2-25-1999

Re Canada Post Corp and CUPW

Innis Christie

PRELIMINARY AWARD IN THE MATTER OF A FORMAL ARBITRATION

BETWEEN:

THE CANADIAN UNION OF POSTAL WORKERS

(The Union)

and

CANADA POST CORPORATION

(The Employer)

99 085 043

RE: CUPW National (*Preferred Assignments and the "Simplified Registered Mail Service" project*) - CUPW Gr. No. N00-95-00032

BEFORE: Innis Christie, Arbitrator

HEARING DATE: February 18, 1999

AT: Ottawa, Ontario

FOR THE UNION: David I. Bloom, Counsel
Ted Penney, National Grievance Officer
Jeff Bennie, National Union Representative
Karen Urchak
Paul Godmarc
Mike Tessier

FOR THE EMPLOYER: John B. West, Counsel
Denise Belanger, Labour Relations Officer, National Policy Grievances

DATE OF PRELIMINARY AWARD: February 25, 1999

Union national policy grievance dated November 25, 1998, alleging breach of the Collective Agreement between the parties bearing the date January 31, 1995, and in particular of Article 12, in that in announcing the creation of its "Simplified Registered Mail Service" project, the Employer indicated that new positions created under this project would not be preferred assignments although, the Union alleges, the work in question corresponds with the duties of a preferred assignment within the meaning of Article 12. The Union requests a declaratory decision that the work in question be performed in registration sections by PO4's in preferred assignments, or alternatively, at a minimum by PO4's in preferred assignments, and that all employees prejudiced by the alleged violations of the Collective Agreement be compensated, with interest.

At the outset of the hearing in this matter 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.

Prior to consideration of the merits of this matter, Counsel for the Employer moved that I order two other national policy Grievances, CUPW Grievance Nos. N00-95-00033 and 00034, to be consolidated and heard together with this one. Those two Grievances also allege breaches of the Collective Agreement arising out of the Employer's "Simplified Registered Mail Service", but of other articles. They were filed on the same day as this Grievance and are currently assigned to other arbitrators. The parties agreed that I should rule on this motion before proceeding with the merits.

PRELIMINARY AWARD

This motion by the Employer invokes for the first time, at least between these parties, the statutory power newly granted grievance arbitrators "to expedite proceedings and prevent abuse of the arbitration process" by *Bill-C19*, which amended the *Canada Labour Code (Part I)* effective January 1, 1999. Among the powers those amendments added to the powers of arbitrators in section 60(1)(a) of the *Code* is:

> (a.4) the power to expedite proceedings and to prevent abuse of the arbitration process by making the orders or giving the directions that the arbitrator or arbitration board considers appropriate for those purposes;

The Employer's motion is that in the exercise of this power I order two national policy grievances already assigned by the Union to two other arbitrators, in accordance, the Union says, with Article 9 of the Collective Agreement, to be consolidated with this one and heard by me. The Employer submits that to do so would "expedite proceedings" and prevent the abuse of the arbitration process which the Employer alleges is involved in filing three separate grievances against one operational change.

In the autumn of 1998 the Employer announced a Simplified Registered Mail Service project, which has since been implemented, effective January 1, 1999. From the customers' perspective, this was to replace three existing services; Registered Mail, Security Registered Mail and Money Packets. In response, on November 25, 1998, the Union filed three national policy grievances; CUPW Grievance Nos. N00-95-00032, 00033 and 00034. The Employer denied all three grievances and each was assigned by the Union, in accordance, it says, with paragraphs 9.77 and 9.79 of Article 9 of the

Collective Agreement, to a different arbitrator. In this preliminary motion the Employer's position is that the three Grievances should be combined and heard as one because, although they allege breach of different articles of the Collective Agreement, all three arise out of the Employer's announcement of the Simplified Registered Mail Service project and have similar evidentiary foundations.

The Employer's response to the Grievance before me now, No. N00-95-00032, is dated December 23, 1998. It states:

> In its grievance filed on November 25, 1998, the Union alleges that the Corporation is creating new positions under the Registered Mail Service project indicating that these positions will not be preferred assignments within the meaning of Article 12 of the collective agreement.
>
> The duties involved in the new Registered Mail Service are not preferred assignment duties as per clause 12.01(a), therefore article 12 does not apply to this work.
>
> As there is no violation of the collective agreement, this grievance is denied.

Article 12 of the Collective Agreement provides:

> **12.01 <u>Preferred Assignments in Staff Post Offices Grades 9 and Up</u>**
>
> **(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;

A somewhat more complete picture of the issue before me now is presented by documents put in evidence by agreement.

The minutes of a national consultation between the parties for September 24, 1998, are a useful statement of the background. They state in part:

> **Registered Simplifications**
>
> The parties met to discuss the Corporation's intention to simplify registered service offerings and respond to our customers needs while at the same time ensuring the long-term viability of the business. It is the Corporation's intention to discontinue the current registered service offerings and introduce a simplified Registered Service on January 1, 1999, for counter and commercial customers. Security Registered, Certified and Money Packets will be discontinued in their entirety. This change is being made following analysis of findings from extensive customer consultation and market analysis and research. The simplified registered service will be competitively priced and providing customers with the features they want and options they may wish to purchase for an additional fee.
>
> The Union asked how the corporation was eliminating a regulated service. The Corporation stated that the green registered is regulated. Security registered is not a regulated service. It is the Regulated Service that will be discontinued along with eliminated with Money Packets and Certified Mail. ...
>
> The Corporation stated that with the discontinuance of Security Registered Mail and Money Packets, the secure processing stream will no longer be required as the entire mail processing network is secure ... As a result, the preferred assignments currently associated with the secure processing stream will be eliminated. The registered service will be processed in the distribution work centres and as such, we will require additional positions in this area. As such there will not be a reduction in person years as a result of this change. The Union asked if these new positions would be preferred. The Corporation stated that they would not, as the preferred assignments are currently associated with the Security Registered service and that this service was being discontinued in its entirety. The new positions will be created to handle the simplified service. This mail is currently processed in the lettermail stream and will be moved to the distribution work centres prior to implementation. With the increase in volumes in the distribution with the registered service, additional positions will be required.

Prior to the change one option available to lettermail customers was "Registered". That service secured a signature, date and time upon delivery of the item and provided the customer with a mailing receipt. The Registered service indicator was green in colour,

giving rise to the reference to "green registered" in the preceding minutes. Registered mail of that sort was processed as part of the regular lettermail stream before the change. Another option was "Security Registered", which also secured a signature, date and time upon delivery of the item, provided the customer with a mailing receipt and was processed in a secure area and shipped in locked containers. An Acknowledgement of Receipt could be purchased, which meant a card was signed by the addressee and returned to the sender. Customers of this service could also purchase Money Packets for valuable items.

Because the mail service is regulated under the *Canada Post Corporation Act*, as the Union suggested in the consultations, these changes required changes in the Regulations. These appear in the *Canada Gazette Part I* for July 17, 1998. At p. 1432 the "Regulatory Impact Analysis Statement" states, in part;

> ...the Corporation is rationalizing its three domestic registered services into one and eliminating the Money Packets and domestic Security Registered offerings. Effective January 1, 1999, the existing Registered Mail (commercial and retail) and Certified Mail will be replaced by a single domestic Registered Service which has simplified features, options and pricing. All Registered items will be processed in a separate processing stream.
>
> The new domestic Registered service will offer legal proof of mailing, legal proof of delivery, automated delivery confirmation for bar-coded items, and a basic delivery indemnity of $100. Customers will also have the option of purchasing a hard copy "printout" of the delivery information for $5.00. This printout is competitively priced to offset the cost of providing the service and will replace the current manual Acknowledgement of Receipt Card. A "Hold for Pick Up" option will be offered free of charge.

The Employer advised the Union that the total of about 230 regular full time PO4's working in preferred assignments in registration sections across the country was projected by to be reduced to 112 by this change, with all of the others thereafter holding non-preferred assignments in distribution work centres.

Thus, the issue in the Grievance before me, N00-95-00032, is whether work on Security Registered Mail and Money Packets previously done by Union bargaining unit members as preferred assignments under Article 12 of the Collective Agreement is now being done, as the Union alleges, in breach of the Collective Agreement as non-preferred assignment work.

Grievance N00-95-00033, which has been assigned by the Union to Arbitrator Kevin Burkett, is scheduled for hearing commencing April 6. In that Grievance the Union alleges violation of Article 53 in that the Employer failed to apply it to the elimination of the approximately 118 preferred assignment positions affected by the implementation of the Simplified Registered Mail Service project. The issues there are whether the job security provisions of Article 53 for regular employees whose positions are "rendered surplus" should have been applied and, if so, whether they were applied in accordance with the Collective Agreement.

Grievance N00-95-00034, which has been assigned by the Union to Arbitrator Roderigue Blouin, is scheduled for hearing commencing May 6. In that Grievance the Union alleges violation of Article 29 of the Collective Agreement governing technological changes. The issues there are whether that Article applied and, if it did, whether the Employer acted in accordance with it.

The following provisions of Article 9 of the Collective Agreement, which govern the assignment of national policy grievance arbitrations under this Collective Agreement, are relevant to the Employer's motion to consolidate these Grievances;

Definitions

9.01 In this article:

(a) *"grievance"* means a complaint in writing presented by the Union; ...

Right to Present a Policy Grievance

9.09 An authorized representative of the Union or a national representative of the Corporation may present a policy grievance in order to obtain a declaratory decision. A policy grievance may be presented in the following cases:

(a) where there is a disagreement between the Corporation and the Union concerning the interpretation or the application of the Collective Agreement;

(b) where the Union is of the opinion that a policy, directive, regulation, instruction or communication of the Corporation has or will have the effect of contravening any provision of the Collective Agreement, of causing prejudice to employees of the Union or of being unjust or unfair to them.

...

9.13 A policy grievance may be presented by an authorized representative of the Union at any time.

...

Corporation's Reply

9.25 Within twenty (20) working days after receipt of such presentation the Corporation shall reply in writing to the grievance.

...

Right to Arbitration

9.33 When a grievance has been presented and has not been dealt with to the satisfaction of the Union, the Union may refer such grievance to arbitration ...

...

9.40 The national list of arbitrators shall be used for policy grievances, grievances concerning the unit as a whole, grievances conceding the Union as such and grievances

concerning employees in more than one area described above. The national arbitrators shall by rotation be assigned grievances in the chronological order in which they were referred to arbitration, unless the parties agree otherwise.

...

National Formal Arbitration

9.77 Grievances to be heard by the arbitrators appearing on the national list will be assigned in the chronological order in which they were referred to arbitration, unless otherwise agreed to by the parties.

9.78 Where more than one grievance is referred to an arbitrator, the concerned party determines the order in which the grievances will be heard.

9.79 At least thirty (30) working days in advance of the hearing, one or the other party shall forward to the other party a list of the grievances to be heard, the names of the arbitrators assigned and the date(s) of hearing for each. The notice shall identify the location of the hearing and the language in which the hearing shall be conducted.

9.80 The notices hereinabove mentioned shall also fix one or more days of hearing among the days set apart by the designated arbitrator. The hearing of the grievance shall then commence and be pursued on the day or days so fixed unless the arbitrator decides for serious reasons to postpone the hearing to another day.

General Provisions

9.81 Where different grievances raise similar issues, the Union may refer such grievances to the same arbitrator in order to have these grievances dealt with simultaneously. If the arbitrator decides that the grievances will not be heard simultaneously, the Union may then,

(a) determine the grievance or the grievances that will be heard immediately by this arbitrator;

(b) decide if the other grievances will be heard later on by the same arbitrator or by another arbitrator.

Where the Union decides that these other grievances will be heard by another arbitrator, it shall proceed in accordance with the provisions of clauses 9.50 to 9.80.

Issues on the Employer's Preliminary Motion. The issues before me on this preliminary motion are:

1. Whether Section 60(1)(a.4) of the *Canada Labour Code (Part I)*, as amended by *Bill C-19*, gives me the power to order the two grievances already assigned to other arbitrators to be consolidated with this one and heard by me, on the grounds that to do so would expedite proceedings and prevent abuse of the arbitration process.

2. If the new Section 60(1)(a.4) does give me that power, whether I should exercise it in this case.

Decision. For the reasons that follow I have decided that even if Section 60(1)(a.4) of the *Canada Labour Code (Part I)*, as amended by *Bill C-19*, gives me the power to order the two grievances already assigned to two other arbitrators to be consolidated with this one and heard by me I should not do so in the circumstances of this matter. I express no decided opinion on the issue of whether I have power to do so.

1. Does Section 60(1)(a.4) of the *Canada Labour Code (Part I)*, as amended by *Bill C-19*, give me the power to grant the order to consolidate sought by the Employer? Counsel for the Union submitted that the new Section 60(1)(a.4) of the *Canada Labour Code* is a jurisdiction enhancing provision, not a jurisdiction granting provision. It does not, in his submission, empower me to take jurisdiction over grievances not assigned to me, and in fact already assigned to other arbitrators who are now seized with jurisdiction over them. In his submission the apparent intent of Parliament in enacting paragraph (a.4) of Section 60(1) was to add to the power of grievance arbitrators to deal

with matters properly before them, not to expand or confer jurisdiction. In other words, if all three Grievances in issue here were before me I would have the power under Section 60(1)(a.4) to consolidate them, and the only question would be whether I should do so. As it is, counsel for the Union submitted, I cannot do so. In my opinion this submission warrants very serious consideration.

Counsel for the Union pointed out that Section 15 of the *Canada Labour Relations Board Regulations* explicitly empowers the Board to consolidate "two or more proceedings before it...". This, he suggested, has two significant implications. First, it was evidently thought by the Board in making this regulation that its general powers under the *Canada Labour Code*, some of which are bestowed by Section 60(1) on grievance arbitrators, were not adequate to enable it to order such consolidation. My response to that submission is that it may have been so, but if the Board had had a power as broad as that stated in Section 60(1)(a.4) it might have thought differently.

Second, counsel for the Union suggested, this power to consolidate is not one that was explicitly bestowed by Parliament on grievance arbitrators, either by Section 60(1) prior to amendment or by *Bill C-19* when it added paragraph (a.4), although it is a power that has been made explicit for exercise by the Labour Relations Board. The ommission should therefore be taken to have been intended.

I agree that the second of these implications can be derived from the existence of the Canada Labour Relations Board's explicit power to consolidate proceedings, but it can be nothing more than a helpful hint in the interpretation of Section 60(1)(a.4). To conclude on that basis that an arbitrator has no power to consolidate even grievances properly

already before him or her would be to limit Section 60(1)(a.4) in a way that would seem to me to defeat a significant aspect of the explicit purpose of the paragraph, that is "to expedite proceedings". But that is the true breadth of implication in this submission by counsel for the Union, because Section 15 of the *Canada Labour Relations Board Regulations* refers to the consolidation of "two or more proceedings before it...", not the consolidation of proceedings before the Board with matters not before the Board. Thus, I do not find this argument helpful with respect to the narrow question of jurisdiction so well articulated in Union counsel's first submission; have I the power to take jurisdiction over grievances not assigned to me?

Counsel for the Union cited *Canadian Pacific Air Lines Ltd. and Canadian Pacific Air Lines Pilots Association* (1993), 160 N.R. 321 (S.C.C.), in which the Supreme Court of Canada held that the Canada Labour Relations Board had no implied power to order the pre-hearing of production of documents, as authority for the proposition that such powers should not be extended to non-court tribunals by implication from general provisions. Here, however, it seems to me there is no room for doubt that the broad power now given to arbitrators by Section 60(1)(a.4) of the *Canada Labour Code* includes the power to order the consolidation of grievances. Although its terms require interpretation, I would characterize that power as express rather than implied. The difficult question of interpretation is whether it gives the power to do so in circumstances such as these, where the arbitrator is not already seized of the other grievances in question.

In arguing that I have that power under the new Section 60(1)(a.4) of the *Canada Labour Code*, counsel for the Employer submitted, first, that generally speaking, the

courts regard multiple proceedings as an abuse of process. He cited a patent prosecution case (*R. v. Miles of Music Ltd.* (1989), 24 C.P.R. 301 (Ont. C.A.)), a patent infringement case (*General Foods Ltd. v. Struthers Scientific and International Corporation*, [1974] S.C.R. 98) and a damage action (*Reddy v. Oshawa Flying Club* (1992), 11 C.P.C. 154 (O.C.J., Gen'l Div.)) in support of this proposition and I am prepared to accept it.

Counsel for the Employer then referred me to the preliminary award of Arbitrator Kilgour in *Loeb IGA Southside and UFCW* (1994), 39 LAC(4th) 353, decided on the very issue before me here but under the since repealed Section 45(8.1) 5. of the Ontario *Labour Relations Act*, R.S.O. 1990, as am., which provided:

> 45(8.1) An arbitrator or board of arbitration has the following powers:
>
> ...
>
> 5. To make such orders or give such directions in proceedings as he, she or it considers appropriate to expedite the proceedings or to prevent the abuse of the arbitration process.

In that preliminary award the arbitrator granted a motion similar to the Employer's motion here, and ordered five grievances already before five different arbitrators consolidated before him. The union there opposed the motion, as has the Union here. The arbitrator's reasons, in so far as they are relevant to the issue of his jurisdiction to consolidate before himself grievances assigned to other arbitrators, were, at pp 362-3;

> The company has placed before me a motion for consolidation. Dealing with such a motion is part of my arbitral obligation and is well within my jurisdiction. ... If the ruling on the company's motion has the result of bringing the five grievances before one arbitrator instead of five arbitrators dealing with one grievance each, that result, flowing from the ruling, can hardly be characterized as the arbitrator expanding the

> issues "of his own volition". Nor can such a result be characterized as the arbitrator having the power to "subvert [the] jurisdiction of other duly appointed arbitrators. ... " I agree entirely that the powers of an arbitrator cannot be used to subvert the jurisdiction of another duly appointed arbitrator. But if the result of a properly made ruling by an arbitrator is the cancellation of other arbitrations because those arbitrations have become unnecessary as a result of the ruling, that sequence of events does not constitute on arbitrator subverting the jurisdiction of another arbitrator.
>
> ... I gave certain directions to the parties during these proceedings (at the first day of hearing), and did so because I considered them "appropriate to expedite the proceedings and prevent the abuse of the arbitration process", pursuant to the specific powers granted by s.45(8.1), para. 5 of the Act.

Obviously, I am not bound by this award, but I would have take it seriously into account if I were to decide whether or not I have jurisdiction under the Section 60(1)(a.4) of the *Canada Labour Code* to do what Arbitrator Kilgour did under the then Section 45(8.1) 5. of the Ontario *Labour Relations Act*. The wording of the two statutory provisions is virtually the same, so, as another helpful hint in the interpretation of Section 60(1)(a.4), it would probably be legitimate to assume that someone in the process of bringing the new paragraph (a.4) into Section 60(1) of the *Canada Labour Code* was aware that the then Section 45(8.1) 5. of the Ontario *Labour Relations Act* had been given this broad interpretation.

However, as I have already stated, for the reasons that follow I have decided that, even if Section 60(1)(a.4) of the *Canada Labour Code (Part I)*, as amended by *Bill C-19*, gives me the power to do so, in the circumstances of this matter I should not order the two grievances already assigned to other arbitrators to be consolidated with this one and heard by me. That being so, I find it unnecessary to decide whether I have the power or jurisdiction to make the order sought by the Employer. My aim is to deal expeditiously with the matter before me and I think that end is best served by not deciding more than I

need to; that is by not pronouncing here on what is undoubtedly an issue of significance beyond the change in the processing of registered mail with which I am concerned here, and indeed beyond this Collective Agreement and these parties. If I had concluded that I should order the consolidation of the other two Grievances with this one before me, obviously I would have decided this jurisdictional issue. As it is, I express no concluded opinion on the very able submissions of counsel set out above.

Counsel for the Employer addressed the issue of whether the amendments to Section 60(1) of the *Canada Labour Code (Part I)* by *Bill C-19*, specifically the addition of paragraph (a.4) empowering grievance arbitrators "to expedite proceedings and to prevent abuse of the arbitration process by making orders or giving the directions that the arbitrator or arbitration board considers appropriate for those purposes", have retrospective effect such that I can invoke these new powers in dealing with a Grievance filed before January 1, 1999, when they came into effect. Because of my conclusion that I will not order the consolidation of the three Grievances in issue here even if I have power to do so, it is not necessary to decide this issue. However, I do think the amendments are procedural rather than substantive, so that I could apply them if I thought it appropriate to do so. See *Wildman v. R.*, [1984] 2 S.C.R. 311 and *Sun Alliance Insurance Company v. Hart,* [1988] 2 S.C.R. 256 cited by counsel for the Employer.

Counsel for the Employer further submitted that for me to exercise these new remedial powers now should not properly be considered as giving them retrospective effect at all. I need not reach any considered conclusion on that point either, but I am inclined to think that it is just another way of looking at the "rule" that there is no presumption

against retrospective construction of enactments that affect only practice and procedure. See *Sun Alliance Insurance Company v. Hart (supra)*, per LaForest J., at p. 267.

2. If the new Section 60(1)(a.4) of the *Canada Labour Code (Part I)*, as amended by *Bill C-19* gives me the power to grant the order to consolidate sought by the Employer, should I exercise it in this case? In support of his motion counsel for the Employer stressed that all three Grievances were filed on the same day, all three grew out of the same operational changes with respect to registered mail announced by the Employer and all three depend on the same facts. It is undeniable that the three Grievances grew out of the same changes announced by the Employer, and that to decide each of them the arbitrator will have to understand those changes, and their impacts. In so far as it describes the changes and the reasons for them the evidence before me and before each of the other two arbitrators will be much the same. It would seem, however, that the relevant evidence with respect to the impact of the changes will be different.

Essentially, my factual concern will be with what work was done on registered mail by those holding preferred assignments before the changes and what is being done on registered mail now by those not holding preferred assignments. The arbitrator dealing with the Article 53 Grievance will be concerned with evidence of the job displacement effects of doing away with Security Registered Mail and Money Packets. The arbitrator dealing with the Article 29 Grievance will be concerned with evidence of the changes in the manner in which the Employer carries out its operations, in work methods and in postal service operations, their effects on employees and the notice given by the

Employer of the changes, if any, that come within the purview of that Article. Clearly, there will be overlap in the evidence relevant to these issues, but it will not be the same.

Counsel for the Employer, in moving that I order the other two Grievances arising out of the Simplified Registered Mail Service project to be consolidated with this one and heard by me, is invoking my statutory "power" under Section 60(1)(a.4) of the *Canada Labour Code (Part I)*, as amended by *Bill C-19*, "to expedite proceedings and to prevent abuse of the arbitration process". His submission is that by treating its allegations of breach of three different Articles of the Collective Agreement as three separate Grievances the Union is abusing the arbitration process both generally and by "arbitrator shopping". I also understand him to be submitting that by making the order requested I would "expedite proceedings". I will address his submission with respect to arbitrator shopping first. Then I will consider the submission that, quite apart from the allegation of arbitrator shopping, the Union is abusing the arbitration process and finally I will consider whether I should exercise my power to expedite proceedings.

"Arbitrator Shopping". There is no explicit evidence before me in support of the submission that by treating its allegations of breach of three different Articles of the Collective Agreement as three separate Grievances the Union is "arbitrator shopping", and I do not understand how I am to conclude that what the Union has done here inherently involves "arbitrator shopping", any more than might be involved in the assignment of any national policy grievance.

Neither counsel attempted to define "arbitrator shopping" (a small blessing for which I should probably be thankful), but I suppose what counsel for the Employer meant is an

attempt to select for a particular matter an arbitrator who, on the basis of previous decisions or statements, the Union thinks will decide in its favour in a particular grievance. In my view, the extent to which the Union can engage in such arbitrator shopping is built into the Collective Agreement provisions governing the ordering of the hearing of grievances and the rotation of arbitrators, most specifically Article 9.77. In so far as the Union can foresee in which order arbitrators will be assigned cases, it may be able to arbitrator shop by timing the filing of grievances. Nevertheless, to the extent that is possible it is an effect the parties have built, presumably with full awareness, into the very detailed provisions of the Collective Agreement set out above.

In other words, the sort of general allegation of arbitrator shopping made here might equally be made in respect of any national policy grievance, or, indeed, any formal grievance under this Collective Agreement. Logically, the Employer might as easily have charged the Union with arbitrator shopping if it had grouped together as one the three Grievances arising out of the Simplified Registered Mail project, alleging that it was trying to get all three before one arbitrator thought to be favourably inclined on all three issues. It cannot be the case that by simply alleging arbitrator shopping the Employer can subject the ordering of grievances, a function assigned to the Union by specific provisions of the Collective Agreement, to arbitral determination under Section 60(1)(a.4) of the *Canada Labour Code (Part I)*, as amended by *Bill C-19*.

Abuse of the Arbitration Process. Apart from the allegation of arbitrator shopping, is the Union abusing the arbitration process by treating its allegations of breach of three different Articles of the Collective Agreement as three separate Grievances? In addressing this issue I am proceeding on the basis that if the Union had chosen to file

one grievance alleging that the Simplified Registered Mail project involved breaches of the Collective Agreement, specifically of Articles 12, 29 and 53, or if it had filed the three grievances as it did, and then referred them to one arbitrator in accordance with its power under Article 9.81, the Employer would have accepted that there was no abuse of process.

It is important that in Article 9.81 the parties are clear and explicit in giving the Union the power to refer different grievances to the same arbitrator. I quote it again here for convenience;

> **9.81** Where different grievances raise similar issues, the Union may refer such grievances to the same arbitrator in order to have these grievances dealt with simultaneously. If the arbitrator decides that the grievances will not be heard simultaneously, the Union may then,
>
> **(a)** determine the grievance or the grievances that will be heard immediately by this arbitrator;
>
> **(b)** decide if the other grievances will be heard later on by the same arbitrator or by another arbitrator.
>
> Where the Union decides that these other grievances will be heard by another arbitrator, it shall proceed in accordance with the provisions of clauses 9.50 to 9.80.

There are three implications relevant to the issue before me to be drawn from Article 9.81. First, Article 9.81states that "the Union *may* refer [grievances that raise similar issues] to the same arbitrator".[emphasis added] In other words, it empowers, but does not require, the Union to group grievances. The parties having chosen, presumably with full awareness, to give the Union that choice, I should not readily treat the Union's exercise of the choice, either way, as an abuse of process. Second, by inference Article 9.81 recognizes that the Union will on occasion, and can appropriately, file "different

grievances [that] raise similar issues". The inference that it is not inappropriate to do so flows from the fact that the Union is not required to group such grievances. Third, the fact that the parties chose in Article 9.81 to empower the Union and not the Employer to group grievances suggests to me that I should be slow to allow the Employer to invoke any power I might have under Section 60(1)(a.4) of the *Canada Labour Code (Part I)*, as amended by *Bill C-19* to do so.

It is worth noting that Article 9.81 obviously contemplates that an arbitrator under this Collective Agreement may decide not to hear grievances simultaneously even though the Union has decided to group them. The unreported award of Arbitrator Burkett between these parties in *Sauro* (CUPW Gr. No. 626-88-37661, CP Arb. No. 3296484Y), *Bryson* (CUPW Gr. No. 626-88-38345, CP Arb. No. 339526Y), *Kopec* (CUPW Gr. No. 626-88-38273, CP Arb. No. 337080Y) and *Baldwin* (CUPW Gr. No. 626-88-38084, CP Arb. No. 335477Y), applying the identical predecessor provisions to Article 9.81 was put before me by counsel for the Employer. In that award, at p. 3, Arbitrator Burkett set out useful guidelines for the grouping of grievances under that provision;

> I read the requirement for there to be "similar issues" to encompass both factual and legal or contractual issues. As a general approach I would be prepared to group grievances where there is a common legal issue (that for purposes of consistency would be better determined by a single arbitrator) and where the factual issues are sufficiently similar as to permit a more efficient disposition of the grievances than if each were to be heard separately and, finally, where the factual issues are sufficiently similar as not to require disproportionate expenditure of time and money in preparing and transporting witnesses to a central location. ...

I understand and see the good sense in the submission on behalf of the Employer that these considerations should now be used in the new regime under Section 60(1)(a.4) the *Canada Labour Code (Part I)* to decide when the Union should be ordered to group grievances. In that context I note that there is not a "common legal issue" among the three Grievances in issue here. Moreover, I must emphasize that I think the three implications from Article 9.81 that I have just articulated are more significant than Arbitrator Burkett's considerations in deciding whether to use whatever power I have under Section 60(1)(a.4).

I welcome the grant of new statutory power to grievance arbitrators to make orders and give directions "to prevent abuse of the arbitration process", but in applying whatever new power I have I must bear in mind that under the *Canada Labour Code* there is no "arbitration process" in the abstract. There is only the parties' arbitration process in each collective agreement, with the statutory add-ons set out in Section 60, including those recently added by *Bill C-19*. The fleshing out of those processes by arbitrators, and courts in judicial review, giving fully contextual interpretations has always been, and will continue to be, essential.(See, among many other writings, Paul Weiler's classic "The Role of the Labour Arbitrator: Alternative Versions", (1969) 19 U.T.L.J. 16).

That, however, is not to say that my task is other than to give effect to the mutual intent of the parties as best I can ascertain it from the words of the collective agreement read in context, in the absence of legislated direction to the contrary. I should not hold the Union to be abusing the arbitration process in this Collective Agreement unless I am satisfied that that it is in fact abusing the process, not simply exercising to its advantage,

a power clearly given to it in this process. On those terms I am not satisfied that the Union has abused the arbitration process here.

Power to Expedite Proceedings. This is the firmest footing for the Employer's motion that I order the other two Grievances arising out of the Simplified Registered Mail Service project to be consolidated with this one and heard by me. I do not interpret the new Section 60(1)(a.4) of the *Canada Labour Code* conjunctively, as requiring that to make the orders or give the directions I consider appropriate I must do so to both "expedite proceedings" *and* "prevent abuse of the arbitration process". In my opinion the repetition of the word "to" in the phrases following "the power", i.e. "to expedite proceedings and to prevent abuse", suggests that the power can be exercised for either or both purposes.

Moreover, there will be situations in which fairness, expedition and cheapness will be enhanced by arbitrators having a power to expedite proceedings which is not limited by a requirement that there be a finding of abuse of process. I assume, therefore, that Parliament intended to bestow the broader rather than the narrower power.

Nevertheless, in the circumstances of this motion I decline to make the orders requested by counsel for the Employer. I do so for a combination of the reasons that follow.

First, as with the Employer's allegations of arbitrator shopping and general abuse of the arbitration process, the extent to which the Union can, from the Employer's point of view, complicate the grievance process by filing different grievances on the same facts and fail to refer grievances that raise similar issues to the same arbitrator is built into this

Collective Agreement. The elaborate provisions governing the ordering of the hearing of grievances and the rotation of arbitrators, most specifically Article 9.77 and 9.81, are set out in full above.

Second, the three Grievances which the Employer's counsel would have me combine are each, on their face, substantial and complex. While they obviously arise out of the same operational change and much of the evidence of the impact of the change might conveniently be given once rather than three times, the ways in which the operational change allegedly breaches Article 12, 29 and 53 are completely different. Although I recognize that I am not well informed on this, it seems to me that there need be little dispute about what the Employer has done, or why, or indeed about the employment impacts of what it has done The most serious dispute in respect of each Grievance will be about the application of the relevant provision of the Collective Agreement to the facts; and combining the three grievances does little to assist in that, at least as far as the Article 12 Grievance before me is concerned.

Third, if the order sought here is in fact within my jurisdiction, it seems to me that it is one of the most radical that could be sought under the new Section 60(1)(a.4) of the *Canada Labour Code*. The result of my issuing the order sought by the Employer here might very well be the exact opposite of expediting proceedings. That is not in itself a reason to deny such an order but it is a reason to require that the need for it be particularly clearly demonstrated, in terms of the fairness it will bring to the process and the time and money it will save. Two other arbitrators are already seized with jurisdiction over the other two Grievances, with initial hearing dates set. I happen to be the first up and for that reason I am asked, not to decline jurisdiction, but to take to

myself jurisdiction over all three matters. I am not saying that I do not have the power to do so, or that I would never do so, but I am saying that I would do so only in circumstances that provide more or better reasons than exist here.

I have read with interest the award of Arbitrator Kilgour in *Loeb IGA Southside and UFCW* (19940, 39 LAC(4th) 353 cited by Counsel for the Employer, to which I referred above in connection with the issue of whether I have power to consolidate the grievances here in issue. As I said there, in that preliminary award the arbitrator granted a motion similar to the Employer's motion here, and ordered five grievances already before five different arbitrators consolidated before him, acting under what were then provisions of the Ontario *Labour Relations Act*, RSO 1990, c. L.2 as am. 1992, c.21, very similar to the new Section 60(1)(a.4) of the *Canada Labour Code*.

I note that in *Loeb IGA Southside* there were five grievances filed by five different grievors affected by the same lay-off, but, unlike here, all five grievances alleged breach of the same provision of the collective agreement. That, I think, made the employer's case for consolidation before Arbitrator Kilgour somewhat stronger, given that the facts of the five grievances were similar as well. However, I note too that the arbitrator there actively invited the motion to consolidate, partly on the basis that the subsequent grievances might "be of questionable arbitrability, pursuant to the doctrine of *res judicata*" [at p. 355]. That is a proposition which I consider to be itself questionable, and which, if it motivated the arbitrator in granting of the motion, undercuts the persuasiveness of *Loeb IGA Southside* as a precedent.

I agree with Arbitrator Kilgour's [p. 363] that the spirit of the Act, and I think of the *Canada Labour Code* with which I am dealing here as much as of the Ontario *Labour Relations Act*, is to bring finality to the real issues separating the parties, but I think that aim will not be significantly hindered by the three Grievances in issue here being heard by three different arbitrators. I have found it very useful to consider *Loeb IGA Southside* here, but I respectfully decline to follow it here.

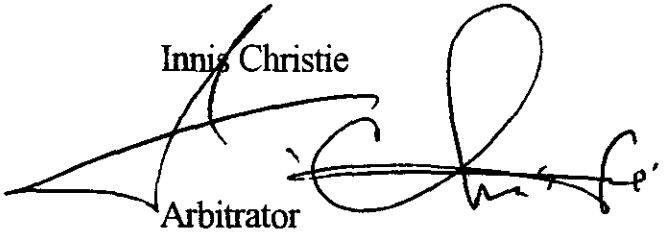
Lever Brothers Ltd. and Teamsters, Chemical, Energy and Allied Workers, Local 132 (March 7, 1994, unreported), to which I also referred above, has not assisted me here. If the Union lacked the explicit power it has under this Collective Agreement to group grievances for arbitration, and there were several grievances under the same provisions of the Collective Agreement and arising out of the same circumstances before me I would find it more helpful. Similarly, I have considered but not found helpful in this context the award of Arbitrator Pam Picher in *The Wellesley Hospital and S.I.U., Local 204* (January 29, 1997, unreported). That award appears to suggest that in some contexts a grievance arbitrator may have power to order the consolidation of grievances even in the absence of specific statutory power. Even if that were so under this Collective Agreement, in circumstances such as these where I would decline to order the consolidation of grievances in the exercise of a clear statutory power I would obviously decline to do so under an implied general power.

Conclusion and Order on the Employer's motion to consolidate. I decline to make the orders requested by counsel for the Employer because the extent to which the Union can, from the Employer's point of view, complicate the grievance process by filing different grievances on the same facts and fail to refer grievances that raise similar

issues to the same arbitrator is built into this Collective Agreement, in the elaborate provisions governing the ordering of the hearing of grievances and the rotation of arbitrators, most specifically Article 9.77 and 9.81, set out in full above.

The three Grievances which the Employer's counsel would have me combine are each, on their face, substantial and complex and the ways in which the operational change in question allegedly breaches Article 12, 29 and 53 are completely different. Faced with that, the need for the consolidation order has not been sufficiently clearly demonstrated, in terms of the fairness it will bring to the process and the time and money it will save, for me to take to myself jurisdiction over two Grievances of which other arbitrators are already seized, with initial hearing dates set.

Innis Christie



Arbitrator