CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3123

Heard in Montreal, Tuesday, 11 July, 2000

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TRANSPORTATION COMMUNICATIONS LOCAL 1976 STEELWORKERS

DISPUTE:

Whether the Company can unilaterally deduct $50 per pay period from Mr. Nur's remuneration, as the Company submits. Mr. Nur has improperly received benefits under the Company dental plan, and profited accordingly, which amount the Company submits must be repaid.

JOINT STATEMENT OF ISSUE:

In the summer of 1999, Mr. Nur was formally investigated by the Company with respect to numerous dental claims he had submitted to the administrator of the Company's dental benefit plan on behalf of his brothers Hussein, Adbi and Mohammed, alleging they were his sons. The Company benefit plan does not contain any provisions that allow dental claims to be filed by Mr. Nur on behalf of his brothers.

During the investigation, Mr. Nur produced letters from the lawyer who had assisted Mr. Nur in preparing the legal papers to allow him to sponsors his brothers' immigration to Canada. Based on these letters, the Company accepted Mr. Nur's explanation that he properly believed that, through his sponsorship of his brothers' immigration to Canada, they would be treated in the eyes of the law as his sons and he was entitled to claim them as his dependants under the Company benefit plan.

The Company elected not to impose discipline upon Mr. Nur for submitting improper dental claims. While the Company viewed that it could have demanded immediate restitution of the entire amount paid to Mr. Nur in respect of claims filed on behalf of his brothers, the Company instead began making deductions of $50 per pay period from Mr. Nur's pay cheque to recover the excess insurance monies improperly paid to Mr. Nur from the Company dental plan on behalf of his brothers, which in the Company's view he was not otherwise entitled to.

The Union grieved the deduction of monies from Mr. Nur's pay cheque, alleging that the Company had not the right nor entitlement to make the deductions. The Union further asserted that under the Company dental plan there are no provisions for recovery of overpayments of moneys and therefore Mr. Nur was entitled to retain excess monies paid to him. The Union requested that the Company cease the practice of making deductions from Mr. Nur's pay cheque and reimburse him for monies previously deducted.

The Company contends that it was within its rights to make arrangements to recover monies improperly claimed and improperly paid to the grievor under the Company dental plan. To allow the grievor to retain the monies would amount to a windfall which Mr. Nur would not otherwise be entitled to.

The Union contends that the Company has improperly deducted monies from Mr. Nur's pay cheque to repay monies paid to him under the Company dental plan. The Union requests that the Company immediately cease this practice and return the monies collected, as the claims had been approved by the dental plan administrator and there is no provision under the dental plan for return of any excess monies paid improperly.

The Company has declined the Union's request as it maintains Mr. Nur's brothers are not dependants under the Company's benefit plan and Mr. Nur was not entitled to claim benefits on their behalf. The Company also submits it has the right to unilaterally make the deductions from Mr. Nur's pay cheque to recover excess monies improperly paid to Mr. Nur. Alternatively, if it is deemed that the Company does not have the requisite authority to recover this payment through unilateral deductions, the Company seeks an order from the arbitrator affirming the requirement of the grievor to pay the Company monies received improperly under the Company's dental benefit plan.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) N. LAPOINTE **DIVISIONAL VICE-PRESIDENT**	**(SGD.) R. V. HAMPEL** **FOR: DISTRICT GENERAL MANAGER**

There appeared on behalf of the Company:

R. V. Hampel – Labour Relations Officer, Calgary

And on behalf of the Union:

P. J. Conlon – Local Chairman, Toronto
N. Lapointe – Divisional Vice-President, Montreal
S. Hadden – Executive Board Member, Montreal

AWARD OF THE ARBITRATOR

The facts giving rise to this dispute are not in contention. The grievance involves a two-fold claim by the Union. Firstly it maintains that the Company was under an obligation to pay dental benefits to the grievor for dental services received by his brothers who are orphaned refugees from Somalia in respect of whom he has for some years acted in *loco parentis*. Secondly, if the grievor was not entitled to the payment of such benefits the Company is prevented from recovering the overpayment of dental benefits to Mr. Nur by deducting the amount in question, said to be some $3,200, from his wages at the rate of $50 per pay period.

Mr. Nur immigrated from Somalia before the recent civil war in that country. Married with his own children, he has been employed by the Company for some ten years at its facility in Agincourt, Ontario. In 1993 the grievor's parents had been killed, and his three younger brothers were living as orphaned refugees at a UN camp in Ethiopia. Mr. Nur then took a three month leave of absence to return to East Africa to locate his brothers and bring them to Canada pursuant to permission received by Canada Immigration. There is no dispute that he became the guarantor of his siblings for the purposes of immigration for a period of ten years. For that time, by his own agreement, he undertook that they would not become a charge on the social assistance programs of Canada, a condition said to be common in such immigration arrangements. The grievor's undertaking in that regard is confirmed in a record of landing document filed before the Arbitrator.

There appears to be no dispute that in fact all three of Mr. Nur's brother's lived with him from 1993 onwards and that they were dependent on him for the necessities of life. For all practical purposes, his siblings were under his guardianship. For example, his solicitor prepared a letter, apparently accepted by educational authorities in Toronto, confirming that he had "*de facto* custody" of his brothers.

On a number of occasions, over the years, the grievor filed dental benefit claims for dental services received by his three siblings. On the dental plan claim forms submitted Mr. Nur responded, in the blank space next to the title "relationship", by inserting the word "son". The claims so presented were paid without incident until December of 1998. At that time the administrator of the policy noticed the closeness in time of the birth dates of the grievor's siblings and his own birth date, suggesting that they were not in fact father and sons. At the time of the two claims giving rise to the administrator's queries two of the siblings were in fact over twenty-one years of age.

It is not disputed that the dental plan forms part of the collective agreement. Its protections extend to eligible dependants who are defined in article 2.1(7)(b) of the plan as follows:

> **2.1** DEFINITIONS
> **(7)** "Dependant" means
> …

(b) Any unemployed dependent child, stepchild or adopted child of an employee

- **(i)** under age 21 and residing with the eligible employee or the eligible spouse of the employee, or
- **(ii)** under age 25 if registered as a full-time college or university student, or
- **(iii)** of any age if handicapped and solely dependent upon the employee.

Based on the information made available to it the Company conducted a disciplinary investigation to determine whether there had been any fraudulent misconduct on the part of the grievor. It ultimately concluded that Mr. Nur had in fact acted out of a colour of right, based on a good faith belief on his part that he was entitled to claim his siblings as dependent children by reason of his *de facto* custody of them. A letter from his solicitor confirms that when the grievor inquired of his lawyer in 1993 with respect to a obtaining formal custody under the **Child and Family Services Act** of Ontario he was advised that his status as "legal guardian under the **Immigration Act**" served the same purpose, and the matter was therefore not pursued. Although the Company questions that there is any such status as "legal guardian" under the **Immigration Act**, and maintains that the only documented relationship between the grievor and his siblings is that of immigration guarantor, it decided not to assess discipline against Mr. Nur in the circumstances. The Company did, however, proceed to recover the total amount of $3,138.24 paid in respect of dental benefits for the grievor's three brothers since 1993. It opted to do so by making deductions of $50 from the grievor's pay cheques until the total amount is fully recovered, without any charge for interest.

The Union grieves that the dental plan did entitle the grievor to receive the payment of dental benefits for his three siblings, in relation to whom he acted in *loco parentis*, as dependent children within the meaning of the plan. Alternatively, should there have been no such entitlement, it maintains that the plan must be construed to be in violation of the **Canadian Human Rights Act** to the extent that it would discriminate against the grievor on the basis of family status. It further argues that the Company's attempts to recover the payment of the dental benefits by deductions from the grievor's pay cheques is in violation of the **Canada Labour Code**. Finally, it maintains that in any event the employer is estopped from effectively reversing payments which for a number of years were regularly approved by the plan's administrator.

In support of its first position the Union's representative points to provisions in certain legislation, including the **Divorce Act** of Canada and the **Family Law Act** of Ontario. Specifically he stresses the definition of "child" appearing within those pieces of legislation:

The **Divorce Act** R.S.C. 1985, c.3 s.2(2)

(2) For the purpose of the definition "child of the marriage" in subsection (1) a child of the spouses or former spouses includes

(a) and child for whom they both stand in the place of parents;

The **Family Law Act** R.S.O. 1990, c.F.4, s.1(1)

(1) In this Act
"child" includes a person whom a parent has demonstrated a settled intention to treat as a child of his or her family,

The Union's representative also notes that the *Dictionary of Canadian Law* (Toronto: Carswell, 1991) includes within the definition of "child" the following: "Any other child to whom another person stood in *loco parentis*". Further reference is made to decisions of the courts which indicate that insurance documents should, where they are ambiguous, be read in a large and liberal manner most consistent with the interests of the insured (**Wigle v. Allstate Insurance Co. of Canada** (1984) 49 O.R. (2d) 101 (Ont. C. A.); **Brissette Estate v. Westbury Life Insurance Co.** [1992] 3 S.C.R. 87).

The Company raises a preliminary objection with respect to the Union's claim in these proceedings that the dental plan violates the **Canadian Human Rights Act**. Its representative stresses that there is nothing within the joint statement of facts and issues which raises that matter to be resolved by the Arbitrator. I must conclude that that objection is well founded. It is well established that the expedited form of arbitration which has operated with success within the railway industry for some thirty-five years depends, in substantial part, on the avoidance of procedural technicalities and claims of surprise by reason of issues being raised for the first time at the arbitration

hearing. To that end the jurisdiction of the arbitrator has been circumscribed by the memorandum of agreement of September 1, 1971 establishing the rules of the Canadian Railway Office of Arbitration.

Paragraph 12 of the rules reads, in part, as follows:

> **12** The decision of the Arbitrator shall be limited to the disputes or questions contained in the joint statement submitted to him by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions.

On the basis of the foregoing language I find that I am without jurisdiction to deal with the issue of any alleged violation of the **Canadian Human Rights Act**, an issue which is nowhere to be found within the Joint Statement. Indeed, it appears clear that the Company came to the hearing anticipating that the issues would be confined to provisions of the collective agreement discussed in the grievance procedure, and that it was not prepared to deal with broader questions of the application of the **Canadian Human Rights Act**. While I sustain the objection of the Company, that ruling is obviously without prejudice to such rights as the grievor may have before any other forum as may regard his entitlements under the **Canadian Human Rights Act**.

The most fundamental issue to be addresses is whether the dental plan, which is incorporated into the collective agreement, does contemplate that the grievor was entitled to benefits coverage for dental services provided to his three brothers, in respect of whom he acted as *de facto* guardian. In approaching that issue it is the Arbitrator's obligation to interpret the intention of the parties in framing the language of their dental plan. The concept of a "child" is obviously susceptible of broad and various forms of definition. In a juridical sense the term may be differently defined in accordance with the purposes and limitations of a particular statute, whether in respect of matters such as child welfare, the obligation to provide the necessities of life under the **Criminal Code**, for the purposes of custody and support in marital disputes or the entitlement to make deductions for taxation purposes, to name but the most obvious.

There is within the dental plan itself no definition of the word "child" or the phrase "dependent child". The Union urges upon the Arbitrator a very simple approach, which is to give to the phrase "dependent child" a scope which would incorporate any minor in respect of whom an employee stands in *loco parentis*. Indeed, he stresses that the test should simply be, in keeping with the **Family Law Act** of Ontario, whether a parent has demonstrated a settled intention to treat an individual as a child of his or her family. He submits that where that is established it should be concluded that the individual is a "child" for the purposes of paragraph 2.1(7)(b) of the dental plan. Putting it differently, the Union argues that *de facto* custody, guardianship or an in *loco parentis* relationship is sufficient to establish the conditions of an individual being a "dependent child", presuming of course such other conditions as the individual being a minor, being unemployed and presumably being without any other means.

The Arbitrator is greatly impressed with the spirit of humanity and equity which prompts the Union's position in this grievance. I am equally impressed by the extraordinary devotion to his family and siblings shown by Mr. Nur. However, it is the most fundamental of rules that the Arbitrator is without jurisdiction to alter or amend the terms of a collective agreement, a principle separately included within paragraph 12 of the rules of this Office. The Arbitrator is not at liberty to interpret words of a collective agreement, or an appended benefits plan, as he or she may feel they should be interpreted. Rather, where the original intention of the parties is clear, the Arbitrator must take that intention as he or she may find it.

What, then, did the parties intend? If, as the Union argues, by the word "child" the parties intended to incorporate any individual in respect of whom a parent has demonstrated an intention to treat as a child of his or her family, or in respect of whom one exercises *de facto* guardianship, custody or obligations in *loco parentis*, it would plainly have been entirely unnecessary to add to the definition of "dependant" the express reference to "stepchild or adopted child of an employee". Those concepts would obviously be subsumed in the broader definition of "dependent child" which the Union now espouses. In the Arbitrator's view by expressly referring to the stepchild or adopted child of an employee the parties must reasonably be taken, on the balance of probabilities, to have intended that the phrase "dependent child" must refer to the natural or birth child of a parent. It is against that definition that the additional references to a stepchild or adopted child would have significant meaning. Conversely, those words would have no real utility if by "dependent child" the parties intended to mean any minor in an employee's care and custody. In that context, on the balance of probabilities, I must conclude that by the word "child" the parties originally intended to designate the natural son or daughter of an employee, a category augmented only by the addition of a stepchild or adopted child.

Nor is such an interpretation without some purposive justification. If the Union's position were to obtain the concept of a dependent child could arguably extend to any number of unadopted children a well-intentioned employee might choose to take under their roof, or whom the employee might support in some other dwelling or institution. While it might be open to the parties to opt for so broad a definition of the concept of "dependent child", a board of arbitration should not lightly conclude that they intended to do so absent clear and unequivocal language to support such an interpretation. The language in the dental plan before me does not do so.

For all of the foregoing reasons the Arbitrator concludes that the Company is correct in its interpretation and application of the dental plan, and that the grievor's brothers do not qualify as beneficiaries or dependants under its terms.

The issue then becomes whether the Company is entitled to recover the overpayment made to Mr. Nur in the manner which it has. The Union submits that the Company is prevented from making the deductions as it has by the terms of article 254.1 of the **Canada Labour Code** R.S.C. 1985, c. L-2, as amended:

> **254.1(1)** [**General Rule**] No employer shall make deductions from wages or other amounts due to an employee, except as permitted by or under this section.
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> **(2)** [**Permitted deductions**] The permitted deductions are
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> **(a)** those required by a federal or provincial Act or regulations made thereunder;
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> **(b)** those authorized by a court order or a collective agreement or other document signed by a trade union on behalf of the employee'
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> **(c)** amounts authorized in writing by the employee;
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> **(d)** overpayments of wages by the employer; and
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> **(e)** other amounts prescribed by regulation.

The Union also draws to the Arbitrator's attention the decision of the board of arbitration in **Robert Lemire v. Claudien Blais**, an award of Arbitrator Léonce E. Roy dated October 15, 1999. In the Arbitrator's view the decision of Arbitrator Roy is of little precedential value of the purposes of this dispute. It concerned an apparently non-unionized employee's claim that his employer had wrongfully deducted from his wages the amount of $250 for a fine incurred against the company by the grievor operating his company truck contrary to highway weight restrictions. In that circumstance, obviously without reference to any collective agreement provisions, the arbitrator concluded that the employer was prohibited by article 251.1 of the **Code** from deducting the monies from the grievor's wages, specifically finding that a general understanding signed by the employee that he would respect company rules did not act as an individual agreement justifying such a deduction.

In the instant case the collective agreement does make reference to a right of recovery in the Company in the event of the overpayment of benefits under the dental plan. In that regard article 15.1(G) provides as follows:

> **G. Right of Recovery**
> Whenever payments have been made by the Employer with respect to Allowable Expenses in a total amount, at any time, in excess of the maximum amount of payment necessary at that time to satisfy the intent of this provision, the Employer shall have the right to recover such payments, to the extent of such excess, from among one or more of the following, as the Employer shall determine: any persons to or for or with respect to whom such payments were made, any insurance companies, any other organizations.

The Union's representative submits that the foregoing provision is in fact intended to facilitate adjustments as between insurance companies where, for example, benefits may be payable in part under an employee's benefit plan and in part under a separate benefit plan of his or her spouse. It was not intended, he argues, as an agreement for the deduction of wages as a means of recovery of an overpayment directly from an employee who may have had the benefit of such an overpayment. He submits that while the language may speak to a right of recovery, it gives no specific direction with respect to the means by which such recovery may be made. In that circumstance the Union's representative argues that recovery is to be made otherwise, as for example through the filing of a grievance by the Company.

The Arbitrator has some difficulty with that submission. Firstly it is questionable whether the Company could file a grievance against an individual employee. Bearing in mind that the collective agreement, and indeed the dental

plan, is a document negotiated between the Company and the Union, it is at least arguable that it is only the actions of the Union which might properly be the subject of a grievance by the Company. It is also doubtful that the Company could proceed in the civil courts to recover monies against the employee where the matter in dispute relates entirely to the application of a collective agreement, including an incorporated benefits plan. (See, e.g., **Rights of Labour Act**, R.S.O. 1990, c. R.33.)

It is well settled in Canadian arbitral jurisprudence, including the decisions of this Office, that as a general rule an employer is entitled to recover an overpayment of wages or benefits by deductions from an employee's wages, subject to any contrary provision in a collective agreement, employment standards legislation or the application of the rule of estoppel (**CROA 2095; Ottawa Board of Education** (1986), 25 L.A.C. (3d) 146 (P.C. Picher); **Canada Post Corp.** (1985), 21 L.A.C. (3d) 204 (Bird); **Board of School Trustees, School District No. 45 (West Vancouver)** (1983), 12 L.A.C. (3d) 38 (Morrison); **City of Belleville** (1994) 42 L.A.C. (4th) 224 (Allison); **H. Fine & Sons Ltd.** (1984), 15 L.A.C. (3d) 236 (Roach); **Re Corporation of the Town of Arnprior and International Union of Operating Engineers, Local 793** (1991) 22 L.A.C. (4th) 80 (Bendel).) I am satisfied that in the case at hand the collective agreement does address itself to the issue of the recovery of overpayment, and that the situation is therefore brought within the exception of sub-paragraph (2)(b) of article 254.1 of the **Canada Labour Code**. The collective agreement expressly authorizes the recovery of overpayments. In my view it is not material that there is no specific procedure articulated within the agreement for that purpose: it should fairly be implied to be available to the employer, presumably to be exercised on a fair and reasonable basis. In the circumstances, therefore, I can find no impediment within the **Canada Labour Code** to the right of the employer to make recovery.

As noted above, the jurisprudence is clear that where there has been an overpayment of wages or benefits to an employee by reason of a mistake of fact, the employer may recover such overpayment by deducting from an employee's wages, subject only to an application of the doctrine of estoppel. If it can be shown, for example, that the employee has detrimentally relied upon the mistaken payment, and would be prejudiced by the recovery of the monies, deduction may not be permitted.

The first element necessary to assert an estoppel is a representation on the part of one party to a collective agreement that it will not rely upon the strict terms of the document, and a corresponding reliance upon that representation by the other party. On what basis can it be said that there was a representation by the Company made to Mr. Nur to the effect that he would continue to have benefits for his brothers under the dental plan? The only documents which appear to have been forwarded to the plan administrator are the claim forms filled out by the grievor himself, on the face of which each of his brothers is described by him as being his "son". I fail to see how the administrator, much less the Company, can be taken in these circumstances to have ever held out to the grievor that he had a right to insured dental services for his brothers under the Company's dental plan. I cannot accept the suggestion of the Union's representative that some general knowledge on the part of the grievor's foreman to the effect that he did have *de facto* guardianship of his brothers can be knowledge on the part of the Company that would be tantamount to a representation on its part with respect to the administration of the dental plan. If anything, it is the representation made by the grievor, to the effect that the claimants were his sons, which is problematic in the case at hand. There is nothing in the facts of the case at hand which, in the Arbitrator's view, would justify an application of the doctrine of estoppel in these circumstances.

In the result, and with some regret in light of the grievor's obvious devotion to his extended family, the Arbitrator finds and declares that the dental plan benefits were not intended by the parties to cover the grievor's brothers, that they were paid to him on the basis of a mistake of fact and that the collective agreement expressly contemplates recovery by the Company. The method of recovery utilized by the Company is reasonable, and not in violation of the **Canada Labour Code**, and the doctrine of estoppel has no application to the facts at hand. As noted above, these findings are without prejudice to any such rights as the grievor may have under the **Canadian Human Rights Act**.

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

July 14, 2000

(signed) MICHEL G. PICHER
ARBITRATOR