8-31-1992

Re Canada Post Corp and CUPW (Godwin)

Innis Christie
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Re Canada Post Corp. and Canadian Union of Postal Workers (Godwin et al.)

[Indexed as: Canada Post Corp. and C.U.P.W. (Godwin), Re]

File No. 096-90-00002

Canada, I. Christie. August 31, 1992.

EMPLOYEE GRIEVANCES alleging unjust suspension. Grievances allowed.

G. Forsyth and others, for the union.
T. Roane, M. Belliveau and others, for the employer.

AWARD

The grievances which are the subject of this arbitration were filed under the *Postal Services Continuation Act, 1991*, S.C. 1991, c. 35, which was passed to bring an end to the postal strike of August and September, 1991. The Act directed the employer to continue or resume postal operations, required every employee to continue or resume the duties of his or her employment, extended the relevant collective agreements to July 31, 1993, and provided for the amendment and revision of the collective agreements by compulsory arbitration. Excepted from period of statutory extension of the collective agreements was the period beginning on August 24, 1991, and ending at 3:00 p.m. Eastern Daylight Time on September 5, 1991. With respect to that period s. 5(3) and (4) of the Act provide:

> 5(3) Any employee who is disciplined or discharged in the period beginning on August 24, 1991 and ending at 3:00 p.m. Eastern Daylight Time on September 5, 1991 may submit the matter for final settlement
>
> (*a*) to an arbitrator selected by the employer and the union; or
>
> (*b*) where they are unable to agree on the selection of an arbitrator and either of them makes a written request to the Minister to appoint an arbitrator, to an arbitrator appointed by the Minister after such inquiry, if any, as the Minister considers necessary.
>
> (4) Sections 58 to 61 and 63 to 66 of the *Canada Labour Code* apply, with such modifications as the circumstances require, in respect of an arbitrator to whom a matter is submitted under subsection (3).

During the period covered by this special arrangement each of the four grievors was sent home from, or told not to report for, work at the Halifax mail processing plant. Each has "submitted the matter for final settlement" pursuant to s. 5(3), and in each case the employer has taken the position that I have no jurisdiction to deal with the matter because the grievor was not "disciplined", but was, instead, locked out. Lock-outs are not mentioned anywhere in the *Postal Services Continuation Act, 1991* and are not, in the employer's submission, subject to the jurisdiction of an arbitrator selected, as I have been, in accordance with s. 5(3).

Alternatively, counsel for the employer submitted that if the grievors were not locked out, they were simply sent home or told to

stay home as an "administrative action", which was not disciplinary and is similarly not covered by s. 5(3).

The employer explicitly did not take the position that, if the grievors were found to have been "disciplined", there had been just cause.

For the reasons set out below, I have concluded that the grievors were "disciplined" within the meaning of that term in s. 5(3) of the *Postal Services Continuation Act, 1991*, and that I therefore have jurisdiction to rule in "final settlement" of their grievances. There having been no submission to the effect that there was just cause for the employer's actions in relation to the grievors, I have allowed their grievances.

I heard extensive testimony and took a great deal of documentary evidence over two days of hearings relating to this aspect of the employer's administration during the postal strike, the actions of the grievors and their treatment by the employer during the strike, and dealings between the union and the employer leading up to the hearing in this matter. Before turning to the reasons for my conclusion, I will state the relevant facts as I have found them, summarizing this evidence where there was any dispute on factual matters which have turned out to be relevant.

There is no dispute that the parties became free legally to strike or lock out on August 24, 1991. The employer continued to operate and the union began to exercise its right to strike in the form of various kinds of stoppages and disruptions at different times and locations across Canada. Effective September 5th at 3:00 p.m. the parties agreed that the terms and conditions of the pre-existing collective agreement would continue to apply, to allow for mediation by Judge Allan Gold. It is that intervening "no collective agreement" period to which s. 5(3) of the *Postal Services Continuation Act, 1991*, applies and with which I am concerned here.

Mr. John Crook is the employer's manager, industrial relations, for the Atlantic region. During the period in question he worked in the employer's control centre in its Purdy's Wharf offices in Halifax, and maintained liaison with the national control centre and postal facilities in the district. On the night of August 26th he received the following "RETURN TO WORK GUIDELINES", dated August 26th, 1991, from his superior in the employer's national office, Elliot Clarke:

> In accordance with 6.2.25 HEGA portions of the Contingency plan, employees who agree to return to work will be assigned to perform available work EXCEPT in the following instances:

1) If they are known agitators, allow entry and assign them work in restricted areas of the facility. If these people disrupt the workplace, have them removed from the facility. They are locked out for the duration of the work disruption.

2) If there are employees who will be receiving disciplinary suspension, do not allow reentry into the facility. They are locked out for the duration of the work stoppage.

3) Any employee involved in an act causing the Corporation to contemplate discharge, do not allow reentry until the discipline committee has concluded its thinking.

4) No discharged employee is to be allowed reentry.

5) If the employee has been identified picketing employees and/or management homes, do not allow entry to the facility. They are locked out for the duration of the work disruption.

Pay actions will be based on the "no work no pay" concept.

This "game plan", as counsel for the employer characterized it, was not widely disseminated, because the employer was anxious, for public relations reasons, to avoid the use of the term "lock-out" publicly or in its dealings with the union or employees. In the Atlantic region the "game plan" was, initially at least, apparently only shared with Gerald Roy, the district general manager, and with the plant managers.

According to Mr. Crook, throughout the period in question, in response to the union's rotating strikes and other industrial actions, the employer was also locking out groups of employees, although, for public relations reasons, it did not characterize its actions that way, preferring generally to simply announce that there was no work to be done by the particular group of employees in question.

There may have been illegal activities on both sides, but for the purposes of this award I am proceeding on the basis that both the strike activity and the locking out of groups of employees was legal because the collective agreement was no longer in effect and all required waiting periods had expired.

During this time, if there were any incidents that were thought to be strike activity on the plant floor of the Halifax mail processing plant they were dealt with initially by the supervisors on the floor, but any final disposition of such matters was decided by Mr. Crook and the district manager, and then referred back to the plant manager for action.

Mr. Crook testified that it was his understanding that the purpose of any lock-outs, including the "lock-outs" referred to in the August 26th memorandum from Elliot Clarke, was to put pressure on the union at the bargaining table, just as the union's various legal strike activities put pressure on the employer. He

testified that the policy in that memorandum was effectuated by telling employees to whom it had been decided that it applied to stay out of the work place until the strike was over, or until there was a collective agreement, or words to that effect.

Mr. Crook testified that as of September 5, 1991, there were 15 employees in the Atlantic region who had been involved in actions for which they had been locked out or disciplined or whose cases were under investigation. In some of those cases Mr. Crook considered them to be both locked out and subjected to discipline. In corroboration of his evidence Mr. Crook put in evidence a handwritten summary of the 15 cases which he had prepared for a briefing of Mr. Roy, the district general manager, on September 10th. It shows employees in all three categories, with each of the four grievors being shown as "locked out", with no notation of discipline, or at least what the employer regarded as discipline, having been imposed.

Mr. Crook testified that the decisions that the grievors be told that they were suspended for the duration of the strike had been made in the employer's Halifax control centre by a committee of himself and Mr. Roy. Mr. Crook said that these were not decisions to discipline, but were made simply in the interests of keeping the mail moving and to put pressure on the union. Mr. Crook also acknowledged that everyone who was "locked out" in Halifax had committed acts which, if they had been committed other than in a legal strike context, would have been misconduct warranting a disciplinary response. He claimed that the union knew that individuals were being locked out, but admitted that "we played it close to the chest".

In support of his claim that the union knew that individuals were being locked out, Mr. Crook testified that, although Mr. Clarke's memorandum of August 26, 1991, was classified as "protected", for the employer's security purposes, it very soon came into the union's possession. In fact, with a memorandum dated September 4th, over the signature of "Jim Crowell, 4th National Vice-President", it was circulated by the union's head office to "ALL REGIONS". Also, through Mr. Crook the employer introduced a copy of the union's strike publication, "The Daily Picket", for September 3rd to show that the Atlantic region union knew at that time that the employer was telling "some members" that they were not to return to work until after the strike.

Also introduced was a copy of a letter dated September 5, 1991, from Deborah Bourque, the union's third national vice-president, addressed "Dear Sister and Brother", in which she explains that the union had agreed to work during the process of mediation by

Judge Allan Gold which commenced on that day. One of the conditions of this return to work, she states, was the employer's agreement that:

> CUPW members who have received short term suspensions, banned from the post office or subject to individual lockout for the duration of the strike will be permitted to return to work.

Mr. Crook testified with respect to the individual treatment of each of the four grievors, all of whom were called as witnesses by counsel for the union. It is unnecessary to set out here the details of this testimony with respect to the individual actions of each of them, which resulted ultimately in each of them being directed not to come to work until after the strike had ended, because the employer decided not to argue, in the alternative, that, if I were to hold that they had in fact been "disciplined" within the meaning of s. 5(3) of the *Postal Services Continuation Act, 1991*, there had, in the context, been what amounted to just cause. What matters is the general nature of each their actions and the disciplinary, or non-disciplinary, characteristics of the employer's reaction in each case. The only issue now before me is whether each of the grievors was "disciplined" for purposes of the Act.

Mr. Crook testified that the documentation on these matters was not put on the grievors' personal files, as documents related to discipline would have been, but was kept on a separate "complaints" file in the labour relations department. Also, the decisions by Mr. Crook and Mr. Roy to suspend the grievors for the duration of the strike were made without reference to their discipline records.

For each employee the employer maintains an attendance card known as a TAC card. Counsel for the union placed considerable emphasis on the notations on the grievors' TAC cards. For instance, for August 28th, 29th and September 3rd the grievor Godwin's TAC card shows a "D", which is the code for "suspended". There is no code for "lock-out", or, for that matter for "strike". Apparently, in the cases of all four grievors the employer's payroll clerks used "D" to indicate the days when they were, in the employer's submission, "locked out", and used "W", which means "without pay", to indicate the days when they were on strike.

The union's position is that the "D" notation on the grievors' files may have adversely affected them already and is likely to in the future, because it normally indicates a disciplinary action. TAC cards do not cease to be part of an employee's file after a year, as do disciplinary documents or notations on personal files. This, in

the union's submission, makes what amounts to a disciplinary notation on the TAC cards particularly damaging.

I accept Mr. Crook's evidence that the payroll clerks put the "Ds" on the TAC cards without direction from the labour relations department or any higher official of the employer. The presence of the "Ds" does not therefore indicate that at the time Mr. Crook or managerial personnel at his level really considered what the employer now says were lay-offs to have in fact been discipline. It is some indication, however, that those not privy to Mr. Clarke's memorandum of August 26th may well have seen the suspensions of the grievors as disciplinary.

Even though the payroll clerks were given no specific direction about the matter the employer must, of course, bear responsibility for any damage to the grievors that may have flowed from the misnotations, although no specific damage was proven here. In this connection I note that in the course of the hearings in this matter Mr. Crook arranged for the "Ds" to be removed and replaced by an indication that the grievors were locked out.

I also accept Mr. Crook's testimony that the TAC cards are only referred to where an employee is being considered for discipline or other processes in connection with cumulative poor attendance.

I note in passing that as a result of this award the TAC cards must be changed again to indicate faultless absence other than lock-out. All four grievors filed grievances on September 23, 1992, to the effect that they had been disciplined without just cause. In each case the first stage reply was:

> As there was no collective agreement in effect at the time of the alleged infraction, the complaint will not be heard through the grievance procedure.
>
> The Corporation has accepted your complaint solely for the purpose of attempting to resolve the problem and will therefore, conduct the necessary investigation into the allegations.
>
> Should you feel the problem has not been resolved to your satisfaction, please contact, in writing, your Divisional General Manager, who will make the final determination.

In grievor Godwin's case, and in the case of grievor LaPierre, the second stage reply was:

> The complaint has not been discussed with your Union Representatives.
>
> At the time of the alleged infraction, there was no Collective Agreement in place, therefore, this complaint will not be heard through the grievance procedure.
>
> We have investigated the circumstances surrounding you [*sic*] complaint, and find that the action taken was warranted.
>
> Should you feel the problem has not been resolved to your satisfaction, please contact in writing your D.G.M., who will make a final determintion [*sic*].

In the other two cases the wording of the second stage reply was to the same effect but instead of stating that the "action taken was warranted" those replies state "your complaint is not warranted". In my opinion, nothing turns on these replies or any difference between the second stage replies.

About the grievor Chris Godwin, Mr. Crook's handwritten summary for Mr. Roy says in the column headed "Infraction", "Refusal to work", and in the "Status" column, "locked out". On the day shift on August 28th the grievor, a P04 who normally works volume electronic mail, was told that there was none of his regular work to do but he was asked to stay and work on the forward floor. After he had been sorting for 20 minutes he "became uncomfortable" sorting what he realized was internal Moncton mail, because he knew Moncton was on strike. He and another of the three employees with whom he was working asked their supervisor if they could do something else. The supervisor told them what the performance standard was, and that if they did not intend to do the work they should punch out and go home. The grievor testified that his fellow employee said she really did not want to do the work and the supervisor then told them both to go home. The grievor acknowledged that he left the work place with some sense of relief at not having to sort the Moncton mail.

According to the written report of the supervisor, Glenda Sutherland, which was put in evidence through Mr. Crook, the grievor simply went to punch out after being told that if he did not choose to do the work assigned he should punch out. This is, of course, hearsay evidence which, while it is admissible in an arbitration proceeding, cannot be subjected to cross-examination and must be given reduced weight accordingly. I have concluded that the grievor's perfectly credible testimony is to be preferred in so far as there is any conflict.

Later that day the grievor was called by Glenda Sutherland, his supervisor, and told not to come back to work until the strike was over, or until after the collective agreement was signed, the grievor was not sure which. He testified that they had some discussion about whether he had in fact refused to do the work. She said she would get back to him, and called again in an hour with the same instructions.

The next day shift the grievor attempted to enter the plant and was refused admission. In that context he had some discussion with Peter Cahill, the general superintendent, who said he would look into the matter. Subsequently, the grievor got a telephone call at home from superintendent Ken Moore, who simply confirmed that he was not to come to work. A couple of days later, on the

evening of Sunday, September 1st, Mr. Cahill called the grievor at home to tell him not to come to work until after the strike was over, or until the collective agreement had been signed. Again, the grievor could not recall which, but was sure that Mr. Cahill had used whichever of those two phrases Ms Sutherland had not used.

The grievor Godwin testified that he thought he had been suspended for refusing to sort the Moncton mail. He said that he had never heard the words "lock-out" in connection with what happened to him until a week before the hearing in this matter. On the other hand he admitted in cross-examination that neither Ms Sutherland nor Mr. Cahill had ever used the specific word "discipline".

Mr. Godwin acknowledged that, apart from the "Ds" on his TAC card, there was nothing about this matter on his personal file and no suggestion that the incident in question would play any part in progressive discipline.

About the grievor John LaPierre, Mr. Crook's handwritten summary for Mr. Roy says in the column headed "Infraction", "Refusal to do as instructed-work disruption", and in the "Status" column, "locked out". On the night shift on August 30th, supervisor Glenda Sutherland noticed that the grievor LaPierre was one of three employees who was not keeping track, in the normal way, of the number of monotainers being worked in the lettertainer unit. Subsequently, she checked on the sheets used for that purpose and saw that the number was grossly inflated. On that same shift Ms Sutherland filled out a notice of interview addressed to the grievor, advising him to report for an interview on September 3rd, which was his next scheduled workday. After the word "concerning" on the form she filled in the following:

> your poor work performance on Aug. 30, 1991 specifically while working on the Lettertainer Unit, your recording an inflated number of monotainers in the unit, which you claim to have worked during the time period 0100 to 0300.

The printed part of the form then states:

> Your personal file will be referred to. You may be accompanied by a union representative.
>
> "Failure to attend an interview could result in disciplinary action being taken."

As the grievor testified, and Mr. Crook acknowledged in cross-examination, this form is a regular part of the employer's disciplinary process.

When Mr. LaPierre came in for work on September 3rd he was told by supervisor John LaRue that superintendent Peter Cahill wanted to talk to him. He asked what about, and Mr. LaRue

responded that Canada Post was sending home people it was having problems with, and mentioned the matter of the lettertainer unit. The grievor asked who else was being sent home and was given a few names before the conversation ended. Mr. Cahill then came in and, without conducting an interview, told the grievor he was being sent home until they had a collective agreement. The grievor testified that he thought he was being sent home because of the lettertainer incident. Mr. LaPierre testified in direct examination that he had never heard the term "lock-out" applied to him until a week before the hearing, and in cross-examination that supervisor LaRue had not used the word "discipline".

About the grievor Elise LeBlanc, Mr. Crook's handwritten summary for Mr. Roy says in the column headed "Infraction", "Poor work perf. Picket line activity. Refusal to accept N.D.I." (non-disciplinary interview?), and in the "Status" column, "locked out". She returned to work on August 27th on the afternoon shift, after two days of very vocal activity on the picket line, and was told to work on the forward floor, which is not her usual place of work. At about 6:20 p.m. supervisor Paul Day commented to Ms LeBlanc that she was still on the first binnie she had started with. She refused to discuss her work performance with him without a shop steward, and, after some to and fro, he went to the office and returned and presented her with a "Suspension From Duty" form. An emergency suspension is normally given for a disciplinary matter, and the grievor testified that she thought that she was being suspended for poor work performance.

The printed part of the form states:

> You are hereby suspended from duty.
>
> You are instructed to report to at the commencement of your nest [*sic*] scheduled shift or as otherwise advised in the interim period. You are informed that a review of the circumstances, along with your total employment record, will be made to determine the extent of any further disciplinary action.
>
> The reason(s) for the suspension is/are:

Supervisor Day wrote in:

> — Your poor work performance while sorting o/s mail
>
> — your refusal to discuss with me a matter concerning your work at this centre

On the next two days the grievor tried to get into the plant and was denied admission. She tried again after the Labour Day holiday, and this time encountered superintendent Ken Moore. Later that day he telephoned her at home and said "I guess nobody told you, you have been suspended for the duration of the strike."

The grievor testified that she thought she had been suspended for poor work performance, since suspensions are normally disciplinary, and she had never heard the words "lock-out" used in reference to her case until a week before the hearings began. She said in cross-examination that there had been no mention of progressive discipline in any of her conversations with management in connection with this matter.

Mr. Crook testified that when he saw the suspension from duty document used in this case he advised that, considering what the grievor had done, its use was "wrong" and that the grievor should be locked out. He said the same was true for Mr. Lewis' case.

About the grievor Roger Lewis, Mr. Crook's handwritten summary for Mr. Roy says in the column headed "Infraction", "Poor work perf. Slowdown Picket line activity.", and in the "Status" column, "locked out". Mr. Lewis worked on the evening shift in the mech section. On August 27th, about an hour after he had started work, his supervisor, Frank Sullivan, called him to his desk. There, supervisor Rick Arthur of quality control told him he had coded a letter wrong. The grievor asked for a shop steward, which was denied, and then he was told that he was "sent home — suspended". Supervisor Arthur gave him the same "Suspension From Duty" form that had been give to the grievor Elise LeBlanc, the clearly disciplinary wording of which is quoted above. Supervisor Frank Sullivan had written in the following, as the "reason(s) for suspension":

> Your insubordination, specifically, your failure to code mail on the G.D.S. as directed by your supervisor, on Aug. 27, 1991.

Mr. Lewis returned to work the next day and worked the rest of the week, and then on Sunday, September 1st, at the end of the shift he was approached by superintendent Cahill. Mr. Cahill told him that the decision had been made to suspend him indefinitely as a result of the incident of August 27th.

Mr. Lewis testified that he thought he had been suspended for failing to code properly and had never heard the words "lock-out" as applied to him until a week before the hearing in this matter. In his experience emergency suspensions are used in disciplinary contexts. In cross-examination he acknowledged that neither Mr. Arthur nor Mr. Cahill had said that he was being disciplined, and that his understanding was that when there was a collective agreement he would be back at work.

Mr. Crook testified that the fact that supervisor Sullivan had issued the "Suspension From Duty" form did not change his characterization of the incident. As far as he was concerned the

grievor had engaged in legal strike activity and had been locked out. In cross-examination he acknowledged that the supervisors may not have understood that at the time. Indeed, he said that the supervisor had made a mistake and he had "fixed it".

Mr. Phillippe Arbour, the union's national grievance officer, testified with respect to the way the parties dealt with these and other cases under s. 5(3) of the *Postal Services Continuation Act, 1991*, after the passage of that Act. He said he had met eight or nine times and had one conference call with the employer's responsible officials. In the context of a general attempt to settle grievances arising from the strike, one issue was which cases were to be treated as falling under s. 5(3) and which were to be treated as grievances under the collective agreement. The four grievances with which I am concerned here were initially, and remained, on the s. 5(3) list.

Mr. Arbour testified that he first heard the term "lock-out" in this connection at a meeting on March 27th. He said he had been aware that there had been local lock-outs in the context of the strike, but until then he had not heard of the concept of individual lock-outs. Until then, as far as he was concerned, the discussion had been about discipline. Mr. Arbour acknowledged in cross-examination that, while he was not sure, he did not think there had been any employer document in which the grievances before me here were specifically designated as "discipline" matters. He said he was sure that at the first meeting Mr. Rick Goodfellow, speaking for the employer, had said that the parties had to meet "to discuss discipline under Bill C-40".

Against this background, on April 15, 1992, the parties signed a "MEMORANDUM OF UNDERSTANDING . . . RE: POSTAL SERVICES CONTINUATION ACT (1991)", the relevant parts of which are:

> 1 — This memorandum of agreement is established for the sole purpose of ensuring the implementation of provisions included under Bill C-40, an Act to provide for the continuation of postal services, as passed by the House of Commons October 29, 1991, with regard to the complaints filed by the Union of behalf of Employees or filed by employees subject to, or who were subjected to, disciplinary sanctions or dismissed during the period between August 24, 1991, 00:01 hrs and September 5, 1991, 15:00 hrs. EDT.
>
> 2 — For the purpose of the memorandum, the parties acknowledge four geographical areas; the Atlantic provinces, the province of Quebec, the province of Ontario, the provinces of Manitoba, Saskatchewan, Alberta, British Columbia, Yukon and the Northwest Territories.
>
> 3 — The following individuals will act as arbitrators concerning complaints filed in their designated area:

Atlantic Provinces

I. Christie
W. Thistle . . .

. . . . .

7 — The parties agree to establish a list of complaints which would "prima facia" [*sic*], fall under the dispositions of Bill C-40:

a) the above mentioned list is established by the parties without any admission whatsoever.

b) the said list is strictly used as a working paper by the parties' representatives.

. . . . .

10 — The term "complaints" used in this memorandum of understanding refers to any claim filed in writing by the Union and/or the employee.

Under the same date, April 15, 1992, Hughette LeBlanc, the national union representative who had attended the meetings with Mr. Arbour, wrote to Mr. Jim Goodwin, the employer's manager, labour relations, the "list of grievances to be heard before Innis Christie and Wayne Thistle". The attached list of grievances to be heard by me, which is in evidence, is entitled "ASSIGNATION DES GRIEFS AUX ARBITRES DU SECTEUR GEOGRAPHIQUE DE L'ATLANTIQUE". Below that in slightly smaller print are the words "MEASURES DISCIPLINAIRES".

The issues

As I have already said, the employer objected at the outset to my jurisdiction to deal with these matters under s. 5(3) of the *Postal Services Continuation Act, 1991*, on the basis that the grievors had not been "disciplined or discharged", but had been "locked out" or, alternatively, removed from the work place by "administrative action". None of these four grievors was discharged, so the issue is whether, for purposes of s. 5(3) of the *Postal Services Continuation Act, 1991*, the four grievors, or any of them, were "disciplined". This is a matter of interpretation of s. 5(3) of the Act and its application to the facts. As counsel for the union acknowledged, I cannot gain statutory jurisdiction by estoppel.

The employer's primary position was that it had locked the grievors out, but whether or not they were "locked out" is secondary to the jurisdictional question of whether they were "disciplined" within the meaning to be accorded to that word in s. 5(3) of the *Postal Services Continuation Act, 1991*. If the grievors were "disciplined" within the meaning of that term in the Act, it is undisputed that there was no justification for that "discipline", so I do not have to, indeed, I cannot, deal with that issue.

Decision

The parties agreed in art. 7 of their April 15, 1992 memorandum of agreement, quoted above, that they would "establish a list of complaints that would 'prima facia' [*sic*] fall under the dispositions of Bill C-40", which is to say s. 5(3) of the *Postal Services Continuation Act, 1991.* My starting point, therefore, is that the four grievances in issue here are within my jurisdiction. The burden of persuading me otherwise is, however, really no burden at all, because art. 7 goes on to provide in para. (a) that "the above mentioned list is established by the parties without any admission whatsoever". Paragraph (b) further provides "the said list is strictly used as a working paper by the parties' representatives". I must take the parties as meaning what they said when they signed this memorandum and, therefore, cannot do other than weigh the evidence and arguments in the balance, it being, ultimately, for the union as the grieving or moving party to satisfy me, on the balance of probabilities, on each element of the case.

The word "disciplined", or "discipline", is not defined in the *Postal Services Continuation Act, 1991*, nor is it defined in the *Canada Labour Code*, R.S.C. 1985, c. L-2, which is important because s. 2(2) of the *Postal Services Continuation Act, 1991*, provides:

> 2(2) Unless otherwise provided, words and expressions used in this Act have the same meaning as in Part I of the *Canada Labour Code.*

A suspension from work as a result of misconduct, which penalizes an employee by causing him or her to lose pay, is part of what Brown and Beatty refer to as "the traditional trilogy" of "sanctions . . . available to employers in the exercise of their disciplinary powers" (*Canadian Labour Arbitration*, 3rd ed., looseleaf, para. 7:4210). No doubt, employees can be sent home involuntarily, or be refused work, and suffer loss of pay as a result, in non-disciplinary contexts, such as lay-offs, emergency shut-downs, illness and lock-outs, but the distinguishing feature of disciplinary suspension in general is surely that it is given for misconduct. It penalizes the employee for what he or she has done, rather than being unrelated to any fault on his or her part.

I have concluded that the proper application of s. 5(3) of the *Postal Services Continuation Act, 1991*, is to read the word "disciplined" as including any suspension which is disciplinary in this broad sense. To put it another way, this must be taken to have been the intent of Parliament, in the absence of any indication that a more narrow definition of "disciplined" was intended.

I accept the submission of counsel for the union that the employer cannot convert a disciplinary suspension into something else simply by calling it a different name. If I were to conclude that what was involved here was a lock-out and not discipline it would have to be because of the inherent characteristics of what was done, measured against the meaning of "disciplined" in the Act. The fact that the employer chose to characterize what it was doing as lock-out, because of what it took to be its legal rights in a legal strike and lock-out situation, does not of itself change disciplinary suspensions into lock-outs.

The submissions by counsel for the employer boil down to two. (1) The individual grievors were not "disciplined" because in significant ways they were not treated the same as this employer treats employees when it disciplines them under the collective agreement, nor, indeed, were they treated the same as most employers treat employees when they discipline them under collective agreements, and (2) there is no basis for concluding that Parliament intended to legislate away, or limit, the employer's right to lock out employees on a legal strike.

(1) I accept that the grievors were not treated in the way that this employer treats employees subject to discipline under the collective agreement. Except for the erroneous inclusion of the "Ds" on their TAC cards, the suspensions did not go on the grievors' personal files and will not enter future discipline considerations, there was no element of warning or progressive discipline, and there were no formal interviews, in the presence of shop stewards, with invitations for explanations. Probably the strongest point in the employer's favour along these lines is the fact that the suspensions were not quantified in any way. They were all simply indefinite, "until the strike is over", or words to that effect.

In so far as they were aware of these factors, the grievors might have been alerted to the fact that they were not being disciplined, or at least not being disciplined in the ordinary way. Each, nevertheless, testified that he or she thought what was going on was discipline. That this was their initial reaction, at least, is hardly surprising, since the upper levels of management had decided to keep the characterization of these suspensions as "lock-outs" so close to the chest that even the supervisors who sent the grievors home got it wrong most of the time.

Counsel for the employer also submitted that the suspensions were not used for corrective purposes. I am not sure that is the case, in that the grievors may well have tempered their activities as a foreseeable result, and it seems likely that their suspensions had

a deterrent effect on others. She also submitted that there was no use of the word "discipline", but two of the grievors were given "Suspension From Duty" forms which contained clearly disciplinary language, and a third was given a notice of interview which also contained disciplinary language.

More fundamentally, this line of argument misses the point. As Parliament must be taken to have understood, there was no collective agreement in effect for the period to which s. 5(3) of the *Postal Services Continuation Act, 1991* was made applicable. Why then should it be assumed that discipline covered by the Act must have the characteristics of discipline under the old or the new collective agreement, or, indeed, of discipline under collective agreements generally? "Disciplined" as a generic term, and as applied outside the context of collective agreements, has a broader meaning. My conclusion, therefore, is that each of the grievors was "disciplined" in the sense of the word as it is used in the Act.

In this context the fact that, at the time, the grievors probably considered themselves to have been disciplined, as, apparently, did everyone involved except those privy to the August 26th memorandum from Elliot Clarke, simply buttresses my conclusion. Even when supervisors and some union officials became aware of that memorandum the nature of the suspensions, for purposes of the application of s. 5(3) of the Act, did not change.

(2) There are two answers to the submission on behalf of the employer that in enacting s. 5(3) of the *Postal Services Continuation Act, 1991*, Parliament cannot be taken to have intended to legislate out of existence, or limit, the employer's right to lock out. First, I have concluded that the suspensions of the grievors were not lock-outs as defined in the *Canada Labour Code*, and therefore in the Act under consideration. Second, even if I am wrong and each individual grievor could, for other purposes, be considered to have been locked out, to interpret my jurisdiction so narrowly as to exclude the cases of individual grievors such as these would be to defeat the apparent purpose of the legislation.

There was a good deal of decisional material put before me on the matter of an employer's right to lock out in the context of a legal strike, much of it emanating from the Canada Labour Relations Board. That board, of course, administers the *Canada Labour Code* under which the union and the employer operate, so its decisions, if not binding, must be taken very seriously in this context.

There is complex law around the question of the rights of, and remedies available to, the parties where a collective agreement has terminated and it is legal to strike and lock out. As a starting

proposition, the parties can be said to be free to do whatever is within the law, both criminal and civil, including all applicable statutes and tort and contract law. The most important constraint for present purposes is the law of unfair labour practices in the *Canada Labour Code*, which, in s. 94(3), prohibits any employer from disciplining any person because he or she "has participated in a strike . . .".

In *Graham Cable TV/FM* (1985), 12 C.L.R.B.R. (N.S.) 1 (Jamieson), the Canada Labour Relations Board held that the employer had committed unfair labour practices in disciplining employees for participating in slow-downs and related job activities designed to restrict output, because such activities fell within the Code definition of "strike". The Canada board then itself asked the question that is obvious from the employer's point of view, and gave [at p. 14] a partial answer:

> Where does that leave employers? Are they defenceless once a trade union is in a lawful strike position? We think the Ontario Labour Relations Board's comments, when they were faced with similar circumstances to what we have here, are most appropriate (*The Corporation of the City of Brampton*, [1981] 2 Can LRBR 65, at pp. 69-70):
>
> > "It perhaps bears repeating that our conclusion follows from the definition of the term 'strike' set out in the Act. In most instances, the definition acts in management's interests in that employees cannot during the term of a collective agreement act in concert to refuse voluntary overtime as a means of restricting or limiting output. Indeed, as noted above, in the one previous instance where the City's transit drivers did impose a ban on overtime, it was the Union which stepped in and convinced the employees to cease their conduct as being unlawful. However, the other side to the definition is that it makes a concerted refusal to work overtime a right of employees when they are in a legal strike position. Such action may well result in disruptions to an employer's operations and corresponding increase in the union's bargaining power, but that is the scheme envisaged by the Act. *An employer, for its part, is free to take measures designed to limit the disruptive effect of this type of strike activity, such as the increased use of managerial personnel and non-striking employees. An employer is also free to take responsive action through its right to lock out employees. An employer is not, however, free to discipline or punish employees for engaging in a lawful strike.*
>
> (Emphasis added.)
>
> We concur with that assessment of the situation and adopt it as our own.

In this context, the issue then becomes whether what the employer has done is a "lock-out", which is defined in s. 3(1) of the *Canada Labour Code* as:

> "lockout" includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of his employees, done to compel his employees, or to aid another

> employer to compel his employees, to agree to terms or conditions of employment;

a There are two definitional hurdles to be cleared on the way to characterizing the suspension of the grievors here as a "lock-out". First, a suspension could only be a lock-out if it was done to "compel" the employer's employees, though their union, to agree to terms or conditions of employment. This is a question of the actual b intent of the directing minds of the employer. Mr. Crook testified that the intent behind the effectuation of the August 26th memorandum from Elliot Clarke was to put pressure back on the union at the bargaining table. On the face of that document the more readily apparent attempt is to keep the mails flowing as smoothly as possible, but that could, of course, be said to play into the c pressure on the employees and their union at the bargaining table. For purposes of this award I accept that the necessary intent has been proven.

Second, and fundamentally important here, is the collective nature of the acts specified in the definition of "lockout" in the d *Canada Labour Code*. It speaks of "closing a place of employment", "a suspension of work" and a refusal to continue to employ "a number of his employees". This is, of course, consistent with the whole tenor and purpose of the Code, which similarly defines "strike" in collective terms. I recognize that both definitions e commence the word "includes", but historically and as a matter of common law authority both have been considered to be collective actions.

In my opinion there are very good reasons for treating a lock-out as necessarily involving more than an individual employee. The f whole thrust of s. 94(3)(*a*)(vi) of the *Canada Labour Code*, the unfair labour practice provision quoted above, and indeed of modern Canadian labour relations legislation in general, is to prevent the individual employee, who is exercising his or her right to strike in accordance with the law, from being persecuted g individually. For these reasons the Canada board cannot be taken to have interpreted the employer's right to lock out as allowing the employer to pick off individual legal strikers arbitrarily, or even on an "administratively" consistent basis.

The most recent decision by the Canada Labour Relations Board h in this area to which counsel referred me is a case between these parties which also arose out of the strike in the late summer of 1991, *Canada Post Corp.*, board files Nos. 745-4015 and 4021, decision No. 930. The board there dealt with two unfair labour practice complaints. Writing for the board, vice-chairman Eberlee states, at p. 3:

In essence, the question for the Board to decide is whether Canada Post's response to certain rotating strike activity by employees at the Richmond priority courier unit and the Campbell River processing plant was of a disciplinary character, specific punishment for engaging in strike activity, and therefore proscribed by section 94(3)(a)(vi) in the context of a legal strike, or whether it was something else, such as a defensive rotating lockout, not prohibited by the Code.

In the case of the Richmond Priority Courier unit the employees who regularly worked there were directed on August 27th and 28th to report elsewhere for work, and their work was done by others. Obviously this was collective action, and the employer's submission that it was a legal lock-out caused the board difficulty mainly because the employer had insisted to the employees at the time, undoubtedly for public relations reasons, that it was not a lock-out. In the result the board nevertheless characterized this activity as a lock-out, in effect allowing the employer to have its cake and eat it too; but more importantly adhering to the principle that the way the employer labels an activity does not determine its legal character.

The Campbell River complaint is more relevant here. The board had this to say at pp. 14-18:

Canada Post's treatment of the 10 Campbell River letter carriers who refused to deliver anything but first-class mail was much less generalized than the PCU [the Richmond Priority Courier Unit] barring of CUPW members. The union claims that because Canada Post pin-pointed specifically the individuals involved, it was clearly a suspension of persons who did engage directly in legal strike activity. Canada Post barred these people from employment only because of their particular conduct; by selecting individuals, rather than the whole group, CPC discriminated against them, contrary to the Code . . .

There is nothing in the Code which suggests that a lockout is not a lockout if it is not a general shut-down. In other words, just as a legal strike can be, and is, the sort of behaviour by employees as was described in *Graham Cable*, *supra*, or the periodic walkouts at the PCU, or the refusal to handle anything but first-class mail by some 10 or 11 out of a much larger number of employees at Campbell River, so, too, can a lockout be a rotating affair, designed to isolate specific groups of striking employees and to insulate an employer's operations from their specific activities . . .

To suggest that a union can engage through legal strike action in activities which have the effect of being "retaliation", "punishment", "pressure", "intimidation", all designed to force an employer to agree to terms satisfactory to the union, but to say that an employer cannot respond in a similar way via lockout activities is to put in place a balance in the industrial relations system that was never intended. Of course, the degree of "retaliation", "punishment", "pressure", "intimidation", or whatever that may legitimately be practised by either party against the other is constrained by such rules in the Code as the duty to bargain in good faith, and others, and by the strictures of the Criminal Code. So absolutely all is not fair in love, war and collective

bargaining — but a great deal is. In short, not all "retaliation" for legal strike activity runs afoul of section 94(3)(a)(vi) . . .

> The overwhelming weight of the evidence convinces this panel that Canada Post's actions at the PCU and Campbell River, which are complained of by CUPW, were simply lockouts, for brief periods, of specific groups of employees, which had the same ultimate purpose for C.P.C. as the employee actions had for CUPW — to put pressure on the other party to compel it to come to terms. Canada Post's activities were not prohibited by section 94(3)(a)(vi) of the Code and the complaints should therefore be dismissed.

I need not decide whether I think this decision is a proper interpretation and application of the *Canada Labour Code* because even the Campbell River situation was significantly different from the facts before me in that the employer there took action against a group, albeit not a very large group, of employees for an action which they had taken collectively. The problem for the board was the first one I have addressed above; whether it was satisfied that the required purpose had been demonstrated; not the second, whether the employer's actions had the collective quality required by the definition of "lockout". This second aspect is, however, the important one here.

In the passages quoted the Canada Labour Relations Board is obviously wrestling with serious policy concerns focused on the breadth of the protection to be afforded to legal strikers by the unfair labour practice provisions of the *Canada Labour Code*. Even in *Graham Cable*, as seen in the quote above, the board was concerned that an over-broad application of those provisions of the Code would be unfair to employers and tilt the balance it thought to be intended. It is undeniable that such concerns must underlie the board's decisions in this area, and that they are involved here.

It would be, at best, ironic, and in my view contrary to the whole tenor of our labour relations legislation, if, by adopting the stance that its actions are lock-outs, an employer could freely and openly suspend individuals for the very strike activities protected by s. 94(3)(*a*)(vi) of the *Canada Labour Code*. It may be, as the Canada board appears to think, that for the Code to be interpreted to hamstring employers when it comes to collective action unduly tilts the balance in favour of unions. But to put individual employees at risk in strike situations not only tilts the balance the other way, it shifts the load from the collective parties to the backs of individual people.

If I am correct, that an individual suspension should not, indeed cannot, be treated as a lock-out, does that pose the problem of tilting the balance against employers, which appears to concern the Canada Labour Relations Board? I do not think it does.

In the first place, if the employer is genuinely concerned to bring pressure and not to discipline any individual for legal strike activities, management can take an appropriately collective response, and legally lock out a group of employees.

Secondly, where the concern really is with the behaviour of individuals interfering with the flow of the mail, and not with pressure at the bargaining table, management can forget about locking out and simply face up to the *Canada Labour Code*, as it has been interpreted in *Graham Cable* and many other decisions of the Canada Labour Relations Board. The board appears to accept that even in a legal strike situation management is entitled to direct the work-force and can discipline an employee if it is not motivated by the fact that the employee participated in legal strike activities. In *Rogers Cable T.V. (British Columbia) Ltd., Vancouver Division and Rogers Cable T.V. (British Columbia) Ltd., Fraser Divison and Int'l Brotherhood of Electrical Workers, Local 213* (1987), 16 C.L.R.B.R. (N.S.) 71 (Jamieson, vice-chairman) at pp. 90-1 the board said:

> In the over-all scheme of the Code, strikes and lockouts are expected to be temporary suspensions in the employment relationship during which collective bargaining differences are ironed out. While these periods of economic sanctions last, employees have no obligation to report to work or to perform services on the employer's behalf. The employer on the other hand need not provide work to the employees, in fact, he has a legal right to call on others to perform the services necessary to keep the business going.

But the board went on to say, on pp. 91-2:

> Arbitrators who have dealt with cases concerning discipline during a lawful strike manifest ... concerns ... that it does not make legal or practical sense to apply traditional principles to just cause claims arising in the factual context of an ongoing strike. They also talk in terms of the mitigating effect of the ongoing strike in terms of explaining or excusing employee conduct. *But nowhere in the arbitration cases we reviewed* [the board cites nine awards] *did we find a total ban on the employer's use of discipline* ...

(Emphasis added.)

Had management taken that approach here the issue before me would have been the one Parliament evidently intended me to deal with; whether the employer had acted appropriately in relation to these grievors. I must say that in my opinion "traditional principles of just cause claims" might also give way in the other direction in the context of a legal strike; such that to suspend an employee for the duration of the strike, or for the active strike period, might be held to be justified, depending on the circumstances, even though in another context it might merit only minor discipline.

Thus I return to my starting point: s. 5(3) of the *Postal Services Continuation Act, 1991*, which provides for the submission of any

case where an employee is "disciplined or discharged" to a mutually selected arbitrator "for final settlement". The law appears to be somewhat unclear on what an employer's rights are with respect to employees who continue to work in a legal strike situation and, with no collective agreement in place, unless there has been an unfair labour practice or a human rights violation it is difficult for an individual employee who has been disciplined, in his or her view inappropriately, to find a remedy. In this context Parliament provided in s. 5(3) for a special process for the selection of arbitrators with a broad mandate to effect final settlement.

For me to decline jurisdiction on the basis that the grievors were not "disciplined", but were instead "locked out" or suspended as a matter of "administrative action", would be to defeat the apparent purpose of the legislation; to provide a process to deal with, and settle, these difficult issues for this particular strike.

Conclusion and order

Each of the four grievors was "disciplined" within the meaning of that word in s. 5(3) of the *Postal Services Continuation Act, 1991*. While, strictly speaking, it is unnecessary to decide, in my opinion none of them was "locked out" within the meaning of that term in the *Canada Labour Code*. Neither should, or can, they be held to have been suspended as a matter of "administrative action" and therefore not "disciplined". Each of their grievances falls precisely within what I believe Parliament intended to be my mandate as an arbitrator selected under s. 5(3). The employer's objection to my jurisdiction is therefore denied.

The employer took the position that, if the grievors were held to have been disciplined within the meaning of that term in s. 5(3) of the *Postal Services Continuation Act, 1991*, there was no just cause for that discipline. I cannot, therefore, address the question of whether, in my opinion, the employer's actions were justified and must allow the grievances.

The four grievors are to be compensated for all losses of pay and benefits that resulted from their being suspended on the occasions which are the subject of their grievances. I leave it to the parties to agree on the exact amounts of compensation but hereby retain jurisdiction in these matters, as counsel agreed I should at the outset of the hearings. If the parties are unable to agree on this, or any other aspect of the application of this award, I will reconvene the hearing at the request of either of them.