IN THE MATTER OF AN ARBITRATION INTERIM ORDER

BETWEEN:

THE CANADIAN NATIONAL RAILWAY COMPANY
("the Company")

And

THE UNITED TRANSPORTATION UNION
("the Union")

RE: ARTICLE 84 – TIME LIMITS

ARBITRATOR: Michel G. Picher

APPEARING FOR CANADIAN NATIONAL RAILWAY:

Andre Giroux	– Counsel
Doug Van Cauwenbergh	– Director, Labour Relations
Myron W. Becker	– Director, Labour Relations, CSXT – Operations
J. Torchia	– Senior Manager, Labour Relations
R.A. Bowden	– Manager, Labour Relations
Donald Gagne	– Manager, Labour Relations
Barry Hogan	– Manager, Labour Relations
J. Krawec	– Manager, Labour Relations (Retired)

APPEARING FOR UNITED TRANSPORTATION UNION:

Michael A. Church	– Counsel
Guy Ethier	– General Chairperson
Glenn Gower	– Vice General Chairperson
Ed Page	– Local Chairperson, Local 483
Rex Beatty	– Former General Chairperson
James Robbins	– Former Vice General Chairperson

A hearing in this matter was held in Toronto on July 17, 2008.

AWARD

This grievance concerns the application of the provisions of article 84 of the collective agreement which govern the timeliness of a submission of a grievance to the Canadian Railway Office of Arbitration and Dispute Resolution. By agreement, the parties decided to have this matter heard and determined by the Arbitrator on an expedited and ad-hoc basis.

A conference call was held in advance of the hearing, in relation to a possible intervention on behalf of the United Transportation Union's international office. Its counsel, Mr. Brian Shell, expressed concern during the conference call that the dispute not deal with certain events and the actions of representatives appointed by the UTU's international office after the commencement of a strike by the Union against the Company on February 10, 2007 until such time as General Chairperson Guy Ethier was elected in October of 2007. By agreement between the parties it was undertaken that there would be no evidence or argument concerning the events between those dates. That undertaking was honoured during the course of the hearing and, for the purposes of clarity, nothing in this award touches upon actions of the representatives of the UTU International between the commencement of the strike on February 10, 2007 and the installation into office of Mr. Ethier in October of the same year, or in relation to the timeliness of any grievances within that period.

The time limits in relation to the grievance procedure have been included in the collective agreement since 1929. Those time limits relating to the various steps of the grievance procedure are not here at issue. What is at issue is the time within which a grievance is to be filed for arbitration with the Canadian Railway Office of Arbitration and Dispute Resolution. The provisions of articles 84.3 through 84.5 of the collective agreement bear on this dispute. They read as follows:

> **84.3** A grievance which is not settled at the Vice-President's Step of the grievance procedure may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work.
>
> (Refer to Addendum No. 22)
>
> **84.4** A request for arbitration shall be made within 60 calendar days from the date decision is rendered in writing by the Vice-President by filing written notice thereof with the Canadian Railway office of Arbitration and on the same date a copy of such filed notice will be transmitted to the other party to the grievance.
>
> **NOTE:** In the application of this paragraph upon receipt of a request for arbitration, the Company will meet with the General Chairperson, within 30 calendar days from receipt of such request, to finalize the required Joint Statement of Issue. Failure to comply with the provisions of this paragraph will permit either party to the dispute to progress the dispute to the Canadian Railway Office of Arbitration on an "ex parte basis" pursuant to the provisions of the Memorandum of Agreement governing the Canadian Railway Office of Arbitration.
>
> **Grievances Not Timely**
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> **84.5** Any grievance not progressed by the Union within the prescribed time limits shall be considered settled on the basis of the last decision and shall not

> be subject to further appeal. The settlement of a grievance on this basis will not constitute a precedent or waiver of the contentions of the Union in that case or in respect of other similar claims. Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may, except as provided in paragraph 84.6, be progressed to the next step in the grievance procedure.

The Union maintains that the parties have effectively agreed to waive the provisions of article 84.5, thereby relieving the Union from the obligation of filing grievances to arbitration with the CROA & DR within 60 days of the Company's final decision, as contemplated in article 84.4. It submits that by reason of an arrangement made between the parties, it remains within the discretion of the Union to notify the Company of the time at which it chooses to file a grievance to arbitration. Its representatives submit that that arrangement is essential to avoid a clogging of the arbitration system, based on the "first in, first out" principle utilized by the Arbitration Office, with the only exception being for discharge cases.

The Company submits that no agreement or understanding in the terms asserted by the Union has been made. Its representatives stress that the timely observance of the requirements with respect to filing for arbitration are essential to the Company from the standpoint of knowing, with some clarity, which grievance files need to remain open and having a clear and realistic sense of its pending arbitration burden. The Company's representatives accept that there may well be many circumstances in which an extension of time limits may be

requested and granted to assist the Union with its own administrative concerns. However, they argue that there has never been an agreement or arrangement whereby unilateral control over the flow of grievances filed to arbitration has been remitted into the sole discretion of the Union.

In substantial part the dispute between the parties concerns what was undertaken in relation to the settlement of a specific grievance. According to the Union, discussions between the parties with respect to this issue took place around the hearing of the dismissal case of employee Gerry Coffey, a matter which was scheduled to be heard before the Arbitrator in the office of the CROA & DR on January 11, 2005. Simply put, the recollection of the Union's then General Chairperson Rex Beatty is that the parties met outside the hearing room to deal with the Company's objection as to the timeliness of that grievance. He states that an agreement was then reached whereby the Company not only waived its objection as to the timeliness of the filing of the Coffey grievance to arbitration, but agreed that in all future cases the Company would not assert the 60 day time limit in article 84.4, with respect to the Union's obligation to file for arbitration. Thenceforth, as he recalls it, it was understood that it would be within the discretion of the Union as to when a grievance would be filed to arbitration in the office of the CROA & DR.

The evidence of the Company's then representative, Mr. Myron Becker, is that there was a settlement which involved the waiver of time limits by the

Company as applied to the specific case of Mr. Coffey, however Mr. Becker denies that there was any agreement between the parties beyond the specifics of that case, and that there was certainly no surrendering of the Company's right to insist on the application of the 60 day time limit in article 84.4 in all cases in the future.

As the record indicates, there can be little doubt that as the Coffey case came on for arbitration the parties were in disagreement with the issue of the mandatory time limits for filing to arbitration. At the time the Company took the position that the Coffey grievance was filed to arbitration in an untimely way, and was therefore not arbitrable. That is reflected in a letter sent to Mr. Beatty, signed by Mr. J. Krawec on behalf of Senior Vice President K. Creel on December 6, 2004, which reads as follows:

> Dear Rex,
>
> Have reviewed your letter and proposed Joint Statement of Issue received on 03 December, 2004 in connection with the above.
>
> Please be advised that the Company is unable to agree with your proposed JSI as the grievance is deemed to be time-barred from arbitration for the following reasons.
>
> The historic sequence of events begins with the incident of 28 May, 2004, wherein Mr. Coffey had allegedly directed a Company Officer to "fuck off" during the course of their conversation on the lead at Oakville.
>
> Time limits were maintained for the notice and investigation as per Article 82 of agreement 4.16, 01 and 03 June, 2004, respectively.

> Likewise discipline was assessed within the required 30 days from date of investigation.(Art 82.5) on 25 June, 2004.
>
> A step 3 grievance under Article 84.1 was received on 08 July, 2004 and responded to by the Company by letter dated 05 August, 2004. The Company appreciated your advice of your intent to progress this matter to arbitration by letter of 10 August, 2004 but did not hear further from our office until receiving the JSI on 03 December, 2004.
>
> This time line for filing for arbitration far exceeds any contemplated time limits as provided by Article 84.4 of agreement 4.16 – Grievance procedure. Such notification was required within 60 days from the date of the Company's response at Step 3 – that being prior to 05 October, 2004.
>
> Therefore, the Company is of the position that the grievance is not timely as supported by Article 84.5 of Agreement 4.16 and is "... deemed settled on the basis of the last decision and shall not be subject to further appeal."
>
> For the above reasons, the Company does not accept your letter and proposed Joint Statement of Issue as a valid grievance.
>
> Should you still wish to proceed to arbitration, the Company will file a preliminary objection.

By letter dated December 6, 2004 Mr. Beatty responded to Mr. Krawec in the following terms, in part:

> Dear Jim,
>
> I have this date received and reviewed your letter of December 6th, 2004 with respect to the above noted matter. I make the following initial comments.
>
> It should first be noted that the manner in which the Union has progressed the grievance of Mr. Coffey to Arbitration is consistent with past practices, implied

> agreements and understandings between the parties. To this extent, I remind you of the provisions of Article 85.3 of the Collective Agreement with respect to changing any accepted interpretation of any Article of the Collective Agreement.
>
> Specifically, any change (as suggested in your noted letter) is considered by the Union as a violation of Article 85.3. To this extent (should the Company maintain its position) please consider this a "Policy Grievance" under the provisions of Article 84 of the Collective Agreement. It should also be noted that this position will be argued by the Union should the Company raise any preliminary objection at Arbitration (as noted in your correspondence).
>
> The Union, in addition to the above, will argue that the Company is "estopped" from changing the accepted practice (and interpretation of Article 84.4) with respect to the manner in which the Union progresses its grievances to Arbitration. The Union submits that any Company change to the accepted application of such progression will (and does) create a detrimental affect to the Union and its membership.
>
> As you are aware the Company had an opportunity to advise the Union at the commencement of negotiations that it wished to revert to what it believed was the strict interpretation of Article 84.4. The Company did not take such action. It is the Union's position that the Company must comply with the implied agreements and understandings with respect to the accepted manner in which the Union progresses its grievances to Arbitration.

The Company expressed itself with respect to the issue of time limits, both with respect to the Coffey matter and with respect to future practice. In that regard a letter was issued to Mr. Beatty, dated December 22, 2004, by then Director of Labour Relations Myron Becker. That letter reads as follows:

> **Re: Company's Preliminary Objection**
> **Concerning the Discharge of J. Coffey**

Reference our conversation concerning the discharge of J. Coffey, in regards to the Company's preliminary objection to be heard at the office of CROA & DR on January 11, 2004, that the time limits described in Paragraph 84.4, Article 84 of the 4.16 agreement, were exceeded.

With respect to the time limit provisions outlined in Paragraph 84.4, of Article 84 of Agreement 4.16, your position is that it has been the practice to apply the provisions in the following manner:

1. In Central and Eastern Canada, the UTU has had sixty (60) days from the date of the written decision from the Company to advise of it's intent to proceed to CROA.
2. If the Union's advise to the Company did not include filing a written notice to CROA as outlined in Article 84.4 of the 4.16 Agreement, then the Union would request an extension from the Company.
3. As a result, the filing with CROA would be delayed and the file remains open.

During our discussions I advised that I was concerned that the practice may not be clearly understood by all parties. I also indicated that if possible we should attempt to clarify the process so that future misunderstandings can be avoided.

In view of the foregoing, the Company's is prepared to withdraw it's preliminary objection concerning the time limits under Paragraph 84.4, of Article 84 Agreement 4.16, in the Coffey Grievance and have the case heard on its merits.

The Company is also prepared to formalize this process and propose the following in respect to the application of Paragraph 84.4, of Article 84 of Agreement 4.16, as follows:

1) The Union will have sixty (60) days from the date of the Company's written Step

3 response to consider whether it will be proceeding to Arbitration.

2) If the timely request for Arbitration does not include a Joint Statement for the Company to consider, a request for extension of the 60 days is to be requested. Request's for extensions will not be unreasonably refused by the Company and the Grievance will be kept alive.

3) Once the Union or the Company, receives or issues a Joint Statement of issue for either parties (sic) consideration, the parties will meet to finalize the required Joint Statement of Issue within 30 days as prescribed in the Note contained in Paragraph 84.4, of Article 84 of Agreement 4.16. Failure to do so will permit either party to progress the dispute on an "ex parte basis", pursuant to the provisions of the Memorandum of Agreement governing the Canadian Railway Office of Arbitration.

This agreement, with the exception of the Coffey Case, does not extend to those cases already docketed at CROA & DR for January, 2005, nor to those cases previously responded to as exceeding time limits.

If you are in agreement with the foregoing, please indicate your concurrence in the space provided and return one signed copy to the undersigned.

Mr. Beatty's written response on January 4, 2005 rejects the proposal made by Mr. Becker and states, in part:

The following is in response to your letter dated December 22nd (received in our Office at 10:38 hrs on December 27th, 2004) in regards to the above referenced matter.

> With respect, your letter has not accurately reflected the Union's position in this matter. Your letter does not accurately reflect the practices and procedures which have been in place of many, many years (without dispute). These practices and procedures have been applied and followed by both parties without difficulty or confusion. These practices and procedures are relied upon by the Union.
>
> It now appears, unfortunately, that the Union's good faith attempts at resolving these matters through dialogue have failed. As such these matters, with respect, will now proceed to Arbitration for resolution as scheduled.

As noted above, the parties met and resolved the issue of timeliness, at least as regards the Coffey grievance, when that matter came on for hearing. They are disagreed, however, as to whether the settlement made in *Coffey* intended to confirm an understanding that the Union would be relieved of the 60 day time limit found in article 84.4 of the collective agreement, and retain discretion as to when it might wish to file a matter to arbitration.

The Union's representatives clearly believe that the parties agreed to the latter course. That is reflected in letter sent to Mr. Becker by Mr. Beatty, dated January 17, 2005. That letter deals with the settlement made in the Coffey matter, albeit characterizing it as a settlement made in respect of the application of article 84.4 of the collective agreement. It reads as follows:

> **RE: APPLICATION OF ARTICLE 84.4 OF COLLECTIVE AGREEMENT 4.16**
>
> Dear Myron,

> The flowing is in regards to our recent discussion (and resultant settlement) of the above referenced matter.
>
> As background, you will recall the Company raised a preliminary objection concerning the arbitrability of a dispute concerning the dismissal of Mr. J. Coffey. Specifically, the Company argued that the Union was in violation of the time limits as contained in Article 84.4 of Collective Agreement 4.16. For reference purposes I provide the following excerpt (Company letter – December 6th, 2004):
>
> ***"This time line for filing for arbitration far exceeds any contemplated time limits as provided by Article 84.4 of agreement 4.16 – Grievance Procedure.***
>
> As you know, this matter (Company preliminary objection) was scheduled to be heard by the Arbitrator on January 11th, 2005 (ref: CROA & DR Case #3466).
>
> Prior to the commencement of the noted arbitration hearing, the parties reached a binding settlement in the resolution of the central issue in dispute (time limits – Article 84.4). It was agreed and understood that the parties are not (and have not been) restricted by any time lines as provided in the application of Article 84.4 of Collective Agreement 4.16 in the progression of grievances to Arbitration.
>
> I appreciate your time, consideration and cooperation in resolving this very important issue.

The parties are agreed with respect to the scope of the issue before the Arbitrator. They accept that the language of article 84 of the collective agreement is clear and that it is therefore not appropriate, in the absence of any ambiguity, to have reference to past practice for the purposes of interpreting that provision. In the result, the case rests entirely on the Union's claim of estoppel. The Union maintains that there was an agreement between Mr. Beatty and Mr.

Becker, that that agreement, made in the context of the Coffey grievance, was to the effect that the Union would not be held to the strict application of the time limits for filing to arbitration contained in article 84.4, and that grievances could be filed to arbitration according to the Union's own discretion. Counsel for the Union submits that that was the state of the understanding when the parties returned to negotiations for the renewal of their collective agreement in February of 2007, and that there was no indication from the Company that it wished to return to the strict application of article 84. On that basis, Counsel argues, the estoppel which the Union raises against the Company continues to the present time. In its alternative argument, the Union maintains that in any event the Arbitrator retains a discretion to extend the time limits in relation to any grievance under the terms of the *Canada Labour Code* (CROA & DR 3493) and that at a minimum this award should affirm that that discretion is exercised as regards all of the grievances outstanding prior to February 10, 2007.

The Company's representatives deny that there was ever any understanding, agreement or practice whereby the Union was given to understand that it had entire discretion with respect to the timeliness of filing any grievance to arbitration, and that the provisions of article 84.4 of the collective agreement would not be invoked or enforced. The Company's recital over the facts in relation to this dispute commences in late 2003, when two complaints were filed with the CIRB by the Union alleging, in part, that the Company was failing to respond to grievances. It appears that the Company's response to the

Board was that the majority of the claims which were the subject of the complaint, dating from September 2002 to October 2003, had never been received by the Company. The Company relates that shortly thereafter large numbers of grievances were filed from Mr. Beatty's office. The Company reviewed the grievances and took the position that they were untimely.

In a letter dated March 1, 2004, apparently in response to a letter from the Company dated February 25, 2004 concerning a possible extension of time limits, Mr. Beatty expressed that in light of the volume of grievances it was being forced to handle, the Union did not consider the time limits to be mandatory. His letter added: "In spite of the above, the Union will, without prejudice, when requesting time limit extensions provide specifics as to the duration of such requested extension." On March 9, 2004 Mr. Van Cauwenbergh wrote to Mr. Beatty, and to Mr. Raymond Lebel of the Union, indicating administrative changes in the handling of the second step of the grievance procedure and, in addition, reiterating: "All grievances filed in writing will be governed under the provisions found under the Grievance Procedure, as directed by Article 84 of the 4.16 Agreement and Article 32 of the 4.2 Agreement." To the same effect, in a later letter dated March 11, 2004 Mr. Van Cauwenbergh wrote:

> The time limits, as prescribed by Article 84 of the 4.16 Agreement and Article 32 of the 4.2 Agreement, are mandatory, and in the absence of a clear and mutual agreement to an extension, are to be respected. Grievances not filed on a timely basis shall continue to be administered as provided in Paragraph 84.5 of Article 84 of the 4.16 Agreement and Paragraph 32.4 of Article 32 of the 4.2 Agreement.

> In closing the Company will continue to decline any grievance that is not submitted on a timely basis as prescribed by Article 84 of the 4.16 Agreement and Article 32 of the 4.2 Agreement. In respect to requests for extensions, the Company will consider request for extensions, as long as such request contains the duration of the requested extension and that the request was received within the prescribed time limits. Please refer to my letter dated February 25, 2004.

By letter dated April 28, 2004 Mr. Beatty advised the Company that he was processing some 112 specified grievances to arbitration. Noting that the Company had provided the Union with declinations in respect of each of those grievances by communication dated April 19, 2004, he went on to state:

> As you are aware, the Union requested an unlimited time extension given the voluminous and unprecedented amount of grievances received. The Union acknowledges that the Company did not grant this request. You are further aware that the Union subsequently advised the Company that it would nevertheless, advance all grievances to Arbitration.
>
> In doing so, the Union advised the Company that it would request that the Arbitrator exercise his authority under the Code to resolve such disputes in spite of any Company argument relating to time limit restrictions. The Union maintains this position. Specifically, although we acknowledge your referenced correspondence, unless you are otherwise notified by the Union, we will proceed to Arbitration on all of the above referenced matters.
>
> It should also be noted that these matters are, in part, the subject of a complaint presently before the Canada Industrial Relations Board. To this extent, we will advise our Counsel of these latest developments. The Union reserves its rights to refer to these latest developments during the scheduled hearing before the CIRB.

It is in the foregoing context that the Union then advised the Company that it was forwarding the Coffey matter to arbitration, prompting the Company's position that the Coffey grievance was untimely. In a letter dated December 6, 2004 Mr. Beatty replied to Company Vice President K. Creel, in part:

> The Union, in addition to the above, will argue that the Company is "estopped" from changing the accepted practice (and interpretation of Article 84.4) with respect to the manner in which the Union progresses its grievances to Arbitration. The Union submits that any Company change to the accepted application of such progression will (and does) create a detrimental affect to the Union and its membership.

As noted above, the Coffey matter settled at the offices of the CROA & DR on January 11, 2005. The position of the Company is that it simply withdrew its objection to timeliness in that case, without prejudice. When Mr. Beatty wrote his letter of January 17, 2005 asserting a general understanding with respect to the waiver of article 84.4 of the collective agreement although the Company did not respond, it submits that it did not agree and that it continued, in any event, to decline grievances in violation of time limits under article 84.

The Company notes that the issue of progressing matters and requesting time limits is again reflected in correspondence from Mr. Beatty in 2006. On January 27, 2006 Mr. Beatty wrote to Mr. Krawec concerning the matter of a substantial list of grievances settled at a joint conference in London, Ontario on December 10, 2005. That letter reads as follows:

> Please find attached a voluminous list of grievances which were settled at the recent Joint Conference on December 10th, in London. As you are aware the decision of our Office in these matters may be individually appealed through an internal appeal process contained within the UTU Constitution. Should such an appeal be successful our Office may be directed to proceed to Arbitration.
>
> It is with the above in mind that we request that time limits be extended in these matters until all appeals (if initiated) have been exhausted. It is our view that such a request is reasonable and consistent with the Collective Agreement and in line with the intent and purpose of the Canada Labour Code.
>
> If you are in agreement with the above (extension of time limits) please sing in the place provided and return to our Office.
>
> With respect, should you disagree with our request, by notification or by not signing, we will proceed on the premise that such refusal is unreasonable. In this regard, should an appeal of our decision be successful we will deal with such matters (time limits) should they give rise to any future preliminary objection.
>
> In closing, and with respect, we fully understand the difficult situation this creates for the Company (keeping files open). Although we are bound by the above noted process we stand by our decision in the resolution of these grievances. In the event an appeal is progressed we assure you that we will aggressively advocate our position of settlement as expressed to you at our Joint Conference.

By letter dated January 30, 2006 Mr. Creel responded to Mr. Beatty that the Company could not accept his suggestion stating, in part: "To agree to your request would render settlement discussions/conferences virtually useless and

files would remain 'open' or result in every case going to arbitration in order to seek finality."

The Company further notes that during the course of bargaining in the contract negotiations in the fall of 2006 the Union made a number of demands, including the proposal to "reaffirm there are no time limits at step 3 for progression". The Company did not agree and the Union proceeded to exercise its right to strike. In the settlement following the strike no change was made to the language of article 84. Some time later, by way of letter dated April 25, 2008 addressed to General Chairperson Guy Ethier, Mr. Van Cauwenbergh proposed the general issue of time limits in article 84, upon which the parties were clearly not in agreement, could be addressed in an *ad hoc* arbitration. The Union agreed and this hearing ensued.

The Company argues that the facts simply do not support the Union's assertion of an estoppel. With respect to the merits of the dispute, it argues that to allow the Union to indefinitely extend time limits by its own discretion, advancing matters to arbitration as it sees fit, is tantamount to placing a "Sword of Damocles" over the Employer's head. It argues that the Company would be placed in a position of perpetual uncertainty and preparation, unable to administer its collective bargaining affairs in a rational way. Its representatives submit that the sequence of correspondence reviewed above confirms that at all times the Company held to the general position that the time limits in article 84 of

the collective agreement are mandatory, indicating that it was prepared to extend the time limits by agreement, subject to such extensions being for a clear period to a date certain.

While the Company acknowledges that no answer was given to Mr. Beatty's letter which asserted, in the settlement of the Coffey grievance, that a general agreement with respect to the waiver of article 84 time limits for filing to arbitration had been reached, it maintains that the Union was advised otherwise. As reflected in the evidence of Mr. Becker at the hearing, in the negotiations for the renewal of the collective agreement Mr. Becker was dealing with Mr. John Armstrong, then UTU Vice President and chief spokesperson at the bargaining table. He recalls that he expressed to Mr. Armstrong that the Company was not agreeing to a general waiver of the time limits for filing to arbitration found within article 84.4 of the collective agreement.

With respect to the mandatory nature of the time limits, the Company refers the Arbitrator to prior jurisprudence of the CROA including CROA 1233, 1056, 1356 and 1900. The Company also cites CROA 1929 for the proposition that a practice or understanding must be demonstrated on the evidence to be mutual, and "not a unilateral thought of only one party".

I turn to consider the merits of this dispute. The Arbitrator must confess to considerable difficulty in understanding and accepting the argument of the Union

that it has an unfettered discretion with respect to the timing during which any grievance may be filed to arbitration, notwithstanding the language of article 84.4 of the collective agreement. The Arbitrator readily appreciates that there may have been some great frustration experienced by the Union, particularly during that period of time during which it would appear many grievances simply were not responded to by the Company. Obviously, in that situation, absent any final determination in writing from the Vice President, as contemplated within article 84 of the collective agreement, the Union would be at liberty to advance the grievance to arbitration at such time as it might deem appropriate. Its right to do that, however, does not flow from any mutual understanding with respect to a waiver of the provisions of article 84. Rather, it flows from the express provisions of the Note to article 84.4 and the language of article 84.5.

How can the Arbitrator conclude that there was a mutual understanding between the parties with respect to the Union's right to file grievances to arbitration at its discretion, in disregard of the 60 day time limit found in article 84.4, when there is not a jot of mutual written evidence to support the Union's position? While it is obviously true that an estoppel can rest upon statements and verbal evidence, in the instant case the assertion of Mr. Beatty with respect to the purported understanding made at the time of the Coffey settlement is in fact denied by the evidence of Mr. Becker, evidence which the Arbitrator considers to be fairly and honestly given.

Reverting to first principles, it is important to recall that the *Canada Labour Code,* section 3(1), defines "collective agreement" as "...an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters"; the requirement of a written understanding is the most basic element of proof of a collective agreement. As a general rule, an agreement in writing is signed or executed by both parties who agree. It is not to be inferred from the self-serving written declaration of only one party, absent compelling and extraordinary evidence to support such an unusual conclusion.

The position which the Union argues in the case at hand is fraught with risk for all parties to collective bargaining. Suppose, for example, that a Company officer were to write the Union's General Chairperson, asserting his personal, albeit erroneous, belief that the author of the letter and the General Chairperson had agreed that henceforth wages would be reduced by 10 percent and hours of work increased by 20 percent. For whatever reason, the Union does not reply to the letter sent by the manager. Can it seriously be argued that the failure to respond to such a self-serving letter would give rise to an estoppel so that the Company could effectively implement a reduction in wages and an increase in working hours? That is simply not the basis upon which collective bargaining and collective agreements are made and enforced in Canada. Parties to collective agreements are not to be placed at peril of having their collective agreement amended should they fail to respond to self-serving declarations or

interpretations communicated to them by the other side. The doctrine of estoppel was never intended to extend so far.

What does the evidence in the instant case disclose? As reviewed above, notwithstanding the written position asserted by Mr. Beatty with respect to the settlement made in the Coffey grievance, there is an extensive line of correspondence from Company representatives stating and restating that in the Company's view the provisions of time limits for filing to arbitration found in article 84.4 of the collective agreement are mandatory, and can be departed from only by an agreed extension of time limits. There is, with respect, no compelling evidence of any contrary mutual understanding between the parties or of any contrary representation by Mr. Becker.

What the Union asserts in the case at hand is a significant amendment of the collective agreement. Is a board of arbitration to conclude that so important an event, apparently made in the anteroom of the CROA in settlement of the Coffey dispute, was left to a verbal exchange and a handshake? Is a board of arbitration to conclude that the Company surrendered its ability to know with some precision the status of any given grievance, and in the ongoing scope of its arbitration liability, not to mention the managing of its ongoing files, for nothing in exchange and without reducing the understanding to writing? I think not. I also consider it implausible that the parties would have agreed to such an arrangement, and yet upon the renewal of their collective agreement in 2007

made no adjustment whatsoever in the mandatory time limits language of article 84.4 of the collective agreement. It is highly doubtful that the parties would have intended to effectively conceal their true agreement from the managers and Union officers responsible for its administration or the employees whose critical rights depend on the language of their collective agreement. I am satisfied that there was no understanding, no representation and that no estoppel can be said to operate. On that basis the position of the Union cannot be sustained.

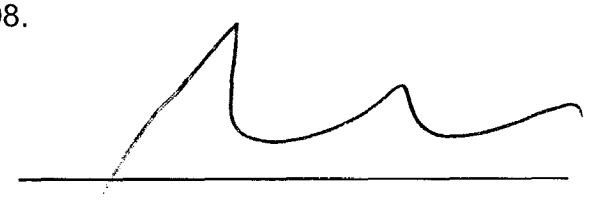
What of the alternative position of the Union? Section 60(1.1) of the *Canada Labour Code, Part 1* grants to an arbitrator the discretion to extend the time limits in relation to the grievance and arbitration procedure established within a collective agreement, "...if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension".

In light of the statutory language reproduced above, the Arbitrator is not persuaded that it would be appropriate to grant a blanket time extension for a substantial number of grievances in relation to which there have been no representations or submissions made as to the issue of reasonableness or possible prejudice to the Company. It may well be that in light of the disputes between the parties over recent years, including the complaint to the CIRB, the two elements of section 60(1.1) of the *Canada Labour Code, Part 1* may be made out, on a case to case basis. However, in the Arbitrator's view the section

is to be applied in specific reference to an individual grievance which is before the Arbitrator for a determination. In my view it is highly doubtful that an arbitrator could, in any event, give a blanket extension of time limits for a large number of grievances in relation to which the specific facts and equities are not known. Therefore, with respect to this branch of the Union's argument, the Arbitrator simply declares that nothing in this Award derogates from the right of the Union to request that the Arbitrator exercise his discretion in relation to the extension of time limits if and when the individual grievances are advanced to hearing. Conversely, the rights of the Company to argue that the Arbitrator's discretion should not be exercised remain intact, again to be argued on a case by case basis, having regard to the facts and equities of each specific grievance. Simply put, each grievance is entitled to be assessed on the standards of reasonableness and possible prejudice to the other party, as contemplated within the *Code,* on a case by case basis.

For all of the foregoing reasons, the grievance must be dismissed.

Dated at Ottawa this 29th day of July, 2008.



Michel G. Picher
Aribtrator