CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3054

Heard in Calgary, Thursday, 13, May 1999

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

Notice of position abolishment issued December 28, 1998 to Burnaby Dockpersons Derek Morley, Kevin Templeton, Don Nuttall, Kit Cheng and William Leung.

EX PARTE STATEMENT OF ISSUE:

The Union contends that the affected employees are required to perform the exact same job functions today as prior to the issuing of the notices of abolishment. The Union argues that the Company's past practice has established that an employee does not have to work full-time hours in order to maintain their hourly rate as a Dockperson, and they should be estopped from lowering the rate of pay now.

The Company contends that the grievors were paid the Dockperson's rate due to an oversight on management's part that was brought to their attention through another grievance. The Company submits that their actions have been proper, and were taken to correct a prior mistake.

FOR THE UNION:

(SGD.) A. KANE
ASSISTANT DIVISION VICE-PRESIDENT

There appeared on behalf of the Company:

P. Young	– Counsel, Toronto
P. D. MacLeod	– Vice-President, Operations, Toronto
E. Donnelly	– Regional Manager, British Columbia
J. Zysstra	– Supervisor, Vancouver

And on behalf of the Union:

A. Kane	– Chief Steward, Western Canada, Vancouver
D. Neal	– President, Local 1976, Toronto
B. Plante	– Local Protective Chairman, Calgary
K. Templeton	– Grievor

AWARD OF THE ARBITRATOR

The Union grieves the abolishment of some five Dockperson positions at the Burnaby Terminal by notice issued December 28, 1998. It submits that the work performed by the employees, including their hours of service, has not substantially changed from what has occurred since 1992. It does not appear disputed that since that time employees at Burnaby in the category of Dockperson have generally worked less than forty hours per week for a substantial segment of the year, normally from January to August, while working fuller hours in the fall and period immediately prior to Christmas.

The position of the Company is that employees in the classification of Dockperson are employed pursuant to the collective agreement on a basis of full-time hours, generally loading and unloading trailers. The same functions are performed by lower rated individuals in the classification of Warehouseperson A, save that those employees work on a part-time basis. It also appears that there is a classification of Warehouseperson B, who performs part-time and relief service, without accumulating seniority and without entitlement to benefits under the collective agreement.

The facts do not appear in dispute. For a substantial number of years individuals in the classification of Dockperson at the Burnaby Terminal have in fact not worked forty hours per week on a regular basis, but have nevertheless been retained in the classification and paid its higher wage rate. The Company submits that the practice, apparently dating back to 1992, has been pursued by reason of the error of the terminal manager, and that his mistake only came to the attention of higher management by reason of the discussion and settlement of another grievance. The Union submits that the Company cannot now assert the right to effectively re-classify the individuals as Warehouseperson A, reducing their wages while they perform essentially the same work for the same hours as they previously did for a number of years, spanning several collective agreements.

On a careful review of the facts and authorities cited, as well as the language of the collective agreement, the Arbitrator has considerable difficulty with the position asserted by the Union in this case. Firstly, it does not appear disputed that the agreement under consideration is a national collective agreement covering a substantial number of Company terminals. It seems to be common ground that in all other locations the Company has consistently paid the Dockperson's higher rate of pay to persons so classified, on the basis that they hold and work a bulletined position of forty hours per week.

Although the Union's representative argues before me that the grievors were classified as Dockpersons pursuant to the bulletining of part-time positions in 1992, that is not borne out on the evidence. While it is true that the Company issued a "Position Bulletin Award" notice on January 14, 1992 indicating that the start time of the awarded positions was 19:30, there is no substantial evidence to indicate that a part-time position was intended. On the contrary, the actual bulletin, posted on January 6, 1992 clearly indicates that the positions in question are for a full-time tour of duty, from 19:30 to 04:00, with a half-hour lunch break. The same is indicated in a re-bulletining of six Dockperson positions on May 10, 1994. There is, in other words, nothing in the documentation before the Arbitrator to indicate that the Company deliberately intended to post part-time Dockperson positions, contrary to its universal practice at all other terminals in Canada.

It appears to be well settled that an employer can correct a mistake in the administration of the collective agreement without offending the principles of estoppel, particularly where there has been no clear undertaking to the opposite party, nor injurious reliance by the trade union in relation to the erroneous practice. In that regard the comments of Arbitrator H.D. Brown in **Boise Cascade Canada Ltd. and International Association of Machinists and Aerospace Workers, Lodge 771**, an unreported award dated January 20, 1987 are instructive. In that case the union grieved the company's correction of the previous overpayment of the classifications of senior foreman and journeyman. At pp 36-38 the learned arbitrator commented as follows:

> In the present case, the payment of the amounts in excess of the classification wage rates in the collective agreements was not made by the Company with an intent to affect the legal relationship of the parties to the collective agreements and in doing so, did not exhibit any intent to subvert its contractual right to pay the negotiated rates. In my view of the history of this matter, it is clear that the payment of these rates was due to either an improper interpretation of Appendix A to the Memorandum of Agreement in 1976 by the supervisor, or by the inadvertence of the Payroll and Personnel Departments or a combination of these factors, but in either situation, the Company's legal rights under the collective agreements negotiated since 1976, were never adversely affected so as to conclude that the Union could rely on the continuation of such an error in the application

> of wage payments not part of and therefore not inconsistent with the terms of the collective agreements. There was no pre-existing legal right to the Union or to these particular employees which the Employer intended to alter by its conduct and what occurred was a bonus given to these employees for a period of eight years by mistake. I find that it would be inequitable in such circumstances to require the Company to make further payments for wages in circumstances where the employees in receipt of such extra payments over the years have no legal basis to claim.
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> As the Doctrine of Estoppel is an equitable principle and even if the collective agreement would give an arbitrator the authority to make an equitable decision, the considerations for such an application must be made to both parties in the exercise of the discretion to accord fairness in the administration of a collective agreement. On that basis it would not be a reasonable conclusion in my opinion, that fairness would dictate a continuation of a payment to certain employees in the bargaining unit who were treated differently by the Company through the *ex gratia* payments than others covered by the same collective agreements whose rights were specifically contained in those agreements, to continue such payments once the mistake had been found. At that time I find it was reasonable for the Company to discontinue further payments to these employees, as there is no legal basis on which they could or the Union could enforce such payment at any time. Had the Company sought to recover amounts wrongly paid then the application of an equitable principle would surely be applied as a defence based on the Company's conduct through mistake. The other side of that consideration however, is that the Union cannot require the Company to continue to make a payment outside of the terms negotiated by the parties and set forth in their collective agreement and Memorandum of Agreement, but can only insist on the proper interpretation and application of the terms of the collective agreement. …

In previous cases this Office has had occasion to find that errors in the local administration of a collective agreement which is national in scope do not necessarily give rise to principles of estoppel, and an employer retains the discretion to correct such errors upon becoming aware of them. (See, e.g., **CROA 1729** and **2638**.) Nor, in my opinion, can the Union rely upon the decision of this Office in **CROA 2522** in support of its position in this matter. While that case concerned a grievance relating to the layoff of Dockpersons at the Burnaby Terminal, it was dismissed, noting that nothing in the collective agreement or in the facts disclosed prevented the employees from exercising their seniority into the position of Warehouseperson, a classification which they maintained was not reduced in its work opportunities. Significantly, in the second paragraph of that award the decision notes, in part: "Dockpersons occupy full-time bulletined positions …". If anything, that award confirms the position of the Company with respect to the nature of hours to be worked by an individual holding the Dockperson classification.

It is also clear that the Union has acknowledged as much in prior litigation. As noted by counsel for the Company, the Union's own reply to a complaint before the Canada Labour Relations Board, following the abolishment of Dockperson positions at Concord, Ontario, involved a letter of its own counsel, dated March 10, 1997 which acknowledges the right of the Company to abolish positions, including the Dockperson positions which were abolished in that case. If the equities are closely examined, as in the **Boise Cascade** award, for a number of years the employees at the Burnaby terminal who have been paid at the rate of Dockperson, while not employed full-time, have enjoyed a windfall benefit not available to all other employees working similar hours at other terminals in Canada. To allow the Union's grievance would effectively perpetuate an error, and in the Arbitrator's view an inequity, which was never intended by the parties in the negotiation of the terms of their collective agreement.

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

May 14, 1999

(signed) MICHEL G. PICHER
ARBITRATOR