CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3114

Heard in Calgary, Thursday, 11 May 2000

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

EX PARTE

DISPUTE:

Appeal of General Notice No. ED-98-07-10, dated July 10, 1998, in which the Company instructed employees that guaranteed overtime should no longer be claimed on the 549 road switcher assignment at Edson, AB.

EX PARTE STATEMENT OF ISSUE:

In conjunction with the establishment of the 549 road switcher assignment in 1987, the Company also established that employees would be compensated three (3) hours overtime, paid twice weekly. On July 10, 1998, the Company issued General Notice ED-98-07-10 indicating that effective July 17, 1998, guaranteed overtime payments would be discontinued.

The Brotherhood contends that the Company has consistently compensated locomotive engineers three (3) hours overtime for some eleven (11) years and cannot revert to the strict application of article 1.7, article 6 and Addendum No. 10 of collective agreement 1.2. The Brotherhood's position is that the Company is estopped from subsequently altering the practice of guaranteed overtime and that it must remain unchanged through the remainder of the current collective agreement. The Brotherhood has also requested that those employees assigned to train 549 be compensated all lost earnings since July 17, 1998

FOR THE COUNCIL:

(SGD.) D. J. SHEWCHUK
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

S. Blackmore	– Labour Relations Associate, Edmonton
R. Reny	– Human Resources Associate, Vancouver
B. Kalin	– Observer
K. Sherman	– Observer

And on behalf of the Council:

D. J. Shewchuk	– Vice-General Chairman, Saskatoon

AWARD OF THE ARBITRATOR

It is common ground that from the creation of the Edson road switcher assignment 549, in 1987, the Company decided to establish a guaranteed premium payment of three hours' overtime, to be paid twice weekly, to the crew performing the assignment. It appears agreed that the premium was established as an incentive to attract senior employees to the road switcher assignment, so as to establish a better and more stable relationship with the Company's Edson customers, notably Weyerhauser and Procor. Road switcher 549 continued to receive the premium payment down through the years, and over the currency of several successive collective agreements.

Although there is some dispute as to when the Company communicated to the Council its decision to discontinue the premium payment, it appears that it addressed the question, at least internally, in April of 1998. In any event, on July 10, 1998 the Company issued General Notice ED-98-07-10 which reads, in part, as follows:

> Subject: Guaranteed Overtime 549 Assignment
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> Effective completion of shift 1998 July 17th guaranteed overtime should no longer be claimed on the 549 assignment.
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> This is in keeping with Company policy regarding payment of overtime when no overtime is actually worked. Overtime will be paid as per collective agreements when workload requires the extension of a shift.

The Council grieves the cancellation of the guaranteed overtime payments, and asserts that in the circumstances the Company must be estopped from reverting to the strict application of the collective agreement. The Council's position is that the practice established and maintained by the Company over a significant period of years is tantamount to a representation to the employees that the premium would be paid.

The Company's representative submits that the issue is not arbitrable, as the Council raises no specific provision of the collective agreement which it alleges has been violated. On that basis the Company submits that the grievance does not conform with the requirements of clause 4 of the memorandum of agreement establishing the Canadian Railway Office of Arbitration, by which this Office is mandated to deal with "… disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement …".

With respect, the Arbitrator cannot accede to the jurisdictional argument of arbitrability raised by the Company in this grievance. Many estoppel issues are, by their very nature, disputes about promises and undertaking exchanged verbally between parties, or arising from their conduct, whereby one party leads the other to understand that it will not enforce its strict rights under the collective agreement. The jurisdiction of boards of arbitration to properly deal with issues of equitable estoppel, even where the estoppel may be founded on an undertaking or practice not recorded the collective agreement, has long been recognized by the courts. That doctrine, and others such as waiver, acquiescence, *laches*, abandonment or the settlement of claims are obviously essential for a board of arbitration to deal with the true nature of industrial relations disputes relating to a collective agreement. Moreover, if it were necessary to so find, in the instant case I am satisfied that the dispute would in fact bear upon the "meaning" of the overtime provisions of the collective agreement as they specifically apply to the circumstance of the 549 road switcher assignment. The Company's preliminary objection with respect to arbitrability is therefore denied.

In **CROA 2650** this Office commented as follows with respect to the doctrine of estoppel:

> The elements of the doctrine of estoppel, as correctly presented by the Council, are as follows:
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> **(1)** a representation made by the Company either verbally or by conduct to the employee;
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> **(2)** an intention on the part of the employer that the representation would be relied upon by the employee;
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> **(3)** actual reliance on the representation by the employee; and,
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> **(4)** detriment suffered by the employee as a result of his reliance.

When regard is had to the elements of the doctrine of estoppel for the purposes of the case at hand, the Arbitrator is not persuaded that it can properly be invoked to support the Council's grievance. If it could be shown that one or more employees relied upon the overtime premium in such a way as to bid the job in question, thereby

incurring certain liabilities or foregoing other gainful opportunities, the case for injurious reliance might be made out. The evidence before the Arbitrator, however, does not demonstrate any such injurious reliance. In fact such evidence as is available with respect to the employees who performed the 549 road switcher assignment at Edson reveals that the work was performed by a substantial number of employees for relatively short periods of time. Eleven separate employees are shown working the assignment from July of 1997 through December of 1998. None, it may be noted, held the work for any extensive period of time.

In the circumstances, what the evidence reveals is that the Company decided to offer a unilateral incentive, beyond the wage limits of the collective agreement, to attract senior employees to the 549 road switcher assignment, initially for the purpose of utilizing more seasoned locomotive engineers, with a view to developing a stable and positive working relationship with the industrial customers serviced by the road switcher. In fact senior employees have not consistently bid and worked the assignment, and it has rotated extensively among a number of employees, including relatively junior locomotive engineers. In the circumstances the Company's decision to discontinue the incentive cannot be said to have triggered the application of the doctrine of estoppel. Even if the practice of a number of years can be construed as an implicit undertaking on the part of the Company, the evidence before the Arbitrator falls well short of establishing that there was any injurious reliance on the part of any employee flowing from the Company's practice. On the contrary, as the record indicates, the assignment appears to have created no particular sustained attachment for any employee. In that circumstance the element of injurious reliance is clearly not made out.

For all of the foregoing reasons the Arbitrator is compelled to reject the argument of the Council based on the doctrine of estoppel. The grievance must therefore be dismissed.

May 12, 2000

(signed) MICHEL G. PICHER
ARBITRATOR