IN AN

ARBITRATION

BETWEEN:

CATALYST PAPER CORPORATION (POWELL RIVER DIVISION),

the "Company"

AND:

COMMUNICATION, ENERGY and PAPERWORKERS' UNION OF CANADA, LOCAL 76,

the "Union"

RE: Floaters, Weekly Indemnity and Supplementary Vacations on layoff

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AWARD

Arbitrator:	Rod Germaine
For the Union:	John Rogers, Q.C.
For the Company:	Donald J. Jordan, Q.C.
Hearing:	March 9, 2010; Powell River, B.C.
Date of Award:	May 26, 2010

Introduction

1 This arbitration consolidates three separate but related grievances. All three concern benefit entitlement issues for employees on layoff. Each is a consequence of a change in the administration of the collective agreement.

2 The first grievance is related to Article XVIII, Special (Personal) Floating Holidays. The parties refer to these days off as "floaters". The grievance was initiated by letter dated July 8, 2009.

3 The second deals with weekly indemnity benefits, a component of the Welfare Plan provided by Article XIX and Exhibit "C" to the collective agreement. This grievance was also commenced by letter dated July 8, 2009.

4 The third concerns Article XVI, Supplementary Vacations. This grievance was submitted by letter dated August 20. 2009.

5 By agreement, the parties referred all three directly to this arbitration without processing them through the grievance procedure.

Background

6 Mike Verdiel, the Union's president, was the only witness at the hearing. He testified the parties concluded a round of collective bargaining in November 2008, the term of the previous agreement having expired on April 30, 2008. The negotiations included discussions of attaining a specific labour cost per unit of production. Mr. Verdiel testified the negotiations did not include any reference to the benefits in dispute in this proceeding.

7 Layoffs have been a lamentable reality in the industry for several years. In 1989, when Mr. Verdiel was elected president, the Union's bargaining unit included

approximately 1500 employees. That number is now 235. A number of layoffs have contributed to the reduction. The most recent was effective June 1, 2009.

8 On the date of the hearing - March 9, 2010 - there were 19 employees on layoff. These employees were in the Labour Replacement Pool ("LRP"), from which they are recalled to work according to their seniority when a regular employee is not available. Mr. Verdiel estimated that from ten to 14 of the 19 laid-off employees in the LRP worked the equivalent of full-time hours in February 2010 and, except for those who were ill or on a leave of absence, all of the 19 worked some hours during the month.

Applicable principles

9 Both parties rely on the plain and ordinary meaning of the words in the relevant provisions of the collective agreement. The Union also relies on past practice and, in the alternative, on estoppel by conduct. The Company contends all three disputes can be determined "within the terms of the collective agreement". In the submission of the Company, the past practice evidence is not helpful because it cannot be relied on to vary the terms of the collective agreement. The Company says further that, as the past practice is not capable of illuminating the parties' mutual intentions in relation to the disputed contract provisions, it cannot establish the type of representation necessary to establish an estoppel.

10 The Union does not take issue with the awards cited by the Company for their reiteration of general principles concerning the interpretation of collective agreements: *TBC Teletheatre British Columbia -and- OPEIU, Local 378*, [2002] BCCAAA No. 68 (Foley); and, *Southern Railway of British Columbia -and- CUPE, Local 7000*, [2006] BCCAAA No. 237 (Germaine). The Company references particular passages in the latter which emphasize the arbitrator's "overriding duty to locate the parties' intention in the *ordinary* meaning of the words they used to craft their agreement": emphasis added, paragraph 15. *GVRD -and- GVRDEU* (July 20, 1999), unreported (McPhillips), confirms that "the words of a collective agreement must be given, where possible, their plain, ordinary meaning" (page 7). All of which is consistent with the Union's references to an

award of particular relevance to this dispute: *Norske Canada Limited (Powell River Division) -and- CEP, Local 76*, [2002] BCCAAA No. A-042/02 (Greyell). The case concerned a dispute over floaters between these parties or, more precisely, between the Union and a predecessor to the Company. Both parties draw support from the award; as far as interpretive principles are concerned, it refers the arbitrator's responsibility to ascertain the *mutual* intention of both parties and the paramount importance of contract language in the search for that intention: emphasis added, page 6. Like the *Southern Railway* and *GVRD* awards, *Norske Canada* emphasizes the necessity to give effect to the "plain and clear language" of the agreement: page 7.

11 With regard to the proper use of past practice, the Union cites two awards: *BCNU and CEP, Local 444* (1995), 49 LAC (4th) 374 (MacIntyre); and, *Eurocan Pulp & Paper and CEP, Local 298* (2001), 99 LAC (4th) 24 (Hope) (hereafter, "*Eurocan Pulp & Paper* (2001)"). The Company does not take issue with the considered and lengthy analysis of the legal significance of past practice evidence in those awards, particularly the latter. But the Company stresses the basic principal that past practice is of no assistance to an arbitrator if there is "a clear preponderance in favour of one meaning, stemming from the words and structure of the agreement": *John Bertram and Sons Co. Ltd.* (1967), 18 LAC 362 (Weiler), at page 368, as quoted in *GVRD, supra,* at page 9.

12 In support of its alternative argument of estoppel, the Union cites: *Corporation of the County of Simcoe and SEIU, Local 1 Canada* (2009), 182 LAC (*4th*) 170 (Knopf); and, *TFL Forest Limited (Elk Falls Lumber Mill) -and- CEP, Local 1123* (March 20, 2008), unreported (Dorsey). The Company argues the law in this respect is undergoing clarification: *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 SCR 50; *Fording Coal Ltd. and USW, Local 7884*, BCLRB Decision No. B2/2003; *Ryan v. Moore*, [2005] 2 SCR 53; and, *West Fraser Mills Ltd. and USW, Local 1-425*, BCLRB Decisions No. B199/2006 and B311/2006. In the view I take of these disputes, it will not be necessary for me to examine the estoppel principles to be derived from these cases.

13 In what follows, I will deal with each of the disputes in turn. The three decisions are not entirely discrete; many of the principles will be cross referenced because they apply to more than one. I will approach them in chronological order.

Floaters

14 Floaters are governed by Article XVIII of the collective agreement, the relevant portions of which are:

> **ARTICLE XVIII - SPECIAL (PERSONAL) FLOATING HOLIDAYS**
>
> **Section 1: Floating Holidays**
>
> There shall be granted annually five (5) Special (Personal) Floating Holidays with pay to regular full-time employees, such special holidays to be arranged at a time suitable to the employee and the Company, during the contract year, so that there will be no loss of production.
>
> Effective May 1st, 1998 there shall be five (5) twelve-hour special personal floating holidays provided to those employees who are defined as tour workers.
>
> Employees who normally work a combination of 8 and 12 hour shifts will be paid as per the schedule for the week in which he/she takes a Floating Holiday.
>
> **Section 2: Qualifying Conditions**
>
> For each Special (Personal) Floating Holiday taken an employee will be granted eight (8) hours pay (12 hours for tour workers) on the straight time rate of the employee's regular job subject to the following:
>
> (a) A new employee must have been on the payroll for not less than ninety (90) days to qualify for his first Special (Personal) Floating Holiday and on the payroll for one hundred and eighty (180) days to qualify for his second, third, fourth and fifth Special (Personal) Floating Holidays.
>
> (b) Employees will not qualify for Special (Personal) Floating Holidays if on leave of absence of more than nine (9) months in the contract year except in the case of sickness or injury.

15 Until 2009, employees on layoff received five "floaters" on May 1st; the benefit was not pro-rated to reflect the portion of the year worked by the employee prior to being

laid off. The Union was aware that other mills were introducing changes to this practice, but it had no notice of a change affecting its members until April 2009. In a letter to Mr. Verdiel dated April 21, 2009, Richard Demchuk, Director, Human Resources, advised as follows:

> Dear Mike,
>
> **Re: Floater entitlement for employees on lay-off**
>
> As discussed with you yesterday, the Company has reviewed the application of Article XVIII – Special (Personal) Floating Holidays for employees on lay-off. Section 1 of the article states that five (5) floaters with pay will be granted to regular full-time employees.
>
> Effective May 1, 2009 employees on lay-off will not be granted the 5 floaters with pay, as they are not regular full-time employees. This will be applied in all Catalyst operations with this contractual provision.
>
> Employees that are recalled to fill permanent vacancies will receive a pro-rated number of floaters based on the time within the contract year that they are recalled. The following table outlines how floaters will be provided:

Time remaining in contract year upon recall to regular full-time	**# of Floaters based on remaining portion of contract year**
Minimum of 36 days	1
Greater than 72 days	2
Greater than 108 days	3
Greater than 144 days	4
Greater than 180 days	5

> Employees that work intermittently while on lay-off will not be entitled to Floaters. They must be recalled to regular status.

16 Based on an award which considered language similar to Article XVIII, the Union anticipated the Company would endeavour to link floaters with Article XVII, Statutory Holidays, in a manner which would limit the entitlement of laid-off employees. This link was found in *Western Pulp Limited Partnership -and- PPWC, Local 3* (January 26, 2005), unreported (Lanyon), and it was relied on to effectively pro-rate the floater entitlement of an employee returning to work from a long-term disability leave in excess of a in duration. The Union therefore reviewed the history of floaters in the parties' long bargaining relationship.

17 The history was traced back to the "Holidays" provision in the two collective agreements from 1949 to 1952. It provided for five specified holidays on New Year's Day, Easter Monday, Dominion Day, Labour Day and Christmas Day. In the 1952-53 contract, the provision – still called "Holidays" – included a new "Floating Statutory Holiday ... other than, and in addition to, those [five] statutory holidays set out above". The additional statutory holiday was floating because it was to be taken on a mutually agreed day. These terms remained unchanged in the ensuing 1953-55 contract but another term was introduced. The new "Special Floating Holiday" clause created an "additional Floating holiday with pay" in language which presaged the qualification still in the floater provision today: the day off was to be arranged "so that there will be no loss of production". The 1955-57 collective agreement retained the same structure but the new floater was re-titled and the new language has survived for over 50 years; the name of the clause became "Special (Personal) Floating Holidays". The number of these floater holidays increased to two during the term of this contract.

18 The "Holidays" provision did not change again until the 1961-63 contract when the number of floaters increased to three. The original Floating Statutory Holiday clause – not the floater or Special (Personal) Floating Holiday clause – was deleted in the 1963-64 contract. But the number of holidays did not decline because the floating statutory holiday was incorporated into the list of specified holidays in the form of Boxing Day.

19 In the 1966-68 collective agreement the Holidays provision was divided into part A governing statutory holidays and part B governing the Special (Personal) Floating Holidays or floaters; the structure of the two parts foretold the current configuration of Articles XVII and XVIII. Then, in the 1970-73 contract, the two parts were designated as separate Articles entitled 'Statutory Holidays" and "Special (Personal) Floating Holidays". The fourth floater was added in 1975 and the fifth in 1978. In 1997 the statutory holidays were increased to seven with the addition of Christmas Eve but the floaters provision did not change.

20 The only link between statutory holidays and floaters, then, is that they both originated in the Holidays provision. Beyond that, there was and is no direct linkage; nothing of substance ever connected the two benefits. The deleted Floating Statutory Holiday was always separate from the gradual development of the floaters provision.

21 As the Union contends, this conclusion necessarily contradicts the reasoning of the *Western Pulp Partnership* award, *supra*. The award held that: "Four of the five [floater] days relate to specific statutory holidays" and it pro-rated the floaters on that basis (see page 10). But the *Western Pulp* award was founded on agreed facts, one of which established a strong link between floaters and statutory holidays. The parties in *Western Pulp* agreed that: "The five floaters are intended to compensate for the fact that four statutory holidays are not recognized in the Collective Agreement: Victoria Day; B.C. Day; Thanksgiving Day and Remembrance Day" (page 4). I agree with the Union that this fact inevitably influenced the reasoning of the *Western Pulp* award. Based on the history of the floaters recounted above, it is not consistent with the facts before me.

22 The Company, however, does not rely on *Western Pulp* for more than the proposition that floaters, like statutory holidays, are an earned benefit. The contention is supported by the awards in *Eurocan Pulp & Paper Co. Ltd. -and- UPEU, Local 298* (March 23, 1973), unreported (Hutcheon) (hereafter, "*Eurocan Pulp & Paper* (1973)"); and, *Norske Canada Limited (Powell River Division), supra*. But the proposition is not disputed. The Union says it is "clear that floaters constitute an earned benefit".

23 The Company's interpretation appears to gather strength from the earned nature of floaters. As counsel submits, an earned benefit is earned by some relevant period of active work. But the weight of this consideration is undermined in two respects. The first is the extent to which the employees on layoff at the time of the hearing *were* in fact working. To repeat, as members of the LRP, some ten to 14 of the 19 on layoff worked the equivalent of full-time hours in the month preceding the hearing, and the only laid-off employees who did not work at all were either ill or on leave of absence. Second, pursuant to Section 2(b), employees who are not working nevertheless do qualify for

floaters. Absence due to illness or injury apparently does not affect an employee's entitlement. Neither does absence on leave for up to nine months. In other words, a relevant period of work is not required if the employee's inactivity is due to illness or injury. Further, for employees on leave of absence, work is sufficiently relevant if it occurred within nine months.

24 The Company's plain and ordinary meaning arguments focus on aspects of Section 1. As the Company contends, the term "regular full-time employees" in the first sentence connotes employees who regularly work full-time hours. The requirement in the second half of that sentence that floaters be scheduled so there is no loss of production implies the employee is working. These features are not repeated in the second sentence which extends the benefit to tour workers but the definition of tour workers in Article II imports another implication of active employment. The definition is: "The words 'tour workers' mean employees when engaged in operations schedule din advance for at least twenty-four (24) hours continuous running". In *Norske Canada Limited (Powell River Division), supra*, this definition was found to "imply such employee must be actively working in continuous running operations": page 7. The implication is further reinforced by the formula for deciding whether a floater is paid according to the eight hour shift of a Day Worker or the twelve hour shift of a Tour Worker; the formula in the third paragraph of Section 1 refers to employees "who *normally work* a combination" of the two shifts (emphasis added).

25 The Company reinforces these features of the contract language by emphasizing the plain and ordinary meaning of the words in the key phrase "regular full-time employees". It cites dictionary definitions and a number of cases to underline the proposition that the phrase cannot possibly embrace laid-off employees: *Concise Oxford Dictionary of Current English*, 8th edition; *White Spot Limited -and- CAW-Canada, Local 3010* (September 2, 1994) unreported (Bird); *Hallyburton v. Markham* (1988), 47 DLR (4th) 641 (Ont. CA); *Canada v. McKenzie* (1993), 104 DLR (4th) 261 (Fed CA).

26 These external sources help to entrench the ordinary meaning of the words in question but they must be considered in conjunction with any contrary indications of the parties' mutual intention. Such indications may be derived from the language in the balance of the provision or from the language of the collective agreement as a whole. And the contract language, even when appropriate emphasis is given to the plain and ordinary meaning of the words used, is not uniformly supportive of the Company's interpretation. Section 1 appears to distinguish between "regular full-time employees" on the one hand and, in the absence of these words in the second paragraph, "tour workers" on the other. The Union's contention that "regular" in this collective agreement merely excludes probationers does not explain the apparent distinction. The Union also says there are only full-time employees. Management of a predecessor to the Company so acknowledged this in a previous dispute: *MacMillan Bloedel Ltd. -and- CEP, Local 76*, [1997] BCCAAA No. 347 (Germaine), at paragraph 98.

27 The Union also cites the only other reference to "regular full-time employee" in the collective agreement, Article XIII, Bereavement Leave, which provides that "a regular full-time employee" shall be granted leave when there is a death in her or his immediate family. The provision states that the employee shall be compensated "for hours lost" to a maximum of three days. The Union asserts an employee on layoff would be entitled to bereavement leave under this provision but would not be able to claim compensation. I need not decide whether the Union is correct in this respect but the reference to compensation for lost hours suggests a regular full-time employee is engaged in active employment. In that sense, if anything, the Bereavement Leave clause appears to support the Company's interpretation. On the other hand, the Union may yet be correct in that a laid-off employee working as a member of the LRP could be in a position to seek bereavement leave and claim compensation under the provision.

28 In my view, the Bereavement Leave language is unhelpful. However, the difficulties inherent in the inscrutable references to "regular full-time employees" in Section 1 of Article XVII are not the only headwind against the Company's interpretation. I have referred to Section 2(b) which expressly preserves the floater

entitlement during periods an employee is not actively at work. The term "regular full-time employees" therefore includes employees who are ill or injured, as well as employees on leave of absence for up to nine months. The effect is to reduce the improbability that the parties intended "regular full-time employees" to include employees on layoff. More importantly, there is nothing in Article XVIII or any related term to support the Company's intention to pro-rate floaters or, as set out in Mr. Demchuk's letter to Mr. Verdiel, to restrict entitlement to pro-rated floaters to employees recalled to fill permanent vacancies. As sensible as these refinements may seem in some circumstances, the absence of any language to support pro-rating the benefit tends to suggest the parties did not intend it to be pro-rated: *Corporation of the County of Simcoe and SEIU, Local 1 Canada* (2009), 182 LAC (4th) 170 (Knopf), at page 178; and, *Federated Cooperatives Ltd. –and- Teamsters, Local Union 987*, [2004] CLAD No. 234 (Ponak), at paragraphs 26 to 30. In order to sustain this aspect of the Company's application of Article XVIII, it would be necessary to compose and insert new terms into the collective agreement. This is beyond my jurisdiction of course: *SEIU, Local 268 and USWA, Local 5481* (1991), 43 LAC (4th) 76 (Aggarwal). Furthermore, since new employees frequently start in a pool rather than a permanent position, the prerequisite of recall to a permanent vacancy is contrary to the entitlement to floaters under Section 2(a).

29 The Union also relies on past practice, which I must consider in conjunction with the language of the collective agreement to decide whether there is a *bona fide* doubt about the meaning of the disputed language: *Nanaimo Times Ltd.*, BCLRB Nos. B40/96 and B151/96. The asserted practice is not disputed by the Company. Until April 2009, employees on layoff "were granted their full entitlement to floaters".

30 I accept that the Company's interpretation is plausible. To some extent the earned benefit character of floaters reinforces the implications derived from: the term "regular full-time employees"; the express requirement that the floaters not interfere with production; and, the reference to employees "who normally work" in the formula for determining the value of a floater, as well as the phrase "engaged in operations" in the definition of Tour Worker. It is possible the term "regular full-time employees" is simply

an inelegant reference to active employment in a collective agreement which does not provide for casual or part-time employees. The second paragraph of section 1 might be an extension of the benefit to Tour Workers which, by further implication, also requires active employment. Section 2(b) is perhaps the only exception in this regard and, if so, since it encompasses employees who are ill or injured, it would be consistent with the parties' agreement in a 2004 Letter of Understanding "that employees who return to work following an absence due to compensable injury or non-occupational illness or injury are not new employees... [and] will immediately qualify for 5 floaters upon return to work". On this interpretation, none of the foregoing would open the door to floaters for employees on layoff. It would therefore avoid the incongruity of floaters being based on employment status while statutory holidays are tied to the performance of work.

31 In the absence of any other considerations, the Company's interpretation might prevail. It is contrary to the parties' consistent past practice but, as the Company insists, past practice cannot create a contract term: *Eurocan Pulp & Paper Co. Ltd.* (2001), *supra,* at page 39. Nor can past practice itself generate a *bona fide* doubt about the meaning of the collective agreement. The question therefore becomes whether, to paraphrase the award in *John Bertram and Sons, supra,* there is a clear preponderance in favour of the Company's interpretation, stemming from the words and structure of the agreement as seen in their labour relations context: see page 368. If so, the interpretation must be sustained in spite of the practice. This is the essence of the Company's position. But, for the reasons which follow, I am unable to conclude the words of the provision are sufficiently clear and unambiguous to exclude any reference to past practice.

32 First of all, as I have said, the interpretation requires some assumptions about the meaning of "regular full-time employees". The term is not defined. There are no casual or part-time employees. The term "regular" could mean, as the Union argues, employees who are no longer probationary. Second, although it seems likely, nevertheless an inference must be drawn in order to conclude that Tour Workers are also required to be regular and full-time in order to qualify for floaters. Third, in contrast with the qualifying conditions for statutory holidays in Section 5 of Article XVII, Article XVIII does not

stipulate a prerequisite of active employment in the 60 days preceding a floater or on scheduled shifts before and after a floater. Had the parties intended such a prerequisite, it would have been an easy matter for them to insert it. Instead, in Section 2(b) of Article XVIII, the parties agreed that employees on leave for extended periods are entitled to floaters. Fourth, there is simply no warrant in the collective agreement language for the Company's intention to pro-rate floaters and the announced necessity of recall to fill permanent vacancies in that regard is inconsistent with Section 2(a) of Article XVIII.

33 Finally, the labour relations context in which this interpretation must be assessed is that most of the employees on layoff are working and some of them are logging the equivalent of full-time hours. Under the Company's interpretation set out in Mr. Demchuk's letter to Mr. Verdiel, these employees will not qualify for floaters. But the collective agreement offers no support for denying floaters to employees currently engaged in active employment. The Company's interpretation thus disqualifies LRP employees who are actively employed by applying a test which presupposes inactive status. In my view, it is doubtful the parties would have intended such a result. It is more likely they intended to extend the floaters benefit to employees on layoff because they appreciated that this normally results in only a minor incidence of inactive employees receiving the benefit. And such employees are not the only inactive employees receiving the benefit. As noted above, Section 2(b) of Article XVIII provides that employees on leave due to sickness or injury are entitled to floaters. In short, if "regular full-time employees" includes employees on leave due to sickness or injury, it is not a stretch to find the term also includes employees on layoff, especially when many or most of them will be working out of the LRP.

34 The doubt thus affecting the Company's interpretation is not diminished by *Eurocan Pulp & Paper Co. Ltd.* (1973), *supra*. The case was decided after the floater provision had evolved into a separate Article, as recounted in paragraph 19 above. The grievor in the case received three floaters when he voluntarily terminated his employment in October of 1971. The Union points out that all of the floaters then provided by the collective agreement were paid even though he had worked only a portion of the annual

cycle for which they were due. Nevertheless, when he was rehired in November 1971, the grievor claimed entitlement to the three floaters as a new employee under what is now Section 2 of Article XVIII. The employer's denial of those additional floaters was upheld by the award because the grievor had already received all of his floaters for the year. This reasoning does not lend any support to the Company's contention that "regular full-time employee" must mean an employee actively engaged in work.

35 Having regard to both the language and structure of the contractual language, and having regard to the labour relations context and practical application of the language, I conclude the meaning of Article XVIII is not so clear that I must find the Union is effectively relying on past practice to vary the collective agreement. The contract language is subject to *bona fide* doubt. The several indications that the parties intended the benefit to be confined to employees actively at work are eroded by a number of ambiguous and contrary considerations. It is further undermined by the evidence of past practice. However, by their consistent practice, the parties themselves have established the mutually intended meaning. Arbitrator Hope in *Eurocan Pulp & Paper* (2001), *supra,* at pages 39 to 42, explains the proper use of extrinsic evidence in circumstances such as these. I adopt his explanation and consider it applicable here. The consistent practice that employees on layoff have always received floaters meets the criteria of the *Bertram and Sons* test; the practice therefore clarifies the intended meaning of disputed language. The grievance therefore succeeds; employees on layoff are entitled to floaters.

Weekly indemnity benefits

36 Weekly indemnity benefits are a component of the welfare plan contemplated by Article XIX and governed by Exhibit "C" to the collective agreement. The relevant provisions are:

ARTICLE XIX - WELFARE PLAN

Section 1: The Plan

There shall be a Welfare Plan pursuant to the terms and conditions of Exhibit "C", which is attached hereto and forms part of this Agreement. Membership in the Plan for all eligible employees shall be a condition of employment on and after July 1, 1973.

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EXHIBIT "C" WELFARE PLAN

This Exhibit "C" sets forth the respective coverages, benefits, rights and obligations of the Company and its employees under the Welfare Plan established pursuant to Article XIX of this Agreement.

1. Compliance

(a) The Company signatory to the Labour Agreement will comply with the terms and conditions set forth in this Exhibit "C", and provide the coverages required therein.

(b) The coverages shall be subject to the limitations in the contracts of the selected carrier or carriers.

2. Coverages and Benefits

.....

(c) **Non-occupational Accident and Sickness Insurance**

The Welfare Plan will include Non-Occupational Accident and Sickness Insurance that will provide a benefit of sixty percent (60%) of the employee's regular job rate to the maximums in the following table.

Maximum Weekly Indemnity Benefits Payable	
Effective Date	**Benefit Maximum**
Date of Ratification	$750.00 per week
May 1, 2009	$800.00 per week
May 1, 2010	$820.00 per week
May 1, 2011	$845.00 per week

NOTE: The increase effective May 1, 2010 and May 1, 2011 reflect the May 1, 2009 benefit being increased in accordance with the general wage increases effective on those dates.

Weekly Indemnity benefits will be payable beginning with the first day of disability caused by non-occupational accident and beginning with the fourth day of disability caused by non-occupational sickness, except that in those cases of non-occupational sickness, which result in the claimant being hospitalized as a bed patient, and in those cases where surgery is performed which necessitates loss of time from work, the said Weekly Indemnity benefits will be payable beginning with the first day of sickness. Benefits will be payable for a maximum of fifty-two (52) weeks during any one period of disability.

Weekly indemnity benefits which begin prior to age 65 will continue until the employee has received at least 15 weeks of

benefits, or until the employee is no longer disabled or retires, whichever comes first.

The premium structure for coverage f an employee over the age of 64 will be as follows:

First three months	75% of Normal Premium
Second three months	50% of Normal Premium
Third three months	25% of Normal Premium
Last three months	No Premium

Where the employee recovers an amount from a liable third party for loss of income as a result of the same accident or illness, they must reimburse the Plan once they receive 100% of their loss. One hundred percent (100%) of their loss includes gross wages lost.

37 The collective agreement expressly addresses welfare plan benefits for employees on layoff. Article XXI, Seniority, includes the following:

Section 6: Welfare Coverage

(a) An employee with one (1) or more years seniority may have his welfare coverage continued for six (6) months while on layoff.

(b) An employee with more than four (4) months but less than one (1) years seniority may have his welfare coverage continued for three (3) months while on layoff.

(c) An employee who elects to maintain coverage while laid off will be required to pay the employee portion of the premium in advance on a monthly basis.

(d) An employee who has welfare coverage as provided for in paragraphs (a) and (b) above, will on return to work have his welfare coverage extended by one (1) month for each month in which he works.

(e) An employee whose welfare coverage under paragraphs (a) and (b) above has expired, will on return to work be eligible for coverage for the period of his employment.

(f) An employee will qualify for a new period of welfare coverage as provided in paragraphs (a) and (b) above if he returns to work for at least ten (10) days within a floating period of thirty (30) consecutive days.

38 The premium referenced in clause (c) of Article XXI, Section 6 is clarified in Section 7 of Exhibit "C" Welfare Plan. It will be remembered that the Weekly Indemnity

benefits fall under the heading "Non-occupational Accident and Sickness Insurance". I quote Section 7 of Exhibit "C":

> **7. Costs**
>
> Net costs of the coverages and benefits made available to participating employees under the Welfare Plan will be shared between the Company and the said employees in accordance with the following:
>
> **Group Term Life Insurance, Accidental Death or Dismemberment Insurance, Medical-Surgical Coverage, Extended Health Benefit and Dental Plan**
>
> | | |
> |---|---|
> | Company | 100% |
> | Employee | Nil |
>
> **Non-occupational Accident and Sickness Insurance, Long Term Disability Plan**
>
> | | |
> |---|---|
> | Company | 70% |
> | Employee | 30% |

39 Mr. Verdiel testified that until 2009 the Company paid full weekly indemnity benefits to employees on layoff during the coverage periods prescribed in Article XXI, Section 6, provided of course the employee had opted under Article XXI(6)(c) to pay the employee portion of the costs in accordance with section 7 of Exhibit "C" . The first notice of any change in this respect was conveyed to the Union in another letter dated April 21, 2009. This letter was also addressed to Mr. Verdiel and signed by Mr. Demchuk:

> Dear Mike:
>
> This letter is intended to summarize the Company's view of a laid-off employee's entitlement to Weekly Indemnity benefits under the Welfare Plan established pursuant to Article XIX of the Collective Agreement.
>
> At the present time, while an employee is on lay-off, the Weekly Indemnity and Long Term Disability benefit provide coverage only in the event that work is available for the employee and the available benefit is based upon the work opportunity that would have been available to the employee.
>
> In reviewing the language of the plan and the carrier's interpretation, we believe that the weekly indemnity benefit is characterized as income replacement and requires that a claim for the benefit be for a period in

which an employee has been scheduled to work but was unable to do so due to some infirmity.

The following examples are provided to help clarify our position as it relates to the application of the benefit:

1) *An employee is injured while on lay-off and has no hours scheduled in the week they were injured. In this situation, that employee would not be entitled to the benefit during this week because they had no scheduled hours.*

2) *In our next example, the employee was called to report for work for two (2) days but couldn't because of their non-occupational accident. In this situation they would be entitled to two days of benefit coverage, as the laid-off employee had no additional work available that week.*

3) *In our third example, the employee was called to report for work for five (5) days but couldn't because of their non-occupational sickness. In this situation they would be entitled to two days of benefit coverage, the first 3 days would be considered his/her waiting period.*

We have experienced situations where an employee is in receipt of weekly indemnity benefits prior to an announced curtailment which would have resulted in his/her lay-off and continued to collect the benefit.

The reason for this is that the benefit plan contemplates that payments will be made "for as long as such employee is Disabled and under the ongoing care of a licensed doctor but not beyond the Benefit Duration, regardless of any subsequent termination of coverage dud to lay off or termination of employment".

Based upon our review of the collective agreement and the policy provisions, we support the carrier's interpretation that the benefit plan does not contemplate that a laid-off employee is entitled to the same benefit and corresponding benefit level as an employee engaged in active full-time work.

40 Consistent with his evidence of past practice, Mr. Verdiel testified the second paragraph of this letter was not accurate. His evidence was that laid-off employees otherwise entitled to weekly indemnity benefits have received the benefits without regard to whether there was work available for them. Mr. Verdiel also described the practice of paying the benefits each day an employee is so entitled. For this purpose, the work week was regarded as Sunday to Saturday and one-seventh of the total weekly entitlement was

paid for each day the employee was eligible. Further, the benefits were paid regardless of whether the day was a scheduled workday. This practice was particularly significant for Tour Workers who enjoy more days off each week on a compressed work schedule. In view of this evidence, it was logical that Mr. Verdiel also took issue with the characterization of the waiting period in the italicized sentence number 3. He testified the beginning of the waiting period depended on when the employee became sick, not when the employee would have started work.

41 The Union begins its case by contrasting eligibility for long term disability benefits with eligibility for weekly indemnity benefits. Section 1(a) of Exhibit "C", Appendix "2" Pulp and Paper Industry Long Term Disability Plan Summary, stipulates: "Minimum hours worked must be no less than thirty (30) per week". There is no such eligibility term for weekly indemnity benefits. In *MacMillan Bloedel Ltd., supra,* the Company's predecessor relied on the 30-hour per week minimum qualification in the policy it had secured to provide coverage for the benefit. The award held there was "nothing in Exhibit "C" to bar an employee who worked less than 30 hours from claiming the weekly indemnity benefit...[and in] the absence of any contrary definition, the weekly indemnity benefit... must be available to all employees without restriction": (paragraph 105). The Union submits the Company has thus introduced an "income replacement" exception to coverage which is contrary to long-standing consistent practice and not supported by the contract language. The contract language, it is submitted, provides a benefit to employees unable to work, whether on layoff or not, and the Company's changed administration of the benefit effectively denies the coverage which the collective agreement expressly gives an employee the option to retain.

42 The Company's response is to focus on the repeated reference to the "weekly indemnity benefits" in section 2(c) of Exhibit "C". The Company contends the effect of the term "indemnity" is well understood in the law. The meaning is consistent with the dictionary definition of "compensation for *loss incurred*": emphasis added, *The Concise Oxford Dictionary of Current English*, 8th edition. In the words of counsel, "one is not indemnified in the void". And this meaning is confirmed by the oft-cited award in *VME*

Equipment of Canada Ltd. and CAW-Canada, Local 1917 (1990), 10 LAC (4th) 348 (Hinnegan), which dealt with a weekly indemnity claim by an employee injured while on paid vacation. The award finds the ordinary meaning of "indemnity" is "'to compensate for' or 'to make up' a loss which has been suffered by the person to be indemnified": paragraph 9. On that basis, Arbitrator Hinnegan held:

> Because indemnity against loss is the essence of that type of benefit, arbitrators have generally considered that to be a loss of earnings due to an employee's inability to work and have reasoned that it would, therefore, be inconsistent and improper to allow an employee on vacation with pay to simultaneously claim disability income, unless there is clear language in the agreement indicating otherwise. (paragraph 10)

This reasoning was adopted in *Unisource Canada Inc. and CEP, Local 1124* (1995), 47 LAC (4th) 435 (Blasina), and *Western Star Trucks -and- IAM*, [2000] OLAA No. 461 (Keller). The Company also relies on the extensive analysis of case law respecting group disability plans and whether such plans are contracts of indemnity in *Association of Management, Administrative and Professional Crown Employees of Ontario –and- Ontario (Ministry of Government Services)*, [2009] OGSBA No. 45 (Nairn) (the "*AMAPCE* award").

43 Are the weekly indemnity benefits an obligation which arises from a contract of indemnity and, hence, intended by the parties to provide income replacement only? Viewed in isolation, the language of Exhibit "C", section 2(c) could be so construed. Apart from the repeated presence of the term "indemnity", lost income is a consequence of lost time at work and it is evident the benefits are payable when the employee has lost time at work. Interestingly, this is expressed only once in the provision and then only to describe an illness which does not entail a waiting period: "in those cases where surgery is performed which necessitates *loss of time from work*" (emphasis added). I do not understand the Union to argue this express stipulation implies that other non-occupational accidents and illnesses attract weekly indemnity benefits without loss of time from work. Such an argument could not succeed because of course a weekly disability benefit makes no sense unless the employee is disabled from working. As the Company submits, this is confirmed by section 2(j) which clarifies the waiting period in cases of serious illness

requiring recurring treatments. After the initial waiting period in such cases, benefits are paid "for any subsequent lost time". The only explanation for the reference to loss of time from work in respect of "those cases where surgery is performed", then, is that benefits are not paid until the fourth day of sickness involving surgery if the surgery did not require time off from work.

44 The most significant indication that the weekly indemnity benefits are an indemnity against lost income is the last sentence of section 2(c). For convenience, I quote the paragraph again:

> Where the employee recovers an amount from a liable third party for loss of income as a result of the same accident or illness, they must reimburse the Plan once they receive 100% of their loss. One hundred percent (100%) of their loss includes gross wages lost.

The force of this language is undeniably strong. As the Company submits, it clearly implies the weekly indemnity benefits are a form of indemnity against loss of income.

45 The language is akin to a right of subrogation. Although it does not give the Plan the right to take action against a third party on behalf of the employee, it nevertheless entitles the Plan to reimbursement in the event the employee receives compensation from a third party which is liable to the employee for damages in connection with the employee's illness or injury. The obligation to reimburse is not triggered until the employee has received full compensation for actual losses, while the benefit itself is a percentage of the employee's "regular job rate" as opposed to full income loss. The effect implies the benefits are a limited form of income replacement and thus connotes the necessity for lost income. But I am not satisfied the obstacle thus posed to the grievance is, as counsel characterized it, "daunting in the extreme".

46 The Union seeks to remove the benefits from the realm of indemnity by characterizing it as insurance against the occurrence of disability. The Union refers to heading of section 2(c) and the first sentence of the provision, both of which refer to "Non-occupational Accident and Sickness *Insurance*" (emphasis added). The Union

argues it is a benefit for employees not able to work which can afflict employees on layoff as well as any others. The Union also submits there is no basis for the exception the Company accepts for employees on weekly indemnity benefits continuing to receive the benefits after they would have been laid off. Each of these arguments is valid but even cumulatively they cannot overcome the substantive effect of the last paragraph of the provision. The suggestion that the purpose of the benefits is to assist employees who are unable to work is particularly problematical. Taken to its logical conclusion, this conception of weekly indemnity benefits could result in entitlement in circumstances where the laid-off employee's only loss is income from another employer. As Arbitrator Nairn observed in the context of an LTD plan in *AMAPCE* award, such benefits are provided "in the context of the particular employment relationship" and:

> An employer is unlikely to have any interest in agreeing to insure employees for income losses going beyond those arising from that employment relationship. Nor, particularly, does a union representing those employees. To the extent that an employer agrees to contribute the bulk of the cost of premiums for long term disability coverage, it is not likely amenable to paying a higher premium to capture coverage going beyond a loss of income related to that employment. (paragraph 60)

47 The one Union argument the Company's interpretation does not address is that the parties expressly provided for an employee to retain welfare coverage while on layoff. Section 6 of Article XXI, Seniority, quoted above, sets out the terms on which employees may extend welfare coverage if they "pay the employee portion of the premium in advance on a monthly basis" (clause (c)). There is no question this applies to weekly indemnity benefits. Under section 7 of Exhibit "C", the Non-occupational Accident and Sickness Insurance and the Long Term Disability Plan are the only components of the welfare plan for which there is an "employee portion of the premium". Depending on the employee's seniority, this extension may continue for up to six months. This coverage is not conditional on any active employment. Clauses (d), (e) and (f) deal with how active employment may result in further extensions.

48 In other words, as the Union contends, the Company's interpretation appears to conflict with the parties' unmistakable intention to allow employees to retain weekly

indemnity benefits coverage after being laid off, for the periods prescribed in Article XXI, Section 6. This intention is plainly consistent with the previously noted absence of any requirement for a minimum number of hours of weekly work. And it is consistent with another feature of Section 2(c) of Exhibit "C": the language of the provision does not actually require proof of loss of income. Nor is such proof of such loss an unavoidable implication of the reimbursement language of the last paragraph of section 2(c). The obligation to prove a loss is different from the obligation to reimburse if the employee is compensated by a third party; the latter may be operative without the necessity of the former. Nothing in the authorities on ordinary or legal meaning of indemnity prevents this conclusion.

49 The presence in the contract language of a clear intention to provide employees with the opportunity to retain weekly indemnity coverage for prescribed periods of layoff, and the related compatibility of other aspects of the weekly indemnity language, invigorates the strength of the Union's other arguments. The use of the term "Insurance" in section 2(c) of Exhibit "C" may well be the parties' indication that the word "indemnity" is not to be construed as a determinative feature of the benefits. There is no doubt that coverage for the first three or six months of a layoff creates the potential for the employee to receive benefits when the lost income was being earned from another employer. But the express language to this effect overcomes the improbability noted in the *AMAPCE* award.

50 If the availability of coverage for periods during a layoff is given its usual and ordinary meaning, the grievance should succeed. At the very least, provision for this optional coverage leads to a serious *bona fide* doubt about the meaning of the "indemnity" language on which the Company relies to support its new administration of the weekly indemnity provisions. The doubt is further reinforced by the undisputed past practice of the parties.

51 I refer again to Arbitrator Hope's discussion of the use of extrinsic evidence in *Eurocan Pulp & Paper* (2001), *supra.* I am satisfied that the past practice here similarly supports the interpretation advance by the Union in this dispute.

52 One further comment is warranted. The factual context of this case, as I have noted previously, is that the majority of employees on layoff maintain hours of work which, in many cases, are equivalent to full-time. These facts may explain why the weekly indemnity provisions do not require proof of loss of income. It is a fair inference that the parties' expectation was that employees on layoff would frequently continue to work during the periods for which weekly indemnity coverage would remain available.

53 The grievance succeeds.

Supplementary vacation

54 Supplementary Vacations are governed by Article XVI, the relevant portions of which are:

ARTICLE XVI - SUPPLEMENTARY VACATIONS

Section 1: Eligibility

(a) After completing five (5) years of continuous service with the Company, an employee shall, in addition to the regular vacation to which he is entitled, become eligible to receive a Supplementary Vacation with pay each five (5) years as set forth below:

Years of Completed Continuous Service	**Weeks of Supplementary Vacation**
After Five (5)	One (1)
After Ten (10)	Two (2)
After Fifteen (15)	Two (2)
After Twenty (20)	Three (3)
After Twenty-Five (25)	Three (3)
After Thirty (30)	Four (4)
After Thirty-Five (35)	Four (4)
After Forty (40)	Five (5)

(b) For the purpose of determining eligibility for Supplementary Vacation, an employee's service shall be calculated from the date of his joining the Company.

Section 2: General Provisions

(a) The Supplementary Vacation may be taken in conjunction with the regular vacation to which the employee is entitled provided such regular vacation is not scheduled to be taken during the months of July or August...

*****

(d) An employee may elect to take his Supplementary Vacation one day at a time according to the following schedule...

Section 3: Partial Entitlement

At retirement or termination from the Company an employee who has competed five (5) or more years of service shall be entitled to that portion of Supplementary Vacation Pay proportionate to the number of years of service completed subsequent to his last five (5) year entitlement period.

55 Until 2009, employees on layoff received the supplementary vacation benefit. Mr. Verdiel testified layoff did not change entitlement to the benefit; "when you come up on your anniversary date, you got Supplementary Vacation". The Union was unaware the Company contemplated any change to this benefit until Mr. Verdiel received the following letter dated July 20, 2009 from Vern Phillips, Director, Human Resources:

Dear Mike:

Re: Application of supplemental vacation to employees on lay-off

Supplemental leave is earned based on continuous service with the Company. Employees on lay-off are not in a situation where continuous service is occurring. We believe that it is not reasonable that laid off employees should earn supplemental vacation time off entitlements during their layoff period when they are not receiving earnings from the Company.

After review of the collective agreement and a review of the payroll processes, the Company has determined that full entitlement will be granted, however the anniversary date will be extended for each month not worked.

To provide further clarification on how the Company intends to manage supplemental vacations, we will be proceeding as follows:

- Worked hours in any month wile on lay-off will be considered a month worked for the purpose of Supplemental vacation entitlement.

- Only worked hours shall be considered as service. Paid leave taken through a lay-off period will not be considered service with the exception of:
    - If an employee takes a paid time off on a continual basis from the date of layoff and passes an anniversary date for supplemental vacation, those supplemental vacation hours and associated earnings will be credited to the employee's account and can be used.

- When an employee is out of paid time off or chooses not to use it, they are no longer receiving earnings from the Company and therefore their service is not continuous. The anniversary date for qualifying for the next supplemental vacation entitlement will be extended by the amount of time the employee is not receiving earnings from the Company. In effect the supplemental anniversary date will change, however when the anniversary is achieved, the full entitlement of the leave will be granted.

Consistent with his evidence of the practice prior to this letter, Mr. Verdiel testified he had not previously heard of a "continuous service" requirement for the benefit.

56 The Union relies on the literal meaning of the language of Section 1(b) of Article XVI, pursuant to which an employee's service is calculated from the employee's date of hire. The Union submits the Company's announced intention of extending the employee's anniversary date for this purpose is "altering the collective agreement". The Union contends the parties understand how to pro-rate the Supplementary Vacations benefit to reflect reduced service, as indicated by Section 3 of Article XVI. They also understand how to remove periods of layoff from consideration when calculating a benefit, as indicated by Section 4(i) of Article XV, Vacations:

> Time lost as the result of layoff shall not be considered as time worked for the purpose of qualifying for a vacation.

The Union argues the absence of any similar language in Article XVI confirms the entitlement of laid-off employees to the benefit. The Union also cites Article XXI, Seniority. It was Mr. Verdiel's evidence that seniority is calculated from an employee's date of hire and such seniority is retained for the layoff periods specified in Article XXI, Section 3 without any adjustment of the date of hire whether or not the employee is

recalled to active employment. The relevant language of the provision is this:

> **Section 3: Retention of Seniority**
>
> (a) Any employee, other than a probationary employee, whose employment ceases through not fault of his own, shall retain seniority and shall be recalled on the following basis:
>
> (i) An employee with less than one (1) years continuous service shall retain these rights for six (6) months from the date of lay-off.
>
> (ii) An employee with one (1) or more years continuous service shall retain these rights for twelve (12) months from the date of lay-off, plus two (2) additional months for each years service up to an additional twenty-four (24) months.

57 In the submission of the Company, Section 1 of Article XVI plainly provides that continuous service is how the employee establishes *eligibility* for the benefit. But eligibility for a benefit is not entitlement. The meaning of continuous service and its relationship to seniority depends on the language of the collective agreement as a whole, as illustrated by: *Canadian Airlines International Ltd. -and- IAM, Lodge 764*, [1987] CLAD No. 18 (Greyell). In this agreement, the Company argues, the plain and ordinary meaning of "supplementary" is crucial. It is defined as "forming or serving as a supplement, additional" in *Concise Oxford Dictionary of Current English*, 8th edition. The Company submits this definition is consistent with and reinforced by the words in Section 1 which expressly indicate the benefit is "in addition to the regular vacation" to which the employee is entitled under Article XV. The symbiotic relationship between the two benefits, it is submitted, is evident in the sense that an employee who does not qualify for any vacation should not be entitled to claim a supplementary vacation benefit. In this respect, the Company also refers to Article XV, Section 4(i). The Company also contends Supplementary Vacation benefits are earned, and the Union's interpretation would "stretch out of all proportion the work done and... pay earned": *T.C.F. of Canada Ltd. and Textile Workers' Union of America, Local 1332* (1972), 1 LAC (2d) 382 (Adell), at page 385, as quoted in *B.C. Timber Ltd. (Skeena Pulp Division) -and- PPWC, Local No. 4* (October 4, 1983), unreported (Munroe), at page 14.

58 Again, the Company brings logic to the interpretation on which it relies to support its new administration of the benefit language. It is self-evidently counterintuitive that an employee who has no vacation rights could be entitled to *supplementary* vacation benefits. But that is the effect of the Union's interpretation. It claims employees on layoff are entitled to Supplementary Vacation benefits even though there is no question that, pursuant to Article XV, Section 4(i), time on layoff does not earn vacation credit.

59 At the same time, several aspects of the Company's argument betray ambiguity. The absence of a provision such as Article XV, Section 4(i) in Article XVI is significant. As the Union contends, the Company's argument imports the clause into Article XVI by implication. It is safe to say that the parties to a collective agreement are more likely to expressly state such important benefit limitations. Only a few words in Article XVI would have been necessary to achieve that result; a brief reference to Article XV, Section 4(i) would have sufficed. Further, the Company's emphasis on the words "in addition to the regular vacation" in Section 1 of Article XVI is not necessarily helpful. The words do not necessarily connote an add-on to vacation; they are as easily construed to mean apart from or besides the regular vacation. Further, Supplementary Vacation days need not be taken in conjunction with regular vacation: Article XVI, Section 2(d).

60 More problems for the Company's interpretation arise from Section 3 of Article XVI. The express provision for reduced Supplementary Vacation on retirement or termination compounds the doubt instilled by the absence of any clause adjusting the benefits in the event of a layoff. Nor does the award in *B.C. Timber, supra,* remove the doubt. The interpretation advanced by the trade union in that case created the potential for an employee to earn full annual vacation benefits, which were as much as seven weeks with pay for senior employees, by performing a week or even a day of work in the annual vacation cycle. The disproportionate relationship between the work performed and the benefit derived was apparent. But in this case, the benefit is earned over a period of five years. Not only does this feature of Supplementary Vacations further disconnect the benefit from annual Vacations, it also puts the relationship between work and benefit

into a much more extended perspective. The relationship between work performed and benefit derived is not so disproportionate if the five years includes a period of layoff.

61 Moreover, as previously noted, the evidence is that during the present layoff at least, many of the employees affected are working and a substantial number of them are getting the equivalent of full-time hours. For those employees, the layoff does not place any stress on the relationship between work performed and the earned benefit.

62 This brings me to the extrinsic evidence of past practice described by Mr. Verdiel. As I have recorded, he testified continuous service has always included periods of layoff under Article XVI in the same manner that seniority has included layoffs under Article XXI. Neither extends forever, of course; Section 3(a) of Article XXI defines the duration of seniority during a layoff. But the consistency in the past practice serves to reinforce the uncertainty regarding the parties' mutual intention. Despite the label "Supplementary Vacation", it is far from clear the parties intended "continuous service" to mean active employment in the manner the Company began to administer the provision in July 2009. Indeed, the adjustment of the employee's anniversary date as described by Mr. Phillips' letter of July 20, 2009, finds no support in the collective agreement.

63 Having regard to the conflicting considerations emanating from the contract language and the Company's previous consistent practice of paying these benefits to an employee who reaches the requisite anniversary date of employment with the Company, even if the employee is on layoff, I am forced to conclude there is a *bona fide* doubt about the meaning of the language of Article XVI. For the reasons canvassed above in connection with both floaters and WI benefits, the past practice evidence also resolves this doubt; the mutual intention reflected by the past practice supports the Union's interpretation.

64 The grievance succeeds.

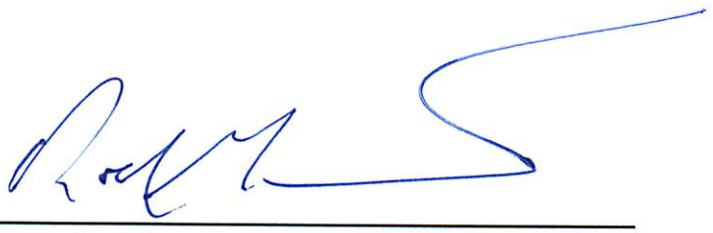
Conclusion

65 For all of the foregoing reasons, each of the three grievances succeeds.

66 This conclusion renders it unnecessary to consider whether the Company is estopped from implementing its interpretation of the collective agreement in any of the three disputes.

67 I retain jurisdiction to deal with any remedial issues the parties are unable to resolve by agreement and to determine any other issue arising out of or in connection with this Award.

68 Dated at Vancouver, B.C., this 26th day of May 2010.



Rod Germaine, Arbitrator