CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 731

Heard at Montreal, Tuesday, December 11,1979

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAlLWAY, TRANSPORT AND GENERAL WORKERS

DlSPUTE.
Claim for Motorman's overtime by Heavy Equipment Operator Zurowski at Winnipeg Intermodal Terminal.

JOINT STATEMENT OF lSSUE:

On January 6 Motorman Nadon reported for work at 1600 and booked sick at 1800. The Company called Motorman Mculure for 1800 January 6 and Motorman Fox for 1600 January 7 as replacements at the Motorman's punitive rate of pay.

The Brotherhood claims that Heavy Equipment Operator Zurowski, qualified and more senior employee, was available and should have been called, as provided by the Local Overtime Agreement, for Mr. Nadon's shifts on January 6 and January 7 and are requesting 6 and 8 hours respectively at the Motorman's punitive rate of pay.

The Company has refused payment saying the senior available employee in the same classification at that location was entitled to the work and was so called.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) J. D. HUNTER National Vice-President	(SGD.) S.T. COOKE Assistant Vice-President Labour Relations

There appeared on behalf of the Company..

J. A. Fellows	System Labour Relations Officer, C.N.R., Montreal
J. McLeod	System Labour Relations Officer, C.N.R., Mtl.
J. H. Meneer	Labour Relations Assistant, C.N.R., Winnipeg
G. S. Smith	Manager Intermodal Services
L. Zabroski	Supervisor lntermodal Operations, C.N.R., Winnipeg

And on behalf of the Brotherhood:

W. H. Matthew	Regional Vice President, C.B.R.T., Winnipeg

R. McGregor Local Chairman, C.B.R.T., Winnipeg

AWARD OF THE ARBlTRATOR

Article 5.1 of the collective agreement provides that overtime work is to be performed "as locally arranged in writing''. The Union relies on local arrangements as set out in a letter dated December l8, 1965, the contents of which (insofar as they are material here) were subsequently agreed to by the Company. In C.R.0.A. Case No. 626 it was held that that letter (together with related correspondence) constituted a local arrangement with respect to overtime.

For the purposes of the instant case, the following portion of the letter of December l8, 1965 is significant:

> "1. Only employees in the classification of work where the overtime occurs will be allowed to perform such overtime, e.g. Porters shall perform the overtime requiring porters. Motormen only to perform overtime on duties requiring motormen, such as driving trucks and unloading trucks; Clerical force shall perform their own overtime. The clerical force shall include office staff, transfer clerk, money and value clerk and Waybill clerks.''

That agreement seems clear in its application to the facts of the instant case. There was overtime to be performed in the classification of Motorman, and the Company assigned the work to Motormen. That would appear to be in keeping with the local arrangement.

The Union contends, however, that the Company is estopped from relying on the terms of the local arrangement because it had entered into a subsequent agreement whereby Heavy Equipment Operators were to be entitled to perform overtime work in the classification of Motorman, in accordance with their seniority.

There was in fact a verbal understanding reached between the parties in November, 1973, when a Heavy Equipment Operator's classification was established at Symington Yard. At that time, it seems, there was Just one Heavy Equipment Operator, and it was agreed that, for overtime purposes, the two classifications would be combined. The Heavy Equipment Operator was a qualified Motorman, although Motormen would not necessarily be qualified as Heavy Equipment Operators.

When more Heavy Equipment Operators were hired, the agreement combining the two classifications for overtime purposes was continued. This worked to the disadvantage of Motormen, since the Heavy Equipment Operators tended to be employees of greater seniority. Subsequently, the volume of traffic having increased, so that there were certain Motormen qualified as well as Heavy Equipment Operators, such persons were considered for overtime in the Heavy Equipment Operator classification. ln my view, this simply gave real effect to the agreement that the two classifications should be combined for overtime purposes, subject to the senior employee being qualified for the overtime work to be done. The Union protested this, contending that while Heavy Equipment Operators might exercise

seniority for overtime work in the Motorman's classification, the converse was not the case, and Motormen, even if qualified, could not exercise seniority for overtime as Heavy Equipment Operators.

The written arrangement, of course, is for overtime to be offered to employees within the classiiication of the work to be performed. The Company has reverted to the written agreement and offered the overtime in question - Motorman's work - to Motormen. The Union contends that a Senior Heavy Equipment Operator should have had the work.

The issue to be decided is whether or not there exists a sub sequent agreement modifying the 1965 written agreement, and by which the Company is bound. The Union contends that the Company is bound by the principle of estoppel: that it cannot, by reason of the 1973 verbal agreement, now rely on the 1965 written agreement.

As a general statement of the doctrine of estoppel, the Union referred to the words of Denning, L.J., in the case of Combe v. Combe, (1951)1 All E.R. 767 at p. 770:

> "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 re lations 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.''

It is generally said that a party cannot rely on a written agreement where he has made a representation that he will not rely on it, and the other party has acted on that representation to its detriment, so that it would be inequitable to allow the first party to rely on its strict legal rights - that is, as here, to rely on the written agreement. ln the instant case, however, it is not clear what the extent of the verbal agreement was. While it is clear that it was to the effect that the two classifications should be "combined'' for the purposes of overtime, the agreement was made at a time when there was only one Heavy Equipment Operator, and the Motormen then so classified may well have lacked the qualifications to act as Heavy Equipment Operators. It has not been established that there was in fact any verbal agreement by which, regardless of changed circumstances or individual qualifi cations, Heavy Equlpment Operators could claim overtime as Motormen whereas Motormen could not claim overtime as Heavy Equipment Operators.

Secondly, while the element of "reliance" is an important aspect of the doctrine of estoppel, it is perhaps stretching the point to say that the Union "relied" on the Company's verbal agreement modifying the written arrangement. Rather, the Heavy Equipment Operators had, for a time, the advantage of such agreement. In the light of the changed circumstances to which, as 1 have noted, it has not been shown that the verbal agreement applied it can scarcely be said that

it is "inequitable'' for the Company to rely on the written local arrangement. The opposite seems more likely the case: the position urged by the Union would clearly favour one classification over another, even although this is contrary to the general position taken by the Union in re questing the local arrangement in 1965.

Since the extent of the verbal alteration of the written arrangement is not clear; since the Union has not relied on that alteration to its detriment, but any reliance thereon has been to the advantage of the Heavy Equipment Operators; and since there appears to be nothing inequitable in allowing the Company to rely on the written local arrangement, it is my con clusion that the Company is not estopped from doing that, and from offering overtime work in the first instance to members of the classification in which the work is to be performed.

For the foregoing reasons the grievance must be dismissed.

J.F.W. WEATHERILL
ARBITRATOR