7-3-2002

Re Canada Post Corp and CUPW (Fitzhenry)

Innis Christie

IN THE MATTER OF A REGULAR ARBITRATION:

BETWEEN:

THE CANADIAN UNION OF POSTAL WORKERS

(The Union)

and

CANADA POST CORPORATION

(The Employer)

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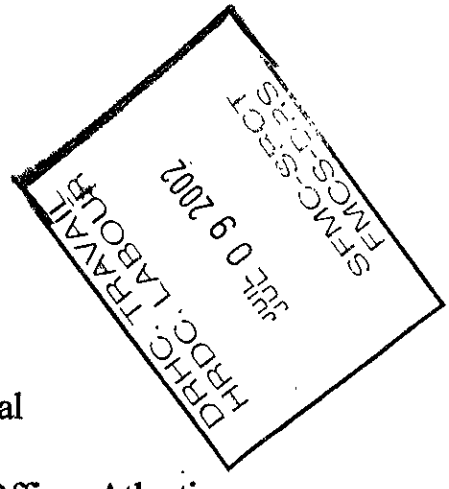
RE: *Fitzhenry, M.*	CUPW No. 126-00-00405
Pittman, T.	CUPW No. 126-00-00406
Vokey, G.	CUPW No. 126-00-00407
Croke, J.	CUPW No. 126-00-00408
Whittle, E.	CUPW No. 126-00-00409
Purchase, L.	CUPW No. 126-00-00411

BEFORE: Innis Christie, Arbitrator



HEARING DATE: May 28, 2002

AT: St. John's, Newfoundland

FOR THE UNION: Ted Penney, Shop Steward
Dave Moyst, President St. John's Local
Craig Dyer, Vice-president St. John's Local

FOR THE EMPLOYER: Laurie Stewart, Labour Relations Officer Atlantic
Barb O'Connor, Supervisor St. John's Mail Processing Plant
John Martin, Supervisor St. John's Mail Processing Plant
Dave Francis, Supervisor St. John's Mail Processing Plant

DATE OF AWARD: 3 July, 2002

Union grievances dated January, 2002 on behalf of six 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 2, 5 and 21 "unreasonably, in a discriminatory fashion and without conducting a legitimate inquiry" denied each of the Grievors special leave with pay for the number of hours stated in the Grievance in the context of "a severe winter storm in the St. John's area". In each Grievance the Union seeks an order that the Employer grant full redress for all lost rights, earnings and benefits.

AWARD

The issue is whether the Employer acted reasonably in denying each of the Grievors special leave under Article 21.03 for part of the 11 pm –7 am shift in the context of the storm on the night of January 22-23, 2002. Each of the Grievors reported for work but left early because of the storm. They each claimed for the hours missed, which ranged from 4½ to 6. The Employer's position is that the Grievors should not have left before the end of their shift because it was unsafe to do so, the storm abated and the Grievors could have made it home safely at the end of the shift.

The peculiarity of the situation in issue is that when employees on the night shift in question asked their Supervisor, Barb O'Connor, if they could go home her evidence is that she neither gave nor denied permission. Instead, she testified that she told them that management had been tracking the storm and that it would be "irresponsible for management to send people out into the storm; that they were not authorized to go and that management would not take responsibility for anyone going out". Before leaving work to go home in the storm in the early hours of the morning some of the Grievors said they would be applying for special leave and some left without saying anything about

special leave. Ms. O'Connor testified that she did not agree to special leave nor did she tell the Grievors that they would not be entitled to special leave. She told the Grievor's that the situation of each of them would be reviewed individually and decided on that basis.

As is standard practice in the context of storms, the Grievors each applied for special leave after returning to work, and each was denied. The Employer's reply in all six instances was:

> This grievance was discussed with a representative of your bargaining unit.
>
> The evidence indicates that the storm abated during the shift and that all staff for Shift 2 [7 am – 3 pm] arrived for duty. The night shift were in the building and there was no reason to leave. All staff made it to work, but you never and it is your responsibility to attend work.
>
> Therefore your grievance is denied.

Article 21.03 provides:

> 21.03 Leave for Other Reason
>
> Where conditions warrant it, special leave with pay may be granted when circumstances not directly attributable to the employee, including but not limited to illness in the immediate family, as defined in clause 21.02, prevent his or her reporting for duty. Such leave shall not be unreasonably withheld.

There is no dispute that this provision has been applied in the context of severe winter storms countless times. It has been the subject of many arbitration awards in the regular process and, prior to the adoption of that format, of many reported arbitral awards, mercifully few of which were put before me by the parties here. In all of the "snow storm cases" the issue, broadly, is whether the Employer acted reasonably in denying special leave.

There is no dispute that around 11 am on January 22, 2002 a major snow storm started in St. John's. From about 3 p.m. to midnight the storm abated and then picked up again, with more snow and major winds of 111 km/h, 120 km/h having been predicted. The day shift was given special leave with pay from 11 a.m. to the end of their shift at 3 p.m. The evening shift reported and completed their shift without difficulty. Virtually the whole midnight shift reported, but when the wind came up many were concerned about whether they would be able to get home. In fact the storm abated again about 5 a.m. on the 23rd, and the streets started to be plowed. The City of St. John's was seriously tied up on the morning of the 23rd, with most businesses and schools closed, but the evidence is that no employees of the Employer who stayed until the end of the night shift at 7:00 a.m. on the 23rd of January had real trouble getting home. At that time day was beginning to break.

According to the testimony of supervisor Barb O'Connor, a group of employees on the night shift, including Susan Clark, Shop Steward, and John Croke, Shop Steward and health and safety representative, both of whom testified at the hearing, went to the supervisors' office and asked their supervisors, Bill Hyde and Barb O'Connor, who was relieving their regular supervisor, if they could go home. Ms. O'Connor testified that she advised them that she had been in contact with Ken Hogan, the Plant Manager, who was tracking the storm on the internet. She said she passed on his advice that employees should stay at work for their own safety, because the storm would "end" at about 6:00 a.m, and showed them the weather map on the computer screen. She testified "I told them if they chose to leave there was nothing I could do, but to let me know if they were going to leave". According to Ms. O'Connor, all of the Grievors who chose to leave did let her know, although some other employees simply left. Some of the Grievors told Ms.

O'Connor they would be applying for special leave and some left without saying anything about special leave.

Susan Clark testified that Ms. O'Connor said to the group who went to the office "you can go if you want to guys"; that she "said it was up to us". Susan Clark testified that nothing was said in the office about the weather report on the internet but that as she and several others were about to leave the building Bill Hyde came running after them and said that he had learned from Ken Hogan on the telephone that the storm would abate after 3:30 and, pointing his finger at them said "if you leave you are not getting paid". There was no evidence that this was said to any of the other Grievors.

John Croke testified that he talked to Bill Hyde "outside his office" but with respect to the computer screen showing that the storm would abate gave evidence that "no one discussed anything like that with me." However, when he was asked in cross examination whether it was possible that Mr. Hyde had raised safety concerns with him Mr. Croke replied "Oh sure, I just don't recall", but he was sure that Ms. O'Connor had not raised safety concerns with him. Mr. Croke testified that no member of management ever talked to him about his application for special leave.

Ms. Clark's grievance was sustained because of her "special circumstances", which she presumed to be her pregnancy (about which she had previously informed the Employer) because another pregnant employee's application for special leave was granted using that same wording. Ms. Clark also testified that no member of management ever talked to her about her application for special leave.

Three of the Grievors, Fitzhenry, Vokey and Croke, left with Susan Clark at 1:00 am; another, Pittman, left at 1:30; and two more, Whittle and Purchase, left at 2:30. Two employees, not among the Grievors, left at about 1:30 and, after trying to get home, come back to the Mail Processing Plant and completed their shifts, after which they got home, not without considerable difficulty.

Ed Whittle testified that he left work at 2:30 with his sister Lynn Purchase with whom he car pools. He said she had to be home shortly after 7:00 because of her children and he had to be because his spouse needed the car to get to her work. He said he talked earlier to Supervisor Bill Hyde who told him the storm would be over by 2:30, and then again at 2:15, when Hyde told him that it would be over at 3:37. Whittle said that Hyde's position was that if they left they would not get special leave. At 2:30 he and Purchase decided they had to go if they were going to get home. He told his supervisor he was leaving and that he would be applying for special leave. In fact he got Ms. Purchase home relatively easily but then got stuck and did not get home himself until 3:45. All of this was corroborated by Ms. Purchase. Mr. Whittle testified that no member of management ever talked to him subsequently about his application for special leave.

The parties agreed that the other three Grievors would testify in the same terms as those who had already testified. I must assume this would have included testimony by Vokey and Fitzhenry with respect to the meeting with O'Connor and Hyde before the first group of employees, including these Grievors, left work. I must also assume that they would have testified that no member of management ever talked to them subsequently about their applications for special leave.

Ms. O'Connor testified that she did not agree to special leave nor did she tell the Grievors that they would not be entitled to special leave. She told the Grievor's that the situation of each of them would be reviewed individually and decided on that basis. Beyond perhaps receiving the special leave application forms and telling her superiors what had happened, Ms. O'Connor played no further role deciding whether special leave would be granted to the Grievors or others who left work on the night in question. The decisions to deny special leave to each of the Grievors were made by their superintendents, who did not testify. At the hearing Mr. Stewart, for the Employer, stated that while the employees were not required to stay at work it was made clear to them that management considered it unsafe for them to leave and that the Employer would not take responsibility if they did.

Generally, of course, snow storm cases deal with people trying to get in for work, not people leaving, but it was not disputed that the parties have recognized that early departure from work may warrant the granting of special leave. At the St. John's Mail Processing Plant the Employer even has a form entitled "Re: Special Leave Request – Snow Storm – early Departure", which was used by at least one employee on the day shift on January 22nd, although such forms are not in evidence with respect to these grievances. According to both Mr. Penney for the Union and Mr. Stewart for the Employer, none of the many many reported arbitration awards on special leave address this aspect of special leave.

There are two issues here: the factual issue arises from the conflict between the testimony of Ms. O'Connor and the testimony of the Union witnesses as to what was said in the suprvisors' office on the night of January 22/23; the issues of application of the Collective Agreement arise from the ambiguity of the message that, according to her

own testimony, Ms. O'Connor conveyed to the Grievors, and from the way in which the Employer decided to grant, or not grant, special leave for that night.

The factual issue. While it is far from clear that it was Ms. O'Connor rather than Mr. Hyde who did so, I have decided these Grievances on the basis that the supervisors told the Grievors that management considered it unsafe for them to leave and that the Employer would not take responsibility if they did, but did not tell them that they were not to leave. I have also decided on the basis that the Grievors were told that they would not be entitled to special leave if they left during the shift.

The issues of application of the Collective Agreement. Although Article 21.03 speaks only in terms of "circumstances not directly attributable to the employee" which "*prevent* his or her *reporting* for duty [emphasis added]", on the basis of undisputed past practice or estoppel that provision must be interpreted as applying to employees who leave mid-shift because of such circumstances and are, in that sense, "prevented" from reporting for the remainder of their shifts. There is no dispute that a major winter storm can be such a circumstance, nor is there any dispute that there was a major winter storm in St. John's on the night of January 22/23, 2002.

The Union's position is that in these special leave cases initially the Union bears the onus of proving that the Grievors were prevented from "reporting for", or staying at, "work" for reasons "not directly attributable to the employee". According to the Union, once it has made out that *prima facie* case the onus shifts to the Employer to prove that special "leave [was] not ... unreasonably withheld." I am not prepared to articulate the shift of onus that way. In my opinion the onus is on the Union as the grieving party to make out a *prima facie* case based on all the elements of the

entitlement to special leave. That is the Union must show that (i) the Grievors were "prevented" from reporting for work (here, in the special sense of prevented from staying at work), (ii) by circumstances beyond their control and (iii) that special leave was unreasonably withheld. Obviously what constitutes circumstances that "prevent" reporting for duty is tied to the notion of "unreasonableness", and the reported awards on Article 21.03 and its predecessors make it clear that there is also an element of procedural "reasonableness" involved. In *Geng* (1985), CUPW No. W-400-Grievor-1601; CPC No. 84-1-3-5394, at p. 14, Arbitrator Bird summarized Arbitrator Bruce Outhouse's oft-quoted award in *Chaffey* as follows:

> In *Chaffey* it was decided that there is an onus on an applicant to provide information in support of the application for special leave but also there is an obligation on the employer to fairly consider it. That obligation includes the duty to make appropriate inquiries where it appears that it does not have sufficient information concerning the circumstances surrounding the application to make an informed decision. I add that the employer cannot escape its duty by making no judgment as to the sufficiency of the information where a judgment is indicated. All that was necessary here was to interview the employee or request further particulars in writing.

As in any non-discipline matter, the Union must make its case. Once it has done so on a *prima facie* basis, the Employer must meet that case. In that sense the onus shifts to the Employer.

Clearly here the 'circumstances", that is the storm, were beyond the Grievors' control. The issue on the night of January 22/23 was whether it was "unreasonable" for the Employer to expect the Grievors to stay at work. The Employer had to make a judgment call. That is a function of management.

The Employer can say, as it did on the morning of January 22 when the storm first started, that employees are allowed to, or should, go home and that they will be paid special leave. Or the Employer can say that the storm does not warrant people going home, and it certainly is entitled to take into account its expectations about a storm abating in making that call. If it had does that employees who leave are *awol* and subject to discipline. Of course, that discipline is grievable and an arbitrator might have to decide subsequently whether, in the circumstances, there was just cause for it. In that situation the Union might also grieve the denial of special leave under Article 21.03, and an arbitrator might have also to decide subsequently whether, in the circumstances, special leave was unreasonably denied.

Alternatively, the Employer could say, "go home if you wish, but the circumstances do not warrant the grant of special leave". In that situation again the Union might grieve the denial of special leave under Article 21.03, and an arbitrator might have to decide subsequently whether, in the circumstances, special leave was unreasonably denied. Based on the evidence of what Mr. Hyde said, that is essentially what happened here, although Ms. O'Connor, on her evidence, muddied the waters by saying, "we don't think you should go home because it is unsafe." This may have been sound advice, but in my opinion, unless the employees are going out on the Employer's business, or being forced out into the storm, their safety on the way home is a matter for their own judgement. By saying "we don't authorize it", as Ms. O'Connor testified she did, the Employer is making clear that the employees are not going out on the Employer's business, or being forced out into the storm.

A further alternative, which is what Ms. O'Connor said happened here, is that the Employer could say "go home if you wish, and the Employer will decide after the

fact if the circumstances warranted the grant of special leave". While that may seem to be something of an abdication of the obligations of management, I can certainly understand why the parties would regard it as a practical approach. It may not make sense in the circumstances of a storm or other occasion for possible special leave for the supervisors to take the time needed to assess each employee's individual circumstances.

Whether what was said to the Grievors here was, in effect, "go home if you wish, but the circumstances do not warrant the grant of special leave" or "go home if you wish, and the Employer will decide after the fact if the circumstances warrant the grant of special leave", I must decide whether it was "unreasonable" for the Employer to expect each of the Grievors to stay at work. Each of them provided information in support of his or her application for special leave, as did Susan Clark and at least one other employee who was granted special leave.

Leaving aside the basis upon which it made its judgement call, in my opinion it might well have been not at all "unreasonable" for the Employer to have decided that, because the storm would predictably abate, special leave would not be granted to these Grievors. However, the arbitration awards between these parties on this special leave provision make it clear that the basis upon which the Employer made its judgement call cannot, in fact, be left aside. As the passage quoted above from *Geng* makes clear, the obligation not to unreasonably withhold special leave "includes the duty to make appropriate inquiries where it appears that it does not have sufficient information concerning the circumstances surrounding the application to make an informed decision." Those circumstances may well be peculiar to each individual applicant for special leave.

In both *Gardhouse* (1982), CPC No. 82-1-6-4 (Saltman), at p. 5, and *Thompson* (1984), CUPW No. W-354-GG-5; CPC No. 82-1-3-1 (T.A.B. Jolliffe), at p.10, put before me by Mr. Penney for the Union, the learned arbitrators decided that special leave was "unreasonably withheld" because no inquiry was made into "the circumstances, perhaps peculiar to [the Grievor's] situation." The evidence is clear that no inquiry was made into the individual circumstances of each of the Grievors here. There was no interview or request for further particulars before special leave was denied.

For the Employer, Mr. Stewart submitted that the fact that Susan Clark and one other pregnant employee were granted special leave for part of the night shift of January 22/23 demonstrated that management had in fact taken individual circumstances into account. Apart from the question of why the Employer thought it was a safe thing for pregnant women to go out in the storm but not safe thing for others to do so (leaving that aside because, unlike Mr. Stewart, I do not think safety was the issue) I do not understand the special leave provision and the reported awards under it to suggest that in winter storm situations the only relevant consideration is whether or not an employee is pregnant. They do suggest that before denying special leave in a situation where it might quite plausibly be warranted the Employer must at least interview or hear further from the employee in writing.

Conclusion and Order. These grievances are allowed, on the basis that the Employer breached Article 21.03 unreasonably withholding special leave because no inquiry was made into the circumstances, perhaps peculiar to each of the Grievors

situations. The Grievors are entitled to be compensated for the special leave they did not receive.

I remain seized of each of these matters. If the parties are unable to agree on the amount of compensation to which each of the Grievors is entitled I will reconvene the hearing at the request of either of them to settle those issues.

Innis Christie
Arbitrator