

**British Columbia Rail Ltd. and Canadian of  
Transportation  
Employees, Local No. 1**

IN THE MATTER OF An Arbitration

Between  
BC Rail Ltd. (hereinafter referred to as the "Railway"), and  
Canadian Union of Transportation Employees, Local No. 1  
(hereinafter referred to as the "Union")

(Starlight Dinner Train Arbitration)

[1997] B.C.C.A.A.A. No. 513  
Award no. A-272/97

**British Columbia  
Collective Agreement Arbitration  
H.A. Hope, Q.C., Arbitrator**

Heard: (Vancouver, B.C.) June 23, 1997.  
Award: June 27, 1997.  
(12 pp.)

**Appearances:**

Bob Colquhoun, for the Employer.  
Theo Arsenault, for the Union.

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AWARD

I - The Dispute

¶ 1 The dispute involves a grievance filed by the Union on May 23, 1997. It reads as follows:

Subject: Policy Grievance scheduling of dinner excursion train, May 7,  
1997

CUTE 1, Sub-Local 1 hereby grieves the discontinuance of the practice of scheduling two Enginemen for passenger excursions. The practice of calling two Enginemen for this class of service, has always been recognized by the Railway for years, therefore the Union alleges the Railway is estopped from terminating this practice while in mid-contract. As a remedy, the Union seeks an order from the arbitrator, making whole, all effected Union members for lost wages. (emphasis added)

¶ 2 The position of the Railway was that the practice with respect to passenger excursion trains was irrelevant. Its position was that the facts did not support an application of the doctrine of estoppel in the terms alleged by the Union.

## II - The Facts

¶ 3 On March 12, 1997 the vice-president of rail support services for the Railway, J.C. Trainor, wrote to John Ruddell, the general chairman of the Union, with respect to the proposal of the Railway to introduce a service described as the "BC Rail Dinner Train". That letter followed a meeting between the senior officers of the Railway and the senior officers of the two affected unions, being this Union and the UTU, Locals 1778 and 1923. The proposals of the Railway was summarized in the last paragraph of its letter, as follows:

I am respectfully requesting the operating crew for this particular train be one Engineman and one Conductor. Hopefully this answers your concerns, and I am anticipating a positive and early response.

¶ 4 The response of the Union was expressed in a letter sent by Mr. Ruddell to Mr. Trainor on April 21, 1997. His position on behalf of the Union was "that the operating crew on the locomotive should be two locomotive engineers". The reasons listed in support of that position were "the safety of the travelling public and ... a more productive locomotive crew". The reply of the Railway came in a letter from Mr. Trainor to Mr. Ruddell dated May 9, 1997 in which he advised that the decision of the Railway was that manning would consist of an engineer and a conductor. The relevant part of the letter reads as follows:

Thank you for your letter of April 21, 1997 which advocated the use of two Locomotive Engineers in the operating cab of the "Dinner Train" locomotive. The manning provision for the "Dinner Train" service is outlined in Section 142(2) of the Railway Act. "When travelling between stations, all trains except rail diesel cars must have a second person in the operating cab". Our position is that a UTU member of the crew is fully qualified to be the "second person" referred to in the Railway Act. It would be an unnecessary cost to add an additional member to this train

crew.

¶ 5 That letter gave rise to the grievance dated May 23, 1997. The Union, as indicated, alleged that the facts estopped the Railway from operating dinner trains with less than two enginemen. The grievance was the first occasion upon which the Union raised the issue of the practice of the parties in the manning of passenger excursion trains as a basis for estopping the Railway from manning dinner train locomotives with one engineman and a conductor. The Railway's response was that the dinner train was not an excursion train.

¶ 6 The parties were in essential agreement with respect to the facts relating to passenger excursion trains and the "Starlight Dinner Train". In particular, it was agreed between them that the Railway has operated excursion trains for a number of years and continues to operate them. The trains are operated in the nature of a charter service in the sense that a group charters an excursion train for a specified number of persons at a negotiated price. The consistent practice has been to man locomotives pulling excursion trains with two enginemen.

¶ 7 Prior to November of 1989 that manning was pursuant to s. 142(1) of the regulations passed pursuant to the Railway Act. However, on November 7, 1989, the Railway received an interpretation of the regulation by F.H. Christensen, the Provincial Government's chief inspecting engineer. He wrote that the phrase, "two members of an engine crew, one of which shall be a certified locomotive engineer", did not require two enginemen, it could include one engineman and "a person who is not a locomotive engineer as the second person of an engine crew". Specifically, Mr. Christensen's interpretation contemplated that the second person "could come from any craft (such as a trainman or locomotive mechanic)".

¶ 8 That interpretation led the Railway to circulate all crew dispatchers on November 29, 1989 with a memorandum advising that, "it is no longer necessary to use two locomotive enginemen when freight units are used in conjunction with passenger service". The Railway agreed in this dispute that the interpretation applied with equal force to passenger service involving excursion trains and that, under the regulations, it had been in a position as of that date to replace the second engineman on excursion trains with a crew member from another trade. However, the Railway did not take that action and continued to crew locomotives pulling excursion trains with two enginemen.

¶ 9 The issue arose again in September of 1994 when Mr. Christensen advised interested parties, including the Union, that the Provincial Government proposed to amend the regulations so as to accommodate "the operation of caboosless, conductor only trains on those provincial common carrier railways that requested authority to do so". The parties were invited to make representations with respect to the proposed changes in the regulations. The result of those representations was an amendment to s. 142 that provided, inter alia, that diesel locomotives operating in any service were required to have a certified locomotive engineer in the cab together with "a second person located in the operating cab".

¶ 10 That change confirmed, in effect, what the prior interpretation of Mr. Christensen had contemplated. That is, it was made clear that it was open to the Railway from the point of view of the regulatory authority to cease its practice of manning locomotives pulling excursion trains with two enginemen. Once again, however, the Railway continued its practice of manning excursion trains with two enginemen. That practice persisted through bargaining for the current collective agreement between the member unions of the Council of Trade Unions on BC Rail and the Railway. Bargaining was concluded on May 9, 1996. The term of the agreement was from January 1, 1996 to December 31, 1997. In short, the 1996-97 collective agreement was the agreement in force when this dispute arose.

¶ 11 During bargaining for the 1996-97 agreement the Railway gave notice to the member unions of its intention to cancel certain past practices. For example, the Railway gave notice to this Union of its intention to cease an existing practice of a paying enginemen a 90-minute bonus at the end of each tour on the Takla run. During bargaining the Railway withdrew those notices. That withdrawal became the subject of an arbitration between the Railway and the Council when the Railway sought to unilaterally change various practices despite its withdrawal of its notice during bargaining. The Council position was that the Railway was estopped from changing its practices until it had given notice that afforded the unions an opportunity to pursue the issue in collective bargaining.

¶ 12 The dispute was addressed in B.C. Rail Ltd. and The Council of Unions on B.C. Rail, June 11, 1997 (Albertini). The arbitrator concluded in that case that the Railway was estopped from unilaterally changing "the current practices" for the duration of the 1996-97 collective agreement. In that bargaining the practice of manning locomotives pulling excursion trains with two enginemen was not addressed. However the position of the Union was that the same reasoning applied to that practice and that the Railway was estopped from unilaterally changing that practice, not only in light of the particular circumstances, but also because it was bound by the decision of Mr. Albertini.

¶ 13 In that same vein, the Union noted that the Railway, in effect, conceded that it was not at liberty to change its practice with respect to excursion trains until the Union had been given an opportunity to address the issue in collective bargaining. The facts were that the Railway had initially proposed to change its practice on excursion trains. However, on June 20, 1997, approximately one month after the grievance was filed in this dispute, the Railway elected to continue the practice. On that date the Railway issued the following memorandum:

Subject: Passenger charters pulled by diesel units.

All concerned:

The past practice of calling two engineers for passenger charters pulled by diesel units will remain in effect. This practice will cease upon the

expiration of the current C.U.T.E. Local No. 1 collective agreement.

¶ 14 The question arising, first as an issue of fact and then as an issue of interpretation, is whether what the Railway calls the "Dinner Train" and what the Union calls the "Dinner Excursion Train" should be seen as governed by that practice. In short, is the "Dinner Train" a form of excursion train that is caught by the existing practice, or is it, as asserted by the Railway, a new form of passenger service that is unencumbered by existing practices? Excursion trains were and are operated ad hoc approximately five times each tourist season. They are charter trains in the sense that groups negotiate a price for an excursion to and from a particular location or in transit from one location to another. Some excursion trains are dinner trains in the sense that a meal is catered.

¶ 15 The dinner train differs in the sense that it is a regular service sold on a ticket basis to the general public at a fixed price. When the Railway made the decision to initiate the dinner train service, it also initiated a new marketing strategy and made a \$3 million purchase of nine passenger cars suitable for the service. The marketing strategy was to promote the sale of dinner train tickets to the general public at a fixed ticket price rather than a charter rate to groups. It is, in effect, a restaurant train that travels to Porteau Cove from North Vancouver and then returns. Porteau Cove is located in the vicinity of Squamish and the route is considered one of the more scenic routes available on the Railway.

¶ 16 To facilitate the service, the Railway paved a parking lot in North Vancouver and at Porteau Cove. In addition, a gift shop was built at Porteau Cove and arrangements were made to joint venture the food service with a hotel chain that could provide trained staff. The general concept was described in the March 12, 1997 letter sent by Mr. Trainor to the unions involved. At that time it was contemplated that the train would run a staggered schedule of two days per week in May, three days per week in June, four to five days per week in July and August, three to four days per week in September and two days per week in October. Service began on June 6, 1997 and is currently operated five days per week.

### III - Position of the Parties

¶ 17 The position of the Union was that the dinner train is an excursion train which falls into the category of passenger service, being an aspect of road service within the meaning of Article 1 of the collective agreement. As such, said the Union, the Railway is bound by its existing practice with respect to the operation of excursion trains. The position of the Railway was that excursion trains are ad hoc in the sense that, unlike dinner trains, they are unscheduled. To accommodate the sporadic nature of the service, excursion trains are manned from the spare board, said the Railway, whereas the dinner train is manned by bulletin. The Railway said that the system of marketing, the nature of the passengers, and the other factors enumerated, serve to take the dinner train outside the scope of the practice associated with excursion trains.

### IV - Decision

¶ 18 The parties did not disagree on the principles that define the doctrine of estoppel and govern its application in collective agreement relationships. The Railway cited and relied on decisions of the Canadian Railway Office of Arbitration (CROA) and a series of decisions that mark the evolution of the principle of estoppel as it evolved in the law of the collective agreement in the 1980's. The Union relied on Dover Corporation (Canada) Ltd.; Montgomery Kone Elevator Co. Ltd.; and OTIS Canada Inc. and International Union of Elevator Constructors, Local Union No. 82, May 24, 1996, unreported (Hall). In that decision the arbitrator reflected the contemporary arbitral view of the doctrine and its application in a collective agreement regime. However, as stated, the parties did not differ on the governing principles, they disagreed on the application of the principles to the particular facts.

¶ 19 It is convenient in reviewing the principles to refer to the decision in Dover Corporation et al. The decision involved an assertion by the union that the employer was estopped from discontinuing "certain past practices" which had existed prior to bargaining for a 1994-99 renewal of their collective agreement. The discontinuance came following the renewal of the agreement. The practices in question involved the payment of double time and the payment of bus fares to employees travelling to work sites. The union had sought during bargaining to have the practice relating to double time incorporated into the collective agreement and its proposal was rejected. Mr. Hall concluded that disavowing the practice during bargaining deprived the union of its basis for arguing that the practice amounted to a representation that the employer would continue it.

¶ 20 By contrast, the practice with respect to bus fares was not raised in bargaining and the employer did not give notice the practice would cease, nor did it seek amendments to the travel time provision which would have discontinued the practice. On those facts, Mr. Hall concluded that the employer was estopped from discontinuing the bus fare practice. In the course of reaching that conclusion he reviewed the legal principles relating to the doctrine of estoppel and its application in defence of a work practice. In particular, Mr. Hall cited and relied on *Re Commissioner of the Northwest Territories and Northwest Territories Public Service Association* (1986), [24 L.A.C. \(3d\) 132](#) (Hope), in which the arbitrator wrote as follows on p. 139:

The nature of the plea and its application in an arbitration was considered at some length in both the casual employees arbitration and the duty travel pay arbitration. In those decisions I made reference to the decision of the arbitrator in *Re Lake Ontario Cement Ltd. and United Cement, Lime & Gypsum Workers' Int'l Union, Local 387* (1984), [13 L.A.C. \(3d\) 1](#) (M.G. Picher). That decision contains a convenient summary of the ingredients necessary to found a plea of estoppel. It is set forth on p. 7 as follows:

The elements of estoppel are:

- (1) a promise or assurance through words or conduct,
- (2) intended to alter the legal relations between the parties,
- (3) relied on or acted upon by the other party, so that it would be prejudicial if the undertaking were revoked.

¶ 21 Here, as stated, the elements relied on by the Union consisted of the practice of the Railway with respect to manning excursion trains. Accepting that the collective agreement does not contain express provisions dealing with the manning of trains, the Union said that the practice nevertheless altered "the legal relations between the parties" in the sense of restricting the right of the Railway to make unilateral changes in the manning of excursion trains, including dinner trains. Finally, the Union submitted that it was entitled to rely on that representation by conduct until such time as it was afforded an opportunity to address the issue in collective bargaining and thus seek to have the practice endorsed in collective agreement language.

¶ 22 It is not necessary to review the authorities in detail in this process. It is sufficient to say that the practice at issue here was not in any sense analogous to the discontinuance of ex gratia benefits and other practices occurring outside the scope and reach of the collective agreement that were at issue in the authorities relied on by the Railway. The operation of locomotives is the major task performed by the bargaining unit and issues relating to the manning of locomotives thus relate directly to a principal aspect of the collective agreement.

¶ 23 The Railway has the right under the collective agreement to fix manning levels on locomotives and the first question is whether its practice with respect to excursion trains amounts to a representation by conduct that it will exercise that legal right consistent with its practice. The second question is whether the practice with respect to excursion trains should be seen as having application to dinner trains. On the first question, I am of the view that the practice with respect to excursion trains does constitute a representation binding upon the Railway in the sense contemplated by Mr. Albertini and the arbitral authorities relied on by the Union.

¶ 24 Turning to the second question, being the question of whether dinner trains are the equivalent of excursion trains, it can be addressed in terms of the types of train service contemplated in the collective agreement. Obviously both excursion trains and dinner trains fall within the "passenger" category of road service as defined in Article 1. Further, dinner trains are an excursion service in the sense that they do not function to transport passengers from one point to another. Rather, they function to provide an excursion to Porteau Cove and return during which dinner is available. In that context, it is noteworthy that "excursion" is defined in the Concise Oxford Dictionary, Ninth Edition, as, "a short journey for pleasure with [a] return to the starting point".

¶ 25 To accept the position of the Railway, it would be necessary to conclude that manning practices can be distinguished on the basis of such collateral management

factors as the marketing of a particular service, whether the service is regular or ad hoc, and whether manning is done by bulletin or off the spare board. To test that position, it is useful to consider whether manning practices relating to freight service could be distinguished on the basis of how the service is marketed, what cargo is carried, whether it is a scheduled service and whether manning is by bulletin or off the spare board.

¶ 26 In both cases the question is to be answered on the basis of the essential character of the work performed. In that context, the work on the dinner train is to operate a locomotive on an excursion to Porteau Cove and return with dinner service available. As a species of work, that assignment does not differ in material terms from the operation of any other excursion train. In terms of the work performed by enginemen under the collective agreement, an assignment to operate a regularly scheduled locomotive pulling a dinner excursion train does not differ from an assignment to operate a locomotive pulling any other excursion train. The Railway, having agreed both in practice and in writing to man excursion trains with two enginemen, is bound to extend that commitment to the operation of dinner trains.

¶ 27 In summary, a change in practice that involves the assignment of work to employees in another trade requires notice of the change. It is not an issue of jurisdiction. It is a question of whether the Railway, having represented that locomotives pulling excursion trains will be manned by two enginemen, is estopped from terminating that practice without notice. The Railway conceded the point with ad hoc excursion trains and is estopped from instituting a different practice on the basis that the dinner train is a different type of excursion train. In the result, the application for a plea of estoppel is granted.