CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4606

Heard in Montreal, January 9, 2018

Concerning

CANADIAN NATIONAL RAILWAY

And

UNITED STEELWORKERS UNION – LOCAL 2004

DISPUTE:

Policy grievance; Classification of Flagging Job as identified in Appendix VIII of 10.8.

JOINT STATEMENT OF ISSUE:

On February 23, 2016 the Union filed a grievance on behalf of USW employees pertaining to the manner in which 'flagging positions' are advertised and awarded on the monthly job bulletins.

Flagging positions are required to provide rail traffic protection for the safe movement of trains. These positions are advertised on the bulletin as 'Track Maintainer/Flagman' and awarded on the basis of Track Maintainer seniority.

The rate of pay applied to these flagging positions has been that of 'Untrained Foreman' pursuant to Article 6.1.1(a) of Supplemental Agreement 10.8.

The Union contends that flagging positions should be advertised as Track Maintenance Foreman (TMF) because there is no classification of 'Track Maintainer/Flagman', and that the Company is in violation of Appendix VIII of Supplemental Agreement 10.8.

The Union requests that the Company make whole employees who have been disadvantaged by the manner in which the Company has bulletined the flagging positions.

The Company disagrees with the Union's contentions and declines the grievance.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) M. Piché	**(SGD.) B. Laidlaw**
Union Representative	Manager Labour Relations

There appeared on behalf of the Company:

B. Laidlaw	– Manager, Labour Relations, Winnipeg
D. Laurendeau	– Manager, Labour Relations, Montreal

And on behalf of the Union:

G. Colli	– Chief Steward, Winnipeg
M. Piché	– Staff Representative, Toronto
R. Koch	– President, Winnipeg

AWARD OF THE ARBITRATOR

Nature of the Case

1. The USW filed a policy grievance contesting CN's posting for the position of "Temporary Maintainer Track/Flagman". The USW alleged that CN cannot post a position which does not exist under the collective agreement (U-1; Union Brief; Paragraphs 7-8).

2. CN defended its posting practice by referring to Appendix VIII of Supplemental Agreement 10.8. That Appendix governs the "rate of pay applicable to Track employees responsible for the protection of track units or track work".

3. The arbitrator concludes that Appendix VIII, which is not ambiguous, is neither a posting provision nor one which governs the creation of new classifications. Rather, it sets out how track employees will be paid should they be required during their regular duties to perform flagging functions. In addition, the fact that CN has used Appendix VIII as a posting provision on several occasions does not modify the wording in the collective agreement.

4. The parties have negotiated into their collective agreement a process to deal with new classifications. That process would apply to the disputes arising in this case.

Analysis and Decision

i) Does Appendix VIII Allow CN to Post "Flagman" Positions?

5. Flagging refers to safety rules which protect those working on and around railway tracks. Rule 42 (Planned Protection), as well as Rules 849-864 Track Occupancy Permits (TOP), ensure that trains do not enter track on which work is being done. For ease of reference, Rule 42 and TOP work will be referred to as "flagging".

6. Collective Agreement 10.1 does not contain a specific classification for "Flagman". Article 27.1 of Collective Agreement 10.1, entitled "Compensation for Additional Positions or Classifications", deals with situations where CN creates additional standalone positions:

> 27.1 When additional positions or classifications are created, or upon introducing new major equipment for specific Supplemental Agreements which is significantly different from current equipment, compensation shall be fixed in conformity with agreed rates for similar positions with that Supplemental Agreement or by agreement between the USW President, Local 2004 or designated representatives and Officers of the Company.

7. In 1993, the parties at that time negotiated Appendix VIII as part of Supplemental Agreement 10.8. That Appendix indicates both to whom it applies, as well as the rate of pay. Appendix VIII governs "the rate of pay applicable to Track employees responsible for the protection of track units or track work".

8. Appendix VIII increases track employees' compensation levels to those of a Track Maintenance Foreman level for any time spent performing Rule 42 or TOP duties:

> IT IS AGREED that Track employees working in a classification lower than that of a Foreman, shall be compensated at the rate of pay of a Track Maintenance Foreman pursuant to the provisions of Article 6.1 (A) of Supplemental Agreement 10.8 when assigned the duties of handling CROR Rule 42 or Track Occupancy Permits (TOP).

9. Employees only receive this additional pay for the "actual time" spent performing those flagging duties:

> This rate of pay will be paid solely for the actual time that the employees are engaged in the performance of the duties directly related to the protection of track units or track work, such as…

10. Appendix VIII describes some of the flagging duties a track employee may perform:

> Establishing the requirements of Rule 42 or TOP protection by consulting with the Foreman in charge of the work regarding the nature of the work, tracks affected, mileage limits, time limits, etc.
>
> …
>
> Notifying the Foreman in charge of work protected by Rule 42 or TOP of approaching trains and acting on that Foreman's instructions.

11. Several observations follow from the text of Appendix VIII. First, it applies to "track employees", who are working in a lower classification than that of a foreman. Second, it allows track employees, while carrying out their regular work, to be assigned

flagging duties. Third, for the actual time when a track employee performs this flagging, he/she will be paid at the rate of a Track Maintenance Foreman.

12. Appendix VIII can be cancelled “on 60 days’ written notice by other party”.

13. Appendix VIII does not contain language which would render it an exception to article 27.1 and allow CN to establish a new standalone classification and pay rate for a “Flagman”. This is something which the parties have agreed to negotiate, as has seemingly already happened for Eastern Canada.

14. The parties’ briefs did not describe in significant detail the daily functions carried out by those in the position of temporary “Maintainer, Track/Flagman”. However, it appears that the “Flagman” was not working as part of a crew, but instead performed flagging functions almost exclusively (U-1; Union Brief; Tab 3). For example, the bulletin (posting) included the duty to “…provide the necessary day to day protection for the Contractor’s men…”.

15. CN’s posting of a temporary “Flagman” position using Appendix VIII highlighted other consequences. For example, in 2011 all members of the bargaining unit were made permanent (U-1; Union Brief; Paragraphs 10 and 13). They cannot bid for a temporary “Flagman” position without forfeiting their permanent position: article 15.13(b). The interplay between provisions in a collective agreement is not something

which an arbitrator can amend: Ad Hoc 596 and MOA, Article 14. Such issues remain for collective bargaining.

16. Nonetheless, the USW has satisfied the arbitrator that Appendix VIII, which neither party suggested is ambiguous, is not a posting provision. It does not provide for the creation of new or standalone flagging positions. Rather, it governs situations where a track employee is assigned flagging during his/her regular duties. For the actual time spent performing those flagging duties, the employee receives a higher rate of pay.

17. CN, however, suggested that the parties' past practice allowed it to post these flagging positions.

ii) Does past practice prevent the USW from grieving CN's reliance on Appendix VIII?

18. CN noted "that Appendix VIII was written in clear and unambiguous language, and that language had remained unchanged for more than 24 years (E-1; Company Brief; Paragraph 32). It suggested that because it had posted the position of "Track Maintainer/Flagman" on 12 occasions since September 1, 2009, that a practice existed which obliged the USW to deal with the matter in the next round of collective bargaining: CROA&DR 1930.

19. The parties agree Appendix VIII is not ambiguous. Thus, a past practice cannot be used to change the Supplemental Agreement's clear wording: CROA&DR 605:

> Past practice cannot alter the terms of a collective agreement, or create an ambiguity where none exists. Article 6.7 is not ambiguous. It creates an entitlement to appointment to senior qualified persons applying on a bulletin. Here, the grievor, while senior, was not qualified. The person who was appointed was qualified. The grievor was not, therefore, entitled to the job, and the Company did not violate the collective agreement in appointing the junior man in this case.

20. In other words, if a collective agreement provision is clear, then past practice does not assist as an interpretive aid, as noted in CROA&DR 4601 and Catholic District School Board of Eastern Ontario v Ontario English Catholic Teachers Association, 2015 CanLII 23819:

> I begin my analysis by noting acquiescence by a union to an employer's practice can be used in labour arbitration either as an aide to interpretation or to create an estoppel. In Drug Trading, I suggested one of the criterion applied to determine whether a past practice has value as an aide to interpretation—i.e. the continuance of a practice for a long period without objection—should also be applied when determining whether a past practice creates an estoppel. To this extent, the legal principals applicable to the use of past practice to interpret a contract also apply to the use of such practice to prevent the enforcement of contractual rights. Nonetheless, there remain important differences between these two legal doctrines. Some of these differences relate to the criteria applied to determine whether a union's acceptance of an employer practice has any legal consequence. **As Professor Weiler noted in John Bertram, past practice is useful as an interpretative aid only if there is no "clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context." This sort of ambiguity is not a pre-requisite for the use of past practice to establish an estoppel.** Conversely, an employer's past practice gives rise to an estoppel in its favour only if it has detrimentally relied

> upon the union's acquiescence in that practice. In the typical scenario, detrimental reliance takes the form of management foregoing the opportunity to bring the contractual language into line with its practice during a previous round of bargaining. Detrimental reliance is not a pre-requisite for invoking past practice as an interpretive aid.
>
> (Emphasis added)

21. Beyond the need for an ambiguity, one of the key points from CROA&DR 1930 is that the evidence must show a "mutual acceptance" of the practice, as Arbitrator Picher later noted in CROA&DR 3634:

> However, CROA 1930 is not an award based on the doctrine of estoppel. That award simply recognizes the well established arbitral principle that by their own agreement through past practice the parties may fashion what amounts to an interpretation of a provision of their collective agreement which must be deemed to operate, at least until such time as they negotiate something different at the bargaining table. As is evident from the language of that award, by the longstanding practice the parties effectively agreed to treat seasonal employees other than extra gang labourers as having extra gang labourer status upon a seasonal layoff from their higher rated position. That interpretation, plausible on its face, was simply confirmed by the parties' mutual acceptance of their own practice.
>
> (Emphasis added)

22. The arbitrator does not find "plausible" an interpretation that Appendix VIII is a posting provision. Even if one were prepared to accept, for the sake of argument, that Appendix VIII was ambiguous, which is a key condition when using "past practice" as an aid to interpretation, the arbitrator does not find that 12 postings over 6.5 years establishes the required "mutual acceptance" for CN's interpretation of Appendix VIII.

23. By contrast, in CROA&DR 4316, Arbitrator Schmidt examined a consistent practice which had existed for years and concluded that “I am persuaded that by their conduct and by their words, the parties have made clear their intent that overtime is voluntary”.

24. Nothing similar exists in the instant case. At no time could the arbitrator find a meeting of the minds to the effect that both CN and the USW agreed that Appendix VIII was a posting provision. It is one thing to demonstrate several instances where something was done which may have been inconsistent with the collective agreement’s wording. It is quite another to demonstrate that the other party knew of it, and agreed with it through its words or conduct.

25. While this point was not pleaded, a past practice can also be raised to support an estoppel argument. In Canadian National Railway Co. v. Beatty, 1981 CanLII 2953, a case which contested an arbitrator’s application of the estoppel doctrine, the Ontario Divisional Court cited one of the classic descriptions of estoppel:

> [17] The arbitrator later sets out the principle as enunciated by Denning L.J. in Combe v. Combe, [1951] 1 All E.R. 767 at p. 770. That exposition of the doctrine was as follows:
>
> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he

> himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

26. In the instant case, there was no evidence that the USW acquiesced and therefore gave its approval that "Flagman" postings could take place, despite that classification not existing in the collective agreement. A party cannot create an estoppel by unilateral conduct. There needs to be some promise or assurance which would prevent the USW from arguing that the collective agreement must be applied as it reads. The handful of postings over the year does not create this type of promise or assurance.

27. In contrast, in CROA&DR 4550, Unifor contested VIA's notice prior to collective bargaining that it intended to return to a strict interpretation of the collective agreement regarding punch clock premiums:

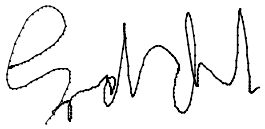
> 16. VIA served an estoppel notice during bargaining, since it had been paying the punch clock premium from 2009 to 2013, despite its change to a swipe system. In the arbitrator's view, once the new collective agreement commenced, VIA had satisfied the notice requirements to allow it to apply the strict 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.

28. In that case, CN had paid the punch clock premium to Unifor members, despite the collective agreement's wording, which set up an estoppel. 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.

Disposition

29. The arbitrator upholds the USW's policy grievance and declares that CN's use of Appendix VIII as a posting provision did not respect the parties' collective agreement. The collective agreement already contains a process for the addition of a new classification. Since this was not a group grievance or an individual's grievance, a declaration will suffice. The arbitrator retains jurisdiction should any issues arise out of this award.



January 19, 2018

GRAHAM J. CLARKE
ARBITRATOR