

IN THE MATTER OF AN ARBITRATION

CONCERNING

BC RAIL LTD.

AND

CAW, LOCAL 110

DISPUTE:

The interpretation and application of Article 17.1.8.

JOINT STATEMENT OF ISSUE:

Employees who have accepted promotion to official capacities on BC Rail or with the CAW have previously accumulated seniority within the bargaining unit, provided they pay union dues while working outside of it.

The Union contends that the wording of Article 17.1.8 does not support the accumulation of seniority within the bargaining unit of enginemen accepting promotions in official capacity on BC Rail or with CAW. The Union contends that the accumulation of seniority for these employees has only been permitted through a past practice which is contrary to the wording of the collective agreement.

The Company submits that the language of Article 17.1.8 is ambiguous. The Company further submits that proper interpretation and application of this Article, as it applies to management personnel, may be discovered in past practice, our negotiating history, and through a contextual reading of the collective agreement.

The Company has declined the Union grievance.

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 grievance, filed by the Union, alleging the Company has violated Article 17.1.8, regarding seniority of bargaining unit members accepting promotions with the Company or the Union.

Article 17.1.8 provides:

17.1.8

Enginemen accepting promotion in official capacity on BC Rail or with the Canadian Union of Transportation Employees (now CAW) will retain seniority on the enginemen's seniority list provided they pay union dues.

The evidence reveals that, since at least 1968, the Collective Agreement has contained a provision substantively similar, or identical, to Article 17.1.8 in its present form regarding retention of Union seniority after promotion outside of the bargaining unit. Since the introduction of such language into the Collective Agreement employees promoted to supervisory positions, who chose to pay Union dues, have been permitted to accumulate seniority. Those who chose not to pay dues forfeited their seniority.

The evidence also discloses that the Union has, in the past, sought to negotiate a limitation on the number of days a promoted employee could retain seniority. In collective bargaining in 1995 the Union proposed to amend Article 17.1.8 to limit the retention of seniority for a specified period of 180 days. Further, at the outset of the current round of collective bargaining, at the end of 2002, the Union proposed:

Any CUTE trade member who occupies any management position(s) with BC Rail will forfeit his/her seniority after 90 accumulated days occupying said position(s).

On November 22, 2002 the Union issued to the Employer a letter containing notification to cancel certain past practices upon the expiration of their Collective Agreement on December 31, 2002. The Union's letter stated, in part:

...(3) 17.1.8; Management personnel holding seniority in CUTE 1 will "retain" their seniority as clearly stated and not accrue seniority as past practices. As of 23:59 December 31st 2002 management will have their seniority retained in years, months and days of engine service.

Decision

The issue before this Board is whether the Union's notification to terminate the practice is effective. Determination of this issue necessarily requires an assessment of the Collective Agreement language and the past practice. If the practice relates to an ambiguous or unclear collective agreement term then it may disclose how the parties themselves intended the term to be interpreted. The evidence extrinsic to the language allows one to construct a consensus that cannot be unilaterally altered.

If, on the other hand, the past practice conflicts with a clear and unambiguous term, it may form the basis of an estoppel, which can be unilaterally concluded. Where one party to a contract, by words or conduct (including silence), represents to another that it will not be relying upon its strict legal rights, and the other party detrimentally relies on this representation, it may be inequitable to allow reversion to the strict legal rights, without appropriate notice. The appropriate notice period to terminate a practice which forms an estoppel is often linked to the timing of collective bargaining, to allow for renegotiation.

Having carefully considered the facts and the submissions of the parties I conclude the disputed Collective Agreement term is ambiguous when viewed in context, and that the parties' past practice indicates how the parties intended their written expression of consensus to be interpreted. While the term "retain" generally does not, in itself, connote growth or an addition, it is not always mutually exclusive to the concept of accrual. Where seniority under a collective agreement is defined as a particular date, as it is in Article 17.1.3 of the present agreement, retention of that date may reasonably be construed in a manner which leads to an accumulation of seniority over time. Article 17.1.3 provides:

ARTICLE 17 - SENIORITY AND PROBATIONARY PERIOD

17.1 Seniority

...

17.1.3 The seniority date of the hired engineer shall be the date of the first service as engineer

When Articles 17.1.3 and 17.1.8 are read together a question arises as to the meaning of retained seniority under Article 17.1.8 for employees promoted outside the bargaining unit who continue to pay Union dues. In context, the language is latently

ambiguous and invites consideration of extrinsic evidence as an aid to interpret the parties' intentions.

My conclusion is supported by how the parties themselves have interpreted Article 25.11.1, regarding the retention of "seniority rights" during periods of layoff. That provision reads:

25.11.1

When engineers are laid off on account of reduction in service, they will retain all seniority rights, provided they return to actual service within fifteen (15) days from the date their services are required.

The evidence discloses laid off employees covered by this provision continue to accrue seniority rights, ostensibly based on retaining, or maintaining, the "date of their first service".

Based on the consistent, longstanding practice which has existed since the relevant language was negotiated well over thirty years ago, I am satisfied the parties intended seniority for a promoted employee to accrue as time passed beyond the retained Article 17.1.3 seniority date.

In the circumstances the past practice does not serve to establish an estoppel which can be concluded by the issuance of cancellation notice by the Union. The grievance is, therefore, denied.

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

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