ref.#

Sick Leave benefits
Estoppel (Laches)

FINDINGS AND DECISION

IN A DISPUTE
between

DEPARTMENT OF TRANSPORTATION AND WORKS
(MARINE SERVICES DIVISION)
(the Employer)
and

NEWFOUNDLAND ASSOCIATION OF PUBLIC & PRIVATE EMPLOYEES
(the Union)

Grievor: Mr. Jim Whelan

APPEARANCES:

For the Union:

Presenter: Ms. Elaine Price, Employee Relations Officer
Advisor: Mr. Jim Whelan, Shop Steward
Witness: The Grievor

For the Employer:

Presenter: Mr. Don Saturley, Staff Relations Specialist
Advisor: Ms. Carol Hurley

The Arbitrator: Mr. John A. Scott

The Statement of Grievance: not properly awarded sick leave as per Section 16 .01(a) and all pertinent Articles of the Collective Agreement. (Being charged 1½ days for every day taken off)

The Requested Adjustment: Full Redress

The Grievance was heard in St. John's on March 23, 2011.

THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed and had authority to hear the case;
- the Arbitrator's notes of evidence argument as recorded in the final award will prevail in case of conflict;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were properly observed or are waived;
- there are no points to be raised as to arbitrability or other preliminary objections;
- all witnesses were to be excluded until all their testimony had been heard;
- issues of quantum, if any, would be considered separately and if the parties do not reach agreement within sixty (60) calendar days they will be referred to the Board, within the same sixty (60) calendar days, for resolution;
- the Board will remain seised of the matter for sixty (60) calendar days after publication of the award to deal with matters of interpretation should they arise.

DOCUMENTS TAKEN INTO EVIDENCE:

Consent #1 Grievance form dated Feb. 16, 2010
" #2 Collective Agreement between the Parties expiring March 31, 2012
" #3 Intra-Departmental Memorandum Jan. 19, 1987 "Sick Leave - Debits Ferry Operations"

Consent # 3 reads: TRANSPORTATION
INTRA-DEPARTMENTAL MEMORANDUM

To ....District Manager McLoughlan ....
From .... Director of Personnel ....
Date ... January 19, 1987

Reference: Sick leave - Debits
Ferry Operations

Recently, during negotiations the issue of sick leave, particularly the methodology of recording debits, was discussed.

It was determined that, in fairness to all other Government employees who could lose at least 21 days sick leave for a month of absence, Ferry Services employees should be debited at the same rate. In order to accomplish this, it is necessary that an employee covered by the Ferry Services Collective Agreement be debited with 1½ days for each full day of sick leave e.g. 2 day's sick would result in a debit of 3 days.

Please ensure this method is followed for employees in your District. Should you wish to further discuss this, please contact me.

Gordon Murphy
Director of Personnel

GM/bt
cc. Mr. J.M. Casey
Admin. Officer (Payrolls)

COLLECTIVE AGREEMENT ARTICLES DIRECTLY CONSIDERED

ARTICLE 1
PURPOSE OF AGREEMENT

1.01 The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the employees and the Association, to set forth certain terms and conditions of employment relating to remuneration, hours of work, safety, employee benefits and general working conditions affecting employees covered by this Agreement.

1.02 In the event that any law passed by the Government applying to employees covered by this Agreement renders null and void any provision of this Agreement, the remaining provisions of the Agreement shall remain in effect for the term of this Agreement.

1.03 The Employer will notify the Association before any amendment, repeal or revision of the Public Service (Collective Bargaining) Act, which would affect the terms and conditions of employment of employees covered by this Agreement, is introduced.

1.04 In the event that there is a conflict between the contents of this Agreement and any regulation made by the Employer, this Agreement shall take precedence over the said regulation.

ARTICLE 2
DEFINITIONS

For the purpose of this Agreement:

(a) "bargaining unit" means the bargaining unit recognized in accordance with Article 3....

(d) "day" means a working day unless otherwise stipulated in the Agreement.

ARTICLE 4
MANAGEMENT RIGHTS

4.01 All functions, rights, powers and authority, including the scheduling of service, which are not specifically abridged, delegated or modified by this Agreement are recognized by the Association as being retained by the Employer.

ARTICLE 8
GRIEVANCE PROCEDURE

8.01 Subject to Clauses 8.03 and 8.07, grievances shall be processed in the following manner:

Step 1:

With the exception of dismissal due to unsuitability or incompetence, as assessed by the Employer, of a probationary employee or a part-time or temporary employee with less

than six (6) months' service and subject to Clauses 8.03 and 8.07, an employee who alleges that he/she has a grievance, shall first present the matter to his/her immediate supervisor through his/her Shop Steward within five (5) days of the occurrence or discovery of the incident giving rise to the alleged grievance and an earnest effort shall be made to settle the grievance at this level.

In cases where an employee's immediate supervisor is his/her permanent head, the grievance may be submitted immediately at Step 3.

Step 2:

If the employee fails to receive a satisfactory answer within five (5) days of presenting the matter under Step 1, he/she may, within five (5) days present a grievance in writing to the second managerial level designated by the permanent head who will give the grievor a dated receipt. In instances where there is no second level of management other than the Director of Human Resources, the employee may submit his/her grievance at Step 3 within the prescribed time limits.

In the interest of expediency, the grievor, in conjunction with a shop steward, shall submit a written summary at the time of submitting the grievance at Step 2, on a without prejudice basis.

Step 3:

If the employee fails to receive a satisfactory answer to his/her grievance within five (5) days after the filing of the grievance at Step 2, he/she may, within a further five (5) days submit his/her grievance in writing to the Director of Human Resources who, for the purpose of investigating the grievance, shall form a committee consisting of four (4) persons, comprising an equal number of Employer and Union representatives. The Union shall appoint its two (2) representatives to the committee and advise the Employer. The Employer shall appoint two (2) representatives and notify the Union within ten (10) days of the names of the Employer representatives on the Grievance Committee. One of the Employer's representatives shall chair the meeting(s). The committee shall be entitled to interview such persons as it deems necessary for the investigation of the grievance and shall give its decision in writing to the grievor within ten (10) days of receipt of the grievance. The committee's report shall consist of the joint decision of the committee where the committee members agree to a solution. If the matter is not mutually resolved by the committee, then the Employer's representatives will send their position, along with a brief summary of the committee's deliberations, to the grievor, with a copy being sent to the Union.

8.02 If the grievance is still not satisfactorily settled by the foregoing procedure, or if it is of the type referred to in Clause 8.03, either party to this Agreement may submit the grievance to arbitration in accordance with Article 9...

8.06 (a) The time limits specified in this Article may be extended, in writing, by mutual agreement of the parties.

(b) An Arbitrator or Arbitration Board may extend the time limits of any step in the grievance procedure, notwithstanding the expiration of such

time limits, where the Arbitrator or Arbitration Board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension...

8.08 The settlement of a grievance without reference to arbitration shall be applied retroactively to the date of the occurrence of the action or situation which gave rise to the grievance, unless the settlement states otherwise...

ARTICLE 9
ARBITRATION

9.01 Where a difference arises between the parties to or persons bound by this Agreement or on whose behalf it has been entered into and where that difference arises out of the interpretation, application, administration or alleged violation of this Agreement and including any question as to whether a matter is arbitrable, either of the parties may within fourteen (14) calendar days after exhausting the grievance procedure notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the person appointed to be an arbitrator by the party giving notice.

Notice in accordance with Clause 9.01 shall be sent to the Collective Bargaining Division as well as the applicable Department.

9.02 Notwithstanding any other provisions of this Article, the parties may mutually agree to the substitution of a single arbitrator for an arbitration board, in which event, the foregoing provisions of this Article shall apply equally to a single arbitrator when reference is made to an arbitration board. Furthermore, the parties shall endeavour to utilize a sole arbitrator for the majority of arbitration hearings and reserve the use of arbitration boards for cases where a party feels it is absolutely necessary...

9.16 An arbitration board may not alter, modify or amend any provisions to this Agreement but shall have the power to dispose of a grievance by any arrangement which it deems just and equitable.

ARTICLE 10
HOURS OF WORK

10.01 (a) The hours of work for employees shall be in accordance with the established daily sailing schedule.

(b) The scheduled work day shall commence one half (1/2) hour before the printed schedule and end fifteen (15) minutes after the printed schedule.

(c) The shift rotation for the Marine Services, except Bell Island run, shall be fourteen (14) days on and fourteen (14) days off. Bell Island shall be seven (7) days on and seven (7) days off...

ARTICLE 14
HOLIDAYS

14.03 Holiday Falling on the Day of Rest

(a) When a calendar day designated as a holiday under Clause 14.01 coincides with an employee's day of rest, the employee shall receive one (1) days pay at straight time to compensate him for the holiday. The number of hours pay for this day shall correspond with the hours of work for the applicable holiday as contained in the printed schedule of the respective service. Where applicable, the number of hours will include any scheduled overtime in the printed schedule, which hours shall be compensated at time and one half (1½).

(b) When a holiday falls on an employee's day of rest and he is required to work on such a holiday, he shall receive two (2) hours pay for each hour worked on that day in addition to his holiday pay. The employee may request time off in lieu of payment provided that such time off must be granted on the basis of two (2) hours off for each hour worked within two months of incurring the overtime. If such time off cannot be given within two months and at the convenience of the employee, he shall be paid at the applicable rate.

14.04 Effective the date of signing of this Agreement, the Employer will continue to operate marine vessels on statutory holidays and the pay of employees will not be reduced.

ARTICLE 15
ANNUAL LEAVE

15.01 In consideration of the exigencies of the ferry operation, and the two week shift rotating referred to in Article 10, employees will receive the following combination of paid vacation and pay to a maximum of:

Vacation Time

Years of Service	# of Weeks	Vacation Pay
Up to ten (10) years	2	2%
From ten (10) to twenty-five (25) years	2	4%
In excess of twenty-five (25) years	2	6%

(a) The Employer will endeavour to pay any vacation due to employees on the first payday in November.

(b) With the prior approval of the permanent head, employees may elect to receive pay in lieu of vacation time.

(c) Subject to Clause 15.03, the annual leave accumulated by an employee pursuant to sub- clause (a) hereof, may be taken by him at any time in addition to his current and accrued annual leave....

15.06 Subject to Clauses 15.07 and 20.04, an employee who has entered upon annual leave may not change the status of his leave to any other type of leave until he has used up all his current annual leave (exclusive of leave carried forward from previous years).

15.07 (a) An employee who becomes ill while on annual leave may change the status of his leave effective the date of notification to the Employer provided that the employee submits a certificate acceptable to the permanent head, signed by a qualified medical practitioner:

(i) by the date the employee's approved annual leave period expires; or

(ii) where the period of illness is to extend beyond the expiration of the approved annual leave period at such intervals as the permanent head may require.

The medical certificate shall state that during the period of his absence (which shall be stated on the certificate) he was unable to perform his duties and in addition the reason(s) for such absence should be given.

(b) In the case of an employee who is admitted to hospital while on annual leave, he may change the status of his leave to sick leave with effect from the date he was admitted to hospital.

(c) The period of vacation so displaced in Clause 15.07(a) and (b) shall be reinstated for use at a later date to be mutually agreed.

15.08 Subject to Clause 15.02, in an incomplete year before resignation or retirement, an employee may receive a proportionate part of his annual leave pay for that year.

15.09 Sick leave awarded in accordance with Clause 16.04 or periods of special leave without pay in excess of twenty (20) days in the aggregate in any year shall not be reckoned for annual leave purposes and the employee's period of service shall be noted accordingly.

15.10 Military service shall be recognized for annual leave purposes in accordance with the War Service (Pensions) Act, and service as a teacher recognized as pensionable service in accordance with the Public Service (Pensions) Act shall be recognized for annual leave purposes.

ARTICLE 16
SICK LEAVE

16.01 (a) The number of days of sick leave with full pay which may be awarded to an employee, other than a part-time employee, at any time shall not exceed the figure obtained by multiplying his total months of service by two (2) and subtracting therefrom the number of working days of sick leave previously awarded to him, provided that the maximum number of working days of sick leave with full pay which may be awarded to an employee during any period of two hundred and forty (240) months of service shall not exceed four hundred and eighty (480) days in the aggregate.

(b) Notwithstanding clause 16.01 (a), an employee hired after May 4, 2004 is eligible to accumulate sick leave at the rate of one (1) day for each month of service.

(c) Notwithstanding clause 16.01 (a), the maximum number of days sick leave which may be awarded an employee hired after May 4, 2004 during any consecutive twenty (20) year period of shall not exceed two hundred and forty (240) days

16.02 For the purposes of Clause 16.01, an employee who receives full salary or wages in respect of not less than two-thirds (2/3) of the working days in the first or last calendar month of his service, computed in full or half days shall, in each case, be deemed to have had a month of service.

16.03 (a) Subject to Clause 16.05, when an employee has reached the maximum of the sick leave which may be awarded him in accordance with this Article, he shall proceed on special leave without pay.

(b) Employees on special leave without pay shall continue to accumulate seniority except where they would have been otherwise laid off.

16.04 Where, in the opinion of the permanent head, it is unlikely that an employee will be able to return to duty after the expiration of his accumulated sick leave, he may be required by the permanent head to undergo a medical examination, If it appears from such examination that, in the opinion of a Medical Doctor acceptable to the permanent head it is unlikely that the employee will be able to return to duty, the employee may be retired effective when his accumulated sick leave has expired or at retirement age, and paid such pension award as he may be eligible to receive, and the employee shall be given notice in accordance with Article 22.

16.05 The permanent head may require an employee to submit a medical certificate during any period that an employee is on sick leave. In any event, sick leave in excess of three (3) consecutive working days at any time or six (6) working days in the aggregate in any year shall not be awarded to an employee unless he has submitted in respect thereof a medical certificate prior to or immediately upon his return to work, which is satisfactory to the permanent head of service.

16.06 Periods of special leave without pay in excess of twenty (20) working days in the aggregate in any year shall not be reckoned for sick leave purposes, and the employees' record of service shall be noted accordingly.

16.07 Sick leave shall not be granted to an employee who is on maternity leave or any other type of leave without pay.

16.08 Subject to Clauses 16.01 and 16.06, an employee who has had less than twelve (12) months of service may be awarded sick leave with full pay as follows:

(a) (i) A temporary or probationary employee may, at any time during his first twelve (12) months of service, be awarded days of sick leave on full pay not exceeding the figure obtained by multiplying his total months of service by two and subtracting therefrom the number of working days of sick leave previously awarded to him.

(ii) A temporary or probationary employee hired after May 4, 2004 may, at any time during his first twelve (12) month

of service, be awarded days of sick leave on full pay not exceeding the figure obtained by multiplying his total months of service by one (1) and subtracting the number of working days of sick leave previously awarded to him.

(b) Where a temporary or probationary employee is granted sick leave in excess of that earned in accordance with Clause 16.01 and the employee resigns or is terminated, the Employer reserves the right to recover an amount equivalent to the excessive leave granted.

16.09 The Employer shall provide each employee a copy of his sick leave records once each year.

ARTICLE 18
SPECIAL LEAVE

18.03 Subject to the approval of the permanent head, an employee may be granted special leave with pay not exceeding three (3) days a year to attend to the temporary care of sick family member; needs related to the birth of the employee's child: medical or dental appointments for dependent family members: meetings with school authorities or adoption agencies; needs related to the adoption of a child; or home or family emergencies.

ARTICLE 20
BEREAVEMENT LEAVE

20.01 Subject to Clause 20.02, an employee shall be entitled to bereavement leave with pay as follows:

(a) In case of the death of an employee's mother, father, brother, sister, child, spouse, legal guardian, common-law spouse, grandmother, grandfather, grandchild, mother-in- law, father-in-law, or near relative living in the same household, three (3) consecutive days; and For the purpose of this Article, a "common-law spouse" relationship is said to exist when, for a continuous period of at least one (1) year, an employee has lived with a person of the opposite or same sex, publicly represented that person to be his/her spouse and lives and intends to continue to live with that person as if that person were his/her spouse.

(b) In the case of his son-in-law, daughter-in-law, brother- in-law, sister-in-law, one (1) day.

20.02 If the death of a relative referred to in Clause 20.01(a) occurs outside the Province, the employee may be granted leave with pay not exceeding four (4) consecutive working days for the purpose of attending the funeral.

20.03 In cases where extraordinary circumstances prevail, the permanent head may, at his discretion, grant special leave for bereavement up to a maximum of two (2) consecutive working days in addition to that provided in Clauses 20.01 and 20.02.

20.04 If any employee is on annual leave with pay at the time of bereavement, the employee shall be granted bereavement leave and be credited the appropriate number of days to annual leave.

L #8 Hours of Work

Notwithstanding the bonus provision for the hours of work and the requirement for employees to be available for call back as contained in Article 12, Clause 12.03, the parties to this Agreement agree that due to the abnormal nature of the hours of work of Marine Services employees, the following principles of remuneration are agreed to for payroll purposes:

1. Employees shall be paid at straight time rates for all hours worked in accordance with the established daily sailing schedule. The straight time rate is calculated, as per Clause 12.04, by dividing the employee's annual salary, per Schedule AA@, by 2080 hours.
2. Employees will be paid on the basis of a twelve (12) hour day. Following from this:
   - a 14 day shift is 168 hours
   - a 7 day shift is 84 hours
   - annual hours are 2,184 hours

3. Where the actual hours worked in accordance with the established daily sailing schedule are above 2,184 on an annual basis, the employee will be compensated for such hours on a lump sum on the last pay period of the fiscal year.

Example:

The sailing schedule for the Little Bay Islands service calls for an employee to work 2,314 hours per year. An employee who works the full year would be paid on a bi-weekly basis for 12 hours per day - 168 hours per shift for a total of 2,184 hours. However, on the last pay period of each fiscal year he would be entitled to compensation for the extra 130 hours (2,314 - 2,184) at straight time rates.

4. The above notwithstanding, temporary employees will be compensated weekly/bi-weekly on the basis of the hours worked in accordance with the established schedule for their respective service.

5. The Bell Island scheduled 10:30 p.m. trip will not be affected by this Clause, but will be reimbursed as per past practice.

OPENING STATEMENTS

For the Union, Ms. Price described the grievance as involving how the Employer has been crediting and debiting sick leave benefits. The Grievor alleges improper debits.

The matter came to light when he took sick leave for two days. When the report sheet came back to the vessel on which he works he noted the Employer had debited three days, not the two he had taken. He inquired and was told the Employer was debiting 12 hours (or 1½ days) for each day used.

The Union claims there is a violation of Articles 1, 2, 10, 16 and L #8. Under the Collective Agreement there is no justification for the Employer's actions. When an employee earns two days of sick leave it is two full working days. The credit should be calculated as a working day interpreted as the Agreement defines it. Similarly, one day of sick leave should be deducted for each day taken.

For the Employer, Mr. Saturley noted that, as of January 19, 1987 (Consent #3), the Employer changed the way sick leave deductions were calculated for employees in Marine Services. Up until then, one day was debited for each day of sick leave taken. After that date, 1½ days were debited for each day of sick leave taken. The matter was grieved approximately twenty-five years later, on February 16, 2010, when Mr. Whelan filed the instant grievance (Consent #1).

The evidence will show that during the period from April 2009 to March 2010 the Grievor was absent for 7 days of sick leave, but his sick leave bank was debited 10.5 days. Notwithstanding this agreement on these facts, the Parties may not be in agreement as to the appropriate remedy.

The Agreement expires on March 31, 2012, and, under its provisions, bargaining could start as early as October 1, 2011. The Employer will argue that the remedy should be left for determination during the up-coming round of negotiations, and that the Arbitrator's award should reflect this disposition of the matter. Noting that the Union claims it was unaware of the Employer's change of practice, Mr. Saturley confirmed that the January 19, 1987 Intra-Departmental Memorandum (Consent #3) that initiated the change was not copied to the Union.

For the Union, Ms. Price rejected any attempt by the Employer to raise an estoppel-based argument. The Union had no knowledge of this matter. The Union's silence can not be taken as consent. Similarly, the Union can not now let the matter pass.

EVIDENCE

The only witness was the Grievor, Mr. Whelan, a Shop Steward and Chief Engineer on the Bell Island Service. He testified that under the Collective Agreement he earns 24 sick leave days per year. He then described his discovery, in February 2010, of the

Employer's sick leave debit practice, as Ms. Price had described it in her opening statement.

> When I came back to work, the note from Payroll came. I was off two days, but they debited 3 days. I called Payroll and they said they normally debit 1.5 days for every day. They just said, "It's the policy."

The Grievor confirmed that this was the first time he had heard of the practice, and that he had never seen the 1987 Intra-Departmental Memorandum (Consent #3). He also confirmed that no one had ever before raised the issue with him as Shop Steward. Mr. Whelan reviewed his normal hours of work, which are set out according to the "established daily sailing schedule", under Article 10.01. He also confirmed that Articles 15.07, 18.03, and 20.00 all deal similarly with special leave on a day-for-a-day-basis. The established daily sailing schedule set out in Article 10.01(a) & (b) determines this.

On Cross Examination, the Grievor confirmed that he works 112.5 hours per week and that he was not short paid when off on sick leave, so far as he is aware. He confirmed, therefore, that the only issue is the fact that his sick leave bank had been debited at the rate of 1.5 days for each day taken.

The Grievor also testified that the Employer does provide employees an annual report of sick leave that lists the debits and credits.

On Redirect Examination, the Grievor confirmed that Article 10.01(c) provides that the rotation for "Bell Island shall be seven (7) days on and seven (7) days off".

No further witnesses were called.

ARGUMENT

For the Union, Ms. Price summarised the Union's position that a "day" for sick leave purposes under the Collective Agreement begins thirty minutes prior to the time set by the established daily sailing schedule, and ends fifteen minutes after the time set by that schedule. The duration of a day is set by Article 10.01 (a) "The scheduled work day shall commence one half (1/2) hour before the printed schedule and end fifteen (15) minutes after the printed schedule." When an employee uses a day of sick leave, its duration is governed by the same calculation, not the calculation the Employer appears to have been using under the 1987 Memorandum (Consent #3). Article 2.01(d) says:

For the purpose of this Agreement:
(d)"day" means a working day unless otherwise stipulated in the Agreement.

The fundamental violation of the Collective Agreement is clear. Article 1.01 clearly sets out that:

> "The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the employees and the Association, to set forth certain terms and conditions of employment relating to *remuneration, hours of work*, safety, *employee benefits* and general working conditions affecting employees covered by this Agreement." (emphases added)

Nothing in the Management Rights clause (4.01) justifies the Employer's practice relating to debit of the sick leave bank. Nothing in Articles 8 or 9 are at issue between the Parties here.

On the question of redress, the Union is constrained by the Agreement, Article 8.00 in particular, to anything that falls within the appropriate time limits. Thus, the redress is limited by the date of the Grievance to anything five days prior to that date. The Union does not seek to take the matter back to 1987. The Union does not think that the Arbitral Jurisprudence would support such an attempt on its part. Article 9 confers the powers to act in this matter on the sole Arbitrator.

This Collective Agreement has a been arbitrated on a number of occasions and, in particular, the interpretation of Article 10 as it relates to hours of work has been well established by that Arbitral Jurisprudence. The established daily sailing schedule is the mechanism for establishing the hours of work. On this there is no lack of clarity. Articles 14.03, 15.07, and the reference to "full pay" in Article 16.01(a), all clearly support the Union's position, as do 16.05, 16.08, and 18.03 as well as the L8 Memo. Note too, that the Employer's practice would erode the Grievor's right to the 480 days he is due under Article 10.01

The Union had no knowledge of Consent #3, and must now challenge it strenuously. There is no ground for a successful estoppel argument.

Ms. Price introduced four cases from Arbitral Jurisprudence between the Parties dealing with pertinent provisions of the Collective Agreement: *Department of Transpor-*

tation and Works V. Newfoundland Association of Public & Private Employees Group Grievance, Arbitrator John Scott, October 2004; *Department of Transportation and Works V. Newfoundland Association of Public & Private Employees* Group Grievance, Arbitrator John Scott, May 2006; *Department of Transportation and Works V. Newfoundland Association of Public & Private Employees* Group Grievances June 22, June 29, July 3, 2009, Arbitrator James Oakley, November 2009; *Department of Transportation and Works V. Newfoundland Association of Public & Private Employees* Group Grievances re callback, Arbitrator James Oakley, February 2011.

For the Employer, Mr. Saturley acknowledged the Union's evidence and argument, noting that there is no evidence of any employees having been short paid, and that the only matter in dispute is the sick leave debit.

It is hard to imagine why the regular sick leave reports provided by the Employer did not trigger an earlier grievance. The employees work a compressed work week, so it is surprising that there was no talk among them that might have disclosed the problem earlier. The practice has been followed for almost a quarter century. This is a mystery!

Mr. Saturley noted that the four awards submitted by the Union all have to do with the established daily sailing schedule, but none deals with sick leave. They are not on point.

Mr. Saturley said that the Employer can not speak to the 1987 Intra-Departmental Memorandum (Consent #3), except to say that the Employer does not agree with its contents. Debiting on the basis of 1.5 days for each sick leave day taken was a mistake.

There is pertinent Arbitral Jurisprudence, which, in the Employer's view, should guide the Arbitrator in forming his decision. In particular, Mr. Saturley referred to Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para 2:2211 on the basic elements of the doctrine of estoppel, and at 2:2211 to past practice as one of those elements. He also cited *Re Board of Commissioners of Police for the City of Owen Sound and Owen Sound Police Association* 14 L.A.C. (3d) 46. M.G. Picher 1984 and to a local case between the same Parties on an issue of Severance Pay *NAPE v Marine Services* John Sibley, Grievor; Arbitrator James Oakley , September 2005.

The evidence is clear that, since 1987, the Employer has debited the sick leave bank improperly. Through several rounds of negotiations the Union failed to grieve this as a policy or union grievance. If the Union was unaware, the fact remains that it ought to have been aware . The Grievor, Mr. White, is a Shop Steward. He acknowledges that the Employer sent out sick leave reports and that he received them. And it is clear that in February 2010, he grieved on his own behalf. The Union claims he should be made whole for the April 2009 - 2010 period when he took 7.0 days but was debited 10.5, a difference of 3.5 days.

The Arbitrator may be tempted to order the 3.5 days be reinstated to his sick leave bank, but the Employer urges the Arbitrator resist that temptation. The Grievor got the reports. The Union either knew or ought to have known what the Employer was doing since 1987. The Arbitrator should consider adopting the approach of Arbitrator Picher, and deny this grievance on the basis of estoppel. The Union has acquiesced in this practice. The Union should now be barred from raising the matter at this time when the Parties are about to start the next round of bargaining. Estoppel does not continue for ever, but it can not be ended on the basis of this grievance, in the Employer's view.

In Rebuttal Argument for the Union, Ms. Price rejected the Employer's attempt to raise what is, in fact, a preliminary objection at this point in the hearing. In the first place, the estoppel issue could have been properly raised at the outset. It was not, and the Union can not now be blind-sided. The evidence about sick leave reports is not clear. They may or may not have been circulated. The simple fact is that no grievance was triggered before this one because the issue did not crystallise prior to this grievance. The Employer acknowledges it should not have debited sick leave as it did. It must be fixed.

The test for estoppel is not met in these circumstances. There is no ambiguity in the language. Other leaves are calculated on the basis of the established daily sailing schedule just as sick leave is calculated. The Employer's action is without justification.

The Arbitral Jurisprudence provided by the Employer relies on language that is very different from that in the instant Agreement. The Picher award is not appropriate as a model to follow. The Oakley case is not on point with this situation. Agreements

about past practice apply to both Parties. In the Union's view, the contract language must be made to work.

The Union did not acquiesce in the Employer's action. The Union had no knowledge of it, and acted as soon as it did become aware. The grievance must be sustained. The Union does not agree with this practice, and never has. Notice is given that this practice must cease. If it were feasible, the Union would seek an order with retroactive effect back 23 years.

CONSIDERATIONS

I am seised of an individual grievance, brought by the Union on Mr. Whelan's behalf. The grievance complains of his having been:

> "not properly awarded sick leave as per Section 16 .01(a) and all pertinent Articles of the Collective Agreement. (Being charged 1½ days for every day taken off)".

The Employer acknowledges that the long standing practice of debiting employees' sick leave banks at the rate of 1½ days for each day of leave taken was a mistake. The Employer did not argue the mistake was based on an interpretation of the Agreement.

At issue between the Parties is, first, what remedy is appropriate in the circumstances and, second, whether that remedy should be ordered by the Arbitrator.

The Employer does not challenge the Grievor's evidence that his sick leave account was in fact debited 10.5 days during the 12 months following April 30, 2009, despite the fact that he had taken only 7 sick leave days. The Employer also acknowledges the January 19, 1987 Intra-Departmental Memorandum "Sick Leave - Debits Ferry Operations" (Consent #3) was not copied to the Union.

The Employer argued that the Grievor's evidence of his having received sick leave reports shows, on the balance of probabilities, that employees and their Union either knew or ought to have known of this ongoing practice over the nearly quarter century it was in effect. In the Employer's view, the Union should now be estopped, therefore, from grieving this issue. Upcoming bargaining should address this matter, and the Arbitrator should not order any remedy at this late date.

The Union firmly denies any knowledge of the practice prior to the February 2010 circumstances giving rise to the instant grievance. It further denies it ought to have known of it. First, the Intra- Departmental Memorandum (Consent #3) was not, on its face, copied to the Union. Second, the evidence concerning the publication, circulation, and content of the Employer's sick leave reports is sketchy at best. Finally, any motion of estoppel is proper only as a preliminary objection going to arbitrability. The Employer waived its right at the opening of the hearing to make such a preliminary motion. The Union can not be required to respond to such a motion, or be exposed to jeopardy by such a motion being accepted at this point.

The Arbitrator's powers are set out in Article 9.16, which says:

> An arbitration board may not alter, modify or amend any provisions to this Agreement but shall have the power to dispose of a grievance by any arrangement which it deems just and equitable.

Findings: I am persuaded by the parole and documentary evidence entered, and by the Employer's acknowledgment, that the Collective Agreement has been violated by the implementation of the sick leave debiting practice complained of. I find therefore that I am required to sustain the grievance.

On the issue of remedy, I note that the Employer has directed my attention to certain items of Arbitral Jurisprudence in support of its argument that I should find the Union barred under the principle of estoppel in view of its long delay in complaining, and should not order the "Full Redress" requested on the grievance form, but allow the matter to be resolved through upcoming bargaining.

The Arbitral Jurisprudence: In particular, the Employer cited *Re Board of Commissioners of Police for the City of Owen Sound and Owen Sound Police Association* 14 L.A.C. (3d) 46. M.G. Picher 1984.

The Picher award is very helpful to me in the instant matter, despite significant differences in the facts involved in the two cases. I note that Arbitrator Picher had to deal with a difference between the Parties as to what the language of the Collective Agreement required. There is no such difference in the case before me. The Employer's practice in the instant case was based, not on its interpretation of the Agreement, but on its unilateral decision issued as a directive in Consent #3 which, on its face, was not

shared with the Union. There is no evidence before me that the Union has made any representation to the Employer on the matter, as required by the principle of estoppel. There is no evidence that the Union was informed or made directly aware that there was anything about which to make a representation, nor do I find persuasive evidence of reasons to support the Employer's claim that the Union ought to have known.

The Employer argued that 23 years is a very long time for such a practice to go unnoticed and unchallenged; and that if the Union did not, in fact, know of the ongoing practice, it should have known, especially in view of the Grievor's evidence that he had received sick leave reports from the Employer.

I am, with respect, not persuaded by the Employer's argument. I acknowledge that the length of time is surprising, but I am not persuaded that it constitutes evidence that the Union "ought" to have known. The grounds for estoppel do not obtain in the instant matter. In making this finding I rely, in part, on Arbitrator Picher's approach to the somewhat similar situation in *Re Board of Commissioners of Police for the City of Owen Sound and Owen Sound Police Association* 14 L.A.C. (3d) 4 at p. 55 ff., where he explains estoppel as it relates to the case before him:

> I turn now to the question of estoppel. The doctrine of estoppel applies when a number of essential elements are established. Firstly, there must be a course of conduct or a statement by one party to a collective agreement to the other which amounts to a representation that it will not insist upon the strict application of its rights under the agreement. The representation must be made and be received as intended to alter the legal relations of the parties. Secondly, the party to whom the representation is made must rely on it, and so change its position in reliance upon the representation that it would suffer prejudice if the representation were withdrawn, with a return to the enforcement of the strict rights of the parties under the agreement. When the foregoing conditions are established a board of arbitration may view either a grieving party or a responding party as estopped from advancing a condition inconsistent with that which it has previously adopted ...
>
> It is well established that laches can form the basis of an estoppel. Where a collective agreement does not contain any time-limits within which a party must pursue a grievance, it has been held... that undue delay in bringing a grievance may be grounds to disallow the claim by the grieving party, particularly where delay has prejudiced the position of the other party....

Arbitrator Picher then turns to the fact situation in the matter before him, and draws a distinction between collective agreements where past practice plays a significant role when compared with some other kinds of contract. I quote is portion at length for the fact issues it reviews.

> The merits of estoppel in the instant case plainly fall to be determined pursuant to the principles pursuant to this latter category (laches). This is not a case where the association has, by any verbal representation or overt action, caused the board of com-missioners to draw any conclusions about the enforcement of the sick-leave provisions of the collective agreement. The conduct of the association is characterized by inaction and delay, rather than by action. The uncontradicted evidence would suggest that... certainly since 1959, the association has taken no exception to the administration of art. 14 of the collective agreement. For as long as 32 years the sick-leave credit provision has been applied consistently and in keeping with the interpretation of art. 14 argued on behalf of the board of commissioners. That kind of inaction is significant in the enforcement of strict rights under the collective agreement.
>
> Collective agreements differ from other forms of private contract in a number of ways. They exist for a minimum term established by statute. They must be in writing and they are amended or renegotiated only in keeping with the procedural provisions of the *Labour Relations Act,* R.S.O. 1980, c. 228, or a comparable statute governing collective bargaining in the public sector. Most significantly, collective agreements are made and renewed under a collective bargaining system which contemplates a sustained relationship between the parties. They are not, like many commercial contracts, entered into on a one-time basis or concluded by the discharge of a single obligation. Consequently, the collective agreement is not unlike a constitutional document which, through its ongoing application and successive renegotiation, shapes the mutual expectations of the parties. Those expectations are therefore reflected in large measure in the past practice of the parties. Critical to the process are the ongoing responses of each of them to any changes in an established practice of the other. It is therefore not surprising that the acquiescence of the parties in a long-standing practice or in a change in practice can be a significant component in the application of their collective agreement.

Finally, Arbitrator Picher draws his conclusions in the context of the facts before him.

> With the foregoing principles in mind I turn to consider the facts of the instant case as they apply to the issue of estoppel. In my view it is significant that the formula by which the board of commissioners calculated sick-leave credits was at all times readily accessible to the

members of the association. This is not a circumstance where a complex calculation was left entirely in the hands of management and implemented through the workings of a computer: *cf. Re Goodyear Canada Inc. and United Rubber Workers, Local* 232 (1980), 28 L.A.C. (2d) 196 (Picher). There is no reason why a diligent employee or representative of the association could not, by the application of a reasonable degree of care, have scrutinized and fully under-stood the interpretation of art. 14 which was at all times reflected in the records of the board of commissioners. At all material times, any officer wishing to know the status of his or her sick-leave entitlements had access to the log books of Staff Sergeant Grahlman and the shift sergeants. The provisions of art. 14 were equally available. Consequently, the association and its members had all of the tools necessary to monitor and, where appropriate, to object to the application of art. 14 by the board of commissioners. Indeed, that is what Police Constable Reid (the Grievor) has finally done in the instant case.

It is reasonable for any employer in a collective bargaining relationship to expect that the application of any part of the collective agreement which does not meet with the approval of the opposite party will either give rise to a grievance or become a point of contention in the periodic renegotiation of the collective agreement. In this case the association has made no objection to the way in which the board of commissioners applied art. 14 over a great number of years. No grievance was filed since the article was first inserted into the collective agreement, nor was any word of objection raised in the many successive rounds of renegotiation of the parties' agreement.

In my view, in these circumstances, it would be most inequitable to allow the association to assert successfully an interpretation of the sick-leave credits provision that is inconsistent with its many years of apparent acceptance of a contrary interpretation applied by the board of commissioners. To give full effect to the grievance would subject the board of commissioners to the substantial cost of retroactively crediting all of the officers in its service in a manner consistent with the correct interpretation of art. 14. It is not subject to dispute that the plan-ning and budgeting of the board of commissioners has proceeded on an entirely different expectation. The employer has been encouraged by the apparent acquiescence of the association in its unwavering method of calculating sick-leave credits down through the years. Bearing in mind that it is the association, and not the individual members that is party to the collective agreement, that reliance and consequent prejudice requires that the association be estopped from succeeding in the instant grievance.

I cannot, however, accept the position advanced by counsel for the board of commissioners to the effect that the estoppel must be permanent. It is well established that a party whose acquiescence gives rise to an

estoppel may give notice that its acquiescence has ceased, and that it will insist on the strict terms of the agreement in the future. Arbitrators have drawn a distinction between knowing acceptance of a practice inconsistent with the collective agreement and unknowing acquiescence or error. Where knowing acceptance of a practice is found, the estopped party will be prevented from asserting its rights during the life of the agreement, particularly where its acceptance was relied upon by the other party at the previous renewal of the agreement. Where, on the other hand, the estopped party has acquiesced out of ignorance of the details of an impugned practice, upon discovering the practice it may end the estoppel during the term of the agreement by giving notice to the other party: see *Re Domglas Ltd. and United Glass & Cera-mic Workers, Local 203* (1980), 26 L.A.C. (2d). 94 (Burkett), and cases cited...

In my view a correct application of equitable principles should operate to prevent the termination of an estoppel during the life of a collective agreement not only where it is established that the party estopped knew of the practice grieved without objecting to it, but also where it is found that the estopped party reasonably should have known that the agreement was being applied in a way contrary to its view. The perception of the party asserting the estoppel is critical: if it follows a course of conduct openly and consistently so that it can reasonably conclude that the opposite party knows of its practice and has not objected at the point of renewing the collective agreement, it would be inequitable to allow the estoppel of the other party to end before the termination of the collective agreement during which it is raised.

While there is no evidence before me either way on whether the association knew of the board of commissioners' practice with respect to computing sick- leave credits over many years, I am satisfied, given the figures which were at all times available to the association that it reasonably should have known how art. 14 was being applied. To put it differently, for many years the association had constructive notice of the employer's calculation of sick-leave credits. It would be inequitable to let it now assert the rights of an ignorant party which has just discovered a violation of its rights. The board of commissioners has relied on the acquiescence of the association, and has accordingly geared its financial planning and expectations for the life of the current collective agreement.

In the circumstances of this case the board of commissioners is entitled to rely on the past application of the agreement until such time as the current agreement expires and the parties are returned to bargaining, where both of them will have the opportunity to address the issue. If the terms of art. 14 should pass into the ensuing collective agreement unchanged, it must then be administered in a manner consistent with the interpretation advanced by the association. Until that time, however, the

> estoppel grounded in the undue delay of the association will continue.
>
> For the foregoing reasons, while I accept the interpretation of art. 14 submitted by the association, I conclude that the grievance... must be dismissed.

The instant matter before me is distinguishable from that before Arbitrator Picher in a number of particulars. First, there was an ambiguity in the Collective Agreement before him. That ambiguity gave rise to his consideration, and Arbitrator Picher found the Union's interpretation to prevail. In the instant case before me it is common ground between the Parties that there is no ambiguity, and that the matter does not turn on interpretation of the Collective Agreement. Thus the instant matter before me is not coloured by any arguable Collective Agreement-based justification.

Second, on the face of the 1987 Intra-departmental Memorandum (Consent #3), there is clear and acknowledged evidence that management unilaterally instituted a debiting practice on which Union was not copied. The Union was not made aware in Consent #3 that the Employer was initiating a practice that was a mistake in terms of the Collective Agreement. There is no evidence before me that the Employer made the Union aware of its revised ongoing practice.

The Employer argued, citing Picher, and based on the Grievor's evidence that the Employer issued sick leave reports, that the Union should have become aware of the Employer's practice, and that its almost quarter century delay in objecting constitutes a representation of acquiescence in that practice. Thus, in the Employer's view, the Union is now estopped from objecting to the practice during the life of the present Agreement.

With respect, I am not persuaded by the Employer's argument. The fact situation is different in the instant matter from the one before Arbitrator Picher, who found that "for many years the association had constructive notice of the employer's calculation of sick-leave credits", and that consequently "It would be inequitable to let it now assert the rights of an ignorant party which has just discovered a violation of its rights." The only evidence of anything that might be construed as "constructive notice of the employer's calculation of sick-leave credits" is the Grievor's testimony that the Employer issued sick leave reports that list the debits and credits. I have no detailed evidence of the

content of these reports, or whether the Union itself received them, or whether there was any indication in them of the Employer's unilateral change in practice in calculating sick leave credits, or the debiting procedure itself.

Thus, in the matter before me I am not able to conclude, as Arbitrator Picher did on the basis of the evidence before him, that "There is no reason why a diligent employee or representative of the association could not, by the application of a reasonable degree of care, have scrutinized and fully understood the interpretation of art. 14 which was at all times reflected in the records of the Employer." In fact, the Employer's action in the matter before me was based expressly on considerations that do *not* involve its particular "*interpretation*" (emphasis added) of the Collective Agreement, but involved its unilateral estimation of "...fairness to all other Government employees who could lose at least 21 days sick leave for a month of absence..." (Consent #3).

In the matter before me, therefore, I am persuaded that it would be inequitable to prevent the Union from asserting "the rights of an ignorant party which has just discovered a violation of its rights." (*Owen Sound* p. 58)

I note that I am bound by Article 9.16 to "dispose of (the) grievance by (an) arrangement which (I deem) just and equitable."

DECISION

In light of the foregoing considerations, I find that

> **The grievance is sustained. The Grievor's sick leave bank is to be credited 3.5 days for the April 2009 to March 2010 period.**

Respectfully submitted as the decision of the Arbitrator.

John A. Scott, Ph.D.
Arbitrator

May 23, 2011