

**B.C. Rapid Transit Co. Ltd.**  
**(“the employer”)**

**and**

**C.U.P.E. Local 7000**  
**(“the union”)**

**(Becker Grievance)**

**PRELIMINARY ISSUES**

**For Company: Paul Devine**

**For the Union: Leo McGrady, Q.C.**

**Before: M.A. Hickling**

**Date of Hearing: December 5, 2008**

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## **INTRODUCTION**

### **I. The Issue**

1. The central issue in the case is the interpretation and application of Article 21.00 which declares “retired employees with five or more years of service to be eligible for coverage” under extended health, dental care and Medical Service Plan (MSP) provision of the collective agreement [Article 21.06, 27.07 and 27.08].
2. By a letter dated August 23, 2007 the union launched two grievances, one on behalf of itself (under Article 3.01) and the other an employee grievance on behalf of David Becker (under Article 3.03). It alleged that the employer was attempting unilaterally to amend the collective agreement by attaching additional limitations to retirees’ eligibility for benefits [Exhibit 2, tab 173].

### **II. The Union’s Opening**

3. It is the union’s position that the language is mandatory, and that on the plain meaning of the term an individual may still properly be described as a retired employee of B.C. Transit, even though he may seek or actually obtain work with another employer. In his opening, Mr. McGrady indicated that the company had specified that in the future, it may require proof that retired employees remain retired and not, subsequent to retirement, take full-time employment. It was Mr. McGrady’s understanding that the company would, however, permit part-time employment. The rationale given for this policy is that the employer does not wish to subsidize other companies.
4. The union characterized the company’s action as arbitrary and capricious since it lacks any sound rational basis. It does not, for example, distinguish between full-time employment with companies that offer benefits with those that do not. When benefits are provided by the new employer, it is immaterial whether those benefits are inferior, equal to or superior to those offered by B.C. Rapid Transit. The retiree would become ineligible for the benefits under Article 21. The union claims that in most instances the past retirement found by the company’s former employees carries either inferior benefits or no benefits at all
5. It was further alleged that the company policies towards its own retirees and retirees from other employers are inconsistent in that while it denies benefits to its own retirees, it routinely hires retirees from other employers, such as ex-R.C.M.P. officers, who are in receipt of pension and health benefits from the R.C.M.P.
6. In addition, the company sometimes hires back retired employees on a casual basis or as consultants.

7. The company's policy, it was contended, had the effect of limiting what retirees could do on their own time. That was at odds with the limitations placed by the jurisprudence on an employer's ability to regulate the conduct of employees on their own time.
8. Finally, it was contended that the result sought by the company could only be achieved through collective bargaining, which was still a year away.

### **III. The Company's Position**

9. The company contends that there has been no change in policy. It claims that it has consistently applied the same interpretation in its dealings with individual employees claiming benefits. It emphasizes that effect must be given to all the words. It focuses on the word "retired", which it defined as the "cessation of active employment". It is not sufficient simply to cease to work for B.C. Transit. The individual must have ceased working. On this view, a person who is actively seeking work or actually obtains is not truly retired. It would also seem to follow that a person who having retired, re-enters the workforce, ceases to be eligible for benefits for so long as he or she is actively working.
10. Mr. McGrady had also raised in his opening statement the position of Skytrain retirees who are hired back as consultants or on a casual basis, as trainers, for example. They would already be in receipt of benefits under the contract. They do not lose them by returning as consultants. Mr. Devine, in effect, confirmed that.
11. Mr. Devine then proceeded to refer to an incident in which an employee gave notice of his intention to take early retirement. His memorandum was treated as a resignation since by taking a "contract position" with a major construction firm on a "project" in Kuala Lumpur" he was not actually retiring. The exact nature of that "contract position" is unclear, but according to the company's statement it was sufficient to render the claimant ineligible. In any event, according to company statements of policy, the fact that the individual went to work outside B.C. would be sufficient to disentitle [see Company's Statement of Particulars of November 24, 2008, at paragraph 8].
12. Rejecting the union's claim that the words were plain and unambiguous, Mr. Devine gave notice of his intention to adduce extrinsic evidence on the historical origin and evolution of the benefit provisions, and past practice in their administration. Evidence would be given by Mr. Gary May, the manager of human resources, as to the discussions he had with employees contemplating or approaching retirement. During counseling sessions with the over 50s he would learn if the retirees were contemplating other employment and explain the consequences as to them. He would draw the distinction between part-time work, which would disentitle the employee to benefit and casual work which would not.

13. Dealing with the contention that the company policies are arbitrary and capricious and the reference to the hiring of former RCMP officers, Mr. Devine indicated that the company would “not hire someone who has a pension plan”. He also noted the co-ordination of benefits between carriers. That was not a matter for the company, he said.
14. During the life of the clause, no issue had ever been raised about the interpretation and application of the benefit clauses. There had been no grievances, prior to this, and in Mr. Devine’s submission, the company was not guilty, in the dealings with individual applicants, of negotiating terms different from those of the agreement.
15. I would note, however, that while the incompatibility between active employment and the state of retirement was explained as early as November 17, 1995 to an individual who had disclosed his acceptance of work with another company [see Exhibit 2, tab 174], the correspondence between Mr. May and the employee was not supplied to the union. Whether or not such a failure in that or any similar case would have constituted a breach of the company’s obligations under the collective agreement [see Article 1.05(b)(ii)] was not directly raised, and I express no opinion on it. I simply note that, on the basis of the information before me, that particular channel of communication had not resulted in the employer’s interpretation coming to the union’s attention. On the basis of the submissions of counsel and admissions made in the course of the proceedings to date, this appears to be one of those circumstances in which the employer and the union had different perceptions of the meaning of the agreement but neither was aware of the other’s position until the present case arose.
16. The meaning of words may vary according to the context. “Retire” commonly means to give up one’s regular work or employment. It is usually because of advancing age though there could be other reasons. It does not necessarily import an intention to give up work together. The fact that an individual returns to his chosen profession as a consultant, for example, does not necessarily preclude one from describing the departure from his earlier job as a “retirement”. The history of negotiations and past practice may provide keys to the meaning of the word in a particular context.
17. Anticipating the possibility of argument on this issue at a later stage, the attention of counsel is drawn to the classic statement on the use of past practice in *John Bertram and Sons Ltd.* (1967) 18 L.A.C. 362 (P.C. Weiler) – Quicklaw version at pp. 5-6]. It would require proof of acquiescence in the practice by someone in the union hierarchy “who have some real responsibility for the meaning of the agreement”. One should also bear in mind the requirements of the modern doctrine of estoppel, should that be invoked.

18. As Mr. McGrady pointed out, retirees may increasingly be driven to seek work as the value of their pensions diminishes with the decline in the stock markets. The work available may often be part-time or casual and carry no benefits.
19. The distinction drawn by the company between part-time and casual work can produce anomalous results, with individuals arguably being treated differently without any rational basis. Thus in its ordinary usage, a part-time employee means one who regularly works significantly less than the standard hours of work. That could cover a broad range from half a day, for example, to thirty hours (the figure used by Statistics Canada in its labour force reviews to mark the line between part-time and full-time work). A "casual employee" ordinarily means one who is called upon to work intermittently, rather than on a regular basis, to meet an employer's short-term needs. While a person with casual tenure may be in a more precarious position, he or she could well earn more than a part-time employee with low weekly hours of work.
20. With that introduction, let us turn to the union's request for particulars

#### **IV. The Particulars Sought**

##### **1. Hirees in Receipt of Benefits from Another Employer**

21. The union's first request was for
  1. Names of any individuals hired by the company since the introduction of the policy that is the subject of this arbitration who have retired from other employment and who are in receipt of benefit coverage from that other employment."

The union claimed that there are a number of them and that they may include retired police officers and military personnel.

22. In view of Mr. Devine's response, set out earlier, it would first have to be ascertained if B.C. Transit does, in fact, knowingly hire personnel who are in receipt of retirement benefits from another employer. Do those responsible for hiring even ask? Or is it left to the insurance companies that carry the plans for B.C. Rapid Transit and the former employer to co-ordinate the coverage to avoid duplication?
23. While the information sought may be of interest in negotiating amendments to the plans, I am not entirely convinced of its relevance to the question whether the company is in violation of the benefits provisions. The focus of the inquiry is whether the employer is in breach of the terms of the collective agreement. Has it treated its own employees, once hired, differently? Has it granted benefits to some, but denied them to others? Whether a person hired by B.C. Rapid Transit should continue to receive benefits under an agreement between him and his former employer is a matter for the latter. B.C. Rapid

Transit could, subject to any provisions in its collective agreement, make the hiring conditional on an applicant foregoing benefits from his previous employer. But it cannot, once an applicant is hired, deny him the benefits to which he is entitled under Exhibit 1 [the B.C. Rapid Transit collective agreement].

24. Not being convinced of the relevance of the information sought to the issue before me, I deny the first request.

## **2. Personal Information Relating to Retirees**

25. Next, in two separate paragraphs relating to (a) retirees who have received, and (b) to those who have been denied benefits under Article 21, the union seeks the disclosure of their names, addresses and telephone numbers. Since the two requests raise the same issue of privacy, they can conveniently be treated together.
26. The B.C. Rapid Transit Company is a public body subject to the Freedom of Information and Protection of Privacy Act: see section 1, and Schedule 2. One of the prime purposes of the statute is to protect personal privacy by preventing the disclosure by public bodies of personal information in their possession: see s. 2(1)(d). Section 33 requires a public body “to ensure that personal information in its custody or under its control is disclosed only as permitted under section 33.1 or 33.2”. Those sections spell out the circumstances in which personal information may be disclosed. Section 33.1 has no application here. Section 33.2 lists eleven separate circumstances in which disclosure is permitted. Of those, three are relevant to the present discussion namely (a), (b) and (h).
27. The first permits disclosure of personal information for the purposes “for which it was obtained or compiled or for a use consistent with that purpose”. Section 34 establishes a two-fold test for determining consistency. First the use must have “a reasonable and direct connection to that purpose”. Secondly, it must also be “necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that disclosed the information or causes” it to be disclosed.
28. The second permits the public body to disclose personal information  

“to comply with a subpoena, warrant or order issued or made by a ... person or body ... with jurisdiction to compel the production of information.”
29. The third authorizes disclosure to a representative of a bargaining agent who has been authorized in writing by the employee whom the personal information is about to make an inquiry. Quite apart from the question whether the retirees are employees, there is no suggestion that the union in this case has been given written authorization to seek any information about

any retiree (other than Mr. Becker). The fact that the Act makes specific provision for the union to obtain information with the express consent of the individual, does not preclude the union from invoking section 32.2(a) and/or (b) if the facts fit: see *Coast Mountain Bus* at paragraph 68; *Economic Development Edmonton* at paragraph 32. Even if the union could meet the requirements of paragraph (h), or had other means of obtaining the information, that would not preclude the union from seeking the information from the employer: see *Millcroft Inn* at paragraph 32; cited in *Buhler Manufacturing* at paragraph 18; and *Coast Mountain Bus; supra*.

### 3. Are We Dealing with Personal Information?

30. The first question that has to be addressed is whether the information sought is “personal information”. The term is defined as “recorded information about an identifiable individual other than contact information” [Section 1, Schedule 1]. It will be noted that it does not say identifiable by name. There are other ways by which an individual may be identified, such as by description, title or position. Further, the “contact information” exception is limited in scope. The term is defined as:

information to enable an individual at a place of business to be contacted and includes the name, position, title, business telephone number, business address, business e-mail or business fax number of the individual [see section 1, Schedule 1]. [Emphasis added.]

31. A comment made by the Labour Relations Board in *Hudson’s Bay* suggests that the employer might be permitted to disclose, without the consent of the individuals, a list of the names of employees. In dealing with the similar, but not identical language of the Personal Information an Protection Act, it states

19. “Contact Information” means information to enable a person to be contacted, including the name, position or title and the business contact numbers for the individual. Therefore, employee names and position titles are not “personal information” and are not protected from disclosure under *PIPA*.”

That is not quite accurate. Apart from substituting “person” for individual (which may well be immaterial) it omits the phrase “at a place of business” which qualified the word individual in the statutory definition [see *PIPA*, section 1]. The purpose appears to be to facilitate contacts at the place of business. An individual’s name is quintessentially personal information. The name of the position or title he holds is not. It is no means clear to me that the language of either the *PIPA* or *FOIPPA* contemplates the employer distributing a list of employees without their consent. Fortunately, it is not necessary for me to decide the point. The union is not seeking a bare list of names. Without a home address, telephone number or e-mail address,

