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1984 CanLII 5182 (CA LA)

RE EASTERN PROVINCIAL AIRWAYS LTD. AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

I. Christie. (Canada) January 26, 1984.

PRELIMINARY ISSUE relating to arbitrability. Grievance arbitrable.

G. J. McConnell and others, for the union.
R. Farley and others, for the employer.

PRELIMINARY AWARD

The grievance before me arose out of the back-to-work procedures followed by the company after the settlement of the labour dispute between the parties which lasted from early January to March 10, 1983. In March the company was still involved in a dispute with its pilots so both parties understood that it would be some time before the company returned to normal operations. On March 10th, following a marathon session, the parties concluded the back-to-work agreement under which the issues before me arise. The relevant provisions of the back-to-work agreement are the following:

> 4. All employees presently involved in the work stoppage will, upon ratification of the agreement and this back-to-work agreement, be considered on layoff due to reduced operations resulting from a work stoppage of Pilots as represented by C.A.L.P.A. (07.03.13).
>
> It is understood that the problems of returning to normal operations make it impractical to adhere strictly to all of the provisions of the seniority related clauses of the collective agreement, for a temporary period.
>
> It is agreed, that employees will be recalled to work in accordance with the needs of the operations, and the Company agrees to meet with the Union as soon as possible to resolve the application of seniority rights during the partial operation of the airline. Any moratorium of the said seniority provisions of the collective agreement will exist until the return to full scheduled operations, following which the seniority provisions shall be reactivated from that date on.
>
> It is agreed that no grievance shall be filed as a result of the non-application of the recall or seniority provisions of the collective agreement during the moratorium.
>
> . . . . .
>
> 16. Any grievance concerning the interpretation or application of this agreement, shall be resolved by reference to the grievance procedures set forth in the new collective agreement and if necessary to the arbitration procedures therein set forth.
>
> . . . . .
>
> 18. This back-to-work agreement is considered to be part of the new collective agreement but will not be printed therein.

Shortly after the conclusion of this back-to-work agreement representatives of the parties met in accordance with the third paragraph of cl. 4. There was some discrepancy in the evidence

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with respect to just when that meeting occurred but nothing turns on it. I accept the testimony of the union witnesses, Jean Paul Bourque and Gary Taylor. Mr. Taylor was chairman of the Joint Negotiating Committee throughout the dispute. He testified that when the parties met on the morning of March 11th the company gave the union a list of positions that they needed to fill. He testified that the company spokesman said that in the clerical unit there might be some problems so the company gave the union a list of positions and a tentative list of the employees who would fill the positions, with some suggestion that people would have to be recalled out of seniority. Mr. Taylor testified that the union then had an executive meeting and at 2:00 p.m. that afternoon they met with the company again. The result was that the return to work of the members of the maintenance unit was done strictly by seniority but in the clerical unit the company identified aspects of the work in Gander where people who had been doing specific job functions prior to the labour dispute were said to be needed and the union recognized those needs in certain areas. Mr. Taylor testified that there was no discussion about the Halifax base, except that the union asked if there was to be a recall in Halifax and the company spokesman said "no". Mr. Taylor testified that there was no discussion that he was aware of with respect to individuals at Halifax. Under cross-examination Mr. Taylor testified that the purpose of the meeting was to discuss the initial recall of employees.

Guy Annable, the company's manager of employee relations, testified that the company discussed with the union only a partial listing of people who would be recalled. He testified that the situation was so abnormal that the company could not give a clear indication of who would be recalled or when. The company identified positions that would have to be filled very shortly and people who would almost certainly be brought back. Otherwise, Mr. Annable testified, the discussion was with regard to the generalities of the procedure. Mr. Annable agreed with Mr. Taylor that there was no discussion with respect to the recall of clerical people in Halifax. He agreed that the company has been asked about that but said that at the time of the meeting the company had not identified the requirement in Halifax.

Under cross-examination Mr. Annable agreed that, broadly speaking, what happened at the meeting was that where the union could satisfy management that the senior person ought to have a job that was subject to recall, in the sense that he or she could do the work, management acceded.

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Apart from that one meeting immediately after the back-to-work agreement was signed there were no further meetings in fulfilment of the third paragraph of cl. 4 of the back-to-work agreement. A union policy grievance was filed with respect to that but according to Mr. Annable it was settled "without prejudice". I heard no other comment on that grievance.

The junior employee whose recall gave rise to this grievance was recalled on March 16th. This grievance is dated March 22nd. On April 29th the grievance of Pamela Tibbo was filed at Gander with respect to the recall to work of Mr. Larry Marsh, a clerk typist junior to Ms. Tibbo, who was a senior clerk typist.

The Tibbo grievance went to arbitration before Mr. Wayne Thistle on October 12, 1983. On November 9th, arbitrator Thistle made his award sustaining the company's preliminary objection, ruling that the Tibbo grievance was not arbitrable because of "the provisions of the return-to-work agreement, particularly cl. 4".

At the outset of the hearing before me counsel for the company made two preliminary objections. First, he submitted that the grievance before me is not arbitrable because the matter is *res judicata*, the threshold question having been decided against the union by arbitrator Thistle. Counsel not only relied upon the legal doctrine applied by arbitrators, he also invoked art. 05.03.05 of the collective agreement which provides: "All decisions arrived at by the Arbitrator shall be final and binding on the Employee, the Union and the Company." Counsel for the company also relied upon s. 156 [rep. & sub. 1972, c. 18, s. 1; am. 1977-78, c. 27, s. 53] of the *Canada Labour Code*, R.S.C. 1970, c. L-1, in this context. It provides:

> 156(1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed by any court.

Second, counsel for the company made the same argument before me that was made to arbitrator Thistle, that cl. 4 of the back-to-work agreement rendered the grievance before me inarbitrable.

The issues

(1) The first issue is whether I am bound, by the doctrine of *res judicata*, by art. 05.03.05 of the collective agreement or by s. 156(1) of the *Canada Labour Code*, to conclude that because arbitrator Thistle found the Tibbo grievance not to be arbitrable I *must* find that Ms. Mann's grievance is not arbitrable in light of cl. 4 of the back-to-work agreement.

(2) If, notwithstanding arbitrator Thistle's conclusion, it is open to me to reach my own conclusion about the effect of cl. 4, the

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second issue is whether cl. 4 is effective to preclude the grievor from relying on seniority rights that would otherwise be hers under the collective agreement or is null and void because it constitutes a bar to the final settlement by arbitration of a difference between the parties.

Decision

Subject to the two very recent judicial decisions, to which I turn below, I subscribe to the generally held view of the doctrine of *res judicata* as stated in Brown and Beatty, *Canadian Labour Arbitration* (1977), para. 1:3000, pp. 14-5:

> ... while recognizing that there is no operative doctrine of *stare decisis*, prior awards in similar cases have been given substantial persuasive weight by arbitrators. However, in assessing the precedential effect of prior decisions, arbitrators have distinguished between the binding effect of past awards under the same agreement between the same parties; the impact of awards of other arbitrators in like circumstances; and the consequences of judicial decisions.
>
> With respect to the first of these, that is where precisely the same grievance is brought a second time by the same party or grievor, arbitrators have applied the doctrine of *res judicata* and have held the second grievance to be inarbitrable. As well, some arbitrators have held themselves strictly bound where the same term of the same agreement is raised for interpretation a second time, although this may not be so if they are of the view that the decision in the earlier award was "clearly wrong". The prevailing view has been summarized as follows:
>
> > "It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of the Agreement. Nonetheless, if the second Board has the clear conviction that the first award is wrong, it is its duty to determine the case before it on principles that it believes are applicable."
>
> Of course, if the issues are not precisely the same, then this policy will be weakened and will more readily give rise to reasoned distinctions. Moreover, it is generally conceded that arbitral awards have no binding effect where the prior award is under a different collective agreement or where one of the parties did not participate in the earlier proceedings.

(Footnotes omitted. The quote is from *Re Brewers' Warehousing Co. Ltd. and Int'l Union of Brewery, Flour, Cereal, Malt, Yeast, Soft Drink & Distillery Workers of America, Local 278C* (1954), 5 L.A.C. 1797 (Laskin) p. 1798.) The first of the two judicial decisions in light of which this passage must now be read is the succinct judgment of the Supreme Court of Canada in *Re Manitoba Food & Commercial Workers Union, Local 832 and Canada Safeway Ltd.* (1981), 123 D.L.R. (3d) 512*n*, [1981] 2 S.C.R. 180, 9 Man. R. (2d) 217, 37 N.R. 394, *sub nom. Canada Safeway Ltd. v. Retail Store Employees Union, Local 832*:

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THE COURT:— We agree substantially with the reasons of Monnin J.A. and would accordingly allow the appeal, set aside the order of the Manitoba Court of Appeal and restore the order of Solomon J. dismissing the union's application to set aside the award of the arbitration board.

The Supreme Court of Canada thus endorsed the dissenting reasons of Monnin J.A. in the Manitoba Court of Appeal, 120 D.L.R. (3d) 42, [1981] 2 W.W.R. 615, 7 Man. R. (2d) 238 *sub nom. Re Last; Manitoba Food & Commercial Workers Union, Local 832 v. Canada Safeway Ltd.* In the *Safeway* case the trial judge, Solomon J., had refused to set aside the decision of an arbitration board on the grounds of *res judicata* where the board had reached the opposite conclusion from a previous arbitration board considering a different grievance on the question of whether Canada Safeway's no-beard policy could properly be the basis for discipline. The majority of the Court of Appeal held that because the issue had been decided by the first arbitration board the second one was not entitled to reach a different conclusion. In the reasons endorsed by the Supreme Court Mr. Justice Monnin took a different view. He said, at p. 46 *et seq.*:

> Now to the doctrine of *res judicata* and the principles of issue estoppel.
>
> The principles governing *res judicata* are not statutory. Like the rules of evidence, they are judge-made and are very useful for the conduct of litigation in the court-room, so as to assure finality in litigation. That is the underlying principle behind all the pronouncements on the subject. Litigation in the court-room must come to an end and Courts are jealous to see that this is done so as to guarantee finality of its decisions and also in order to avoid the extra burden of re-litigating the same issues over and over again. There is great merit and soundness to such a principle. But *res judicata* is a very complex matter. Judges and textbook writers have dealt with it and not always clearly. Jurists speak of *res judicata*, estoppel, estoppel by record, issue estoppel, cause of action estoppel, estoppel *per rem judicatam* and other similar expressions. It is not always that clear where the distinction exists and sometimes you wonder if there is one.
>
> . . . . . .
>
> I have not found nor have I been referred to a case where, in a labour dispute before a board of arbitration, the doctrine of *res judicata* has been held to apply.
>
> . . . . . .
>
> Parliament and the provincial legislators have devised methods to solve labour disputes mainly in order to avoid the rigidity and the time-consuming features of the court-rooms. The legislators thought that they had pushed these disputes out of the court-rooms. How wrong were they, since we are still too frequently dealing with them. Yet it would be adding salt to the wound if we were to bring into labour arbitration, all the rigid procedures of the court-rooms and the complex judge-made laws. I do not wish to be a party to such a revival, since Parliament has clearly indicated that it wished labour disputes to be solved by boards of arbitrators not necessarily familiar with or trained in legal principles.
>
> . . . . . .

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> I therefore conclude that *res judicata* and estoppel have no place in the settlement of labour disputes by private tribunals or by boards of arbitration. It is a principle to be reserved for the court-rooms.

Mr. Justice Monnin's reasoning, endorsed as it was by the Supreme Court of Canada, was relied upon by Mr. Justice Rogers of the Supreme Court of Nova Scotia in *Construction Assoc. Management Labour Bureau Ltd. et al. v. Int'l Brotherhood of Electrical Workers, Local 625 et al.* (1983 — unreported) [84 C.L.L.C. para. 14,003, 59 N.S.R. (2d) 345]. In that case Mr. Justice Rogers considered an application to quash the decision of an arbitrator acting under the construction industry part of the Nova Scotia *Trade Union Act* on the grounds that his decision was directly contrary to that of another arbitrator interpreting the same collective agreement. In the result the decisions of both arbitrators were allowed to stand.

In my opinion neither the decision of the Supreme Court of Canada nor Mr. Justice Rogers' application of it in Nova Scotia necessitates any change in the conventional view of *res judicata* quoted above from Brown and Beatty except, possibly, in the case where "the same grievance is brought a second time by the same party or grievor". Where what is involved is a different grievance, involving a different grievor or a different incident, neither Chief Justice Laskin in his former role as arbitrator nor the learned authors suggest that the decision of one arbitrator should render a grievance inarbitrable before another. On the other hand, the fact that Mr. Justice Rogers, Mr. Justice Monnin and, by adopting His Lordship's words, the Supreme Court of Canada have decried the rigidities of a strict doctrine of *res judicata* does not refute the wisdom in the statement from the Laskin award quoted by Brown and Beatty, *supra*:

> "It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of the Agreement."

Counsel for the company submitted that the doctrine of *res judicata* should apply here because, while there were different grievors in the Tibbo matter and the matter before me, the "parties" in each case were the union and the company. It is, of course, true that the company has carriage of any grievance by the time it reaches the arbitration stage, but even before the *Canada Safeway* case and the *O'Malley Electric* case the conventional view, as the passage quoted from Brown and Beatty makes

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clear, was that the doctrine of *res judicata* applies only where the same grievor is involved in both grievances. That would include the situation in the award relied upon by the company, *Re Algoma Steel Corp. Ltd. and U.S.W., Local 2251* (1982), 6 L.A.C. (3d) 346 (Brown), where the grievors in the second grievance had been part of the group covered by an earlier group or general grievance.

To sum up with respect to the doctrine of *res judicata*: it is unnecessary for me to reach any firm conclusion on the question of whether it will henceforth be an error in law for an arbitrator to rule that a second grievance by the same grievor arising out of the same incident is inarbitrable, because here different grievors are involved. Nothing in the recent cases suggests that it is other than good policy to follow the award of another arbitrator in a similar dispute under the same collective agreement unless convinced that his or her award is clearly wrong.

Article 05.03.05 of the collective agreement before me provides that "all decisions arrived at by the Arbitrator shall be final and binding on the Employee, the Union and the Company". The arbitrator in the *Algoma Steel* case cited above dealt with a similar provision. I agree with him that the effect of such wording must surely be that the same grievance cannot be brought again. In other words, Ms. Tibbo cannot file another grievance with respect to the fact that Mr. Marsh was recalled to work in Gander before she was, because arbitrator Thistle has ruled that issue inarbitrable. I do not think that art. 05.03.05 would prevent her from grieving the recall of a different allegedly junior employee, although any arbitrator might be expected to dispose of the matter very quickly with a reference to arbitrator Thistle's award and a responsible union would not carry such a grievance forward. Even more clearly, I do not think art. 05.03.05 precluded Ms. Mann from filing her grievance or renders it inarbitrable.

Section 156(1) of the *Canada Labour Code* provides not only that every order or decision of an arbitrator "is final", it goes on to provide that such an order or decision "shall not be questioned or reviewed by any court". I agree with counsel for the union that s. 156(1) is a privative clause intended to limit review by the courts. In my opinion it does not address the question of whether the decision of one arbitrator makes a matter inarbitrable before another. Even if I am wrong in that, I have no doubt whatever that s. 156(1) does not have the effect argued for by counsel for the company. It does not, in other words, mean that the decision of one arbitrator renders a new grievance by a different grievor inarbitrable before another arbitrator.

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(2) In dealing with the Tibbo grievance arbitrator Thistle dealt with two issues: first, whether cl. 16 of the back-to-work agreement, which says that it is to be considered part of the "new Collective Agreement", overrides para. 4 of cl. 4, which states: "It is agreed that no grievance shall be filed as a result of the non-application of the recall or seniority provisions of the collective agreement during the moratorium." Second, arbitrator Thistle dealt with the union's submission that the company has an obligation under cl. 4 to demonstrate that recalls made without respect to seniority must be "in accordance with the needs of the operations". That is, in effect, the issue of whether cl. 4 of the back-to-work agreement gave the company a unilateral right to recall employees out of the line of seniority during the moratorium.

Most of arbitrator Thistle's "considerations", commencing at p. 17 of his award, are devoted to the first of these questions. He concludes that the specific words in para. 4 of cl. 4 must override the general words of cl. 16, and in that he is surely correct. Before me, however, the union did not argue that point but submitted instead that para. 4 of cl. 4 is illegal, because in prohibiting the filing of a grievance on the recall or seniority rights of employees it runs counter to s. 155(1) [rep. & sub. 1972, c. 18, s. 1] of the *Canada Labour Code*, which provides:

> 155(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged violation.

Arbitrator Thistle considered this point but rejected it because he said that it must

> ... be accepted that the ruling by the Newfoundland Court of Appeal *E.P.A.* case recognizes the right of the parties to preclude access to the grievance procedure in certain defined cases. This is precisely what has happened in the instant case.

The *E.P.A.* case to which he was referring is *Re Canadian Air Line Employees' Assoc. and Eastern Provincial Airways* (1981), 126 D.L.R. (3d) 406, 33 Nfld. & P.E.I.R. 308 (Nfld. S.C.T.D.), appeal dismissed 140 D.L.R. (3d) 369, 39 Nfld. & P.E.I.R. 10 (Nfld. C.A.), leave to appeal to the Supreme Court of Canada denied 40 Nfld. & P.E.I.R. 359*n*, 46 N.R. 625*n*. I was the arbitrator in that case and my award, to the effect that the *Canada Labour Code* precluded denial of access to the grievance procedure by a probationary employee, and that words of the collective agreement were not effective to remove the grievor's

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substantive right to grieve against *arbitrary* termination during the probationary period, was quashed. However, the view expressed by the Newfoundland courts, which of necessity, was accepted by arbitrator Thistle, is not the view taken by other courts in Canada. Specifically, the Nova Scotia Court of Appeal and the Ontario Court of Appeal have come to a different conclusion on the question of whether a collective agreement can legally preclude probationary employees from pursuing their substantive rights under a collective agreement through the grievance procedure and to arbitration.

In *Re City of Halifax Int'l Assoc. of Firefighters, Local 268* (1982), 131 D.L.R. (3d) 426 at p. 434, 50 N.S.R. (2d) 299, 82 C.L.L.C. para. 14,167, the Nova Scotia Supreme Court, Appeal Division, concluded that s. 40(1) of the Nova Scotia *Trade Union Act*, which is practically identical to s. 155(1) of the *Canada Labour Code*, precluded denial of access to the grievance procedure and arbitration. Chief Justice MacKeigan, speaking for the majority, quotes Paul Weiler, chairman of the British Columbia Labour Relations Board in *Cassiar Asbestos Corp. and U.S.W., Local 6536*, [1975] 1 Can. L.R.B.R. 212 at pp. 215-6:

> "The legal principle . . . is this: when the parties negotiate certain provisions in a collective agreement, it must permit *all* disputes between the persons bound by the agreement respecting the interpretation, application, etc. of those provisions to be conclusively settled by arbitration or such other method as may be agreed to by the parties."

(Only part of Chief Justice MacKeigan's quotation from *Cassiar* is reproduced here.) Chief Justice MacKeigan then stated:

> In result, I agree with the arbitrator, although for slightly different reasons, that the phrase in art. 16.02 purporting to deprive probationary employees of "the right to grieve dismissal" should be declared void and be struck out. The arbitrator has jurisdiction to proceed.

Just as arbitrator Thistle is subject to review by and must therefore defer to the views of the Newfoundland courts so am I subject to review by the Nova Scotia courts. This is not the place to do more than acknowledge this apparently undesirable division of judicial authority over arbitrators acting under the same collective agreement within federal jurisdiction. This legal situation appears to derive from the fact that s. 156(3) of the *Canada Labour Code* provides that for purposes of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), an arbitrator under a federal collective agreement is not a federal board, commission or other tribunal reviewable by the federal courts. Section 156(1), which I have already quoted in another context above, on its face precludes an arbitrator's decision from being questioned or

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reviewed by any court but that, of course, is not considered by the provincial superior courts to preclude them from exercising their traditional, pre-*Federal Court Act*, power to review the decisions of any tribunal operating within their various provinces for excess of jurisdiction.

The Ontario Court of Appeal in *Re Ontario Hydro and Ontario Hydro Employees' Union, Local 1000 et al.* (1983), 147 D.L.R. (3d) 210, reached a conclusion similar to that of the Nova Scotia Appeal Division with respect to s. 37(1), the Ontario equivalent of s. 155(1) of the *Canada Labour Code*. Speaking for the court, Morden J.A. recognized the distinction between, on the one hand, a collective agreement provision which simply gives an employee no substantive right, or takes a general substantive right away from a specific class of employees and, on the other hand, a provision which denies access to the grievance procedure and arbitration to perfect a right given elsewhere in the collective agreement. His Lordship states at pp. 222-3:

> In the first stage, if the arbitrator interprets the agreement as conferring on the complaining employee a right assertable in the circumstances against the employer, then there is a "difference" within the meaning of this word (more accurately the word is "differences") in s. 37(1). In the present case the board of arbitration interpreted the agreement as creating a right in a probationary employee, based on an allegation of discharge without just cause, which could give rise to a "difference". The difference was one relating to the interpretation, application or administration of the collective agreement. If this is the conclusion on the interpretation of the agreement, then any provision in the agreement which blocks the resort to arbitration to determine the right would be void as contrary to s. 37(1).
>
> Of course, if the process takes a different turn during the first stage then it may be that no "difference" will emerge which would entitle the union or employee to proceed to arbitration. An arbitrator may interpret the agreement as conferring no right on an employee which could give rise to a difference capable of being adjudicated by arbitration.
>
> . . . . .
>
> I think that the adjective "substantive" affords a reasonable description of the nature of the rights with which we are now concerned which can give rise to a "difference". Broadly speaking, collective agreements confer on the parties, including employees, certain rights which may be asserted against the other party. In the present case the board of arbitration, in one of its descriptions of what the agreement provided, said that the agreement conferred on probationary employees "certain protections based on the principle of just cause". These protections, I think, embody substantive rights. The other kind of rights which will be found in collective agreements relate to the machinery for enforcing these substantive rights or protections and a convenient description of them is "procedural". With due respect to the contrary view of the Nova Scotia Court of Appeal in *Int'l Ass'n of Firefighters, Local 268 v. City of Halifax* (1982), 131 D.L.R. (3d) 426 at p. 430, 50 N.S.R. (2d) 299 at p. 307, 82 C.L.L.C. para 14,167, p. 12,812 at p. 12,815, I think that it is helpful

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> to have the natural distinction between substantive and procedural rights in mind in determining, at the end of the process of interpretation of the contract, whether the allegation gives rise to a difference capable of proceeding to arbitration. If the impediment to arbitration is an absolute procedural bar, as opposed to an absence of a substantive right to be submitted to arbitration, then there is an arbitrable difference.

Mr. Justice Morden's statement of the law accords precisely with my understanding of it. I refer also to two recent arbitration awards cited by the union: *Re Ontario Public Service Employees Union and Ontario Public Service Staff Union* (1983), 8 L.A.C. (3d) 302 (Saltman), and *Re Metropolitan Toronto Assoc. for Mentally Retarded and C.U.P.E., Local 2191* (1983), 9 L.A.C. (3d) 58 (Langille). I should note that in the *Halifax Firefighters* case Chief Justice MacKeigan said, at p. 431, referring to the "substantive" or "procedural" analysis, simply that he found "such analysis unnecessary and irrelevant, at least in respect of the collective agreement before us".

All of this leads me to the conclusion that if the back-to-work agreement in issue here did not take the grievor's seniority rights from her then the agreement by the parties in para. 4 of cl. 4 that no grievance could be filed in respect of recall or seniority provisions cannot bar her grievance. On that point I disagree with arbitrator Thistle, not because I think he is clearly wrong in Newfoundland, but because he would be clearly wrong in Nova Scotia.

Unfortunately for Ms. Mann and the union, however, there remains the question of whether the first three paragraphs of cl. 4 of the back-to-work agreement did in fact take away her substantive recall or seniority rights so that, in the terminology of Mr. Justice Morden in the *Ontario Hydro* case, there was no "difference"; no right under the collective agreement on the basis of which her grievance can be allowed.

The union did not argue here, as it apparently did before arbitrator Thistle, that under para. 3 of cl. 4 on the back-to-work agreement the company had to demonstrate that recalls had been done "in accordance with the needs of the operations". Arbitrator Thistle did not accept that submission and, again, I would not disagree with him on that point. Before me the union argued that seniority rights were not given up by the back-to-work agreement. Rather, it was submitted, the union simply recognized in the back-to-work agreement that there would have to be some modification of seniority rights and agreed to meet with the company to make those modifications. Since, according to the evidence, no modifications were agreed to with respect to the

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Halifax operation the union's position is that Ms. Mann's seniority rights were intact and she should have been recalled before the junior employee.

Notwithstanding the evidence of the meetings in Gander after the signing of the back-to-work agreement, I am unable to accept the union's submission with regard to the substantive effect of cl. 4 of the back-to-work agreement. In para. 2 of that clause the parties recognize that it will be "impractical to adhere strictly to all of the provisions of the seniority related clauses of the collective agreement". Paragraph 3 is more specific about that non-adherence: "It is agreed, that employees will be recalled to work in accordance with the needs of the operations . . .". There was no suggestion before me that the company acted in bad faith and, as I have already said, I agree with arbitrator Thistle that this does not require the company to demonstrate for the arbitrator "the needs of the operations". Paragraph 3 then goes on to provide that "the Company agrees to meet with the Union as soon as possible to resolve the application of seniority rights during the partial operation of the airline". I read this as an agreement "to meet", not as an agreement "to resolve the application of seniority rights". Grammatically, one reading is as natural as the other, but it would be fatuous for the parties to agree "to resolve" because an "agreement to agree" is inherently unenforceable. I must therefore attribute to the parties the perfectly sensible intention to agree to meet to try to work out problems. Whether that agreement was honoured is not before me.

As a matter of grammatical construction, the final sentence of para. 3 of cl. 4 does tend to support the union's submission that the "moratorium" referred to is one coming out of the agreed meetings. The company should have insisted that the words "*the* moratorium . . ." be used, instead of "*any* moratorium". However, collective agreements, and even less back-to-work agreements, are often not models of the draftsmen's art and I am unprepared to defeat what appears to me to be the likely intention of the parties in cl. 4 on the basis of a misused word.

By cl. 18 the back-to-work agreement was made part of the collective agreement between the parties. Therefore cl. 4 was effective to create a moratorium on seniority rights during the period from March 10 to June 12, 1983, not by way of estoppel but by amendment of the collective agreement. As a result the grievor's seniority rights were suspended during that period and there is no substantive basis for her grievance.

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In conclusion, although para. 4 of cl. 4 of the back-to-work agreement between the parties is rendered void by s. 155(1) of the *Canada Labour Code* in so far as it precludes the grievance and arbitration of differences between the parties, there is no grievable "difference" here because during the moratorium paras. 2 and 3 of cl. 4 eliminated by agreement any seniority right that the grievor had under the collective agreement. Although I am not bound by arbitrator Thistle's decision on the Tibbo grievance I think it desirable that I have reached the same result. The preliminary objection by the company is sustained and the grievance is dismissed.

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