do in order to not to lose the annual leave for the following year, Mr. Nurse said: "He has to take the thirty days so as not to carry forward more than one year to the next." Mr. Nurse confirmed that this means Mr. Quinn would have to take both the twenty days and the thirty days to avoid the carryover.

Asked when the vacation schedule is posted, Mr. Nurse said there are various periods of annual leave. "The schedule is posted by February 28th. Everyone is posted for annual leave according based on seniority." Asked if he knew that Mr. Quinn had 15 days scheduled in 2005, Mr. Nurse answered: "I don't disagree with that."

[At this point in the hearing testimony the Union provided Counsel for the Employer with a copy of the notes which Mr. Nurse testified he had reviewed. Mr. Nurse said these were the only notes he had reviewed with Mr. DeHann:

Others had their own. Basically I had some counter proposals and sign off notes. These are just the handwritten notes about certain sign off sheets or proposals. I would have reviewed his sign off sheets and whatever counter proposals he had as well just prior to the beginning of these hearings. The notes I reviewed with him were the counter proposals and sign off sheets and some notes he made referring to collective bargaining.

After some discussion about the adequacy of the documents provided, since they did not include the sign off and counter proposal notes to which Mr. Nurse was referring, and some questioning of the documentary basis available in support of the Union's argument on admissibility of negotiating history evidence, Mr. Mahoney continued his cross examination of Mr. Nurse.]

Asked who was present during his discussion of these notes with Mr. DeHann, Mr. Nurse answered: "John Stamp, Rick DeHann and myself." Asked whether Mr. John Hussey was also present, as he had earlier indicated: Mr. Nurse answered: "If I said John Hussey, I'm pretty sure it was John Stamp. I did not take notes, but I'm pretty sure that it was John Stamp."

Asked whether, during the negotiations between the City and the Association, reference was made to the CUPE 569 or 1289 negotiations, Mr. Nurse said: "We could have had that opportunity, yes." Asked whether there had been reference to provisions in the CUPE collective agreements, Mr. Nurse said: "Yes, that's correct." Mr. Nurse also confirmed that he had earlier testified it was the Employer that had made the proposal on Article 15.05, and that he had got interpretations of the Collective Agreement from the Union's Chief Negotiator, Mr. Byrne. "Yes I did say that." Asked whether there had been any notes of that discussion between himself and Mr. Byrne, he answered: "No, it was a conversation in a brief meeting while we were both on duty, and it was after this grievance was initially filed."

Mr. Mahoney pressed the witness on whether the discussion with Mr. Byrne took place after the grievance was filed. Mr. Nurse said:

It was in discussion with Don Byrne that he confirmed the language being proposed meant no change to the previous Collective Agreement. Any unused leave was carried forward, and had to be used if he returned to work; but if he did not return to work and went into retirement, the payment would be made, as in the previous Collective Agreement. It was myself and Don and others on the bargaining committee at this time, after we'd caucused to discuss this issue. I could not say for sure that all the members of the bargaining committee were there. Rick DeHann might have been there, and Don and me for sure. It had to be during a conversation during negotiations to determine any change of the Collective Agreement, and Don Byrne said that there is no change to the spirit or intent of the Collective Agreement.

Asked why Mr. Byrne was giving the negotiating team this assurance, Mr. Nurse said:

Because he was Chief Negotiator. He, himself, felt there was no change as a result of the wording. It was his understanding of the proposal, what it meant to him.

Asked if he had earlier testified it was standard practice for someone to take notes, and if he had ever seen notes recording Mr. Byrne's assurance on this matter, Mr. Nurse answered:

I said that some people took notes better than others. Our Chief Negotiator would likely say, 'Take some notes.' I was referring to negotiations, not caucus meetings.

I didn't see anything written.

Asked if he would agree there was a substantial change in the wording of Article 15.05 between CN #1 and Consent #1, Mr. Nurse said: "There is a language change, but I would not agree it was 'substantial'." Asked if he would agree there was a change in the construction of the Article, Mr. Nurse said: "I would agree; but do not regard it as substantial." Asked whether he had found his reviewing of the notes helpful in preparation for this hearing, Mr. Nurse answered:

Well, I recall looking at the language in the current agreement. I noted the duplication of language, and it was agreed by the executive that it was a typo. But the spirit and intent of the language remains. 15.05(a) was a sign off sheet, and that language had no change in its intent on the sick leave that we had there.

Asked what assurance his notes had provided him, Mr. Nurse said: "That is what I felt the sign off sheet meant. It was the sign off sheet: Consent #18, that's correct."

There was no redirect examination.

THE SECOND UNION WITNESS was Mr. Rick DeHann who has had twenty years with the Fire Department and is the Recording Secretary for the Union, having served previously as Sergeant at Arms. He was involved in negotiations for the Collective Agreement for the most recent and the two previous rounds of bargaining. Mr. DeHann identified Mr. Byrne as the previous President of the Local who had served as Chief Negotiator for the last round. The current President "is Mr. Nurse, Vice President is Mr. Bussey, Treasurer John Hussey, and Scott Kelly and John Stamp served as observers."

Asked how the negotiations had proceeded, Mr. DeHann said, "We exchanged proposals at the table, any articles that needed to be addressed." Asked whether he recalls negotiations about Article 15, Mr. DeHann said:

Somewhat... It was considering the conversion of all our leaves to hours where previously it had been all in days. There was no issue provided. The *status quo* was maintained.

Asked who had said that the *status quo* was maintained, Mr. DeHann said: "I am not sure, but I suspect it was Mr. Breen as Chief Negotiator." Asked whether the Article 15 proposal had been described as monetary or non-monetary, Mr. DeHann answered: "We did not really see it as monetary. We saw it as a bit of housekeeping for the ease of administration." Asked whether he understood that the function of Article 15.05 had changed, Mr. DeHann answered:

"No, not at all. It was merely housekeeping, and would affect no one."

Asked whether Mr. Byrne had said anything about it and if so, to whom, Mr. DeHann said:

Oh yes. We wanted reassurance that it would have zero impact on members. As a group: I guess those involved at the table, both of the negotiating teams.

Asked whether he understood there was any intent to change the entitlement, Mr. DeHann said:

Not at that time. That was a later development to entitlement. It was negotiated to give some personnel an extra day of annual leave.

Asked if that had been negotiated later, and what happened at the step beyond housekeeping, Mr. DeHann said:

For the most part, yes; but it was understood that other articles that were affected would have to be changed... Now it was time to deal with things that impacted the same articles... The entitlement to the additional day was the only thing, I think... No (... other entitlements were implicated) No. The articles were already specified... 15.05(a) is highlighted (in the current Collective Agreement, Consent #1) as a change merely to reflect the change to hours. Article 15.05 (of CN #1) was used to specify the entitlement in addition to 15.01, but... 15.05 (of CN #1) spells out all that was said in 15.01, and we saw it as redundant; so we eliminated the redundancy, and just said what is there in 15.05 (of the current Collective Agreement, Consent #1).

Asked whether he views the changes to Article 15.05 as changing anything else, Mr. DeHann answered: "No, not at all. There is no change of intent."

Asked whether he had reviewed the notes provided at the Hearing, Mr. DeHann said:

I had a quick look through a box or two of notes from the Collective Agreements. I think what I was looking for were the sign off sheets to see how it was spelled out on the sign off sheets.

There was no cross examination.

THE FIRST EMPLOYER WITNESS was Mr. Don Byrne, an employee for thirty-one years with the St. John's Fire Department, now a Shift Superintendent, and no longer a member of the bargaining unit. He is responsible for the daily operation of all seven stations and for all personnel. Formerly, as a Fire Lieutenant, Mr. Byrne had served in the bargaining unit and in negotiating for the Association. He was Chief Negotiator for Local 1075, and had served with Mr. DeHann, Mr. Hussey, Mr. Tilley, and Mr. Nurse on that negotiating team.

Mr. Byrne identified as DB #1, a copy of the City's "Opening Proposals: Collective Bargaining... April 12, 2004," which he described as having been "passed to the Union during negotiations. I believe it was the City who proposed this." Asked whether there is any reference in DB #1 to Articles 14 and 15 or to a proposal to carry forward a maximum annual leave entitlement. Mr. Byrne answered:

Not in this document, no... DB #1 is a partial extract referring primarily to Article 15, the initial proposal concerning Article 15.

Asked whether the Association itself had proposed any change concerning the entitlement of carryforward in 15.05(c) (of the old Collective Agreement, CN #1), Mr. Byrne said, "That was in the initial proposals of the Union." He then identified as DB #2 the April 14, 2004 "Initial Proposals" of the Union. This records a proposal under Article 15. 05 (c) that reads "An Employee shall be permitted to carry forward the equivalent of one Year's Annual Leave."

Mr. Byrne also identified as DB #3 the City's proposals #2, dated May 5, 2004, relating to Article 15.

There was an exchange of documents between the parties. I believe this is the City's second proposal and exchange.

Asked whether the City had responded to the question of entitlement in DB #3, Mr. Byrne answered, "No, nothing there."

Mr. Byrne also identified as DB #4 the Union's proposals #2, dated May 6, 2004, covering changes to Articles 15.01 and 15.05. Asked whether the phrase "may be taken at any time" in DB #4 was different language being proposed by the Union for Article 15.05, Mr. Byrne said: "Oh yes. This is a difference with the first contract, yes."

Mr. Byrne identified as DB #5 the City's third proposal, dated September 14, 2004. Noting passages crossed out at Article 15.01 of DB #5, Mr. Byrne said: "I believe these cross outs were the Association's at that time."

Asked how he would summarize the City's response to the Unions proposed language changes to 15. 05, Mr. Byrne said he understood ...

the City's response was in clarification of the language of the previous agreement. The leave provisions were agreed. We discussed having the other City's contracts, and having the same wording as in those other contracts... The intent was to accumulate up to two years annual leave.

Asked what led him to this understanding, Mr. Byrne said: "The chief negotiator for the City, Kevin Breen."

Mr. Byrne confirmed that he recognized Consent #18: "Yes that's the sign off. That was done between the City and the Association, signed by myself and Kevin Breen." Asked whether the Parties had looked at the language of other City contracts, Mr. Byrne answered: "We had those documents with us at all times."

Mr. Byrne identified DB #6 as the Collective Agreement between the City of St. John's and the *Canadian Union of Public Employees*, Local 1289, and DB #7 as the Collective Agreement between the City of St. John's and the *Canadian Union of Public Employees*, Local 569.

Asked to compare the language of Consent #18 with Article 17.06 of DB #6, Mr. Byrne said:

Yes, the last part is identical, lines 4, 5, 6 and 7... DB #7 contains the same three lines.

Asked to describe the effect of this new language, Mr. Byrne said:

We have to go back to the discussions at the table. There was a particular Fire Captain's experience being considered. He was on sick leave... The question was where does the payment stop for someone off on sick leave. And that was in the other two locals contracts. And that's why the agreement was in the sign off ... that the two years was as much as you could accumulate.

Asked whether he recalls discussions with anyone on his Union bargaining committee, either in caucus or on a sidebar, during which he had expressed any different view, Mr. Byrne answered, "No." Asked whether he can recall anything concerning the Consent #18 sign off relating what was being agreed, Mr. Byrne answered:

To the best of my recollection we were putting the cap the same as the rest of the City's bargaining units.

ON CROSS EXAMINATION Mr. Byrne testified that:

We looked at the other two Locals plus Halifax; and the changes made concerning the amount of annual leave was based on a schedule in the Halifax contract. So it was two or three comparators that we were using.

Mr. Byrne also confirmed that in the first Association proposal (DB #2), Article 15.05(d) was unchanged.

Mr. Byrne agreed that 15.05(d) in DB #2 and 15.05(b) in Consent #18, "have no difference between the two of them."

He testified that DB #6 and #7, the Collective Agreements for CUPE Locals 1289 and 569 say the same thing. "The intent was to keep them in line with these agreements."

Mr. Patey pointed out to Mr. Byrne that Article 15.05(b) of Consent #18 is not, in fact, included in the other two CUPE Collective Agreements. Mr. Byrne agreed that 15.05(b) does exist in the current CUPE Collective Agreements

... so as to protect those firefighters returning from sick leave, who do not, therefore, lose their annual leave while they are on sick leave.

Mr. Byrne also agreed that 15.05(a) entitles a firefighter ...

to carry forward annual leave for a period over one year. At any time a firefighter can have a total of two years, which is what the old Collective Agreement said as well... It is a simplified version of what the previous agreement (CN #1) had said. Two years is the cap. What we did was simplify the language to some extent.

Asked whether there had been any change to the intent of the Collective Agreement at this point, Mr. Byrne answered:

I never knew it was meant to be any different. There was no change if it was a return to work. That's the important thing.

Asked whether that is in the new Collective Agreement, Mr. Byrne said:

Yes. It's in the previous, and the current language is the same. It's in the Agreement that it says upon return to work... It doesn't specify that, no.

Asked whether he recalls having a discussion with Mr. Nurse and Mr. DeHann about this article, and saying that it would not change the entitlement, Mr. Byrne said:

I recall a conversation with them saying that it would not impact because it was so negligible. I thought it unimportant. If you build up more than two years, it was not likely.

Mr. Patey pointed out that since the (b) element of the clause continued to exist, this did not effectively cap the entitlement at two years accumulation. Mr. Byrne responded: "Kevin said that it accumulated up to two years in reference to retirement." Mr. Patey again asked if there is any reference to that fact in the Collective Agreement, and Mr. Byrne answered, "No."

Mr. Patey asked whether Article 15.05(a) in the current Collective Agreement (Consent #1), which guarantees twice the annual entitlement to annual leave, is the same as 15.05(a) (i) & (ii) and (b) (i) & (ii) of the previous agreement (CN #1), Mr. Byrne answered, "Yes." The current 15.05(b) was 15.05(d) in the previous agreement. "In terms of the writing, there is no change."

Asked whether, in his view, changes to 15.05 were monetary or non-monetary, he said:

As we got to the end, we really treated it as monetary in October. This bordered on the monetary. We negotiated in April and May and signed off in September.

ON REDIRECT EXAMINATION, Mr. Byrne was directed to Consent #18, the sign off sheet, and was reminded that in his cross examination he had referred to the situation of someone who returns to work. He was asked to recall what Mr. Breen had told him at the table as the context for someone off for long term sick leave, and returns to work. Mr. Byrne answered:

The contract says that you can have up to two years of annual leave at a given time. Anyone off sick who was returning to work, if you got more than the two years you could use that portion in addition to the two years.

Asked whether the entitlement was to be taken as paid leave, Mr. Byrne said: "Yes, he was entitled to take it as paid leave." Asked what the situation would be for someone retiring, Mr. Byrne answered: "The entitlement would be the two years, only."

Asked to explain what he had said in the conversation with his own negotiating group and what had been discussed, Mr. Byrne said:

It would be in the context of what we had just discussed. The likelihood of accumulating more than two years would be negligible... I guess there might be some people, but at the time I did not see it as a hardship to anyone.

Asked to sum up what he felt the new language of Consent #18 said, and what he understood they were doing to those affected, Mr. Byrne said: "We were capping it to two years."

ARGUMENT

FOR THE UNION, Mr. Patey noted that the grievance concerns the Grievor's entitlement to annual leave on retirement. The City's position is that Fire Lieutenant Quinn is entitled to be paid a maximum of two years annual leave entitlement. It was agreed that he had 20 days of unused leave carried forward from 2004 into 2005. In 2005 he accumulated 30 additional days. He had scheduled fifteen days of leave in 2005 when he went off sick. In addition, he accumulated thirty days leave in 2006 when he retired on January 31, 2006. On retirement, Mr. Quinn was paid out the 75 days, 15 of which were objected to by the Employer. The 60 days are not in dispute. The Association says that he is, in fact, due an additional 5 days for a total of eighty. He is, in the Union's view, clearly entitled to be paid for unused leave on retirement.

The issue before the Board is the interpretation of Collective Agreement Articles 13 and 15. Lieutenant Quinn was on sick leave. On retirement he took pay in *lieu* of annual leave. So what happens to the unused annual leave accumulated while he is on sick leave? That is the question. What the Board must craft is the interpretation of the Collective Agreement in the light of what is set out in Brown and Beatty *Canadian Labour Arbitration* (4th ed.).

4:2100 The Object of Construction: Intention of the Parties

It has often been stated that the fundamental object in construing the terms of a collective agreement is to discover the intention of the parties who agreed to it. As one arbitrator, quoting from Halsbury's Laws of England, stated in an early award:

The object of all interpretation of a written instrument is to discover the intention of the author, the written declaration of whose mind it is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit.

And further:

But the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention.

Accordingly, in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions. Thus, where the parties had detailed in the collective agreement specific elements of management rights, without limitation as to the manner in which they would be applied, an arbitrator was held to have erred in implying that those rights were to be exercised fairly and without discrimination. When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the purpose of particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies. But where a collective agreement is silent on an issue, yet a legislative provision is presumed to be incorporated and must be applied by the arbitrator, such a provision "must be interpreted on its own terms and not in light of the understandings of the parties".

The Agreement requires (Article 8.09) that the Board not vary its terms. The object is to discover the intent of the Parties; but when faced with alternatives we must look at the reasonableness of each interpretation, and ask whether any interpretation would give rise to anomalies.

The Association argued that there is, in fact, a latent ambiguity in the language of this Collective Agreement, and has been allowed to explore evidence in that respect. Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at Para. 3:4400 deals with the application and weight of extrinsic evidence in such matters.

3:4400 Extrinsic Evidence

Parol or extrinsic evidence, in the form of either oral testimony or documents, is evidence which lies outside, or is separate from, the written document subject to interpretation and application by an adjudicative body. Although there are numerous exceptions, the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing. If the written agreement is ambiguous, however, such evidence is admissible as an aid to the interpretation of the agreement to explain the ambiguity but not to vary the terms of the agreement. The two most common forms of such evidence in labour arbitrations are the negotiating history of the parties leading up to the making of a collective agreement, and their practices before and after the making of the agreement...

Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para 3:4401, contrasts how boards of arbitration may weigh extrinsic evidence in different ways depending on whether the alleged ambiguity is patent or latent.

... Where an ambiguity is patent, that is, where it appears on the face of the agreement, an arbitrator may resort to extrinsic evidence as an aid to its interpretation. Where an ambiguity is latent, that is, where it is not apparent on its face, an arbitrator may rely upon extrinsic evidence not only as an aid to resolve the ambiguity once it is established but also to disclose the ambiguity. However, arbitrators have had a difference of opinion as to what constitutes an ambiguity. One view holds that more than the arguability of different constructions of the collective agreement is necessary to constitute an ambiguity. Another view is that an ambiguity exists if there is no clear preponderance of meaning stemming from the words and structure of the agreement. In Ontario, a decision of the Court of Appeal provided a fresh point of departure for determining whether an ambiguity exists in the following terms:

The Court is not necessarily concerned only with the literal meaning of the language used but rather with its meaning in the light of the intentions of the signatories...

A transaction having been reduced to writing, extrinsic evidence is generally inadmissible to contradict, vary, add to or subtract from its terms. This is fundamental in the interpretation of written instruments. Parol evidence may, however, be admitted in aid of interpretation.

Where the language of the document and the incorporated manifestations of initial intention are clear on a consideration of the document alone and can be applied without difficulty to the facts of a case, it can be said that no patent ambi-

guity exists. In such a case, extrinsic evidence is not admissible to affect its interpretation. On the other hand, where the language is equivocal, or if unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present. The term "latent ambiguity" seems now to be applied generally to all cases of doubtful meaning or application.

Extrinsic evidence may be admitted to disclose a latent ambiguity, in either the language of the instrument or in its application to the facts, and also to resolve it, but it is to be noted that the evidence allowed in to clear up the ambiguity may be more extensive than that which reveals it. Thus, evidence of relevant surrounding circumstances can be accepted to ascertain the meaning of the document and may clarify the meaning by indirectly disclosing the intention of the parties.

If the surrounding circumstances, however, do not explain the latent ambiguity an equivocation is said to be established, in which event, in addition to evidence of circumstances, direct evidence of the parties' intentions may be received to resolve the equivocation.

That statement of the law, however, has led to a further lack of consensus among arbitrators. Some arbitrators have suggested that the Court of Appeal, while broadening the notion of latent ambiguity, could not have intended to open the door to the admission of extrinsic evidence whenever the parties disagreed as to the construction of a document, whereas others have been more inclined to apply the notion of "doubtful application" more literally. Nevertheless, there appears to be agreement amongst arbitrators that silence itself cannot amount to ambiguity in the meaning of the agreement, since "silence" may merely indicate that the parties did not agree to anything.

The Association argues that the application of this matter is "uncertain", in the words quoted above.. The Collective Agreement does not specifically determine how annual leave entitlement for a retiree like Mr. Quinn is to be handled. How is his displaced annual leave to be calculated at retirement.

The Parties agree that he was paid, but the difference between the Parties arises over the question how much he should have been paid. This becomes critical at the time of retirement. He was unable to take any annual leave because of his sick leave.

The Employer argues that when you retire any annual leave accumulated cannot be scheduled because there is no return to work. Hence unscheduled leave is not at issue, in the Employer's view, because unscheduled leave does not fall within their interpretation of "displaced" leave. But there is really no distinction to be made as to whether the annual leave was scheduled or unscheduled. The Employer witnesses did not draw any such distinction.

Mr. Nurse and Mr. DeHann were both involved in the negotiation of the Collective Agreement. Both were clear that the negotiation was in terms of administrative changes and the units to be used in calculating leave, but had not affected whether entitlements were to be paid on retirement. Mr. DeHann and Mr. Nurse both testified there was no change in the Agreement that would justify the Employer's interpretation.

Mr. Byrne testified that the changes were not extensive, but agreed that it allowed those returning to work to use up the excess annual leave that had been accumulated.

It is important to look at the prior Collective Agreement (CN #1) and at Browne & Beatty para. 4:2200 in understanding the relationship between the old and the new Agreements. Old Collective Agreements help with interpretation of a new Collective Agreement

One noteworthy point is that there really has been no change in the Collective Agreement. CN #1 and Consent #1, Article 15.01(a) changes only the actual mechanism of calculation of entitlement by shifts to hours.

The carryover entitlement is set out at Article 15.05 in CN #1 and in Consent #1. As seen in Mr. Byrne's testimony, 15.04(a) under the old Collective Agreement allows the bargaining unit member to carry forward one year entitlement. Basically, 15.05 in the old Agreement says, "no more than one year" is to be carried forward. Consent #1 says the same thing. There is no substantial change in the new Collective Agreement.

The Union would like to note, for the record, that 15.07 in Consent #1 and in CN #1 show no change at all. In the Union's submission the evidence concerning bargaining history shows no substantial changes, but only administrative changes being affected in this new Agreement.

So it is not clear how to resolve the ambiguity in this matter. 15.01 determines the annual entitlement based on years of service, which in Mr. Quinn's case entitled him to 30 days annually under 15.01(b) of annual leave. 15.04(a) makes it clear that there is a maximum carry over of one year. Therefore he had accumulated two years worth of annual leave or sixty days.

Further, the Grievor had carried over 20 days from 2004 into 2005 which he is entitled to do. This was added to the thirty from 2005, so that in 2005 he had fifty days in total, which was less than the two times annual entitlement. Article 15.05(b) says: "Annual Leave displaced with sick leave can be carried forward over and above 15.05 a & b, but must be taken within one year."

The Association interprets this to say that if you are on sick leave it is possible to accumulate more the one year carry forward. But the Employer's position forces the questions: What does "displaced" mean? What does "taken" mean?

Mr. Patey directed the Board's attention to *Browne & Beatty* 4:2210 which recommends the use of ordinary dictionary meanings. Essentially "displaced" means to take the place of. The Employer relies on a distinction between "scheduled" and "unscheduled" in order to disclose what "displaced" must mean in this context. But that distinction is neither provided for in the Collective Agreement nor is it inherent in the meaning of the word "displaced".

The word "taken" simply means to use, make use of, to consume, to accept or to receive. There are a lot of different meanings to the word "take" or "taken". The City claims, arbitrarily, that "taken" must mean "removed from time worked" and thus distinguishes it from benefits that are available to be paid out. But there is no such distinction inherent in the word "taken".

In the Union's view such narrow definitions arbitrarily restrict the term "annual leave" and the nature of annual leave. On this argument, Mr Patey directed the Board's attention to three cases drawn from the arbitral jurisprudence: *re Northern Electric Co. Ltd. And United Automobile Workers, Local 1530*, D. L. Johnston. (Ontario), May 18, 1974; and *Re Kingston Regional Ambulance Service and Ontario Public Service Employees Union, Local 462*, Ontario, M. V. Watters, G. Majesky, L.M. Guest, August 26, 1992; *Re Children's Aid Society of Algoma and Canadian Union of Public Employees, Local 1880* Ontario, G.G. Brent, R. Fortin, R.W. Forbes. November 11, 1988. *Brown and Beatty Canadian Labour Arbitration* (4th ed.) at para. 8:3210 describes vacation entitlement, and the concept of annual leave, as an earned benefit. Sick leave is not supposed to clash with an annual leave entitlement. So under Article 15.05 sick leave does not clash with annual leave. In Mr. Quinn's view he was paid for 5 too few days of annual leave. Mr. Patey invited the Board to look particularly at *Kingston Regional Ambulance Service* and at *Children's Aid Society of Algoma* in considering this aspect of the matter.

The Union argues there is no basis to find any difference in interpreting these terms. There is no direction within the Agreement that allows a distinction between scheduled and unscheduled. It is unwarranted to deal with annual leave in this manner since it is an earned entitlement. The word "take" does not, in any way, prevent its being interpreted as "take as pay".

Mr. Quinn should therefore be credited with twenty days for 2004 under 15.05(b), thirty days for 2005 under 15.01(b), which equals fifty days available in the annual leave bank at the end of 2005. Those days could not be taken. It was displaced by sick leave. Therefore under 15.01(b) thirty more days were accumulated as earned benefit in his bank on the day he retired.

If he returned to work in 2006, based on Mr. Byrne's evidence, he would then have been allowed to take that and accumulate the 30 days forward from 2006 when he returned to work.

Mr. Byrne's testimony is consistent with the Collective Agreement in treating annual leave as an earned benefit. It is not possible to see how any difference should be attributed to an individual who is incapable of returning to work due to illness.

The City says that the retiring firefighter's leaves were displaced. The entire matter is about how you calculate the annual leave. There is simply no difference to be attached to the fact that he retires from sick leave since he still has access to the eighty days annual leave. There is no difference in the Collective Agreement between scheduled and unscheduled. Article 15.07 gives entitlement to annual leave to the end of the year in which he retires.

In the Union's submission the grievance must succeed.

FOR THE EMPLOYER, Mr. Mahoney set out the City's position that the Agreement has clear, unambiguous language, which supports the City's interpretation as outlined in Consent #8, Mr. Penney's letter. Extrinsic evidence to the extent that it is relevant, supports the City's position. Mr. Penney's determination is appropriate in respect of a retiring firefighter such as Mr. Quinn.

The potential for liability to claims of multiple years of annual entitlement is a serious liability which the Employer must address. The Agreement language is all directed towards the use of the term "taken" as a day off with pay from work. Article 15.01(c) is particularly instructive:

"no annual leave may be taken by an employee until s/he has had not less than sixty (60) days of service prior to taking leave"

Article 15.05(b) uses taken within the phrase "taken within the year" which suggests duration is what is in the Parties' minds, not payment. Article 15.06 actually adds the words "... for use at a later date". In Article 15.09(a) it is clear from the use of the word "scheduled" that leave means actual time off at designated dates. The entire article is written with the view to leave taken

during some period of time with pay.

There are only two categories of employees that get paid out: recruits (Article 40.07), and retirees. The Collective Agreement is very different from any cited in Mr. Patey's case law. This Agreement contains a lot of regulations concerning how annual leave is accrued and how it is to be used. There are a lot of provisions concerning entitlement, including Articles 15.02 and 15.08. This Agreement is very prescriptive in calculations of entitlement. Mr. Patey may not distinguish between returning-to-work entitlement versus retirement entitlement, but the Collective Agreement makes a distinction between a retiree and a non-retiree leaving the department. Article 15.07 and 15.07(a) should be considered in this light, especially in the context of the enhanced benefits there negotiated.

It is in the context of this language that 15.05(b) grants a right to an employee returning to work. It allows such a firefighter to use it up, to take it as a day off. Article 15.05(b) specifically uses the words "displaced" and "taken". Article 15.06 simply refers to "reinstated for use"... Articles 15.05(b) and 15.06 are clearly linked.

Association Counsel suggested that under 15.05(b) Mr. Quinn could return to work and take all his entitlement in that year. That is simply not the case. He is only allowed to take that which was displaced by sick leave. That is why we noted he had fifteen days scheduled. That is why, when the language is written as it is, the word "displaced" has meaning. There is something there that is already scheduled. 15.05(b) and 15.06 have to be read together.

A similar examination of 15.05(a) reveals some interesting facts. There is no clearer capping language than is contained at 15.05. Mr. Byrne called it a "cap", identical to the language of CUPE 1289. The missing period at the end of the Article as it appears in Consent #18 and in the Collective Agreement indicates that the language was, in fact, copied and pasted from that particular CUPE Collective Agreement. It was a straight lift. Article 15.05(a) does not use the verb to "take". It uses the word "due"; that is to say, a debt owing that is payable. The agreement was for two years as a cap. It was our Agreement.

Mr. Mahoney then introduced a series of cases drawn from the jurisprudence, as follows: *re Cfto-TV Ltd. And National Association of Broadcast Employees and Technicians, Local 79*, 10 L.A.C. (3d) 232, Ontario, R. L. Kennedy, 1983; *Lakeport Brewing Corp. v. Teamsters, Local*

938 (Seasonal Employees Grievance) [2003] O.L.A.A. No. 254, File No. MPA/Y300344, Ontario, B. Stephens, Arbitrator May 6, 2003; *Brewery Workers, Local 232, re Bradings Cincinnati Cream Brewery Ltd.*, 5 L.A.C. 2012, H. D. Lang J., T. L. Rees, J. C. Adams, Q.C., 1954

Mr. Dwyer's comments and responses are not, in fact, the final authority. Mr. Penney, after looking at the language produces a correct judgement. Consent #8, where Mr. Penney takes a fresh view, says exactly what Mr. Breen said to Mr. Byrne, and Mr. Byrne said here today. Article 15.05(a) is the key clause and subclause (b) only allows leave to be taken. In all other cases 15.05(a) applies. The language is clear and unambiguous.

On the issue of negotiating history, to the extent that the Board chooses to rely on it, – and it is not necessary to rely on it at all – the evidence supports the City's interpretation. The City's evidence is to be preferred. The Association has not met its burden by showing that there is an ambiguity, or that it should be resolved in the Association's preferred manner.

Mr. Byrne's evidence was clear, and it must be given a weight since he was, in fact, the Chief Negotiator for the Association in this Collective Agreement, and his testimony supports the Employer's view. The most telling element of his testimony is that the bargaining team had assessed the impact as negligible. The negotiating team was aware of the effect of a cap at two years. There was nothing to suggest that Mr. Byrne's testimony was of questionable credibility.

Mr. Mahoney encouraged the Board to focus on the evidence provided by Mr. Byrne. A firefighter who returns to work must use the displaced annual leave, and take it in a year, or it is lost. Article 15.05 says it "must be taken." It is a mandatory provision. A retiree in the same situation gets the benefit of 15.07 for a full year, but is only due the maximum cap at two years.

Brown & Beatty say a reasonable interpretation must be supported. The Employer's is the reasonable interpretation, and it is in keeping with the standard limitations made in this Collective Agreement. To suppose that the clause grants a greater amount of leave up to four years is not warranted under the current Collective Agreement.

The grievance must, in the Employer's respectful submission, be denied.

IN REBUTTAL COMMENT for the Association, Mr. Patey pointed again to Article 15.06 and to the meaning of the word "displaced". It is not, in the Union's submission, reasonable to require, on the mere fact of retirement, that the entitlement sheltered from sick leave is arbitrarily

denied to a retiree.

Mr. Patey also accepted the fact that the current Collective Agreement involves a certain cut and paste. The fact of the matter is that 15.05(b) exists within this Collective Agreement and cannot be ignored; but neither can Article 15.05(a) be given the preference over Article 15.05(b) that Mr. Mahoney seems to attach to it. To do so is to deny 15.05(b) the meaning it naturally has.

Referring to Mr. Byrne's evidence Mr. Patey pointed out that what he said was that Article 15.05(a) and 15.05(b) were, in fact, no different from the previous agreement. Somehow or other the same Collective Agreement read by the Employer has a substantial change for retirees. The intent of this Collective Agreement cannot be allowed to change as the Employer wishes to see it changed.

CONSIDERATIONS

AT ISSUE BETWEEN THE PARTIES, as set out in the statement of Grievance, is the interpretation of Articles 13 and 15 of the Collective Agreement. As became clear throughout the presentation of evidence and argument however, the focus of concern is the difference between the Parties in their understandings of Article 15.00.

The Board excluded extrinsic past practice evidence in light of Article 29.01, but, subject to its weight, permitted introduction of bargaining history evidence for the purpose of disclosing the alleged ambiguity and of aiding in the crafting of a decision if ambiguity is established.

INTERPRETATION: In providing the required interpretation the Board notes, in addition to the authorities raised by the Counsel for the Parties, the commentary found in *Brown and Beatty Canadian Labour Arbitration* (4th ed.) at para 4:2100 which reads, in part, as follows:

... in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions. Thus, where the parties had detailed in the collective agreement specific elements of management rights, without limitation as to the manner in which they would be applied, an arbitrator was held to have erred in implying that those rights were to be exercised fairly and without discrimination. When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the purpose of particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies. But where a collective agreement is silent on an issue, yet a legislative provision is presumed to be incorporated and must be applied by the arbitrator, such a provision "must be interpreted on its own terms and not in light of the understandings of the parties".

And at paragraph 4:2300 "The Collective Bargaining Context" the Board notes the following:

In construing collective agreements, arbitrators look to the purpose of the particular provision in the collective agreement as an aid to determining the meaning intended by the parties. In this regard, they have recognized that collective agreements are not negotiated in a vacuum, but rather are settled in the context of general industrial relations practices, within a specific negotiating context and against a vast history of judicial and arbitral jurisprudence which will affect the parties' expectations and understandings. In the result, arbitrators give effect to this general contextual climate by requiring clear statements to alter such general expectations.

And at 1:5400 in reviewing "Error of Law" The Board also notes the following observations:

... Because questions of interpretation of the collective agreement have always been viewed as questions of law, in most jurisdictions the courts may review an arbitrator's interpretation of the terms of an agreement, and in so doing, they have in recent years uniformly applied what they have characterized as either the "reasonable construction" or the "clearly wrong" standard of review. This standard has been described as follows:

It is immaterial whether or not the Court from whom an order of *certiorari* is sought agrees with the interpretation given to the agreement by an arbitrator; it is sufficient to defeat the application if it can be said that the interpretation given to the agreement by the arbitrator is one which the language of the agreement reasonably will bear. ...

The courts may also have occasion to review the arbitrator's interpretation of a collective agreement where extrinsic evidence has been admitted to clarify its meaning. In this context the usual expression of the rule is that extrinsic evidence may not be relied upon as an aid to interpretation where the words to be construed are not ambiguous. Because this question necessarily involves interpretation of the collective agreement, in some instances the same "reasonable construction" standard has been applied, as evidenced in one case where the court noted that the arbitrator had found an ambiguity "by an interpretation of the collective agreement, which it [did] not reasonably bear"....

An arbitrator also commits an error of law if, as part of the decision-making process, he or she ignores a relevant provision of the collective agreement, arrives at conclusions for which there is no evidentiary basis, or in drawing upon general principles of law, misapplies that law, as for example where the arbitrator precluded himself from considering "extrinsic evidence" which he had held was admissible.

Finally, the Board notes Palmer and Palmer *Collective Agreement Arbitration in Canada* 3rd Edition (at p. 120 Para.4.6) and Arbitrator Teplitsky's somewhat contrary comment in the citation note on the same page.

It is for "... the grievor, whether employer, union or employee to establish the preferability of his interpretation of the relevant collective agreement provision.

...Therefore, if the weight of evidence and arguments supporting the Union's view as to the proper interpretation of the contract is equally balanced by the weight of evidence and arguments supporting the Company's contention as to the interpretation of the contract, the grievance must be said to fail. (Note 11. Welland Vale, 5 L.A.C. 1945 at 1948-1949 (Anderson 1954) ...A board of arbitration must decide the true meaning of the collective agreement. It cannot, in cases where the meaning is uncertain or the provisions ambiguous, abdicate its responsibility to adjudicate by deferring to management's opinions and upholding its interpretation if it is reasonable...)

POSITIONS OF THE PARTIES:

The Association claims that the current Collective Agreement contains a latent ambiguity in that Article 15.00 is "uncertain" in its application to those who retire, and in particular to those who retire from a period of sick leave.

The Association asserts that, on its reading of the Collective Agreement, the Grievor should have been paid for 80 days annual leave, not the 75 he was paid. The agreed statement of fact shows that the Grievor had 20 days of unused annual leave carried forward from 2004 into 2005 and that in 2005 he accumulated 30 additional days of which 15 were actually scheduled, but not yet taken, when he fell ill and took sick leave.

The Association argues that, since the Grievor was on sick leave in 2005 until the time of his retirement in January 2006, this annual leave was not lost, but accumulated under Article 15.05(b) which reads:

Annual Leave displaced with sick leave can be carried forward over and above 15:05 a & b, but must be taken within one year.

Thus, on the Association's calculation, in 2005 he had a total of 50 days annual leave accumulated which conforms to the 15.05(a) requirement that:

The amount of vacation that an employee may carry over to the next year shall not exceed that employee's normal entitlement and thus the maximum amount of unused vacation that shall be due to any employee at any time is limited to twice his annual entitlement

In addition, he accumulated (in accordance with Article 15.07(a)) a further 30 days annual leave in 2006 by the time he retired on January 31, 2006.

Thus, on the Association's calculation, the Grievor was due to be paid for a total of 80

days of accumulated annual leave. The Association explains that the apparent 20 day excess over the Grievor's annual leave ("twice his annual entitlement") maximum set in 15.05(a) is permitted because Article 15.05(b) expressly allows this excess to be accumulated since it was "displaced with sick leave".

On retirement Mr. Quinn was actually paid out 75 days, 15 of which were objected to by the Employer, but repayment is not sought. Sixty days are not in dispute.

The Association says that the Grievor is, in fact, due an additional 5 days for a total of 80. **The Employer** disagrees with the Association's interpretation of the Collective Agreement, and with its calculation of the annual leave the Grievor should have been paid.

On the Employer's reading of the Collective Agreement, the Grievor should have been paid for 60 days annual leave, not the 75 he was paid. The agreed statement of fact shows that the Grievor had 20 days of unused annual leave carried forward from 2004 into 2005, and that in 2005 he accumulated 30 additional days of which 15 were actually scheduled, but not yet taken, when he fell ill and took sick leave.

The Employer argues that, since the Grievor was on sick leave in 2005 until the time of his retirement in January 2006, this annual leave *was* lost under Article 15.05(b) which reads: "Annual Leave displaced with sick leave can be carried forward over and above 15:05 a & b, *but must be taken within one year.*" (Employer's emphases added).

The Employer also argued that, since only scheduled leave can, logically, be actually "displaced", the 15 unscheduled 2005 days of the Grievor's 30 day annual leave entitlement was *not* shielded by Article 15.05(b) in view of this logical entailment in the term "displaced".

The Employer argues that the 20 days annual leave the Grievor accumulated in 2004 were lost to him because they were not "taken within" the "one year" specified in Article 15.05(b).

In particular the Employer argued that the verb "taken" must be given its own natural and normal meaning when read in its context in which annual leave is paid time off from work. Thus it is not to be confused with words like "due" as that word is used elsewhere in the Collective Agreement.

Thus, on the Employer's calculation, in 2005 he had a total of 30 days annual leave accumulated within that 2005 year.

In addition, the Employer agrees that the Grievor accumulated (in accordance with Article 15.07(a)) a further 30 days annual leave in 2006 by the time he retired on January 31, 2006.

Thus, on the Employer's calculation, the Grievor was due to be paid for a total of 60 days of accumulated annual leave. The Employer rejects the Association's attempt to justify its claim for the additional 20 day excess over the Grievor's annual leave ("twice his annual entitlement") maximum set in 15.05(a). Article 15.05(b) does allow excess to be accumulated if it is "displaced with sick leave", but that excess *"must be TAKEN within one year."*

On retirement Mr. Quinn was actually paid out 75 days, 15 of which were in error, but repayment is not sought.

ISSUES:

Is there a latent ambiguity? The Board must first address the question put by the Association: Is there a "latent ambiguity" in the Collective Agreement disclosed by the argument and evidence presented by the Parties, including the extrinsic bargaining history evidence the Board allowed in order to disclose any such ambiguity?

The Board has reviewed all the argument and evidence presented by the Parties, including the extrinsic bargaining history evidence and, with respect, finds no latent ambiguity. The Board notes that the Association argued that the Collective Agreement is clear in the language that the Parties chose to use to express their intention. The Board agrees. The language is unambiguous, and does provide the direction the Parties seek in the instant circumstances, as set out more fully below.

No latent ambiguity was disclosed by the extrinsic bargaining history evidence. Therefore, Board does not rely for its determination of the matter on the extrinsic bargaining history evidence led by the Parties.

Calculation of the Grievor's Annual Leave:

The Grievor should have been paid for 60 days accumulated annual leave. In making this finding the Board notes that the Collective Agreement provides, at Article 15.05(a), that:

The amount of vacation that an employee may carry over to the next year shall not exceed that employee's normal entitlement and thus the maximum amount of unused vacation that shall be due to any employee at any time is limited to twice his annual entitlement

This clause has two parts. In the first part ("**The amount of vacation that an employee may carry over to the next year shall not exceed that employee's normal entitlement**") the general principle is clearly and unambiguously stated in categorical language at the opening of the Article. The Board notes that "shall" is used, and recognises the normally mandatory sense that term conveys.

The second part of the clause ("**and thus the maximum amount of unused vacation that shall be due to any employee at any time is limited to twice his annual entitlement**") provides a restatement of the general principle in a clearly alternative formulation, suggesting that the Parties were striving to be as clear and unambiguous as they possibly could. In the repetition of the word "any" the Board notes further evidence of the Parties' intention to be categorical in phrasing this provision. This has the effect of excluding individuals or circumstances as exceptions.

The agreed statement of fact shows that the Grievor had 20 days of unused annual leave carried forward from 2004 into 2005, and that in 2005 he accumulated 30 additional days of which 15 were actually scheduled, but not yet taken, when he fell ill and took sick leave. The Association claims, and the Board agrees, that in 2005 the Grievor had therefore accumulated 50 days of annual leave which were legitimate under 15.05(a) since this total did not exceed the Grievor's "twice his annual entitlement" maximum. (The Board will address below the separate question of the 15 unscheduled days annual leave in 2005.)

The Grievor retired on January 31, 2006, by which time he had become eligible (under Article 15.07) for 30 annual leave days for 2006. The Association claims that these 30 days for 2006 should be added to the 50 already accumulated for a total of 80.

The Board finds that this is not what the Collective Agreement requires. Article 15.05(a) states, as noted above, that "**the maximum amount of unused vacation that shall be due to any employee at any time is limited to twice his annual entitlement**". It is common ground between the Parties that the Grievor's annual leave entitlement was 30 days. The total of 80 days, therefore, clearly exceeds, by 20 days, the 60 days that were the "maximum amount of unused vacation ... due to" the Grievor.

The Board recognises, however, that the Association strenuously argued that 15.05(a) is

not the only subclause in Article 15.05, and that Article 15.05(b) does, in fact, make the Grievor a member of an exceptional group in respect of the 15.05(a) principle. Article 15.05(b) reads: "Annual Leave displaced with sick leave can be carried forward over and above 15:05 a & b, but must be taken within one year."

"Taken"? The Board agrees that this subclause does create an exception to the principle. However, that exception does not, on the evidence provided, encompass the Grievor since the 20 days from 2005 were not "taken within one year" as required by the exception as stated.

The Employer argued that the word "taken" must be read, in the context of the language of this Collective Agreement, to mean "used" as paid annual leave rather than used to create a financial benefit / liability in the way that the Association claims. The Association stressed that annual leave is recognised in the arbitral jurisprudence as an earned benefit, which the Employer must, therefore, not be permitted to withdraw unilaterally.

The Board has considered the language of the Collective Agreement as a whole and notes, as described above, the particularly categorical phrasing of subclause 15.05(a) with its exclusive repetition of the word "any". The Board has also considered the Employer's argument that subclause 15.05(b) is clearly and naturally intended to provide an exception very specifically directed to firefighters who are returning to work.

The Board is, on balance, persuaded that the phrase "within one year" naturally intends those who are working in that year, not those already retired. Thus, the Board finds that Article 15.05 a & b, taken as a whole does not provide the exception that the Association seeks on the Grievor's behalf.

Thus, the Board finds that the Grievor was due a total of 60 days annual leave.

"Displaced"? The Employer also argued at some points during the Hearing, that since only "scheduled" leave can, logically, be actually "displaced", the 15 days of the Grievor's 30 day annual leave entitlement for 2005 which were NOT scheduled were not shielded by Article 15.05(b) in view of this logical entailment in the term "displaced".

With respect, the Board is not persuaded by this line of the Employer's argument. The fact of the Grievor's 2005 sick leave did, on the evidence provided, *de facto* displace the possibility – and therefore the fact – of the Grievor taking the whole leave entitlement for that year.

DECISION

In light of the forgoing considerations, the Board finds that

THE GRIEVANCE IS DENIED.

Respectfully submitted as the decision of the Board.

Mr. Claude Horlick

For the Employer

Ms. Judy Vanta

For the Union

Mr. John Scott

Chairman

April 14, 2008