CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1825

Heard at Montreal, Wednesday, 14 September 1988

Concerning

CANADIAN PARCEL DELIVERY
(CP EXPRESS AND TRANSPORT)

And

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The assessment of 29 demerits to employee F. Bourdage of Saint John, New Brunswick, for unsecured vehicle, which led to him being left with 59 demerits on his record.

UNION'S STATEMENT OF ISSUE:

Employee Bourdage, on the night of September 8, 1987, left his truck, No. 807117, parked at the north side of the Saint John, N.B. terminal, backed up close to the building. During the evening, it was found to have the rear door unsecured and also to have freight on it. On the next night, September 9, the same truck was again found parked in the same manner and again with freight on it.

The Union contends that this truck was parked in this manner with the full knowledge, and in fact on instructions of Supervisor C. Hooton, as there was no lock for the rear door. The Union also contends that although it was known by Terminal Manager L. Killam and Safety Supervisor A. Chiasson that the truck was being parked in this manner, nothing was done on the morning of September 9 to correct the situation. That acted as further justification, in the driver's mind, to park the vehicle as he had been instructed and as he and others had been doing.

The Company contends that there had never been instructions issued by the supervisor to park vehicles in this manner and the discipline assessed was justified and reasonable. The Company also contends that this grievance is out of time limits.

The relief requested is the removal of the 29 demerits from the employee's record.

FOR THE UNION:

(SGD) J. J. BOYCE
General Chairman
System Board of Adjustment 517

There appeared on behalf of the Company:

M. D. Failes	- Counsel, Toronto
D. J. Bennett	- Labour Relations Officer, CanPar, Toronto
C. Hooton	- Operation Supervisor, Saint John
P. Kendrick	- Regional Manager, Atlantic Canada, Dartmouth

And on behalf of the Union:

L. Chahley	- Counsel, Toronto
J. Crabb	- Secretary/Treasurer, Toronto
M. Gauthier	- Vice-General Chairman, Montreal
F. Bourdage	- Grievor

AWARD OF THE ARBITRATOR

The Company raises a preliminary issue with respect to the arbitrability of the grievance, asserting that it was not processed in a timely manner. The Union does not dispute that it did fail to meet the time limits in processing the grievance. It maintains, however, that a certain degree of laxity on the part of the Company with respect to time limits lulled the Union into a belief that time limits would not be strictly enforced. On this basis, in an argument analogous to estoppel, it submits that the Company should not be able to rely on the time limits within the Collective Agreement.

As a matter of principle, if it could be established that the Company engaged in a clear course of conduct or made verbal representations to the effect that it would not enforce time limits, and that the Union detrimentally relied on such representations, the Union's position might succeed. However, such a conclusion could only be founded on clear and cogent evidence. In this instance the Union was unable to call any direct evidence. At best, through the tabling of documents and the representations of its counsel, it maintains that there were three occasions in the past when the Union missed a time limit in the course of processing a grievance and the Company raised no objection.

Even assuming the truth of the Union's assertion of fact, in the Arbitrator's view the evidence would fall well short of establishing the conditions for an estoppel. The parties to a collective agreement make decisions, almost daily, with respect to the interpretation and enforcement of a myriad of rights. On occasion they may decide to forego the assertion of their rights in a given circumstance or, alternatively, they may simply fail to assert a right by error or inadvertence. As a general matter, the failure to assert a right in a few isolated instances does not mean that the right is forfeited in a general sense. To conclude otherwise would be extremely unsettling to the day to day administration of collective agreements by unions and employers alike.

In the instant case the Arbitrator cannot conclude that the Company's failure, whether by ignorance or design, to rely on strict time

limits in some three isolated instances is in any way tantamount to a general waiver of the time limits in the Collective Agreement, which both parties agree are mandatory. In this case the material filed, even if proved, could not form the basis for an estoppel or a conclusion that the Company had otherwise generally waived its right to enforce the time limits within the Collective Agreement.

For these reasons the grievance must be dismissed.

September 16, 1988 (SGD) MICHEL G. PICHER
ARBITRATOR