CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3765

Heard in Montreal Thursday 14 May 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

EX PARTE

DISPUTE:

Concerning a change in the Company's sick day policy and the failure to pay Mr. Pierre Fontaine and others following the change.

UNION'S STATEMENT OF ISSUE:

Mr. Pierre Fontaine booked sick on June 12, 2008. He was not paid. This was true for other employees working within the Customer Service Centre.

It is the Union's position that the Company has failed to live up to a long-standing practice of paying sick days to weekly rated employees at the Customer Service Centre when they book sick. The practice was contained in the Company's Human Resources Supervisor's Manual. It was further enshrined in a letter dated August 22, 1998 from Mr. Dixon to Mr. Johnston during the 1998 round of collective bargaining. The practice had provided that weekly rated employees be paid ten sick days per year, provided there was no additional expense to the Company. The Union contends that the Company unilaterally changed the policy when it decentralized the Customer Service Centre from Winnipeg for employees working within that function. The Union relies upon the principles of estoppel in support of its position and requests that the practice of paying sick days at the Customer Support Centres be reinstated pursuant to the longstanding practice. The Union further requests that the arbitrator order that any and all employees who have been adversely affected by the change be compensated accordingly.

The Company denies any violation of the collective agreement, the Human Resources Manual or the 1998 letter of understanding.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

D. S. Fisher	– Director, Labour Relations, Montreal
S. Grou	– Manager, Labour Relations, Montreal
J. Rousseau	– Regional Director, C.S.C., Montreal
A. Durocher	– Assistant Director, C.G.F., Montreal

And on behalf of the Union:

D. Olshewski	– National Representative, Winnipeg

B. Kennedy	– Regional Representative, Edmonton
R. Doherty	– Regiona Representative, Winnipeg
H. Grant	– Secretary/Treasurer, Toronto
G. Fortin	– Local Chairman, Montreal
S. Auger	– Regional Bargaining Representative, Montreal
C. Rainville	– Regional Bargaining Representative, Montreal
J. Almdal	– Regional Bargaining Representative, Toronto
P. Fontaine	– Grievor

AWARD OF THE ARBITRATOR

The Union submits that the Company must be estopped from changing its practice with respect to the payment of sick days. It is not disputed that the collective agreement does not contain any provision which directly entitles employees to the payment of sick days. The Union relies, on part, on the Company's policy in accordance with the Human Resources Supervisor's Manual. Article 5.7 of the manual deals with leaves of absence with pay and provides, in part, as follows:

> **Leave of Absence with Pay – Weekly Rated Unionized Clerical Employees**
>
> **5.7.1 Authority**
>
> Vice-Presidents and officers who report directly to the President are authorized to approve leave of absence with pay in accordance with the provisions of this section. The authority may be delegated.
>
> **5.7.2 Administration**
>
> The sick leave with pay privilege is administered solely by the Company and is separate and distinct from the weekly indemnity plan. It is intended as supplemental income to eligible employees who are on sick leave during regular work days and are not eligible for Weekly Indemnity Benefits.
>
> For most unionized clerical employees benefits are only paid during the waiting period for Weekly Indemnity Benefits.
>
> For non-unionized employees who became members of the CBRT&GW in 1982 and 1985, benefits are not restricted to the WIB waiting period.
>
> **5.7.3 Conditions of Payment**
>
> The sick leave with pay privilege is subject to the following conditions:
>
> - paid sick leave will only apply to clerical employees represented by the CAW 5.1 (former CBRT&GW) and not to other classifications of employees.
> - benefits may only be paid during the waiting period for Weekly Indemnity Benefits when there is no additional expense to the Company i.e. when no replacement for the absent employee is required.
> - for non-unionized employees who became members of the CBRT&GW in 1982 and 1985, benefits are not restricted to the weekly indemnity benefit waiting period.
> - sick leave credits not used in a 12-month period cannot be carried over to the succeeding 12-month period.

The only indirect reference to employees being absent with pay due to sickness appears within the collective agreement in article 21 which reads, in part:

> **21.1** An employee temporarily assigned to a higher-rated position, shall receive the higher rate while occupying such position. Employees temporarily assigned to lower-rated positions shall not have their rate reduced.
>
> …
>
> **21.3** Paragraph 21.1 shall not apply to a weekly rated employee who is filling a higher-rated position through a higher-rated employee being absent from duty with pay due to sickness or similar cause, other than vacation.

The historic working of the policy is well reflected in a letter drafted by the Director of Labour Relations, for the Company, Mark M. Boyle dated August 26, 1992. That letter reads as follows:

> As requested, I am writing to clarify the application of the paid leave policy for unionized staff paid on a weekly basis who work in a department where a spare board exists. This policy appears in section 5.7 of the Human Resources Manual.
>
> First of all, it should be noted that the policy only applies in situations where “a unionized employee is absent due to illness” and where “no additional costs are incurred by the company.” Both of these conditions must therefore be met.
>
> At the level of unionized employees, there are two job categories: the administrative positions, such as correspondence clerk and timekeeper, and positions directly related to operations and customer service, such as customer service centre agents.
>
> It very frequently happens that employees in administrative positions are not replaced if they are absent for one or two days because the nature of their job is such that their work can accumulate until their return or, on occasion, it can be accomplished by other employees. In such situations, no additional costs are incurred by the company and, consequently, the employee is entitled to the benefits provided for in the policy.
>
> In the case of positions related to operations, given the nature of these positions, in most cases, the incumbent must be replaced, since the work must be carried out immediately and cannot be accumulated.
>
> Replacing these employees can be done in several ways and replacements can come from several sources or combinations of sources, such as the spare board, overtime by regular employees. casual employees who do not have an assignment, employees on standby, laid-off employees, spare board employees and relief employees.
>
> In all situations where one of these sources is used, there is a cost associated with replacing the employee since, in addition to paying the salary of the absent employee, the replacement must also be paid. Consequently, in such situation, the benefits provided for in the policy do not apply.
>
> (translation)

The record before the Arbitrator confirms that in 1998, during bargaining, the parties executed a document referred to as “Attachment R”. That document, signed by both parties, refers to the continuation of the Company’s policy, as reads, in part, as follows:

> During National Negotiations the Union raised the issue of paid sick leave. The Company has advised the Union that the practice of paying employees, at its discretion would be discontinued. The parties have discussed this issue and agree that it is resolved on the following bases:
>
> - The current practice of paid sick days for weekly rated employees will be continued on the strict condition that no additional costs will be incurred by the department as a result of the employee not being available for work; and
> - the Union acknowledges that employees may be required to provide a medical certificate to support that they were not at work, where such requirement is reasonable.
>
> **This letter shall not form part of the Collective Agreement.**
>
> (emphasis added)

This grievance arises because the Company has now allegedly departed from the undertaking found in attachment R.

The instant grievance arises by reason of the denial of sick days pay to Mr. P. Fontaine, a weekly rated employee from Montreal. When Mr. Fontaine booked sick on June 12, 2008 his claim for the day was denied by his supervisor. As first emerged at the arbitration hearing, it now appears undisputed that in fact Mr. Fontaine was replaced by another employee on the day in question. In the result, even the application of the policy as it has stood would have disentitled him to the claim which he made. The Union nevertheless submits that the larger issue of the ongoing policy is properly before the Arbitrator as it did place the Company on notice that it was proceeding by way of a policy grievance in this matter. While the Company objects to that characterization of the scope of the grievance, the Arbitrator is satisfied that it is unnecessary to resolve that dispute given the result in this award.

In essence, the Union submits that the Company is estopped from changing its practice with respect to sick days for weekly rated employees. Its representative submits that the fact situation in the case at hand is identical to that in the seminal case on estoppel decided by Arbitrator Beatty in **CN/CP Telecommunications and Canadian Telecommunications Union 4** (1981), 4 L.A.C. (3d) 205 (Beatty). That case, like the instant case, concerned the Union's grievance against the revocation of a long-standing practice of paying for sick days for the employees of the bargaining unit. The arbitrator famously concluded that the Company was estopped from discontinuing its practice during the term of an ongoing collective agreement, a point at which the Union could not negotiate any further protection for its members. In his reasoning Arbitrator Beatty concluded, in part, that the Company's argument to the effect that the Union must have viewed the Company's practice as a gratuity because it did not insist on any written understanding or provision to be inserted into the collective agreement to protect the policy, was rejected by the arbitrator.

Having carefully examined the facts of the instant case, in comparison with the facts in the **CN/CP case**, the Arbitrator is compelled to come to a different conclusion in the instant dispute. The material before the Arbitrator discloses that in the negotiation of the collective agreement in August of 1998 the parties made a number of side agreements, not unlike Attachment R. One of those agreements in fact not only stipulated that it would not form part of the collective agreement, but it also adverted to the fact that any violation of the agreement could nevertheless be brought forward to arbitration.

The evidence of the way those arrangements were made does, I am satisfied, make this case distinguishable from **CN/CP**. For reasons which it best appreciates the Union signed the letter of agreement of August 22, 1998, including the provision: "This letter shall not form part of

the Collective Agreement." With respect, when a party sophisticated in the ways of collective bargaining executes a document to that effect it can, and I believe should, be taken as having recognized that in fact the undertaking contained within the letter is not enforceable through the provisions of the collective agreement. The conclusion would therefore be that the parties agreed that the matter could be enforced elsewhere, presumably in a forum other than arbitration under the collective agreement or, as is more likely, that should the employer discontinue its practice the issue would be one for discussion at the next round of bargaining.

There are further points of distinction with respect to **CN/CP**. As became evident from the material filed, it would appear that in this case the practice of the Company was not consistent over time and over all locations in its national system. There appear to have been local adjustments in the number of days available and the conditions which attached to the granting of sick days at various locations, and that these adjustments were made without any grievance or objection from the Union. In other words, conduct over time appears to reflect the view that the Union did not consider that the content of Attachment R involved immutable rights which could be enforced through the collective agreement.

On the whole, therefore, the Arbitrator is not persuaded that the Union makes a compelling case for estoppel in this grievance, whether it be viewed as an individual grievance or a policy grievance of general application. For the reasons touched upon above, the Arbitrator is compelled to agree with the position of the Company that in fact this grievance is not arbitrable.

For these reasons the grievance must be dismissed.

May 19, 2009

(signed) MICHEL G. PICHER
ARBITRATOR