IN THE MATTER OF AN ARBITRATION UNDER THE
LABOUR RELATIONS CODE, R.S.B.C. 1996

BETWEEN:

City of Vancouver

(the "Employer")

AND:

Canadian Union of Public Employees
Local 1004

(the "Union")

Re: Backhoe Grease Time Grievance, Remittal Award

ARBITRATOR:	John Steeves
COUNSEL:	Alan Winter for the Employer
	Leo McGrady Q.C. for the Union
DATE OF HEARING:	October 20, 2008
PLACE OF HEARING:	Vancouver, B.C.
DATE OF AWARD:	January 9, 2009

A. INTRODUCTION

1. This is a decision about whether the Employer must continue paying grease time for backhoe operators. It follows a decision by the Labour Relations Board that my previous award of May 29, 2007 should be remitted back to me. The issue is estoppel.

2. Grease time is one half hour of overtime per shift that was paid to backhoe operators in Waterworks and Sewers Operations. This time was used by the operators to service their machines. The Employer eliminated grease time effective December 31, 2006.

3. The Union submits that grease time has been paid for at least thirty years and the Employer's decision to stop paying it amounts to a significant loss of pay. They rely on estoppel. The Employer acknowledges that the payment for grease time has been longstanding. However, they submit that they have the right to eliminate it and estoppel is not applicable.

B. LABOUR RELATIONS BOARD REMITTAL

4. On May 29, 2007 I issued a decision denying the Union's grievance, among other things, on the issue of estoppel. This was appealed by the Union, pursuant to section 99 of the *Labour Relations Code,* and on February 5, 2008 the Labour Relations Board allowed the appeal with the following direction,

> Whether a particular longstanding practice is sufficient to amount to an unequivocal representation is a question of fact for arbitrators to assess in light of all the relevant circumstances, including the nature of the practice and its context.
>
> I am not persuaded it would be appropriate to decide the merits of the estoppel issue, as that would be inconsistent with the Board's role under section 99. This matter is remitted back to the Arbitrator to reassess the estoppel issue in light of this decision: i.e., he is not precluded from considering the factors such as the nature, magnitude and surrounding circumstances in determining if there was an

> unequivocal representation. The ruling revives the Arbitrator's jurisdiction and permits him to reach the same or a different conclusion. (Paragraphs 29-30).

The Employer applied to the Board for reconsideration of this decision but this was unsuccessful (BCLRB No. B65/2008).

5. At a hearing on October 20, 2008 the parties presented submissions to me about the direction from the Board. In summary, the Union submits that I should reach a different conclusion than my previous award and find that the Employer is estopped from ending the payment of grease time. For their part, the Employer submits that there is no estoppel in this case, they were entitled to end the payment of grease time and my previous award was correct.

6. My previous award denied the Union's grievance on two other issues raised by the Union, Article 20 of the collective agreement ("Conditions and Benefits Not Mentioned") and section 45 of the *Labour Relations Code* ("Notice to Bargain Collectively"). The section 99 panel of the Board did not address the issues of Article 20 of the agreement and section 45 of the *Code*. Therefore, those issues are not part of this decision.

C. BACKGROUND

7. The facts in this case are not particularly in dispute and they are set out in some detail in my previous award of May 29, 2007.

8. In summary, there was a practice in place for thirty or forty years that backhoe operators would be paid one-half hour overtime at the beginning of each shift in order to service their machines. This extra paid time amounted to about $4,000.00 per operator per year and the Union estimates that its loss is equivalent to a 7.8% loss in pay for operators. The Union estimates that the total cost of grease time over the years was about $2.5 million. Grease time was also used by operators to take compensating time off.

9. In 2006 the Employer purchased some new backhoes that had automatic greasing systems and this reduced the time necessary for servicing, from about fifteen minutes to three to five minutes. The Employer concluded that this servicing could be done during regular work hours when the machines were not busy. The work of the backhoes was reviewed and the Employer concluded that the average down time in 2006 was thirty-eight percent (with a range of twenty-nine to fifty-five per cent). The Union disputes this conclusion. I also found in the previous award that the servicing targets and schedules set by the Employer were within the range set by the manufacturer. And I reviewed the practice with other equipment in other departments of the Employer; I found there was some consistency on the part of the Employer but what happened in other departments was otherwise inconclusive. I also commented that these matters might not be relevant to the issue of estoppel.

10. The original effective date for the elimination of grease time was May 1, 2006. However, this was ultimately changed to December 31, 2006, the expiry date of the collective agreement in force at the time. This was grieved by the Union and that grievance was the subject of my May 29, 2007 award and this award.

11. My previous award denied the Union's grievance. I reviewed a number of authorities on the issue of estoppel including *Fording Coal Ltd. and United Steelworkers of America, Local 7884,* (2002) B.C.C.A.A.A. No. 205 (Lanyon) at Paragraphs 27 - 28), upheld on reconsideration, B.C.L.R.B. No. 2/2003; *B.C. Rail Ltd.,* IRC No. C152/92, upheld on reconsideration, BCLRB No. B128/93, at Page 29-30; and *Maple Ridge,* BCLRB No. B209/2001.

12. Another, more recent decision from the Labour Relations Board was also cited and it concluded, among other things, "The mere existence of the practice alone is insufficient. The reason this is so is because absent something more, the practice alone can be construed either as an abridgement/waiver of legal rights or a mere indulgence. That is to say, a practice on its own is equivocal, not unequivocal". *West Fraser Mills Ltd. (100 Mile Lumber Division) and United Steelworkers of America, Local 1-425,*

BCLRB No. B199/2006, at Page 7 (Review pursuant to section 99 of the *Labour Relations* Code, setting aside an arbitration award, *West Fraser Mills Ltd. (100 Mile Lumber Division) and United Steelworkers of America, Local 1-425,* February 6, 2006 (Steeves); upheld on reconsideration, BCLRB No. B311/2006).

13. The section 99 panel that remitted this grievance back to me reviewed a number of authorities and noted that the reconsideration panel on *West Fraser Mills* "stated that the decision did not evince an intent on the part of the Board to broaden the review of arbitral estoppel decisions; rather review will remain narrow ...". Further, according to the section 99 panel in this case, the *West Fraser Mills* decision "represents somewhat of a "high water mark" of Board intervention in arbitration awards, relative to the Board's usual policy of deference to arbitrators' conclusions in matters not involving the law of statute" (Paragraph 22). The Board pointed out that these issues involve questions of facts that are generally decided by arbitrators and cited *Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608,* [1978] BCLRB No. 26.

14. The reconsideration panel in this case also commented on the *West Fraser Mills* case as follows,

> We find that the Original Decision has properly set forth the Board's approach under the Code to the matters at issue. We also agree with the original panel at paragraph 15 of the Original Decision that *West Fraser Mills* cannot be interpreted as meaning that a practice is never sufficient to establish an unequivocal representation, regardless of circumstances and context. Rather, a practice may found an estoppel, depending on the circumstances of the case. Whether a practice is sufficient to found an estoppel is a question for the arbitrator to determine based on the circumstances of a given case. (Paragraph 10).

C. DECISION AND REASONS

15. While the above statement from the Board provides some clarity about the doctrine of estoppel, the question remains, as it has throughout the jurisprudence, when will a practice justify a finding of an estoppel? (For a general discussion of this issue see,

Chris Albertyn, "Silence and Estoppel: An Evolving Doctrine, An Arbitrator's Perspective", *Labour Arbitration Yearbook 1999-2000* (Lancaster House, Toronto)). More particularly, since there is no evidence that the Employer specifically said that the payment of grease time would continue or that they agreed to fetter their discretion in scheduling overtime, do the facts of this case support a finding of an estoppel?

16. The essential elements of estoppel are well known: (a) intentionally or not, one party has unequivocally represented that it will not rely on its legal rights; (b) the second party has relied on the representation; and (c) the second party would suffer real harm or detriment if the first party were allowed to change its position (*Insurance Corporation of B.C. v. Office & Professional Employees' International Union, Local 378*, [2002] B.C.C.A.A.A. No. 109 (Hall) at Paragraph 40).

17. There is no issue that employees suffer real harm by the cancellation of grease time and the evidence is also clear there was reliance by employees who relied on grease time for income and to take compensating time off. Therefore this issue to be decided is whether there is unequivocal representation.

18. The context for this case is Article 7 of the collective agreement and it means, when read with the arbitral jurisprudence, that scheduling of overtime is a right reserved to the Employer. Over the years the practice with grease time was an exception to that discretion; it was regularly scheduled (until December 31, 2007) and in significant dollar amounts. The Employer says this practice has no legal consequences and the Union says it amounts to an estoppel with considerable legal consequences.

19. The leading case for the application by arbitrators of estoppel in British Columbia is *BC Rail Ltd. and UTU Locals 1778 and 1923 et al*, BCIRC Decision No. C152/92 (upheld on reconsideration, BCLRB No. B128/93). In *BC Rail* the Board adopted the decision of the Court of Appeal of B.C. in *Litwin Construction (1973) Ltd.*, (1988) 29 B.C.L.R. (2d) 88 and in particular the following statement,

> ... The underlying concept [of estoppel] is that of unfairness or injustice and it is

> not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of judgment. If the unfairness or injustice is very slight, then the principle would not be applied. If it is more than slight, then the principle may be applicable.
>
> Thus, as to knowledge, Mr. Justice Oliver in *Taylor Fashions* [reported at [1981] 1 All ER 897] said 'it would be unreasonable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment.. '. [Page 17 QL]

20. In *BC Rail* the Board also emphasized that this approach "is now the proper test to be used in British Columbia with respect to the modern doctrine of estoppel. The purpose of the doctrine is to prevent inequitable detriment" (Page 17). Further, it was noted that the Court of Appeal in *Litwin Construction* adopted the following passage from *Grundt v. Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641 (Aus. H.C.):

> In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.

21. This approach has been applied in other cases. In *University College of the Cariboo v. Canadian Union of Public Employees, Local 900*, [2002] B.C.C.A.A.A. No. 388 (Germaine) the collective agreement required the posting of job vacancies. A certain position had not been posted for about six years and this was grieved by the union. Among other things, the employer argued that the Union was estopped from alleging a violation of the collective agreement. Arbitrator Germaine agreed with the employer and, after citing the *Litwin Construction* and *B.C. Rail* decisions, he concluded that the Court in *Litwin* "also held that intention to induce reliance is not an essential element of

estoppel, and the conduct giving rise to an estoppel need not involve a positive act". (Paragraph 57). Further,

> ... the estoppel argument does not depend on whether the Union actually knew of the Employer's breaches of the collective agreement. The Union's argument that it must have such knowledge is not consistent with the principles stated in *Litwin* and adopted in *BC Rail*. The determinative concept is unfairness or injustice, and knowledge is not essential. The Court of Appeal specifically said a party may be stopped from denying what it has knowingly or unknowingly encouraged the other party to assume to its detriment. ... the court emphasized that intention to induce reliance is not essential. (Paragraph 80).

22. In this case there is the undisputed practice over thirty or forty years to pay grease time at the overtime rate for backhoe operators. Further, it is generally agreed that the cost is significant. For example, the Union's estimate of about $4,000.00 per year per operator is accepted as accurate, as is the estimate of a 7.6% loss in pay with the removal of grease time. Over the years the total amount was about $2.5 million or approximately $80,000.00 per year.

23. The approach in *Litwin, supra,* and *University College of the Cariboo, supra,* is noted whereby intention to induce reliance is not required and knowledge of the conduct that is contrary to the collective agreement is also not required. What is determinative is whether there will be an "unfair or unjust" result by permitting a party to a contract to deny that which he has knowingly or unknowingly allowed or encouraged another to assume to his detriment (also paraphrasing the Court of Appeal decision in *Litwin*). That would seem to be a broad equitable approach. Whether the Labour Relations Board, in the appeal and reconsideration decisions in this case, intended to include this approach in their conclusions is an interesting point, but one that it is not necessary to decide in this case.

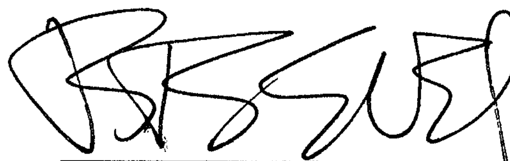
24. There is an additional element to the case under consideration here that supports a finding of an estoppel. There is no dispute that everyone knew about the practice of paying for grease time. That is, this is not a case where a practice took place without the knowledge of one or both parties. Significant sums of money were involved and these

sums were expended and received with the knowledge that they were for routine overtime work not provided for in the collective agreement. While cost is not necessarily determinative to finding an estoppel, in this case I conclude that the practice was widely known and the practice, and its cost, must have come to the attention of responsible people within the Employer. As the Court of Appeal stated in *Litwin, supra,* (and adopted by the Labour Relations Board in *BC Rail, supra*) the presence of knowledge may serve to raise the unfairness or injustice to the level requiring the exercise of judgment in favour of an estoppel. The Union reasonably relied on the Employer's silence over the years and through several rounds of bargaining. The lost opportunity to bargain in this case supports a finding of detrimental reliance (*Re Versatile and Pacific Shipyards Inc.* (1986), 26 L.A.C. (3rd) 258 (Kelleher)). Looked at this way, the practice of paying grease time amounts to an estoppel and it suspends the Employer's right to schedule overtime in this case, a right that is not otherwise fettered in the collective agreement.

25. For the above reasons the grievance is allowed. I refer the issue of damages to the parties for their consideration and discussion, bearing in mind that estoppel does not create a right but suspends existing rights for a specific period of time. The doctrine of estoppel operates so that, at some point, the payment of grease time ends and the Employer retains the unfettered right to schedule overtime. What that point is, and whether any damages follow from it, is referred to the parties. In the event the parties cannot resolve the issue of damages I retain jurisdiction over it.

It is so ordered.

Dated this 9th day of January 2009, in the City of Burnaby, Province of B.C.



John Steeves