CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3634

Heard in Montreal, Thursday, 11 October 2007

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

EX PARTE

DISPUTE:

Claim on behalf of Mr. D. Zazuliak.

UNION'S STATEMENT OF ISSUE:

On April 13, 2007, the grievor received notice from the Company that his application for SUB benefits pursuant to the Job Security Agreement (JSA) was declined. The reason given by the Company is its belief that the grievor was, at the relevant time, a seasonal employee. The Union takes the position that the grievor was fully entitled to receive SUB benefits and, as such, filed a grievance.

The Union contends that **(1.)** Article 10.1 of the JSA provides that seasonal employees "shall be defined in Memorandum of Agreement" entered into between the Company and the Union. The grievor does not fall within the scope of any such Memorandum and, therefore, cannot be classified as a seasonal employee for the purposes of the JSA; **(2.)** The grievor satisfied the conditions of article 4 of the JSA and, therefore, was entitled to benefits. By failing to pay those benefits, the Company is in violation of article 4.1 of the JSA.

The Union requests that the grievor's application for benefits be recognized as legitimate and that be compensated for all benefits lost as a result of the Company's violation of the JSA.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:

(SGD.) WM. BREHL
PRESIDENT

There appeared on behalf of the Company:

S. Seeney	– Manager, Labour Relations, Calgary
A. Dannji	– Project Engineer, Labour Relations, Calgary

And on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. Brown	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

It is common ground that the grievor did not hold a permanent position. His record of employment indicates, beyond controversy, that over the years he has been called to work at the commencement of the construction and maintenance season, generally being laid off at the conclusion of that season, typically in October or November. Exceptionally, between January of 1997 and November of 2002, Mr. Zazuliak was able to exercise his seniority to

move through various positions, without any interruption of employment, until his eventual layoff at the conclusion of the season in November of 2002. Thereafter the pattern of seasonal layoffs continued, with the grievor being recalled in April of 2006 and laid off in January of 2007. It is in relation to that layoff which the Union seeks the application of the benefits provisions of the Job Security Agreement, including SUB payments under article 4.

The Union acknowledges that a decision of this Office in 1989, **CROA 1930**, found that seasonal workers other than extra gang labourers were, by well-established past practice, considered to fall within the exception established within article 10 of the Job Security Agreement. In **CROA 1930**, a welder foreman laid off from his position at the end of the work season applied for weekly layoff benefits, just as the grievor in the case at hand. The Company then asserted that the long-standing practice of the parties was to consider that persons in higher positions, such as welder foremen, were deemed to revert to their status as extra gang labourers at the time of their layoff at the season's end. They were therefore treated as not entitled to weekly layoff benefits available under what was then article 5 of the Job Security Agreement.

In that case, as in the case at hand, the Union relied upon article 10.1 of the JSA which provides:

> **10.1** Seasonal employees and recognized seasonal working periods shall be as defined in Memoranda of Agreement signed between the Company and the affected Organizations signatory thereto.

Pursuant to a memorandum of agreement made in April of 1978 the parties defined seasonal working periods as applied to extra gang labourers, in conformity with article 10.1.

The Union makes a twofold submission. Firstly, it argues that what it characterizes as the estoppel recognized in **CROA 1930** was brought to an end by a letter of notice which it provided to the Company in advance of bargaining for the renewal of the collective agreement, in a letter dated May 17, 2006. That letter advised the Company that upon the expiration of the then current collective agreement the Union would no longer recognize the past practice with respect to the application of article 10 of the Job Security Agreement. As no change was made to article 10 during the course of bargaining, the Union maintains that it is entitled to revert to the strict language of that provision. On that basis, to the extent that the only defined exceptions under the heading of seasonal employees are extra gang labourers, it submits that the grievor's layoff from the position of assistant crane operator did not fall within the exception and that he is therefore entitled to the benefits of the Job Security Agreement.

The Company's representative submits that the principles reflected in **CROA 1930** apply four square in the case at hand. He maintains that this Office recognized that by the parties' own acceptance of long-standing practice it became part of their collective agreement that employees called to work as extra gang labourers and employed during the construction and maintenance season in higher categories were considered to be laid off as extra gang labourers and therefore not entitled to the benefits which are here claimed. The Company relies on the language of that award, which reads, in part, as follows:

> But for the long-standing past practice of the Company, apparently un-objected to by the Brotherhood over many years, by which it treated seasonal employees other than extra gang labourers as reverting to extra gang labourer status if they do not claim permanent employment at the conclusion of their seasonal employment, thereby bringing them within the exception described in Article 10 of the Job Security Agreement, the Brotherhood's argument might have some appeal. As is well established in the prior decisions of this Office, when a given interpretation of a collective agreement has been knowingly applied between the parties, without objection or grievance over a substantial number of years, spanning the renegotiation and renewal of the Collective Agreement in unchanged terms, the parties are taken to accept the established interpretation as part of their agreement, and the union which has acquiesced in the interpretation so applied cannot assert some different interpretation by means of a grievance. By the renewal of the Collective Agreement without change, in the knowledge of the interpretation applied to Article 10 of the Job Security Agreement by the Company over many years, the parties have effectively agreed that interpretation into the terms of their collective agreement. Any change with respect to the established interpretation is a matter to be resolved in bargaining.

Turning to the merits of this dispute, the Arbitrator has some difficulty with the application of the doctrine of estoppel to the case at hand, as the Union would have it. **CROA 2645** and **1976** are examples of cases where established past practice can ground an estoppel, whereby one party cannot unilaterally cease to provide to the other party an advantage beyond the strict language of the collective agreement. However, **CROA 1930** is not an award based on the doctrine of estoppel. That award simply recognizes the well established arbitral principle that by their own agreement through past practice the parties may fashion what amounts to an interpretation of a provision of

their collective agreement which must be deemed to operate, at least until such time as they negotiate something different at the bargaining table. As is evident from the language of that award, by the longstanding practice the parties effectively agreed to treat seasonal employees other than extra gang labourers as having extra gang labourer status upon a seasonal layoff from their higher rated position. That interpretation, plausible on its face, was simply confirmed by the parties' mutual acceptance of their own practice. This is not a case where there is a departure from the clear and contrary language of the collective agreement such as to raise the concept of estoppel. In that situation, as indicated in **CROA 1930**, should the Union wish to make any change with respect to the application of article 10 of the collective agreement it must do so at the bargaining table. Merely to provide notice to the Company of its displeasure with the past practice and resulting interpretation does not, of itself, accomplish that end.

In the case at hand, as the parties made no change to the language of their collective agreement and provided no shared indication of their intention to depart from the established interpretation of **CROA 1930**, the Arbitrator is compelled to conclude that the mutual rights and obligations of the parties with respect to the interpretation of article 10 of the JSA remain unchanged. In the result, the grievor does not fall within the exception of article 10.1 of the J.S.A.

For these reasons the grievance must be dismissed.

October 12, 2007

(signed) MICHEL G. PICHER
CHIEF ARBITRATOR