7-30-2001

# Re Canada Post Corp and CUPW (106-00-00003)

Innis Christie

IN THE MATTER OF A REGULAR ARBITRATION:

BETWEEN:

THE CANADIAN UNION OF POSTAL WORKERS

(The Union)

and

CANADA POST CORPORATION

(The Employer)

RE: *Fundy Local* CUPW No. 106-00-00003

BEFORE: Innis Christie, Arbitrator

HEARING DATE: June 11, 2001

AT: Saint John, N.B.

FOR THE UNION: Carole Woodhall, Union Representative
Kevin Suttie, Chief Shop Steward, Fundy Local
Paul Rowley, Shop Steward, Fundy Local
Cyril Galbraith, Union Observer, Fundy Local
Kevin Murphy, Union Observer, Fundy Local

FOR THE EMPLOYER: Joe Doucette, Labour Relations Officer
Rick Smith, Superintendent Mail Operations, Saint John
Peter Lystiuk, Route Measurement Coordinator

DATE OF PRELIMINARY AWARD: 30 July, 2001

Union grievance dated April 26, 2000 on behalf of all employees in Group 2 alleging breach of the Collective Agreement between the parties bearing the expiry date January 31, 2000, in that the Employer violated Articles 9, 46 and 47 and Appendix V by not providing the results of the five day count taken September 22-28, 1999 to Local representatives or Union observers to allow the Union to verify loading and unloading times of vehicles. The Union seeks an order that the Employer provide the results of the five day count taken September 22-28, 1999 to the Union and make appropriate adjustments to time values for the work functions affected.

The Employer made preliminary objections to my jurisdiction to deal with this matter based on: (i) the assertion that the matter had been dealt with in two of my previous awards, and (ii) timeliness. This preliminary award deals only with those objections. At the outset of the hearing in this matter the representatives of the parties agreed that, subject to these two objections, 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.

## PRELIMINARY AWARD

This Award deals only two preliminary objections by the Employer to my jurisdiction to deal with this matter. The first arises from the assertion by the Union that the issue here flows from two earlier awards by me in the "regular" process and comes within the jurisdiction that I retained in those awards. The second is that this Grievance has been filed too late.

I must also state here that my notes and recollection are unclear on whether these objections also relate to Grievance No. 105-00-0010, which is next on the list for hearing on June 11, 2001, but with regard to which I was provided with no documentation. The representatives of the parties will know whether that Grievance relates to the same issues and whether it was their intention that it be dealt with by this Award.

**First Preliminary Objection.** For the Employer, Mr. Doucette objected, first, on the basis of Article 9.70 of the Collective Agreement, to me considering two of my earlier awards between these parties with respect to the last Saint John restructure. Article 9.70 provides;

> 9.70 The decision of the arbitrator shall not constitute a precedent and shall not be referred to in subsequent arbitrations. Clause 9.103 shall not apply to such decisions.

Clause 9.103 provides:

> Future Cases
>
> 9.103 The final decision rendered by an arbitrator binds the Corporation, the Union and the employees in all cases involving identical and/or substantially identical circumstances.

This objection is ill conceived. Article 9.70 does not address the basis upon which, as I understood Ms. Woodhall, the Union is asking me to look at two of my earlier awards rendered in the "regular" process. In each of those cases, as

agreed by the parties at the outset of each hearing, I retained jurisdiction by stating that I would remain seized after the issue of this award to deal with any matters arising from its application. To exercise that retained jurisdiction at the request of either of the parties does not constitute using the award in which I retained jurisdiction as precedent or applying Clause 9.103. Nor does it constitute referring to the award in which I retained jurisdiction "in subsequent arbitrations". The true exercise of retained jurisdiction constitutes a continuation of the same arbitration.

However, I have used the phrase "[t]he true exercise of retained jurisdiction" purposely, because there is still the question of whether what the Union seeks here falls within the jurisdiction that I retained in either of those awards. I can only determine that after I have understood the issues in this Grievance and in each of the awards in question. That then is a matter of argument at the next stage, with those awards before me.

It might well be asked why, if this is a matter of retained jurisdiction, it is coming before me as a new Grievance. I have decided tentatively, in the absence of any formal arbitral rulings between these parties on the point, that it would be unduly technical to refuse to exercise my retained jurisdiction on that basis, even though there is no mention in this Grievance of failure to abide an earlier award. Although a simple letter to the arbitrator, copied to the other party, might be more appropriate than filing a new grievance, there is no provision of which I am aware in this Collective Agreement specifically establishing a process for bringing a matter of retained jurisdiction back before an arbitrator.

If, after considering this matter together with the awards in which the Union says I retained jurisdiction to deal with the issues here, I decide that this is not "[t]he true exercise of retained jurisdiction" will I be disqualified from disposing of the issues here? The Employer put before me the December 19, 1997 award of Arbitrator Kevin Burkett between these parties in *CUPW National*, CUPW No. N00-95-00019, in which he held that to be the effect of the revelation to him of the outcome of a regular award on the same issue before him in the formal process. In my view that would not be the effect here, unless in the regular awards which the Union proposes to put before me when this hearing is reconvened I ruled on the issue here. But I do not understand that to be the case. Indeed, I understand the Union's whole point to be that I was seized of issue or issues here but did not deal with them, leaving them to be dealt with, if necessary, as part of my retained jurisdiction.

**Second Preliminary Objection.** For the Employer, Mr. Doucette objected, second,

that the Grievance here was not filed within the time limits set by the Collective Agreement. Acknowledging that this was a group Grievance, he took the position that, by virtue of paragraph (b), Article 9.11 means this Grievance is untimely. In any event, he submitted, it is also untimely by virtue of Article 9.11(c). Article 9.11 provides;

> Time Limit on Grievance
>
> ...
>
> 9.11 A grievance concerning a group of employees may be presented by an authorized representative of the Union not later than on the first of the two following dates:

(a) the twenty-fifth (25th) working day after the date on which the last employee of the group first became aware of the action or circumstances giving rise to the grievance; or

(b) the twenty-fifth (25th) working day after the date on which the Union first became aware of the action or circumstances giving rise to the grievance;

(c) notwithstanding paragraphs 9.11(a) and (b), not later than the sixtieth (60th) working day following the date on which the first employee of the group first became aware of the action or circumstances giving rise to the grievance.

For the Union, Ms. Woodhall recognized this as a mandatory time limit but took the position that the Grievance was a continuing grievance and was filed within the time limits set in both paragraphs (b) and (c) of Article 9.11. In the alternative she submitted that the Employer had waived it right to object to the timeliness of the Grievance by failing to make that objection until the hearing before me.

The full wording of the Grievance, dated April 26, 2000, is;

> The Union grieves on behalf of all employees in group 2 that the employer has violated articles 9, 46, 47 and App V and all other elated provisions of the collective agreement by not providing the results of the 5 day count taken from Sept. 22-28/99 to local representatives and/or union observer(s) in order to allow the union to verify the loading and unloading of a vehicle(s) times; including specifically, time values for the 2nd, 3rd 4th additional loads; time values to obtain keys, time values to obtain additional rolling stock and waiting tome for additional loads to arrive.
>
> Corrective Action Requested That the employer recognize that it has violated the collective agreement with respect to this matter and

> immediately provide to the local union representative and/or union observer(s) the results of the 5 day check taken September 99. Further that the employer make appropriate adjustments to the time values for the work functions described above. The Union reserves the right to request further corrective action including compensation and/or damages and interest at the Bank of Canada rate.

The Employer's reply, dated May 15, 2000, is;

> A meeting was scheduled with your union representatives to hear this grievance on MAY 15/2000.
>
> An investigation into the facts has revealed the following:
>
> The above noted Grievance was discussed with Local C.U.P.W. Reps. on Friday May 12, 2000. They expressed concerns with not having Representatives/Observers and results of the five day count taken from September 22 - 28, 1999. Our findings reveal that the above was not the case thus the Grievance is denied.
>
> In view of this your grievance is: 1X Denied as there has been no violation of the Collective Agreement.
>
> 1 Sustained
> 1 Adjusted to the extent outlined above

For the Employer, Mr. Doucette submitted that, based on a detailed internal letter of October 28, 1999, signed 'Cyril Galbraith, Route Measurement Steward" to Kevin Suttie, Chief Shop Steward of the Fundy Local, the Union, and certainly at least one of the affected employees knew of the substance of the Grievance on that date. For the Union, Ms. Woodhall submitted that while the Union had some information on working sheets from the "5 day count taken from Sept. 22-28/99" it did not receive the full and final information it had requested and been assured it

would be given until June 10th 2000,the day before the hearing before me. Until then, she submitted, no time limit could have started to run.

There was disagreement between the parties with respect to a meeting of February 3, 2001 at which, apparently, a number of contentious issues outstanding from the restructure in the spring of 1999 were discussed. While there was no evidence of what was agreed at that meeting, in the Employer's submission at that point, at the latest, the Union would have known whatever it needed to be aware of "the action or circumstances giving rise to the grievance".

It is, however, unnecessary for me to deal with these aspects of the Employer's preliminary objection to the timeliness of filing of this Grievance because I must conclude that the Employer waived any right it had to raise this preliminary objection. There is nothing in the Employer's reply to the Grievance, quoted in full above, and no other basis for concluding that the Employer advised the Union appropriately in advance of the hearing before me that it would make this objection.

In Brown and Beatty *Canadian Labour Arbitration* (3rd ed., CD ROM current to 92 L.A.C. (4th), expiry date Nov. 30, 2001) the learned authors state at para. 2:3130 [footnotes omitted];

> Waiver of procedural irregularities
>
> The concept of "waiver" connotes not insisting on some right, or giving up some advantage. It involves both knowledge and intention to forgo the exercise of such a right. In its application, it is a doctrine

> which parallels the one utilized by the civil courts known as "taking a fresh step", and holds that by failing to make a timely objection and "by treating the grievance on its merits in the presence of a clear procedural defect, the party "waives' the defect". That is, by not objecting to a failure to act within mandatory time-limits until the grievance comes on for hearing, the party then objecting will be held to have waived non-compliance and his objection to arbitrability will not be sustained. This has been held to be so even where there was a timely objection as to arbitrability but one that did not relate to the failure to meet time-limits. Where, however, the objection is made at the earliest opportunity, even if it is not made in writing, this will preclude a finding that the irregularity was waived

None of the arbitration awards between these parties put before me for consideration by the Employer deals with waiver. They all concern individual Grievances in respect of which arbitrators have held that Article 9.10 applies and is mandatory in it effect.

**Conclusion and Order.** The Employer's preliminary objection to my jurisdiction to hear this Grievance based on the fact that it was not filed within the time limits allowed by the Collective Agreement is not allowed, on the basis that it's right to object on that basis was effectively waived because the Employer dealt with the Grievance on its merits and did not otherwise indicate that it was making this objection until the eve of the hearing before me.

The Employer's preliminary objection based on the Union's proposed reliance on two earlier awards of mine in which I retained jurisdiction is also rejected. To exercise retained jurisdiction at the request of either of the parties does not constitute using the award in which I retained jurisdiction as precedent contrary to Article 9.70 or applying Clause 9.103. Nor does it constitute referring to the

award in which I retained jurisdiction "in subsequent arbitrations". However, there is still the question of whether what the Union seeks here falls within the jurisdiction that I retained in either of those awards.

Innis Christie
Arbitrator

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