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IN THE MATTER OF AN ARBITRATION

BETWEEN:

NORTHWOOD PULP AND TIMBER LIMITED

(hereinafter referred to as the "Employer")

AND:

IWA-CANADA, LOCAL 1-424

(hereinafter referred to as the "Union")

c.c. B. Brown
F. Bruder
D. Cadman
A. Delany
M. Madrigga
Andy Meints
C. Meints
H. Miller
B. Sundquist
G. Thesen
L. Waldie
R. Williams

(Car Loaders Arbitration)

Arbitrator:	H. Allan Hope, Q.C.
Counsel for the Employer:	Norman K. Trerise, Esq.
Counsel for the Union:	James H. Cluff, Esq.
Place of Hearing:	Prince George, B.C.
Date of Hearing:	July 26, 1990

AWARD

I

There are seven grievors in this dispute. The Union alleges that the Employer is estopped from reducing the piece work rate paid to them for the loading of a new type of lumber car, called a centre beam car. Rates for the new cars were unilaterally reduced by the Employer in January of 1989. Rates for two existing types of cars were maintained. Three of the grievors work at Prince George Sawmill (PG Mill) and four of them work at Upper Fraser Sawmill (Upper Fraser), being two mills operated by the Employer in the interior of the province. The seven grievors load all of the lumber produced at those two mills. Loading has been paid on piece work rates since 1968. The rates have always been fixed unilaterally by the Employer. The Union position is that even though the Employer has historically fixed the rates, it has never reduced them before and is estopped from reducing them in light of that practice.

The implication is that the Union brought its claim under the doctrine of estoppel because changing the rates was clearly not a breach of the collective agreement. That is not to say that the Union is not entitled to raise the plea of estoppel. It is to say that the Union position is not supported in the collective agreement. In fact, the Union position is antithetical to the agreement. The only provision dealing with the obligation of the Employer with respect to piece work rates in the agreement is an obligation to ensure that the hourly equivalent for the work does not drop below the rates negotiated for hourly paid employees. The provision reads as follows:

> Section 7:
>
> It is agreed that employees engaged on contract or piece-work shall not receive less money than the equivalent of the hourly rate specified in

> the wage schedule for the number of hours worked in each pay period.

It is conceded that the piece work rates paid by the Employer met the requirements of that provision. The position of the Employer is that it has always fixed piece work rates unilaterally and has consistently rejected moves by the Union to have negotiations in renewal bargaining extend to those rates. In particular, the Employer filed copies of Union bargaining proposals for the contract years 1975-76; 1977-78; 1979-80; and 1983-86; each of which contains the following proposal:

> 5(7) Employees who are paid on a piece-work basis shall receive the said increases as additions to existing daily rates and/or conversions effective as in (a) above.

The significance of that proposal is that it would constitute a negotiation of piece work rates as between the Employer and the Union. In particular, it would have the effect of incorporating the piece work rate into the wage increases negotiated for other employees. As stated, the Employer rejected that proposal on each occasion when it was presented. The submission of the Employer is that the rejection of the proposal was consistent with the position it has always taken that it is not willing to negotiate piece work rates beyond the guarantee contained in Article 5(7) of the collective agreement.

The submission of the Employer is that no basis was established for invoking the doctrine of estoppel because, not only was there no express or implied representation by the Employer that piece work rates would be maintained at existing levels, the fact is that it has always taken the converse position that it retained the unilateral right to fix piece work rates and that it was not willing to have those rates negotiated. The Employer said that there was no basis upon which the Union could assert that the Employer had

represented that piece work rates would be maintained at a level beyond the level guaranteed in the collective agreement.

II

Before returning to the estoppel issue, it is convenient to address a collateral issue raised by the Union. It has to do with whether the Employer acted reasonably in reducing the rates. The Employer's position was that the decrease in rates was responsive to its belief that the introduction of the centre beam cars had resulted in loading efficiencies that invited the change in rates. The Union submitted that the Employer was wrong in concluding that the centre beam cars afforded that potential. In particular, the Union contention was that the reduction in rates had resulted in a corresponding reduction in the income of the grievors.

The position of the Employer was that the efficiencies achievable offset any loss in income caused by the drop in rates. The Union challenged that fact and sought to support its position with documentary evidence disclosing that the three grievors in PG Mill experienced a reduction in annual earnings between 1988 and 1989 of approximately $10,000. The Employer's reply was that the earnings levels for the grievors from Upper Fraser remained relatively constant. The Union addressed that issue by establishing that the car loaders in PG Mill only perform car loading duties, whereas the car loaders in Upper Fraser perform other duties at an hourly rate when car loading is not required. On that basis, the Union urged that the experience at PG Mill supported the contention that the reduction in rates had resulted in a corresponding reduction in income. The Union submitted that if the Employer was correct in its estimate that the reduction in rate would be off-set by increased efficiencies in loading, the incomes would have remained the same in PG Mill as well as in Upper Fraser.

The Employer filed documentary evidence disclosing that the volumes of car loadings in Prince George have been declining since 1987 and that there was a significant decline in volumes at PG Mill between 1988 and 1989. By comparison, there had been a slight increase in volumes between 1988 and 1989 in Upper Fraser. Similarly, the number of hours worked by the three grievors in PG Mill declined significantly between 1988 and 1989. I conclude on the evidence that the Union fell short of proving on a balance of probabilities that the reduction in rates had caused a reduction in wages.

In any event, it was not established that the question of whether the centre beam cars made production efficiencies possible is relevant to the estoppel issue. The question of the reasonableness of the Employer's position is not put in issue by the doctrine of estoppel. It was made clear that the Employer acted in good faith in response to its assessment that centre beam cars did afford loading efficiencies. Both parties called evidence with respect to the configuration of the centre beam cars as compared with ordinary flat cars, but they reached different conclusions about their efficiency. The Employer, based upon a performance analysis of the use of the cars in other operations, and its own observations, was satisfied that they could be loaded faster than the existing cars. The evidence of the grievors was to the effect that in their experience the centre beam cars could not be loaded faster and that the reduction in the piece work rate had resulted in a reduction in income to them.

In any event, the evidence relied on by the Union was not sufficient to establish on a balance of probabilities that it was correct in its conclusion that greater efficiency in loading was not possible. In particular, the documentary evidence filed by the Employer calls the Union conclusion into question. It may be worth noting in that same regard that if the Employer bore the onus of establishing on a balance of probabilities that efficiencies had been achieved, the evidence it led would not meet that requirement either.

But that issue of fact would only be relevant if it was established that the Employer was under an obligation to justify the level of piece work rates beyond maintaining the rates at or above the level required by the collective agreement. There is no such obligation under the collective agreement and the doctrine of estoppel raises different issues.

Returning to those issues, the Union called evidence to establish that while there had been changes in the past that had increased efficiencies in terms of volumes loaded, the Employer had not imposed a reduction in rates. The Union relied on that evidence as support for the inference that the Employer did not see itself as free to reduce rates. However, it was also established that, in the past, the Employer had restricted the level of increase in the piece work rates in recognition of the introduction of efficiencies in the loading process. The thrust of the evidence was that the Employer has sought to maintain a relationship between the hourly rate generated by the piece work rates and the rates paid to employees performing similar work at an hourly wage rate. It would appear that the Employer seeks to ensure that the piece work rates remain premium in comparison with hourly rates, but to avoid a significant widening of the gap between the hourly rate triggered by the piece work rates and the hourly rate paid to other employees. On those facts, I cannot conclude that the Employer has conceded that it does not have the right to reduce rates.

III

On those facts, I turn to a consideration of the authorities relating to a claim for estoppel. The first requirement of the Union, as the party seeking to invoke the doctrine, is to establish that the Employer made a representation that it would not unilaterally reduce piece work rates. See Re City of Lethbridge and Canadian Union of Public Employees, Local 70 (1987), 26 L.A.C. (3d) 81 (England)

@ pp. 89-90 citing Re City of Penticton and C.U.P.E., Local 608 (1978), 18 L.A.C. (2d) 307. The representation can be made in words or by conduct. Here the Union said that the action of the Employer of never reducing piece work rates must be seen as amounting to a representation by conduct that the rates would not be unilaterally reduced. However, as I will outline shortly, the mere existence of a practice is not sufficient to support an application of the doctrine and, in any event, the Union failed to meet the second requirement of the doctrine, which is to show that it relied on the representation of the Employer to its detriment.

Assuming that the Union could overcome the hurdle of establishing that the practice itself amounted to a representation, there was no evidentiary basis for concluding that the Union relied on the representation. The Union failed to establish that it had a reason to assume that the Employer would maintain the rates. The fixing of piece work rates was raised by the Union in successive bargaining sessions and the Employer's position throughout in those negotiations was that, aside from the guaranteed minimum agreed to in the collective agreement, it was unwilling to negotiate piece work rates. On those facts, the Union was not in a position to establish a reliance on the fact that the Employer had not reduced rates in the past as amounting to an agreement not to reduce them in the future. For example, the factors involved in establishing detrimental reliance were discussed in City of Lethbridge on pp. 90-1 as follows:

> The city negotiators honestly and reasonably believed, as a result of the union's acquiescence in the practice in the past and its silence in bargaining, that the union consented to the city continuing to apply art. 10.05 in the same manner as it had previously applied art. 11(b)3 ...

Here there is no evidence to support a similar finding. Firstly, there was no evidence of a practice similar to the practice at issue in that decision. Here the practice was not a failure to

reduce rates, as urged by the Union, the practice was to unilaterally fix piece work rates without negotiating them with either the employees or the Union. On the evidence, the Union failed to establish that the failure to decrease them was anything more than coincidental. Further, the Employer did not remain silent in bargaining. It consistently reserved to itself the right to determine piece work rates unilaterally. The only inference available to be drawn from the various collective bargaining sessions was that the Employer was unwilling to negotiate rates with the employees or the Union. Hence, while the fact is that the Employer did not reduce piece work rates over the years, there was nothing in that fact and the circumstances in which it arose to support a finding that the Employer was representing to the Union that piece work rates would be maintained.

IV

In my view the line of arbitral authority having application to this dispute consists of the decisions relating to wage premiums that are calculated and paid outside of collective agreements. The general subject is addressed in Brown & Beatty, Canadian Labour Arbitration (1988) @ pp. 8-22 ff. There the authors record a general arbitral consensus that the obligation of an employer to continue to pay incentive wages is contingent upon the language of the collective agreement. That reasoning governed the decision in Re Treasury Board of the Province of Newfoundland and Newfoundland Association of Public Employees (1982), 3 L.A.C. (3d) 329 (Woolridge). There the issue related to whether workers under that collective agreement were properly dismissed for a failure to maintain production minimums. One aspect of the issue was the fixing of an incentive bonus.

There, as here, there was a provision in the collective agreement permitting the employer to pay bonus rates provided the rates were maintained at or above the hourly rate negotiated for

employees performing similar work. The union position in that dispute was that the employer could not arbitrarily fix the bonus rate and that the rate should have been negotiated with the union. The arbitrator rejected that position on the basis that the agreement did not require that the rate be negotiated. The reasoning has application in this dispute. The arbitrator commented as follows on pp. 334-5:

> That argument is not an acceptable position because art. 45.02 specifically permits the employer to do what it did, without any consultation requirement, with the exception that it must never pay less than the hourly rate in the agreement.

In Re United Steelworkers, Local 3292, and Sunshine Waterloo Co. Ltd. (1963), 13 L.A.C. 219 (Fuller), the issue was whether an employer could unilaterally discontinue the payment of bonus rates. On p. 227 the board commented as follows:

> There is nothing in the collective agreement to provide that these workers will continue to work under the incentive plan. The schedule fixes the rates where the plan applies and it cannot be used to read into the agreement a stipulation that an incentive rate worker will continue to work at incentive rates for any particular period.

The Employer also relied on the decision in Cominco Ltd. and United Steelworkers of America, Local 651, March 14, 1990, unreported (Chertkow). In that case, Mr. Chertkow was dealing with a circumstance in which an incentive bonus plan was discontinued and the employees who had worked under the plan reverted to working at an hourly rate. The issue was whether the employer was at liberty to fix production levels higher than the base level that had been fixed under the incentive plan. That level was substantially below the level fixed by the employer after the plan was discontinued.

The position of the union in that case was that even though the incentive bonus plan had expired, the negotiating history of its existence in the collective bargaining relationship between the parties prohibited the employer from unilaterally fixing production quotas, as opposed to negotiating those quotas with the union.

Mr. Chertkow was required to determine whether the collective agreement entitled the employees to limit their production to base levels. The Employer in this dispute relies on the following comments made by Mr. Chertkow on p. 30:

> Nothing in the collective agreement can be found to support the union's position. There is no language there that supports the view that contract miners are entitled to work at a "base", or any level for that matter, when working on day's pay. Article 4.01 of the collective agreement gives the company the right to manage its affairs. The language is broad enough, in my view, to include the fundamental proposition that in the absence of any bargain to the contrary, the company is entitled to set its production standards from time to time for bona fide business reasons. For the union to succeed in its assertion that the company has somehow abrogated the right, I would have to find clear and unambiguous language in the collective agreement to that effect (see Wire Rope Industries Ltd. and United Steelworkers of America, Local 3910, 4 L.A.C. (3d) 323). None can be found and none can be inferred.

The Employer relies on that passage as having application by analogy to the facts present in this dispute. The submission of the Employer is that employers have the right to fix rates of pay for particular work unless that right is fettered by the collective agreement. Its submission is that the reasoning of Mr. Chertkow in Cominco Ltd. applies here with respect to whether the Employer can be taken by inference to have agreed to a particular result in the fixing of piece work rates in the absence of specific language to

that effect. In the submission of the Employer, the onus was upon the Union to establish that the Employer, either in the provisions of the collective agreement or in the form of a representation under the doctrine of estoppel, agreed to maintain piece work rates at a particular level.

The Employer submitted that it is quite evident that no such agreement is contained in the collective agreement. In fact, said the Employer, the collective agreement provides expressly that its obligation is to keep piece work rates at or above the hourly rate equivalent. The Employer's alternative position was that the onus was upon the Union to establish that it had made a representation that it would not reduce piece work rates and that nothing in the evidence supports such a finding. In fact, said the Employer, the evidence negates any such representation.

V

I am in agreement with the position of the Employer. Here the relationship between the parties with respect to the fixing of piece work rates was well defined and well established. The Employer fixed those rates unilaterally without prior discussion with the employees involved or the Union. The obligation of the Employer with respect to fixing piece work rates had been bargained collectively between the parties and resulted in a provision that the hourly rate triggered by the piece work rate would not fall below the rate paid to employees working on an hourly wage. The very fact that the parties addressed the subject in collective bargaining, including visitations to that subject in successive collective bargaining sessions, negates any suggestion that the Employer, by its conduct, made a representation that piece work rates would be maintained at any level other than its commitment that rates would not be reduced below the equivalent hourly rate.

I conclude that the Union failed to establish a contractual right to have the piece work rates maintained. Furthermore, the nature of the collective agreement provision and its bargaining history is inconsistent with a finding that the Employer held out that the rates would be maintained. In the result, I conclude that the Union failed to establish a basis for invoking the doctrine of estoppel and the grievance must be dismissed.

DATED at the City of Vancouver, in the Province of British Columbia, this 13th day of November, 1990.

H. ALLAN HOPE, Q.C. - Arbitrator