CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2638

Heard in Montreal, Tuesday, 13 June 1995

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Appeal of Mountain Region Work Equipment Bulletin 2/91 in which Field Maintainers' positions were incorrectly advertised as "A" Mechanics' positions.

BROTHERHOOD'S STATEMENT OF ISSUE:

The contention of the Brotherhood is that the Company is estopped from changing the requirements for mechanical repairs for the Extra Gang season without first negotiating the change with the Brotherhood, simply because Field Maintainers have historically performed the work of machine repair and maintenance for the Extra Gangs on the Mount Region for the past number of years.

The Brotherhood requests that Job No. 2 on Gang 103, Job No. 3 on Gang 105, Job No. 9 on Gang 123, Job No. 10 on Gang 137, Job No. 4 on Gang 107, Job No. 5 on Gang 900, Job No. 7 on Gang No. 120 and Job No. 8 on Gang No. 121 be cancelled and a supplement to W/E Bulletin 2/91 be re-issued. Failing this, the Brotherhood requests that the employees working as "A" Mechanics instead of Field Maintainers be compensated for all hours worked at the Field Maintainers' rate of pay.

The Company has denied the Brotherhood's contention and declined the Brotherhood's request.

FOR THE BROTHERHOOD:

(SGD.) G. SCHNEIDER
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

J. C. McDonnell	– Counsel, Toronto
N. Dionne	– Manager, Labour Relations, Montreal
M. E. Hughes	– System Labour Relations Officer, Montreal
G. Marcus	– Manager, Work Equipment, Western Canada, Edmonton

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
G. Schneider	– System Federation General Chairman, Western Lines, Winnipeg
R. A. Bowden	– System Federation General Chairman, Eastern Lines, Ottawa
A. Trudel	– Federation General Chairman, Montreal

AWARD OF THE ARBITRATOR

It does not appear contested that for a period of some eleven years, ending in 1991, the work equipment bulletins which established a number of gangs on the Mountain Region listed a job which attached to each of the extra gangs as being occupied by a Field Maintainer. It is not disputed that in fact, under the strict letter of the collective agreement, the jobs in question should have been bulletined for a Mechanic "A". It is not substantially disputed that article 2.8 of the supplemental agreement 10.3, read together with appendix "D", confirms that a field maintainer is to be given a regular assignment, and is not attached to any particular gang. By way of contrast, on the Company's Prairie Region, the work which is the subject of this grievance was always advertised and filled as a position of Mechanic "A".

The Brotherhood asserts the doctrine of estoppel to claim that the Company could not change the bulletining practice, as it purported to do in 1991. Its Counsel argues that the lengthy past practice of bulletining the positions in question as field maintainer positions prevents the Company from reverting to the strict letter of the collective agreement. It is not disputed that with the implementation of a more recent collective agreement the Company's practice was regularized, by mutual agreement, so that the Mechanic "A" position has since been bulletined, without objection, on the Mountain Region. The claim, therefore, is restricted to the period in 1991.

The elements of estoppel were described as follows in **Re Lake Ontario Cement Ltd. and United Cement. Lime and Gypsum Workers International Union, Local 387** (1984) 13 L.A.C. (3d) 1 (M.G. Picher) at p. 7:

(1) a promise or assurance through words or conduct.

(2) intended to alter the legal relations between the parties,

(3) relied on or acted upon by the other party so that it would be prejudicial if the undertaking were revoked.

In the case at hand the Brotherhood asserts that the practice of the Company in not enforcing the strict letter of the collective agreement as regards the bulletining of field maintainer positions for work with extra gangs is, of itself, a representation sufficient to ground an estoppel. It argues that since reverting to the lower rated pay of the Mechanic "A" provision impacts employees negatively in their earnings, prejudice is shown and the elements of an estoppel are established.

The Arbitrator has some difficulty with that submission. The suggestion that any party to a collective agreement, whether an employer or a union, is immutably bound to a course of action which it has followed in the past is a proposition fraught with some danger. As a general rule both unions and employers must be given the latitude to correct oversights or mistakes in the administration of their collective agreement without necessarily being met with an argument of estoppel based solely on their past practice. In **Re Rothmans of Pall Mall Canada Ltd. and Bakery, Confectionery and Tobacco Workers International Union, Local 319T**, (1983) 12 L.A.C. (3d) 329 (M.G. Picher) a board of arbitration was called upon to consider whether the change in an employer's practice with respect to filling temporary vacancies was foreclosed by an estoppel, in light of the employer's prior consistent practice to fill all such vacancies, notwithstanding a discretion in the employer not to fill such vacancies contained in the collective agreement. The board first rejected the Union's argument that the employer's practice had become an established "working condition" protected under the terms of the agreement. At pp. 335-36 the following comments appear:

> In defining what is and what is not an unwritten rule or an established working condition, a distinction must be drawn between working conditions or rules which arise by a conscious decision and outcomes which have been dictated by circumstances. As noted above, the decision of an employer to continually provide safety shoes might, after a sufficient period of time, become an established working condition. If, on the other hand, an employer's enterprise has so prospered that it has never laid off an employee, it does not follow that immunity from lay-offs has become a working condition for all employees. Management's right to lay off employees subsists even though there may never have been any need to exercise it. By the same token, a union does not lose its right to grieve merely because it has not filed a grievance for a number of years. Boards of arbitration should obviously not infer from the fact that either party to a collective agreement has

> not exercised one of its fundamental prerogatives that the prerogative in question has ceased to exist.

The board of arbitration in the **Rothmans Case** went on to consider the Union's alternative argument with respect to the application of the doctrine of estoppel, based on **Re CN/CP Telecommunications and Canadian Telecommunications Union** (1981) 4 L.A.C. (3d) 205 (Beatty), a decision upheld by the Ontario Divisional Court 128 D.L.R. (3d) 236, 34 O.R. (2d) 385, 82 C.L.L.C. para. 14,163 *subnom. Re C.N.R. Co. et al and Beatty et al*. At pp. 343-44 the board of arbitration rejected that argument, in part, for the following reasons:

> The *CN/CP* decision, and those which have followed it, do not stand for the proposition that every past practice gives rise to an enforceable right under a collective agreement. Suppose, for example, that an employer has provided a Christmas turkey to each of its employees for a substantial number of years. The Christmas turkey has never been discussed with the union and the collective agreement makes no mention of a Christmas bonus or gift to employees, and has no provision freezing "working conditions" comparable to art. 23.01 in the instant collective agreement. In my view the recent cases on estoppel and general principles of equity would not support the proposition, in that case, that a decision by the employer to no longer provide Christmas turkeys would be prevented by estoppel The doctrine of estoppel does not convert all established practices into rights enforceable under a collective agreement.
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> In *Re Hallmark Containers Ltd. and Canadian Paperworkers Union, Local 303* (unreported decision dated January 24, 1983, of a board of arbitration chaired by Kevin M. Burkett [reported 8 L.A.C. (3d) 117]), the board had occasion to consider this aspect of the doctrine of estoppel following the decision of the Ontario Divisional Court in the *CN/CP* case. It concluded that the fact that an estoppel can be used as a sword, that is to provide the grounds for a grievance, does not mean that all management practices become enforceable legal rights. In this regard the board reasoned as follows [at pp. 128-9]:
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> > Finally, the *CN/CP* award, supra, as affirmed by the Divisional Court, has put to bed the sword/shield distinction which has been consistently relied upon in the prior arbitration awards. It has been rejected in the subsequent awards (see *Re Hydro Electric Power Com'n of Ontario and C.U.P.E., Local 1000* (1982), 4 L.A.C. (3d) 216 (Ianni); *Canteen of Canada Ltd. and Retail Wholesale & Department Store Union*, September 20, 1982, unreported (Devlin), and *Re Westclox Canada Ltd. and Int'l Union of Electrical, Radio & Machine Workers* (1981), 3 L.A.C. (3d) 68 (Beatty)) and was not argued by the company in this matter. The elimination of the distinction does not mean, as has been suggested by some, that a union can enforce all long-standing work place practices by way of estoppel if the employer has not reserved his right to alter these practices during the term of the agreement. Indeed, given the statutory requirement that a collective agreement be in writing and the broad discretion usually given to management under the management's rights clause of a collective agreement, this would be a strange result. There may be work place practices which do not conform to the express terms of the collective agreement, as the payment of weekly indemnity provisions in *CN/CP*, supra. The failure of an employer to reserve his right at the bargaining table to alter this type of practice may, as in *CN/CP*, supra, give rise to an estoppel. However, there are innumerable other work place practices which exist at the discretion of management under the management rights clause and are not referable to any other provision of the collective agreement. It is generally accepted in labour/management relations that in the absence of specific language in the agreement to codify these practices, they exist at the discretion of the employer. It could hardly be found, therefore that silence at the bargaining table with respect to these types of practices constitutes a representation by the employer that he is waiving his right to change them during the term of the agreement. This is not to say, however, that a representation by the employer at the bargaining table that he will maintain an existing practice, might not serve to estop the employer from subsequently relying on his authority under the management rights clause to modify the practice during the term of the agreement.

Can it be said that by assigning the extra gang work to a field maintainer for a period of years the Company can be taken to have made a representation to the Brotherhood, intended to affect their legal relations, and in respect of which either the Brotherhood or employees can be said to have relied to their detriment, in the event of a change in the practice? I think not. There is no suggestion in the material before the Arbitrator that any employee has altered his circumstances irrevocably, or has taken steps to change his position in reliance on the Company's past practice. The most that can be said, it seems agreed, is that a job that was gratuitously assigned at a higher level of pay, beyond the contemplation of the collective agreement, has now been realigned to a lower rate of pay, in keeping with the terms of the collective agreement. This is not, in the Arbitrator's view, a case in which it can be shown that there is any prejudice or inequity visited upon any individual or upon the Brotherhood. It is, in my view, more analogous to a circumstance in which a union has failed to grieve a particular company action, for perhaps several years, without necessarily waiving its ultimate right to do so.

If it could be shown, of course, that the parties went to the bargaining table with a specific mutual understanding that the positions in question would continue to be bulletined at the field maintainer level, and that the Brotherhood signed a renewal of the collective agreement in reliance on any such understanding or undertaking, the matter might be substantially different. In fact, however, the evidence is devoid of any such understanding and, as reflected in the facts related above, the Company's practice in the adjacent Prairie Region was substantially different. It is not possible, in my view, to find a basis for a waiver of the Company's rights under the general terms of the collective agreement in the circumstances disclosed, or to support an estoppel.

For all of the foregoing reasons the grievance must be dismissed.

16 June 1995

(signed) MICHEL G. PICHER
ARBITRATOR