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IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE COMMISSIONER OF THE NORTHWEST TERRITORIES

(hereinafter referred to as the "Employer")

AND:

THE NORTHWEST TERRITORIES PUBLIC SERVICE ASSOCIATION

(hereinafter referred to as the "Union")

(Commuting Allowance Arbitration)

Arbitrator:	H. Allan Hope, Q.C.
Counsel for the Employer:	Austin Marshall
Counsel for the Union	David M. Landry
Place of Hearing:	Yellowknife, N.W.T.
Date of Hearing:	February 24, 1986

A W A R D

I

The Employer in this dispute is the Government of the Northwest Territories. The four grievors are assigned to duties at Weigh Scales located at a small community called Enterprise. The grievors reside in Hay River, a larger centre which is located approximately 37 kilometers from Enterprise. They commute to work daily. The dispute arose when the Employer ceased paying the grievors a travel allowance they had received for a number of years. At issue is the following provision of the collective agreement:

> COMMUTING ALLOWANCES
>
> 28.01 An employee whose workplace is located outside of a five (5) mile radius of a settlement centre, and no public transportation is available to his place of work, shall:
> (a) be provided with transportation to and from his workplace by the Employer; or
> (b) where he is required to use his personal motor vehicle, be paid the distance rate specified in the Duty Travel Expenses Article 45.

The Employer gave notice on April 2, 1985 that it intended to terminate the allowance effective May 1, 1985. The allowance was terminated pursuant to that notice. The evidence was that the grievors were the only employees in the work force who were receiving Article 28.01 benefits. Apparently employees at the Enterprise Weigh Scales were the only employees who had ever received the benefit on a regular basis.

The position of the Employer is that Enterprise is a "settlement centre" within the meaning of that article and

that the Weigh Scales are located within the prescribed five-mile radius. Thus, says the Employer, the provision, on the plain meaning of the language used, cannot possibly extend to the grievors. The Employer said that the decision to discontinue the benefit was a policy decision aimed at inducing employees to reside in the communities in which they work.

What was not explained was why the benefit was paid in the first place if the Employer was not obligated to pay it. The Union made that point when it said that the facts with respect to Enterprise have always existed and the Employer, despite those facts, had always paid the benefit. In the submission of the Union, nothing had changed to explain or justify its unilateral withdrawal. The Union contests the fact that Enterprise is a "settlement centre" within the meaning of Article 28.01 and says that the Employer had never taken that position with respect to Article 28.01 prior to its April 2, 1985 notice.

On the basis of its practice, said the Union, the Employer must be taken to have agreed that Enterprise is not a "settlement centre" within the meaning of the provision. The practice, on the evidence, has existed for more than ten years and, in the Union's view, it confirms a mutual intention in the parties to confer the commuting allowance benefits on the grievors, regardless of any ambiguity in the language of the provision. The Union argued as its alternate position that if the language of the collective agreement does not permit its interpretation, the Employer, by reason of its practice, should be estopped from unilaterally withdrawing the benefit until the Union has had an opportunity to address the issue in collective bargaining.

The Employer's position on the estoppel issue is similar to its position on the interpretation issue. That is, the Employer submits that the language of the provision is clear, that it gave reasonable notice to the grievors of its intention to eliminate the benefit, and that it was entitled to cease paying what it saw, at least belatedly, as an ex gratia benefit which it was entitled to terminate.

II

Undoubtedly it is open to a party to cease a practice which is contrary to the provisions of the collective agreement. See: Re Corporation of City of Victoria and Canadian Union of Public Employees, Local 50 (1974), 7 L.A.C. (2d) 239 (Weiler). On pp. 243-4 Professor Weiler, sitting as chairman of the Labour Relations Board of British Columbia, said as follows:

> Apparently, the City has administered the collective agreement - and in particular this language under s.21:10 - for a considerable number of years on the assumption that only three hours' pay at the normal rates was guaranteed on an emergency call. It argued that this past practice implied that that was the correct interpretation. However, I believe that the language of the agreement on its face is sufficiently clear that extrinsic evidence may not be used to alter its meaning, and that is certainly true of the character of the evidence advanced here. See Re Sudbury Mine, Mill & Smelter Workers, Local 598 and Falconbridge Nickel Mines Ltd. (1969), 19 L.A.C. 210 (Weiler). Even a long-standing error in the interpretation of a collective agreement may be corrected once it is discovered by one of the parties. See Re Int'l Operating Engineers, Local 796, and Wellesley Hospital (1963), 14 L.A.C. 81 (Reville).

But here the evidence does not suggest that the Employer was paying the benefit ex gratia or in error. Quite

the contrary, the evidence of the Union was that payment of the benefit was used by the Employer to induce employees to accept positions at the Enterprise Weigh Scales. As to whether the benefit was paid ex gratia, it must be pointed out that the Employer appears to have paid it pursuant to Article 28.01. The inference I draw from the evidence is that the Employer later concluded that it was not required to pay the benefit on a strict application of the language.

The Union submission is that the language of the disputed provision is at least ambiguous. In particular, it is of the view that there is a serious question raised as to whether Enterprise falls within the definition of a "settlement centre" as that term is used in Article 28.01. I will return to the language issue later. At this stage it is helpful to review some of the facts relating to Enterprise which may assist in understanding the basis upon which the allowance has been paid.

III

Enterprise is an extremely small community which exists primarily because it is located in a place where two highways meet. That fact is the reason why the Weigh Scales are located there. On the uncontradicted evidence of the Union it is a truck stop with a population listed at 40 persons and there is some question about whether that modest statistic is accurate. The Union evidence was that the current population is less than 40 persons. It was conceded that there are other government employees residing at Enterprise who deal with highway maintenance, but they are very few in number.

Enterprise was further described as being entirely dependent for some essential services on Hay River. For instance, water for the residents is trucked in and sewage is removed by tank truck. In both cases, those services are provided from Hay River. On the evidence, there is no growth potential for Enterprise, first because there is no reason for persons to locate there, secondly because of the close proximity of the established community of Hay River and thirdly because of the limited access to water and sewage services.

In a similar vein, evidence was given of a housing policy pursued by the Employer, the application of which is seen by the Union as indicative of a rather cavalier attitude towards Enterprise on the part of the Employer. (That policy exists outside the collective agreement and is in the discretion of the Employer). The Employer provides housing assistance to employees under the terms of the policy. The level of assistance is based upon the type of community involved. The policy is recorded in a Directive and divides communities into three categories, designated as Level I, Level II and Level III.

Enterprise is listed as a Level II community. The degree of assistance contemplated in the policy with respect to Level II communities is expressed in the Directive as follows:

> 28. The Government of the Northwest Territories will provide staff accommodation on an ongoing basis to eligible employees in Level II and III Communities.

However, it appears that the Government has not implemented that policy with respect to Enterprise, at least

insofar as the grievors are concerned. Called to give evidence was one of the grievors, Mark Minute. He said he has never been offered accommodation in Enterprise by the Employer but he did receive an offer of assistance when locating at Hay River. He said further that there is no accommodation available in Enterprise to his knowledge. The Employer did not contradict that evidence, although it was emphasized that its housing policy is administered outside the collective agreement. On that evidence I conclude there is no accommodation available to the grievors which would permit them to move from Hay River to Enterprise. The realistic fact is that the grievors have no choice but to reside at Hay River and commute to Enterprise on a daily basis. The inference I draw is that the Employer paid the allowance in recognition of that fact. It is against that factual backdrop that I return to the issue of interpretation.

IV

The Union, as stated, submits that the parties must be taken to have intended to exclude Enterprise from the term, "settlement centre", as it is used in Article 28.01. The collective agreement contains no reference to that term in any other provision which was brought to my attention. Nor is it defined in the definition provision, being Article 2.01. Article 2.02 incorporates definitions in two Acts governing the relationship, being the Public Service Act and the Northwest Territories Public Service Association Act, but it is not suggested that "settlement centre" is defined in either of those Acts.

In support of its assertion that Enterprise is a "settlement centre", the Employer made reference to Article 41, a provision dealing with a benefit called "Settlement

Allowance". The nature of that benefit is discussed in two other arbitrations between the parties, the Casual Employees Arbitration, (see pp. 22-25), and the Duty Travel Pay Arbitration, (see pp. 11-13). Basically it is a benefit that sets up the Employer's headquarters community of Yellowknife as the standard and provides an allowance to employees residing in "settlements" where living costs exceed those in Yellowknife.

Article 41.08 incorporates a schedule of "settlements" for purposes of administering and calculating that benefit. Enterprise is included in the schedule. On that basis the Employer submits that Enterprise is a "settlement" within the meaning of the agreement and, ipso facto, must be viewed as a "settlement centre" within the meaning of Article 28.01. But, in order for that reasoning to prevail, one must presume that the parties did not intend there to be any difference in meaning between "settlement" and "settlement centre."

The Union conceded that Article 41.08 may serve to establish that Enterprise is a "settlement" for purposes of paying Settlement Allowance benefits. But, said the Union, that fact does not do anything to determine what the parties meant by the term, "settlement centre", in Article 28.01. The Union submission, in effect, is that the term "settlement centre", is at least ambiguous in the context of Article 20.01 and that the practice of the Employer in administering the provision can only mean that the parties did not intend to have the term apply to Enterprise.

That latter submission is in accord with contemporary arbitral authorities in other jurisdictions. The submission, in effect, presumes that the use of the term

"settlement centre" creates a latent ambiguity in the disputed article which justifies the use of extrinsic evidence to clarify the intentions of the parties. The concept of a latent ambiguity exists with respect to provisions where the language is clear with respect to the ordinary meaning of the words used but is ambiguous in context or with respect to its application to particular circumstances. The concept of a latent ambiguity and its application in the task of interpreting an agreement was considered in a decision of the Ontario Court of Appeal which is frequently cited in arbitral authorities. In that decision, Leitch Gold Mines Ltd. et al. v. Texas Gulf Sulphur Co. (Incorporated), (1968) 3 D.L.R. (3d) 161, [1969] 1 O.R. 469, the court defined a latent ambiguity in the following terms on p. 216:

> ... where the language [of an agreement] is equivocal, or if unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present. The term "latent ambiguity" seems now to be applied generally to all cases of doubtful meaning or application.

The fundamental principle in any disputed interpretation of an agreement is that the arbitrator must seek out the mutual intentions of the parties. On p. 215 of Leitch Gold Mines, the Court said:

> The Court is not necessarily concerned only with the literal meaning of the language used but rather with its meaning in the light of the intentions of the signatories ...

That decision, as stated, has been relied on by numerous arbitrators as guidance for the general approach to the notion of ambiguity and the use of extrinsic evidence in the task of interpretation.

The reasoning in Leitch Gold Mines was applied by the arbitrator in Re Teamsters Union and Motor Transport Industrial Relations Bureau of Ontario (1969), 22 L.A.C. 57 (Weatherill). On p. 59 Professor Weatherill, said as follows:

> While it may be said that the provisions of art. 23.2(g) give rise to problems of construction, we would not say that they were "patently ambiguous". Questions do arise, however, respecting the application of these provisions to particular situations, and it must be acknowledged that it is not clear, from a reading of these provisions, even in the context of the whole agreement, whether they would include within the scope of "work" the particular activities put in question by this grievance. There is, then, "ambiguity" in these provisions, in that it is not clear how they are to be applied to particular fact-situations. This is what has come to be known as "latent ambiguity", a phrase which seems recently to have been given a wider meaning than in the earlier cases, where it was often used to refer to special usages of words, which it was open to a party to establish through extrinsic evidence.

Here I have no difficulty in saying that the term, "settlement centre", is ambiguous in the sense that the question of how the parties are to determine whether a "settlement" is a "settlement centre" within the meaning of the provision is not made clear. The submission of the Employer, in effect, is that "settlement centre" must be seen as synonymous with the term "settlement" as used in Article 41. But, the legitimate question arising is, if the parties intended "settlement centre" to mean "settlement", why would they not simply have used the term "settlement"?

It is true that one must recognize in the interpretation of collective agreements that they are not instruments which reflect precise draftsmanship and that the mere

evidence of a representation by both words and conduct that the commuting allowance would be paid to employees in the category of the grievors. They were assured in words that the allowance would be paid and, in terms of conduct, the allowance was in fact paid for many years.

On the facts before me the additional elements necessary for a plea of estoppel follow as an inevitable result of that representation. Firstly, the grievors relied upon the representation of the Employer as reflecting the compensation they were to receive for their work. Lastly, to permit the Employer to terminate the benefit would be prejudicial to the grievors in the sense contemplated in Lake Ontario Cement. Mr. Minute estimated that the costs to him of maintaining a vehicle and travelling to and from work are in excess of $350.00 per month. Loss of the allowance leaves him with no compensation for the added cost of attending at work.

The jurisdiction of an arbitrator to apply the doctrine of estoppel was given a liberal cast in the decision in Re CN/CP Telecommunications and Canadian Telecommunications Union (1981), 4 L.A.C. (3d) 205 (Beatty). In his decision Professor Beatty commented favourably on the earlier decision of the Labour Relations Board of B.C. in Re City of Penticton and C.U.P.E., Local 608 (1978), 18 L.A.C. (2d) 307 (Weiler), which itself urges that arbitrators have a broad jurisdiction to apply the doctrine.

In addition, the decision in CN/CP Telecommunications offered a different view of what is called the "sword/shield" controversy with respect to the application of the doctrine. Professor Beatty expressed the view that there is no basis in equity for restricting the application of the

doctrine on the basis of the "sword/shield" reasoning. (See: pp. 212-14) That finding is of considerable significance in this dispute because one of the defences raised by the Employer relies, in effect, on a recognition and application of the "sword/shield" distinction.

To place that distinction in perspective, it is sufficient to say that its proponents see the doctrine of estoppel as being limited to the defence of an existing right, being use of the doctrine as a "shield". Those proponents hold to the view that the doctrine cannot be used to found a right, an act perceived as using the doctrine as a "sword". In this dispute the Employer says that the grievors are seeking to use the doctrine as a sword in the sense that they seek to use it to found a claim for entitlement to payment of a commuting allowance.

Numerous arbitrators have elected to follow Professor Beatty. His reasoning has been applied in a host of reported decisions. That is not to say that his views have not gone unchallenged. Two recent arbitral decisions reject his reasoning in part. See: Re Monarch Fine Foods Co. Ltd. and Milk and Bread Drivers, Local 647 (1985), 18 L.A.C. (3d) 257 (Schiff) @ pp. 261-64 and Re Consolidated-Bathurst Inc., Bathurst Division and Canadian Paperworkers' Union, Local 120 (1985), 19 L.A.C. (3d) 231 (Kuttner) @ pp. 233-35.

However, in my view, the "sword/shield" rationale is not apropos the facts and issues in this dispute in any event. I see the question raised in any application of the doctrine of estoppel as being whether there exists some legal right possessed by the party to be charged with the estoppel that the party should be enjoined from exercising on equitable grounds. Here the issue in that context, presuming the

fact that parties use different expressions does not necessarily mean that they intend the expressions to have a different meaning. However, an arbitrator faced with a disputed interpretation must weigh all of the words used and attempt to determine the meaning intended by the parties in their use of differing terms. In particular, an arbitrator should not be quick to discard a particular word as having no meaning.

One can suppose that the parties intended to distinguish between "settlements" and "settlement centres" with respect to entitlement to the commuting allowance. Certainly it makes sense for the Employer to seek to exclude from the benefit those "settlement centres" where commuting is an option, not a requirement. Conversely, it does not make sense to conclude that the parties intended to exclude from the benefit those "settlements", such as Enterprise, where employees are compelled to commute. Enterprise would appear to reflect the very set of circumstances the provision is designed to address.

In short, I am of the view that the language and the circumstances favour the interpretation urged by the Union. In particular, the administration of the provision compels the inference that the parties intended it to apply to the employees at Enterprise, whatever deficiencies may be perceived in the language when it is considered in the abstract.

V

I am of the further view that the Union is entitled to succeed on its plea of estoppel and I propose to set out my reasons for having reached that conclusion. The nature of

the plea and its application in an arbitration was considered at some length in both the Casual Employees Arbitration and the Duty Travel Pay Arbitration. In those decisions I made reference to the decision of the arbitrator in Re Lake Ontario Cement Ltd. and United Cement, Lime and Gypsum Workers' International Union, Local 387 (1984), 13 L.A.C. (3d) 1 (Picher). That decision contains a convenient summary of the ingredients necessary to found a plea of estoppel. It is set forth on p. 7 as follows:

> The elements of estoppel are:
>
> (1) a promise or assurance through words or conduct,
> (2) intended to alter the legal relations between the parties,
> (3) relied on or acted upon by the other party, so that it would be prejudicial if the undertaking were revoked

Applying that criteria to the facts before me, I am of the view that the Employer held out to the grievors and the Union that employees at the Weigh Scales in Enterprise would receive a commuting allowance to compensate them for the fact that they are required to commute to work from Hay River. The precise number of years during which that benefit has been paid was not given but employees have been receiving it for more than a decade.

Mr. Minute, as an example, was told at the time of hiring that he would receive the allowance as part of his compensation package and it was a significant factor in his decision to accept the position. The clear implication in the evidence is that other employees recruited for the Weigh Scales were similarly informed that the commuting allowance would be part of their compensation. Hence, there was clear

Employer has a legal right to discontinue paying the commuting allowance, is whether it would be equitable to permit the Employer to exercise that right.

The most frequently quoted decision in the arbitral authorities with respect to the application of the doctrine is the decision in Combe v. Combe, [1951] 1 All E.R. 767. The following passage appears in that decision on p. 770:

> 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 to 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.

Some arbitrators have expressed impatience with attempts to restrict the applications of the doctrine beyond the limitations reflected in that decision. In particular, there has been criticism of the introduction of the "sword/shield" rationale as an unnecessary and unjustified complication in the application of the doctrine. The concern is that the approach can result in the plea being denied in circumstances where equitable principles would support its application. See: Pacific Forest Products Ltd., Nanaimo Division and Pulp, Paper and Woodworkers of Canada, Local 7 (1983), 14 L.A.C. (3d) 151 (Munroe) at pp. 160-68.

I am of the view that the "sword/shield" rationale should not be substituted for the principles devised by courts of equity to govern the description and application of the doctrine. I refer in particular to the statement of the doctrine as it appears in Combe v. Combe. The test of whether the doctrine will apply in given circumstances turns on whether there is a legal right in existence inter partes and whether it would be equitable to prohibit the party sought to be estopped from exercising that right.

When that reasoning is translated into the context of a practice that one party seeks to maintain and the other party seeks to discontinue, the question is not whether one party has a right to compel continuation of the practice, which is the "sword" analogy, but whether the circumstances justify prohibiting the other party from exercising its legal right to discontinue the practice.

Expressed in terms of a collective bargaining arrangement and a collective agreement, questions can arise as to whether an employer should be estopped from exercising its legal right as management to discontinue a practice not otherwise mandated in the collective agreement. See: Re Consolidated Bathurst Inc., Bathurst Division and Canadian Paperworkers Union, Local 120 (1984), 15 L.A.C. (3d) 423 (Kuttner) @ pp. 427-8. Here the Employer held out that it would pay employees at the Enterprise Weigh Scales the benefits provided for in the commuting allowance provision. It would be inequitable to permit the Employer to renege on that commitment, even assuming it is contractually free to renege.

Further, applying the reasoning of Professor Beatty in CN/CP Telecommunications at pp. 215-216, I am of the view

that the Employer should be estopped from discontinuing the practice during the life of the current collective agreement. The Employer argued that the reasoning in CN/CP Telecommunications as to notice should not apply because, in its view, the Union was afforded a full opportunity to address the issue in bargaining. In particular, the Employer pointed out that the grievors were given notice of the intention of the Employer to discontinue paying commuting allowance on April 2, 1985, some six months before the current collective agreement was entered into between the parties.

There is no doubt that where an employer gives notice during collective bargaining that it does not intend to be contractually bound to a particular practice, the Union cannot rely on the doctrine of estoppel to maintain the practice beyond a reasonable period of notice. See: Re St. John's Convalescent Hospital and Canadian Union of Public Employees, Local 790 (1983), 11 L.A.C. (3d) 278 (Devlin) @ p. 287 and Re Ottawa General Hospital and Ontario Nurses' Association, Local 83 (1985), 18 L.A.C. (3d) 208 (Roach) @ p. 213.

As stated, an employer, aside from application of the doctrine of estoppel, is free to discontinue an ex gratia payment. See: Re United Steelworkers and Uddeholm Steels Ltd. (1971), 22 L.A.C. 419 (Weiler). Professor Weiler said as follows on p. 422:

> There are many arbitration precedents which have upheld the rights of the employer, under the usual management rights clause, to change unilaterally working conditions about which the agreement is silent, and as to which no reasonable implications can be drawn.

But, with respect, the practice upon which the Union relies was not addressed in collective bargaining. What occurred was that the Employer served notice on individual employees that, on its interpretation of Article 28.01, it did not consider itself required to pay the commuting allowance and that it proposed to discontinue paying it after a certain date. The Union challenged that interpretation and thereafter the dispute was addressed through the grievance and arbitration process.

In collective bargaining for the current collective agreement between these parties the only thing raised by the Employer was a demand that Article 28.01 be removed from the collective agreement entirely. The Union resisted that demand and it was dropped by the Employer. It was not suggested in the evidence that the negotiations addressed the issue raised in this dispute, being whether the Employer is obligated to pay the allowance upon a proper interpretation of the agreement.

Both parties appear to have been content to have that issue resolved in the grievance and arbitration process. In my view of the facts the Employer did not give effective notice of an intention to cease paying commuting allowance at Enterprise in the context of the ongoing negotiations. The only reference to the matter came when the Employer filed a demand to "delete [the] entire article". There was no evidence led as to precisely how that issue was addressed in bargaining. The only evidence was that the Union rejected the demand and that it was dropped by the Employer.

Obviously that demand proceeded on the basis that benefits under the provision would continue to be available unless the article was deleted. The Employer withdrew the

demand to have the article deleted and, in effect, agreed to have Article 28.01 maintained in the agreement. To accede to the Employer's submission would be to permit the Employer, after it had agreed to the inclusion of Article 28.01, to repudiate the only application of the provision which existed at the time of negotiations, being its application at the Enterprise Weigh Scales. The Employer failed to give clear notice of an intention to discontinue paying commuting allowance at Enterprise in a context which would release it from a continuing estoppel against terminating the practice until the Union is offered an opportunity to pursue the matter in collective bargaining.

VI

In conclusion, if estoppel were the appropriate remedy, I would hold the Employer estopped from discontinuing payment of the allowance during the life of the collective agreement. However, as indicated, I am of the view that the facts and circumstances support the interpretation urged by the Union. In short, I am of the view that the Employer must be taken to have intended that employees at the Enterprise Weigh Scales fall within the scope of Article 28.01 and are entitled to receive commuting allowance. It is left to the parties to determine if the matter is to be addressed in future collective bargaining.

In the result, the grievances are granted and the Employer is directed to resume payment of the commuting allowance to the grievors. In addition, the grievors are entitled to be compensated for their loss of the allowance during the period following the Employer's termination of it. I will reserve jurisdiction to calculate the compensation to

which the grievors are entitled if the parties are unable to agree on the amount.

DATED at the City of Vancouver, in the Province of British Columbia, this 1st day of May, A.D., 1986.

H. ALLAN HOPE, Q.C. - Arbitrator