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IN THE MATTER OF AN EXPEDITED ARBITRATION

087047917

BETWEEN:

CANADIAN UNION OF POSTAL WORKERS (The Union)

AND:

CANADA POST CORPORATION (The Employer)

Re: Jean Richard and Ken Clark
C.U.P.W. Grievance Nos. A-52-H-140 and 141;
C.P.C. Arbitration Nos. 86-1-3-6735 and 36

Before: Innis Christie, Arbitrator

At: Campbellton, New Brunswick

Hearing Date: January 22, 1987

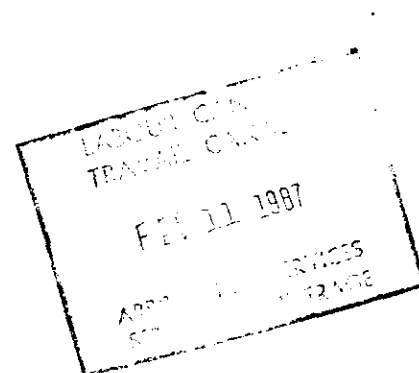
For the Union:

Wayne Mundle, Regional Education and
Organization Officer, C.U.P.W. -
Atlantic Region

For the Employer:

David Jamieson, Labour Relations Officer,
Canada Post C.U.P.W. Portfolio -
Atlantic Division

Date of Decision: January 29, 1987



Union grievances alleging breach of the Collective Agreement between the parties for the Postal Operations Group (Non-Supervisory): Internal Mail Processing and Complementary Postal Services, which expires September 30, 1986 and in particular Article 31, in that the Employer notified the grievor, Richard, that he was to be held responsible for a wicket shortage which occurred in his wicket credit in the amount of \$188,84, and the grievor Clark that he was to be held responsible for a wicket shortage which occurred in his wicket credit in the amount of \$37.36. The Union requests that each grievor not be held responsible for his respective wicket shortage and be granted full redress.

At the outset of the hearing the parties agreed that this matter be proceeded with in accordance with the expedited process set out in paragraphs 13-26 of Appendix "E" to the Collective Agreement. They agreed that I am properly seized of these matters and should remain seized after the issue of this award to deal with any issues arising in connection with its implementation, and that any time limits, either pre- or post-hearing, are waived.

A W A R D

There was little dispute about the basic facts, although the parties drew rather different implications from them. My understanding of the situation was aided considerably by a visit to the Campbellton Post Office in the company of Mr. Mundle, who appeared for the Union, Mr. Jamieson, who appeared for the

Employer, Mr. Leo Fournier, the Postmaster, and Mr. Carl Cyr, the shop steward.

The framework for this arbitration was set by Article 31.04 of the Collective Agreement and its interpretation in two unreported awards under this same Collective Agreement; that of arbitrator Swan in MacEwen, (1985) C.P.C. Nos. 85-1-3-2683, 4 and 5; C.U.P.W. Nos. 298-GG-2304, 5 and 6, and that of arbitrator Outhouse in Blackburn, (1986) C.P.C. No. 86-1-3-3121; C.U.P.W. No. A-24-H-224. Article 31.04 provides:

31.04 Protection Against Shortage

An employee shall not be held responsible for a shortage nor required to reimburse it if such shortage is not due to carelessness.

At arbitration the Corporation will have the onus of proving that an employee was careless.

In Blackburn, which followed MacEwen, arbitrator Outhouse quoted the Employer as taking the following position:

where there is an unexplained shortage, such as in the present case, the onus is on it to establish certain basic facts -- namely, that the security of the workplace was adequate, that the accounting system was reliable, that there were no unusual staff shortages in the relevant time period, and that the machinery was not in any way defective. However, the Employer says that once it has 'closed all of these doors' or, at least, reasonably so, then there is a reverse onus on the employee to explain the shortage.

In effect, arbitrator Outhouse accepted this framework, while elaborating upon it in quoting from arbitrator Swan's decision in MacEwen, as follows:

While Article 31.04 clearly places the onus of proof on the Employer, I cannot accept the Union's argument that the Employer must prove a specific act or acts of carelessness in order to discharge that burden. I prefer instead, as indeed I must having regard to Article 9.43, the approach taken by Arbitrator Swan in MacEwen, Grajvel and Charabaruk (CUPW Nos. 298-GG-2304, 2305 and 2306; CPC Nos. 86-1-3-2683, 2684 and 2685). That is the only case to which counsel could refer me which interprets Article 31.04 in its present form. There, as here, the Union argued that the Employer had to show a specific act or acts of carelessness. The learned arbitrator rejected that argument, commenting as follows at pages 10-12 of the decision:

'In virtually every case of shortages arising under this clause, it will obviously be almost impossible for the Employer to prove carelessness by direct evidence; it is hard to imagine circumstances in which a supervisor will actually see an employee engaged in conduct which could properly be called careless. While that might occur in circumstances of a clear breach of security, it is unlikely that the employer would be able to prove carelessness in the day to day handling of funds constituting the employee's float.

In the absence of any direct evidence, will the employer ever be able to prove carelessness? In my view, where the employer can demonstrate that the security system is such that funds cannot be abstracted from an employee's till without leaving some trace, and that no such trace in fact exists, some onus will shift to the employee to dispell an obvious inference of carelessness. Counting out postal values, accepting cash in return and making change is, after all, the very job for which these employees are hired and paid by the employer; it surely must be a term of the employment that this process be carried out accurately, and in

ordinary circumstances, it is my view that once all external explanations for a shortage have been foreclosed by the employer's security systems, the only explanation for loss is that it was caused by the employee placed in charge of the funds and required to account for them. In normal circumstances, the absence of funds would, in my view, raise an inference of carelessness, thus casting the onus back on the employee to explain the shortage in some [way] inconsistent with carelessness.

Carelessness, however, requires something more than merely not being in possession of funds which one is supposed to be in possession of. Not every honest mistake causing a loss of funds will constitute carelessness; it is only those which demonstrate some fault on the part of the employee, akin to the kind of fault contemplated by the civil law of negligence, which will be sufficient to satisfy the requirements of Article 31.04. To adopt a test from civil law, I think that the employer will have met the onus in Article 31.04 if it can show, on the balance of probabilities, that the loss must have been due to the employee acting in a way other than how a reasonable employee would act, having regard to all of the circumstances.' (emphasis added).

Other possible explanations raised by the Union related to security of the Sub Conversion Unit generally and were not, in my view, relevant to this particular shortage. In this regard, I find the following observations by Arbitrator Swan to be apropos here:

'I agree with counsel for the employer that the explanation offered must not be speculative, but must have some roots in reality. Thus, although I have to accept the evidence given by the employees as to the absence of strict security measures, and certain breaches of security, at the postal station, in the absence of any link between those flaws in the security system and any possible explanation of how these funds were missing, I cannot accept that the security problems are an explanation inconsistent with carelessness.' (p. 12)

It must be emphasized, of course, that at no time is there a reverse onus on the employee to prove that he or she was not careless. That would fly in the face of the clear language of Article 31.04. However, where, as here, the Employer is able to demonstrate that there is a shortage and that the probability of its arising through some external cause is low, then it may well fall upon the employee's shoulders to come forward with a reasonable explanation for the shortage which is inconsistent with carelessness. Thus, the onus on the employee is purely an evidentiary one and does not carry with it the burden of persuasion. At the end of the day, it is for the arbitrator to determine, in light of all the evidence, whether the shortage was, more probably than not, due to carelessness on the employee's part. If that question is answered in the affirmative, then the Employer has met the burden which rests upon it pursuant to Article 31.04. If, on the other hand, that question is answered in the negative, or the probabilities are equally balanced, then the Employer has failed to meet the burden and the employee is under no obligation to make restitution.

Within this framework the spokesman for the Employer set about "closing all the doors". The parties agreed that the system of assigning a float of cash, postal values and two locking drawers to each clerk and the system of documenting and auditing flows of cash and postal values between individual clerks and the central store are the same in Campbellton as in the situations described in MacEwen and Blackburn. Individual clerks are responsible for their own shortages. Supervisors are responsible for storage in the central store of cash and postal values. As in those two cases, the Employer here

did not attempt to establish any particular instances of carelessness on the part of either grievor. As pointed out by both arbitrators in MacEwen and Blackburn, it is hardly surprising that the Employer would be unable to prove such specifics. The Union's case, therefore, consisted of attempting to demonstrate that "all the doors" had not been closed. There was no allegation of staffing difficulty here, as was critical in MacEwen.

Mr. Mundle focused a good deal of his concern on the adequacy of the security of the workplace; the fact that the door to the walk-in vault was open throughout the working day, the fact that the small money safe within the vault was left unlocked through the day, the fact that those coming and going to the washroom and the coffee room could see into the open walk-in vault and, particularly, the fact that, on occasion, the cabinets where the postal values are kept in the walk-in vault had been left open. On these points, however, I must agree with Mr. Jamieson. Insofar as these concerns related to the security of the main stock, which is the responsibility of the supervisors and not of the wicket clerks, they are irrelevant to the shortages here in question.

Mr. Mundle and Mr. Cyr attempted to link these apparent lacks of security with respect to the main stock to wicket clerk shortages. They described a circumstance in which Mr. Clark, one of the grievors here, was initially held responsible for the fact that no account had been kept of the sale of a

mint proof silver coin to a customer in June of 1986. On that occasion supervisor Real Cormier had been called to the front of the post office to ascertain the wishes of a deaf mute customer. When it had been explained to him, by signing, that what the man wanted was one of the coins such as was on display in the lobby, Mr. Cormier took one from the locked cabinet in the vault and gave it to a postal clerk who sold it to the customer. Contrary to the requirements of the Employer's Manual, Mr. Cormier did not obtain a requisition from the postal clerk to whom he gave the coin. As a result, when a shortage equal to the sale price of the coin showed up in the month-end audit, management could not document to which clerk the coin had been given, and Mr. Cormier admits that his recollection might be faulty.

After inquiries, the financial supervisor attributed the shortage of the cost of the coin to the daily Worksheet of Audit of the grievor Clark for the day in question. Clark was, at the time of the inquiry, on annual vacation. When he returned he protested against the shortage claimed from him and it was only then discovered by his Union representative that the value of the coin had been added to his Worksheet of Audit for the day in question. When no supporting requisition could be produced by management the Worksheet of Audit was changed back to what it had been and that amount is not part of Mr. Clark's shortage in issue here. In fact, the price of the coin in question is now shown as a shortage in the main stock, for which the supervisors take responsibility.

The Union's point about this matter is that lack of security for the main stock may, in this way, come to roost on a wicket clerk. However, that can only be so if supervision is dishonest or, as appears to have been the case here with respect to the sale of the coin, simply wrong in ascribing responsibility. For me, the more convincing point is that the accounting system is such that the grievor and the Union were able to prove the responsibility for the price of the coin was not Mr. Clark's. I am unable to conclude, therefore, that any lack of security in respect of the main stock is likely to impose responsibility on the grievors, or any other of the wicket clerks. I am not condoning lack of security for the main stock where the Employer's Manual requires it. I am simply saying that it is not relevant here.

Nothing that I saw or heard satisfied me that security with respect to the clerks' tills -- the two drawers that are in front of them at the wicket while they work and in the vault while they do not -- was not adequate. There may be somewhat more coming and going by rural mail drivers and truck drivers through the wicket area than is desirable for efficiency, but I do not see that it threatens the security of the individual tills.

More specifically, there were complaints that when the wicket clerks do their weekly audits they do not have a sufficiently private area in which to count the money in their tills. I agree the situation could be better, but I cannot see this

as presenting any real opportunity for theft from the individual tills.

For the Union, Mr. Mundle suggested that the accounting system used could not be said to be reliable because of the way it operated in the Campbellton Post Office. Here again, he stressed that in June of 1986 a supervisor had been able to add the cost of the mint coin to Mr. Clark's Worksheet of Audit without Mr. Clark knowing it. He also relied on evidence that on a few occasions employees had not been able to do their weekly audit and that the monthly surprise audits called for by the Manual are not really "surprises" in Campbellton.

I need say little more about the first of these objections to the way in which the accounting procedure works in Campbellton. It was precisely because the procedure does work that the Union and Mr. Clark were able to spot the mis-entry. Had that item stayed on Mr. Clark's file as a shortage the Union could have proved conclusively that it was not properly there when the matter came to arbitration.

I do not think the so-called denials of opportunity to do weekly audits were of any significance. They appear to have related to the fact that a couple of employees who had failed to do their audits as scheduled were told that they could not do them on a busy Friday afternoon but had to wait until the following Monday morning.

With respect to the surprise audits, on the evidence I heard it may well be that things are somewhat more slack

in Campbellton than they should be. However, I fail to see how this, or delays in weekly audits, assist an employee who is trying to show that unaccounted for shortages may have been caused other than by his carelessness. Such laxity may result in carelessness or dishonesty going undetected, but it does not appear to me to work the other way around, and allow for other explanations of shortages.

My serious concern with the reliability of any aspect of the Employer's accounting system relevant here is with lack of security on the postage meters. I do not think there is any basis for suggesting that the shortages in question might be explained by the machines being "defective". There was simply no evidence of that, but two things were perfectly clear. First, the keys to the two postage meters used by the postal clerks in the relevant period were interchangeable with one another and with a third key left in a desk drawer in the area. Second, management did not know this was so at the time.

The real importance of the fact that management did not realize that the postage meters were not secure in this sense is that the wicket clerks were led to believe that the postage meters for which they took responsibility were made secure by the removal of the key. Postage meters, of course, record values sold, and when responsibility for the meter passes from one clerk to the other the numbers are noted. The problem is that the clerks in Campbellton customarily did not make any such notes when they locked their postage meters for lunch or when

they left their wickets for any other reason. Consequently, during such periods the meters were vulnerable to being used by anyone else who had a key, and, if that person were dishonest and pocketed the money paid by the customer for the use of the meter, the shortage would not show up until the month-end audit. This, in my view, constituted a reasonably significant "door" which the Employer had not "closed".

Mr. Jamieson argued, first, that this problem with the postage meters was not a lapse in security or an unreliable element in the accounting system because nobody knew that the keys were interchangeable at the time. Second, he argued that, even if this were an "open door", it could hardly explain the shortages in Campbellton in June of 1986, because the postage meters had been around for years, right across the country, and had never been a problem.

In response to his first argument I can only say that if someone in the post office had spotted this "open door" and was stealing by using the unattended postage meters he or she would not be likely to have told anybody else. It is important to remember that the Union need not prove that the shortages were caused this way. It need only show that the Employer has not "closed all the doors".

I see the force of Mr. Jamieson's second argument, but I cannot agree that the fact that there is no record that anyone has ever used the interchangeable keys to postage meters to steal means that it is not a gap in the security of the workplace.

or the reliability of the accounting system. Mr. Jamieson himself commented that at least at one other post office there was a system by which wicket clerks kept track of the numbers on their postage meters whenever they left them. It was undisputed that there was no such system in Campbellton.

I note that in Groslin, an unreported decision by arbitrator McKee between these same parties in 1983 (CUPW No. W-350-GG-280; CP No. 83-1-3-710) the arbitrator comments, at p. 5, that, at least in the South Burnaby Post Office, the postage meter keys were interchangeable, and that "any employee with a key could therefore activate any postage meter". He also states that the evidence before him there was clear "that there is no standing instruction to wicket clerks to read and note the numbers shown on the meter when leaving or returning to a meter". Arbitrator McKee reiterates this on page 10 in his "Discussion" and adds, "It is obvious that it is accepted practice to assume that the meter is 'secure' when using the key to turn it off. The evidence is clear this is a delusion". He then reaches the conclusion that the grievor was not responsible for the shortage in question, without specifically referring back to his comments about the postage meter, but at p. 11 he does say:

I also find that for a grievor to be expected to accept such burden the security of the workplace and the equipment used by the employee - as well as the security of the till - must be of such a standard that questions of tampering by others cannot be validly argued.

In Campbellton there would normally have been other people around to observe improper use of a postage meter, but they were not, by any means, always around. It seems to me that the very fact that there was no general realization that the postage meter keys were interchangeable would mean that nobody would take much notice of who was using what postage meter during the lunch hour.

While I have found little merit in any other of the points put forward by the Union, I am forced to conclude that the fact of interchangeable postage meter keys introduced a lack of security into the workplace, or an element of unreliability into the accounting system, which directly affected the wicket clerks. That lack of security has now been remedied by removing the postage meters but it clearly existed at the relevant time.

I note in passing that the lack of security in accounting for the use of postage meters could have been remedied by some simple but reliable system of accounting for the numbers on the postage meter. When any clerk removed his or her key he or she would only have to note the numbers and compare them with the numbers when he or she unlocked the meter after lunch or any other break. As I have already mentioned, according to Mr. Jamieson such a system has been used in at least one other post office.

It must be borne in mind that, according to Article 31.04, the onus is on the Employer, to prove that the employee was

careless. Where the Employer relies, as it has here, on "closing all the doors", the Union need not prove that any money was stolen, that any postage meter was used improperly or that anybody, management or bargaining unit member or outsider, was guilty of any culpable wrong-doing. It need only show that a door was open; that there could have been an explanation for the shortage other than the grievor's carelessness, with "some roots in reality"; "a reasonable explanation of the shortage which is inconsistent with carelessness", to quote again the language in MacEwen and Blackburn.

On this basis, then, I sustain these grievances and direct that the grievors not be held accountable for shortages in their wicket credits.



Innis Christie, Arbitrator