No. 58/86

LABOUR RELATIONS BOARD OF BRITISH COLUMBIA

BETWEEN:

WESTAR TIMBER LTD.

(the "Employer")

AND:

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL NO. 1-405

(the "Union")

PANEL: Shona A. Moore, Vice-Chairman
Jack Butterworth, Member
J.R. Lippert, Member

COUNSEL: Tom Roper and Peter Favell for the Employer
Robert B. Blasina for the Union

DATES OF HEARING: July 29 and 30, 1985

DATE OF DECISION: March 5, 1986

DECISION OF THE BOARD

I

This concerns an application by the International Woodworkers of America, Local 1-405 wherein the Union complains pursuant to Section 28 of the Code that Westar Timber Ltd. (Celgar Lumber operations) has acted in a manner which is contrary to Section 46 of the Code. In the alternative, the Union complains pursuant to Section 8 that the Employer is in breach of Sections 3(1), 3(3)(b) and 3(3)(c) of the Code by altering the employees' terms of employment so as to induce those employees to refrain from continuing to be union members, or to exercise their rights under the Code. In the further alternative, the Union complains pursuant to Section 28 of the Code that the Employer is in breach of Section 65(1) by conducting its affairs with an alleged blatant disregard for certain provisions of the collective agreement including the wages and hours of work provisions therein.

Subsequent to receipt of the Union's submissions, the Board convened a formal hearing and both parties appeared with counsel.

II

The Union is the certified bargaining agent for approximately 260 employees of the Employer including a group of eight people who are employed as "carloaders". These employees work the day shift, Monday to Friday, and prepare lumber for shipment on rail flat cars and on boxcars.

The Employer is a member of Interior Forest Labour Relations Association (hereinafter "IFLRA") and is party to a collective agreement with the Union which has a term July 1, 1983 to June 30, 1986. The collective agreement includes provisions which recognize the exclusive bargaining agency of the Union, provisions setting out the hours of work, seniority provisions, and provisions regarding rates of pay.

The instant complaints arose when the Employer introduced an incentive pay system without the Union's consent. The Union alleges that the Employer entered into private discussions and negotiations with the group of eight carloaders and on February 11, 1985, introduced the incentive pay system which provides in its entirety as follows:

"1. Bonus rate will be 50¢ per 7 man crew (8 in winter months) for loading rail cars, in an amount over and above 504 MFBM daily.
2. Normal employee benefits will be paid by the Company.
3. Shipper's instructions and carrier specs to be carried out as per loading diagram. Cost of reloading for errors attributed to crew errors will be deducted from bonus payment. Errors will be determined as per loading diagram and carrier specs.
4. If changes occur to loading diagram after loading commenced, bonus crew will be credited with volume loaded. Unloading will be done by hourly crew.
5. Carloading crew will be responsible to properly care for their equipment.
6. Company to be responsible for maintaining all supplies, tools and equipment in adequate amounts and working order as per list attached.

7. Carloading crew will prepare own dunnage. All dunnage material including stub stakes will be provided by the Company.
8. Excessive snow to be removed by hourly employees.
9. Carloading crew will be responsible for keeping their work area acceptably clean and free of debris.
10. If for any reason there is no rail cars or a shortage of lumber to load, the loading crew will have the option of going home or accepting other hourly work in the plant at normal job rate.
11. As long as bonus work is available, crew will not be required to work elsewhewre.
12. Normal hourly pay rates will apply to the bonus carloading crew. Bonus above hourly rate will be distributed evenly among the crew and amount loaded will be recorded on a daily basis. Hours worked over and above 8 hours will be paid current overtime rates or in bonus form, whichever is greater.
13. Bonus crew time to be kept by time card system and Company will provide information on amounts loaded.
14. WCB and Company safety regulations to be adhered to by employees and Company.
15. Company to maintain loading deck surface and have hourly employees move rail cars.
16. Company will deal with bonus crew through a crew representative selected by the Plant Committee in consultation with the bonus crew.
17. All incumbent carloading employees will have first option to return to the bonus crew in line with vacancies and seniority, after which carblocking vacancies will be posted.
18. Fifteen day written notice will be required by either party to terminate this arrangement.
19. These guidelines open for revision or renewal six months from date of acceptance."

The group of carloaders is made up of two forklift drivers, who are ordinarily paid the "Group 11" wage scale of $14.66 per hour, and six carloaders who are paid a "Group 5" wage scale of $13.82 per hour. The incentive pay scheme was

introduced to the carloading group in spite of advice to local management from the Union's Plant Committee chairman that the Union objected.

The Union called evidence from Mr. Nowlan, who has acted as president of the local union since 1968. We accept Mr. Nowlan's testimony that he first learned about the carloading incentive scheme when a copy of the guidelines was sent to him by the Plant Committee. Mr. Nowlan discussed the incentive scheme for the first time with Ken Halliday, vice-president of industrial relations for the Employer, in late February 1985, when Mr. Nowlan telephoned Mr. Halliday to ask what the company intended by implementing a bonus carloading scheme. We accept Mr. Nowlan's evidence that during that early conversation, he strenuously objected to the company's unilateral implementation of the incentive scheme and advised the Employer that the Union was opposed to the system.

Mr. Nowlan characterized the rationale for the Union's opposition to the scheme as being three-fold; first, that the unilateral imposition of the incentive program is a scheme which is contrary to the established system of job evaluation which links evaluated job classifications with specialized wage rates under the collective agreement; second, the Union believes that an incentive program encourages workers to adopt unsafe work practices; third, an incentive program creates dissention amongst the employees in the bargaining unit by providing to a very small group a bonus system while the remaining employees are paid in accordance with the wage schedule.

Mr. Ferreira, who has acted as plant chairman of the Union since 1972, gave more specific testimony concerning the basis for the Union's opposition to the bonus scheme. He described the dissention amongst the employees which sprang from the implementation of the bonus system. Mr. Ferreira's evidence, which we accept on this point, is that some of the carloading crew had been threatened by other members of the bargaining unit who saw them as individuals receiving an unfair advantage from the Employer. Furthermore, Mr. Ferreira said that arguments are encouraged within the carloading crew itself with respect to the speed or slowness with which one of the members of the crew may work, thus, in the view of other members of the crew, impeding or jeopardizing the crew's ability to meet a bonus target.

The second reason for opposing the scheme in the instant case was characterized by Mr. Ferreira as being a matter of principle. In his eyes, the local Union is the only bargaining

agent and, in his view, the Employer's means of implementing this program was interpreted by him as a direct challenge to the Union's status as bargaining agent.

The Regional Council of the International Woodworkers of America opposes incentive systems and in 1972, moved to eliminate existing incentive systems in bucking and falling in the coast region.

On cross-examination, Mr. Nowlan conceded that carloading bonuses do exist in some northern regions, however, he pointed out that in those cases, the bonus schemes have been negotiated with the local unions or accepted by them. It was on the matter of negotiations or acceptance by the local union that made those cases different, in Mr. Nowlan's eyes, from the situation at Westar. Mr. Nowlan also agreed that some "bonuses" have been distributed by Westar, for example, the Union has not opposed the passing out of free cold pop on hot summer days, nor has it opposed the distribution of jackets to a limited number of employees to commemorate production or safety targets.

Tony Ferreira, who has acted as plant chairman of the Union since 1982, gave uncontradicted evidence describing the provisions in the collective agreement establishing the wage rate for forklift operators at Group 11 or $15.32 an hour, and the balance of the carloading crew at a Group 5 wage rate at $14.44 an hour. Mr. Ferreira heard rumours of an incentive carloading system which prompted him to speak with Mr. Hampton, who at that time was the superintendent. Mr. Hampton has since been succeeded by Mr. Swanson. Mr. Hampton told Mr. Ferreira that he had talked to the carloading crew regarding the implementation of an incentive bonus system. Mr. Ferreira told Mr. Hampton that he objected to the system.

Mr. Hampton approached Mr. Ferreira at some later time to ask why he was upset with the bonus system that Mr. Hampton wanted to implement. Mr. Ferreira replied that he would not discuss the matter with Mr. Hampton but that he was "upset and was not going to talk about it". As far as Mr. Ferreira knew, Mr. Hampton talked directly with the crew regarding the implementation of the incentive pay scheme in October or November of 1984. Subsequent to those meetings Mr. Ferreira refused to talk about the system with Mr. Hampton.

Although the incentive scheme generally did find acceptance with the bonus crew, Mr. Ferreira spoke with Mr. Metzner after its implementation and told him to stop implementing the system and said that if he wanted to implement an incentive pay system, he would have to go to the local Union. Mr. Ferreira's

evidence on this point, which we accept, was that Mr. Metzner replied that it was none of the Union's business and that he, Mr. Metzner, did not have to deal with the local Union with respect to the carloading bonus.

Mr. Ferreira was somewhat taken aback by this response. Subsequently, a meeting occurred between Mr. Swanson, Mr. Metzner, for the company, and Mr. Olson, the shop steward, and Mr. Ferreira, for the Union. One purpose for this meeting was to settle a dispute concerning whether the carloading crew would be paid overtime for the 45 minutes they had worked a particular day in order to qualify for the bonus. That dispute was resolved. Mr. Swanson agreed that if the Union was upset about the 45 minutes worked, then he would pay the overtime rates. Mr. Ferreira asked Mr. Swanson to put the bonus scheme into writing and as a result of that request, on February 12, 1985, the "Guidelines" document set out earlier in this decision was produced.

The Union's complaint springs from two sources. First, the Union opposes, in principle, the implementation of new incentive schemes. Second, the Union is angry that the incentive scheme was introduced and, since introduction, has been administered with what the Union says is a complete disregard of the local Union.

The scheme certainly is a unilaterally imposed wage system. Equally clear is that neither Mr. Ferreira nor any local Union representative was consulted prior to the implementation of the program. Furthermore, while point 16 of the guidelines for the bonus carloading scheme states that the company will deal with the bonus crew through a crew representative selected by the Plant Committee, the Plant Committee had never been contacted by the manager with respect to any matter arising under the bonus scheme. Rather, the company had meetings directly with crew members in order to discuss certain issues arising under the guidelines for the bonus carloading scheme and entirely circumvented the normal route for communicating work related information or concerns from management to the Union.

The Employer elected to call no evidence in this case.

III

Counsel for the Union characteized the guidelines for the bonus carloading scheme as amounting to a private contract entered into between members of the carloading crew and the Employer and as including agreements which were contrary to the provisions of the collective agreement. As an example of this

sort of provision, counsel directed the Board's attention to point 17 which states:

> "All incumbent carloading employees will have first option to return to the bonus crew in line with vacancies and seniority, after which carblocking vacancies will be posted."

Counsel for the Union says that this provision of the guidelines purports to set up some special seniority provision outside of the seniority and job posting provisions of the collective agreement. Furthermore, counsel for the Union argued that the bonus incentive scheme contemplated by the guidelines sets out a wage system to be superimposed on the existing rates which is wholly different than the scheme contemplated by the collective agreement. Counsel differentiates between the Guidelines' bonus or incentive system on the one hand and the rigid structure of the collective agreement which establishes a wage scheme which pays employees a certain amount of money for a certain number of hours worked. On this point, counsel for the Union asks the Board to note the highly structured job evaluation and wage scheme which has been established under the existing collective agreement.

Indeed, it is not in dispute that IFLRA and the Union administer a joint evaluation plan which establishes wage rates for every new job classification. The procedure is highly structured and has been developed over a number of years. Briefly, when a new job is created, the plan provides for the immediate setting of an interim rate. The next step is that a job description is generated and a group number and thus a wage rate is assigned to the new job. The wage rate and group number fix the new job into a specific point in the hierarchy of jobs in the industry. If the job content changes, then the incumbent in the position or the company can re-apply for a new job description to be generated.

The only jobs not covered by the job evaluation plan are a handful of jobs set out at page 60 of the collective agreement:

"JOB CATEGORIES NOT INCLUDED IN JOB EVALUATION
EFFECTIVE JULY 1, 1982

Grader Improver	(Equiv. Group 11)	$14.10
Grader Trainee	(Equiv. Group 9)	13.80
Tallyperson Trainee	(Equiv. Group 6)	13.40
Storeperson	(Equiv. Group 17)	15.13
Heavy Equipment Op./ Maintenance	(Equiv. Group 14)	14.58

FIRST AID ATTENDANT/ TIMEKEEPER	(Equiv. Group 9)	$13.80
Plus Premium		
30 cents/hr.	'C' Certificate	
40 cents/hr.	'B' Certificate	
50 cents/hr.	'A' Certificate	
60 cents/hr.	'AA' Certificate	
HEAD FIRST AID ATTENDANT/TIMEKEEPER	(Equiv. Group 9)	$13.80
Plus Certificate Premium		
Plus 25 cents/hr.		

"

In addition to this handful of positions not governed by the evaluation plan are certain certified logging trade persons classifications.

In addition to being contrary to the scheme contemplated by the Code, the Union argues that the incentive pay scheme is contrary to the wage rates provided by the collective agreement. The Union submits that the rates set out in the collective agreement are not minimums, but rather are the wage rates. Furthermore, the Union argues that the hours of work provisions are mandatory hours of work and that an incentive system which encourages persons to work at more flexible hours is contrary to the fixed hours of work provisions in the collective agreement.

Counsel for the Union argues that the Union is the exclusive bargaining agent for every employee in the bargaining unit and that the collective agreement is binding on the Union, the Employer and every employee in the bargaining unit. Counsel for the Union argues that the Board must distinguish between bonuses paid by the company with the Union's agreement or acquiescence and a unilaterally imposed scheme which is vigorously opposed by the Union. Counsel relies on Le Syndicat Catholique des Employes de Magasins de Quebec, Inc. v. La Compagnie Paquet Ltee., [1959] S.C.R. 206 (S.C.C.), C.P.R. Co. v. Zambri (1962), 34 D.L.R. (2d) 654 (S.C.C.), McGavin Toastmaster Ltd. v. Ainscough et al (1975), 54 D.L.R. (3d) 1 (S.C.C.), and Re Telegram Publishing Co. Ltd. v. Zwelling et al (1975), 67 D.L.R. (3d) 404 (Ont. C.A.) for the proposition that where a collective agreement is in force, it is not possible to speak of individual contracts of employment binding the employer and the employee. Counsel for the Union argues that however characterized, the bonus carloading scheme is something which the Employer has purported to impose as a condition of employment without the Union's consent.

Counsel for the Union also relies on a decision of the Manitoba Court of Appeal in Winnipeg Police Association et al v. Irvine, [1980] 4 W.W.R. 696, where before the Court was a private agreement to send a police officer to law school. The Court held that such an individual contract is illegal, not simply unenforceable. The Union further refers the Board to a decision of the Board in Paccar of Canada Ltd., BCLRB No. 291/84, (1985) 7 CLRBR (NS) 227. Counsel for the Union advances that case for the proposition that where there is a collective agreement in force and thus no strike option is available to the Union, then there can be no unilateral imposition of terms by management. Counsel also relies on MacMillan Bloedel Industries Limited, Harmac Division, BCLRB No. 46/74, [1974] 1 Can LRBR 313, for the same proposition.

Counsel for the Union submits that collective bargaining as contemplated by the Code is expected to occur throughout the relationship between an employer and a trade union which is certified to represent the employees in the bargaining unit. Counsel for the Union says that it is an overly restrictive and narrow analysis of the Code which would limit the proper place and function of collective bargaining to something that occurs simply at the expiry of a collective agreement.

Counsel for the Union argues that the Board's decision in Cariboo College, BCLRB No. 396/83, [1983] 4 Can LRBR 320, is wrongly decided if it stands for the proposition that the provisions of Section 46 of the Code are not prescriptive. Rather, the Union says that the correct view is that an independent unfair labour practice is not necessary to support a complaint under Section 46. Rather, Section 46 of the Code standing alone is sufficient to support the Union's complaint in the instant case. That Section of the Code is argued to provide that the trade union is the exclusive bargaining agent. Furthermore, and flowing from that, is the notion that the trade union is the exclusive bargaining agent for each employee in the bargaining unit and thus the company may not negotiate directly with any of the employees in the bargaining unit. The Union further submits that the company may not, accordingly, make private arrangements with the employees because those employees have no status to enter into any agreement for no contract can stand touching terms or conditions of employment outside of the collective agreement negotiated with the Union. This analysis, in the Union's submission, of Section 46 explicitly excludes the imposition of any special contract over the common framework imposed by the collective agreement.

Counsel for the Employer argues that Section 46 of the Code, upon which the Union relies, provides to the Union no

substantive rights which can support a complaint before the Board, rather, that it only defines the status of the trade union in the same way that B.C. Hydro is given the status of a corporation pursuant to the relevant incorporating legislation, and the University of British Columbia is given the status of a university by virtue of certain provisions of the Universities Act. The thrust of the Employer's argument on this point is that it is not meaningful to speak of a "breach" of a status section such as Section 46. Therefore, one must point to some other section of the Code in order to find a violation upon which the Board can rule. Counsel for the Employer argues that no such independent violation is being proved in the instant case. Counsel relies on Pacific Press Ltd., BCLRB No. 86/83 at pages 8 and 9, and Crestbrook Forest Industries Ltd., BCLRB No. 268/83.

Counsel argues in the alternative that if the Union succeeds, then there would be no need for Section 61(1)(c). The submission is that if Section 46 of the Code goes beyond merely stating the status of a trade union and goes farther and operates as an active prohibition against the unilateral imposition of conditions of employment by an employer on employees without first going through the trade union, then a statutory freeze, such as Section 61, would be unnecessary.

Furthermore, counsel for the Employer submits that if Section 46 prohibits the unilateral imposition of any terms or conditions of employment, the rule-making power of management would also fail. Any imposition of a benefit would be per se illegal and this would catch, in the Employer's submission, the company's existing practice to pay sick benefits on the first day of absence rather than on the sixth day as strictly required by the collective agreement.

If the real issue was whether the bonus plan is contrary to the collective agreement, counsel for the Employer submits that the mere fact that a contract is not enforceable is irrelevant to the issue of whether or not the Code has been threatened. In this way, counsel argues that while the contractual arrangement between the company and the employees may not be enforceable as against the Union, but that would not amount to a violation of the Code. Counsel for the Employer submits that if the Union succeeds, then through Section 46 of the Code the Union would achieve the equivalent of a collective agreement contractual prohibition against the unilateral giving of gratuities or any other benefit not contemplated by the Code.

Last, at the outset of the case, counsel for the Employer raised as a preliminary matter the fact that the Union's complaint in this case ought to go to arbitration but immediately

advised the Board that it was content to have the preliminary objection dealt with at the end of the case and in the formal reasons.

In bringing the preliminary objection, counsel referred the Board to B.C. Timber Ltd., Celgar Lumber Division and Celgar Woodlands Division, BCLRB No. 267/84, Matsqui Police Board -and- Corporation of the District of Matsqui, BCLRB No. 15/85, and Famous Players Ltd., BCLRB No. 365/84, for the proposition that where an issue is raised between the parties with respect to a matter which is arbitrable under the collective agreement, and where, as in the instant case, the parties have agreed in their collective bargaining that Section 96(1) of the Code is not available and the Board will defer to arbitration with respect to all of the issues in order to avoid a multiplicity of proceedings.

IV

We turn first to the preliminary objection raised by the Employer. In cases similar to this, where the parties have agreed in their collective bargaining that Section 96(1) of the Code is excluded from operation, the Board will defer to arbitration all of the issues arising under the collective agreement in order to avoid a multiplicity of proceedings. As stated in B.C. Timber Ltd., Celgar Lumber Division and Celgar Woodlands Division, BCLRB No. 267/84, the Board will use Section 65(1) of the Code as a vehicle for remedying collective agreement disputes only in certain narrow circumstances. The Board will not finesse the procedure whereby parties exclude application of Section 96 of the Code by inquring indirectly into the contract dispute through the vehicle of an alleged statutory violation.

However, in the instant case, we are satisfied that this is an appropriate case for the Board to enter upon an inquiry of the issues in dispute between the parties which also include a dispute arising under the collective agreement. To put it another way, this case does not concern solely an arbitral dispute governed by the arbitration provisions of the collective agreement. In this case, the trade union not only alleges that the Employer has violated certain provisions of the collective agreement, but also that in doing so the Employer has failed to recognize the trade union as the exclusive bargaining agent for the employees in the unit and has failed to recognize the trade union as having exclusive authority to bargain collectively for those employees.

In our view, a complaint by a trade union alleging conduct by an employer inconsistent with the trade union's status described in Section 46 may be entertained by the Board. In any event, in this case, the Union's complaint does not rest solely in Section 46, but rather, complains that the Employer has concluded certain negotiations with the employees in the bargaining unit which are inconsistent with the collective agreement as well as amounting to a failure to recognize the trade union status. The trade union also frames its complaint in Section 3 of the Code arguing, among other things, that the Employer's refusal to negotiate exclusively with the Union amounts to an interference with the administration of the trade union which is charged among other things with the negotiation and enforcement of collective agreements.

The carloading scheme which we have described at some length earlier in this decision affects terms and conditions of employment, including the wages payable to employees on the crew, and purports to implement provisions affecting seniority and job postings. This scheme was negotiated directly with the employees on the crew. It was negotiated with the individual employees in spite of the trade union's direct opposition. Its implementation was in the face of resistance from the Union.

In this way, the facts of this case differ from the examples raised by the Employer. Were the Union to succeed in this case, the result is not a collective agreement prohibition against the unilateral giving of gratuities or other benefits not contemplated by the Code. Rather, with the knowledge and consent of a trade union, the Employer may implement gratuities and benefits so long as the practice is known to the union which does not object. The key is not that the benefit or gratuity is initiated by the Employer but rather that its implementation meets with either the approval or acquiescence of the trade union.

There is no doubt that when the Employer commenced negotiating and later implementing the incentive scheme directly with the employees it acted in a manner wholly inconsistent with a recognition of the trade union's status as exclusive bargaining agent for the employees in the unit.

The incentive scheme fundamentally amends the wages and benefits provided by the collective agreement for employees in the carloading crew. The conduct of the Employer is precisely that condemned by the Supreme Court of Canada in Syndicat Catholique des Employes de Magasins de Quebec Inc. v. Compagnie Paquat Ltee., [1959] 18 DLR (2d) 348, where speaking for the Court Judson, J. stated:

> "...There is no room left for private negotiation between employer and employee. Certainly to the extent that the matter is covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the Employer on what terms he must in the future conduct his master and servant relations...The terms of employment are defined for all employees, whether or not they are members of the Union, they are identical for all..."
>
> (at 353-4)

In our view, nothing turns on the fact that members of the carloading crew earn no less than the wage provisions set out in the collective agreement and, pursuant to the incentive scheme, only have a possibility of earning more. Our decision would be the same were the plan to contemplate a lower rate of pay as well as an improvement on the collective agreement provisions. The question is whether or not an employer may treat a term of a collective agreement as a minimum requirement without explicit language to that effect and unilaterally implement terms or conditions of employment which are different than those set out in the collective agreement. We are satisfied that an employer may not. While an employer may not intend to affect the trade union's ability to represent the employees, by embarking on the course chosen by this Employer, an employer's unilateral implementation of terms and conditions of employment different than those stipulated by a collective agreement strikes directly at the trade union's authority to represent the bargaining unit. In large part, a trade union's support amongst the employees in the unit is fundamentally affected by those employees' perception of the union's ability to control and regulate the conduct of the employer as it affects the terms and conditions of employment of those in the bargaining unit. Furthermore, much of the trade union's status in the eyes of its members depends on the bargaining unit employees' perception that the union successfully satisfies all of the employees that they are not suffering from discrimination inter se. The Employer's unilateral implementation of the incentive scheme directly affects the trade union's status vis a vis the members in the bargaining unit. The Employer's conduct in this case, if allowed to stand, would be powerful evidence that the Union had no input into setting the terms or conditions of employment and had little or no ability to ensure that all employees worked under similar conditions.

In reaching our decision in this case, we have found guidance in the arbitration award in Re United Rubber Workers,

Local 723 -and- Fluid Power Ltd., (1968) 19 LAC 51 (Weiler). There, a bonus incentive plan was introduced after discussions with the union, but only on a trial basis for a limited number of employees. The trial period was extended, but at the end of that time, the union decided that the plan should be withdrawn completely. Eventually, after some negotiations with the union, the company decided to reinstate the plan unilaterally. At arbitration, the union argued that the parties had agreed to specific hourly wage rates which each employee is to receive at any particular time for any particular job. The company argued that the bonus incentive plan does not relate to hourly wage rates, rather that the collective agreement rates are established as a basic floor under which no employee's earnings will sink. That submission is similar to that advanced on behalf of the Employer in this case. The arbitrator recognized in that case that the union wished to compel the company to negotiate with it in order to eliminate the anomalies caused by the insertion of a bonus incentive plan into a collectively established employment relationship based on hourly rates. At page 55 of Re United Rubber Workers, Local 723, supra, the arbitrator states:

> " The second problem concerns a relative equity as far as different groups of employees are concerned. When the Agreement was negotiated, the relative claims of different jobs were settled and rates established by Appendix A. Now some employees work in jobs which are not covered by the bonus incentive plan, others in jobs which are not as amenable to incentive efficiency as others. Moreover, within each job classification, some employees are obviously going to earn a higher bonus than others. Hence the whole structure of equitable relationships among the employees which the Union was able to obtain in the agreement has now been disrupted. Some employees, though not worse off in an absolute sense, suffer from 'relative deprivation' by comparison with others, and feel discriminated against. This the Union argues is inconsistent with the existence of the wage structure in the Agreement, and is not solved by simply asserting the Employer has given its money away above the minimum rates in the interest of efficiency."

The effect of an employer's mid-collective agreement "amendment" on the trade union's status and strength as

exclusive bargaining agent were recognized at pages 58 and 60 of Re United Rubber Workers, Local 723, supra:

> "...There is a specific term which sets out the wage bargain. To allow the Company to tamper with the various proportions and equities established in this bargain, and also to change the operative effects of other parts of the agreement, would be to run contrary to the principles of law established by Judson, J., in Syndicat Catholique des Employes de Magasins de Quebec Inc. v. Compagnie Paquat Ltee., 18 DLR (2d) 348 at page 353-4, [1959] SCR 206..."

In reaching this conclusion, we decline to follow those cases which hold that collective agreement provisions establish only minimum rates. (For example, see Re USW -and- Dominion Brake Shoe Co. Ltd. (1962), 12 LAC 318 (Hanrahan).) Our decision in this case, however, does not mean that implementation of mid-term improvements to collective agreement standards are illegal, rather simply that improved benefits during the life of the agreement must be implemented with the consent of the union as exclusive bargaining agent.

In this case, we are not persuaded by counsel for the Employer's argument that the incentive scheme is consistent with the collective agreement in view of the fact that the collective agreement rates are paid as minimums to be increased by the incentive scheme in certain cases. It is the fact that the incentive scheme provides for a different system of payment for work, among other things, that strikes at the heart of the deal negotiated by the Union. The Union negotiated a fixed wage structure treating all employees performing work within the same classifications, with the same pay, and substituted a system which differentiates between the amounts paid to workers within the same sets of job classifications. The collective agreement set the terms and conditions of work for employees represented by the Union. It did not merely set minimum rates in the same way that the Employment Standards Act sets minimum rates for those working in the community. Rather, it describes the whole of the contract of employment.

Counsel for the Employer argues that if the collective agreement describes all of the terms and conditions of employment which exist in the work place, a number of other incentive schemes would violate the collective agreement. Counsel for the Employer referred to the past practice of providing free cold drinks to employees on hot summer days, and providing jackets to persons as a reward for good safety records.

We are not persuaded that the Employer's past practice to provide these "benefits" is inconsistent with this decision. First, none of the practices referred to during the course of this hearing seem to amount to bonus or incentive pay schemes. Secondly, our decision on this point does not interfere with any practice of giving gifts, prizes, or incentives to members of the bargaining unit in circumstances not regulated by the collective agreement.

This gives rise to our next point, namely, that if changes are to be made to the terms or conditions of employment set out in the collective agreement, the Employer is required to obtain the consent of the Union.

This is an approach applied by a number of arbitrators. One good example is Re Printing Specialties and Paper Products Union, Local No. 512 -and- Union Carbide Canada Ltd., (1970) 22 LAC 194 (O'Shea). In that case, an employee was paid a certain salary before the union was certified. Subsequent to certification, the union negotiated job classifications enjoying specified wage rates. One employee's job was assigned a classification which would result in a substantial reduction in pay during the first year of the operation of the collective agreement. The company approached the employee and agreed to pay him an additional sum per hour for the first year of the collective agreement with the result that he would not experience a loss of pay. The company went to the union who objected to the company's negotiating directly with the employee. The union argued that all employees in the same job classification should receive the same pay. The arbitrator stated:

> "While the Company's motives are not open to criticism, the method adopted by the Company leaves something to be desired. Other bargaining unit employees and especially other Class 7 employees may not accept the Company's reason for granting Perdue special consideration. As exclusive bargaining agent, the Union has the responsibility to do whatever is necessary to attempt to satisfy all bargaining unit employees that they are not suffering from discrimination. While the method adopted by the Company was wrong, and while we have found that there is nothing in the collective agreement which would permit this Board to direct the Company to upgrade the job of Receiver, we do not intend to imply that the Company should not attempt to resolve the continuing problem with respect to Perdue by

negotiating the matter with the Union as Perdue's exclusive bargaining agent."

(at 198)

This approach is reminiscent of that in Re Peterboro Lock Manufacturing Co. Ltd. -and- UEW, Local 527 (1953), 4 LAC 1499, where Laskin, sitting as an arbitrator, stated:

> " In this Board's view it is a very superficial generalization to contend that a Collective Agreement must be read as limiting an employer's pre-collective bargaining perogatives only to the extent expressly stipulated. Such a generalization ignores completely the climate of employer-employee relations under a Collective Agreement. The change from individual to Collective Bargaining is a change in kind and not merely a difference in degree. The introduction of a Collective Bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to a era of individual bargaining....It would seem to be fundamental in a Collective Bargaining regime that, say is otherwise specifically provided, an employer cannot unilaterally shift from an incentive to an hourly rate only for a particular job for which an incentive rate has been fixed. Otherwise there is little sense in a Collective Agreement which provides for incentive rates as does the Agreement involved in this case. If it depends on an employer's whim whether he will continue to pay incentive on a job for which incentive pay has been fixed what is the point in prescribing conditions for the taking of time studies and for the modification of time-studied rates in certain circumstances?"

(at 501-2)

See also Re Toronto Star Newspaper -and- Southern Ontario Newspaper Guild, Local 87 (1983), 10 LAC (3d) 1.

The company has an obligation to negotiate with the trade union and to conclude a collective agreement outlining terms and conditions of employment. One upshot of this obligation is that the company loses the right to unilaterally alter wages or terms and conditions of employment of persons employed in the

bargaining unit during the currency of the collective agreement. To provide for terms and conditions of employment that are different than those set out in the collective agreement, an employer must obtain the actual or tacit approval of the union.

V

For the reasons set out above, we are satisfied that the Employer has acted in a manner contrary to the Code and in particular to the trade union's status as exclusive bargaining agent within the meaning of Section 46 of the Code by purporting to directly negotiate an incentive bonus scheme directly with the employees and against the express wishes of the Union. We have concluded that the Code clearly establishes the trade union as exclusive bargaining agent for employees in the bargaining unit, including the carloading crew. Accordingly, the company may not negotiate directly with the employees to conclude any private arrangements that concern the terms and conditions of employment. If the Employer wishes to make changes, it must negotiate with and obtain the agreement of the Union.

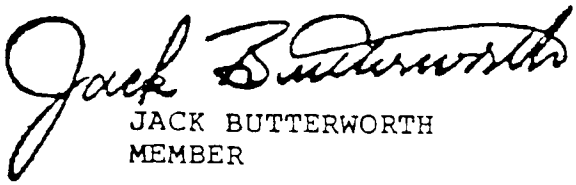
Furthermore, we are satisfied, pursuant to Sections 28 and 65 of the Code, that the bonus incentive plan is inconsistent with the collective agreement as amounting to an illegal unilateral change to the terms and conditions of employment set out in the collective agreement. In reaching this conclusion, we are satisfied that the provisions in the collective agreement establishing certain terms and conditions of employment, including the wage scheme, amount to the actual rates and terms and conditions of employment which must be enforced. The provisions in the collective agreement are not minimum rates. Rather, they are the set rates and standards.

We hereby declare pursuant to Sections 28 and 38 that Westar Timber Ltd. has acted in a manner which is inconsistent with the trade union's status as exclusive bargaining agent and in a manner which undermines the trade union's status under the Code. We further determine pursuant to Sections 8 and 28 of the Code that Westar Timber Ltd., by implementing the carloading bonus scheme, has interfered with the administration of the trade union, namely, its obligation to negotiate and enforce the collective agreement, contrary to Section 3(1) of the Code. Last, we are satisfied that the Employer's conduct in this case amounts to a violation of a number of sections of the collective agreement, including the recognition clause thereof, and has, thereby, violated Section 65(1) of the Code.

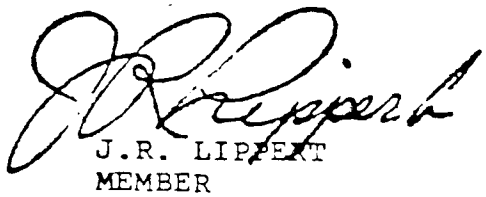
Accordingly, we hereby grant the applications and complaints filed on behalf of the Union and order the Employer to cease and desist its violations of the Code.

LABOUR RELATIONS BOARD
OF BRITISH COLUMBIA

SHONA A. MOORE
VICE-CHAIRMAN



JACK BUTTERWORTH
MEMBER



J.R. LIPPERT
MEMBER