CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3708

Heard in Calgary, Wednesday 12 November 2008

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the file closure of Conductor Eugene Stifter effective August 20, 2007.

JOINT STATEMENT OF ISSUE:

Conductor Stifter suffered a work related injury in June 2003, as a result of which he was unable to return to his regular duties. By a letter from the Company dated July 30, 2007, Conductor Stifter was notified that his employment file with the Company would be closed effective August 20, 2007.

The Union contends that the Company's closure of Conductor Stifter's file violates the collective agreement, the Company's Workplace Accommodation Policy, the *Saskatchewan Workers' Compensation Act* (and WCB policies enacted thereunder) and/or the *Canadian Human Rights Act*.

In addition, the Union contends that the Company is estopped from closing Conductor Stifter's file.

The Union requests that Conductor Stifter be reinstated without loss of seniority and benefits and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company objects to the manner in which the Union is advancing this claim. In particular, there has been no prior reference to any violation of the *Canadian Human Rights Act*, nor has there been any reference to estoppel with respect to the closing of Mr. Stifter's file, except for in this document. The Company also notes that there has been no prior reference to a violation of the *Saskatchewan Workers' Compensation Act* and submits that any violation thereto should be addressed with the forum outlined in that legislation.

The Company advances a preliminary objection to the introduction of three new contentions by the Union in this document. These are the alleged violations to the *Canadian Human Rights Act* and the *Saskatchewan Workers' Compensation Act* and the advancement of the argument of estoppel.

On the merits, the Company disagrees with the Union's allegations and denies the relief requested.

FOR THE UNION:

(SGD.) D. W. OLSON
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) A. AZIM
FOR: ASSISTANT VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

M. Thompson – Labour Relations Officer, Calgary
J. Bairaktaris – Director, Labour Relations, Calgary
A. Azim – Manager, Labour Relations, Calgary

And on behalf of the Union:

M. Church	– Counsel, Toronto
D. Olson	– General Chairman, Calgary
D. Fulton	– Vice-General Chairman, Calgary
D. Able	– General Chairman, Calgary
D. Irwin	– Local Chairman, Calgary
J. MacDonald	– Observor

PRELIMINARY AWARD OF THE ARBITRATOR

The Company submits that the Union has advanced three new contentions that have not been properly advanced through the grievance procedure to arbitration and were therefore ineligible to be included in the Joint Statement of Issue. In support, the Company noted the comments in **CROA 200** where the arbitrator states:

> There can be no doubt that the Arbitrator has jurisdiction to hear only those cases that have been properly processed through the appropriate stages of the applicable grievance procedure, and in accordance with the Memorandum of Agreement establishing the Office of Arbitration. …

The Company further submits that the Union cannot expand upon the grievance at each progressive step of the grievance procedure and certainly not at the final stage of arbitration. In the Company's view, the three new contentions would negate the grievance procedure set out in the collective agreement as well as the CROA rules. To allow the three submissions would be tantamount, in the Company's view, to permitting previously undisclosed aspects of the dispute to be advanced for the first time at arbitration. With respect to the alleged violations of the **Saskatchewan Workers' Compensation Act** (SWCA) and the **Canadian Human Rights Act** (CHRA), in particular, the Company notes that the Union has not cited references to the sections allegedly violated. The Company claims that it is now faced with the difficult task of responding to a number of claims stemming from the lengthy legislative provisions contained in both statutes.

The Union noted at the outset that the **Canada Labour Code** states that an arbitrator has jurisdiction over all aspects of a dispute, including those that arise from the Company's statutory obligations:

> **s. 60(1)** An arbitrator or arbitration board has …
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> **(a.1)** the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is a conflict between the statute and the collective agreement.

With respect to the reference to the CHRA, the Union submits that the Company was put on notice at several points in the grievance procedure that this matter involved the denial of ongoing accommodation to the grievor. Accordingly, the Union submits that the Company knew, or ought to have known, that this case involved the grievor's rights under the CHRA. Similarly, the Union submits that the facts underpinning the dispute raise legal issues with respect to the Company's obligations under the SWCA. Those issues include the requirement for the grievor to cooperate with return-to-work plans of the Workers' Compensation Board (WCB). The Union notes that the WCB's involvement was expressly referenced in both of the Union's grievance step letters. Finally, the Union submits that the estoppel submission is not a new contention but a legal argument stemming from the facts of this case as presented. The Union also notes that the case law in this area supports the proposition that procedural requirements should not be strictly enforced where there has been no demonstrable prejudice to the employer. See: **Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 24** [2003] SCR 157.

The Arbitrator notes that The Memorandum of Agreement for the Office of Arbitration states at clause 9 that no dispute alleging a violation of the collective agreement under clause 6(A) is to be referred to arbitration until it has been processed through the last step of the grievance procedure of the collective agreement. Clause 6 is also clear that the jurisdiction of the Arbitrator is limited to hearing disputes that are in strict compliance with the Memorandum. Those provisions read as follows:

> **6.** The jurisdiction of the arbitrators shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;

> **(A)** disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and
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> **(B)** other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration & Dispute Resolution for final and binding settlement by arbitration;
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> **but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this agreement.**
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> …
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> **9. No dispute of the nature set forth in section (A) of clause 6 may be referred to arbitration until it has first been processed through the last step of the grievance procedure provided for in the applicable collective agreement.** Failing final disposition under the said procedure a request for arbitration may be made but only in the manner and within the period provided for that purpose in the applicable collective agreement in effect from time to time or, if no such period is fixed in the applicable collective agreement in respect to disputes of the nature set forth in section (A) of clause 6, within the period of 60 days from the date the decision was rendered in the last step of the grievance procedure. …
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> (emphasis added)

The submission of the Company here is similar to that raised in **CROA 3360,** which involved a preliminary objection by the Company over the fact that the Union did not place the provisions of a specific provision of the collective agreement in issue during the grievance procedure:

> The Company raises a preliminary objection, arguing that the Union did not properly place the provisions of article 12.1 of the collective agreement in issue during the course of the grievance procedure. On that basis it's representative maintains that the Union cannot assert the application of that article for the first time within the text of it's *ex parte* statement of issue.
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> The Arbitrator cannot sustain that preliminary objection. It is well settled, as a matter of law, that boards of arbitration should avoid undue technicality in resolving issues concerning the drafting of grievance documents, and should deal, insofar as possible, with the substance of the parties' dispute. (See **Blouin Drywall Contractors Ltd.** (1973) 4 L.A.C. (2d) 254 (O'Shea), affirmed on judicial review 57 D.L.R. (3d) 199 (Ont. C.A.)). In the case at hand there is no dispute that the issue of posting regionally the bargaining unit position vacated by Mr. Linnick was clearly raised during the course of grievance correspondence. To that effect the Union's representative draws to the Arbitrator's attention a letter dated January 31, 2002 addressed to the Company by the Union's regional bargaining representative, Mr. Rick Doherty. On more than one occasion during the course of that letter Mr. Doherty adverts to the Union's stance that the position of Mr. Linnick should be posted on a regional bulletin, as Mr. Linnick had been absent from that position for more than 120 days, as contemplated under article 11.9 of the collective agreement. The penultimate paragraph of that letter clearly states: "The Union requests the permanent position formerly owned by Brother Linnick be posted on a regional bulletin immediately."
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> **Against that background there is no surprise or prejudice to the Company in the framing of the Union's statement of issue alleging, in part, that the Company "should have … posted in accordance with the provisions of article 12.1 …". In matters of such collective bargaining importance substance must prevail over form. I am satisfied that the issue of the application of article 12.1 was clearly advanced by the Union during the course of the grievance. There has, in my view, been substantial compliance with the requirements of article 24.5 of the collective agreement which stipulates that at step 3 of the grievance procedure the Union must identify the provision of the collective agreement in issue. While it may arguably have been done more clearly by expressly stipulating the number of the article in question, the**

> **clear reference by the Union to what it alleged to be the failure of the Company to post regionally was not in doubt. This is not a case where the Union seeks, at the last minute in the text of the statement of issue, to insert an entirely new substantive issue not previously dealt with, as was found to be improper and contrary to article 24.5 in CROA 3265. Nor is the precise citation of the number of a specific article in all cases a *sine qua non* to its argument (see CROA 2891). In the instant case there was clearly no violation of article 24.5 in substance and no resulting unfairness or prejudice to the Company. On that basis the Company's preliminary objection must be dismissed.**
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> (emphasis added)

The above case illustrates the kind of clarity required in the grievance documents in identifying the issues in dispute. The arbitrator, in dismissing the preliminary objection, was satisfied that the issue of the application of the particular article of the collective agreement in issue had been properly advanced during the course of the grievance procedure and that there was no surprise or prejudice to the Company.

The Union's allegations in this case regarding the alleged breaches of the CHRC and SWCA, by contrast, were first put forward in the joint statement. Although the grievance step letters of the Union refer to the involvement of the WCB and the efforts made to accommodate the grievor, the allegations concerning the actual statutory breaches of the SWCA and the CHRC are never squarely addressed in the grievance documents. The Company, in my view, is prejudiced in this instance because it has never been apprised of the alleged statutory breaches nor been in a position to answer those allegations during the course of the grievance procedure. That is particularly true in the case of the SWCA, a lengthy statute which speaks to numerous matters involving workers' compensation claims. It is perhaps trite, but nevertheless important, to underline that the precise issues in dispute must be all be addressed before reaching arbitration, given the rules of this office that no dispute can be referred to arbitration until it has been processed through the last step of the grievance procedure. It would not be within the spirit, or letter, of the Memorandum of Agreement to simply allow the Union to amend its claims at this stage of the proceedings to include the CHRC and the SWCA.

The third argument of the Company concerning the raising of an estoppel argument is another matter. The Union claims that an agreement has been made between the Company's Occupational Health Services Department, the Company's Pension Department and the Workers' Compensation Board to allow the grievor to pay pension arrears to the age of retirement and that the Company is now estopped from denying him the right to do so. The Company disagrees claiming no knowledge of such an agreement and that it had the right to close the grievor's employment file. The Union, in my view, should not be prevented from advancing its evidence concerning the existence of the alleged agreement and then to use that evidence to support an argument for estoppel. The basis for the estoppel submission is clearly referred to in the Step I grievance:

> Mr. Stifter had a severe work related injury on June 3,2003 and had prolonged rehabilitation involving several surgeries. Workers Compensation Board and CP Rail eventually felt there were no jobs that he could perform due to either symptoms or safety related issues and it was agreed that he could do light seasonal work in Wilkie for a local contractor and continue his rehabilitation, WCB would continue wage loss entitlement and earnings replacement, Mr. Stifter would pay pension arrears until the age of retirement occurred. This arrangement agreed to by OH&S, the Pension Dept. and WCB has continued since April 2005 when Mr. Stifter ended daily rehabilitation.

As noted in **Re: Cargill Foods and UFCW, Local 633** (2004) 133 LAC (4th) 306, the applicability of the doctrine of estoppel belongs more to the adjudication of the merits than the preliminary objection:

> Having regard to the submissions of the parties, I find in the present grievance that the Union's estoppel claims are integral to the grievance and provide a potential foundation which might, in all the circumstances, support the grievance. They are therefore arbitrable and should be heard on the merits. The Employer's arguments to the applicability of the doctrine of estoppel in the circumstances (and any arguments that the Union may have in reply) belong more properly to the adjudication of the merits than to the preliminary objection; they may be advanced and will be considered at the appropriate point in these proceedings.

For all the above reasons, the Company's preliminary objection is upheld in part. The Union shall not be permitted to refer to alleged breaches of either the SWCA or the CHRC at the hearing into the merits. The basis for the estoppel submission, on the other hand, has been sufficiently identified in the grievance documents. The Union shall be allowed to argue estoppel when the parties reconvene at the next sittings to be held on December 10, 2008.

November 26, 2008

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR

This dispute was ultimately resolved between the parties and no further award issued.