2-12-1988

Re Canada Post Corp and CUPW

Innis Christie
Dalhousie University Schulich School of Law

09:0259

IN THE MATTER OF AN ARBITRATION

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

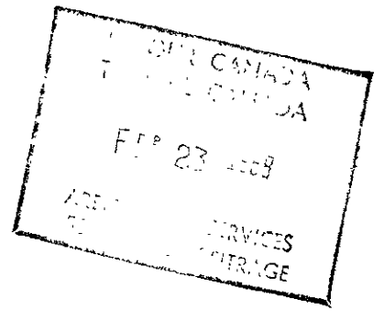
AND:

088057006

CANADA POST CORPORATION (The Employer)

Re: Moncton Local (The Grievor)
Changes to Annual Leave Practice
C.U.P.W. Grievance No. 078-85-00436
C.P.C. Arbitration No. 87-1-3-6087

Before: Innis Christie (Arbitrator)



At: Moncton, New Brunswick

Hearing Date: October 27, 1987

For the Union:

Raymond Larkin	-	Counsel
Ted Penney	-	C.U.P.W. Representative, Atlantic Region
Ron Paschal	-	President, Moncton Local C.U.P.W.
Carolyn Gaynor	-	1st Vice President, Moncton Local, C.U.P.W.
Charles Poirier	-	2nd Vice President, Moncton Local, C.U.P.W.
Huguette LeBlanc	-	Technical Assistant
George Bourgeois		

For the Employer:

Terry Roane	-	Counsel
Wally Legge	-	Manager, Labour Relations, Atlantic Division
John Tanguay	-	Plant Manager, Moncton
Rick Herrichs	-	Relief Supervisor

Date of Decision: February 12, 1988

Union grievance alleging breach of the Collective Agreement between the parties for the Postal Operations Group (Non-Supervisory): Internal Mail Processing and Complementary Postal Services, which expired September 30, 1986 and remains in force pursuant to the Postal Services Continuation Act, 1987, and in particular that the Employer breached Articles 19.14 and 19.15 by changing certain annual leave practices in Moncton. The Union requests an order that the Employer revert to previous practice.

At the outset of the hearing the parties agreed that I am properly seized of this matter, that I should remain seized after the issue of this award to deal with any matters arising directly from its interpretation or application at the request of either of them, and that all time limits, either pre- or post-hearing, are waived.

A W A R D

The Facts:

This award flows from Moncton Local's grievance against changes that management has sought to make unilaterally in local practices related to vacation leave scheduling and the allocation of annual vacation time to particular employees. To a considerable degree these matters are left by Articles 19.14 and 19.15 of the Collective Agreement to be governed by a "local Union/Management consultation" and "present practice".

The matters particularly in dispute are: (1) Whether the periods from which employees can select their annual vacation

leave must include the week in which Christmas falls; (2) whether employees can be required to have the approval of their shift superintendents before they are allowed to cancel a period of vacation leave which they have selected by bid and then select another available period or periods; (3) whether the entitlement of employees to select single days and other vacation periods of less than one week (where those days or periods are available) can be made subject to "operational requirements" and to being "requested seven (7) calendar days prior to the period in question"; and (4) whether, once all employees have put in their annual vacation bids, any unbid leave periods can then be deleted from the vacation leave schedule. These questions can be answered on the basis of the Collective Agreement, particularly Articles 19.14 and 19.15, and, because those clauses refer to "local Union/Management consultation" and "present practice" on the basis of any binding local arrangements and practices established on the evidence before me.

These two provisions of the Collective Agreement mainly in issue here provide:

> 19.14 Vacation Leave Scheduling
>
> The vacation leave schedule for an employee will be spread over thirty-nine (39) weeks starting either with the last Monday in March or the first Monday in April and continuing in three (3) week blocks for thirty-six (36) consecutive weeks. The remaining three (3) week block will be scheduled in March of the following year. Alternate arrangements may be made by mutual agreement determined through local Union/Management consultation.

One schedule is established for each class of employees.

19.15 Number of Employees on Vacation Leave

(a) The present practice will continue with respect to:

(i) The determination of the number of full-time employees who may be on vacation leave in each three (3) week block;

(ii) The allocation of vacation leave on the basis of seniority with regard to:

a) The choice of the block in which the full-time employee wishes to take his vacation leave;

b) The amount of leave he may take in each block;

c) The granting of a fourth (4th), fifth (5th), sixth (6th) or seventh (7th) week of vacation leave to those full-time employees qualifying for the extra week's leave;

(iii) The granting of leave during January and February if full-time employees so request;

(iv) The bidding for leave by work area or by office.

(b) Part-time employees will be entitled to vacation leave at a time determined by the Corporation in meaningful consultation with the local of the Union.

There is little dispute about the relevant facts. I turn first to the "Christmas week" issue. It is not clear, nor does it matter, when the annual vacation leave schedule was first spread beyond the thirty-nine weeks provided for in Article 19.14. On the evidence of Ted Penney, Union Representative for the Atlantic Region throughout the period, the calendar week including New Year's Day was always agreed upon as part of the vacation leave schedule. That evidence was not disputed. Nor is there any dispute that in 1983 the week of Sunday, December 25 to Saturday, December 31 was included in the annual leave schedule. It is also clear that the annual leave schedule for 1984-85 included Christmas week, beginning Sunday, December 12 and ending Saturday, December 29.

The inclusion of the 1984 Christmas week in the annual vacation schedule was not purely a matter of "local consultation". Vacation leave scheduling consultations in the early months of 1984 were marked by the Employer's attempt to change the way employees had been allowed to select their annual vacation leaves in the previous year, which resulted in a grievance, C.U.P.W. No. A-59-GG-522 ("Grievance 522", for short). I will deal more fully with that grievance and its disposition in connection with the other issues which I consider below. Here, it must be noted that Grievance 522 made no specific mention of the Christmas week issue, other than its possible inclusion in the sentence, "The Employer has changed the present practice at the Moncton Post Office with respect to the selection of

vacation leave for the 1984/85 fiscal year". However, in Union Management meetings following the filing of the grievance the Union proposed, among other things, that "The period of December 23 to 29 be open to the same number as non-summer". More important, in the document entitled "FINAL TERMS OF SETTLEMENT" Grievance number A-59-GG-522, Arbitration number CPC A-84-1-3-4754, Moncton Local" dated July 4, 1984 and signed by I. Z. Goguen, Superintendent, Mail Processing and Ted Penney, C.U.P.W. Grievance Officer, on the last page the following sentence appears:

> (6) The last week of December will be open to the same number of employees as during the non-summer periods.

According to the evidence there was some problem with the implementation of this grievance settlement. However, it is undisputed that the vacation schedule for fiscal 1984-85 covered a fifty week vacation leave schedule and specifically included Christmas week, from December 23 to December 29.

There is no dispute that fiscal 1985-86 was the same as the preceding year in this respect, except that Christmas week ran from Sunday December 22 to Saturday December 28. This is reflected in a letter from Mr. Penney to Hugh Currie, Labour Relations Officer for the Employer's Atlantic Postal Division,dated June 12, 1985:

RE: MONCTON LOCAL GRIEVANCE - A-59-GG-522 - VACATION LEAVE

> This is in reference to our telephone conversation of June 7, 1985, confirming that management at the Moncton Post Office have agreed to follow the present practice with respect to vacation leave scheduling in line with the final terms of settlement for the above-mentioned grievance. In particular, management has agreed that, in accordance with present practice, the vacation leave schedule will be spread over a period of 50 weeks, including the two-week period from December 22, 1985 to January 4, 1986.
>
> For greater clarity and understanding, this is to confirm that the 50-week vacation leave schedule for 1984-85 included the two-week period from December 23, 1984 to January 5, 1985, and the vacation leave schedule for the fiscal year 1986-87 will include the two-week period from December 21, 1986 to January 3, 1987.

At the beginning of January 1986 Management entered into local consultations with the suggestion that the whole month of December be excluded from the annual vacation leave schedule. A letter of January 2, 1986 to Mr. R. Poley who was then President of the C.U.P.W. Local, from John Tanguay, the area postmaster, included the statement:

> Furthermore, it is proposed that the vacation leave scheduling for 1986/87 be spread over forty-seven weeks commencing the 31st of March, 1986 until the 28th of March 1987 excluding the month of December.

On January 4 Mr. Poley replied:

> We have reviewed your proposals on Vacation Leave Bid and see no need for consultation. We have no problem with the past practice and wish to start bidding immediately. Sustained grievance A-59-GG-522 outlines criteria as same as last year. ...

I am not clear on the documentation before me just how this dispute about inclusion of the month of December 1986 in the annual vacation leave schedule was settled, but there was no dispute between the parties that in fact the annual vacation schedule for fiscal 1986-87 was the same as for the preceding two years. That is, it extended over fifty weeks starting Sunday March 30, ending with the week finishing December 6 and beginning again on Sunday December 21. It thus included Christmas week.

The effect of year to year calendar changes is that, whereas in 1983 Christmas week started on December 25, in 1986 it started on December 21, in 1987 it started on December 20 and in 1988 will again start on December 25. From the Employer's point of view there is an obvious disadvantage in including pre-Christmas days in the annual vacation schedule, a disadvantage which does not arise from including post-Christmas days because then the worst of the Christmas rush is over. In any event, early in January 1987 the Employer posted a document entitled "ADMINISTRATIVE PROCEDURES, VACATION LEAVE 1987/1988 MONCTON, N.B.", which I set out fully below, in connection with the other issues before me, the relevant paragraph of which stated:

> 6. As per previous agreement, there will be only one additional week in December, ie; the last week.

As I have already said, this is one of the aspects of the Employer's unilateral promulgation which was grieved and is now before me.

There was some suggestion that the proper interpretation of the phrase "the last week" is an issue before me; that is whether that phrase referred to the last full week in December or to the last week beginning in December. It is clear to me, however, that the real issue is whether the Employer is obliged to include Christmas week, that is the week including Christmas Day, in the annual vacation leave schedule, and that is the issue with which I will deal below.

Unfortunately, perhaps, in the three and a half months since the hearing in this matter Christmas 1987 has come and gone. I do not know how this issue was finally dealt with for December 1987. Because the Union has not requested any financial compensation in this matter it would seem to me that the conclusion that I reach below will dispose of the Christmas week issue but, if not, I have remained seized of this matter to deal with issues of interpretation and application arising directly from this award.

I turn now to the facts relevant to issues other than the inclusion of Christmas week in the annual vacation schedule. As I have already mentioned, early in 1987 John Tanguay, the Moncton Plant Manager, posted a set of "ADMINISTRATIVE PROCEDURES, VACATION LEAVE 1987/1988" decided upon unilaterally by the Employer. The posting, in its entirety, stated:

1. All annual leave entitlements for each fiscal year must be bid prior to end of March or the commencement of the next fiscal year.

2. Forty-eight (48) hours will be the maximum amount of time allowed to select vacation leave periods. Employees who do not bid within 48 hours will be either bypassed and/or vacation leave being assigned. [sic]

3. Cancelling of vacation leave and/or exchanging leave with or without other employees must be approved by the respective shift superintendent. Exceptional circumstances will only be allowed. [sic]

4. Vacation leave periods of less than one week will be subject to operational requirements and requested seven (7) calendar days prior to the period in question. Where practical, the shift Supt. can waive the 7 day requirement.

5. Ten (10) week summer period in 1987 will be from June 28th to September 5th.

6. As per previous agreement, there will be only one additional week in December, ie; the last week.

7. Following the vacation leave bid, all remaining leave periods that are vacant will be depleted from the 87/88 vacation leave schedule. Vacant periods will only be re-opened for exceptional circumstances.

In essence the Union's grievance is that, in a number of respects, these "procedures" run contrary to the "present practice" which, by Article 19.15(a), is to "continue". My findings of fact may, therefore, be conveniently stated by relating them to each of the numbered paragraphs on the Employer's document.

1. The practice has been to bid annual leave entitlements

for each fiscal year prior to the end of March, and it appears to be in everybody's interest that this be done. In the past, leave selections have been made after the end of March but only in respect of brief periods that were vacant either because they had never been selected or because a selection had been cancelled.

2. Forty-eight hours to select vacation periods is roughly what has been allowed in the past. Management has exercised some discretion where selection has been made a bit late for good reason. There has been no established practice of assigning vacation leave to an employee who has failed to select. The practice appears to have been to simply bypass any such employee.

3. There has been no practice of allowing employees to exchange leaves. To some extent exchanges have been able to be accomplished, but only by following the cancellation and re-selection procedures, which have built into them a good deal of protection for seniority. Cancellation of vacation leave at the election of the employee, without approval by his or her shift superintendent, has been the clear practice.

Mr. Penney and Mr. Paschal testified with respect to the practice of cancelling and re-selecting vacation leave and Mr. Tanguay, explicitly, did not contradict their testimony.

4. The practice in Moncton has been to allow employees to select vacation leave periods of less than one week and, indeed, of one day, provided those periods fall within a leave period

that is vacant either because it was never bid or because selection of it was cancelled. By "vacant" I mean a period in which the maximum permitted number of employees have not elected to take their annual vacation leaves. Entitlement of an employee to select a leave period of less than one week, or of a day, has never been "subject to operational requirements". As far as operational requirements have been a concern they have been met in setting the maximum number of employees who can be on leave in any particular period. There has been no requirement that vacation leave periods of less than one week, or of a day, have to be requested "seven (7) calendar days prior to the period in question". Indeed, the clear practice has been that such a selection has only to be made "at least one day ahead", that is on the preceding shift.

In finding that these have been the clear practices I do not find that the Employer has been happy with them. It is clear, though, that prior to the 1983-84 vacation year, on February 23, 1983, Mr. Tanguay, then the Postmaster, wrote to the Secretary of the Union Local with the "Management Submission" on the annual leave schedules for that period. After setting out the maximum number of employees in various categories who could be on leave Mr. Tanguay stated as follows:

> Cancelled complete weeks of vacation leave will be posted for a seven day period and given to senior employee indicating a wish.
>
> If no bid is received, vacation period will be given on a first come, first served basis.

> Employees may select single days after completion of bidding if openings within the maximum agreed to number of openings on condition that it is indicated at least one day ahead.

This was established as the practice for the 1983-84 vacation year. In consultations with respect to the next fiscal year, the 1984-85 vacation year, the Employer suggested changes. The total work complement had been reduced, and the average annual leave was longer so the Employer, quite understandably, made an attempt to bring the very liberal annual vacation leave practice which had been followed in the previous year under control. In response, the Union filed Grievance 522, to which I have already referred in discussing the facts relating to the Christmas week issue. The document settling that grievance, entitled "FINAL TERMS OF SETTLEMENT, Grievance number A-59-GG-522, Arbitration number CPC A-84-1-3-4754, Moncton Local" dated July 4, 1984 and signed by I. Z. Goguen, Superintendent Mail Processing, and Ted Penney C.U.P.W. Grievance Officer, restates, word for word, the provisions of Mr. Tanguay's letter of February 23, 1983, quoted above, with respect to these matters. It adds the explicit statement:

> It was agreed that "one day ahead" is equated to mean the employees' previous shift.

That was the way things stood until January 2, 1986 when Mr. Tanguay, at that point Area Postmaster for Eastern New Brunswick, wrote to Mr. Poley, the President of the C.U.P.W. Local, setting out his proposals for the scheduling of annual

vacation leave for the forthcoming fiscal and vacation year. Part of that proposal stated:

> Vacation leave periods of less than one week shall be subject to operational requirements and requested seven (7) days prior to the period in question.

The Union, however, insisted that things continue to be done as they previously had, and in accordance with the agreed settlement of Grievance 522. The evidence is that that was, in fact, the case for the vacation year 1986-87.

5. The timing of the "summer period" is irrelevant here.

6. I have dealt with the "Christmas week" issue.

7. The evidence in connection with paragraph 4 of the Employer's "ADMINISTRATIVE PROCEDURES" document is, of course, highly relevant here. The practice has not been to delete vacant vacation leave periods from the schedule. Rather, they have been available,upon only one shift of notice,to employees who have not yet bid their full vacation period or who exercise what, in practice, has been their right to cancel previously selected vacation periods.

A good deal of the testimony called by counsel for the Employer went to show how difficult, indeed unreasonable, it is for the Employer to have to meet operational requirements with the very liberal arrangements for the selection of annual vacation leave which have been in place in Moncton. I have no doubt that those difficulties are real.

Submissions of Counsel:

Counsel for the Union submitted that the inclusion of Christmas week in the annual vacation leave schedule was an established practice, that it had been set by agreement of the parties and was part of the settlement of Grievance 522, and therefore could not be changed. He submitted that "the present practice" referred to in Article 19.15(a) of the Collective Agreement is the practice that was in place on April 2, 1985, when the current Collective Agreement was signed. He submitted that that practice, which Article 19.15(a) provides "will continue", is the whole seniority based system of allowing employees to select their vacation leave periods in order of seniority, to cancel those periods or part of them, and to re-select cancelled complete weeks on a seniority basis; then if a period is left open, including single days, to allow those periods to be selected on a first come, first served basis provided there is one shift's notice. In his submission my task is to determine what the "present practice" was on the date of the signing of the Collective Agreement and then to decide whether it was a practice within the terms of Article 19.15(a)(i)-(iv). Any practice found to exist which falls within one of those sub-paragraphs cannot, in his submission, be unilaterally changed by the Employer.

Counsel for the Employer submitted that the changes made by the Employer were within management's rights set out in Article 2.01 and did not infringe upon practices enumerated in Article 19.15(a). Specifically, with respect to the Christmas

week issue, she submitted that the agreement referred to in Mr. Penney's June 12, 1985 letter to Mr. Currie related to Christmas 1986 and did not govern what the parties might agree on as a result of consultations in the following year. In her submission, no such agreement was reached for 1987-88.

With respect to the cancellation of selected annual vacation leave periods and the selection of single or casual vacation leave days, counsel for the Employer submitted that these were not included within the enumerated matters with respect to which "present practice will continue" in accordance with Article 19.15(a). In her submission the terms of the settlement of Grievance 522 related to such matters in the year which was the subject of the grievance and were not intended to bind the Employer to those details of practice in subsequent years. It was unthinkable, she submitted, that the Employer would agree to so limit its control with respect to the selection of annual vacation leave for any longer period.

The Issues:

(1) Is the Employer precluded from establishing an annual vacation leave schedule which does not include Christmas week by (a) practice, (b) agreement or (c) the settlement of Grievance 522?

(2) What is the relevant date for the determination of "present practice" in the application of Article 19.15?

(3) Does "present practice" with respect to any of the matters enumerated in Article 19.15(a)(i)-(iv) preclude any of the

"Administrative Procedures" unilaterally established by the Employer with respect to vacation leaves for 1987/1988 being put into effect?

Decision:

The issue of whether or not Christmas week must be included in the annual vacation leave schedule falls to be determined under Article 19.14, not under Article 19.15. Article 19.14, it will be recalled, provides that vacation leave schedule will be spread "in three (3) week blocks" over thirty-nine weeks and then further provides

> Alternate arrangements may be made by mutual agreement determined through local Union/Management consultation.

There is simply no part of Article 19.15 which addresses "present practice" with respect to the period over which the vacation leave schedule will be spread. Sub-paragraph (a)(i) is concerned with the number of full-time employees who may be on leave in each block. Sub-paragraph (a)(ii)a) is concerned with "the choice of the block in which the full-time employee wishes to take his vacation leave". I suppose if Christmas week is not available the choice for a full-time employee is somewhat restricted but, grammatically, this provision is clearly concerned with the making of the choice among the blocks that have been made available under Article 19.14, not with maintaining the availability of particular blocks. The same is true of the provision in sub-paragraph (a)(ii)b) which is concerned with "The amount of leave [a full-time

employee] may take in each block".

The point is that "present practice" is only of significance with respect to the matters covered in Article 19.15 (a)(i)-(iv). Since inclusion of Christmas week in the vacation leave schedule does not fall within any of those subparagraphs "the present practice" with respect to Christmas week is not given any continuing binding effect by Article 19.15.

As I have already mentioned, the vacation leave schedule may be spread beyond thirty-nine weeks "by mutual agreement determined through Local Union/Management consultation". There is no question that that has been done in the past and that, at least since the Christmas of 1983, Christmas week has been included in the vacation leave schedule. However, I have concluded from the evidence before me that this has been a matter of mutual agreement for each separate vacation year. I do not read in any of the documents as establishing, nor am I satisfied from the testimony, that the Employer has agreed for all time, or for the life of this Collective Agreement, that it will include Christmas week in the vacation leave schedule. The agreement to do so has been on a year to year basis.

The settlement of Grievance 522, as clarified by Mr. Penney's letter to Mr. Currie, addresses specifically Christmas week of 1985 and Christmas week of 1986. It refers to "present practice", but as I have already said, present practice is irrelevant to the Christmas week issue because

this is a matter under Article 19.14, not under Article 19.15. I am no more satisfied that the settlement of Grievance 522 binds the Employer with respect to future Christmas weeks than I am satisfied that the Employer is bound by any other agreement.

In the future, the Employer is free to exclude Christmas week from the vacation leave schedule. In so doing it need not rely on management rights under Article 2.01, because Article 19.14 itself is quite clear about the spread of the vacation leave schedule, in the absence of alternate arrangements made by mutual agreement through local Union/Management consultation. On this issue the Union's grievance fails.

As I have already commented, when this matter was before me there may have been an issue with respect to the meaning of the Employer's "ADMINISTRATIVE PROCEDURES, Vacation Leave 1987/1988" document, where it states that "There will be only one additional week in December, ie. the last week". Christmas 1987 is now in the past so I need not concern myself here with whether "the last week" as used there referred to the last full week or the last week partly in December 1987:

(2) Counsel for the Union addressed the issue of the meaning of "the present practice" in Article 19.15(a). I accept his submission that this refers to practice at the date of signing the current Collective Agreement, that is April 2, 1985. There was no serious dispute about this, and adjudicators under the Public Service Staff Relations Act and arbitrators

under the current Collective Agreement and its predecessors seem to be of one mind on it. See adjudications under the Public Service Staff Relations Act between the Treasury Board on behalf of the Post Office Department, and this Union; File Nos. 169-2-141, at p. 6 (November 9, 1978 - Clarke, adjudicator); 166-2-6732, at p. 7 (October 31, 1979 - MacLean, adjudicator); 166-2-8808, at p. 9 (October 30, 1981 - Abbott, adjudicator) and awards between these two parties in CUPW No. W-387-GG-14; CPC No. 82-1-3-2162 (August 30, 1983 - McKee) and CUPW No. A-9-GG-411; CPC No. 83-1-3-3982 (March 16, 1984 - Thistle).

(3) The issue of whether the "present practice" precludes the unilateral implementation of any of the provisions of the Employer's "ADMINISTRATIVE PROCEDURES, Vacation Leave 1987/1988" turns not only on the evidence of "present practice", which I have already set out, but also on the proper interpretation of the term "practice" in this context, and on the question of whether sub-paragraphs (i)-(iv) cover the matters set out in the Employer's document.

With respect to the meaning of the term "practice" in this context I was referred to a decision between these parties of March 24, 1986 (CUPW No. 1300-H-2-G-65-11-NAT; CP No. 85-2-3-18) by arbitrator Morin. The grievance there arose when the Union learned that the Employer intended, apparently in certain Quebec division post offices, "to apply the practice in effect in 1980-81 to annual leave for 1985-86". The Union requested

a ruling that the present practice referred to in Clause 19.15 was the practice in effect at the time the Collective Agreement was signed. On this point arbitrator Morin agreed with the awards cited above, at p. 7. The Union also requested "a ruling to the effect that the present practice applicable to annual leave in 1985-1986 is the practice in effect in 1984-1985". At p. 4 Arbitrator Morin says:

> To clarify his position and define the problem,counsel for the Union stated that the issue raised by this grievance (point 1) was limited to whether the practice followed in 1984-1985 was in fact that which should also be followed in 1985-1986 and did not involve a detailed explanation of the actual nature or terms of this practice.

Then, at p. 7, the learned arbitrator says:

> the expression "present practice" refers, in our opinion, to the proper procedure on that date, for the following reasons:
>
> - The parties chose to refer to this procedure or method for settling the issues in question, rather than spell out the content, undoubtedly because of the many different methods used by the parties,
>
> - This provision cannot be read as a freeze on the number of employees who may simultaneously take annual leave since the parties obviously intended to favour the opposite approach. Is the rule not to maintain the practice for determining this number? We must therefore conclude that this number is not necessarily set and fixed;

- The terms of this practice may vary considerably due to many factors; service requirements, local conditions or context, the habits and preferences of those involved, the understanding of local management, etc.;

- We must presume that the parties to the present collective agreement were familiar with these previous and present practices and the relevant arbitration case law. If they still used the same wording, we must therefore take this to mean that they accepted that those involved would maintain this procedure, either through special agreement or any other acceptable means actually used.

Thus, what is maintained is not the local agreement of 1985 but rather the practice of negotiating such agreements, barring which, the practice in similar situations applies. By this we mean that when the parties negotiated an agreement in 1985 in particular, they could not be certain of reaching one and thus had to consider an alternative, and it is that alternative that was to continue.

...

The expression "present practice" (19.15) refers to or means the method or procedure applicable to the parties on 10 March 1985, and not the solution or approach specifically agreed upon or actually in force on that same date.

I confess to some difficulty in understanding exactly what this means. Is it authority that "practice" in this context means "method or procedure" of determining, and not that which is determined? In my view sub-paragraphs 19.15(a)(i) and (ii) say somewhat different things. Under (a)(i) "The present practice will continue with respect to:

(i) The determination of the number of full-time employees who may be on vacation...". That, in my view, clearly speaks to the continuation of a process for determining. In that context I find the final paragraph of Arbitrator Morin's award to be entirely accurate. However, there is no dispute before me about the number of employees who were allowed to be on vacation in the 1987-88 vacation year or about the way in which those numbers were, or are to be, determined.

In my view sub-paragraph (a)(ii) of Article 19.15 is different. There, "The present practice will continue with respect to: ...(ii) The allocation of vacation leave on the basis of seniority with regard to:" the three matters set out in the following sub-sub-paragraphs [emphasis added]. This, it seems to me, equally clearly, speaks to a present practice with respect to allocation, not a practice for determining or deciding something. In this connection I agree with what Arbitrator Morin says in the second last paragraph quoted above. The parties can try to reach a new arrangement for allocating vacation leave on the basis of seniority but if they could not make a new arrangement "and thus had to continue an alternative" the "alternative that was to continue", according to this provision of the Collective Agreement would be the one that was in place on April 2, 1985.

In summary on this point, "the present practice" in Article 19.15(a) means, in relation to sub-paragraph (i), the practice of making a determination and, in relation to sub-paragraph (ii), the practice of "the allocation of vacation

leave on the basis of seniority with regard to" the specifics set out there. I do not understand that interpretation to be contrary to what Arbitrator Morin was saying in his award cited above, nor does it seem to me to be in any way inconsistent with the decision of Arbitrator Thistle in his 1984 award, cited above, to which I make further reference below.

I turn now to the details of the paragraphs in the Employer's "ADMINISTRATIVE PROCEDURES - Vacation Leave 1987/1988, Moncton N.B." which are the subject matter of this grievance. The question in relation to each paragraph is whether it runs contrary to "present practice" established by the evidence and, if so, whether the practice in question is one which according to Article 19.15(a) "will continue with respect to:

> (ii) The allocation of vacation leave on the basis of seniority with regard to:
>
> a) The choice of the block in which the full-time employee wishes to take his vacation leave;
>
> b) The amount of leave he may take in each block; ...

I have already suggested that sub-paragraph (i), which deals with the determination of the number of full-time employees who may be on vacation leave at any one time, is not in issue here, and the same is true of sub-paragraphs (a)(ii)c), (iii), (iv) and (b).

Dealing with the paragraphs in the Employer's document in turn:

1. All annual leave entitlements for each fiscal year must be bid prior to end of March or the commencement of the next fiscal year.

The evidence is that this is not contrary to "the present practice".

2. Forty-eight (48) hours will be the maximum amount of time allowed to select vacation leave periods. Employees who do not bid within 48 hours will be either bypassed and/or vacation leave being assigned.

This clearly relates to the practice described by sub-paragraph 19.15(a)(ii)a) "The choice of the block in which the full-time employee wishes to take his vacation leave". On the evidence, the forty-eight hour limit is consistent with "the present practice", provided it is applied with the exercise of some discretion where there are special circumstances. However, the second sentence is inconsistent with present practice insofar as it provides that vacation leave may be assigned. It would be consistent with present practice to simply bypass an employee who failed to make his or her selection within the time allowed.

3. **Cancelling of vacation leave and/or exchanging leave with or without other employees must be approved by the respective shift superintendent. Exceptional circumstances will only be allowed.**

I have concluded that cancellation and exchanging of leave are matters covered by sub-paragraphs 19.15(a)(ii)a) and b). They are aspects of the choice of the block and of the amount of leave an employee may take in each block.

On the evidence, exchanging leave, other than by cancellation and re-selection in accordance with the established process, is not part of "the present practice" and therefore, this rule goes too far in allowing for the exchanging of leave, even with the approval of the shift superintendent.

More important, the cancelling of vacation leave has been wide open, so the requirement of approval by the shift superintendent and the limitation to exceptional circumstances is a clear departure from "the present practice". This rule is, therefore, invalid under the Collective Agreement, and the grievance succeeds in this respect.

> 4. Vacation leave periods of less than one week will be subject to operational requirements and requested seven (7) calendar days prior to the period in question. Where practical, the shift Supt. can waive the 7 day requirement.

I have been forced to conclude that the taking of vacation periods of less than one week is clearly a matter that falls within Article 19.15(a)(ii)a) and, even more obviously, b), "The amount of time [an employee] may take in each block".

Paragraph 4 of the rules is a very considerable restriction on the rights of employees under "the present practice" which, since at least the 1983-1984 vacation year, has been to allow employees to select cancelled or unbid weeks of vacation leave on a seniority basis for a seven day period and after that on a first come, first served basis. Employees have been entitled to select single days after completion of bidding if there are

openings within the maximum agreed to, provided they have given notice on the previous shift. In this important respect as well, then, the grievance is allowed. Paragraph 4 is inconsistent with the Collective Agreement insofar as it makes the selection of vacation leave periods of less than one week subject to operational requirements and requires that they be requested seven calendar days in advance.

In his 1984 award cited above Arbitrator Thistle stated, at p. 41, in relation to a similar rule introduced by the Employer in the St. John's Post Office:

> The Union has argued that Condition Number Four is contrary to the present practice. There is nothing in the evidence to support a finding that changes to or cancellations of vacation leave after it has been bid can be made at the request of the employee and without the need to demonstrate exceptional circumstances exist. The Union did not argue that an employee should have the unilateral and unrestricted right to make changes once the leave is bid. In fact, it would be preposterous to conclude, given the nature of the bidding system by seniority, that an employee could make changes as he deemed necessary. I therefore find that Condition Number Four does not alter in any way what the evidence has demonstrated as being present practice.

I cannot disagree with Arbitrator Thistle with respect to what had, or had not, been established as "present practice" in the St. John's Post Office. Obviously, in Moncton the practice with respect to the aspects of annual vacation leave addressed by the Employer's proposed rules 3 and 4 is very liberal. Nevertheless, the Collective Agreement gives full effect to

"the present practice" and the evidence before me clearly establishes what that practice is.

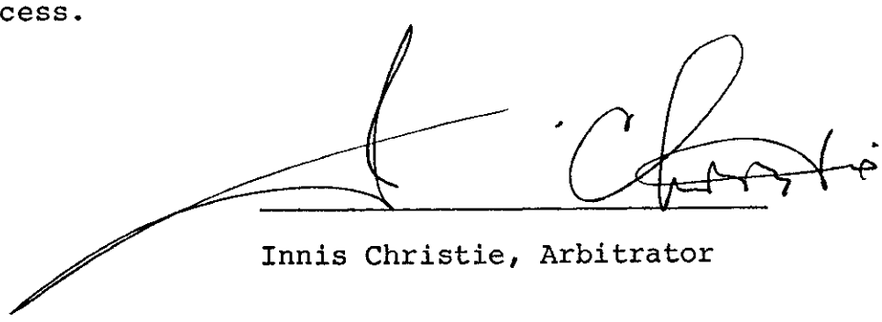
Paragraph 5 of the "ADMINISTRATIVE PROCEDURES, Vacation Leave 1987/1988, Moncton, N.B." is not in issue before me and I have already dealt with paragraph 6, which relates to the Christmas week issue.

> 7. Following the vacation leave bid, all remaining leave periods that are vacant will be depleted from the 87/88 vacation leave schedule. Vacant periods will only be re-opened for exceptional circumstances.

This paragraph clearly relates to sub-paragraphs 19.15 (a)(ii)a) and b) of the Collective Agreement. Also, it is clearly contrary to "the present practice" as established by the evidence. It is clear that the practice for Moncton is for employees to have the continuing opportunity to take any annual leave periods which are available because they have been unbid or as a result of cancellations, until the employees have exhausted their annual leave entitlements. This is subject, of course, to the limit on the number of employees who may be on annual vacation leave at any one time. Paragraph 7 is, therefore, in conflict with the Collective Agreement and cannot stand. In this respect, too, the grievance succeeds.

Conclusion: This Union grievance is denied insofar as it requests an order that Christmas week is to be included in the vacation leave schedule for a fiscal year where no such arrangement has been made by mutual agreement through local Union/Management consultation. The grievance is allowed

with respect of the Employer's "ADMINISTRATIVE PROCEDURES, Vacation Leave 1987/1988, Moncton, N.B.", specifically with respect to paragraphs 2, 3, 4 and 7, to the extent set out above. The Employer is hereby ordered not to infringe on present practice in those respects. If that practice conflicts with the Employer's view of its operational needs it will have to negotiate changes through the collective bargaining process.



Innis Christie, Arbitrator