IN THE MATTER OF AN ARBITRATION

BETWEEN

RIO TINTO ALCAN INC.

(the “Employer”)

AND

UNIFOR, LOCAL 2301

RE: PENSION BUYBACK INTEREST GRIEVANCE

APPEARANCES:	Stephanie Gutierrez, for the Employer
	Peter Shklanka, for the Union
ARBITRATOR:	Mark J. Brown
DATES OF HEARING:	September 22 and 23, 2022
DATE OF AWARD:	October 13, 2022

I. ISSUE

The Union commenced a lawful strike on July 25, 2021. On September 25, 2021, the parties signed a Return to Work Protocol Agreement (the "RTW Agreement"). Paragraph 14 of the RTW Agreement set out provisions for eligible employees to buyback pensionable service in the Defined Benefit Pension Plan (the "DB Plan").

Paragraph 14 states:

> For employees enrolled in the Defined Benefits Pension Plan, there will be no pension accrual for the period between July 25, 2021 and an employee's return to work date (the "Non-Accrual Period") however, employees may elect to buy back pensionable service equal to the lesser of (1) the amount of months in the Non-Accrual Period and (2) twelve months (the DB Buyback"). The costs of buying back any pensionable service, both employee and employer costs, will be the sole responsibility of the employee. Any buy back of pensionable service must be done in accordance with the provisions of the Income Tax Act and any applicable pension legislation. A DB buy back may be done in instalments but must be done no later than April 1, 2024 and may only be done while the employee is employed by the Employer.

If an employee chose the instalment option, the Employer included interest in the instalment amount.

The Union grieved that interest should not be applied to the buyback amount. The Employer argues that interest is included in the "costs" which are the "sole responsibility of the employee".

Although not part of the grievance in the case at hand, the parties referred to the RTW Agreement buyback provision for the Defined Contribution Pension Plan (the "DC Plan") which states:

> For employees enrolled in the Defined Contribution Pension Plan the employee will have the option of making both the employee and employer contributions equal to the lesser of (1) the amount of months in the Non_Accrual Period and (2) twelve months (the "DC Buyback"). Any buyback of pensionable service must be done in accordance with the provisions of the Income Tax Act and any applicable pension legislation. A DC Buyback must be done on the date on which the CAAT Plan is implemented and may only be done while the employee is employed by the Employer.

II. BACKGROUND

The material facts are not in dispute and can be set out briefly.

The DB Plan that the employees are included in is registered in Quebec, as the majority of employees included in the DB Plan are employed in that Province.

The DB Plan document put before me states in part in Section 5.0.01 that the Employer "shall contribute to the Plan such amount, in addition to the Member Contributions, as shall be considered necessary on the advice of the Actuary to provide the pensions, benefits and other payments provided under the Plan and to defray fees and expenses provided under subsections 16.12 and 16.13. A Participating Company will pay such contributions on a monthly basis during each fiscal year".

In Section E.2 of Annex E of the DB Plan document there is a formula for Member Contributions.

The parties agreed, as part of the RTW Agreement, that employees would return to work in a staggered format beginning two (2) weeks after the ratification vote, which was October 1, 2021, and ending seven (7) months after the first employee was returned to work. Therefore the Non-Accrual Period would vary for different employee groups.

During the RTW Agreement negotiations, the DB Plan buyback was addressed, as noted above.

Martin McIlrath, Union Local President, testified that in the negotiations the Union raised the issue of pension buyback. The Union wanted to ensure that an employee could retire on the same timeline as if the strike did not occur (i.e. to ensure that the employee's service was uninterrupted). The Employer provided the initial proposal in writing. In the Employer's proposal the employee was responsible for both the Employer and employee "costs". The buyback was to be completed by no later than April 1, 2024; however, the lump sum and instalment options were not set out. Interest is not referenced in the proposal.

McIlrath stated that the Union countered with a proposal where no contributions would be made up as the Union believed that the Employer was not making contributions to the DB Plan prior to the strike. Subsequently the Union proposed that the "costs" for the employee to buyback pensionable service would include employee costs only.

A sub-committee was established to discuss the pension issue. The Employer's Manager of Pension and Benefits for Canada, Marie - eve Genest attended the meeting virtually. She explained that the Employer had in fact been making contributions to the DB Plan prior to the strike.

The parties agreed to the provision set out above. McIlrath stated that interest was never discussed. This fact is not disputed.

After the RTW Agreement was signed, Genest commenced internal discussions to establish the contents of the buyback communication that would be sent to employees. The Employer used as a template the forms used in a buyback option that was agreed to between the Employer and a different union after a lockout at the Alma, Quebec site. The fact that the Employer used the Alma agreement as a template in its discussions during negotiations with the Union was not communicated to the Union.

There were various internal emails put before me involving Genest, actuarial staff and Lifeworks, a consulting company. In one email Genest requested "can you you please confirm the rate to be used for the buyback cost *and* the interest rate to be used for late payments" (emphasis added).

The emails describe "the total required contribution will therefore be 16.95 x pension multiplier". This was calculated by taking the employee contribution of 5.25 x multiplier and adding the Employer amount of 222.9 x the employee amount of 5.25 equalling 11.7 (i.e. 5.25 x 222.9). In an email dated November 1, 2021 it states in part that "the buyback cost will be equal to 16.95 times the pension multiplier".

Genest sent McIlrath a draft of a package that was to be sent to employees setting out the options, amounts owed and election to buyback deadlines. McIlrath noted that the instalment option included interest at the rate of 4.6%. McIlrath contacted the Employer and disputed the inclusion of interest, leading to the grievance at hand.

Genest stated that the Employer made the decision to not include interest in the lump sum option, which was a benefit to the employee as the Employer would be absorbing the interest amount. Only employees choosing the instalment option would have the amount owed subject to interest.

Marc Queenton, the Employer's Principal Actuarial Advisor, also testified. He stated that the DB Plan valuation establishes the funding requirements of the Plan. It is based on an assumption that contributions are paid monthly and an interest rate is established calculating the time value of the money projecting investment assumptions for the long term.

He stated that the 4.6% used for the instalment option was the recommended interest rate in the last valuation. He stated that ultimately the Employer is responsible for losses in the Pension Plan. He stated that the 4.6% is a projection, and that the interest collected may or may not result in a loss. He stated further that it is a requirement to collect interest on late payments; however, in order to have pension buyback there must be an amendment to the DB Plan. The amendment has not been approved as yet. Therefore, the inclusion of interest was up to the Employer. There was no legal requirement to include it.

Queenton also stated that as of the last valuation date, the DB Plan was in a surplus as a going concern; and, in a surplus if the DB Plan was wound up at the valuation date. If no interest had been applied in the instalments the DB Plan would still be in a surplus situation.

It is not in dispute that the application of interest was not discussed in the RTW Agreement negotiations. Furthermore, the fact that the Employer was using the Alma negotiations as a template was not communicated to the Union.

III. ARGUMENT

The Union argues that the grievance should succeed. Interest was not discussed by the parties at any time during the negotiations for the RTW Agreement. The fact that the Employer was using the Alma situation as a template was not communicated to the Union.

The interest that the Employer applied to the instalment option is the actuarial interest based on the expected long term investment return on the pension fund, plus inflation, less allowance for certain expenses and other items. The Union argues that the interest was not an integral part of paying to receive back the pension service an employee would have accrued had there not been a strike. The date upon which interest was charged by the Employer was an arbitrary date.

The Union argues that the language in the RTW Agreement is clear. The costs of buying back pensionable service is the equivalent of what the employee and the Employer would have contributed had the employee's service not been affected by the strike. This is supported by the fact that the parties only talked about contributions and interest was never mentioned as being part of the costs.

The Union refers to interpretive principles set out in *Pacific Press v. Graphic Communications International Union, Local 25-C*, [1995] B.C.C.A.A.A. No. 637, and notes several points. The Union argues that you cannot impute interest as mutual intention and that the Alma template was never put to it. The extrinsic evidence about the application of interest only included internal Employer communication. In order to apply interest the Employer needed to expressly state it in the negotiations.

The Union also cites *Canada Post Corp. and C.U.P.W. (Winlaw), Re*, [1993] C.L.A.D. No. 1221 for the proposition that the Employer needed to negotiate interest. It is not automatically part of a make whole remedy.

The Employer argues that interest is part of "costs" under the DB Plan. Interest is included in the time value of money that would have been contributed into the DB Plan by the Employer and the employees had the strike not occurred. None of the costs of

the DB Plan are specifically mentioned in the RTW Agreement. The costs include the actuarial assumptions in order to provide a guaranteed benefit in the future as the Employer is ultimately responsible for the DB Plan benefits.

The Employer argues that it granted a gratuitous benefit by not applying interest to the lump sum payments. Interest was only applied to the instalment payments.

The Employer argues that different words have different meaning. The DC Plan buyback referenced “contributions”. The DB Plan buyback references “costs”. Costs must include something other than just contributions. The Union’s position includes contributions only.

The Employer cites several cases to support its argument that the application of interest is normal in a pension buyback situation and that the Union should have been aware of this jurisprudence during the RTW Agreement negotiations: *Ontario Power Generation and The Society of Energy Professionals (Pension Dispute)*, 2006 CarswellOnt 10532, 84 C.L.A.S. 118; *Kaymar Rehabilitation Inc. and OPSEU, Local 452 (Richard)*, *Re*, 2015 CarswellOnt 2585, [2015] O.L.A.A. No 56; *Ontario (Ministry of Attorney General) and OPSEU (Hunt), Re,* 2013 CarswellOnt 14891, 116 C.L.A.S. 213; *Spinks v. R.*, 1996 CarswellNat 326; and, *Savoury v. Nova Scotia*, 2012 NSSC 70, CarswellNS 113.

IV. AWARD

I will first set out some case law that guides my analysis.

The principles to be used for interpretation of a collective agreement are set out in *Pacific Press v. Graphic Communications International Union, Local 25-C*, [1995] B.C.C.A.A.A. No. 637 (“*Pacific Press*”):

1. The object of interpretation is to discover the mutual intention of the parties.

2. The primary resource for an interpretation is the collective agreement.

3. Extrinsic evidence (evidence outside the official record if agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.

4. Extrinsic evidence may clarify but not contradict the collective agreement.

5. A very important promise is likely to be clearly and unequivocally expressed.

6. In construing two provisions, a harmonious interpretation is preferred rather than one that places them in conflict.

7. All clauses and words in a collective agreement should be given meaning, if possible.

8. Where an agreement uses different words, one presumes that the parties intended different meanings.

9. Ordinary words in a collective agreement should be given their plain meaning.

10. Parties are presumed to know about relevant jurisprudence.

With respect to the use of extrinsic evidence arbitrators most often refer to *Nanaimo Times Ltd.*, BCLRB No. B40/96:

It follows that there is no requirement or pre-condition that a party seeking to adduce extrinsic evidence must first establish a bona fide doubt or an ambiguity on the face of the collective agreement prior to the arbitrator admitting the evidence. An arbitrator will accept the evidence when it is proffered (subject, of course, to the usual rules about relevancy and so on). The arbitrator is then able to consider both the language of the disputed provision and the extrinsic evidence when determining whether there is any bona fide doubt or ambiguity about the language of the agreement.

If the arbitrator decides, after considering both the collective agreement language and the extrinsic evidence, that there is no doubt about the proper meaning of the clause in question, the arbitrator then reaches an interpretive judgment without regard to the extrinsic evidence. See *Pacific Press Ltd.*, BCLRB No. B97/94 (upheld on reconsideration BCLRB No. B427/94) where the Board concluded that after considering the extrinsic evidence and finding the language of the collective agreement to be clear, the arbitrator did not need to (and would not be entitled to) resort to extrinsic evidence as an aid to interpretation. This amounts to the arbitrator effectively concluding: "I have considered all of the evidence, both the collective agreement and that which is extrinsic to the agreement, and conclude that what the language means is what it appears to mean to me on first reading."

On the other hand, if an arbitrator concludes that when the language of the collective agreement is considered with the extrinsic evidence, there is some doubt about the meaning of the provision in dispute, the arbitrator is entitled to use extrinsic evidence to resolve the ambiguity or doubt, even in the face of collective agreement language that appeared clear when read in isolation: *Finlay Forest Industries Ltd.,* BCLRB No. B137/94. However, even in these circumstances, an arbitrator is not bound to base his or her decision on the extrinsic evidence simply because the language is somewhat equivocal. The arbitrator is trying to decipher the meaning which the parties mutually intended for the

> disputed contract language, and should not forget the actual language in concentrating on a mass of extrinsic material: *U.B.C.* Subject to the considerations in *Board of School Trustees, School District No. 57 (Prince George),* BCLRB No. 41/76, with respect to the relative value of various types of extrinsic evidence as disclosing mutuality, an arbitrator's assessment of the weight attached to extrinsic evidence is not properly the subject of review under Section 99: *Board of School Trustees of School District No. 39 (Vancouver),* BCLRB No. B386/95.
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> In our view, the use of "bona fide doubt" as opposed to "ambiguity" in U.B.C. is of no consequence; one term is not a more stringent standard than the other. Neither are required prior to admitting extrinsic evidence, and both express the notion that an arbitrator must find some doubt arising from the language of the collective agreement in the context of any extrinsic evidence.
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> The fundamental point, as we have emphasized, is that arbitrators approach their interpretive task with a full appreciation of the circumstances relevant to the disputed contract language. The arbitrator may then determine how, if at all, the extrinsic evidence is of assistance. For example, the collective agreement language may not admit of ambiguity, such that the extrinsic evidence is properly disregarded; alternatively, where ambiguity is found, the evidence may be used as an aid to interpretation. These aspects of an arbitrator's reasoning should be evident on the face of the award (although there is no need for a rote analysis of the U. B. C. concepts). Beyond this, it is not the Board's role to second guess the arbitrator's assessment of ambiguity, the weight attached to the extrinsic evidence, or the interpretation of the collective agreement in light of the extrinsic evidence. (paras. 28-32)

The principles in *Pacific Press* must be considered.

The object of the analysis is to discover the mutual intent of the parties. Was it the mutual intent to include interest in the DB Plan buyback? I do not consider the RTW Agreement to be clear as "costs" are not defined.

It is clear from the extrinsic evidence that interest was not discussed by the parties when the RTW Agreement was negotiated. Before the RTW Agreement was finalized a sub-committee met to discuss pension issues. Whether or not the Employer was making its contributions to the DB Plan prior to the strike was an issue that the Union wanted clarified.

After the RTW Agreement was finalized, the Employer drafted documents to use to send to employees to communicate the process for the DB Plan buyback, and the amount owed by the employees. While the Employer was using the Alma template to do so, the Employer never communicated this to the Union. Internal emails described the "buyback cost" as "equal to 16.95 times the pension multiplier" with no reference to interest. And in one email, Genest requested the "buyback cost and the interest rate to be used for late payments", demonstrating that interest was in addition to buyback costs. I conclude that if the Employer intended to apply interest, it should have been clearly requested in the negotiations.

I am not persuaded by the Employer's argument regarding the different words used in the DB Plan buyback provision and the DC Plan buyback provision. The context of the Plans must be considered. The DC Plan is based on set contributions so it is not surprising that the parties used the word contributions in that provision. The DB Plan is a defined benefit plan. Therefore the word contributions does not adequately describe the basis of the Plan.

Parties should be aware of relevant jurisprudence. Cases cited by the Employer describe a normal approach of applying interest to pension buyback schemes. However, it is interesting to note that in *Ontario Power Generation and The Society of Energy Professionals*, supra, at paragraph 7, the arbitrator stated:

> The only real issue, therefore, is whether employees who pay the amount in a lump sum must pay an interest component. The relevant provision of the award refers to interest. Paying interest in these circumstances is appropriate. Employees buying back service under this or just about any other plan must pay a (small) interest component. That is the way it works to fully fund a buy back. Contributions alone are not sufficient. There is absolutely no reason why this interest obligation should be assumed by the employer. It should be assumed by the benefitting party: the employee.

Although the arbitrator referenced the "way it works" is that interest is applied, he felt that it was necessary to specifically award interest in the original decision. It was not assumed to apply.

The amount paid into the Plan by the Employer and the employees would have earned interest had the amounts been paid in the normal timely manner. The time value of money is not a new concept. The Employer is ultimately responsible for the guaranteed benefit payments to retirees. For late payments, it is a requirement that interest be applied. The last valuation interest amount is utilized for that purpose.

However, the "cost" of not receiving payments into the Plan for the period of the strike cannot be ascertained with certainty. The contributions can be calculated with certainty. But whether the Plan will be at a loss if interest is not charged is not certain. Investments over the long term may result in the Plan continuing to be in a surplus situation, in which case there would be no cost to not collecting interest.

I also conclude that the mutual intent of the parties would not have been for the Employer to have an arbitrary right to charge interest or not, when to charge interest and to determine the rate of interest.

For all the above reasons, I conclude that interest was not agreed to in the RTW Agreement. The grievance succeeds. Employees that have paid interest shall be reimbursed the amount of interest paid and future instalments shall not include interest.

"Mark J. Brown"

Dated this 13th day of October, 2022.