2-4-1988

Re Canada Post Corp and CUPW

Innis Christie
Dalhousie University Schulich School of Law

08:0016

038063039

IN THE MATTER OF AN ARBITRATION

BETWEEN: THE CANADIAN UNION OF POSTAL WORKERS (The Union)

AND:

CANADA POST CORPORATION (The Employer)

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

Consultation on the Establishment of Franchises
C.U.P.W. Grievance No. N 1000 H 13
C.P.C. Arbitration No.

Before: Innis Christie (Arbitrator)

At: Ottawa (Location)

Hearing Dates: July 27, 28, August 13, 14, October 26, and December 22, 1987

For the Union:

Thomas A. McDougall, Q.C.	- Counsel
Anne Mactavish	- Counsel
Barbara J. Nicholls	- Counsel

For the Corporation:

George W. Adams, Q.C.	- Counsel
Carol Ritter	- Counsel
Walter Pylypchuk	- Counsel, Canada Post Corporation
Stuart Cook	- Executive Vice President, Administration and Communications.
Elizabeth Kreigler	- Vice President, Corporate Representation
A. W. Brown	- Manager, Labour Relations, C.U.P.W. Portfolio
Frank Smith	- Director of Franchising
Andre Sauriol	- Director of Labour Relations, C.U.P.W.

Date of Decision: February 4, 1988

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National Union grievance alleging violation of Articles 13.15 and 39.08 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, maintained in force and effect by the Postal Services Continuation Act, 1987, Bill C-86. The Union requested an order that the Employer be directed to withdraw from franchise agreements allegedly made in breach of the Collective Agreement to engage in constructive consultations and to provide certain specified information, and for damages, both in its own right and on behalf of the employees affected by the alleged breaches.

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

The grievance filed by the Union at the National level states as follows:

> The Union grieves that the Corporation refuses to hold constructive consultation with regard to the Corporate Retail Representation Plan and the franchising of retail outlets presented to the union on February 10, 1987. This is in violation of clause 39.08 and other relevant sections of the collective agreement between the parties.
>
> CORRECTIVE ACTION:- That the Corporation hold constructive consultation with the union on the Corporate Retail Representation Plan and the franchising of retail outlets presented to the union on February 10, 1987.
>
> That prior to these consultations, the Corporation provide the union with the information requested in the letter dated March 4, 1987, signed by the national president of the union and addressed to vice-president, Employee Relations of the Corporation along with any other relevant information.
>
> That the Corporation does not proceed any further with this program until it has met its obligation to constructive consultation with the union.
>
> That the Corporation re-establish the situation as it was before it started implementing the Corporate Retail Representation Plan and the franchising of retail outlets and that the employees who have been affected by this unilateral decision of the Corporation be compensated for the inconvenience they have suffered during that period of time.

I have proceeded on the basis that the only "other relevant sections" of which the Union is alleging violation is Article 13.15. The provisions of the Collective Agreement alleged to have been violated are, therefore:

13.15 List of Large Postal Establishments, Offices and Sections

The Corporation shall acknowledge that the list of large postal establishments, offices and sections thereof, with which the Union was furnished at the time of the signing of this agreement, is correct and that it will advise in writing the Union of any change at least ninety (90) days in advance.

39.08 Contracting Out

(a) The Corporation agrees to hold constructive consultation with the Union prior to having the work usually done by the employees of the bargaining unit given outside.

(b) If work belonging to the bargaining unit is given outside, the Corporation agrees that an alternate position will be offered to any employee who performs such work.

There was no suggestion of any breach of Article 39.08(b) here. Apparently any employees affected have been established in alternate positions.

In the course of six days of hearings over a five month span, from the end of July to the end of December, 1987, I heard many hours of oral testimony, including testimony from senior officers of both the Employer and the Union, and a mass of documentary evidence was introduced. John Stevenson, C.U.P.W. Representative in the Ontario region, and Jean-Claude Parrot, were called by counsel for the Union. Elizabeth Kreigler, Vice President, Corporate Representation, Robert Devlin, Director

of Counter Operations, Frank Smith, Director of Franchising, Stuart Cook, Executive Vice-President, Administration and Communications and Andre Sauriol, Director of Labour Relations responsible for C.U.P.W., were called by counsel for the Employer. I do not intend to canvass their testimony in detail here. I will attempt to state the facts as I have found them, to the extent necessary to explain my conclusions. After reading the documentation and reviewing my notes on the evidence I see little conflict of evidence with respect to relevant facts.

Evidence and argument in this matter proceeded on two levels; on the local level with respect to the grant of a Canada Post franchise to Sheldon Manly Drugs Limited, which operates a Shoppers Drug Mart store in the Willowdale Shopping Centre in Toronto, and on the national level, with respect to the plans that Canada Post has made to franchise a significant part of its retail operations. There was some evidence and argument with respect to the extent to which those plans have been carried out not only in Willowdale but also on the premises of Neiman's Drug Store in Winnipeg, at the University of Western Ontario in London and at Kananaskis, the site of the 1988 Winter Olympics, and elsewhere. The facts relevant to this award involve both levels and are best outlined in roughly chronological order.

It must also be appreciated that between the first and last hearing in this matter the tempestuous relationship between these parties has continued to evolve ("change" might be a

better word, since evolution might be taken to imply progress) through negotiations, a strike-lock-out, back-to-work legislation, Canada Labour Board and court decisions, arbitrators' awards and the creation of more franchises. I turn initially to the relevant facts as things stood on the 1st of April, 1987, when the grievance was filed. I will then refer briefly to supervening events of relevance to this award.

On December 8, 1986, the Union received notice from the Employer that Postal Station "C" in the Willowdale Shopping Centre in Toronto was to be closed effective January 31, 1987. This was in the form of a letter from A. W. Brown, Manager Labour Relations, to William Chedore, then First National Vice-President of the Union. The letter stated "The Corporation must vacate the premises by that date in order that the mall owners can renovate the mall". Canada Post held the premises on which Postal Station "C" was located under a lease which entitled the landlord to give ninety days notice. Canada Post's real estate department had gotten that notice on October 31, advising it that the lease would be terminated as of January 31, 1987. According to the evidence of the Employer's witnesses, the intervening time was spent reaching a decision whether Postal Station "C" would be relocated and deciding that it would not. Andre Sauriol, the Employer's Director of Labour Relations for C.U.P.W., testified that as soon as the Labour Relations Department knew of this decision it notified the Union.

There is no evidentiary basis upon which to find that any

individual member of management acted in bad faith, but in my view that does not absolve the Employer of its responsibility for meeting its obligations under the Collective Agreement with respect to notice. I will return to Article 13.15 below, but will simply comment here that, having undertaken to provide advice of "any change at least ninety (90) days in advance" to the Union, the Employer as an entity, and no one else, had responsibility to ensure that it would learn of events that would precipitate such changes far enough ahead to give the agreed notice. It was surely foreseeable that a ninety day notice on a lease would not enable a huge corporation to react and in turn give ninety days notice to one of its unions. It is to be noted that Willowdale Station "C" did not in fact close until February 28, 1987, a change of which the Union was given notice by a letter of January 29. The result was that the Employer was only about a week short of the notice required by Article 13.15.

Contemporaneously with notice being given under the lease, discussion was going on in another department of Canada Post about the possibility of experimenting with "franchising", through a pilot project. Elizabeth Kreigler, Vice-President, CorporateRepresentation, testified that early in November she had first discussed such a project in quite specific terms with the Corporation's marketing people. At that time no thought had been given to the Shoppers Drug Mart location in the Willowdale Mall.

In a summary of the Canada Post Corporate Plan, which was tabled in Parliament on November 5, 1986 the following is stated:

> POSTAL COUNTER SERVICE
>
> As part of a major ten year retail counter services program being implemented to improve the public's access to postal services in a cost-effective manner, Canada Post will:
>
> - provide adequate access in more convenient locations;
> - offer more convenient hours of operation;
> - gear products and services offered to local requirements; and
>
> significantly expand on the current involvement of the private sector in the provision of counter services, including the adoption of franchising and other arrangements.

This summary was sent, on November 5, to J. C. Parrot, President of the Union, by Andre Sauriol, Director of Labour Relations, C.U.P.W. Mr. Sauriol invited Mr. Parrot to an information session on November 6 or 7 and stated in that letter:

> Specific programmes which may impact upon your Union, will be consulted on as appropriate during the life of this plan.

According to her testimony, Ms. Kreigler first suggested, internally to the Vice-President of Marketing Services, that the Shoppers Drug Mart location might be a good place for the pilot project at the end of November, 1986. At that point the prevailing management assumption was, apparently, that a

sub-post office would be established to provide most of the services that had previously been supplied by Postal Station "C". Throughout December 1986 and January of 1987 negotiations with Sheldon Manly Drugs ripened to the point where the pilot franchise agreement was signed on February 20. There had been agreement in principle, and on all but a few details, by February 10.

Under date of February 6, A. W. Brown, the Corporation's Manager for Labour Relations, sent the following letter to Mr. Chedore:

> Re: C.P.C. Representation Plan
>
> This letter will serve as an invitation by the Corporation to the Canadian Union of Postal Workers to attend a meeting on the subject of the Corporation's Representation Plan.
>
> As you are no doubt aware, the Representation Plan will examine the present network of Postal Stations, New Direction Outlets, Sub-Post Offices, etc. to ensure that the postal network meets the requirements of both Canada Post Corporation and the public.
>
> Canada Post Corporation would like to meet during the week of 1987-02-09.
>
> Please contact the undersigned with a date and time during that week that would be suitable to the C.U.P.W.
>
> Your prompt response is appreciated.

Up to that point there had been no notice from the Employer to the Union with respect to the Representation Plan or franchising,

other than the November notice when the Corporate Plan was laid before Parliament, and nothing about the arrangements for a franchise in the Shoppers Drug Mart in the Willowdale Mall, except the original notice that Postal Station "C" was closing and the January 29 notice that the closing would be delayed by one month.

In accordance with the letter of February 6, on February 10 there was a national level meeting between the Union and the Employer where, for the first time, the Union was informed that there would be a franchise in the Fairview Mall to replace Postal Station "C" and given information directly about the Employer's franchising plans. On the evidence before me, the Employer's notes of that meeting are reasonably accurate, and I include them here:

NATIONAL CONSULTATION
BETWEEN
CANADA POST CORPORATION
AND THE
CANADIAN UNION OF POSTAL WORKERS
10 FEBRUARY 1987
2.25 P.M.

For the Corporation	For the Union
A. Sauriol	J. C. Parrot
A. Brown	W. Chedore
J. Flindall	C. Lee
F. Smith	
W. Wiley	
E. Miller	
B. Hughes	

SUBJECT: CORPORATION REPRESENTATION PLAN

General

A slide presentation on the Representation Plan was given by J. Flindall, Corporate Manager, Corporate Representation.

The C.U.P.W. has been provided with a copy of the presentation in both official languages.

The Union then asked for an explanation of the difference between a franchise and a sub post office.

The major differences are a franchise operator would pay a franchise fee, purchase product lines, and would be set up according to strict Corporation specifications. Further, the margin of profit for a franchise would be 18.5%. This compares to a sub post office operator selling on consignment, and having a varying margin of profit.

The Union asked if franchises would be tendered.

The Corporation responded that it would depend upon businesses available in the area. If there were more than one (1) suitable business it could go to tender. The two (2) franchises granted to date (Fairview and Kananaskis) were not tendered.

Fairview Franchise (Willowdale)

The Franchise in the Fairview Mall (located in Shoppers Drug Mart) would replace Willowdale Station "C" which was closing due to cancellation of the lease. The closing will be effective February 28, 1987 and the franchise will open March 2, 1987. Some meters would be handled by the franchisee, along with lock boxes being handled by Mall management. Commercial business would be handled at other outlets.

Station "C" had approximately $200,000.00 annual philatelic sales. Shoppers Drug Mart will handle as much of this product as possible and the balance will be handled by the philatelic facility in Antigonish, N.S.

The closing of Willowdale Station "C" will affect approximately ten (10) people who will be offered alternate employment.

The Union was informed that the Corporation viewed the franchise operation in Fairview Mall to fall under clause 39.08.

The Union asked if the Fairview lease had been renewed sometime in 1986.

The Corporation stated that the lease contained a cancellation clause which the mall management had exercised in order to carry out renovations.

The Union stated that the Corporation knew that chances were pretty good that the lease would be cancelled. The Corporation stated that this was absolutely not true.

Kananaskis

The opening date for this franchise has not been finalized. The franchise will open in time for the Winter Olympics.

Representation Plan

The Corporation is attempting to open approximately fifty (50) franchises in the first year.

The Union asked if the Corporation was closing down fifty (50) postal stations.

The Corporation replied no. Kananaskis, for example, is in a new area where no service existed previously.

The Union asked if a list was available of the retail outlets which are inefficient and poorly located.

The Corporation stated that the market analysis was not yet complete. Therefore the Corporation could not grant the Union's request.

The Union stated that this was obviously a big issue for both parties and felt that the Corporation has a bigger programme than what was being communicated, yet only two (2) locations were being discussed. The Corporation reiterated that market analysis was being done in several cities and other franchises had not been selected as yet.

Retail Representation Nationally was responsible for getting the plan implemented. Mr. Flincall (who reports to E. Kriegler) is the Corporate Manager responsible for the plan.

The Union was informed that the Representation Plan was designed to operate the counter operations of the business as efficiently as possible and would cut across all sizes of operation, and not directed solely at replacing existing postal stations.

In response to a Union question, a franchise could sell stock at a discount but could not exceed gazetted rates. Also, the hours of operations were about seventy percent (70%) greater than post offices. It is not possible to extend hours of operation at post offices on an economic basis.

The Union stated the extension of hours was costly when there is no revenue generation (eg. extended hours for income tax). Extended hours are profitable if the Collective Agreement is followed.

The Corporation was unaware that the Collective Agreement was not being followed and stated that studies were done under Appendix "P" and all obligations had been on this subject.

The Union stated that the Corporation had not shown this to the Union.

The Corporation stated meetings had been held and letters sent to the Union on this as far back as February 1986.

The Union stated that the Corporation should do studies and discuss the results with the Union, not just state that the program is not feasible. The Union stated that the road that the Corporation was embarking on was not conducive to good relationships between the parties and the Corporation should not expect co-operation from the Union on this matter.

When outlets are to be closed, the Corporation will abide by the Collective Agreement and a ninety (90) day notice will be provided to the Union (clause 13.15).

The ninety (90) day notice was not possible in Willowdale due to the Corporation's lease being cancelled.

The Union stated that further information was required on Willowdale Station "C" and would send a letter outlining the additional information required.

The meeting adjourned at 3:15 p.m.

The Employer's presentation at the February 10 meeting was supported by slides showing the following text:

CANADA POST

CORPORATE RETAIL

REPRESENTATION PLAN

RETAIL REPRESENTATION

A TERM USED TO DESCRIBE THE PROVISION OF OUTLETS THROUGHOUT CANADA WHERE THE PUBLIC CAN BUY STAMPS AND OTHER POSTAL PRODUCTS AND SERVICES AND DO BUSINESS WITH THE CORPORATION.

CURRENT SITUATION

MANY OUTLETS POORLY LOCATED

CUSTOMER ACCESS CONSTRAINED:

- HOURS OF OPERATION
- PARKING FACILITIES

COSTS OUT OF LINE WITH RETAIL NORMS

PRODUCT AND SERVICE OFFERING INCONSISTENT

LAYOUTS AND DESIGNS OUTDATED, INEFFICIENT, INCONSISTENT

STANDARDS, PRACTICES AND PROCEDURES INEFFICIENT, INCONSISTENT AND CONSTRAINED

OCCUPANCY COSTS BORNE FULLY BY CPC

SIGNIFICANT REAL ESTATE INVESTMENT

THIS DOES NOT MEAN WE ARE GETTING OUT OF THE RETAIL BUSINESS ENTIRELY -
E.G. NOT ALL LOCATIONS ARE POORLY LOCATED

OBJECTIVES

DEVELOP EFFICIENT, PROFITABLE, RATIONALIZED RETAIL NETWORK WITH CONSISTENT IMAGE, PRODUCTS AND SERVICES

IMPROVE PUBLIC ACCESS TO CPC PRODUCTS AND COUNTER SERVICES

REDUCE COSTS TO DELIVER IMPROVED SERVICE TO CUSTOMERS

TO ADDRESS THESE OBJECTIVES THE CORPORATION HAD DEVELOPED THE RESPRESENTATION PLAN.

UNDERLYING ASSUMPTIONS OF REPRESENTATION PLAN

ALL PRODUCTS AND SERVICES ACCESSIBLE AT OR THROUGH EACH OUTLET

THERE WILL BE UNIFORM LOCATIONAL, DESIGN, PRODUCT AND PERFORMANCE STANDARDS

RETAIL NETWORK WILL INCLUDE CORPORATE OUTLETS, NEW FRANCHISE OUTLETS AND STAMP SHOPS

ESTABLISH A PLAN WHEREBY EMPLOYEES AFFECTED BY CHANGES TO THE RETAIL NETWORK WILL BE OFFERED ALTERNATE EMPLOYMENT OR INCOME PROTECTION.

ACTIVITIES

LOCATIONAL AND DEMOGRAPHIC ANALYSIS TO REFLECT TRAFFIC PATTERNS AND DEVELOP OPTIMAL NETWORK OF RETAIL OUTLETS

IMAGE AND INTERIOR DESIGN ANALYSIS TO OFFER ATTRACTIVE, CONSISTENT, EFFICIENT AND CONVENIENT USE OF RETAIL SPACE

ACTIVITIES WILL IMPACT ON POSTAL STATIONS, STAFF OFFICES, SEMI-STAFF OFFICES, REVENUE OFFICES AND SUB POST OFFICES ACROSS CANADA

IMPLEMENTATION WILL BEGIN IN 1987 AND WILL CONTINUE TO EVOLVE OVER THE NEXT 10+ YEARS

FRANCHISE BASICS

FRANCHISE FEE	UP TO $80,000
ROYALTY	1.5%
DESIGN	TO CORPORATE STANDARDS FRANCHISEE COST
EQUIPMENT	FRANCHISEE COST
INVENTORY	OWNED BY FRANCHISEE
HOURS OF OPERATION	RETAIL TRADE AREA

SUMMARY

. BROAD BRUSH LOOK AT REPRESENTATION

- REDUCE CONFUSION ABOUT WORDS PRIVATIZATION, FRANCHISING ETC.

. EXAMINATION BEING MADE

- ENTIRE RETAIL NETWORK
  - WHEN AND HOW WE DO BUSINESS ACROSS CANADA
- FRANCHISE OPPORTUNITY
- WHEN AND WHAT IMPROVEMENTS SHOULD BE MADE TO EXISTING OUTLETS

. OPPORTUNITIES EXAMINED AS THEY ARISE

- E.G. FAIRVIEW AND KANANASKIS

On February 20 there was a "divisional", or local, consultation between the Employer and the Union with respect to the closing of Postal Station "C". Discussion there focused mainly on the relocating of the C.U.P.W. members who had been working at Postal Station "C", but there were some questions about the Employer's plans for further franchises. Management responded that discussions of franchising were taking place at the national level. Local Union officials who were at this February 20 meeting, including John Stevenson, C.U.P.W. Ontario region representative, who testified before me, were supplied with minutes of the February 10 meeting.

No further meetings were requested by the Union but on March 4 a letter from Mr. Parrot, the National President, was delivered to Mr. W. T. Kennedy, the Employer's Vice President for Employee Relations. In that letter Mr. Parrot stated "To

enable the Union to hold constructive consultation with the Corporation on this new program of Canada Post under clause 39.08, Contracting Out, the Union requests the following information:", and then listed thirty-six specific questions, as follows:

1. How much did Shoppers Drug Mart pay CPC for the franchise?

2. What product lines and inventory did CPC sell or provide to Shoppers Drug Mart and at what cost to the Corporation?

3. What equipment did CPC sell or provide to Shoppers Drug Mart and at what cost to the Corporation?

4. Provide a copy of the Corporation's specifications for the Shoppers Drug Mart franchise?

5. Why wasn't the franchise at Fairview considered for tendering?

6. What commercial business formerly handled at Station "C" Willowdale will be handled at other outlets? Provide details.

7. Which meters will be handled by Shoppers Drug Mart and provide the locations the other meters would be handled at.

8. How much and what philatelic products will be handled by Shoppers Drug Mart and what philatelic products will be handled by Antigonish, N.S.?

9. The CUPW was informed the Willowdale lease expired six months ago and was renewed on a month-to-month basis. Why wasn't CUPW given 90 days' notice provided in accordance with clause 13.15?

10. What CPC services will the franchise at Shoppers Drug Mart provide?

11. What hours and days will the Shoppers Drug Mart franchised CPC outlet remain open?

12. What training has CPC provided Shoppers Drug Mart personnel to run the franchised post office?

13. What training has Shoppers Drug Mart provided its employees who will be working the CPC outlet?

14. How many employees will Shoppers Drug Mart provide to work the CPC franchise and at what wage rate?

15. What services currently being performed by Station "C" CUPW members will not be performed by Shoppers Drug Mart franchise and where and how will these services be provided?

16. Provide a detailed breakdown on differences between the franchised outlet at Shoppers Drug Mart and any other sub-post office already located in other drug stores.

17. What was the revenue for Willowdale received by month for the fiscal year 1985-86?

18. What were the operating costs for the Willowdale station "C" outlet.

19. Where will the CUPW members currently at Station "C" be relocated and what provision of the collective agreement will be used?

20. Why is the Corporation proposing a franchise in Kananaskis when CPC already has a semi-staff office in the area?

21. Why wasn't the Kananaskis franchise tendered if the outlet is not due to open until the Winter Olympics?

22. Who was given the franchise in Kananaskis?

23. What product lines and services will the Kananaskis franchise provide?

24. Provide a list of the 50 franchises being considered for the first year.

25. Provide a list of the poorly located CPC retail outlets.

26. Provide a list of the inefficient retail outlets.

27. When will the CPC market analysis be completed?

28. Who is conducting the market analysis for CPC at the national, division and local level?

29. Provide a copy of the CPC analysis completed for the Fairview and the Kananaskis outlets.

30. Will CPC provide an analysis on an office-by-office basis upon completion as opposed to waiting for the entire national analysis?

31. Which cities is CPC currently conducting a market analysis?

32. What franchises are being considered in these cities and will any of these franchises be tendered?

33. Provide the studies that were done under Appendix "P" of the collective agreement.

"The 3-week period preceding Christmas 1984 at some 335 offices and the results will determine the criteria for proposed extension of the program. This will involve a consideration on a location-by-location basis of such factors as revenue, cost, service, the enhancement of the Corporation and customer satisfaction."

34. Provide any other studies CPC has done on extension of hours program since 1984.

35. Provide all copies of minutes of meetings and correspondence to CUPW on the Appendix "P" study as far back as February 1986 referred to in CPC minutes 10-02-87.

36. Are any other Shoppers Drug Mart stores being considered for CPC franchises and, if so, what locations?

This letter was never responded to in substance. On March 5 the Union applied to the Canada Labour Relations Board under Section 144 of the Canada Labour Code with a claim that the Employer had sold part of its business to Sheldon Manly Drugs Limited and that Sheldon Manly Drugs should therefore be bound by the terms of its Collective Agreement. On March 16 Mr. Kennedy replied to Mr. Parrot's letter as follows:

> I refer to your letter of March 4, 1987 wherein you raised certain questions with regard to the Corporate Retail Representation Plan and the franchising of retail outlets. Having regard to the application filed by the Canadian Union of Postal Workers under Section 144 of the Canada Labour Code, a copy of which has now been sent to me by the Canada Labour Relations Board, it would be inappropriate for me to answer those questions at this time.

Two weeks later the grievance which is the subject of this award was filed.

On March 2, 1987, the Shoppers Drug Mart franchise in the Willowdale Shopping Mall opened, providing the public with virtually all of the services previously available at Postal Station "C". C.U.P.W. immediately commenced picketing the franchise and passing out leaflets to potential customers at the Willowdale Mall.

There is no question that, from the Employer's point of view, a franchise such as that given to Sheldon Manly Drugs at Shoppers Drug Mart in the Willowdale Mall is quite different

from the sub-post offices which have been part of the operations of the Canadian postal service from its very beginning. According to the remarks of Donald Lander, the President and Chief Executive Officer of Canada Post, to Parliament's Standing Committee on Government Operations on November 20, 1986, at that point there were 1,986 sub-post offices. A sub-post office is there described as

> a facility, generally established in an urban area, operated by the private sector under specific agreement, for the purpose of providing postal retail sales and services and, in some cases, limited delivery services to the general public.

The new franchises are to operate with state of the art equipment and marketing techniques quite different from what has normally been found in the back of a bookstore or convenience store in Canada. Even more important from the Employer's point of view, the new franchise operations grow out of a recognition that exclusive rights to a full postal service in a geographic area are valuable to a retailer to whom they are awarded. They are sold at a substantial profit to Canada Post. Nevertheless, whatever their appearance and whatever the terms of the contract, the franchise operations clearly fit within the definition of "sub-post office" quoted above from the Employer's own documents. This is important because the opening of new sub-post offices has been a matter of contention between the parties under the last couple of collective agreements, and in that context it appears to have been accepted

that the establishment of new sub-post offices, other than franchises, are matters for consultation under Article 39.08.

I note in particular the letter of August 15, 1983 to Mr. L. C. Hiltz, then National Secretary-Treasurer of C.U.P.W., from J. F. Boyer, then Director, Labour Relations C.U.P.W. for the Employer, headed "Re: Opening of New Sub-Post Offices and Expansion of Services at Existing Outlets". I refer also to the award of arbitrator Burkett between these parties in The Establishment of Sub-Post Offices, Grievance N-1000-H-15, dated September 8, 1987. In that award arbitrator Burkett sets out a memorandum of agreement and award between the parties which recites, at the outset,

> WHEREAS CUPW has filed grievance N-1000-H-15 concerning the application of Article 39.08 to the opening of new sub post offices and call for items.
>
> AND WHEREAS the parties are desirous of entering into the following settlement of their differences, on consent, it is hereby ordered as follows:
>
> 1) CPC agrees to apply Article 39.08 to the opening of new sub post offices (excluding replacement sub post offices as defined) and call for items on the following terms.
>
> ...
>
> 3) The notice to CUPW will contain:
>
> a) distance to closest corporate outlet,
>
> b) type of business,
>
> c) services to be provided with estimated volume per week,
>
> d) proposed hours of service,

e) impact on existing CUPW counter employees,

f) rationale,

g) projected or estimated annual revenue and forecasted capital expenditures, if any,

h) map showing location of sub post office and other offices (if available),

i) estimated displaced revenue of postal stations and subs (if available)

4) CUPW commits that during the consultation process any specific information concerning a specific location obtained from the Corporation pursuant to this Award will be used only in connection with the consultation process.

...

9) This Award does not apply to franchised sub post offices subject to a franchise agreement, without prejudice to CUPW's right to claim that Article 39.08 is applicable to the opening of a sub post office by a franchise.

At the time of the first hearings in this matter, in July of 1987, in addition to the franchise in the Shoppers Drug Mart, Willowdale Shopping Centre, Canada Post had established franchise operations on the campus of the University of Western Ontario in London, at Kananaskis, Alberta, the site of the 1988 Winter Olympics, and in Neiman's Drug Store in Winnipeg. The first two of these do not raise the applicability of Article 39.08 in any direct way, because the franchise at the University of Western Ontario replaced an existing sub-post office and the Kananaskis franchise was a new operation which would, in any event, have taken the place of a revenue post office, not a

postal station. A revenue post office is a rural post office located on the premises of the postmaster, either in his residence or in a small business operated by the postmaster. The postmaster is the only employee of Canada Post in any such office. Postmasters are bargained for by the C.P.A.A., not C.U.P.W.

There was little clear evidence before me with respect to the situation at Neiman's Drug Store in Winnipeg. My understanding is that there had previously been a sub-post office in that store which was upgraded by the establishment of the franchise operation and this coincided with the closure of a nearby postal station.

By letter of May 6, 1987, A. W. Brown, the Employer's Manager of Labour Relations, reminded Mr. William Chedore, then the Union's 1st National Vice President, that on April 24 the Union had been advised that the postal station operations in Winnipeg, that is, Postal Station "C" in that city, "would be replaced by a franchised operation", to occur on July 24 and July 27. Mr. Brown further stated that the rationale for these changes had been the subject of a national consultation between the parties on February 10, 1987 and stated that "With regards to the specific implications for the Winnipeg closure these matters will be addressed at consultation held at the local level". Mr. Chedore replied on May 20 that the February 10 meeting had involved "only a generalized presentation which did not reflect any particular information on

specific locations". He went on to state that this was not a matter for local consultation saying "you are well aware that 39.08 does not involve consultation at the local level but consultation with the Union, i.e. the national Union." On June 1 Mr. Brown replied to Mr. Parrot, the National President, with reference to Mr. Chedore's letter, in the following terms:

> Re: W. Chedore's letter - Closure Winnipeg Station "C"
>
> With regards to the letter dated May 20, 1987, the Corporation is prepared to hold consultation on the Winnipeg franchising in accordance with clause 39.08 of the Collective Agreement. However, as mentioned in my letter to Mr. Chedore dated May 6, 1987, the specific implications of the closure of Station "C" (eg. where the people who are currently working in Station "C" will be working after the closure) will be, by necessity, subject to local consultation.
>
> In February of this year, the Corporation provided the C.U.P.W. with information on the Corporation's franchising plans. Some of the information you requested as a result of that meeting could not be provided due to confidentiality, however, the franchising plans were discussed in considerable detail. For this reason, we did not consider that further individual consultation would be required at the National level. We are, however, prepared to meet your request for further consultation and in order that we can properly respond, it would be appreciated if you would provide us with your specific concerns/questions in advance of the meeting.
>
> Please contact the undersigned in order that arrangements for the consultation can be made.
>
> I await your reply.

There is no further evidence before me with respect to consultations on the Neiman's Drug Store franchise.

In his cross-examination of management witnesses counsel for the Union sought to gain information about the Employer's future franchise plans. There was a good deal of discussion of the analysis being carried out by the Employer, to discover where, in the Employer's view, the postal service most needed improvement, and plans for Calgary, Vancouver, Ottawa and Halifax were specifically mentioned. In cross-examining Frank Smith, the Employer's Director of Franchising, counsel for the Union asked specifically the names of the retailers with whom the Employer was negotiating for franchises. Counsel for the Employer objected to the question and I upheld the objection for the following reasons, which I stated in the course of the hearing:

> I cannot say that the answer to this question is of no relevance, but I do not think I need to know names or more specific locations to decide this matter properly and fairly under the Collective Agreement. The marginal advantage of having the information is offset by the potential damage to Canada Post's commercial interests in making this information public now. Current commercial negotiations might well be hindered and future negotiations would have to proceed on a different footing. The Union's interest in the information for purposes other than in this proceeding certainly does not justify the question.
>
> The information might, in theory, be of assistance on cross-examination, particularly with respect to credibility, but I see no sufficiently serious issue of credibility, which the answer to this question would solve, to justify permitting it.

> Bad faith in the consultative process, if consultation was or is required, may well be an issue; but I do not think these specific names are necessary to help me determine whether bad faith has been made out or whether denials of bad faith by the Employer's witnesses are credible.
>
> I think the Kananaskis situation is sufficiently different from the three or four other specific situations in question that the introduction by the Employer of that evidence does not justify me in, or obligate me to, allow the question under dispute.

At the final hearing in this matter, on December 22, I was informed that the Employer had established a franchise in Ottawa and had arranged for three sub-franchises with Sheldon Manly Drugs in Toronto.

I said at the outset of this award that there had been developments over the period of the hearings before me. I have already noted, and quoted extensively from,the award of arbitrator Burkett on sub-post offices and have noted that the Employer has proceeded with a few more franchises. There have been several other very important developments.

On September 1, 1987 the Canada Labour Relations Board ruled that the granting of the franchise to Sheldon Manly Drugs Ltd. constituted a sale of business for the purposes of Section 144 of the Canada Labour Code, with the effect that C.U.P.W. is bargaining agent for employees employed in the work of the franchise and the franchisee is bound by the Collective Agreement between C.U.P.W. and Canada Post. The Employer sought

judicial review of the decision of the Board and I have before me a news report in the Globe and Mail for January 30, 1988, which states that the Federal Court of Canada dismissed "an appeal" by Canda Post "and upheld a ruling by the Canada Labour Relations Board ordering the franchise operation to pay its employees the same wages and benefits as the post office pays its staff".

These parties have been in negotiations since September 30, 1986. One of many matters on the table is the creation of franchises. This matter was addressed by the Conciliation Commissioner, Claude H. Foisy, Q.C., in his report to the Minister of Labour, at pp. 18-31. His recommendations were not accepted by the parties, and a strike-lockout followed, culminating with the passage of Bill C-86, the Postal Services Continuation Act, 1987, section 5(1) of which provides:

> 5(1) The term of the Collective Agreement is extended to include the period beginning on October 1, 1986 and ending on a date to be fixed by the mediator-arbitrator, which date shall not be earlier than September 30, 1988 or later than September 30, 1989.

The effect, of course, is that for what will probably amount to a year and a half the Employer's plans for further franchising will be governed by Section 144 of the Canada Labour Code and whatever obligations it has under the Collective Agreement, specifically Article 13.15 and 39.08 as far as this award is concerned.

The Issues:

1. The first issue is whether franchising in accordance with the Employer's Corporate Representation Plan comes within Article 39.08. Article 39.08(a), it will be recalled, is headed "Contracting Out" but in the text somewhat different language is used. The Employer agrees to hold constructive consultation with the Union "prior to having the work usually done by the employees of the bargaining unit given outside". This first issue involves a determination of the stage at which the Employer is required to hold such consultations. Does the obligation arise only when the franchise is about to "impact" on the Union's members?

2. The second issue is whether constructive consultation in fact occurred prior to the grant of the franchise to Sheldon Manly Drugs Ltd? If not, what more should the Employer have done? Should I order the Employer to provide any specific information, in answer to the Union's letter of March 4? These questions must be answered in the context of the collective bargaining relationship between the parties at the time.

3. If constructive consultation was required and did not occur, what is the appropriate remedy? Can I, and should I, order compliance with the Collective Agreement by directing the Employer to return to the situation that existed before February 20, 1987, engage in constructive consultation with the Union and only then, if it is still inclined to do so, close

its postal station and enter into a franchise arrangement at Willowdale Shopping Centre? Should there be an order for damages with any such order for specific compliance, or in the absence of such an order? What should be the nature and amount of damages for a failure to consult?

4. In connection with the closing of Postal Station "C" in the Willowdale Shopping Centre and the granting of the franchise operation to Sheldon Manly Drugs Ltd.,was there a breach of Article 13.15 of the Collective Agreement, and if so, what remedy is appropriate?

Decision:

1. Does the establishment of a "franchise" require "constructive consultation?" The Employer's obligation under Article 39.08(a) is to hold constructive consultations with the Union "prior to having work usually done by the employees of the bargaining unit given outside". On the evidence, particularly in light of the Memorandum of Agreement reflected in the award of arbitrator Burkett, In the Matter of the Establishment of Sub-Post Offices, Grievance N 1000 H 15, dated September 8, 1987, the Employer appears to have accepted that the establishment of new sub-post offices involves an obligation to consult under Article 39.08. I recognize that the Memorandum of Agreement set out in that award specifically does not apply to franchised sub-post offices, but I can see

no distinction whatever between sub-post offices and franchises that is relevant to Article 39.08. Quite apart from the agreement between the parties, I have no difficulty in concluding that the establishment of a sub-post office, a "franchise" or a "dealership" on the site of, or serving the same market as, a pre-existing postal operation staffed by C.U.P.W. members constitutes "having the work usually done by the employees of the bargaining unit given outside", within the terms of Article 39.08(a). The Canada Labour Board was dealing with the somewhat different terminology of section 144 of the Canada Labour Code, but in substance it reached this same conclusion in its September 1, 1987 order, referred to above.

A more difficult question arises where a franchise is established to serve an area not previously served by any postal facility. However, the same question must be asked in that case. Is the work given to the employees of the franchisee "work usually done by the employees of the bargaining unit"? On the evidence, the answer in the case of Kananaskis would be "no". In an urban setting the very difficult question would be whether the market served by a new franchise would be the sort "usually done by employees of the bargaining unit" or usually done by a sub-post operator and his or her employees. Apparently, in the case of the University of Western Ontario franchise the latter would be the case, but where there was no pre-existing facility in an urban setting the factual determination might be difficult.

I agree with the thrust of the award in Re Drug City - Orangeville (Kent Drugs Limited) and Retail Wholesale and Department Store Union, Local 414 (1984), 15 L.A.C. (3d) 368 (Adams, Chair). The question is not whether the sort of work in issue is only done by employees of the bargaining unit but whether the work actually in issue would have been done by employees of the bargaining unit had the contracting out, the "giving outside" in question, not occurred.

When must consultation occur? Must the Employer consult on its business plans?

I am satisfied that Article 39.08 applied and the Employer was therefore obliged to hold constructive consultation with the Union before establishing the franchise at the Willowdale Shopping Centre. A timing problem remains, however, with the meaning to be attached to the words "prior to having the work ...given outside". Does this mean, as submitted by counsel for the Employer, that such consultation must be held only on "impact"? Does it, as submitted by counsel for the Union, require constructive consultation with the Union on the generalities and long-term planning for the franchising aspect of the Employer's Corporate Representation Plan?

It is clear from the evidence, particularly the testimony of Ms. Kreigler, that the Employer is very much committed to the creation of franchises on the model of the Sheldon Manly Drug franchise in the Willowdale Mall, and has been committed since at least the summer of 1986. Donald Lander said so in his remarks to the Standing Committee on Government Operations on November 20, 1986. I do not think, though, that Article

39.08(a) can be read to require the Employer to hold constructive consultations with the Union in evolving its business plans. I am not suggesting that it should not do so or that to do so might not improve the relationship. I am simply deciding here that the Employer meets its obligations under Article 39.08(a) by holding constructive consultation with the Union even after its business plans are firmly in place, provided it does so "prior to" committing itself to a franchise that involves "having work usually done by the employees of the bargaining unit given outside". Those are the words of Article 39.08(a), and that is the extent of the Employer's obligation.

My conclusion that the Employer complies with Article 39.08 by holding constructive consultation prior to committing itself to a particular franchise should not be taken to amount to a holding that the Employer need only hold such consultations when a franchise is about to "impact" on employees. Article 39.08 not only requires consultation about the "impact" of giving work outside, it also requires consultation about the decision to do so. There is no basis for suggesting that the required "constructive consultation" is intended to deal only with how employees will be dealt with when their work has been "given outside". On the face of it, the Employer's obligation is to hold constructive consultation also about whether the "giving outside" should occur at all, and, if it does, when, to what extent, and under what sort of arrangement. The"prior" consultation on such matters could hardly be called "constructive" if it occurred only after the Employer was under a legal obligation to proceed with giving the work outside.

In sum, Article 39.08 obliges the Employer to hold constructive consultations before establishing a franchise where the employees of the franchisee will do the work usually done by employees of the bargaining unit. Article 39.08(a) does not compel the Employer to consult about its business plans or negotiations but it must hold such constructive consultations before legally committing itself to the establishment of any such particular franchise at a specified time and place. Here, the Employer did not formally sign the franchise until February 20, 1987. The question, therefore, is whether what occurred prior to that, and particularly the meeting of February 10, constituted holding "constructive consultation".

2. The broad question is "What constitutes constructive consultation as required by Article 39.08?" To some extent, I have already addressed that question in saying above that, on the face of it, the Employer's obligation is not only to consult on how affected employees will be dealt with but also on whether the "giving outside" should occur at all, and, if it does, when, to what extent, and under what sort of arrangement. Beyond that, I will confine myself to answering the narrower question: "Did the Employer hold constructive consultation with the Union 'prior' to granting the franchise in the Willowdale Mall to Sheldon Manly Drugs Ltd.?"

In addressing that question counsel referred to two other provisions in the Collective Agreement requiring consultation which have been the subject of arbitrators' awards under this Collective Agreement.

Article 29.05 provides that where the Corporation has notified the Union of its intention to introduce a technological change, the parties shall undertake to meet within the next fifteen days and "hold constructive and meaningful consultations". It must be noted, however, that Article 29.03(a) specifically requires the Corporation to notify the Union as far as possible in advance of its intention to make a technological change, when it is "considering" the introduction of any such change, and paragraph (b) provides explicitly for one hundred and twenty days' notice before the introduction of technological change, with a detailed description of the project "disclosing all foreseeable effects and repercussions on employees". It is against this background that the "meaningful and constructive consultations" are to be carried on. There is no such elaboration in connection with Article 39.08 so I must be hesitant to import the prescriptions for consultations under Article 29 set out by the Chairman Jolliffe in adjudicating between these parties under the Public Service Staff Relations Act in his adjudication of July 20, 1976 (Files: 169-2-81; 169-2-83).

I agree with the learned chairman where he says, at p.76, that it is "obvious that if consultations are to be meaningful, both parties must be well informed as to the facts in relation to the problems they attempt to solve". It is not clear in the context of Article 39.08, however, that, as he goes on to say on p. 76,"a meeting is not the proper place at which information should be given initially to the bargaining agent. It

should be given in writing in advance of the meeting, so that the bargaining agent will have adequate opportunity to analyse it". It is not clear that, under Article 39.08(a), information could not be given initially at a meeting, provided there was another meeting at which the information could be discussed, after the bargaining agent had had time to digest it.

Thus, I do not regard it as a failure of constructive consultation that the Employer first gave the Union information about the franchising component of its Corporate Representation Plan at the meeting of February 10, 1987. Any failure of constructive consultation lay in the fact that there was no further meeting before the Employer committed itself to the Sheldon Manly Drug Ltd. franchise.

The second consultation requirement to which counsel referred, Article 14.02(c), provides that the Corporation may change shift schedules provided it has had "meaningful consultations with the representatives of the Union". Counsel for the Union submitted that, according to the dictionary, "constructive" consultations are a heavier obligation than "meaningful" consultations. I suppose "constructive" does carry the implication of building or creating something, and perhaps consultations can be "meaningful" and fall short of being productive or constructive, but I find it hard to believe that the parties intended these nuances.

The real point, it seems to me, as I said in my 1983 award on Article 14.02(2) in Fundy Local Grievance - Change in

Schedules of Work (CPC No. 82-1-3-2745; CUPW No. A-62-GG-129), at p. 16, is that consultations were intended to allow the Union to have input. On the face of it, the Employer here did not hold "constructive consultations" in the sense of allowing the Union to have any real input into its decision to establish a franchise in the Shoppers Drug Mart store in the Willowdale Mall effective the 1st of March, 1987. The meeting of February 10 might well have been a good start had it been held earlier, but the meeting on February 20 was dealing with a fait accompli, except to the extent that it dealt with the Employer's obligation under Article 39.08(b) to offer alternate positions to displaced employees. As I have already said, I do not think that the purposes of constructive consultation under Article 39.08(a) are so limited.

Counsel for the Employer submitted that in the context of the relationship between the parties, taking into account the nature of that relationship as it stood in January and February of 1987, the Employer should not be found to have failed to hold constructive consultations. In dealing with this submission I find useful the approach I took in my award of May 25, 1984 between these parties in Atlantic Region - Meaningful Consultations in Accordance with Article 14.02(c) Prior to Christmas 1983 (CUPW No. R-1400-GG-19; CPC No. 83-2-3-45), an approach which arbitrator Norman found "helpful" in his award between these parties in Mervold and Others (January 2, 1985, CUPW No. W-460-GG-271 and 286; CPC No. 82-1-3-2172 and 83-1-3-11),at pp. 11 ff.

In Atlantic Region etc., the Employer was entitled to make shift changes only where it had had "meaningful consultations" with the Union whereas here the Employer has undertaken "to hold constructive consultations" with the Union before having work usually done by employees of the bargaining unit given outside. In both cases consultations of the required sort are a condition precedent. There I started from the proposition, at pp. 19, that it takes two to consult, two to really do the thing required by Article [39.08(a)] and that the parties

> must, therefore, be taken to have contemplated where the Employer had done everything it reasonably could to achieve meaningful consultations the pre-conditions set out in [the relevant]...Articles would be satisfied. In other words, where 'consultation' is required all that can reasonably be expected of either party is that it stand ready, willing and able to consult

because there is no reason to think that in agreeing to Article 39.08(a) the Employer agreed to give the Union a veto power over its capacity to contract out, limited as it is by Section 144 of the Canada Labour Code.

In the Atlantic Region award, I went on to state, at p.20:

> Returning briefly to the matter of onus of proof; the onus is on the Union to prove that the Employer changed the work schedules and that meaningful consultations did not occur. It has proved both of these points, and that is enough to show that the Employer acted in breach of the Collective Agreement unless the Employer can show that it was ready and willing to consult and therefore that "meaningful consultations" did not take place because the Union was not ready and willing.

Taking the same approach, on the evidence before me I have concluded that here the Employer did not hold "constructive consultation" with the Union prior to granting the franchise in the Willowdale Mall to Sheldon Manly Drugs Ltd. The meeting of February 10 was a start, but it dealt primarily with the broad strokes of the franchising aspects of the Corporate Representation Plan rather than with the specifics of the Shoppers Drug Mart franchise. The Union was told who the franchisee would be, when the postal station would close (eight days hence!) and when the franchise would open and what aspects of the work previously carried on at Postal Station "C" would be handled by the franchisee, in broad terms.

This was not sufficient for several reasons. The meeting did not come at a stage where the Union's input could conceivably have affected the Employer's decision to proceed by way of franchise rather than by finding a new location for a postal station staffed by C.U.P.W. members.

The Union was not given estimates of costs and revenues of the Willowdale operation on the basis of which the Employer had concluded that the switch to a franchise operation was justified. Surely, if the Employer was to hold constructive consultations prior to contracting out, consultations which were to be "constructive" in the sense that they were to give the Union an input into the decision, the Employer must at least have given the Union an opportunity to convince the Employer that the basic business reasons for contracting out

were in some way invalid. The Union should have been given an opportunity to show that there was a real reason to either change the Employer's objectives, or the means of achieving them, to something other than contracting out.

Let me be perfectly clear that I am not holding here that the Union must be given an opportunity to convince the public or any third party of anything, and I am certainly not suggesting that the business validity of the Employer's decision to contract out is a matter for arbitration. The Employer's obligation is to hold constructive consultations. It need not convince the Union, or anybody else, of anything. But "constructive consultation" does involve giving the Union an opportunity to have input into the management decision to contract out; to give work outside, in the words of the Collective Agreement. There must also, of course, be "constructive consultation" on the impact of the decision to give work outside, and in the case of the Shoppers Drug Mart franchise in the Willowdale Mall, as I have already said, even that sort of consultation was not held until too late.

Was the failure to hold "constructive consultation" not the Employer's fault? Continuing with the approach taken in my award in Atlantic Region; having satisfied myself that "work usually done by employees of the bargaining unit" was "given outside" without the Employer having met its obligation to "hold constructive consultation", I must now ask whether the Employer has shown

"that it was ready and willing to consult" and therefore that "meaningful consultations" did not take place because the Union was not "ready and willing". The submissions by the Employer's counsel on this point were that, (i) the history of the relationship between the Employer and this Union showed that consultations would be futile, (ii) the Union's actions in picketing and leafleting at the Willowdale Mall were inconsistent with its stance that it was ready and willing at that time to engage in "constructive consultation", (iii) the Union was intent on harassing potenial franchisees and wanted further information only for that purpose, and (iv) consultation would have been futile, as demonstrated by the fact that, subsequently, months of negotiation and a strike have not brought the parties together on the issue of franchising. These considerations are relevant to both my determination of whether the Sheldon Manly franchise in the Willowdale Mall was given without the required consultation, and my assessment of the Employer's obligation with respect to the implementation of its plans for franchisesnationally. Moreover, they relate both to whether the Collective Agreement was breached and to the issue of the appropriate remedy.

With respect to the granting of the Willowdale franchise and submission (i); I agree that it was perfectly rational for the Employer to conclude in November and December of 1986 and January and February of 1987 that consultation with the Union on the issue of franchising would not lead to a more effective

implementation of that aspect of the Employer's Corporate Representation Plan. Considering all that had gone before in the parties' relationship, it was quite predictable that the Union would take a stance that would be obstructionist rather than "constructive", from the Employer's point of view. Nevertheless, Article 39.08 was, and is, part of the Collective Agreement negotiated between the parties, so the Employer was obligated to try. It had to give the Union an opportunity for input even if it was quite predictable that nothing would be offered that would be useful from management's point of view. Even more clearly,it had to give the Union the kind of "impact" information that was not given until the local consultation on February 20, 1987.

In the last two months of 1986 and the first two months of 1987 the Employer's concern with picketing and leafleting at the Willowdale Mall was prospective, even if predictable. For purposes of my decision with respect to the franchise at the Willowdale Mall it adds nothing, and cannot excuse the Employer in its failure to hold constructive consultations before committing itself to that franchise. The same is true of the fact that the parties have not subsequently been able to agree on franchising. The Employer's fear that the Union would use any information given to harass future franchises is far from groundless but the Employer did not have to disclose the identity of the franchisee. Moreover, the Union was limited by the general law in its capacity to bring pressure on the franchisee. Pressure within the limits of the law is

surely a fact of business life. In sum, the Employer's four submissions have not satisfied me that its failure to hold "constructive consultation" before granting the Willowdale franchise to Sheldon Manly Drugs was the Union's fault.

Insofar as this award concerns the Employer's failure to hold constructive consultation with respect to subsequent franchises , the Employer's four submissions on whether the Union has been ready and willing to hold constructive consultation are much more relevant. The Employer was, and is, entitled to take into account the Union's actions at the Willowdale Mall and its other subsequent attempts to pressure individual franchisees. Whatever might otherwise be the case, in these circumstance I do not think the Employer is obliged to disclose the identity of potential franchisees or, what amounts to the same thing, the exact location of a potential franchise, until the terms of the franchise arrangement have been worked out. Only then, but still prior to binding itself contractually to the franchisee, does the Employer have an obligation to give the Union sufficient information to allow it to both (a) have input into the final decision to enter the franchise and (b) deal with the impact of the franchise on its members.

At that stage, information about which postal station will be closed or seriously affected, and about costs and revenues must be given. This information may very possibly allow the Union to identify the franchisee. Ultimately,

however, neither the Employer nor its business partners has any claim to be insulated from Union pressure, provided of course that the Union's means were lawful.

"National" or "local" consultation. For the reasons given in my Atlantic Region award, above, I think it is for the Union to decide whether consultations under Article 39.08 were to be carried out by its national officials rather than local officials. As I point out there, the collective agreement in various places makes reference to "local consultation". Article 39.08 is not one of them, so it must be for each side to determine who its spokesman will be, subject to its obligation not to make that a cause for unreasonable delay.

"Constructive consultation" imposes no absolute obligation that information be given in writing, rather than at a meeting. Provided it is sufficiently far in advance, I can see nothing wrong with the Employer providing information at a meeting, as it did at the meeting of February 20, 1987, and then allowing the Union an opportunity to require more specifics. Unavoidably, management must make a judgment whether the specifics requested go beyond what is necessary for the Union to have real input into the decision to give work outside and to deal with its members with respect to the impact on them from any such decision. It is perfectly legitimate in that context for management to take into account what the Union already knows and to govern itself according to the stage of

its business negotiations with franchisees, but the probability that the parties will not reach any agreement will not release the Employer from the obligation that it undertook in agreeing to Article 39.08(a).

3. Having concluded that the required constructive consultation did not occur before the Employer committed itself to the Sheldon Manly Drugs Ltd. franchise at the Willowdale Shopping Centre, what is the appropriate remedy?

The Union's first request was that I order compliance with the Collective Agreement by directing the Employer to revert to the situation before February 20, 1987, engage in constructive consultation and only then, if it is still inclined to close Postal Station "C", enter into a franchise at the Willowdale Shopping Centre. This would, of course, necessarily involve the Employer in a breach of its obligations under the franchise contract. On that I am still of the view which I expressed in CUPW National - Sub-Post Office Contract Renewals (1986); CUPW No. N-1000-H-8; CPC No. 86-1-3-648) at p. 18:

> 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. ...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.

To take any other approach as a general rule would be to license the Employer to disregard its obligation to hold constructive consultation.

However, I am not prepared to order the Employer here to breach its franchise contract with Sheldon Manly Drugs Ltd., for two reasons: (1) The ramifications for the Employer, and for Sheldon Manly Drugs Ltd., would probably be very serious, whereas the potential gain for the Union would, quite predictably, be very slight. Here, the fact that no agreement has been reached with respect to franchising notwithstanding the extended national negotiations, a conciliation report and a national strike-lockout, is relevant. I can see now with even greater certainty than the parties could have had in late 1986 and early 1987 that imposed "constructive consultation" after the fact will not result in greater benefits for the Union and its members. (2) Most important, the obligation to engage in "constructive consultation" in the context of franchising is an amorphous obligation which, prior to this award had not been elaborated on in any arbitration award. Certainly no prior award has been brought to my attention.

The similar phrase "meaningful consultation" in Article 14.02(c) has been elaborated somewhat and the phrase "constructive

and meaningful consultations" in Article 29.05 has been considered with some care. However, the first phrase is different and, as I have already said, the latter phrase occurs in the context of some very specific obligations which arise where there is to be a technological change. This is the first award in which Employer activities have been tested against the specific requirements of Article 39.08. Therefore, it is not appropriate to make the Employer pay such a heavy price, with so little legitimate potential gain for the Union, simply because the consultations which it held have been found not to have met the requirements of Article 39.08, in terms of timing and content.

Article 9.43 gives this award some binding effect in future cases. Therefore, to the extent that, in the granting of future franchises, the Employer fails to live up to its now somewhat clarified obligation "to hold constructive consultation" an order for specific performance such as that sought here may then be justified.

Damages. Relying on the following statement in my Atlantic Region award, cited above, counsel for the Employer submitted that damages should be awarded here. In that award I said at pp. 28, 29, 30 and 31:

> In principle, therefore, I have no difficulty in concluding that a failure to live up to an obligation to consult with the Union may give rise to an award of damages to the employees, or some of the employees, that it represents. I refer to the decision

> of a Board of Arbitration of which I was chairman in Burrard Yarrows Corporation, Vancouver Division (1981), 30 L.A.C. (2d) 331, in which "Blouin Drywall" damages were awarded where work that might have been done by a union's members was contracted out without prior consultation with the Union, as required by the collective agreement. By "Blouin Drywall" damages I mean an award of damages to the Union as trustee for distribution to those of its members who it ascertains have in fact suffered by the breach in question. See Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1973), 4 L.A.C. (2d) 254 (O'Shea): quashed 6 L.A.C. (2d) 34n. 48 D.L.R. (3d) 191, 4 O.R. (2d) 423 (Ont. Div. Ct.); restored 9 L.A.C. (2d) 26n. 57 D.L.R. (3d) 199, 8 O.R. (2d) 103 (Ont. C.A.)...To establish that employees suffered a loss which is to be compensated by damages, the Union must satisfy me that there was at least a chance that the consultations would have resulted in changes that would have meant more money for the employees. See Burrard Yarrows Corporation, Vancouver Division, supra, at pp. 340-7. ...

In Atlantic Region I concluded it was not very likely that the Employer would have made any but minimal changes as a result of the "meaningful consultations" that should have taken place and awarded no damages. However, in his award in Mervold, cited above, arbitrator Norman did award damages to compensate employees because he concluded that proper consultation would have delayed a change by at least two weeks.

At the end of the argument by counsel for the Union, on the final day of hearings in this matter, I asked him to specify what damages the Union actually seeks in this case. After a brief recess he made three submissions: (1) that there should

be compensation for any lost wages or losses due to the impact of relocation of employees displaced by any of the eight franchises that are now open; (2) that the Union should be compensated for lost union dues; (3) that if I accept that damages are appropriate in the circumstances I should reconvene to determine not only the quantum but the appropriate areas in which damages might be said to have arisen.

With respect to (1), throughout six days of hearings I heard no allegation of any breach of Article 39.08(b), which provides that where bargaining unit work is given outside "the Corporation agrees that an alternate position will be offered to any employee who performs such work". Loss of wages would be more likely to flow, it seems to me, from a breach of that paragraph than from any failure to "hold constructive consultation" in accordance with Article 39.08(a). Possibly, if constructive consultation had resulted in a franchise not being granted to Sheldon Manly Drugs Ltd. what counsel called "relocation impacts" might have been avoided, but there was not a bit of evidence on relocation impacts actually suffered by any individual employees as a result of the granting of the Willowdale franchise. I will not reconvene this hearing on the basis of any such tenuous claim.

Although I have found that the Employer failed to hold constructive consultation with respect to the granting of the Willowdale Shopping Centre franchise to Sheldon Manly Drugs Ltd. but I have not found any breach of Article 39.08(a) in

respect of the adoption by the Employer of its franchising plan generally. There was no case put before me with respect to the other seven franchises which, according to counsel for the Union, have now been granted. I can reconvene the hearing in this matter to assess the quantum of damages but I do not think I should do so to hear evidence on the whole new question of whether there is Employer liability for failure to hold constructive consultation in respect to those other seven franchises.

In respect of the second head of damages submitted, lost union dues, the evidence falls far short of establishing that failure to hold constructive consultation in respect of the grant of the franchise at Willowdale Shopping Centre to Sheldon Manly Drugs Ltd. caused any loss of union membership and therefore loss of union dues to the Union itself. On the national level, if the Employer substitutes franchises for postal stations, either for existing postal stations or for postal stations which would otherwise have been opened, Union membership across the country may suffer as a result, although the ruling of the Canada Labour Board might change that. However, in this award I have not found that there has been a failure "to hold constructive consultation with the Union prior to having the work...given outside" in respect of the adoption by the Employer of the franchising aspect of its Corporate Representation Plan. Loss of union membership, or potential union membership, as a result of the Employer's failure "to hold constructive consultation with the Union" would, therefore, have to be proven

in relation to the grant of each particular franchise, which, as I have said, would raise questions well beyond merely assessing the quantum of damages flowing from established liability.

The third submission by counsel for the Union with respect to damages amounts to a request to keep the whole remedial aspect of this case open for new evidence and argument. Counsel for the Employer submitted, almost equally sweepingly, that since it was obvious that "constructive consultation" would not result in any change of mind on the part of the Employer with respect to franchising, either in the general policy or in the particular instance at Willowdale, neither the Union nor its members had lost a chance that was worth anything. Because I have concluded that the general adoption by the Employer of franchising as a constituent element of its Corporate Representation Plan did not constitute "having the work usually done by the employees of the bargaining unit given outside", I do not have to deal with these broad assertions in respect of any union claim for damages flowing from that alleged breach. With respect to the Willowdale franchise, I do not think it appropriate to simply keep this case open for a whole new argument by the Union, and evidence to support it.

I trust, however, that what I have already said will preclude the Employer thinking that my failure to grant damages here amounts to a free ticket to grant further franchises without holding the "constructive consultation with the Union" required by Article 39.08, prior to work usually done by

employees of the bargaining unit being given outside.

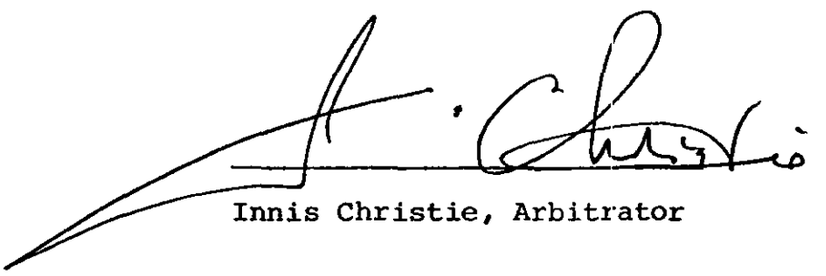
4. In closing, I return to the fact that there was a technical breach of Article 13.15 in this case. The Union was not advised ninety days in advance of a change in the list of large postal establishments, offices and sections thereof, which would result from the closure of Postal Station "C" and the substitution for it of the Sheldon Manly Drug Ltd. franchise at the Willowdale Shopping Mall. The Union was first advised on December 8, that Postal Station "C" would be closing January 31, which amounted to notice short by well over a month. In fact Postal Station "C" did not close until the 28th of February, so the notice proved to be short by only just over a week. I heard no submission on behalf of the Union as to what remedy was appropriate for this breach, and there is no evidence to suggest that the Union or its members suffered any economic loss as a result particularly of the short notice.

The submission on behalf of the Employer was that a longer notice could not have been given because the Employer was under notice of termination of its lease from the landlord, and it took time for that notice to get from the operations people who received it to the labour relations people who gave the resultant notice under Article 13.15 to the Union. It suffices to say that if real consequences for the Union of the short notice had been established before me I would have held the Employer to be the author of its own misfortune. However, since no adverse

effects followed specifically from the one week of short notice this breach, too, attracts no remedy.

In sum, I find that the Employer breached Article 39.08(a) of the Collective Agreement by failing to hold constructive consultation prior to granting the franchise to Sheldon Manly Drugs Ltd. in the Willowdale Mall. I do not, however, order the Employer to withdraw from that franchise agreement, nor do I order the payment of any damages in respect of that breach. I find that the Employer did not breach Article 39.08(a) by adopting the franchise aspect of its Corporate Representation Plan without prior constructive consultation with the Union. However, such consultations must be held before the Employer commits itself to any particular franchise in the future, and should it fail to do so an order to withdraw from the franchise may be held to be appropriate in any resulting arbitration, as may an order for payment of any damages that are proven. I have made no specific findings with respect to the information requested by the national president of the Union in his letter of March 4, 1987, but I have addressed generally the question of what information must be provided if consultations are to be "constructive". I find also that the Employer breached Article 13.15 by giving about one week less notice of a change in the list of large postal establishments than is required by that provision. I am not satisfied that either the Union or any of its members suffered any financial loss as a result

of the Employer's breaches of Article 39.08(a) and Article 13.15, so I do not retain jurisdiction to determine the quantum of damages. I do retain jurisdiction to deal with any other questions about the interpretation or application of this award which arise directly from the terms.



Innis Christie, Arbitrator