CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3705

Heard in Montreal, Thursday, 16 October 2008

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

The Company's refusal to deduct Union dues from supervisory employees in an amount mandated by the Union.

JOINT STATEMENT OF ISSUE:

On July 18, 2007, the Union counted the results of referendum ballot that had been mailed out to the Union membership. The ballot, conducted in accordance with the Union's constitution, asked the membership to decide upon a proposed increase in the dues of non-bargaining unit (supervisory) employees. The membership voted 84.2% in favour of adopting the proposal. Subsequently, by way of letter dated August 14, 2007, the Union formally requested the Company to commence deducting dues from the applicable employees at the new rate. The Company refused and continued to deduct dues at the previous rate, On September 5, 2007, a grievance was filed objecting to the Company's refusal.

The Union contends that: **(1)** The dues increase for the employees in question was proposed and approved in conformity with the constitutional requirements of the TCRC/MWED; **(2)** Determining the amount of dues is a matter of Union security that is solely and entirely within the jurisdiction of the Union and its constitution; **(3)** The Company's actions are in violation of sections 7.1, 7.2, 7.3 and 10.21 of Agreement No. 41 and sections 70(1) and 94(1) of the *Canada Labour Code*.

The Union requests that: The Company be required **(1)** to commence deducting dues from employees who fall within the scope of section 10.21 of Agreement in the amount set out in the Union's letter to the Company dated August 14, 2007 and **(2)** to collect and remit to the Union all dues that should properly have been deducted from the employees in question back to, and including, the August 24, 2007 deduction date.

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

FOR THE UNION:	FOR THE COMPANY:
(SGD.) WM. BREHL	**(SGD.) D. E. FREEBORN**
PRESIDENT	**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

D. Freeborn	– Manager, Labour Relations, Calgary
R. Hampel	– Counsel, Calgary
M. Goldsmith	– Labour Research and Budget Specialist, Calgary

There appeared on behalf of the Union:

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

AWARD OF THE ARBITRATOR

The instant grievance raises issues apparently unprecedented in the jurisprudence of this Office. Can the Union impose higher union dues on managers who are outside the bargaining unit, but who remain entitled to maintain their bargaining unit seniority by continuing to pay union dues, because those managers performed bargaining unit work during a lawful strike?

The facts giving rise to this grievance are not in substantial dispute. The Union conducted a lawful three week strike against the Company in May and June of 2007. During the strike supervisory employees, some of whom continue to pay union dues to protect their seniority in the bargaining unit, performed bargaining unit work. In the Union's view that fact tended to prolong the strike and deprived bargaining unit employees of wages they might otherwise have earned.

The ability of persons promoted from the bargaining unit into Company management to maintain their seniority by continuing to pay union dues has long been a feature of this collective agreement, as well as other collective agreements in the railway industry. By electing to pay union dues, managers can continue to accrue seniority even though they are not working within the bargaining unit, a right which may become extremely valuable in the event of a reorganization or a layoff of management personnel which compels a supervisor to return to the bargaining unit. A corollary advantage of that arrangement is that it tends to encourage the movement of employees from the ranks of the bargaining unit into management positions, promoting a cadre of supervisors who are knowledgeable about the work of the bargaining unit, the workings of the collective agreement and the legitimate interests of both the Union and the Company in its day to day administration.

The Union security provisions of the instant collective agreement were first negotiated in 1977, then appearing as sections 14.18 and 14.19 of the agreement. Those provisions evolved over time, eventually giving a person promoted to the rank of supervisor the ability to elect to protect the continuing accumulation of his or her seniority by paying union dues. Until the events giving rise to this grievance, the amount of union dues paid by supervisors were the same amount as the union dues paid by all bargaining unit employees. There was, in other words, a single, uniform monthly figure payable by all employees in the bargaining unit as their union dues and that same amount was assessed against supervisors who elected to continue to pay union dues.

At the outset sections 14.18 and 14.19 gave a limited protection to supervisors, depending upon the time at which they might return to the bargaining unit. Those sections, as they stood between 1977 and 1989 were as follows:

> **14.18** An employee accepting an official position may be returned to his former position if such change is made within a period of one year, and after one year he may displace the junior permanent employee of his class of his seniority territory.
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> **14.19** An employee holding seniority under this Agreement who works in a classification not specified in this agreement for a period of twelve (12) consecutive months will have his former permanent position bulletined as permanent.

In 1989 section 14.18 was amended to read as follows:

> **14.18.1** An employee accepting an official position may be returned to his former position if such change is made within a period of one year, and after one year he may displace the junior permanent employee of his class on his seniority territory.
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> **18.18.2** Employees accepting official positions with the Railway prior to May 1, 1989, will retain and continue to accumulate seniority under this agreement.
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> **18.18.3** Employees accepting official positions with the Railway on or subsequent to May 1, 1989, will retain and continue to accumulate seniority under this agreement for a period of one year. Following this one year period in such capacity such employee shall no longer accumulate seniority but shall retain the seniority rights already accumulated up the conclusion of the one year period.

So matters remained until 2000. At that point the renewal of the collective agreement saw the addition of section 10.22 as it appears in the 2005 collective agreement, albeit it was then section 14.18.4. At that time an

amendment to section 14.18.3 also introduced the optional payment of union dues by supervisors. The language of these provisions then appeared as follows:

> **14.18.1** An employee accepting an official position may be returned to his former position if such change is made within a period of one year, and after one year he may displace the junior permanent employee of his class on his seniority territory.
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> **14.18.2** Employees accepting official positions with the Railway prior to May 1, 1989, will retain and continue to accumulate seniority under this agreement.
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> **14.18.3** Employees accepting official positions with the Railway on or subsequent to May 1, 1989, will have the option of paying union dues. Employees who elect to pay union dues will continue to accumulate seniority. Employees who elect not to pay union dues shall cease accumulating seniority but shall retain all seniority accumulated to date. Employees accepting official positions temporarily will be required to pay Union dues and will continue to accumulate all seniority.
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> **14.18.4** Permanent and Temporary supervisors are not active bargaining unit member [sic] nor can they be represented by the union while serving as a Supervisor but they may continue to accumulate seniority in accordance with Section 14.18.2 and 14.18.3. The Company will provide timely notice of temporary and permanent appointments and reversions to the unionized ranks.
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> **14.19** An employee holding seniority under this Agreement who works in a classification not specified in this agreement for a period of twelve (12) consecutive months will have his former permanent position bulletined as permanent.

The 2005 collective agreement involved a re-ordering of provisions. Sections 14.18 and 14.19 were continued as sections 10.20 through 10.24 of the collective agreement. The changes to these provisions were finalized with the negotiation of the 2005 collective agreement and the addition of section 10.23. In the result, the provisions in relation to the status of supervisory employees as they appeared both in the 2005 collective agreement and the current collective agreement renegotiated in 2007, are as follows:

> **10.20** An employee accepting an official position may be returned to his former position if such change is made within a period of one year, and after one year he may displace the junior permanent employee of his class on his seniority territory.
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> **10.21** Employees accepting official positions with the Railway will have the option of paying union dues. Employees who elect to pay union dues will continue to accumulate seniority. Employees who elect not to pay union dues shall cease accumulating seniority but shall retain all seniority accumulated to date. Employees accepting official positions temporarily will be required to pay Union dues and will continue to accumulate all seniority.
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> **10.22** Permanent and Temporary supervisors are not active bargaining unit member [sic] nor can they be represented by the Union while serving as a Supervisor but they may continue to accumulate seniority in accordance with Article 10.21. The Company will provide timely notice of temporary and permanent appointments and reversions to the unionized ranks.
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> **10.23** Employees permanently promoted from a bargaining unit position who reverts [sic] to a bargaining unit position will not be eligible to receive a benefit contained in the Job Security Agreement, Article 7.14, unless such employee has occupied a bargaining unit position for a period of one (1) year or will be required to relocate in order to hold a position as a result of the implementation of a T/O/O/ change. It is also understood that this restriction may be waived by mutual agreement between the parties, should a junior employee eligible to receive Article 7 benefits contained in the Job Security Agreement be required to relocate as a result of the implementation of a T/O/O/ change during this one (1) year period.

> **10.24** An employee holding seniority under this Agreement who works in a classification not specified in this agreement for a period of twelve (12) consecutive months will have their permanent position bulletined as permanent.

Bargaining unit employees who move into the ranks of supervision have gained important job security protections. Most significantly, since 1989 some supervisors have been allowed to continue to accumulate seniority. In accordance with article 10.21, since 2005, all supervisors are given the election to pay or not pay union dues, and to accumulate or no longer accumulate seniority accordingly.

The deduction of union dues for employees in the bargaining unit is provided for under section 7 of the collective agreement. That provision reads, in part, as follows:

> **7.1** The Railway shall deduct on the payroll for the pay period which contains the 24th day of each month from wages due and payable to each employee coming within the scope of this Collective Agreement an amount equivalent to the uniform monthly union dues of the Teamsters Canada Rail Conference Maintenance of Way Employees Division, subject to the conditions and exceptions set forth hereunder.
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> **7.2** The amount to be deducted shall be equivalent to the uniform, regular dues payment of the Teamsters Canada Rail Conference Maintenance of Way Employees Division covering the position in which the employee concerned is engaged and shall not include special assessments. The amount to be deducted shall not be changed during the term of this Collective Agreement excepting to conform to a change in the amount of regular dues of the TCRC MWED in accordance with its constitutional provisions. The provisions of Section 7 shall be applicable on receipt by the Railway of notice in writing from the TCRC MWED of the amount of the regular monthly dues.
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> **7.3** Employees filling positions of a supervisory or confidential nature not subject to all the rules of the applicable agreement as may be mutually agreed between the designated officers of the Railway and of the Organization, shall be excluded from dues deduction, except as otherwise provided for in Article 10.21.

The record discloses that in fact in the last round of bargaining leading to the 2007 collective agreement, the Union did seek to change radically the provisions of the collective agreement relating to supervisors. In demands presented to the Company on July 5, 2006 the Union tabled the following demand:

> Remove all supervisors from seniority lists once they have worked a supervisory position outside of the Collective Agreement for 6 months cumulative in any 12 months.

The Union did not succeed in its demand, and the collective agreement was renewed without any substantial change in the provisions concerning the payment of dues and the continuing accumulation or preservation of seniority by supervisors.

With the renewal of the collective agreement, following the strike, the Union nevertheless determined that supervisors should pay a higher level of dues, specifically two and one-half times the dues paid by all other bargaining unit members. It put that issue to a vote of its members, a vote incidentally conducted at the same time as the ratification vote for the renewal of the collective agreement. The Arbitrator is advised that the vote to adjust the union dues of supervisors passed by a vote of some 84% of the voting membership. The letter of explanation sent to the bargaining unit members by the Union asking them to record their support or non-support of the change reads as follows:

> Dear Brother or Sister:
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> At the end of this letter you will find a ballot that provides you with the opportunity to vote on a proposal to increase the amount of dues paid by employees while they are working in supervisory or other official positions After you read this letter, please indicate your preference on the ballot and return the ballot portion in the enclosed envelope.
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> The background to the proposal is as follows:
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> As you know, the presence of CP supervisory staff on bargaining unit seniority lists has long been of serious and legitimate concern to the members of the bargaining unit.

During the just concluded round of collective bargaining, one of the Union's demands was the removal of supervisors from bargaining unit seniority lists. Unfortunately, this goal could not be achieved without a much prolonged strike. In consequence, the status quo as it existed before the current round remains in place. In that regard, section 10.21 of Agreement No. 41 provides that:

Employees accepting official positions with the Railway will have the option of paying union dues. Employees who elect to pay dues will continue to accumulate seniority. Employees who elect not to pay dues shall cease accumulating seniority, but shall retain all seniority accumulated to date. Employees accepting official positions temporarily will be required to pay union dues and will continue to accumulate all seniority. Employees accepting official positions temporarily will be required to pay union dues and will continue to accumulate all seniority.

By accumulating seniority in the bargaining unit, supervisors will, over time, move up in the seniority rankings. This ensures that when a supervisor decides to return to the bargaining unit he or she will possess seniority sufficient to acquire a bargaining unit position. Upon acquiring such a position, the former supervisor will immediately take full advantage of all wages and benefits that have been won by the bargaining unit.

As you know, supervisory employees play no role in the acquisition of new collective agreements. Moreover, they played no positive role in the recent three week strike that was needed to achieve the current settlement with the company In fact, by performing bargaining unit work, supervisory employees certainly prolonged the strike.

It goes without saying that negotiations and strikes are very expensive, not only to individual strikers but to the bargaining unit and the union as a whole In view of the fact that supervisors, when they return to the bargaining unit, benefit fully from the wage and benefit enhancements won as a result of negotiations and strike, it is only right and appropriate that supervisory employees be required to contribute to the cost of the improvements to the collective agreement that they will enjoy when they return to the bargaining unit.

Section 7.2 of Agreement No 41 provides as follows:

The amount (of dues) to be deducted (from a worker's pay) shall be equivalent to the uniform, regular dues payment of the Teamsters Canada Rail conference Maintenance of Way Employees Division covering the position in which the employee concerned is engaged and shall not include special assessments The amount to be deducted shall not be changed during the term of this collective agreement except to conform to a change in the amount of regular dues of the TCRC MWED in accordance with its constitutional provisions. The provisions of Section 7 shall be applicable on receipt by the Railway of notice in writing from the TCRC MWED of the amount of the regular monthly dues.

Until present, all CP employees who hold bargaining unit seniority have paid the same amount of dues regardless of the position they hold.

However, in light of the explanation given above, the TCRC MWED is now proposing a two-tiered union dues structure based upon a distinction between employees working in the bargaining unit and employees working in non-bargaining unit (supervisory) positions.

The amount of dues to be paid by bargaining unit members shall remain at the current constitutionally authorized levels.

The amount of dues to be paid by non-bargaining unit (supervisory) members shall be set at two and one half times the regular bargaining unit members' rate of dues. This rate is reflective of the cost of collective agreement negotiations, of conducting the just concluded strike and of conducting future strikes, of the harm and damage done to the bargaining unit by supervisory employees who perform bargaining unit work during a strike while bargaining unit members are receiving no remuneration, and of the general administration and maintenance of the bargaining unit.

Section 7.2 of Agreement No 41 provides that the amount of dues deducted shall not be changed during the term of the collective agreement "except to conform to a change in the amount of

> regular dues of the TCRC MWED in accordance with its constitutional provisions." It is with the satisfaction of these constitutional requirements in mind, that this letter and ballot is being forwarded to you If you concur with the proposed increase in the uniform, regular dues for non-bargaining unit (supervisory) employees, please check the appropriate box on the ballot and return.
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> (emphasis added)

Armed with an 84% vote of support for the change in the union dues of supervisory employees, the Union gave notice to the Company by way of letter dated August 14, 2007 to commence deducting dues from supervisors at the higher rate. By paying 2-1/2 times the rate of union dues of employees in the bargaining unit, who all pay the same flat amount, the supervisors would have their monthly union dues increase from the bargaining unit rate of $63.31 per month to the new rate of $156.55 per month.

The Company refused to implement the change, asserting that it is in effect a punitive assessment aimed at supervisors for complying with the Company's right to have them perform bargaining unit work during a lawful strike. In essence, the Company asserts that the amount of union dues sought to be deducted from supervisors by the change made pursuant to the Union's constitution is not in fact the deduction of uniform and regular union dues as contemplated under the collective agreement, but rather the assessment of a punitive penalty assessment which, by the terms of the agreement, the Company is not bound to deduct and remit.

In its submission to the Arbitrator the Union stresses that the assessment and collection of union dues is an essential form of union security in the Canadian collective bargaining system and it should not be interfered with by any third party. Its representatives stress that it is not for the Company to judge or characterize the purpose of the dues which the Union seeks to have deducted under the terms of the collective agreement as that matter is, in essence, a matter of internal union management. They stress the mandatory provisions of the **Canada Labour Code** which, in section 70(1), mandates that employers are required to deduct union dues for employees in a bargaining unit when the Union which is the bargaining agent for that unit makes such a request, with the collective agreement to contain a provision to that effect. In that regard the Union makes reference to the following provisions of the **Code**:

> **70(1)** Where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union forthwith.
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> …
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> **70(4)** "regular union dues" means, in respect of
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> **(a)** an employee who is a member of a trade union, the dues uniformly and regularly paid by a member of the union in accordance with the constitution and by-laws of the union, and
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> **(b)** an employee who is not a member of a trade union, the dues referred to in paragraph (a), other than any amount that is for payment of pension, superannuation, sickness insurance or any other benefit available only to members of the union.

The Union's representatives stress, having reference to the language of section 7.2 of the collective agreement, that the dues which it has requested the Company to deduct in respect of supervisors are the uniform, regular dues covering the position which the supervisors hold. On that basis the Union submits that the Company is under a clear collective agreement obligation to deduct the dues of supervisors at the rate of 2-1/2 times that of the regular dues paid by all employees within the bargaining unit. Its representatives stress that the only involvement that an employer can have with respect to the issue of union dues is two-fold, namely the deduction at source and then the remittance of those dues to the Union. Indeed, they urge, any failure on the part of the employer to honour its obligation can be viewed as interference with the formation and administration of a trade union. In that regard reliance is placed on the decision of the Canada Labour Relations Board in **Re ATV New Brunswick Ltd.** [1979] 29 d.i. 23.

In support of the proposition that the Company is bound to respect the decision of the Union to raise dues, and that dues are to be remitted in accordance with what is properly determined under the processes of the Union's own constitution, reference is made to the following jurisprudence: **Re USW and Macassa Gold Mines** [1969] 20 L.A.C. 75 (H.D. Brown); **Re USW and Union Carbide** [1969] 20 L.A.C. 215 (J.H. Brown); **Re USW and Triangle Conduit** [1970] 21 L.A.C. 332 (P.C. Weiler); **Re Toronto and CUPE Local 43** [1979] 23 L.A.C. (2d) 381 (Teplitsky).

The Union further submits that there is nothing in the language of the collective agreement which would suggest that the dues which it has assessed against supervisors, in keeping with its constitutional process, are other than "uniform" or "regular" as contemplated within the terms of section 7 of the collective agreement. The Union's representatives argue that the use of those words does not mean that every employee falling within the scope of the bargaining unit must pay the same amount of dues. They submit that the phrase "covering the position in which the employee concerned is engaged" found section 7.2 clearly leaves scope for differing levels of union dues payment.

The Company submits that the initiative of the Union can only be understood as a change intended to punish supervisors for performing bargaining unit work, which was their lawful right, during the strike which immediately preceded the Union's request to the Company. Its representatives argue that, viewed in the context of the history of the deduction of Union dues within the bargaining unit, and indeed within the railway industry generally, what the Union seeks is not in fact the deduction of uniform regular dues, but rather a special punitive assessment made against supervisors.

The Company's representatives stress that historically there has never been any differentiation as among employees of any rank or category, either within the bargaining unit or within the ranks of supervisors, from the standpoint of the amount of union dues that they have been required to pay. They assert that in the entire history of handling dues within the Company, over all bargaining units, including the bargaining unit at hand, the Company has never deducted and remitted differing levels of union dues based on positions or crafts. Indeed, the Company stresses that to deduct union dues in different amounts for different employees would in all likelihood occasion an unsupportable administrative burden, suggesting that the deduction of uniform amounts of union dues has been agreed to, over many decades, as a means of avoiding the administrative cost and complexity which would otherwise result. In the Company's submission any departure from that long established understanding must be bargained and agreed upon rather than imposed unilaterally.

In an alternative submission, the Company's representatives argue that even if the Arbitrator should accept that the language of the collective agreement would allow, on a strict interpretation, the imposition of different amounts of dues such as has occurred in this case, the Union must nevertheless be estopped. It argues that having followed a uniform industry standard for decades and having tabled no language at the bargaining table prior to the renewal of the collective agreement which would have changed the Company's expectation that a single amount of union dues would continue to be assessed as against all persons, it would be inequitable to now have the Union revert to the strict language of the collective agreement to assess differing levels of dues based on the position held by different individuals. It stresses that it is especially inequitable, given that the intention and likely effect of the Union's action is not only to punish current supervisors, but also to dissuade employees from accepting promotion into the rank of supervisor, and discouraging existing supervisors from continuing in that capacity. It characterizes the Union's action as an "attempt to negatively impact our work force and hamstring our Maintenance Operations."

Dealing with the language of section 7.2 of the collective agreement, the Company questions how it can be said to apply, in any event, to supervisors. It stresses that the words "covering the position in which the employee concerned is engaged" must by definition refer to positions within the bargaining unit. That language cannot, the Company argues, be said to relate to the position of a person outside the bargaining unit, and cannot contemplate the separate assessment of higher dues for the "position" of supervisor.

In support of its characterization of the Union's request as relating to an assessment, reference is made by the Company to an excerpt of the decision of Arbitrator Germaine in **Re Eurocan Pulp and Paper Ltd. and Communications, Energy and Paperworkers Union of Canada, Local 298** [2005] 143 L.A.C. (4th) 353 (R. Germaine). In that case the union had levied an assessment on its members to give help to a sister local engaged in a strike against another company. It requested the employer to deduct the assessment from the wages of members who voluntarily accepted to contribute the assessment. Although it appears that the company had levied similar assessments in the past, by reason of the complexity of the dues administration burden, it refused the union's request. In dismissing the grievance and finding that the union's request went beyond the obligation to collect dues Arbitrator Germaine cited with approval the decision of the British Columbia Labour Relations Board (**Decision**

NO. 55/82 Corporation of the District of West Vancouver and West Vancouver Municipal Employees Association, a decision which issued in 1982:

> The deduction authorized in the form of assignment set out in Section 10(2) … [new section 16(2) of the Code] is confined to initiation fees and regular dues. Generally speaking, although subject to change … the amounts of such deductions are relatively stable in both the short and long term. Assessments, on the other hand, are quite the opposite. The purpose and the amount of such deductions are not ascertainable until the assessment … [has] been levied by means of a resolution adopted by the Union's membership or by such other procedures as may be contemplated by the Union's constitution.
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> Although these distinctions are legitimate, they are not as important for these purposes as one further distinction. Fees and dues comprise the normal income or revenue of a trade union. As we have said, it was undoubtedly the intention of the legislature that Section 10 … facilitate the collective bargaining process by securing such income through a checkoff mechanism. Assessments, on the other hand, will rarely constitute part of a trade union's ordinary income. Assessments are ad hoc and irregular in nature; they need not even be levied equally upon all members or all employees within the bargaining unit. Whether designed to support the strike activity, to penalize a member for a violation of the trade union's constitution, or for some other purposes, the principal rationale of an assessment is seldom related to the ordinary or regular revenues of a trade union.

The Company also notes the prior decision of this Office in **CROA 2389**, a case which involved this same Union and the Canadian National Railway Company. The Union there sought to have the Company deduct union dues from company managers who retained the right, as provided within the collective agreement, to preserve and accumulate seniority notwithstanding that they were no longer part of the bargaining unit. In declining that grievance the Arbitrator commented as follows:

> … When section 70.1 of the **Canada Labour Code** is interpreted in light of well-established industrial relations norms, there can be little doubt that Parliament intended the dues check-off provision to apply to employees in the bargaining unit which is covered by the collective agreement in question, that is to say persons who earn wages under the terms of that collective agreement. The provisions of section 70 of the **Code** cannot, in my view, be fairly interpreted as establishing an obligation on the part of the Company to mandatorilly deduct union dues from managers who are no longer members of the bargaining unit, notwithstanding that they may retain residual seniority rights and the ability to some day resume the status of bargaining unit employees.

The Employer's representatives note that the decision in **CROA 2389** was cited with approval by the Canada Labour Relations Board when the Union subsequently filed a separate complaint alleging a violation of sections 70)1) and 94(1)(a) of the **Code**. In that case the Union's complaint was also dismissed. (see **Canadian National Railway Company** [1994] 97 d.i. 1)

I turn to consider the merits of the dispute. Firstly, as is well reflected in the jurisprudence, in Canadian industrial relations the mandatory deduction and remittance of union dues is the lifeblood of union security and a critical underpinning to the collective bargaining process mandated by the Canada Labour Code and by similar provincial labour relations statutes. The Rand formula, first established in 1946 following a major strike, has become a cornerstone of the Canadian collective bargaining system. It therefore goes without saying that it is incumbent upon boards of arbitration to appreciate the central importance of Rand formula provisions which have become incorporated into Canadian collective agreements. Against that background the Arbitrator readily accepts the Union's assertion that it is the obligation of the Employer to deduct and remit dues in accordance with the terms of the collective agreement, which are the contractual expression of section 70 of the **Canada Labour Code**.

At issue in this grievance, however, is the correct interpretation and application of sections 7 and 10 of the instant collective agreement. The question to be resolved is whether the amounts which the Union has requested the employer to deduct against the wages of supervisors can be said to be equivalent to "… the uniform, regular dues payments of the Teamsters Canada Rail Conference Maintenance of Way Employees Division covering the position in which the employee concerned is engaged …", and not "special assessments" as appears in section 7.2 of the collective agreement. A related question is whether those same amounts are "union dues" to be deducted voluntarily

from supervisors in exchange for the right to continue to accumulate seniority, as contemplated within section 10.21 of the collective agreement.

In approaching this issue it is instructive to consider, if only as background, the language found within sections 70(1) and 70(4) of the **Canada Labour Code**, which are the codification of the Rand Formula. Section 70(1) speaks in terms of deducting and remitting "… the regular union dues …". Section 70(4) then defines regular union dues as "… the dues uniformly and regularly paid by a member of the union …".

It is, I think, significant to note that the two qualifiers, "uniform" and "regular" which are central to section 70 of the **Code** are also used in section 7 of the collective agreement. Sections 7.1 and 7.2 speak variously about the dues deduction and remittance in terms of "uniform monthly union dues", "uniform, regular dues", "regular dues" and "regular monthly dues".

In the Arbitrator's view the words "uniform" and "regular" are intended to have different meanings. In normal parlance, in this context, the word "regular" would appear to have a temporal connotation, that is to say that dues are deducted on a regular basis over time. In other words, dues may be said to be regular if they are assessed on an annual, monthly or weekly basis. Also, according to the dictionary definition, the word "regular" connotes that dues are to be assessed and deducted in accordance with normative rules, principles or regulations.

The word "uniform" is this context must be taken to intend something different. At a minimum, it would suggest that dues are to be assessed against employees in a manner that is consistent from one employee to another. Given the history of union dues deduction and remittance of union dues within this bargaining unit, it is not insignificant that all employees in the bargaining unit, regardless of their rank, trade, classification or hourly rate have for decades paid the same amount of monthly union dues. In that historic context the word "uniform" would appear to have a relatively certain meaning. It is also notable that during the same extensive number of years supervisors, regardless of their earnings, have been assessed the same uniform amount as all employees. At first blush, therefore, these words would appear to contemplate a single and uniform amount of union dues to be paid by all of those in the bargaining unit who are compelled to pay dues and by supervisors outside the bargaining unit who elect to pay them.

Can it be said, as is argued by the Union, that dues need only be uniform "by position" given the use of the phrase "covering the position" which appears in section of 7.2 of the collective agreement? Obviously, on its face, that language would appear to contemplate the possibility of different amounts of union dues based on different positions. However that argument falters to the extent that the Union would seek to apply it to the position of a supervisor. Clearly, section 7.2 of the collective agreement addresses the bargaining unit, and dues to be paid by employees who are in the bargaining unit. There is, quite simply, no other way to understand the phrase "covering the position in which the employee concerned is engaged". In that context, as is clear in Canadian labour law, the word "employee" can only mean an employee within the bargaining unit. As the Union readily acknowledges, it is without jurisdiction to negotiate or enforce any terms and conditions of employment for persons who are not employees in the bargaining unit. It can, of course, as guardian of the seniority system, agree with the Company to allow non-bargaining unit persons to retain and/or accumulate seniority in the event that they should ever return to bargaining unit service. And it is not disputed that it may lawfully bargain for the payment of dues in exchange for that right, as has occurred within the provisions of section 10 of the collective agreement. However, when these provisions are read as a whole, and are interpreted in light of the history of many decades of practice, the compelling picture which emerges is that all persons who have paid dues under the terms of the collective agreement, whether bargaining unit members or supervisors, have been subject to paying a single uniform amount of dues. While the language of section 7.2 clearly contemplates that there can be increases in the amount of dues to be collected, such increases are to be in accordance a change "in the amount of regular dues of the TCRC MWED …". Again, a degree of uniformity appears to be clearly contemplated.

What is to be made of the phrase within section 7.2 of the collective agreement to the effect that the deduction of dues "… shall not include special assessments."? In the Arbitrator's view that phrase must be assessed in the context of the language both of the **Canada Labour Code** and of section 7 generally. Those provisions speak repeatedly of dues which are "uniform" and "regular". As reflected in the jurisprudence cited above, special assessments can be of many kinds, and commonly arise in the context of a strike where a union may determine that there is a special need to be dealt with. When regard is had to the explanation provided to the Union's members for the increase of the dues to be assessed against supervisors, there can be little doubt but that the amount being sought is strike related. That letter expressly states: "this rate is reflective of the cost of collective agreement negotiations, of conducting the just concluded strike and of conducting future strikes …". While the same sentence goes on to

include “the general administration and maintenance of the bargaining unit” as a reason for the amount to be paid by supervisors, the thrust of the message is unmistakable: the amount to be paid by supervisors is to offset the cost of strikes in a manner that exceeds the lower regular dues of bargaining unit members. The Arbitrator therefore finds it difficult to see how the particular dues burden being so placed upon supervisors, and only supervisors, can be characterized as anything other than a special assessment. Given the history of decades, on the balance of probabilities, it is to the Arbitrator more compelling to characterize the treatment of the supervisors by the Union as involving a form of special assessment rather than the collection of “uniform, regular dues” as contemplated within the language of section 7.2 of the collective agreement.

In conclusion, from the standpoint of contract interpretation, given the history of these provisions and the fact that they have consistently been applied to deduct the same amount of union dues from all employees in the bargaining unit as well as supervisors for many decades, and the motive for which the higher amount to be paid by supervisors was imposed, the Arbitrator is compelled to conclude that the dues to be paid by supervisors, pegged at 2-1/2 times the dues to be paid by all bargaining unit employees, are in fact a special assessment and are not “uniform, regular dues” as contemplated within section 7.2 of the collective agreement and, by extension, section 10.21 of the agreement. In the result, the Arbitrator finds and declares that the amounts sought by the Union to be deducted against supervisors are not union dues within the meaning of sections 7.2 and 10.21 of the collective agreement, and that the Company is therefore under no contractual obligation to collect and remit them.

Alternatively, if the foregoing analysis should be in error, the Arbitrator would rest this decision on the alternative grounds of estoppel. For over fifty years the parties have bargained successive collective agreements during which time, without exception, and in conformity with the industry practice, union dues have been a single set monthly figure payable by all employees in the bargaining unit and, in more recent years, also payable by supervisors who elect to pay such dues in exchange for the continued accumulation of their bargaining unit seniority. There was never any attempt by the Union to negotiate a different arrangement during the course of bargaining which culminated in 2007. Upon reaching agreement on the new collective agreement the Company had no reason to believe that the deduction and remittance of union dues, a matter of some concern to it from the standpoint of maintaining a simplified payroll administration, would vary from the historic pattern whereby all employees and supervisors would pay, by deduction, the same monthly amount of union dues, without exception. The practice of fifty years and the Union’s silence at the bargaining table can, in my view, be fairly characterized as a tacit representation that no change would be brought to the method by which union dues would be assessed, deducted and remitted. At a point when the Company was no longer able to protect itself through bargaining, the Union then sought to introduce a strict interpretation of the provisions of section 7.2 of the collective agreement which would clearly have a prejudicial effect upon the Company, in a number of respects. Apart from the administrative complexity of collecting different amounts of dues from different persons, the Company was faced with what would arguably have become a strong disincentive for employees to seek and accept promotion into the ranks of management, or for existing managers to continue to remain in supervisory positions at a substantially higher cost should they prefer to opt for the greater security of returning to the bargaining unit on the basis of their current seniority. There can be little doubt but that the change sought to be implemented by the Union would have substantial negative effects on the Company’s ability to attract and hold supervisors.

In the foregoing circumstances I am satisfied that the elements of estoppel, firstly a representation by the Union through its actions and silence, secondly a reliance by the Company and, lastly, the element of prejudice should the Union revert to the strict application of section 7.2 of the collective agreement (assuming that the Arbitrator’s interpretation is incorrect) are all amply made out. In theses circumstances I would, in the alternative, conclude that the Union is estopped from asserting its position, at least during the course of the current collective agreement, until the parties are returned to the bargaining table when they are able to freely negotiate the terms of its renewal.

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

November 19, 2008

(signed) MICHEL G. PICHER
ARBITRATOR