CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2948

Heard in Calgary, Wednesday, 13 May 1998

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

DISPUTE:

A claim in the amount of $7,171.34 for Mr. R. Kissner when the amount of his severance opportunity did not match the amount provided in his severance papers.

JOINT STATEMENT OF ISSUE:

On February 22, 1996, Mr. R. Kissner received an estimate on a separation allowance in the amount of $72,087.98. On March 29, 1996 Mr. Kissner signed forms to elect bridging in accordance with article 7.14 Option II of the ESIMA. He elected to have the separation allowance paid in two instalments of; $40,000.00 in December 1996 and $32, 087.98 in January of 1997. When he received the second instalment it fell short by $7,171.34.

It is the Union's position that the Company is estopped from changing the figures originally provided to Mr. Kissner; that Mr. Kissner was without recourse once the error was discovered and had no remedial opportunities.

The Company asserts that Mr. Kissner received the severance payment to which he was entitled.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. OLSHEWSKI	**(SGD.) J. B. DIXON**
NATIONAL REPRESENTATIVE	**for: VICE-PRESIDENT, CN WEST**

There appeared on behalf of the Company:

J. Dixon	— Assistant Manager, Labour Relations, Edmonton
J. Torchia	— Director, Labour Relations, Edmonton
D. Van Cauwenbergh	— Labour Relations Officer, Edmonton
S. Blackmore	— Labour Relations Officer, Edmonton
J. Bauer	— Human Resources Business Partners, Great Plains District, Transportation, Edmonton

And on behalf of the Union:

B. McDonagh	— National Representative, Windsor
R. Kissner	— Grievor

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. The grievor was hired by the Company in 1958, and was eligible for early retirement on December 31, 1996. In January of 1996 the Company gave notice of operational and organizational changes at Regina under the terms of article 8 of the Employment Security and Income Maintenance Agreement. As the notice involved the abolishment of the grievor's position, he was eventually given the option of moving to work elsewhere or taking the benefit of an early retirement package.

The package offered to Mr. Kissner included a bridging provision for the period of seven and one-half months until the date of his eligibility for retirement. As part of that option the grievor was faced with a choice of accepting a monthly allowance or, alternatively, to take a lump sum separation allowance. It is common ground that during the bridging period of seven and one-half months Mr. Kissner was to be paid, as indeed he was, at 65% of his current salary for the period from July 23 to December 31, 1996.

On or about February 22, 1996, prior to his election, the grievor was provided an estimate by the Company's officers which indicated to him that he could take a lump sum payment of $72,087.98. After discussions with his wife, based on the estimated amount, he decided to accept the early retirement package, rather than to continue his employment with the Company at another location. The grievor's evidence, which the Arbitrator accepts, is that he was not told by the officer with whom he dealt that in fact the lump sum payment he was to receive was subject to adjustment, either upwards or downwards. Based upon the lump sum value of his monthly separation allowance, after consultation with his wife, the grievor signed an irrevocable election form on March 29, 1996 whereby he agreed to leave his employment, electing the benefits of the bridging option, and receiving 65% of his basic weekly rate during the bridging period. The election form signed by the grievor reads as follows:

> I, KISSNER, RONALD ROY (please print name and surname), PIN 658543, irrevocably elect the benefits of Option II – Bridging, in accordance with the provisions of article 7.14 of the Employment Security and Income Maintenance Plan in effect. I will receive 65% of my basic weekly rate $728.07 until I am eligible to retire under the Company Pensions Rules.
>
> Separation allowance in the amount of $72,087.98 (estimated) will be payable on DEC 1996 & JAN 1997 (approximate date - payable after employee has officially retired).
>
> Six (6) months prior to the official date of my early retirement, CN will be forwarding all the necessary documents to my home address in order for me to make my final choice of payment option.
>
> Dental coverage will be maintained until early retirement. Extended Health Care and Life Insurance will be maintained until age 65.
>
> Signature: R.R. KISSNER Date: MARCH 29/96

The grievor later instructed the Company to pay his severance payment in two instalments, being $40,000.00 and $32,087.98, respectively. In December of 1996 the grievor duly received the first part of his separation allowance in the amount of a cheque for $40,000.00. Approximately one month later, following his retirement, on February 3, 1997 he was sent the second instalment. However, the cheque which he then received was in the amount of $24,916.64, a shortfall of some $7,171.34. By this grievance Mr. Kissner claims the payment of that amount.

The Union's representative submits that the Company is estopped in the circumstances from denying to the grievor the payment of the shortfall of $7,171.34. He submits that the Company represented to Mr. Kissner that he would receive the full sum of $72,087.98 as his separation allowance lump sum payment. He argues that the grievor then made an irrevocable decision to leave his employment, and to enter into retirement with the intention of moving from Regina to Calgary, where he and his wife undertook the purchase of a home, on mortgage terms predicated, in part, on the amount of the lump sum payment he expected to receive. He further notes that by accepting the Company's offer of the lump sum payment Mr. Kissner put himself in the position of receiving only 65% of his wages for the bridging period, as compared to the 100% amount which he would have received had he opted not to take the bridging option.

The Company's representative submits, as indeed the evidence confirms, that the projected lump sum payment of $72,087.98 proposed to the grievor was only an estimate. In that regard he draws to the Arbitrator's attention the word "estimate" stamped in large character letters at the top of the sheet which bears the separation allowance

calculation. According to his submission, when employees are in a position of considering whether to accept an early retirement opportunity, including bridging, they are provided an estimated statement of the lump sum value of their monthly separation allowance. That sum, he submits, is understood to be subject to adjustment upwards or downwards, based principally on such factors as the wages earned by the employee prior to the commencement of his or her severance. By way of example, the Company submits that any break in service, by reason of sick time or a leave of absence which might intervene during the period between the estimate and the eventual date of separation, could reduce the total amount of the lump sum eventually payable. On that basis it submits that the precise amount payable to any employee cannot be accurately known until they reach the point of actual severance or retirement.

In support of that submission the Company's representatives tendered in evidence bridging payroll figures for a substantial number of employees in a number of bargaining units and locations, who opted for lump sums similar to those paid to the grievor. The data reveal that in fact in most cases the estimated severance amount is not the same as the actual severance payment. However, there are no instances in the figures tabled which resemble a discrepancy of the kind experienced by Mr. Kissner. Most of the differences range in amount of a few hundred dollars, although some are somewhat more. Further, in a number of cases the adjustment is upwards, in favour of the employee.

It is not disputed that the 10% discrepancy in the lump sum separation allowance pay out to the grievor was not occasioned by any fluctuation in his attendance at work in the time between the making of the estimate and his eventual retirement. Rather, it is common ground that the discrepancy is attributable to the failure of the Company to take into account the fact that the grievor would be paid at 65% of his regular wages during the bridging period. It appears that in fact the calculation was incorrectly made on a 100% wage projection for that period.

The Company submits that the instant case should be determined on the principles reflected in a prior award of this Office in **CROA 2650**. That award, dated July 14, 1995, involved a grievance between **Canadian Pacific Limited and the Canadian Council of Railway Operating Unions (Brotherhood of Locomotive Engineers)**. In that case the employee opted for retirement based on a projected separation opportunity lump sum payment of $69,000.00. When in fact the Company realized it had made a serious error, it advised the employee that the corrected figure was $50,862.00. The timing was such, however, that the Company was able to offer to the employee the option of retiring with the corrected amount or rescinding his retirement election and returning to work with his vacation credits intact. In that case the Arbitrator denied the Council's claim for the difference in the estimated amounts and the actual amount paid out, where the employee had decided to proceed with his retirement in the full knowledge of the discrepancy. The Arbitrator found that in that case the Council's plea of estoppel could not be accepted, reasoning, in part, as follows:

> What, then, does the evidence disclose with respect to any injurious or detrimental reliance suffered by Mr. McInnis? In the Arbitrator's view the evidence is devoid of any negative consequence visited upon Mr. McInnis by the Company's error. The most that the evidence shows is that when he was advised that he would be entitled to a separation payment of $69,970.00, Mr. McInnis decided to take the option offered, and placed his house on the market for sale. The sale of his home was never consummated, however, and his house was withdrawn from the market, apparently in light of the subsequent events. The grievor was eventually placed in the same position as he would have been in had the Company correctly calculated his separation entitlement in the first place. …

This Office has, however, had occasion to consider the application of the doctrine of estoppel to prevent the recovery by an employer of monies paid in error to an employee. In **CROA 2095**, an award in a grievance between **VIA Rail Canada Inc. and the United Transportation Union** dated January 11, 1991, it was held that the employer could not recover maintenance of earnings payments incorrectly made to an employee in the amount of some $4,600.00, where the employer's error had induced the employee to forego a more lucrative employment opportunity with another railroad (see also **Re Ottawa Board of Education and Federation of Women Teachers Association** (1986), 25 L.A.C. (3d) 146 (P.C. Picher)).

I turn to consider the merits of the instant dispute. In my view there are substantial distinctions to be drawn between the facts of the instant case and those considered in **CROA 2650**. It is not disputed that in the instant case the discrepancy in the calculation of the grievor's lump sum payment was not discovered or communicated to him until after he had left his employment and undertaken retirement. There is no suggestion on the evidence before me that the Company offered the grievor the opportunity to return to work, subject to the repayment of monies received. The evidence also discloses that in the instant case Mr. Kissner did, by opting for bridging, substantially reduce his income for the bridging period. As noted by the Union's representative, by receiving bridging payments for some

twenty-three weeks, reducing his weekly salary from $728.07 to $473.25, Mr. Kissner found himself receiving some $5,860.86 less for the period in question.

Critical to the analysis of this grievance is an appreciation of the leeway which the parties would appear to understand can operate in the formulating of an estimate of the lump sum separation allowance for an employee who is contemplating bridging to early retirement. The submissions before me confirm that an employee in the position of the grievor knows, or reasonably ought to know, that the estimated amount given to him may be reduced downwards if in fact the employee incurs absences from work, by reason of sick leave or otherwise, in the period between the making of the estimate and his or her eventual separation or retirement. Conversely, it may be revised upwards if subsequent earnings are greater than anticipated. The Arbitrator finds it difficult to accept however, that the parties, or the employees subject to these arrangements, are implicitly on notice or accept that the amount eventually paid out may vary dramatically from the estimated amount by reason of a negligent oversight in the method of calculation used by the Company, as occurred in the instant case.

I am satisfied that the estimate provided to Mr. Kissner could, in light of the normal practice and fluctuations common in such circumstances, be understood to be subject to variation by reason of his later possible absences from work. There is nothing in the material before me, however, to suggest that the parties operate under the expectation that the estimate of the lump sum payment and the amount eventually paid may vary by as much as 10% by reason of an avoidable error in calculation made by the Company in preparing the estimate. Estimation, in this context, must be taken to mean a reasonable projection based on the diligent calculation of the employee's entitlement in accordance with an objective formula, subject only to changes by reason of subsequent conditions beyond the Company's control, and which may be not predictable. I find it impossible to conclude that in a matter of such importance the parties can be taken to agree or understand that an estimate of an employee's lump sum separation allowance may vary from the eventual pay-out by reason of a gross, avoidable error in calculation on the part of the employer. To put it bluntly, the parties did not intend that employees must make critical and irrevocable life choices based on important figures which may be incorrect because of an avoidable lack of diligence on the part of the Company, or because it failed to properly apply an objective, agreed formula. Unfortunately, that is what transpired in the instant case.

The issue then becomes whether the doctrine of estoppel applies. Is the Company equitably prevented from denying to the grievor the payment of the amount which, according to his evidence which I accept, induced him to take the bridging option offered to him, and to sign an irrevocable declaration in furtherance of that choice? In considering that question it is useful to reflect on the following comments on estoppel found in Palmer, **Collective Agreement Arbitration in Canada (Toronto, 1978)** at p. 167:

> Estoppel is a rule of law whereby a party is precluded from denying the existence of some state of facts which he has previously asserted. The general rule is that when a man by his words or conduct, wilfully or by negligence, causes another to believe in the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position to his detriment, the former is precluded from denying the existence of that state of facts. The essential factors giving rise to an estoppel *in pais* (by conduct) are (1) a representation intended to induce a course of conduct on the part of the person to whom the representation was made; (2) resulting from the representation, an act by the person to whom it was made; (3) detriment to such person from the act …

On the evidence before me, I am compelled to conclude that the Company did make a representation to the grievor, albeit negligently, that the lump sum payment payable to him would be in the amount of $72,087.98, subject only to such upward or downward fluctuations as might be occasioned by leaves of absence or increased earnings in the period between the making of the estimate and his actual retirement. I am also satisfied that the grievor was induced to act on the Company's representation. He plainly altered his position to his detriment, to the extent that he severed his employment. However, by the grievor's own account, the decision to move from Regina to Calgary, and to purchase a home, cannot be said to have been undertaken in reliance on the figure quoted by the Company. The decision to sell his own home and to purchase a new home in Calgary was entirely taken after Mr. Kissner became aware of the reduction in the lump sum payment which the Company paid him, that is to say after he received the second segment of the lump sum payment. Detrimental reliance cannot, therefore, be found to have occurred on that basis.

More fundamentally, however, I am satisfied that there was detriment suffered by the grievor, in that he chose to forego his pre-existing right to continue in gainful employment, which he apparently could have done for several

more years. He also opted to receive substantially less by way of income for the period of bridging, representing a wage loss in excess of $5,000.00. In these circumstances I am satisfied that all of the elements of estoppel are made out, and that the Company cannot now deny that the grievor is entitled to anything less than the originally estimated sum of $72,086.98, subject only to the normal adjustment, whether upwards or downwards, by reason of the grievor's attendance at work in the period between the making of the estimate and his actual departure from employment. On that basis, the Union's claim must succeed.

If the foregoing analysis is in error, recent jurisprudence would also suggest that there is an alternative basis upon which a board of arbitration might ground liability. Following the decision of the Supreme Court of Canada in **Weber v. Ontario Hydro** (1995), 125 D.L.R. (4th) 583, it is arguable that, quite apart from notions of contract and estoppel, a remedy in respect of liability for the negligent miscalculation of the grievor's lump sum severance allowance payment, causing him quantifiable economic damage in relation to the irrevocable severance of his gainful employment, would also be available as a remedy through the grievance arbitration process. In the instant case, however, for the reasons related above, I am satisfied that this grievance can be entirely disposed of on the basis of the application of well-established principles of estoppel.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the Company pay to the grievor forthwith the sum of $7,171.34, subject to any legitimate adjustment which may be made based on the grievor's attendance at work between the period of the Company's initial estimate of his lump sum separation allowance payment and the date of his departure from employment. Should there be any dispute with respect to the calculation of compensation, the matter may be spoken to.

May 21, 1998

(signed) MICHEL G. PICHER
ARBITRATOR