CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3458

Heard in Montreal, Tuesday, 14 December 2004

concerning

VIA RAIL CANADA INC.

and

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

EX PARTE

DISPUTE:

The deduction and remittance of provincial medical premiums for employees living in British Columbia.

CORPORATION'S STATEMENT OF ISSUE:

The Corporation has voluntarily deducted and remitted provincial medical insurance premiums for many years on behalf of unionized employees residing in British Columbia. Due to the difficulty in ensuring accounts were up to date following periods of absence due to lay off or sick leave, the Corporation decided to have the employees remit their medical insurance premiums directly. On August 31, 2004 the Corporation advised the Union and the employees of the change to become effective January 1, 2005.

The Union has grieved the matter on the basis that the Corporation is estopped from changing the long-standing practice.

The Corporation has declined the grievance on the basis that they are not required under the collective agreement to deduct and remit the premiums. The indulgence can be halted on notice which was provided to the Union.

FOR THE CORPORATION:

(SGD.) E. J. HOULIHAN
FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

L. Laplante	– Labour Relations Officer, Montreal
E. J. Houlihan	– Senior Manager, Labour Relations, Montreal
J. Conveyers	– Supervisor, Employee Services
J. Letellier	– Project Leader

And on behalf of the Union:

D. Olshewski	– National Representative, Winnipeg
R. Johnston	– President, Council 4000, Montreal
B. Coolen	– Secretary-Treasurer, Council 4000
R. Masse	– Bargaining Representative, Montreal

AWARD OF THE ARBITRATOR

The evidence confirms that for as long as anyone can remember the Corporation has deducted provincial health insurance premiums for employees in British Columbia. It is not disputed that many employees have opted not to take advantage of the deduction, generally in circumstances where their spouse might have the same premiums deducted for family coverage at another employment.

The Union's three collective agreements do not place any obligation upon the Corporation to deduct and remit the premiums in British Columbia, which has no law requiring payroll deductions of the premium (as contrasted with Alberta). Article 3.7 of the two collective agreements governing on board and off train employees respectively, and Rule 3 of the collective agreement governing shopcraft employees read as follows:

> Only payroll deductions now or hereafter required by law, deduction of monies due or owing the Corporation and pension deductions shall be made from wages prior to the deduction of dues.

Notwithstanding the foregoing, the Corporation had made the payroll deduction and remittance virtually since its inception in the 1970s.

The record discloses that the parties bargained for the renewal of their three collective agreements in 2004, and that the Union advised the Corporation that all three agreements had been ratified on or about August 30, 2004. It is common ground that although demands were made at the bargaining table for the employer to actually pay the full amount of the BC medical premium, and that some partial payment was already provided for under the shopcraft collective agreement, in fact no change in the agreements was agreed to. It is also not disputed that there was no discussion at the bargaining table of the possibility of the Corporation ceasing to provide employees the convenience of automatic deduction and remittance of the medical premium by the employer, as had gone on over many years, through a substantial number of collective agreement renewals.

However, on September 2, 2004, shortly after the ratification, the Corporation advised members of the Union's bargaining committee that effective January 1, 2005, "VIA has decided to change its policy of deducting and remitting medical premiums for those employees residing in British Columbia." The Union submits that in these circumstances the Corporation is estopped from changing its practice.

After careful consideration, the Arbitrator must agree. While it is true that not all past practices can be said to raise an estoppel (see, e.g., **Re Rothmans of Pall Mall Canada Ltd. and Bakery, Confectionary and Tobacco Workers' International Union, Local 319T** (1983), 12 L.A.C. (3d) 239 (M.G. Picher)), an estoppel must operate where the elements of estoppel are established. In **CROA 2650** those elements were described as follows:

> **(1)** a representation made by the Company either verbally or by conduct to the employee;
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> **(2)** an intention on the part of the employer that the representation would be relied upon by the employee;
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> **(3)** actual reliance on the representation by the employee; and,
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> **(4)** detriment suffered by the employee as a result of his reliance.

The Arbitrator is satisfied that in the case at hand the practice of more than thirty years engaged in by the employer can fairly be characterized as "conduct" amounting to a representation to the employees, giving them to understand that the system of premium deductions would be ongoing. It was obviously the intention, over the years, of the employer that the employees would rely on that representation, to the extent that they would obviously not be making duplicate payments to the provincial medical health plan of British Columbia. In a very real sense, the practice can be said to have become part of the terms and conditions of employment reasonably expected by the employees and their bargaining agent.

Can it be said that the employees actually relied on the representation and that they would stand to suffer detriment as a result of that reliance and a change in the practice? I think that the answer is yes. The case at hand is to be distinguished from the circumstance, for example, of an employer changing its method of wage payment from a cash payment to a system of direct bank deposit (**CROA 2024**). In that case there is arguably no injurious reliance to the extent that the change, if anything, gives a greater convenience and advantage to the employee. That is clearly not so in the case at hand. While it may be that there are a number of arguably convenient methods by which individuals may pay their own health care premiums, the fact remains that the decision of the Corporation places the employees at a disadvantage by taking away the substantial convenience of automatic deduction and remittance of their health insurance premiums which they had previously enjoyed. It is also arguable, I think, that the Union finds itself prejudiced by the Corporation's action, to the extent that it is made powerless to defend against the Corporation's proposed change, in a manner which could arguably cause resentment among the ranks of its members. In any event, for the reasons touched upon above, I am satisfied that the change of practice clearly does occasion a detriment to the employees affected.

For all of the foregoing reasons the Arbitrator finds that the doctrine of estoppel applies in the case at hand, and that indeed the facts are closely parallel to those in the lead case of **Canadian National Railway Company v. Beatty** (1982), 343 O.R. (2nd) 385 (Ont. Div. Ct.). The grievance is therefore allowed. The Arbitrator declares that the Corporation is estopped from changing the practice of deducting and remitting health care premiums for employees in British Columbia, and that it is accordingly under an

obligation to refrain from altering its practice until the parties have the opportunity to deal with the issue a the next round of bargaining for the renewal of their collective agreements.

December 17, 2004

(signed) MICHEL G. PICHER
ARBITRATOR