

SECOND INTERIM AWARD

IN A DISPUTE

between

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND

AS REPRESENTED BY TREASURY BOARD

("the Employer")

and

NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC & PRIVATE

EMPLOYEES

("the Union")

APPEARANCES:

Grievor: Mr. Stephen Dyke

For the Union

Presenter: Mr. Bert Blundon, NAPE Secretary Treasurer

For the Employer:

Presenter: Mr. Don Saturley, Staff Relations Specialist

Advisor: Ms. Tina Follett

Observer: Mr. Doug Redmond

Interested Party: Ms. Jocelyn Tucker

The Arbitrator: Mr. John A. Scott, Arbitrator

Statement of Grievance reads: "Violation of the General Service Collective Agreement re: Articles 12.07, 33.01, 33.02, 33.07 and all other pertinent articles."

Requested Adjustment reads: "Full redress."

The hearing resumed on March 8 & 9, 2010 in St. Johns.

Background: On December 19, 2007, I published an Interim Award in an application for intervener status in the instant arbitration. That Award contains, at p 2, the following record of the initial questions that established the terms under which the hearing proceeded and the responses given by the Parties on the first day of the hearing, December 14, 2007.

"THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed with authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were either properly observed or are waived;
- there were no preliminary objections to be raised.
- all witnesses were to be excluded until all their testimony had been heard;
- issues of quantum, if any, would be considered separately and if the parties do not reach agreement within sixty (60) calendar days they will be referred to the Board for resolution;
- the Board will remain seised of the matter for sixty (60) calendar days after publication of the award to deal with matters of interpretation should they arise."

When the hearing resumed on March 8, 2010, the Employer asserted the right to move a preliminary objection on a substantial matter going to the Arbitrator's jurisdiction to hear the case.

The issue arises in the following context:

1. As the text of the first (2007) Interim Award, quoted above, establishes, when the hearing reconvened on March 8, 2010 the hearing had already passed the point where the Arbitrator had secured the Parties' responses to questions that establish the agreed terms under which the hearing was to proceed, and had already accepted and identified 9 items of consent evidence;
2. As noted above, both the Union and the Employer had responded that it was agreed that "there were no preliminary objections to be raised".

The Employer argues that it maintains the right to raise the preliminary objection it now seeks to raise:

first, because it informed the Union in writing on three separate occasions, the first on July 20, 2006, that the Employer retains the right to make a preliminary objection;

and

second, because the preliminary objection the Employer seeks to raise addresses a substantial matter going to the Arbitrator's jurisdiction, and therefore flows from a right of the sort that could not be subject to waiver.

The Employer also cited authorities and cases drawn from the arbitral jurisprudence, in support of its claim, as follows: *Brown and Beatty Canadian Labour Arbitration* (4th ed.) at paragraph 2:3130 "Waiver of procedural irregularities"; *Re International Leather Goods. Plastics & Novelty Workers, Local 9 & Morbern Industries Ltd.* [1971] O.L.A.A. No. 20, 23 L.A.C. 196; *Re Hawker Siddeley Canada Inc. & I.A.M. District Lodge 717*, R. D. Joyce [1991] O.L.A.A. No. 80, 21 L.A.C. (4th) 289; *Findings & Decision in a Dispute between the Newfoundland and Labrador Association of Public & Private Employees & the Newfoundland & Labrador Health Boards Assoc.*, Gary Baldwin, Grievor, August 2005; *Judgement of the Newfoundland & Labrador Supreme Court (Trial Division)* in Baldwin, R.M.Hall, J. May 10, 2006; *Judgement of the Newfoundland & Labrador Supreme Court (Court of Appeal)* in Baldwin, March 9, 2009; *Brown and Beatty Canadian Labour Arbitration* (4th ed.) at paragraph 3:2100 "Preliminary Objections"; *Re Cherubini Metal Works Ltd. & U.S.W.A. , Local 4122*, 172 L.A.C.(4th) 1, I Christie April 2008; *Re School District No. 27, (Cariboo-Chilcotin) & Cariboo-Chilcotin Teachers' Assn.*, 46, J. Kinzie, J. Rogers, L. Page Nov. 1994, L.A.C.(4th) 385.

The Union argues that the Employer does not have the right it asserts since it waived that right on December 14, 2007 when it told the Arbitrator that it had no preliminary objection to raise, and the hearing proceeded to address the matter of an application for intervener status. The Union also pointed out that the Arbitrator had accepted and identified the 9 items of evidence recorded in the first (December 2007) Interim Award.

The Union pointed out that the Employer's communications gave notice that it reserved the right to raise a preliminary objection, but did not inform the Union of its intention actually to do so until the hearing reconvened on March 8, 2010.

The Union argues that it would be an abuse of process to allow the Employer to raise the preliminary objection at this point in the ongoing progress of the hearing. A party can not be permitted to revisit a matter already settled. It would be like allowing a party to reopen its case.

The Union also argued the arbitral jurisprudence submitted by the Employer was not on point, in that none of it addressed the precise point at issue here: viz., the Employer's attempt to

raise a preliminary objection *after* the terms on which the hearing was to proceed were settled by the Parties' responses to the initial questions asked by the Arbitrator.

CONSIDERATIONS

I note for the record that I have not been given the particulars of the preliminary objection that the Employer seeks to raise, and am not, therefore, in a position to evaluate or determine its substance or character.

I also note for the record that the communications to the Union concerning the Employer's retaining the right to raise a preliminary objection were not tendered in evidence. The Employer did inform me that one of the communications was dated July 20, 2006. I note this predates the initial hearing (December 14, 2007) at which the Employer responded to my question that it had no preliminary objection to raise.

I have carefully reviewed the submissions, authorities, and arbitral jurisprudence submitted by the Parties.

On the first ground advanced (that its repeated reservations of the right to raise a preliminary objection established that no waiver was intended and, thus, no right relinquished by its response to the initial question asked at the 2007 hearing), I find the Employer's argument is not persuasive. The evidence is clear and unchallenged that the Employer did respond as the record shows, and thus did knowingly provide a clear declaration of its intention on this important issue. The basic elements of a waiver, knowledge and intention (Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para. 2:3130, *cf.* R. M. Hall, J. *Judgement of the Newfoundland & Labrador Supreme Court (Trial Division) in Baldwin*, at para. #25) are, thus, clearly in evidence.

On the second of the Employer's grounds (that the preliminary objection goes to a substantial issue that could not, in its very nature, be waived), I also find, with respect, that I am not persuaded. The distinction between procedural and substantial rights is complex, and the arbitral jurisprudence provided and authorities cited are not univocal on this issue. I note the Employer referred to *British American Oil Co.(1965)* 15 L.A.C. 408 (Lane) which distinguished issues that can be waived from those "that go to jurisdiction and cannot be waived", but I also note that this position was "subsequently disapproved of by the court" (16 L.A.C. 276 Ontario H.C.J.).

I further note that the issue reported in *Re Hawker Siddeley Canada Inc. & I.A.M. District*

Lodge 717, R. D. Joyce [1991] O.L.A.A. No. 80, 21 L.A.C. (4th) 289 is distinct from the matter before me, in that, in *Hawker Siddeley*, the waiver claimed unsuccessfully by the Union occurred prior to the commencement of the arbitration hearing and consisted in "simply taking a fresh step or proceeding without objection" (Brown and Beatty, *ibid*). I note that, in the instant matter, the waiver claimed by the Union consisted in the Employer's response to a question directly put at the commencement of the hearing.

I am therefore not convinced, with respect, that the distinction between procedural and substantial made by the Employer tells significantly against the fact that the instant hearing actually did proceed on the clearly agreed basis that no preliminary objection was to be made.

In this context, it is true that the hearing has not actually yet proceeded to the point where the Parties have lead evidence on the merits in direct or cross examination. I note, however, that a significant issue has by now been settled: the intervener status question. Therefore, in my view, it would be a potentially serious modification of process, amounting perhaps to abuse, to permit a party to do something very much like splitting its case.

DECISION

(Decision delivered to the parties orally on March 9)

On the basis of the foregoing considerations, I therefore find,

The Employer's claim to retain the right to make the preliminary objection at this point in the instant hearing is denied.

Respectfully submitted as the decision of the Arbitrator,

John A. Scott, PhD.
Arbitrator

March 11, 2010

