

IN THE MATTER OF AN ARBITRATION

CONCERNING

BC RAIL LTD.

AND

CAW, LOCAL 110

DISPUTE:

The calculation of payments to be made under Article 12 – Held Away From Home Terminal.

JOINT STATEMENT OF ISSUE:

Prior to April, 2002, calculations of time for the purposes of held away from home terminal payment was made continuously from the initial arrival at the away from home terminal until the final departure.

In this period between arrival and eventual departure, when crews at the away from home terminal were required to perform turnaround service, the time paid in that turnaround service was deducted from the continuous calculation of time being held at the away from home terminal.

After April, 2002, employees who were required to perform turnaround service at the away from home terminal had their held away from home terminal time calculated in two segments; first, from the time of the initial arrival at the away from home terminal until called for the turnaround service and second, from the time the turnaround service was complete until the next call to service.

The Union contends that the method of calculation made prior to April, 2002 is the correct means for employees who perform turnaround service from the away from home terminal.

The Union contends that the collective agreement language on its face, and the past practice of the parties supports its position.

The Company submits that the method of calculations made prior to April, 2002 for employees who perform turnaround service is inconsistent with the wording and intent of Article 12.

The Company further contends that the misapplication of Article 12 prior to April, 2002 resulted from administrative error, and that it is entitled to correct this administrative error without giving rise to an estoppel argument.

The Company has declined claims which have been held in abeyance.

FOR THE UNION:

**Robert Samson
General Chairperson
CAW, Local 110**

FOR THE RAILWAY:

**D.A. Lypka
Vice President
Operations**

ARBITRATOR:

Christopher Sullivan

COUNSEL:

Michael Keiran for
the Company

Robert Samson for
the Union

DATE AND PLACE OF HEARING:

May 28, 2003
Vancouver, BC

DATE OF AWARD:

July 28, 2003

The parties agree I have jurisdiction, as arbitrator pursuant to the terms of their Collective Agreement, to hear and determine the matter in dispute. The case involves a policy grievance filed by the Union alleging the Company has, since April, 2002, improperly calculated payments pursuant to Article 12 – Held Away From Home Terminal. The outcome of this Award will affect a number of individual wage claims.

Article 12 of the Collective Agreement reads, in part, as follows:

ARTICLE 12
HELD AWAY FROM HOME TERMINAL

- 12.1 Engineers in freight service held at other than home terminal longer than eleven (11) hours without being called for duty will be paid on the hourly basis for all time held in excess of eleven (11) hours. Time will be computed from the time pay ceases on the incoming trip until the time pay commences on the next trip.
- 12.2 Should an engineer be called for service or ordered to deadhead after pay begins, held away from home terminal time shall cease at the time pay begins for such service or deadheading.
- 12.3 Payments accruing under this Article 12 shall be paid for separate and apart from pay to the subsequent service or deadheading and time paid for under Article 12 will not be considered as Time on Duty in qualifying for time and on-half in other services.
- 12.4 When rest period in excess of eight (8) hours is booked, the eleven (11) hour period before pay commences will be increased correspondingly. For example, if ten (10) hours rest is booked, pay for time held will commence after expiration of thirteen (13) hours.

A Letter of Understanding between the parties, regarding coal freight service to Quintette and Teck mines, replaces the eleven hours referred to in Article 12.1 with ten hours.

The evidence reveals that since the inception of coal service in the 1980's, the usual pattern of crew handling rarely involved a turnaround trip between the original arrival and final departure times away from one's home terminal. Between this time and April 1, 1993 entitlement under Article 12 was calculated manually with all time from the off duty arrival time until the on duty call time being included in accordance with Article

12.1. Appropriate adjustments for personal rest were deducted in accordance with Article 12.4.

On April 1, 1993 the manual calculations were incorporated into the Company's pay operations computer system. Any consideration of a turnaround trip before one's original arrival and final departure time was not programmed into the system, and employees had their away from home turnaround payments automatically calculated for the entire period they were off duty at the away from home terminal.

By October of 2000, circumstances in the Company's coal service had significantly changed. By mid-2000 coal production had diminished from two or three coal trains per day to two or three coal trains per week. In October of 2000 the Company sought to reduce its fiscal costs in accordance with the following:

...The Company determined that greater efficiencies could be obtained by eliminating the pusher assignments, and have the through freight crews handle their own tonnage with their road engines. These road crews henceforth would arrive at Tumbler Ridge and go off duty in the usual manner, during which time the loading of their train would commence. At a point in time when approximately half of the train was loaded, they would be called to perform "turnaround service", take the available tonnage to the top of the controlling grade to the Table siding, return to Tumbler Ridge and again go off duty. When the remainder of their train was loaded they would again be called, would transport this tonnage to Table, pick up the tonnage already at Table and proceed through to Prince George.

The Company takes the position that in October of 2000 the computer system had not been reprogrammed to recognize this described turnaround service as a "next outgoing trip" contemplated by Article 12.1. The Company did not notice held away from home terminal time was being calculated on a continuous basis until December of

2001, when the Manager of Crew Administration reviewed the previous year's budget report. Shortly thereafter, the Company advised the affected Unions of what it states to be an error and changed its payment calculation. The first grievance regarding the matter was filed by Locomotive Engineer David Veniot on March 20, 2002.

Before this board the parties agree the practice in dispute has been consistently in effect since October of 2000. The evidence also reveals, however, a number of incidents pre-dated that time. By letter dated February 26, 1998 the Company's Crew Office Supervisor set out Locomotive Engineer Brian Pynn's entitlement to Held Away From Home Terminal pay in a manner consistent with the established practice.

The Company's letter to Mr. Pynn addressed a situation whereby the Locomotive Engineer was called to take a train to Quintette at Tumbler Ridge. He arrived at the away-from-home terminal and went off duty at 16:30 February 14, 1998. He performed two short turnaround trips – a turn and a push – and was later called for his trip to return to his home terminal at 15:00 February 15, 1998. In the Company's letter to Mr. Pynn, no deduction was made for periods between outgoing trips. Only one ten hour qualification period was applied. The letter stated, in part:

You are entitled to Held Away From Home Terminal payment from 02:30, February 15th/98 until 15:00, February 15th/98, for a total of 12.5 hours.

Decision

Having carefully considered the facts and the parties' respective submissions I find the past practice cannot merely be attributable to an administrative error that can be unilaterally concluded without any notice. While the practice may have originated as a clerical error, it was clearly represented by the Company as a conscious payment practice in relation to a relatively infrequent situation, when one is held away from home terminal.

The Company's 1998 letter to Mr. Pynn appears to be a thought out response declining a particular wage claim involving the Held Away From Home Terminal language.

The more relevant issue before this Board pertains to the clarity of Article 12, the parties' mutual intentions, and the purpose that the past practice serves. Is the language unclear or ambiguous, and does the practice disclose how the parties themselves intended it to be interpreted? Or, is the meaning of the language clear, with the practice forming the basis of an estoppel, as a representation to the effect one party will not be relying on certain legal rights?

I am satisfied Article 12 is clear and unambiguous in relation to the matter in dispute, and that the past practice serves to establish an estoppel. The practice cannot be used to shed light on the parties' mutual intentions. As made clear by the title to the provision, Article 12 deals with situations whereby an employee is held away from his or her home terminal, and the provision sets out the circumstances where additional payment obligations arise. The first sentence of Article 12.1 generally sets out a penalty/benefit to be paid to employees held away from home terminal for a certain length of time. The second sentence unequivocally sets out the particular time to be computed for the additional pay: "Time will be computed from the time pay ceases on the incoming trip until the time commences on the next outgoing trip". On its face, this language provides for a renewed calculation for each separate time period between outgoing trips, which may not necessarily return to home terminal. The term "next outgoing trip" contemplates more than a single homeward bound trip. Article 12.2 confirms the cessation of the penalty/benefit when an employee is called for "service", a term which clearly covers the turnaround work being performed by the individual grievors.

It should be pointed out that Article 25.6 serves as an overriding restriction that prevents the Company from holding an employee to make more than one trip in a turnaround service. That provision reads:

ARTICLE 25 - HANDLING OF MEN

...

25.6 Engineer will not be held away from home terminal to make more than one round trip in turn-around service, or for more than one full day in short run work.

The doctrine of estoppel serves as an equitable measure to prevent a party to an agreement from relying on its strict legal rights in certain circumstances where it would be inequitable to do so. An estoppel begins with a representation, by words or conduct (including silence), to the effect one party will not be relying upon its strict contractual rights. The other party then relies upon the representation to its detriment by, for example, not having sought to renegotiate a particular matter in light of the prevailing practice.

I accept these requisite elements have been met in the present case and that the established practice forms the basis of an estoppel. The practice, as described by the Company's 1998 letter to Mr. Pynn, constitutes a representation which the Union has detrimentally relied upon by not seeking to renegotiate Collective Agreement language.

The next issue raised by the parties is whether the Company's September 17, 2002 Notice of Discontinuation of Past Practice constituted effective notice to terminate the practice. On this matter the Union argues it cannot be required to seek renegotiation of a benefit it claimed it already possessed. In other words, the Company's notice cannot be effective until after this arbitration, when the parties' respective rights have been determined. The Union adds it is too late to submit the matter for renegotiation since the

parties have been engaged in collective bargaining for several months under a statutory freeze.

In City of London and CUPE, Local 101, (1990) 11 L.A.C. (4th) 319, Arbitrator R.J. Roberts considered a situation whereby the Union did not seek to negotiate a benefit that it claimed it already possessed, and was pursuing to arbitration. The arbitrator held:

So long as they can make out a *prima facie* case for their conflicting interpretations of contractual language, both sides are entitled to test them at arbitration before suffering the consequences of having one interpretation or the other rejected. The termination of an estoppel, whose function, as here, is merely to preserve the status quo ante, does not even arise for consideration until then. Similar observations were made in Commissioner of Northwest Territories and Northwest Territories Public Service Association, (1986) 24 L.A.C. (3d) 132 (Hope).

(at 324)

In City of London the arbitrator effectively found there was some basis in the collective agreement language as a whole to support the Union's interpretation and, therefore, notice to terminate the practice was not effective until after adjudication.

The circumstances giving rise to the present case, including the clarity of collective agreement language, are clearly distinguishable from those before the arbitrator in City of London, and warrant a different result. I find that, in the present case, the Union has not made out a *prima facie* case to support its position on the collective agreement language to the extent the language is clear and unambiguous, both patently and latently, and requires no aid to interpretation in relation to the aggrieved circumstances. As noted, the second sentence of Article 12.1 specifically addresses the time computation for the penalty/benefit, and places no limitation on the term "the next

outgoing trip”. The provision, together with Article 12.2, clearly contemplates more than one qualification period if there is more than one trip, subject to the bargained restriction contained in Article 25.6. Unlike the situation in City of London, there are no collective agreement provisions that draw into question the meaning of the relevant article in respect to the factual circumstances at hand.

The Company’s September 17, 2002 Notice of Termination of Past Practice is, therefore, effective. To the extent the practice cannot be concluded without appropriate notice, which I find was served on September 17, 2002, the grievance is allowed in part. I shall remain seized with jurisdiction to resolve any dispute that may arise out of the implementation of this decision.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 28th day of July, 2003.

Christopher Sullivan

Christopher Sullivan