AH891

IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC 1985, c L-2.*

BETWEEN:

Teamsters Canada Rail Conference

(TCRC)

-and-

Canadian Pacific Kansas City Railway

(CPKC)

Article 37: Benefits Dispute

Arbitrator: Graham J. Clarke
Date: October 18, 2024

Appearances:
TCRC:

K. Stuebing:	Legal Counsel, CaleyWray
E. Lewis:	Articling Student, CaleyWray
D. Fulton:	General Chairperson, TCRC CTY West
G. Lawrenson:	General Chairperson, TCRC LE West
W. Apsey:	General Chairperson CTY East, Smiths Falls
E. Mogus:	General Chairperson LE East, Oakville
J. Hnatiuk:	Vice General Chairperson – TCRC CTY West
C. Ruggles:	Sr. Vice General Chairperson, TCRC LE West

CPKC:

I. Campbell:	Counsel, Fasken
T. Gain:	Counsel, CPKC
F. Billings:	Director, Labour Relations
A. Cake:	Manager, Labour Relations
J. Bessey:	Managing Director, Talent Acquisition & Occupational Health
S. Hewko:	Director, North American Benefits
S. Mitchell:	Advisor, Benefits

Arbitration held via videoconference on August 28, 2024. Additional written submissions completed October 9, 2024.

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Award

BACKGROUND

1. This award examines multiple disputes arising from Appendix 1[1] (App1) which formed part of an interest arbitration 2022 Memorandum of Settlement (MOS). App1 confirmed certain improvements to employees' benefits, such as a direct billing card. It further established a review process to examine the benefits being administered by the new administrator, Sun Life.

2. The App1 process successfully resolved several disputed items. The parties' Joint Statement of Issue[2] (JSI) left remaining 2 procedural objections and 10 specific items for the current arbitration.

3. On the first day of arbitration, the parties agreed to park one issue which would require evidence[3] and used most of the day to settle multiple JSI issues themselves. However, those successes did not leave enough time for full oral argument, despite the hearing lasting until 6:30 pm. The parties had earlier also agreed between themselves to omit the usual step of filing written replies to each other's Briefs. At the arbitrator's later request, the parties completed their legal submissions in writing.

4. This award[4] will decide 6 issues from the JSI about which the arbitrator heard the parties' submissions. In the JSI, CPKC also raised the doctrine of estoppel. The parties have scheduled January 28, 2025 to plead the remaining issues[5].

5. Fundamentally, the parties differed on how to apply App1.

[1] TCRC Documents, Tab 2.
[2] TCRC Documents, Tab 1.
[3] This issue (Number 1 in the JSI) involved the TCRC disputing a $200,000 Lifetime Drug Maximum for employees hired after July 20, 2018. CPKC raised a preliminary objection, and further alleged the parties had agreed on this change during bargaining.
[4] This is a policy grievance under App1. While the TCRC included in its documentation several employee grievances, those individual matters are not part of this arbitration.
[5] The remaining JSI issues for Day 2 will be Objection #1 and Issues #3 & #7.

6. The TCRC argued the proper analysis for this case required a comparison of the current Sun Life benefits with collective agreement (CBA) article 37 and three 1980s agreements (collectively, "80s Agreements") incorporated therein. In its view, only mutual agreements could amend those 80s Agreements. The TCRC highlighted, for example, a July 3, 2019, CPKC offer for certain enhancements when switching from Manulife to Sun Life, an offer which the TCRC accepted[6].

7. CPKC argued that estoppel prevented the TCRC from pursuing these claims. On the merits, CPKC argued that the 80s Agreements envisioned that experienced insurers would administer the parties' agreement on benefits. Those negotiated benefits would necessarily evolve over the decades.

8. CPKC suggested the proper analysis must focus on the benefits TCRC members have been enjoying for decades. In this regard, CPKC relied on roughly 20 years of Manulife booklets confirming the benefits provided. In CPKC's view, the Sun Life benefits remained the same or better than those Manulife administered.

9. For the reasons which follow, the arbitrator has upheld some, but not all, of the TCRC's suggested interpretations of CBA article 37. The applicable analysis must involve the 80s Agreements, as sometimes amended, or else the arbitrator would effectively remove them from the CBA.

10. However, CPKC satisfied the arbitrator that an estoppel should apply to this situation. CPKC had no notice that the TCRC, despite years and even decades of accepting the benefits status quo, had changed its position on the proper interpretation of CBA article 37. While the TCRC remains entitled to the benefit of its bargain, its recent change of position prejudiced CPKC.

11. An estoppel manages that prejudice and allows the parties to address these issues during their next collective bargaining session.

COLLECTIVE AGREEMENT

12. The parties negotiated an extensive article 37 in the CBA[7]. In their Briefs and at the hearing, both parties highlighted these extracts:

[6] TCRC Documents, Tab 7.
[7] TCRC Documents, Tab 3.

37.01 WEEKLY INDEMNITY AND LIFE INSURANCE

Benefits shall be available in accordance with the terms of the Disability and Life Insurance Plan Agreement dated November 29, 1988, establishing the Benefit Plan for Train and Engine Service Employees, **as amended**:

Note: The Agreement of November 29, 1988, referred to above, is not reproduced here.

…

37.03 DENTAL PLAN

The Dental Plan Agreement, dated December 10, 1985, **as amended will be further amended** as follows in respect of employees covered by this Collective Agreement:

Note: The Dental Plan Agreement dated December 10, 1985 referred to above is not reproduced here.

(1) Effective with treatment which commenced on or after January 1, 2022 covered expenses will be defined as the amounts in effect on the day of such treatment, as specified in the relevant provincial Dental Association Fee Guides for the year 2022.

(2) Effective with treatment which commenced on or after January 1, 2023 covered expenses will be defined as the amounts in effect on the day of such treatment, as specified in the relevant provincial Dental Association Fee Guides for the year 2023.

(3) For the Province of Alberta, the Fee Guide stated above shall be the Alberta Representative Guide and will be made available to the TCRC Membership as published yearly by the Company.

(4) Effective January 1, 2006 scaling will be limited to eight units for each plan and eligible dependent member per calendar year.

(5) Effective January 1, 2000, the frequency of exams will be extended from once every six months to once every nine months for adults over the age of 18.

(6) Effective January 1, 2000, coverage will be provided to cover pit and fissure sealant for children under the age of 18.

(7) Effective January 1, 2018, increase the annual maximum from $1,825 to $1950.

(8) Effective January 1, 2019, increase the annual maximum from $1,950 to $2,000.

(9) Effective January 1, 2020 increase the annual maximum from $2,000 to $2050.

(10) Effective January 1, 2021 increase the annual maximum from $2,050 to $2100.

(11) Effective January 1, 2023 increase the annual maximum from $2,100 to $2,150.

Note: Effective January 1, 2008, reduce the employee paid deductible to $0 and establish a co-pay provision where the employee will pay 10% of the premium.

(12) New employees shall become eligible for dental benefits on the first day of service.

(13) An eligible employee whose coverage is terminated due to layoff may, at the employee's option, continue coverage for a period of 12 months following the end of the month in which the lay-off commences upon remitting monthly to the Employer an amount equal to the estimated cost of the Dental plan as determined by the Service organization. To exercise this option, the employee must notify the Company of their desire to continue benefits upon layoff and make arrangements for payment.

37.04 EXTENDED HEALTH AND VISION CARE PLAN

(1) The Extended Health and Vision Care Plan shall be that Plan established by the Extended Health and Vision Care Plan Agreement dated December 10, 1985, **as revised, amended or superseded by any agreement to which the parties to this Collective Agreement are signatories**.

Note: The Extended Health and Vision Care Plan dated December 10, 1985, referred to above, is not reproduced here.

(Emphasis added)

13. The TCRC included in its materials the 80s Agreements which article 37 incorporated by reference[8].

CHRONOLOGY

14. For better context, the arbitrator will provide a limited chronology of the events which led to the current disputes.

[8] TCRC Documents, Tabs 4-6.

15. **December 10, 1985**: Dental Plan Agreement (Dental Plan) negotiated between Canadian Pacific Limited and the Brotherhood of Locomotive Engineers and United Transportation Union (CBA 37.03).

16. **December 10, 1985**: Extended Health and Vision Care Plan Agreement (Vision Plan) negotiated between Canadian Pacific Limited, the Brotherhood of Locomotive Engineers, and United Transportation Union (CBA 37.04).

17. **November 29, 1988**: Disability and Life Insurance Plan Agreement (Disability Plan) negotiated for Running Trades Employees of Canadian Pacific (CBA 37.01).

18. **1985-2003**: Administrator of the plans: Great West Life (GWL).

19. **2004-2019**: Administrator of the plans: Manulife.

20. **January 1, 2004**: Transition from GWL to Manulife.

21. **July 3, 2019**: TCRC accepted CPKC's offer[9] of certain enhanced benefits for employees as part of the upcoming transition from Manulife to Sun Life.

22. **2020-present**: Administrator of the plans: Sun Life

23. **January 1, 2020**: Transition from Manulife to Sun Life.

24. **January 1, 2020**: Weekly Indemnity Benefit (WIB) administrator changed from Manulife to Morneau Shepell (now Telus Health).

25. **March 21, 2022**: The parties agreed to App1[10] which provided benefit improvements and established a procedure to compare the Sun Life benefits with those required under the CBA:

[9] TCRC Documents, Tab 7.
[10] TCRC Documents, Tab 2.

This is in reference to our discussions during 2021 negotiations in which the Union indicated their desire for a variety of improvements to the Benefits Plan. This will serve as an amendment to Article 37.

The parties agreed that in addition to the Plan amendments identified in the Memorandum of Settlement, the appropriate documents will be updated to reflect the following improvements to the Benefits Plan effective 30 days following this Agreement coming into effect:

Extended Health Care

1. Provide a direct billing benefits card.

2. Provide for preventative vaccines including: hepatitis, tetanus, diphtheria, malaria, meningitis, and typhoid.

3. Provide for Infertility drug coverage at 50% to a maximum of $3,000 per lifetime and Erectile Dysfunction drug coverage at 50% to a maximum $1,000 per calendar year as prescribed.

4. Psychologist Benefit: Addition of Clinical Counsellor to Psychologist Coverage of 100% up to $1,000 calendar year maximum.

In addition, the parties agree to a closed period commitment to meet within 60 days of this Agreement coming into effect and complete within 120 days of this Agreement coming into effect, a comparison review of current benefit terminology and that of pre-existing benefit language contained in the Consolidated Collective Agreement. Any disputes arising from this review will be advanced to rights arbitration before Arbitrator Clarke on an ad-hoc basis.

(Emphasis added)

26. **August 15, 2022**: Arbitrator Kaplan issued his interest arbitration award[11] resolving the CBA's terms for the January 1, 2022 to December 31, 2023 period. That award also incorporated the 2022 MOS and App1.

PARTIES' GENERAL POSITIONS

27. The arbitrator will examine the parties' positions on each issue separately below, though some positions apply to multiple issues.

[11] CPKC Documents, Tab 30.

28. The TCRC argued generally that CPKC must respect the minimum standards found in the 80s Agreements[12]:

> 11. The language at issue in the 10 items involve CPKC allowing its administrator ("Service Organization" under the Plan Agreements) unilateral insertions of limitations on eligibility, coverage, and grounds of termination which do not abide the language of Article 37 and the respective Plan Agreements.
>
> 12. This dispute has significant ramifications for the Union and its members. **TCRC seeks findings that confirm that the limitations on benefits entitlements and eligibility unilaterally imposed by CPKC and its administrator SunLife breach the requirements of Article 37, and seeks relief in the form of directions that CPKC comply with the minimum requirements of the Collective Agreement**.
>
> …
>
> 23. The Company is not at liberty to contract out its management rights to a third-party provider if such provider fails to provide benefits that do not adhere to the minimum provisions of Article 37.
>
> 24. As an overall proposition, TCRC maintains that the minimum entitlements set forth in Article 37 must be accepted as being mandatory because of the repeated use of the word "shall" in Articles 37.01 and 37.04. Likewise, the Dental plan is incorporated as the applicable terms of dental benefits under Article 37.03.
>
> 25. **Given the language Article 37 of the Collective Agreement, the Union contends the Company does not have the ability to provide restrictions or limitations on benefits set forth in the respective Plan Agreements, save by the mutual agreements set forth throughout Article 37**.
>
> 26. Over time, each Plan Agreement has been amended/revised through the parties' mutual agreement. Generally, such amendments have been achieved through national negotiations (e.g., the July 3, 2019 agreement at Tab 7, discussed below).
>
> 27. The terms of these respective Plan Agreements have not been revised, amended or superseded by any agreement of the parties that would permit the Company's departure from such minimum standards as identified in the 10 items under dispute.
>
> (Emphasis added)

[12] When referring to the 80s Agreements, the TCRC used the term "Plan Agreements" while CPKC used "Plans".

29. CPKC's Brief summarized its general position:

> 41. Following the change in benefits carrier and administrator, the Union began to challenge the coverage levels and administration of a number of benefit terms. **The Union's position appears to be that any wording in the Benefit Handbooks that does not align with the specific wording of the Plans as they existed in 1985 and 1988 respectively is contrary to the CCA. CPKC's position was, and remains that the change in carriers from Manulife to Sun Life has not resulted in any reduction in benefits or changes to the manner in which benefits are administered. To the contrary, Union members have received benefits improvements as a result of the change**.
>
> …
>
> 48. Respectfully, it is unclear to CPKC what exactly the union is seeking through this arbitration process.
>
> 49. **The Union appears to be taking the position that the text of the original 1985 and 1988 Plans is the authoritative source of benefits coverage/administration and that any unnegotiated changes to benefits coverage and administration that do not align with the express language of the 1985 and 1988 Plans are offside the CCA. In other words, the Union's position is that benefits are frozen in the 1980s and must be provided as expressly set out in the original Plans (unless the parties have negotiated otherwise).**
>
> 50. The Union's position is untenable. If accepted, it would undo decades of benefits enhancements provided to Union members as well as efficiencies in the administration of benefits (which allows Union members to more quickly and easily access benefits).
>
> 51. **The Union appears to be cherry-picking. It is content to continue to accept unnegotiated benefits improvements that have resulted over the course of the past 35 or more years yet wants to revert to the strict language of the 1985 and 1988 Plans for certain specific items**.
>
> 52. **The Union cannot have it both ways. It cannot take the position that all benefits must be provided or administered in accordance with the language of the original Plans (unless negotiated otherwise) while simultaneously saying that its members are also entitled to the unnegotiated benefits improvements that are not specifically addressed in the Plans**.
>
> …
>
> 152. It is CPKC's position that the Union has failed to establish that there have been any changes to benefits coverage or administration that are contrary to the CCA, and specifically the Plans incorporated into the CCA.

153. To the contrary, coverage now exceeds the terms outlined in the CCA and administrative efficiencies allow Union members to access benefits quicker and more easily. There have been no changes to benefits coverage or administration that have materially or substantively affected Union members' entitlements.

154. **It is the amended or revised versions of the Plans that are incorporated by reference into the CCA, not the original 1985 and 1988 versions. Given this, benefits entitlements and administration are not fixed in the 1980s. The Plans have been, and can continue to be, administered in accordance with industry practices without there being a violation of the CCA**.

155. **Further, it is CPKC's position that where benefits coverage is not specified in the Plans or CCA, changes on the basis of what is "reasonable and customary" coverage or standards do not amount to violations of the CCA**.

(Emphasis added)

ANALYSIS AND DECISIONS

30. The arbitrator will analyze individually the 6 issues the parties pleaded on August 28 after making some preliminary observations.

What issues are before the arbitrator?

31. As mentioned above, the parties spent most of the August 28 hearing resolving various issues themselves. This left limited time for pleading. Following the hearing, and given that the parties had not filed written replies, the arbitrator asked for their comments on the cases each had submitted.

32. The arbitrator wanted to ensure the parties had an opportunity to comment on each other's case law. Those cases raised several issues, including a CPKC case which referred to the doctrine of laches[13]. While an arbitrator is not limited to the case law put forward by the parties, the parties must be given an opportunity to comment on potentially new issues[14].

33. The reference to laches caused a quandary for the arbitrator. Dealing with that issue, or alternatively ignoring it, seemingly could lead to legal challenges to this award.

[13] Fredericton Police Union, United Brotherhood of Carpenters and Joiners of America, Local 911 v Fredericton (City), 2022 CanLII 135109.
[14] See generally McGuffin v. Canada (Attorney General), 2017 FC 97 and First Nation Sipekne'katik v. Paul, 2016 FC 769.

The arbitrator accordingly asked for the parties' assistance, especially since they had not had time on August 28 to comment on each other's case law.

34. In its October 4 submission, CPKC argued that the cases it originally submitted for the August 28 hearing demonstrated that the doctrine of laches applied to this case. In its October 9 submission, CPKC expanded on this position:

> 5. CPKC's position in this matter has always been that the practices now at issue have been in place for decades and that it is too late for the TCRC to grieve the issue now. This is highlighted at several different locations in the Joint Statement of Issues, including at the following locations:
>
> > Page 2: "The Company submits that the Items in Dispute were either…items detailed within the Manulife Benefit Booklet that were not disputed by the Union in a timely fashion…"
> >
> > Page 2: "…the current application of the Company's benefit plan has been in place for a number of years and multiple rounds of collective bargaining."
> >
> > Page 3: "The Company objects to the arbitrability of those items that are contained in both the current Benefit Book and the former Manulife Benefit Booklet, as no objection or grievance was raised within the timelines prescribed by the Collective Agreement. Those items include: 2, 3, 4, 5, 6, 9 and 10."
>
> 6. **Given the above, it cannot be seriously suggested that the issue of the Union's delay in bringing these issues forward was not specifically raised as a matter in dispute. As such, there is no barrier to the Company making specific submissions on the applicability of the doctrine of laches**, especially in light of this issue having been specifically raised during our most recent case conference call.
>
> (Emphasis added)

35. In its October 4 submission, the TCRC argued that CPKC had never pleaded the doctrine of laches:

> Through its submissions, CPKC does not object on the basis of the doctrine of laches. The parties' JSI contains no reference to the doctrine of laches. The section of its brief commencing at para 160 argues estoppel, not laches. As such, in a dispute bound by the CROA rules, it is not open to the Company to assert laches, implicitly or otherwise.

36. The TCRC expanded upon its position in its October 9 submission:

> 10. As noted in TCRC's October 4 submissions, the parties' JSI contains no reference to the doctrine of laches. This Ad Hoc proceeding is governed by The Memorandum of Agreement Establishing the CROA&DR, in which Item 14 provides that "The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be."
>
> 11. It is not open to CPKC to take a new position for the first time at this late stage despite the parties' agreed upon JSI. In support, TCRC notes your reasoning in AH 825 (enclosed) at paras 22-31.
>
> 12. In the alternative, CPKC cannot rely on an alleged delay in identifying shortcomings in the benefits package when it itself agreed to a process to review the contemporary benefits plan language to determine its consistency with the Collective Agreement. Having agreed to the comparison review (as part of main table collective bargaining discussions), it cannot disclaim any liability for inconsistencies identified in the very review process it has invited to take place.

37. Given the specific parameters which protect the integrity of the expedited railway arbitration regime, the arbitrator agrees with the TCRC that CPKC cannot raise the issue of laches. CPKC did however raise the issue of estoppel in the JSI, something which will be examined below.

38. In SHP744[15], the arbitrator described why the JSI determines the issues for a railway arbitration (footnotes omitted):

> 21. Despite Mr. Kennedy's able argument, adding the issue of whether CPKC had grounds to test Mr. Arjoon constituted a significant expansion of the issues placed before the arbitrator. Neither the original grievance nor the JSI contested the original drug testing or the results.
>
> 22. **Given that most parties plead railway arbitrations in an hour or two, parties must disclose the key issues in advance**. In the instant case, the parties' agreed-upon procedure had them exchange their briefs at the start of the hearing. This reflected the traditional process followed by CROA. **Many decisions have confirmed that a party, however innocently, cannot add new issues in its Brief and take the other party by surprise**.

[15] Unifor Local 101R v Canadian Pacific Kansas City Railway, 2024 CanLII 57556

23. In AH809-M, the arbitrator concluded that a new argument had been added in the Brief and fell outside the issues submitted to arbitration (Footnotes omitted):

> 35. **While an arbitrator in a regular labour arbitration might remedy these challenges through expensive adjournments, the current parties have required an expedited process. They do not want an arbitrator to decide a single case after multiple hearing days sometimes over a number of years. Instead, their agreement often requires an arbitrator to hear multiple cases in a single day**.
>
> 36. **To get these benefits, the parties have accepted certain important obligations, such as clearly identifying the issues before the arbitrator**.
>
> …
>
> 39. For similar reasons to those cited above in AH825, the TCRC first raised this argument in its brief. There may be vague references to Mr. Cole's email, but the arbitrator can find nothing in the grievance steps or the JSI alleging that an agreement existed and that the TCRC filed a grievance to enforce that agreement.
>
> 40. Even if the arbitrator were wrong on that essential procedural point which goes to the heart of the railway model's incredible efficiency, a review of the facts does not disclose a clear agreement. Beyond the interpretation challenges which a single email can present, the parties continued to contest the numbers even after Mr. Cole's email.
>
> 41. **The arbitrator appreciates the challenges for both parties in identifying the legal issues early in the process. But that identification is at the heart of this arbitration regime since the late addition of issues can prevent an arbitrator from running a procedurally fair hearing. It is for that reason that the railway model has, for decades, imposed harsh consequences for actions, however innocent, which prejudice the process**.

24. Arguments on the mitigation of the penalty do not provide a gateway to add new issues to an arbitration. To accept those arguments, the arbitrator would have to conclude that CPKC did not have any grounds to test Mr. Arjoon. That would result in the arbitrator doing indirectly what could not be done directly under the parties' rules for this expedited railway arbitration.

(Emphasis added)

39. CPKC clearly raised delay and estoppel in the JSI. But CPKC did not raise laches. The parties' supplemental submissions satisfied the arbitrator that a distinct legal issue

which arises for the first time from a party's case law cannot be added to those already found in the JSI. This is consistent with SHP744 which held that the issue of mitigation does not open the door to adding further issues never contained in the JSI.

Rules of interpretation

40. AH801[16] summarized some of the principles arbitrators follow when interpreting a collective agreement:

> 21. **An arbitrator must interpret the words the parties used in their CA. It does not matter what a party might have intended if the words to which they agree mean something else**. The parties have the ultimate responsibility to ensure the language of their contract reflects their mutual intention.
>
> 22. In CROA 4631, the arbitrator noted:
>
> > 13. **A rights arbitrator cannot amend the collective agreement**. Article 14 of the parties' Memorandum of Agreement Establishing the CROA&DR makes this explicit:
> >
> > > The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.
> >
> > 14. For interpretation cases, Arbitrator Moreau described the importance of evidence and the plain and ordinary meaning of negotiated provisions in CROA&DR 3601:
> >
> > > Arbitrators follow several presumptive rules of interpretation when construing a collective agreement. One of the lead rules is that the provisions in a collective agreement must be read according to their plain and ordinary meaning. That rule will only be set aside when it has been demonstrated, with clear and reliable evidence, that the parties have agreed to an interpretation that is different from its ordinary meaning.
> >
> > 15. **In CROA&DR 4606, this Office described how past practice and estoppel can impact collective agreement interpretations**.
>
> (Emphasis added)

[16] Teamsters Canada Rail Conference (CTY-West) v Canadian National Railway Company, 2022 CanLII 112672.

41. The former requirement to identify an ambiguity before considering extrinsic evidence has also changed, as noted in AH836[17] [Footnotes omitted]:

> 26. Fourth, the parties did not provide any context behind their change from "unpaid wages" to "monetary claim". The Supreme Court of Canada in *Sattva Capital Corp* now allows parties, even in the absence of any ambiguity, to produce contextual evidence and information.

42. The arbitrator acknowledges the challenges for both parties to provide such "contextual evidence" when the period in question goes back decades and involves different bargaining agents. The challenge deepens when no objections had been raised over multiple bargaining sessions. CPKC relies on this fact, among others, in support of its estoppel argument.

How to interpret App1?

43. Under App1, the parties agreed to conduct:

> …a comparison review of current benefit terminology and that of pre-existing benefit language contained in the Consolidated Collective Agreement.

44. App1 further provided for a rights arbitration, as distinct from an interest arbitration, when/if the parties failed to agree:

> Any disputes arising from this review will be advanced to rights arbitration before Arbitrator Clarke on an ad-hoc basis.

45. The TCRC viewed the App1 exercise as comparing the Sun Life benefits and the CBA, which at article 37 incorporated explicitly the 80s Agreements[18]:

> 111. Article 37 imposes an obligation upon CPKC to provide benefits that comply with the incorporated Plan Agreements. Its provisions capture the parties' mutual intention that CPKC provide its running trades employees with the benefits they have collaboratively identified within the incorporated Agreement. Each Plan Agreement is to form the minimum benefits entitlements for Train Engine Service Employees.

[17] International Brotherhood of Electrical Workers (System Council No. 11) v Canadian Pacific Kansas City Railway, 2023 CanLII 73434.
[18] TCRC Brief, Paragraph 111.

46. Given App1's wording, the TCRC also argued that CPKC could not object to the arbitrability of any issue[19]. It further suggested that App1 prevented CPKC from raising any related issues like estoppel.

47. CPKC's suggested interpretation for App1 required a comparison of what TCRC members had received during the 2004-2019 Manulife regime with the current Sun Life benefits[20]:

> 46. From CPKC's perspective, the comparison review was simply intended to confirm for the Union that the change from Manulife to Sun Life/Telus Health has not resulted in any benefit reductions for Union members. More specifically, it was intended to confirm that the Sun Life coverage and Telus Health administration aligned with the benefits coverage and administration as described in the prior Manulife Benefit Booklets. It was not intended to be a historic review of benefits coverage for Union members or to revert to outdated and/or noncomprehensive language contained in the original versions of the Plans from 1985 and 1988.

48. CPKC further argued that benefits necessarily evolve over time.

49. The arbitrator interprets App1's language as providing for a process, but it does not deprive either party of the right to raise any legal arguments in the JSI that they would have otherwise had available for any individual grievances.

50. The arbitrator agrees with the TCRC that the App1 analysis cannot limit itself to comparing the Sun Life benefits with those found in the Manulife booklets. That may have been CPKC's understanding, but the text of App1 does not support that interpretation. App1 required a comparison of the Sun Life benefits with CBA article 37 given its explicit reference to the "pre-existing benefit language contained in the Consolidated Collective Agreement".

51. If the arbitrator adopted CPKC's interpretation, the result would effectively amend article 37 and eliminate the parties' 80s Agreements from the CBA. Nonetheless, the parties' actions, including inaction, over the decades remain relevant to the outcome of this arbitration.

[19] TCRC Brief, Paragraphs 64-66 and 69.
[20] CPKC Brief, Paragraph 46.

Manulife Booklets

52. The arbitrator respectfully disagrees with the TCRC's position at the hearing that the Manulife Booklets have no bearing on the current exercise[21]. Those booklets provide evidence about how the parties have administered employee benefits over time.

53. The arbitrator notes as well that CBA article 37.11 expressly referred to the "benefit plan booklets", a topic on which the arbitrator will expand upon below.

54. For the Dental Plan, article 37.03 contained various annual monetary increases in benefits. Those changes appear to come, not from amendments to the 80s Agreements, but from the previous amounts contained in the Manulife Booklets[22]. For example, the parties agreed to increase the $2000 limit in the 2019 Manulife Booklet[23] to $2050 for the year 2020[24] (CBA art 37.03(9)).

55. Having noted their relevance, the arbitrator confirms that the booklets' wording does not trump CBA article 37.

The 80's Agreements

56. As the TCRC noted, the parties always intended that a "Service Organization" would administer the 80s Agreements. In other words, the 80s Agreements were not comprehensive group insurance plans. They instead provided a framework for employees' entitlements.

Joint Committees

57. The 80's Agreements also created joint Administrative Committees (Administrative Committee) composed of an equal number of railway and union representatives. The 80s Agreements provided funding to allow the Administrative Committees to carry out their functions. The Record before the arbitrator did not specify whether they continue to function.

58. For example, the Dental Plan described[25] some of the Administrative Committee's duties:

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[21] See also, for example, TCRC Brief, Paragraphs 92 and 188.
[22] They might come from previous collective agreements, but the Record does not contain that negotiating history.
[23] CPKC Documents, Tab 14, 2019 Benefit Handbook.
[24] Article 37.03 contains various changes for the years 2018-2023. The Disability Plan (Art 37.01) and the Vision Plan (Art 37.04) also have some references to recent calendar years.
[25] TCRC Documents, Tab 5, Page 101/417.

ARTICLE VIII - POWERS AND DUTIES OF THE COMMITTEE

1. Except as otherwise provided herein, **the powers and duties of the Committee shall be**:

(a) **To meet with the Service Organization as may be necessary to discuss the overall operations of the Dental Plan**;

(b) **To review general communication to employees with respect to the Dental Plan**;

…

(Emphasis added)

59. CBA article 37.11 also established a "joint Union/Management committee" for benefits matters and referenced the possibility of posting the benefit booklets on the CPKC and TCRC websites:

37.11

(1) This refers to various discussions surrounding the issues of benefits provided by the Company and the application of same to members, especially given the introduction of employee co-pay in 2008.

(2) It was agreed that the Union would be part of the process so that they could conduct a detailed review, understand the co-pay calculations and ensure these calculations are correct. Such calculations will only include employees of this bargaining unit. Employees who are not eligible for benefits will not be required to make co-pay payments during that period. **As well, it was agreed that a joint Union Management committee would be established consisting of full time union representatives or designates from each General Committee and designated Company managers. This committee would meet annually, or more often as required. This committee will review the application and administration of employee benefits to ensure that they are being properly applied, that appropriate claims are not being declined, and the level of service to the employees is maintained at an acceptable level**. Issues not resolved by the committee may be escalated to the Vice-President TCRC and Assistant Vice-President Industrial Relations for resolution.

(3) **The committee will also discuss and oversee the issue of communication of benefit entitlements to your respective members. As a part of this effort, the Company proposes that the benefit books be maintained in their updated format on the respective Company and TCRC Websites, and will also provide printed benefit plan booklets for plan**

> **members and TCRC officers**. Additionally, the committee will undertake to update the benefit plan agreements between the Union and the Company.
>
> (4) Furthermore, should the Union request a comprehensive and detailed review of benefit claims this will be done jointly with representatives of the plan service provider, the Company, and the Union. If it is found that claims are being denied incorrectly, immediate corrective action will be initiated to ensure the plan service provider takes the necessary steps to correct this. Specific tracking of claim payments may be initiated upon request of the Union if it is determined that certain types of claims are continuously denied. Should it be found that claims are not being submitted correctly by plan members, educational material will be distributed to the plan members to educate and inform them of the correct claim submission requirements.
>
> (Emphasis added)

60. The Record does not disclose when the parties added article 37.11[26], how it worked in practice and whether it co-existed with the Administrative Committee(s) from the 80s Agreements. The essential point remains that the TCRC negotiated a significant role for itself which allowed it to oversee its members' benefits.

Summary

61. The TCRC satisfied the arbitrator that the interpretation exercise in this case involves comparing CBA article 37, including the 80s Agreements, with the current Sun Life benefits. The arbitrator cannot simply compare the benefits Manulife offered with those now administered by Sun Life.

62. The arbitrator will apply that analysis to the 6 issues pleaded during the August 28 arbitration.

A. Issue # 2: Exception to Definition of Dependent - Child: "The exception is if they have a spouse"

TCRC position

63. The TCRC objected to the definition of dependent child in the Sun Life booklets which excluded those who had married[27]:

> A child who is a full-time student under age 25 (age 26 for drugs listed in the Regie de l'assurance-maladie du Quebec drug formulary for employees residing in Quebec) is also considered an eligible dependent **as long as the**

[26] Article 37.11 appears to have existed prior to the 2022 MOS/App1 since those documents contain no mention of it: CPKC Documents, Tab 30.
[27] TCRC Documents, Tab 20-E.

child is dependent on you for financial support and does not have a spouse.

(Emphasis added)

64. The TCRC relied on the Vision Plan and the Dental Plan which contained no similar spousal restriction[28]. The Vision Plan defined "dependent children" as:

(e) "Dependent (s) " means:

(i) the Eligible Spouse of an Eligible Employee;

(ii) **any unemployed dependent children**, stepchildren or adopted children of an Eligible Employee:

A) **under the age of 21 residing with such Eligible Employee** or the Eligible Spouse of such Eligible Employee, or

B) under age twenty-five if registered as a full-time College or University Student, or

(ii) **any unemployed dependent children**, stepchildren or adopted children of an Eligible Employee:

(a) **under age twenty-one and residing with such Eligible Employee** or the Eligible Spouse of such Eligible Employee, or

(b) under age twenty-five if registered as a full-time College or University Student, or

(c) of any age if handicapped and solely dependent upon such Eligible Employee,

but

(iii) excludes any person who is covered under this Dental Plan[29] as an Eligible Employee;

(Emphasis added)

[28] TCRC Documents, Tabs 20-C and 20-D.

[29] This provision in the Vision Plan seemingly incorporates parts of the same definition from the Dental Plan, including the reference to "this Dental Plan".

65. The TCRC further noted that CPKC's 2-page January 1 2007 benefit chart contained no spousal limitation[30]. Manulife's booklets, however, included this limitation for dependents[31].

66. In its Brief, the TCRC argued that the CBA did not permit this type of exclusion:

> 145. This ratio applies equally to non-age-based restrictions. CPKC's restriction on employees' eligibility for benefits by excluding married children from the definition of "dependent child," thus conditioning their eligibility upon their marital status, is in breach of the Collective Agreement. No such condition is found in Article 37 or the Plan Agreements incorporated therein.

CPKC position

67. CPKC accepted that the 80s Agreements did not exclude married dependents from the definition of dependent:

> 67. **CPKC acknowledges that the original versions of the 1985 Extended Health Plan and 1985 Dental Plan do not expressly exclude married children from the definition of dependent**. **However, this exclusion has been expressly specified in all Benefit Handbooks dating back to at least 2004. It is therefore CPKC's position that the parties have been aware of and accepted the exclusion of married children from the definition of dependents for approximately 20 years.**
>
> …
>
> 70. It is CPKC's position that the administrative exclusion of married children from the definition of dependent has been in place for at least the last 20 years and has little to no adverse impact on bargaining unit members or their families. Indeed, CPKC is unaware of any grievances filed in respect of this issue.
>
> (Emphasis added)

68. During its oral submissions, CPKC noted that the parties' benefits had continuously evolved over the decades. For example, the eligibility of "dependent children" in the 80s Agreements required them to reside at home. The Sun Life booklet contained no similar restriction and CPKC had not applied this limitation. Similarly, the definition of spouse, as part of the standard terms found in insurance policies, had greatly expanded beyond what the 80s Agreements ever contemplated[32].

---

[30] TCRC Documents Tab 20-A.
[31] TCRC Documents, Tab 20-B.
[32] TCRC Documents, Tab 20-C: See, for example, the definition of "Eligible Spouse" in the Dental Plan Agreement

Decision

69. Subject to the comments below on estoppel, the TCRC demonstrated that CBA article 37 and the incorporated 80s Agreements did not deny coverage to dependents with spouses.

70. The TCRC, by analogy, relied on *City of Vancouver*[33] which examined the question "whether the Employer is contractually obliged to ensure coverage for employees who continue working beyond 65 years of age". That award noted specifically that the parties had never agreed that insurance policies, which the employer had taken out in that case[34], would prevail over the terms of the collective agreement.

71. As a result, the insurance the employer took out could not exclude an employee based on age, when the collective agreement provided coverage to all employees:

> The Union's interpretation of Article 10.3(a) is upheld. **The unambiguous language of the provision obliges the Employer to provide group life insurance for all employees "effective the first day of the first full pay period worked following the date of hire". Such eligibility is not "subject to" the policy taken out by the Employer and, in more specific answer to the grievance, applies regardless of age**.
>
> (Emphasis added)

72. That same principle applies to the definition of dependent children.

73. Neither the Dental Plan itself nor article 37.03 contains exclusionary language for a dependent with a spouse. A review of article 37.03 confirms the parties have negotiated changes for recent calendar years. However, no changes deal with the issue of coverage for dependents with spouses.

74. For the Vision Plan, which references amendments coming from "any agreement to which the parties to this Collective Agreement are signatories", neither article 37.04 nor any separate written agreement demonstrated an exclusion for dependents with spouses.

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[33] City of Vancouver v Canadian Union of Public Employees, Local 15, 2014 CanLII 31326

[34] The instant case does not involve an employer taking out group insurance policies. Instead, CPKC retained insurers to fulfill the role of the "Service Organization" under article 37 and the 80s Agreements.

75. The arbitrator acknowledges CPKC's comments that it has not excluded from coverage any dependents who did not reside at home, despite that condition existing in the 80s Agreements. But that issue is not before the arbitrator. This fact, which the TCRC did not contest, remains relevant to the question of estoppel, *infra*.

76. Neither can the arbitrator conclude that the exclusion of certain dependents from coverage would constitute a "reasonable and customary" change, a concept to which may awards refer. In *Unifor Local 41-O v Purina*[35], Arbitrator Wilson commented on the difference between an administrative and substantive change:

> The reasonable and customary limits commonly found in benefit plans do not apply to the newly implemented pre-authorization process. **Thus, the decisions referred to me do not persuade me that reasonable and customary limits found in the benefit plan allow for a pre-authorization process that requires employees to use medications other than those prescribed by their physician in order to obtain coverage**. This is not what the parties bargained for when they negotiated the benefit provisions. **It is more than an administrative change because it substantively affects the employee's entitlement to the prescription medication coverage by imposing a significant criterion on the entitlement**.
>
> (Emphasis added)

77. Conversely, Arbitrator Wilson did apply the "reasonable and customary" concept for the issue of dispensing frequency:

> **In my view, this is a change to the way the benefits are administered in that it targets the frequency and method of reimbursement and not the actual benefit entitlement**. The level of coverage for the dispensing fee has not changed, nor has the level of coverage for the prescription drugs. Rather, the only change for the employee is that she receives a larger quantum of prescribed medication in fewer visits. This is an administrative change as contemplated by Article 23.02 and permitted under the collective agreement.
>
> (Emphasis added)

78. For the definition of dependent, the booklets denied coverage based on spousal status. This goes beyond what the reasonable and customary concept would involve. More importantly, CBA article 37 does not permit this type of exclusion.

[35] 2017 CanLII 74146

B. Issue #4: Dental - Frequency of recall examinations and bite-wing x-rays.

TCRC Position

79. The TCRC contested the Sun Life booklet provision which contained a 9-month limitation for adults accessing examinations and bite-wing x-rays[36]:

> Oral examinations: 1 recall examination every 6 months for a person under age 18 or every 9 months for every other person;
>
> Bitewing x-rays: 1 set of bitewing x-rays every 6 months for a person under age 18 or every 9 months for any other person

80. The Manulife booklet continued similar wording limiting such services to every 9 months for persons over the age of 18[37].

81. The TCRC relied on the 1985 Dental Plan which provided for these services every 6 months[38]:

> (a) **The following services (i) to (iv) inclusive, each limited to twice in any calendar year**:
>
> **(i) oral examination**;
>
> (ii) prophylaxis (the cleaning and scaling of teeth);
>
> **(iii) bite-wing x-rays**;
>
> (iv) topical application of fluoride solutions;
>
> provided that, for each of the above services, a period of at least five consecutive months has elapsed since the last such service was rendered.
>
> (Emphasis added)

82. In paragraph 156 of its Brief, the TCRC summarized its position:

> 156. For the reasons set forth above, CPKC is not entitled to defer to Manulife (Tab 22-A) or Sun Life to justify the inconsistency with Article 37. CPKC is not at liberty to permit its third-party administrators to impose restrictions on recall

[36] TCRC Documents, Tab 22-C.
[37] TCRC Documents Tab 22-A.
[38] TCRC Documents, Tab 22-B.

examinations and bitewing x-rays when no such restrictions are contained in the Collective Agreement.

CPKC Position

83. During its oral submissions, CPKC referred to CBA 37.03(5) in support of the nine-month limitation for oral exams:

> (5) Effective January 1, 2000, **the frequency of exams will be extended from once every six months to once every nine months for adults** over the age of 18.

84. The arbitrator had understood at the hearing that this reference resolved the parties' dispute about oral examinations. But the dispute about bite-wing x-rays remained.

85. However, in its October 4 & 9, 2024 written submissions, CPKC suggested that CBA 37.03(5) had resolved both issues:

> Issue #4 (Dental – Frequency of Recall Examination and Bitewing X-Rays) was expressly agreed to by the parties and has been incorporated into what is now Article 37.03(5) of the CCA.

86. In the arbitrator's view, while article 37.03(5) resolved the issue of "frequency of exams", it did not cover the separate and distinct issue of bite-wing x-rays.

87. CPKC's Brief commented on employee dental benefits:

> 85. **It is CPKC's position that Union members have greater total entitlements under the current Sun Life Benefit Handbook relative to the 1985 Dental Plan. They are entitled to both oral examinations and recall examinations under Sun Life whereas the 1985 Dental Plan did not distinguish between the two exams**.
>
> 86. **Further, it is CPKC's position that the dental coverage under Sun Life's current Benefit Handbook is identical to the dental benefits provided under the Manulife Benefit Handbooks dating back to 2004**. There has been no change in the above listed dental coverage in 20 years.
>
> 87. Further and in any event, it is CPKC's position that **the current dental coverage reflects industry standards and reasonable and customary limits**. There is generally no need for multiple complete oral examinations or bitewing x-rays every year or multiple times per year.
>
> (Emphasis added)

88. In its oral submissions, CPKC described how dentists used to provide all services to patients. These days, dental hygienists provide many of those services. The dentist may only provide a periodic check.

89. CPKC further highlighted that the parties had always intended that the dental entitlements would evolve, as noted in the wording in Appendix A[39] of the 1985 Dental Plan, Section I - Definitions which incorporated the concept of "reasonable and customary charges":

> (7) **"Covered Expenses" means**, where permitted by law and to the extent that such services and supplies or portion thereof are not covered by the medical care insurance plan of the applicable province or any government dental plan or any other government health plan of the Eligible Employee's home province, **Reasonable and Customary Charges for the types of dental treatment (Basic or Major) further described herein and identified in the Table of Benefits for the Eligible Employee's Coverage Class**, up to but not exceeding the amount shown for a General Practitioner in the dental fee guide identified in the Table of Benefits for the Eligible Employee's Coverage Class, except that
>
> > (a) if such service is rendered by a Dentist who is a specialist, and such dental fee guide contains a separate fee guide for his specialty, the maximum Covered Expense for such service shall be the amount listed in the guide for such specialty, and
> >
> > (b) if such service is rendered by a Dental Assistant or Dental Mechanic who is a member of a provincial group of Dental Assistants or Dental Mechanics which has its own official fee guide, the maximum Covered Expense for such service shall be the amount listed in such guide.
>
> (Emphasis added)

90. Appendix A then described the "Covered Expenses", which included bite-wing x-rays[40]:

> **The following are Covered Expenses**:
>
> A. Basic Expenses: Routine treatment rendered or prescribed by a Physician, surgeon, Dentist or Oral surgeon, or rendered by a Dental Assistant under the

[39] CPKC documents, Tab 4, Page 583/2017; TCRC documents, Tab 5, Page 105/417.
[40] CPKC documents, Tab 4, Page 584/2017.

direct supervision of a Physician, Surgeon, Dentist or Oral Surgeon, or rendered by a Dental Mechanic:

(a) **The following services (i) to (iv) inclusive, each limited to twice in any calendar year**:

(i) oral examination;

(ii) prophylaxis (the cleaning and scaling of teeth);

(iii) **bite-wing x-rays**;

(iv) topical application of fluoride solutions;

provided that, for each of the above services, a period of at least five consecutive months has elapsed since the last such service was rendered.

(Emphasis added)

Decision

91. The TCRC satisfied the arbitrator that its members remained entitled to bite-wing x-rays every 6 months. CBA article 37.03(5)'s reference to "the frequency of exams" clearly demonstrated how the parties could change a time frame from 6 to 9 months. CPKC did not point to any similar amendment impacting the frequency of bite-wing x-rays.

92. Evidently, there would have been no need to list bite-wing x-rays separately in Appendix A, if the parties considered them part and parcel of an "oral examination".

93. The "reasonable and customary" principle might have applied had article 37 been silent on the frequency of bite-wing x-rays. Arbitrator Knopf dealt with that scenario in *Air Canada*[41]:

> …Therefore, for orthopedic shoes, because the number of covered shoes is not specified in the Plan (although the deductible is), the employees' entitlement may be determined on the basis of industry standards. If the Employer is concerned about the amounts being claimed for the numerically specified items, or the validity of claims made, the Plan allows for the claims to be denied and for disputes to be resolved.

94. In the instant case, the parties agreed on bite-wing x-rays every 6 months. The Record does not provide any evidence that this understanding had changed over time.

[41] Air Canada v Air Canada Pilots Association, 2012 CanLII 92037.

C. Issue #5(b): Termination of Weekly Indemnity Benefit (WIB) Payments: "Age 65"

95. The WIB constitutes CPKC's short term disability plan. The Disability Plan contemplated coverage ending when an employee ceased active work, a concept which included retirement[42]:

> 4.2 Termination of an Eligible Employee's employment shall, for the purposes of this Disability Benefit Plan, be deemed to occur on the date on which such Eligible Employee discontinues active work (including retirement) with a Railway, except that employment will be deemed to continue…

96. The parties do not dispute that both the Manulife and Sun Life benefit booklets limited WIB payments to those age 65 or under. The Sun Life booklet states[43]:

> Termination Age - your benefit amount terminates at age 65 or retirement, whichever is earlier.

97. Multiple cases have examined the impact of later legislative changes preventing employers from obliging employees to retire at 65.

TCRC Position

98. The TCRC relied on the Disability Plan which contained no age 65 limitation[44]. It noted in argument that employees now work past the age of 65. The Disability Plan provides important benefits to these workers given that employees have no sick days:

> 172. The Disability and Life Insurance Plan Agreement does not contain any provision that provides for termination at age 65. Employees who work beyond age 65 have not "discontinued active work" with CPKC.
>
> 173. CPKC cites section 4.1(c) in its JSI. Section 4.1(c) has no application to employees who work beyond age 65. CPKC's employees are at liberty to choose to work beyond age 65. One Conductor working out of Calgary is presently 70 years old.
>
> 174. Employees who elect to work beyond age 65 are not, "ceasing to be eligible for insurance hereunder for any reason other than termination of service with a Railway, the date on which he ceases to be eligible." As such they remain eligible for WIB per the parties' Disability and Life Insurance Plan Agreement, incorporated by Article 37.

[42] TCRC Documents, Tab 24-B, Page 87/263.
[43] TCRC Documents, Tab 24-C; Page 86/263.
[44] TCRC Documents, Tab 24-B.

> 175. **For the reasons set forth above, CPKC is not at liberty to permit its third-party administrators to impose an age-based restriction on WIB eligibility, contrary to the provisions of Article 37 and the incorporated Plan document. CPKC is not entitled to defer to Manulife (Tab 24-A) or Sun Life to justify the inconsistency with Article 37. CPKC is not at liberty to permit its third-party administrators to impose a limitation on WIB eligibility where none is found in the Collective Agreement**.
>
> (Emphasis added)

99. The TCRC also noted that the Dental Plan and the Vision Plan continue to apply to employees who work past 65.

CPKC Position

100. CPKC argued that the age 65 limitation reflected the Disability Plan's original intent:

> 94. **It is CPKC's position that when the 1988 Disability Plan was established, the mandatory retirement age was 65. WIB therefore ceased at age 65 for members who elected to continue working until the mandatory retirement age. As a result, there has been no change to the terms of the 1988 Disability Plan**.
>
> …
>
> 99. Following CPKC's elimination of mandatory retirement, the Benefit Handbooks began expressly referring to termination of WIB on the earlier of age 65 or retirement. All Benefit Handbooks from at least 2014 onwards reference the termination of benefits at the earlier of age 65 or retirement.
>
> 100. Given the above, there has been no change to the age at which WIB benefits cease or a reduction in entitlements for Union members.
>
> 101. **It should also be noted that all Union plans of a similar nature provide for the discontinuation of benefits at age 65**.
>
> (Emphasis added)

101. In oral argument, CPKC maintained that the Disability Plan, given its reference to retirement when determining eligibility, had always limited WIB to those employees who were 65 or under[45]:

> ARTICLE V - TERMINATION OF COVERAGE

[45] CPKC Documents, Tab 3, Page 515/2017.

> 1. An Eligible Employee shall cease to be an Eligible Employee in the circumstances and on the earliest of the dates specified hereunder:
>
> (a) In the event of the Eligible Employee's:
>
> …
>
> (ii) retirement, the date on which he retires pursuant to the applicable pension rules; except that Life Insurance coverage shall continue for a period of 31 days after the end of the month in which he retires pursuant to the applicable pension rules;

102. In CPKC's view, this original understanding constituted the parties' agreement and the TCRC would have to negotiate any extension beyond age 65 for this benefit.

Decision

103. The arbitrator agrees with the TCRC that the age 65 limitation differs from the parties' original agreement that retirement would determine when Disability Plan/WIB coverage ended[46]. While the law governing retirement changed in the intervening years, nothing prevented the continued application of these provisions referencing "retirement". The only difference, imposed legislatively, had shifted the retirement decision away from the employer and to the employee.

104. As noted earlier, the 80s Agreements differ from a group benefits insurance policy. The parties' CBA does not incorporate any insurance policies or give a priority to the contents of the benefit booklets.

105. CPKC did not demonstrate how the booklets could take precedence over CBA article 37. In *Canroof*[47], an employer had expressly negotiated the incorporation and supremacy of insurance policies in the case of any conflicts with the collective agreement:

> 32. In short, Appendix "A" incorporates by reference the insurance policies which provide the group benefit coverage described in the "Benefits" section and summarized in the "I - Group Insurance" section. It requires that the insurance policies provide the specific levels of benefits stipulated in the "I - Group Insurance" section. **It also specifies that the terms and conditions of eligibility shall be determined by reference to both Appendix "A" and the insurance policies, and that the latter prevail in that respect to the extent that there is any conflict or inconsistency with anything else in the collective agreement.**

[46] See also the analysis above for the analogous issue concerning a dependent with a spouse.
[47] Canroof Corporation Inc v Teamsters Local 230, 2013 CanLII 25722

(Emphasis added)

106. As noted earlier in *City of Vancouver*, *supra*, which did not have a provision giving supremacy to insurance policies, the addition of an age 65 limitation violated the parties' collective agreement.

107. In *Markham*[48], an award which on its specific facts considered both the collective agreement and the insurance booklet, Arbitrator Trachuk concluded that LTD coverage did not end at 65[49]:

> **The parties could have agreed to include the age 65 limit for LTD coverage in the collective agreement anytime since 1992 if that was their intention. Many collective agreements do include such a limit. The parties have had the opportunity during every negotiation since 2006 to ensure that the language in the collective agreement reflected their bargain in light of changes to the *Code***. They continued to include Article 13.01(a) without adding that the Employer's obligation to pay LTD premiums ends at age 65. Furthermore, the parties must be presumed to have known the jurisprudence related to benefit continuation after age 65 when they negotiated the collective agreement under which this grievance was filed but they did not specify that LTD coverage would end at that age. Coverage will, therefore, continue until such time as they agree to such a change.
>
> (Emphasis added)

108. In short, the CBA did not limit WIB to those employees aged 65 or under. The age 65 limitation in the booklets violated the parties' CBA.

D. Issue 6(a): "Recover from the disability, including securing Appropriate Treatment and participating in any reasonable treatment or Rehabilitation Program and accepting any reasonable offer of Modified Work from the Employer".

109. The Sun Life booklet[50] described the Disability Plan's "Employee Responsibilities", *inter alia*, as follows:

---

[48] Canadian Union of Public Employees, Local 1999 v Markham Stouffville Hospital, 2018 CanLII 111617
[49] See also, Rayonier v Unifor, Locals 256 and 89, 2022 CanLII 75226, which highlights that these cases remain highly fact dependent.
[50] TCRC Documents, Tab 27-C.

> Recover from the disability, including securing Appropriate Treatment and participating in any reasonable treatment or Rehabilitation Program and **accepting any reasonable offer of Modified Work from the Employer**.
>
> (Emphasis added)

TCRC Position

110. The TCRC contested any requirement for one of its members to accept a reasonable offer of modified work from CPKC. The TCRC highlighted that section 6 in the Disability Plan[51] described all limitations on employee payments. In its Brief, the TCRC argued that nothing in section 6 required its members to accept a reasonable offer of modified work:

> 193. The language highlighted above is inconsistent with the provisions of Article 37 and the 1988 Disability and Life Insurance Plan Agreement. The 1988 Plan Agreement provides at pages 59-60 a comprehensive set of mutually-agreed Limitations for which "Payment will NOT be made under the Disability Benefit Plan." (Tab 27-A).
>
> 194. **There is zero language in Article 37 and the Disability and Life Insurance Plan Agreement that provides termination of benefits if an employee declines "any reasonable offer of Modified Work from the Employer."** CPKC would need to negotiate this additional limitation to amend the Limitations provided in the 1988 Disability and Life Insurance Plan Agreement.
>
> 195. For the reasons and in view of the authorities set forth above, CPKC is not at liberty to permit its third-party administrators to impose such termination language, contrary to the provisions of Article 37 and the incorporated Plan document.
>
> 196. **CPKC is not entitled to defer to Manulife (Tab 27-B) or Sun Life to justify the inconsistency with Article 37 and the Plan Agreement. CPKC is not at liberty to permit its third-party administrators to impose a limitation on WIB eligibility where none is found in the Collective Agreement**. TCRC maintains that the unilaterally imposed termination language in the Sun Life booklets is in breach of the Collective Agreement and that the Company must be directed to cease and desist such breach.
>
> (Emphasis added)

111. At the hearing, the TCRC submitted that the Disability Plan only contains an "own occ" limitation. It does not contain an "any occ" requirement which might permit the assignment of modified duties.

[51] TCRC Documents, Tab 27-A.

CPKC Position

112. CPKC's Brief argued that offers of modified work arise from the duty to accommodate, an obligation which applies to employees, trade unions and employers:

> 113.The Union appears to be taking the position that an employee should be entitled to WIB in situations where they are capable of performing work in modified duties. This position is wholly unreasonable.
>
> 114. The duty to accommodate an employee at law is a collaborative process. Both an employer and employee have a duty to cooperate in the accommodation of a disabled employee.
>
> 115. **It is a standard administrative term that employees will not be eligible for WIB or short-term disability benefits in situations where appropriate work is available to an employee and the employee chooses not to take it**. **The provision of WIB is intended to provide benefits only to employees who are unable to work as a result of disability. It is not intended to provide a source of income for employees who can, but simply choose not to, work.**
>
> 116. The obligation on an employee to accept any reasonable offer of modified work from CPKC has been contained in every Benefit Handbook dating back to at least 2004. For at least 20 years, this obligation has existed without challenge. It is therefore unclear on what basis the Union is challenging this standard employee responsibility.
>
> (Emphasis added)

113. At the hearing, CPKC added that these types of plans never allow an employee to decide to stay home and collect income if they could be performing productive work. Moreover, the requirement in no way deprived the TCRC of its right to grieve the reasonableness of any modified work offer made to an employee.

Decision

114. For multiple reasons, the TCRC did not persuade the arbitrator that the Disability Plan allows its members receiving WIB payments to refuse an offer of reasonable modified work.

115. CPKC demonstrated that the duty to accommodate obliges employees, trade unions and employers to work together to get an employee back to work. External legal developments in recent decades have imposed this tripartite duty on the parties, in a way analogous to the changes noted above for mandatory retirement at 65. The Disability Plan, as drafted, does not provide either an employee or the TCRC the right to opt out of their human rights obligations.

116. Moreover, the Disability Plan never existed as a full standalone agreement independent of how benefits operated. For example, the parties understood when they signed that 1988 agreement that CPKC would engage a “Service Organization”[52]:

> (j) "Service Organization" means the institution which is responsible for the daily administration and operation of the Plan and, where appropriate, underwriting of portions of the Plan.

117. The parties also jointly created an Administrative Committee with two members from the unions and two from CPKC[53]. The Administrative Committee had access to an Administrative Fund which financed its Disability Plan duties.

118. Moreover, the Disability Plan at section 3(f)[54] already contemplated the possibility an employee might have other “earnings” during a period of disability:

> (f) Except as provided in paragraph 3(c), **an employee who is eligible for an Unemployment Insurance payment in any week, but because he has earnings in such week, does not receive any Unemployment Insurance payment from the Canada Employment and Immigration Commission, will not be entitled to Disability Benefits for any part of such week**. This provision will also apply to an employee who receives a reduced payment from the Canada Employment and Immigration Commission because he has earnings in a particular claim week.
>
> (Emphasis added)

119. Appendix B[55] to the Disability Plan provided further particulars about the parties’ intentions. The Disability Plan Appendix at paragraph 3.1 contains both “own occ” and “any occ” language[56]:

> 3.1 On receipt by the Service Organization of proof as herein required that an Eligible Employee has become **wholly and continuously disabled from bodily injury or from sickness or disease so as to be prevented from performing the duties of his occupation or employment**, a benefit will be paid to such Eligible Employee equal to one-seventh of the Amount of Disability Benefits to which the Eligible Employee was entitled on the date he became so

[52] TCRC Documents, Tab 4, Page 30/417.
[53] TCRC Documents, Tab 4, Page 39/417.
[54] TCRC Documents, Tab 4, Page 34/417.
[55] TCRC Documents, Tab 4, Page 70/417.
[56] TCRC Documents, Tab 4, Page 77/417.

> disabled for each day that he continues to be so disabled **and does not engage in any occupation or employment for wage or profit** subject to the limitations set out in Section 6 hereof.
>
> (Emphasis added)

120. Similarly, Appendix B Section 6.1 indicates when payments will not be made. This includes:

> (f) for any period during which the Eligible Employee is **engaged in any occupation for wage or profit**.

121. Some of the language cited above might suggest that any reasonable offer of modified work, even part time in a lower paid position, automatically ends WIB benefits. That is not how the duty to accommodate generally works when an employee starts performing modified duties. In any event, the parties could arbitrate that issue if it ever arose.

122. The 80s Agreements do not deal explicitly with what happens if an employee can perform modified duties. This reflects the era in which they were negotiated. Article 37 must be interpreted in a manner consistent with current legal standards.

123. In summary, the duty to accommodate, and the negotiated language in the Disability Plan, do not support the TCRC's suggestion that its members can refuse any reasonable offers of accommodated work and still receive 100% of their disability benefits. If this right of refusal could even be negotiated given current human rights principles, the CBA would need clear language to this effect. The current CBA at article 37 does not achieve this goal.

E. Issue 6(c): "Obtain benefits that may be available from other sources." and Issue 6(d): "Assist in recovering damages from a third party responsible for your illness or injury - Subrogation Agreement."

TCRC Position

124. The TCRC contested language which could lead to the termination of disability benefits. The TCRC referenced section 6 in Appendix B of the Disability Plan[57] as providing the only reasons why an employee will not receive benefits. Section 6 does not

[57] TCRC Documents, Tab 29-A; Page 119/263.

mention an employee's obligation to obtain benefits from other sources or to sign a subrogation agreement[58].

125. In its Brief, the TCRC commented on these two obligations:

> 209. **There is zero language in Article 37 and the Disability and Life Insurance Plan Agreement that provides termination of benefits if an employee declines to obtain benefits that may be available from other sources**, **or declines to assist in recovering damages from a third party responsible for your illness or injury**.
>
> 210. CPKC would need to negotiate this additional limitation to amend the Limitations provided in the 1988 Disability and Life Insurance Plan Agreement.
>
> …
>
> 212. At Tabs 30-A through 30-F, the Union encloses a series of grievances challenging specific, recent instances of denial of benefits to disability claimants for failure to sign a subrogation and reimbursement agreement. A sample subrogation agreement is found at Tab 30-A (page 139 of Book of Documents Volume 2).
>
> 213. TCRC adopts and relies on the positions set out therein. **The Union repeatedly notes through these grievances that the unilateral requirement that employees sign a subrogation and reimbursement agreement does not abide by the terms and conditions of the 1988 Plan Agreement**.
>
> (Emphasis added)

126. At the hearing, the TCRC argued that section 3.2(h) of Appendix B to the Disability Plan prevented "doubling up" but did not oblige any employee to obtain other available benefits.

CPKC Position

127. CPKC commented on the two issues separately.

128. CPKC disputed that the Disability Plan did not reference the requirement to obtain benefits from other sources:

> 120. It appears that the Union is suggesting that its members should be entitled to WIB benefits when alternate benefits are available to them.

[58] TCRC Documents, Page 139/263: An example of a Subrogation and Reimbursement Agreement.

121. **The Union's position appears to be based on its claim that the 1988 Disability Plan did not dictate that an employee was required to obtain benefits from other sources. This is untrue.**

122. Section 3 in Article IV of the 1988 Disability Plan expressly contemplated employees applying for "Unemployment Insurance Sickness Benefits" and "Unemployment Insurance Maternity Benefits".

123. **In any event, it is a standard administrative term that employees will not be eligible for WIB benefits where alternate benefits may be available from other sources. Again, WIB is not intended to be a cash grab or to provide a financial incentive for employees to remain off work**. If other sources of benefits are available to an employee, an employee has an obligation to apply for and accept those benefits.

124. **Further, the obligation to obtain benefits that may be available from other sources has been contained in every Benefit Handbook dating back to at least 2004**. For at least 20 years, this obligation has existed without challenge. As a result, it is unclear on what basis the Union is challenging this standard employee responsibility.

(Emphasis added)

129. Section 3.2(h) in Appendix B to the Disability Plan[59] contemplated an employee's entitlement to other benefits and authorized the parties' "Service Organization" to determine if "overinsurance" has occurred:

3.2 It is provided that:

…

(h) if an Eligible Employee entitled to benefits hereunder in respect of a period of disability qualifies, by virtue of being insured under any other scheme whether arranged with an insurer or provided by any association, for daily, weekly or monthly indemnity benefits or all or any portion of such period of disability, **benefits payable to such Eligible Employee will be reduced by such part of the amount of benefits payable under such other scheme for such period or portion of such period of disability as may be deemed by the Service Organization to constitute overinsurance in respect of such Eligible Employee**.

(Emphasis added)

[59] TCRC Documents, Tab 4, Page 79/417.

130. CPKC also referred to an October 10, 2002 letter it had sent to the TCRC's predecessor unions about how it would apply section 3.2(h):

> Gentlemen,
>
> It has come to our attention that our insurance carriers have not been consistently applying (Section 3.2 (h)) of the Disability Benefit Plan. This provision allows for the reduction in disability benefit payable by our plan when employees receives benefits from a third party for the same injury/illness. The purpose of this provision is to ensure that an employee does not receive more than 100% of normal compensation.
>
> For your information we are instructing our carriers to apply the provision of our plan consistently effective January 1, 2003.

131. For the subrogation agreement[60] issue, CPKC commented in its Brief that this requirement forms part of standard administrative terms for benefits:

> 125. **The Union's position is that the 1988 Disability Plan did not provide for subrogation. This is incorrect**.
>
> **126. Section 3.2(h) of the 1988 Disability Plan allowed for the reduction in WIB payable under the 1988 Disability Plan when employees received benefits from a third party for the same illness or injury.**
>
> **127. Section 3.2(h) of the 1988 Disability Plan is a standard administrative term whose purpose is to ensure that an employee does not receive more than 100% of their normal compensation**.
>
> 128. **On October 10, 2002, CPKC sent the Union a letter advising that its insurance carriers had not been consistently applying section 3.2(h) of the 1988 Disability Plan. CPKC expressly set out the purpose of section 3.2(h) and advised that it had instructed its insurance carriers to apply the provisions of section 3.2(h) consistently effective January 1, 2003**. A copy of CPKC's October 10, 2002 letter to the Union is attached at Tab 37.
>
> 129. **The 1988 Disability Plan, 1999 version of the Disability Plan and all Benefit Handbooks dating back to 2004 have included a provision that requires employees to assist in recovering damages from a third party responsible for the employee's injury or illness**.
>
> 130. Given this, the Union's position that employees were not previously responsible for assisting in recovering damages from third parties is invalid.
>
> 131. **Further, if the agreement to subrogate did not exist, there could be unintended consequences. A main benefit of the subrogation provision is**

[60] TCRC Documents, Subrogation Agreement, Page 139/263.

> **that it allows Union members to apply for and potentially receive WIB benefits while waiting for a workers compensation claim to be adjudicated. If this subrogation provision did not exist, CPKC may not be willing to provide WIB payments during the waiting period**.
>
> (Emphasis added)

Decision

132. The TCRC did not demonstrate that the CBA gave its members the right to refuse to apply for any benefits to which they might be entitled. The arbitrator would need clear drafting in the Disability Plan allowing employees to receive WIB, while refusing to apply for other available benefits.

133. The Disability Plan implicitly contemplated employees applying for other benefits when eligible. For example, article IV 3(d)[61] provided for a top up by the Disability Plan if an employee obtained "Unemployment Insurance Sickness Benefits". The inclusion of such language necessarily involves the coordination of all available benefits, even if some of them may not have existed back in the 1980s.

134. CPKC also advised the predecessor unions back in 2002 about how it intended to apply article section 3.2(h). The arbitrator appreciates the TCRC's point that section 3.2(h) focuses more on double recovery than an obligation to apply for other benefits. Nonetheless, that section, like others in the Disability Plan, remains consistent with the implicit understanding that employees must apply for all available benefits. That implicit obligation then allows the parties' Service Organization to perform its explicit function to deem whether "overinsurance" has occurred.

135. However, the arbitrator concludes differently for the subrogation agreement.

136. The parties clearly contemplated that a "Service Organization"[62], in practice an insurer, would administer and operate the parties' Disability Plan. Similarly, they formed an Administrative Committee, *supra*, to monitor the Disability Plan.

137. But the arbitrator can find no evidence in the Record to support CPKC's position at paragraph 129 of its Brief that the CBA allows it to impose a detailed subrogation agreement as a condition for an employee receiving benefits:

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[61] TCRC Documents, Tab 4, Page 34/417.
[62] TCRC Documents, Tab 4, Page 74/417

> 129. The 1988 Disability Plan, 1999 version of the Disability Plan and all Benefit Handbooks dating back to 2004 have included a provision that requires employees to assist in recovering damages from a third party responsible for the employee's injury or illness.

138. While all cases are fact specific, Arbitrator Dorsey commented on a similar situation in *Catalyst Paper*[63]:

> [88] **Although the extended health benefit is merely described rather than having a comprehensive set of terms in the collective agreement, because it is provided by the employer in a manner other than through a contract of insurance, the following conclusion by Arbitrator Germaine is applicable to these terms. The reimbursement agreement imposes:**
>
> > **… personal contractual obligations on the employee which exceed the employee's obligations in the collective agreement**. If the employee is required to execute such an agreement in order to obtain the [extended health] benefit, it becomes an additional condition which the employee must meet in order to receive a benefit to which the employee is entitled under the collective agreement. **Such a condition is inconsistent with the Company's obligation to provide the benefit**. (MacMillan Bloedel Limited, Powell River Division [1997] B.C.C.A.A.A. No. 505 (Germaine), ¶ 108)

139. Arbitrator Dorsey later commented on an employee's duty to cooperate with a third-party insurer under a contract of insurance as contrasted with an employee's dealings with an administrative services provider:

> [91] The sixth term of the extended health reimbursement agreement states:
>
> > 6) I also authorize any third party to release to PBC all clinical, medical and settlement records including details of the settlement agreement and the liability allocation percentage. PBC will use this information solely for adjudicating my claims and calculating balances repayable.
>
> **An insured person has a duty of cooperation with an insurer advancing a subrogated claim. An employee does not have the same obligation to an employer paying a benefit under a collective agreement. This term mimics what an insurer might expect or require from an insured under a policy of insurance or at common law. It is not an obligation that flows from a collective agreement requirement for an employee to repay a benefit expense for which the employee recovers compensation from a**

[63] Unifor v Catalyst Paper Corporation, 2013 CanLII 77056.

> **third party**. **It might be that an employee must give the administrative services provider access to clinical and medical records from third parties for its claims adjudication and management on behalf of the self-insuring employer, but this is not an authorization that should be included in a "reimbursement agreement."** This term is inconsistent with the employer's obligation to provide this benefit.
>
> (Emphasis added)

140. In short, the subrogation agreement resembles CPKC's unilateral addition of an age 65 limitation for the receipt of WIB benefits or the disqualification of dependents who have a spouse. The CBA must authorize those conditions. CPKC cannot otherwise exclude TCRC members from benefits to which they are entitled. The arbitrator finds nothing in the CBA which implicitly or explicitly obliges employees to sign a comprehensive and detailed subrogation agreement.

DOES THE DOCTRINE OF ESTOPPEL APPLY TO THIS DISPUTE?

141. This interpretation exercise for CBA article 37 obliged the arbitrator to consider the parties' benefit agreements going back, in some cases, almost 40 years. That time frame led CPKC to raise certain procedural arguments.

CPKC objections

142. CPKC's main position posited that the benefits employees received over the decades had amended the 80's Agreements:

> 154. It is the amended or revised versions of the Plans that are incorporated by reference into the CCA, not the original 1985 and 1988 versions. Given this, benefits entitlements and administration are not fixed in the 1980s. The Plans have been, and can continue to be, administered in accordance with industry practices without there being a violation of the CCA.

143. The arbitrator, as noted above, did not accept CPKC's argument that the 80s Agreements have changed, unless the Record contained evidence confirming such amendments. Article 37 contained some amendments to the Dental Plan, for example.

144. Alternatively, CPKC argued that if the arbitrator found any violations of article 37, then any changes occurred over 20 years ago and the TCRC is estopped from grieving them:

> 160. **In the alternative, if there have been material changes to benefits coverage or administration (which is denied), those changes occurred 20 or more years ago and the Union is estopped from grieving them**. More

specifically, the change in carrier from Manulife to Sun Life/Telus Health has not resulted in any material changes to benefits coverage or the administration of benefits.

161. **As stated above, the coverage level and administration of a number of the issues in dispute date back to at least 2004. More specifically, the Manulife Benefit Handbooks from 2004 to 2019 established identical coverage limits and administrative terms to those set out in Sun Life's Benefit Handbooks from 2020 to present**. The Union was clearly aware of the terms of the Manulife Benefit Handbooks. Both CPKC and the Union relied on the clear language in those Benefit Handbooks without issue from either party up until this point. The Union has never raised a number of the issues in dispute until now.

162. As a result, the Union is estopped from reverting to the strict wording of the incorporated original Plans (which the Company denies supports the Union's positions in any event).

163. It would be inequitable to permit the Union to enforce its strict rights under the Plan when both the parties and Union members have clearly relied on and accepted the terms of the former Manulife Benefit Handbooks since 2004 without challenge from the Union.

…

165. **There is no basis for the Union to suggest that it was unaware of CPKC's or its insurers' practices with respect to benefits coverage or administration. The Benefit Handbooks have at all times been accessible to the Union and all of its members. The Benefit Handbooks are clear and transparent. The coverage and administration levels challenged by the Union date back to at least 2004**.

(Emphasis added)

145. In the JSI[64], CPKC's Preliminary Objection #2 contested the timeliness and/or arbitrability of a grievance contesting any items which are found in both the previous Manulife booklets and the current Sun Life booklet.

TCRC position

146. The TCRC disputed CPKC's position on arbitrability. In its view, App1 clearly established the process to review benefits and further provided a recourse in the event of a disagreement:

[64] TCRC Documents, Tab 1.

> Any disputes arising from this review will be advanced to rights arbitration before Arbitrator Clarke on an ad-hoc basis.

147. As noted above, the August 28 arbitration did not deal with all issues. The TCRC contested CPKC's estoppel argument for Issue #1 which dealt with a $200,000 Lifetime Drug Maximum for employees hired after July 20, 2018. The parties have not yet pleaded that issue.

148. The TCRC's comments below on the issue of estoppel must therefore be read with this context in mind. This award makes no finding about Issue #1 which the parties will plead on January 28, 2025.

149. In its Brief, the TCRC contested CPKC's position on estoppel:

> 71. At (Tab 1 BOA) the Union encloses excerpts from Canadian Labour Arbitration where, commencing at section 2:53, the learned authors Brown and Beatty provide an overview of the principles of estoppel as they apply in the arbitral context, and as they pertain to past practice. For the doctrine of estoppel to apply, the practice must be both long-standing and uninterrupted.
>
> 72. **Fundamentally, the Company is incapable of asserting that the Union is in any way estopped from challenging the Company's breaches of the fundamental scope of benefits that must be available to all employees governed by the Collective Agreement**.
>
> 73. **The essentials of estoppel cannot be proven by the Company. There was no "promise" by way of conduct or representation, on which CPKC can be seen to have detrimentally relied**.
>
> 74. During main table negotiations in 2021-2022 the Company agreed to the comparison review and to any outstanding matters in dispute will be heard before the Arbitrator. There were no limits placed on this review. Having agreed to the review and binding arbitration of disputes, it is not now open to the Company to insist that the Union is estopped from reconciling any part(s) of the Company's benefits regimen against the language of the Collective Agreement.
>
> (Emphasis added)

150. At the hearing, the TCRC added that CPKC's estoppel argument must fail since it can point to no promise on which it relied. Instead, CPKC agreed in App1 to conduct a benefit review and submit any issues in dispute to rights arbitration. The parties' negotiated App1 process demonstrated the absence of detrimental reliance or prejudice.

Decision

151. As noted above, the arbitrator finds that these matters are arbitrable, especially given the wording of App1.

152. The arbitrator has further concluded that the TCRC is estopped at the current time from returning to a strict interpretation of article 37. For decades, CPKC has followed a consistent practice when administering benefits without objection. To the extent the arbitrator has agreed with the TCRC's position on some of the issues examined in this award, it would nonetheless be unfair to allow the TCRC to enforce its strict CBA rights until the parties can collectively bargain those issues.

153. The Record contains little evidence concerning the parties' discussions about their 80s Agreements. CBA article 37 does contain some clear amendments, such as for the Dental Plan. But the general acceptance of the status quo for a long period of time, and over multiple collective bargaining sessions, may explain why neither party raised the current matters.

154. The expedited nature of a railway arbitration may also impact the Record placed before the arbitrator. In regular arbitration, these types of benefit grievances often entail many hearing days and significant *viva voce* evidence. For example, in the recent *Vancouver Police Board* arbitration[65], a 15-day hearing took place to review whether the change in insurance carriers providing administrative services led to collective agreement violations. Similarly, an 8-day hearing occurred in *Toronto (City) v Toronto Professional Firefighters' Association, Local 3888*[66].

155. The Supreme Court of Canada in *Nor-Man*[67] commented on a labour arbitrator's application of the doctrine of estoppel:

> [2] **Essentially, the arbitrator held that the union was barred by its long-standing acquiescence from grieving the employer's application of the disputed provisions**. **Given the employer's consistent and open practice of calculating vacation entitlements as it did, and the employer's detrimental reliance on the union's acquiescence, it would be unfair, the arbitrator found, for the union to now hold the employer to the strict terms of the collective agreement in that regard**.

[65] Vancouver Police Board v Vancouver Police Union, 2024 CanLII 47238.
[66] 2020 CanLII 31921
[67] Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals, 2011 SCC 59.

…

[5] Labour arbitrators are not legally bound to apply equitable and common law principles — including estoppel — in the same manner as courts of law. Theirs is a different mission, informed by the particular context of labour relations.

[6] To assist them in the pursuit of that mission, arbitrators are given a broad mandate in adapting the legal principles they find relevant to the grievances of which they are seized. They must, of course, exercise that mandate reasonably, in a manner that is consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance.

[7] The arbitrator's decision in this case falls well within those bounds. I would allow the appeal and restore his award.

…

[21] **The arbitrator in this case applied Agassiz and Murdock to the facts as he found them and, as I have already mentioned, imposed an estoppel against the Union. This estoppel was to terminate upon the expiry of the collective agreement, on March 31, 2010**.

…

[60] I would reject that submission as well. **The question is not whether the labour arbitrator failed to apply Maracle to the letter, but whether he adapted and applied the equitable doctrine of estoppel in a manner reasonably consistent with the objectives and purposes of the LRA, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of Ms. Plaisier's grievance**.

[61] **I am satisfied that he did**.

156. In *York University*[68], Arbitrator Gedalof distinguished his case, where the union was unaware of the issue, from those involving long delays throughout which the union had full knowledge of the practice(s):

> 133. **In Owen Sound, the impugned practice was easily ascertainable and had affected every member of the bargaining unit on an ongoing basis for a period of between 25 and 30 years**. Nor-Man arose from similar circumstances, where the practice had been in place for over 20 years and 5 collective agreements. **In Child and Family Services of Timmins, the impugned practice had not only been applied to an unspecified number**

[68] York University v York University Faculty Association, 2021 CanLII 31520.

> **of members of the bargaining unit; it had been specifically applied to the union's chair in circumstances where she was directly impacted by it and acknowledged its application**.
>
> 134. In the instant case, the impugned practice affected a relatively small proportion of the bargaining unit and the impact of that practice did not affect a single member of the bargaining unit, let alone its leadership, until the circumstances giving rise to the instant grievance. **On a day to day and ongoing basis, the fact that the University was not providing life insurance coverage to employees in mandatory receipt of pension would not have been obvious to the Association or its membership at large**.

157. The current case does not involve significant benefit practices about which the TCRC had no knowledge[69]. The TCRC and its predecessors negotiated for themselves an active role for benefits under article 37 and had access to the benefit booklets for decades.

158. The arbitrator acknowledges that, prior to 2004, the TCRC's predecessors negotiated and administered the 80s Agreements[70]. Nonetheless, the 80s Agreements created the Administrative Committee which allowed the TCRC and predecessor unions, as noted in the Dental Plan for example, to meet regularly "with the Service Organization as may be necessary to discuss the overall operations of the Dental Plan".

159. CBA article 37.11 further demonstrated the TCRC's ongoing involvement for benefits since the parties created a joint committee. Article 37.11 also contemplated the possible posting of the benefit booklets on both the CPKC and TCRC websites.

160. Given that, for decades, the TCRC and its predecessors did not protest the benefits set out in the booklets, CPKC had no reason to suspect that it needed to negotiate changes to article 37 to address the issues now raised in this arbitration.

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[69] Compare *York University*, *supra,* with Fredericton Police Union, United Brotherhood of Carpenters and Joiners of America, Local 911 v Fredericton (City), 2022 CanLII 135109 at paragraphs 201-205.
[70] See CIRB Order 8600-U and Canadian Pacific Railway Company, 2004 CIRB 268 for the TCRC's history as bargaining agent.

161. The Record also contained a couple of formally signed documents, including App1[71], through which CPKC, somewhat unilaterally, offered the TCRC increased benefit entitlements. For example, CPKC's July 3, 2019 letter[72] stated:

> This letter is in reference to the previously communicated Benefit carrier change CP is undertaking, moving from Manulife to Sun Life, effective January 1, 2020.
>
> **The Company has spent the past several weeks working closely with the carriers to ensure this transition is seamless for employees, while maintaining the benefit coverage conferred by the Collective Agreement and Benefits Policy**.
>
> **Through this process, we have identified certain enhancements that can be offered to employees**. These improvements are:
>
> …
>
> **We believe these important enhancements offer value to plan members and look forward to offering them as part of CP's Benefit plan through Sun Life beginning January, 2020**.
>
> (Emphasis added)

162. CPKC further implemented additional benefit improvements unilaterally[73]. On the issue of dependents, while a spousal exclusion came into existence at some point, CPKC did not insist that dependents reside at home despite that condition existing in the 80s Agreements. Had the TCRC advised CPKC of its current interpretations for article 37, then CPKC might have reserved these unilateral improvements for collective bargaining.

163. The TCRC's change of position, after a long period of acquiescence, denied CPKC the opportunity to negotiate some of these benefits disagreements. If the arbitrator granted the TCRC's request for a cease-and-desist order, without considering the overall context of this case[74], then CPKC would suffer significant prejudice.

164. As in other cases, the estoppel will continue until such time as the parties have had an opportunity to negotiate these issues.

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[71] TCRC Documents, Tabs 2 and 7.
[72] TCRC Documents, Tab 7.
[73] See, for example, the list in CPKC's Brief at paragraph 22.
[74] See also Canadian Union of Public Employees, Local 1867 v Nova Scotia Department of Transportation and Infrastructure Renewal, 2024 CanLII 1406 at paragraphs 110-112.

DISPOSITION

165. The TCRC's Brief requested the following remedies:

> 262. For all of the foregoing reasons, the Union respectfully requests that the Arbitrator provide the following relief and directions:
>
> (a) Dismiss the Company's preliminary objection.
>
> (b) Find that the Company's benefits packages have breached the Collective Agreement in the manner set out herein.
>
> (c) Order the Company to cease and desist from its violations.
>
> (d) Direct that the Company comply with the Collective Agreement going forward, in particular with respect to the benefits entitlements available to employees.
>
> (e) Order full redress to any affected members for any lost entitlements.
>
> 263. In addition, the Union requests the Arbitrator remain seized.

166. At the hearing, the TCRC also asked the arbitrator to order the parties to discuss compliance.

167. In its Brief, CPKC requested:

> 166. In light of the above, the Company submits that there has been no violation of the CCA. There have been no material changes to the benefits coverage and administration with respect to the issues in dispute.
>
> 167. Accordingly, the Company submits that this matter should be dismissed.

168. At the hearing, CPKC further particularized its position on remedy if the arbitrator found any violations. It argued that if the arbitrator did not accept the estoppel or other arguments in favour of dismissing the grievance then CPKC suggested a going forward declaration constituted the appropriate relief. The parties could then negotiate the issues.

169. As noted above, the arbitrator agreed with the TCRC that some of the current benefits do not respect CBA article 37, namely:

> - Issue # 2: Exception to Definition of Dependent - Child: "The exception is if they have a spouse";

- Issue #4: Dental - Frequency of … bite-wing x-rays;

- Issue #5(b): Termination of Weekly Indemnity Benefit (WIB) Payments: "Age 65" and;

- Issue 6(d): "Assist in recovering damages from a third party responsible for your illness or injury - Subrogation Agreement."

170. Nonetheless, the TCRC's change of position, however innocent, on the correct interpretation of CBA article 37, after years and even decades of acquiescing to CPKC's benefit practices, gives rise to an estoppel. This estoppel will remain until such time as the parties have negotiated a new CBA, a process which will provide a fair opportunity for the parties to deal with these issues.

171. The arbitrator remains seized. This arbitration will resume on January 28, 2025 to hear argument on the remaining issues.

SIGNED at Ottawa this 18th day of October 2024.

_____

Graham J. Clarke
Arbitrator