7-12-1988

Re Canada Post Corp and CUPW (Hogan)

Innis Christie
Dalhousie University Schulich School of Law

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IN THE MATTER OF AN ARBITRATION

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

AND:

CANADA POST CORPORATION (The Employer)

Re: P. Hogan - Discharge (The Grievor)

C.U.P.W. Grievance No. 096-85-00903
C.P.C. Arbitration No. 87-1-3-13871

Before: Innis Christie, Arbitrator

At: Halifax, Nova Scotia

Hearing Date: March 28, 1988

For the Union:

Kimberley Turner - Counsel
Gordon Ash - C.U.P.W. Officer

For the Employer:

Daniel Campbell - Counsel
Joanne Harrington - Labour Relations Officer, Atlantic Division, Canada Post Corporation

Date of Decision: July 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 Article 10, in that the Employer discharged the grievor without just, reasonable or sufficient cause. The Union requests that the grievor be reinstated and compensated for all lost rights, benefits and earnings and that all reports, letters and documents relating to this discharge be removed from his personal file.

At the outset of the hearing the parties agreed that I am properly seized of this matter and that I should remain seized, with power to reconvene the hearing should any disagreement arise in the interpretation or implementation of this award. The parties also waived any time limits, either pre- or post-hearing, with respect to these proceedings.

A W A R D

On August 12, 1987 the grievor was discharged for assaulting a replacement employee on June 18, 1987, in the context of the legal strike by the Letter Carriers Union of Canada. At the hearing the grievor and the Union on his behalf admitted that the assault had occurred but took the position that discharge was not warranted. At the conclusion of the hearing I advised the parties that I would order the

grievor reinstated but reserved on the issue of the length of the suspension warranted by his misconduct.

On June 17, 1987 the grievor was an inside postal worker working on the City Floor at the Halifax plant. He was working the midnight to 8:00 a.m. shift, filling in on Registration. He testified that just before midnight on the 17th he learned that the Letter Carriers Union of Canada had gone out on a legal strike. The grievor testified that at about 3:30 a.m. on the 18th he was asked by supervisors to "do letter carriers work" and, when he refused, was sent home. When he left the plant he joined the L.C.U.C. picket line and remained there until about 3:00 p.m. on the 18th. At that time, the grievor testified, some mail trucks left the Halifax plant and he got into a car with two L.C.U.C. members to follow them, to see where they went. Eventually the car he was in arrived at the Atlantic Fair grounds, where he and his companions learned that a number of cabs had been sent out carrying temporary employees to deliver mail.

The grievor testified that he and his L.C.U.C. companions then proceeded to the downtown area of Halifax, he said to take down the numbers of the cabs being used in the mail delivery operation. When they encountered one of the cabs parked in front of the Household Finance office on Quinpool Road they parked just across the street, on Preston Street. The three of them then walked across the street with the intention, according to the grievor, of intimidating the

temporary mail carriers in the cab. At that point, according to the grievor, he was very tired, not having slept for over twenty-four hours, and angry because the Employer was using temporary employees to replace the striking L.C.U.C. members.

The cab in question was driven by Doug Walker, who had been assigned by the taxi company which employed him to drive two temporary mail carriers to Quinpool Road and along that street as they made their deliveries. When Walker's cab was approached by the grievor and his two companions, one of the temporary mail carriers was making a final delivery, to the offices of Household Finance. The other, Allan MacKenzie, was sitting beside Mr. Walker in the front seat of the cab.

As the grievor and the two L.C.U.C. members came close to Mr. Walker's cab they began to shout obscenities and call Mr. MacKenzie a scab. Walker and MacKenzie rolled up the front windows of the cab but the rear window on MacKenzie's side was left down.

There is some difference between the testimony of MacKenzie and Walker on the one hand and that of the grievor on the other as to some of what happened next. Having considered the degree to which MacKenzie's evidence is corroborated by Walker's, the reasons that each of the witnesses might have had for not telling the truth and their demeanor while testifying, I have concluded that where there is any conflict between MacKenzie's testimony and the grievor's, MacKenzie's is to be preferred.

There is no dispute that the grievor and his L.C.U.C. companions came up very close to Walker's cab, called MacKenzie a scab and shouted threats and obscenities. Both MacKenzie and Walker said quite definitely that the grievor was the most aggressive of the three and came closest to MacKenzie on the passenger side of the cab. That evidence was not disputed, and it was also common ground that at one point the grievor asked MacKenzie if he had a wife and child. That was probably in the context of saying that he, the grievor, had a wife and child and did not wish to lose his job. MacKenzie responded to that; saying that he did have a wife and child. Other than that MacKenzie said nothing to the grievor.

MacKenzie testified that the grievor threatened to kill him, saying that he would remember his face and if he ever met him on the street he would be a dead man. The grievor denies that he said words to that effect, although he implied that his companions may have. Walker could not be certain that it was the grievor who had used those words but MacKenzie was quite sure. Here, as I have said, I prefer MacKenzie's testimony and find that the grievor did in fact make that sort of threat.

While MacKenzie testified that the grievor's words induced some fear and that he would thereafter have met the grievor on the street with some trepidation, I find that he did not interpret the grievor's words as a literal threat of murder. Moreover, I must say that I am reasonably certain that if the

grievor were ever to attack Mr. MacKenzie in a one-on-one situation he would come off considerably the worse. Mr. MacKenzie is not a big man but he looks fit and has a brown belt in judo, which may explain an air of real physical calm and self-confidence. The grievor is larger, but his bearing and his dimensions do not suggest physical prowess.

To return to the narative, in the midst of the threats and abuse, MacKenzie half turned to try to roll up the rear window of the cab, because there were mail bags on the back seat, and at that point,he testified, the grievor reached through the open window with his left arm and hit MacKenzie in the face with his clenched fist. The grievor admits that he hit MacKenzie in the face but says that he did it through the front window with the back of his hand. Walker did not actually see the grievor's hand hit MacKenzie, but realized that the blow had been struck and corroborated the testimony to the effect that the grievor's hand and arm had come through the back window. Here again, I prefer MacKenzie's evidence over the grievor's. I find that he struck Mr. MacKenzie in the face with his fist.

At that point, having told his dispatcher to call the police, Mr. Walker got out of his cab and effectively challenged the grievor and his companions. The police arrived shortly thereafter and told the grievor and the others to clear off. Mr. MacKenzie then told one of the policemen that he had been assaulted and identified the grievor by his clothing.

The policeman caught up with the grievor before he got back into the car he had come in, and took him to the police cruiser for brief questioning.

The blow to Mr. MacKenzie's face had not been hard enough to leave any visible effect so the policeman told him it was a matter of common assault for which it would be up to him to lay a charge. Mr. MacKenzie did in fact file charges twice but a summons was not served either time, so he gave up. Somehow the Employer became aware of the incident and Peter McNulty of the Security Branch later sought out Mr. MacKenzie and got the facts from him.

The grievor is 29 years old and is married with a two year old son. He has a Grade 12 education and has been working in the Post Office since 1981 as a P.O.4. He has been employed in Halifax except for a two year stint in Kitchener from the spring of 1985 to the spring of 1987. There was no evidence of any disciplinary record.

The grievor apologized at the arbitration hearing, but had not done so previously in any context. He testified that although he had felt anger towards his Employer on the 18th of June, 1987 he felt nothing personal toward Mr. MacKenzie. He said that he had not planned to do more than verbally intimidate Mr. MacKenzie, with an eye to protecting L.C.U.C. jobs and his own, because he had realized that the C.U.P.W. strike would be coming on shortly. He admitted that he struck Mr. MacKenzie but claimed to have done so on the spur-of-the-moment.

Although the burden of proof on the Employer is only a civil one here, I must give the grievor the benefit of the doubt and find that he did not approach the cab with any specific intention to punch a temporary replacement mail carrier. However, I do find that he acted with premeditation when he reached around through the back window of the cab and hit Mr. MacKenzie with his fist. That act was certainly not accidental and it was not spur-of-the-moment in the sense of being caught up in a flurry of activity. Indeed, most of any flurry of activity was of the grievor's own making.

The Issues: It was not disputed that some discipline was warranted by the grievor's admitted assault on Mr. MacKenzie. The first issue, therefore, was whether discharge was warranted and if, as I have already told the parties, I find discharge was not warranted, the second issue is what period of suspension should be substituted for it. These determinations require that I address two sub-issues raised by counsel: First, in judging the appropriateness of the grievor's discipline can I take into accont the threats which I have found he made. This is an issue because, while the termination letter refers to the fact that the grievor "assaulted a replacement employee", the supervisor's "incident report" which appeared on his file refers only to the fact that he punched Mr. MacKenzie, and not to the threat. The second sub-issue is whether the fact that this assault occurred in a strike context is a mitigating factor? Does it make any

difference that the strike was by a union other than the grievor's?

Decision: The first of the sub-issues arises out of a general principle of arbitration jurisprudence which is made quite explicit in the Collective Agreement between the parties. Article 10.10(a) provides:

> 10.01 Just Cause and Burden of Proof
>
> No disciplinary measure in the form of a notice of discipline, suspension or discharge or in any other form shall be imposed on any employee without just, reasonable and sufficient cause and without his receiving beforehand or at the same time a written notice showing the grounds on which a disciplinary measure is imposed.

The reasons for both the general rule and Article 10 are succinctly captured in the following passage from the award of T.A.B. Jolliffe an award between these parties in Webber (CPC No. 82-1-3-59; CUPW No. W-400-GG-65) dated June 17, 1983 where he says, at pp. 9 and 10:

> It is no doubt by now common ground amongst arbitrators that as a general rule, and except in extraordinary circumstances, an employer is bound to rely on those reasons given for discipline by time of discipline being meted out. Such cases as USW and Aerocide Dispensers Ltd. (1965) 15 L.A.C. 416 (Laskin) have made this principle rather clear.
>
> However, this is not to say that arbitrators should refrain from interpreting the grounds alleged in reasonable and comprehensive fashion. Perhaps the best known comment with respect to this issue is that as contained in the Aerocide case, wherein Arbitrator Laskin as he was then, commented as follows:

"The Board is justified in a case of challenged discharge to hold the employer fairly strictly to the grounds upon which it has chose to act against an employee who consequently feels himself aggrieved. This is not to say that the Board should be overly technical in assessing an assigned cause of discharge but it does mean that it ought not to permit an assigned cause to be reformed into one different from it merely because the evidence does not support the assigned cause but rather one something like it. The parties prepare their submissions to arbitration according to the issues raised by the grievance and the answer or answers thereto, and the case comes to arbitration after having run the gauntlet of the grievance procedure and discussions therein. If another cause of discipline emerges from the evidence other than the one stated at the time, it is not an automatic conclusion that the employer would have treated it the same way merely because it finds it necessary to say so because of the turn of evidence at the arbitration. This explanation underlies the Board's holding that the stated grounds of discharge were not established in fact."

...

I am also mindful of Adjudicator Mitchell's comment as made in Williams and Treasury Board (P.S.S.R.B. No. 166-2-5869) as follows:

> "...In my opinion, Article 10 as a whole reflects the intention of the parties to the agreement to ensure that Employee is made aware of an alleged infraction committed by him and the grounds on which the Employer relied in taking disciplinary action before the Grievance or adjudication proceedings commence."

Here, as in Webber, the Employer is not, in my view, "attempting to reform one cause into another". The evidence of the threats uttered by the grievor is simply part of the context in which the admitted blow was struck. I have not treated the threats as a separate assault but rather as evidence which has assisted me in determining how the grievor might have expected his victim to view the assault and, indeed, how he probably intended it.

Turning to the second sub-issue, counsel for the Employer cited Mattabi Mines Limited (1973), 3 L.A.C. (2d) 344 in which the majority of a Board chaired by R. D. Abbott stated that the hitting of a fellow employee was made "far more reprehensible" by the fact that it was "connected with the operation of a picket line ..." (at p. 345). Discharge was, nevertheless, not held to have been justified in that case. More important, a contrary view appears to be commonly held by arbitrators, and has been made explicit by Arbitrator Norman in the very recent award under this Collective Agreement. That award in fact arose out of the same Letter Carriers strike with which I am concerned here. In Ortman (CUPW No. 820-85-00573; CPC No. 87-1-3-11895) dated April 13, 1988 Arbitrator Norman stated, at pp. 12-14:

...I take the special tensions attached to the L.C.U.C. rotating strikes to be a matter to be taken into account. For the first time in its history Canada Post determined to fight back during the L.C.U.C. strike by bringing replacement workers through the picket lines. In Re Radio Shack Division, Tandy Electronics Ltd. and United Steelworkers (1980), 26 L.A.C. (2d) 227, (Beck), the following point is made at page 246:

> Conduct on the picket line must be put in the context of a refusal by employees to work on the one hand, and a determination by the employer to keep the plant operating on the other. The conduct of each is lawful in its own right and the fact of a strike ought not to be seen in any different light than a decision by the company not to come to an agreement with the Union and to continue to operate the plant. Such a situation has been rightly termed economic warfare, and the fact of such warfare is considered, in Mr. O'Shea's opinion, [in O.C.A.W. and Inmont Canada Ltd. (1979), 21 L.A.C. 411.] a mitigating factor, or to quote him directly "... the existence of the strike should be considered as a mitigating factor."
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> All of the volatile circumstances of the moment during the lunch hour on June 23, in light of the swelled numbers on the line and the unanticipated arrival of the buses amount to mitigating factors in this case. ...
>
> My firm impression of Darrell Ortman's character leads me to now assert that, but for the mob frenzy which took hold of him, he would never have acted out in any such manner.

Of course, just because the strike context may be a mitigating factor, it does not follow that violence or other employee misconduct cannot justify discharge or serious discipline. Indeed, in the Inmont Canada Ltd. case, cited in the

foregoing quote, discharge for trespass and attempted sabotage was upheld. Referring to the Inmont award, counsel for the Employer here submitted that the Employer's duty to protect its temporary employees should be taken no less seriously than the protection of property was taken there. I found that a useful comment, but it alone produces no answer. My conclusions on whether discharge was justified and, if not, on how substantial a period of disciplinary suspension I should substitute, could only be based on a number of factors.

I have already ruled that discharge was not justified here and I have concluded that a substantial period of discipline is called for. Before turning to a brief review of the factors that I have taken into account in reaching both of these conclusions I wish to address two considerations related to the fact that the incident in question occurred in the context of a strike by L.C.U.C., a union to which the grievor did not belong.

First, there is no arbitral jurisprudence of which I am aware to the effect that the strike context cannot be a mitigating factor in these circumstances. Nor can I see that the fact that L.C.U.C. and not the grievor's union was on strike should be critical. The grievor was not striking illegally and the strike he was supporting was legal. The questions, therefore, still are whether the grievor's misconduct should be treated as less seriously rupturing his employment relationship than it otherwise would have because

it occurred in the volatile context of a legal strike, or because he was caught up in a mob frenzy. Those questions are as relevant in this case as they would have been had the grievor's own union been on strike. The answers depend on the evidence. The whole notion that the strike may be a mitigating factor is an attempt to capture labour relations realities, one of which would appear to be that, for quite obvious reasons, C.U.P.W. members were very much caught up in the L.C.U.C. strike.

Second, I must note my concurrence with Arbitrator Norman's comments in Ortman dealing with the suspensions meted out to L.C.U.C. members who did violence in the course of their strike. As he points out (at p. 15) those cases "are complicated by the fact of a general amnesty for discharged members bargained by L.C.U.C. as part of its back-to-work agreement." Nevertheless, like Arbitrator Norman, I am concerned that the grievor could be discharged for the very same acts that would have earned his L.C.U.C. companions only a period of suspension.

I note further that in Ortman there was extensive evidence about the numbers of working days for which L.C.U.C. members who had engaged in strike-related violence were suspended. In the hearing before me counsel agreed that in the Atlantic Region L.C.U.C. discharges had been commuted to suspensions of from six to nine months, although the national average period of suspension was much lower.

In non-strike contexts the award of a Board chaired by A. M. Linden in Dominion Glass Co. (1975), 11 L.A.C. (2d) 84, and the summary of that award by Arbitrator Adams in Denison Mines Ltd. (1981), 2 L.A.C. (3d) 209 at pp. 213 and 14, provide a useful list of factors to be considered in determining the discipline appropriate in an assault case. Arbitrator Adams stated:

> Not all assaults support the penalty of discharge. Indeed, in Re Dominion Glass Co. and United Glass & Ceramic Workers, Local 203 (1975), 11 L.A.C. (2d) 84 (Linden) at p. 85, in dealing with an assault observed:
>
> > It is clear that an employee, who repeatedly cannot or will not submit to the instructions of his employer, need not be kept. Nor is a worker of a dangerous and violent temperament entitled to remain as part of the work force in a plant. An employer has the right -- indeed the duty -- to keep peace within its operation. Anyone who threatens the safety of other employees may be removed permanently. It is, however, in my view incumbent upon the company to demonstrate that the insubordinate or violent conduct of the employee was such as to make it improbable that he would be able to function effectively in the plant again. Discharge is a harsh penalty, and should be utilized only sparingly. It should be used only where it is clear that no other method of discipline will be of any avail.
>
> He went on to review the arbitral cases in the area and compiled a check-list of factors important in determining whether dismissal is justified in these kinds of cases. The factors included: (1) the identity of the person attacked; (2) whether the assault was a momentary flare-up or a premeditated attack; (3) the seriousness of the attack; (4) the presence or absence of provocation; (5) the disciplinary record

> of the employee; (6) the length of service of the employee; (7) the economic conditions brought about by reason of the discharge; and (8) the presence or absence of an apology.

As I have already made clear, I am not satisfied that it is "improbable" that the grievor "would be able to function effectively" in the Employer's plant. The check-list of factors bears on both the justifiability of discharge and the seriousness of any substitute discipline warranted:

(1) The person attacked was a temporary replacement employee. That fact in no sense justifies the assault, but does render it highly unlikely that the grievor and the employee assaulted will ever have to work together. Certainly, this is a far cry from the cases of assault on supervisors.

(2) As I have already stated, I am not satisfied that this assault was planned, but neither am I prepared to characterize it as a momentary flare-up. The grievor may have been tired and frustrated, but the whole incident was largely of his own making. I view this as a just cause for more serious discipline than that held justified for many of the violent acts that have occurred on picket lines. Typically, in those situations a grievor could plausibly claim, as Mr. Ortman did for example, that he had been caught up in a mob frenzy. Here the grievor was undoubtedly part of the larger circumstances of the strike but I do not accept that during the incident in question he was other than quite conscious of what he was doing.

(3) The attack on Mr. MacKenzie was serious in the sense that it was more than a push or a shove, and its seriousness was exacerbated by accompanying threats, even if they were somewhat theatrical. On the other hand the blow was not a very effective one. Mr. MacKenzie's face was not marked, there was no economic loss and I do not find that he suffered any great pain.

(4) There was no relevant provocation here, other than that arising from the general context of the strike, which I have already addressed.

(5) On the evidence, the grievor had no disciplinary record.

(6) He is an eight year employee, (7) with a wife and child, who has not been able to find other employment.

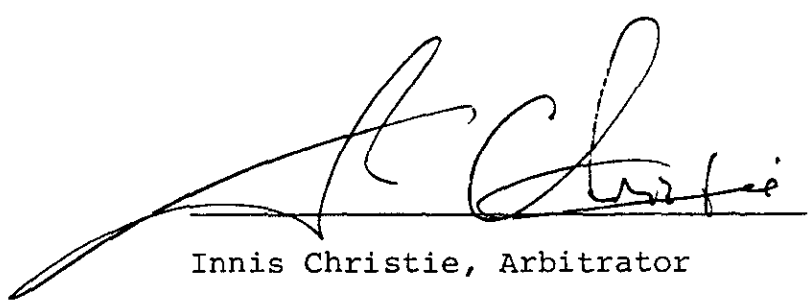
(8) I am prepared to accept that the grievor regrets that he hit Mr. MacKenzie, although I think that what he is really sorry about is that the incident caused him to lose his job. As I have already indicated, I did not find him a particularly credible witness.

All of these factors taken together do not add up to justifying discharge, but they do justify a substantial period of discipline. I did not get the impression that the grievor is normally a violent thug, and he should be disabused of any notion that because there is a strike he is entitled to act like one.

Because there is no precise standard by which to determine just how many days of suspension are appropriate I hereby

simply order that the grievor was entitled to be reinstated from what would have been his second normal working day after the hearing of March 28, 1988, and that his reinstatement be without compensation for any loss of pay or benefits from the date of his discharge to that reinstatement date.

I will remain seized of this matter and will reconvene the hearing at the request of either party should the parties fail to agree on the application and implementation of this award.



Innis Christie, Arbitrator