
David L. Alcock
Sole Arbitrator

OBITER

It is my understanding that this written ruling was requested so that it might provide some guidance on the operation of the grievance and arbitration process for a number of other outstanding grievances. For that reason, I have been as complete and thorough as time has permitted me. If the circumstances were different, I would be guided by the 48 hour time limit for rendering a ruling required by Article 17.05, which the parties have not advised me of any agreement to do otherwise. The result would have been a substantially abbreviated award, which might not have provided the food for thought contained above.

The way grievance #007 was processed was obviously not satisfactory for either party. To avoid a repeat of such dissatisfaction, it appears that the parties may have to decide how to proceed differently in future if governed by the current agreement language, or consider amending the existing stringent time limits to accommodate the kind of grievance mechanism that might better suit their purposes.

I trust that the treatment I have given this particular grievance will be of benefit.

entering into serious grievance discussions and responding in writing to the Union to the effect that the price wasn't right, was entitled to subsequently invoke abandonment as the reason that the merits should be barred from arbitration. In my opinion, by its actions in the 2010 meeting, the Employer effectively waived its right to consider grievance #007 abandoned. For reasons discussed above, I also do not accept the Employer's claim that prejudice exists.

Decision

On the basis of the foregoing, I find that the Employer is not entitled to claim that grievance #007 is abandoned. By its own action of meeting to discuss the merits of the grievance, it effectively re-activated the grievance and made it again subject to the time limits in the grievance and arbitration procedure. On this point, there might be an argument that the Union, knowing the Employer's position on settlement, should now be provided an opportunity to refer its reinstated grievance to arbitration. However, since arbitration proceedings are already in process, I see no merit in taking that route. Therefore, I rule that grievance #007 shall proceed to be arbitrated on its merits.

Respectfully submitted as the decision of the arbitrator.

Dated at Mount Pearl, Newfoundland and Labrador, this 23rd day of January, 2011

August 13, 2010, and despite Mr. Clark's August 11th, 2010 letter insisting that the grievance had been abandoned, the meeting described did occur and discussions and financial calculations did focus on the Union's settlement proposal. It is also noteworthy that Mr. Emberley's September 10, 2010 letter clearly confirmed that the Association had reviewed the Union's proposal for Grievance RDC 07, that the issue reviewed was LOA to Security on their seven days off, and that the Association considered the Union's proposal to be unacceptable. It does not matter that the Employer found the proposal unacceptable; what is relevant is that it gave the proposal active consideration. I find no evidence that the Employer invoked its right to refuse to consider the grievance on the ground that it had been abandoned. It also strikes me that the Employer, having actively discussed and considered the financial aspect of the proposal when it did not have to do so, has significantly weakened its claim for prejudice. For the same reason, I find no support here for the application of the equitable doctrine of laches.

On balance, I find that the Employer willingly and actively discussed settlement options for grievance #007, which it advised the Union as recently as August 11, 2010, it considered to be abandoned. This was a meeting dedicated to discussion and consideration of the merits of grievance #007. The obvious question is what was the status of #007 when the parties dealt with its merits despite the collective agreement requirement that it was abandoned?

In my view, the Employer was entitled to consider the grievance abandoned, but it acted in a manner contrary to that assertion. As I see it, the Employer cannot have it both ways, i.e., it cannot on the one hand actively discuss and consider the merits, but on the other hand insist that the grievance is abandoned. I do not accept that the Employer, after

collective agreement. In such circumstances, the Employer was entitled to consider the grievance abandoned.

The effect of the late August -- early September 2010 meeting

Under ordinary circumstances, an abandonment would end the Union's entitlement to pursue its grievance. However, the evidence here is that the Union did not cease its pursuit of grievance #007. Although I am satisfied that its intentions were based on a mistaken belief that the grievance had not been abandoned, I find that its actions in August and September 2010 complicated matters significantly.

As already indicated, I see no merit in the Union's argument that the *ad hoc* discussions that took place occasionally every second month or so between October 2009 and August 2010 saved the grievance from abandonment. But I am significantly more concerned about the meeting between the parties that took place.

On balance, with the greatest respect for Mr. Clark's testimony that he could recall no such meeting, I am compelled to accept the evidence of both Mr. McCormick and Mr. Wade that a meeting was scheduled at the Employer's board room in late August or early September 2010 for the purpose of discussing the merits of grievance #007. Although it is not clear exactly what date this meeting occurred on or who scheduled it, the preponderance of evidence convinces me that Mr. Clark, Mr. Hollett, Mr. Wade and Mr. McCormick met and discussed a settlement proposal submitted by Mr. McCormick. I note that, although Mr. Clark did not attend the hearings on January 10th and 11th, 2010, Mr. Hollett did so and could have been called to rebut the Union's evidence in this regard. In the result, I find that, after the Union referred the grievance to arbitration on

a victim of circumstance when the Union introduced the issue. The Union made its point that Mr. Clark was not resident in the province and was not as available to deal with grievances as he should have been. But the contractual fact of the matter is that the collective agreement does not provide the Union with authority to ignore the time limits for that reason or any other reason such as concern for the amount of money being lost by the employees. Bluntly put, Mr. Clark's unavailability did not entitle the Union to continue processing the grievance until such time as it might be satisfied that he had provided sufficient opportunity to discuss resolution. If resolution is not achieved for whatever reason within the time limits and Steps provided, the only way the Union can avoid abandonment is to refer the matter to arbitration as required. Of course, after referral there would be no restriction on the Union continuing to attempt satisfactory resolution up to the date of publication of the arbitration award. After all the evidence is that the parties, for their own convenience, do not insist on strict adherence to the time limits for holding hearings after referrals have been made. This might increase the opportunity for the parties to discuss resolution. And although chances of success might be slim, I submit there might be nothing thereafter (except perhaps the existence of a judicial review decision) to prohibit the Union from attempting to negotiate an agreement with the Employer to ignore an arbitration award.

The evidence in this case clearly demonstrates that, even with consideration for some reasonable period of grace after January 5, 2010 based on the two previous occasions already discussed, the Union failed to adhere to the contractual requirements for referral, thereby causing grievance #007 to be abandoned. In essence, the Union was no longer entitled to pursue the grievance because the door had been shut by the

Notwithstanding the foregoing, the evidence is that the Union did not refer the matter to arbitration for more than seven (7) months – a significantly longer period of grievance “limbo” than had been previously experienced. In my view, the length of that delay constituted a deliberate and unjustified departure from the requirement for mandatory time limits expressed in Article 17. The reason the Union offered for this is that it never agreed to abandon the grievance in the first place, and as long as *ad hoc* discussions on the grievance occurred during 2010, the opportunity for settlement still existed and, therefore, the grievance was not abandoned.

To reiterate an earlier finding of interpretation, the state of abandonment is not dependent on the Union indicating its agreement to abandon a grievance. Abandonment is brought about simply by the Union’s failure to refer a grievance to arbitration within the contractually specified mandatory time limits, or upon expiry of a mutual written agreement to extend them. The agreement does not permit the Union to decide with impunity to refer a grievance to arbitration outside those time limits. The Union is also not permitted to unilaterally decide that its grievance is not abandoned despite the mandatory requirements of the collective agreement.

On balance, I am satisfied that the *ad hoc* discussions during the latter part of 2009 and the first seven (7) months of 2010 mentioned by the Union were not formal grievance discussions and did not constitute waiver on the Employer’s part. Rather they were opportunistic conversations consistent with the Union’s practice of taking the opportunity to raise disputed issues with Mr. Clark whenever he was present for other unrelated meetings or discussions. I am not convinced that Mr. Clark initiated discussions about grievance #007. It is more probable that he occasionally found himself

did rely upon. It would have been to the Union's detriment to have the term of the agreed upon extension abbreviated – potentially creating an estoppel.

Meanwhile in Mr. Clark's view, he cautioned the Union on October 12th that abandonment would be the result if there was no referral by November 15th. Yet, when that date came and went without a referral, he (consistent with the two previous occasions when the collective agreement would have established abandonment), did not consider grievance #007 to be abandoned. Rather the abeyance, which was somewhat akin to an extension in the sense that the time limit for referral to arbitration was extended, but different in the sense that continuing discussions were set aside, continued until January 5, 2010. Once the new Security Contractor event occurred on that date, the original agreed upon abeyance ended and the status of grievance #007 became that of a grievance that had not been referred to arbitration as required by the collective agreement and was also not subject to a further written agreement to extend those time limits – a situation which satisfied the collective agreement requirement for abandonment.

However, a finding of immediate abandonment on January 5, 2010 might be worthy of reconsideration here. Given the Employer's previous relaxed treatment of the strict time limits on two occasions, I am satisfied that if referral had occurred within a reasonable period of time after January 5, 2010, say for example seven (7) days (and arguably a little longer so as to have time to briefly discuss its position on the grievance with the Employer before referring to arbitration – not entirely unlike what happened in the two previous instances), the Employer would have been hard pressed to make a compelling case for immediate abandonment as of January 5th.

arbitration did not take place as required by the collective agreement, and the grievance was not treated as being abandoned. Again, the question is whether the Employer is entitled to retroactively prevent abandonment from occurring. And again, I choose to defer addressing this issue now because, by placing the grievances in abeyance, the parties for their own reasons both proceeded as if abandonment had not occurred. However, since this was the second time it happened, at the very least, it suggests to me that some degree of non-adherence to the time limits and grievance advancement requirements was tolerated by the Employer in this particular grievance procedure. In my view, this is of greater relevance than the parties' habit of extending the time limits for commencing hearings after the referral to arbitration has been made. In my opinion, the laxity involved in processing the course of this grievance, while not massive, lends little support to the claim that the time limits should be strictly adhered to when the evidence is that the Employer willingly participated in action to the contrary.

The abeyance period in this case was initially set to the occurrence of an event, i.e., the appointment of a new Security Contractor. Although it was not date specific, it was not unlimited. Mr. Clark, believing that November 15, 2009 would be the date the new Security Contractor would be named, declared that date as the deadline for referral, thereby unilaterally altering the parties' September 22nd "occurrence of an event" abeyance agreement. I am satisfied that he overstepped his authority in doing this. In the first place, there was no agreement by the Union for that date. Secondly, the event did not take place on that date. Thirdly, he previously had made a clear representation to the Union for an extension to the occurrence of an event, which the Union was entitled to and

While these questions are intriguing and tempting to analyze, I choose not to answer them at this point because I am cognizant of the fact that the parties, for reasons known only by them, both considered the grievance to be very much active and alive after August 18, 2009 despite the foregoing deficiencies. For the moment, I choose the waters to remain muddied, but I will return these issues later.

The issue of abeyance

The next event was the parties' agreement to place grievance #007 (and others) in abeyance. I am satisfied that, by their conduct, the parties placed grievance #007 in abeyance for the purpose of temporarily putting off determination of a settlement pending the naming of the new Security Contractor. I am further satisfied that grievance #007 was held in abeyance because, if it was not, there was no extension of time limits to prevent it from becoming abandoned. Once the abeyance ended, the status of the grievance was to place it precisely where it was before the abeyance commenced, namely, directly subject to the requirements of the grievance and arbitration procedure. Effectively this was a temporary suspension of meaningful discussion, i.e., recognition that the *status quo* as it related to ASC's existence on Site was a hindrance to productive discussion on grievance resolution.

The first written communication on abeyance occurred in a September 15, 2009 e-mail from Mr. Wade to Mr. Clark. This took place at 10:05am the day immediately before (September 16th) the expiry date of the most recent extension. Once again, there was silence (albeit for a shorter time than before) on the issue of abandonment. Mr. Clark did not respond to Mr. Wade until September 22, 2009, yet the referral to

extend the period that the above grievances may be referred to arbitration until close of business on September 16, 2009.”

On balance, I find it passing strange that nobody at the hearing questioned the obvious time gap between August 18, 2009 (the expiry date of the first extension) and September 10, 2009 (the date the time limit was extended to September 16th). It is not disputed that the Union did not refer the matter to arbitration by August 18, 2009. Therefore, one is left to wonder why the grievance was not immediately considered abandoned as the collective agreement required it to be. No explanation has been provided to me what prevented the collective agreement from rendering the grievance abandoned as of August 18th and how it somehow enabled the parties to make it the subject of an extension for referral to arbitration until September 16th. In essence, I have been presented with evidence agreed to by both parties of a September 16th extension for a grievance, which, in my view, had inexplicably escaped its contractual fate. The only conceivable explanation I can think of – and it might be a stretch – is that the parties continued to discuss the grievance long past August 18th and, in the interest of the parties’ general labour relationship, the Employer simply ignored the fact that it had been contractually abandoned and, therefore, took it upon itself to retroactively extend the last extension. In light of this, one is left to wonder whether the Employer is entitled to invoke non-abandonment when the agreement mandates the very opposite, or to agree to a retroactive extension of the time limits. At the very least, this situation raises questions why a grievance that should have been considered abandoned was not, and what now is the validity of that second extension.

and give more thought to settlement options. I do not see in this article any restriction on the length of extension that might be agreed. Clearly, it would be up to each party to be comfortable with the length of extension it agrees upon. Frankly I think the parties' extensive experience would guide them away from the uncertainty of an indefinite extension, whatever that term may mean.

In essence then, the substance of the interpretation issue is that, in the absence of a mutual agreement extending time limits, the grieving party is required to adhere to them, and its failure to do so shall cause abandonment of its grievance, meaning contractual relinquishment of its right to pursue it.

The Effect of the Collective Agreement on Grievance #007

The status of the grievance through the grievance procedure, and agreements to extend

The parties have agreed that grievance #007 was processed through Step 3 of the grievance procedure, i.e., the Association Representative and the Council Representative discussed the matter but did not reach a resolution. At that point, the obligation for the Union was to refer the grievance to arbitration within seven (7) days. However, Mr. Clark's July 29, 2009 letter constituted agreement to extend the time limit "to refer the above-noted grievances to arbitration to August 18, 2009." Although this letter referred to nine Union grievances, I am satisfied that it included #007 because, if it did not, there was no other written agreement to extend the time limits for referral, which would mean that the grievance would have been abandoned after the seven (7) days specified in Step 3. However, we know from Mr. Clark's September 10, 2009 letter that grievance #007 was specifically mentioned as one of three (3) grievances that the Employer agreed "to

Interpretation of the grievance and arbitration procedure time limits

Article 17.07 makes it perfectly clear that the time limits are mandatory and that abandonment will be the result if the grieving party fails to advance a grievance to the next step within the time limits.

The parties have negotiated a tightly constructed four (4) step grievance and arbitration procedure with relatively modest time provided for settlement discussions. There are three (3) steps in the grievance procedure itself and one (1) step referring the matter to arbitration where there is no resolution at Step 3. The required procedure sets forth strict conditions and brief limits on the length of time for submission, discussion, decision, and advancement to the next step. The message is absolutely clear and unequivocal. Little time is available for grievance discussions, and expeditious advancement to the next step is mandatory or else the grievance is considered to be abandoned, i.e., the grievance no longer has status and the grieving party relinquishes the right to pursue it further. I reiterate that the focus and intent of the parties' structured grievance and arbitration procedure is a modest hope for early and quick resolution, but an absolute insistence on strictly timed advancement to the next stage. There is not the slightest hint that a leisurely course of protracted discussion is contemplated. Quite the contrary, what is contemplated is a quick-step march to arbitration if resolution is not quickly found and where there is no wish to withdraw.

The only available contractual relief from time limits is Article 17.08, which does permit the parties to agree in writing to extend the mandatory time limits along the way. If there is such agreement, the parties would be able to spend more time on discussions

RULING ON THE PRELIMINARY MATTER

The arbitrator reviewed and considered the parties positions on the preliminary matter overnight on January 10, 2011. After reading two further excerpts from Brown & Beatty, 3rd edition, from the Employer on the subjects of Delay (para. 2:3201); the delay and its causes (para. 2:3212); Prejudice (2:3214); Waiver of procedural irregularities (para. 2:3130); Relief against non-compliance with the grievance procedure (para. 2:3140), and Scope of legislation providing authority to grant relief (para. 2:3142), the arbitrator delivered a bench ruling containing the essential reasons for rejecting the Employer's preliminary objection and declaring that the hearing will proceed on its merits.

The parties subsequently retired to consult their principals on the bench ruling and to briefly discuss a settlement proposal made by the Union. On returning, counsel for the Employer advised that the Employer was not prepared to proceed with the merits at that time because some key witnesses and advisors were not present. Agreement was made to book hearings for the merits on February 14th and 21st. Meanwhile it was agreed that I would not render a written award on the preliminary matter unless and until I was advised to do so, which decision would be communicated before February 14th. On Friday, afternoon January 14th, I received word from counsel for the Employer that he had received instructions from his client to ask me to write up the preliminary ruling.

The following written ruling contains the essential reasons previously delivered verbally as well as some relevant additional supporting explanations.

The foregoing evidence demonstrates that at no time did the Union commit any unequivocal act of abandonment for grievance #007. It is also apparent that the extension of time limits validly applies to the naming of a new Security Contractor and the subsequent opportunity to attempt a resolution. In other words, it was consistent with Article 17.08 to place the grievance in abeyance until those conditions had been met.

Therefore, the Union requested that the preliminary objection be denied and that the grievance should proceed on its merits.

Employer Rebuttal

The Union's jurisprudence involves one Hospital case and two Treasury Board cases. Neither dealt with a collective agreement specifying when abandonment occurs. In the instant agreement, the time limits are mandatory, and if they are not met by the Union, abandonment is the specified result. In the face of such language, looking for evidence of reasonable intent by the Union to abandon is irrelevant.

It does not matter who mentioned abeyance first. It does matter that the collective agreement requires the mandatory time limits to be met and mutual agreements to extend to be in writing. A verbal agreement would violate the agreement and would be void. There was no written agreement here to extend the time limits for referral past January 5, 2010, when the main Security Contractor was appointed. All that was left for the Union after that event was to refer the grievance to arbitration or withdraw it. Since it did neither, the grievance was effectively abandoned.

Therefore, the preliminary objection should be upheld and the merits should not be permitted to proceed.

extension to extend pending attempts to settle the grievance. That was the situation for grievance #007.

The evidence demonstrates that the relationship between the old Security Contractor, ASC, and the Union was fractious. Twelve (12) grievances were filed for 18-20 employees (20% of all the grievance filed at the Site) is proof of that.

It is not clear who first suggested holding the grievances in abeyance. In any event, the parties did agree to do so as expressed in Mr. Clark's October 12, 2009 letter. The evidence is that Mr. Clark hoped that, with a new Security Contractor named, most of the grievances would disappear. Clearly, a substantial extension existed based upon a review of the issues outstanding after the new Contractor was named. Indeed, Mr. Clark said that he would not have used the issue of abandonment if a referral had been made reasonably soon after January 5, 2010. However, when Mr. McCormick tried to meet with Mr. Clark to discuss those grievances, Mr. Clark was not available. Mr. Clark testified that he was not aware of any attempts by Mr. McCormick or Mr. Wade to resolve the issues from October 12, 2009 onwards. Yet the evidence is that there were such attempts, discussions did take place between Mr. Clark and Mr. Wade during which Mr. Clark asked that his apologies be passed on to Mr. McCormick. Clearly Mr. Wade and Mr. McCormick continually demonstrated that grievance #007 could not be resolved by the naming of the new Security Contractor. ASC was the only contractor not to pay Board the way other contractors did. Therefore, Hotel and Restaurant employees had been financially affected, which was not something a new Contractor could remedy. Mr. McCormick kept explaining to Mr. Clark why the members of his Union should receive the same Board as members of other Unions did under the same work schedule.

activity did not constitute an implied extension of the time limits because there was no agreement in writing to do so and, therefore, would have violated the collective agreement.

The Union

Referencing *Re Sault Area Hospitals and C.A.W., Loc. 1120 (Lane)* (2003), 117 L.A.C. (4th) 406 (Knopf), counsel for the Union argued that, to make a finding of abandonment, an arbitrator must find clear and unequivocal evidence of abandonment. No such evidence exists in the instant case.

On the issue of laches, the Union submitted *Re Newfoundland and Labrador (Treasury Board) and N.A.P.E. (St. Croix)* (2005), 138 L.A.C. (4th) 70 (Scott). In that case, despite a seven (7) year delay, justifiable reasons for it were identified.

On the issue of how seriously the parties treated their time limits, the Union submitted *Re Coast Mountain Bus Co. v. CAW-Canada, Local 111* (May 13, 2004), 2004 CarswellBC 2750, 129 L. A.C. (4th) 333 (Chertkow).

It is interesting that the Employer now says that November 15, 2009 was not the time limit of the extension for referral to arbitration. Rather it was January 5, 2010. As the Union sees it, the Employer cannot have it both ways. It was with the new Security Contract arrival in mind that Mr. Clark set the referral time limit to November 15, 2009. However, the Union never accepted that. Clearly, the Employer has accepted that an extension may also be to the occurrence of an event, which may not be definite. If such an indefinite extension is valid, it is the Union's view that it is equally valid for an

grievance being abandoned. After January 5, 2010 there was no obligation on the part of the Employer to contact the Union to advise referral or seek another extension. Indeed the Employer had the right to wait to see what the Union would do and then respond. The evidence shows that even before the Union did refer the matter to arbitration on August 13, 2010, the Employer once again made it clear to the Union in its August 11, 2010 letter that it considered #007 grievance abandoned and went so far as to set out its position how a new grievance on the issue would be handled. There is no doubt then that the Union knew the Employer's position on abandonment. The simple fact is that, prior to August 13, 2010, the Union never intended to refer this grievance to arbitration. In these circumstances, the arbitrator is not permitted to extend the time limits; to do so would be to alter the collective agreement.

By way of an alternative argument, with respect to the law on the issue of delay, the Employer referenced Brown and Beatty, 3rd edition, para. 2:3210 – Delay, which addresses the equitable doctrine of laches, a matter an arbitrator may consider when deciding whether to declare a grievance inarbitrable because of delay “after considering any explanation for the delay, and its effect in terms of prejudice to the other party.”

In summary, there was no verbal agreement to extend the time limit for referral past January 5, 2010. No such agreement would be valid because it would be inconsistent with the collective agreement. The Employer made its position on abandonment clear in writing on October 12, 2009 and reminded the Union again in writing on August 11, 2010.

With respect to the issue of a meeting after the referral, the Employer's position is that, just because it sat down with the Union to give face time to that proposal, this

Re Toronto (City) Board of Education and C.U.P.E., Loc, 3111 (1997), 67 L. A.C. (4th) 144 (Joachim).

Agnes Pratt Home v. Newfoundland Association of Public Employees (Rideout Grievance) (February 9, 2000), 2000 L.A.A. No. 3 (Alcock).

Re Torngait Services Inc. v. Labourers International Union or North America, Local 1208 (1999) 81 L.A.C. (4th) 294 (Alcock).

There is no legislation in this province permitting the arbitrator to relieve against time limits. Therefore, he is obliged to respect the instant collective agreement time limits, which are mandatory. In this dispute, the Union has offered no explanation why it needed more time past January 5, 2010 to refer the grievance to arbitration. Article 17.07 is not a hybrid provision permitting waiver of the time limits on the basis of reasonable grounds and the absence of substantial prejudice to the Employer. As Mr. Clarke testified, prejudice against the Employer exists here due to the cost factors associated with grievance #007.

No waiver by the Employer occurred here. For waiver to be established there must be evidence of knowledge and intention to forego some right, or give up some advantage. However, at no time did the Employer relinquish its right to consider the grievance abandoned if the Union failed to refer the matter to arbitration as of January 5, 2010. There was no agreement between the parties to extend the time limits of grievance #007, or hold the grievance in abeyance, past that date. At that point the Union had to refer the matter to arbitration or seek another extension. The Union did neither.

In the Employer's view, the Union cannot claim to have been caught unawares here. The evidence demonstrates that each extension was clear in cautioning the Union that failure to refer to arbitration by the specified extension date would result in the

Clearly, the result of the Union's failure to refer the matter to arbitration as directed by the agreement was that the grievance was abandoned.

Article 17.01 – Step 3 requires that a grievance be referred to arbitration within seven (7) days of the meeting between the Council and Association representatives. Article 17.06 prohibits the arbitrator from altering, changing, adding to, or detracting from the agreement. Therefore an arbitrator cannot rule in a manner that is inconsistent with the agreement. He/she is constrained by Article 17.06 to disallow an unrestricted time limit. Article 17.07 states that the time limits of the grievance and arbitration procedure are mandatory and that failure by the grieving party to advance a grievance to the next step within those time limits will constitute abandonment. Since the parties did not exercise their right under Article 17.08 to mutually consent in writing to extend the time limit for the referral to arbitration of grievance #007 past January 5, 2010, and since the Union did not refer it until August 13, 2010, its failure constituted abandonment.

In support of its positions, the Employer submitted the following authorities and jurisprudence:

Canadian Labour Arbitration, 3rd edition, para. 2:3128 – *Time limits*; para. 2:3130 – *Waiver of procedural irregularities*, Canada Law Book.

Re: Izaak Walton Killam Grace Health Centre for Children, Women & Families v. Nova Scotia Nurses' Union (March 29, 2001), 2001 CarswellNS 545, 95 L.A.C. (4th) 1 (Christie).

Re Athabaska University v. Canadian Union of Public Employees, Local 3911 (August 25, 1999), 1999 CarswellAlta 1633, 83 L.A.C. (4th), 111 (Moreau).

Re Hotel-Dieu Grace Hospital v. Canadian Auto Workers Local 2458 (April 17, 2002), 2002 CarswellOnt 4697, 106 L.A.C. (4th) 1 (Knopf).

Re Marine Atlantic v. CAW-Canada (September 8, 1999), 1999 CarswellNat 3253, 83 L.A.C. (4th) 308 (Venoit).

ARGUMENT

The Employer

The Union position is essentially that the parties agreed to ignore the time limits or the procedure specified in the collective agreement. However, the facts show that did not happen. Instead, the Union referred the grievance to arbitration only when it felt like doing so. That is not the process required by this agreement. The time limits here are mandatory and cannot be relieved against. In the instant case, the process followed was a series of structured extensions consistent with the grievance and arbitration procedure.

By whatever scenario the arbitrator accepts, this grievance was abandoned. Either it was abandoned when the Union failed to refer it to arbitration by the extended date of November 15, 2009 as indicated in Mr. Clark's October 12th letter, or it was abandoned when the Union failed to refer upon learning that the main Security Contractor was named on January 5, 2010. The evidence confirms that the Union did not refer the grievance to arbitration until August 13, 2010, more than seven (7) months later.

Article 3.05 prohibits the parties from agreeing on any matter within the scope of the agreement in a manner inconsistent with the agreement, and it permits the parties to amend the terms of the agreement by written mutual agreement. The fact of the matter is that there was no letter or item of correspondence amending the agreement or permitting the Union to refer the grievance to arbitration whenever it felt like it. Rather, the parties tried to settle this matter in a manner that was consistent with the agreement. As Mr. Clark testified, it was important to settle matters expeditiously. Article 3.05 makes sense: it would be inconsistent with the agreement to hold a grievance in abeyance indefinitely.

Although Mr. Wade agreed that Mr. Clark's August 11, 2010 letter said that he considered the grievance abandoned, he could not recall hearing any mention of abandonment during the meeting that took place. He noted that his undated letter (Tab 12) made specific mention of a conversation on August 6th. That was not the same event as the meeting that occurred in September.

In answer to the arbitrator's questions of clarification, Mr. Wade testified that there was no meeting on August 6th, 2010; rather it was a telephone conversation. The meeting in late August or early September was a completely separate event. Mr. Wade testified that he was notified to attend that meeting for the purpose of attempting a settlement of grievance #007. On August 6th, Mr. Clark mentioned the issue of a new grievance, but Mr. Wade told him that #007 had not been abandoned. It was after the referral to arbitration on August 13th that the settlement meeting occurred. He was advised of the meeting either by David Clark or Samantha Hunter on his behalf. He conceded that he did not know how this meeting came about, but since it was held in the Employer's boardroom, he assumed that Mr. Clark had set it up. The discussion in that meeting was about grievance #007. Mr. McCormick presented a proposal for less money than was originally sought. Both Mr. Clark and Mr. McCormick did the math, which Mr. McCormick reviewed afterwards, corrected the numbers and Mr. Wade communicated the revision to Mr. Clark by telephone. Mr. Clark thanked him and said he would confer with his associates. In Mr. Wade's opinion, this arrangement would have settled the old grievance as well as any new grievance that might come up.

holding the grievances in abeyance till the main Security Contract was released and the Employer agreed to this on September 22, 2009; on October 12, 2009, Mr. Clark advised that abeyance will expire on November 15th, after which date the grievances will be considered abandoned if not referred to arbitration; The main Security Contract was released on January 5, 2010.

Mr. Wade believed that there would be a settlement for #007. The RDC prefers settlements rather than arbitrations. Otherwise referrals to arbitration or withdrawals are the Union's only options. On the basis of the fact that all the other grievances involved less significant issues and on his experience and knowledge of Mr. McCormick over many years, Mr. Wade believed that this grievance was the most important one for the Union.

He agreed that he did not respond to Mr. Clark's October 12, 2009 letter in writing. In his opinion, although the ball was in the Union's court at that time, he understood that Mr. Clark and the Union were still discussing the issue.

Mr. Ward reiterated that the meeting at the Baine Johnston Building was in September 2010. He consulted his notes at the hearing and reported that they contained a rundown of the Union's proposal and also that September 9th was the date for Mr. Clark's response. In his view, a week for a response would be normal in such cases.

Commenting on the fact that Mr. Clark's August 11, 2010 letter refers to a conversation they had on August 6th, Mr. Wade said it was "possible" that the meeting occurred on August 6th, but he disagreed with counsel's suggestion that August 9th was the date Mr. Clark's response was expected. His notes state September 9th.

Mr. Wade testified that the meeting at the Baine Johnston Building occurred in early September 2010. Attending were Mr. Clark, Mr. David Hollett, Mr. Wade and Mr. McCormick – he was unsure if Mr. Kevin Janes, Business Manager for the Union was present). The purpose of this meeting was to discuss a resolution to grievance #007. Mr. Wade remembered that there was quite a bit of discussion on the issue. Mr. McCormick made a settlement proposal to Mr. Clark and Mr. Hollett who wanted some time to review it and said they would get back to Mr. Wade on September 9th. During this meeting neither Employer representative raised the issue of abandonment. A rejection of the offer was received later. There had been a misunderstanding of the amount of money involved; Mr. McCormick corrected it and Mr. Wade telephoned Mr. Clark to advise that the amount involved was even less than had been discussed at the meeting.

Mr. Wade was not aware that Mr. Clark would have a lapse of memory on this meeting (he testified that he could not remember any meeting). This was an important meeting in which significant matters were put on the table. If that had not been the case at the time, Mr. Wade would have handled the matter by e-mail.

By way of cross examination, Mr. Wade agreed that the grievance and arbitration time limits in the agreement are mandatory. However, he testified that the parties do not follow the time limits. He agreed that they should be noted so that matters can be resolved quickly. He further agreed that: the Employer made it clear early that grievance #007 was denied; that it was denied again at Step 3; an extension for referral to arbitration was made to August 18, 2009; it was denied again on September 10, 2009 and a second extension was made to September 16th; on September 15th Mr. Wade suggested

issue, despite that grievance being held in abeyance. It was also Mr. Wade's understanding that #007 was the Union's number one problem because of the amount of money being lost by the membership. The other grievances appeared to be of less significance. After Mr. Clark's October 12, 2009 letter to Mr. Wade indicating November 15th as the date for referral to arbitration or the Employer would consider the grievance to be abandoned, he and Mr. McCormick continued to have ongoing discussions on the issue with Mr. Clark whenever he was around or during Committee meetings. If the discussions were between himself and Mr. Clark only, Mr. Clark asked him to pass along the information discussed to Pat McCormick so that he would be aware. Mr. Clark said he had a good relationship with Mr. McCormick and did not want to lose it. This was done up until September 2010.

Whenever Mr. Clark came to the Site after November 15, 2009, discussions about #007 occurred during meetings on other topics. Between November 15, 2009 and August 10, 2010, Mr. Wade met and discussed this grievance, with Mr. Clark requesting Mr. Wade to pass on his apologies to Mr. McCormick. These meetings occurred frequently, probably every second month. When he and Mr. Clark talked on August 6, 2010, he had no understanding that grievance #007 had been abandoned. That fact is reflected in his undated letter to Mr. Clark (Tab 12) in which he responded to Mr. Clark's letter of August 11th.

He and Mr. Clark met in either late August or early September 2010 to discuss grievance #007. He recalled that Mr. Clark was to get back to himself and Pat McCormick by September 9th with a response, but no such response was received from him.

each Trade. Mr. David Clark was the chief negotiator for Vale and has continued to be the “go to guy” for industrial relations matters notwithstanding Mr. David Hollett and Mr. Ralph Emberley who also deal with labour relations issues.

Mr. Wade became involved in grievance #007 after the Site people drafted and faxed it to his office and a secretary typed it on a grievance form for his signature. It was then sent to the Site. By that time, he had a discussion with the Site Representative and the Business Manager. The Hotel and Restaurant employees did not receive 14 days board on their 7 on 7 off schedule., i.e., they were not paid for the 7 day off period. However, Medical Staff (Teamsters), Site Services, Plumbers and Labourers were all paid 14 days board while on the same shift. This appeared to change somewhat after August 13, 2009.

After the grievance was filed, things went normally until the fall of 2009. Mr. Wade spoke to Mr. Clark about the grievance while on the phone about other matters. Mr. Clark told him that he and Pat McCormick had put that Union’s grievances in abeyance until the main Security Contract is signed. Twelve (12) grievances had been filed against ASC from April to the end of 2009. The ASC contract seemed to be for four (4) months, but was extended several times. Mr. Clark was hopeful the new Contractor would be named by November 15th. It was January 5, 2010 that Spectrum Security was appointed. By the end of 2009, approximately 18 security employees were employed among the 500+ workers on the Site.

Although Mr. Wade could not remember the exact date of his telephone conversation with Mr. Clark (probably a few months before ASC left the Site), he understood from Mr. Clark that he and Pat McCormick were still meeting on the Board

Mr. Clark was always interested in settling matters before going to arbitration. Mr. McCormick testified that he attended a meeting with David Clark, David Hollett, and David Wade at the Baine Johnston Building in St. John's after grievance #007 had been referred to arbitration. At this meeting calculations were made of the amounts of money involved in the Union's settlement proposal. Mr. McCormick recalled that Mr. Clark's calculation was half of what it should have been. Mr. McCormick went to the Union membership to suggest accepting 50% of the Board amount owing and then going forward after that. In his view, this was an olive branch for the Employer.

In essence, grievance #007 was always an outstanding issue, which was subject to discussion. At no time did Mr. McCormick agree to abandon that grievance; he only agreed to hold it in abeyance. In his view, the purpose of Mr. Clark's August 11, 2010 letter (Tab 9) was to attempt to avoid liability for retroactive Board payment.

Mr. David Wade, Executive Director of both the RDC and the Newfoundland and Labrador Building Trades Council, described his prior extensive experience in the labour movement with the International Ironworkers Union. He explained that the RDC represents 16 local unions and 14 international unions. Its purpose is to address Special Projects legislated for the oil, gas and mining industries. Its predecessor was the Oil Development Council, ODC, for the Hibernia Project. Other Projects for the RDC have been the Terra Nova project; Site Module work for Terra Nova and White Rose; a refit for a drill rig, and the Voisey's Bay mining construction Project. For the Long Harbour Project, Mr. Wade co-chaired negotiations for the main body of the collective agreement. The various Trade Appendices were negotiated individually by the Business Managers of

allegation of a supervisor doing bargaining unit work and the non appointment of supervision, i.e., issues specific to individuals; it was not about the claim for room and board, which was an issue of benefits for all employees. In other words, Mr. McCormick told Mr. Clarke that “some” of the grievances may disappear. Mr. Clark was desirous of extending the time frames because he was not the most available person given that he did not reside in the province. In other words, the time limits were extended not only for the Union, but also for Mr. Clark to get the answers he needed. Mr. McCormick testified that some of the other 12 grievances were held in abeyance, but #007 was never intended to be. Indeed, in a conversation with Mr. Clark, he made it perfectly clear that #007 was not to be abandoned. Mr. Clark believed that the Security Contractor would be named by November 15, 2009. That event did not occur until the new year. Mr. McCormick testified that, in those uncertain circumstances, there was no way he would agree to an extension to November 15th. He gave no approval to the RDC to agree to such a thing and he did not respond to Mr. Clark’s letter of October 12, 2009 (Tab 8). Therefore, he did not abandon grievance #007.

Between October 12, 2009 and August 2010, numerous discussions on grievance #007 occurred between Mr. McCormick and Mr. Clark, not with Mr. Wade. Mr. McCormick could not explain why Mr. Clark would now be shocked to hear him say that arrangements had been made between them to discuss the matter. Those meetings were always cancelled or postponed because of Mr. Clark’s own unavailability. Mr. McCormick testified that the matter would have been referred to arbitration after Spectrum was appointed as the new Security Contractor if there had been no wish on the Employer’s part to pursue a settlement. However, Mr. Clark did want a settlement.

The Union

Mr. Pat McCormick, National Secretary and President of the Union, related his thirty (3) year history of service as Business Manager with three (3) trade unions. He also negotiated the instant collective agreement and the Union's Trade Appendix. He estimated that he has negotiated 100 collective agreements and processed 100 grievances and arbitrations. Mr. McCormick has been involved in several Special Projects in the province.

By way of background behind grievance #007, Mr. McCormick explained that Security employees were hired shortly after Site work commenced in April 2009 and were responsible for allowing only authorized people on Site. The Security Contractor at the time was Atlantic Safety Centre, ASC, which whom the Union had some experience at the Voisey's Bay Site in Labrador both before and after the construction phase. Grievance #007 was filed on July 7, 2009 because of the actions of ASC and it was denied on July 28, 2009. Tab 5 refers to nine (9) Union grievances that had gone through Step 3 of the grievance procedure. The LHEA agreed to extend their referral to arbitration until August 19, 2009. Tab 6 dated September 10, 2009 referred to three (3) union grievances filed against ASC, including #007, which the Employer agreed to extend the referral deadline to September 16, 2009.

Mr. McCormick recalled that the issue of holding grievances in abeyance came up at a meeting at the RDC office attended by the Contractor and the Union. Mr. Clark suggested that the grievances should go into abeyance pending the appointment of the new Security Contractor. The discussions on grievances disappearing were about the

nothing from him, it would mean that the grievances have been abandoned. With respect to grievance #007, Mr. Wade wrote Mr. Clark an undated letter (Tab 12) referencing a conversation they had on August 6, 2010 and indicating the RDC's decision to proceed to arbitration. Mr. Clark responded to this by his letter of August 11, 2010, advising Mr. Wade of the Employer's position that grievance #007 has been abandoned, but if a fresh grievance is filed the Employer will ensure that the time limits are followed within reason.

He and Mr. Wade met on several Liaison Committees. Mr. Wade wanted grievances discussed at those meetings, but Mr. Clark felt that would circumvent the grievance procedure. Nevertheless, grievances were discussed at Liaison Committee meetings in August and September 2010. On several occasions, Mr. Wade tried to have grievances placed on the Liaison Committee agenda, but Mr. Clark was opposed.

The September 10, 2010, letter (Tab 13) from Mr. Ralph Emberley to Mr. Wade referred to a compromise written settlement offer proposed by Mr. McCormick after the grievance had been referred to arbitration. That letter states:

Dave

The Association has reviewed the proposal of the Hotel and Restaurant Workers in relations [sic] to Grievance RDC-07

The Union proposals that we agree to pay LOA to Security on their seven days off on a go forward basis and pay back LOA at the level the Union proposes are unacceptable.

For the LHEA
Ralph Emberley

Mr. Clark remembered Mr. Wade asking for a meeting to be held with him and Mr. McCormick, but he could not remember such a meeting occurring. There was an attempt by Pat McCormick to hold post referral discussion, but no meetings were held.

Union regarding ASC. However, no grievances have been filed to date against Spectrum, the new Contractor.

Mr. Clark testified that only a couple of grievances have been filed on serious matters; one by the Employer against the RDC for \$1 million dollars; another on small damages to a bucket. Of the other grievances filed by the Union, most of them had only minor financial implications. For grievance #007, the possible implications are \$476 per person per month over a significant period of time. He agreed that, between July 7, 2009 and to date, neither Pat McCormick nor David Wade said they would withdraw or abandon this grievance. Neither of them acknowledged in any way that they accepted the Employer's position on abandonment. After his (Clark's) August 11, 2010 letter, he had an inkling that the Union wanted to proceed on this grievance.

As far as Mr. Clark was concerned, his October 12, 2009 letter made it perfectly clear that grievance #007 would be considered abandoned if it was not referred to arbitration by November 15, 2009. Yet he felt the trigger point was intended to be the awarding of the main Security Contract. Indeed, he testified that, if Mr. Wade had said to him within two (2) days of January 5, 2010 (the date the Contract was awarded) that the referral had been made, this issue probably would not be argued today. Actually, the second grievance filed on the firing of some OE employees was the subject of 9 or 10 hearing days. That case was almost referred to arbitration within the time limits, but Mr. Clark accepted it. In his view, the referral to arbitration is the critical issue for the Employer because it needs to know what is happening with grievances.

When grievances are filed, Mr. Clark generally sees them courtesy of Mr. Wade. Usually he would get a letter from Mr. Wade in accordance with Step 3, or if he receives

get grievances referred to arbitration quickly so that the issues don't fester. Mr. Clark conceded that referrals to arbitration have been relaxed, but there is a joint Friday forum to discuss grievances for the past month and note their time limits so as to ensure there is no uncertainty where things are. Also, Mr. Clarke, Mr. Donnelly and Mr. Emberley met so that issues could be dealt with and so that David Wade, a man of honour, would know where things were.

However, Mr. Clark felt that his correspondence on the status of the #007 grievance was not unclear. Since the Union referred the matter to arbitration, he tried to set up a meeting, which did not happen due to his own unavailability. He indicated the existence of other Hotel and Restaurant Union grievances concerning time limits going back to 2009.

Mr. Clark agreed that once referral to arbitration has occurred, there has been relaxation of the time limits for hearings to take place to accommodate counsels' calendars, etc. No letters of extension are written. There is simply recognition that everybody is busy.

With regard to Mr. Wade's September 15, 2009 e-mail, Mr. Clark agreed that he had conversations with both Mr. Wade and Mr. McCormick on their concerns about ASC being named the permanent main Security Contractor. In essence he cut them some slack because he had the sense that the grievances would disappear if another Contractor was named. He testified that it was possible that he made the suggestion about holding the grievances in abeyance, but he was absolutely clear from talking to Mr. McCormick that if Bill Hogan stayed on as Contractor, the grievances would continue. Some 57 grievances have been filed on Site, twelve (12) by the Hotel and Restaurant Employees

A conversation occurred between Mr. Wade and Mr. Clark on August 6, 2010. In a letter dated August 11, 2010 (Tab 9), Mr. Clark referred to this conversation, specifically as it related to grievance #007, reiterating his position that:

.... It is the position of the [LHEA] that the grievance filed by the RDC on behalf of [the Union] claiming LOA (Living Out Allowance) on the week when employees are not working has been abandoned and, further, should a subsequent grievance be filed, we will take the position that there has been no violation of the Collective Agreement.

If the RDC chooses to file another grievance on the same issue and we are not able to resolve it during the steps of the grievance procedure, we will ensure the timelines in the Collective Agreement are followed within reason so that the matter can be heard quickly as I know this is an important issue to Pat McCormick and the [Union].

Mr. Clark testified that in the interest of good labour relations, the Employer would consider the grievance if it was filed again, but it would not consider payment of benefits for the period prior to the new grievance.

On August 13, 2010, the Union referred the old grievance #007 to arbitration. In Mr. Clark's view, this would cause prejudice to the Employer because several employees had been involved for a significant period of time. Although he had not calculated the cost, he believed there had been some 20 Security employees working in 2009, most of whom would represent a cost of \$500 apiece.

By way of cross examination, Mr. Clark agreed that, for the past 1½ years the parties have had a collegial relationship. Though there have been some differences, resolutions have been found due to the high level of trust and respect among the stakeholders. He did not want to let matters fester. Since the arbitration provisions in the agreement are subject to mandatory time limits, he considered it to be the main issue to

Meeting and that, “On another matter, I was speaking to Pat McCormick about outstanding grievances and he is willing to place them in abeyance until such time as the main Security Contract is released at which time they may disappear. Where are you on the subject?” Mr. Clark’s reply on September 22, 2009 stated: “I apologize for the delay in responding to your e-mail of September 15; however, we agree to the grievances you identified in your e-mail and placing them in abeyance.” No date was specified for a referral to arbitration to occur. In essence, this was not a date-specific extension but one based on the occurrence of a future event. Mr. Clark testified that tenders were called for a permanent Security Contractor to replace ASC, the previous contractor. He understood that, if ASC was named, all the grievances would proceed; if not they would be abandoned.

No Security Contract had been determined by October 12, 2009, when Mr. Clark wrote Mr. Wade (Tab 8) concerning several Union grievances, specifically including the matter grieved in #007, stating: “. . . the LHEA consent to all of these grievances being placed in abeyance until November 15. At which time if they are not referred to arbitration or withdrawn the LHEA will consider them to be abandoned.” Mr. Clark testified that he expected the permanent Security Contractor would be named by November 15th. Since no referral to arbitration was made by that date and the matter was not withdrawn, the Employer’s position was that the grievance was abandoned.

The new permanent Security Contractor was named on January 5, 2010. No referral to arbitration occurred by that date or for many months after.

The Employer

David Clark, a lawyer with McInnes Cooper based in Fredericton, NB is H.R. Consultant for the Employer. He was previously outsourced to Vale to provide Industrial Relations advice and to work day-to-day with Mr. Ralph Emberley, Senior Labour Relations Manager, and was temporarily Industrial Relations Representative for the Site until Mr. David Hollett returned from Madagascar. Mr. Clark negotiated the grievance procedure contained in Article 17. He explained the time limits associated with each step, particularly the Union's responsibility to refer a matter to arbitration within seven (7) days in accordance with Step 3.

Grievance #007 was received on July 7, 2009. Mr. Clark discussed the matter from time-to-time with David Wade and Mr. McCormick. The LHEA denied the grievance, after which a series of time limit extensions were granted for the Union to refer the matter to arbitration.

The first extension occurred in a July 29, 2009 letter from Mr. Clark to Mr. Wade (Tab 5) agreeing to extend the time limits for nine (9) Union grievances to August 18, 2009. Mr. Wade was going on vacation at the time. No referral was made for grievance #007 by August 18, 2009.

The second extension occurred in a September 10, 2009 letter from Mr. Clark to Mr. Wade (Tab 6) agreeing to extend the time limits for three (3) grievances, specifically #003, #005 and #007, to September 16, 2009. No referral to arbitration was made by September 16, 2009

On September 15, 2009, Mr. Wade e-mailed Mr. Clark advising him that he would speak to him at 11:30 am about additional agenda items for the Liaison Committee

The Union's position is that its employees are not receiving Travel and Board while they are on the payroll. In the Employer's view, someone's status on the payroll does not trigger the benefit; the individual's work schedule does. In other words, the benefit is tied to the work week, not to the payroll. The Union blurs the concepts of payroll and schedule.

Article 19.01(b) steers the reader to Article 7.01 of the Trade Appendix. There a seven (7) on seven (7) off work schedule is specified and how employees on such schedule will be paid. Payment for work performed is a separate concept from entitlement to the benefit of Board payment. Article 24.03(c) provides for Board payment of \$68 when an employee is scheduled to work, i.e., when the employee works. The payment of overtime has nothing to do with Room and Board. In the Employer's view, it flies in the face of logic to pay employees when they are not scheduled for work. The arbitrator cannot ignore the fact that the employees work schedule is the trigger for his/her Board.

The Teamsters work the same 7 on 7 off schedule and their members receive the same benefit as the Hotel Employees and Restaurant Employees. Also Site Services Contractor employees work the same schedule and receive the same benefit as this Union. The Labourers, Teamsters, Electricians and Hotel & Restaurant Union employees are all employed by Lockerbie Contractors.

EVIDENCE ON THE PRELIMINARY MATTER

is in the first week and Sunday is in the second week. Medical Services employees work that same schedule and are paid Board for all fourteen (14) days. Therefore, there is no reason that Hotel and Restaurant Union employees should be paid differently.

The Security Contractor can cause further mischief by working employees seven (7) days in one week and none in the other week. Article 19 of the agreement deals with overtime, but Article 7.01 of the Trade Appendix provides that Security Personnel may work twelve (12) hour shifts during a seven (7) days on and seven (7) days off work schedule, in which case employees who work eighty-four (84) hours in one week will be paid 106 hours straight time pay in two segments, i.e., 53 hours in the first week and 53 hours in the second week. The Union negotiated Article 7.01 with full knowledge how other trades would work. Therefore, Article 7 was intended to ensure that the Union's members would receive the Board benefit in the second calendar week. Therefore, the Union disagrees with the Employer's interpretation that no benefit is receivable in the second week if an employee does not work in that week.

If there is an ambiguity in Article 7.01, the Union will call negotiators Pat McCormick and David Wade who will testify that there was never any intention to take a benefit away from this Union's members that applies to every other union's members.

The Employer

Counsel took the position that the issue is not complex. On the matter of Board entitlement, the collective agreement is clear and unambiguous. Therefore, no extrinsic evidence can be admitted.

OPENING STATEMENTS ON THE MERITS:

The Union:

Counsel explained the nature of the RDC as a party to this Special Project collective agreement by virtue of it being the organization of the various individual Trade Unions who are also parties to the collective agreement. In addition to the main body of the agreement, each Trade Union is covered by separately negotiated Trade Appendices.

The grievance alleges violations of Article 24.03(c) of the agreement and Article 7.01 of the Union's Trade Appendix. Specifically the Union's claim was that the Employer has continually failed to live up to its contractual obligations regarding the Site Security Contract. The Union's position is that if any employee works any part of a two (2) calendar week period, he is entitled to fourteen (14) days of board payment. However, this Union's members are the only employees not receiving that benefit. The Union disagrees with the Employer's position that Article 7.01 of the Trade Appendix takes Security employees outside the scope of Article 24.03.

In the alternative, the Union claimed that Article 24.03 is now interpreted such that any employee who works any part of a week is entitled to Board pay for each day in that week. The Teamsters Union works seven (7) days straight days (6 days in one week and one day in the next week) during a fourteen (14) day period, and its members are paid Board for the full fourteen (14) days. Therefore, this Union's employees should receive the same benefit.

Article 25.04 defines the work week for payroll purposes as beginning on Sunday and ending at midnight on Saturday night. Initially, the Union's members worked from Thursday to Wednesday; now they work Monday to Sunday, which means that Saturday

residence. Employees living within that zone shall travel to work at their own expense. . . .

- b) Employees permanently residing at a distance greater than thirty-four (34) kilometers but less than one-hundred (100) road kilometers from the Site parking lot to the town hall, or such other public building as may be agreed under Article 24.01a), in the community of the employee's permanent residence shall be paid at the rate of \$0.68 per road kilometer between the above noted two points by the most direct route to be paid for each day worked with the normal pay day.

....

- 24.03c) Subject to sub-paragraph d) hereof, if an employee, permanently residing outside the travel zone of Article 24.01b) chooses not to, or is unable by reason of lack of space, to reside in the camp, he/she shall be compensated with a board allowance of \$68.00 per day payable for seven (7) days per week in which the employee is scheduled to work

....

ARTICLE 25 – WAGES AND BENEFIT LANGUAGE

....

- 25.04 The work week for payroll purposes shall end on Saturday midnight. Employees shall be paid on the Thursday of the following week.

The following is the relevant language of the TRADE APPENDIX for the HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION AND LOCAL UNION 779:

7.0 SECURITY SPECIAL CONDITIONS

- 7.01 Notwithstanding Article 19 (Hours of Work and Overtime) in the Agreement, the hours of work for Security, Crew Chief Security and Assistant Crew Chief Security employees may be seven (7) consecutive twelve (12) hour shifts and seven (7) consecutive days off. The employee when working this schedule shall be paid one hundred and six (106) hours at his straight time hourly rate of pay for such eighty-four (84) hours worked. When working on this schedule, the employee is to be paid the first fifty-three (53) hours in the week worked, and the other fifty-three (53) hours in his/her week off.

respective legal counsel(s) acting as presenters. Unless the Parties otherwise agree, all rulings will be given by the arbitrator within forty eight (48) hours and shall not be considered precedential or binding in any other grievance.

- 17.06 The arbitrator shall not have any power to alter, change, add to, or detract from the Agreement or to substitute any new provision for any existing provision nor to give any decision inconsistent with the terms and provisions of this Agreement. An arbitrator shall not dismiss any grievance on a technicality or error on the grievance form.
- 17.07 The time limits specified in this procedure are mandatory. Failure by the grieving party to advance a grievance to the next step within the time limited shall constitute abandonment. Fridays, Saturdays, Sundays and recognized holidays as listed in Article 22.02 shall be excluded from any time limits.
- 17.08 The Parties may, by mutual consent (in writing) extend the time limits of this grievance and arbitration procedure.
- 17.09 Each of the Parties shall pay an equal share of the fees and expenses of the arbitrator.

....

ARTICLE 19 – HOURS OF WORK, OVERTIME AND TERMS OF PAYMENT

- 19.01a) The normal hours of work shall consist of forty (40) hours per week divided into five (5) consecutive eight (8) hour work days from Monday to Friday or four (4) consecutive ten (10) hour work days from Monday to Thursday, or such hours as shall be prescribed by regulations of the Lieutenant Governor in Council, if required, upon submission of the Parties to extend normal work hours beyond forty (40) hours per week.
- b) The hours of work and overtime triggers for workers represented by Hotel Employees and Restaurant employees International Union and Local Union 779 and the International Brotherhood of Teamsters and Local Union 855 are set out in the Trade Appendices of each of those trades, and the hours of work for the workers they represent shall be governed by those Trade Appendices, save and except where those Trade Appendices direct that the provision of Article 19.00 apply.

....

ARTICLE 24 – TRAVEL AND BOARD

- 24.01a) There shall be a free zone of thirty-four (34) road kilometers from the Site parking lot to the town hall in the community of the employee’s permanent

shall render his decision within two (2) days of his receiving the grievance. Decisions rendered at this Step are solely for the purpose of resolving the grievance and shall not be considered precedential or binding in any other grievance dispute.

STEP 2: Should the decision rendered in Step 1 be unsatisfactory to the employee, or should no decision be rendered, the employee assisted by his steward, shall submit the grievance within a further two (2) days to the Association and the Contractor's designated representative on the Site.

Such complaint shall be made in writing, stating the alleged violation, referencing the Article or Articles of this Agreement alleged to have been violated, and the remedy sought. The Association representative, the Council representative and the employee, assisted by the steward, shall meet within two (2) days to discuss the matter. The Contractor shall render a decision in writing within one (1) day. If such a meeting is not held the matter shall be referred to Step 3.

STEP 3: Should the decision rendered at Step 2 be unsatisfactory, within two (2) days of the decision, the Contractor, the Association representative and the Council representative shall meet to discuss the matter. If no resolution can be achieved within two (2) days, either of the Parties may, within seven (7) days of the meeting, refer the matter to arbitration in accordance with the procedure contained herein. If such meeting is not held, the matter shall be referred to the next step, arbitration.

17.02 The Association/Contractor may file a grievance in writing with the Council. The Council may file a grievance with a Contractor and/or Association. If such grievances are not resolved within two (2) days, the grievance may be treated as a grievance commencing at Step 3 and may be referred to arbitration in the same manner as an employee's grievance.

17.03 The appointment of an arbitrator will be made within two (2) days of Step 3 referral to arbitration. The arbitrator shall be selected in rotation from a list (Schedule "C") of five (5) arbitrators acceptable to the Parties attached and forming part of this Agreement. The list shall be updated by the Parties once every year during the term of this Agreement. Should the arbitrator whose turn it is be unable to act within the time requirements delineated in 17.04 and 17.05, he shall be passed over to the next person on the list.

17.04 The arbitrator shall, within five (5) days of his appointment, convene a meeting to hear the relevant evidence. (The decision of the arbitrator shall be final and binding on the Parties.)

17.05 Arbitration hearings shall be conducted at a mutually acceptable location with the Association representative and the Council representative or their designated

The parties agreed to the selection of the arbitrator, but the Employer disagreed that the arbitrator had jurisdiction to deal with the grievance on the grounds that the Union failed to refer the grievance to arbitration within the mandatory time limits required by Article 17 Step 3 of the collective agreement. The Union's position was that the grievance had not been abandoned.

It was agreed that the issue of time limits would be dealt with first.

The following items were admitted into evidence by consent:

- 1) Collective agreement.
- 2) List of Employer exhibits Tabs 1 – 13, excepting Tabs 4 and 11.
- 3) *Vale Inco Long Harbour Processing Plant Special Order* under the *Labour Relations Act O.C. 2009-126 (Filed April 9, 2009)*.

Witness for the Employer:

Mr. David Clark, LLb., Human Resources Consultant

Witnesses for the Union:

Mr. Pat McCormick, National Secretary & President of Hotel Employees and Restaurant Employees Union Local 779

Mr. David Wade, Executive Director of RDC, also Executive Director of Newfoundland and Labrador Building Trades Council

The relevant collective agreement articles are:

ARTICLE 17 – GRIEVANCES AND ARBITRATION

17.01 - A disciplinary measure for other than just and reasonable cause or a dispute arising out of the interpretation, application or alleged violation of this Agreement, including a dispute as to whether a matter is arbitrable and including the quantum of discipline, but excluding disputes involving trade jurisdiction, shall be adjusted in accordance with the following procedures:

STEP 1: An employee, assisted by his steward if he so desires, shall present a grievance to his immediate superintendent within four (4) days after the circumstances giving rise to the grievance have occurred or originated or within four (4) days of the employee becoming aware of such circumstances. The superintendent

Ref: # 2011:01

Insufficient Payment for Board
Preliminary Objection

- Arbitrability
- Time limits
-

IN THE MATTER OF AN ARBITRATION

Between

LONG HARBOUR EMPLOYERS' ASSOCIATION INC.
(hereinafter called "LHEA" or "the Employer" or "the Association")

And

**RESOURCE DEVELOPMENT TRADES COUNCIL OF NEWFOUNDLAND
AND LABRADOR on behalf of HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES INTERNATIONAL UNION, LOCAL 779**
(hereinafter respectively called "the RDC" and "the Union")

THE GRIEVANCE

On July 7, 2009, the RDC filed grievance # 007 alleging that, while working with Contractor A.S.C., the Union's employees were "not receiving Travel & Board for 14 days while on payroll (getting paid for seven days only)."

The alleged articles violated were "Article 24 – Travel and Board, and Trade Appendix article 7 and/or any other article that may be applicable under the collective agreement." Full redress was requested.

A preliminary matter was heard at St. John's, Newfoundland and Labrador on November 23rd, 2010 and January 10th and 11th, 2011.

For the Employer: Mr. Brad Proctor LLb, *et al.*
For the Union: Mr. Dana Lenehan, Q.C., *et al.*
Sole Arbitrator: Mr. David Alcock