CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1304

Heard at Montreal, Wednesday, November 14, 1984

Concerning

CANADIAN PACIFIC LIMITED (CP Rail)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Effective March 23, 1984, all B&B employees under the jurisdiction of' the Works Manager, Weston Shops, Winnipeg, Manitoba, ceased to be paid the clock punching compensation.

BROTHERHOOD'S STATEMENT OF ISSUE:

The Union contends that:

1. B&B employees have been clock punching and receiving compensation since 1980.

2. Employees are still punching and signing their time cards.

3. The Company violated Sections 2(1), 4(1), 4(1)A and 6(1)A and B of the "Public Sector Compensation Restraint Act".

4. The clock punching compensation be reinstated, and retroactive payments made from March 23, 1984.

The Company denies the Union's contention and declines payment.

FOR THE BROTHERHOOD:

(SGD.) L. M. DiMASSIMO
FOR: System Federation
General Chairman.

There appeared on behalf of the Company:

K. R. Brown	- Director Human Resources, Mechanical Dept. CPR, Montreal
I. J. Waddell	- Manager Labour Relations, CPR, Montreal
R. A. Colquhoun	- Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	- System Federation General Chairman, BMWE, Ottawa

R. Y. Gaudreau - Vice-President, BMWE, Ottawa
L. M. DiMassimo - Federation General Chairman, BMWE, Montreal
G. Valance - General Chairman, BMWE, Sherbrooke

INTERIM AWARD OF THE ARBITRATOR

The trade union's grievance was prompted by the company's discontinuance of clock punching payments which allegedly were erroneously made to a group of bargaining unit employees at its Weston Shops, Winnipeg. Because the grievance contained no provision of the collective agreement that was alleged to have been violated (but reference was made to an alleged breach of The Public Sector Compensation Restraint Act), the Company refused to participate in the preparation of a Joint Statement of Issue as contemplated under Section 5 of the CROA Rules and Regulations. The company's position is set out in its letter to the trade union dated September 26, 1984.

> "As you have indicated that it is still the Union's position to bring this matter before the CROA, I must point out that the Company's position is that the matter of the present grievance is not related to the contents of the Collective Agreement.
>
> In view of the above, I cannot concur to join with your organization at arbitration and would suggest that you proceed on an "Ex Parte" basis, with the time limits for procedural purposes to start upon the date of receipt of this letter."
>
> (emphasis added)

Pursuant to the company's suggestion the trade union proceeded Ex Parte and referred its grievance to CROA. In due course, the grievance was scheduled for hearing on November 14, 1984. Approximately four days prior to the hearing Mr. Thiessen received telephone notification from the company's representative that the employer for the reasons set out in its letter of September 26, 1984, intended to challenge the arbitrability of the grievance. In this regard Section 4 of the CROA Rules and Regulations defines the Arbitrator's jurisdiction as follows:

> "4. The jurisdiction of the Arbitrator shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;
>
> (A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting

collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and

(B) other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration for final and binding settlement by arbitration,

but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this Agreement."

At the outset of the hearing the trade union vigorously resisted the company's efforts to contest the arbitrability of the grievance even though it was aware of the company's views as to the CROA's jurisdiction by virtue of the letter of September 26. Mr. Thiessen complained that he had not received formal notification through CROA of the company's challenge to the arbitrability of the grievance as was the normal procedure. It is of some significance to note that no specific procedure is contained in the CROA Rules and Regulations dealing with jurisdictional challenges to the arbitrability of a grievance referred to CROA.

In this light I attempted to accommodate the short notice extended the trade union of the company's challenge by allowing an adjournment of the proceedings so that the trade union's representative might prepare an answer. Mr. Thiessen opposed the adjournment and requested that I proceed with the merits of the grievance without entertaining the company's jurisdictional challenge.

In light of the parties representations I made the following oral ruling:

"It is patently obvious that an Arbitrator cannot assert jurisdiction to hear a grievance that is not arbitrable. There does not appear to be any provisions in the Rules and Regulations of CROA that prevents a party from raising an issue with respect to arbitrability at any time prior to a scheduled hearing.

Because the issue of arbitrability goes to the root of my authority and competence to adjudicate an issue referred to CROA it is my view, in the absence of a provision to the contrary in the collective agreement or the

CROA Rules and Regulations, I am duty bound to entertain any jurisdictional challenge raised before me.

The one condition that I attach however to entertaining such challenges is that the opposite party be given ample notice to prepare an answer. While it may appear from the company correspondence to the trade union that it questioned the appropriateness of the grievance, it did not raise the issue of arbitrability until a few days before the hearing.

Accordingly, it is my decision to adjourn this hearing and to reschedule the same at a mutually satisfactory date in order to allow the trade union to prepare an answer to the company's challenge.

For all the foregoing reasons the matter stands adjourned as aforesaid.

DAVID H. KATES,
ARBITRATOR.

Parties appeared on Wednesday, January 9, 1985.

AWARD OF THE ARBITRATOR

The issue to be resolved at this juncture of the procee- dings is whether the grievance presented by the trade union raises on arbitrable question that may be resolved at CROA.

In this particular regard, the trade union acknowledges that in order to bring its grievance within the ambit of CROA's juris- diction it must demonstrate that a provision or provisions of the relevant collective agreement have been allegedly breached.

In this regard it is coxmon ground that no provision of the relevant collective agreement confers upon the grievors the entitlement to a clock punching premium as appears to be the case under the collective agreement covering the company's Shop- craft employees. Nonetheless the trade union, as clarified in its written brief, alleges that the company has improperly remo- ved the payment of that premium as part of the grievors' regular pay in violation of the pay provisions of the collective agreement. It is also comnon ground that the company, albeit it claims mistakenly, has paid the clock punching premium for approximately four years.

The trade union's defence to the allegation that no provi- sion of

the collective agreement supports its claim rests on the application of the doctrine of "promissory estoppel". That is to say, the trade union has invoked the "equitable" principle of estoppel to preclude the company from relying, in light of the four year practice, on its strict legal rights under the collec- tive agreement. And, it is in this context that the trade union claims that the grievance referred to CROA is arbitrable.

The company's representative has assisted this arbitrator by adducing two judgements that appear to express opposite conclusions with respect to the appropriateness of the estoppel principle in arbitration proceedings. In the one case in Re Canadian National Railway Co. et al vs Beatty et al 128 DLR. (3d) 236 the Ontario Divisional Court appears to have sustained an arbitrator's jurisdiction to apply the estoppel principle; and in an unreported decision of the Alberta Queen's Bench in Re Smokey River Coal Limited and United Steelworkers of America, Local 7621 et al an opposite conclusion appears to have been reached.

In any event, the company's representative went on record, even if the estoppel principle was within the jurisdiction of CROA, that the specific circumstances of this case would not warrant its application as a defence to the company's position.

As indicated to the parties at the hearing, I am satisfied, without attributing any opinion on either the legal issues raised or the merits of the estoppel defence, that the trade union has raised on arbitrable issue that I am required, in accordance with the Rules and Regulations governing CROA, to determine. And it is for that reason that the company's attack to my juris- dictional competence must be rejected.

Accordingly, the matter is to be scheduled for hearing on the merits of the grievance.

DAVID H. KATES
ARBITRATOR.

On March 6th, 1985, the Union Representative advised that the dispute has been resolved to the parties' satisfaction.

DAVID H. KATES,
ARBITRATOR.