CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5042

Heard in Montreal, May 15, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dispute concerning the Company's decision to change the lunch periods of the grievors, the Eastern Region Work Equipment Maintainers working in the Work Equipment shops in Sudbury, Toronto, and Montreal

JOINT STATEMENT OF ISSUE :

On June 30 2023, the Company provided the Union with the following notice regarding Meal Breaks at Work Equipment Shops in Sudbury, Montreal, and Toronto.

"This letter is in reference to our recent discussions concerning meal breaks in our Work Equipment Shops in Sudbury, Montreal and Toronto.

In order to provide consistency across our locations, we will be changing the current scheduling to comply the Collective Agreement requirement of one hour unpaid lunch – Section 8.4. Where mutual agreement is reached, this unpaid lunch may be reduced to 30 minutes.

This change will be implemented July 31, 2023."

The Union objected to the change and a grievance has progressed through the grievance procedure.

The Union contends that: 1) On June 30 2023, the Company notified the Union that the long practice of providing the grievors with a 20 minute paid lunch inside of their 8 hours of shift work would be replaced with a 1 hour unpaid lunch outside of (i.e. in addition to) their 8 hours of shift work. The 20 minute paid lunch period has, with the full and open knowledge of everyone involved, been in place for more than 20 years and has existed without objection or dispute through multiple rounds of collective bargaining. There has been no change in the workplace or in the Company's operational requirements sufficient to warrant such a change;

2) In circumstances like this, the Company cannot suddenly and unilaterally decide that it will adhere to, and implement, the strict language of section 8.4 of the collective agreement. The Company is estopped from making such a change;

3) The Company's actions are unsupported and arbitrary

The Union requests that: The Arbitrator declare that the Company is estopped from unilaterally implementing a literal adherence to the language of section 8.4 of the collective agreement but, rather, deal with the matter at the bargaining table during collective bargaining. In addition, the Union requests that every grievor who has been forced to take one-hour unpaid lunches be compensated for each such hour at the overtime rate.

The Company Position**:**

The Company disagrees with the Union's contentions and denies the Union's request.

The change was not arbitrary or unsupported. Operationally, the Company required a consistent application of meal periods across our property.

The Collective Agreement language is not ambiguous and clarifies that **a meal period shall be one (1) hour unless otherwise mutually arranged**.

Proper notice of the change was provided to the Union, and contrary to the Union's assertion otherwise, estoppel does not apply.

Employees have not been required to work during any of the portion of their meal period. As such, the requested remedy is without merit.

There has been no violation of the Collective Agreement and the Company requests that Arbitrator deny this grievance in its entirety.

For the Union:	**For the Company:**
(SGD.) W. Phillips	**(SGD.) L. McGinley**
President, MWED	Director, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen	– Manager, Labour Relations, Calgary
A. Harrison	– Manager, Labour Relations, Calgary

And on behalf of the Union:

W. Phillips	– President, MWED, Ottawa
P. Gauthier	– Director Atlantic Region, Lachute

AWARD OF THE ARBITRATOR

Context

1. In June 2023 the Company provided notice to the Union that for Work Equipment shops in Sudbury, Toronto and Montreal, it would be reverting to the lunch breaks foreseen in the Collective Agreement at article 8.4, as these shops are not in "continuous service". As such, working hours would be for 8 hours, with a 1 hour unpaid lunch break, subject to agreement.

2. The Union argues that the Company is estopped from changing a practice which has existed for some 20 years, whereby the hours of work in these shops was for 8 hours, with a 20 minute paid lunch.

3. **Issues**

A. Is article 8.4 ambiguous, such that proof of past practice can help to resolve that ambiguity?

B. If not, is the Company estopped from relying on one of the two practices set out in article 8.4?

C. What is the appropriate remedy?

A. Is article 8.4 ambiguous, such that proof of past practice can help to resolve that ambiguity?

Position of the Parties

4. The Union argues that the Parties have "mutually agreed" by their course of conduct to a particular interpretation of article 8.4, such that the Company cannot unilaterally change the agreement, but must negotiate any such change through collective bargaining.

5. It notes that the shops in Sudbury, Toronto and Montreal have had an 8 hour day with a 20 minute paid lunch for more than 20 years. There have been no operational changes made by the Company which can justify a change to the practice to which the Parties have agreed.

6. The Company argues that it is merely bringing these shops into conformity with the rest of the country. The shops are not in "continuous service" and hence the hours of work should be for 8 hours, with a one hour unpaid lunch.

7. Under article 8.4, there are two options foreseen, one of which is for shops in "continuous service" and the other for shops not operating on three shifts. The shops

here are not on three shifts and hence the employees should not be governed by those provisions.

8. The Company argues that article 8.4 is clear and unambiguous, and the Union is not entitled to invoke extrinsic evidence to change the clear terms of the article.

Analysis and decision

9. Article 8.4 of the Collective Agreement reads as follows:

> Eight (8) consecutive hours, exclusive of meal period (which shall be one (1) hour unless otherwise mutually arranged) shall, except as otherwise provided, constitute a day's work. If an employee normally takes a one (1) hour meal break and is required to work any portion of that time they will be paid time and one half for actual time worked. When eight (8) hours of continuous service are required in regular operations, twenty (20) minutes will be allowed in the fifth or sixth hour of service for a meal without loss of pay, during which no service will be performed. Requirements of the nature of service will determine at what point in the fifth or sixth hour of service the twenty (20) minutes will be.

10. The article sets out two options:

> Option 1: 8 hours with a 1 hour unpaid lunch break;
> Option 2: When continuous service is required, 8 hours with a 20 minute lunch break in the fifth or sixth hour without loss of pay.

11. In Gourmet Baker Inc. v. United Food and Commercial Workers Union, Local 832, 2004 M.G.A.D. No 49, rules of interpretation of collective agreements were set out as follows:

> 125. The parties are presumed to have intended what is stated in the collective agreement, so the meaning can be found in their express words; that is:
>
> > "**Accordingly, in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions**:" (Canadian Labour Arbitration, supra, para. 4-2100)
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> 126. **If the language used in a collective agreement is clear and unambiguous, interpretation should be confined to that actual**

> **language.** On the other hand, if a provision is ambiguous, then in interpreting the provision one may rely on extrinsic evidence. That is:
>
> > "The prescribed task ... is to construe and interpret the Agreement according to the intention of the parties, which intention is derived from the words they have used, unless there is an ambiguity of the nature and to the extent that would warrant the admissibility of extrinsic evidence to aid in the interpretation of the Agreement." (University of Manitoba and Canadian Union of Educational Workers (1990), 11 L.A.C. (4th) 353 (Freedman.)

12. Arbitrator Moreau in **CROA 3601** noted the following:

> "Arbitrators follow several presumptive rules of interpretation when construing a collective agreement. One of the lead rules is that the provisions in a collective agreement must be read according to their plain and ordinary meaning. That rule will only be set aside when it has been demonstrated, **with clear and reliable evidence**, that the parties have agreed to an interpretation that is **different from its ordinary meaning**." (**Emphasis Added**)

13. Here neither Party alleges that article 8.04 is ambiguous. The Union submits, however, that a lengthy past practice is evidence of a "mutual agreement" as to its interpretation. The Company contests that any such agreement exists, and points out that the Union has not argued that the provision is ambiguous.

14. Here, I do not find that there is any ambiguity in the interpretation of article 8.4. The words are clear and unambiguous. As Arbitrator Weatherill noted in **CROA 605**: "Past practice cannot alter the terms of a collective agreement, or create an ambiguity where none exists."

15. Accordingly, I find that there is no need to look to extrinsic evidence of a past practice in seeking to interpret the wording of the article. The plain and ordinary meaning of the words in article 8.4 apply.

B. If not, is the Company estopped from relying on one of the two practices ("Option 1") set out in article 8.4?

Position of the Parties

16. The primary position of the Union is that the Company is estopped from applying Option 1 under article 8.4, as Option 2 has been consistently applied for more than 20 years, through multiple rounds of collective bargaining.

17. The Union argues that it would be unfair to permit the Company to change its position after such a lengthy time, without giving the Union the opportunity to negotiate to attempt to keep the benefit at collective bargaining.

18. The Union sets out the four criteria for a finding of estoppel and submits that it has clearly met all of them. It points to multiple cases where arbitrators, exercising their discretion, have intervened to prevent one side or the other from changing the status quo, where it would be inequitable to do so (see **CROA 4409, CROA 1976, AH 2015-073, AH 655**).

19. The Company argues that the Union has the burden of proof to establish that it has met each of the four criteria for a finding of estoppel, and that it has failed to do so here.

20. It notes that article 8.4 sets out two options, and on its face, where there are not continuous operations, option one applies. The Company never said it would never apply option one or that option two would always apply. It points in particular to cases which note that even apparent unfairness is not a reason for the arbitrator to intervene, if the parties' collective agreement provides otherwise (see **SHP-19**).

Analysis and decision

21. Estoppel is an equitable remedy employed by Courts and arbitrators, to prevent a party from insisting on its strict legal rights, when it would be inequitable for the party to

do so. Before estoppel can be found, the moving party must establish that it has met four criteria:

1) A representation made by the Company either verbally or by conduct to the employee;
2) An intention on the part of the employer that the representation would be relied upon by the employee;
3) Actual reliance on the representation by the employee; and,
4) Detriment suffered by the employee as a result of his reliance.

22. Arbitrator Clarke in **CROA 4550** summarized Supreme Court of Canada jurisprudence as follows:

> The Union has alleged that this change is inconsistent with past-practice and as a result, estoppel applies. As the party bearing the onus of proof, the Union must satisfy **all** four elements of estoppel for their grievance to succeed. Any failure to meet their burden must cause their grievance to fail.

23. The first criterion is that a representation has been made by the Company, either verbally or by conduct, to the employee. While no statement has been made, the Company has by its conduct over the last twenty years, made a representation to the Union that Option 2 applied. As Arbitrator Silverman noted in **AH 655**: “That consistent application over those years, and through a number of contract negotiations, was a clear and unequivocal representation by conduct that the Life for S & C Program would continue”. In the present matter, the conduct was for an even longer period of time, 20 years, as compared to 13 years in **AH 655**.

24. The second criterion is that there was an intention on the part of the employer that the representation would be relied upon by the employee. The situation here is not the same as in **CROA 1976**, where there was an actual representation during bargaining by Company representatives that the paid lunch in Transcona and Saskatoon shops would continue. However, the intention of the employer can be seen from their actions. In **CROA 4606**, Arbitrator Clarke found that 12 postings over 6.5 years did not constitute a practice. He distinguished his matter from a consistent four year practice in **CROA 4550**, where an estoppel was found. In the present matter, there has been a consistent practice for 20 years. The Company must have known that their representation by conduct would be relied on by employees.

25. The third criterion is that there is actual reliance on the representation by the employee. In my view, it would be surprising if, after 20 years, employees in the three shops had not ordered their lives in accordance with the practice. As Arbritrator Silverman noted in **AH 655**: "There was also reliance by the employees themselves who no doubt would arrange their personal affairs (vacation, childcare, time off) in accordance with the eleven/three schedule". Arbitrator Schmidt in **AH 2015-073**, found that employees would have relied on the Company 20 year practice of permitting employees to use Company vehicles for personal commuting.

26. The fourth criterion is that there be a detriment suffered by the employee as a result of his reliance. Here, as a result of the Company decision to move from option 2 to option 1, the employee would both have to work an extra 20 minutes per day and be at the workplace for a longer period, as the unpaid lunch would now take place in addition to the 8 paid hours.

27. As stated earlier, estoppel is an equitable doctrine which prevents a party from insisting on its strict legal rights when it would be unfair for that party to do so. As Arbitrator Schmidt noted in **AH 2015-073**:

> The Company has exercised its management right to no longer assign Company vehicles for personal commuting, and to commence paying overtime for call-outs where employees now pick up the Company vehicles and drop them off. There is nothing in the collective agreement to preclude the Company from doing so. But fairness dictates that the Company not be permitted to unilaterally, and with next to no advance notice, pull the rug out from under the Union and the many employees who have come to rely upon their assigned Company vehicles for commuting purposes and who have every reasonable expectation to be paid for all hours on call backs in the door-to-door fashion that has emerged over a lengthy period of time. <u>That is the essence of estoppel: to prevent an unfair insistence on a party's strict legal rights, at least for a period of time, when it has led the other party to believe that it would forego those rights</u> (underlining added).

28. I find that the criteria for estoppel have been made out by the Union. I find that it would be unfair for the Company to insist on its strict legal right to apply option 1 with notice of a single month, when option 2 had been applied for 20 years.

C. What is the appropriate remedy?

29. When estoppel is found, it does not mean that the legal right of one of the parties must forever be held in abeyance.

30. However, the jurisprudence is consistent that the existing practice should continue until it can be the subject of collective bargaining. As Arbitrator Clarke wrote in **CROA 4606**: "An estoppel ends when a party gives the other notice during collective bargaining that it intends to revert to a strict interpretation of the collective agreement. That notice allows the other party to address the matter during bargaining". Similar findings were made by Arbitrator Picher in **CROA 1976**, Arbitrator Schmidt in **AH 2015-073** and Arbitrator Silverman in **AH 655**.

31. Here, I find that option 2 should be reinstated until the matter can be addressed in collective bargaining. Employees in the three designated shops who were affected by the change should be compensated for a 20 minute paid lunch.

32. The grievance is therefore allowed.

33. I remain seized with respect to any questions of interpretation or application of this Award

June 18, 2024

JAMES CAMERON

ARBITRATOR