5-22-1987

# Re Canada Post Corp and Canadian Union of Postal Workers

Innis Christie

**RE CANADA POST CORP. AND CANADIAN UNION OF POSTAL WORKERS**

*I. Christie. (Canada) May 22, 1987.*

POLICY GRIEVANCE relating to grievance procedure. Grievance allowed.

*W. Mundle*, for the union.
*H. Levinson Polowin* and others, for the employer.

AWARD

At issue here is the binding effect of an arrangement between the parties in the Atlantic region which allows for the "Level 2" hearing in grievances relating to absenteeism to be held at Halifax rather than at the employer's head office. Also at issue was the question of whether the implication of this arrangement is that the union has the option of using the expedited arbitration procedure set out in paras. 13 to 25 of app. "E" to the collective agreement for such grievances.

From 1980 until 1984 there was an informal agreement in the Atlantic region that grievances over absenteeism notations on employees' personal files were to be heard at "Level 2" in Halifax. In 1984 the employer recognized that the Atlantic division was out of step with the rest of the country, in that elsewhere these grievances were dealt with at "Level 2" by the vice-president, labour relations, or his delegate at the employer's head office. The employer put the union on notice that it would no longer deal with these matters, at the second level, in Halifax. This led to a policy grievance by the union, C.U.P.W. No. R-1400-GG-22. That matter was set down for arbitration but was settled on the eve of the hearing in the following terms:

MINUTES OF SETTLEMENT

Whereas a question has arisen about the proper application of Article 9.08, in the Atlantic Division, and in particular the referral of grievances to the Regional level,

(1) It is agreed that, in the application of Article 9.08, all grievances relating to matters in which the Employer is subject to the burden of proof, or which relate to matters in which an action by the Employer has been made part of an employee's record pursuant to Article 10, shall be presented for hearing, heard and replied to at the Regional level.

(2) The Union withdraws Grievance No. R-1400-GG-22.

Dated October 19, 1984

| | |
|---|---|
| [signed] | [signed] |
| Manager Labour Relations- | Chief Shop Steward |
| CUPW CANADA POST | C.U.P.W. |

When that settlement was signed the collective agreement currently in effect between the parties was being negotiated. It was signed April 2, 1985, and contains the following provision with regard to "Effective Dates":

43.01 *Effective Dates*

The term of this Collective Agreement covers a period of two (2) years from October 1, 1984, to September 30, 1986. It shall come into effect on October 1, 1984, but except as otherwise provided, the new provisions of this Collective Agreement shall become effective only on the date of signing of the Collective Agreement.

There is virtually no evidence before me with respect to anything said about the October 19, 1984 "Minutes of Settlement" in the course of negotiations. All I have is a document in evidence by agreement entitled "1984 Corporate Proposals — C.U.P.W." of which I have "page 2 of 11", headed "General". Item 1 on that page is the only one relevant here. It provides:

1. All relevant Letters of Understanding, Commitments, or Agreements are null and void and as a consequence, the Parties must come to agreement concerning their renewal.

No such provision appears in the collective agreement, although app. "C" is entitled "Renewal of Agreements Entered Into Prior to the Coming into Force of this Agreement". Paragraph 1 of app. "C" provides "The Agreements signed between the parties and pertaining to new facilities will remain in effect for the term of the Collective Agreement", and goes on to provide that staffing and schedule changes which may be required in those facilities will be effected pursuant to the applicable articles of the collective agreement. Paragraph 2 states that "The following local agreements are renewed without any modifications", and lists a number of local

agreements relating to "Equal Opportunity for O.T.", two relating to "Change of Shift System" and one relating to "Health and Safety".

Notwithstanding the lack of any reference in the current collective agreement to the October 19, 1984 minutes of settlement with respect to "Level 2" hearings, the arrangement between the parties set out there continued to be respected until the spring of 1986. On June 11th, in a telex to Wayne Mundle, the union's education and organization officer, Atlantic, who is counsel for the union here, Hugh Currie, labour relations officer in the employer's Atlantic postal division, raised an objection to proceeding at expedited arbitration with absenteeism cases. His telex stated as follows:

> RE: ARBITRATION CASE SCHEDULED FOR 17-6-86
>
> A review of the cases has been conducted. As a result we will concede grievance A-59-H-215, L. Alward. Mr. Alward will be paid eight hours for his rest day of Sept. 6, 1985.
>
> It is our position that the absenteeism cases, Files A-59-H-23, 24, 25 and any other absenteeism case are improperly before the arbitrator.
>
> The rationale for this position is as follows:
>
> The expedited arbitration procedure is used as outlined in Appendix E at E-14, for disciplinary measures, for grievances relating to Article 15 and Clause 21, 03, and for grievances to which the Corporation did not reply within the prescribed time limit at the second level of the grievance procedure. Absenteeism as in the instance of these grievances, is not disciplinary in nature nor was a disciplinary measure taken. Clearly Appendix E states that only disciplinary measures can be addressed in the expedited forum.
>
> As well, Article 10.04(a) speaks of a notice being required for an interview of a disciplinary nature or related to attendance records. The distinction is there for a reason. That reason is to distinguish between two situations, disciplinary measures and administrative issues, i.e., attendance records.
>
> This is the position we will be taking before the arbitrator on June 17, 1986.

Following a hearing in Moncton on June 17th, on June 23rd arbitrator Outhouse allowed the grievances to which Mr. Currie's telex referred. Subsequent telexes resulted in the following telex to Ms. Cheryl Simmonds, the union's regional grievance officer, from Mr. Wally Legge, the employer's manager, labour relations for the Atlantic division, which summarizes the employer's position as follows:

> Further to our telephone conversation of Aug. 18/86 and our tlxs of June 11 + June 27/86 regarding attendance related grievances, we are left with no other choice but to take the following action.
>
> > "All grievances relating to attendance will be forwarded to HQ for their consideration and reply".

This action has become necessary as a result of the Union's opposition to hearing attendance grievances at the Div. Level without prejudice to the Corporation's position that these grievances are not arbitrable through the expedited process. This is pursuant to the ruling of arbitrator S. Bruce Outhouse at the June 17/86 expedited arbitration hearing in Moncton, N.B.

At this hearing the Corp.'s position was put before arbitrator Outhouse, who in his ruling on the preliminary matter agreed with the Corp's position on this issue. However, he also stated that because the Corp. had heard the absenteeism grievances at the Div. Level, it waived its rights to object to their scheduling in the expedited process. This places Canada Post in an untenable position and as such has prompted us to take the action described above.

As we cannot continue to hear absenteeism grievances at the Div. Level without accepting the prejudice therein, the Agreement of Settlement of Oct., 1984 to the grievance R1400GG22 becomes untenable for the Corporation. Thus agreement was reached under the previous Collective Agreement and cannot be defended as the current arbitration process which were non-existent in Oct, 1986.

I wish to point out that we are not at all opposed to hearing absenteeism grievances at the Div. Level provided they are heard without prejudice to the Corporation's position or the hearing of these grievances in the expedited process.

Should the Union wish to reconsider its position on this matter we are available to discuss the issue further, including any alternative proposals the Union may have.

This stance by the employer resulted in the policy grievance before me, the full statement of which is:

*Statement of Grievance*

The Union grieves that Canada Post Corporation has violated Article 9 and all other related articles of the Collective Agreement. The employer refuses to hear and reply to all grievances duly submitted by the Union to the Regional Level in accordance with clause 9.08(a) of the Collective Agreement. The employer has unilaterally changed an agreement in effect since June 4, 1980 and written agreement dated October 19, 1986 stemming from grievance number R-1400-GG-22, whereby all grievances referring to a violation of Article 10 would be heard and replied to at the Regional Level.

*Corrective Action Requested*

That the employer rescind its decision and restore the situation which existed prior to the change. That the employer hear and reply to all grievances duly submitted by the Union to the Regional level for hearing in accordance with clause 9.08(a) of the Collective Agreement.

## *The issues*

In the course of the hearing in this matter I concluded, and stated to the parties, that both of the following issues are before me in this matter. Counsel for the employer was offered an opportunity to submit written argument with respect to the second issue if she felt in some way surprised, but she declined the opportunity.

1. Does the agreement set out in the "Minutes of Settlement" of October 19, 1984, to the effect that certain types of grievances "shall be presented for hearing, heard and replied to at the Regional Level" bind the employer to the end of the current collective agreement? This must be understood to mean to the end of the current collective agreement as extended by the *Canada Labour Code*, R.S.C. 1970, c. L-1. The submission on behalf of the union was that the "Minutes of Settlement" are either binding as an agreement or create an estoppel which precludes the employer from insisting that the types of grievances referred to in the "Minutes of Settlement" be dealt with at "Level 2" at the employer's headquarters rather than in Halifax.

2. Do the "Minutes of Settlement" of October 19, 1984, give the union the option of dealing with absenteeism grievances to the expedited arbitration process?

*Decision*

1. The agreement in question is, as I have explained above, contained in "Minutes of Settlement" dated October 19, 1984, and is, clearly, a resolution of grievance No. R-1400-GG-22, which was in virtually the same terms as the grievance before me. This grievance differs only in that it is based not on the informal agreement which founded the earlier grievance but on the "Minutes of Settlement". The union submitted that the "Minutes of Settlement" are given continuing force and effect by art. 9.23(a), which was the same in the predecessor agreement as it is in the current one:

> 9.23 *Final Decision*
>
> (a) Where a representative of the Corporation sustains a grievance at any of the prescribed levels, such a decision is final and binding upon the Corporation and should be implemented without delay.

Counsel for the employer submitted that grievance C.U.P.W. No. R-1400-GG-22 had not been "sustain[ed]" but had, instead, been settled, which she said was something different. She noted that, by the terms of the "Minutes of Settlement", "the Union withdraws Grievance No. R-1400-GG-22".

I cannot accept the intent behind art. 9.23(a), or its obvious meaning, is to distinguish between a situation where the employer wholly allows or "sustains" a grievance and the situation where some compromise is reached. In the latter situation the employer surely "sustains" the grievance in part. In either case the quite obvious purpose of art. 9.23(a), subject to para. (b), which is not relevant here, is to render binding, the resolution of the dispute

and to provide, in paras. (c) and (d), the process for its effectuation. No reason was suggested to me, and I can think of none, why these provisions should not be every bit as applicable where the grievance is sustained in part as they are where it is sustained in whole.

There is no question that when the collective agreement came up for renegotiation in 1984 the employer was bound by the "Minutes of Settlement" of October 19, 1984. The serious question is as to the effect of that renegotiation.

Before proceeding with that question, I should note that the "Minutes of Settlement" in question were clearly not a "local agreement" as that term is used in art. 8.05 of the collective agreement. Article 8.05 refers to agreements arising out of consultation under art. 8.04 which relates to specific matters none of which is the subject-matter of these "Minutes of Settlement". Moreover, these "Minutes of Settlement" contradict the explicit words of art. 9.08(b) of the collective agreement and, by art. 8.05(a), a "local agreement" cannot do that. For these reasons it is clear to me that the "Minutes of Settlement" of October 19, 1984, was not a "local agreement" in the sense of para. 2 of app. "C".

The conclusion that the "Minutes of Settlement" here in question did not constitute a "local agreement" for purposes of app. "C" is of some significance, because counsel for the employer submitted that the fact that some local agreements had been specifically renewed by inclusion in app. "C" implied that those not included in app. "C" had not been renewed. That might be true for "local agreements". I have concluded that it is not true for agreements such as these "Minutes of Settlement", which were not a "local agreement" as that phrase is used in this collective agreement.

What then is the status or legal nature of the "Minutes of Settlement" of October 19, 1984? Counsel for the employer relied on my decision in *Re Bakery & Confectionery Workers' Int'l Union, Local 322 and Canada Bread Co. Ltd.* (1970), 22 L.A.C. 98 (Christie). At p. 102 of that award, after discussing letters of understanding which clarify ambiguous provisions, the board stated:

> Different considerations enter where a letter of understanding or supplementary agreement purports to modify, or to create obligations not contained in, the primary document embodying the collective agreement. In such cases each of the documents must be considered to constitute a part of the collective agreement. It is well established that a collective agreement may be found in several documents.

In that award the implication of the fact that the letter of understanding in issue created new obligations was held to be that it terminated with the collective agreement in the context in which it was signed and of which it was treated as being a part. There was, in that case, no indication of any contrary intent. If the same were true here I would similarly conclude that the agreement in the "Minutes of Settlement" of October 19, 1984, came to an end with the collective agreement which was still in effect, by virtue of the provisions of the *Canada Labour Code*, when it was signed.

Counsel for the employer seemed to rely on the fact that the employer's proposals in the 1984 negotiations included the statement: "All relevant Letters of Understanding, Commitments or Agreements are null and void and as a consequence the parties must come to an understanding concerning their renewal". The suggestion seemed to be that this buttressed the *Canada Bread* proposition that, in the absence of any indication of contrary intent, the agreement evidenced by the "Minutes of Settlement" would terminate with the rest of the 1984 collective agreement. The difficulty is that that proposal did not find its way into the resulting collective agreement, except possibly in app. "C", which, as I have already pointed out, only applies to "local agreements". Is the inference to be drawn that all "Letters of Understanding, Commitments or Agreements" other than those "local agreements" are "null and void" or is it that the union did not accept the view put forward by the employer as proposal No. 1 under the "General" heading?

In the *Canada Bread* award the board recognized that a letter, even one signed by only one of the parties to the collective agreement, may create an estoppel and in that sense vary the collective agreement. At p. 105 the board stated:

> Similarly, the settlement of a grievance estops the grieving party from raising the matter again. If the settlement is clearly intended to establish an agreed interpretation of the collective agreement and thus to govern future conduct it may not subsequently be disregarded...

The board in *Canada Bread* did not address the question of whether such an estoppel survives the renegotiation of the collective agreement. In *Re Board of Com'rs of Police for Township of Innisfil and Township of Innisfil Police Assoc.* (1985), 19 L.A.C. (3d) 263 at p. 268, arbitrator Hinnegan did expressly address this issue as follows:

> Where the representation relied upon is made so as to operate for a future period of time, as in the case of a representation made during negotiations as to the application of a particular clause in the agreement, then the estoppel applies for the duration of the agreement or as otherwise represented, which may extend beyond the expiry of the agreement...

The distinction here, however, is that there is nothing explicit in the "Minutes of Settlement" of October 19, 1984, to suggest that the agreed change in the application of art. 9.08 for the Atlantic division was to continue beyond the life of the then current collective agreement. In my view, therefore, the effect is that the agreement in the "Minutes of Settlement" would terminate with the collective agreement of which it became a part when it was made unless the employer is estopped from denying its application to the current collective agreement.

There has been no doctrine more extensively dealt with in the recent arbitration jurisprudence than the doctrine of equitable or promissory estoppel. It has long been clear that where one of the parties, expressly or impliedly, promises to forgo a right under the collective agreement, knowing the other party will rely on that promise, the promising party cannot retract and reassert the right it has promised to forgo where the result would be unfair because the relying party would suffer a detriment due to its reliance. Detriment in this context means that the relying party would end up worse off than it would have been had the promise never been made. Depending on the effect of the reliance, this may mean that the right in question can be reasserted with due notice, or it may mean that it can never be reasserted.

An extended application of this doctrine has received the approval of the Ontario Divisional Court in *Re C.N.R. Co. et al. and Beatty et al.* (1981), 128 D.L.R. (3d) 236, 34 O.R. (2d) 385, 82 C.L.L.C. ¶14,163. In the arbitration award, 4 L.A.C. (3d) 205, which the court there declined to quash the arbitrator held that the employer could not reassert limitations on the payment of sickness benefits which it had been ignoring for some time. By not alerting the union of its intent to change this practice the employer was held to have led the union to rely on its continuance, a reliance which was detrimental to the union in that it had lost the opportunity to negotiate a change in the collective agreement. In that situation the limitation on benefits could not be reasserted for the life of the then current collective agreement, that is until the union had a chance in the next round of negotiations to renegotiate the provision.

This extended application of the doctrine of equitable or promissory estoppel has been controversial, because it may be seen as allowing for enforcement at arbitration of employer promises which are not part of the collective agreement and which may not be in writing. In its most attenuated application (i) the employer is held bound by a positive promise not included in the

collective agreement, which does not amount to a promise to forgo any collective agreement right, except, perhaps, some aspect of the general management right not to do what it is not obligated under the collective agreement to do; (ii) the employer's promise is implied from ambiguous conduct; and (iii) the union has not suffered a proven detriment because it is not clear that negotiating over the practice in question would have been at all likely to gain it an express right under the collective agreement.

Be that as it may, estoppel in this form has been approved not only by arbitrators but by courts across Canada, except in Nova Scotia. In *Re Metropolitan Toronto Civic Employees' Union Local 43, C.U.P.E. and Municipality of Metropolitan Toronto et al.* (1985), 18 D.L.R. (4th) 409, 50 O.R. (2d) 618, 85 C.L.L.C. ¶12,101, Reid J., speaking for the Ontario Divisional Court, made very clear the approval of that court for the application of the doctrine of promissory estoppel in the sort of case "where a course of conduct has been followed by an employer which is at odds with the agreement but has led the union not to seek to have the agreement amended to accord with the conduct" (at p. 417). In *Re Smoky River Coal Ltd. and U.S.W., Local 7621 et al.* (1985), 18 D.L.R. (4th) 742, 38 Alta. L.R. (2d) 193, 60 A.R. 36, the Alberta Court of Appeal expressed "grave reservations" (at p. 745) about the suggestion at trial that the doctrine of promissory estoppel was not applicable by arbitrators. Only in Nova Scotia, apparently, is there any doubt about the applicability of the doctrine in grievance arbitrations: see *Re Hawker Siddeley Canada Inc. and U.S.W., Local 1237* (1983), 150 D.L.R. (3d) 509 at pp. 522-3, 59 N.S.R. (2d) 29 (Nathanson J.). Generally, see *Re Brewers' Warehousing Co. Ltd. and United Brewers' Warehousing Workers' Provincial Board* (1985), 21 L.A.C. (3d) 327 (Brunner), and *Re John Rennie Ltd. and Western Ontario Joint Board, Amalgamated Clothing & Textile Workers Union, Local 740* (1987), 26 L.A.C. (3d) 296 (Brunner).

I have no wish to question the general judicial approval of the extended application of the doctrine of equitable or promissory estoppel in grievance arbitration. I do, however, feel the force of the words of arbitrator Adams in *Re Sudbury District Roman Catholic Separate School Board and Ontario English Catholic Teachers' Assoc.* (1984), 15 L.A.C. (3d) 284 at pp. 286-7:

> I emphasize that evidence establishing an estoppel in the form of a representation made during negotiations and inconsistent with the clear wording of a collective agreement must be in the form of clear and cogent evidence. Labour relations statutes in all Canadian jurisdictions require that a collective

> agreement be in writing and it is simply too easy for parties in difficult negotiations, on the conclusion of a collective agreement, to allege that representations were made contrary to the document signed.

To the same effect, in *Re Consolidated-Bathurst Inc. (Bathurst Division) and Canadian Paperworkers Union, Local 120* (1985), 19 L.A.C. (3d) 231 (Kuttner), the board provided a useful framework for considering the relevant evidence (at p. 242):

> From the foregoing, it is evident that the application of the doctrine is warranted only by the clearest and most cogent of evidence. What is the nature of the evidence put forward here in support of its application? It is three-fold, comprising the following:
>
> 1. The past practice of the parties in their lengthy collective bargaining relationship.
> 2. The negotiating history of the current collective agreement.
> 3. The subsequent practice of the parties under the terms of that collective agreement.

Here, as I have already pointed out, the parties came into the negotiation of the current collective agreement with a written agreement, reflected in the "Minutes of Settlement" of October 19, 1984, to the effect that in the Atlantic region certain types of grievances would be dealt with differently at Level 2 than was provided in the collective agreement, that is at regional level rather than at headquarters. The evidence of the negotiation history is anything but clear and cogent. All there is is an employer proposal which did not become part of the collective agreement, but which suggests that the employer took the view that all ancillary agreements, like the one in question, would become null and void unless renegotiated. The fact that no such provision found its way into the collective agreement might indicate that the union agreed that this was the general thrust of the law so that no explicit statement was necessary, or it might indicate that the union refused to dispose of ancillary agreements by any such general provision.

The subsequent practice of the parties is clear. Immediately after the current collective agreement began they acted as if the "Minutes of Settlement" of October 19, 1984, were still in effect, until the union began to draw from that practice the implication that absenteeism grievances could, at its option, be dealt with by the new expedited arbitration procedure under paras. 13 to 25 of app. "E". But was that because there was some understanding that the "Minutes of Settlement" of October 19, 1984, had survived the renegotiation of the collective agreement, or was it simply the re-establishment of a practice that the parties in the Atlantic region had evidently found mutually satisfactory? If it

was the latter the employer might well be held estopped from changing the practice only until it had given the union fair notice that "Level 2" of absenteeism grievances would no longer be dealt with at the regional level. If it was the former then the implication of the extended application of equitable or promissory estoppel discussed above is that the employer is precluded from changing its practice until the union has had a chance to renegotiate the collective agreement.

The only evidence before me which is "clear and cogent" is the evidence of the practice of the parties after the renegotiation of the collective agreement to its current form. Nevertheless, I am satisfied that the employer, no more than the union, wanted, or intended, to bring an end to the arrangement in the Atlantic division which allowed for "Level 2" of absenteeism grievances to be dealt with in the employer's regional office. The employer's manager, labour relations, for the Atlantic division, stated that were it not for the union's notion that this somehow necessarily led into expedited arbitration he would be happy to continue with the arrangement.

For reasons to which I will shortly turn, I am of the view that the mere fact that there is a special arrangement to dispose of grievances at "Level 2" in Halifax does not dictate anything with respect to the availability of expedited arbitration. Perhaps because of that, I am prepared to conclude on less convincing evidence that I might otherwise require that the employer's conduct in negotiations led the union to rely on an understanding that the practice outlined in the "Minutes of Settlement" of October 19, 1984, would be continued. Evidently, that was the understanding of both parties. My conclusion is that the employer is estopped from denying the continuing effect of the "Minutes of Settlement" of October 19, 1984, until the current collective agreement is no longer in effect.

2. The "Minutes of Settlement" of October 19, 1984, do not refer, in so many words, to absenteeism grievances or to matters of discipline. Rather, they refer to

> ... all grievances relating to matters in which the Employer is subject to the burden of proof, or which relate to matters in which an action by the Employer has been made part of an employee's record pursuant to Article 10...

The expedited arbitration provisions in paras. 13 to 25 of app. "E" are, by para. 14, applicable to three types of cases. The only one relevant here is "disciplinary measures — not including discharge cases". The essence of the union's case on this issue appears to be

that because discipline cases fall clearly within the grievances to which the "Minutes of Settlement" of October 19, 1984, apply, any other cases to which the "Minutes of Settlement" apply must be disciplinary cases and are therefore subject to expedited arbitration. That is, quite simply and succinctly, false logic at the most elementary level.

Counsel for the employer cited numerous awards between these same parties to the effect that grievances about the employer's treatment of absenteeism are not, or are not necessarily, grievances about discipline. Quite apart from that, however, the "Minutes of Settlement" of October 19, 1984, do not say anything about the characterization of grievances over the employer's reaction to absenteeism, or anything about whether such grievances are disciplinary or not. Because such grievances are invariably about actions by the employer which have been made part of the employee's record pursuant to art. 10, the "Minutes of Settlement" do appear to dictate that at "Level 2" such grievances shall be presented for hearing, heard and replied to at the regional level, in the application of art. 9.08. This means that in that respect they are treated the same as disciplinary matters, but that does not mean that they are disciplinary matters; nor does it mean that they are not disciplinary matters. Consequently, it does not mean that they are, necessarily, properly the subject of expedited arbitration, nor does it mean that they are never properly the subject of expedited arbitration. It simply means what it says.

In an expedited arbitration decision dated June 23, 1986 (*LeBlanc, MacArthur, Price, Bourque, Gauthier*; C.U.P.W. Nos. A-59-H-24, 25, 39, 122 and 130; C.P.C. Nos. 85-1-3-4690, 91, 93, 94 and 95) [unreported], arbitrator Outhouse dealt with grievances over letters concerning attendance which had been placed on the grievors' personal files. In the hearing before me the parties agreed that arbitrator Outhouse stated at that hearing, although not in his award, that having dealt with these matters at "Level 2" at the regional level the employer was estopped from denying that they were appropriately dealt with in expedited arbitration. In the grievances of *Hurley*, *Hickey* and *Christopher* (C.U.P.W. Nos. A-57-GG-273, 396 and 403; C.P.C. Nos. [unknown]) which was heard in Saint John, New Brunswick the day following the hearing in this matter, I reached a similar conclusion. At p. 5 of my award I said:

> For purposes of this expedited proceeding I will adopt the position taken by arbitrator Outhouse and hold that the employer is estopped from saying that these matters are not disciplinary and therefore properly before me in this

> expedited process. The result is that, since the placement of the notices of interview on the grievors' personal files were conceded to have been out of time under art. 10.02(b), the grievances succeed.
>
> I am not to be taken as having concluded that counselling, or notification with respect thereto, under the employer's attendance management programme is necessarily disciplinary, nor am I to be taken as saying here that it is not disciplinary. That, it seems to me, is an important issue to be decided in the normal grievance and arbitration process, not the expedited process, unless the parties clearly agree to deal with it that way. In that context an arbitrator could decide the fundamental issue and put it in the context of any established regional practice, with the benefit of full evidence and argument.

I have now concluded that the reason the employer dealt with "Level 2" of these absenteeism grievances at the regional level was because it understood the "Minutes of Settlement" of October 19, 1984, to be in effect. Indeed, I have concluded that the employer was estopped from denying that those "Minutes of Settlement" were in effect. Therefore, I now think that both arbitrator Outhouse and I were wrong in the expedited awards to which I have just referred. I do not think that the employer should have been taken to have treated these matters as "disciplinary" and therefore to have been estopped from denying the applicability of the expedited process.

Because of the nature of the grievances in question and the remedies granted I am certainly satisfied that no injustice has occurred. Moreover, para. 25 of app. "E" precludes those awards from having any lasting effect:

> 25. The decision of the arbitrator shall not constitute a precedent and shall not be referred to in subsequent arbitration. Clause 9.43 shall not apply to such decision.

Nevertheless, it is clear that, in acceding to the union's suggestion that disposing of a grievance at "Level 2" at the regional level stamped the grievance as "disciplinary", arbitrator Outhouse appeared to grant the union the option of expedited arbitration in circumstances where neither the collective agreement nor the "Minutes of Settlement" granted it. In these circumstances, the employer's reaction, of refusing to proceed to deal with such grievances at "Level 2" at the regional level is not hard to understand. This award will, I trust, make that reaction unnecessary.

*Conclusion*

The "Minutes of Settlement" of October 19, 1984, were binding and enforceable because they were part of the collective agreement which terminated with the signing of the current collective agreement in April of 1985. Accordingly, the agreement

in the "Minutes of Settlement" terminated as well. However, although there was little evidence of negotiations leading up to April, 1985, I have concluded from the fact that both parties proceeded on the assumption that the employer was still bound by the "Minutes of Settlement" that there was a representation to that effect which the union relied upon in not negotiating for a similar provision in the current collective agreement. That conclusion does not appear to adversely affect the interests of either party. In the result, the employer is bound by the "Minutes of Settlement" of October 19, 1984, until the termination of the current collective agreement.

The "Minutes of Settlement" of October 19, 1984, provide, in effect, that grievances about the employer's dealings with absenteeism "shall be presented for hearing, heard and replied to at the Regional Level". That does not make them disciplinary grievances, nor does it give the union the option of proceeding with them by way of expedited arbitration under app. "E". If the employer's treatment of absenteeism involves discipline then expedited arbitration is available by virtue of para. 14(a) of app. "E" to the collective agreement. If it does not involve discipline then the expedited arbitration process is not available.