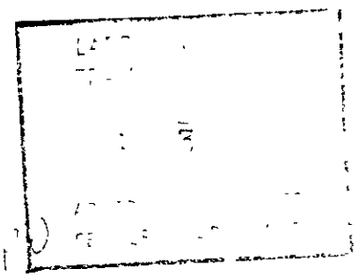
1-14-1992

Re Canada Post Corp and CUPW (105-88-00646)

Innis Christie
Dalhousie University Schulich School of Law



IN THE MATTER OF AN ARBITRATION:

BETWEEN:

THE CANADIAN UNION OF POSTAL WORKERS

(The Union)

and

CANADA POST CORPORATION

(The Employer)

RE: Arsenault, A. (The Grievor)
CUPW Grievance No. 105-88-00646
CP Arbitration No.

BEFORE: Innis Christie, Arbitrator

AT: Amherst Shore, N.S. (by telephone conference) and Saint John, N.B.

HEARING DATES: September 6 and 27 and October 1, 2 and 3, 1991

FINAL WRITTEN SUBMISSION RECEIVED: January 9, 1992

FOR THE UNION: Gordon Forsyth, Counsel
Raymond Larkin, Counsel (preliminary issue)
Wayne Mundle, CUPW National Executive Representative
Jeff Woods, Regional Grievance Officer
Tony Correia, Shop Steward, Fundy Local
Al Arsenault, Grievance Officer, Fundy Local

FOR THE EMPLOYER: Malcolm Boyle, Counsel
Brian Johnston, Counsel (preliminary issue)
Donald McDonald, Labour Relations Officer
Seymour Kell, Plant Manager, Saint John Mail Processing Plant

DATE OF AWARD: January 14, 1992

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Union grievance alleging breach of the Collective Agreement between the parties bearing the expiry date 31-07-89 but kept in force by legislation, and in particular of Article 11.07, in that the Grievor was wrongly refused modified duties and forced to go on sick leave. The Union requests an order that the Grievor be returned to work in accordance with Article 11.07 and that he be granted full redress for all lost rights earnings and benefits, including sick leave credits.

Prior to the scheduled days of hearing in this matter the Employer sought an adjournment due to rotating legal strikes by the Union. By agreement of the parties, that request was dealt with by telephone conference.

At the outset of the subsequent hearing in Saint John the parties agreed that I am properly seized of it, that I should remain seized after the issue of this award to deal with any matters arising from its application, and that all time limits, either pre- or post-hearing, are waived.

AWARD

The Grievor, who is a PO4 in the Saint John, N. B. Mail Processing Plant, had a heart attack in August of 1990. He returned to work on October 22, 1990, under restrictions imposed by his doctor and was put on the Employer's Modified Duties Program. Under that Program he was assigned work in the registration section, in an enclosed and relatively quiet part of the Plant, although his position at the time was in the Manual Section. In March he was directed by the Employer to spend part of each shift sorting to boxfronts, part of his regular duties on the Plant floor but a task to which he objected because he found work on the Plant floor stressful. He obtained a letter from his doctor stating that he should not work on the Plant floor, following which he was taken off the Modified Duties Program and placed on sick leave.

This grievance is against that action by the Employer, on the ground that it was breach of the Collective Agreement, particularly

Article 11.07, especially the last two paragraphs, which were added to the Collective Agreement by the June 29, 1988 Report of Judge Cossette as mediator-arbitrator. Those two paragraphs have been the subject of differing interpretations by arbitrators under this Collective Agreement. Article 11.07 provides:

> 11.07 Employee Becomes Handicapped
>
> Where an employee has become physically handicapped because of:
>
> (a) a compensable injury,
>
> or
>
> (b) non-compensable health reasons, and the need for assignment is supported by a certificate issued by a qualified medical doctor upon written application he may be assigned to any appropriate vacancy within the Bargaining Unit. Where such vacancy is subject to the application of the provisions of the Article on Selection of Shifts, the initial assignment will be only for the period necessary to implement the Article. However, if the employee accepts appointments in the assigned class, he shall be deemed to belong to the assigned class and the normal rules of seniority shall apply.
>
> The Corporation shall notify the local of the Union in writing each time an employee exercises his rights under this clause.
>
> ** Moreover, the duties of the position held by the employee or the methods used to fulfil such duties shall be modified if the employee is capable of performing at least part of the regular duties of his position.
>
> ** The modified duties situation shall end when the employee becomes capable of performing all the duties of his position.

Before dealing further with the application of the Collective Agreement, and of this Article in particular, to the grievance before me, I shall explain the procedural context, state more fully what I have found to be the relevant facts and articulate the issues as I see them and as they arise from the positions taken by counsel at the hearings before me and in their written submissions.

This matter was originally scheduled to be heard in Saint John on September 11, 1991. Like all other arbitrators between these parties, under date of August 19, 1991, I received a memo signed by Mr. Gilles Bourgeois, Director, Grievances, Arbitration and Administration, for the Employer, advising that in the event of a strike the Employer would not be prepared to proceed with scheduled grievance arbitration hearings. The Union, on the other hand, was of the view that scheduled hearings should proceed. Like a number of other arbitrators, I heard the parties by telephone conference on the question of whether the Employer should be granted an adjournment. After hearing counsel on September 6, I procured their agreement that this matter and the somewhat similar grievance of G. Correia, CUPW Grievance No. 105-88-00647, would proceed on September 27 and October 1, 2 and 3 in Saint John. As it turned out, those four days, including one late evening, provided only enough time for me to take the evidence in this matter. By agreement of counsel, I have received their arguments in writing and Correia has been scheduled to be heard in Saint John January 22, 23 and 24, 1992.

The grievance in this matter is dated May 3, 1991. It states:

> Statement of Grievance
> The Union grieves on behalf of A. Arsenault that the employer has violated article 2, 5, 11, clause 11.07, 20 and all other related provisions of the collective agreement. That by letter dated April 8, 1991 A. Arsenault was advised by plant manager S. Kell that he was being refused modified duties, not permitted to return to work and forced out on sick leave.
>
> Corrective Action Requested That A. Arsenault be granted full redress in the way of any and all lost rights, earnings and benefits and that the Corporation rescind

> their decision and immediately return him to work in accordance with 11.07 and all sick leave credits be reinstated to him. Further, the Union reserves the right to request an additional compensation and/or damages as a result of this violation.

The letter to the Grievor of April 8, by which the Plant Manager, Mr. Seymour Kell, took the action grieved against, stated as follows:

> The Corporation has reviewed the most current medical information relating to your modified duty status.
>
> The purpose of the modified duty program is to allow a sick/injured employee the opportunity to participate in a work hardening program that will assist their recovery. The program is normally offered for a 3 month period but can in special circumstances be extended to six months. It is of course expected that there will be significant improvement during the period.
>
> You commenced modified duties on October 22, 1990 some 6 months ago, to date, there has been no significant improvement in your condition. The most recent information indicates that it will be a further number of months before improvement is expected.
>
> Based upon your six months of modified duties without improvement and your prognosis for the future it is evident that the program is not appropriate for you at this time, consequently you will not continue on the program beyond today.
>
> Once you have improved to a level where the program would contribute to your recovery it will be made available to you. Until such time you will be placed on sick leave status.

Article 2 provides:

MANAGEMENT RIGHTS

2.01 Rights

It is recognized that the Corporation exercises rights and responsibilities as management, which are subject to the terms of this Collective Agreement.

Article 5 provides:

DISCRIMINATION

5.01 No Discrimination

It is agreed that there shall be no discrimination, interforence, restriction, coercion, harassment, intimidation or stronger disciplinary action exercised or practised with respect to an employee by reason of age, race, creed, colour, national origin, political or religious affiliation, sex, sexual orientation or membership or activity on the union.

5.02 Use of Leave Provisions

An employee who is or has been on leave under any provision of the collective agreement shall not be importuned or disci lined because he is or has been on leave unless it has been established that the employee dishonestly took advantage of the provisions of the said agreement.

Article 20 sets out the details of sick leave entitlement.

At the commencement of the hearings in Saint John Counsel for the Union, Mr. Forsyth, took the position that the Employer had not only violated Article 11.07 of the Collective Agreement but also that the Employer had "effectively 10.10'ed" the Grievor; in other words, had released him for incapacity. It is clear from his written submissions that Counsel has not maintained that position, as, indeed, in my view he could not, since the Grievor was still an employee not only at the time of the grievance but also at the date

of the hearing, albeit by then an employee on long term disability.

I mention this original position on behalf of the Union because it was in this context that Mr. Forsyth first sought to introduce evidence of the Grievor's state of health and of his attempts to return to work following the date of the grievance right up to the end of the hearings in Saint John. When Mr. Boyle, Counsel for the Employer, objected to this post-grievance evidence on the ground that it would not be relevant, I ruled that such evidence would be admitted because, and to the extent that, it could be relevant to whatever remedy I might order if the grievance were to succeed, and because, and to the extent that, it could help me understand the evidence of what occurred before the grievance was filed.

For reasons that are fully explained below, I have concluded that this grievance must be denied. Consequently, I will not set out here evidence which has turned out to be relevant only to any remedy that I might otherwise have ordered.

The Grievor has worked for the Employer since 1980 and has been a full-time PO4 since 1986. On August 10, 1991, he had a heart attack which put him in intensive care for a week. The Grievor was off work until October 22, 1990.

At the time of his heart attack the Grievor was working in the Manual Section of the Saint John Mail Processing Plant, on the midnight shift. In cross-examination the Grievor agreed that that was his "position" in terms of Article 13.04 of the Collective Agreement, which provides, in part:

> 13.04 Position
>
> (a) A position is identified by the following constituent elements:
>
> (i) the class of employment;
>
> (ii) the office where the work is performed;
>
> (iii) the section where the work is performed;

(iv) the work schedule for those holding fixed positions or the cycle of shifts for those holding rotating positions.

As agreed by counsel in the course of the hearing, for the purposes of this grievance I am assuming, without deciding, that the Manual Section and the Mechanical Section are two separate sections in the Saint John Plant.

For some time the Grievor has been active in the Union, he is, and has been since well before his heart attack, Grievance Chairman for the Fundy Local. One of the themes in the evidence before me, particularly the testimony of the Grievor himself, was that there was animosity between the Grievor and Mr. Kell, the Plant Manager. Certainly there was ample evidence of rudeness and personal animosity on the Grievor's part. The only evidence to corroborate to any degree suggestions by the Grievor that Mr. Kell acted on the basis of animosity was in the testimony of Dan Hurley who, since January 21, 1991, has been Superintendent of the Midnight Shift.

In cross-examination Mr. Hurley acknowledged that it was "safe to say" that relations between Mr. Kell and the Grievor had not been good in the past. He testified on re-direct that he had heard the Grievor refer to Mr. Kell in unfriendly terms and, based on "shop talk", he thought that Mr. Kell had done the same with respect to the Grievor, but he had never personally heard such comments. He testified that he had heard Mr. Kell say that he thought the Grievor should have been "doing more than he was doing", but that, he testified, was "strictly in the context of the employer-employee relationship" and had to do with the Grievor's attitude toward the work place. It had nothing at all with his Union position, according to Mr. Hurley.

The first document in this matter which is in evidence is a letter dated August 31, 1990, from Mr. Kell addressed "Dear Doctor", which describes the Employer's Modified Duties Program as it was then proposed it should apply to the Grievor. This letter was sent to the Grievor to give to Dr. Robert Webb, his family physician. The letter, which was copied to the Employer's Manager, Occupational Health and Safety and the Occupational Health and Safety Nurse in the Saint John Plant, states:

This letter is to outline the Modified Dutys [sic] Program here to help ease Al Arsenault back to full duties while recovering from his current ailment.

1. Training to sort mail to Saint John Letter Carriers. This would involve working at a computer terminal with a computer assisted learning program. It would also involve working with practise items to again assist in the learning process. These items are all regular letter size and the activity involved would be to sit and sort them according to delivery address.

2. Completing and modifying labels and tags used to identify containers of mail being dispatched from the Plant. This involves sitting at a desk or table and writing or stamping labels or tags with appropriate information.

3. Revision of empty bags. This is checking empty bags for possible missed letters and laying the checked bags out on a skid or in a cage (monotainer). This activity must be done standing up and involves a significant amount of bending and straightening up.

4. Sortation of mail. This can be done either sitting or standing or a combination of both. It's simply the sorting of mail into a sortation case. It would not be necessary for Al to lift containers of mail either to or away from the sortation case.

It is also possible to have Al work only partial shifts (2, 4, or 6 Hours per day) or be allowed more frequent or longer rest periods during his shifts, to accommodate his limitations during his recovery.

Please indicate if Al can perform any or all of these duties as described and complete the accompanging [sic] Occupational Fitness Assessment Form to outline Al's limitations. Any invoice for completing these forms can be submitted to Canada Post when you return the forms.

Should you have any questions or concerns regarding our Modified Duty Program I can arrange for our local Occupational Health Nurse, Barb Clark, or our Corporate medical consultant Dr. M. Burnstein to contact you.

Thank you for your time in considering this program.

Under date of September 4, the Grievor sent Mr. Kell the following "response" to Mr. Kell's "Dear Doctor" letter of August 31, with copies to Dr. Webb, the Regional Office of the Union and Tony Correia, who was a shop steward in the Fundy Local:

RE: YOUR LETTER 1990-08-31 CONCERNING LEAVE AND DOCTOR

Be advised I am in receipt of your letter dated August 31st, 1990 concerning leave and doctor visits.

Attached is a copy of a doctor's note dated August 23rd, 1990 from Dr. Webb letting the Corporation know I am not able to return to work until October 15, 1990 - may I remind you Mr. Kell that I am out because of a heart attack, not a back problem or a cold but a heart attack!

Also be advised I will pass him your letter on September 12th, as that is the next time I am in his office, I will also pass him the "meat chart" you have also included for my convenience! I wish to note your letter to my doctor about made me ill - you are trying too hard to show that you care or that you are even close to being a friend - "Al this and Al that - what a joke! Be advised I will be bringing along other documentation where you are not so kind to me when you speak to me. Again please never try to be something you are not with me, thanks.

As I told Mr. Crook today in the hallway of the Delta I will bring your letter and the CPC meat chart to my doctor on the next visit.

Regarding the leave form - I will fill out this form when I return to work - I do not know the time of night I left

> the post office by ambulance - please have Mr. McIntyre provide me with this time.
>
> Again please be aware our relationship is one of management/worker, I do not believe you wish my recovery nor do I care, if I would have died on the 10th I would have tried to haunt you. When Mr. Crook says he is glad to see me, I believe him - 'your best wishes' are not accepted.

The Grievor's family physician, Dr. Webb, testified at length in the hearing before me. He has been in family practice for twelve years, the Grievor has been his patient since 1981 and, as of the date of the doctor's testimony, he had seen the Grievor regularly since August 13, 1990, in connection with his heart attack.

Dr. Webb returned the OFA Form referred to in the preceding correspondence on September 12. In it he said that the Grievor would be able to return to work on October 15, with the restrictions that he noted. Counsel for the Employer devoted a good deal of time both in the course of the hearing and in his written argument to the restrictions noted by Dr. Webb on this and subsequent forms. Because of the conclusion I have reached in this matter it is unnecessary for me to deal fully with those points.

I must say, however, that in general I am not impressed with the approach Dr. Webb appears to have taken to the Employer's OFA Forms. He testified that he was seriously concerned with limiting the lifting the Grievor was expected to do, for reasons which he articulated very helpfully at the hearing. He appears not to have recognized, however, that the categories on the OFA form might bear some relationship to the usual tasks in the Employer's facilities.

In the first OFA Form he filled out, in September, Dr. Webb ignored completely the weight limits he was asked to check and simply wrote in "never more that 25 lbs." In the second one, in October, he checked the boxes indicating 15 pound lifting and carrying limits. Thereafter the Grievor's lifting limit was always set at 25 pounds.

Dr. Webb testified that pushing did not concern him particularly, claimed that he filled in the spaces with respect to a pushing

limit "because they were there" and noted that the grievor could exert 150 pounds of force just by leaning against a trolley. Nevertheless, he limited the Grievor in "Pushing & Pulling Trolley" to 36 pounds in both the September and October OFA Forms and continued thereafter to state a pushing limit, until he retracted it at the hearing.

I note that there is no trolley involved in the Grievor's regular work which in and of itself weighs less than 55 pounds, and that is the highest weight in the three boxes provided on the Employer's OFA Form for an employee's doctor to check. Thus, according to the normal understanding in the Plant of what a pushing restriction means, any of the standard restrictions would preclude all trolley handling. However I cannot leave this side issue without commenting that there is a serious ambiguity in this aspect of the Employer's OFA Forms, which could have been quite crucially important in this case. The Form should specify whether the doctor is concerned about pushing a wheeled vehicle which moves easily, and ask the doctor to address the limit on the exertion required, not simply the weight of the vehicle and its load.

In fact, the Grievor did not return to work until October 22, a week later than Dr. Webb had first thought. Just prior to his return, Dr. Matthew Burnstein, the Employer's Divisional Occupational Medical Consultant, wrote to Dr. Webb as follows, with copies to Mr. Kell and the Employer's Occupational Health and Safety people but not, I note, the Grievor:

> RE: Alan Arsenault
>
> Dear Dr. Webb:
>
> I understand from Mr. Arsenault's manager, Mr. Seymour Kell, that Mr. Arsenault appears to be well on the road to recovery.
>
> As you know, Canada Post has developed an extensive modified duties/rehabilitation program for its employees recovering from illness or injury.

> In this program, temporarily disabled employees are given the opportunity to rehabilitate while remaining in the workplace. These rehabilitation duties allow for he restoration of health through the application of work, form follows function. Stamina is developed and a "disability mentality" does not set in.
>
> The employee heals more rapidly without becoming desocialized from the workplace and Canada Post has its experienced employee back at work sooner that normally possible. ...
>
> ... I am enclosing a copy of a letter I received from Mr. Kell... .
>
> I would ask that on your next assessment of Mr. Arsenault, you discuss the role of modified duties and provide Mr. Arsenault with a note, indicating those workplace activities he is able to perform.
>
> Needless to say, you are in charge of Mr. Arsenault's rehabilitation program. Canada Post simply wishes to inform you of our desire to help our employees recuperate whenever possible. ...

The enclosed letter from Mr. Kell to Dr. Burnstein described Mr. Arsenault's situation and his proposed assignment to city sortation training. Mr. Kell noted there that "The training takes place in a private room away from the daily noise and hub bub of the main plant."

When the Grievor returned to work October 22 he started training on city sortation, as contemplated in Mr. Kell's letters. Shortly thereafter, however, he applied for and was granted leave to attend a Union training school. When he returned no sortation training was being offered so different modified duties were found for him. There was no evidence to support any suggestion that the Employer acted other than in the normal course in not offering a sortation training course in the pre-Christmas period, after the Grievor returned from his Union course. There was no evidence or argument

addressed to training, or the lack of it, in the post-Christmas period.

The modified duties found for the Grievor after he returned from his Union course were in the registration section, a sedentary job in a secure room away from the hub-bub of the main floor of the Plant. The regular assignment of PO4's, like the Grievor, to such work is governed by Article 12.01 of the Collective Agreement:

PREFERRED ASSIGNMENTS

12.01 Preferred assignments in Staff Post Offices Grades 9 and up

(a) Assignment of Postal clerks to full-time continuous work assignments in the functions listed below, in Staff Post Offices Grades 9 and up shall be in accordance with this article:

...

(ii) registration sections;

(iii) directory service

- repair of Damaged Mail

- undeliverable mail;

(iv) postage due - including collection and rating of short paid items;

(v) special delivery and C.O.D.'s.

There was considerable evidence of the nature of the Grievor's work in registration but it suffices to say that he scanned track and trace documents and sorted special delivery mail. In circumstances which are explained below, from some time in March onward the Grievor also spent a few hours each day in the Undeliverable Mail Office, which is also covered by Article 12.01.

These duties do not appear on either of the lists of regular duties of postal clerks introduced into evidence by the Union and considered in detail by both parties. The first, introduced as Exhibit 4, is a list of REGULAR DUTIES OF A POSTAL CLERK originally provided by Mr. Kell. The other, introduced as Exhibit 25, is three sample weekly work schedules for MANUAL - SHIFT #1, MANUAL - SHIFT #3 AND MECH - SHIFT # 3, each with a list of the duties covered at the foot of the page.

The Grievor's testimony was that when he was off duty the Employer brought in another clerk from the floor to do the special delivery letters, and that all of the duties he did from his return to work on October 22 until he was put on sick leave on April 8 continued to be performed after April 8.

In so far as it is relevant, I find, on the basis of the testimony of both the Grievor and Superintendent Dan Hurley, that there were seven positions in the Registration Section, working varied hours and that, until March 31 there was always at least one vacancy, either in the Registration Section or Money Order Relief. There was then no vacancy in either until April 14. During that period only one registration clerk was regularly scheduled to work midnights, but since early June two regular registration clerks have worked the midnight shift.

Also, from March 1, 1991, on the Employer adopted a policy of moving a full-time employees on its Modified Duties Program onto the midnight shift and several of them were assigned to the UMO, including a number from outside the CUPW bargaining unit.

There is no doubt that after April 8 work in the secure mail unit continued to be done by regular PO4's in that unit and by people on the Employer's Modified Duties Program.

There is no reason to think that the Grievor's work in the Registration Section, including the UMO, was other than productive and his performance was completely satisfactory. However, according to the testimony of Seymour Kell, there was some concern on the part of management, not with the quality of the Grievor's work, but with the fact that he was not progressing toward return to his regular duties, in accordance with the Modified Duties Program. Mr.

Kell testified that the Grievor's progress was reviewed in late January, some three months after he had returned to work, as part of the regular administration of the Program.

Superintendent Dan Hurley testified that Mr. Kell had first discussed with him the general approach to the Modified Duties Program, with no particular reference to the Grievor. On the basis of this general understanding Mr. Hurley raised with the Grievor as early as January the fact that management would soon expect him to start doing some of his regular duties. In that context, Mr. Hurley testified, the Grievor's response was "nonchalant".

In late January or early February the Grievor went to Halifax for tests on his heart. He was experiencing occasional chest pains and shortness of breath. The results, reported to Dr. Webb on February 5, were inconclusive with respect to the cause of the chest pains and shortness of breath. They could have been caused by "an anginal equivalent" or by the Grievor's obesity and general poor conditioning. Further tests, which would give a clear answer, could not be scheduled earlier than May 1. They have since shown that the Grievor is fit to return to work as stated by his heart specialist in Saint John in a letter to Dr. Webb of August 14, 1991:

> From his description of his work, I feel that he could return as long as he can avoid doing the shifts which require lifting 40 - 50 lb. sacks of mail for eight hours. I think having to lift a occasional sack of that weight would not be deleterious to his health but I do not think that he should be doing this on a regular basis.

The point, however, is that the Grievor was very concerned about his heart in early February, and with reason. Dr. Webb submitted an OFA Form dated February 7 which restricted pushing to 50 lbs.and lifting in a very ambiguous way, by checking the boxes which limited the Grievor to 15 lbs and writing in "not more than 25 lbs". He also wrote in the "comments" section of the Form, "Recent tests demonstrate continuing problem - continue light duty. Further investigations are pending". Mr. Hurley testified that he received this Form around that time.

Mr. Hurley testified that it was Mr. Kell's opinion, and his, that the Grievor's restrictions at that time did not prevent him from doing some main floor duties. He told the Grievor that, and required him to spend the last three hours of his shift sorting letters to boxfronts. This meant the Grievor would have to work on the main floor. There was a good deal of evidence about the area where the boxfronts are located, how much traffic there is at which hours and how noisy it is for how long. It is not necessary to detail that testimony here. It suffices to say that I find that working in the area in question would have put the Grievor in the hub-bub of the main floor of the Saint John Mail Processing Plant, but to about as limited an extent as any job on the main floor could have. It was unquestionably a job within his lifting and pushing restrictions. It was also a job which was part of the regular duties of a PO4 in the Grievor's section.

The Grievor's response to Mr. Hurley's request was that his doctor did not feel it was best for him to leave the secure mail unit and he was not prepared to do it. Mr. Hurley then ordered him to do it. The Grievor repeated that his doctor had said that it would not be in his best interests to leave the secure mail room and that if he were given no choice he would leave work.

According to Mr. Hurley "the issue was then being forced", and he was instructed to move the Grievor out of the secure mail room and have him perform oth r tasks. Sometime before March 11 Mr. Hurley and a fellow supervi or approached the Grievor in the secure mail room and told him that he had been back at work long enough that some improvement was expected. Again the Grievor said that if he was forced to work on the floor he was going to go home. Mr. Hurley testified that he told the Grievor that if that was the way he felt that was his option.

Back in his office after that confrontation, the other supervisor suggested to Mr. Hurley that they put the Grievor in the Undeliverable Mail Office. At that time there were a number of people on modified duties in the UMO. It is marginally noisier than registration but is a self-contained room, although it has no ceiling. From then on the Grievor spent part of each shift there. In cross-examination Mr. Hurley acknowledged that this constituted an expansion in the number of work centres in which the Grievor was

employed and involved some new duties. He thought it "was a step in the right direction".

I note that the UMO is a "preferred assignment" under Article 12.01, just as registration is.

Shortly after the Grievor started to work in the UMO Mr. Hurley had a further conversation with him, in which he pointed out that the Grievor's OFA Form did not restrict him from going onto the main floor. According to Mr. Hurley the Grievor said, "If I get a doctor's letter saying I can't go on the floor will you buy that?", and he, Hurley, responded, "Yeah, I got no problem with that". That, said Mr. Hurley, was the basis on which the Grievor was allowed to stay in the UMO.

The Grievor provided the following hand written letter from Dr. Webb:

> To Whom it may concern
>
> March11/91
>
> Re; Alan Arsenault
> DOB 16/10/50
>
> I have advised this patient to remain on light duty for the next few months at least. This will allow the completion of several investigations and allow reassessment of possible angioplasty.
>
> (signature)

The Grievor had visited Dr. Webb to get this letter, as indicated in the following note from the doctor's file, which was put in evidence:

> March 11/91
> NO Appt
>
> Wants to stay in the secure mail unit rather than go back to floor - anxious etc. when on main floor. Considering risks etc. this is not a bad idea. I think that this person's biggest risk is life style not his job

however. He has a terrible relationship [with] management - largely due to his approach to it
...

Rather than giving the doctor's letter to Mr. Hurley or any other supervisor, the Grievor enclosed it in a letter to Mr. Kell, the Plant Manager, as follows:

RE: YOUR OBSESSION WITH MY HEALTH AND SAFETY

Since my heart attack I have worked in the secure mail unit of the post office - it is my understanding that no supervisor or superintendent has a problem with the work I do there under a light or modified duty program. My duties in the secure mail unit are special delivery mail sorting and dispatching and the track and trace computer input.

The secure mail unit has a quiet atmosphere away from the 'factory' type atmosphere that exists outside this unit and generally caused by employee traffic, motorized equipment and mechanized equipment.

I have been informed by your subordinates that you are demanding I be placed out in the 'factory' type atmosphere "even if only for an hour". I have explained this causes tension, anxiety, eagerness, etc. that I I am not willing to put myself in. My health is not a thing I take lightly, especially since a heart attack!

Your obsession or agenda to apparently have my condition become worse frightens all who is aware!

Doctors Lodge, MacDonald and Webb are aware of the light duties i have been placed on since my heart attack and attached to this is a letter from Doctor Webb advising that I remain doing what I am doing, at least for the time being.

In closing I wish to reiterate, I will not be placing my health in jeopardy. Your job, however menial, is to

> employee [sic] me where my health and safety is not at risk. Thank you.

This letter was copied to various union offices, Don Roberts, who was the Grievor's supervisor on the midnight shift, the Employer's Occupational Health and Safety Nurse and Dr. Webb.

By letter dated 1991-03-18, Mr. Kell replied:

> RE: MODIFIED DUTIES
>
> No where on the O.F.A.'s you have presented to date does your Doctor limit you to a quiet area to work. Nor does the letter from Dr. Webb of March 11, 1991 state that you cannot work on the Mail Processing floor.
>
> If your Doctor wishes to increase the limitations of your duties then have him specify what those limitations are. We in turn will try to accommodate your limitations by providing modified duties that are consistent with your limitations.
>
> In any case you will be assigned to duties as we see fit and as long as they don't overstep your limitations we'll expect you to comply.

This letter was also copied to Don Roberts and the Occupational Health and Safety Nurse.

On March 20 the Grievor sent a fax to Dr. Webb:

> Dear Dr. Webb;
>
> First I would like to apologize for the time Canada Post seems to think you and I have plenty of, but apparently they have.
>
> I have been instructed that I will be forced to work on the post office work floor immediately if I do not have a clearer explanation from you as to where I can and can not feel stressful. CPC says the O.F.A. filled out by you

is not specific enough and the 'continued light duties' could mean anything I would have explained to you!!!

As you are aware the work floor causes me stress etc. - I explained this to you on my last visit and even provided you with a homemade map of the post office.

Apparently what I need from you is a letter explaining I am to stay off the 'factory' (operational) part of the post office, at least for the time being or something that tells them I should use my own discretion.

Thanking you in advance for your time and considerations - please fax this to me a.s.a.p. - I return to work tonight for midnight shift - ... and I will pick it up later tonight . ...

P.S. - attached is a list of C.P.C.'s light duties for people like myself - they suggest the doctor pick the ones which suit each case. You could circle what you think and fax this with your letter.

This resulted in the most critical document in this case, another hand written letter from Dr. Webb:

Re Al Arsenault
DOB 16/10/50

To clarify my letter of March 11/91.

Mr. Arsenault finds working on the main floor of the post office very stressful. Until we have completed the current set of investigations & follow-up I feel that it would be advisable for him to continue working in the secure Mail unit for now. However if things go as expected he should be able to return to the floor in about 3 months as long as the total weight he has to lift does not exceed 25 lbs.

Mr. Kell testified that under the Modified Duties Program management practice was to try to review each case every three

months but, he said, each case is really under continuous review, measuring the employee's progress against the aims of the Program. Therefore, he testified, when, in response to management's request that he expand his activities, the Grievor produced medical evidence that his limitations had become more serious, his situation was given attention. As part of this consideration, Dr. Burnstein, the Employer's Divisional Occupational Medical Consultant, contacted Dr. Webb about the letter just quoted. Dr. Burnstein then made the recommendation on the basis of which Mr. Kell acted in writing the letter which gave rise to this grievance, and which is quoted at the beginning of this award.

The decision to take the Grievor off the Modified Duties Program and force him to go on sick leave was Mr. Kell's and his letter of April 8 giving effect to that decision speaks for itself, but Dr. Burnstein's letter of recommendation is in evidence and is of some relevance. It is dated March 28 and is addressed to "Joe Lahey, Manager O.H.S.& E." with a copy to Mr. Kell:

> RE: Al Arsenault, Saint John Post Office
>
> Dear Joe:
>
> I spoke to Mr. Arsenault's family physical, Dr. G. Webb on March 27, 1991.
>
> This conversation took place without signed consent so the discussion was limited in its' scope to modified duties and the long term prognosis for Mr. Arsenault with regard to return to full duties.
>
> Dr. Webb felt that Mr. Arsenault would require another three months of modified duties before he could attempt to return to full duties. In terms of full duties, Mr. Arsenault will be limited in the future to lifting less that 25 lbs. Other than that, Dr. Webb feels that Mr. Arsenault will eventually return to full duties.
>
> Interestingly, Dr. Webb has been copied on the correspondence between Mr. Arsenault and Mr. Kell and commented on the animosity Mr. Arsenault felt for Canada

Post. This attitude may be contributing to Mr. Arsenault's difficulty returning to the "factory floor".

In any case after Mr. Arsenault has completed further testing, we should expect to see him return to full duties within the aforementioned limitations.

It is not clear to me that we are helping Mr. Arsenault recuperate by keeping him on the same modified duty program as he has been on for the past six months. The modified duties program was designed to aid people in a reintegration into the work place over a three to six month period. Generally speaking, there are psycho-social benefits to remaining in touch with the work place. In this particular case, there is minimal psycho-social benefit, in fact there may be some negative effect. With regard to modified duties helping Mr. Arsenault recuperate, he could retain the same benefit from a lengthy walk twice daily.

I will leave this decision to operations, but I do not believe the modified duties program has anything further to offer Mr. Arsenault at this point. I would recommend that he be allowed to go off work, use up his sick days, apply for short term disability, and return to the work place two weeks prior to his expected date of return to full duties so that a progressive rehabilitation program can be implemented.

On April 8 Mr. Kell wrote the letter set out early in this award placing the Grievor on sick leave status.

The grievance here under consideration is dated May 3. The only intervening event of which there is any evidence is an application on April 15 by the Grievor for a vacancy notified to the employees in the Manual Section. He faxed Mr. Kell;

Recent Order in the Order Book concerning MOB Relief

I have just been informed of an opening in the M.O.B. section where I have been employed for the past several months and before you certified me on sick leave.

Are you going to allow me to apply for this section - is this opened for me under article 11,13 and others? Please let me know a.s.a.p.

This letter will in no way impede or cancel any grievances my Union have or will submit concerning your recent decision with regards to my status.

On that same day Mr. Kell informed the Grievor and the Local Union President that the Grievor was free to apply for the position in question:

TO: AL ARSENAULT

BRUCE PRINCE

RE: M.O.B. RELIEF VACANCY

1. Vacancy is filled from within the section first then from other sections. Therefore posting a notice in the Manual Section only is appropriate.

2. Attention A. Arsenault - Your status on sick leave does not preclude you from bidding for positions within your section.

The position, which was in the Article 12.01 "PREFERRED ASSIGNMENT" section where the Grievor worked while on modified duties, was awarded to a more senior employee.

Subsequent to the filing of the grievance, the Grievor applied for a vacant position in the Mech Section. He was awarded that job and his name appeared thereafter in that connection on the Employer's work schedules, although at the time of the hearing he had not been returned to work and was on Long Term Disability.

There was a great deal of other evidence before me which has not been set out or even adverted to here. It had to do with the potential remedies to which I might have found the Grievor entitled and, as I said at the outset of this award, in the result it has not turned out to be relevant. Most of it concerned the Grievor's state of health and work limitations after April and the pushing and lifting involved in the various tasks in which PO4's engage in their regular duties in the Manual and Mech sections of the Saint John Mail Processing Plant.

The Issues: 1) The first issue concerns the nature of this grievance. The real question is whether the evidence of the Grievor's state of health after the date of the grievance should have been considered relevant not only to damages and to understanding what occurred before the grievance was filed, but also to the substance of his claim that the Employer breached the Collective Agreement. In his opening statement Counsel for the Union suggested that the grievance here is in the nature of a grievance under Article 10.10 of the Collective Agreement, the point being that, in dealing with such a grievance, arbitrators take into account the grievor's state of health right up to the date of the hearing. In his written argument Counsel acknowledged that the Grievor was not released pursuant to Article 10.10. In his written argument Counsel submitted that this grievance was a "continuing request to return to work".

2) Because, for reasons which I will shortly elaborate, I have concluded that evidence of the grievor's state of health after the date of the grievance is not relevant here, the second issue is the basis, the nature and the extent of the Employer's legal obligations to the Grievor on April 8, the date of the letter advising him that he had to go on sick leave, or May 3, the date of the grievance.

3) The third issue is whether, on the evidence, the Employer breached any legal obligation it had to the Grievor on the date of the Grievance. This depends importantly on what constituted "the regular duties of his position" as referred to in the first of the two paragraphs added to Article 11.07 by the Cossette Report.

Decision:

The grievance before me. The grievance before me is clear on on its face. It is an allegation that the Employer breached the Collective Agreement in that Mr. Kell advised the Grievor by the letter of April 8 "that he was being refused modified duties, not permitted to return to work and forced out on sick leave." It refers to Articles 2, 5 and 11, clause 11.07 and Article 20, but the only provision of the Collective Agreement addressed in argument by Counsel for the Union was Article 11.07, and I do not see that he could appropriately have argued any of the others, except, possibly and obliquely, Article 2. The remedy requested is that the Employer rescind its decision and immediately return the Grievor to work with full compensation. That, it seems to me, determines what the issue before me is.

A matter not part of a grievance that has been dealt with and taken to arbitration in accordance with the grievance procedure under a collective agreement may not be dealt with by an arbitrator seized only with that grievance. An obvious problem with any other approach is that the additional matter may not have been grieved in timely fashion. A clear example is afforded by the award of Arbitrator Kates in Ottawa Citizen (1989), 9 LAC 246, where the arbitrator, having allowed a grievance claiming premium pay for Christmas and New Year's day, refused to consider a union request of make a similar ruling with respect of Boxing Day, which was not mentioned in the grievance.

Of course, very stringent application of this principal would lead to technical concerns with the wording of grievances that would be out of place in the arbitration of grievances under collective agreements between labour and management. Arbitrators are mindful of the fact that grievances are often written by grievors or shop stewards not trained in, or normally much concerned with, precision of language. They, therefore, commonly assert jurisdiction over and dispose of all of the issues in a dispute between the parties, provided they can fairly be said to have been raised by the grievance.

Brown and Beatty, Canadian Labour Arbitration (3rd ed.,looseleaf) state the arbitral jurisprudence this way [footnotes omitted];

> ... Just as the collective agreement defines the general scope of the arbitrator's jurisdiction, the submission to arbitration defines his jurisdiction in the particular case. ... The submission may consist of the written grievance or it may be an independent document. But regardless of the form, once the submission is made the arbitrator cannot of his own volition extend, amplify, or add to the issues nor substitute other issues for or in lieu of the issues defined by the submission to arbitration. However, if there is agreement of do so or if there is conduct amounting to acquiesce in the modification of the submission then the arbitration board may thereby acquire jurisdiction. In this regard a distinction must be made between a grievance which is merely lacking in particularity and one which fails to define or include a matter and thereby put it in issue in the dispute. If the written grievance is merely too vague, that will not affect the arbitrator's jurisdiction and it may be cured by giving particulars, or by granting an adjournment.

Can questions of how the Employer here dealt with the Grievor after May 3, 1991, be fairly said to have been raised by this grievance? I have decided that they cannot, both for the simple reason that the words of the grievance would not normally be read as raising those questions and because I do not think that to read the grievance that way would accord with the effective administration of the Collective Agreement, which I take the parties to have intended. I return to this point and the end of this part of this award, in the context of considering whether this grievance should be characterized as a continuing request to return to work or a "continuing grievance".

Since the grievance before me relates only to what the Employer did on April 8, the starting assumption must be that evidence of what happened after that date is not relevant to the question of whether there was a breach of the Collective Agreement as alleged. I am satisfied, therefore, that I made the correct ruling in the course of the hearing when I said that I would hear evidence of what happened after that date only because it might help me understand

what went before, and because it might prove relevant to any remedy I might decide to order.

Article 10.10. Counsel for the Union did not maintain the suggestion in his opening statement that this was a grievance under Article 10.10, "Release for Incapacity", as, indeed, he could not, because the Grievor had not been "released", or terminated, which is clearly the circumstance to which that provision of the Collective Agreement is directed. He submitted, however, that reference to Article 10.10 is appropriate here because, although Article 10.10 is "normally invoked for innocent absenteeism" it is "also applicable to true incapacity cases". "The parallels are striking", he submitted and the effect here was that the Employer removed the Grievor from the workplace for incapacity - "effectively discharged" him - with none of the special protections afforded by Article 10.10.

Those special protections are; (i) the Grievor gets to stay on the job until the arbitrator rules on whether his or her incapacity is such that the Employer was justified in deciding to bring the relationship to an end, and (ii) the union may introduce evidence of the grievor's health right up to date of the hearing.

The first of these special protections is peculiar to this Collective Agreement and is specifically agreed upon in the situation covered by Article 10.10; that is where the employee has been terminated for incapacity and would otherwise be without any financial means flowing from the Collective Agreement. There are provisions in this Collective Agreement and arbitration awards bearing on the question of whether an employee entitled to Workers' Compensation or sick leave benefits under this Collective Agreement can, in fact, be properly terminated in accordance with Article 10.10. The clearest case, it seems, for the application of the Article is where no such protections are available and that situation may well have influenced the parties in agreeing upon it. Even if I had the power to do so, I do not, therefore, consider it appropriate to treat this case, which is admittedly not a 10.10 release, as if it were one.

The second of the special protections, the right to introduce evidence right up to the date of the hearing, is not peculiar to

Article 10.10 of this Collective Agreement. It has generally now been agreed by labour arbitrators in Canada that such evidence is relevant in any case of discharge for "innocent absenteeism". This is so because in such cases the arbitrator is concerned not only with the diagnosis of the grievor's health problems, if that is what is alleged to be the cause of his or her undue absences, but also with the prognosis for the future. I agree with this approach to the evidence in such cases because, once the decision is made that an employee has been, or, under this Collective Agreement, can be, properly dismissed for innocent absenteeism, he or she has no further recourse. Not only is there no source of income under the Collective Agreement, the grievor ceases to be an employee and has no standing to reopen the case.

The Grievor's situation here is quite different. He gets sick pay and then Long Term Disability payments flowing from the Collective Agreement and there is not the same need to speculate about his prognosis, because if and when he is able to do his job he is still an employee and can assert his right to it by filing a grievance. Indeed, under Article 11.07, as it has been interperted, unless the Employer is prepared to assert that he is permanently disabled it is not disputed that the Grievor is entitled to work if he "is capable of performing at least part of the duties of his regular position".

In my opinion, therefore, there is no good reason, as there was in the innocent absenteeism cases, to depart from the normal rule that whether or not the collective agreement breach grieved against in fact occurred is to be determined on the basis of the facts as they stood at the time the breach of the Collective Agreement is alleged to have occurred.

Counsel for the Union submitted that Article 10.10 "was used" in three awards where arbitrators under this Collective Agreement dealt with the difficult question of whether the clauses added to Article 11.07 by the Cossette Report cover permanently, as well as temporarily, disabled employees. In McLean, (unreported, Dec. 12, 1990), CUPW Gr. Nos. 626-88-3-07670 and 08454; CPC Arb. Nos. 0333189Y and 342160Y (Teplitsky), the grievor had been discharged because of his disability (see p. 3). In Allain, (unreported, Feb. 7, 1991) CUPW Gr. Nos. 347810M and 349168M; CPC Arb. Nos.350-88-

15534 and 704 (Rousseau), the grievor had been discharged (see p. 2) outright and then put back at work by the Employer on the basis that she was being terminated in accordance with Article 10.10. Here there was no discharge and no reference to Article 10.10 by the Employer. Thus, whereas the "use" of Article 10.10 was natural and necessary in those cases, it is not so here.

In Wytrykush, (unreported, June 3, 1991) CUPW Gr. Nos. 860-88-00018, 34 and 37 (Norman), as in this case, the grievor was placed on sick leave rather than discharged, but there the Employer refused modified duties explicitly on the basis that the grievor was permanently disabled. At p.2 of his award Arbitrator Norman quotes the Employer's letter:

> ... there is no indication that you will ever be able to perform the full range of duties associated with those of a postal clerk. ...

In my reading of that award I have been unable to find any explicit "use" of Article 10.10.

In any event, I find that this case is different from Wytrykush in that the Employer here has not dealt with the Grievor on the basis that his disabilities are permanent, and has not denied on that basis, or any other, the full application to him of Article 11.07.

In his alternative argument Counsel for the Employer addressed the fundamentally serious question of the Employer's obligation to accommodate permanently disabled employees, which was the subject of the Wytrykush, because Counsel for the Union attempted to have me consider this case on that basis, but, because the Grievor was not dealt with on that basis I have not done so. I return to this point below.

A continuing grievance. I am not prepared to characterize this as grievance as being a continuing request to return to work or a continuing grievance. The grievance itself alleges that the employer "has violated" the Collective Agreement by a particular act, that being the letter of April 8. What is sought is recision of that decision and compensation. The wording of the grievance is, however, only the starting point. More important, perhaps, is the

nature of the grievance and the effect of treating it as a continuing grievance. I do not think that treating this grievance as a continuing request to return to work or a continuing grievance would lead to the effective administration of the Collective Agreement in this respect, and that is what I take the parties to have intended.

The sort of grievance which it makes sense to treat as a continuing grievance is an allegation of a breach of the collective agreement that recurs or continues as the employer (or union) takes the same position or replicates the action grieved against in respect of a situation which does not change in any significant respect. The evidence that I heard with respect to developments after April 8, the date of the letter putting the Grievor on sick leave, or May 3, the date of the grievance, certainly make it clear that the Grievor's situation changed continuously after those dates. Indeed, that is so almost by definition in a case of temporary disability. This, therefore, is not a grievance that is to be characterized as a continuing grievance.

Counsel for the Union would have it that once the Grievor filed this grievance the Employer was obliged, not only by the Collective Agreement but also by the hovering grievance, to bring the Grievor back to work as soon as Article 11.07 entitled him to return. The effect of this would be that, when the grievance came on for hearing, if it could be shown that the Grievor had, at any stage after the filing of the grievance, become able to perform as required under Article 11.07 the grievance would be allowed, and the Employer would be liable to compensate the Grievor, even though at the date specified in the grievance there had been no breach.

Presumably, from Counsel's submission, he would say that liability would only run from the date the Grievor had put the Employer on notice that he could perform his duties to the extent required by the Collective Agreement. Counsel for the Employer submitted in the course of the hearing that it was up to the Grievor to file a new grievance if he felt that his notice to the Employer that he was now fit to perform as required by the Collective Agreement had not be dealt with properly.

I think the second approach is more realistic and more likely to achieve the sort of efficient collective agreement administration which I take to have been intended by the parties. The obvious concern is that it might result in a multiplicity of grievances and, potentially, arbitrations, but I think those concerns are the lesser of the potential evils.

Taking the Union's approach, at any point when an employee on sick leave wishes to return to work he or she can so advise the employer and, if the employer does not agree, file a grievance. Indeed, any employee would be well advised to file a grievance immediately upon going on sick leave just in case the Employer objects when the employee (with appropriate medical certification) announces himself or herself well enough to return to work. In considering such a grievance the Employer would have to be aware that there was no point at which judgment could safely be brought to bear, because the employee's condition could change, or, more accurately, could be said by his or her doctor to have changed, at any point up to the date of the hearing. This uncertainty, it seems to me, is not likely to result in grievance settlements, but is, on the contrary, likely to lead to administration of the collective agreement in this respect by arbitrators, rather than by the parties.

I realize that the "uncertainty problem" I have just outlined was considered in the context of terminations for innocent absenteeism and thought by most arbitrators not to have been persuasive. However, for reasons I have already given above, I think placing an employee on sick leave is quite different for terminating him or her, and therefore that the competing considerations are quite different here.

The approach I think preferable, and to have been intended, would involve an employee filing a grievance when he or she is put unwillingly on sick leave, as was the case here, or when he or she had properly indicated a desire to return to work and has been refused. Both the union and the employer could then consider the medical and other evidence as it stood at the point of the employer's refusal to put the grievor to work as allegedly required by the collective agreement, and settle the matter, or not, as the case might be. If the grievor's medical situation changed, or if there were any other relevant change in the circumstances, such as

the work available, there could be a new request to return to work and, if necessary, a new grievance.

If grievances of this kind were not settled, several grievances could be dealt with in one arbitration hearing, but each would be referable to a definable set of facts. If it were found that the collective agreement had been breached, evidence of what the grievor had lost would in all likelihood require evidence of what happened after the date of the grievance and, indeed, of what might be likely to happen in the future. In the normal course, however, damages would be likely to be left for agreement by the parties, with the arbitrator retaining jurisdiction to determine them if the parties were unable to agree.

2) The Basis, Nature and Extent of the Employer's Legal Obligations to the Grievor.

Given the grievance, the only questions for me as arbitrator here are whether the Employer breached the Collective Agreement in putting the Grievor on sick leave on April 8, 1991 and, if so, the remedies to which he is entitled.

There was considerable evidence, much of it set out above, about the Employer's Modified Duties Program. It is not for me to say whether or not that program is a good one in either concept or application. Moreover, the fact that the Employer put the Grievor on sick leave in purported compliance with the Program is of limited relevance because there is no mention whatever of the Program in the Collective Agreement. I say "limited relevance" rather than "no relevance" because it could be that, in so far as the Collective Agreement gives the Employer discretionary powers, failure to apply the Program even-handedly would be evidence of abuse of that discretion, a point to which I return below.

It has been held, by Arbitrator Blouin in his award between these parties in National Policy Grievance (unreported, September 24, 1990) CUPW Gr. No. N-00-88-00002; CPC Arb. No. 88-23-00051, that Article 11.07, Employee Becomes Handicapped, applies differently to temporarily and permanently handicapped employees. A great deal of the written argument before me was devoted to the question of whether the learned arbitrator was right in his conclusion that the

clauses added to Article 11.07 by The Cossette Report were to be interpreted as not applying to permanently handicapped employees. This is an extremely serious point, upon which Arbitrator Rousseau subsequently disagreed, in Allain, cited above. Later still, in Wytrykush, cited above, Arbitrator Norman both disagreed with Arbitrator Blouin's interpretation of the Collective Agreement and held that he had not properly taken account of the Canadian Human Rights Act, S.C. 1976-77, R.S.C. c. H-6 and certain decisions of the Supreme Court of Canada, particularly Alberta Human Rights Commission v. Central Alberta Dairy Pool (1990), 72 D.L.R. (4th) 416. I am informed that both Allain and Wytrykush are currently subject to applications for judicial review. However, there is, apparently, no dispute, and before me the parties are in full agreement, that all of Article 11.07 applies to temporarily disabled employees.

The Union's position is that the question of whether the clauses added to Article 11.07 by the Cossette Report apply to permanently handicapped employees is before me because the Grievor has a permanent lifting restriction of 25 pounds and, indeed, had that restriction at the date of the grievance. I do not accept that view of this matter. On April 8 it was not at all clear what the Grievor's permanent, or even long-term, restrictions would be. Even if it had been reasonably clear that he would have some permanent restrictions, the Employer did not treat him as a permanently restricted or permanently handicapped employee, but as one with temporary restrictions. That is clearly what the letter of April 8, which gave rise to the grievance, said:

> ... The most recent information indicates that it will be a further number of months before improvement is expected. ...
>
> Once you have improved to a level where the program would contribute to your recovery it will be made available to you. Until such time you will be placed on sick leave status.

Furthermore, the evidence is clear that the Employer continued to treat the Grievor as a employee, but one temporarily on sick leave.

This is made clear by the way it treated both of his applications for vacant positions.

There are, as far as I can see, no rights given under this Collective Agreement to a permanently handicapped employee which are not also given to a temporarily handicapped one. Thus, there is no reason, for the purposes of this award, or under this Collective Agreement, to treat the Grievor as permanently handicapped when the Employer has not characterized him that way.

If the Blouin National Policy Grievance Award is correct or binding, and I take no position on whether it is either, then, of course, the Grievor would be seriously disadvantaged by being characterized as permanently disabled. I note, too, that if the two clauses added to Article 11 of the Collective Agreement by the Cossette Report are read, not as Arbitrator Blouin read them, but according to what, in the English version of the Collective Agreement at least, is their normal grammatical sense, there is, in fact, no provision in the Collective Agreement for "permanent" disability or handicap and no reason to decide whether an employee is permanently or temporarily handicapped. The employee is simply entitled to modified duties until he or she "becomes capable of performing all the duties of his position".

In this context, I have proceeded on the basis that on April 8, which is the relevant date for this grievance, the Grievor was, and was treated as being, temporarily disabled. I will not. therefore, deal further with the important issue of whether the Blouin National Policy Grievance award is correct or binding in its conclusion that the clauses added by the Cossette Report do not apply to permanently handicappped employees.

Both parties appear to agree that Article 11.07 of the Collective Agreement as it now stands involves two systems of rights for temporarily handicapped employees, one under paragraphs (a) and (b) of the Article, and one under the paragraphs added by the Cossette Report. The first, in the submission of the Union, "allows permanently and temporarily disabled employees to be assigned to any appropriate vacancy in the bargaining unit" compatible with the employee's abilities. The second, which is of greater concern here,

is found in the following words, which have already been set out above but which are repeated here for convenience:

> ** Moreover, the duties of the position held by the employee or the methods used to fulfil such duties shall be modified if the employee is capable of performing at least part of the regular duties of his position.
>
> ** The modified duties situation shall end when the employee becomes capable of performing all the duties of his position.

The questions which arise in the application of these provisions of the Collective Agreement to a temporarily disabled employee (and perhaps to a permanently disabled employee, but I am not deciding that question here) are: (i) what was his or her position? (ii) what were the regular duties of that position? (iii) is the employee capable of performing at least part of those duties? And perhaps (I say "perhaps" here because I will not reach this question in this award) (iv) are the modifications in the duties of the position, or in the methods used to fulfil such duties, which would have to be made to accommodate the grievor within the apparent intent of the draftsperson?

3) Did the Employer Breach Any Legal Obligation to the Grievor on April 8?

The terms of the Collective Agreement. On the evidence, and bearing in mind Article 13.04 of the Collective Agrement, which is set out above, the Grievor's position on April 8 was that of PO4 in the Manual section, on the midnight shift. The distinction between Manual and Mech is not important here. What is important is that the Grievor did not have one of the "PREFERRED ASSIGNMENTS" under Article 12.01.

He had been working in the registration section and on undeliverable mail but, in terms of this Collective Agreement, he did not hold a position there. He had been working there as a matter of light duties in accordance with the Employer's Modified Duties Program, not because that was his position. I would not say

that the Program was established simply to accommodate people in the Grievor's position. Undoubtedly it has advantages for the Employer too. Nevertheless, it is not my interpretation of the Collective Agreement that where an employee is temporarily assigned to a position other than his or her own to accommodate a disability it is those new, presumably lighter, duties that are to be treated as the "regular duties of his position" for purposes of Article 11.07. Such is not the most obvious meaning of those words and to assign such a meaning to them would be to chill any inclination the Employer might have to go beyond the letter of the Collective Agreement to find work for employees suffering from a disability. Therefore, for the purposes of my decision here, at the relevant time the Grievor was a PO4 in the Manual Section.

I heard a great deal of evidence about the regular duties of a PO4 in the Saint John Mail Processing Plant in both the Manual and Mech Sections. I have not set it out in this award because it has not proved to be relevant. All that matters for purposes of my decision here is that on April 8 the Grievor was under a restriction by his own doctor, in whom he had complete confidence apparently, from working anywhere on the main floor of the plant. It was a restriction that he had actively sought and which both he and his doctor continued to insist at the hearing before me had been thought necessary at the relevant time. It is unnecessary to review here the evidence of the regular duties of the position held by the Grievor because I can state categorically that, on the evidence before me, all of them required him to work on the main floor. The fact that the Employer occasionally, or even relatively frequently, exercised whatever rights it has to assign PO4s on the floor to the registration section on a shift by shift basis did not make duties in that section part of the "regular duties of [the Grievor's] position".

The conclusion with respect to the "second system" for accommodating disabled employees under Article 11.07 (that is, under the paragraphs added by the Cossette Report) is then obvious. On April 8, and on the date of the grievance, the Grievor was not "capable of performing at least part of the regular duties of his position" so the Employer was not obligated by the second part of Article 11.07 to modify the duties of his position.

With respect to the "first system" under Article 11.07, I agree with the submission of Counsel for the Union, that the Grievor "had access to it", but the evidence does not establish that at the relevant times there was a vacancy to which that system could apply. The Grievor applied and was considered for the MOB Relief position but did not get it because a more senior employee was entitled to it, and there is no evidence that any such position was improperly denied to the Grievor because the Employer did not take proper account of Arbitrator Outhouse's approach in Sampson, (unreported, Oct. 17) 1985) CUPW Gr. No. 29-H-4-5; CPC Arb. Nos. 85-1-3-4652 and 4653.

The Canadian Human Rights Act. I have decided these questions on the basis that the Canadian Human Rights Act (cited above) applies to Canada Post. The primary means of enforcing that legislation is, of course provided by the Act itself, but as an arbitrator within the Federal Government's legislative jurisdiction I cannot give effect to a provision in a collective agreement rendered illegal by that Act.

I am not certain that the Grievor suffered at the relevant time from a "disability" within the terms or purpose of the Canadian Human Rights Act, in so far as it had not been established that he was permanently disabled. (I have little doubt that a person permanently limited in his activities as a result of a heart attack would be held to be disabled or handicapped - See Guidelines for Interpretation of "Because of Handicap" recently issued by the Ontario Human Rights commission, Appendix D to the Employer's written argument) I do not need to try to decide that quetion, however, because even if he was "disabled" at the time for purposes of the Act, I do not think that the Canadian Human Rights Act requires the Employer to go beyond the very generous terms of the clauses added to the Collective Agreement by Judge Cossette, which, Arbitrator Blouin held in National Policy Grievance (cited above) and the parties appear to agree, do apply to temporarily handicapped employees at least. As I have already made clear, in my opinion at the time of the grievance there had been no breach of those clauses by the Employer.

In support of my conclusion that the requirements of the Canadian Human Rights Act with respect to the Grievor as a temporarily

handicapped employee are no greater than those of the Collective Agreement, I refer to the words of Madame Justice Wilson, which were quoted by Counsel for the Union in his written argument, in the course of his submission on the current state of the law of adverse effect discrimination, as it applies to the disabled. Madame Justice Wilson, speaking for the majority of the Supreme Court of Canada in Alberta Human Rights Commission v. Central Alberta Dairy Pool; Canadian Human Rights Commission et al., Interveners (1990), 72 D.L.R. 417, said at pp. 437 and 439,

> The second branch of the Brossard test [Brossard (Ville) v. Quebec (Commission des droits de la personne) (1988), 53 D.L.R. (4th) 609 ...] addresses alternatives to the employer's rule. ...[It is] a factor that must be taken into account in determining whether the rule is "reasonably necessary" under the first branch. I believe the proposition it stands for is uncontroversial. If a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be bona fide.
> ...
> The onus is upon the respondent employer to show that it made efforts to accommodate the religious beliefs of the complainant up to the point of undue hardship.
>
> I do not find it necessary to provide a comprehensive definition of undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the board of inquiry in the case at bar - financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. ...

The Employer's Modified Duties Program. Counsel for the Union submitted that the Employer "misapplied its own program" by putting the Grievor on sick leave without waiting to see whether his scheduled tests would allow him to do more duties, by not keeping him on the program when it had kept others on longer that six months and by making its decision based on his antagonism toward

management. Since the Modified Duties Program has no place in the Collective Agreement the only way the Union can rely on it is by demonstrating that the Employer departed from the Program and in by doing so discriminated against the Grievor (in the broad sense of the term, there being no evidence of a breach of Article 5, set out above), thereby abusing its discretion under the Collective Agreement.

"Discrimination in the broad sense", which may be held to constitute abuse of a discretionary decision-making power, I take to mean treating differently people between whom there is in fact no distinction which can be rationally related to the decision to be made. Illegal discrimination such as that addressed by Article 5 is a narrower concept.

Management's rights under this Collective Agreement, which are set out Article 2, above, add nothing to this argument.

I am not satisfied that, in giving consideration to the Grievor's case after receiving his doctor's letter of March 20, the Employer acting through Mr. Kell did anything out of the normal course. It is clear from the evidence that the Modified Duties Program is conducted on a case by case basis, and I do not think it appropriate for me as arbitrator to invoke an implied doctrine of no-discrimination (in the broad sense) in a way that would rigidify a program which is not part of the Collective Agreement. In any case, the evidence did not establish that employees who were left on the Modified Duties Program for longer periods than the Grievor was were not in quite different situations medically.

I do not read Dr. Burnstein's letter of March 28,1991 to Mr. Kell, which is set out above, as recommending that the Grievor be taken off the Modified Duties Program because he was antagonistic to management. I read it as saying that some of the supposed major benefits of the Program, "the psycho-social benefits", were not being realized and, because the physical benefits were minimal the Grievor should go off the Program. Like the Grievor's family doctor, Dr. Burnstein felt that his attitude was hampering his effective return to work. It was not a breach of the Collective Agreement for Mr. Kell to have taken that letter into consideration in deciding to place the Grievor on sick leave.

Did the Employer reach its conclusion on the wrong basis and, if so, what effect did that have? The final issue for consideration arises out of the following submission in the written brief of Counsel for the Union:

> 183. ... The grievor's entitlement to modified duties did not, as the Employer claimed, rest upon whether he was improving under the [Modified Duties] program; rather it lay with whether the Employer can continue to modify his duties without undue hardship. The Employer failed to consider whether it could continue to accommodate the grievor in his duties on April 8. The grievance should be allowed on this ground alone.
>
> 184. If the employer had considered whether it could continue to offer him modified duties without undue hardship, what would it have decided? ...

As has, I hope, been made clear, I agree with Counsel for the Union that the Grievor's claim to modified duties did not rest on the Employer's Modified Duties Program. That Program does not exist by virtue of the Collective Agreement, but as a management initiative and can therefore survive challenges under the grievance procedure only to the extent that it does not conflict with the Collective Agreement. I agree as well that "improvement", which, as Dr. Burnstein explained at the hearing and in letters quoted above, is an important feature of the Program, is not part of the Collective Agreement definition of the Employer's obligation to provide modified duties. If the issue were one of reasonable accommodation under the Human Rights Act it is not unlikely that improvement might be held to be an appropriate consideration, but I see no room for it under the words of Article 11.07.

The question under the clauses added by the Cossette Report is simply whether the Employee can perform "at least part of the regular duties of his position". Whatever "at least part" may be held to mean, if he or she can so perform, his or her duties "shall be modified", whether or not that "part" has been increasing. Here, of course, I have held that the Grievor could not perform "at least part of the regular duties of his position".

I note that if the Employer chose, and was allowed by the Collective Agreement, to keep at work an employee who could not "perform at least part of his regular duties" or was otherwise not entitled to modified duties, the Employer would be free to apply its Modified Duties Program as designed, subject only to any express or implied limitations on the exercise of its management rights found in the Collective Agreement or imposed by human rights and other laws of general application.

It follows that, in my opinion the Employer appears to have missed a step in the process of deciding that the Grievor should be put on sick leave status as of April 8, 1991. The first question should have been whether he could perform "at least part of the regular duties of his position". It may well be that both Dr. Burnstein, in writing his letter of recommendation, and Mr. Kell, in writing the letter of April 8, thought that everybody involved, including the Grievor, would understand that they were writing in the context of an Employee who had made clear it by presenting his doctor's letter of March 20 that he could not perform any part of his regular duties. That, they may have thought, made it unnecessary to spell out that fact before going on to the reasons why the Modified Duties Program was no longer appropriate. There is no evidence on that. The more important point, however, is that if Mr. Kell had been explicit in addressing the question of whether the Grievor was "capable of performing at least part of the regular duties of his position" he would most certainly have said "no". And he would have been right!

Conclusion and Order: For the foregoing reasons the grievance is denied.

Arbitrator