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IN THE MATTER OF AN ARBITRATION

BETWEEN:

MACMILLAN BLOEDEL LTD
Eve River Division
(the "Employer")

AND:

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 1-363
(the "Union")

Re: C. Muzyka - Seniority Grievance

ARBITRATOR:	Judi Korbin
COUNSEL:	Lloyd Doidge for the Employer Sy Pederson for the Union
DATE OF HEARING:	July 6, 1993
PLACE OF HEARING:	Campbell River, B.C.
DATE OF DECISION:	August 6, 1993

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The parties agreed that I had jurisdiction to hear and determine the matter in dispute under the terms of their Collective Agreement.

The case concerns a grievance brought by the Union on behalf of Chris Muzyka, a Heavy Duty Mechanic, in the Employer's Eve River Division, alleging that the Employer unilaterally changed an agreement and practice regarding recognition of the principle of seniority between the parties. Specifically, the grievor was replaced in a "woods" Mechanic position on November 16, 1992 by Willie Fontaine, who has less seniority.

The relevant provisions of the Collective Agreement are Article II - EMPLOYER'S RIGHTS - set out herein:

Sec. 1: Management and Direction

> The management and the operation of, and the direction and promotion of the working forces is vested exclusively in the Management; provided, however, that this will not be used for purposes of discrimination against employees.

and Article XX - SENIORITY set out herein:

Sec. 1: Principle

> (a) The Company recognizes the principle of seniority, competency considered. In the application of seniority, it shall be determined first by department and second by plant seniority.

Sec. 4: Job Posting

> (a) Vacancies shall be posted in advance for a period of not less than two (2) working days except when otherwise agreed.

A short history of the facts will help to focus the issue.

1. The grievor is a Heavy Duty Mechanic who has been employed at Eve River since May 8, 1979, and currently works in the "dry land sort/shop" area.

2. Willie Fontaine is a Heavy Duty Mechanic who has been employed at Eve River since March 4, 1980, and currently works in the "woods".

3. For many years, there has been a maintenance crew at the Division which is comprised of three Heavy Duty Field Mechanics. Two of these Mechanics normally work in the "woods" and one works in the "dry land sort/shop" area.

4. The "woods" job involves travelling over the claim all day, whereas the "dry land sort/shop" job involves being in the shop for approximately seventy-five per cent of the day, or the week, and being down at the beach when needed.

5. There was a time when there was a great deal of overtime in the "dry land sort/shop" area. However, generally and currently, the "woods" jobs incur more overtime than the "dry land sort/shop" job.

6. Mr. Fontaine had a back injury dating back to an accident in 1970 which caused him to have one leg three-quarters of an inch shorter than the other, and a twisted pelvis at the bottom of his spine. These hip and leg injuries have led to back pain over the years.

7. In the Fall of 1992, Mr. Fontaine approached Bruce Munro, the Equipment Supervisor, advising that his condition was being aggravated by working on a concrete floor. It was causing him to suffer severe back pain. He felt that, if he continued to work on the concrete floor, he might not be able to continue to work as a Heavy Duty Mechanic.

8. Mr. Munro approached the grievor and asked if he would switch places with Mr. Fontaine.

9. The grievor reluctantly agreed to the request for a limited period of time, stating he would have preferred to have remained in the "woods". Effective November 16, 1992, Mr. Munro replaced the grievor in the "woods" position, and assigned him to the "dry land sort/shop" position. Willie Fontaine was placed in the field position.

10. Both employees are acknowledged to be competent.

11. At one time, the field mechanic positions were specifically posted, as were day and night shifts. The most recent posting in January of 1988 posted only for a Heavy Duty Mechanic. No grievances were filed as a result of this change.

THE ISSUE

The issue to be determined in this case is whether the Employer has the right to assign heavy duty mechanics to the "woods", or the "dry land sort/shop" area, out of seniority.

THE EVIDENCE

The Union witnesses both testified to a belief that shifts and positions have both always been awarded in accordance with the principle of seniority. They provided several specific examples to buttress their belief.

For instance, the grievor testified that there was an occasion when Kenny Marr, who had been an apprentice, got his heavy duty mechanic ticket and used his seniority to bump Willie Fontaine off day shift and onto night shift.

The grievor also testified that, when Willie Fontaine went onto nights and Kenny Marr took the day shift, management discussed a rotation of six months with the three affected heavy duty mechanics for the "woods" and the "dry land sort/beach" area. However, when it came to a point in the rotation where a senior employee, Alfie

Wilkins, was to go to the "beach", he refused, and used his seniority to stay out in the "woods", thereby ending the rotation agreement.

Another example cited by a Union witness, Wayne Christensen, was that of Barry Lovell who worked in the woods for a month or two when he completed his apprenticeship, and then applied his seniority to go down to the "dry land sort" area, because, as Mr. Christensen put it, "at that time, that is where there was a lot of overtime."

The Employer witnesses testified that they knew of nothing, either in writing or in any verbal understanding between the parties, indicating that they must fill either shifts or positions in seniority order. Rather, Bruce Munro and Bill Sandison maintained that they accommodated and permitted seniority for filling of jobs on day shift "most of the time".

Evidence was adduced to indicate that there were several occasions where the principle of seniority was not followed in these assignments. The following are some examples that emerge from the evidence.

When Mr. Fontaine was off on W.C.B. leave, Mr. Siu was assigned to the "dry land sort/shop" to cover the work, while the Employer assigned Stanley Nichol, a junior employee, to the "woods" for

about a month. David Siu grieved that situation, but dropped his grievance at the first level. The Union does not deny these facts.

Mr. Fontaine testified that, when he was hired, he was first on night shift for approximately four months. Then he went on day shift as a Heavy Duty Mechanic, and immediately was assigned to the "woods", thereby by-passing employees who were senior to him, and there were no grievances on that occasion.

Bill Sandison, who had been a management employee in charge of the shop at Eve River for many years, testified that, at one time, he wanted all three heavy duty mechanics to be familiar with both beach and woods equipment, and particularly with the beach hydraulic equipment for holiday and sickness replacement. At the time, there was no hydraulic equipment in the woods - only at the beach. As he testified, "I put it to the people, there was no problem, and then I rotated them until the problem with Alfie Wilkins occurred", which was described earlier in this Award, and which ended the rotation.

In Exhibit #6, the Employer tabled evidence of at least five occasions when, for a series of days, a senior employee was assigned to work on the "beach" or "dry land sort/shop" while more junior employees worked in the "woods".

On the other hand, witnesses also gave evidence of an occasion where seniority was adhered to. Mr. Fontaine testified that, after Kenny Marr had served his apprenticeship, he was still on night shift while he, Fontaine, was on day shift as a Bush Mechanic. Then both Marr and Fontaine were laid off. Mr. Fontaine went on to explain that was why Kenny Marr had the opportunity to bump him. Fontaine went back to night shift and fought it, but he was told by the Employer that Kenny Marr had the right, by seniority, to replace him in the woods. This all happened during a reduction of forces at the operation.

Mr. Sandison testified that the reason Mr. Marr stayed in the woods on day shift is that he, Sandison, got some bad advice from the Personnel Department. He said he got advice that he could not change Marr and Fontaine, and believed he may have been a little naive in taking that advice, but that he went along with it.

POSITION OF THE UNION

Counsel for the Union argues that the Eve River Division has, by its conduct, given reason for the Union to rely on the application of seniority in filling the "woods/field mechanic" position, and it is, therefore, estopped from assigning employees to this position out of seniority order.

Mr. Pederson asserts, on behalf of the Union, that Mr. Sandison's evidence that he followed the instructions of Personnel in not

putting Willie Fontaine back on day shift when he was junior to an incumbent, is consistent with the conduct the Union and employees have relied on over the years.

Counsel states that, in this case, the Employer has attempted to retract from representations made to the Union, and a practice which has existed over the years, and that the Employer is estopped from altering this practice until the Union has a reasonable opportunity to deal with the matter in negotiations. In dealing with the fact that there is no written contractual provision for the Union to rely on in this regard, Mr. Pederson cites Re Westmin Resources Limited -and- the International Union of Operating Engineers, Local 115, -and- Tunnel & Rock Workers Union, Local 168 unreported, February 14, 1992, where Arbitrator Robert Blasina, on p. 33 states:

> ...It is not an aspect of the doctrine of estoppel that one can escape from his word without responsibility just because no reference to a written contractual provision can be made. If estoppel is to be applied exclusively when a party has foregone application of a specific contractual provision, that would reduce the doctrine to the discredited and trivial shield/sword distinction....

Finally, Counsel argues that, while the Union sympathizes with Mr. Fontaine's problems, it is concerned that the grievor, who is senior to him, will be left at the "dry land sort" while a junior employee is in a preferred position, and that, given the understanding the Union has relied on, this is an injustice which

will have an unfair effect on other Union members.

POSITION OF THE EMPLOYER

Counsel for the Employer argues that there is no evidence adduced to support the Union's position that the Employer's practice of accommodating seniority in assigning employees to either the "woods" or the "dry land/sort" over the years was intended to affect the legal rights of the parties. On behalf of the Employer, Mr. Doidge points out there is no evidence of any discussion or any meetings between the Employer and the local Union on this matter. Rather, the evidence of the Employer's witnesses is that they wanted to work things out and to accommodate seniority issues, but at no time did the Employer forego its management rights to assign employees to work in either area.

In fact, Mr. Doidge asserts that the evidence of Mr. Christensen, whereby he testified that the Employer used to post for a "woods" mechanic, must be compared with the most recent posting, which posted only for a heavy duty mechanic. That comparison serves to support the Employer's claim that its rights are intact. Mr. Doidge adds that the fact there was no grievance on this change in posting procedures buttresses the Employer's position.

Counsel cites two cases to support the proposition that the mere existence of a practice does not confirm a right. First, in Westmin Resources, supra, Arbitrator Blasina stated:

> ...Equally, the mere fact that for many years an employer has afforded a benefit to employees for many years does not create an estoppel where the benefits were granted as a matter of grace: Hickling, loc.cit.,supra, at p.206; and see Re Victoria Time Colonist and Victoria Newspaper Guild (1984), 17 L.A.C. (3d) 284 (Hope), which might be explained on that ground. The mere existence of a practice does not confer a right. The fact that a party has followed a particular course of action does not necessarily import a promise that it would continue to do so:...

And in Re Mayo Forest Products Ltd., -and- IWA-Canada, Local 1-80, unreported, dated March 5, 1993, Arbitrator Kinzie stated:

> ...Employer's past practice regarding the assignment of millwright employees is not sufficient, by itself, to create an estoppel. The Union must also establish that in doing so, the Employer intended to forego its rights under Article II, Section 1 of the agreement to change its method of assignment in the future....

Further, Counsel points out that the Employer did not have a consistent practice of appointing the senior employee to the preferred position as evidenced by the five examples of occasions where the Employer assigned a senior employee to work the "beach", while a junior employee(s) worked in the "woods". In other words, this case is no different from those examples.

Mr. Doidge also argues on behalf of the Employer that, if the Union were found to be correct, vacancies would have to be posted as "Day Shift/Mechanic/Woods", and relies on the fact that the Employer had not posted in this fashion since 1988, and this has not been grieved.

Finally, Mr. Doidge argues it would take very specific evidence to turn good faith efforts into binding commitments, and there is no such evidence in this case. The facts are not present for the Union to establish an estoppel.

In summary, Counsel points out that the Employer's evidence consistently was that, when it wanted to move an employee, it would accommodate or permit seniority if it was in the Employer's and employee's interest, but, if there was a good business reason not to do so, as in the case of the hydraulic equipment at the beach, it would rely on its management rights. There are many examples of the above between 1975 and 1993, which are documented, and which support the position of management relying on its rights and accommodating seniority when it could.

DECISION

At the outset, there is one matter I feel compelled to address. That is the evidence concerning the occasion when Mr. Marr bumped Mr. Fontaine on the day shift in the "woods". That incident must be put in context. By that I mean it occurred during a reduction in forces which is governed by Article XX, Sec. 2 - Reduction and Recall of Forces. On reading the Collective Agreement, Mr. Marr, by virtue of his seniority, had a contractual entitlement to the available work during a reduction in force. That evidence is of no assistance in this case.

I will now deal with the Union submission that the Employer is estopped from assigning a junior employee to the "woods" position to replace a senior employee. In a nutshell, the Union urges me to find, based on several examples of senior employees working in the "woods" mechanics position, cited in evidence, that an estoppel is created and, further, that the parties shall not change the practice until the Union has had a chance to negotiate such change.

As stated in Re Combe v. Combe, [1951] 1 All E.R. 767 at p.770, an estoppel arises where:

> ...one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

While the Union's evidence forms the grounds for its genuine belief that a practice of assigning senior mechanics to the "woods" positions exists, the whole of the evidence establishes a varied practice of assigning senior mechanics to the "woods". The evidence of the Union witnesses only paints a part of the picture.

The evidence of the Employer's witnesses establishes, with equal validity, that, on a number of occasions, the senior employees were

not always assigned to the "woods". Specifically, the Employer's evidence points to several examples of a series of days where junior mechanics were assigned to the "woods" positions, while a senior mechanic worked at the "beach-dryland/sort" position.

On many occasions, senior mechanics were assigned to the "woods" positions, and on other occasions, junior mechanics were assigned to the "woods" positions.

On the balance of evidence before me, I conclude there is insufficient evidence to establish that the Employer, either by its actions or conduct, established a consistent practice of assigning employees to the "woods" by strict application of seniority. Accordingly, there is no consistent practice which can be relied on by the Union to the extent that it can be said the Employer is estopped from following its management right to assign junior mechanics to the "woods". The most that I can conclude from the evidence is that there has been a practice of assigning senior employees to the "woods" when it suited the parties. No doubt this general practice made labour relations sense. However, that practice was not consistent. Therefore, it does not establish an estoppel, nor does it establish a contractual right in the circumstances of this case. It is well settled in arbitral jurisprudence that it takes specific language in the Collective Agreement to establish such a right, absent estoppel.

In the result, the Union has not established that an estoppel is present. Therefore, the grievance is dismissed.

It is so awarded.

DATED at Vancouver, British Columbia, this 6th day of August, 1993.

Judi Korbin