IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CAMBRIDGE STAMPINGS INC.
- The Employer

-and-

UNITED STEELWORKERS OF AMERICA, LOCAL 4252-04
- The Union

AND IN THE MATTER OF a group grievance regarding breaks

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Philip J. Wolfenden	- Counsel
Greg Ducharme	- Plant Manager

On behalf of the Union:

David Hilker	- Staff Representative
George Harris	- Local 4252-04 President
Larry Mosser	- Steward

Hearing held November 6, November 12, December 18, 2001, and October 3, 2003, in Cambridge, Ontario.

AWARD

I. INTRODUCTION

This collective agreement provides employees with 10 minute breaks in their workday. However the practice for many years has been breaks of about 13 minutes. During the last collective agreement the Employer made two attempts to enforce 10 minute breaks. The issue in dispute in this grievance is whether the Employer is estopped from enforcing 10 minute breaks under the current collective agreement.

II. THE EVIDENCE

The Employer, Cambridge Stampings Inc., operates an auto parts business. The collective agreement specifies that employees are to receive one ten (10) minute break in each one-half shift.

Notwithstanding the language of the agreement, for many years - one witness estimated 15 years - the practice has been 13 minute breaks. The Employer used a "break clock" which was started when the break was to begin, normally when the coffee truck arrived, and the break clock had a buzzer which alerted employees to the start and end of the break. Writing on the break clock indicated that the duration of the break was 13 minutes.

The last collective agreement ran September 1998 through August 2001. In 2000 the plant manager was Tom Matthews. He made an attempt to follow what he saw as the clear language of the collective agreement in enforcing the 10 minute breaks. He advised the employees that the breaks would be 10 minutes.

Mr. Matthews asked that the break clock be adjusted. When an attempt was made to adjust the old clock, it was impossible to change the clock so that it provided only a 10 minute

break, although the duration of the break was reduced.

The Union grieved Mr. Matthew's attempt to reduce the breaks from 13 minutes to 10 minutes.

There was considerable dispute about how that grievance was resolved. Mr. Matthews said there were other more pressing issues and that he had simply agreed to put this issue on the "back burner." The Union said the matter was resolved during the grievance process by a written settlement in which the parties agreed to revert to the 13 minute breaks.

George Harris (local union president) produced what he testified was the written resolution of that grievance as follows:

June 16/00
Discussion with Tom Matthews on June 1[?]/00 & he agreed that break period would be rivertated [sic] to the original time as before.
Frank Clark was present at this meeting.

Union
(two signatures)

Mr. Harris testified that he and Mr. Matthews met and discussed the matter and reached agreement. Mr. Harris said that he arranged for Frank Clark to attend as a witness, that he wrote the above terms of settlement, and that he and Mr. Matthews had signed the settlement.

When Mr. Matthews testified, he denied that the signature on the settlement was his. He said he had never been at a meeting where Mr. Harris and Mr. Clark were present and where the issue of the breaks grievance was discussed. He said that instead, because there were a number of important matters facing the parties at that time, he simply decided to put the issue on the back burner and return to the former breaks.

The Union called witnesses in reply with respect to the settlement.

Frank Clark testified that he attended a meeting with Mr. Harris and Mr. Matthews at which a resolution of the breaks grievance was discussed on terms which indicated that breaks would return to the previous practice. He said that there was a written resolution signed by both Mr. Matthews and Mr. Harris. However, he said he had not signed the settlement, had not read it, and was unable to say whether the form produced by the Union was the one he had seen signed.

Linda Pitney testified as a handwriting expert. She was provided with original documents which the parties agreed had been signed by Mr. Matthews and she had reviewed them to form an opinion as to whether the disputed grievance settlement had also been signed by Mr. Matthews. She testified that, in her opinion, it was probable that Mr. Matthews had signed the settlement.

In any event, whether the grievance was settled by the parties or the Employer merely set this aside, Mr. Matthews asked that the break clock be returned to 13 minutes. However, the old clock which could not be adjusted to 10 minutes could not be returned to 13 minutes. The length of the breaks was increased as much as possible but it was less than 13 minutes.

In 2001 a new plant manager, Greg Ducharme, arrived. He, too, made an effort to enforce what he saw as the clear language of the agreement with breaks limited to 10 minutes.

There were minor differences among the witnesses as to what action Mr. Ducharme took. I conclude that the following took place.

Spring 2001 Mr. Ducharme met with the Union Committee (local president and stewards) and advised the Committee he was going to enforce the language of the agreement regarding

10 minute breaks. He also discussed other provisions of the collective agreement with the Committee, as well as the state of the Employer's business. Mr. Ducharme then met with employees on each shift and informed them of the enforcement of 10 minute breaks.

Mr. Ducharme attempted to have the break clock changed, but again the old clock could not be set to 10 minutes. However, the Employer did manage to reduce the time on the clock. In addition, over the next few months the supervisors made an effort to get employees back to work faster. The breaks were shorter than they had been but, as the break clock buzzer signifying the end of the break rang after more than 10 minutes, the goal of 10 minute breaks was not achieved. From the Employer perspective, progress was made on the breaks.

Although the Union opposed the changes and spoke to Mr. Ducharme and to the supervisors, there was no grievance. The Union did give a copy of what the Union said was the settlement of the earlier grievance (the grievance filed when Mr. Matthews had tried to change the breaks) to a supervisor to give to Mr. Ducharme. But Mr. Ducharme made no change in his approach.

George Harris, the local union president, said he thought the Employer had dropped the matter and that Mr. Ducharme had given up on his goal of 10 minute breaks, although there was no evidence to support such a conclusion. Instead, it was clear the Employer continued its efforts to shorten the breaks to the 10 minutes specified in the collective agreement, efforts which were hampered by a clock which could not be set for 10 minutes.

Negotiations for a new agreement took place after Mr. Ducharme began to enforce the shorter breaks and the parties reached a new three year agreement effective September 1, 2001. During those negotiations no mention was made by either party of the length of the breaks.

September, 2001, soon after the new agreement was reached, the Employer replaced the old break clock with a new one. This new clock was set for 10 minutes. A grievance was filed September 12. The Union alleged that the lengthy practice of longer breaks had been relied upon by the Union such that it would now be unfair for the Employer to enforce the 10 minute breaks and that the Employer should be estopped from enforcing the 10 minute breaks.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The key provisions of the parties' 2001-2004 collective agreement are as follows:

ARTICLE 6 - GRIEVANCE AND ARBITRATION PROCEDURES

. . .

6.02 The Union or the Company may initiate a written grievance beginning at Step #3 of the grievance procedure. Such grievance shall be filed with the Plant Manager or the Union within ten (10) working days after the circumstances giving rise to the grievance has occurred.

. . .

ARTICLE 8 - HOURS OF WORK AND OVERTIME

. . .

8.03 (a) . . .

(b) Employees will receive one (1) ten (10) minute break during each one-half (½) shift. Employees will receive an additional ten (10) minute break if required to work scheduled overtime in excess of two (2) hours.

. . .

IV. POSITION OF THE UNION

The Union submitted that the evidence indicated the breaks had been 13 minutes for many years. In 2000 the Employer, through Mr. Matthews, tried to change the breaks and the Union had grieved. Although the Union evidence had been that the grievance was settled, there was a dispute as to the signature on the settlement.

If the only issue was whether Mr. Matthews signed the form, Mr. Clark's evidence would be of no value. But Mr. Matthews denied he had ever been at such a meeting with Mr. Harris and Mr. Clark, and on that issue Mr. Clark's evidence was clear and was very helpful. Both Mr. Harris and Mr. Clark had similar memories of such a meeting and I should prefer their evidence on that point. If I were to find there had been such a meeting, the Union said that would affect Mr. Matthews' credibility, and I should also prefer the testimony of Mr. Harris and Mr. Clark that there had been a grievance settlement. If so, considering Mr. Harris' evidence and that of Ms Pitney (the handwriting expert), I should find that the settlement was the document Mr. Harris had identified.

The Union said that the new plant manager, Mr. Ducharme, then wanted to enforce 10 minute breaks. However he did not say when he was going to make that change nor did he put it in writing. The Union provided Mr. Ducharme with a copy of the earlier settlement and understood the matter was again resolved on the same terms the earlier grievance had been resolved.

If I accepted the settlement of the 2000 grievance, the actions of Mr. Ducharme the following year could not end the practice of longer breaks. To end the practice required clear notice, preferably in writing, and the Employer had not done this. The Employer should be estopped from changing this long practice.

The Union asked that each employee be paid an additional six (6) minutes per day. Those minutes should be paid at time and one half as that time was in addition to the employees' normal work day and, as such, attracted an overtime premium.

In reply to the Employer submissions, the Union agreed that if the Union had received clear notice of the end of the estoppel, the estoppel would end. But the Union said it had not received clear notice. Secondly, the Union clarified that it relied on the settlement of the

grievance with Mr. Matthews only as evidence of the practice of longer breaks; it did not assert that the settlement alone prevented the Employer changing to 10 minute breaks. Finally, the Union said the Employer had waived any defence based on the timeliness of this 2001 grievance.

V. POSITION OF THE EMPLOYER

The Employer submitted that the Union had created its own problems. The Employer said that the Union's April 2000 grievance regarding Mr. Matthews' attempt to enforce the 10 minute breaks had been out of time when it was filed. The former manager, Mr. Matthews, said he had given the grievance back but had agreed to put the issue of breaks on the back burner.

But in 2001 the new manager, Mr. Ducharme, was very clear. He said the Employer would enforce 10 minute breaks. He met the Union Committee, he met the employees, he had the break clock changed and he had the supervisors hustle employees back to work after the breaks. The Union could have grieved then but it chose to do nothing, chose to "sit in the bushes." The Union went through the next round of negotiations and again chose to do nothing. It waited until September 2001 to grieve and that grievance regarding Mr. Ducharme's attempt to enforce the 10 minute breaks was also out of time.

As for the claim of estoppel, estoppel is ended by clear notice to that effect. Mr. Matthews had raised the matter and then put it on the back burner. But Mr. Ducharme also raised the matter and, unlike Mr. Matthews, he pursued it. What else could Mr. Ducharme have done to advise the Union? The Union said Mr. Ducharme should have put it in writing but the notice to bring an estoppel to an end need only be clear; the notice does not need to be in writing.

It was the Employer's position that Mr. Matthews had not signed the grievance settlement. It reviewed the evidence and said the evidence did not prove he signed it.

In the alternative, if there was such a settlement, that agreement to continue 13 minute breaks came to an end with Mr. Ducharme's actions. Moreover, if there was a settlement, and the Union wanted to have that settlement included in the new collective agreement, it was required to negotiate that deal into the collective agreement expressly. It did not do so.

The Employer asked that the grievance be dismissed.

The Employer referred to the following authorities: *Re Cominco Ltd. and United Steelworkers of America, Local 480* (1996), 57 L.A.C. (4th) 36 (Larson); *Re Eurocan Pulp & Paper Co. and Canadian Paperworkers Union, Local 298* (1990), 14 L.A.C. (4th) 103 (Hickling); *Re City of Thunder Bay and Canadian Union of Public Employees, Local 87* (2000), 86 L.A.C. (4th) 289 (Sarra); and *Re General Motors of Canada Ltd. and C.A.W.-Canada, Local 199* (2000), 93 L.A.C. (4th) 329 (Marcotte).

VI. CONCLUSIONS

Oral rulings

I begin with two rulings made during the hearing, both of which the Employer requested be included in this award.

The first ruling concerned the Union's right to call reply evidence. After Mr. Matthews testified that he had not signed the grievance resolution, the Union sought to call evidence in reply and the Employer then argued that to allow the Union to do so would be allowing the Union to split its case. I ruled that the Union was entitled to call reply evidence. The

primary purpose of arbitration is to determine the relevant facts and correctly dispose of the grievance. Estoppel was central to the correct disposal of the grievance and the estoppel appeared to depend, in part, on whether Mr. Matthews had signed the grievance resolution. That factual issue had not appeared to be in dispute until Mr. Matthews testified. Although Mr. Harris' testimony was that Mr. Matthews had signed the settlement and Mr. Clark had been present as a witness, the Employer had not indicated in its cross examination of Mr. Harris that Mr. Matthews would deny signing the form. The Union could not reasonably have been expected to call additional evidence to prove Mr. Matthews' signature until after that issue was raised.

Secondly, the Union sought to call a hand writing expert and the Employer reserved its right to call its own expert. To facilitate this, I directed the parties to review their files and to attempt to agree on several documents which had been signed by Mr. Matthews. Those agreed documents could then be examined by each party's hand writing expert and an opinion formed as to whether Mr. Matthews had signed the disputed grievance resolution. This was done in an attempt to avoid a dispute at the subsequent hearing as to whether Mr. Matthews had signed the comparison documents and to avoid the need to call still further witnesses to prove that he had signed those comparison documents.

Timeliness

As for the submission that this September 2001 grievance was out of time, the Employer did not raise timeliness in its opening statement and it appeared that the first time the Employer mentioned this issue was in its closing submissions. There was no indication that the issue had been discussed by the parties. I do not know if the Union had evidence it could have led had it known that the timeliness of the grievance was in dispute, but there would have been no reason for the Union to have led such evidence in a situation such as this in which the Employer said nothing. In fairness to the Union, and to the efficacy of the arbitration

process, the Employer had a responsibility to raise this argument long before its closing submissions. If it does not do so, as here, it will have waived its right to rely on this defence. I find the Employer has waived any defence it may have had as to the timeliness of this grievance.

The grievance

Turning to the substance of the grievance, the language of this collective agreement is clear. There was no dispute about the meaning of the agreement. The Union's position was that because of the many years of longer, 13 minute, breaks the Employer was estopped from enforcing the 10 minute breaks specified in the collective agreement.

Estoppel is a well known principle in labour relations. It is based on fairness. Estoppel prevents one party from asserting something which is contrary to what was communicated by its own earlier actions or statements. Applying that here, when the Employer did or said something (breaks are 13 minutes) to the Union which indicated that the Employer would not rely on its strict rights under that agreement (i.e. 10 minute breaks), and the Union relied on that representation to its detriment (did not negotiate 13 minute breaks into the agreement), estoppel prevents the Employer from going back on its word. The idea is to enforce assurances which one party has given to the other; parties in a collective bargaining relationship are expected to live up to those assurances. Estoppel prevents the Employer from enforcing the written terms of the collective agreement if that would be unfair.

The statements or actions which lead to an estoppel can, of course, be brought to an end. If the Employer advises the Union that it will no longer abide by its assurances, then the practice will come to an end. But the Union must be given an opportunity to fix any problems arising and, in a collective bargaining relationship, the normal place to deal with such matters is during the negotiations for the next collective agreement. For that reason,

the notice ending the estoppel will usually only be effective at the expiration of the collective agreement in force when the notice is given.

In this case I find there was a representation that breaks would be longer than 10 minutes. The notion of 13 minute breaks was conveyed by the 13 minutes on the old break clock and by the many years of practice of longer breaks. Although the evidence of the exact length of those longer breaks was not clear, it was generally accepted that the breaks were 13 minutes, and I accept that as being correct. I find that the Union believed the breaks would remain at 13 minutes and took no steps to change the wording in the collective agreement. Thus in 2000 and early 2001 I find that all the elements needed for an estoppel were present - that is, the parties had agreed to 10 minute breaks in the collective agreement but the Employer through its practice over a number of years of 13 minute breaks, together with the notice on the clock that breaks were 13 minutes, had led the Union to believe the breaks would be 13 minutes and the Union, in reliance on the Employer's representations, had taken no steps to change the collective agreement to provide for 13 minute breaks, so that it would have been unfair to allow the Employer to enforce the 10 minute breaks during that collective agreement.

The only issue is whether the Employer brought the estoppel to an end before this collective agreement - the collective agreement effective September 1, 2001 - began.

In 2000 the Employer, through Mr. Matthews, tried to change the practice. The Union grieved. In essence, that grievance alleged it was unfair to change such a long standing practice in the middle of the collective agreement.

Because the result is the same whether Mr. Matthews simply decided to put the matter aside and return to the former longer breaks or whether there was an actual settlement and the parties agreed to return to the former longer breaks, I conclude that it makes little difference

to this grievance whether or not there was a grievance settlement signed by Mr. Matthews. However, as I heard extensive evidence on this issue, and as the parties appeared to want the matter resolved, I will deal with it.

Both Mr. Harris and Mr. Clark said they had been in a meeting with Mr. Matthews at which time Mr. Matthews signed a grievance settlement. Mr. Harris said the document produced at the hearing was the one signed by Mr. Matthews. Mr. Clark could not identify the settlement, said he had neither read nor signed the form, but he agreed a settlement had been signed by both Mr. Harris and Mr. Matthews. On the other hand, Mr. Matthews said he had been in no such meeting and signed no such settlement.

I prefer the evidence of Mr. Harris and Mr. Clark on whether there was such a meeting. In my experience, a person who has forgotten a meeting may well believe there never was such a meeting, but two persons who each recall a meeting are unlikely to both be imagining it. I conclude there was a meeting at which time Mr. Matthews signed a grievance form recording a resolution of that grievance.

Was the form which the Union produced the one Mr. Matthews signed? Having decided that Mr. Matthews was in such a meeting, a meeting which he did not recall, it is not surprising to me that he would also think he had not signed the resolution produced at the hearing and identified by Mr. Harris as having been signed by Mr. Matthews. Mr. Clark's evidence was consistent with this being the form he saw signed by Mr. Matthews. The evidence of Ms Pitney, the hand writing expert, was supportive of the form having been signed by Mr. Matthews. Taking everything together I conclude that the form identified by Mr. Harris, the local union president, was signed by Mr. Matthews, the plant manager.

What is the impact of that resolution? The settlement said the length of the breaks would return to the earlier 13 minutes. I conclude from this that Mr. Matthews' attempt to enforce

10 minute breaks did not end the estoppel and, on the contrary, the parties agreed the practice of longer breaks would continue. Those longer breaks did continue for about a year.

In 2001 a new manager, Mr. Ducharme, tried to enforce 10 minute breaks. As mentioned earlier, any representation that a particular practice will continue may be brought to an end by the Employer advising the Union to that effect. The practice may have to be continued until the expiry of the collective agreement in force when the notice is given, but the practice can be ended through notice.

So the question is: Did Mr. Ducharme make it clear that the Employer was ending the long practice of 13 minute breaks?

Mr. Ducharme met the Union leaders and told them he would end the longer breaks and enforce the 10 minute breaks. Mr. Ducharme met all the employees on both shifts and informed them of the same thing. Mr. Ducharme had the break clock adjusted to bring it as close as possible to ten minutes. Mr. Ducharme had the supervisors "hustle" employees back to work more promptly at the end of the breaks. While Mr. Ducharme and the supervisors were initially unable to precisely enforce 10 minute breaks because the clock could not be adjusted to 10 minutes, I conclude that the only reasonable interpretation of all this was that the Union was clearly informed it could no longer rely on the practice of breaks being longer than the 10 minutes specified in the collective agreement and that the Employer intended to enforce the 10 minute breaks.

The Union submitted that Mr. Ducharme should have provided notice in writing. I reject that submission. In general, neither those employer representations which create an estoppel nor those that end it need to be in writing. Although there were some representations in writing - the 13 minutes written on the break clock and then, much later, the settlement of

the grievance signed by Mr. Matthews, the Employer's lengthy practice of 13 minute breaks served to indicate that the breaks would be 13 minutes and that was not in writing. Similarly, the notice to end an estoppel need not be in writing. There are a large number of important matters which the law does not require to be in writing. For example, absent a specific statutory requirement to the contrary, such as that requiring a collective agreement to be in writing, a contract may be entirely oral. While having the terms of a contract in writing is likely to make the proof of the contract much easier, there is no general legal requirement that business affairs be conducted in writing. In this case, the Employer actions or statements to bring the estoppel to an end did not need to be in writing; the requirement is simply that the notice inform the Union that the practice will end.

The issue of the precise date on which the practice of 13 minute breaks, a practice protected by the estoppel, ended was not raised by this grievance. As noted, it is normal for estoppel to be used to compel an employer to continue the practice until the end of the collective agreement. Mr. Ducharme gave notice in the spring of 2001 at which time the 1998-2001 agreement was in force. The current agreement, the agreement under which this grievance was filed, is the 2001-2004 collective agreement which was effective as of September 1, 2001. While estoppel might have been used to prevent the Employer from implementing the change to 10 minute breaks until the end of August 2001, the notice given by Mr. Ducharme was sufficient to end this practice at the expiry of the collective agreement at the end of August 2001.

Looking at this more generally, estoppel is based on fairness. The Union could have negotiated, or attempted to negotiate, 13 minute breaks into the collective agreement in the round of bargaining which occurred after Mr. Ducharme advised the Union of this change, but it did not do so. As the Union had both time and opportunity to address the ending of 13 minute breaks in collective bargaining, I see no unfairness in the Employer enforcing the 10 minute breaks under this collective agreement.

In summary, I find that the long practice of 13 minute breaks was brought to an end by the Employer's notice in the spring of 2001 and subsequent actions all of which were to the effect that the negotiated breaks of 10 minutes specified in the collective agreement would be enforced. The estoppel was ended by the Employer's notice and actions. I conclude the Union is not entitled to longer breaks and its grievance is therefore dismissed.

Dated at London, Ontario this 31st day of October, 2003.

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Howard Snow, Arbitrator