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IN THE MATTER OF AN ARBITRATION

BETWEEN: CANADIAN NATIONAL RAILWAY COMPANY

AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS SYSTEM COUNCIL NO. 11

AND IN THE MATTER OF A GRIEVANCE OF A MATTER RELATING TO THE PRACTICE OF BANKING TIME

SOLE ARBITRATOR: J.F.W. Weatherill

A hearing in this matter was held at Montréal on January 24, 2007.

K. Stuebing, for the Union.

C. Gilbert and A.Y. de Montigny, for the Company.

AWARD

The Dispute and Joint Statement of Issue in this matter are as follows:

Dispute

Company decision to cease allowing employees covered under the Signal and Communication Installation umbrella to bank time in exchange of time off during the Christmas holiday period.

Joint Statement of Issue

On February 2, 2005, the Company informed the Union that employees would no longer be allowed to bank time in order to have additional time off during the Christmas Holiday period of 2005 and that it would apply the terms of the collective agreement with respect to overtime.

While acknowledging that collective agreement 11.1 does not contain any provision with respect to banking time, the Union still maintains that the Company was estopped from discontinuing the practice within the S&C installation department. The Union further contends that the Company failed to provide satisfactory reasons for such cancellation.

The Company denies the Union's contentions and declines the Union's request.

It is clear that there has existed a practice of allowing installations employees - employees in the installation division of Signals and Communications to "bank" overtime in order to have additional time off during the Christmas holiday period, additional, that is, to the Christmas and other rest days which the collective agreement provides in respect of that period. This is particularly important in those cases, and there are many of them, where employees work a considerable distance from their homes, and are required to live away from home during their work periods. This is accommodated to some extent by arranging work schedules of four days on/ three days off, or in some cases eight days on/three days off, but even with arrangements such as these, there is no doubt that it is a benefit to employees in these circumstances to be able to bank overtime and have additional time off at the Christmas season. This arrangement did not, in the past, cause significant

difficulty for the company, and reflected a reduced workload and more difficult working conditions in the winter season. As well, the union provided a "volunteer list" of employees available to respond to calls for installation work during the holiday period, should the need arise.

The practice has varied on different Regions. In the Western Division, following a substantial reduction in the work force, it has not been followed since 1982, and has since been discontinued in certain other areas. No grievances appear to have been filed in those cases. In late December, 2004, employees apparently on the "volunteer list" were very slow to respond to calls urgently required to be done in the Northern Ontario Zone. This may have been one of the considerations that led the company to announce, in February, 2005, that it would no longer allow employees to bank time in order to have extra time in the Christmas season. As well, the company cited changes in technology and the scheduling of operations which allowed the work of these employees and other to continue during this period, although it has established minimum availability requirements which still would leave some employees with the choice of requesting vacation or work in the Christmas period.

The practice of allowing the banking of time has existed on the Eastern regions for some fifty years. It does not appear from the material before me, however, that the practice was in some way automatic: in recent years at least the company has made a decision each year, in late October or early November, as to the number of hours to be banked. (This evidence was received subject to an objection by the union; that objection will be dealt with below, as well as an objection by the company to reference being made to certain other material.) There is no material before me relating to any discussions between the parties with respect to the banking of time in any year, although the company's internal communications indicate that employees would have an option whether or not to bank time, and that supervisors were to make "suitable arrangements" with their staff.

At the hearing of this matter, the union (which had given the company some two weeks' notice of its intention to do so) referred to certain articles of the collective agreement which may be

said to refer, either implicitly or explicitly, to banking time. The company objected to the introduction of such evidence, which appears to contradict the words in the joint statement of issue: "that collective agreement 11.1 does not contain any provision with respect to banking time". Article 13.19 of the collective agreement contemplates that the parties shall jointly submit a joint statement of issue, although it also contemplates ex parte statements where the parties cannot agree upon a joint statement. There is no language which would limit the parties from presenting material going beyond the joint statement. In the instant case the union seeks to refer to certain provisions in the collective agreement. That document is of course properly and necessarily before me, as a foundation of arbitral jurisdiction. To accept the company's objection that material provisions of the collective agreement cannot be referred to because their existence is denied in the joint statement would have the effect of amending the collective agreement itself. That is something which the parties may do, but it does not appear that that is what they sought to do in this case; it would take very clear language to achieve such a result.

It would appear that the company, at or about the time it advised the union it would no longer make arrangements for banking time, advised the union that the matter was not dealt with in the collective agreement. The union appears, inexplicably, to have accepted that, but subsequently realized that that was mistaken, and now seeks to refer to the material provisions of the collective agreement in argument. On this point, I am in agreement with what is said by arbitrator Picher in SHP Case 373:

> *There is nothing, however, in the collective agreement to support the suggestion that when one party has made an error, in good faith, in the execution of a joint statement of facts, that it cannot seek correction of that error prior to or at the commencement of the arbitration hearing. While the joint statement of issue and joint statement of facts are a procedural device developed by the parties to expedite the hearing of a grievance, they are not intended to be so rigidly applied as to defeat the substantive rights of either*

> *party by a technical irregularity. A board of arbitration constituted under the Canada Labour Code is, subject to the terms of the collective agreement, charged with following a fair and liberal procedure which will allow the parties the fullest opportunity to explore the substance of their claim with respect to the alleged violation of the terms of a collective agreement. Absent clear language in a collective agreement to the contrary, undue rigidity in the interpretation or application of grievance documents is to be avoided.*

The union, as noted above, objected to the reception of certain internal company documents showing, over a number of years, that the company did indeed take a decision with respect to arrangements for banking time in the fall of each year. While the union was not a party to this correspondence, it is admissible as showing what procedures the company followed internally, although it does not go to any interactions there may have been between the parties. It does show that company officers were expected to make arrangements in respect of banking with their employees in each of those years. Certain other documents, submitted by the union, show communications to employees advising how and what time was to be banked in a particular year.

There are, in fact, two provisions in the collective agreement which deal, expressly or otherwise, with the matter of banking time. The first of these is article 19.3(d), which is as follows:

> *19.3 In order to qualify for pay for any one of the holidays specified in Article 19.1, an employee*

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> *(d) When S & C gangs, otherwise continuously employed, are closed down for Christmas and New Year's holidays to allow employees to return to their homes, and where employees do affected are, by mutual arrangement and as a consequence of such close-down, required by the Company to work additional days over and above their normal work week prior to such close down, the additional days so worked will be*

> *recognized as shifts or tours of duty for which the employee is entitled to wages in the application of Clause (c). Where such close-down occurs and the Company does not require the employees to work additional days as a consequence thereof, the number of working days in the period of close-down will be credited in the application of clause (c).*

Although it may be taken to confirm that there has been a practice, this is not a clause which provides that there shall be banking time, but simply refers to a modification of the effect of clause (c), which requires a certain amount of work to be performed to entitle employees to holiday pay. The most that can be said, in my view, is that article 19.3(d) contemplates the possibility of a system of banking days and deals with an aspect of the system when such days are arranged.

Article 5.7(b) of the collective agreement is as follows:

> *An S & C Testman, if required to work in excess of eight (8) hours on a regular work day or to work on a rest day, shall be compensated in accordance with Article 6 of this Agreement, except that present understandings of the accumulation of "bank time" will continue in effect.*

Article 6 of the collective agreement deals with overtime and calls. Article 5.7(b), again, while contemplating that there may be "bank time" (at least for some employees), does not require it. Rather, its effect is that where bank time is arranged, the extra time worked prior to Christmas, to be banked for the holiday, will be paid for at straight time, rather than at overtime, which would otherwise have been the case.

While the parties were in error in stating, in the joint statement, that the collective agreement contained no provision "with respect to banking time", and while it is, as I have found, appropriate that this error be corrected, it remains that the collective agreement contains no provision calling for - as opposed to contemplating the possibility of - bank time. The clauses referred to do, as I have

said, support the existence of a practice, with respect to which there is really no doubt, but they do not indicate that the company is bound to continue it. The company would, accordingly, not be in violation of the collective agreement in bringing an end to the practice.

The essential argument in the matter, of course, is whether the company is bound by the practice which it has in fact followed for many years, and in particular whether it is estopped from continuing that practice. The elements of estoppel are clearly set out in *Brown and Beatty, Canadian Labour Arbitration,* (4th ed.) at 2:2211:

> - - *a clear and unequivocal representation, particularly where the representation occurs in the context of bargaining; which may be made by words or conduct; or in some circumstances it may result from silence or acquiescence; intended to be relied on by the party to whom it was directed; although that intention may be inferred from what reasonably should have been understood; some reliance in the form of some action or inaction; and detriment resulting therefrom.*

In the instant case, there was no representation by words that the practice of banking time would continue. There was certainly no representation "in the context of bargaining" - indeed, as will be noted below, the contrary appears to be the case. The strength of the union's case is in the length of time the practice has continued - in the east. Its weaknesses are three: the fact of annual decisions, although these might perhaps have been taken by employees as merely announcements of timing or of the number of shifts to be banked; the fact of the discontinuance of the practice on another region (best considered as an assertion that the annual decision was within the company's discretion, not as a "representation" that the system would continue in the east, although not in the west); and (going to the matter of detrimental reliance), that the union had sought to negotiate a provision relating to banking time in the negotiations leading to the present agreement.

On October 17, 2003, the Senior System General Chairman of the union wrote the company's Vice President Labour Relations setting out a list of demands relating to changes to be negotiated in the collective agreement. These included the following:

Add new article 6.5; "Upon agreement between the employee and supervisor, an employee may elect to receive time off in lieu of payment for overtime worked, at the rate of 1 ½ hours off for very overtime hour worked. An employee may accumulate up to a maximum of five working days (40 hours), which may be taken off at a time to be agreed upon by the supervisor. If not taken, they will be paid out after four months."

Article 6, as noted above, deals with overtime and calls. While the proposed article deals expressly with overtime, and while the union's evidence, which I accept, is that its demand was made for the benefit of maintainers, not installers, its effect, as it reads, would nevertheless be to create a form of banking time, although not one specific to the Christmas season, nor one specific to the Signals and Communications employees affected by the present case. It was not agreed to by the company, and does not appear in the memorandum of Settlement made on March 24, 2005.

It was argued for the union that if the company did seek to amend its practice, it had an onus to provide an opportunity to bargain. It is clear, however, as the demand just cited shows, that the union had, and exercised, an opportunity to bargain, and put forward a request which would, in its effect, have encompassed the benefit it now seeks. The company's announcement, in February, 2005, that it would not arrange for banking time in 2005, was made prior to the memorandum of settlement of March 24 of that year. In my view, even if the fact of the longstanding practice could be considered to be a representation that the practice would continue, it cannot properly be said that the union relied on that practice to its detriment - it was not deprived of a timely opportunity to bargain in respect of this benefit.

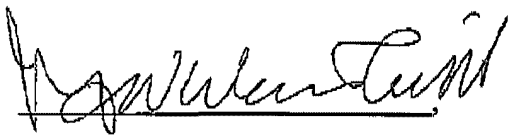
In giving the judgment of the Court in *C.N.R. v. Beatty* (1981), 128 D.L.R. (3d) 236, Osler. J. stated at p. 245 that, "to permit the unilateral alteration of the practice - - during the term of the collective agreement - - would be to render an injustice to the employees and the union ". In the instant case, although it may be doubted whether there was a "clear and unequivocal representation" that the practice would continue, I think it cannot properly be said that the union had "lost the

opportunity to negotiate a change in the terms of the agreement to embody the practice in express contract language", as arbitrator MacDowell put it in the *Beatrice Foods* case, (1994) 44 L.A.C. 59, at p. 66, referring to the *C.N.R.* case, noted above. In the instant case, the union was advised, almost two months prior to the signing of the memorandum of agreement, that the company would not continue the practice of banking time. It had already put on the table a proposal that, while not intended to deal with that particular issue would, on its terms, have recognized it in the collective agreement. There was no detriment in terms of a lost opportunity to bargain.

Having regard to all of the foregoing, I do not think it can properly be said that the company is estopped from relying on the collective agreement, or from ending its practice in respect of banking time.

Accordingly, the grievance must be dismissed.

DATED AT OTTAWA, this 13th day of February, 2007,



Arbitrator