In the Matter of an Arbitration

Pursuant to the *B.C. Labour Relations Code*

Between:

Insurance Corporation of British Columbia

Corporation

And

Move-Up Together

(Canadian Office and Professional Employees Union, Local 378)

Union

MEAL EXPENSE ARBITRATION

ARTICLE 20.06 (B)

Arbitrator:	Joan McEwen
Counsel for Corporation:	Chris Leenheer
Counsel for Union:	Brian Nelson, Jude Morrison
Date of Hearing:	December 14, 2017
Date of Award:	February 14, 2018

I. Grievance

On July 6, 2016, the Corporation advised the Union that, from that date forward, estimators working out of the Centralized Estimating Facility ("CEF") would no longer be able to claim lunch expenses. The Union grieves a violation of Article 20.06 (b) and says that, even if the Corporation's interpretation is correct, it is estopped from changing its practice mid-Collective Agreement.

II. Facts

ICBC, launched in 1973, is a monopoly provider of mandatory automobile insurance coverage in B.C. It operates through a number of offices in claim centres throughout the province. It markets its car insurance policies, branded as AutoPlan, through independent insurance dealers. In addition to the dealers, it liaises through its employees with a wide variety of agencies and vendors, including auto repair shops, car rental companies, towing companies, law firms and the police.

The Union represents a wide variety of office, technical and professional employees. The Corporation and the Union (including its predecessor unions) have been parties to Collective Agreements since 1974. The current Collective Agreement is in effect from 2014 to 2019. The relevant contractual provisions are Articles 0.10, 20.01 and 20.06 (b). Articles 0.10 and 20 provide that

> 0.10 Management Rights
>
> All management rights heretofore exercised by the Corporation, unless expressly limited by this Agreement, are reserved to and are vested exclusively in the Corporation.
>
> Notification of Corporation Policies and Procedures
>
> The Corporation agrees to advise the Union in writing of all policy and procedure instructions relating to matters covered by this Agreement. The Corporation will not issue any policy and procedure instructions which are contrary to the terms and conditions of this Agreement, and it is recognized that all such policy and procedure instructions may be the subject of grievance pursuant to Article 3 of this Agreement.

ARTICLE 20

MOVING, TRAVELLING, SPECIAL ENTITLEMENTS

20.01 Headquarters

Each employee will have an established headquarters which will be the location where the employee normally works, reports for work, or the location to which he returns between jobs and will be a permanently established Corporation place of business unless otherwise specifically agreed by the parties. Under this clause, the homes of resident adjusters will be considered the established headquarters for those employees and classifications in the absence of a permanent Corporation office.

For the purposes of this Article, local region will be defined as the area within twenty (20) kilometres of the employee's established headquarters.

20.02 General Provisions - Transportation and Travel Time

(a) Transportation - General

Unless otherwise specified, employees who… travel on Corporation business will be provided with transportation….

(b) Travel Time - General

Unless otherwise established in this Agreement, all time spent in travel prior to and after regular hours…. will be paid as time worked.

(c) It is understood and agreed that employees who are away from their established headquarters and are utilizing a a Corporation vehicle will be entitled to use such vehicle for reasonable personal use after regular working hours.

(d) ….the Corporation will provide studded snow tires on request and survival kits when (Corporation vehicles are) operated in northern and southern regions….

20.03 Commercial Travel

The Corporation will pay the equivalent of economy air fare for air travel… where required for employees traveling on Corporation business….

20.04 Travel - Involving No Change in Lodging

Employees who are required to report to a temporary headquarters which does not involve any change in lodging will be reimbursed for additional transportation cost incurred….

20.05 Use of Personal Vehicles

Employees who elect… to use their personal vehicles… shall receive fifty-two cents … for all distances travelled on Corporation business.

20.06 Expense Claims

Employees travelling on Corporation business or working away from their established/alternate headquarters will be reimbursed for reasonable expenses as set out below by submitting the appropriate Corporation form:

(a) Accommodation expenses.

(b) Meal allowances will include actual expenses incurred for all meals and gratuities. Receipts will be required for individual meals above the following amounts:

Breakfast -	$10.00
Lunch -	$12.00
Dinner -	$21.00

(c) Personal vehicle mileage expenses….

(d) Reasonable Corporation promotion expenses….

(e) Reasonable miscellaneous expenses…..

20.07 Monetary Advances

Employees will receive monetary advances on request when traveling or incurring expenses on Corporation business.

20.08 Moving Expenses….

20.09 Moving Expenses Defined….

20.10 Special Allowances….

20.11 Training/Travel Guidelines….

In 2002, the Corporation initiated the express Repair Program—a program that gave claimants the option of having their vehicle damage either estimated by estimators at a Claim Centre and then repaired at a body shop (either a valet or base shop), or estimated and repaired at a valet-designated body shop. As a result of changes made to that program in 2006, 2008, 2010 and 2013, estimating functions are now mostly handled only by Claim Centres (significantly reduced number) and the CEF, along with more than 500 valet shops which have estimating authority. A valet body shop can perform estimate duties, which are subject to review by estimators. In addition, claimants still have an option to have vehicle damage repaired at a base shop which does not have estimating authority. At these shops an estimator performs the estimate work involved.

The CEF has been in operation since 1998 and has been located at 1575 Hartley Avenue, Coquitlam, British Columbia for the past seventeen years. The CEF operates seven days per week, with two overlapping shifts involving a 4x4 work week and fortnight work system. Approximately 150 employees work out of this facility—including approximately 80 estimators and Specialty Vehicle Appraisers ("SVA"). All employees working at or out of this facility has the CEF as their identified "headquarters" under Article 20.01.

The estimators are grouped into three departments: express estimators, estimators, and SVA's. From each group, estimators are designated to travel to various shops to perform on–site visits.

"Road duties" are performed on a rotational basis. On average, each estimator performs road duties once per month and approximately two road estimators are assigned per day. Road estimators attend at the CEF at the commencement of their shift to pick up their work schedule (i.e. which repair shops they need to attend that day), plan their routes (including scheduling breaks and lunch, and performing estimate reviews), and pick up a company car—a total of approximately two hours. They usually return to the facility around 1.5 hours prior to the completion of their shift to perform computer updates on claims handled during the day.

While performing their road assignments, they may be redirected to other locations.

Prior to July 2016, CEF estimators performing road duties were reimbursed for lunch expenses under Article 20.06 (b). In 2016 however, the Corporation reduced the geographic servicing boundaries for the CEF estimators—the previous boundary being from the University of British Columbia to Maple Ridge; the new boundary being from Boundary Road to Langley, including Maple Ridge and Surrey. John Foreman, Manager of Claims Operations, advised by memo dated July 6, 2016:

> … (E)mployees doing estimating road work will no longer be entitled to expense for lunch based on ICBC's road territory….
>
> The estimator job description states
>
> Work Environment
>
> - to travel to repair shops and suppliers (occasional to routine basis)
>
> As part of the job description, it is safe to say that estimators do road work. We've also confirmed that it is reasonable if taking a lunch that the employee may stop by another ICBC location and use that office lunchroom (Corporate ID would be required to attend another facility), i.e., Surrey, Maple Ridge, New West, etc.
>
> I realize this is a change in how we currently operate however it is seen to be fair and reasonable.

The Union, in addition to noting that it had received no notice of the change, grieved that the "Policy Directive" violated Article 20.06 (b) and was an improper and unreasonable company rule.

In the 1996 negotiations, Article 20.01 was amended such that the range of the local region was described as "the area within 20 kilometres of the … established headquarters." Since then, the only changes to Article 20.06 (b) have concerned the amount of the meal expense entitlements.

In its 1998 "Corporate Policy Guide," the Corporation stated that, to be eligible to claim meal expenses under Article 20.06 (b), an employee must be working away from "his/her designated or alternate headquarters on corporate business," and the cost of the meal must be reasonable. The current Corporate Policy Guide provides for reimbursement where:

The part of the current Corporate Policy Guide that pertains to bargaining unit employees provides as follows:

> Meal allowances paid to Bargaining Unit employees travelling on Corporate business working away from their established work locations are as outlined in the Collective Bargaining Agreement Article 20.06. Employees are reimbursed by submitting the expense statement form (ACG7) (pdf) or online through Employee Self–Serve (ESS)–Travel and Expense.…

Prior to this case, no issue has arisen between the parties as to whether Article 20.06 (b) has a geographic qualifying component that affects meal expense entitlements.

The parties agree that, upon the issuance of this Award, any dispute relating to remedy will be dealt with between the parties.

III. Parties' Submissions

A. Union

1. Interpretation of Article 20.06 (b)

The estimators' "headquarters" is the CEF, a fact made abundantly clear by the plain language of Article 20.01:

> Each employee will have an established headquarters which will be the location where the employee normally works, reports for work, or the location to which he returns between jobs and will be a permanently established Corporation place of business unless otherwise specifically agreed by the parties….

The definition of "headquarters" clearly fits the CEF situation. The majority of an estimator's work assignments "normally" takes place there; it is the location to which he/she both reports to work and returns back towards the end of the shift. Further, in the parties' Agreed Statement of Facts, the Corporation has in effect conceded this interpretation:

> The CEF operates seven days per week, with two overlapping shifts involving a 4x4 work week and fortnight work system. Approximately 150 employees work out of this facility—including approximately 80 estimators and Specialty Vehicle Appraisers ("SVA"). *All employees working at or out of this facility has the CEF as their identified "headquarters" under Article 20.01 of the Collective Agreement.* [emphasis added]

The language in Article 20.06 (b) is mandatory: whenever an employee works away from his/her "headquarters," he/she "*will* [emphasis added] be reimbursed for reasonable expenses…." As noted, the Corporation has provided such benefits to estimators since the outset of its bargaining relationship in1974.

In response to the Corporation's argument that estimators may eat their bag lunches at ICBC establishments, the Union notes that road work can cover a large territory. As well, assignments often change during the day such that estimators must travel to body-shops far away from the nearest ICBC location. In circumstances such as these, the estimators' only realistic option is to buy lunch at an eating establishment.

The arbitral jurisprudence is clear: the arbitrator's mandate is not to weigh in on competing equities but to interpret the disputed Collective Agreement language so as to uncover the mutual intention of the parties.

As arbitrator Germaine said regarding Article 0.10 (Management Rights) in *ICBC and OPEU, Local 387 (Article15.12 Vacation Scheduling)* ([2002] B.C.C.A.A.A. No. 389),

> The Corporation is not at liberty to unilaterally amend the Collective Agreement by rescinding [a prescribed right]. Neither of the parties individually has the authority to re-write the Collective Agreement. Nor does an arbitrator. Until renegotiated between the parties, the obligations imposed by the Collective Agreement must be observed…. (paragraph 44)

2. <u>*KVP* Analysis</u>

In the alternative, the change implemented in 2016 represents the introduction of a new—and unenforceable—policy.

While employers have the right to develop rules and policies for the workplace, in so doing they must adhere to the guiding principles laid out in the classic "KVP" award ((1965), 16 LAC 73), including that the policy must not neither inconsistent with the Collective Agreement nor unreasonable. The policy fails on both grounds.

As noted, it is inconsistent with the language of Article 20.01. As well, the Corporation's sole rationale for the change in policy has been the reduction in the road territory. In the words of

Corporation counsel, “employees are now driving in a more confined area. That was what caused the Corporation to look at the ‘meal expense’ issue.” At no time did the Corporation advise the Union that it was “reverting” to the plain language of the Collective Agreement.

Given that the Collective Agreement at no point links entitlement to meal expenses to geography, the policy is unreasonable on its face.

Because the policy is both inconsistent with the Collective Agreement and unreasonable, it is void *ab initio: Fording Coal Ltd. and USWA, Local 9705* ([2002], B.C.C.A.A.A. No.9 (Hope); *VIHA and BCNU* [2004], B.C.C.A.A.A. No. 210 (Munroe); ICBC and COPE, Local 378 [2012], B.C.C.A.A.A. No.112 (Taylor).

3. Estoppel

In the further alternative, the Corporation was required, in view of the longstanding application of Article 20.06 (b), to have notified the Union, during the last round of bargaining, as to its changed interpretation. Having failed to do so, it is estopped from ending the meal expenses entitlement for the duration of the current Collective Agreement.

In 1993, the BC. Labour Relations Board explained what it called the “modern doctrine of estoppel: *B.C. Rail Ltd. and U.T.U. Locals 1778 and 1923* (Doc. C152/92 (B.C.I.R.C.) (affirmed in (April 30, 1993) B128/93 (B.C.L.R.B.)) The Board noted that the traditional compartmentalization of equitable remedies and the strict tests for their application have been abandoned; in their place is a broad principle designed to avoid unfairness or injustice.

To quote arbitrator Hall in *ICBC and OPEIU, Local 378* ([2002] B.C.C.A.A.A. No. 109, at paragraph 40):

> The purpose of the modern doctrine it to avoid inequitable treatment. An estoppel may arise where (a) intentionally or otherwise, one party has unequivocally represented that it will not rely on its legal rights; (b) the second party has relied on the representation; and (c) the second party would suffer real harm or detriment if the first party were allowed to change its position. The requirement of unequivocal representation or conduct is a matter of fact, and may arise from silence where the circumstances create an obligation to speak out. The notion of reliance must be assessed from the perspective of the party raising the estoppel. In

> the labour relations context, the element of detriment may be satisfied by a lost opportunity to negotiate….

In *MAHCP and Nor-Man Regional Health Authority* (2011 SCC 59)), the Supreme Court of Canada cited with approval comments made by Paul Weiler, the then Chairman of the B.C. Labour Relation Board, in a 1978 Board decision: *Re City of Penticton and CUPE, Local 608* (1978), LAC (2d) 307. In explaining the different application of the doctrine of estoppel in a grievance arbitration than in a court of law, Mr. Weiler said,

> … (the) collective bargaining relationship is quite a different animal. The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems… across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language.

Mr. Weiler then discussed a situation wherein a union, aware that the employer is acting in a way which it (the union) believes offends the collective agreement, makes no objection. The union later takes a second look and, believing it might have a good argument under the collective agreement, asks an arbitrator to explore its strict legal rights for events that have already occurred. What should be the outcome?

> *It is apparent on its face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side.* In the words of the Board [in a case decided earlier in the year], "It is hard to imagine a better recipe for eroding the trust and co-operation which is required for good labour/management relations, ultimately breeding industrial unrest in the relationship—all contrary to the objectives of the *Labour Code*…." [emphasis added]

Endorsing those comments, the Supreme Court of Canada said that the courts must remain alive to "these distinctive features of the collective bargaining relationship, and reserve to arbitrators the right to craft labour-specific remedial doctrines."

In summary, the Corporation should be held to its longstanding past practice for the duration of the current Collective Agreement.

B. Corporation

The Corporation says that, despite its admittedly decades-long practice, the Collective Agreement is clear and unambiguous and does not, on its face, provide for the benefit claimed.

Estimators are required, on a routine and rotational basis, to perform duties away from their CEF—a fact made clear by their job description:

- To perform the full working level of office-based and traditional estimating and repair/replace authorization on personal claims, including technically complex vehicles. Also performs rotational mobile services to support and audit vendors.

- Work Environment—to travel to repair shops and suppliers (occasional to routine basis)

- Vendor Support—Provides support during rotational visits to supplier/repair shops, addressing matters related to personal vehicle estimates, repair techniques and solutions based on technical expertise and awareness of current trends in vehicle repair techniques.

- Vendor Shop Audits—Conducts audits during rotational visits to supplier/repair shops, ensuring compliance with established repair/replace standards and policies, preparing reports, providing follow-up with vendor, and keeping ICBC management informed.

- It is a normal and routine function of the estimator's job at CEF to perform "road duties" and attend various third party shops and vendors to conduct their duties. These are performed on a rotational basis, such that each estimator will be required to perform road duties approximately once per month.

1. <u>Plain Language</u>

The plain language of a collective agreement is the primary determinant of the parties' intended meaning: e.g., *Pacific Press v. Graphic Communications International Union, Local 25-C,* [1995] B.C.C.A.A.A. No. 637.

In addition and of key importance in this case, the words in dispute must be read in the context of the sentence, section, and agreement as a whole:*Prince Rupert School District No. 52*, [2003] B.C.C.A.A.A. No. 148 (Blasina); *Western Oil Services Ltd.*, [2000] B.C.L.R.B.D. No. 200/2000 (B.C. Labour Relations Board).

The heading of Article 20, "MOVING, TRAVELLING, SPECIAL ENTITLEMENTS," makes it clear that Articles 20.02 to 20.07 deal with travelling. Articles 20.08 and 20.09 deal with moving, and 20.11 deals with travelling to attend training.

Articles 20.02 to 20.07 deal with employees required to travel or go out of their normal routine to perform work on behalf of the Corporation. The obvious intent of the parties was to provide for certain expenses, or allowances, in the case of employees who are inconvenienced by being away from home and not able to easily attend to their normal daily functions. Hence, the provisions for car allowances, adjusting "working time," accommodations, monetary advances, laundry, and meals.

Reading Article 20 in its entirety, it is clear that the parties intended that entitlement to such expenses depends on a significant disruption in the normal routine of the employee—whether travelling a material distance by automobile, airplane or other form of transportation, or working a notable distance from their normal place of work.

This interpretation is borne out by arbitrator Hope's decision in *ICBC and OPEIU, Local 378*, unreported; July 20, 2001. The issue involved a claim for meal expenses by a newly added group of employees ("compliance employees") who were routinely assigned patrol duties:

> …The dispute involves the application of Article 20.06. It provides in part for meal expenses for employees who are "working away from their established/alternate headquarters."
>
> The issue is whether employees assigned routinely to patrol duties can claim meal expenses on the basis that the location where they receive mail and electronic messages and perform routine tasks related to patrol duties is their headquarters for purposes of claiming meal expenses. That interpretation would entitle them to meal expenses on most, if not all, work days. (page 2)

In accepting the Corporation's position, Mr. Hope said that

> the Union's interpretation is not consistent with the clear intent of the provision, which is to compensate employees who are required to be away from their work place *out of their ordinary routine* and who incur the expense of purchasing a meal in order to accommodate the needs of the Corporation. [emphasis added]

In a decision rendered six months later and entitled "Mediation Memorandum," Mr. Hope addressed certain questions arising from his earlier award ("Hope Award"). In so doing, he confirmed that the intent and purpose of Article 20.06 (b) is to "compensate employees who are required to be away from their headquarters in circumstances that take them out of their ordinary

routine and who thereby incur the expense of purchasing a meal in order to accommodate the needs of the Corporation."

In essence, the Hope Award stands for the proposition that the term "headquarters" is a broad concept—not restricted in its meaning to only the head office but, rather, a flexible definition that takes into account the various positions and job duties within the organization. The estimators regularly perform "road duties" which require them to use a company car and attend at various vendors and shops within the geographical boundaries serviced by the CEF. Such duties are within an estimator's normal and ordinary routine. The concept of "headquarters" is sufficiently flexible to deem the CEF *region* to be their headquarters on the days they are required to perform road duties.

2. Past Practice

Past practice cannot be used to create new rights not found in the language of the collective agreement.

In *ICBC v.COPE, Local 378 (Policy and Group Grievance)*, [2012] B.C.C.A.A.A. No. 112 (Taylor), the Corporation sought, in part, to rely on past practice. The arbitrator concluded as follows at paragraphs 85-86:

> The language of the collective agreement overrides a practice that is inconsistent with the express language of the agreement. As arbitrator Williams said in *Howe Sound School District No. 48 v. Howe Sound Teachers' Assn. (Detlef Grievance)* [1995] B.C.C.A.A.A. No. 165,
>
> > … If however the wording of the Collective Agreement once understood is clear and plain, in a situation where one of the parties to the past practice was assenting to that practice without full knowledge of its rights under the Collective Agreement and where the two are in direct conflict, then it seems to me the Collective Agreement in those circumstances would prevail. (paragraph 24)
>
> The fact that there has developed a practice of requiring overtime to be authorized cannot create a "right" to one party inconsistent with the language of the Collective Agreement. Even a long-standing error in the interpretation of a collective agreement may be corrected once it is discovered by one of the parties….

In *Cranbrook (City) (Re)*, [2001] B.C.L.R.B.D. No 294, the B.C. Labour Relation Board reviewed an award interpreting a pension clause in a collective agreement. After noting that the language of the agreement remains the primary resource for interpreting the parties' mutual intent, the Board said at paragraphs 63-4:

> The starting point in the search for the mutual intent is the language of the agreement itself. A collective agreement is a bargain that is required to be in writing, and as arbitrator Munroe stated in *Government Air Services, supra*, at p. 19, the general principle is the intention of the parties is "to be derived as far as possible from the plain meaning of the words used by them in their written instrument". Likewise arbitrator Hope in *Vancouver Police Board, supra,* at p. 226:
>
> > ... The primary resource in a disputed interpretation is ... the language itself. An arbitrator has no jurisdiction to alter, amend, subtract from or add to the collective agreement….

The Board discussed two kinds of extrinsic evidence—that which establishes a consensus and that which evidences one side's unilateral intent. There is no evidence in this case that past practice was such as to establish a consensus or mutual intent regarding interpretation. To the contrary, it is clear from the Hope Award that the Corporation's position in 2001 regarding the meaning of Article 20.06 was the same as it is today. There is no evidence that the practice at the CEF changed the Corporation's view on the ultimate intent of Article 20.06.

3. Estoppel

The required elements of estoppel are summarized in the B.C. Labour Relations Board's decision in *NCR Canada Ltd.*, BCLRB No. B152/2014 (paragraph 52):

> … [1] an existing legal relationship, [2] an unequivocal representation by the first party, [3] reliance of on that representation by the second party and [4] detriment to the second party if the first party is allowed to change its position.

The issue of whether a party has made an unequivocal representation is a question of fact: *Maple Ridge District*, BCLRB Decision No. B209/2001 [reconsideration of BCLRB B295/2000], at paragraph 25.

Arbitrators and the Labour Relations Board have consistently held that past practice, on its own, is not evidence of an unequivocal representation to support a claim of estoppel. In *Re Eurocan Pulp and Paper Company*, (1991) 14 L.A.C. (4th) 103, the arbitrator held at paragraph 44:

> The mere existence of a practice does not confer a right. The fact that a party has followed a particular course of action does not necessarily import a promise that it would continue to do so: see *Re Western Pulp Inc. (Woodfibre Pulp Operations) and P.P.W.C., Loc. 3* (1984), 17 L.A.C. (3d) 228 at p. 240 where Professor MacIntyre correctly states that "… the mere long continuance of a state of affairs is not a basis of estoppel." If further support is needed for the proposition that gratuitous benefits can be eliminated or changed without notice being given, it can be found in *Re Cassiar Mining Corp. and U.S.W., Locals 6536 & 8449* (1986), 24 L.A.C. (3d) 257 (Hope) at pp. 277 and 282. In the absence of an express commitment or evidence from which a commitment to continue the practice in force may be inferred, the mere fact it has remained unchanged for years does not preclude the employer changing the practice unilaterally.

In *Fording Coal Ltd.*, BCLRB Letter Decision No. B2/2003, the Labour Relations Board cited *Eurocan* with approval. At paragraphs 24 and 26, the Board rejected

> the broad proposition that any conduct sufficient to induce reliance will necessarily constitute an unequivocal representation. Judged in context, and from the perspective of the party raising estoppel, the conduct must be such that it led the party to reasonably believe that an undertaking or commitment had been given. This reasoning is not inconsistent with the proposition that a party need not intend or know that it induced reliance for its acts or omissions to constitute an unequivocal representation. For these reasons I find that the arbitrator's conclusions at page 9 of the award that "mere continuance of a longstanding practice is not a sufficient basis to create an estoppel" and that "[t]here must be an express commitment, or evidence of conduct, that would indicate that the practice will be continued" is consistent with this reasoning in *Maple Ridge* (*supra*), and does not disclose reviewable error.

To summarize, the mere existence of a practice, even a long-standing practice, is not sufficient to found an estoppel. This is so because the mere fact of the practice does not import a promise or representation that the practice will continue.

In a later case, *West Fraser Mills Ltd.,* [2006] B.C.L.R.B.D. No. 199, the B.C. LRB reiterated the correctness of the principle:

> As the panel in *Fording Coal Limited* (above) correctly notes…, before an estoppel by practice is established, there must be something upon which it can reasonably be

> construed that one of the parties has made a promise or commitment to do or not do something. The mere existence of the practice alone is insufficient.
>
> The reason that this is so is because, absent something more, the practice alone can be construed either as an abridgement/waiver of legal rights or as a mere indulgence. That is to say, a practice on its own is equivocal, not unequivocal. The reason that an equivocal representation is insufficient to establish an estoppel is because it would be unreasonable for the party attempting to rely on an equivocal representation, even if it did so to its detriment. Parties are only entitled to the protection of the equitable doctrine of promissory estoppel if it can be said to be reasonable to rely on a representation…. (paragraph 21)

The Corporation made no representation, promise or commitment that its practice would continue. Thus, there can be no finding of an unequivocal representation by the Corporation.

Estoppel is not applicable where there is a change in circumstances—in this case, a material reduction in the distance estimators performing road duties must drive. After this change, the Corporation determined that paying a meal expense for these employees was no longer justified (if it had ever been).

In *School District No. 39 (Vancouver) and Vancouver Teachers' Federation*, [1996] B.C.C.A.A.A. No. 630 (Devine), the arbitrator confirmed that the estoppel may end with a change in circumstances. At paragraphs 30-31 he said that, just as arbitrators may extend the estoppel beyond the life of one collective agreement, a significant change in circumstances may also affect the duration of an estoppel: see *Squamish Terminals Ltd. and ILWU, Local 514* (1992), 25 L.A.C. (4th) 116 (Kelleher). "Each case is decided on its own facts. An estoppel may be found to end before or after the expiration of an existing collective agreement."

The practice here relied on was in place only until such time as an operational change significantly altered the geographic boundaries of the CEF. As a result of that change, the Corporation made a decision to change its practice and revert to the Collective Agreement language.

C. Union Reply

The Hope *Mediation Memorandum* is inadmissible in that it is clearly the product of "without prejudice" mediation efforts, efforts aimed at resolving merger issues. In support of its argument that everything was off-the-record, the Union tabled a further Hope decision dated September 4, 2001—i.e., after Hope's July 20, 2001 award and before his February 15, 2002 Mediation Memorandum. In that document, Hope deals with certain (non-meal expense) "interest" items in respect of the same merger.

The Corporation is not entitled to reply on the heading of Article 20, namely "Moving Travelling, Special Entitlements." In 1995, the following preamble was added to the Collective Agreement:

> It is understood and agreed that the following article headings and sub-headings, subject to further changes to the Agreement, will not change the meaning and intent of the appertaining language provisions.

D. Post-Hearing Submissions

Shortly after the hearing, I asked counsel to comment on my award in *B.C. West Terminal Freight Services Incident, and RWU, Local 580 (Weekend Rate Policy Grievance)*; unreported; February 10, 2017.

After citing with approval arbitrator Lanyon's comments in *Seaspan and ILWU, Local 400 (O'Keefe)* ([2014] CLAD No. 349) regarding the "modern doctrine of estoppel," I made note of the fact that this so-called modern doctrine "collapsed many prior equitable precepts to achieve one basic purpose, namely the prevention of inequitable detriment."

In response to my request, Corporation counsel submitted that the award is distinguishable on its facts. Union counsel submitted that it, like the cases cited in its brief of authorities, replies on principles of fairness and equity as opposed to principles embedded in strict doctrinal prescriptions.

IV. Decision

Having carefully considered the evidence and the submissions, I have determined that the language in Article 20.06 (b) bears the meaning advanced by the Corporation but that, due to the

unique circumstances of this case, the practice cannot be terminated until the expiry of the Collective Agreement.

Dealing first with the proper interpretation of Article 20.06 (b), I agreed with the Union that the Corporation cannot rely on the heading of Article 20.

However, I am satisfied that, when Article 20 is viewed in its entirety, Article 20.01 must be read, as argued by the Corporation, as applying to employees working outside of their normal routine. While I make no finding as to whether arbitrator Hope's "Mediation Memorandum" was intended to be *without prejudice,* I note that it simply confirms the conclusion reached in the Hope Award—namely, that the meal expenses entitlement only applies to employees who are "required to be away from their work place *out of their ordinary routine* and who incur the expense of purchasing a meal in order to accommodate the needs of the Corporation."

I am not satisfied on the evidence that there is any justification for estimators performing road duties (for a little more than 1/2 their shift) to be privileged over and above either those working their entire shift at the CEF. Nor can I find a reason to distinguish the case of the CEF estimators from that of the compliance employees who were the subject of the Hope Award.

Regarding the Union's argument in respect of the *KVP* case, I do not find that case to be applicable to the case before me. The Corporation did not introduce a new policy; rather it took the opportunity, pursuant to the geographical boundaries being reduced, to institute what it believed to be the correct interpretation of Article 20.06 (b).

Turning to the Union's estoppel argument, it is true that past practice, no matter how long it has endured, cannot create a right. However, the duration of that practice taken together with other relevant circumstances may give rise to an estoppel.

In the *B.C. Rail* case (above) in1993, the B.C. Labour Relations Board described what it called the "modern doctrine of estoppel": the traditional compartmentalization of equitable remedies and the strict tests for their application have been abandoned; in their place is a *broad principle designed to avoid unfairness or injustice.* [*my emphasis*]

In the 2002 *ICBC and OPEIU, Local 378* case (above), arbitrator Hall elaborated upon that "modern doctrine:"

> The purpose of the modern doctrine it to *avoid inequitable treatment*….
>
> The requirement of unequivocal representation or conduct is a matter of fact, and may arise from silence where the circumstances create an obligation to speak out. The notion of reliance must be assessed from the perspective of the party raising the estoppel. In the labour relations context, the element of detriment may be satisfied by a lost opportunity to negotiate…. [emphasis added]

In the 2011 *MAHCP* case (above), the Supreme Court of Canada discussed the application of the doctrine of estoppel in a labour relations context. As argued by the Union, the Court endorsed Paul Weiler's statement in *Re Penticton City and CUPE, Local 608* (above) that the doctrine must be applied differently in a grievance arbitration than in a court of law:

> … (The) collective bargaining relationship is quite a different animal. The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems… across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language.

Mr. Weiler went on to set out a set of hypothetical facts. For ease of reference, I will repeat both those facts as well as his commentary (page 10, above):

> (A) union, aware that the employer is acting in a way which it (the union) believes offends the collective agreement, makes no objection. The union later takes a second look and, believing it might have a good argument under the collective agreement, asks an arbitrator to explore its strict legal rights for events that have already occurred. What should be the outcome?
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> > *It is apparent on its face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board [in a case decided earlier in the year], "It is hard to imagine a better recipe for eroding the trust and co-operation which is required for good labour/management relations, ultimately breeding industrial unrest in the relationship—all contrary to the objectives of the Labour Code…."* [my emphasis]

The hypothetical facts bear a striking resemblance to the facts before me. Given its persistent practice over the years—in the face of policy directives spelling out the conditions for entitlement thereto—the Corporation must be deemed to have known that the estimators were

being reimbursed for a benefit to which they were not entitled. At a minimum, the Hope Award in 2001 would have clearly brought home that fact.

Yet the Corporation did nothing. It made no objection either before or after that Award. At that point, the Union had every reason to believe that the Corporation's interpretation of the disputed Article 20 vis-à-vis the CEF estimators, aligned perfectly with its own.

At no time prior to 2016——a period of well over four decades—did the Corporation disabuse the Union of that belief.

Consistent with the equities discussed by Paul Weiler found in the *City of Penticton* case, I believe it would be"inequitable and unfair to permit such a reversal to the detriment of the other side," in this case the Union.

Cases involving the doctrine of estoppel turn on their facts. Further, as is apparent from the cases cited in this case, the doctrine has been, for the last many years, in a continual state of evolution. More often than one would prefer, results seem less than consistent. For instance, although the Corporation relied on cases standing for the proposition that the mere existence of past practice alone is insufficient, the *City of Penticton* case points to a different conclusion.

Regarding the matters of "unequivocal representation," "reliance," and "detriment," I adopt the words of arbitrator Hall in the *ICBC and OPEIU, Local 378* case (above),

> *The requirement of unequivocal representation or conduct is a matter of fact, and may arise from silence where the circumstances create an obligation to speak out. The notion of reliance must be assessed from the perspective of the party raising the estoppel. In the labour relations context, the element of detriment may be satisfied by a lost opportunity to negotiate….* [my emphasis]

In the circumstances, I am satisfied that estoppel has been established. For the duration of the current Collective Agreement, CEF estimators performing road duties will be able to claim the meal expenses benefit.

As noted above, the parties have asked that I leave it to them to fashion the remedy.

Dated this 14th day of February, 2018.

“Joan I. McEwen”
Joan I. McEwen
Arbitrator