

IN THE MATTER OF AN ARBITRATION

INTO A DIFFERENCE

BETWEEN:

Prince George Airport Authority

(Employer)

AND:

Public Service Alliance of Canada
Union of Canadian Transportation Employees, Local 20212

(Union)

(Archie Smith Dismissal Grievance—

Employer's Preliminary Objection regarding Timeliness)

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| Arbitrator: | Joan I. McEwen |
| Employer Counsel: | Joe Coutts |
| Union Counsel: | Brandon Quinn |
| Dates of Hearing: | March 29 and 30, 2006 |
| Date of Award: | April 3, 2006 |

I. Nature of Preliminary Objection

The Grievor was dismissed on June 23, 2004 for allegedly "selling corporate assets (namely up to 200 logs) without authorization". The Union grieved his dismissal on June 24th, and the Employer responded within the 10 days mandated by Article 26.02:

"Stage 2

... Within ten (10) days of the receipt of the grievance, the Authority's designate shall give written response delivered confidentially only to the employee and the Union representative and Human Resources representative."

The parties thereafter agreed to put the grievance in abeyance pending completion of an RCMP investigation (I will hereafter refer to this as the "First Abeyance Period"). The Employer alleges that, because the Union had the RCMP report no later than September 29th, the time period for referring the grievance to arbitration (Article 26.03) resumed at that time:

"If the grievance is not satisfactorily settled under Stage 2, then the grievance may be referred to arbitration, within thirty (30) days of the expiry of the time limits set out in Stage 2."

On November 3rd, the Union advised the Employer that it wished to take the grievance out of abeyance. It requested the name of the Employer's contact person and, on November 8th, Mark Miller, Manager Operations, replied acknowledging the Union's "decision" and advising that he would be the contact person.

On December 15th, the Union wrote to the Employer referring the matter to arbitration, proposing the names of three arbitrators, and asking that the grievance be held in abeyance ("Second Abeyance Period") pending "the decision of the Public Service Staff Relations Board concerning its jurisdiction over this grievance." Given that the Federal Government owned the airport up until March 2003, and that the Collective Agreement was not signed until after the Grievor's dismissal, the Union was uncertain as to whether the dispute would

fall within the jurisdiction of the PSSRB or under the auspices of the *Canada Labour Code*.

Section 47 (1) of the *Code* provides:

"(1) Where portion as federal business—Where the name of any portion of the federal public administration specified from time to time in Schedule I, IV or V to the *Financial Administration Act* is deleted and that portion of the federal public administration is established as or becomes a part of a corporation or business to which this Part applies, or where a portion of the federal public administration specified in those Schedules is severed from the portion in which it was included and established as or becomes a part of such a corporation or business,

(a) a collective agreement or arbitral award that applies to any employees in that portion of the federal public administration and that is in force at the time the portion of the federal public administration is established as or becomes a part of such a corporation or business continues in force, subject to subsections (3) to (7), until its term expires; and

(b) the *Public Service Staff Labour Relations Act* applies in all respects to the interpretation and application of the collective agreement or arbitral award."

The December 15th letter asked Miller to respond by January 6, 2005 and was signed on behalf of Cecile La Bissonnière, A/Coordinator, Representation Section. Miller left a message on La Bissonnière's answering machine and heard nothing back. The evidence is that she was away at the time the letter was sent and had someone else sign the letter for her.

The matter remained outstanding before the PSSRB for several months and, at the Union's prompting, the Board sought written submissions from the Employer on June 1, 2005. The Employer submitted that the Board lacked jurisdiction and, on August 16th, the grievance was dismissed for lack of jurisdiction.

On August 22nd, the Union wrote to Miller saying it wished to restart the arbitration process and, on August 26th, the Employer responded saying that the grievance was out of time.

The Employer says that it did not agree to this second abeyance period and, further, that the Union had no reason to believe that the PSSRB might have jurisdiction. Given that it was

certified in the latter part of 2003 to represent the employees of the Employer, it should have been clear from that time on that the *Canada Labour Code* applied.

Section 60 (1) (1.1) of the *Canada Labour Code* provides:

"The arbitrator or arbitration board may extend the time for taking any step in the grievance process of arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension."

The Employer says that the Union has not established "reasonable grounds" for extending the time and, therefore, the grievance should be deemed to be abandoned under the clear language of the Collective Agreement. Article 26.04 provides:

"The time limits set out in the Grievance and Arbitration procedures are mandatory and not directory. In calculating all time limits, Saturday s, Sundays and holidays shall be excluded. If the time limits set out in clauses 26.02 and 26.03 are not complied with, then the grievance shall be deemed to be abandoned, unless the parties have mutually agreed, in writing, to extend the time limits."

The Union argues that it acted reasonably in proceeding, first, to the PSSRB. The language of Section 47 (1) is ambiguous at best. While conceding that it erred by stating the date of dismissal as 2003 rather than 2004, that mistake was inadvertent and was corrected at once.

Deb Seaboyer, Grievance & Adjudication Officer, BC/YT, testified that very little correspondence passed between it and the Board, and that the PSSRB controls the paper flow in proceedings before it. The Union contends that—in light of those facts, as well as Seaboyer's hectic schedule at that time, it is not surprising that it was not until June that the Union realized that the Employer had not been made part of the process. As soon as Seaboyer became aware, she asked the Board to notify the Employer of the proceedings.

The Union further says that, when it received no response from Miller to its December 15th letter, it assumed that the Employer was not objecting to the second abeyance period. That same letter referred the matter to arbitration, and the Collective Agreement is silent regarding time limits from that point on. Articles 26.07 and 26.08 (Arbitration) provide:

"Article 26.07 The parties agree that a single arbitrator shall be used as provided for in the *Canada Labour Code*. The Authority and the Union shall make every effort to agree on the selection of the arbitrator within 10 (ten) days as calculated in Article 26 after the party requesting arbitration has delivered written notice of submission of the difference to arbitration.

Article 26.08 In the event the parties fail to agree on the choice of an arbitrator, they shall forthwith request the Minister of Labour to appoint an arbitrator."

The Union says that it never heard back from the Employer regarding its list of proposed arbitrators, and that the obligation is on both parties to try to reach consensus before seeking the Minister of Labour to appoint an arbitrator.

II. Decision

Having carefully reviewed the evidence and submissions, I have concluded that the Employer's timeliness objection must be dismissed.

Because dates are being held for later this week for the continuation of the hearing on its merits, the parties have asked for an expeditious ruling in this regard. My reasons will therefore, necessarily, be summary in nature.

The *Canada Labour Code* requires that, in order for time limits to be waived, two factors must be established: "there are reasonable grounds for the extension", and "the other party would not be unduly prejudiced by the extension." No specific prejudice has been alleged in this case, and Employer counsel agrees that the Employer's stronger argument is that no "reasonable grounds for the extension" have been established by the Union.

Dealing with the first abeyance period, Seaboyer testified that the parties hold matters in abeyance either until a date certain, or because another process is underway—in this case, the RCMP investigation. That evidence was not disputed. Hence, the critical issue is not the date on which the Union received a copy of the RCMP report but when, following receipt of that report, it decided to take the matter out of abeyance.

In addition, there was no indication from the Employer in November that it considered the grievance to have been abandoned. To the contrary, Miller's November 8th email reads: "Thank you for notifying us of the Union's decision to remove (the grievance) from abeyance". In testimony, Miller agreed that the Employer was not concerned about timeliness until the PSSRB process.

In terms of the second abeyance period, Miller testified that he received some indication from Norm Ricard, local Union representative, in late 2004 that the grievance might not be going forward. Such communication falls short of formal notification of withdrawal. In addition, the Union's December 15th letter, delivered within Article 26.03's 30-day time limit, made it clear to the Employer that the grievance was alive and would be proceeding to adjudication.

In summary, the *status quo* as of December 15th was that the Union was in compliance with the Collective Agreement time limits; it proposed names of arbitrators; it notified the Employer that it was proceeding first to the PSSRB; and it asked to hear back from the Employer by January 6th. The contents of this letter are in accord with Seaboyer's evidence that the Union takes time limits seriously.

While Miller left a message with La Bissonnière, she was away at the time and there is no evidence that she or anyone else in the Union received that message. Even though Miller did not agree to writing to hold the matter in abeyance a second time, nor did he advise the Union that he objected. In any event, the Collective Agreement does not require written agreement regarding time limit extensions after a referral to arbitration has been made. Had the Employer wished to oppose the second abeyance period, it behoved it either to ensure

that the Union received notice of that objection, and/or respond to the Union's list of proposed arbitrators.

In addition, and it was not argued otherwise, there is no evidence that the Union acted in bad faith in the pursuit of this grievance. To the contrary, Seaboyer's belief that the applicable legislation was confusing is understandable. The language of Section 47 (1) is less than transparent. Similarly, Seaboyer's surprise when she learned that the Employer had not been advised of the proceedings by the PSSRB is understandable. Given that the Union's application raised squarely the question of which entity was the legal "employer", she was justified in assuming that the Board would have notified the Employer of the proceedings.

As soon as the PSSRB proceedings concluded, the Union acted quickly to notify the Employer that it would be proceeding to arbitration. While Miller testified that the Union should have contacted the Minister "forthwith" upon the parties failing to agree on an arbitrator within 10 days after the referral, my conclusion that a second abeyance period was in effect means that the Article 26.07 and 26.08 language was suspended as well.

While it is regrettable that the Employer was kept out of the loop for so long, I cannot, on the evidence, lay blame for that at the Union's feet. In summary, I am satisfied, on the evidence, that "reasonable grounds" have been established for allowing the grievance to proceed on its merits. At no time did the Union abandon, or cause the Employer to believe that it had abandoned, the subject grievance.

For these reasons, I respectfully conclude that the Employer's timeliness objection must be dismissed. The hearing will proceed on its merits on April 6 and 7, 2006.

Dated this 3rd day of April, 2006.

"Joan I. McEwen"
Joan I. McEwen
Arbitrator

