IN THE MATTER OF AN ARBITRATION

BETWEEN

BRITISH COLUMBIA RAPID TRANSIT COMPANY

(the "Employer")

AND

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 7000

(the "Union")

Re: Retired Employee Benefit Grievance

APPEARANCES:	Paul Devine, for the Employer
	Leo McGrady, Q.C., for the Union
ARBITRATOR:	Mark J. Brown
DATES OF HEARING:	November 17, 18 and 19, 2009
DATE OF DECISION:	November 23, 2009

I. ISSUE

The Union filed a grievance on its own behalf, on behalf of its members and on behalf of David Becker on August 23, 2007.

The issue is the interpretation and application of Article 21.00 Group Benefits which states in part:

> Retired employees with five (5) or more years of service shall be eligible to receive this coverage.

Under Article 21.00, employees who fall within the scope of the above noted provision receive 100% Employer paid extended health Care (with the exception of a pay direct card), a reduced level of dental care 40% Employer paid, and 100% Employer paid Medical Services Plan coverage.

The Union's position is that an employee with five or more years of service, and age 55 or older, is eligible for the group benefit coverage upon retirement from the Employer, whether he/she seeks employment elsewhere or not.

The Employer's position is that employees are only eligible for the coverage if they retire from active employment in general. If the seek work or are moving to another job with another employer, they are not eligible for the coverage.

This case was previously before Arbitrator Hickling. He issued an Award on December 18, 2008 regarding some preliminary issues but then had to step down from the case. I was appointed by the parties to conclude the case.

II. BACKGROUND

Evidence was led regarding events surrounding Becker's departure from employment with the Employer. There was differing opinions over whether he told the Employer in March of 2006 that he was resigning or retiring. In any event, by the time he left employment in May of 2006, it is undisputed that he advised the Employer he was retiring. Therefore, the evidence up to that point does not need to be reconciled.

Due to his wife's ill health, Becker decided to move to Scotland in May of 2006 to be near his wife's family. They returned to Canada in September of 2006. Becker found out that he had been cut off benefits when his wife attended a medical clinic.

From October 2006 to November of 2006, Becker worked in Redmond, Washington. He also applied to return to work with the Employer, but the application was rejected. During 2007 he worked in British Columbia for Premier Coach Lines, Perimeter Transportation and Cardinal Transportation. From December of 2007 to the present he has been employed by MVT Bus, or its predecessor, driving a Handydart bus. The latter is the only employer that has provided some form of group benefit coverage.

Brad Beattie is the Chief Shop Steward. He has been employed by the Employer for 24 years and has been a Union official for approximately 10 years.

Beattie stated that the issue in the case at hand has not arisen before Becker's case.

Based on the Hickling Award, the Union received a list of employees who had left employment with the Employer. Beattie and another Union official attempted to contact all the employees on the list by phone and planned to ask them whether Gary May, the Employer's former Human Resources Manager, discussed the consequences of taking post retirement employment and how the employment would impact group benefits. Twenty-one employees were contacted. Eighteen were sure that there was no conversation with May about post retirement work.

Beattie discussed the issue with May. Beattie asserted that May had trouble with people saying they were going to retire but then working after they left the Employer. May stated that casual work was not a problem but part-time or fulltime work was a problem. Beattie asserted that May was concerned about subsidizing another employer's benefit costs.

Beattie was not involved in the Collective Agreement negotiations when the disputed clause was included in the Collective Agreement. He was on the collective bargaining committee in 2003 and 2006. He stated that eligibility for retiree benefits was not discussed.

May was the Employer's Human Resources Manager commencing in 1986 and retired at the end of 2007.

The Employer was originally certified in 1978 by the OTEU. It was succeeded by ICTU, and then the Union in 1999.

May stated that the retiree benefits were agreed upon in the initial OTEU Collective Agreement. May asserted that the reason it was agreed upon was to maintain parity with the bus company, which had agreed to retiree benefits for employees who were pensioned under the public service plan. The Employer did not have a pension plan at the time. May was not in attendance at those negotiations.

May stated that the meaning of retired has not been discussed at collective bargaining. May defined retired as retiring from active employment, at age 55 or older, and not looking for employment with any other employer.

May reviewed the changes to retiree benefits over the years. For purposes of this decision, suffice it to say that the extent of the coverage has changed over the years; however, the term "retired" has never been defined or discussed. The pension plan was added to the Collective Agreement in 1991/92.

May stated that the subject of working after retirement may or may not come up with employees. If someone was retiring and there were no signs of working again, the subject was not discussed. If someone stated they would be seeking employment elsewhere, or had secured employment, May would tell them that they were not eligible for retiree benefits.

May stated that casual work would not make them ineligible but part-time work was still active employment and would disentitle them to retiree

benefits. This approach to the provision in dispute was never discussed with the Union.

May also stated that if someone did retire from active employment and was on retiree benefits, and then later started working somewhere, benefits were not clawed back.

May asserted that the Employer's application of the provision has been the same since it was introduced into the Collective Agreement. The only other time he recalled the matter arising was when an employee took early retirement in 1995 and requested benefits. Because he had accepted a position with another employer in another country he was deemed to have resigned not retired. In any event, because he was out of the country he was not eligible for retiree benefits.

May acknowledged that there is no formal policy with respect to the application and interpretation of the provision in question.

Based on all the evidence before, I conclude that the Employer considers retire to mean leaving active employment from any employer, essentially leaving the workforce. If that is not the case, the employee is not eligible for retiree benefits. The Employer has made some exceptions for casual work, and perhaps part-time depending on the amount.

If an employee states they are retiring, the Employer takes it at face value, unless there are signs indicating otherwise, such as a reference check. The Employer does not monitor the situation. For example, someone may retire and then return to the workforce. The Employer does not monitor post employment activity to change eligibility to benefits.

There was evidence led about the cost of benefits. I do not need to reconcile this issue as the cost of the benefits is irrelevant to the interpretive exercise before me.

There was also evidence led about the Employer hiring employees who retired from other employers and were on retiree benefits. This evidence is also

irrelevant to the task before me. It may be an issue for the other employer, but does not assist in interpreting the Collective Agreement between the parties.

It is not disputed that: employees can opt out of benefits if a spouse is covered by benefits; employees can dual enrol in benefits where an employee and their spouse can be enrolled in each other's group benefits plans; employees must age 55 or older and have five or more years of service to be eligible for retiree benefits; and, if an employee resides outside of Canada they are not eligible for retiree benefits.

III. ARGUMENT

I have reviewed all the arguments put to me by Counsel. I will review some of the key points below.

The Union argues that retirement means retirement from the Employer. It disagrees with the broader definition asserted by the Employer where it means complete withdrawal from the working world.

The Union argues that using principles set out in *ct K ct K* (1977), 16 L.A.C. 2d (422)(Weiler) and referenced in *K K ct ct ct K* , 2004 CLB 12382, 78 C.L.A.S. 120, I must consider the Employer's conduct to reflect the intent of the clause in the Collective Agreement.

The Union argues that the definition of employee means employee with the Employer, not another employer. The Union argues by using the plain meaning rule, retired employee must mean retired from the Employer:

chool Employers' Assn. V. British Columbia Teachers' Federation [2005] B.C.C.A.A.A. No. 164.

While the Union notes that the Employer did produce some evidence of past practice, it was fragile evidence. It did not meet the criteria to be useful:

ct K K

[1995] B.C.C.A.A.A. No. 6.

The Union argues that the Employer is arbitrary in its application of the so called policy. There is no reporting, no monitoring, no reasons for the distinction for casual work and the Employer relies on chance to find out if someone intends to, or is, working.

The Union argues further that the Employer is unfair and unreasonable in its exercise of an alleged right under the Collective Agreement. The Employer does not meet the test as set out in *Re Lumber & Sawmill Workers' Union, K CtJ* , 16 L.A.C. 73.

And finally, the Union argues that the Employer's conduct is discriminatory as similarly situated employees are treated differently.

The Employer argues that there is no action for which the Employer should be held to account and therefore there is no policy grievance.

The Employer argues that the only meaningful past practice and negotiating history evidence before me is from May and he explained the interpretation of the Collective Agreement provision. The Employer argues that I need not go any further than *Ct* supra; and, *K K Ct* supra, to conclude that different benefits have different meaning. It is not just the plain wording of the provision that must be considered but the entire context of the Collective Agreement. In doing so, the Employer directs me to several Collective Agreement provisions where the words "employee", "active employee", "retired" and other terms are used.

The Employer argues that there were a number of hypothetical situations put to May by Union Counsel. The Employer argues that a decision cannot be based on hypothetical facts: *Ct* , BCLRB No. B71/2004.

The Employer cites several cases regarding the use of extrinsic evidence: *Ct K* , 99 L.A.C. (4th) 24; , BCLRB No. B281/2002; *Ct Ct K* , 1 L.A.C. (4th) 328. The

Employer argues that the only valid extrinsic evidence before me is that of May's.

The Employer also cites several definitions of retirement and argues that taking employment elsewhere ignores what retirement means. The Employer also cites several cases where different words or phrases mean different things leading to different consequences, emphasizing the point about reading the Collective Agreement as a whole and in context: *ct* *Professional Employees' Union,* 1973 CanLII 18 (S.C.C.); *J* *ct* *ct* *ct* (2002) 71 C.L.A.S. 67; and, *ct* *ct* *K* (2007) 162 L.A.C. (4th) 43.

The Employer cites *ct* *K* (2006), 151 L.A.C. (4th) 64, to show some history to the provision in dispute as it mirrors the transit collective agreement according to May.

The Employer argues that the onus is on the Union to prove their interpretation is correct because they are claiming a monetary benefit: *ct* *ct* *K* (2003) 74 C.L.A.S. 242; *ct* *ct* *K* , 1987, 6 C.L.A.S. 44.

IV. DECISION

I have reviewed all the cases put before me by Counsel, and make the following comments about principles that guide my analysis.

I agree with the Employer that I cannot decide this case based on hypothetical situations. I also agree with the Employer that in reviewing the provision of the Collective Agreement, I must review the plain meaning of the words in the context of the entire Collective Agreement. I agree further that different words and phrases must mean different things.

I am not persuaded by the Employer's argument that there is no policy grievance. There was an action against Becker by denying him retiree benefits, and that action will impact the bargaining unit members as a whole as the

issue involves the general interpretation and application of the Collective Agreement.

The Union must prove its case that based on a balance of probabilities, its interpretation is the one that I should prefer.

An arbitrator will accept extrinsic evidence and consider it along with the language of the disputed provision in determining whether there is any ambiguity about the language of the collective agreement. After considering both, if there is no doubt about the proper meaning of the clause in question the arbitrator reaches an interpretative judgment without using the extrinsic evidence. If there is doubt, the arbitrator is entitled to use the extrinsic evidence to resolve any ambiguity: *K Ct* BCLRB No. B40/96 (upheld on Reconsideration BCLRB No. B151/96).

I conclude that the survey conducted by the Union of employees who left the Employer's employment is not helpful. First it is hearsay. Second, many employees said that May never talked about the effect that post employment work would have on retiree benefits. However, May testified that if there was no indication or sign that a retiring employee was going to be seeking work, the matter was never discussed. Accordingly, May not discussing the matter with those employees could well have been because they gave no indication that they were seeking post employment work. Such a fact does not support the Union's asserted interpretation of the provision.

The provision in question was inserted into the first Collective Agreement with OTEU. I have no direct evidence from anyone who was in attendance at those negotiations. Therefore I have no direct evidence about whether the parties ever discussed the definition of retirement. I have evidence that it has not been discussed since.

May testified about his knowledge of the intent of the clause when it was included in the Collective Agreement. It was to mirror the provision in the transit agreement. The transit agreement provided employees who retired and were pensioned with retiree benefits. However, May did not provide direct

evidence that the transit agreement specifically referenced retirement from "active employment" and whether any employment after retirement resulted in the person being ineligible for retiree benefits.

May stated that the provision in the parties Collective Agreement did not reference a pension plan because there was no pension plan at the time. When the pension plan was introduced into the Collective Agreement the provision was not changed.

The past practice evidence is not helpful. The one other occasion when the matter arose was in 1995. The Union was not copied with the letter to the employee advising him of the Employer's view that he had resigned and not retired. Also, given that he was working outside the country, he was not eligible for retiree benefits in any event.

The Employer's flexible practice in allowing some casual work and perhaps some part-time work does not aid in interpreting the Collective Agreement. If the Employer's position is correct, any employment after leaving the Employer disentitles the person. The language does not provide that flexibility. The practice shows an inconsistency in the application in interpreting the Collective Agreement.

Furthermore, the fact that the Employer takes an employee's statement that he/she is retiring at face value, does not monitor the situation, and potentially has people on retiree benefits right now who returned to the workforce demonstrates another inconsistent practice.

At the end of the day, I conclude that the negotiating evidence, past practice evidence and other extrinsic evidence is not persuasive in assisting in the interpretation of the Collective Agreement.

There is no doubt that "retired" means something other than simply leaving the Employer's employment.

The parties agree that when someone reaches the age of 55 or older, and has five or more years of service, they may “retire” and will be eligible for retiree benefits.

I conclude that an employee retires from the Employer’s employment when he/she exercises an option under the pension plan or Collective Agreement as it relates to their pension contributions. When someone says they are retiring, the Employer informs them of the various options.

I agree with the Union that the Collective Agreement does not have a provision that broadens the scope to include the activities of the employee after he/she retires from employment with the Employer. The fact that retirement is tied to exercising an option under the pension plan or Collective Agreement, does not result in the person not being able to work after retirement with the result being the ineligibility to retiree benefits.

The Employer argues that the Union must prove that it has negotiated this benefit. I conclude that the Collective Agreement does provide for retiree benefits after a person retires. Without an actual definition of retirement, I conclude that the person retires, as I stated above, when he/she exercises an option under the pension plan or Collective Agreement. What the Employer is attempting to do is put conditions on the provision of retiree benefits. The only specific conditions in the Collective Agreement are the years of service, age and retirement. The Employer would have to show specific language to broaden the conditions to include not working at all, after the person leaves its employment.

Having reached this conclusion, I can understand that the Employer is concerned about the future impact of this provision. Arbitrator Hickling in his Award, and I during this hearing process, urged the parties to negotiate this issue rather than litigate it as the Collective Agreement is up for renewal next year.

The Union has demonstrated some flexibility on this issue in its requested remedy for the Becker grievance. The Union is seeking benefit coverage only for the time that Becker was not covered by another group benefit plan. It is not seeking benefit coverage for the entire period he was in Canada, thereby eliminating any dual coverage possibility.

It would be beneficial for the parties to perhaps negotiate a policy on this issue now rather than wait for next years' negotiations. In the meantime as a sign of good faith, the Employer could maintain its current practice, and the Union its approach to remedy.

In summary, for the foregoing reasons I conclude that the Union's grievance succeeds.

Employees are entitled to retiree benefits under the Collective Agreement when they retire from employment with the Employer, have five or more years of service and are age 55 or older. Employment with another employer after retirement is not a consideration.

Becker is entitled to benefits for the period of time that he was not out of the country, and not on another employer's benefit plan.

I remain seized of any issues arising out of the implementation of this Award.

Dated this 23rd day of November, 2009.