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IN THE MATTER OF AN ARBITRATION

087012059

BETWEEN THE CANADIAN UNION OF POSTAL WORKERS (The Union)

and

CANADA POST CORPORATION (The Employer)

Re: C.U.P.W. National (The Grievor)

Sub Post Office Contract Renewals
Union Grievance No. N 1000 H 8
C.P.C. Arbitration No. 86-1-3-648

BEFORE Innis Christie (Arbitrator)

At Halifax, Nova Scotia (Location)

Hearing Date: July 7, 1986

For the Union:

Darrell Tingley - National Director
Gordon Ash - Union Representative

For the Corporation:

Heidi Levenson Polowin - Counsel
Alistair Brown - Manager, Labour Relations

DATE OF DECISION: October 31, 1986

LABOUR CANADA
TRAVAIL CANADA
DEC 22 1986
ARBITRATION SERVICES
SERVICES D'ARBITRAGE

National Union Grievance alleging violation of Appendix "Q" of the Collective Agreement between the parties for the Postal Operations Group (Non-Supervisory): Internal Mail Processing and Complementary Postal Services, signed April 2, 1985 and bearing the expiration date September 30, 1986. The Union requested an order that the Employer respect Appendix "Q" by signing sub post office contracts that do not exceed twelve months and by renegotiating any sub post office contracts "so that they do not exceed a twelve month period from the initial signing date".

At the outset of the hearing the parties agreed that I am properly seized of this matter and that, if appropriate in my judgment, I should remain seized after the issuing of this award. They also agreed that any time limits set out in the Collective Agreement, either pre- or post-hearing, are waived.

A W A R D

Appendix "Q" to the Collective Agreement before me in this matter commences by providing:

RETAIL OUTLETS

> This confirms our agreement to extend the Retail Outlet Experiment dated February 29, 1984, as follows.
>
> The current experiment on Retail Outlets which was due to expire on January 31, 1985 will be extended to September 30, 1986. ...

Thus the Memorandum of Understanding between the parties dealing with the "Canada Post Retail Outlets Experiment" of February 29, 1984 was both extended and clearly brought within the ambit of

the Collective Agreement. By Article 43.03 "all appendices are integral parts of this Collective Agreement".

This matter was heard on July 7, 1986 and is only now being disposed of, some four months later, as the result of delays which are entirely my responsibility as arbitrator. The parties are now in negotiations but the Collective Agreement is in full force and effect because of the "bridging" effect of Article 43.02 as well as the "freeze" imposed by section 148(b) of the Canada Labour Code. Appendix "Q", however, by its own terms, appears only to extend the "experiment on retail outlets" to September 30, 1986.

In the Memorandum of Understanding of February 29, 1984 the parties dealt with the conversion of existing sub post office outlets to Canada Post staffed outlets, the introduction of "new direction outlets" at stated locations and "the Regina Study", which is not relevant here. The aspects of the 1984 Memorandum of Understanding which are directly relevant to this arbitration are the following paragraphs, on p. 3:

> During the experimental period, the Union may continue to promote its position within the membership in regard to the conversion of sub post offices into postal outlets and will postpone its public sub post office campaign.
>
> During the experimental period, the employer will continue to direct the affairs of the business without prejudice to this agreement and renewals of sub post office contracts will not exceed 12 months.
>
> Any project to open new retail outlets will be discussed between the parties under the provisions of the Collective Agreement and Canada Post will inform the Union of the opening of any replacement sub post office.

> It is agreed that the total number of sub post offices will not exceed the present number as of the date of signing of this agreement.
>
> Canada Post agrees there will be no reduction in wicket assignments between now and January 31, 1985 as the result of the opening of sub post offices or the expansion of services at sub post offices.
>
> Termination of the Agreement
>
> Either party may terminate the agreement with 30-day notice to the other party.

I note in passing that this last provision, with respect to Termination of the Agreement, probably conflicts with the express provision of Appendix "Q", but I do not think I have to deal directly with that point.

I heard some evidence with respect to the number of conversions effected and the adoption of some "new direction outlets" but that evidence has not in the end proved relevant to the issues before me. More relevant was evidence that over the period of the experiment there had been a number of transfers or relocations of sub post offices; that is, situations in which an existing sub post office had closed and another had opened in the same general location, shopping centre or trading area. There was no allegation that there had been any failure by the Employer to "inform the Union of the opening of any replacement sub post office", as it had undertaken to do under the Memorandum of Understanding. There was also evidence that as of February, 1984 the Employer had had contractual arrangements with the operators of 2,076 sub post offices, that by the 1st of October 1985 that number had dropped to 2,017 and by the

1st of June 1986 to 1,982. However, the total number of sub post offices closed over the period from February 1984 to June 1, 1986 was 117, because 23 new sub post offices were opened over that period. This, of course, was well within the limit set by the Memorandum of Understanding, "that the total number of sub post offices will not exceed the present number...". It also took account of the Employer's undertaking in Appendix "Q" to actually reduce the number of sub post offices:

> *It is understood that during the term of* the new collective agreement the present number of sub-post offices will be reduced by fifty-three (53) and this new limit will not be exceeded.

In general terms, what led to this grievance is the Union's allegation that the Employer has not respected its obligations under the second of the paragraphs of the Memorandum of February 29, 1984 which are set out above: that "...renewals of sub post office contracts will not exceed 12 months".

In the period from the initial signing of the Memorandum of Understanding to its extension by Appendix "Q" the term of the contract in the standard contracts which the Employer was signing with all its sub post office contractors was the following:

> 4.0 TERM OF THE AGREEMENT
>
> 4.1 This agreement will remain in force between the parties from April 1, 1983 to September 30, 1985 or from the date specified in 4.2 to September 30, 1985 whichever is the shorter period, unless terminated earlier in accordance with the termination provisions of the agreement.
>
> 4.2 The first day of operation of the Sub Post Office business will be _____, 19__.

These clauses and the form of contract then used make it clear that the Employer was aiming at a common termination date for all of its sub post office contractors. They also make it clear that if the Employer renewed any contracts between the date of the signing of the Memorandum of Understanding and September 30, 1984 they must have been renewals which exceeded the twelve months agreed upon. There was, however, no other evidence and no issue taken with respect to that period.

Of much greater relevance is the form of contract that the Employer used when negotiating with all of its sub contractors for their next sub post office contracts after September 30, 1985. Clause 21.6 of that contract provides:

> 21.6 This agreement terminates automatically on September 30, 1987 unless renewed on or before that date.

The evidence is that some twenty-eight of the sub post office contractors chose not to sign this new contract, but the rest did sign it. The important point, of course, is that in every case where this contract was signed it was for a two year period, starting October 1, 1985.

The two year term of these contracts apparently came to the attention of the Union sometime in September of 1985, because it is referred to in Minutes of a Union-Management meeting on September 23, 1985, which show Mr. Chedore, the First National Vice-President, protesting on behalf of the Union that the period is supposed to be no more than one year. Mr. Garmaise, for the Employer, apparently responded that they were for two years so

that the Employer would not have to go through the signing process every year and, in any event, took the position that it made no difference because the contracts could be cancelled at any time.

This last is a reference to clause 21.4 of the standard agreements signed on October 1,1985, which states:

> 21.4 This agreement may be terminated without cause by either party with thirty days notice in writing provided to the other party.

I note that this was not a new provision, because the predecessor sub post office standard agreement contained an identical provision as clause 19.4.

The Union raised the issue in Union-Management meetings on November 20, 1985, January 9, 1986 and February 3, 1986. It was also raised by Mr. Chedore in a letter to Mr. M.B. Bell, Director of Labour Relations for the Employer, in a letter of March 25, 1986. It was raised for the last time in a Union-Management meeting on April 24, 1986 and this grievance was filed on May 20, 1986. From January 9 on the Employer appears to have taken the position that the October 1, 1985 contracts were not "renewals" within the terms of the Memorandum of Understanding of February 29, 1984, but were new contracts because their terms had been substantially changed.

The Union's position in this matter is that the Employer has clearly breached its obligation,under the Memorandum of Understanding of February 29, 1984 as continued in effect by Appendix "Q", that "renewals of sub post office contracts will not exceed 12 months".

It takes the position that where the Employer was unable to negotiate successfully with an existing sub post office contractor so that a new one was substituted on October 1, 1985 that too constituted a "renewal". In fact the Union takes that position even where there was a relocation, transfer or "replacement" of which the Union was informed and which was discussed with it. In other words, the Union's position is that the obligation to discuss "replacements" does not render inapplicable to that new contract the twelve month limit on "renewals".

The remedy sought by the Union was an order that the Employer respect Appendix "Q"

1) by signing sub post office contracts that do not exceed 12 months; and

2) by renegotiating any sub post office contract so they do not exceed a 12 month period from the initial signing date.

The Union says that I have power to make such an order under article 9.39 of the Collective Agreement.

The Employer's position is that relocations and transfers are different from renewals and that the Employer fulfilled its obligations under the Memorandum of Understanding dated February 29, 1984 by discussing them with the Union. It also takes the position that there was no renewal where a new sub post office contractor was substituted for one with whom the Employer had been unable to negotiate the new contract of October 1, 1985. But the Employer also goes much further. Its principal position is that the standard contracts signed with the sub post office

contractors for the period October 1, 1985 to September 30, 1987 were so substantially different from the contracts that preceded them that they were "new contracts", not "renewals". The Employer points first to the differences in the schedule of commissions, where the main difference appears to be the monthly commissions on sales over $3,000 were reduced from 10.9% to 9.62%. I refer to this only by way of illustration of the Employer's point, since my decision does not rest on any quantification of these differences. Second, the liability of sub postmasters for loss or damage to property of the Employer is made more stringent and, third, the new contract imposes new and different requirements with respect to financial guarantees, or letters of credit, on sub postmasters.

Alternatively, the Employer takes the position that, even if the new sub post office contracts that it entered on October 1, 1985 were "renewals", the fact that clause 21.4 of each of them provides that the agreement "may be terminated without cause by either party with 30 days notice in writing provided to the other party" means that in substance, if not in form, the new contracts do not exceed twelve months. The Employer claims, in other words, that if the Union were able to persuade it that there should be conversions or other changes with respect to the sub post offices covered by these new contracts the Employer would not be precluded from making these changes, because it could simply give the one months notice to its sub post office contractors.

Finally, the Employer took the position that if damages had been requested by the Union no quantifiable loss could have

been proved, and that the orders actually requested by the Union, to sign twelve month contracts and renegotiate to that effect, were not appropriate. They were, in the Employer's submission, not appropriate because they impacted on the Employer's legal relations with third parties and were therefore outside my authority and jurisdiction as arbitrator, and in any event would cause great inconvenience while serving only some ill-defined, and indeed minimal, interest on the part of the Union.

The Issues

The issues raised by these opposing positions of the parties may be conveniently summarized as follows:

(1) Does the paragraph in the Memorandum of Understanding of February 29, 1984 in which the Employer undertakes that "renewals of sub post office contracts will not exceed 12 months" apply to relocations and transfers?

(2) Does that paragraph apply where the contract is with a new sub post office contractor at the same location?

(3) Are all of the other contracts renegotiated by the Employer, effective from October 1, 1985 or thereafter to September 30, 1987, "renewals" within the relevant paragraph in the Memorandum of Understanding of February 29, 1984, as continued in effect by Appendix "Q" of the Collective Agreement?

(4) If any of these new contracts are "renewals" for these purposes does the fact that they may be terminated without cause by either party with thirty days notice in writing mean that the

Employer is not in breach of Appendix "Q"?

(5) If the Employer is in breach of Appendix "Q" is the remedy requested appropriate?

Decision

(1) It is clear from the evidence that from the time of the original signing of the Memorandum of February 29, 1984 there were regular exchanges between the parties with respect to closures of sub post offices, transfers and relocations and "authorized openings". In other words, the parties kept track of closures and discussed the establishment of any new sub post offices so that there would be no breach of the Agreement that "the total number of sub post offices will not exceed the present number", and, indeed, to ensure that the number of sub post offices would be reduced by at least the fifty-three specified in Appendix "Q". Where a sub post office simply moved from one location to another in the same shopping centre or trading area the Union was informed and that too was part of the discussion. It seems to me by doing all of that the Employer fulfilled its obligations with respect to those operations.

The twelve month limitation on "renewals of sub post office contracts" is separate in the text of the Memorandum of Understanding of February 29, 1984 from the undertaking of the parties to discuss "new retail outlets", and from the undertaking by the Employer to "inform the Union of the opening of any replacement sub post office". The term "renewal" could not possibly apply to the opening of new retail outlets, and the parties chose to treat the opening of replacement sub post offices in the same

sentence with the opening of such new retail outlets. In the absence of any direct evidence of intention in this respect, it seems to me that the text must lead to the conclusion that they intended new retail outlets and replacements to be treated the same; that is that they not be subject to the twelve month limitation which applied to "renewals".

When Mr. Tingley was on the stand as a witness in this hearing he was asked about the intention behind Appendix "Q", but when counsel for the Employer objected that such evidence was only relevant if the text was ambiguous Mr. Ash, and Mr. Tingley, declined to pursue that line. Thus, I am left to draw inferences about the purpose and intent from the text itself, because the witnesses for the Employer did not address that question either. I might add that in their arguments both counsel freely suggested possible purposes.

In any event, for the reasons I have given I have concluded that retail outlets and replacement sub post offices are both outside the scope of the word "renewals" as used here and are not subject to the twelve month limitation. Mr. Tingley suggested in argument that the purpose of the limitation to twelve months was to put obstacles in the way of the continuation of the sub post office system on a wide scale, and to keep the situation fluid so that the Union's interest in conversion to post offices staffed by the Employer could be more readily taken into account. If that was the purpose, it seems to me that the opening of a replacement sub post office naturally presents the Union with an opportunity to have its interest in a conversion taken into account.

(2) Most of what I have just said applies to the situation where an incumbent postmaster does not sign a new contract and a new person is substituted as contractor. That may well be considered a "transfer", but, whether or not it is a transfer, it is not, in my opinion, a renewal for purposes of the twelve month limitation imposed by the Memorandum of Understanding of February 29, 1984 and continued in effect by Appendix "Q". In other words, for the reasons given in relation to the preceding issue, I think in this context "renewals" must be taken to refer to subsequent contracts with the same sub post office contractors, and not to contracts with new ones.

(3) I must, however, reject the Employer's main submission; that because the two year contracts signed for the period between October 1, 1985 and September 30, 1987 involved "substantial" changes they were not "renewals" for the purposes of the Memorandum of Understanding of February 29, 1984 and Appendix "Q". I do not find it necessary to consider whether the particular changes between the two forms of contract put in evidence were in fact "substantial". I agree with Mr. Tingley's submission. To conclude that, simply because the Employer had negotiated a changed arrangement with the same sub contractor, the twelve month limitation had no application would be to rob the limitation of <u>any</u> apparent use or purpose. The normal and natural meaning of the paragraph in question is that where the Employer makes a new contract for one of its sub post office contractors that new contract "will not exceed 12 months", and I have heard nothing to dissuade me from giving those words that meaning here.

While I do not go so far as to make a finding of bad faith against the Employer, I must say that the Employer's submission on this issue looks very much like an attempt to rationalize blatant breaches of the Memorandum and Appendix "Q" which the Employer went ahead with because it had concluded that the Union had no real remedy.

(4) Can the Employer justify its open disregard of its undertaking not to renew sub post office contracts for periods of more than twelve months by pointing to the fact that under these two year contracts either party may terminate the contract for no cause upon thirty days written notice? Counsel for the Employer recognized that, in form at least, this right to give notice did not meet the Employer's obligations with respect to the term of the contract. She submitted, however, that it did meet that obligation in substance.

At a technical level a contract for a stated term and a contract subject to termination upon written notice are two different things. The second requires that for the contract to terminate one of the parties take an action. The first does not. Technically, and logically, that alone differentiates the two types of contractual relationships. On a practical level there may be a range of reasons, from simple inconvenience to the wish to avoid a "political" issue, why the Employer here might, in fact, have considerably less flexibility in changing sub post office contract arrangements if it had to give notice than if they ended automatically. Whether that flexibility is a good thing, or whether it would be better for the Employer not to be

saddled with the inconvenience of having to renegotiate its sub post office contracts every year, are matters upon which the parties may well differ. Obviously, if the Union did not want the flexibility to be there (indeed, it probably wants the inconvenience to be there as well) this matter would not be before me. The point, of course, is that the Employer agreed that renewals would not exceed twelve months. It did not agree that it would insert a one-month, no cause, notice of termination provision. Indeed, it is surely significant that such a provision is not new to the 1985 standard form sub post office contracts. It appears that it was already there when the Union went to the trouble of negotiating for the twelve month limitation on renewals. It is not for me then to say that one is as good as the other.

For these reasons I reject the Employer's submission that it did not, in substance, breach its undertaking that "renewals of sub post office contracts will not exceed 12 months".

(5) I turn now to the remedies requested by the Union. The Union demands, first,"that the Employer respect Appendix Q by signing sub post office contracts that do not exceed 12 months". Having found the Employer in breach of the Collective Agreement I would have no hesitation in making such an order if Appendix "Q" were still in effect, as it was at the date when the grievance was filed and at the date of the hearing in this matter. However, as I understand Appendix "Q", read in the context of Article 43.02 and Article 43.03, by its own terms it only applied until Septemer 30, 1986. If it was to have expired on that date

simply because it was part of the Collective Agreement which was to expire then, clearly, it would be still in effect, because, as I said at the outset, the Collective Agreement continues in effect during bargaining by virtue of the "bridging" effect of article 43.02 and the "freeze" imposed by section 148(b) of the Canada Labour Code. Given the wording of the Appendix itself, however, I cannot see how that can be so. The substance of the agreement and Employer's undertaking there was to extend "the current experiment" to September 30, 1986; not "for the life of the Collective Agreement", or some such wording.

Article 43.03 makes all Appendices "integral parts of this Collective Agreement", but that does not affect my conclusion on this point. If Appendix "Q" was called Article 46 and provided that its terms would cease to apply on September 30, 1986, April 30, 1986, or any other date, the fact the collective agreement as a whole was kept in effect by "bridging" or "freezing" would not call for any changed reading of that particular provision. It would cease to apply in accordance with its own terms.

In my opinion all I can do now is make a declaration that the Employer was in breach and that it should not have signed sub post office contracts which exceeded twelve months. I cannot order it not to do so in the future.

If Appendix "Q" is renewed by the parties, without any relevant change in its terminology, I suppose my award will have the same force with respect to its future application as any declaration by an arbitrator would have.

Second, the Union requests an order that the Employer respect Appendix "Q" "by renegotiating any sub post office contract[s] so they do not exceed a 12 month period from the initial signing date". Technically, given the delay in issuing this award, I cannot make the order requested because the "12 month period from the initial signing date" is already past for all of the two year contracts entered into on October 1, 1985. The serious question, however, is whether I can and should order the Employer to renegotiate its sub post office contracts so that the existing ones do not exceed the twelve month limitation by any more than they already have and so that any new ones are only for a twelve month period.

The Employer's main objection to my doing this was, in its counsel's submission, that I did not have the authority or jurisdiction to make an order affecting third parties, that is the sub post office contractors. In response to that argument I will content myself with saying simply that any order I might have issued would not have been directed to those third parties. I would not, and I could not, have changed the sub post office contracts to be twelve month contracts, as Mr. Tingley suggested at one point I should do. I could, however, have ordered the Employer to do anything that it legally could do, including that it terminate all its contracts with the appropriate one month notice and attempt to negotiate new ones that would not exceed the twelve month limitation. Such an order would have been directed only to the Employer, who is subject to my authority and jurisdiction; not to the sub post office contractors, who are not so subject.

It is simply not true that one party to a collective agreement can undertake to engage in, or avoid, specified activity and then break its obligation with impunity because the activity in question involves a third party. Indeed, no specific authority is needed for the proposition that a prior contractual obligation, including, I should think, an obligation under a collective agreement, may be enforced even if it necessarily involves the defendant in breach of contract. For example, if "A" contracts to sell a painting to "B" and later contracts to sell the same painting to "C", "B" can enforce his contract with "A" even though it necessarily involves "A" breaching his contract with "C". "C" may, of course, recover damages against "A" for breach of the contract but is of no concern to "B". By the same token, if I am satisfied that the Employer has breached its obligations to the Union I can order the Employer to comply and leave the Employer to sort out its obligations to the sub post office contractors as best it can.

Apart from that concern, counsel for the Employer submitted that the Union's interest here was so slight that I should not make an order which would greatly inconvenience the Employer and the sub post office contractors by forcing them to renegotiate subsisting contracts. As arbitrator under this Collective Agreement I may have considerable discretion, but I am far from satisfied that it is appropriate for me to re-weigh the parties' interests where they have each done so in the context of negotiations. Where the remedy sought is damages it may be very difficult in some circumstances to put any economic value on

what one party has lost where the other has breached the Agreement, but that is not a concern where what is sought is an order specifically to perform the obligation.

Here, unfortunately, whatever may have been the Union's right at the time of the filing of the grievance and at the time of the hearing in this matter, I do not see how I can now order the renegotiation of the sub post office contracts. As I have already pointed out, Appendix "Q", by its own terms, is no longer in effect. For the reasons I have given, if it were still in effect I would not only order it complied with in the future, I would probably make whatever order I could to bring the Employer into line with its obligations now. But I do not see how Article 9.39 can be taken to empower me to order the Employer to do something that it is no longer required to do by the Collective Agreement. If damages had been requested and financial loss proven I could have ordered compensation to put the Union in the position that it should have been in between the date of the action grieved against and September 30, 1986, when the Employer's obligation under Appendix "Q" ended. As has already been noted, however, it might have been very difficult to prove financial loss here.

Unfortunately, from the Union's point of view, because of the delays involved the best I can do is state as a declaration what I have already decided: In signing the two year sub post office contracts in October the Employer breached the obligations it then had under Appendix "Q", and such action in the future would constitute breach of similar wording in any future collective agreement.

Innis Christie, Arbitrator