

The Arbitration hearing was held on December 11, 2007, at the Glynmill Inn, in Corner Brook, Newfoundland and Labrador. At the commencement of the hearing, the parties agreed as follows:

1. That the sole Arbitrator was acceptable to the parties and had jurisdiction to deal with the dispute.
2. That the Arbitrator would take written notes and in the event of conflict, these notes would prevail.
3. That the grievance procedure had been properly followed.
4. That there were no preliminary objections to be argued with respect to arbitrability.
5. That the Arbitrator would remain seized of the matter for a period of sixty (60) days following the date of the Award in the event that any interpretation of the Award or its effect was necessary.
6. That witnesses would not be excluded from the hearing.
7. That all parties likely to be affected by the outcome of the arbitration had received adequate notice.
8. That Collective Agreement and statutory time limits for making the Award would be waived.

THE EXHIBITS

The following exhibits were entered by consent:

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| C1 | Collective Agreement – June 1, 2004 – May 31, 2009 |
| C2 | Grievance Form – June 8, 2007 |
| C3 | Memorandum – Jenkins/Human Resources – August 4, 2007 |

Other Exhibits:

CJ1	Calculation/Comparison – 4% - 2 weeks pay.
CJ2	Various T4s – Statement of Remuneration
SY1	Collective Agreement – 1980-1982
SY2	Collective Agreement – 1984-1988
SY3	Collective Agreement – 1988-1990
SY4	Collective Agreement – 1990-1993

The relevant articles of the Collective Agreement are appended.

NATURE OF THE GRIEVANCE

In a grievance filed June 8, 2007, the Union alleges that the Employer has violated vacation pay provisions as found in Section 28.01 Schedule “A” of the Collective Agreement. By way of remedy, the Union is seeking payment for amounts of vacation pay owing to employees who received less than what the Union asserts is required to be paid under the Collective Agreement.

The Employer denies that the Collective Agreement has been violated in the manner alleged.

THE FACTS

The Union became aware of the circumstances pertaining to this grievance sometime after July 28, 2002, when new employee Cory Jenkins, a first class millwright, commenced working with this Employer. Cory Jenkins maintained that new employees were not receiving their entitlement to 4% vacation pay. Cory Jenkins alleged this was a violation under Article 28.01 – Schedule A of the Collective Agreement, which incorporates the Labour Standards Act, R.S.N. 1990, c. L-2.

Cory Jenkins brought the issue to the Local Union President. At that time Cory Jenkins and others were attempting to obtain fulltime positions with the Employer. For that reason the Union decided not to raise the vacation pay issue with the Employer or to file a grievance. Subsequently, Cory Jenkins and the others obtained fulltime status. The vacation pay issue was not pursued with the Employer at that time.

Approximately four years later, in 2007, Cory Jenkins became the Local Union President. Around the same time, new employees hired maintained that they were not receiving 4% vacation pay as required pursuant to Article 28.01 – Schedule A of the Collective Agreement. These new employees brought the issue to Union President Cory Jenkins. The Union first raised the matter with the Employer in April 2007. The Union had not raised the issue with the Employer during negotiations which resulted in the current Collective Agreement. The current Collective Agreement was executed July 21, 2005, and covers the period June 1, 2004, to May 31, 2009.

This grievance is based on a violation of Article 28.01 – Schedule A of the Collective Agreement. Although the language in the Collective Agreement changed over time, the vacation pay practice remained the same throughout the period.

The 1980-82 Collective Agreement with a predecessor employer and the Union stated in part:

Section 29 – Vacations

The following provisions will apply to vacations taken in the period June 1, 1980 to May 31, 1982.

Schedule A *

29.01 Regular employees who have completed one (1) year of service, but less than five (5) years of continuous service, with the Company will be entitled to vacation with pay based on the number of hours worked in the previous Agreement year in accordance with the following schedule. (Vacation year is June 1st to May 31st). Pay for these vacations will be in accordance with the “Annual Vacations with Pay Act, 1969”.

For employees working on a 40-hour 5-day week basis:

	Hours Worked	Vacation Pay
(a)	1656 or more hours	10 days (80 hours pay)
(b)	1469 to 1655 hours	9 days (72 hours pay)
(c)	1282 to 1468 hours	8 days (64 hours pay)
(d)	1094 to 1281 hours	7 days (56 hours pay)
(e)	907 to 1093 hours	6 days (48 hours pay)

- | | | |
|-----|------------------|-----------------------|
| (f) | 720 to 906 hours | 5 days (40 hour pay) |
| (g) | 533 to 719 hours | 4 days (32 hours pay) |

The 1984 Collective Agreement stated:

Section XXVIII – Vacations

The following provisions will apply to vacations taken in the period June 1 to May 31 of each year.

28.01 – Schedule A

Regular employees who, on May 31, have completed one (1) year but less than four (4) years of continuous service with the Company will be entitled to vacation with pay based on the number of hours worked in the previous Agreement year in accordance with the following schedule. (Vacation year is June 1st to May 31st.) Pay for these vacations will be in accordance with the Newfoundland Labour Standards Act:

For employees working on a 40-hour 5-day week basis:

<u>Hours Worked</u>	<u>Vacation Period and Pay</u>
a) 1656 or more hours	10 days (80 hours pay)
b) 1469 to 1655 hours	9 days (72 hours pay)
c) 1282 to 1468 hours	8 days (64 hours pay)
d) 1094 to 1281 hours	7 days (56 hours pay)
e) 907 to 1093 hours	6 days (48 hours pay)
f) 720 to 906 hours	5 days (40 hours pay)
g) 533 to 719 hours	4 days (32 hours pay)

The Collective Agreement for June 1, 1988 - May 31, 1990, states:

Section XXVIII – Vacations

The following provisions will apply to vacations taken in the period June 1 to May 31 of each year.

28.01 – Schedule A

Regular employees who, on May 31, have completed one (1) year but less than four (4) years of continuous service with the Company will be entitled to vacation with pay based on the number of hours worked in the previous Agreement year in accordance with the following schedule. (Vacation year is June 1st to May 31st.) Pay for these vacations will be in accordance with the Newfoundland Labour Standards Act:

For employees working on a 40-hour 5-day week basis:

<u>Hours Worked</u>	<u>Vacation Period and Pay</u>
a) 1656 or more	10 days (80 hours pay)
b) 1469 to 1655 hours	9 days (72 hours pay)
c) 1282 to 1468 hours	8 days (64 hours pay)
d) 1094 to 1281 hours	7 days (56 hours pay)
e) 907 to 1093 hours	6 days (48 hours pay)
f) 720 to 906 hours	5 days (40 hours pay)
g) 533 to 719 hours	4 days (32 hours pay)

The Collective Agreement for the period June 1, 1990 to May 31, 1993, states:

Section XXVIII – Vacations

The following provisions will apply to vacations taken in the period June 1 to May 31 of each year.

28.01 – Schedule A

Regular employees who, on May 31, have completed one (1) year but less than four (4) years of continuous service with the Company will be entitled to vacation with pay based on the number of hours worked in the previous Agreement year in accordance with the following schedule. (Vacation year is June 1st to May 31st.) Pay for these vacations will be in accordance with the Newfoundland Labour Standards Act:

For employees working on a 40-hour 5-day week basis:

<u>Hours Worked</u>	<u>Vacation Period and Pay</u>
a) 1656 or more	10 days (80 hours pay)

b) 1469 to 1655 hours	9 days (72 hours pay)
c) 1282 to 1468 hours	8 days (64 hours pay)
d) 1094 to 1281 hours	7 days (56 hours pay)
e) 907 to 1093 hours	6 days (48 hours pay)
f) 720 to 906 hours	5 days (40 hours pay)
g) 533 to 719 hours	4 days (32 hours pay)

These are facts relevant to this case.

POSITION OF THE PARTIES

The Union

The Union is alleging a breach of Article 28.01 Schedule “A” of the Collective Agreement. It is the position of the Union that the Employer has been acting in violation of that Article by not applying the provincial Labour Standards Act as required under the Article. Specifically, the Union alleges that the Employer has failed to pay 4% vacation pay on total wages earned as required pursuant to the Article and the relevant section of the Labour Standards Act. In the result, the Union alleges that some employees have been working without receiving their entitlement as required under Article 28.01 Schedule “A”.

The grievance is a group grievance pertaining to specific employees affected. A wrong has been committed in reference to this matter and the Union is seeking the appropriate remedy.

The language of the Article is clear and favours the Union’s submissions. The Union is seeking retroactivity. The Union made reference to the provincial Labour Standards Act and relevant sections of Brown and Beatty’s Canadian Labour Arbitration.

The Employer

It is the Employer's position that the Union is estopped from bringing the grievance in the middle of the contract. The parties have applied the language of the Collective Agreement without dispute for about twenty-seven (27) years. The group of employees affected is limited to Schedule "A" of Article 28.01. The Union did not indicate during previous negotiations that there was any problem with the interpretation placed on Article 28.01 by the Employer.

It is clear based on the evidence that the Union President who signed the grievance was aware of the Union's concerns in reference to Article 28.01 but failed to deal with the issue at the bargaining table. The Employer was led to believe that all issues were correctly stated during bargaining. If the Union knew that it was to raise the issue subsequent to bargaining, there is an estoppel issue which emerges. The Employer is entitled to the shield of estoppel in this instance.

In the alternative, a strict interpretation of the language of Article 28.01 should apply. There should be a broad brush approach. In applying the interpretation the Union advocates, some money may be required to be paid back by employees who may have been paid more than 4% in some categories of service.

The Union has the onus to present evidence in favour of its interpretation and it has failed to do so. The Union is relying upon an interpretation bulletin, but it is the language in the Labour Standards Act which is relevant. The issue pertains to the entitlement of the Union under the statute.

The fact is that the Employer has provided all the entitlement to which employees have been due under Article 28.01. The Employer has paid for wages earned. The intention of the parties was to follow Article 28.01 the way it was administered historically. The Employer is relying on previous collective agreement language and prior statutory provisions.

The Employer made reference to a number of cases, including McGavin Toastmaster Ltd. v. Ainscough (1975) CanLII 9 (S.C.C.); Isidore Garon Ltée v. Syndicat des bois ouvré de la région de Québec inc. (C.S.D.) [2006] 1 S.C.R. (27). The Employer also made reference to relevant sections of Brown and Beatty's Canadian Labour Arbitration and to Palmer's Collective Agreement Arbitration in Canada.

It is the position of the Employer that the grievance should be denied.

CONSIDERATIONS AND REASONS FOR THE DECISION

The Union has alleged a violation of Article 28.01 – Schedule A of the Collective Agreement. Section 28 of the Collective Agreement pertains to vacation and states in part:

Section 28 – Vacations

The following provisions will apply to vacations taken in the period June 1 to May 31 of each year.

28.01 – Schedule A

Regular employees who, on May 31, have completed one (1) year but less than four (4) years of continuous service with the Company will be entitled to vacation with pay based on the number of hours worked in the previous Agreement year in accordance with the following schedule. (Vacation year is June 1st to May 31st.) Pay for these vacations will be in accordance with the Newfoundland Labour Standards Act:

For employees working on a 40-hour 5-day week basis:

<u>Hours Worked</u>	<u>Vacation period and pay</u>
a) 1656 or more	10 days (80 hours pay)
b) 1469 to 1655 hours	9 days (72 hours pay)
c) 1282 to 1468 hours	8 days (64 hours pay)
d) 1094 to 1281 hours	7 days (56 hours pay)
e) 907 to 1093 hours	6 days (48 hours pay)
f) 720 to 906 hours	5 days (40 hours pay)
g) 533 to 719 hours	4 days (32 hours pay)

Article 28.01 makes reference to the Newfoundland Labour Standards Act. The Labour Standards Act, R.S.N.L. 1990 c. L-2 states in part:

2. In this Act ...

- (i) **“wage” means remuneration, salary, commission or return in a form permitted by this Act, or combination of forms, for work or services performed by an employee for an employer under a contract of service and, if the context so admits, includes payments provided for in this Act for vacation pay and holiday pay, but does not include tips and gratuities.**

Part I of the Act pertains to vacations with pay.

7. In this Part

- (a) **“annual vacation” means the vacation to which an employee is entitled under subsection 8(1) or (1.1);**

8. (1) Where

- (a) **an employee works for an employer at least 90% of the normal working hours in a continuous 12 month period, beginning on the date of the start of employment or upon termination of a preceding 12 month period; and**
- (b) **the employment by that employee does not stop before the end of that 12 month period,**

the employer shall permit the employee, within 10 months after the end of the continuous 12 month period, to take an annual vacation of not less than 2 weeks, and shall pay to the employee at the time provided in section 10 wage amounting to 4% of the total wages earned by that employee during the 12 month period

- (1.1) **Notwithstanding subsection (1), where an employee meets the requirements of subsection (1) and has completed 15 years of continuous employment with the same employer, the employer shall permit the employee, within 10 months after the end of the 15 year period to take an annual vacation of not less than 3 weeks and shall pay to the employee at the time provided in section 10 wages amounting to 6% of the total wages earned by that employee during the 12 month period.**

9. (1) Where subsection 8(1) or (1.1) does not apply, the employee is not entitled as of right to an annual vacation, but the employer shall pay to the employee, on or before the times specified in subsection (2),

- (a) **to an employee who has completed 15 years of continuous employment with the same employer, 6%; or**
- (b) **to an employee who has completed less than 15 years of continuous employment with the same employer, 4%**

of the total wages earned by the employee for the hours worked by the employee within the continuous 12 month period, or until the cessation of employment of the employee within the 12 month period.

The Union has described the grievance as a group grievance. In Labour Law Terms A Dictionary of Canadian Labour Law¹ group grievance is defined:

group grievance: grievance relating to a group of employees similarly affected by the employer's action;

There is evidence that the grievance relates to a specific category of employees as described in Article 28.01 – Schedule A of the Collective Agreement and is properly framed as a group grievance.

The Employer maintains that based on past practice the Union is now estopped from relying upon the strict language of Article 28.01 – Schedule “A” of the Collective Agreement.

On the issue of estoppel and past practice Brown and Beatty in Canadian Labour Arbitration at 2:2211 as follows:

The concept of equitable estoppel is well developed at common law and has been expressed in the following way:

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

One arbitrator has summarized the doctrine in the following terms:

It is apparent that there are two aspects of the doctrine as thus stated. There must be a course of conduct in which both parties act or both consent and in which the party who later seeks to set up the estoppel is led to suppose that the strict rights will not be enforced. It follows that the party against whom the estoppel is set up will not be allowed to enforce his strict rights if it would be inequitable to do so. The main situation where it would be inequitable for strict rights to be upheld

¹ Sack and Poskanzer Labour Law Terms (Lancaster House, 1984)

would be where the party now setting up the estoppel has relied to his detriment.

Thus, the essentials of estoppel are: a clear and unequivocal representation, particularly where the representation occurs in the context of bargaining; which may be made by words or conduct; or in some circumstances it may result from silence or acquiescence; intended to be relied on by the party to whom it was directed; although that intention may be inferred from what reasonably should have been understood; some reliance in the form of some action or inaction; and detriment resulting therefrom.

There has been no lack of cases which pertain to the doctrine of estoppel. Some of these cases are particularly relevant to the circumstances before this arbitrator. In Re: Certified Brakes and USW, Local 14831 (1986) 25 L.A.C. (3d) 418 Arbitrator Davis found at p. 425:

Where past practice is relied on as the basis for founding an estoppel the question arises as to whether the practice has been clear, consistent and unambiguous. Relevant to that determination will be the frequency with which the practice has been applied as well as the period of time over which it was effective.

In that case, arbitrator Davis concluded that the company was estopped by its conduct from unilaterally changing a practice during the currency of the Collective Agreement.

In Re: Domglas Inc. and Glassworkers Int'l. Union (1994) 40 L.A.C. (4th) 398 Arbitrator Keller makes reference to a decision of Arbitrator Picher at 404 as follows:

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.

....

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 had 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.

....

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 a 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 & Ceramic Workers, Local 203* (1980), 26 L.A.C. (2d) 94 (Burkett), and cases cited therein.

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.

In this case, for some years prior to the filing of this grievance, the Union was aware that some of its employees had objected to the manner in which the Employer was compensating for vacation pay under Article 28.01 – Schedule A. Employees had informed the Union President that the Employer’s actions were inconsistent with the language of the Collective Agreement. When the matter was brought to the attention of the Union President, the Union, for its own reasons, decided against raising the issue with the Employer. Furthermore, the Union did not raise the matter when negotiating the current Collective Agreement.

The Employer was unaware that the Union took any issue with the manner in which the Employer was paying vacation pursuant to Article 28.01 – Schedule A. The Employer had applied the Article in the same manner over a series of collective agreements, even when the language of that Article changed from time to time. The Employer’s interpretation of the Article had been accepted by the Union for in excess of twenty (20) years. The Employer’s application of Article 28.01 – Schedule A has been consistent.

It would be inequitable in these circumstances for the Union to seek a remedy during the life of the current Collective Agreement. The Employer is entitled to a reasonable period of notice and to have the opportunity to deal with this matter in a collective bargaining context. To find otherwise would be to the Employer's detriment. The elements necessary to create an estoppel have been established. The estoppel therefore should continue until the termination of the current Collective Agreement.

In summary, the Union is estopped from asserting the strict language of Article 28.01 – Schedule A in this instance. The Union ought to have raised this issue during negotiations. For all these reasons the grievance is denied.

DECISION

In conclusion, having carefully considered the relevant Articles of the Collective Agreement, all of the evidence and arbitral jurisprudence as it relates to this matter, I find that the grievance is denied.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 9th day of January, 2008.

Dennis M. Browne, Q.C. – Arbitrator