CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4550

Heard in Montreal, April 13, 2017

Concerning

VIA RAIL CANADA INC.

And

UNIFOR COUNCIL 4000

DISPUTE:

The Corporation's unilateral discontinuation of punch clock premiums for certain employees in the Maintenance Centers across Country.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

The Union maintains the Corporation is in violation of Article 27.13 of collective agreement #1.

On February 21, 2013, the Corporation provided the Union with an alleged estoppel notice regarding Article 27.13, of collective agreement #1 which stated:

"This will serve as an estoppel notice that the Corporation intend to revert to the strict application of Article 27.13 of collective agreement #1 regarding the payment of punch clock premium."

The Union took the position that the Corporation was applying the proper and strict application of the Article from the start and that the estoppel could not alter the language of Article. Therefore, it would take contract language changes to allow the Corporation to discontinue the punch clock premiums which was not achieved. The provision of Article 27.13 of collective agreement #1 remains the same.

Effective October 10, 2013, the Corporation unilaterally discontinued the punch clock premiums for employees that did not have the premium rolled into their base rate of pay. The Union filed a grievance alleging a violation of the collective agreement and requested that the premiums be reinstated for all affected employees including those that did not have the premium rolled into their base rate of pay.

The Corporation declined the grievance.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. J. Fitzgerald	**(SGD.)**
National Staff Representative	

There appeared on behalf of the Company:

W. Hlibchuk	– Counsel, Norton Rose Fulbright, Montreal
M. Boyer	– Senior Labour Relations Advisor, Montreal

B. Blair – Labour Relations Advisor, Montreal
G. Sarazin – Labour Relations Advisor, Montreal

And on behalf of the Union:
R. J. Fitzgerald – National Staff Representative, Toronto
D. Andru – Secretary Treasurer, Toronto
B. Kennedy – President, Edmonton
W. Gajda – Regional Representative, Mississauga

AWARD OF THE ARBITRATOR

Nature of the Case

1. Unifor contested VIA's decision to stop paying punch clock premiums to Maintenance Center employees. For several years after replacing punch clocks with a swipe system, VIA had nonetheless continued to pay employees punch clock premiums. During collective bargaining, VIA served Unifor with an estoppel notice indicating it would in the future apply the collective agreement's wording.

2. For the reasons which follow, the arbitrator has concluded that VIA served a valid estoppel notice during collective bargaining. Following the conclusion of a new collective agreement, VIA was entitled to apply that contract's wording. That punch clock specific wording did not entitle employees to a premium.

Facts

3. A punch clock premium has long formed part of the parties' collective agreement. Article 27.13 reads:

> Employees required to punch clocks in and out and make service cards on their own time will be allowed a bonus of one minute per hour. This article is not applicable to hourly rated employees in the Equipment

> Maintenance Facilities who have had this allowance incorporated into their basic rate of pay.

4. In 2009, VIA implemented the Ulysses System, a swipe card system, at its Maintenance Centres. The swipe card provided some of the information VIA had previously obtained from punch clocks, and also improved security access.

5. VIA suggested that, following the introduction of the swipe card system, it had from 2009 to 2013 inadvertently continued to pay the punch clock premium. Unifor contested the suggestion of inadvertence and argued that VIA paid the premiums because they were owing under the clear wording of the collective agreement.

6. On February 21, 2013, during collective bargaining, VIA sent Unifor an estoppel notice:

> This letter will serve as an estoppel notice that the corporation intends to revert to the strict application of article 27.13 of the Collective Agreement #1 regarding payment of a punch clock premium.

7. The purpose of an estoppel notice is to allow the other party to negotiate the issue during existing collective bargaining. The process is not dissimilar to technological change provisions which allow the parties, during the term of a collective agreement, to negotiate about the impact of those changes.

8. The parties signed a new collective agreement on August 27, 2013. Commencing on October 10, 2013, VIA ceased to pay any further punch clock premiums to Maintenance Center employees.

Analysis and Decision

9. The Supreme Court of Canada (SCC) has examined what evidence is admissible when an arbitrator interprets a collective agreement provision. In *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*[1], the SCC set out the well-known rule of contract interpretation:

> The general rule prohibiting the use of extrinsic evidence to interpret collective agreements originates from the parol evidence rule in contract law. The rule developed from the desire to have finality and certainty in contractual obligations. It is generally presumed that when parties reduce an agreement to writing they will have included all the necessary terms and circumstances and that the intention of the parties is that the written contract is to be the embodiment of all the terms. Furthermore, the rule is designed to prevent the use of fabricated or unreliable extrinsic negotiations to attack formal written contracts.

10. However, the SCC also noted that contractual ambiguity may provide an exception to the parol evidence rule:

> One of the exceptions to the parol evidence rule has always been that where there is ambiguity in the written contract itself, extrinsic evidence may be admitted to clarify the meaning of the ambiguous term. (See Leggatt v. Brown (1899), 30 O.R. 225 (Div. Ct.).).

11. The SCC in *Bradco* referred to relaxed rules of evidence in labour relations statutes[2], and attributed this relaxing to their impression that labour arbitrators were often not legally trained:

> While provisions such as these do not oust judicial review completely, they enable the arbitrator to relax the rules of evidence. **This reflects the fact that arbitrators are often not trained in the law and are permitted to**

[1] 1993 CanLii 88

[2] Section 16(c) of the Canada Labour Code provides: The Board has, in relation to any proceeding before it, power… c) to receive and accept such evidence and information on oath, affidavit or otherwise as the Board in its discretion sees fit, whether admissible in a court of law or not.

> **apply the rules in the same way as would be done by reasonable persons in the conduct of their business.** Section 84(1) evinces a legislative intent to leave these matters to the decision of the arbitrator.
> (emphasis added)

12. For labour arbitrations, a party does not have to go through the mental gymnastics of proving whether a patent or latent ambiguity exists before submitting extrinsic evidence. However, a party must still demonstrate why an arbitrator should go beyond the mutually agreed language in the collective agreement. Extrinsic evidence or bargaining history is not presumptively admissible.

13. In this case, neither party argued article 27.13 was ambiguous. For example, Unifor argued that article 27.13 was "clear and unequivocal"[3]. In such a situation, the arbitrator must interpret the article's language, as drafted by the parties.

14. The evidence indicated that when VIA used a punch clock system, Unifor members would punch and write on the punch card (service card) what work they had been doing. Workers did this record keeping outside of regular work hours. As a result, VIA paid them a premium.

15. The text of article 27.13 sets out the conditions which must be satisfied to earn the premium: i) employees must be required to punch in and out; ii) employees must be required to make service cards; and iii) this work must occur on their own time. Unifor suggested VIA may have paid some employees even if they did not satisfy all three

[3] Union Submission; Paragraph 8 (U-1)

conditions. With the newly introduced swipe system, employees no longer satisfied the first two conditions (though they did have to swipe), and possibly all three.

16. VIA served an estoppel notice during bargaining, since it had been paying the punch clock premium from 2009 to 2013, despite its change to a swipe system. In the arbitrator's view, once the new collective agreement commenced, VIA had satisfied the notice requirements to allow it to apply the strict wording of the collective agreement. As noted above, only employees who met the three described conditions in article 27.13 would henceforth be eligible for a punch clock premium.

17. Even if one might consider that swiping was comparable to using a punch clock, VIA noted that Unifor had taken a contrary position in other matters. In any event, employees no longer completed service cards on their own time, which were the two other conditions found in article 27.13.

18. The arbitrator is obliged to dismiss Unifor's grievance. In so doing, the arbitrator does not doubt Unifor's sincere belief that article 27.13 provided employees with a wage bonus, regardless of whether they used a punch clock or not. But the language of article 27.13, coupled with VIA's estoppel notice, requires the arbitrator to interpret the current wording of the parties' negotiated provision.

April 24, 2017

GRAHAM J. CLARKE
ARBITRATOR