3-1-1990

Re Canada Post Corp and CUPW (N008800005)

Innis Christie
Dalhousie University Schulich School of Law

9801021112

IN THE MATTER OF AN ARBITRATION

BETWEEN:

The Canadian Union of Postal Workers (The Union)

AND:

(CUPW) Canada Post Corporation (The Employer)

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

Day Shift Positions - Article 14.12
C.U.P.W. Grievance No. N 0088 00005
C.P.C. Arbitration No. 882300054

BEFORE: Innis Christie (Arbitrator)

At: Ottawa

Hearing Dates: April 11 and 12, and November 6 and 7, 1989

For the Union:
Thomas A. McDougall, Q.C. - Counsel
R. Aaron Rubinoff - Counsel
Geoff Bickerton - Director of Research
Deborah Bourque - National Union Representative
Andre Kolampar - President, Toronto Local

For the Corporation:
David I. Wakeley - Counsel
Paul McNeill - Manager, Industrial Engineering Field Support - Western Canada
Jacques Mongeon - Labour Relations Officer
Raymond Poirier - Manager, Labour Relations

Date of Decision: March 1, 1990

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National Union Grievance alleging violation of Article 14.12 of the Collective Agreement between the parties for the Postal Operations Group (Non-Supervisory): Internal Mail Processing and Complementary Postal Services, bearing the expiration date, July 31, 1989, in that the Employer has not "minimized" evening and night work and has not studied the organization of its operations to review evening and night work, taking into account service levels, costs and other relevant factors. The Union requested a declaration that there had been a breach of Article 14.12, an order that the Employer move as much as work as possible from the evening and night shifts to the day shift, an order that day shift work lost after June 29, 1988 be reinstated or, alternatively, that the status quo at the date of this award be maintained until the completion of the study alleged to be required by Article 14.12, and a direction that such a study be conducted by an independent agency on terms submitted or agreed to by the Union.

At the outset of the hearing the parties agreed that I am properly seized of this matter and that I should remain seized after the issue of this award to deal with any matters arising from its interpretation or application. The parties also agreed to waive any time limits, either pre- or post-hearing set out in the Collective Agreement.

AWARD

This is a national policy grievance in which the Union alleges that the Employer has breached Article 14.12 of the Collective Agreement which provides:

> 14.12 Day Shift Positions
>
> While recognizing that, as much as possible, the work is normally performed during the day, and the evening and night work should be minimized, the Corporation agrees to study the organization of its operations during the life of this Agreement in order to review evening and night work taking into account service levels, costs and other relevant factors.

The second part of this article, commencing with the words "The Corporation agrees", has been in all collective agreements between the parties since 1981. The first part was added by the award of the mediator-arbitrator appointed pursuant to An Act to Provide for the Resumption and Continuation of Postal Services, S.C. 1987, c.40, His Honor Judge Cossette, dated June 29, 1988. The Union's submission is that this imposed a significant new obligation to minimize evening and night work on the Employer, which it has not met. The Employer's submission is that the change to Article 14.12 imposed no such new obligation. The Union further submitted that, whether or not there is any new obligation of that sort, the Employer is in breach of its obligation "to study the organization of its operations . . . in order to review evening and night work . . .". The Employer's response is that it has met any such obligation "to study" by regularly maintaining sophisticated statistics and by the

frequent production of staffing profiles, which are done whenever a postal facility is not maintaining national service standards.

Three union witnesses, Andre Kolampar, the President of the Toronto Local, Geoff Bickerton, the Union's Research Director, and Deborah Bourque, a National Union Representative, all testified that both before and after June 29, 1988, the effective date of the Cossette arbitration decision, there has been a perceptible move by the Employer away from work on the day shift to work on the afternoon and night shifts. The evidence of Mr. Bickerton and Ms.Bourque to this effect was very general, as indeed was Mr. Kolampar's, although to a somewhat lesser degree. For the purposes of this award the generality of their evidence is not a concern because the Employer did not dispute the fact that this movement has occurred. Indeed, the Employer's principle witness, Ray Vetter, Director of National Mail Processing for the Atlantic and Pacific Divisions, explicitly acknowledged this move from days to evenings and nights, in the context of a general reduction in the number of jobs which has had its greatest impact on day shift jobs.

In this context the Union has expressed serious concern about what it alleges are the negative effects on employees of non-day shift work. Whether or not such effects are proven is not a question I need to deal with here. It suffices to say that in the last round of negotiations between the parties, leading up to the Cossette Arbitration Decision and the Collective Agreement before me here, the Union vigorously asserted this position.

Specifically its demands included the following, for a very much revised article 14.12:

UNION DEMAND

14.12 Day Shift

The parties formally recognize that work is normally performed during the day. They further recognize that this is not a mere question of practice or convenience, but a necessity imposed by physiological, psychological and social factors. They finally recognize that the health and the well-being of a person require that he perform his work during the day. Therefore,

(a) the Employer recognizes that evening and night work shall be confined to what is strictly necessary and restricted to operations that cannot be carried on during a day shift;

(b) the Employer agrees to periodically revise, on its own initiative or upon request by the Union, operational systems and delivery standards in order to reduce as much as possible the number of employees working on night and evening shifts.

(c) without restricting the generality of the above, the following work can be performed only during day shift:

(i) the processing of all mail other than first class mail;
(ii) the processing of first class mail received during the day shift;
(iii) the processing of city mail.

A significant part of the Union's brief dated November 10, 1987, to Judge Cossette, the statutory mediator-arbitrator, focussed on their demand for "More day work and recovery leave for night workers". The Arbitrator acknowledged on p. 59 of his

report that the Union wanted "the following work to be done during the day shift":

> Processing of first class mail received during the day shift, processing of all mail except standard first class mail, and the processing of city mail.

The Arbitrator, however, amended Article 14.12 only by adding the new first part set out above. After quoting the Employer's reply he gave the following reasons:

> The disadvantages and problems associated with evening and night work are not contested or disputed; neither is the need for evening and night work. Everyone seems to agree on these two principles.
>
> But in view of the size of the territory to be served and regional variations, reconciling this principle with the efficient operations of a corporation like Canada Post is a rather difficult task.
>
> What was accomplished in Kitchener and Saskatoon may be difficult or impossible in other locations in Canada.
>
> The imposition by the mediator-arbitrator of a contractual obligation relating to the manner in which mail is processed may constitute a highly questionable form of interference in an area that the legislators have delegated to the employer.
>
> The promising results achieved in Kitchener and Saskatoon should encourage the parties to make use of article 8 of the collective agreement and recommence the consultation process.
>
> For this reason, there is no need to amend article 14.12, except to include an acknowledgement of the principle that day shift work is to be preferred. This article shall read as follows:

This passage from the Arbitrator's report is highly relevant to the question of whether Article 14.12 as amended by the addition of the new first part is to be interpreted as imposing

any different obligation than the Employer has borne since the second part of Article 14.12 became part of the Collective Agreement in 1981.

The evidence is that this is the first grievance filed alleging breach of Article 14.12. I return below to this issue but it should be noted here that counsel for the Employer did not suggest that the Union was estopped from alleging breach of Article 14.12 by its previous failure to file a grievance, and, as counsel for the Union pointed out, there is no evidence of the reliance required to support such an argument. However, insofar as the second part of Article 14.12 is ambiguous, the Employer's failure to carry out the kind of study now alleged by the Union to be required, and the Union's failure to grieve, may be relevant.

Counsel for the Employer submitted that whatever obligation the Employer has had since 1981 "to study the organization of its operations . . . in order to review evening and night work . . ." has been met by the staffing profiles which it has frequently prepared over those years. Much of the hearing was devoted to a careful consideration of the staffing profile done in June of 1987 for the St. Laurent Mail Processing Plant in Montreal. This was offered as an example of the sort of "study" that the Employer does wherever it becomes apparent that a mail handling facility is failing to live up to its national service standards. Mr. Vetter, to whom I have referred above, testified that there is no corporate policy on how often a profile is to be done for

any facility, but normally a staffing profile would be done at least once a year. Each postal plant, he testified, is measured daily, and the results are put into weekly reports which are monitored centrally and which trigger the preparation of a staffing profile if service standards are not met.

Mr. Vetter testified at length on the Employer's systems for measuring mail volumes of all sorts, and Mr. Claude Clement, Manager of Industrial Engineering at the St. Laurent Mail Processing Plant, testified in detail with respect to the preparation and use of staffing profiles, and the of 1987 St. Laurent staffing profile in particular. Their testimony, which was generally interesting and helpful, will not be reproduced here in any detail. What seems to me most important is the relationship between the Employer's service standards and the staffing profiles done, according to the evidence, in every facility across the country.

In November of 1986 the Employer adopted new service standards which allow two days for city mail, three days for regional or divisional mail and four days anywhere in the country. International mail from the U.S. is also allowed four days. The Union has not questioned the Employer's right to set service standards, and explicitly did not do so before me. The Union's Submission to the Mediator-Arbitrator stressed that these new delivery standards should "permit a reorganization of the work process which would involve a vast amount of work being transferred from nights to days" (at p. 144). However, as Mr.

Vetter made very clear, this change to a "more realistic" standard was accompanied by a stringent corporate policy, apparently emanating from the Government of Canada, that the new standard be attained with at least 99% of the mail. This, Mr. Vetter explained, necessitated a corporate policy that 90% of the mail be delivered on D-1, that is one day in advance of the day required by the standard. Unless this happens, he said, it is perfectly clear that the standard can never be met for 99% of the mail. The problem of delivery is not with the greater part of the mail, but with misdirected letters and other such problem mail.

The Employer's systems record in remarkable detail not only the mail volumes received by a postal plant such as the St. Laurent one but also the volumes processed by each work area in the plant. Management has also worked out in detail engineered production standards for each work area. Provided proper account is taken of such factors as vacation leave, week-end rotation and absenteeism, management can then produce a staffing profile on the basis of which it can determine the number of employees required to handle the mail dealt with by any plant, for each work area, hour by hour and in total for each shift. This profile must, of course, take into account processing deadlines for each area and allow for fluctuations in volumes throughout the day. Thus, if, by its system of color coding mail, management ascertains that its service standards are not being met by a particular facility it can, through a staffing profile for that

facility, identify exactly where and when more employees are needed.

In my view all of this evidence goes to show that : (i) the built-in assumptions in creating staffing profiles are that corporate service standards must be met and that plant production objectives are being met, and (ii) the questions thought to be answered by the staffing profiles are how many employees are needed, where and when, to satisfy those assumptions. It may well be the case that if corporate service standards can be met equally well by day shift employees as by night or evening shift employees day shift employees will be utilized, but that is not the object of the exercise in creating the staffing profiles, according to the evidence that I heard. The profiles, according to Mr. Vetter, are driven by when the mail arrives and the push to meet service standards. He said in effect that after a profile is done local management may plug in considerations like the cost and desirability of work being on day shift, but may act on that only if it makes no difference in the effectiveness with which the mail is moved to meet service standards.

Mr. Vetter testified in cross examination that he had never explicitly asked or directed that a study be done under Article 14.12, to determine if work could be moved from the evening and night shifts to the day shift. He did suggest, however, that in a general way management is aware of the capacity of each of its plants in terms of people, work stations, machinery and the like through the studies that underlie its staffing profiles. In that

sense, he said, management is aware of what could be done on the day shift without damaging the drive to meet service standards. Mr. Vetter said that because of the time when the most mail arrives at the mail processing plants the result, though not the aim, of many of the staffing profiles had undoubtedly been that jobs had been moved from the day shift to the evening and night shift.

In cross-examination Union counsel asked Mr. Vetter about several types of mail processing which the Union has argued can be done on day shift without jeopardizing service standards. He was asked about the processing of first class mail received during the day shift, the processing of city mail and about mail other than first class mail, specifically addressed advertising mail, that is third class mail, parcel repair and undeliverable mail. He was also asked in some detail about processing, for example, of a letter with a four day delivery standard being mailed from Ottawa to Vancouver. The relevant thrust of Mr. Vetter's responses was that it might be possible to move some work in these various connections to day shift, insofar as it was not now done on day shift, but, most importantly, his response was that all of these aspects of the work of the Employer are taken into account in staffing profiles done at each of the mail processing plants.

On redirect Mr. Vetter made it perfectly clear that, as far as he understood it, each of these aspects of the process of moving the mail was captured in staffing profiles, although there

had been no global or nationwide studies of each of them individually. Each staffing profile takes account of arrival patterns, originating mail, large volume mailer arrivals and so on, and of the chief characteristics of these factors at the site under study, as well as of the machinery or the physical arrangements at that site. Mr. Vetter summed this up by saying that postal plants cannot be controlled from the national level, but, in his opinion, on the local level nothing that might impact on the question of the allocation of employees to the day shift as opposed to the evening or night shifts was not taken into account in the staffing profiles. He asserted that if all other things were equal and the Employer had a choice of allocating work to day shift rather than nights or evenings it would probably allocate the work to days. He further asserted that staffing profiles in effect tell the Employer what "all other things" are equal, in the sense that they reveal where hours were needed to maximize efficiency, and the efficient use of hours governs costs.

I note that in cross examination Claude Clement, the Manager, Industrial Engineering, St. Laurent Mail Processing Plant, who prepared the staffing profile entered in evidence as an example, concurred with Mr Vetter's testimony, saying that he had never received a specific request to do a study under the provisions of Article 14.12, nor had he ever been asked to do a specific study to see what work could be moved to the day shift.

Mr. Clement did testify, however, that the Employer is "always aiming to do as much as possible by day".

The Issues:

The position of the Union is, first, that the addition by arbitrator Cossette of the new first part to Article 14.12 of the Collective Agreement constitutes an acknowledgement by the parties that day shift work is to be preferred to "off-shift" work. In that context the Employer once again "agrees to study the organization of its operations . . . in order to review evening and night work"; in effect to figure out how to increase day shift work and decrease the amount of work on the off shifts. In the Union's view this logically involves an obligation on the Employer to implement the results of any such study, taking due account of service levels, costs and other relevant factors. Second, in the union's submission, for the Employer to meet its obligation "to study" under Article 14.12 any such study would have to have preference for day shift work as its purpose. That is, it would have to be a study of how to move work to day shift while living up to service standards. In support of this counsel for the Union relied on dictionary definitions of the word "study" as "serious consideration directed toward a specific purpose".

The Employer's position is that the new words added to Article 14.12 by arbitrator Cossette are words of recognition,

not obligation, and that the Employer's obligation is simply "to study", just as it has been since 1981. Insofar as there is any uncertainty about the meaning of the phrase "to study the organization of its operations", in the Employer's submission regard may be had to the way in which the Employer, without a grievance from the Union, has fulfilled that obligation since 1981. That obligation, according to the Employer, has been fulfilled by its virtually annual staffing profiles, which have involved examination of "service levels, costs and [all] other relevant factors".

The Union specifically requested the following remedial orders:

1) A declaration that there has been a breach of Article 14.12 by the Employer;

2) That the Employer move as much work as possible from the evening and night shifts to the day shift immediately;

3) That day shift positions lost since June 29, 1988 be reinstated;

4) Alternatively, that the current status quo be maintained until completion of an appropriate study;

5) That the Employer undertake a study in accordance with Article 14.12; a study to be conducted by an independent party with input from both the Employer and the Union and with mutually agreed terms of reference;

6) That I retain jurisdiction to set the terms of reference of the study if the parties were unable to agree; and,

7) That I retain jurisdiction to consider

> the study upon its completion and to make further orders as required.

Counsel for the Employer concluded his submissions by requesting that I declare that there had been no breach of Article 14.12 and he submitted that each of the other remedies requested by the Union is contrary to the Collective Agreement and beyond my jurisdiction.

Decision:

> While recognizing that, as much as possible, the work is normally performed during the day, and the evening and night work should be minimized, . . .

These words were added to Article 14.12 by Judge Cossette as arbitrator under An Act to Provide for the Resumption and Continuation of Postal Services, S.C. 1987, c.40. They are a far cry from the Union's demand for a revised article 14.12 which would have imposed upon the Employer an obligation to periodically revise operational systems and delivery standards to reduce as much as possible the number of employees working on night and evening shifts. On their face these added words constitute a recognition of what is desirable, not the undertaking of an obligation. Any doubt about their intended effect in this regard is removed by the words of the Arbitrator in his Report, at pp. 61 and 62, which are set out above, at pp. 4 and 5. Clearly, he refused to impose "a contractual obligation relating to the manner in which the mail is processed" and he did not intend "to

amend article 14.12, except to include an acknowledgement of the principle that day shift work is to be preferred". There is, therefore, simply no basis upon which I, as arbitrator under this Collective Agreement, am empowered by the words which were added to Article 14.12 in June of 1988 to order the Employer to do anything, or cease from doing anything.

The only thing the Employer is bound to do by the words of Article 14.12 is "to study the organization of its operations . . . in order to review evening and night work . . .". There is no doubt from the voluminous but still obviously very tiny sample of the Employer's paperwork submitted in evidence, and from the evidence of Mr. Ray Vetter and Mr. Claude Clement, that the Employer studies its own operations very closely. Adhering to a close reading of Article 14.12, the question is whether it does so "in order to review evening and night work", as the Collective Agreement requires. Clearly, the information which the Employer generates for its staffing profiles allows it "to review evening and night work", but does the Employer "study the organization of its operations" "in order" [emphasis added] to carry out such a review. The Union says "no", because that is not why the study is carried out. The employer says "yes", because that is one of the things that gets looked at in creating and examining each of its staffing profiles.

Furthermore, the Employer says that it is "studying" under this Collective Agreement in exactly the same way it has been doing since it first undertook this obligation "to study" in the

1981 Collective Agreement. Any uncertainty about the nature of that obligation can, according to the Employer, be resolved by examining what it has done since 1981 to the evident satisfaction of both parties, since the Union has not previously grieved. I note that this is not an estoppel argument. The Employer is not saying that it had an obligation "to study" which it has not fulfilled and should not now be obliged to fulfill because it has relied on some implied promise by the Union to forego its legal right to have the study done. Rather, the Employer's submission is that if the obligation "to study" is unclear or ambiguous past practice may be taken to demonstrate the intention of the parties when article 14.12 was first negotiated in the 1981 Collective Agreement, and when it was renegotiated thereafter.

It can hardly be contested that the Employer's agreement "to study the organization of its operations . . . in order to review evening and night work . . ." is imprecise. Past practice, however, is not a very useful tool in fleshing out its meaning, because Article 14.12 as it now stands is the product of the Arbitrator's award in 1988; not the product of the parties' agreement in 1981 or subsequent years. The Employer's "agreement" to study is now stated in the new context of explicit recognition that "evening and night work should be minimized". While, as I have already noted, the Arbitrator was unwilling to impose "a contractual obligation relating to the manner in which the mail is processed" he did state at p. 62, that "the disadvantages and problems associated with evening and night work were

not contested or disputed . . .", although need for them, he said, was not contested or disputed either. Further, the Arbitrator suggested that the results of experiments in Kitchener and Saskatoon should encourage the parties to consult under Article 8 on this subject. In the context of those remarks I take the Arbitrator's intention to be that the Employer should "study the organization of its operations . . . in order to review evening and night work . . ." with a sharper focus on the possibility of minimizing evening and night work than had been the case in the past. Clearly, however, "service levels, costs and other relevant factors" are to continue to be taken into account because Article 14.12 was not completely rewritten. The existing words were incorporated into the new Article, so I do not think it appropriate to interpret them as requiring a major departure from the "studies" of the past. Rather, there must be a new or additional focus on the possibility of minimized evening and night work.

I recognize the perils involved in invading the technical and specialized realm of industrial engineering explained at the hearings in this matter by Mr. Clement and Mr. Vetter. Nevertheless my conclusion is that the Employer's studies of "the organization of its operations" which culminate in staffing profiles lack an element now required by Article 14.12. From now on, if the Employer is going to rely on staffing profiles to fulfill its obligation under Article 14.12 it must use the information assembled in those profiles to consciously and

explicitly determine in each local operation whether work can be moved from the evening and night shifts to the day shift without having a demonstrable effect on costs or service levels. I am confident that this can be done relatively easily in the context of producing the staffing profiles which are now done on a virtually annual basis. Indeed, many staffing profiles may already allow that determination to be made, so that all that is lacking is the conscious asking of the question and the conscious turning of the managerial mind to the answer in the case of every staffing profile that is done. Alternatively, the Employer will have to understand a study or studies directed more particularly to fulfilling its obligation under Article 14.12.

I turn now to the specific remedies requested by the Union.

1) As requested by the Union I hereby declare that the Employer is in breach of Article 14.12 insofar as in doing its regular staffing profiles it does not explicitly ask the question whether work can be shifted from the evening and night shifts to the day shift and consciously advert to the answer in each case.

2) I refuse the order requested by the Union, that the Employer move as much work as possible from the evening and night shifts to the day shift immediately. The Employer's only obligation is to study this matter. Arbitrator Cossette explicitly refused to impose a contractual obligation relating to the manner in which the mail is processed, and

Article 14.12 cannot be interpreted as imposing any obligation on the basis of which I could make the order requested.

3) For reasons just given, there is no basis upon which I could order day shift positions lost since June 29, 1988, reinstated.

4) For the same reasons, there is no ground upon which I could grant the order requested in the alternative, that the current status quo be maintained until the completion of any particular study.

5) Article 14.12 states that "the Corporation agrees to study the organization of its operations . . .". I cannot read into this any obligation to undergo a study conducted by an independent party or any power in me as arbitrator to order such a study. By the same token I have no power to order a study on terms agreed to by the Union.

6) I do not retain jurisdiction to set the terms of reference of any study to be undertaken by the Employer. It may be that in the future the Union will grieve an alleged failure by the Employer to focus its staffing profiles in the way that I have said is now required by Article 14.12. If so, that grievance should be dealt with by whatever arbitrator it comes before on the basis of this interpretation of Article 14.12. I do not suppose that by this award I have added any great precision to the obviously imprecise terms of the Employer's obligation "to study" under Article 14.12. It does seem to me, however, that it should be determinable

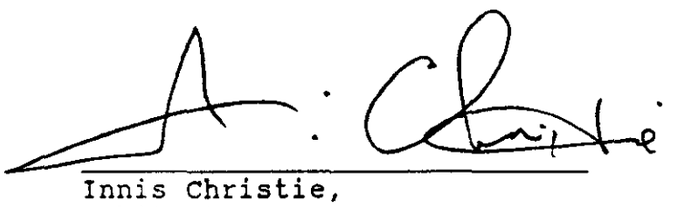
whether the Employer has in fact used the data at its command to explicitly determine whether evening and night work in any postal facility could be minimized without adversely affecting "service levels, costs and other relevant factors". If it can demonstrate in the future that it has asked those questions in creating any staffing profile, and has taken the answers to the questions into account, regardless of whether changes result, in my opinion the Employer will have fulfilled its obligations under Article 14.12. Such, I assume, will also be the view of any other arbitrator in a future grievance arising under Article 14.12.

7) As is apparent from what I have just said, I will not retain jurisdiction to consider any study made in accordance with this award. Obviously, unless the Employer elects to do large global or regional studies to satisfy its obligation under Article 14.12, there will be many, many such studies. In fact, every staffing profile done by the Employer in the future will constitute such a study if it entails the questions which I have said it should.

In conclusion, I allow this grievance to the extent of declaring that the Employer is in breach of Article 14.12 of the Collective Agreement in that it has failed "to study the organization of its operations . . . in order to review evening and night work taking into account service levels, costs and other relevant factors" with a focus on the understanding "that, as

much as possible . . . evening and night work should be minimized". That obligation "to study" will be satisfied if the Employer in all future regular staffing profiles explicitly checks the data used in such profiles to ascertain whether evening and night work can be minimized without adversely affecting service levels, costs and other relevant factors and takes into account the answers to that question.

I retain jurisdiction to deal with any issues arising from this award, but as I have said above in response to the Union's sixth and seventh specific remedial requests, I do not purport to retain jurisdiction to deal with each, or any, specific study that the Employer claims to have conducted in accordance with Article 14.12.



Innis Christie,
Arbitrator.