3-10-2001

Re Canada Post Corp and CUPW (078-00-00032)

Innis Christie

IN THE MATTER OF A REGULAR ARBITRATION:

BETWEEN:

THE CANADIAN UNION OF POSTAL WORKERS

(The Union)

and

CANADA POST CORPORATION

(The Employer)

01 071 089

RE: *Moncton Local* 00032 CUPW No. 078-00-

BEFORE: Innis Christie, Arbitrator

HEARING DATE: January 25, 2001

AT: Moncton, N.B.

FOR THE UNION: Jeff Woods, Regional Grievance Officer
Huguette Leblanc, President Moncton Local
Louise Comtois, Moncton Local Executive
Clarence Leblanc, Moncton Local Executive
Claude Leblanc, Moncton Local Executive

FOR THE EMPLOYER: Joseph P. Doucette, Labour Relations Officer
Daniel Levesque, Supervisor

DATE OF AWARD: 10 March 2001

Union grievance dated May 21, 2000 on behalf of regular employees in Group 2 alleging breach of the Collective Agreement between the parties bearing the expiry date January 31, 2003 in that the Employer violated Articles 15, 17, 19, 44 and 52

in that from May 15 to 19, 2000 the Employer improperly utilized a temporary employee to cover a resultant vacancy due to increased vacations caused by superimposing. The Union requested that the Employer grant full redress to appropriate employees, with interest and revise the appropriate EOP list.

At the outset of the hearing in this matter the representatives of the parties agreed that I am properly seized of it and that I should remain seized after the issue of this award to deal with any matters arising from its application.

AWARD

The issue here is whether, at times other than during the twelve week period specifically provided for by Article 19.16(j), the Employer can, in accordance with Article 17.06, use temporary employees to cover for the extra absences on annual vacation that result from senior employees taking more than four consecutive weeks of vacation.

Mr. Woods for the Union and Mr. Doucette for the Employer agreed that the facts of the particular use of a temporary employee that gave rise to this Grievance are not in dispute and are not of real concern. They agreed on the issue of interpretation in dispute and requested that I rule on how I would apply the relevant provisions of the Collective Agreement here. They requested that I retain jurisdiction to apply my ruling to the facts in this Grievance should they be unable to agree on its disposition based on my ruling. No prior arbitration decisions under this Collective Agreement or its predecessors, or under other collective agreements,

were put before me and there was no extrinsic evidence, either of past practice or relating to the negotiation of the relevant provisions.

This is entirely a matter, therefore, or interpreting the words of the Collective Agreement, in context, in an attempt to ascertain and give effect to the intention of the parties.

In Moncton, as elsewhere, employees in Group 2 bid on their annual vacations by seniority. This is provided for by Article 19 of the Collective Agreement;

> **19.16 Number of Employees on Vacation Leave in Group 2**
>
> The present practice for full-time employees will continue with respect to:
>
> **(a)** the determination of the number of employees who may be on vacation leave in each block,
>
> **(b)** the allocation of vacation leave will be on the basis of seniority with regard to:
>
> **(i)** the choice of the block in which the employee wishes to take his or her vacation leave,
>
> **(ii)** the amount of leave he or she may take in each block,
>
> **(iii)** the granting of vacation leave in excess of four (4) weeks to those employees qualifying for the extra week's leave.

The issue here arises in connection with this last clause, the granting of vacation in excess of four weeks. Were it not for clause (f) of this Article 19.16, Group 2 employees entitled to more than four weeks vacation would fall under the rule in the following, clause (d);

> **(d)** An employee who wishes to split his or her vacation entitlement will be permitted, by seniority, to bid only on one (1) portion of his or her proposed split in the first round of bidding. After all other employees in the post office or work area, whichever is applicable, have bid, he or she will be given the opportunity to use his or her seniority to bid on whatever blocks or portions of blocks are left vacant.
>
> ...

However, the parties have specifically provided that, by a process rather inaptly called "superimposing", Group 2 employees entitled to more than four weeks vacation can bid for their additional one, two or three weeks in the first round. They can do this only if the additional week or weeks are taken "concurrent with", by which, it is undisputed, they mean immediately preceding or following, their primary four weeks of annual vacation. Article 19.16(f) provides;

> **(f)** The superimposing of the fifth (5th), sixth (6th) and seventh (7th) weeks of vacation may be taken concurrent with the four (4) week block selection, subject to the following conditions:
>
> **(i)** shall be selected at the same time as the four (4) week block is selected,
>
> **(ii)** shall be selected contiguous to, either prior to or following, or a combination of both, the four (4) week period,
>
> **(iii)** fifth (5th), sixth (6th) and/or seventh (7th) week(s) not superimposed as described above shall be chosen in the same manner as described in paragraph 19.16(d).

This has the effect of allowing there to be more employees on annual vacation during the popular summer vacation months than would otherwise be the case. In this context the Collective Agreement goes on to provide;

> **(j)** Temporary employees may be used between the middle of June to the middle of September for a twelve (12) week period to cover increased vacation caused by superimposing.
>
> **(k)** The maximum number of temporary employees who may be used above shall be equivalent to the number of relief employees assigned to cover vacation assignments.
>
> **(l)** Temporary employees used to cover the superimposing will be used for a minimum of twenty (20) consecutive days.
>
> **(m)** Any unassigned temporary employees used during the twelve (12) week period in paragraph 19.16(j) may be used to cover other vacation assignments.

The Union's position is that clause (j) provides for the *only* use that the Employer is allowed by the Collective Agreement to make of temporary employees in the context of coverage for vacation absences due to "superimposing". Clause (j), Mr. Woods submitted for the Union, is an exception to the unstated, but obviously intended, general rule that at any other time of year, and except within the limits of clauses (k), (l) and (m), temporary employees cannot be used for that purpose.

For the Employer, Mr. Doucette's position was that there is no such general rule stated or intended. In addition to relying on clause (j) of Article 19.16 during the twelve week period to which it applies, he claimed the Employer can apply Article 17.06, which deals generally with coverage of known Group 2 employee absences of five working days or more. It provides;

> **17.06 Coverage of Known Periods of Absence - Full-time Employees**
>
> If a full-time employee in the letter carrier classification is off on a known absence of five (5) working days or more, the absence may be covered from the first day in the following manner:
>
> **(a)** Relief letter carriers in the installation will bid by seniority to cover the absence.
>
> **(b)** If, under paragraph 17.06(a), a relief letter carrier elects to cover the absence, then full-time letter carriers in the installation will bid by seniority to replace the relief letter carrier.
>
> **(c)** If, under paragraph 17.06(a), there are no relief letter carriers in the installation who wish to cover the absence, the absence will be covered in accordance with paragraph 17.06(d).
>
> **(d)** The original absence, or the absence remaining after or resulting from the application of paragraph 17.06(b) will be bid by seniority among part-time letter carriers in the component. If no such employee wishes to accept this temporary promotion it is offered by seniority to part-time mail service couriers in the component.
>
> **(e)** The part-time absence resulting from the application of paragraph 17.06(d), if any, will be bid by seniority among employees in the same classification and component as the resulting absence.
>
> **(f)** Finally, the original absence or the absence remaining after or resulting from the

application of the above paragraphs will be covered by a temporary employee in accordance with Article 44.

The Employer's position is that, if it reaches clause (f) of this provision, temporary employees can be used on this basis to cover known absences of five working days or more due to superimposing, as well as on the basis of Article 19.16(j). There is nothing in the Collective Agreement, says the Employer, to demonstrate that the parties did not intend the phrase "a known absence of five (5) working days or more", as it is used in Article 17.06(f), to include a known absence on annual vacation.

The Union's position is based on a contextual reading of Article 19.16(j). Its argument is that the parties to this Collective Agreement have addressed the issue of staffing in several complex provisions obviously intended to put limits on the Employer's use of temporary employees who, Article 44 makes clear, have lesser rights than do regular full-time and part-time employees. The Employer is obligated to employ a specified complement of regular relief letter carriers to cover annual vacation entitlements, as well as other reasons why employees may be absent. Article 52.04 provides;

52.04 Relief Letter Carrier Complement

The relief letter carrier complement will be established using the following criteria: a minimum criteria of one (1) in twelve (12) for vacation relief and one (1) in eighteen (18) for relief for other absences. Requirements greater than the minimum criteria will be based on Bar Charts and should they show that an additional relief letter carrier would have been required more than sixty-five (65) percent of the preceding twelve (12) month period, an additional relief letter carrier position will be established.

However, when a twelve (12)-month Bar Chart trend shows a reduction in actual need, any vacancy within the installation(s) will be filled by that relief letter carrier until such time as it is determined by the Bar Charts that the additional relief letter carrier position is still required. Should it be determined that the relief letter carrier position is not required, the

> relief letter carrier with the least seniority will bid on another position in the letter carrier classification.
>
> The relief letter carrier relief complement will be adjusted upwards or downwards as dictated by fluctuations in the Bar Charts based on twelve (12)-month trends.

With respect to vacation relief this means, roughly, that there will be a relief letter carrier available for each four week block of annual vacation taken. While some employees are entitled to more than four weeks, some are entitled to less, so there should be roughly enough relief letter carriers to cover annual vacations. Where the workforce is relatively senior and the average for vacations is more than four weeks the use of the bar charts will mean that the Employer has to hire additional relief letter carriers. This is a somewhat rough mechanism, not only because of all the unforseeables but also because, inherently, it always operates a year late.

This mechanism is further thrown out of kilter by "superimposing", which allows a disproportionate number of annual vacation weeks to be taken in the prime months, so that in that period, predictably, there will not be enough relief letter carriers to cover annual vacations. This, says the Union, is what Article 19.16(j) was intended to look after, by allowing the use of temporary employees for a specified twelve week period. And, most significantly for the issue before me, says the Union, if the intention had been that the Employer could use temporary employees under Article 17.06(f) to cover for "superimposing" there would have been no need to put Article 19.16(j) in the Collective Agreement.

Further, Mr. Woods submitted on behalf of the Union, it is clear that the parties intended temporary employees to be used only under Article 19.16(j) to cover for "superimposing", because the parties imposed special limitations on their use under that clause, in the immediately following clauses (k) and (l), quoted above,

and gave some special latitude to the Employer in clause (m). None of this, he submitted, would make sense if the parties had intended to allow the Employer to use temporary employees under Article 17.06(f) to cover for "superimposing". He also pointed to some perplexing administrative difficulties that arise under Article 44 (referring particularly to clause (m) of Article 19.16) if temporary employees brought in under Article 17.06(f) are in the workplace along with temporary employees brought in under Article 19.16(j).

If the Union is correct in its interpretation of the Collective Agreement, where the Employer cannot cover for "superimposing" under Article 19.16(j), (k) and (l), it would have to go to Article 17.04(a), which makes the basic provisions for coverage of regular Group 2 employee's routes in their absence. (Articles 17.06 and 17.07 carve out the case of known absences of five working days or more). The effect would be that before the Employer could call in temporary employees under clause (v) of Article 17.04(a), "any other means", it would have to offer overtime to regular full-time and part-time employees, including those in other installations within the same post office jurisdiction. This, according to the Union, is precisely the effect if bargained for to protect against the over-use of temporary employees.

The issue is which of these interpretations of the Collective Agreement, the Employer's or the Union's, is correct.

Decision. Although it is, perhaps, trite to reiterate for parties of this sophistication, I note that, as Brown and Beatty say in *Canadian Labour Arbitration* (3rd. Ed., looseleaf), in *para.* 4:2100;

> It has often been stated that the fundamental object in construing the terms of a collective agreement is to discover the intention of the parties who agreed to it. ... in determining the intention of the parties [however] the cardinal presumption is that the parties are assumed to have intended what they said, and the meaning of the collective agreement is to be sought in its express provisions.

An earlier award of mine, *Board of School Trustees, School District No. 70 (Alberni)* 1981, 29 L.A.C.(2d) 129, is one of those cited in support of the first part of this fundamental proposition and a more recent one, *Nova Scotia (Minister of Education)* (1999), 79 L.A.C. (4th) 1 (Christie), aff'd 95 A.C.W.S. (3d) 398 (N.S.S.C.), is cited in support of the second part. But, as the learned authors go on to state;

> When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the reasonableness of each possible interpretation [citing, among others, the awards of Arbitrator Bruce Archibald in *City of Halifax* (1993), 36 L.A.C. 4th 364 and Arbitrator Bruce Outhouse in *F.A. Tucker (Atlantic) Ltd.* (1985) 20 L.A.C. (3d) 33], administrative feasibility and which interpretation would give rise to anomalies.
>
> ...
>
> In searching for the parties' intention with respect to a particular provision in the collective agreement, arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense. [Citing again, among others, Arbitrator Outhouse's award in *F.A. Tucker (Atlantic) Ltd.* (supra)]

A straight-forward application of these fundamental principles leads me to the conclusion that this Grievance must be denied. There is nothing on the face of the Collective Agreement that precludes the Employer from applying Article 17.06(f) as it normally would, to cover a known absence of five working days or more, because the absence is caused by 'superimposing". If the parties had intended the general rule to be as Mr. Woods submitted it is, that temporary employees cannot

be used under that Article to cover for absences due to "superimposing", with Article 19.16(j)-(m) as the only exception, I would have expected them to say so, and they have not. Article 17.06 is no more limited in its application to absences due to superimposing than is Article 17.04(a), which the Union submits does apply to such absences.

Assuming, without deciding, that it is "linguistically permissible" to imply the limitation on the application of Article 17.06 put forward by Mr. Woods for the Union, is the interpretation sought by the Employer not "reasonable", does it lack "administrative feasibility" or "give rise to anomalies"? Does the application of Article 17.06 and the use of temporary employees in accordance with clause (f) of that provision "lead to some absurdity or inconsistency with the rest of the collective agreement", or does "the context" reveal "that the words were used in some other sense"? These are exactly the points that Mr. Woods argued.

I do not think it is unreasonable or anomalous to interpret the Collective Agreement as the Employer has here. Article 17.06 is a clear exception, or carving out, from Article 17.04(a), limited by the requirement that the absence to which it applies must be a "known" one of five days or more. Clearly, on its face, Article 17.06 can and usually will apply to absences on vacation, including those resulting from "superimposing". Under Article 17.06(a) the Employer must first go to the relief letter carriers, which then triggers clauses (d) and (e), before calling in temporary employees. Those clauses involve a cost for the Employer and themselves provide some protection against the overuse of temporary employees, albeit not as much as Article 17.04(a) does. Moreover, proceeding under Article 17.06 will have implications for Article 52.04 quoted above, and

could lead to the requirement that an additional relief letter carrier be hired the next year.

Thus, concluding that the Employer can proceed under Article 17.06 to cover absences caused by "superimposing" does not render clauses (j)-(m) of Article 19.16 useless or meaningless. In the twelve week period from the middle of June to the middle of September, provided it stays within the limits of Clauses (k), (l) and (m), the Employer can avoid the costs normally associated with proceeding under Article 17.06. To give the words their plain meaning and refuse to read in the limitation on the use of Article 17.06 sought by the Union does not, therefore, "lead to some absurdity or inconsistency with the rest of the collective agreement", nor does "the context" reveal that any such limitation was intended.

In summary, I do not see that this interpretation of the Collective Agreement, giving effect to the words used by the parties, is inconsistent with the staffing arrangements evidently contemplated by Article 52.04. It does not render Article 19.16(j) useless or meaningless. The special limitations on the use or temporary employees under that clause imposed by clauses (k) and (l), and the special latitude to the Employer in clause (m), do make sense, because the Employer may well chose to use temporary employees under Article 19.16(j) rather than under Article 17.06(f), to avoid triggering clauses (d) and (e) of that provision and affecting the bar charts referred to in Article 52.04. I agree that there may be some issues about seniority among temporary employees that arise, but I cannot conclude that because of those the parties must be taken to have intended that Article 17.06 could not be used to cover absences caused by "superimposing".

Disposition and Order. The Grievance is denied.

Innis Christie
Arbitrator