CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1929

Heard at Montreal, Tuesday, 11 July 1989

Concerning

QUEBEC NORTH SHORE & LABRADOR RAILWAY

And

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Unjustified discharge – Article 21.02 a).

UNION'S STATEMENT OF ISSUE:

The Union claims that the Railway unjustly discharged Mr. Réjean Lalancette on 16 August 1988.

FOR THE UNION:

(SGD.) B. ARSENAULT
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

D. Manzo	– Counsel, Montreal
A. Belliveau	– Manger, Human Resources, Sept-Iles
J. Y. Nadeau	– Superintendent, Trans
P. Caouette	– Counsel, Montreal

And on behalf of the Union:

R. Cleary	– Counsel, Montreal
B. Arsenault	– General Chairperson, Sept-Iles
R. J. Proulx	– Vice-President, U.T.U., Ottawa
R. Lalancette	– Grievor

The Arbitrator adjourned the hearing until September, 1989.

On Wednesday, 13 September 1989, there appeared on behalf of the Company:

D. Manzo	– Counsel, Montreal
A. Belliveau	– Manger, Human Resources, Sept-Iles
J. Y. Nadeau	– Superintendent, Transportation, Sept-Iles
P. Caouette	– Counsel, Montreal
L. Lagac	– Labour Relations Officer, Sept-Iles
B. A. Beaulieu	– Witness

And on behalf of the Union:

R. Cleary	– Counsel, Montreal
B. Arsenault	– General Chairperson, Sept-Iles
R. J. Proulx	– Vice-President, U.T.U., Ottawa
B. Marcolini	– Vice-President, U.T.U., Ottawa
R. Lalancette	– Grievor

AWARD OF THE ARBITRATOR

The Union claims that the discharge of Mr. Lalancette, who was absent from his work due to his sentencing to imprisonment for a period of three years, was without just cause. The Railway raises a preliminary objection to the arbitrability of the grievance, arguing that the Union has violated the Collective Agreement was well as Article 7 of the rules of the Canadian Railway Office of Arbitration in submitting its request for arbitration after the prescribed time limits. The Union does not argue the fact that it submitted its request after the prescribed time limits but it claims that the doctrine of estoppel applies in its favour. The position of the Union is that in accordance with an established practice the parties followed a tacit understanding to never insist upon the strict application of the time limits for the forwarding of a grievance to arbitration.

The following provision of the Collective Agreement is pertinent to the grievance:

> **PREAMBLE**
> **3.** All differences between the parties to this Agreement concerning its meaning or violation which cannot be mutually adjusted, shall be submitted to (the) Canadian Railway Office of Arbitration for final settlement without stoppage of work. Such differences must be submitted to the Canadian Railway Office of Arbitration according to their rules of procedure unless the parties mutually agree in writing to delay proceedings before the Office.

The pertinent article in the rules of this Office is the following:

> **7.** No dispute of the nature set forth in Section (A) of Clause 4 may be referred to the Arbitrator until it has first been processed through the last step of the Grievance Procedure provided for in the applicable collective agreement. Failing final disposition under the said procedure a request for arbitration may be made but only in the manner and within the period provided for that purpose in the applicable collective agreement in effect from time to time or, if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in Section (A) of Clause 4, within the period of 60 days from the date decision was rendered in the last step of the Grievance Procedure.
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> No dispute of the nature set forth in Section (B) of Clause 4 may be referred to the Arbitrator until it has first been processed through such prior steps as are specified in the applicable collective agreement.

The agreement establishes, at Article 18, a grievance procedure of two steps, each with its own time limits which, in accordance with Article 18.04, may not be extended except "by mutual agreement in writing between the Railway and the Union."

In the instant case, the Employer advised the Union of the discharge of Mr. Lalancette, effective 16 August 1988, by a letter dated 18 August 1988. The second step of the grievance procedure was fulfilled on October 13, 1988 when the Director of Railway Operations advised Mr. Berthier Arsenault, the general chairman of the Union, that the Railway was maintaining its position vis-à-vis the discharge.

The evidence establishes that the Employer did not receive any reply from the Union until April 25, 1989. On that date Mr. Arsenault asked Mr. Albert Belliveau, Manager, Human Resources, to prepare a joint statement to be submitted to the Canadian Railway Office of Arbitration in order to initiate the arbitration procedure for the grievance of Mr. Lalancette. On May 3, 1989, the Railway refused to sign a joint statement. It advised the Union at that time that it was raising an objection to the jurisdiction of the Arbitrator to hear the grievance because of the mandatory time limits set out in Article 7 of the rules of this Office.

In his evidence, Mr. Arsenault professes to be unaware of the time limits set out in Article 7 of the rules. This, according to him, is the natural result of a tacit understanding between the parties in accordance with a practice in effect since before he began his union duties as Vice-General Chairman in 1984. For his part, Mr. Jacques Roy, General Chairman in 1977-78 and from 1981 to 1988, declared that for some years the parties have always accepted that the time limits in Article 7 of the rules would not be strictly enforced.

In one sense the evidence gives credence to the point of view of Mr. Roy. It is agreed that when it was a question of a joint statement the practice was always to allow the Company to file the grievance with the Canadian Railway Office of Arbitration and that often this was done beyond the period of 60 days stipulated in Article 7. The evidence is to the effect that in all these cases the parties discussed the grievances after the second step, sometimes to try to resolve the problem by way of an amicable settlement, sometimes to agree to proceed to arbitration and sometimes to agree to hold it in abeyance and to discuss it further thereafter. It is evident that in certain instances the parties exchanged letters for these purposes and that on occasion the Union indicated to the Employer that a grievance was withdrawn. It seems also, however, that often the communications as to the state of a grievance were made verbally, without anything in writing.

The evidence of the Railway's witnesses is clearly contrary to that of the Union's witnesses that there is in existence a "carte blanche" understanding concerning the time limits at the arbitration step. Mr. Roger Beaulieu, the previous Human Resources Manager for the Railway, declares that there never was any question of setting aside in a general way the provisions of Article 7. According to his explanation the policy of the Employer was to never refuse an extension of the time limits, provided that the request was made within the prescribed limits. However, he denies having granted an extension of the time limits except when the request was made within the time limits in question. Mr. Beaulieu, as well as the other Company witnesses, agreed that often the joint statements were not sent to the Canadian Railway Office of Arbitration for a long time, sometimes years, after the period of 60 days. The Employer maintains, however, that in each case it was a matter of mutual agreement between the parties, in conformance with the third paragraph of the Preamble to the Collective Agreement.

For the purposes of the preliminary objection, and in particular the question of estoppel, the Union bears the burden of proof. After serious reflection, and with the greatest respect for the Union's evidence and the skilful argument of its counsel, the Arbitrator cannot conclude that the preponderance of the evidence supports its position. Estoppel is a doctrine of exceptional equity which allows one party to evade the strict application of the terms of a contract or a collective agreement. Inasmuch as this doctrine represents a corruption of the contractual law, it is not to be invoked except if the evidence is clear and convincing.

In the instant case the evidence of the Union leaves much to be desired. The claim of its witnesses, made without doubt in good faith, is not established in the evidence disclosed. It is true that the Company was not exacting concerning the 60-day time limit after the second step of the grievance procedure. But in practice this arose because the Company always accepted a request for an extension. The Arbitrator accepts that the request was not always made in a formal way. The evidence of Mr. Arsenault, as well as that of Mr. Belliveau, leaves no doubt that often the Union had only to indicate that it wished to pursue the discussion of a file after the second step for it to be treated as still active. In other words, according to its practice, a continuation of the discussion was seen by the Company as indirectly equivalent to a request for an extension, which was never refused.

But what does the foregoing signify? In the view of the Arbitrator, at most, the parties participated in a "*modus vivendi*" according to which an expression of disagreement on the part of the Union to the response of the Railway at the second step was treated as the equivalent of a request for an extension of time limits. But, however, it is not true that their was never any question of a formal discussion of a request for an extension of time limits. For example, a letter from Mr. Roy, dated 3 December 1981, on the subject of two other grievances contains the following statement:

> ... Having discussed these two cases with Mr. R.L. Beaulieu, it was agreed that there would not be any difficulty to obtain this delay.

Furthermore, a letter from Mr. C. Norbert of the Company addressed to Mr. Roy, gives him a negative answer to a request for an extension of time limits for the arbitration of a grievance. And, finally, by a letter dated 12 September 1983, Mrs. Cécile Bois, Labour Relations Assistant, made known to Mr. Roy the decision of the Company to grant a delay of one month for the presentation of two grievances to Arbitration.

In the Arbitrator's view, that which is perhaps the most damaging to the Union's position is that in the totality of extensive evidence, there is not any documentation, nor any precise recollection on the part of any witness, of a grievance which had been advanced to arbitration following a silence of some months on the part of the Union after the negative response of the Railway at the second step of the grievance procedure. The practice proven by the weight of the documentation suggests, on the contrary, that the normal practice was that the Union communicated to the Employer, within a reasonable time, that it did not accept the reply given at the second step and wanted to have further discussions. The fact that such an approach was treated as the equivalent of a request for an extension does not constitute a practice in keeping with the complete abandonment of the time limits of Article 7 of the Rules. I am not able, moreover, to conclude that the fact that Mr. Arsenault, whose good faith is equally not in question, was not aware of Article 7 and have never heard it mentioned by the Company's representatives constitutes a proof capable of supporting the "carte blanche" arrangement put forward by the Union. Furthermore, that proof is in keeping with the possibility, if not the probability, that there had never been a case of a delay similar to that of Mr. Lalancette.

If the evidence had demonstrated a practice known and accepted by the two parties to the effect that Article 7 of the rules would never be argued, the position of the Union would be more convincing. The jurisprudence is clear, however, about something which is treated as a practice in the interpretation of a collective agreement: in order to demonstrate an intention contrary to the sense of the clear terms of a collective agreement the evidence must establish a mutual practice and not a unilateral thought of only one party. In the decision of the arbitral tribunal in the grievance **Re Forsyth and United Steelworkers, Local 2655** (1984) 17 L.A.C. (3d) 257 (Hope) the text refers to a basic principal in the treatment of the practice and emphasizes the following passage of Arbitrator Adams in the decision **Re Hiram Walker & Sons Ltd. and Distillery Workers Local 61** (1973) 3 L.A.C. (2d) 303, at page 209:

> But this is not to say that parole evidence can be relied upon that, too, is vague, unclear, and ambiguous. For parole evidence to be utilized in "discovering" the meaning of the collective agreement it must be "consensual" ...

The evidence in the instant case further shows that the Union and the Company did not perceive in the same way their arrangement concerning the time limits relative to arbitration. There was not anything, however, neither a common accord to the effect that Article 7 of the rules was effectively abolished nor a practice on the part of the Company, which would entice the Union's representatives to error for the purposes of estoppel. In the absence of a delay similar to that of Mr. Lalancette clearly proven, it is impossible to arrive at a contrary conclusion.

In sum, the Arbitrator cannot conclude that the Railway has followed a practice which would reasonably give the Union's representatives the impression that Article 7 of the rules of the Canadian Railway Office of Arbitration would never be invoked. In the light of the evidence, the elements of estoppel are not established and the Union cannot justly claim to be surprised by the application of the time limits by the Company after its total silence of six months following the final reply of the Employer at the second step of the grievance procedure.

For these reasons the grievance must be dismissed. However, the Arbitrator wishes to make clear that this sentence makes no comment of the merits of the grievance of Mr. Lalancette. He is an employee who has given 20 years of good service to the Company. He has without doubt suffered at a personal level and has now paid his debt to society. It is to be hoped that the parties could discuss in a frank and generous manner the possibility of his return to work, always at the discretion of the Railway.

September 15, 1989

(Sgd) MICHEL G. PICHER
ARBITRATOR